



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/05048/2015

THE IMMIGRATION ACTS

Heard at Field House
On 26th March 2018

Decision and Reasons Promulgated
On 16th May 2018

Before

DEPUTY JUDGE FARRELLY OF THE UPPER TRIBUNAL

Between

MRS ATIA ZAIDI
(NO ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr A Jafar, Counsel, instructed by Mayfair Solicitors.

For the respondent: Mr E Tufan, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The appellant has been granted permission to appeal the decision of First-tier Tribunal Judge GA Black, promulgated on 6 December 2017. The judge dismissed her appeal against the refusal of entry clearance as the spouse of a person settled in the United Kingdom.

2. Her sponsor is Mr Syed Zahid Hussain Zaid. He is originally from Pakistan and came to United Kingdom in 1989. He is now a British citizen.
3. He married his first wife, Mrs Ambreen Zaidi in Pakistan on the 29th November 2001. They then made their home in the United Kingdom. They have three children. There were problems in the marriage and they returned to Pakistan in December 2007 to see if this would help. Unfortunately it did not and they separated and subsequently were divorced on 5th February 2014.
4. The appellant is a national of Pakistan. On 30th December 2008. She and her sponsor went through a ceremony of marriage in Pakistan. They had a son born on 1st December 2009.
5. In 2012 the sponsor returned to the United Kingdom. He was joined by his first wife and their children. He owns two adjoining properties and lives in one and his first wife and their children lived in the other.
6. The appellant applied for entry clearance in August 2013 to join the sponsor as his wife. This was refused and her appeal was unsuccessful. Her marriage was not considered valid.
7. She then made a further application. This also was refused on the 30th July 2015. One of the grounds was that the marriage was again not considered valid. This was because at the time of the purported marriage of 2008 her sponsor was not divorced from his first wife. A further ground for refusal related to the financial requirements. On 27 August 2015 the appellant and her sponsor went through another marriage.
8. Her appeal against the refusal was dismissed by First-tier Tribunal Judge Gaskell following a hearing on 22 August 2016. The dismissal related to whether there was a valid marriage. The judge accepted the maintenance requirements were met.
9. That decision was appealed to the Upper Tribunal and was heard on 9 May 2017 by the Hon Mr Justice Lewis and Upper Tribunal Judge Allen. The Upper Tribunal found that the application had been made on the basis she was the spouse of her sponsor rather than being in an unmarried relationship. The Upper Tribunal upheld the conclusion of First-tier Tribunal Judge Gaskell that at the time of the purported marriage of December 2008 the sponsor had acquired a domicile of choice in the United Kingdom. Consequently, as someone domiciled in the United Kingdom, the marriage was void by reason of section 11 D of the Matrimonial Causes Act 1973 as he was already married.
10. The Upper Tribunal concluded that First-tier Tribunal Judge Gaskell materially erred in law in consideration of the subsequent marriage of 27th August 2015. The First-tier Judge mistakenly took the view that

consideration was restricted to the situation at the time of the entry clearance officer's decision, namely, the 30th July 2015 which predated the second ceremony. Instead, the judge should have looked at matters as at the date of hearing. The judge did purport to deal with matters in the alternative but the consideration of the 27 August 2015 marriage was not freestanding but was in relation to whether the first marriage was valid. Consequently, a material error of law was found in that First-tier Tribunal Judge Gaskell failed to consider whether the 27 August 2015 marriage was valid.

11. It had also been argued before First-tier Tribunal Judge Gaskell that the decision breached article 8. The situation was that the sponsor's first wife and British children were living in an adjoining house and he was involved in their lives. The appellant and her British child are in Pakistan. If the appellant was not given entry clearance and her son stayed in Pakistan with her he was separated from his father, the sponsor. If he went to England he would be separated from his mother. If the sponsor moved to Pakistan he would be separated from his children here. First-tier Tribunal Judge Gaskell did not consider these permutations but focused on whether the appellant and her sponsor can continue their family life together outside the United Kingdom and concluded they could. The Upper Tribunal concluded this issue had not been properly dealt with.
12. In summary, the Upper Tribunal remitted the matter back to the First-tier Tribunal for consideration of the validity of the marriage in August 2015. A second issue for reconsideration was article 8 and the position of all the children affected.

First-tier Tribunal Judge GA Black's decision

13. At paragraph 18 of the decision First-tier Tribunal Judge Black stated:

‘I am not satisfied that the re- registration of the 2008 marriage in June 2015 is valid given that the 2008 marriage was polygamous and invalid in English law’...‘It is argued by the appellant that the 2015. Marriage was in effect a re-registration of the 2008 marriage. As the 2008 marriage was not valid. It cannot be argued that the 2015 marriage is valid because its validity relies on the validity of the 2008 marriage...’
14. The judge went on to express concern as to the validity of the documentary evidence. For instance, the 2015 marriage certificate referred to both parties as unmarried. The judge concluded by finding that it had not been established the appellant and her sponsor were validly married for the purposes of the immigration rules.
15. Regarding article 8, First-tier Tribunal Judge Black accepted that the sponsor had a large role in looking after the children here but they lived with and are cared for primarily by his first wife. The judge rejected the

sponsor's evidence at the hearing that his first wife is not in the position to look after the children probably due to behavioural issues. The judge acknowledged there had been involvement by the local authority in 2007. There was no evidence of any mental illness in respect of his first wife. The judge had the benefit of a statement from the sponsor's 15-year-old daughter from his first marriage confirming he shares responsibility and her wish for all the family to be reunited. The judge commented that a decision was taken for the children to come to the United Kingdom to advance their education, leaving the appellant and her son in Pakistan. The judge noted the children from the first wife were regular visitors to Pakistan and felt it would be possible for them to return to Pakistan but their best interests lay here. The judge did not find evidence that the children from the first marriage had suffered because of the separation from their father. The conclusion reached by the judge was at the entrance of the children from the first marriage did not outweigh the public interest.

16. Regarding the appellant and her son, the judge referred to the fact her son is British and can choose to live here as of right. The judge did not find evidence of family life between the appellant and the children from the sponsor's first marriage; albeit the judge accepted a relationship existed because of the time they spent in Pakistan and her visits to the United Kingdom. The judge went on to find no evidence that the appellant's son would be adversely affected if he remained in Pakistan, separate from his father, the sponsor. The judge found no evidence of family life between the child and the sponsor. The judge concluded by finding the existing arrangements of the sponsor visiting for extended periods in Pakistan could continue and reflected the best interests of all of the children. Finally, the judge referred to the choice made by the appellant and her sponsor to marry in Pakistan which allowed polygamy. However, the interference caused but the decision was seen as proportionate.
17. Permission was granted on the basis it was arguable the judge had not considered whether the 2015 marriage was valid in its own right and was not dependent on the area manager 2008. This may also have impacted upon the consideration of the best interests of the child.

The second Upper Tribunal hearing.

18. Mr Jafar opened the appeal by stating that the documents submitted were accepted as genuine by the respondent and it was an error on the judge's part to seek to go behind that. Furthermore, the judge erred in referring to the 2015 marriage as a remarriage. Rather, the 2015 marriage was simply a marriage.
19. He submitted that the judge's article 8 analysis was flawed in suggesting the sponsor could continue to divide his time between one family in the United Kingdom and another in Pakistan.

20. Mr Tufan confirmed that the crucial issue in terms of meeting appendix FM was whether the marriage of 2015 was valid in the United Kingdom. He confirmed that finances were no longer an issue.

Consideration

21. This appeal illustrates the issues which can arise out of differing cultural religious and cultural backgrounds. The appeal has had a long history. The sponsor has been maintaining two families one in the United Kingdom and one in Pakistan. He is active in the upbringing of all of his children. He spends a significant amount of time in Pakistan. There was reference to visits totalling over 100 days in a year. The indications are that the reason for his visits to Pakistan is because of his family there. He maintains a good relationship with his former wife, who lives in the adjoining house with their children. That wife and his children also have a bond with his second wife and her son. This developed through the time they were in Pakistan and through visits.
22. The decision under appeal was taken on the 30th July 2015. The appellant has a limited right of appeal, namely, it is confined to human rights issues (Section 84(1) (c) of the Nationality, Immigration and Asylum Act 2002.) If a protected human right is engaged then when considering the final stage of the Razgar approach then initially matters are considered through the prism of any relevant immigration rule (see Mostafa (article 8 in entry clearance)[2015] UKUT 112.) In this appeal. There is only one issue in relation to appendix FM, that is, the appellant must show she is married to her sponsor. There is no longer any dispute about finance.
23. The decision of First-tier Tribunal Judge Gaskell was that the appellant's initial marriage to her sponsor in 2008 was void. At that stage, her sponsor's first marriage still legally existed. Polygamy is permitted in Pakistan. The judge however found that her sponsor retained his domicile of choice, British. Because of this and section 11 D of the Matrimonial Causes Act 1973 is charged to the appellant was void. First-tier Tribunal Judge Gaskell had rejected the argument that he had reverted to his domicile of origin, Pakistan. The judge also rejected the argument that she could succeed on the alternative definition of partner as being someone who had lived with her sponsor in a relationship akin to marriage for at least two years before the date of application. All of these conclusions were upheld in the Upper Tribunal and I take them as established.
24. After the application had been refused on the basis the marriage was void the appellant and her sponsor remarried on 27 August 2015. It seems likely the reason for doing so was because of the existing impediment to her entry clearance. The Upper Tribunal in remitting the appeal was requiring the First Tier Tribunal to consider the validity of that marriage.

25. First-tier Tribunal Judge Black has unnecessarily complicated matters by linking it with the earlier marriage and describing it as a re registration. The judge accepted from the evidence that the sponsor was divorced at the time of the second marriage. Para 8 refers to a letter dated 16 June 2017 from the Union Council attested by the Ministry of Foreign Affairs confirming that the marriage in 2015 was valid in Pakistan. However, the judge continues to go back to the validity of the 2008 marriage.
26. Paragraph 18 of the decision suggests that it was the appellant's representative, Mr Chohan, who introduced the notion that the 2015 marriage was a re-registration of the 2008 marriage. In my view the introduction of such a notion unduly complicates matters and leads to extraneous considerations. Because of this, the judge went on to incorrectly reason that as the 2008 marriage was not valid it cannot be argued that the 2015 marriage is valid because it relies on the validity of the 2008 marriage.
27. The judge states that it was not argued that the second marriage was a new marriage following a valid divorce. It is my conclusion this is precisely what it was. It seems that the reluctance by the appellant's representative to accept that the first marriage was void was due to concerns over the legitimacy of the child. Basic family law in the United Kingdom is that if a marriage is void as opposed to voidable then it is treated as if it never existed. The 2015 marriage is freestanding. The appellant was divorced at that stage. There is documentary proof of the marriage, which is not disputed. There are a number of cases on this issue - see for instance Entry Clearance Officer -Islamabad -v- Mehmood [2002] UKAIT 08328 and SSWP -v- MN(BB)(Validity of polygamous marriage) [2018] UKUT 68 (AAC) have considered this issue.
28. Consequently, the judge materially erred in law in linking the validity of the 2015 marriage to the 2008 marriage. I have been provided with a copy of the marriage certificate. I accept the explanation given as to why the sponsor is described as being unmarried. The form only asks if the bride has been divorced. It is my conclusion therefore that the appellant is validly married to her sponsor.
29. I find the article 8 assessment of First-tier Tribunal Judge Black unsustainable. The judge indicates that the parties are in the position they are because of choice. This overlooks the situation of the children. It is not satisfactory for the children to be separated when there is a bond between them and they face long periods of separation from their father. The family units here and in Pakistan have a bond and all the indications are that the best interests of the children are served by the appellant and her son being admitted to the United Kingdom. The respondent has taken no issue is finance. No other countervailing interest has been shown of sufficient weight to effectively exclude a British child.

Conclusions

30. First-tier Tribunal Judge Black materially erred in law in consideration of the validity of the 2015 marriage and in the article 8 assessment. Consequently, the decision dismissing the appeal cannot stand.
31. The Upper Tribunal in remitting the appeal to the First-tier Tribunal made reference to the need for proper fact-finding based on proper evidence rather than assertion. Regarding disposal at this stage I am conscious about the length of time already spent in the appeals process. First-tier Tribunal Judge Black did make findings in respect of family life. The judge accepted a genuine and close relationship between the sponsor and the appellant. The financial requirements were met. The judge accepted the sponsor looked after the children in the United Kingdom, attended, parent meetings and so forth. However, she rejected his claim that his first wife was not in a position to care for them, albeit there has been some difficulties leading to the involvement of the local authority in 2007. The judge had evidence from the appellant's 15-year-old daughter and the views of the children are important.
32. The judge did not find family life between the appellant and the children in the United Kingdom. This is understandable, given the fact they have been living apart.
33. The judge did not explain the finding there was no family life between the sponsor and his child in Pakistan. It may be that within the family dynamics the strengths of the family life varies between individuals. I cannot see how there can be no bond between them.

Remaking the decision.

34. As stated, I find the marriage in 2015 is valid. From the facts found in the First-tier Tribunal family life is engaged. Looking at matters in the round it is my conclusion that the respondent's decision is a disproportionate interference with family life. No strong public interest factors have been demonstrated, which would outweigh the interests of the appellant and her British son. Consequently, I allow the appeal on article 8 grounds

Decision

The decision of First-tier Tribunal Judge Black dismissing the appeal materially erred in law and set aside. I remake the decision, allowing the appeal.

Francis J Farrelly
Deputy Upper Tribunal Judge

dated 13 May 2018