IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/07914/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 February 2016	**On 14 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

MD MUSA KHAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRERTARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M K Mustafa
For the Respondent: Mr Mr S Staunton, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal from the decision of First-tier Tribunal Judge Housego, promulgated on 1 July 2015. The appellant was born in Bangladesh on 24 August 1998. He is one of four siblings, the others being Aysha Begum (born 10 April 1986), Tarif Khan (1 September 1991) and Taslim Khan (21

October 1993). The appellant's father Juad Khan became registered as a citizen of the United Kingdom and Colonies on 9 October 1962. The appellant's mother is Afia Begum. It was common ground that Juad Khan was living in Bangladesh at the date of the appellant's birth, but the judge made no finding as to his place of domicile at that time.

2. The appellant made an application for a Certificate of Entitlement to the Right of Abode on the basis that he was a child of Juad Khan. That application was considered by the Entry Clearance Officer in Bangladesh and reviewed by a manager on 22 December 2014. The application was refused on a number of bases. The first was that the photocopy of the British nationality certificate of Juad Khan was not accepted as legitimate. The second was the production of a non-genuine marriage certificate relating to Juad Khan and Afia Begum. The third was the lack of evidence to support the claimed relationship. And the fourth was in relation to certain DNA testing.

3. The appellant appealed to the First-tier Tribunal. The judge heard evidence from the appellant's brother, Tarif Khan. There was no Presenting Officer to represent the Secretary of State. Mr Mustafa acted for the appellant and he has done so again before me today.

4. The judge made findings of fact as follows. First he found, at paragraph 25, that there was no valid marriage between Juad Khan and Afia Begum. He further found, at paragraph 26, that Afia Begum could not reasonably have believed herself to be married to Juad Khan.

5. The judge continued:

> "27. If there had been a marriage I would find against the appellant on this point, as plainly the marriage (had there been one) would have been bigamous for Mr Khan, and polygamous for Afia Begum. Afia Begum lives in Bangladesh with the appellant. There is no witness statement from her. The burden of proof is on the appellant. It would not be reasonable to assume that she thought the marriage was valid when she could, but had not, said so.
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> 28. The appellant's birth certificate. The appellant produced a photocopy of a birth certificate, purportedly registering on 5 October 1998 the birth of the appellant on 24 August 1998. The certificate states that it was registered at the office of the chairman, local registrar of birth and death, No 1 Umorpur Union Parishad Sylhet. I do not find incredible [*sic?*] the explanation that the original certificate was lost, leaving only this photocopy, so that the birth had to be registered afresh. This is akin to a parish register, and even though compulsory registration of births was not required until 2003, the appellant's case is that his birth was registered on 5 October 1998 in a local register. No

evidence is produced, nor any explanation given, as to why that register does not exist, or has been destroyed, or why a duplicate of the register/certificate could not have been obtained. The registration of the birth some fifteen years after the event is a factor to be borne in mind in the decision-making process."

6. The judge's conclusions are at paragraph 34.

> "34. There is no evidence to link the appellant to Juad Khan other than the fact that the three who are his siblings were granted British citizenship on the basis that he was their father, and that as he is their full sibling, Juad Khan must have been his father too. It is possible, likely even, that the three earlier applications were based on invalid documents such as the false marriage certificate, since the marriage that did not occur was a prerequisite for those applications also."

7. The judge found at paragraph 36: "However, as I find that Juad Khan was not married to Afia Begum, polygamously or at all, the appellant is not legitimate. This is a fundamental problem with this application". Accordingly the appeal under the Immigration Act therefore failed.

8. At the outset of hearing before me, I discussed with Counsel the issues which had required determination before the First-tier Tribunal. After some discussion, I formulated the following questions which both agreed were the contested matters which had to be resolved.
   i. As a matter of fact, had there been a marriage at between Afia Begum and Juad Khan?
   ii. If so, was it void for bigamy/polygamy?
   iii. If so, does the statutory presumption of reasonable belief in the validity of the marriage apply, pursuant to the Legitimacy Act 1976?
   iv. And again if so (in order to determine the applicability of the statutory presumption) was Juad Khan domiciled in England and Wales at the time of the appellant's birth?

9. I received lengthy oral submissions on a range of legal and factual issues, all of which, to a greater or lesser degree, engaged one or more of these four questions. However, it was to the first question that argument was principally directed, since if the judge's disposal of this point was unassailable, it was implicitly accepted by counsel that none of the three following questions would fall for consideration.

10. In reality, notwithstanding the extensive legal arguments which were advanced on the appellant's behalf, both in oral submissions and in his skeleton argument, the substantive appeal is in fact no more than a challenge to the judge's finding of fact that appellant had failed to satisfy him that there had been a marriage between Afia Begum and Juad Khan.

11. Mr Mustafa accepted that the burden of proof lay on the appellant and the assessment of credibility and the weight to be given to different parts of the evidence were matters for the judge. Mr Mustafa submitted:
    i. that that the judge appeared to place undue weight on the fact that the marriage was not registered;
    ii. that the judge failed to give any, or any adequate, weight to the fact that the appellant's siblings had apparently been given a Certificate of Entitlement on separate applications at an earlier point in time.

10. Mr Mustafa drew my attention to the requirements of the Muslim Family Laws Ordinance of 1961, which applies to all Muslim citizens of Bangladesh and Pakistan. In the Secretary of State's guidance entitled 'Marriage', the Ordinance is described in the following terms:

> "It provides for all Muslim (or Mohammedan marriages) to be registered by a Nikah Registrar appointed by the Union Council. The Pakistan courts have in the past refused to recognise marriages which have not been registered in accordance with the ordinance. Polygamy (up to four wives) is allowed on condition that the man obtains permission for each marriage from the Arbitration Council. The ordinance is regarded as directive rather than mandatory since it makes no reference to the validity of marriages which do not conform to its requirements."

11. Mr Mustafa relies on this, on appellant's behalf, to support his proposition that registration of marriages is not required. Therefore, the lack of an authenticated register is not fatal. The difficulty here, however, is not simply the lack of registration but absence of any evidence to support the proposition that any marriage took place.

12. Notwithstanding the submissions made by Mr Mustafa, in my judgment no error of law can be demonstrated in this regard and, therefore, this appeal fails *in limine*.

13. In carrying out a full review of the evidence which was before the judge, and the manner in which he dealt with it, I note in particular:
    i. that the burden of proof was on the appellant (para 27);
    ii. that no witness statement was adduced from Afia Begum (para 27). In the course of argument, Mr Mustafa handed up a statement apparently from her but stated it was only to be deployed if I found an error of law and decided to remake the decision;
    ii. the issue of non-registration was not of the generalised type addressed in the Guidance quoted above, but one of greater specificity. As the judge found (para 25), the alleged marriage occurred in circumstances where marriages were routinely registered (notwithstanding that this practice may not have been mandatory) and that a check against the register demonstrated an obvious mismatch between the content of the register and the details on the purported marriage certificate. The judge made a positive finding on

the evidence that there had been no marriages registered on the alleged date of 25 June 1983. It was not the appellant's case that the practice was not to register marriages; on the contrary the case was put on the basis of *de facto* registration which the judge rejected after carefully considering and assessing the evidence which was before him.

14. It is not open to the Upper Tribunal to review the factual findings made by the judge. His findings are clear, supported by cogent reasons, and based upon his assessment of the evidence, the credibility of witness and the weight to be afforded to documents, some of which he concluded were of dubious provenance. He found that there was no valid marriage. He further found that Afia Begum cannot reasonably have believed herself to have been married. Both these findings were open to him on the evidence. It therefore follows that no error of law can be demonstrated in relation to these factual findings of the judge.

15. There are some further matters which I need to deal with since reliance placed upon them by Mr Mustafa. First, he advanced something akin to an estoppel argument, suggesting that the Secretary of State was in some way obliged to grant the appellant a Certificate of Entitlement since such a Certificate had been granted to each of his siblings. I do not consider there to merit in this submission. As a general principle, like cases should be treated alike, but a case which fails under the Immigration Rules cannot be saved by reference to a related matter in which, through oversight, inadvertence or (indeed) deceit, a contrary conclusion was reached. Each case turns on its merits.

16. Secondly, Mr Mustafa suggests that in some way the Secretary of Estate was under an obligation to inform the appellant in advance that the marriage certificate was not accepted as valid and that she did not consider herself bound by the manner in which the appellant's siblings were treated. I can see no merit in this submission either. The burden of proof is on the appellant throughout, and it is for him or his advisers to marshal and deploy such evidence as they deem relevant and sufficient to discharge that burden. It was clear from the Entry Clearance Officer's refusal that the certificate of marriage was not accepted as genuine so the appellant was on notice that the existence of the marriage was in issue. If the appellant or his advisers chose not to place relevant evidence before the judge (including but not limited to a statement from a surviving partner to the alleged marriage), that does not invalidate the judge's conclusions.

17. Finally, Mr Mustafa drew my attention to regulation 4 of the Immigration (Certificate of Entitlement to Right of Abode) Regulations 2006 and suggested that this was an appropriate case for waiver of the requirement for the provision of a particular document, whether an original or a photocopy. This submission, too, is flawed because the judge's finding that there had been no valid judge was based upon his assessment of the

totality of the evidence placed before him and not upon the absence of any particular document whose production could have been waived.

18. As I have already indicated, my rejection of the principal ground is dispositive of the entire appeal. If, as I find, there was no error of law on the part of the judge in finding as a fact that there was no valid marriage (nor any reasonable belief in such a marriage on Afia Begum's part) then the subsequent questions do not fall to be addressed and the alternative grounds of appeal become purely academic.

19. In all the circumstances, for the reasons which I have given, this appeal is dismissed.

Notice of Decision

Appeal dismissed.

No anonymity direction is made.

Signed *Mark Hill* Date 3 March 2016

Deputy Upper Tribunal Judge Hill QC