



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/13118/2012

THE IMMIGRATION ACTS

**Heard at : Field House
On : 24th April, 18th September &
22nd November 2013**

**Determination Promulgated
On : 29th November 2013**

Before

Upper Tribunal Judge McKee

Between

IBRAHIM HAJI AHMED MOHAMOUD

Appellant

and

Entry Clearance Officer, Abu Dhabi

Respondent

Representation:

For the Appellant: Mr James Collins, instructed by Ahmed Hersi
For the Respondent: Mr Chris Avery & Miss Julie Isherwood of the Specialist Appeals Team

DETERMINATION

(1) This appeal to the Upper Tribunal has been attended by a number of difficulties. The decision to refuse entry clearance on the basis of marriage was made on 10th June 2012, the ECO not being satisfied that a valid marriage had been contracted or, in any event, that the marriage was genuine and subsisting, with each party intending to live permanently with the other. An appeal to the First-tier Tribunal came before Judge James

on 29th October 2012 and was dismissed, but permission to appeal to the Upper Tribunal was granted by Judge Baird. By the time the matter came before me, however, most of the necessary documents had gone missing, although enough remained to enable an error of law to be established. After that, the case was adjourned, and the parties were sent a 'Decision & Directions', setting out the error and asking for the missing documents to be retrieved. This is appended below. The case then came before me again on 18th September, but again it had to be adjourned, and the final hearing was on 22nd November. My understanding of the issues has grown incrementally with each hearing, as will be reflected in this determination, which is divided into three parts, to correspond to the three hearings.

DECISION AND DIRECTIONS

1. Permission to appeal to the Upper Tribunal against the determination of Judge James, after a hearing at the First-tier Tribunal on 29th October 2012, was granted by Designated Judge Baird, but when the matter came before me on 24th April this year, the original court file had been lost, and the only documents on my file were the First-tier determination, the application by the Horn of Africa Women and Children's Association for leave to appeal, the grant of leave and the notice of today's hearing. Mr Avery did not have a copy of the Respondent's Bundle, which would have been sent from the British post in response to the notice of appeal against the refusal of entry clearance, while Mr Collins said that the sponsor had not yet been able to obtain all the papers in the case from her previous representative, a Mr Paxi-Cato. Nevertheless, it was possible to identify errors of law in Judge James' determination, rendering it necessary to set her decision aside.
2. An adverse credibility finding was made by the judge because a business trip supposedly taken by the appellant to the United Kingdom overlaps with the time when he and the sponsor were together in Abu Dhabi, celebrating their wedding. This is stated at paragraphs 35 and 47 of her determination, and clearly misunderstands the evidence. Mr Avery argues that "*overlaps*" should not be taken to mean what it apparently means, but if the judge is using the word in a sense which no one else can understand, that in itself would be a legal error. Apart from that, there are no clear findings on whether the sponsor was free to marry the appellant and, if so, whether a marriage actually took place. The decision on the appeal will have to be re-made by the Upper Tribunal, in the light of whatever evidence is available.

DIRECTIONS

The parties are to use their best endeavours to re-assemble the missing documents, in particular the Respondent's Bundle and Appellant's Bundle which were before the First-tier Tribunal. These, and any further relevant documents, should be filed with the Tribunal and served on the other side no later than five working days before the next hearing, at which the sponsor will be expected to give oral evidence. Statements from her and from any other witness who is to be called should be filed and served in the same way.

Hearing on 18th September

(2) Mr Avery was able to replace the Respondent's Bundle on 30th May, but a thick Appellant's Bundle from the Horn of Africa Women & Children Association did not reach Field House until 10th September, and was not copied to the Specialist Appeals Team. Another, smaller bundle arrived the day before the re-listed hearing on 18th September, but this time it was copied to Angel Square as well as Field House. We now had all the documents which were before the First-tier Tribunal, and some more recent ones. But as Mr Collins frankly admitted, there was still not enough evidence to address all the issues arising in this appeal. In particular, had the sponsor divorced his first wife? At Q.168 of the Visa Application Form, the appellant said that he had been separated from his first wife since 2005, not that he had divorced her. He had also stated that he had married the sponsor in Abu Dhabi on 27th July 2011, but it turned out that this was a small party to celebrate the wedding which had actually, it was said, taken place by proxy on 25th July 2011 in Somalia.

(3) I pointed out some oddities in the certificate (with translation) adduced as evidence of this. There are actually two versions of the certificate, one apparently being a 'standard' pre-printed Nikah form in Somali, with the names of those involved being filled in by hand. The other version is in Arabic. The English translation misses out the name of the appellant's father, which is Haji Ahmed Mohamud in the certificate, but gives the names of the two witnesses as Mohamed Sheikh Ahmed and Salad Ahmed Noor. Only one of those names appears on the certificate, and only as 'Mohamed'. It is accordingly doubtful whether there were two witnesses to this Nikah contract at all. For some reason, the location of the marriage is given in the translation as 'Herjisa city in the Republic of Somalia', but in fact it is Hargeisa, the capital of Somaliland. Yet the Nikah form is headed 'Democratic Republic of Somalia' (*Jamhuuriyadda Dimoqraadiga Soomaaliya*). This was the name of the country from 1969 to 1991, under the Communist regime of Siad Barre. The translation is here incomplete, just putting 'Republic of Somalia'. Clearly, what has been used to record the marriage is an out-of-date Nikah form, at least 20 years old. Another oddity is that the name of the groom's father is requested on the form, but not the name of the bride's father. Her mother's name is given instead. Yet, as we shall see, according to the sponsor the whole purpose of having a marriage by proxy in Hargeisa was that her father was there, and his consent to the marriage was essential. Hargeisa being the capital of the self-styled independent Republic of Somaliland, it might seem surprising that the bottom part of the certificate is stamped with 'attestations' from the Ministry of Foreign Affairs of the now-defunct Somali Democratic Republic (the Ministry would not have been located in Hargeisa in any event), as well as by the Consular Section of the Embassy of the Somali Federal Republic (the name of the country since August 2012, but not including Somaliland) in Abu Dhabi.

(4) Because the sponsor was in attendance, we were at least able to find out what light she could shed on the issues which troubled the Entry Clearance Officer and the First-tier judge. In examination in-chief, she explained that her four children were the offspring of an Islamic marriage which was contracted at her mother's house in 1996 and terminated by *talaq* pronounced by her husband in 2006. The marriage was never registered for official purposes in the United Kingdom. As for the appellant's first marriage, this, thought the sponsor, was an Islamic marriage contracted in Somalia (in the VAF, the sponsor said Abu Dhabi), which had ended in an Islamic divorce in the UAE in 2005. She was sure her

husband was divorced. The sponsor was adamant that she would never go back to live in Somalia. She had not been back since leaving the country at the age of 10 (actually, being born in 1978, she would have been at least 16). Having been granted refugee status, she was now a British citizen, and London was her home.

(5) Both in-chief and in cross-examination, the sponsor explained that the proxy marriage had taken place in Hargeisa because her father was passing through that city on his way to Mogadishu from the Yemen. He was there, she insisted, despite his name not being on the Nikah. She had not thought to ask for evidence from any of the people who attended the proxy wedding ceremony. She confirmed that the appellant had completed the Visa Application Form himself, and that he understood the difference between being divorced and being separated.

(6) In re-examination, the sponsor confirmed that she did know things about her husband, such as the tribe which he belonged to. She did have photographs at home of when the appellant visited London in June 2011, but she had not adduced these as evidence. In reply to questions from me, and to further questions from Mr Collins, the sponsor said that her father had been living in the Yemen for a long time. He was on his way from there to Mogadishu, where he had some property, when he stopped off in Hargeisa for three or four weeks to do some business there. No family members were living in Hargeisa, but the sponsor thought that the witnesses to the Nikah were friends. She could ask her father. The sponsor was adamant that her father's consent was needed in order for the wedding to take place, but that he could not obtain a visa to come to Abu Dhabi in time for when the sponsor was there. Miss Isherwood asked when the wedding photographs were taken, and the sponsor said at first 25th July 2011. She then corrected this to 27th July, the date of the celebratory party, not the date of the proxy wedding itself.

(7) The appeal was now adjourned, in order, if possible, for further evidence to be obtained as to whether a proxy wedding took place in Hargeisa on 25th July 2011, and whether the appellant had divorced his first wife by that date.

Hearing on 22nd November

(8) When we convened again on 22nd November, I indicated to the parties that there were problems with the documentary evidence of the proxy marriage which went beyond those which I had outlined at the previous hearing. The documents which I was looking at then ~ the marriage certificate in Somali, an Arabic version of the same, and an English translation ~ had been included with the Notice of Appeal, and were listed as B1- B3 in the bundle which was reviewed by the Entry Clearance Manager. I had not noticed that different versions of the same documents were submitted with the Visa Application Form in April 2012, and are numbered A4 - A6 in the bundle reviewed by the Entry Clearance Manager. The differences are significant. The entries in the Somali-language Marriage Certificate were clearly made at different times. The later version is not simply a photocopy of the earlier one. Rather, the form has been completed again by hand ~ although, contrary to my initial impression, it may be the same hand. The main difference between the two Somali versions is that the earlier one gives the names of the two witnesses in full ~ Mohamed Sheikh Ahmed and Salad Ahmed Nur ~ whereas the later version just gives one name, Mohamed.

(9) The Arabic versions of the marriage certificate are very different from each other in appearance, and they too have obviously been produced at different times. But the most serious discrepancy concerns the English translations. The translation of the earlier certificate contains the following passage :

“They married by proxy before the judge of The Court of Hargesia City – Somali (*sic*), dated in 25/07/2011 AD, this Marriage is done by presence of **Abdi Haji Ahmed Mohamoud** representing his brother (the husband) and with the approval of the guardian of the wife, that is her father called **Nasir Mohamed.**”

(10) Nothing corresponding to this passage appears in the Somali version. It is a concoction designed to show that the marriage was contracted by proxy. The later translation does not contain this passage, and it would appear that there is nothing in the Somali certificate to suggest that the marriage was a proxy marriage. The later translation is no doubt more faithful when it says, “*They were married before the judge at court of Herjisa city.*” Curiously, the inserted passage suggests that the sponsor’s father was not there. If he had been present, his presence would surely have been mentioned, rather than just his approval.

(11) We now have a witness statement from Nasir Mohamed Sheikh Nur, dated 19th November 2013, in which he emphasizes that he was indeed there, because “*it is very important that the bride’s father is present during the ceremony and gives his blessing to the marriage.*” He also says that not only was he there, but so were “*Ibrahim’s mother and many of his siblings.*” That was not mentioned by the sponsor at the last hearing, when she surmised that the two witnesses to the marriage were friends of her father. In her oral evidence today, she said that she did not think that any further details about who was there were needed.

(12) Far from assisting the appellant’s case, the documentary evidence adduced for today’s hearing has added more confusion. A statement from the sponsor’s mother, also dated 19th November 2013, says : “*My daughter had an Islamic engagement with the father of her children, Mr Abdirahman Osman Abdi. She was never legally married to him. Once the relationship broke down they both went their separate ways.*” It is certainly the case that the sponsor was never married for official purposes in the United Kingdom. But to say that she had nothing more than an ‘Islamic engagement’ with the father of her four children is ludicrous. I can only assume that the wording of this statement is the result of the anxiety of the appellant’s representative, Ahmed Hersi, to make sure that the Upper Tribunal does not labour under the misapprehension that the sponsor was married to another man when she married the appellant in 2011. He should not have been worried about that. I am quite sure that the sponsor’s Islamic marriage to her first husband was not valid under English law. Her subsequent divorce, by *Talaq*, rendered her free to marry again by Islamic law, but was not necessary under English law.

(13) The confusing and contradictory evidence as to who was in Hargeisa on 25th July 2011 led Miss Isherwood to submit that there was no proxy wedding at all. On the other hand, evidence adduced on the day of the hearing, which inexplicably had not been provided sooner, bolstered the claim that on 27th July 2011 there had been a celebration in Abu Dhabi. Previously, there had just been photographs of the appellant and the sponsor in romantic poses. Now, photographs were produced of the happy couple surrounded by well-wishers at a party venue. In her oral evidence, the sponsor explained that these people were friends of her husband. She did not know them herself.

(14) Asked whether, if she was found not to be validly married to the appellant for the purposes of English law, she could go back to Abu Dhabi and marry the appellant again, as it were, the sponsor replied that this would be feasible. Her father, who has permission to reside in the Yemen, would have great difficulty getting a visa to come to Abu Dhabi, but he could give his consent to the marriage over the telephone while it was being celebrated. One might ask why this was not done in the first place, rather than arrange for the wedding to be celebrated without the physical presence of either the bride or the groom, while the bride's father happened to be passing through Somaliland and, as we are now told, the groom's mother and brother and other siblings converged on Hargeisa from Buhodle (a town which I have been unable to spot on a map of Somalia, with that spelling). But Mr Collins submitted that, if it was perfectly possible for the couple to get married in Abu Dhabi, why would they have gone to the trouble of pretending to get married by proxy in Somaliland, and getting together all the evidence to prove it, if no such proxy marriage had ever taken place?

(15) There is logic in Mr Collins' submission. Despite the problems with the documentary evidence, I think it more likely than not that the couple had something to celebrate on 27th July 2011, and that that something was their wedding. The sponsor gave what Mr Collins rightly called "compelling" evidence today that she regards herself as married to the appellant. She explained how, having agreed to marry a man chosen for her by her family, who turned out to be unsuitable, and having thereafter brought up the four children of the marriage on her own, she was on the lookout for a good man of her own choice, and was sure that she had found him in the appellant. Having seen and heard the sponsor give her testimony, I have no doubt that she sincerely loves the appellant and wants to live with him in this country. She gave perfectly good reasons why she would not take her four children, who are all British and are all at school here, to live in Abu Dhabi.

(16) The real stumbling block for this appeal, as Mr Collins, with his customary realism, candidly recognised, is not whether a proxy marriage took place, but whether the sponsor was free to marry the appellant. The sponsor has made it clear, both today and at the previous hearing, that she has no intention of ever going back to Somalia. She regards this country, of which she is a citizen, as her home. Plainly, she has acquired a domicile of choice in England. She cannot therefore enter a polygamous marriage that would be recognised as valid in the United Kingdom. If the appellant was married to someone else when the proxy wedding is said to have taken place on 25th July 2011, then he is not entitled to enter the United Kingdom as a husband under the Immigration Rules.

(17) The appellant has previously maintained that he divorced his first wife in 2005, and that his use of the word 'separated' in his Visa Application Form was an unfortunate slip. But just in time for today's hearing, he says in a witness statement, taken over the phone by Ahmed Hersi on 21st November, that his first marriage "*was an informal Islamic marriage. My first wife and I separated in 2005. I divorced my first wife informally in 2011.*" There are two problems with the appellant's new stance. First, there is no reason to suppose that the appellant's first marriage was not recognised as a lawful marriage in the UAE, so the appellant would have needed a divorce. He does not say when in 2011 he divorced his first wife. The sponsor believes, no doubt sincerely, that the appellant was divorced before he married her. She has no wish to share him with another woman. But something more is needed than the appellant's bare assertion, especially in the light of the change in his position.

(18) The second problem is that there is no corroborative evidence of the divorce. What the appellant goes on to say in his statement does not help his case : “*There was nothing legally to stop Najma and I from marrying in the UAE or Somalia because in both countries men are permitted to be married to up to four wives at a time.*” That does not assist in showing that his marriage to the sponsor was monogamous. What is needed is information about when, and how, and before whom the appellant obtained his divorce. I presume that by ‘informal’, the appellant means that he divorced his first wife by a ‘bare’ *talaq*. But I do not know whether a bare *talaq* suffices in the United Arab Emirates, or whether the divorce also has to be registered with some official body in order to be effective. If a bare *talaq* does suffice, it still has to be pronounced in the presence of witnesses. Who were those witnesses, and when did it take place? In the absence of any information, I cannot be satisfied that the sponsor was able to contract a marriage with the appellant that would be a valid marriage for the purpose of obtaining entry clearance as a spouse.

(19) If the appeal could not be allowed under the Immigration Rules, Mr Collins asked me to consider allowing it under Article 8. I have indeed given this possibility serious consideration, because I do not doubt that the sponsor sincerely desires to live with the appellant in this country as a married couple, and that the protracted litigation which she has gone through is not a contrivance to bring somebody to this country purely for economic betterment. But when Article 8 falls for consideration, it is not just the private and family life of the appellant and the sponsor that must be taken into account. The best interests of any children must also be ‘a primary consideration’. Section 55 of the 2009 Act requires the welfare of children who are in the United Kingdom to be promoted. The sponsor’s four children obviously fit the bill. But the appellant also has four children, and Entry Clearance Officers are enjoined to apply the spirit of the section 55 duty to children who are outside the United Kingdom. I have no idea how the appellant’s departure would impinge upon his children. In short, a proper Article 8 assessment would require me to range much more widely than I have done in the present appeal, which has focused on whether the appellant is validly married to the sponsor.

(20) On the evidence before me, I have no choice but to dismiss the appeal. It may be that the sponsor can (re)marry the appellant in Abu Dhabi, and that a fresh application can be made, but that is a matter for them and their advisers.

DECISION

The appeal is dismissed.

Richard McKee
Judge of the Upper Tribunal

23rd November 2013

R. McKee