UT Neutral Citation Number: [2024] UKUT 00363 (IAC)

Javed (Marriage (Scotland) Act 1977, s20)

Upper Tribunal
(Immigration and Asylum Chamber)

Heard at Edinburgh

THE IMMIGRATION ACTS

Heard on 1 December 2023
Promulgated on 29 February 2024

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE MACLEMAN

Between

ZEESHAN JAVED

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Shabbir, instructed by K & A Solicitors.
For the Respondent: Mr T. Lindsay, Senior Home Office Presenting Officer.

(1) If the parties' marriage was not previously valid or recognised in Scotland, then, following the ceremony, they are validly married for the purposes of Scots law from the date of the ceremony.

(2) *If the parties' marriage was previously valid and entitled to recognition in Scots law, their status as married persons is unchanged by the ceremony, but the documentation arising from the ceremony enables them to establish that status from a date no later than that of the s 20 ceremony.*

(3) It is in the nature of the circumstances covered by s 20 that there may still be doubt about whether (1) or (2) applies; and nothing in the s 20 process assists in resolving that doubt.

DECISION AND REASONS

INTRODUCTION

1. The essential question in this appeal is whether the appellant can show that when proceedings began for the termination of his marriage, the marriage had lasted at least three years. That question raises a number of issues about Islamic marriage ceremonies, and about the effect of s 20 of the Marriage (Scotland) Act 1977.

BACKGROUND

2. The appellant ("A") is a national of Pakistan. He came to the United Kingdom in 2010 as a student and is lawfully in the United Kingdom, with limited leave due to expire on 11 February 2025. He had a relationship with a Bulgarian national, Ms Silvia Antonova Yankova ("Y") from 2015. They sought to marry. On 29 September 2016 the Secretary of State gave notice under s 50 of the Immigration Act 2014 that A had failed to comply with an investigation under that section, with the result that the process for undergoing a civil marriage was not open to them in either Scotland or England and Wales (s 3F(7) and paragraph 2 of Schedule 1A to the Marriage (Scotland) Act 1977, and s 28H(9) of and paragraph 2 of Schedule 3 to the Marriage Act 1949 respectively). They underwent an Islamic marriage on 10 October 2016.

3. A and Y have a child, born in Scotland on 2 April 2019, who has been issued with a Bulgarian passport. Having made the appropriate declarations, A and Y took part in a ceremony of marriage in Scotland under the provisions of s 20 of the Marriage (Scotland) Act 1977 on 2 May 2019. The child's birth was registered on 21 May. A little over two years later, on 23 July 2021, the marriage on 2 May 2019 was dissolved by Decree of Divorce.

4. A sought indefinite leave under the provisions of the EU Settlement Scheme. He based his application on retained rights arising from his marriage to Y. The rules are notoriously complex, but fortunately for present purposes only one aspect of them matters. He could be successful in his application only if before he started proceedings to terminate the marriage it had lasted for at least three years. This requirement appears in paragraph (d)(i) of the definition of "family member who has retained the right of residence" in the definitions in Annex 1 to Appendix EU to the Immigration Rules. The date when the proceedings to terminate the marriage is not clear, but as the period between 2 May 2019 and 23 July 2021 is itself less than three years, it is evident that A cannot succeed if his marriage was on 2 May 2019 as the Secretary of State found or assumed in refusing his application. His position is that he has been married since 10 October 2016. He says that

the marriage upon which he relies was contracted in Pakistan on that date (although both parties were in the United Kingdom) and that as such that marriage is or was valid in Scots law and United Kingdom law.

5. A appealed against the refusal of his application. His appeal raised a number of grounds, all of which were rejected in the First-tier Tribunal by Judge Debra Clapham in her decision of 9 March 2023. He appeals, with permission, to this Tribunal on the sole ground that Judge Clapham erred in her approach to the evidence and the law governing the marriage of A and Y.

6. Argument on A's behalf was presented to us fully and elegantly by Mr Shabbir, partly on the basis of grounds drafted by Mr Zane Malik KC. Mr Lindsay put the Respondent's position. Although our task is to determine whether Judge Clapham erred in law, it is, we think, preferable in this case to look at the evidence, and the relevant law, from first principles.

THE LAW

7. Islamic law is a system whose details require proof by evidence like any foreign legal rules, but we can take judicial knowledge (in England, judicial notice) of basic principles and notorious facts. An Islamic marriage is essentially simply a contract between the parties. The Hanafi school requires witnesses, but even that requirement is regarded as unnecessary by Shiites. Where there is a ceremony, it often takes place at a mosque and is confirmed by a minister, or Nikah Khan. An Islamic marriage contracted in any part of the United Kingdom does not as such comply with the Marriage Acts (with their requirements for notice, form, presence of a relevant church minister or Registrar, and licenced place of celebration). It is not formally valid and is therefore not entitled to recognition as a marriage by the law of any part of the United Kingdom.

8. A marriage contracted outside the United Kingdom will be recognised as formally valid in the United Kingdom if it was in a form required or permitted by the law of the country where it took place. So far as Scotland is concerned that rule now has statutory force in s 38(1) of the Family Law (Scotland) Act 2006. In England and Wales the same rule is still derived only from the common law: a recent example of its application is MM v NA [2020] EWHC 93 (Fam).

9. The law of Pakistan appears to allow marriages by proxy, that is to say marriages where at the ceremony one or both of the principals is represented by another person. It is also said that Pakistan allows marriages by telephone, at least where one party is absent but communicates by telephone with the place in Pakistan where the marriage is being celebrated: see the Opinion of Lord Stewart in MRA v NRK [2011] CSOH at [16]-[18]. There is in this case no evidence of foreign law in relation to whether Pakistan recognises a marriage where neither party is present in person, as is apparently the case in Ghana (see McCabe v McCabe [1994] 1 FLR 410) or where neither party is present in person but both are in telephonic contact with a place in Pakistan where the marriage

is said to be being celebrated. The absence of evidence is potentially important, because A has the burden of proving that in 2016 there was a marriage entitled to recognition in Scots and UK law.

10. Section 20 of the Marriage (Scotland) Act 1977 has no equivalent in England and Wales. Subsection (1) provides as follows:

> "Where two persons have gone through a marriage ceremony with each other outside the United Kingdom, whether before or after the commencement of this Act, but they are not, or are unable to prove that they are, validly married to each other in Scots law, an authorised registrar, on an application made to him by those persons, may, subject to the approval of the Registrar General and to subsection (2) below, solemnise their marriage as if they had not already gone through a marriage ceremony with each other."

11. Subsection (2) includes consequential modifications of the general law of marriage and requires the parties to submit a statutory declaration that they have previously "gone through a marriage ceremony with each other", giving the date, place and circumstances.

12. No judicial authority on this section was cited to us. Academic discussion points out that if the previous ceremony was ineffective the provision is unnecessary because the parties would be free to marry without it. If the previous ceremony was effective there is nothing in s 20 or elsewhere suggesting that the ceremony under s 20 revokes or replaces it. (See Anton's Private International Law, 3rd ed, 15.08; Clive's The Law of Husband and Wife in Scotland 4th ed, 04.028).

13. We agree. The section specifically deals with cases where there is or could be a doubt about the evidence. As it appears to us, the effect of the ceremony under s 20 is as follows. (1) If the parties' marriage was not previously valid or recognised in Scotland, then, following the ceremony, they are validly married for the purposes of Scots law from the date of the ceremony. (2) If the parties' marriage was previously valid and entitled to recognition in Scots law, their status as married persons is unchanged by the ceremony, but the documentation arising from the ceremony enables them to establish that status from a date no later than that of the s 20 ceremony. It is in the nature of the circumstances covered by s 20 that there may still be doubt about whether (1) or (2) applies; and nothing in the s 20 process assists in resolving that doubt.

14. The presumption in favour of marriage is found in both English and Scots law. As set out in Crawford and Carruthers' International Private Law: A Scots Perspective (4th ed) at 11-26, based on English judicial authority:

> "The common law presumption is that if a marriage has been celebrated, registered and a formal certificate produced, it will be formally valid, and the onus of proving otherwise rests upon any person who so avers."

THE EVIDENCE

15. The evidence in this case is twofold: there is evidence from A and Y, and there is evidence in the form of certificates and similar documents from official, or semi-official, sources. It is convenient to begin with the latter.

16. The Nikah Nama of the Islamic marriage between A and Y is completed (and partly printed) in English. It records that the marriage took place in Birmingham at the Jamia Masjid Minhaj ul Quran Mosque in Birmingham on 10 October 2016 at 4 pm. There was an immediate dower of a nominal sum, and two male witnesses. The certificate bears signatures of A and Y, the witnesses, and the Nikah Khan, whose name is given as "M. Bilal Qadri".

17. There is no certificate of any marriage between A and Y in Pakistan on the same or any other day.

18. There is a document in Bulgarian, issued by the Municipality of Svilengrad on 21 December 2016. We have a translation, with the heading 'Civil Marriage Certificate'. It sets out the names and other data of A and Y, together with the data (as translated) "Date of the civil marriage conclusion: 10.10.2016; Place of marriage conclusion: Pakistan".

19. Next in time is the application for a Scottish second marriage ceremony, consisting of an application setting out the facts, a statutory declaration by A and Y, and a purported witnessing by a Justice of the Peace. We use the word 'purported' because although the form clearly requires the Declaration to be signed before a Justice of the Peace, the Councillor who signs as witness has not indicated that he is one, and has competed the date in a strikingly unusual way (but in the same way as the date entered by A and Y in the Declaration itself). Be that as it may, in the Declaration A and Y declare that they went through a marriage ceremony with each other "at PAKISTAN over the skype and registered marriage in Pakistan and Bulgaria on 10 October 2016. The marriage was solemnised by M. Bilal Qadri in accordance with the laws of Pakistan". The circumstances of the marriage are entered on the form by a statement that A and Y "were not physically present in the ceremony we attended the ceremony over the skype and we registered the marriage in Pakistan in accordance with Pakistani law. [Y] also registered marriage in Bulgaria and now we moved to United Kingdom so we want to legalise our marriage in United Kingdom because we will reside in United Kingdom".

20. The next document is the certificate of the parties' marriage in Scotland on 2 May 2019 giving the status of each as "Existing Marriage", and with a note that 'the parties went through a marriage ceremony with each other on Tenth October 2016 in Pakistan'. Finally, there is an extract Decree of Divorce, dated 9 August 2021 and giving 23 July 2021 as the date of the divorce, and dissolving the marriage that took place on 2 May 2019.

21. The evidence from the parties is found in A's witness statement. There was no evidence from Y (who, according to the Decree of Divorce, had returned to Bulgaria, but is now again living in Glasgow); and it appears that A's evidence at the hearing before the First-tier Tribunal judge was in essence limited to adopting his witness statement and pointing to certain features of the documents. The statement is apparently intended to be a

full account of A's immigration and marital history. It records that A and Y encountered each other on social media and first met on 26 April 2016, on which date also they started living together. They were not able to undertake a UK civil marriage, but:

> "Thereafter, we got married on 10 October 2016 under Islamic Nikah at Birmingham. We also registered our marriage in Pakistan through Skype and got subsequently married in accordance with the Pakistani law. I submit that we attended the ceremony over the Skype as we were not physically present in Pakistan. Further, my ex-wife provided our Pakistani marriage certificate to Bulgarian authorities for the registration of our marriage in Bulgaria which was accepted as legal and valid. Thus our marriage was also legally registered in Bulgaria and we were issued the marriage certificate dated 21 December 2016. … [The Scottish authorities] accepted my application considering my marriage dated 10 October 2016 as legal and valid and issued the marriage registration certificate [drawing attention to the note, cited above]. … Later on, unfortunately, our marriage broken down on 23 July 2021. …"

22. Apart from the statements of A, and in the statutory declaration, Y, the only evidence of the second ceremony is said to be the existence of the Bulgarian certificate. The First-tier Tribunal judge said as follows about that:

> "Although the authorities in Bulgaria may have been prepared to accept the 2016 date I was not given evidence about how the Bulgarian legal system determines these matters or the factual basis which might have inclined the Bulgarian authorities to accept the 2016 date."

23. We agree entirely with that, so far as it goes: in these proceedings, and in the absence of evidence of those matters, the Bulgarian certificate does not assist A's case. But in a sense the First-tier judge does not go far enough. The question is not only the date (because it is clear that there was a marriage in Birmingham in 2016) but the place of the marriage that is important. Because the Birmingham marriage is not entitled to recognition in any part of the United Kingdom, A needs to prove on the balance of probabilities that there was also the marriage in Pakistan on that date. The Scottish marriage certificate takes the matter no further: it simply repeats the statements made in the statutory declaration and cannot itself constitute a Pakistani marriage; nor is it itself evidence of a formally valid Pakistani marriage as detailed in the note. The presumption of formal validity applies in relation to the Scottish ceremony itself, but that is no help either, particularly because the reason (or a possible reason) for the s 20 procedure is uncertainty about the parties' marital status.

DECISION

24. It is apparent from A's evidence that his position is that three events took place on 10 October 2016, in the following order: an Islamic marriage in Birmingham, the registration of that marriage in Pakistan, and an Islamic marriage in Pakistan. The registration must have been of the Birmingham marriage because the later one had not taken place; and the second

marriage of that day must have been an Islamic marriage because it was, as his statutory declaration for the Scottish marriage asserts, solemnised by M. Bilal Kadri, i.e. the same person who solemnised the Birmingham marriage (unless it is another person of exactly the same name – but such a coincidence of two different people of the same name officiating at two separate marriages of the same couple on the same day in two different countries is a possibility we are prepared to discount). The two latter events must have taken place after 9 pm in Pakistan, because of the time of the Birmingham marriage.

25. The absence of a certificate was explained to us (not by way of evidence) as resulting from the Bulgarian authorities having retained the only certificate, in a process requiring Bulgarian nationals to register, in Bulgaria, a marriage entered into abroad. Even if that were so, there is no reason why another certificate could not have been obtained, if such a marriage did take place; and without a certificate there is no room for the presumption of marriage. Evidently no certificate of a Pakistani marriage was produced in the course of arrangements for the Scottish marriage.

26. Without any direct documentary evidence of a marriage in Pakistan, the following questions (at least) arise, and other than the bare statements already detailed, there is no evidence enabling any of them to be resolved in A's favour.

27. First, could the ceremony have happened, as a marriage taking place in Pakistan? As we have said, there is nothing before us to show that a marriage in which neither party is present in Pakistan, and neither party is represented by a person present in Pakistan, is recognised or is capable of being recognised as a marriage that took place in Pakistan. In the present case there appears to be a further difficulty in that the Nikah Khan was not in Pakistan either. As a valid Islamic ceremony, it may well be the case that the Birmingham marriage is recognised in Pakistan as a valid marriage that took place outside Pakistan, but that is another matter altogether and is no help to A.

28. The second question is whether the ceremony did happen. We have no evidence about the extent to which registration of an existing marriage, and then an Islamic marriage, can take place in Pakistan after 9 pm. But we do note that in contrast with all the details recorded on the Birmingham Nikah Nama, neither of the parties has been able to say anything about the place where the second marriage was celebrated, save that it was 'in Pakistan'. There is no evidence of dowry, or of the identity of the witnesses. We have noted that there is no evidence that a new certificate of that marriage has ever been sought, but on A's evidence there is no reason to suppose that he has any awareness of where his marriage is supposed to have taken place or even where the earlier marriage was registered.

29. There is a further aspect to this question. The basis of A's case is that despite the non-recognition of the Birmingham marriage, because there was a marriage in Pakistan on the same day, he is to be regarded in Scots (and UK) law as having entered into a valid marriage on 10 October 2016. But if that is so, it is remarkable that there is no evidence of dissolution of

that marriage. The only marriage that has been dissolved is the later Scottish marriage: the Decree is specific as to that. If A's position is that the marriage of 10 October 2016 was valid in Scots law, it follows that he and Y are still married in Scots law, which is not how he describes his marital status. In particular, in a parental agreement dated 12 October 2022, A and Y describe themselves as divorced on 23 July 2021, and in his EUSS application, A describes himself as divorced by decree issued on 9 August 2021. Those statements are not obviously consistent with an assertion of the Pakistani marriage in 2016 of which no dissolution is mentioned. (In any event A and Y are apparently still married in Islamic law, with all that that entails for both of them.)

30. The third question is whether, if the ceremony did take place, it would have had any effect. It is not suggested that the Birmingham marriage was not effective as an Islamic marriage, having full effect in Islamic law (and entitled to recognition in Pakistan: if there were any doubt about that, there is nevertheless no doubt about A's position, because he says it was registered in Pakistan). The second ceremony was, therefore, supposed to be a ceremony in Pakistan uniting in an Islamic marriage a couple each of whom was already a party to an Islamic marriage (which so far as the bride is concerned is not valid in Islamic law, and so far as the groom is concerned is not permissible save by the process set out in the Muslim Family Laws Ordinance of 1961, of which we take judicial knowledge). Further, each was already a party to an Islamic marriage with the other. We have been shown no basis upon which such a ceremony, even if permitted in Islamic law or the law of Pakistan (which we doubt) could have had the effect of creating a (new) valid marriage between two persons already validly married to each other.

31. Those are the questions. Our answers are that we are not remotely persuaded that a further ceremony by skype could have been regarded as taking place in Pakistan, or that it would have had any effect if it did; and we do not believe that any such ceremony took place or that A and Y consider themselves bound by it.

32. We have treated the matter at length because of the submissions made to us. Our prime task is to determine whether the First-tier Tribunal erred in law. On the evidence before it, that Tribunal made no error in concluding that a marriage between A and Y in Pakistan in 2016 had not been established. There was no event before 2019 that could be counted as initiating a period of "marriage" for the purposes of the EU Settlement Scheme. This appeal is therefore dismissed.

C.M.G. Ockelton

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 22 February 2024