ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Glasgow Date of Hearing: 11 September 2008

Before:

Mr C M G Ockelton, Deputy President of the Asylum and Immigration Tribunal
Immigration Judge M Price OBE

Between

KH

Appellant

and

THE ENTRY CLEARANCE OFFICER, AMAN

Respondent

Representation
For the Appellant: Mr E Mackay, Livingston Brown Solicitors
For the Respondent: Mr D Matthew, Home Office Presenting Officer

A reconsideration application made in respect of a Scottish appeal in a form other than that prescribed by the Rules of the Court of Session in irregular, but it cannot be regarded as void ab initio because the Court has power to dispense from the Rules. The Tribunal does not have that dispensing power but can regard the other party as having waived the irregularity when it has not acted promptly in objecting to the defect of form.

DETERMINATION AND REASONS

1. The appellant, a citizen of Iraq, appealed to the Tribunal against the decision of the respondent on 20 June 2007 refusing her clearance to the United Kingdom as a spouse. The Immigration Judge allowed the appeal. The respondent sought and obtained an order for reconsideration. Thus the matter comes before us.

2. The application and the appeal were based on an assertion that the appellant and the sponsor are married. The sponsor is of Iraqi background. We understand he

came to this country as a refugee. He is now a naturalised British citizen. He married a person to whom we will refer as his "first wife" in 2000. It is said that he visited Iraq in the summer of 2006 and his first wife was ill. In March 2007 he returned to Iraq and was told that his first wife had died the previous November. He was also told that members of his family had not wanted to tell him about his wife's death in case it upset him. He was introduced to the appellant, who lived in the house next door, and married her on 27 March. The appellant's witness statement refers to previous applications by the appellant for entry clearance, but we know nothing more of those. So far as the present application is concerned, one of the grounds for refusal was that the respondent was not satisfied that the sponsor's first wife was indeed dead and therefore that the marriage was valid.

3. The Immigration Judge had evidence before her, to some of which we shall refer shortly. She regarded the sponsor as a credible witness. She found that the appellant met the maintenance and accommodation requirements of the Rules, and that "the marriage was subsisting". She made, however, no specific finding on the evidence relating to the validity of the marriage. Her determination allowing the appeal was sent out on 20 February 2008. The respondent sought reconsideration and was granted it on the ground that it was arguable that the Immigration Judge had failed to address a key issue, that is, the validity of the marriage. The order granting reconsideration was sent out on 7 March 2008.

4. At the hearing before us Mr Matthew said that he readily accepted that the Immigration Judge had no obligation to refer to every piece of evidence or to set out in detail every finding of fact she made. He submitted, however, that she did need to show that she had considered properly the concerns raised by the Entry Clearance Officer and the evidence relating to those issues before making a finding in the appellant's favour, particularly if she was making one without referring specifically to the issue in question.

5. When we asked for Mr Mackay's reply to those submissions, he submitted that the Tribunal had no jurisdiction to embark upon a reconsideration, because the application had not been made in the proper form. He drew our attention to the rules of the Court of Session and to form 41.48, the form prescribed by those rules for making an application for reconsideration, pointing out that it was clear that the respondent's application was not in that form. Mr Mackay accepted, however, that the requirements imposed by the Court of Session are not absolute in that it can allow variation of the forms, and he accepted also that he had done nothing to raise the issue prior to Mr Matthew's completing his submissions on the substance of the reconsideration.

6. We considered the matter. The Court of Session's requirement for the use of specific forms is a requirement which is not to be treated lightly. Further, the Court's power to dispense from the requirements of its rules is a power which only the Court can exercise. On the other hand, however, the existence of the dispensing power shows that the requirements are not absolute. By not raising the

issue either straight away, or by way of reply under r 30, or at any other time prior to the hearing of the reconsideration, or even at the commencement of the reconsideration hearing itself, it appears to us that the appellant, who has been represented by the same member of the same firm of Solicitors throughout, has waived his right to require strict compliance with the Rules. In the circumstances we regard ourselves as having jurisdiction.

7. Mr Mackay's submissions on the substance of the reconsideration were that the Immigration Judge had considered the evidence before her before making her determination and that there was no reason to upset it. For reasons we made clear at the hearing, we are unable to accept that submission.

8. There can be no doubt that the validity of the marriage, and, in particular, the death of the sponsor's first wife, was an issue raised by the Entry Clearance Officer in the notice of decision. As the application and the appeal were made on the basis of the validity of the marriage, that was a matter that needed to be determined by the Immigration Judge. The evidence supporting the appellant's and the sponsor's account of the position was the sponsor's account of his own two marriages, the appellant's account of her marriage, the sponsor's account of what he had been told when he went to Iraq in 2007, and three documents, described as the marriage contracts from 2000 and 2007, and the death certificate of the first wife. The Immigration Judge regarded the sponsor as a credible witness, which means that she regarded him as having indeed undergone marriage ceremonies in 2000 and 2007, and as having been told that his first wife had died. The finding of credibility adds nothing to the determination of the issue of whether his first wife was in fact dead at the time that he married the appellant.

9. The two documents described as marriage contracts and the death certificate were before the Immigration Judge, as they are before us, in photocopy form accompanied by translations. Mr Mackay assured us that the two marriage contracts had been translated by the same person. The contract dated 2000 records, in the translation, the making of a contract of marriage between the sponsor and his first wife. The translation of the 2007 document indicates that it records the *termination* of a marriage between the appellant and the sponsor. That is a remarkable feature of a document purporting to evidence the marriage ceremony. There may be some mistake in the translation, but we notice also that although in the English version both documents are headed identically "marriage contract", that phrase appears to translate an Arabic phrase which is not identical in the two original documents. We asked Mr Mackay what explanation he had given to the Immigration Judge of the use of the word "terminated" in the translation of the 2007 document. He told us that he had not previously noticed that the 2007 document referred to the termination of the contract of marriage. Turning now to the death certificate, we asked Mr Mackay what the certificate gave as the date of death of the sponsor's first wife. After considering the matter at some length he stated the obvious fact that the certificate gives no date of death for the sponsor's first wife: the space for the date of death has not been completed. We asked him if

he had ever before seen an officially issued death certificate which did not give the date of the deceased's death. He told us he had not. We asked as to what he said to the Immigration Judge about that. He told us that he had not previously noticed that the certificate contained, neither in the original nor in the translation, any date for the deceased's death.

10. Further examination of the death certificate appears to show that where the translation gives the sponsor's first wife's full name, the original appears to give only the first name of the deceased. But of course we may be wrong about that: we work from the translations.

11. Mr Mackay told us that if we thought there was a material error of law, there was no other evidence bearing on the question whether the appellant met the requirements of the Immigration Rules at the date of the decision. He reminded us that the Immigration Judge had found the sponsor to be a credible witness. He asked us to assume that the 2007 document was mistranslated. He asked us also to assume that the death certificate referred to the sponsor's first wife and was reliable evidence of her death. He said that if the sponsor had been minded to deceive the immigration authorities, he could have gone about the matter a great deal more easily.

12. As we have said, it appears to us that the Immigration Judge was, in the circumstances of this case, obliged to consider whether the marriage between the appellant and the sponsor was valid. The case has been put on the basis of a marriage, and it has not been suggested that the relevant marriage regime is anything other than one requiring monogamy. The Immigration Judge's acceptance of the credibility of the sponsor does not, as we have said, assist at all in the determination of whether his first wife is dead. We are sorry to say that we are not able to accept the submission that the Immigration Judge must have considered the evidence relating to that issue. Mr Mackay (who is a solicitor) took, as we understand it, the position before us that he had not previously read the one-page documents that he had adduced before the Immigration Judge. We regard that as a surprising performance of a solicitor's duty to a Court. Be that as it may, it is apparent to us that the Immigration Judge cannot have read them either. Perhaps she simply accepted what Mr Mackay told her about them. Anybody who read the documents in question would raise the questions we have raised, and unless there were satisfactory answers to those questions would, we are confident, place no credence on the documents as evidence of a death and a subsequent marriage.

13. It follows that the error by the Immigration Judge was material, because it cannot be said the she would have unarguably allowed the appeal if she had not made the error. We must substitute a determination of our own.

14. We take into account the submission Mr Mackay made to us. It may be true that other deceptions might have been possible: but that is not the question. The question is whether the case is proved on the evidence adduced. We do not for

present purposes seek to go behind the Immigration Judge's assessment of the sponsor's evidence as credible, although it appears that he was responsible for producing the documents and their translations, and, if a new judgement were being made about his credibility it would be no doubt be necessary to take into account the difficulties arising from those documents. Treating him as credible, however, merely means that he is to be regarded as a person who underwent a ceremony of marriage with his next door neighbour, genuinely believing his first wife to have died and (apparently) not being very interested in when she had died.

15. Good faith and pious hopes do not render a marriage valid. This marriage is said to be rendered valid by the death of the first wife, and the evidence of that consists of the sponsor's account of what he was told by his family and the death certificate, which has the features we have indicated. We regard the evidence as wholly insufficient to prove the death of the sponsor's first wife. That being, as we have said, and as acknowledged by the parties, a requirement for the success of the present appeal, we substitute a determination dismissing it.

C M G OCKELTON
DEPUTY PRESIDENT
Date: