Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05048/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 May 2017	**On 24 May 2017**

Before

THE HONOURABLE MR JUSTICE LEWIS
UPPER TRIBUNAL JUDGE ALLEN

Between

MRS ATIA ZAIDI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S. Karim
For the Respondent: Mr Ian Jarvis

DECISION AND REASONS

1. This is an appeal against the decision of Judge Gaskell sitting as the Judge of the First-tier Tribunal and promulgated on 15 September 2016. By that decision Judge Gaskell dismissed the appeal by Mrs Atia Zaidi against a decision of an Entry Clearance Officer in Islamabad, Pakistan dated 30 July

2016. The Entry Clearance Officer refused Mrs Zaidi's application for entry clearance. We will return to the question of the basis of that application later.

2. The background facts are fully set out in the decision of First-tier Tribunal in particular at paragraph 4 to 11. In essence the sponsor is 48 years of age. He was born in Pakistan and has both Pakistani and British citizenship. He came to the United Kingdom in 1989 and told the Tribunal below that he came for a better life and now regarded the United Kingdom as his home. He has business interests in the United Kingdom.

3. On 29 November 2001 the sponsor married his first wife Mrs Ambreen Zaidi in Pakistan and they made their home in the United Kingdom and have three children. There were marital problems and they returned to Pakistan in about December 2007 of that year to see if they could resolve the difficulties. They were unable to resolve the difficulties and they separated. They were divorced in 2014.

4. In December 2008 during the period of informal separation from the sponsor's first wife the sponsor and the appellant Mrs Zaidi purported to get married in Pakistan. They made their home in Pakistan and they have a child born in 2009. The Tribunal noted that the appellant and the sponsor together with the sponsor's first wife and all of the children remained living in Pakistan until 2012. The sponsor together with his first wife and their children then returned to the United Kingdom leaving the appellant and her son in Pakistan. The sponsor owns two adjoining properties, he lives in one and the appellant and their child visited him in that property. His first wife and their children lived in the adjoining property. The Tribunal said that the sponsor was engaged in the children's lives and appeared to have financial responsibility for the whole family.

5. Turning to the present appeal Mr Atia Zaidi applied for entry clearance firstly in August 2013. That application was refused. There was an appeal. The appeal was dismissed and there was no further appeal. There was a further application made. It is unclear precisely on what date Mrs Zaidi made that application. It is clear that she was claiming to be the spouse of Mr Zaidi because at that time she was relying on the purported marriage of December 2008. There has been a suggestion that in fact she simply made a broad application as a partner which was capable of being understood to be either as an unmarried partner in a settled relationship of two years or more or as the spouse. Mr Karim on behalf of the appellant refers to the terms of the refusal of entry clearance which refers to an application as a partner. The substance of the decision clearly refers to the claim that the appellant was the spouse of the sponsor. In my judgment it is incumbent upon the applicant to establish the basis of the application that she was making. We have not had produced to us by either party the actual application that she made. On balance we infer that she made an application on the basis that she was the spouse of the sponsor not somebody who was in an unmarried relationship for a certain period of time. For reasons that will be relevant that conclusion will not affect the

outcome of this appeal. Following the refusal of the application for entry clearance on the grounds that Mr Zaidi was not divorced at the time of the purported marriage in 2008 to his first wife, Mrs Zaidi appealed to the First-tier Tribunal. At some stage in 2015 she alleges that she underwent a further marriage ceremony with Mr Zaidi and that she presumably became married a second time, first on her account having been married in 2008 and secondly having been married for a second time in 2015.

6. In her appeal to the First-tier Tribunal one of the first grounds of appeal was that the marriage in 2008 was a valid marriage. It was said that Mr Zaidi had not changed his domicile from Pakistan to England when he came to England and had remained throughout with his original domicile of origin in Pakistan. It was further pointed out that he had spent most of his time since 2007 in Pakistan.

7. Turning to the decision of Judge Gaskell on that issue he noted in paragraph 16 of this judgment it was essential to any prospect of success of this appeal that there was a valid marriage between the appellant and the sponsor. He noted that there was a route whereby an unmarried partner might apply for entry clearance but he noted that the representative of the appellant was not suggesting that the appellant could meet the criteria for that route and he noted at paragraph 17 that the burden was upon the appellant to establish on the balance of probabilities that there was a valid marriage He said he could only look at the marriage in 2008 and he could not look at whether or not the later marriage of 27 August 2015 was valid because that came after the decision of the Entry Clearance Officer. He noted at paragraphs 18 and 19 that the December 2008 marriage would be invalid if the sponsor had been domiciled in the United Kingdom because Section 11D of the Matrimonial Causes Act 1973 outlawed polygamous marriages contracted abroad that is that it made such marriages void. The question therefore is whether or not the sponsor did or did not have domicile in the UK at the time of the first marriage. In that regard Judge Gaskell said this at 19:

> "19. The sponsor was born in Pakistan but moved to the United Kingdom in 1989 when he was approximately 26 years of age and became a British citizen and established permanent residence in the United Kingdom until 2007 when he returned to Pakistan for a period of five years. During that period he married the appellant. The sponsor's domicile of origin was clearly Pakistan the question I must consider is whether he has established a domicile of choice in the United Kingdom.
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> 20. For reasons which I fully understand the sponsor sought to advance the case that upon his return to Pakistan in 2007 he intended to remain there permanently and so even if by then the UK had been his domicile of choice he effectively changed his domicile of choice upon his return. I do not consider that the sponsor has attempted to mislead the Tribunal but his evidence with regard to this is somewhat inconsistent. He emphasises

that at the time of the marriage both he and the appellant were resident in Pakistan but this does not equate to domicile. In his oral evidence he stated that following his return to Pakistan in 2007 he never expected to return to the United Kingdom however during his five years in Pakistan the sponsor took no steps to divest himself of his business and property interests in the UK and later in his oral evidence he was emphatic that he always intended to return for the benefit of his children's education. He stated that he and the children of his first marriage regarded themselves as British even to the extent that on Pakistan Independence Day he and his family flew a British flag.

21. Having heard the sponsor's evidence I am not satisfied that the appellant has established that the sponsor was domiciled in Pakistan at the time of the 2008 marriage. I find on the balance of probabilities that the sponsor was domiciled in the United Kingdom it being the case that his 2008 marriage to the appellant was not a valid marriage for the purposes of United Kingdom law".

8. Dealing with the ground of appeal in relation to that finding the appellant says that the First Tribunal erred as the evidence showed that the sponsor had a Pakistani domicile as at the date of the mariage to the appellant in December 2008 or that the First-tier Tribunal failed to provide clear reasons for the conclusion that he did not or alternatively it is submitted that the Tribunal should have found that he had established a domicile of choice in Pakistan in 2007. First it is clear that the First-tier Tribunal decided that the sponsor had acquired a domicile of choice in the United Kingdom as at the time of the mariage in December 2008, indeed the First-tier Tribunal said so at paragraph 21. Furthermore the reasons for that are clear. The sponsor as the Tribunal noted at paragraph 19 had established permanent residence in the United Kingdom that is he intended to reside permanently in the United Kingdom and had acquired a domicile of choice. There is ample evidence to justify that conclusion. The sponsor came to the United Kingdom at the age of 26 in 1989. He acquired British nationality. He had business in the United Kingdom. He had a family and children and they made their home in the United Kingdom. They returned to Pakistan in 2007 to try and solve marital difficulties. On the sponsor's own oral evidence the sponsor always intended to return to the United Kingdom for the benefit of the children's education and he said that he and his children regarded themselves as British. In those circumstances in our judgment the judge was entitled to conclude that the sponsor had acquired a domicile of choice in the United Kingdom and furthermore that he had not changed that domicile of choice when he went to Pakistan in 2007 or at the time he married in Pakistan in December 2008. In those circumstances the judge in our judgment correctly held having regard to 11D of the Matrimonial Causes Act 1973 that the marriage if it existed was not a valid marriage. For that reason the first ground of appeal fails.

9. We granted permission this morning to allow amended grounds of appeal. The second ground is in effect that the judge did not address the separate question as to whether or not the second purported marriage in August 2015 was in fact a valid marriage. The Tribunal said that it was looking at matters as at the date of the decision of the Entry Clearance Officer and that second purported marriage if it occurred occurred after that in August 2015. Mr Jarvis for the Home Office accepts that under the relevant statutory scheme the judge erred in that regard and he accepts that the judge was required to look at matters as at the time of the Tribunal decision. Mr Jarvis however sought to persuade us that the judge had done that in paragraph 22 of the decision. In that paragraph the judge said this,

> "for the purpose of completeness however I have considered what the position might be had I been satisfied that in 2008 the sponsor was domiciled in Pakistan. In such circumstances the burden would be on the appellant to show that the 2008 marriage was a valid marriage in Pakistan. There is no independent and reliable evidence to the effect that this marriage during the currency of the sponsor's first marriage would be valid and recognised in Pakistan. The sponsor's vociferous assertions that he is validly married under Pakistani law carry little weight. Furthermore the sponsor has produced a certificate suggesting that the marriage between himself and the appellant was also contracted on 27 August 2015. I find it inherently unlikely that two individuals who are already validly married would then be permitted to contract a further valid marriage to one another. The fact that they purported to have done so, in my judgment, suggests that the 2008 marriage was not a valid marriage in Pakistan. In addition the 27 August 2015 marriage certificate states that at the time of that marriage the appellant and the sponsor were both unmarried. It is further evidence that the 2008 marriage was not valid."

In our judgment it is clear that the Tribunal judge was grappling with the validity of the alleged marriage in December 2008. The matter that is drawn attention to in paragraph 22 is whether or not the 2008 marriage was valid. Furthermore in paragraph 17 he makes it clear that he is only looking at the validity of the 2008 marriage. In the circumstances and given the concession that the judge should have looked at the validity of the alleged second marriage in August 2015 we do find that there has been an error of law and that the First-tier Tribunal had not addressed the question of whether or not the purported in August 2015 was a valid marriage.

10. The third ground of appeal relates to the way in which Article 8 was dealt with. The essential factual situation here is said to be that the first family with three children who are in the United Kingdom and the sponsor is involved in the lives of those children it is said that there is a second family with the one child who is currently in Pakistan and the sponsor it is said is involved with that child too. It is said that there has not been a

proper grappling with the consequences to either set of children if the appellant is not allowed to come to the United Kingdom. It is said that that arises in this way. If the appellant is not able to bring her child to England and stays in Pakistan the father is either then going to be separated from the child in England, if he stays in England. Or he is going to be separated from the children in Pakistan if he stays with the children in England all his time between the two families is going to be split. Alternatively if the mother stays in Pakistan and the child came to England it is said that the child would be deprived of the relationship with the mother. That it is said is something that is not grappled with. There was a suggestion by Mr Karim that Section 117B(6) of the Immigration, Nationality and Asylum Act 2002 applied but in fact it is quite clear that that sub-sectino does not apply. We are satisfied however that in the unusual circumstances of this case the First-tier Tribunal has not adequately grappled with the question of how to address the balance between the family in England and the child that is currently in Pakistan. We therefore find that that is a second error on the part of the Tribunal.

11. Two further matters have been referred to. One is that in some way the Article 8 claim is strengthened or bolstered by the fact that the appellant could have claimed as an unmarried partner. We have a number of difficulties with this in submission we understand the appellant claimed to have been married on two separate occasions to the sponsor and on the second occasion she says she married him at a time when she was already claiming to be unmarried. We do not fully understand the mechanics by which those two marriages occurred but in any event no application has been produced to us in which she ever sought to enter the United Kingdom as the unmarried partner of the appellant. Indeed, as we noted, at paragraph 16 of the judgment the former representative of the appellant did not suggest that the appellant would meet the criteria for an unmarried partner application. In those circumstances therefore we cannot find that the Tribunal erred in its approach to dealing with this hypothetical situation and we would not regard this issue as evidencing any error of law on the part of the Tribunal.

12. The other matter that arose is said to arise out of a policy document issued by the Home Office and referred to under the title of SET 14.8 “termination of previous marriage”. That refers to a polygamous spouse who may apply for entry clearance and support the application by claiming that a previous marriage (which would otherwise disqualiy him/her) had been dissolved or terminated by the death of the spouse concerned. On the one hand Mr Jarvis for the Home Office emphasises that the guidance refers to spouse and what the Rule is doing is reflecting the provisions of paragraph 278 of the Immigration Rules and is dealing with a situation where somebody is validly married under the law of a foreign country and then has a second marriage which is valid under the law of that country because that country permits polygamy. It is said this document therefore simply permits the spouse to enter the United Kingdom if the first marriage has been dissolved or terminated by death. The position is said to be different here because if as we have found the sponsor had a

domicile of choice in the United Kingdom there never was a valid marriage for the purposes of United Kingdom law and the appellant was not a spouse (leaving to one side the question of the second possible marriage). Mr Karim said that is not what it means and it allows somebody who is married under a law which United Kingdom law regards as void still to claim that they are a polygamous spouse so that if an earlier marriage was dissolved or terminated by death later the polygamous spouse can rely on that policy to come to the United Kingdom. Fortunately we do not have to resolve that interesting question because it would not make any difference in this case because the Tribunal at some stage would in any event have to investigate whether or not the 2015 marriage was valid.

13. In substance therefore we find there was a domicile of choice in the United Kingdom at the time of the alleged first marriage on the part of the sponsor and we dismiss that ground of appeal. We do allow the grant of appeal in relation to the fact that the Tribunal below did not address the question of the validity of the alleged second marriage in August 2015 and we also find that the Tribunal had not actually grappled with the position of the children in making its assessment under Article 8 ECHR. For those two reasons we allow the appeal.

14. We consider that the matter should be remitted to the First-tier Tribunal because the position in relation to the alleged second marriage in 2015 and the position in relation to the children need properly to be addressed. Proper factual finding based on proper evidence not assertion needs to be made so we therefore allow the appeal and remit the matter to the First-tier Tribunal.

Notice of Decision

The appeal is allowed to the extent that it is remitted to the First-tier Tribunal for determination on the basis set out at paragraph 14 above.

Signed Date 17 May 2017

Mr Justice Lewis