



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

Appeal Number: OA/09092/2013

THE IMMIGRATION ACTS

Heard at Birmingham

**Decision & Reasons
Promulgated**

On 11th December 2014

On 2nd January 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE FRENCH

Between

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
(ACTING ON BEHALF OF ENTRY CLEARANCE OFFICER - ISLAMABAD)**

Appellant

and

**MUHAMMAD NADEEM ASLAM AWAN
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer

For the Respondent: Mr M Azmi instructed by Messrs Ravi Dilan & Hayer

DECISION AND REASONS

1. Muhammad Nadeem Aslam Awan is a citizen of Pakistan, born on the 22 May 1978. In the interests of clarity and continuity I will refer to Mr Awan as the Appellant, the title by which he was known before the First-tier

Tribunal. He went through a ceremony of marriage with the Sponsor, Maria Ivone Do Rosario Augusto, a Portuguese national, in Pakistan on 12th November 2012. He then applied to the ECO for an EEA family permit under the Immigration (European Economic Area) Regulations 2006 as amended. The application was refused as the ECO was not satisfied that the Sponsor was divorced from her first husband and therefore able to marry. A Portuguese document had been produced but was untranslated. It was not accepted that the marriage was valid.

2. The Appellant appealed against that decision under the 2006 Regulations. The appeal was listed to be heard on 29th November 2013 at the Nottingham Magistrates Court before Judge P J M Hollingworth. The history of the appeal is regrettably convoluted after that point. I will go into the circumstances in more detail below. Suffice it to say that Counsel then instructed appears to have indicated at the hearing that as the original divorce certificate was not available the Sponsor wished to withdraw the appeal and the judge seems to have accepted that request on certain terms. Subsequently the Tribunal issued a standard notice that the appeal had been withdrawn. Following a request from a different representative, by then acting for the Appellant, in which it was stated that there had been no intention to withdraw the appeal and there had been a misunderstanding, Designated Judge Coates on 15th January 2014 gave instructions for the hearing to be reinstated.
3. The appeal was then heard before Judge Gurung-Thapa, again at Nottingham Magistrates Court, on 5th February 2014. The issue of jurisdiction was raised by the Presenting Officer on that occasion but Judge Gurung-Thapa, having recited the history, proceeded to hear the appeal, which was allowed.
4. The Secretary of State applied for permission to appeal contending that the appeal had been withdrawn at the hearing in November of 2013. Judge Gurung-Thapa had therefore been without jurisdiction to determine the appeal and had failed to give reasons as to why she thought she had jurisdiction. Secondly it was said that the judge failed to resolve conflicts of fact with regard to the validity of the marriage. The original divorce document had never been produced and the judge had been in error in considering that the authenticity that the divorce certificate was not in issue. Permission was initially refused by Judge of the First-tier Tribunal Grant-Hutchison on 6th March 2014. The application was then renewed to the Upper Tribunal and was granted by Upper Tribunal Judge Goldstein on 9th April 2014. He felt that the contention that the Tribunal had lacked jurisdiction following oral withdrawal had arguable merit and was persuaded that the remaining grounds could also be argued.
5. By the time of the hearing before me the solicitors who have been acting at the time of the hearing on 29th November 2013 were again acting for the Appellant but different Counsel appeared, Mr Azmi not having represented the Appellant at the initial hearing.

6. Mr Mills for the Secretary of State handed in a copy of the relevant section of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (Procedure Rule 17) and by way of contrast also a copy of the equivalent Rule in the Upper Tribunal Procedure Rules. He also handed in a copy of Section 104 of the Nationality, Immigration and Asylum Act 2002. He referred to a minute from the Presenting Officer who had been representing the Entry Clearance Officer at the hearing on 29th November 2013. The Tribunal had issued notices on 18th December 2013 confirming that the appeal had been withdrawn. No documents appeared to have been received prior to the notice of withdrawal. The document dated 29th November 2013 written on behalf of the Sponsor only appeared to have been sent on 23rd December and it seemed that that was in response to the notice of withdrawal. Under Section 104 of the 2002 Act the appeal had been withdrawn.
7. Mr Mills submitted that the subsequent letter and the decision of the Designated Judge could not reinstate the appeal. First-tier Tribunal Procedure Rule 17 contained no power to reinstate, unlike the equivalent Upper Tribunal Procedure Rules which did. As Designated Judge Coates had no power to reinstate the appeal Judge Gurung-Thapa had no jurisdiction to hear it, he said. The argument had been put by the Presenting Officer at the hearing before her and she had made no reasoned finding as to why she had jurisdiction. If I was not with him on that basis the other ground was that the judge appeared to have considered there was no subsisting issue regarding the divorce certificate and she had not dealt with that point properly. There was a challenge to the authenticity of this certificate and the judge did not give an adequate explanation as to why she considered the marriage to be valid.
8. In response Mr Azmi referred expressly to the Presenting Officer's note of the hearing of 29th November 2013. His reading of that note, he said, was that Judge Hollingworth had indicated that he needed something directly from the Appellant before he would regard the appeal as withdrawn. That confirmation was not received and therefore the appeal was not validly withdrawn. The subsequent notices were therefore in error and the Designated Judge had been correct in reinstating the appeal. His action at that point could have been challenged by the Secretary of State by judicial review but no action was taken.
9. With regard to the capacity of the Sponsor and Appellant to marry he relied on his skeleton argument. Only a copy of the divorce certificate from Mozambique had been provided to the Entry Clearance Officer but a translation had been provided to the Entry Clearance Manager. The ECM did not take issue with the authenticity of the documents, only that the original divorce certificate was not provided. Judge Gurung-Thapa had noted that the Sponsor had with her at the hearing the divorce certificate from Portugal along with a translation and found on the balance of probabilities that the Sponsor had obtained a divorce issued in Mozambique and therefore had the capacity to marry. She did so having considered the copy certificate and translation from Mozambique, the

certificate and translation from Portugal and the oral evidence of the Sponsor. She gave sufficient reasons for her finding. The divorce certificate from Portugal was from a competent authority within the European Union. I asked whether there were any authorities known to the representatives on the issue of validity of withdrawal and was told that none had come to light. I reserved my decision which I now give.

10. Both representatives placed reliance upon the note from the Presenting Officer who was representing the ECO at the hearing on 29th November 2013. It appears from that note that after the judge had queried the divorce document and Counsel for the Appellant had spoken to the Sponsor the judge said that

“he will treat the matter as withdrawn for now. But before it could be official a letter is needed from the Appellant or acting solicitors confirming instructions from the Appellant to withdraw. Mr Hussain was of the view that from his experience once a representative indicated to the Tribunal as to a withdrawal that’s sufficient. The judge directed that the representative has until 3.12.13 to send in a confirmation to the Tribunal as to the withdrawal. The appeal will be treated as withdrawn on 3rd December 2013 – but Mr Hussain’s withdrawal is noted on record for the file.”

That is of course the Presenting Officer’s note and not any form of official record. The judge’s Record of Proceedings, written in manuscript, is on the Tribunal file. It is brief. It states “Ravi, Dilan & Hayer act as solicitors for Appellant. Appeal is withdrawn. Confirmation required from Appellant by December 3rd at 4 p.m. On receipt of this appropriate notices to be issued.” The Record of Proceedings is then signed. On the fly leaf of the file the judge endorsed “Appeal withdrawn confirmation from Appellant to be provided by 4 p.m. 3.12.13.”

11. Mr Mills is quite right that there is no record of any communication on the file from or on behalf of the Appellant prior to 3rd December 2013. Subsequently letters were received which were dated 29th November 2013 from a different representative but which were not received by the Tribunal until substantially later. In those it was stated that there had been a misunderstanding and that the Appellant had not been intending to withdraw the appeal. It was following receipt of these communications that Designated Judge Coates gave instructions for the hearing to be reinstated. The scenario is wholly unsatisfactory, given in particular uncertainties as to whether documentation may or may not be received by the appropriate department of the Tribunal by a particular date. Be that as it may that is what occurred.
12. Having considered the matter and of course the submissions made to me I have reached the conclusion that Judge Gurung-Thapa did have jurisdiction to hear the appeal before her. A fair reading of the Record of Proceedings from Judge Hollingworth, read together with the note from the Presenting Officer, indicates that the judge was not wholly satisfied that

the appeal was actually being withdrawn by the Appellant. Had he been so satisfied then there was absolutely no reason why he would have required a confirmatory letter from the Appellant or the solicitors acting on his behalf. The withdrawal at that stage was not a final act but more in the nature of an indication. The judge's note is clear that notices of withdrawal were only to be issued once the letter of confirmation was received from the Appellant or his solicitors. This again is consistent with the note from the Presenting Officer. The note to the administrative staff left upon the fly leaf of the file was regrettably not sufficiently clear that notices of withdrawal under Procedure Rules 17 were not to be sent unless there was confirmation in writing from the Appellant or his solicitors.

13. Perhaps understandably the administrative staff then went ahead and issued the notices under Procedure Rules 17. That in itself does not indicate that the appeal had in fact been withdrawn. A relevant case on the matter is **AP (Withdrawals - nullity assessment) Pakistan [2007] UKAIT 00022**, which makes it clear that the validity of a withdrawal may be challenged. Paragraph 57 of that determination provides useful guidelines. Among examples given of when a purported withdrawal may lack validity are:

“(iii) a withdrawal has been communicated to the Tribunal by a representative without there being clear understanding, or meeting of the minds, between the Appellant and the representative; or

(iv) a withdrawal has been communicated to the Tribunal by a representative on the instructions of a Sponsor, (who has completed Section 5 of the appeal form), rather than the actual instructions of the Appellant.”

14. To my mind it is clear that the appeal was not in reality withdrawn. Any instructions for withdrawal were given by the Sponsor not the Appellant. The purported withdrawal was treated by the judge as provisional. He was clearly not satisfied that it was given with the consent of the Appellant. In other words it was not unequivocal. The condition set by the judge, that there should be confirmation in writing received by the Tribunal no later than 4 p.m. on 3rd December 2013, had not been met. In those circumstances I accept that the purported withdrawal was a nullity. The matter was so apparent that Designated Judge Coates did not need to order a hearing before deciding that the hearing should be ‘reinstated’, as was done. In relisting the appeal Designated Judge Coates was exercising the power to remedy administrative errors comprised in the former Procedure Rules 60(1). He did not expressly refer to that Rule but he did not need to do so.
15. In all those circumstances I find that the appeal was validly before Judge Gurung-Thapa and she did not need to explain in any detail the basis of her jurisdiction beyond referring to the background, which she did.

16. The other basis on which the decision was challenged was the evidence of the Sponsor's divorce, which goes to the validity of the marriage. Judge Gurung-Thapa dealt with this matter at paragraphs 19 to 22 of her determination. As Mr Azmi pointed out the judge had the benefit of the documents which were before her but most particularly of the oral evidence of the Sponsor, which she accepted. Although she noted that the authenticity or otherwise of the divorce certificate had not been questioned by the Respondent she herself had heard evidence of how the divorce had been obtained and she found the Sponsor to be credible and a truthful witness. On the basis of the evidence before her she accepted that the Sponsor had divorced her first husband in the way described and had been issued with a divorce certificate by the appropriate registry in Mozambique. She gave sufficient reasons for her finding and no material error on a point of law in her approach is apparent.
17. Accordingly this appeal by the Secretary of State on behalf of the ECO falls to be dismissed.
18. There was no request for anonymity and I could see no basis on which anonymity was required.

Decision

19. The making of the original decision by the First-tier Tribunal did not involve the making of an error on a point of law. The decision that the appeal be allowed therefore stands.

Signed

Deputy Upper Tribunal Judge French
December 2014

Dated 31