



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/07679/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 22 May 2018**

**Decision & Reasons Promulgated
On 5 June 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

ENTRY CLEARANCE OFFICER (NEW DELHI)

Appellant

and

R B

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Respondent: Mr M M Hossain, Counsel
For the Appellant: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. This matter comes before me for consideration as to whether or not there is a material error of law in the determination of First-tier Tribunal Judge Abebrese (“the FTTJ”), promulgated on 30 October 2017, in which he dismissed an appeal against the refusal of an application for a Certificate of Entitlement to a right of abode in the UK pursuant to s2 of the Immigration Act 1971.
2. For the sake of convenience, I refer to the parties as they were in the First-tier Tribunal with the Entry Clearance Officer as the respondent notwithstanding it is the Entry Clearance Officer who pursues this appeal.
3. Whilst no anonymity direction was made in the First-tier Tribunal, I make such a direction now because of my references to the appellant’s and her family’s personal circumstances.

Background

4. The appellant claims to be born on 2 February 1973. She is a citizen of Bangladesh. She claims to be the legitimate daughter of S A who became a naturalised British citizen before her birth. She claims to be the child of her father's second, bigamous, marriage. The appellant's case, before the First-tier Tribunal, was that her birth was legitimate because her father had been domiciled in Bangladesh at the time of his marriage to her mother.
5. In the refusal decision of 20 March 2015 the respondent referred to an earlier decision of the First-tier Tribunal promulgated on 16 February 2014 in which the Judge had found the appellant was indeed the biological daughter of S A who was registered as a Citizen of the UK and Colonies on 29 July 1971. The Judge was unable to make findings on the appellant's age and whether she was born before or after her father registered as a British citizen. The Judge found there was no evidence capable of establishing the appellant's father was domiciled in Bangladesh at the date of marriage to her mother or at the date of her birth. The Judge could not find therefore that the appellant was the legitimate child of her father or entitled to a right of abode as her father's daughter.
6. The respondent, in the notice of decision, noted the appellant had supplied various documents with her fresh application but that these could not be verified. He considered such documents could easily be created in Bangladesh; they appeared to be self-serving with no corroborating evidence. The respondent did not consider the appellant had addressed the concerns of the First-tier Tribunal. Furthermore, the letter which the appellant had provided from a school had referred to the appellant as male and there was no explanation for this discrepancy. The respondent refused the application on 20 March 2015.
7. FTTJ Abebrese found the evidence before him, including oral evidence, to be consistent and credible. He allowed the appeal. The respondent sought permission to appeal and this was granted in the following terms:
 - “ ...
 2. It is arguable that the judge has erred in failing to consider the domicile of the appellant's father at the time of her birth and this may constitute a misdirection in law.
 3. It is arguable that the judge has erred in failing to address the issue of whether or not the appellant was born legitimate.
 4. It is arguable that the judge has failed to address the issue of the appellant's father's domicile at the date of his marriage to his second wife, the appellant's mother. ...”

Hence the matter came before me.

Submissions

8. Mr Tarlow, for the respondent, relied on the application grounds. At [14] the FTTJ had referred to the only issue to be decided as being whether the appellant was born after her father had registered as a British citizen. It was submitted that the FTTJ had failed to consider whether the appellant's father was domiciled in Bangladesh at the date of her birth or whether, having been registered as a British citizen, he was in fact domiciled in the UK. Furthermore at [3] the FTTJ highlighted the earlier findings of the First-tier Tribunal including that the appellant had to prove she was the legitimate child of her father. It was submitted that the FTTJ had failed to address the issue. Finally, it was for the appellant to prove that her father was domiciled in Bangladesh at the date of his marriage to her mother, given he was still married to his first wife

at the time, and not in the UK as was believed by the respondent. Mr Tarlow made the point that the father's domicile was relevant to the issue of the validity of the marriage and hence the legitimacy of the appellant. He submitted that the failure to make findings on those issues was a material error of law. Had he done so the outcome might have been different.

9. Mr Hossain, for the appellant, submitted that the FTTJ had heard oral evidence from the appellant's family in the UK, including her step-mother (the appellant's father's first wife). It was accepted that the FTTJ had not, in so many words, made specific findings on the appellant's father's domicile and her legitimacy but he submitted that, had he done so, the outcome would have been the same, given the evidence to the effect that the appellant's father had spent most of his time in Bangladesh, as evidenced by the birth of the appellant's step-siblings there. The FTTJ had found the appellant's step-mother and step-brother credible witnesses. He submitted that the appellant's parents' marriage certificate had not been challenged by the respondent; the appellant's father had been in Bangladesh on that date.

Findings

10. I agree with the parties that there were outstanding issues before the FTTJ which should have been and were not specifically decided by the FTTJ: the appellant's date of birth; where her father was domiciled at the date of marriage to her mother and at the date of her birth and thus whether the appellant was the legitimate child of her father. The FTT had already made findings as to the date on which the appellant's father had been naturalised as a British citizen and those findings were adopted by the FTTJ. Mr Hossain accepts the FTTJ failed to address the issues of the appellant's father's domicile at the date of marriage and date of her birth. These are matters which should have been addressed and decided by the FTTJ; indeed the FTTJ identifies as much when citing the earlier FTT findings. It is not clear why the FTTJ did not address these. I indicated to the parties at the hearing that I would find the FTTJ had erred in law for failure to address these matters which are at the heart of the appeal. I invited submissions on materiality.
11. On this issues, it is the respondent's case that the outcome of the hearing might have been different had these matters been addressed. For the appellant, it was submitted that, given the FTTJ's findings as regards the credibility of the witnesses and the reliability of the documentary evidence, there could have been no different outcome.
12. Before me, the respondent has not challenged the credibility findings of the FTTJ or the FTTJ's positive findings with regard to the reliability of the documentary evidence. Thus they stand. He heard in person from the appellant's step-mother (the appellant's father's first wife), and her step-brother (the eldest son of her father's first wife) who claimed to be born four months after the appellant. The FTTJ found at [14] that the evidence of the appellant's step-mother and step-brother was "consistent and credible". He noted they both stated "that the appellant was born after the birth of [the appellant's step-brother]". The FTTJ stated he found it "credible that the appellant's late father did register as a British citizen before the birth of the appellant as this coincides and is consistent with the evidence of the chronology of [the appellant's stepmother] in that she was the first wife of the appellant's late father and that she gave birth to her first son [the appellant's stepbrother] and after this the appellant was born". Whilst this phraseology is a little difficult to follow, the unchallenged finding of the FTTJ is that the appellant's stepbrother was born on 6 October 1972 (see [12]) and the appellant's father had earlier been naturalised on 29 July 1971 (as found by in the previous FTT determination, see [3]). It can reasonably be inferred that the FTTJ, having accepted as reliable the evidence of the witnesses, would have found the appellant was born, as she claims, on 2 February 1973 when her father was British.

13. Mr Hossain submitted that the appellant's parents' marriage certificate had not been challenged by the respondent. However, this is not correct, as is clear from the notice of immigration decision where the respondent specifically states that the appellant's documents could not be verified and that false documents were readily available in Bangladesh. That said, the FTTJ took the respondent's concerns into account at [15] in his assessment of the documentary evidence. The FTTJ identifies at [16] the evidence he has taken into account. He also makes specific reference to another specific area of concern for the respondent, namely the inappropriate pronoun in the letter from the appellant's school. However, he finds that this "does not undermine the credibility of the appellant's claim and that the appellant did indeed go to that school ...". This finding is not challenged before me. He notes that the "documentary evidence is consistent with all of the other evidence in particular those of the two main witnesses in this appeal". He goes on to state "it is unfortunate that the respondent was not represented in this appeal so that they would have had the opportunity to cross-examine the witnesses and to test the robustness of their evidence in this appeal".
14. The FTTJ has considered all the evidence, addressed the concerns of the respondent in his notice of decision and come to conclusions which are sustainable on the evidence. Given that he accepted as credible the evidence of the witnesses he would have found the appellant's father had been domiciled in Bangladesh at the date of his marriage. The affidavit evidence, which the FTTJ accepted as reliable, is that the appellant's parents married on 11 July 1966 in Bangladesh when the appellant's father was domiciled there. The appellant's father became a British citizen on 29 July 1971. The FTTJ found, on the evidence of the appellant's step-brother that, following his naturalisation "he spent most of his life in Bangladesh" [12].
15. With regard to the appellant's birth and her father's domicile at that date, the appellant's step-brother's evidence is that his father "had been living mainly with them in Bangladesh until his birth [the parties agreed before me this should be "death", rather than "birth"]". He was buried in Bangladesh. After he registered as a British citizen he spent most of his life in Bangladesh." There is no challenge to the FTTJ's reasoning for his credibility findings. Thus it can reasonably be inferred that the FTTJ would have found, had he addressed the issue specifically, that the appellant's father was domiciled in Bangladesh at the time of the appellant's birth.
16. Given the content of the witness and documentary evidence which addresses the issues to be decided by the FTTJ and his positive credibility findings, the outcome of the appeal would have been no different: the FTTJ, had he gone on to do so, would have found that the appellant was the legitimate daughter of a naturalised British subject. Thus the appeal would have been successful notwithstanding the errors of law identified above.
17. For these reasons, I am satisfied that while the FTTJ's decision contains errors of law, they are not such as to impact on the outcome of the appeal.

Decision

18. The making of the decision of the First-tier Tribunal did not involve material errors on points of law.
19. I do not set aside the decision of the FTTJ.
20. This appeal is dismissed.

A M Black

Date 1 June 2018

Deputy Upper Tribunal Judge A M Black

Anonymity Direction

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. We do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of his protection claim.

Fee Award

The FTTJ did not make a fee award. I have considered making a fee award because I have allowed the appeal but do not make such an award. The appeal was successful largely because the appellant produced at the hearing sufficient evidence to demonstrate her entitlement to a right of abode.

A M Black

Date 1 June 2018

Deputy Upper Tribunal Judge A M Black