IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/13966/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 30th October 2014	**On 6th November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

MISTRESS MAZEDA BEGUM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Islam, Counsel
For the Respondent: Mr Kandola, Senior Home Office Presenting Officer

DECISION AND REASONS
EXTEMPORE JUDGMENT

1. The Appellant appeals with permission a decision of the First-tier Tribunal, Judge Sweet, promulgated on 14th May 2014 in which this Bangladeshi Appellant's appeal against the Respondent's refusal of her application for Certificate of Entitlement along with that of her brother Mohammed Husain

Miah was dismissed. Permission has not been granted in respect of Mr Mohammed Husain Miah and the only appeal that I am considering is that of Miss Mazeda Begum.

2. The grounds of the application upon which permission is granted assert that the judge has failed to pay regard to the statutory provisions regarding the presumption of legitimacy for the children of void marriages. That was a matter that was particularly pertinent in this Appellant's case, for reasons that I shall come to shortly. Permission was granted on that ground, but also on the basis that the judge failed to take account of a decision by First-tier Tribunal Judge Chana, promulgated on 12th February 2007, concerning the Appellant's half-sister Mahmuda Begum, where the factual matrix and legal issues were as they largely are in this appeal, and in which he decided that the marriage was a valid one and that in the alternative that the presumption applied.

3. The matter came before me to decide and, there being no application to admit additional evidence, the representatives proceeded on the basis of submissions only. I indicated at the beginning of the hearing that, as per the grant of permission it was apparent from the judge's determination that the judge had not made a finding in respect of the domicile of the Appellant's father, and further, even if it had been found that he was domiciled in the UK at the time of this, his third marriage, there had been no consideration of the impact of the statutory presumption with regard to legitimacy, as set out in Section 1 of the Legitimacy Act 1976. The judge had stopped at his consideration that the divorce certificate, not put before him, would if valid operate to make the marriage valid. Inter alia in light of the failure to give consideration to the issues in the alternative the judge's decision making process is vitiated by legal error to the point that the decision must be set aside and remade.

4. Before deciding whether to remake the decision I took the opportunity of clarifying with Mr Kandola whether the Respondent had brought before the First –tier, or was even able to bring forward now, evidence to rebut the presumption of legitimacy at Section 1 (4) of the Legitimacy Act 1976, which I set out below. Mr Kandola indicated that albeit a switch by the father, from his Bangladeshi domicile of origin to one of choice of the UK, might be inferred from his having held his British passport since 1968, and so for some 30 years before the Appellant's birth, the judge had not made a finding on the point, and he could not say if there had been any argument on the issue. In the context of the presumption of legitimacy he could take me to no evidence of rebuttal before the First tier, and he had none to adduce before me.

5. I find therefore that even taking the Appellant's case at its lowest i.e. assuming that her father had entered into a polygamous marriage to her mother, and that it remained so as at the time of her birth, and that it was a marriage where one of the parties, in this case her father, was in fact domiciled in the United Kingdom, so that the marriage is void in the context of Section 11D of the Matrimonial Causes Act 1973, absent

evidence to rebut the presumption that the mother believed it valid, the Appellant's case must succeed.

6. Section 1 of the Legitimacy Act 1976 reads as follows:

> "1. Legitimacy of children of certain void marriages
>
> (1) The child of a void marriage, 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 if later) both or either of the parties reasonably believed that the marriage was valid.
>
> (2) This section only applies where 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.
>
> (3) It is hereby declared for the avoidance of doubt that subsection (1) above applies notwithstanding that the belief that the marriage was valid was due to a mistake as to law.
>
> (4) In relation to a child born after the coming into force of section 28 of the Family Law Reform Act 1987, it shall be presumed for the purposes of subsection (1) above, unless the contrary is shown, that one of the parties to the void marriage reasonably believed 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 if later) that the marriage was valid.

7. As subparagraph (4) above reveals even taking the case at its lowest, so as to assume the father had at the relevant times a British domicile, absent rebuttal evidence the issue of the mother's belief is statutorily determined by the operation of the presumption. I note that when the matter was before Judge Chana in respect of the half-sister that the issue of the presumption was live, and that in that case, Judge Chana noted that no evidence was available to the Respondent to rebut that presumption. None was put before the First-tier Tribunal in this case. No application to adduce additional evidence is made to me. I can see no reason not to remake the decision on the evidence.

8. The only reasonable conclusion available, bearing in mind the presumption, is that the Appellant's mother did reasonably believe at the material time that the marriage was valid. In those circumstances the decision of the First-tier Tribunal should have been to allow the Appellant's appeal, and that is the way that I remake the decision today.

Signed E DAVIDGE Date 04 November 2014

Deputy Upper Tribunal Judge Davidge