



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

Appeal Number: OA/22240/2012  
OA/22247/2012

**THE IMMIGRATION ACTS**

**Determined at Field House  
On 1<sup>st</sup> July 2014  
(following oral hearing on 2<sup>nd</sup> May 2014)**

**Promulgated on:  
On 2<sup>nd</sup> July 2014**

**Before**

**UPPER TRIBUNAL JUDGE COKER**

**Between**

**ABADUL ISLAM  
MONIRA BEGUM**

Appellants

**And**

**ENTRY CLEARANCE OFFICER**

Respondent

**Representation at the hearing on 2<sup>nd</sup> May 2014:**

For the Appellant: Mr M Hussain, Zahra & Co solicitors  
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The First-tier Tribunal dismissed the appellants' appeals against the refusal of the Entry Clearance Officer to issue them with Certificates of Entitlement to a right of abode.
2. On 17<sup>th</sup> March 2014 I granted permission to appeal on the grounds that it was arguable that the judge had failed to give adequate consideration to the DNA evidence produced and had incorrectly asserted that citizenship could not pass unless the appellants' father had been a citizen by descent.

## Background

3. Mr Islam, a Bangladeshi citizen, date of birth 20<sup>th</sup> October 1990 claims to be the son of Nasir Ali and Fateha Begum. Monira Begum, a Bangladeshi citizen date of birth 1<sup>st</sup> February 1994 claims to be the daughter of Nasir Ali and Bedena Begum. The 'sponsor' is Shilpara Khatun, date of birth 7<sup>th</sup> April 1977, a British Citizen by descent who came to the UK in October 1990 and claims to be the daughter of Nasir Ali and Johura Khatun; she came with her mother and both she and her mother have remained in the UK since then.
4. There is no challenge to the claimed birth parents of Shilpara Khatun or that she is a British Citizen by descent – in any event this was proved to be so by production of the passport upon which she entered the UK which confirmed that she was entering pursuant to a Certificate of Entitlement to a Right of Abode as the daughter of Nasir Ali.
5. Nasir Ali's first wife was Sitarun Nesa who died prior to his marriage to Johura Khatun, such marriage taking place in 1968 or 1969. It was claimed that Nasir Ali then married Fateha Begum in May 1987 (in Bangladesh) and then married Bedena Begum in July 1992 (in Bangladesh). He was thus married to three women at the same time.
6. Nasir Ali, who was registered as a British Citizen on 21<sup>st</sup> January 1969, died in October 1995.
7. The marriage certificates produced by the appellants of their respective mothers to their claimed father do not appear to have been correctly completed ie there is no reference to the existence of any other wives. There is thus an issue as to whether the appellants are able to assert citizenship by descent through their claimed father because they may not be legitimate.
8. The DNA evidence produced states that there is a 99.2318% probability that the two appellants and the sponsor have the same father but three different mothers.

## Error of law

9. I heard submissions from both parties at a hearing on 2<sup>nd</sup> May 2014 and found an error of law in the determination of the First-tier Tribunal determination on the following basis
  1. For some unexplained reason the First-tier Tribunal judge held that although the DNA evidence showed that the three share the same father and their relationship is through the paternal line, there was evidence that Nasir Ali had a brother and thus they had not proved to the balance of probabilities that they were Nasir Ali's children.
  2. Before me Mr Avery confirmed that this was a finding difficult to justify on the evidence but submitted that irrespective of that finding and irrespective of the

error by the judge as to the passing of citizenship by descent, the appeal could not succeed because the two appellants' mothers were not, on the evidence before the First-tier Tribunal, lawfully married. He submitted that given that they were not legitimate at the time of their birth, they could not in any event succeed in their appeal.

3. Mr Hussain submitted that although the marriage certificates did not, on their face, appear to comply with the relevant requirements, the two mothers considered themselves, in the context of the society in which they lived and into which the two appellants were born, lawfully married and thus in accordance with the Legitimacy Act 1976, British Citizens by descent.
4. I am satisfied that the First-tier Tribunal judge erred in law in his finding as to the appellants' paternity. The evidence before him could hardly have been more indicative of the probability of Nasir Ali being their father. The judge further erred in his finding that citizenship could only be passed on if Nasir Ali were British by descent. Although there are concerns over the validity of the marriage, in the light of the Legitimacy Act 1976 provisions it is conceivable that the two appellants are able to assert their citizenship by descent.

10. Accordingly I set aside the decision of the First-tier Tribunal to be remade and gave the following directions:

- a. Leave to the solicitors to the appellants to file additional material including witness statements of the surviving mothers, the appellants and the sponsor such further evidence as they intend to rely upon to be filed by 2<sup>nd</sup> June 2014
- b. Both parties to file and serve written submissions by 14<sup>th</sup> June 2014
- c. Thereafter I would determine the appeal on the documentary evidence and the written submissions before me unless either party states in writing that they wish the opportunity to make oral submissions in which case the appeal will be listed for oral hearing (no interpreter) for one hour.

11. Mr Hussain, on behalf of the appellants', filed and served witness statements of the appellants and their respective mothers and written submissions. He made no request for a hearing to make oral submissions. No further documents were served by the respondent and no request for an oral hearing by today and I have therefore determined these appeals on the basis of the documents and written submissions before me.

12. The only issue to be determined is the legitimacy of the two appellants: if they are or are deemed to be legitimately descended from their British Citizen father then they are entitled to Certificates of Entitlement to the Right of Abode as British Citizens and their appeal succeeds. If they are not legitimately so descended they are not entitled to such Certificates and their appeal fails.

13. A child born outside the UK and Falkland Islands on or after 1 January 1983 was born a British Citizen by descent if, at the time of the child's birth the father or mother of the child was a British Citizen otherwise than by descent: s2(1) British

Nationality Act 1981. In the period 1 January 1983 to 20 May 2002 inclusive, acquisition by descent from a father required the child to be legitimate at birth.

14. Nasir Ali was born in Sylhet on 16 November 1937. He was registered as a British Citizen on 21<sup>st</sup> January 1969. According to his application for registration he had been ordinarily resident in the UK from 6<sup>th</sup> October 1963 and he was married to Sitarun Nesa. It was not now disputed that Sitarun Nesa had died prior to his marriage to Johura Khatun and there is no challenge to the validity of that marriage or to the legitimacy of Shilpara Khatun. Nasir Ali returned to Bangladesh in 1991 and died there on 30 October 1995.
15. The respondent submits that the marriage of Nasir Ali to Fateha Begum is not valid and thus Abadul Islam is illegitimate. The respondent submits that the marriage of Nasir Ali to Bedana Beg is not valid and thus Monira Begum is illegitimate.
16. The appellants submit that the respective marriages are valid because at the time of each marriage Mr Ali was domiciled in Bangladesh; where a person is domiciled in the country where the marriage is celebrated and the marriage is valid in that country, then English law requires that the marriage is valid in the UK. There is no challenge by the respondent to this assertion and I am satisfied that this is correct. The appellants also submit that the law of Bangladesh does not require registration as a condition of a valid marriage. In the event that the marriages are void the appellants submit that in accordance with the s1 Legitimacy Act 1976, because the parties reasonably believed themselves to be married, the two appellants are legitimate.
17. The immediate question therefore is “what was the domicile of Mr Ali at the date of his marriage firstly to Fateha Begum and secondly to Bedana Begum?” Domicile is a distinct concept separate to nationality and habitual residence. Domicile can be acquired by origin, choice or dependence (although this latter is not relevant in this case because it does not involve the acquisition of domicile by a person under the age of 16). A person must always have a domicile but can only have one domicile. The acquisition of a domicile of choice extinguishes a previous domicile. Everyone acquires a domicile of origin at birth and this will continue unless and until a positive decision to acquire a domicile of choice is made. This would require an intention to settle and/or live permanently in England but residence in a particular place does not necessarily establish domicile there. There is a strong presumption in favour of the continuance of the domicile of origin (Agulian and Anor v Cyganik [2006] EWCA Civ 129). The burden of proving that a domicile of choice has been acquired lies upon the person who asserts that the domicile of origin has been lost (Winans v A-G [1904] AC 287). There is no evidence before me that Mr Ali has or had acquired a domicile of choice, namely England prior to his death. Registration as a British Citizen is a factor to be taken into account but other evidence would normally be required for example a statutory declaration, relinquishing of original nationality, possession of property, length of residence.
18. There has been no response by the respondent to the submission of the applicants and no separate assertion by the respondent that Mr Ali has acquired

a domicile of choice in the UK. I have noted that he returned to live (and die) in Bangladesh and that he founded a family there. I am satisfied that he retained his domicile of origin ie Bangladesh.

19. The next question therefore is whether the marriages in Bangladesh were valid given that both parties were domiciled there at their inception. The appellants submit that polygamous marriages are permitted in Bangladesh. The decisions the subject of appeal state that

“You have provided no evidence to demonstrate that your father was no longer married to the former spouses when you were born. I am therefore not satisfied that your father’s marriage to your mother was valid in the UK.”

20. The review carried out by the ECM did not elaborate on this inadequate exposition of the lack of validity of the marriages in question. There has been no challenge to the assertion in the submissions before me that Bangladesh permits polygamous marriage. The extract from Muslim Family Law 3<sup>rd</sup> edition by David Pearl and Werner Menski refers to the registration of polygamous marriages in Bangladesh. I am satisfied that polygamy is permitted in Bangladesh. Thus the mere fact that Mr Ali was previously married is insufficient to render void the marriages of the mother’s of these two appellants to Mr Ali.

21. There remains however the issue of the Marriage Deeds. In both cases boxes 21 and 22 were marked with a cross

21. Whether the bridegroom has any existing wife and, if so, whether he has secured the permission of the Arbitration Council under the Muslim Family Laws Ordinance 1961 to contract another marriage.

22. Number and date of the communication conveying to the bridegroom the permission of the Arbitration Council to contract another marriage.

22. The appellants submit that the respondent has failed to present any argument/evidence as to why the marriages may not be valid; that there is no legal authority to suggest that a defect in the particulars of another marriage invalidates the registration or the marriage (although this submission is difficult to understand); that the extract from Muslim Family Law shows that registration is not required as a condition of a valid marriage. Muslim Family Law [6-48, 6-49] states that any unregistered Muslim marriage is valid in Muslim law and may be proved by means other than registration. It appears plain that the marriage deed has not been correctly completed and/or cannot be relied upon as evidence that the marriage in question has taken place. The respondent has not amplified her assertion that registration is a requirement of validity; it would appear from Muslim Family Law that the submission by the appellants is correct.

23. I have also considered the witness statements of the appellants and their respective mothers. In each case their unchallenged evidence is that they underwent the usual Islamic ceremonies for marriage and they and their children have throughout the relevant period been treated as the spouses and children respectively of Nasir Ali. They lived in the same compound. I accept this evidence as credible.

24. In FI and others (Bangladesh – presumptions-marriage-legitimacy) Bangladesh [2005] UKIAT 00016 the tribunal considered the issue of the presumption of marriage and found that on the facts in that case (which included that the husband lived and worked in the UK sending money back to Bangladesh, the length of cohabitation with the mother, the strong presumption of marriage in an Islamic Society, the stigma attached to illegitimate children in Bangladeshi society, the presumption of marriage arises. In the appeals before me there are similar facts in as much as Mr Ali worked in the UK and supported his families in Bangladesh; his wives lived in the same compound and underwent Islamic ceremonies of marriage; he returned to Bangladesh in 1991 to resume living with them full time until his death; the children were treated as the children of Mr Ali and their mothers were treated as Mr Ali's spouses. I accept that there remains a stigma attached to illegitimate children in Bangladesh which has not been inflicted upon these two appellants. Although the Marriage deeds have not been properly completed I accept the evidence that has been put before me that such errors do not invalidate the fact of the marriage.

25. I am therefore satisfied that taken together the evidence is that Mr Ali was lawfully and validly married to the mothers of the two appellants at the date of their birth, at which time he was a British citizen. It therefore follows that the appellants are entitled to a certificate of entitlement to the right of abode.

26. I will deal in passing with the second submission put by the appellants, namely that they are legitimate by virtue of s1 Legitimacy Act 1976. This would only apply where the marriages were void and Mr Ali was domiciled in England – neither of which is the case here.

#### Conclusion

There is an error of law in the determination of the First-tier Tribunal such that it is set aside to be re-made.

I remake the decision and allow the appeal against the decision of the respondent in both cases.

Date 1<sup>st</sup> July 2014

Judge of the Upper Tribunal Coker