

## **ASYLUM AND IMMIGRATION TRIBUNAL**

### **THE IMMIGRATION ACTS**

Heard at: Glasgow  
September 2008

Date of Hearing: 12

Determination delivered orally at hearing

Before:

**Mr C M G Ockelton, Deputy President of the Asylum and Immigration  
Tribunal  
Immigration Judge Forbes**

Between

**SM**

Appellant

and

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

#### Representation

For the Appellant: Mr. D Byrne, Drummond Miller LLP  
For the Respondent: Ms. M MacDonald, Home Office Presenting  
Officer

*1. In a Scottish case, whether a person is domiciled within the United Kingdom or not falls to be considered by the rules of Scots law, which, although placing the burden of proof firmly on the party asserting the acquisition of a domicile of choice do not impose a higher standard than the balance of probabilities. The evidence must be looked at as a whole, and as a whole it needs to show a change of permanent home for all purposes.*

*2. A person who evinces a desire to retain the laws of his original home (as distinct from the rules of UK or Scots law) for a continuing part of his life does not show the intention relevant to a change of domicile.*

### **DETERMINATION AND REASONS**

1. The appellant is a citizen of Pakistan. She appealed to the Tribunal against the decision of the respondent Entry Clearance Officer on 12 July 2007 refusing her entry clearance as the unmarried partner of the sponsor. An Immigration Judge dismissed the appeal. The appellant sought and obtained an order for reconsideration. Thus the matter comes before us.
2. The matrimonial or quasi-matrimonial history of the sponsor is a matter of some complexity and importance in this case. The sponsor was born in Pakistan and came to the United Kingdom as a child with his father. He has subsequently obtained British citizenship. In 1993 he married in Pakistan a wife who came to the United Kingdom under the provision of the Immigration Rules to settle with him. That relationship has now broken down, but there has been no divorce recognised in the United Kingdom. It follows that the sponsor and that wife of his are still married in United Kingdom and indeed Scottish law.
3. Following the breakdown of his marriage he entered into a further relationship (possibly beginning as long ago as 2000) with the appellant in Pakistan and has a number of children by her. As we have said there is no United Kingdom divorce between the first wife and the sponsor, but in 2005 the sponsor executed, in Scotland, in English, what is called a "Letter of Divorce" and purports to be a Talaq. Following that he went again to Pakistan and entered into a ceremony of marriage with the appellant.
4. There has been a previous application by the appellant for admission to the United Kingdom as the spouse of the sponsor. That application, we understand, was refused. The reason for the refusal may have been that the marriage was not valid or it may have been that under para 278 of the Statement of Changes in Immigration Rules, HC 395 a second wife (that is to say, a party to a polygamous marriage where other wives of the sponsor are already in the United Kingdom) cannot be admitted to the United Kingdom whilst the marriage to the first wife subsists. It is under those circumstances that, advised by the solicitors who represent her before us today, the appellant has made a further application to admission to the United Kingdom as an unmarried partner.
5. The Immigration Judge's determination, it is fair to say, exhibits some confusion. It is confusion which goes to the heart of the issue which the Immigration Judge had to determine. The Immigration Judge had before her evidence in the form of a witness statement adopted orally by the sponsor, and documentary evidence, showing links between the sponsor and the appellant said to continue over a number of years. The Immigration Judge was clearly in a state of some confusion as to whether the case fell to be decided under the rules applicable to "married" or "unmarried" partners. Referring to the requirement under

the rules applicable to unmarried partners, in para 295A of the Immigration Rules, she began her conclusion on the issue as follows:

“The Entry Clearance Officer’s decision was based on the fact that he did not consider that the Appellant had lived with the U.K. sponsor for a period of two years. He based this decision by applying rule 295A. I consider this approach to be erroneous.”

6. So far so good, perhaps. The Immigration Judge then continues as follows:

“The fact is that the Appellant considers that she is married and indeed that there is a valid marriage under the laws of Pakistan. It is the status of the Appellant which is significant under the rules and I would refer to Rule 281(1)(a) in this connection which states ‘the applicant is married to or the civil partner of a person present and settled in the United Kingdom.’. It is therefore incorrect to seek to apply rule 295A in this case. The Appellant does not consider herself to be the unmarried partner of the sponsor but considers herself to be the spouse. However, the marriage is not valid under UK law as the UK sponsor is not divorced under UK law from his first wife. Accordingly, the Appellant does not meet the requirements of Rule 281. It is not open to the Appellant to then choose to apply another rule based on unmarried partners.”

The Immigration Judge then went on to consider matters relating to finance and to Art 8, although no ground of appeal was based on Art 8. The Immigration Judge dismissed the appeal.

7. In making his application for reconsideration Mr. Byrne has pointed out that, broadly speaking, it is probably fair to say that a couple are either married or are not married and that the determination of the Immigration Judge does not demonstrate whether she thought that they were married or not married. Indeed, as he pointed out in his expansion of his grounds before us, she appears to have treated them both as being not married and not unmarried, evidently to the disadvantage of the appellant in attempting to prove her case.
8. Those criticisms of the Immigration Judge’s determination appear to us to be sound. This was a case in which the Immigration Judge needed to decide whether she was satisfied that the appellant met the requirements of the Immigration Rules upon which she relied. She relied on Immigration Rules applicable to her as an unmarried partner and, because of the provisions of para 278 to which we have referred, she needed indeed to show that she was not married to the sponsor. It was therefore necessary for the Immigration Judge to decide whether the parties were married for the purposes of the Immigration Rules and UK law, and she failed to do so. That was an error of law.

9. We then turn, as we must, to deciding whether that error was material. The error would not be material if the Immigration Judge would have been bound on the evidence before her and the law correctly interpreted, to have decided it in the same way that she did decide it.
10. The relevant law as it applies to this appeal is, as it seems to us, as follows. The marriage ceremony between the appellant and the sponsor constitutes a marriage in UK and, in particular, Scots law, if and only if it was valid. Given that it was polygamous it would be valid if and only if neither of the parties was domiciled in any part of the United Kingdom at the time that the marriage took place. There is no doubt that the appellant was not domiciled in any part of the United Kingdom. The sponsor had a domicile of origin in Pakistan and would have a domicile in a part of the United Kingdom therefore only if he had acquired by choice a domicile different from his domicile of origin. It is well known that both in English law and Scots law and, indeed we understand it, the law of much of the rest of the world, it is for a person who seeks to establish that a domicile of origin has been lost and replaced by a domicile of choice to show that. The better and current view is probably that, despite some Scottish authority to the contrary, in a civil action the standard of proof is on no issue higher than the balance of probabilities (see eg Lamb v Lord Advocate 1976 SC 110). In this the law of Scotland (by which the sponsor's domicile is to be determined in this appeal) may differ from that of England. There is no doubt, however, that the burden of proof is on the appellant in the present case. She needs to show that the sponsor had acquired a domicile of choice in Scotland before undergoing a ceremony of marriage with her. If he had done, her marriage to him would be (in Scots law) void on the ground of polygamy.
11. If the sponsor was domiciled in Pakistan at the time of his marriage to the appellant the marriage is valid although polygamous. It is valid because there is nothing in the provisions of Scottish law or UK law which would invalidate it. The law of the United Kingdom and its various parts recognises polygamous marriages contracted abroad by those with domiciles not in the United Kingdom. The marriage although valid would, however, have the consequence under para 278 that because of the continuance of the sponsor's first marriage, the appellant could not be admitted into the United Kingdom. But it is only if the marriage is not valid that the parties are entitled to be regarded as unmarried for the purposes of para 295A.
12. Everything therefore depends on whether the sponsor had acquired a domicile of choice in any part of the United Kingdom, (that is to say, for the present for these purposes, in Scotland) after his arrival in the United Kingdom with his father in his childhood. If, on the evidence before her, the Immigration Judge could not but have come to the conclusion that she was not satisfied that a domicile of choice had been acquired, then her error of law, already identified by us, would not be material because she would have been bound to conclude that the marriage was a valid

polygamous marriage and that the appellant therefore could not succeed because of the provisions of para 278. Only if there could be a doubt about the matter would we regard her error of law as material.

13. What then was the evidence before her? Mr Byrne has pointed, in particular to the application form made by and in the name of the appellant in which she states that the sponsor's permanent address is in Scotland and that his home is the United Kingdom; and to the sponsor's own witness statement, a production before the Immigration Judge which was adopted in evidence, in which he gives his history. Mr Byrne also points to the fact that the sponsor has a job in the United Kingdom and that he has obtained British citizenship and he asks us also to infer from the fact that this application has been made that he wishes to continue to "keep his home" in Scotland, which is a part of the United Kingdom.

14. We perhaps should cite the witness statement of the sponsor almost in full:

"I am making this statement in support of my application for my wife and children to come to the United Kingdom.

I was born in Lahore but came to the UK to follow my dad in 1971 on 18<sup>th</sup> June when I was 13 years old. I became a British citizen in 1976.

I married [my first wife] from Pakistan on 6<sup>th</sup> November 1979.

Unfortunately our relationship broke down in September 1993 and she moved out in July of that year. She went to Birmingham and got a lawyer and informed me that we were no longer married.

I tried to patch things up along the way as we have 5 children together, 4 daughters over 18 and a boy who is 14.

Eventually I realised that our relationship was over and I met [the appellant] in 2000 in Pakistan. I met her through some relatives whilst I was visiting Pakistan.

We decided to marry and married on 31<sup>st</sup> December 2000 and I have been subsequently spending nearly half my time in Pakistan and the remainder in the UK since, splitting my life between my work in the United Kingdom and my family in Pakistan.

I have two daughters and a boy with the appellant and they are all British. My two eldest have British passports... .

In our culture my marriage with the appellant is competent and my divorce with [my first wife] is also culturally competent as a Nika Divorce. To me therefore I am divorced and remarried. However in terms of British law [my first wife] will not sign the

papers for a British divorce. I believe she is doing this out of spite because she doesn't want me to bring my wife over. I got this impression when I last spoke to her on the telephone in 2002. I have no contact with her.

I want my new family over here because I have settled here. Also, I do not like travelling back and forward to see my family. It is particularly difficult to come back to the UK without them."

15. In support of the appellant's application there were detailed submissions by her solicitor which set out some of the facts relating to the sponsor's movements. The sponsor says that his relationship with the appellant goes back a number of years and, as set out by Mr Byrne in his submissions, the sponsor was in Pakistan for two weeks in June and two weeks in December 2000, two weeks in February and six months starting in May 2001, five months in 2002, over eight months in 2003, four months beginning in October 2004 and two months from April 2005, and then a further period of five months beginning in August 2005, which is, we think, the last visit to which Mr Byrne makes specific reference.
16. A domicile of choice is acquired by the person deciding that his permanent home, for all purposes, is to be the new one. A person who intends his home to be the new one for certain purposes only does not acquire a new domicile. In determining whether a domicile of choice has been established it is important to look at the evidence, including all relevant conduct and statements of the person in question, as a whole: see Ross v Ross 1930 SC (HL) 1, per Lord Buckmaster.
17. Mr Byrne is right to point to the acquisition of citizenship, to the job, to the reference to the permanent address and to the family life as assisting him to indicate a change of domicile. There is (as is frequently the case) nothing in the evidence that was before the Immigration Judge to indicate that there had been any specific intention to change domicile. There had been, however, a number of visits to Pakistan. There had been the creation of a new family life in Pakistan and, of the highest importance, the sponsor's witness statement indicates quite clearly that he distinguishes between the law which he appears to regard as governing his relationships in family matters on the one hand, and UK law on the other. He recognises that he is not divorced by UK law. He recognises the difficulty in regarding his relationship with the appellant of one of marriage in UK law. And, nevertheless, his position is that he regards the divorce by Talaq and the new relationship by marriage as being valid. Those are circumstances which appear to us, as we say, to be of the greatest weight. We think that it is impossible on the basis of that evidence to say that he had made his permanent home in Scotland for all purposes. He clearly reserved a part of his life as exempt from the consequences of such an intention. If, therefore, the Immigration Judge had considered all the evidence before her she could not have considered that the sponsor had acquired a domicile of choice.

18. It thus follows that she would have been bound to conclude that the sponsor remained domiciled in Pakistan and that the marriage between him and the appellant was a valid marriage. She would have been bound therefore to dismiss the appeal because of the provisions of para 278.
19. It follows from that, that we do not consider that the error of law which we have identified in her treatment of the question which she had to decide was a material error. We shall therefore order that her determination dismissing the appeal shall stand.

C M G OCKELTON  
DEPUTY PRESIDENT