



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/19896/2012

THE IMMIGRATION ACTS

Heard at Field House
On 7 November 2013

Determination Promulgated
On 13 November 2013

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

MISS MUSLIMA KHANOM
(No Anonymity Direction Made)

Appellant

and

ENTRY CLEARANCE OFFICER - DHAKA

Respondent

Representation:

For the Appellant: Not legally represented. Her father and sponsor attended.
For the Respondent: Mr E Tufan a Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. The appellant is a citizen of Bangladesh who was born on 12 April 2005. She has been given permission to appeal the determination of First-Tier Tribunal Judge Shepherd ("the FTTJ") who dismissed her appeal against the respondent's decision of 18 September 2012 to refuse to grant a Certificate of Entitlement to the Right of Abode in the UK ("the Certificate"). The appellant and her younger sister Mukaroma who was born on 16 January 2007 both applied to the respondent at the same time and both were refused for essentially the same reasons.

2. The sponsor for the appellant and her sister is their father, Mozir Khan, a registered British citizen originally from Bangladesh who lives in Essex with his first wife, the children of their marriage and three children by his second marriage. The mother of the appellant and her sister is the second and polygamous wife of the sponsor and she lives in Bangladesh.
3. The basis of the applications made by the appellant and her sister is that they are both the children of the sponsor who is a British citizen otherwise than by descent and who has the right to pass this entitlement to a right of abode to his children.
4. In the absence of DNA evidence the respondent concluded that the appellant and her sister had not established that the sponsor was their father. There was no evidence as to arrangements for their care or education in the UK, that he had supported them or made important decisions in their lives. It was not suggested that their mother would leave Bangladesh. The respondent also considered but rejected the application on Article 8 human rights grounds.
5. The appellant and her sister appealed and the FTTJ heard the appeal on 6 June 2013. They were not legally represented but the sponsor attended on their behalf. The respondent was represented. The FTTJ heard evidence from the sponsor through an interpreter. He was offered but declined an adjournment in order to obtain legal representation.
6. The sponsor produced DNA test results and other original documents all of which were accepted as genuine. The Presenting Officer conceded and the FTTJ found that the DNA evidence established that the sponsor was the father of the appellant and her sister. She found the sponsor to be a credible witness.
7. The FTTJ found that the sponsor was domiciled in England and Wales and that for the purposes of English matrimonial and nationality law the appellant and her sister were born outside a lawful marriage and remained so. She said, in paragraph 43; "the respondent avers that to acquire citizenship "by descent" requires that it is legitimate descent. This is the sole issue in the appeal."
8. The FTTJ found that three of the sponsor's children by his second marriage who had come to this country were presumed to be legitimate by virtue of Section 1 of the 1976 Legitimacy Act but this was not the case for any subsequent children. Whilst there was no legislation which assisted the appellant her younger sister benefited from the provisions of the British Nationality (Proof of Paternity) Regulations 2006 made under Section 50 (9B) of the British Nationality Act 1981. This provides that for children born after 1 July 2006 citizenship by descent and acquisition of the right of abode through their father no longer depended on legitimacy, whether presumed or otherwise. Her legitimacy was no longer a bar to tracing nationality through the father who was either (a) the father named in the birth certificate issued within one year of the birth of the children or (c) was able to satisfy

requirements as to proof of paternity under the Regulations. The FTTJ said and I agree that it was unfortunate that for the appellant these provisions did not apply to her because her date of birth was before 1 July 2006. The FTTJ concluded that she was forced to the conclusion that, whilst allowing the appeal of the appellant's sister, the appellant's appeal failed under the provisions of the Immigration Act 1971 and the British Nationality Act 1981. She dismissed the appellant's appeal.

9. The sponsor applied for permission to appeal on the appellant's behalf. A judge in the First-Tier Tribunal granted permission on the basis that; "the grounds of appeal essentially refer to the desire to have a family together in the UK. The appellant's qualified right under Article 8 was considered by the entry clearance officer and a not restrictive interpretation of ground 2 of the original grounds of appeal might suggest that the appellant was relying on Article 8. This was not a matter dealt with by the judge and could therefore be said to be an arguable error in law. As such permission to appeal is granted."
10. The sponsor appeared before me, accompanied by one of his sons. He said that the family could not afford legal representation. I explained the nature of my task and that I would assist him as far as I could. It was clear and he accepted that he was in no position to deal with the legal aspects of the appeal. The main point he wished to make was that all his children by his second marriage were now in this country legally, except for the appellant's sister who would be coming soon, the appellant and another son born to his second wife on 14 January 2013.
11. I accept that what is said in the grounds of appeal to the Upper Tribunal, whilst making no mention of "Article 8" or "human rights", can properly be interpreted as raising some matters which would be relevant to any Article 8 grounds. I note that Article 8 issues were addressed by the respondent in the refusal document. I cannot find anything in the grounds of appeal to the First-Tier Tribunal which expressly or by implication raises Article 8 human rights grounds. However, the FTTJ did address Article 8; in paragraph 52 of her determination she said;

"I have considered the matter in the light of Article 8, but concluded that even if it was shown that there has been established a family life in the UK between (the sponsor) and (the appellant), such that denial of an entry clearance would be a disproportionate interference, I remind myself that there is no appeal before me concerning an application for entry clearance. The application the subject of this appeal was for the issue of a Certificate to which the appellant maintained she was entitled on the basis of her biological relationship with a British citizen, and the law as it currently stands. The facts have demonstrated that she is not, in my view, so entitled and that is the limit of this appeal. The mechanism by which a positive finding under Article 8 may result in the grant to a discretionary period of leave to enter or remain in the UK may not be deployed to direct

the foreign post to issue a Certificate as to facts which manifestly may not be so certified."

12. The appellant had a right of appeal against the refusal of the Certificate under s 82 (1) and (2) (c) of the Nationality, Immigration and Asylum Act 2002. The grounds of appeal available to her include human rights grounds under s 84 (1) (c) of the same Act. The question arises as to what, if any, remedy is available to the appellant if it was found that the decision to refuse her the Certificate breached her Article 8 human rights. I agree with the FTTJ that it would not be an appropriate remedy to issue her with a Certificate to which she was otherwise not entitled. One possible alternative would be for her to be given entry clearance to the UK, possibly for settlement. No doubt this is what she wants but it is not what she asked for. I reach the same conclusion as the FTTJ and find that in this regard she did not err in law.

13. However if I am mistaken and there is an appropriate remedy available to the appellant on Article 8 human rights grounds then I find that there was insufficient evidence before the FTTJ which, on a proper assessment, could have led her to the conclusion that there was a disproportionate interference with the appellant's Article 8 human rights. There is some relevant information, for example the status and place of residence of the sponsor, his first and second wives and most of the children by his second wife and the unfortunate legal position which permits one sister to come to this country but not the other. On the other hand there is likely to be far more information which has not been provided but would be available and important to the assessment of any Article 8 grounds. The appellant and the sponsor were put on notice as to what some of this information might be in the refusal document, for example the support the sponsor has been providing for the appellant in Bangladesh, who has been making the important decisions in her life, the arrangements for the appellant's care and education in the UK and the position of the appellant's mother in her life bearing in mind that she as a polygamous second wife is unlikely to obtain leave to come to this country if indeed she wants to.

14. I find that the FTTJ did not err in law or, if she did in relation to any Article 8 human rights grounds that any judge properly directing him or herself would inevitably have come to the same conclusion. Any error is not one which should result in the setting aside of the decision. I uphold the FTTJ's decision.

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Signed
Upper Tribunal Judge Moulden

Date 8 November 2013