Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/05445/2011

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 6 August 2013	**On 9 August 2013**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

MRS SUZIA ABDIN

Appellant

and

ENTRY CLEARANCE OFFICER - DHAKA

Respondent

Representation:

For the Appellant: Ms H Foot of counsel instructed by Syed Shaheen solicitors
For the Respondent: Mr G Saunders a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Bangladesh who was born on 4 June 1985. In April 2004 she married the sponsor, who is a British citizen, in Bangladesh. He had previously married another woman but it was claimed that they separated in June 2003 when he gave her an Islamic divorce which became effective 90 days later. Their divorce was not finalised by UK proceedings until November 2009. The appellant and the sponsor have four children three of whom were born before the date of the decision.

2. In September 2010 the appellant applied for entry clearance for settlement in the UK as the spouse of the sponsor with their children as dependants. This was her second application, the first having been made and refused in October 2005. The second application was refused on 20 December 2010. Two interrelated reasons were given. First, the respondent considered that the appellant's marriage to the sponsor was not a valid marriage because his divorce from his previous wife post-dated his second marriage by over four years. Second, because the sponsor was domiciled in the UK he could not lawfully contract his second marriage to the appellant so as to satisfy paragraph 281(i) of HC 395.

3. The appellant appealed. The grounds of appeal were that the sponsor had validly divorced his first wife before contracting his marriage with the appellant and so the appellant did meet the requirements of the Immigration Rules. Further, it was stated that the refusal decision infringed the appellant's human rights.

4. On 30 November 2011 First-tier Tribunal (FTT) Judge Neyman heard the appellant's appeal. She was represented but the respondent was not. After the hearing, on 4 October 2011, the judge sent detailed narrative directions to the parties asking the appellant to address matters which, wholly or in part, had not been raised at the hearing. Specifically she was asked to submit DNA evidence and to produce the original of the sponsor's tenancy agreement together with expert evidence as to why the tenant's covenants were limited.

5. Having made adverse credibility findings on the sponsor's credibility, the judge concluded as follows:

> "44. The sponsor is now 45 years old and he left Bangladesh when he was 20 i.e. he has lived here for the last 25 years i.e. more than half of his life. He is a national of this country. When his last Bangladeshi passport expired in May 2004, he did not bother to renew it. He works in the United Kingdom and has done so for many years. In paragraph 1 of his statutory declaration the sponsor said that he is "permanently settled in the United Kingdom". All these factors when taken together indicate that the sponsor has made a decision to abandon his domicile of origin and to acquire a new domicile of choice in the United Kingdom. In addition, the sponsor is not a credible witness, so I attach little weight to his claims that he has retained his domicile of origin i.e. Bangladesh and that he has not acquired a domicile of choice i.e. the UK.
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> 45. For all these reasons, I find that the sponsor is domiciled in the United Kingdom and that he has been so domiciled at all relevant times. Given that the sponsor did not divorce his first wife until 2009 and that he married the appellant in 2005, his marriage to the appellant is polygamous and so it is not a valid marriage at English law.
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> 46. I now turn to the requirements of paragraph 281 of the Immigration Rules which requires (inter alia) that the applicant be married to the sponsor. Since the appellant has failed to show that her marriage to the sponsor is valid at English law, she cannot succeed under paragraph 281. In addition, given that the sponsor is not a credible witness, he has failed to show that he intends to live

permanently with the appellant, so that again her appeal under paragraph 281 of the Immigration Rules must fail. In addition, since the sponsor has failed to show that he has the accommodation claimed, the appellant has failed to show that there would be adequate accommodation for her here without recourse to public funds, so that, for this additional and independent reason, her appeal must fail under the Immigration Rules. For all these reasons, I must dismiss the appellant's appeal under the Immigration Rules and I hereby do so."

6. The appellant applied for and was granted permission to appeal to the Upper Tribunal. The appeal was heard by Upper Tribunal Judge Storey ("the UTJ") on 13 April 2012. He was satisfied that the FTT Judge was justified in finding that the appellant's husband and sponsor had not retained a Bangladeshi domicile and, prior to the date of his marriage to the appellant, he had acquired a domicile of choice in England and Wales. The FTT judge was correct to consider that the sponsor's acquisition of a UK domicile of choice meant that his marriage to the appellant, being actually polygamous, was void.

7. In relation to the grounds of appeal addressing the accommodation requirements of the Immigration Rules the UTJ assessed the position on the basis that the FTT judge had ensured procedural fairness by notifying the appellant in advance and by way of directions that accommodation was considered by him to be a live issue and that at the hearing the sponsor was afforded an opportunity to address this issue. Unfortunately, as is now common ground, that was not the position or the order of events. The FTT judge did not raise his concerns about accommodation until after the hearing. In the light of his understanding of the position the UTJ concluded that the appellant's appeal was also properly dismissed for failure to satisfy the accommodation requirements of the Immigration Rules.

8. The grounds addressed by the UTJ also contended that the FTT Judge erred in his assessment of the appellant's Article 8 claim. The UTJ concluded that as the UK passport authorities had issued British passports to three of the children the FTT judge was wrong to find that there was no family life relationship between the appellant and the sponsor. (I note that it is now said that all four of the children have British passports. The discrepancy arises because the fourth child was born after the application was made.) The ECO's grounds of refusal did not challenge the appellant's claim that the sponsor was the father of her three children and in the circumstances the FTT judge erred in law when he concluded that they were not related as claimed just because they had not availed themselves of the opportunity to produce DNA test results.

9. However, the UTJ did not consider that the error was a material one largely because the sponsor had made no effort to apply for entry clearance for his wife until 2009, even though on his own account he had the legal capacity to marry her from 2003 onwards. The UTJ subsequently accepted, in dealing with the application for permission to appeal to the Court of Appeal, that the appellant had submitted documentation that showed that she first applied for settlement in October 2005.

10. The UTJ concluded that the FTT judge did not materially err in law and upheld his decision to dismiss the appellant's appeal.

11. The appellant applied for permission to appeal to the Court of Appeal which was refused by the UTJ. The application was renewed to the Court of Appeal and permission was granted by Davis LJ. Following the grant of permission there was a consent order made by Moses LJ on 19 June 2013 quashing the decision of the UTJ and remitting the appeal to the Upper Tribunal for reconsideration. The order was accompanied by a Statement of Reasons agreed between the parties which stated, in paragraph 2 :-

> "The respondent accepts that the UTIAC misdirected itself in law for the following reasons: –
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> a. The UTIAC erred in law by upholding the finding of the First-Tier Tribunal ("FTT") that the appellant's sponsor had lost his domicile of origin in Bangladesh. In this respect the evidence adduced was insufficient to show that domicile had been lost.
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> b. The UTIAC misdirected itself in law by concluding that there was no breach of Article 8.
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> c. The UTIAC wrongly concluded that the procedure adopted by the FTT in respect of the appellant's accommodation was a fair one."

12. Both representatives agreed and I find that the clear effect of the order of the Court of Appeal and the Statement of Reasons is, firstly and obviously that the decision of the UTJ has been quashed. Were this is the only conclusion my first task would be to consider whether the FTT judge erred in law. However, both representatives agree and I find that there is also a conclusion that the FTT judge erred in law in at least three respects namely his conclusions that the sponsor had lost his domicile of origin, there was no breach of Article 8 rights and that there had been procedural fairness in relation to the question of adequacy of accommodation.

13. Mr Saunders stated that what was set out in the Statement of Reasons meant that the respondent had accepted that the sponsor had not lost his domicile of origin in Bangladesh. He formally conceded that this was still the respondent's position and that as a result the appellant was at all relevant times validly married to the sponsor. Mr Saunders also said that the respondent did not wish to depart from the reasons for refusal. The question of adequacy of accommodation under the provisions of the Immigration Rules was not disputed then or now. He was not authorised to concede the appeal as a whole but had no further submissions to make and asked me to substitute my decision for that of the FTT judge.

14. Ms Foot said that if the appeal was allowed under the Immigration Rules the appellant would not pursue the appeal on Article 8 human rights grounds.

15. Mr Saunders' concession that the respondent accepted that the sponsor had not lost his domicile of origin in Bangladesh and that as a result the appellant was at all relevant times validly married to the sponsor disposes of the only reasons for refusal given by the respondent. The respondent has been given the opportunity to adopt the point taken by the FTT judge and to question whether the appellant meets the accommodation requirements of paragraph 281 of the Immigration Rule but has declined to do so. That alone is sufficient to dispose of the point but, as it was raised by the FTT judge, I will address this. In his directions the FTT judge asked to see the original tenancy agreement and expressed concern that there were only limited tenant's covenants in the copy he had seen. He asked for a satisfactory written explanation from a qualified individual as to why the tenant's covenants were so limited. I have seen a copy of the tenancy agreement which is a "TENANCY AGREEMENT for letting a furnished dwelling house on an assured shorthold tenancy under Part 1 of the Housing Act 1988". In the light of the provisions implied by the Housing Act 1988 it does not appear to me that the agreement is deficient in respect of tenant's covenants or otherwise. It is in a standard form widely used and often seen. I also note that there is an immigration housing report with detailed information about the property which expresses the opinion that it would not be statutorily overcrowded for the occupation proposed by the appellant and the sponsor.

16. I set aside the decision of the FTT judge and remake the decision by allowing the appellant's appeal under the Immigration Rules.

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Signed Date 7 August 2013

Upper Tribunal Judge Moulden