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of Glasgow

Mair, J. (2003) *A sham marriage or a proper wedding?: Hakeem v Hussain*. Edinburgh Law Review, 7 (3). pp. 404-409. ISSN 1364-9809

<http://eprints.gla.ac.uk/37969/>

Deposited on: 02 April 2012

EdinLR Vol 5 pp 404–409

## A Sham Marriage or a Proper Wedding?: *Hakeem v Hussain*

### A. THE BACKGROUND

The Scottish courts have considered the issue of sham marriages on relatively few occasions and attention has focused on the trio of decisions in *Orlandi*,<sup>1</sup> *Mahmud*<sup>2</sup> and *Akram*.<sup>3</sup> In each of these cases the facts were similar in that the parties went through a civil marriage while holding to the belief that they would only be truly married by religious marriage. In each, the woman subsequently sought declarator of nullity on the basis of lack of true consent by the parties. Neither subsequent cohabitation nor consummation of the marriage followed and in each case it emerged that there was an ulterior motive, that being the achievement by the man of some immigration benefit as a result of his married status. Lord Cameron in *Orlandi*<sup>4</sup> held that declarator of nullity could be granted where “it can be established that there has been no true matrimonial consent and that the ceremony was only designed as a sham or as an antecedent to a true marriage”. This was followed in *Mahmud*<sup>5</sup> and *Akram*,<sup>6</sup> although with considerable reluctance in the latter, with Lord Dunpark expressing his disquiet that civil marriage may be used by those “whose religious faith does not acknowledge” it and then set aside on the basis that “their religious beliefs deny that ceremony the legal effect for which it is provided”. He considered himself bound, however, by the “consensual principle” and, while he questioned the policy of allowing parties to be freed from marriage in this way, he conceded that it was not for the courts but for Parliament to change the law.<sup>7</sup> In their approach to sham marriages, the Scottish courts have differed from those in England which have consistently refused to allow parties to escape from a sham marriage, insisting instead that they should seek a divorce.<sup>8</sup>

In the recent case of *Hakeem v Hussain*,<sup>9</sup> the Outer House has had the opportunity, in the absence of legislative reform, to revisit the issues surrounding sham marriage and in his decision Lord Clarke distances himself to some extent from the previous approach.<sup>10</sup> He does so primarily by distinguishing the facts but there is also some indication of a fresh approach to the dilemma presented by each of these cases, that

1 *Orlandi v Castelli* 1961 SC 118; 1961 SLT 118.

2 *Mahmud v Mahmud* 1977 SLT (Notes) 17.

3 *Akram v Akram* 1979 SLT (Notes) 87.

4 1961 SLT 118 at 122.

5 1977 SLT (Notes) 17.

6 1979 SLT (Notes) 87.

7 The Scottish Law Commission has recommended reform in its Report on Family Law (Scot Law Com No 135, 1992) at para 8.20. See also Scottish Executive *Parents and Children* (2000) para 6.4(e) (at [www.scotland.gov.uk/justice/family/law/pac-00.asp](http://www.scotland.gov.uk/justice/family/law/pac-00.asp)).

8 *H v H* (1954) P 258; *Silver v Silver* (1955) 2 All ER 614. See also E M Clive, *The Law of Husband and Wife*, 4th edn (1977) at 90, para 07.051; E Sutherland, *Child and Family Law* (1999) at 456, para 10.46.

9 2003 SLT 515.

10 At 525–526.

is how to balance the form against the substance—the actings of the parties against their innermost thoughts and beliefs. There is much in the present case which can be used to distinguish it from *Orlandi*,<sup>11</sup> *Mahmud*<sup>12</sup> and *Akram*,<sup>13</sup> and indeed from any ideal notion of a sham marriage, but perhaps most striking of all is the fact that the wedding itself was captured on film—in the ubiquitous wedding video.

### B. *HAKEEM v HUSSAIN: THE FACTS*

The facts of this case disclose two narratives—the wedding plans and the immigration process—and it is the extent to which these are intertwined that creates the legal issues and undoubtedly the human interest. Is this the story of young love that cools, of a scheming man and a woman scorned, or of a carefully planned and sophisticated sham?

Saira Hakeem, born in Scotland to parents who had come from Pakistan, raised an action for declarator of nullity against Khalid Hussain, a young man who had come to Scotland in early 1998 with a temporary visa, in respect of their marriage by civil ceremony on 22 June 1998. The pursuer argued that, according to the Muslim beliefs of both, neither party had regarded the civil ceremony as a true marriage and neither party had given consent to be married. Instead, she regarded the ceremony as being “just like ‘a second engagement’”<sup>14</sup> which they had agreed to go through as a way of enabling the defender to obtain an extension to his visa.

A few months after his arrival in Scotland, and subsequent to a number of family meetings arranged through a mutual acquaintance, the pursuer’s mother deemed Mr Hussain “a suitable husband” for her daughter and allowed them to meet. The meeting was a success, the daughter pronounced herself “happy at the prospect of having the defender as her husband”, and it was concluded that each found the “other to be attractive and that the prospect of being a married couple was something they contemplated without any difficulty”.<sup>15</sup> In the presence of family and friends a ring was given, together with other gifts, and the happy occasion was captured in photographic form.

After the engagement was concluded, the wedding plans commenced. As is common in such situations, the separate preferences of both sides began to emerge but it seemed that their various desires could, at least for the time being, be happily accommodated. The pursuer still wished to complete her secondary education and hoped to proceed to University. For that reason, neither she nor her mother wished her to live with the defender in Pakistan. The problem of the expiry of his six months’ visa in August 1998 was raised and it was recognised that an extension might be obtained if he could satisfy the immigration authorities that he and the pursuer were married and “living together as husband and wife”.<sup>16</sup> On that basis the pursuer and her family agreed that they should go through a civil wedding in the near future, which would

11 *Orlandi v Castelli* 1961 SC 118; 1961 SLT 118.

12 *Mahmud v Mahmud* 1977 SLT (Notes) 17.

13 *Akram v Akram* 1979 SLT (Notes) 87.

14 2003 SLT 515 at 517C.

15 At 516E–F.

16 At 516I.

be followed in due course by a religious ceremony in compliance with their shared Muslim beliefs. Only then would they be regarded according to Muslim beliefs as husband and wife and only then would they live together.

The civil ceremony took place in Stirling on 22 June 1998 and it was for all “a special occasion”,<sup>17</sup> complete with the trappings of the modern day wedding—the dresses, the bridesmaids, the flowers, the party, and, of course, the video. A special occasion it may have been, but both nonetheless intended a subsequent religious ceremony and only then would they consider themselves husband and wife. What followed was a lengthy period during which, for various reasons, the religious ceremony was postponed. In early 2000 an ultimatum was issued by the pursuer and her mother, and in response the defender declared that he no longer wished to proceed with the religious ceremony. The recriminations began. His motives were unclear; he denied that his “Scottish girlfriend” was any more than a friend, but for whatever reason it was evident that the religious ceremony would not now take place.

The wedding plans had ultimately failed, at least in the minds of the parties, but the second story, that of the immigration process, had been successful. Following the civil ceremony, the defender applied for and was granted an initial twelve months’ extension of his visa.<sup>18</sup> In order to do so, he and the pursuer were required to state that they were married and that they were living together. In October 1999, when the defender’s visa was due to expire, the defender, assisted by the pursuer, applied for indefinite leave to remain in the United Kingdom.<sup>19</sup> In February 2000 the defender had notice of his success in the immigration process by way of a letter informing him of his entitlement to remain indefinitely.<sup>20</sup> It was this success, coupled with the collapse soon after of the religious wedding plans, which raised the question as to whether or not this was a sham marriage. When the pursuer and her mother sought to put pressure on the defender to complete the religious marriage, they employed the threat of disclosure to the immigration authorities. In June 2000 the pursuer disclosed some detail of their relationship to the Immigration Department. In particular she told it that she and the defender had never lived together as husband and wife and alleged that the defender’s sole purpose in going through the civil ceremony of marriage had been to obtain an extension to his visa. She subsequently sought declarator of nullity of the marriage by reason of lack of consent by both parties.

### C. THE DECISION

Lord Clarke, in concluding that this was indeed a valid marriage, distinguishes it from the situations which arose in *Orlandi*, *Mahmud* and *Akram* but also takes the opportunity to restate the law<sup>21</sup> in the terms set out by Eric Clive: “a purported marriage, even if it is a regular marriage, is void if the parties both regard it as an empty formality and do not consent to become husband and wife”.<sup>22</sup> Clive goes on to

<sup>17</sup> At 516K.

<sup>18</sup> At 517–518.

<sup>19</sup> At 518–519.

<sup>20</sup> At 519D.

<sup>21</sup> At 525K–L.

<sup>22</sup> *Law of Husband and Wife*, note 8 above, at 88, para 07.047.

highlight the danger of two possible misinterpretations of this rule. First he emphasises that a marriage which is entered into for an ulterior motive is not necessarily void. In this context he draws a distinction between the situation where two parties intend to “assume the legal relationship of husband and wife”, albeit for a variety of motives or for limited purposes, and the situation where they go through a ceremony but with no intention to be married. The first, provided that consent is freely given, is a valid marriage; the second is a sham. The second possibility for misinterpretation relates to the situation where a couple go through a civil marriage but in the belief that they will only be truly married as a result of some form of religious marriage. Clive states clearly that “[t]he religious view which parties have of a marriage ceremony is legally immaterial”.<sup>23</sup>

The question to be asked in a case like this is whether the parties consented to be married by civil marriage. The regular form of civil marriage as provided for by the Marriage (Scotland) Act 1977 “has nothing to say about the religious significance, or otherwise, of the parties’ relationship”.<sup>24</sup> While according to the beliefs of the parties, a civil marriage may have no religious value, the only question to be addressed by “a judge in a secular court . . . is whether or not it was a valid civil marriage”.<sup>25</sup> Thus the assessment of the adequacy of the consent of both parties should be conducted not within the realms of their religious faith but within the confines of civil marriage. Did they consent to be married in terms of what civil marriage entails? The answer, it is concluded here, was yes.

In drawing this clear distinction between civil and religious marriage, Lord Clarke avoids the second possible misinterpretation as set out above by Clive and, in so doing, distances himself from the decisions in *Mahmud* and *Akram*.<sup>26</sup> While not ruling out the potential value of legislative reform he hints that the existing law might be adequate for modern purposes through “development and application”.<sup>27</sup>

#### D. SEX, LIES AND THE WEDDING VIDEO

Lord Clarke cites Clive to the effect that: “Given the presumption in favour of the validity of a regular marriage and the presumption that the parties intend the normal and natural consequences of their acts, it would take very convincing and unequivocal evidence to justify any other conclusion.”<sup>28</sup>

It is the absence of the “normal and natural consequences” in alleged cases of sham marriage which raise the suspicion as to the validity of the marriage and which challenge the existence of consent. In these days of designer dresses and wedding planners, it may seem that one of the “normal” consequences of a wedding is the wedding video and so it was in this case. It is the video of the happy day, with the images it presents and the fact that it allows the court to see how the couple acted on their wedding day, which perhaps most distinguishes this case from those which have previously been

<sup>23</sup> *Law of Husband and Wife*, note 8 above, at 88, para 07.047.

<sup>24</sup> At 525H.

<sup>25</sup> At 525J.

<sup>26</sup> At 526–527.

<sup>27</sup> At 526E.

<sup>28</sup> Clive, *Law of Husband and Wife*, note 8 above, at 88, para 07.047, cited in *Hakeem* at 524A–B.

considered by the Scottish courts. In many ways, the common elements are there—a lack of consummation or cohabitation and a pattern of deceit—but the presentation of these elements and their perception is markedly distinct.

*Hakeem* is consistent with the facts of the previous cases in that there was no cohabitation or consummation as a consequence of the civil marriage. The couple socialised together within the company of their families—and may even have spent some time alone—but beyond that they had no common life as might normally be expected of husband and wife. Within the particular facts of this case, however, the absence of these elements may be explicable. The pursuer was very young at the time of the civil marriage and was in fact still at school. The first request for a postponement of the religious ceremony was made by the pursuer herself, in order to enable her to complete her school education. Far from suggesting a problem with the validity of the marriage, the fact that the pursuer continued to live with her mother at this young age and that the defender lived with his family, while seeking employment, might be seen as signs of their sensible and mature approach to their individual situations and their developing relationship.

The absence of sexual relations is also explained in terms of their religious beliefs which were accepted as genuine.<sup>29</sup> As with the earlier decisions in *Orlandi*, *Mahmud* and *Akram*, the religious beliefs of the couple were put forward as evidence of the fact that they had not truly consented to be husband and wife. In *Hakeem*, however, they may be perceived as one of the reasons why the couple were not yet cohabiting. In the earlier decisions there was little if any evidence of an intention to enter into sexual relations, whereas in *Hakeem* the mutual attraction of the couple and their actions in the planning of their various ceremonies and the conduct of the civil ceremony were interpreted as signs of their intention to cohabit in the future. Lord Clarke cites with approval<sup>30</sup> the possibility highlighted by Clive that a couple might “intend to be married for the purposes of civil law even if they did not regard themselves as married for religious purposes”, and the absence of sex in this case may be seen not as a consequence of their lack of consent to be married (in civil terms) but as a consequence of their personal understanding of marriage (in religious terms).

Lies and deceit are a common feature of all of these cases but *Hakeem* offers the most detailed outline of both the developing relationship and the immigration process as a background to these lies. Most obviously the defender, at times with the collusion of the pursuer and possibly other family members and friends, lied to the immigration authorities for the purpose of securing the right to remain in the United Kingdom. These lies are noteworthy not only for the distinction they highlight between the requirements of family law and immigration law but also for the way in which they are perceived and presented by the court.

Family law concentrates to a large extent on the formation of marriage rather than on the relationship which individual spouses may choose to develop. For immigration purposes, however, a validly constituted marriage is insufficient without consequent cohabitation<sup>31</sup> and it is this difference in focus which required the parties to lie. An

29 At 516J, 525I.

30 At 526–527, citing Clive, *Law of Husband and Wife*, note 8 above, at 88, para 07.047.

31 The Home Office requires an “intention to live permanently with the other”: Statement of Changes in Immigration Rules (HC395) para 281. See further [www.ind.homeoffice.gov.uk](http://www.ind.homeoffice.gov.uk).

understanding of the separate concerns of family law and immigration policy is evident in the Lord Ordinary's treatment of their lies.<sup>32</sup> In fact in their joint deceit and in the collusion of the pursuer there is some sign of a common matrimonial pursuit: "at the end of the day my purposes were to marry him and to stay with him so I didn't have no [*sic*] reason not to sign it".<sup>33</sup>

In *Akram*,<sup>34</sup> Lord Dunpark stated that it is "contra bonos mores to annul a marriage which is solemnly constituted in a registry office" but where the parties are in effect deceiving the registrar as to their intent. In *Hakeem*, the issue of lying to the registrar is avoided by concentrating on the consent of the parties to a civil marriage. An underlying doubt remains, however, in the facts of the case as to the honesty of the defender, expressed in the view of the pursuer and her mother who were "clearly hurt by the defender's attitude and considered him to have been guilty of a deep breach of trust".<sup>35</sup>

The legal implications of this decision may take some time to be clarified. It represents a very clear approval of the law as stated by Clive, avoiding as it does the pitfalls which he has highlighted. It also hints that long-awaited reform may not be necessary and that decisions, which are no longer in line with the English courts or perhaps with immigration policy, may be reinterpreted. What is beyond doubt is that the facts of this case, and most of all the photographic evidence of those facts, make it stand out from the others. Not only did the ceremony comply with the legal requirements set out in the Marriage (Scotland) Act 1977, but the wedding also complied with modern etiquette, captured for posterity by both video and photographs which "present graphically an image of the occasion being a happy and special family occasion where those attending have taken particular care over their dress and where the attitudes struck were what one would see at any wedding ceremony".<sup>36</sup> The camera never lies? The couple certainly had a proper wedding although their true consent to be husband and wife remains uncertain. In judging the legal validity of their marriage, the court too has chosen to focus on their outward compliance with formalities rather than on their innermost thoughts. In a modern legal setting, with clear rules on civil formation of marriage, that may indeed be the proper thing to do.

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32 At 517-519.

33 At 517I.

34 1979 SLT (Notes) 87 at 88.

35 At 519J.

36 At 516L.