Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/07455/2011**

THE IMMIGRATION ACTS

Heard at North Shields	**Determination Promulgated**
On 13 March 2013	**On 16 August 2013**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

HOKAN KHAN OMERZY

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Mohammed, with Kingstons solicitors
For the Respondent: Ms R Petterson, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Afghanistan born in 1978 and now 35 years old. He appeals against the respondent's refusal to grant him a Residence Card as confirmation of his right to reside in the United Kingdom as the spouse of an Accession State citizen.

His application is based on his relationship with Ms Jana Sestakova, a citizen of the Slovak Republic. Ms Sestakova has a child with cerebral palsy, now age about 16, but not the appellant's child.

2. The parties entered into an Egyptian Urfi (customary) marriage contract on 2 November 2010 by proxy, with Ms Sestakova present in Egypt and the appellant on the end of a telephone from the United Kingdom. His proxy for the contract in Egypt was his brother, who is also said to be his wife's employer in the United Kingdom.

3. The appellant has been in the United Kingdom since 2008. When he entered the United Kingdom, he had a wife and child in Afghanistan. It is his case that he has long since divorced that wife, but no evidence of that divorce is before me. There were a number of other applications before the present application, including an application under Article 8 ECHR, all of which failed.

First-tier Tribunal determination

4. On 2 August 2012, First-tier Tribunal Judge Trotter dismissed the appellant's appeal, holding, in a fully reasoned determination, that there was no valid appeal before him; that an Urfi or customary marriage is not valid in United Kingdom law; that even if it were, the appellant and sponsor had not entered into such a marriage; that if they had, it was a marriage of convenience; and that to the extent that the interests of the sponsor's child were relevant, no reason had been put forward why it was not in the child's best interests for the appellant to be removed to Afghanistan. He declined to make an anonymity order.

Grounds of appeal

5. The appellant appealed. He challenged the determination on a number of bases:

    (a) that the First-tier Tribunal Judge erred in finding that there was no in country right of appeal, and had failed to engage with paragraphs 10-19 of the skeleton argument prepared for him in this respect, with particular reference to *JH Zimbabwe* and *Abdullah;*

    (b) that the appellant had adduced sufficient proof of the Urfi proxy marriage contract in Egypt and that it should be accepted as valid in United Kingdom law;

    (c) that the Tribunal's criticism of the translation of the Urfi contract was erroneous since all the essential information was properly recorded therein;

    (d) that the absence of the appellant's brother from the First-tier Tribunal proceedings (he had returned to Pakistan because of a family bereavement) should not damage the appellant's credibility and that the Tribunal judge had showed bias in considering that it did;

(e) that the First-tier Tribunal Judge erred in considering that Ms Sestakova was still required to comply with the Accession Agreement, which had come to an end as of May 2011, the case being determinations in August 2012;

(f) that in any event, she had completed a year's registered work by 1 December 2011;

(g) that the respondent had not cross-examined the appellant on the 'marriage of convenience' point and that it was not open to the judge to find the marriage to be such without giving the parties an opportunity to deal with that submission; and overall

(h) that the determination was tainted by 'systematic failure' and the First-tier Tribunal Judge's bias and pre-conceived assumptions.

Permission to appeal

6. Permission to appeal was granted by First-tier Tribunal Judge Easterman on 17 August 2012 on the basis that the allegations made were so complex, and so serious, that they required a hearing and that the First-tier Tribunal judge who dealt with the appeal should be permitted to comment thereon. That has not happened: directions were given by the Upper Tribunal to clarify the grounds of appeal and the matters therein alleged.

Directions

7. On 22 October 2012, the Upper Tribunal standard directions were sent to the parties and in addition, Upper Tribunal Judge King directed as follows:

> "1) Permission to appeal was given on 17 August 2012. The judge granting leave found the lengthy grounds and skeleton argument to be difficult to read and to interpret. Much of the complaint centres upon the approach taken by the First-tier Tribunal judge to the status of the Urfi marriage and whether the parties are lawfully married.
>
> 2) Those acting for the appellant shall set out concisely the main issues to be raised, identifying by schedule and paginated reference the documents to be relied upon to progress each issue. Such a schedule shall be served together with a paginated bundle no less than 7 days before the hearing.
>
> 3) If the Tribunal finds there to be an error of law it is likely to determine the appeal at that same hearing. The appellant and sponsor should attend and, in those circumstances, an interpreter in the Pushto and one in the Slovakian language is required. "

Rule 24 Reply

8. On 4 March 2013, the respondent served a reply under rule 24, stating that 'in summary, the respondent will submit *inter alia* that the judge of the First-tier Tribunal directed himself appropriately'.

9. No further documents were filed for the hearing, which came before me on that basis.

Upper Tribunal hearing

10. At the Upper Tribunal hearing, Ms Petterson accepted that the document produced evidencing the Urfi marriage by proxy in Egypt was genuine. The question was whether it amounted to a valid marriage capable of engaging the EEA provisions. She also accepted that Ms Sestakova was a Slovak citizen exercising Treaty rights in the United Kingdom at the date of decision.

11. There is no evidence at all, other than the assertion by the appellant, that he is no longer the spouse of his Afghan wife. However, if he has entered into a valid marriage with Ms Sestakova and if in Egypt such a marriage can be polygamous, then the requirements of the Immigration (European Economic Area) Regulations 2006 may be met and he would be entitled to the Residence Card for which he applied.

12. I gave Mr Mohammed time to produce evidence to assist me with the legality and effect of an Urfi marriage entered into by proxy. The additional evidence was emailed to the Upper Tribunal on 15 March and 15 April 2013. It consisted of further submissions by Mr Mohammed, accompanied by a bundle of documents, and an affidavit from an Egyptian solicitor.

Mr Mohammed's submissions

13. Mr Mohammed submitted that following *A-M v A-M (Divorce: Jurisdiction; Validity of Marriage)* [2001] 2 FLR 6, English law allowed for there to be a presumption of validity of marriage arising out of cohabitation and reputation which was strong evidence that a marriage had been entered into. In *El Gamal v El Maktoum* [2011] EWHC 3763 (Fam), Bodey J was said to have held that an Urfi marriage entered into in Egypt without an alleged marriage contract would be void.

14. The appellant relied on Dicey and Morris' 'Conflict of Laws' 15th edition, and contended that foreign marriages would be recognised where the marriage was formally valid and the parties had capacity to enter into such a marriage.

15. Dealing with the recognition of an Islamic marriage, the appellant contends that Islamic law applies in Egypt; that where a Muslim man marries a Christian woman, as here, Shari'a law applies; and that a wife may obtain a form of divorce in an Urfi marriage under Law 1/2000, Article 17 (albeit not a khula' divorce) as long as the marriage contract is evidenced in 'some form of writing'.

16. Mr Mohammed contends that the issues of residence and domicile are not relevant, as long as the religious ceremony is valid in the country where it is contracted. A proxy marriage undertaken in Pakistan is valid in Pakistan, so long as it is undertaken in accordance with Shari'a law, and therefore is recognised in the United Kingdom. The same principle applies in Egypt. By analogy, he relies on s. 5 of the Private International Law (Miscellaneous Provisions) Act 1995, which permits persons domiciled in England and Wales to marry abroad in accordance with the laws of the

country where they do so, when actually present in that other country. The same position on proxy marriages is taken in the respondent's IDIs as the skeleton observes; reference to the case of *Akhtar* (2166) that a telephone marriage was valid are irrelevant here, since this Urfi contract was a proxy marriage.

17. Mr Mohammed referred me to 'Personal Status Laws in Egypt – FAQ' produced by the Promotion of Women's Rights (Egypt) as to the status of Urfi marriages in Egyptian law, and to a document entitled 'The Urfi marriage: Validity and Implications' produced by the Supreme Constitutional Court of Egypt. Overall, his argument is that Egyptian law recognises Urfi marriages, as long as they are documented in 'some kind of writing', at least for the limited purpose of dealing with divorces from such marriages.

18. No further submissions were received from the respondent.

Urfi contracts

19. 'Urfi' or customary marriage in Egypt is a contract taking effect only between the parties, which until 2000 had no external effects. Under Article 17 of the Egyptian Personal Status Law 1/2000, wives under Urfi marriages can apply to the family courts for a divorce, as long as the Urfi contract is evidenced in 'some form of writing'.

20. The affidavit of Mr Aymari Mourad, an Egyptian solicitor, explains that Egyptian law recognises five types of law: Shari'a law, Christian law, Jewish law, non-faith or common law, and conflict laws which are almost always resolved in favour of Shari'a law. The appellant is a Muslim; his marital arrangements would therefore be governed by Shari'a law and that would override whatever religious adherence his wife had.

21. The formalities required for an Urfi marriage in Egypt, as set out in his affidavit, are: that the parties are of the opposite sex and freely consent; the man is a Muslim; there must be two male Muslim witnesses (or one Muslim male and two Muslim females); the marriage must be officially documented in 'any kind of writing'; and the parties must openly speak of the marriage and not conceal the fact that they are married.

22. Mr Mourad agrees with Ms Petterson that the document produced in these proceedings meets those requirements. Mr Mourad considers it of no relevance that the marriage which took place in Egypt was between parties neither of whom was an Egyptian citizen:

> "14. …In Egypt, there is no such thing as a 'foreign' Muslim. All Muslims are part of the wider brotherhood and sisterhood of the Islamic faith. Accordingly, if a Muslim of a foreign state comes to Egypt his actions will be subject to the laws of his Shari'a.
>
> 15. In relation to the proxy element of the marriage, this is entirely permissible under Shari'a law. Indeed, under Shari'a law, there is no requirement that the parties have even met before they marry. However, in this case I understand that the parties had met prior the marriage and now live together as man and wife. In such circumstances, Shari'a law would recognise such a marriage.

16. In conclusion, I confirm that this marriage is recognised in accordance with Egyptian law."

23. Mr Mourad's evidence is tendered as expert evidence. He states that he is a solicitor, but gives no other indication of his expertise in this matter, nor does he give any source for his evidence, other than Personal Status Law 1/2000.

24. A document entitled 'Information on religious freedom in Egypt, particular in relation to mixed marriage?' by the Refugee Documentation Centre (Ireland) confirms Mr Mourad's expert opinion that Muslim women may not marry non-Muslim men without being guilty of apostasy. That is not an issue here. A Muslim man's children are automatically Muslim.

25. A document entitled 'Personal Status Laws in Egypt FAQ', prepared by Promotion of Women's Rights (Egypt) notes that:

> **"10. What are the main fields related to the family that contemporary personal status laws did not solve?**
> * Customary ('Urfi) non registered marriage is not considered as illegal; meaning a man and a woman can still get married secretly, without their marriage being registered. Since 2000, the wife married 'Urfi can petition for divorce but she will not receive any financial support from her former husband. Besides, it is very difficult to prove the paternity of the father in case children are born from customary marriages. DNA testing is not mandatory in paternity cases, though a draft law was submitted to the People's Assembly in 2009 for that purpose. …
>
> **3. What is a customary ('Urfi) marriage?**
> A customary ('Urfi) marriage is a marriage which is not celebrated by a state representative and is not registered. If it is concluded by the two future spouses in front of 2 witnesses and respects the general conditions for a marriage (eg. minimum age, dower, etc.), it will produce certain legal effects.
> Egyptian law does not forbid customary marriages but grants them a status inferior to that of registered marriages: no claim concerning a marriage will be heard by the courts when it is denied, unless it is supported by an official marriage document. A customary marriage is not considered illegal but in case the marriage is denied, the courts will be prohibited from hearing any dispute regarding such a marriage. In other words it deprives the wife from claiming the right to alimony, maintenance or succession: if she goes to courts and pretends that her husband has to pay her alimonies, he will deny the existence of a marriage contract between them and her legal action will be considered inadmissible.
>
> **4. Are children born in a customary marriage legitimate?**
> Parentage can be established if the father recognizes his child. If he does not, the mother can bring a case to family courts to have paternity established. Paternity dispute and filing for divorce are the only grounds on which courts are allowed to rule (since 2000) on customary marriages in case of denegation by one of the parties.
> The mother can prove, by any means of proof, the existence of intimate relations with the alleged father. A customary marriage contract will be considered as a proof, but will most likely need to be substantiated by other elements (ex. testimonies).
>
> **5. Is it possible to terminate a 'Urfi marriage?**

If both spouses agree to terminate a 'Urfi marriage, the husband repudiates his wife and the originals of the marriage contracts are torn. To be in a safer position, the wife can ask her former husband to sign a paper in the presence of 2 witnesses, acknowledging that he repudiated her.
If the original of the marriage contract remains with the husband who refuses to repudiate his wife and to destroy the contract, the wife is still considered married and cannot remarry. However, since 2000, she can petition for a judicial dissolution of her marriage on the same grounds as those recognised for registered marriages. She can use any written document to prove the existence of the marriage, which will then serve as the basis for her subsequent request for divorce. Divorce by khul' however, is not allowed in that case. The divorced wife will not be able to require any financial right for herself. However, the father will have to provide alimony to his children if paternity has been established."

26. Finally, the appellant produces "The Urfi Marriage: Validity and Implications", a paper presented at the International Symposium of the Supreme Constitutional Court Egypt in collaboration with the Konrad-Adenauer-Stiftung Egypt on 14-15 November 2009 at the Supreme Constitutional Court in Cairo. The papers from the conference are not included. The introduction sets out the issue which the Symposium discussed, as follows:

"Urfi marriages, though valid under the religious point of view, are not officially registered in many Muslim states and can, therefore, lead to complex, exceedingly problematical legal issues concerning the personal status of the persons involved, and occasionally severely affect women and children rights in particular. In addition, a number of other unregistered marriages do exist in some Islamic countries, as for example the Misyar marriage in Saudi Arabia, or the Mut'ah marriage under the Shi'ite law, which is widely common in Iran. …

In Egypt today the number of marriages that are concluded informally is on the rise, and these marriages are considered a growing social, economic and legal problem both in Egypt and abroad. Typically referred to as Urfi (customary) marriages, they are formed in a way that makes them religiously valid yet at the same time non-existent under national law, since they typically are not registered with the civil authorities.

As an informal phenomenon, accurate statistics are not available, but researchers have suggested that the number of Urfi marriages might be even higher than the 3 million registered marriages in Egypt. Concurrently, the number of conventional registered marriages is on the decline, and the government has been forced to begin to confront the problems caused by the lack of official status of these marriages, creating for the first time in 2000, for example, a possible path for a woman in an Urfi marriage to seek a divorce from it.

The existence of a type of marriage outside the formal national marriage and registration process is not limited to Egypt. In Saudi Arabia, the concept of a Misyar (travelling or visiting) marriage often involves a woman staying in her own residence and being visited by her husband in this type of marriage which, like the Urfi in Egypt, is typically not registered with the state. In Iran, the specific concept in Shi'ite law of a Mut'ah marriage (typically translated as temporary marriage) is practiced in fairly large numbers. This marriage type shares some characteristics in common with Urfi and Misyar, yet also carries some important differences.

> Urfi marriages can also create international challenges. If the wife obtains a visa for Europe, for example, how do or should the European authorities treat the Urfi husband? If a European man travels to Egypt and concludes there an Urfi marriage with an Egyptian woman, can that woman later petition to join her husband in his home country?"

27. Those are the issues before the Tribunal in this appeal. In 2011 in *El Gamal v Al Maktoum* [2011] EWHC B27 (Fam), Mr Justice Bodey, sitting in the Family Division, was asked to determine whether an Urfi marriage conducted in the United Kingdom should be regarded as a marriage, albeit a void marriage, in English law. The husband was Egyptian, the wife American, and both were Muslims, although the wife was tending towards Kabbalah by the end of the relationship. The Urfi marriage ceremony was conducted in London and no paper record was made.

28. He concluded that as the ceremony had made no attempt to meet the requirements of the Marriage Act 1949, the law governing marriage in the United Kingdom which was the *lex loci celebrationis,* it could not be so regarded. He recorded expert evidence which he had received about the Urfi marriage system in Egyptian law:

> 83. I have had the benefit of expert evidence in Islamic law from Mr. Ian Edge of Counsel on the requirements of a valid Islamic ceremony of marriage. Putting it very shortly, nowadays a written contract or some written evidence is generally required by the courts in Islamic countries, although a court may exceptionally hear oral evidence instead. It would be rare to find a customary Islamic marriage (known as an "Urfi") without writing, and it would be unlikely, says Mr. Edge, that an Imam, certainly one from London, would even perform such a ceremony without a written contract. I pause to say that there is no evidence here of where the Imam came from; he may have practised in London or he may not. The gist of Mr. Edge's evidence was that this requirement for writing has become widely known, to the extent that the traditional Islamic ceremony has actually come to be known generally as a "Katib al Kitaab", meaning the writing of the agreement. The evidence of Nadida el Dakak, the mother's Egyptian solicitor, resonated with this expert evidence from Mr. Edge. When the mother told her of the intended secret marriage, Miss el Dakak says she advised the mother against it; but the mother was headstrong and went through with it. Miss el Dakak advised the mother that if the father was insisting on this sort of marriage ceremony, then she (the mother) must be confident that he would declare it later, and she advised her 'to secure her future'. Miss el Dakak said in her oral evidence that "… in Egypt we don't like secret marriages".

29. A similar type of marriage (albeit not identical) was considered by the AIT in *NA (Customary marriage and divorce – evidence) Ghana* [2009] UKAIT 00009. The Tribunal concluded at paragraph 24 that:

> "24. So far as the position relating to customary marriages and divorces in Ghana is concerned there is no substantial difference between the evidence produced by the appellant and the respondent and we can summarise our findings as follows:
>
> (a) A customary marriage is a lawful form of marriage in Ghana which must be carried out under the relevant particular tradition and customary practices. …
>
> (d) The onus of proving either a customary marriage or dissolution rests on the party making the assertion. Under the immigration rules it is for the appellant to

> prove that a marriage is valid. Where this involves proving that a previous customary marriage has been dissolved, it is reasonable to expect the appellant to produce the best available evidence to support this assertion. As registration of the dissolution of a customary marriage is not mandatory in Ghana, an appellant does not necessarily have to produce a registration of dissolution to prove the divorce although it would be sensible to do so. In the alternative evidence in the form of a statutory declaration or affidavit produced by family members or other people able to confirm the dissolution of the customary tribal marriage should be produced. The fact that such evidence is not produced does not necessarily mean that the appellant cannot succeed on the basis of oral evidence alone but in such cases an appellant may need to explain the absence of documentary evidence which he can reasonably be expected to produce and may in consequence fail to discharge the onus of proof of showing that a previous marriage has been dissolved."

Polygamous marriages

30. The Urfi marriage of these parties may be polygamous, since there is no evidence other than the husband's assertion, that he is divorced from his Afghan wife. *A-M v A-M* [2001] 2 FLR 6 also relied on expert evidence from Mr Edge, this time in relation to divorce by *talaq,* a matter not germane to the present discussion. The parties in *A-M* had purported to go through a marriage ceremony in London, which they both knew to be actually as well as potentially polygamous. That marriage made no attempt to meet the requirements of the Marriage Act 1949 and was not valid in United Kingdom law. Later, apparently in an attempt to regularise the wife's position, the husband had divorced the wife by *talaq* in Sharjah and then, she thought, remarried her there, but it turned out that instead what he had done was to revoke the *talaq,* so that no new legal marriage was created. The parties had lived together for 20 years and the court considered that the presumption of marriage applied to them. The case gives helpful guidance on when a polygamous marriage may be lawful:

> "**[36]** In the present case, if lawful marriage is to be presumed between these parties, it must have occurred in an Islamic country, and it must have been a lawful polygamous marriage. It is common ground between the parties, and I so hold, that the presumption [of marriage] must extend to presuming such a marriage, where the domicile of the parties permits it, since the whole rationale of the rule is to find a lawful occasion for the kind of cohabitation in question whenever that can be done. It follows from the evidence of Mr Edge that a valid polygamous marriage could be contracted between these two parties in an Islamic country without any public ceremony, and indeed without the presence of the wife, providing she had at some stage signed a power of attorney, whether knowing exactly what it was, or what it was for, or not. I have accepted her evidence that she did sign documents at the husband's request from time to time and without applying her mind to what they were for. …
>
> **[40]** If there was a valid marriage by Islamic law in this case, it can only have taken place whilst both were domiciled in countries which permitted a valid polygamous marriage. …
>
> **[48]** There are many other statements of the principle underlying this rule in *Hyde v Hyde and Woodmansee* (above). Whilst it stood, it was held to prevent any grant of a decree of nullity in respect of a polygamous marriage - see *Risk (Otherwise Yerburgh) v Risk* [1951] P 50. A decree of nullity is a form of matrimonial relief. The rule never, however, meant that

> a polygamous union went wholly unrecognised by English courts. *Such marriages were, by contrast, recognised as valid for many purposes when valid by the law of the place where they were contracted, and providing that the lex domicilii of each party permitted entry into such unions."*
> *[Emphasis added]*

The law

31. The Immigration (European Economic Area) Regulations 2006 apply to this appeal. The definition of 'spouse' simply excludes a spouse in a marriage of convenience. The respondent has not asserted that the present relationship is a marriage of convenience and she accepts that the Urfi marriage document is genuine. No distinction is made in the Regulations between registered and customary marriages, subject always to the *lex loci celebrationis* rule, and the very helpful summary at rules 66 and 67 in Dicey and Morris.

32. Mr Mohammed is right that the division is between formal validity and capacity, but wrong as to the meaning of capacity, which in Dicey and Morris' rule 67(1) is qualified thus: "capacity to marry is governed by the law of each party's ante nuptial domicile". In this case, the respective domiciles of the parties are Afghanistan for the husband and Slovakia for the wife. Afghanistan is a Muslim country in which polygamy is lawful; Egypt is also such a country and makes no distinction between foreigners and nationals as long as they are Muslims; but there is no evidence before me to suggest that Slovakia, which is a largely Christian country, is one in which polygamy is lawful.

33. I approach this appeal on the basis that a customary marriage contracted in Egypt is capable of making of the non-EEA party an EEA spouse, but that will be a question of fact on each occasion. There is no satisfactory evidence as to the present situation in relation to the appellant's Afghan spouse: Afghanistan is a Muslim country and he has not returned there for many years. If he had divorced his wife 'years ago' as he now says, there would be community or legal evidence of such divorce.

34. It follows therefore that the appellant has not shown that this marriage was a monogamous marriage and that it is more likely than not to be a polygamous marriage. That is not a difficulty for the appellant, who is appellant is domiciled in Afghanistan, a country in which polygamy is lawful: it is not suggested that he has acquired a domicile of choice in the United Kingdom which might restrict his ability to take another wife.

35. However, the wife is Slovak and Slovakia is not a Muslim, but a Christian country. She is a Christian and there is no evidence before me which suggests that polygamy is lawful in Slovakia. It has also not been suggested that she acquired a domicile of choice in the United Kingdom, nor in Egypt in the two weeks during which she was there on holiday to contract the Urfi marriage. If that analysis is right, the parties did not have capacity to enter into a polygamous marriage together in Egypt.

Conclusions

36. It follows that, even treating the appellants' evidence as to the events in Egypt, the Urfi marriage, and the document produced which recorded it, as genuine, the contract into which they entered is not recognised as a marriage under British law and accordingly, the appellant is not Ms Sestakova's spouse for the purposes of the EEA Regulations. He is not, therefore, entitled to the Residence Card he seeks and I uphold the decision of the First-tier Tribunal. Mr Mohammed has not pursued the allegations of bias in the grounds of appeal and I do not consider it necessary to rule separately thereon.

Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law. I do not set aside the decision.

Anonymity
The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. Nothing in the material before me suggests that such a direction is necessary and I do not make any anonymity order.

Date: 24 October 2013 Signed:

Judith Gleeson
Judge of the Upper Tribunal