Neutral Citation Number: [2021] EWHC 885 (Admin)

Case No: CO/2541/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 April 2021

Before:

HIS HONOUR JUDGE GRAHAM WOOD QC

\- -

Between :

AMIRUL HUSON	**Claimant**
- and –	
SECRETARY OF STATE FOR THE HOME DEPARTMENT (ENTRY CLEARANCE OFFICER)	**Defendant**

\- -
\- -

Sharaz Ahmed (instructed by **Westminster Law Chambers**) for the **Claimant**
Ben Keith (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 24th February 2021 by MS Teams

\- -

Approved Judgment

Covid-19 Protocol: this judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time of hand-down is **2pm** on **Wednesday 14 April 2021**

HH Judge Wood QC :

Introduction

1. The Claimant, who is 19 years of age, and a Bangladeshi national, where he has lived since his birth, seeks to challenge the decision of the Secretary of State by her entry clearance officer (ECO) dated 28th March 2019 to refuse certification for a right of abode in the United Kingdom under section 2 (1) (a) of the Immigration Act 1971. Permission was granted for judicial review in relation to all three grounds of challenge by myself, sitting as a deputy High Court judge, on 27th September 2019. The substantive hearing also took place before me by Microsoft Teams on 23rd February, and I reserved my judgment which is now provided.

2. In granting permission I made the following observation:

> *"In relation to the third ground of challenge that the Defendant's decision based on legitimacy grounds is discriminatory by reference to articles 14 and 8, it would appear that in another case raising the same issue (CO/140/2019), permission to apply for judicial review has been granted, and a hearing is anticipated. The Defendant's representations on whether this case should be linked and/or consolidated are invited. Further, in relation to the first and second grounds, it is at least arguable that a reviewing court can be seized of these challenges and address them as a precedent fact judicial review the light of the evidence which has been submitted. A significant issue is whether or not the Defendant has correctly interpreted the submitted evidence."*

3. At that particular time, no detailed grounds of defence had been provided outside a very brief acknowledgement of service, which sought to rely upon the decision letter, and the response to the pre-action protocol letter. It was unclear to what extent the Defendant was proposing to rely upon the question of a lack of legitimacy in the context of a polygamous marriage which lay behind the earlier refusals for certification, as opposed to the absence of sufficient proof of a relationship with a British citizen (his purported father) which appeared to be the then current justification for refusal. Although the full grounds of defence identified both as issues, the position still remained far from clear, bearing in mind the concerns which I had raised, although following oral argument before me there has been a significant crystallisation of the issues which fall to be decided.

Background

4. Some understanding of the protracted and at times convoluted background to the Claimant's quest for British citizenship is required, beyond the bare bones of the chronology.

5. It is said that the Claimant, Amiral Huson, whom I shall refer to as AH, was born on 15th May 2001 in Bangladesh as the fourth child of Abdur Rahim[1] and Atiful Nessa, who entered into a marriage in March 1984. This was Mr Rahim's second marriage, during the subsistence of the first, but it was recognised as lawful in Bangladesh within the religious and secular laws. His first wife, with whom he had a family, is still alive, and living in London, and it would seem that at some point in 1969 both of them obtained British citizenship. The

[1] As will become apparent, until the decision of the First Tier Tribunal in 2011, the defendant's stance had not been one which challenged that Mr Rahim was the father of AH. That is no longer the case.

circumstances of their citizenship is not pertinent to the matters before this court, save to note that for Mr Rahim it was not by descent and appears to have been by the CKUC route.

6. Prior to 1994, Mr Rahim had been settled in the United Kingdom, but had campaigned to secure the entry clearance of his three older children to Atiful Nessa, two girls and a boy, to join him with a right of abode, whilst his wife remained in Bangladesh. He was successful in achieving this, although the situation pertaining to these children ostensibly was no different to that of AH who was born several years later. Unfortunately little is known about their applications, although there is reference in the papers to two letters dated 11th December 1994 and 25th April 1995, neither of which is any longer available, in which the ECO through the consulate in Dhaka had informed the parents of AH that it was "*likely that their wedding would not be valid under UK law*" (i.e. being a polygamous marriage) and that any further children would not be of "legitimate descent".

7. Whilst these children settled into life in the United Kingdom, it is the case of AH that his father returned to Bangladesh on occasions, and during one such visit he was conceived. British passports used by Mr Rahim at the time are included within the court bundle, suggesting that he had entered the country in February 1999, with the three older children, reuniting with his second wife, and remaining there until August 2003. This is said to provide evidence that he was in Bangladesh at the time of conception[2] and is also relevant to a discrete issue of domicile to which reference will be made later in this judgment. After his birth, and following the departure of Mr Rahim and the other children and their return to the UK, AH continued to live with his mother, and has not visited the United Kingdom, although it is said that occasionally his father would travel to Bangladesh in the intervening period.

8. The birth of AH was registered through local procedures in the village were Atiful Nessa lived, (Noagoan), naming her as the mother, and Mr Rahim as the father. A copy of the certificate is available within the court bundle.[3] It is dated 24th June 2001, that is just over a month after the Claimant's birth.

9. The first evidence of any application on behalf of AH is comprised in a letter dated 20th October 2002 from the British High Commission in Dhaka. It would seem that his father had applied on his behalf for a passport on the basis that AH was a British citizen by descent, he, Mr Rahim, being then a British citizen. The vice consul refused this application on the ground that the citizenship which AH was seeking to acquire by descent did not arise from a legitimate descent because his parents had not been validly married under English law at the time of their marriage (March 1984) which had been polygamous, Mr Rahim then in a subsisting marriage to his first wife. Of course polygamy was not unlawful in Bangladesh. Reference was made to section 1 of the Legitimacy Act 1976 in the letter. This is the provision[4] which allows the child of a void marriage to be treated as legitimate if at the time of insemination the parents reasonably believed the marriage was lawful.

---

[2] Page 112 and page 129

[3] Page 103. This is an analogue duplicate, but contains the registration date of 24th June. It is not understood why the defendant contended at some point that the birth had not been registered for 10 months, and it has not been asserted that this document is forged or not genuine.

[4] Set out in full later in this judgment

10. The vice consul referred to a letter written by his predecessor (which as indicated above, no longer available) in December 1994 and which was said to be attached, in which Mr Rahim and his wife were informed that any further children born to their relationship would not be of legitimate descent, because their marriage *was not regarded as valid under English law*[5]. It is likely that the three older children, therefore, had "slipped under the net" it being accepted by the BHC/immigration authorities that the parents were unaware, or at least did not have reasonable belief at the time of the conception of the older children that their marriage would not be recognised as valid. The existence of this letter ("December 1994 letter") is pivotal to the issues which fall to be decided in this judicial review, as will become apparent.

11. This position of an absence of legitimacy for the descent of AH was adopted in response to the initial tranche of the formal applications made between 2003 and 2010 by Mr Rahim on behalf of his youngest son. The first of these was on 21st April 2003, when a certificate of entitlement to the right of abode was sought[6]. This was refused in a brief decision.[7] Because it was repeated in similar form in later applications that AH had not satisfied the requirements of section 2 of the Immigration Act 1971 and section 1 of the 1976 Act, I set out the reasoning in substance:

> *"Your mother was sent a letter dated 25th April 1995 from this office. I enclose a copy for your reference[8]. It states that it is likely that your parents wedding would not be valid under UK law. Applications made at that time for the other children from the marriage were authorised. However, the letter states that any further children from your parents' marriage would not be of legitimate descent. Your parents are aware of this fact.*
> *You therefore do not qualify under the category in which you have applied and therefore have no such entitlement."*

12. It is noteworthy that there was no challenge to the relationship between father and son, and both Mr Rahim and his wife were referred to as the parents of AH.

13. There was no right of appeal against the decision, although by the time of the second application three years later, (1st November 2006) with precisely the same wording as above, an entitlement to appeal was now provided by section 82 (1) of the Nationality, Immigration and Asylum Act 2002. (NIAA). Once again reference was made in the refusal to the letter of 25th April 1995, said to be relevant to the question of legitimate descent and the reasonable belief of the parents based on their knowledge.

14. An appeal was pursued on behalf of AH, and this came before the Immigration Appeals Tribunal (as it was then known), IJ Lever, on 22nd May 2007. (The "first appeal"). Mr Rahim was unrepresented at this hearing. Evidence was taken from him, although there were no significant factual disputes to resolve. Although it does not appear to have impacted

---

[5] It is not clear whether this is the same letter as that referred to as having been sent in April 1995 (see note 8 below) as no copies of either have been produced, but it would appear to be of the same gist.

[6] If the passport evidence correctly supports a conclusion that Mr Rahim was in Bangladesh between the two date stamps, this application must have been made shortly before his return to the United Kingdom

[7] Bundle page 52

[8] Adding to the confusion relation to missing documentation this is the first mention of a letter in April 1995. Neither counsel were able to shed any light on whether this is the same letter as the December 1994 letter referred to in the 2002 letter from the vice consul, because regrettably it is also unavailable, despite diligent searching.

on the decision of Judge Lever, he was under the impression that there had been no application made at the time of the birth of AH, and that the "application had only come about now" because Mr Rahim wanted a better education and healthcare for his son. He did not make any reference to the consular application or to the 2003 application which had been refused. Essentially Immigration Judge Lever accepted the reasons given in the refusal letter for certification. He also dismissed an Article 8 claim on the basis that no family life had been established between AH and his father, with AH having been cared for by his mother in Bangladesh throughout his young life.

15. In his determination, he made the following observation which may be pertinent to the matters I have to decide.

> *"15. The sponsor has stated that his second wife knew nothing about the letter and in any event she was illiterate. The sponsor himself, despite living in the United Kingdom now for some 40 years, spoke little or no English and accordingly I accept that such a letter may have escaped the notice of his second wife.*[9]*However at that same time the sponsor returned to Bangladesh to deal with applications from other children. Whether or not they read the letter the legal and factual basis remains the same."*

16. The next application for a certificate of entitlement to a right of abode, again with the right of appeal, was made in May 2010. It was refused on virtually the same grounds, with the further comment that the applicant (AH) had failed to provide any further evidence to address the previous refusal.[10] This referred to the April 1995 letter.

11. Once again, Mr Rahim on behalf of his son exercised the right of appeal (the "second appeal") and the matter came before the first tier tribunal in April 2011 (IJ Traynor). It would appear that the Claimant and his father were represented at the hearing, although the representative's name is not stated. This was a far fuller hearing, and the tribunal judge provided a more detailed statement of the applicable law, and in particular the changes which had been brought about by the amendment to section 50 (9) of the British Nationality Act 1981 by section 9 of the NIAA, with effect from 1st July 2006. The judge interpreted the law change in the following way:

> *"15. There is further guidance in respect of the law on this matter as contained in McDonald's Immigration Law and Practice (eighth edition) volume 1, chapter 2.20. This also records that other differences in the treatment of legitimate and illegitimate children were removed on 1 July 2006 and that those not previously recognised, such as the children of a polygamous marriage, will now be recognised and will require the right of abode."*

12. The judge also made reference to section 10 of the Immigration Act 2002 and which empowered the making of regulations as to the type of evidence which would qualify for a certificate of entitlement, (including DNA evidence) but noted that there was no further reference or elaboration provided by the decision maker. The nub of the judge's determination is found in four paragraphs commencing at paragraph 28:

[9] My emphasis

[10] It is difficult to comprehend what further evidence the applicant might have been able to adduce, bearing in mind that the application had been refused on a point of principle, namely the absence of legitimacy.

> *"28. At the commencement of his submissions, the appellant's representative submitted that the respondent's decision was not in accordance with the law and that the appeal should be allowed. It is clear to me, however, that the respondent, whilst properly identifying that section 10 of the 2002 Act plays a part of the consideration process, it is also essential that the requirements of the relevant regulations should also be in conjunction with the evidence submitted in support of the application (sic). In this regard there is a burden upon an applicant to provide evidence which establishes a relationship. This is now permitted by the provisions of section 9 of the 2002 Act which amends the terms of section 2 of the British Nationality Act 1981. This now includes children of a mother or father who has British nationality but who is the issue of a second polygamous marriage and who previously were considered to be illegitimate for the purposes of the British nationality acts because in UK law there could be no lawful second marriage whilst a person remained married to another spouse. Consequently, the children of such a marriage would be considered as illegitimate and not entitled to be considered as the dependent child of a CKUC.*
> *29. It is significant that the respondent appears not to challenge the relationship between the appellant and sponsor, even though it appears that at the time of the birth the appellant sponsor was already 66 years of age. Furthermore, the respondent appeared not to have reminded the appellant that in order to issue the appellant with a certificate of entitlement, he is obliged to provide all necessary evidence which is prescribed by the relevant regulations which are effectively created by section 10 of the 2002 act.*
> *30. Unfortunately, the appellant's representative merely sought to complain that the respondent had misdirected himself in law, because he had considered that as a child of a second (polygamous) marriage the appellant would be considered as illegitimate and therefore have no lawful entitlement. He believed this would be sufficient to allow the appeal. However, having carefully considered the provisions of section 10 and the requirement to meet the terms of the relevant regulations created by it, I find that this is a step which the respondent has so far not taken.*
> *31. I do accept that the respondent has misdirected himself because it is open to the appellant, as the child of a polygamous marriage, to seek the right to join his parents in the United Kingdom by way of a certificate of entitlement. In the first instance, however, he must establish that relationship. On the evidence before me, I am not satisfied that such a relationship has genuinely been established….."*

13. The judge then went on to direct reconsideration by the Secretary of State. At this point the Claimant and his father might have been rightly aggrieved that they were being required to prove a relationship which had never previously been challenged by the ECO, and indeed which appears to have been accepted without question when refusal had been based upon the April 1995 letter, (or the earlier December 1994 letter) and the absence of legitimate descent. Otherwise, the immigration judge seemingly accepted that such a refusal previously maintained was no longer lawful, or at least that is how it had been interpreted by the Claimant's legal advisers. Regrettably the immigration judge failed to acknowledge that the changes effective from 1 July 2006 were not retrospective. In other words, there was no change to the legal position in relation to children born prior to that date and who were still required to prove legitimate descent in the context of a polygamous marriage. Neither party appears to have appreciated this at the time.

14. Be that as it may, the landscape had now shifted. From this point on, and in particular following the remission for further consideration, the ECO now began to address applications for a certificate of entitlement to the right of abode made on behalf of AH on a *different* consideration, apparently accepting that there was a basis for a child of a polygamous marriage to join a parent, notwithstanding a previous refusal on the grounds of an absence of legitimate descent, and no longer placing reliance upon the April 1995 letter. In the reconsidered decision in 2011 the ECO adopts the observations of the IJ (in paragraph 29 of his decision) in relation to concerns about the age of Mr Rahim at the time of the birth of AH (66 years) although parentage had previously been accepted. It was stated that DNA evidence would provide the necessary proof, but that public funds would not be used for such

purposes. Insofar as Mr Rahim had not consented to DNA testing at his own expense, and there was an absence of other compelling evidence to support the relationship, the application was refused. The other evidence referred to comprised the birth certificate, said to be registered 10 months after the birth of AH, and the copy passport which did not contain relevant immigration stamps. This further refusal was made in September 2011, and was not appealed.

15. At the end of January 2017 a further application was made on behalf of AH for a certificate of entitlement to a right of abode. This was refused on 8th February 2017 by the ECO[11]. Statutory changes meant that there was no longer any right of appeal.

16. The decision of the ECO runs to 3 pages. Essentially, it makes reference to previous refusals in 2003 and 2006 which were based upon the absence of legitimate descent, and the unsuccessful appeal to IJ Lever, the further refusal in 2010 on the same basis, which was the subject of a successful appeal in part to IJ Traynor which was said to acknowledge the entitlement of the child of a polygamous marriage to join a parent in the UK, but in the context of a requirement under section 10 of the NIAA for the provision of evidence of the relationship with the putative father. The decision then went on to repeat in substance the contents of the 2011 refusal, thus placing reliance on the absence of any DNA evidence to prove the relationship, and adding that the further information in the form of photographs did not cross the necessary threshold of satisfactory evidence.

17. Although Mr Rahim sadly passed away in March 2018 having at the time returned to Bangladesh, and having been the driving force behind the various applications, the cudgels were taken up on behalf of AH, who was approaching his majority, by his present solicitors, assisted by one of the Claimant's siblings Mr Saydur Hussain, who has provided evidence in support in the form of a statutory declaration. The most recent application on his behalf was contained in a letter dated 27th February 2019. Undoubtedly this was the most comprehensive application in terms of evidence provided to support the entitlement to a right of abode.

18. In their letter, the Claimant's solicitors were clearly acknowledging that the previous five applications until the tribunal determination in April 2011 were "solely" based upon legitimacy, but relied upon the fact that until the September 2011 consideration, the parentage of AH had always been accepted. Objection was raised to the previous stance taken by the ECO as to the requirement for DNA evidence which was said to be unreasonable. The material provided comprised 32 separate documents, said to fall into four categories, direct evidence, being statements from the mother and siblings and Mr Kuddus Ali who had attended both the wedding of the parents and the birth of AH, digital and analogue birth certificates, educational documents, and property documentation. In particular, the original copy UK passports were included, which were said to have been held by the late Mr Rahim during his stay in Bangladesh at the time of the Claimant's birth (one of which was a passport renewed in Dhaka) and which contained immigration stamps upon which reliance was

[11] On a form unhelpfully and inaccurately headed up "refusal of a visit visa"

placed. Also significant was the DNA report establishing a relationship between AH and his mother.

19. The decision of the ECO impugned within this judicial review was provided on 28th March 2019. It requires a little scrutiny. Again it is a three page decision, the first two pages of which appear to be an exact replication of the 2017 decision preamble, with the additional remarks that in 2017 further photographic evidence had been provided which did not provide satisfactory evidence of the relationship. The "new material" if it could be called that, is referred to at the bottom of the second page in four bullet points.

- *"You have now applied again and have provided a DNA legal report dated 22 January 2019 which confirms that Atiful Nessa is your mother. However, this report does not confirm that you are related as claimed to Abdur Rahim.*
- *As stated above, you were advised in 2011 by our office in Dhaka that you may wish to submit DNA evidence in support of your application. At that time it would have been open to you to provide DNA evidence to confirm if and how Abdur Rahim relates to you. This remained the case until the passing away of Abdur Rahim on 5 March 2018.*
- *I note that the immigration judge was not satisfied that you are related as claimed to your sponsor and I am not satisfied that you have demonstrated that you are related as claimed to Abdur Rahim.*
- *Furthermore I note that the immigration judge determined that the ECO was misdirected and that as the child of a polygamous marriage you were entitled to seek the right to join your parent in the UK by way of a certificate of entitlement. However, the immigration judge did not make a determination that the marriage was considered valid under UK law. Nationality is a matter of law that can be determined conclusively only by the courts. On the basis of the information and documentary evidence that you have provided, we are not satisfied that you have established that your birth is legitimate under UK law."*

20. The last bullet point above is the first time since the decision of the immigration judge that the Defendant, by her ECO, appears to restore the position which had been taken prior to that decision in the earlier applications, although it is far from clear whether this amounts to a reliance upon the previous objections which led to those refusals, namely that the Claimant's parents have been informed in a letter (either December 1994 or April 1995) that their marriage would not be recognised as valid in the UK, and that any further child born after this date would not establish the necessary legitimate descent. Both counsel appeared to acknowledge that it was largely a general statement, with the Defendant's counsel, Mr Keith, referring to recently published guidance which may have informed this part of the decision. [12]

The grounds of challenge

21. There were three principal grounds upon which this judicial review was originally pursued.

22. The first was that the Defendant had acted unlawfully in failing to give consideration to the evidence which was submitted in support of the relationship between the Claimant and his

[12] Nationality Policy Guidance referred to at paragraph 20 of his skeleton argument

late father, Abdur Rahim. In addition to failing to address the extensive documentary material, reliance was also placed upon the inconsistency of the Defendant's approach, when the Claimant's parentage had previously been accepted, and the requirement of DNA evidence which should not give rise to any adverse inference if not provided.

23. The second challenged the lawfulness of any reliance on an absence of legitimate descent, although acknowledged that this was not clear from the refusal letter. Insofar as it was still an objection raised by the Defendant that there could be no reasonable belief on the part of either parent that marriage was valid as a result of the correspondence in 1994 or 1995, this was unsustainable in the light of the determination of IJ lever in 2007 that any such letter might have escaped the Claimant's mother's attention and that both were illiterate.

24. The third challenge contended that any decision based upon an absence of legitimacy was discriminatory in breach of article 14 of the ECHR read in conjunction with article 8. This sought to argue that the article 8 right to a private and family life was the subject of discrimination if the marriage lawfully recognised in Bangladesh, and the acceptance into the United Kingdom of the older siblings of the family did not enable the Claimant as the youngest sibling to join his family.

25. As I indicated in the grant of permission, it was common ground that the third challenge raised a point which was being taken in another judicial review in which permission had been granted, which for the purposes of consistency at least supported a substantive hearing on this point with possible consolidation. In such circumstances I indicated that the court could also be seized of the other grounds of challenge and consider the possibility of a precedent fact determination in the light of the available evidence.

26. Since the grant of permission and in the light of the arguments which are advanced by both counsel, sensibly the issues have been significantly distilled and they seem to me to be as follows:

(1) *Has the Defendant acted unlawfully in rejecting the evidence of a relationship between AH and Mr Rahim as son and father?*
(2) *If this relationship had been established on the evidence, has the Defendant acted unlawfully insofar as reliance is still placed upon an absence of legitimate descent as the child of a polygamous marriage?*
(3) *In any event, has there been a breach of the ECHR, articles 14 and 8 if the Defendant's approach to the decision-making process was otherwise lawful?*

27. Mr Ahmed in his submissions has approached the matter even more succinctly, in the light of the broad agreement between the parties as to the applicable legal principles, suggesting that this court should be seized of three matters in addition to the potential discrimination argument, all of which lend themselves to a determination on the basis of a precedent fact approach, namely (1) The relationship (2) the 1994/1995 letter and (3) domicile.

The relevant law

28. A number of statutory provisions and secondary legislation provisions have been referred to, although not all are pertinent to the matters which I have to decide. It seems to me that those relevant are as follows. I have provided emphasis in key areas.

29. The entitlement to the right of abode is enshrined in the **Immigration Act 1971**, (**IA**) Section 2:

> **2. Statement of right of abode in United Kingdom.**
>
> (1) A person is under this Act to have the right of abode in the United Kingdom if—
>
> (a) he is a British citizen; or
>
> (b) he is a Commonwealth citizen……..

30. The **British Nationality Act 1981 (BNA)** addresses the circumstances in which citizenship can be acquired. Section 2 is relevant:

> **2 Acquisition by descent.**
>
> (1) A person born outside the United Kingdom ……. after commencement shall be a British citizen if at the time of the birth his father or mother—
>
> (a) is a British citizen otherwise than by descent; or……….

31. It is not in dispute that the Claimant's father was a British citizen having acquired that status by the CKUC route almost 40 years ago, and had not himself acquired citizenship by descent. The Claimant relies upon the relationship with his father, which is defined by section 50 (9) of the BNA 1981. It is to be noted that the NIAA made significant amendments to the BNA, not least in relation to children born after 1 July 2006, (and it is not disputed for the purposes of this judicial review insofar as IJ Traynor appeared to suggest otherwise in relation to legitimacy in the context of polygamous marriages he was wrong).

> **50 Interpretation**
>
> (9) For the purposes of this Act—
>
> (a) the relationship of mother and child shall be taken to exist between a woman and any child (legitimate or illegitimate) born to her; but
>
> (b) subject to section 47, the relationship of father and child shall be taken to exist only between a man and any legitimate child born to him ;
>
> and the expressions " mother ", " father ", " parent ", " child " and " descended " shall be construed accordingly.

32. Thus, because the relationship between AH and his putative father is relied upon, legitimacy is an essential component.

33. Assuming that can be established, which I shall address later in this judgment, it is necessary to consider the statutory provisions relating to the purported legitimate descent where the marriage is polygamous. The starting point is the **Matrimonial Causes Act 1973**. Section 11 is pertinent:

> **11 Grounds on which a marriage is void.**
>
> A marriage celebrated after 31st July 1971……..shall be void on the following grounds only, that is to say—
>
> (a)………..
>
> (b)………..
>
> (c)………..
>
> (d) in the case of a polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage domiciled in England and Wales.
>
> For the purposes of paragraph (d) of this subsection a marriage is not polygamous if at its inception neither party has any spouse additional to the other.

34. Thus a polygamous marriage is not *per se* void, but it will be if one of the parties was domiciled in England and Wales at the time of the marriage. It is not contended in this case that Mr Rahim was domiciled in Bangladesh at the time of the marriage (March 1984) by which time he had clearly obtained British citizenship, and it is accepted that this would be a void marriage, making any children of the marriage, *prima facie* illegitimate, but the question of domicile does arise in a different context. Here, the Legitimacy Act 1976 is relevant. In particular section 1:

> **1 Legitimacy of children of certain void marriages**
>
> (1) The child of a void marriage or a void civil partnership, whenever born, shall, subject to subsection (2) below and Schedule 1 to this Act, be treated as the legitimate child of his parents if at the time of the insemination resulting in the birth or, where there was no such insemination, the child's conception(or at the time of the celebration of the marriage or the formation of the civil partnership, if later) both or either of the parties reasonably believed that the marriage or civil partnership was valid.
>
> (2)This section only applies where—
>
> (a) the father of the child was domiciled in England and Wales at the time of the birth, or if he died before the birth, was so domiciled immediately before his death, or

> (b) …………………………………..
>
> (3) It is hereby declared for the avoidance of doubt that subsection (1) above applies notwithstanding that the belief that the marriage or civil partnership was valid was due to a mistake as to law.
>
> (4) In relation to a child of a void marriage born after the coming into force of section 28 of the Family Law Reform Act 1987, or a child of a void civil partnership (whenever born), <u>it shall be presumed</u> for the purposes of subsection (1) above, unless the contrary is shown, <u>that one of the parties</u> to the void marriage or civil partnership <u>reasonably believed</u> at the time of the insemination resulting in the birth or, where there was no such insemination, the child's conception (or at the time of the celebration of the marriage, or the formation of the civil partnership, if later) <u>that the marriage or civil partnership was valid</u>.

35. The understanding of these heavily amended statutory provisions in the context of void marriages, domicile and legitimacy is far from straightforward, but there is published guidance in the Nationality Policy (children of unmarried parents)[13]. This is guidance available to caseworkers, but is also publicly accessible.

> ***"Legitimacy and void marriages***
> *In some cases the child of a void marriage can be treated as legitimate by virtue of the Legitimacy Act 1976. Section 1 of that Act provides that the child of a void marriage should be treated as the legitimate child of the parents, if either, or both, of the parents reasonably believed themselves to be validly married in English law and the father was domiciled in England and Wales at the time of either:*
> *• the insemination resulting in the birth*
> *• where there was no such insemination, the child's conception*
> *• the celebration of the marriage, if the marriage takes place between conception and birth*
> *This applies even where the belief that the marriage was valid was due to a mistake as to law. This provision does not benefit children born to a couple before a void marriage is contracted. This particularly applies where the child's parents were in a polygamous marriage, and the second marriage has been deemed to be invalid because the father was domiciled in the UK. If the marriage is void, you must determine whether the parents reasonably believed it to be valid. In the case of a child born after section 28 of the Family Law Reform Act 1987 came into effect on 4 April 1988, you must assume that the parents reasonably believed that the marriage was valid unless there is evidence to the contrary. It may be appropriate to assume reasonable belief in other cases (for example on the part of a woman married in a country whose law permits polygamy). The courts have held that a reasonable belief that the marriage was valid in English law was required[14]. It was not sufficient that, for example, one of the parents believed it to be valid in Bangladeshi law. If the couple had been told that we could not regard the marriage as valid before the conception of the child took place, the child cannot benefit from the provisions of the Legitimacy Act. If you advise a couple that their marriage is invalid, you must therefore note that information in Home Office records, so that we have evidence that they are aware that their marriage is regarded as void if they have any future children. If you recognise a claim for a child who is treated as legitimate under the 1976 Act, you must explain this using the following wording:*
>
> > *'Nationality is a matter of law that can be determined conclusively only by the courts. On the basis of the information and documentary evidence that you have*

---

[13] version 3 published in March 2019
Nat-policy-children-of-unmarried-parents-v3-ext.pdf (publishing.service.gov.uk)

[14] this guidance was brought to the attention of the court by Mr Keith, counsel for the defendant. Neither he nor Mr Ahmed were able to identify the court decisions which appear to have provided the basis for these statements. Insofar as the approach is not disputed, and little turns on it, the references were not further investigated.

> *provided, the Secretary of State is prepared to regard you as a British citizen under section 2(1) of the British Nationality Act 1981, by virtue of section 1 of the Legitimacy Act 1976.'"*

36. A similar nationality policy was published in relation to domicile in March 2017.[15] Again this represents guidance to caseworkers and ECOs, insofar as the question of domicile might arise in determining either whether a marriage is void, or if it is void whether an applicant for entry might be able to avail himself/herself of the Legitimacy Act 1976 provisions.

37. The guidance deals with the different types of domicile which might be relevant on issues of nationality and immigration, and in particular distinguishing between domicile of origin and domicile of choice. In relation to the latter, it is stated:

> ***"Domicile of choice***
>
> *A person can acquire a domicile of choice instead of their domicile of origin. To do this they must both:*
>
> - *Reside in a place*
> - *form a clear and fixed intention of making their permanent home or indefinite residence in that one country*
>
> *If a person has acquired a domicile of choice, they will revert automatically to their domicile of origin if they leave the place in question and have the intention of abandoning their permanent home or indefinite residence there. They will then retain the domicile of origin until they acquire another domicile of choice.*
> *Establishing a domicile of choice There are 2 main elements to the acquisition of a domicile of choice:*
>
> - *residence*
> - *intention*
>
> *For immigration purposes the test is whether a person has made the alleged domicile of choice their home with the intention of establishing their family there and ending their days in that country (unless and until something happens to make them change their mind).*
> *The fact that a person has not resided in a country for a long time may not prevent them from acquiring a domicile of choice if they intend to make it their permanent home. For example, if a person clearly intends to live permanently in another country, they could acquire a domicile of choice on arriving to live there. On the other hand, although long residence is an important factor in assessing domicile, it may not in itself prove that a domicile of choice has been acquired.*
> *The courts have held that a domicile of choice cannot be acquired by illegal residence.*
> *The fact that a person is in the UK on a time restriction does not necessarily mean that a domicile of choice here cannot be acquired. However, you must take it into account when considering whether the person had formed a genuine intention of remaining here permanently. Unless it can be shown that the person had reason to expect - as well as just hope - that he or she would remain in the UK, it would be difficult to establish that the person had acquired a change of domicile.*
> *To show a change of domicile it is essential to establish an intention of remaining in the place permanently or for an unlimited time. Every event in a person's life may be relevant. You must therefore take into account of all the evidence which can reasonably be gathered.*
> *Declarations of intention to remain permanently or to retire in a place are important, but you must bear in mind the context in which they are made and whether they are consistent with the person's actions."*

[15] domicile-guidance-v1.0.pdf (publishing.service.gov.uk)

38. Finally reference should be made to the ECHR. Despite the familiarity of the Administrative Court with the articles referred to, for the sake of completeness I set out the relevant text:

> **Article 8**
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
>
> **Article 14**
>
> **Prohibition of discrimination**
>
> The enjoyment of the rights and freedoms set forth in the European Convention on Human Rights and the Human Rights Act shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

39. It is to be noted that the parties are largely in agreement about the application of the relevant law, and the statutory provisions which apply to the decision-making process and the status of the Claimant.

The respective arguments

40. On behalf of the Claimant, Mr Ahmed of counsel, who did not draft the grounds of review, accepts that there are two hurdles which AH must overcome if he is to successfully challenge the refusal of certification. The first relates to the determination of the ECO on the issue of relationship (the "relationship question") which appears to provide the basis for the refusal in the decision letter which is impugned (28th March 2019). The second, despite the absence of clarity in both the decision itself and the grounds of defence when first filed, but which he accepts is now properly advanced as a justification for the refusal, relates to the absence of legitimate descent (the "reasonable belief" question). As an alternative, he raises the question of domicile (the "domicile question") which if resolved in favour of AH insofar as his father was not domiciled in England and Wales either at the time of the marriage or at the time of the conception would mean that any reasonable belief is irrelevant. In relation to all three of these questions he submits that the material is available before the Administrative Court on this substantive hearing for this to be treated as a "*precedent fact*" judicial review without the remission of the matter for a further consideration, if they are successfully determined in favour of the Claimant.

41. His fallback position relies upon the third ground in the judicial review, that is a contention that the Defendant's action is unlawful in breach of the Claimant's right to a private and family life, representing a discriminatory approach in the context of his three siblings who have been afforded a right of abode, and with whom he has a family life, albeit one conducted overseas.

42. In respect of the relationship question, Mr Ahmed refers to the plethora of material which was provided on the most recent application as providing a very compelling evidential base for establishing the relationship of father and son. He submits that the Defendant, by the ECO, has been fixated on the provision of DNA evidence, first suggested by the immigration judge in 2011, and has in effect created a higher standard of proof for AH to satisfy the requirement. It is pertinent, he says, that previously the relationship was never questioned by the Defendant, and indeed was seemingly acknowledged by the first tribunal judge (IAT Judge Lever). In any event, in the decision letter the ECO completely fails to address the other evidence which had been put forward, and this demonstrates a mindset that without DNA, proof AH could not establish the relationship. The very least which should have been expected was an engagement with the material in his solicitor's letter. Particularly important was the birth certificate, which in its analogue form was an officially issued document, property documentation which was formal material confirming the right of AH to inherit property owned by his father, and the statements from the mother of AH, his siblings and Kuddus Ali who attended both the marriage and the birth. The decision maker should have undertaken an assessment of this material, as an alternative to the DNA, for consideration as to whether or not it collectively established the necessary proof. Instead the letter is completely silent on this.

43. In relation to the reasonable belief question, Mr Ahmed's primary submission is that the absence of either the December 1994 letter or the April 1995 letter is determinative. Because the Legitimacy Act 1976 (1) (d) creates a presumption whereby there is a burden of proof on the ECO in relation to the lack of any reasonable belief on the part of both parents, it is highly germane that neither the December 1994 letter of April 1995 letter can be produced. This is a fundamental flaw, he submits. In any event, the findings which were made by the tribunal judge in the first appeal are relevant to this point and in particular the fact that Mr Rahim spoke little English, was likely to be illiterate, and that the letter may have escaped the attention of his second wife. The Defendant cannot undermine that finding. Further support is derived from the compelling evidence that the Bangladeshi marriage formalities were complied with (the certificate being in the prescribed form), the attendance of Mr Kuddus Ali at the wedding ceremony, and the characteristics of both husband and wife at the time of the marriage in terms of lack of education and their basic religious belief. These are matters which could be determined by this court on the basis of precedent fact.

44. Mr Ahmed notes that the guidance to case officers relied upon by the Defendant refers to a reasonable belief in *English* law, as well as in the country of the marriage, being supported by court precedent, and submits that no particular authority has been relied upon by the Defendant. In any event, this should make no difference to the approach of the reviewing court.

45. In respect of his alternative argument on the domicile question Mr Ahmed relies upon the passport entries which he submits establish a four year residence in Bangladesh covering the period of conception and birth and subsequently (1999-2003), when Mr Rahim had been together with his wife and all his children, and it is not unreasonable for this court to conclude, again if making any determination of fact, that despite his British citizenship, Mr

Rahim had intended, as a matter of choice, that Bangladesh should be his domicile with his family at that time. The burden of proving domicile in England and Wales would lie on the Defendant. If this burden was not discharged, no question of reasonable belief would arise, and the Defendant could not rely upon a lack of legitimate descent from a void marriage.

46. Finally, on the discrimination point, Mr Ahmed accepts that the case of Khanom[16] did not proceed to a full judicial review. However, he relies upon the matters set out in paragraph 22 and following of his skeleton argument, and the decision of the Supreme Court in **R (on the application of Johnson) v SSHD [2016] UKSC 56 40**, particularly the judgment of Lady Hale, for a statement of the principles on the interplay between article 14 and article 8. This is a case, he submits, where there is clear evidence of different treatment that is less favourable compared to his three siblings, all of whom have been granted certification, and where there has been no challenge that they are related biologically to the Claimant. Although a relationship has not been enjoyed within the United Kingdom in terms of a private life, nevertheless AH is well known to his siblings who have visited him in Bangladesh, who maintain contact with their mother, and further AH is supported financially by his brother. In the circumstances, article 14 discrimination is engaged in respect of religion and social origin, touching upon the private life rights enshrined in article 8.

47. In support of his submission that the Administrative Court on this review should make factual findings, (precedent fact) he draws the court's attention to the prayer for relief in which a declaration is sought, and the observations of the Court of Appeal in the case of **Harrison v SSHD [2003] EWCA Civ 432**, (Keene LJ)where issues of citizenship fall to be decided.

> "33. Of course, the Secretary of State is very much involved in related matters, such as the issue of passports; and for that reason, as well as for obvious practical ones, it is sensible for any person asserting that he is entitled to the status of a British citizen to raise the matter first with the Home Office. But even on a passport application, the issue of whether a person is a British citizen is a matter of precedent fact where the courts, if there is a dispute, would be prepared to make a decision on the merits.
>
> 34.If, therefore, there is a dispute as to whether a person has the legal right under the 1981 Act to the status of a British citizen, that dispute is something which can be resolved in the courts. Such a person can bring proceedings for a declaration that he is entitled as of right under that Act to British citizenship, as both Mr Richmond and Mr Pannick agree. In determining that matter the court will itself resolve any issues of fact as well as any issues of law. This is not, in truth, judicial review of a decision taken by any administrative body or person, but the more conventional resolution of a dispute with which the courts are very familiar. That being so, the court would not afford to the Secretary of State any margin of appreciation or degree of deference where the resolution of issues of fact is concerned. It will find the facts for itself according to the evidence before it."

48. On behalf of the Defendant Mr Keith of counsel is neutral on this latter point and accepts that the court if it so chooses could in principle make a decision on the evidence before it. However he maintains the position that a reconsideration by the Secretary of State (the ECO) is unlikely to lead to any different outcome. It is further conceded that not only is there a lack of evidence with the seemingly crucial letters from 1994 (and 1995) no longer

[16] CO/140/2019

available, but also that the decision letter which the Claimant seeks to impugn is inadequate, and does not address the material which had been advanced in the most recent application.

49. However, it is submitted that the letter must be considered in its context, which was that there had been numerous previous decisions including two significant appeals which had addressed the question as to whether or not AH satisfied the necessary requirements for certification. Essentially, the decision maker was saying that even taking all the evidence into account, and in particular the absence of DNA evidence from the father which might have been compelling, he did not pass through the necessary gateway. Issue is taken by Mr Keith with the suggestion that the Defendant was requiring a higher or criminal standard of proof in asking for DNA evidence. This was not mandated, which would have been contrary to the Defendant's own publicly available guidance, but was requested, and properly so in the light of the clear steer given by the immigration judge in the second appeal.

50. Mr Keith in his skeleton argument, provided a helpful exposition of the relevant provisions and the extra statutory guidance addressing questions of legitimacy, void marriages, the approach to a polygamous marriage and domicile. The latter required an evidential based assessment. He referred to SET 15 (1) and the definition of domicile, acknowledging that the burden was on the Defendant to establish that Mr Rahim's domicile was British, in circumstances where the starting assumption was that a person was domiciled where he had been born. There was a dearth of material at any particular point before the decision maker or previous tribunals which would have enabled an adequate assessment to be made in respect of any change in this position, although it was highly relevant that the first tribunal judge had been in no doubt that Mr Rahim was established as a long-term UK resident. It was also highly relevant that he had been registered as a British citizen at the time of his marriage. Insufficient support for a change of domicile by choice was demonstrated by the documentation, including the passport stamps, and this court was simply not in a position if it were so minded, to make any determination on the question.

51. In such circumstances the question of reasonable belief of the parents at the time of conception was material, and accepting that the presumption imposed a burden on the Defendant, this could be resolved by the December 1994 letter (and the April 1995 letter) even if they were no longer available. There was no reason to doubt that such existed when the vice consul wrote to AH (and his parents) in 2002, and it was clearly available later because it was provided in further copy form in some of the earlier applications. The letter referred to, which made it clear that any further children would be regarded as the children of a void marriage, provided a reasonable basis for imputing knowledge to the parents and was clearly central to the question. He referred the court to the case of **MB (Bangladesh) v SSHD [2013] EWCA Civ 220** where there was a similar situation involving a younger sibling who was refused a right of abode in the United Kingdom and where the court was not persuaded that the terms of a letter written in virtually identical terms would have been insufficient to impute such knowledge, notwithstanding the parents poor educational or language status. It was an enquiry which the court directed should be made by the Upper Tribunal on the submission of evidence.

52. In relation to the third ground of challenge, Mr Keith submits that there is insufficient evidence of any family life to engage article 8 considerations, this being parasitic on any question of discrimination (Article 14). The Claimant was still living in Bangladesh with his mother, as he had done all his life, and the family links contended for were tenuous. In any event they could be continued uninterrupted, with the ongoing provision of financial support, and communication by modern social media.

Discussion

53. There is now an unequivocal entitlement for the children of polygamous marriages whose father has British citizenship to acquire a right of abode in the United Kingdom subject to only very limited exception, and it is the historical features of this case, where the Claimant through his putative late father has been attempting to obtain the appropriate certification for the entirety of his life, which have created difficulties for the Claimant. Assuming that the relationship is established, there is ostensible unfairness and apparent inconsistency in decision-making if three out of four siblings have been able to follow their father to the United Kingdom and one is excluded, all before the sensible change in the law, with effect from 1st July 2006.

54. However, this was a consequence of the law as it then existed and the somewhat cumbersome operation of section 1 (4)(d) of the Legitimacy Act which appeared to provide a passing nod to the cultural differences in many third world countries, and the unfair consequences would not in themselves justify any legal challenge, provided that the decision maker followed the correct procedures and took into account all the relevant considerations. It is clear from the updated guidance that these situations will continue to arise, although will become frequently less common with the passage of time.

55. As I have indicated above, in this claim for judicial review matters are compounded by the very unusual and convoluted background, the most prominent feature of which is a stark change of approach by the ECO to the question of relationship and paternity following the second appeal.

Relationship

56. It is convenient to address first and foremost the relationship question, which has been central to the decisions from 2011 onwards, and which is the subject of the first ground of challenge. Here, the main plank of the Claimant's argument is the elevation of the DNA evidence which is given pre-eminence, implying that the Defendant was expecting a higher standard of proof for the establishment of the father-son relationship. There is no doubt that such evidence would have been unequivocal, and therefore definitive in terms of that establishment, which is a matter which the tribunal judge in 2011 would have had in mind. It is likely that he anticipated that the process could be resolved quickly and easily with the appropriate test results and that nothing further would be required. The fact that the costly nature of the process and the unwillingness of the ECO to pay for the same which meant that Mr Rahim did not provide a test result does not of itself render its "request" unreasonable, or otherwise taint the decision. Clearly the Defendant's own guidance within the Nationality

Policy for the children of unmarried parents[17] is clear that such evidence cannot be mandated, and is not a requirement for evidence of paternity. Although the guidance (page 5) suggests that such evidence should be *either volunteered proactively or in response to an invitation to submit further evidence*, it seems to me that a specific request for DNA evidence, especially where its relevance has been identified following the Claimant's successful appeal to a tribunal, falls short of "mandating" such evidence. Further, it was not unreasonable for the decision maker to expect that the Claimant might wish to rely upon definitive evidence to establish the relationship.

57. Accordingly I see no error in respect of the request for the submission of the DNA evidence. The problem arises in relation to the response of the ECO to its absence. There is no doubt that paternity can be established by other means, and compelling circumstantial evidence, whilst not as conclusive as DNA evidence, would achieve this end. For this reason it is expected that the decision maker would engage with the material which was presented for his consideration as an alternative to that evidence. In his written submissions, Mr Keith for the Defendant states "*the other evidence has been considered… It was not persuasive or decisive*". In addressing the court he accepted that the decision letter was "inadequate". It seems to me that a better description would be "wholly inadequate". In fact, it completely fails to engage with any of the material which the Claimant's solicitors provided for a further consideration of the certificate of entitlement.

58. Whilst conclusive DNA proof that AH was the son of Atiful Nessa, his mother, who was known to be the second wife of Mr Rahim, and the mother of the three admitted siblings, albeit in a polygamous marriage, provided a layer of evidence which should have been addressed in the context of what else the Defendant knew from the history, there was an abundance of other material which should also have been considered and assessed. I am unable to accept that this material was considered, not least because it was not referred to. It seems to me most likely that the decision maker had, as Mr Ahmed submitted, developed a mindset that only DNA evidence of the paternity would suffice, and that this is what had been anticipated by the tribunal judge. This led to an approach which I am satisfied did not engage with the other material, and which rendered the decision that a relationship could not be established, being the first hurdle which the Claimant was required to overcome, as unlawful. In simple terms, it did not take into account all relevant material.

59. The question then arises as to how this reviewing court should deal with the unlawful aspect. Although this is but one of two hurdles which the Claimant must clear if he is to succeed in his quest for certification, as will become apparent, it is expedient to dispose of the resolution of the paternity issue first and foremost. Whilst a court of judicial review is predominantly concerned with errors of law, as both counsel acknowledged, and as is endorsed by the Court of Appeal in **Harrison** referred to above, where there is an identifiable precedent fact which is central to the issue as to whether or not a person is entitled to citizenship, and which is capable of resolution by the court, the matter should be determined on the merits. It is increasingly common for the Administrative Court to resolve such issues, although it should still be considered the exception, rather than the norm. The alternative here

[17] Most recent version March 2019 included in D's bundle

would be for the re-submission of the issue to the decision maker with a direction to take into account the balance of the evidence.

60. In my judgment, quite apart from noting Mr Keith's concession that this is unlikely to make any difference, there are compelling factors in the background to this case that suggests this course is inappropriate. First, unlike the earlier successful challenge there is no appeal tribunal to which the matter could be remitted, which is the usual ideal forum for reconsideration. Second, for a number of years the ECO did not challenge the paternity of AH. The evidence suggests that an application was first made within a very short time of his birth, and continued on frequent occasions thereafter. The first tribunal, whilst not seized of the issue specifically, did not question that Mr Rahim was the Claimant's father. I have identified as the basis for the unlawfulness of the March 2019 the decision a mindset, with a fixation on the requirement for DNA evidence.

61. Clearly paternity (pre-2011) had not previously been an issue for the decision maker, and in view of the eminent suitability of this court to resolve the matter on the evidence, in my judgment it would be appropriate to do so and not to remit for further consideration.

62. In this respect, I do not regard the issue as a difficult one to resolve on a balance of probabilities. Whilst the evidence presented is circumstantial, taken in the round it provides a compelling picture. The DNA evidence in relation to the mother is the starting point. This was a Muslim marriage prescribed by strict cultural and religious norms. It is difficult to contemplate possible circumstances in which Atiful Nessa would have given birth to a child at this time, especially when it is clear that her husband was present in Bangladesh, if Mr Rahim was not the father. Equally, the prospect of Mr Rahim continuing with numerous applications to obtain a right of abode for a child who was not his, is extremely implausible. Taking this into account with the balance of the evidence which includes a seemingly legitimate birth certificate, which I am satisfied was far closer to the birth of the child the Defendant has suggested, the statements of Mr Ali, the mother and the brother, and the official property and education documents, it seems to me more likely than not that AH was correctly identified as the natural son of Mr Rahim, and thus entitled to the privileges of being so identified. There is an absence of the necessary elaborate sophistication which would have to exist if all those involved in the previous application processes, and the present, one had fabricated evidence to support the relationship. Whilst the photographs of family connections do not advance the case very much further, the position here is a world apart from that which one sometimes sees in family life or disputed marriage cases where a relatively recent flurry of association is relied upon.

63. In such circumstances, I have little difficulty in coming to the conclusion, determining the precedent fact, that AH is the natural son of Mr Rahim.

Reasonable belief/legitimacy

64. As indicated above, that does not bring the matter to an end. It is necessary to consider the legitimacy question in the context of what is an admitted void marriage, and the

application of the Legitimacy Act reasonable belief question. In this respect, I remind myself that it is the reasonable belief of either parent (and not both) in the validity of the marriage that is presumed, and which the ECO is required to rebut.

65. The question, however, only arises if the father was domiciled in England and Wales the time of the birth. Otherwise, it would not be necessary to investigate the legitimacy of a child born within a polygamous marriage. The validity would be based upon the cultural, religious and procedural bounds of the country of domicile.

66. As an issue, domicile has been identified only very recently. For the Claimant, Mr Ahmed relies upon the compelling evidence of the passport entries, which show that Mr Rahim was in Bangladesh for a four year period (if the date of entry and departure are to be taken as accurate, and there is no reason why they should not be) and would contend that a conclusion is capable of being drawn that he intended this to be his domicile of choice on a permanent basis, even if circumstances meant that he decided subsequently to return to the United Kingdom. Mr Keith relied upon what he submitted was a finding by the first tribunal judge that Mr Rahim was domiciled in the United Kingdom. Although the court was provided subsequently with the policy guidance on nationality in relation to domicile, this is not an issue which was explored with any great precision during the course of argument, perhaps unsurprisingly in the light of the lack of evidence. In my judgment there was insufficient material to address the issue as to whether there had been a change of domicile, and bearing in mind Mr Rahim's citizenship established over many years, and his pursuit of applications to gather his children around him in the United Kingdom, compelling evidence would have been required. Accordingly it is not appropriate for this court either to investigate or to make any ruling that the late Mr Rahim's domicile at the time of the Claimant's birth, despite his residence in Bangladesh, was not that which he had chosen, namely the United Kingdom. It follows that the application of section 1 (4) (d) was appropriate.

67. Otherwise, in relation to this challenge, as indicated above, apart from referring to the issue of legitimacy as being a reason for the pre-2011 refusals, there is limited or no engagement with the question in the refusal letter from March 2019. The final paragraph does little more than provide a general statement of principle, but in fact does not purport to rely upon the crucial letters from 1994 and 1995. In my judgment, and assuming that the intention of the ECO was to rely upon the absence of legitimacy based upon a lack of reasonable belief, bearing in mind that there was a presumption of such reasonable belief which previously the Defendant had purported to contend was rebutted by the 1994/1995 letters, from which stance it had seemingly departed following the decision of IJ Traynor, it was incumbent on the decision maker at the very least to engage with the question and so that the Claimant was properly informed as to the basis for refusal.

68. However, even affording the Defendant the benefit of the doubt, there is a fundamental difficulty faced by her in respect of continuing reliance on the letter(s). Neither any longer exist. Historically, it had never been accepted on behalf of the Claimant or his parents that this letter had been received and understood by them in Bangladesh. It is clear that the communication of advice that any future children of a void marriage at the time would be taken by the ECO to be evidence of that reasonable belief had been rebutted. It was the

absence of any earlier advice which allowed the three older children to acquire a right of abode. Accordingly this letter was central and pivotal as indeed it was for the court in **MB (Bangladesh).** Unlike the situation which prevailed in that case, the letter or letters have been mislaid.

69. However, it is apparent that even if they existed, such advice by itself would not be determinative and further enquiry would be necessary, to be made by a suitable tribunal (in the case of **MB** the Upper Tribunal) in relation to understanding, culture, literacy, mode of communication, language and so on. In this judicial review, there is no tribunal to whom the matter could be remitted for further consideration as indicated. It would be a matter for the ECO, were the court so minded, to reconsider the question of legitimate descent and whether the advice had been properly received to rebut the 1 (4) (d) presumption. Yet without the letter(s) this would be a purposeless exercise.

70. It seems to me, in the circumstances, that whilst it might have been open to this court to make a precedent fact enquiry on this second question, as it has done on the first, this in fact is unnecessary, because there no evidential basis for the Defendant to even begin the process of rebutting the presumption. A reference by the vice consul in 2002 to a letter written seven years earlier falls woefully short of providing any such basis.

71. This in my judgment provides the simple answer to the second question. There cannot be any reliance upon an absence of legitimate consent because the presumption of reasonable belief of at the very least the Claimant's mother has not been rebutted. It is unnecessary to go any further. By this the decision, if it is to be interpreted generously as placing reliance on such matters, is unlawful.

Discrimination

72. That should be the end of the matter, and mean that it is unnecessary to consider the third alternative ground. However, for the sake of completeness I address briefly the question of discrimination, insofar as it might touch upon the Claimant's private and family life.

73. The point is validly made by Mr Keith for the Defendant, in my judgment, that discrimination under article 14 depends upon the establishment of a substantive article 8 breach. Whilst there may well have been a different treatment on religious or cultural grounds (i.e. the polygamous marriage) in relation to the three older children, article 14 does not have an independent existence and the two articles must be considered in conjunction. This is clear from the case of **Novruk v Russia [2016] EHRR 19**, and the judgment of the ECHR:

> "84. Article 14 guarantees the enjoyment of the rights and freedoms set forth in the Convention without discrimination. It has no independent existence, since it has effect solely in relation to the rights and freedoms safeguarded by the other substantive provisions of the Convention and its Protocols. However, the application of Article 14 does not presuppose a breach of one or more of such provisions, and to this extent it is autonomous. For Article 14 to become applicable, what is necessary, and also sufficient, is for the facts of the case to fall "within the ambit" of one or more of the Articles of the Convention or its Protocols (see

Kiyutin, cited above, § 54, and Thlimmenos v. Greece [GC], no. 34369/97, § 40, ECHR 2000-IV)."

74. There is little or no evidence of any family relationship between the father and older siblings and AH. Whilst recently there may have been some financial support provided, and visits from time to time by the late Mr Rahim to see his son, the Claimant's family life has been enjoyed in Bangladesh with his mother. There is no reason why there could not be continuing contact between the siblings as there has been throughout the life of AH albeit conducted at a distance. However, this is an academic question in the light of my determinations above.

Conclusion

75. In the circumstances, the Claimant succeeds on this judicial review claim. The decision of the entry clearance officer dated 28th March 2019 should be quashed, and a declaration provided that the Claimant is entitled to the certification of an entitlement to the right of abode in the United Kingdom. Insofar as the entitlement arises from the establishment of his relationship as a son of the late Mr Rahim, a British national, the declaration should also extend to the Claimant's British nationality and his entitlement to a passport. I did not hear any representations on the form of wording of any potential declaration, and therefore I invite the parties' additional written comments on the wording if appropriate. Further, I invite representations on the issue of costs, or is no reason why the usual order should not follow in favour of the Claimant.

76. The terms of the final order should be agreed prior to the formal hand down of judgment, which can be done remotely.

His Honour Judge Wood QC