LSH

Heard at: Field House
On 12 July 2004

AB (Settlement – 6 months in UK) Bangladesh [2004] UKIAT 00314

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

17 November 2004

Before :

Mr D K Allen (Vice President)
Mr C Thursby

Between

APPELLANT

and

ENTRY CLEARANCE OFFICER - DHAKA

RESPONDENT

DETERMINATION AND REASONS

1. The appellant appeals to the Tribunal with permission against the determination of an Adjudicator, Warren L Grant, in which he dismissed his appeal against the respondent's decision of 28 October 2000, refusing entry clearance.

2. The appeal first came before the Tribunal on 25 September 2003. Miss E Shaw, of Turpin Miller & Higgins, Solicitors, appeared on behalf of the appellant and, appeared at all the subsequent hearings also. On 25 September 2003, Mr M Blundell appeared on behalf of the Entry Clearance Officer. Mr Blundell, raised concerns about the issue of whether the appellant could properly be said to be intending settlement in the United Kingdom when it seemed he proposed to spend half his time with his first wife in Bangladesh. This clearly raised issues as to the proper interpretation of paragraph 281 HC 395, and accordingly the matter was adjourned to give the representatives the opportunity to argue the point.

3. The Tribunal reconvened, on 18 December 2003. On this occasion, Miss Holmes appeared on behalf of the Entry Clearance Officer.

4. Miss Shaw referred us to grounds tow to four of the grounds of appeal. She also referred us to relevant paragraphs in her skeleton argument. She referred us to Shah v Barnet London Borough Council. This was not an immigration case. The absences in this case were temporary as the appellant intended to return. He did not have to be ordinarily resident in just one place.

5. As regards the intention to live together, the Immigration Rules contemplated, validly polygamous marriages, which were not prohibited, as long as the non-British wife did not come into the United Kingdom. The issue was not the sponsor's second marriage, but the fact of her marriage to her husband, whose marriage to her was polygamous. The effect of the immigration rules was that the appellant could not call the first wife over to the United Kingdom. It was a question of interpretation of the rules on marriage, and the purpose of the rules was not to be read as demanding that they spent all their time together. The word "continuously" was not used.

6. As regards the human rights issues again she referred to the skeleton argument. In law, the sponsor could go and live in Bangladesh, but she was a British citizen, with a number of children, some of whom were very young. The sponsor had been widowed and the appellant was therefore complying with the requirements of his religion. Article 14 was also engaged. His marriage had been arranged within the family, and he was very unlikely to leave and there would be a stigma if the marriage broke down. They had spent little time together before the marriage and only four weeks afterwards, which explained his ignorance about various matters. There had been brief telephone calls. Assumptions should not be made about the kind of conversation they would have had. With regard to the son's name Sylheti was a spoken language only, and when it was written in English, it was an approximation of what was spoken and Shazan and Shahjahan sounded very much the same. At interview, the appellant would have been speaking in Sylheti. She accepted that on the face of it, the appellant did not have enough knowledge of his son, but this was an explanation.

7. As regards the support, she had income support and housing benefit with modest outgoings. Documentation had been provided. She already received benefit which she would still receive, and the question was one of additional recourse to public funds. The children had free school meals and uniforms. A schedule of weekly expenditure had been provided. She lived frugally but did her best. Twenty five

pounds a month was put aside and was put into a savings account. She would cope on a tight budget, and the fact of the matter was that there was money left over. There were savings of over £1,000.00. It was not entirely clear how those funds had come about. There were several savings accounts, and money shifted between them. There was a surplus of income with which she could maintain the appellant. He would have permission to work. His job offer had lapsed, given the passing of time. An unskilled worker scheme had recently been set up and he could benefit from that and there would be a decrease in the sponsor's reliance on public funds. As regards accommodation, there was a report in the bundle, which had not been before the Adjudicator and showed that it was adequate.

8. This hearing was then adjourned to enable consideration to be given to the issue of polygamy and whether as a matter of law, the appellant could join his wife in the United Kingdom in any event. The hearing was resumed on 7 May 2004. Miss Holmes again represented the Entry Clearance Officer.

9. Miss Shaw referred us to the definition of "ordinary residence" and the 1971 Immigration Act. She had made her submissions on that. This was not the same as domicile. She referred us also to the case law, in the bundle including **Kane, Haria** and **Ng**. As regards the validity of marriage point, if both were domiciled in Bangladesh, the marriage was valid, though it was a question of whether both were domiciled in Bangladesh.

10. Miss Holmes made the point that there was no proof of any intention to return.

11. Miss Shaw argued that the sponsor had not changed her domicile and had kept Bangladeshi citizenship, as she could have acquired UK citizenship. This was relevant to the issue of domicile. If it was a significant issue, it was though that she had changed her domicile of choice and it could be necessary to hear evidence.

12. Were considered that it would be of assistance to hear oral evidence from the sponsor on this point, and the appeal was adjourned.

13. Subsequently, a letter was received from Miss Holmes dated 2 July 2004, indicating that the Secretary of State would not be arguing that the marriage of the appellant and the sponsor was invalid nor was there any intention of cross-examining the sponsor. The appeal came before the Tribunal again on 12 July 2004, Mr Deller represented the Entry Clearance Officer, as Miss Holmes was unavoidably absent due to a family illness. It was agreed that Miss Holmes would be given a week

in which to put in her final submission with Miss Shaw to have a further week thereafter to put in her own response. We subsequently received the submission from both representatives and, of course have taken them fully into account in producing our determination.

14. The marriage between the appellant and the sponsor is the second marriage for each of them. The sponsor was a widow at the time of her marriage to the appellant, and he was still married and living with his first wife, together with their three sons and three daughters. His application to join the sponsor in the United Kingdom, was dismissed on the basis that the Entry Clearance Officer was not satisfied that the couple intended to live together permanently as husband and wife, nor that the appellant would be adequately maintained and accommodated without recourse of public funds.

15. The Adjudicator heard evidence from the sponsor. He noted that at interview the appellant was initially not able to remember the date of his marriage to the sponsor, and nor did he know the name of her first husband or the date of his death. He did not know when the sponsor had first gone to the United Kingdom, nor did he know how many of her children went with her. He did not know the date of birth of his son by the sponsor and could not remember his name, and when given the correct name of the child, he thought that was her son by her first husband (who died two years before this son was born). He said that he telephoned her from his shop but he could not remember her telephone number, and he did not know the ages of her children. He thought that the sponsor was supported by her son and daughter who were both working. He claimed to have a job lined up but could not remember what it was nor the name of the restaurant which had offered it to him.

16. When the sponsor gave evidence, she said that she lived with several of her children and supported herself and her family with a combination of income support and child benefit. She was asked about deposits paid into her bank account and said that it was money paid to her by her two children who were working who would deposit money into her account and take it back later. She adopted a schedule of weekly expenses that was to be found in her bundle and said that at the end of each month she had twenty five pounds left over which she put into her savings account. She lived in a four bedroomed house. Four children slept in the big bedroom, tow in another room and two plus the baby in another room and she shared her bedroom with her youngest child. The marriage had been arranged by her mother and mother's brother so that she would have someone to look after the children. She said that her son by the appellant was called [ ], which was the name given by the appellant to the Entry Clearance Officer

but she could not spell it in English, she said. All of her children were of school age apart from her two year old son, and two children who lived out of the house.

17. Evidence was also given by [ ] the appellant's nephew, who said he did not believe the appellant would leave the sponsor once he had been allowed to come to join us because it was not the sort of thing done in their family. He said that he knew the person who had offered the appellant a job but the job was no longer on offer, because the restaurant was not successful. He said that the landlord would accept the appellant as a joint tenant of the house, and that the house was not overcrowded because the children were all quite young.

18. The Adjudicator found that the sponsor genuinely believed that the appellant had been introduced to her as a marriage partner in order to help her to look after her large family. He accepted that it was an arranged marriage and that it would be quite wrong to judge the parties by European standards. He noted the fact that it was not a marriage between complete strangers as the parties are related to each other outside marriage. Tough he would not have expected the appellant to know the dates of birth of each of the sponsor's children, he found it impossible to believe that he did not know the true name of his own son by the sponsor, and he found the sponsor's evidence in this regard to be disingenuous. He noted that even the sponsor could not explain why the appellant thought that the name on the birth certificate was that of one of her own sons from her first marriage. He also noted the fact that the appellant did not know the child's date of birth, and found that his indicated a lack of interest by the appellant in the sponsor and taken together with the fact that he did not know the name of her first husband or the date of his death, a factor which caused the match to be arranged, and nor did he know her telephone number or even part of it, he concluded that the appellant had not shown an intention to live with the sponsor as man and wife.

19. With regard to the issue of accommodation, the Adjudicator noted the absence of any environmental health consultants' report, which would have informed him whether the appellant could indeed be accommodated as a joint tenant in the sponsor's house and also noted that he had been given no idea of the sizes of the rooms in the house which led him to conclude that the requirement of the rules concerning accommodation had not been satisfied. As regards maintenance, given the fact that the sponsor had to feed and clothe herself and seven children, he found it incredible that there was any money left over at al land did not consider that the appellant could be maintained out of six pounds a week

which the account provided showed that the sponsor saved. He noted that the sums deposited in the sponsor's bank account were deposited by her children, and then removed by them and he concluded that the money was not hers and was not available to maintain the appellant.

20. We have before us now the written submissions of the representatives. In addition, we have three skeleton arguments on behalf of the appellant and attached documentation. The polygamy issue is no longer before us, and as is agreed, in their representative's latest submissions, the issues before us are firstly the issue of whether the couple intend to live together permanently, secondly, whether there is adequate financial support without additional recourse to public funds, thirdly, whether there is adequate accommodation without recourse to public funds, and fourthly, whether, given that the appellant intends to divide his time equally between Bangladesh and the United Kingdom, he can be said to be seeking to be "admitted for settlement".

21. We consider first the issue of whether or not the couple intend to live together permanently. In this regard, a particularly relevant issue is the fact that the appellant intends to divide his time effectively equally between Bangladesh, where his first wife lives, and the United Kingdom where the sponsor lives. The question, therefore arises as to whether, in accordance with the wording of paragraph 281 of **HC 395**, each of the parties intends to live permanently with the other, as his or her spouse and the marriage is subsisting.

22. In the skeleton argument that Miss Shaw put in under cover of her letter of 10 December 2003, the point is made that under Section 33(2A) of the Immigration Act 1971: "references to a person being settled in the United Kingdom are references to his being ordinarily resident there…"

23. she goes on to quote from the decision of the House of Lords in **Shah v Barnet London Borough Council [1983] 1 AER226**. This is a case concerning foreign-born students who had applied for, and were refused, local authority grants for their further education. They had all been resident in the United Kingdom for the requisite period, but in each case, the local education authority claimed that they had not been "ordinarily" resident, as required by Section 1(1) of the Education Act 1962 in order to qualify for a mandatory grant for the purpose of university study. At page 235 Lord Scarman concluded that the phrase "ordinarily resident" refers "to a man's abode in a particular place or country which he has adopted voluntarily, and for settled purposes, as part of the regular order of his life for the time being, whether of long or short duration".

24. It was said that the construction of the phrase "ordinarily resident" in Section 1 of the 1962 Act, and also in Regulation 13 of the Local Education Authority Awards Regulations 1979, was to be considered according to its natural and ordinary meaning, without reference to the immigration legislation. The reason why the phrase was to be construed without reference to the immigration legislation was because the material provisions of the Act and regulations made no reference to any restriction on the awards of grants based on an applicant's place of origin, domicile or nationality.

25. In the appeal before us, of course the context is very much that of immigration, Lord Scarman went on in **Shah** to say there must be a degree of settled purpose, and the purpose may be one, or there may be several and it may be specific or general. Miss Shaw also cited **Secretary of State for the Home Department and Haria [1986] IAR165 and R v IAT Ex Parte Ng [1986] IAR 23**, as authorities for the proposition that the question is whether, when someone is spending time way from the United Kingdom they retain substantial contact with the United Kingdom and whether there is a clear and definite intention to return. Miss Holmes argued that it is not just the issue of permanence that is relevant but also the issue of "living" with the other. She argued therefore that it is not just the fact that it must be an arrangement required to be permanent but that the parties have to live together permanently as man and wife, which is not possible when one of the parties to the marriage is absent six months of the year in Bangladesh.

26. It will be seen that none of the authorities to which we have referred are specifically on the point with which we have to deal. We bear in mind the reference also by Lord Scarman, at page 234 in **Shah**, that the natural and ordinary meaning of the words "ordinarily resident", is "that the person must be habitually and normally resident here, apart from temporary or occasional absences of long or short duration".

27. The matter was considered by Mr Justice Collins in **Chugtai [1995] IAR559**, in particular, at pages 567 and 568. There Collins J quoted extensively from **Shah** and made the point that it was obviously a question of fact in each case. He noted the example given in argument of a person who had a contract for a definite period of time which might amount to a number of years, to work out of the United Kingdom, which, he concluded would not necessarily prevent that person from being ordinarily resident in the United Kingdom throughout that period and that they may might also, at the same time, be ordinarily resident wherever it was that they were working on the contract. In those circumstances, it seemed to him that this person, if they came back to the United Kingdom within the two year period (that being the context of the

appeal before Collins J) because that was the only way in which they could preserve their right to remain in the United Kingdom, would be seeking admission on that occasion for the purposes of settlement. He noted also at page 567, that it was perfectly possible for someone to be ordinarily resident in two countries at one and the same time.

28. It has not been shown to us that the statutory framework or the legal context in which the words "ordinarily resident" are used requires a different meaning from that considered by Lord Scarman in **Shah** and by Collins J in **Chugtai**. Lord Scarman, at page 235 in **Shah**, emphasised that all that was necessary was that the purpose of living where one did had a sufficient degree of continuity to be properly described as settled. The interpretation placed on the phrase "ordinarily resident" by the House of Lords in **Shah**, is such that we find ourselves bound to conclude that the appellant in this case must be properly regarded as a person who is seeking leave to enter the United Kingdom with a view to settlement in the United Kingdom.

29. Can it be said, however, that the couple intend permanently to live with each other as each other's spouse? Can it be said that a couple who intend to be married to each other but to live apart for six months of each year intend to live together permanently, each with the other as his or her spouse? Although the arrangement proposed would appear to be permanent, the living together, clearly, is not intended to be permanent, since it will only happen for six months of the year. Obviously the rule cannot properly be interpreted so as to preclude a couple who, for example, intend that in the course of their marriage, there might be enforced periods of separation, perhaps because the spouse entering the United Kingdom, would need to go back and visit family in their country origin from time to time or possibly work abroad from time to time, from satisfying its provisions. We do not, however, consider that an arrangement such as that proposed in this case whereby the proposed living arrangement involves an intention to live together for only half of each year in the United Kingdom, due to the fact that the appellant proposes to spend the other half of each year with his first wife in Bangladesh, can be regarded as involving an intention to live permanently with each other. The appeal, is, accordingly, dismissed on this point.

30. Otherwise, with regard to the issue of intention to live together, we have noted above the Adjudicator's reasoning in this regard. Clearly, as Miss Shaw points out in her submissions, the birth of the child is a very relevant factor in this regard. On the other hand, there are the various matters that troubled the Adjudicator concerning lack of knowledge of relevant matters which implied a lack of interest in the

sponsor and in the marriage. Against that, on the other hand, is the fact that they are fist cousins and there is clearly a degree of cultural impetus in favour of the marriage. On balance, the Tribunal considers that on this purely factual issue, had we not decided against the appellant on the legal point, the evidence shows on balance that there is an intention on a factual basis to live together on the part of the couple. As we say, however, that is irrelevant in the light of our finding on the point of law, discussed above.

31. We turn to the question of maintenance. The evidence before the Adjudicator was that the sponsor saves £25 a month and has savings of just over £1,000.00. As the Adjudicator pointed out, however, it appeared that the sums deposited in the sponsor's bank account were put there by her children and then removed by them, and he concluded that it was not money available to maintain the appellant. In the view of the Tribunal, the Adjudicator was entitled to find that the twenty five pounds a month saved by the sponsor, and as it would seem, evidenced, at least, in part, by the savings she has accumulated, is not such, as to enable the requirements of the immigration rules to be satisfied. It is a very small amount from which to maintain an adult. We do not consider that there is force in the contention of Miss Shaw's submissions that the appellant was in the past offered a job and that he might obtain work in the restaurant industry on the basis of the Sectors Based Scheme on which information is provided in an annex to Miss Shaw's submissions. The fact that these opportunities exist by no means indicates that on a balance of probabilities it has been shown that the appellant would succeed in availing himself of such an opportunity. We therefore dismiss the appeal as concerns maintenance.

32. The next issue is that of accommodation. We have derived some assistance from the decision in Thompson which again was annexed to Miss Shaw's submissions where it was conceded by the Presenting Officer that if accommodation were not statutorily overcrowded by reason of an appellant coming to join a sponsor, the accommodation would be adequate for the purposes of the rules. We consider that that concession was properly made, and are of the view that it has equal relevance to the case put before us. We therefore allow this appeal as concerns accommodation.

34. The final issue is that of Article 8 of the Human Rights Convention. Here it is contended that that Article, in conjunction with Article 14 would be breached, because the immigration rules unduly impact o the appellant, due to his religion, which dictates that he divides his time equally between his two wives. The tribunal has not had drawn to its attention any evidence to support the contention that the appellant's religion dictates that he so spend his time. There

is mention at paragraph 13 of an earlier skeleton argument of Miss Shaw's that there is an obligation under the Quran that though polygamous marriages are permitted, the wives are to be treated equally. We do not read that as importing a requirement that a man such as the appellant married to two wives has to spend six months of the year with each of them. It is an interpretation that he proposes to make rather than a mandatory requirement, on the face of it.

34. Otherwise, the argument concerning Article 8 is that a permanent separation of husband and wife would be disproportionate and would constitute a breach of Article 8. In this context however has to be borne in mind the very relevant factor of the importance of maintaining a fair and proper system of immigration control. This is an important aspect of that balance. It is open to the appellant to apply to visit his wife in the United Kingdom and equally, there is no evidence to show that it is impossible to seek to visit him in Bangladesh, although we accept that in her financial circumstances, there might be difficulties of some significance. However, we do not consider that it can properly be said, that refusing entry clearance in this case would comprise a disproportionate interference with the appellant's Article 8 rights.

35. For the reasons stated above, therefore, this appeal is dismissed.

D K Allen
Vice President