Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/01282/2014

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Decision & Reasons Promulgated**
On 19th November 2015	**On 7th December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

ALEKHA BEGUM
(ANONYMITY ORDER NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - DHAKA

Respondent

Representation:

For the Appellant: Mr Z Khan of Universal Solicitors
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge Stott of the First-tier Tribunal (the FtT) promulgated on 29th December 2014.

2. The Appellant is a female citizen of Bangladesh born 12th February 1948 who applied for a Certificate of Entitlement to a Right of Abode in the UK. The application was made on the basis that the Appellant is the wife of the late Mozor Miah who was a British citizen when they married.

3. The application was refused on 2nd December 2014. It was not disputed that Mr Miah was granted British citizenship on 1st August 1967 nor was it disputed that the Appellant and Mr Miah had undergone a marriage ceremony in Bangladesh on 28th February 1970.

4. However the Respondent did not accept that the marriage was valid, and therefore did not accept that the Appellant had married a British citizen. This was because Mr Miah was already married when he underwent a marriage ceremony with the Appellant, and therefore the marriage between Mr Miah and the Appellant was polygamous.

5. If Mr Miah had maintained his Bangladesh domicile of origin, then because a polygamous marriage would be recognised in Bangladesh, the marriage would be recognised under UK law and would be valid. However the Respondent contended that Mr Miah had established a domicile of choice in the UK with his first wife, and because he was domiciled in the UK, rather than Bangladesh, the marriage was invalid.

6. The Appellant appealed to the FtT who found that the marriage was invalid and therefore the Appellant was not entitled to a Certificate of Entitlement to a Right of Abode. The FtT found that although Mr Miah may well have maintained land and assets in Bangladesh for a period, and that he also returned to Bangladesh on a periodic basis, the burden of proof was on the Appellant to establish that at the time of her marriage in 1970, Mr Miah still regarded Bangladesh as his main and true home. The FtT found that the Appellant had not satisfied that burden, and therefore the Respondent was entitled to refuse her application, and the appeal was dismissed.

7. The Appellant applied for permission to appeal to the Upper Tribunal contending that the FtT had materially erred in law in concluding that the burden of proof rested upon the Appellant. It was contended that the burden of proof was on the Respondent, if the Respondent contended that a person had abandoned his domicile of origin and acquired a domicile of choice in the UK. It was submitted that the FtT had erred materially on this issue, and the decision should be set aside.

8. Permission to appeal was granted by Upper Tribunal Judge O'Connor in the following terms;

> "It is arguable that the FtT erred in placing the burden on the Appellant to prove that the domicile of her late husband had changed from his domicile of origin to a domicile of choice, at the time of their marriage in 1970. Although the grounds cite no authority for the legal proposition advanced, the parties' attention is drawn to paragraph 10 of the Tribunal's determination in SM (Domicile of choice; Scott's law) Pakistan [2008] UKAIT 00092."

9. Following the grant of permission the Respondent lodged a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 contending that the FtT had not materially erred and the decision should stand.

10. Directions were subsequently issued providing for an oral hearing to take place before the Upper Tribunal to ascertain whether the FtT had erred in law such that the decision should be set aside.

The Upper Tribunal Hearing

11. Mr Mills indicated that he did not accept that the rule 24 response was correct in law. Mr Mills stated that it was accepted that the FtT had materially erred in law, by concluding that the burden of proof was on the Appellant. It was accepted that the burden of proof was on the party who asserts that there had been a change of domicile.

12. Mr Mills conceded that the decision of the FtT should be set aside and re-made, and accepted that the Respondent could not discharge the burden of proof in relation to a change of domicile, and therefore the appeal should be allowed. Mr Mills indicated that he could not oppose the making of a fee award in favour of the Appellant, as the decision by the Respondent to refuse the application was wrong in law.

13. Mr Khan agreed.

14. I set aside the decision of the FtT and indicated that I would re-make the decision and issue a written decision.

My Conclusions and Reasons

15. The decision of the FtT is set aside because the FtT erred in finding that the burden of proof was on the Appellant to prove that Bangladesh was still the domicile of her late husband. The Immigration Directorate's Instructions (IDI) on marriage and domicile, referred to at paragraph 5 of the grounds seeking permission to appeal, confirm that the onus of proof is on the party asserting that a change of domicile has taken place. If the Secretary of State considers that a polygamous marriage which took place abroad is invalid in the United Kingdom because at the time of the marriage one party had acquired a domicile of choice here, the onus of proof would be on the Secretary of State.

16. The legal position is confirmed in paragraph 10 of SM (Pakistan) in which it was stated;

> "It is well-known that both in English law and Scots law and, indeed we understand it, the law of much of the rest of the world, it is for a person who seeks to establish that a domicile of origin has been lost and replaced by a domicile of choice to show that."

17. Therefore because the Respondent contended that Mr Miah had lost his domicile of origin in Bangladesh, and had acquired a domicile of choice in the UK, the Respondent needed to prove that.

18. As conceded by Mr Mills, the FtT materially erred in finding to the contrary, that the burden of proof was on the Appellant to prove that Mr Miah still had a domicile of choice in Bangladesh at the time of their marriage. It is for this reason that the decision of the FtT was set aside.

19. I re-make the decision by allowing the Appellant's appeal for the following reasons.

20. It is accepted that Mr Miah became a British citizen on 1st August 1967 and therefore he was a British citizen when he married the Appellant in Bangladesh on 28th February 1970. It was accepted by the Respondent that if Mr Miah still had a domicile of origin in Bangladesh, that marriage was valid.

21. It follows, that if the marriage was valid, then the Appellant is entitled to succeed by reason of having married a British citizen.

22. It was accepted by Mr Mills that the Respondent could produce no adequate evidence to prove that at the date of marriage, Mr Miah's domicile of origin in Bangladesh had been replaced by a domicile of choice in the UK. Therefore I conclude that as the Respondent has been unable to discharge the burden of proof, Mr Miah was domiciled in Bangladesh when he married the Appellant, and therefore their marriage is valid, and for the reasons given earlier, this means that the Appellant is entitled to a Certificate of Entitlement to a Right of Abode in the UK.

Notice of Decision

The appeal is allowed.

Anonymity

The First-tier Tribunal made no anonymity direction and there has been no request for anonymity to the Upper Tribunal. No anonymity order is made.

Signed Date: 25th November 2015

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

As the appeal is allowed I have considered whether to make a fee award. It is appropriate to make a whole fee award of £140. The decision made by the Respondent to refuse the application was wrong in law which meant that the Appellant had to enter an appeal.

Signed Date: 25th November 2015

Deputy Upper Tribunal Judge M A Hall