Upper Tribunal
(Immigration and Asylum Chamber)

Abdin (domicile – actually polygamous marriages) [2012] UKUT 00309(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 13 April 2012	

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Before

UPPER TRIBUNAL JUDGE STOREY

Between

SUZIA ABDIN

Appellant

and

ENTRY CLEARANCE OFFICER, DHAKA

Respondent

Representation :

For the Appellant: Mr S Ahmed, Syed Shaheen Solicitors

For the Respondent: Ms C Gough, Home Office Presenting Officer

Whilst the Private International Law (Miscellaneous Provisions) Act 1995 amended section 11(d) of the Matrimonial Causes Act 1973 so that a potentially polygamous marriage would not be void if either party was at the time of the marriage domiciled in England and Wales, it did not alter the position regarding actually polygamous marriages. Under section 11(d) of the 1973 Act a polygamous marriage entered into outside England and Wales shall still be void if either party at the time of the marriage was domiciled in England and Wales.

DETERMINATION AND REASONS

1. The appellant is a citizen of Bangladesh. On 19 April 2004 she married Syed Alal Abdin, a British citizen, in Bangladesh. He had previously married a woman called Nasima Begum but they had decided to separate in July 2003 when (the sponsor now says) he gave her an Islamic divorce. Their English divorce was finalised on 16 November 2009. The present couple now have four children, although at the date of the decision there were only three.

2. In September 2010 the appellant applied for entry clearance for her and three children. On 20 December 2010 the respondent refused this application. 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 dismissed her appeal. Prior to determining the appeal the judge sent direction to the parties so as to afford the appellant the opportunity to submit DNA evidence and to produce an original of the sponsor's tenancy agreement. 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.

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.

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."

5. Although the judge here refers to the appellant marrying the sponsor in 2005, the actual documentation gives the date of the marriage as 19 April 2004, although this was not registered until 19 April 2005.

6. The judge further concluded that for Article 8 purposes the appellant had failed to show she had a family life with the sponsor or that she or the sponsor were the parents of the three children claimed to be theirs.

Legal Framework

7. It is as well to set out before proceeding further relevant parts of two sets of statutory provisions. There is first of all s. 11 of the Matrimonial Causes Act 1973 (as amended):

“ Nullity

11 Grounds on which a marriage is void.

A marriage celebrated after 31 st July 1971 shall be void on the following grounds only, that is to say-

(a) that it is not a valid marriage under the provisions of the Marriage Acts 1949 to 1986 that is to say where –

(i) the parties are within the prohibited degrees of relationship;

(ii) either party is under the age of sixteen; or

(iii) the parties have intermarried in disregard to certain requirements as to the formation of marriage;

(b) that at the time of the marriage either party was already lawfully married or a civil partner;

(c) that the parties are not respectively male and female;

(d) in the case of a polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage domiciled in England and Wales.

For the purposes of paragraph (d) of this subsection a marriage is not polygamous if at its inception neither party has any spouse additional to the other.”

8. Then there is ss. 5-7 of paragraph 2 of the Schedule to the Private International Law (Miscellaneous Provisions) Act 1995 which entered into force on 8 January 1996. Paragraph 2 of the Schedule amends s. 11 of the Matrimonial Causes Act:

“2(1)The Matrimonial Causes Act 1973 shall be amended as follows.

(2)In section 11 (grounds on which a marriage is void), for the words “may be polygamous although” there shall be substituted the words “is not polygamous if ”.”

9. It can be seen that my citation of s. 11 incorporates this amendment. So far as is relevant ss. 5 and 6 of the 1995 Act provide:-

“PART II VALIDITY OF MARRIAGES UNDER A LAW WHICH PERMITS POLYGAMY

5 Validity in English law of potentially polygamous marriages.

(1) A marriage entered into outside England and Wales between parties neither of whom is already married is not void under the law of England and Wales on the ground that it is entered into under a law which permits polygamy and that either party is domiciled in England and Wales.

(2) this section does not affect the determination of the validity of a marriage by reference to the law of another country to the extent that it falls to be so determined in accordance with the rules of private international law.

6 Application of section 5 to prior marriages.

(1) Section 5 above shall be deemed to apply, and always to have applied, to any marriage entered into before commencement which is not excluded by subsection (2) or (3) below.

(2) That section does not apply to a marriage a party to which has (before commencement) entered into a later marriage which either -

(a) is valid apart from this section but would be void if section 5 above applied to the earlier marriage; or

(b) is valid by virtue of this section.

(3) That section does not apply to a marriage which has been annulled before commencement, whether by a decree granted in England and Wales or by an annulment obtained elsewhere and recognised in England and Wales at commencement.

(4) An annulment of a marriage resulting from legal proceedings begun before commencement shall be treated for the purposes of subsection (3) above as having taken effect before that time.

(5) For the purposes of subsections (3) and (4) above a marriage which has been declared to be invalid by a court of competent jurisdiction in any proceedings concerning either the validity of the marriage or any right dependent on its validity shall be treated as having been annulled.

(6) … “

Discussion

10. The grounds of appeal contend first that the judge erred in failing to recognise that the sponsor had divorced his first wife according to the law of his domicile of origin. I find this wholly devoid of merit. When making the application the appellant and her sponsor made no mention of having divorced his first wife in 2003, and indeed, to question 8.4.13 of the relevant form of application (asking whether her sponsor had ever been married before), the appellant answered “yes” and, underneath the name of the wife and the date of marriage, wrote “date of dissolved 16.11.2009” (sic), a plain reference to the 2009 UK divorce. Further, although the grounds of appeal against the respondent’s decision stated that “the divorce took place a few years ago”, even if that were to be construed as a reference to pre-19 April 2004 (the date of the appellant’s marriage to the sponsor), no evidence was produced in support. It was not indeed until the day of the hearing that the appellant produced a document purporting to verify a divorce in 2003. The judge addressed this evidence at paragraph 33 and noted that the sponsor had been unable to give a satisfactory explanation for why it had not been produced earlier. The grounds of appeal to the Upper Tribunal wholly fail to address the judge’s reasons for finding this divorce document unreliable and indeed for finding the whole claim to a pre-April 2004 divorce mendacious. The appellant's and the sponsor's marriage was thus an actually polygamous marriage.

11. The appellant’s second ground of appeal is not drafted with any finesse but can only be intended as an alternative ground to the effect that even if the judge was correct to find that the spouse was still validly married to his first wife when he married the appellant in 2005, his second marriage was still lawful because previous UK law (s.11(d) of the Matrimonial Causes Act 1973 only permitting polygamous marriages contracted outside the UK except where one or both of the parties was domiciled in England and Wales at the time of the marriage) had been repealed by s.5 of the Private International Law (Miscellaneous Provisions) Act 1995 which does not require that either party is domiciled in England and Wales. The author of the grounds also prayed in aid CB (Validity of

Marriage) Brazil [2008] UKAIT 00080 where the Tribunal is said to have stated that for the purposes of English law the validity of the marriage is now governed solely by the lex loci celebrationis and not by the domicile of the parties.

12. If the above contention is correct, then the appellant would be able to meet the requirement that her marriage to the sponsor was lawful.

13. Before proceeding to decide whether it is correct, I should state my finding on the issue of the appellant's domicile. If the test set out in s. 11(d) of the Matrimonial Causes Act 1973 is still the correct test, then the appellant could only succeed if able to show that her husband had not lost his domicile of origin in Bangladesh and acquired an English domicile of choice. That is the test that the FTT Judge considered.

14. I am satisfied that the FTT Judge was fully justified in finding that the appellant's husband had not retained a Bangladesh domicile. There were, it is true, some factors pointing to its retention: that he had retained his Bangladesh citizenship (being a dual national); that (contrary to what the FTT judge thought) he had renewed his Bangladesh passport; that he had no property in the UK; that he had travelled back to Bangladesh on several occasions. However, there were also a very significant set of factors pointing to his having acquired a domicile of choice in the UK: that he had applied for and obtained British citizenship in 1997; that he had applied for and obtained British citizenship for his children; that he had been ordinarily resident in the UK for some 25 years (more than half his life) and that in a statutory declaration he had described himself as "permanently settled in the UK".

15. Of course, under what is known as the principle of tenacity of domicile of origin, the burden of proving loss of such domicile rests on the respondent. In addition, I accept that the FTT judge was mistaken in finding that the sponsor had not renewed his Bangladesh passport; the file shows it was renewed on 31 May 2009. However, I do not consider that the sponsor continuing to hold a Bangladesh passport detracts in any significant way from the very weighty factors otherwise indicating that he had acquired a domicile of choice in the United Kingdom prior to November 2009. I am quite satisfied that the respondent had discharged that burden and that the judge was correct to find at paragraphs 44-45 that prior to the date of his marriage to the appellant, the sponsor had acquired a domicile of choice in England and Wales.

16. The question remains, however, whether the judge was right to regard the sponsor's change of domicile as invalidating his marriage to the appellant. In my view the attempt in the grounds of appeal to argue that they did is misconceived. Contrary to what is stated in the grounds, the Private International Law (Miscellaneous Provisions) Act 1995 at s.5(1) did not repeal s.11(d) of the Matrimonial Causes Act 1973, although it did amend it (as is reflected in the text cited at para 7). However, the amendment was confined to the validity of de facto monogamous or potentially polygamous marriages; it did not affect the application of s.11 to actually polygamous marriages. As explained in Dicey, Morris and Collins, The Conflict of Laws , Vol 2, 14 th Edition, 2006 at 17-173 to 17-186:

"17-173 Section 11(d) of the Matrimonial Causes Act 1973 as originally enacted provided that a polygamous marriage entered into outside England after July 31, 1971 would be void if either party was at the time of the marriage domiciled in England. It further provided that a marriage might be polygamous even though at its inception neither party had any spouse additional to the other. This meant that an actually or potentially polygamous marriage celebrated after July 31, 1971 would be void if either party was domiciled in England at the time of the marriage. The statutory provision did

not apply to marriages celebrated at an earlier date, and there was some uncertainty as to whether the common-law position was the same.

17-174 It was however held in Hussain v Hussain [1983] Fam. 26 (CA) that a marriage celebrated outside England under a system of law permitting polygamy was not to be regarded as polygamous for the purpose of s.11(d) (or presumably for other purposes) if neither spouse had capacity to enter into a second marriage, such capacity being determined by the law of the domicile of the spouse in question immediately before the first marriage.

...

17-178 This anomaly was widely regarded as unfair and reform was proposed by the Law Commission in a report published in 1985 (Law Commission No. 146). Sections 5 to 8 of the Private International Law (Miscellaneous Provisions) Act 1995 are based on the recommendations in that report. Section 5(1) provides that a marriage entered into outside England between persons neither of whom is already married is not void under English law on the ground that it was entered into under a law which permits polygamy and that either party is domiciled in England. Section 11 of the Matrimonial Causes Act 1973 is amended [by Private International Law (Miscellaneous Provisions) Act 1995, Sch 2 para 2] so that, instead of providing that, for the purpose of s.11(d), a marriage may be polygamous even if at its inception neither party has any spouse additional to the other it now provides that a marriage is not polygamous if, at its inception neither party has any spouse additional to the other. As a result s.11(d) can apply only to actual polygamous marriages.

17-179 **Actually polygamous marriages** . A marriage is actually polygamous in terms of Rule 72 if one of the parties to it is a party to a prior, subsisting marriage. The Rule applies irrespective of whether or not the prior marriage was celebrated under a system of law permitting polygamy, it also applies irrespective of whether or not the party who is already married is the one domiciled in England. Thus if an unmarried woman domiciled in England goes through a ceremony of marriage in a foreign country with a married man, that marriage will be void.

17-180 Section 5(2) of the 1999 Act states that the section does not affect the determination of the validity of a marriage by reference to the law of another country to the extent that it falls to be so determined in accordance with the rules of private international law. Thus, for example, if one of the parties is domiciled in a third country (neither England nor the country of celebration), the law of that country will normally decide whether the party domiciled there has a capacity to enter into a marriage celebrated under a law permitting polygamy. The mere fact that the internal law of the country in question does not permit polygamy would not however, be sufficient: it must be shown that its rules of private international law would regard the marriage as invalid. Thus, for example, the internal law of England does not permit polygamy, but the English rules of private international law nevertheless recognise marriages celebrated in a foreign country under a system of law permitting polygamy.

17-181 **Transitional provisions.** Subject to two exceptions, the new rule laid down in s.5 applies, and is deemed always to have applied, to marriage entered into before it came into force (on January 8, 1996). This means that such marriages are retrospectively validated to the extent that they were previously invalidated as polygamous. ...”

To similar effect see Macdonald’s Immigration Law and Practice , 8 th Ed, para 11.33, (pp 17-405).

17. Hence it is clear that 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.

18. As regards Mr Ahmed's attempt to rely on CB , in CB there was no issue of polygamous marriages and the case was concerned not with a question of capacity, but of form (proxy marriages).

19. The FTT Judge also dismissed the appeal because he was not satisfied the appellant met the accommodation requirement. The grounds of appeal complain that as this was not a point taken by the ECO, it was wrong and unfair of the judge to have raised it. I cannot agree. The accommodation requirement is a mandatory requirement and an appellant is not entitled to succeed under the Immigration Rules unless able to meet all of the relevant requirements in full. Furthermore, the judge had ensured procedural fairness by notifying the appellant in advance, by way of directions, that accommodation was considered by him to be a live issue. At the hearing the sponsor was afforded an opportunity to address the accommodation issue, but, having heard his evidence on the matter, the judge was not satisfied the proposed tenancy was a valid one. The grounds fail to raise any substantive challenge to this finding. I conclude that the appellant's appeal was also properly dismissed for failure to satisfy the accommodation requirement.

20. The grounds also contend that the FTT Judge erred in his assessment of the appellant's Article 8 claim. Given that – as Mr Walker accepts is the case – the UK passport authorities have issued passports as British citizens to the three children, I consider the judge was wrong to find that there was no family life relationship between the appellant and the sponsor. The ECO's grounds of refusal did not challenge the appellant's claim that the sponsor was the father of her three children. It was unjustified, therefore, for the judge to have found they were not related as claimed just because they had not availed themselves of the opportunity to conduct DNA tests.

21. However, I do not consider that the error was a material one. Even if related as claimed (and even if the appellant was lawfully married to the sponsor), the appellant could not succeed unless able to show that her family life would be disproportionately affected or disrespected by the refusal decision. Despite his children being stated as born on 7 November 2005; 5 October 2006 and 11 November 2008, and despite going to the trouble to acquire British passports for the oldest two children in 2007, the sponsor 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 sponsor appears to have been content for some period of time to conduct his family life with his second wife and their children by way of visits. The evidence before the judge did not indicate that that way of conducting his family life was contrary to either his wishes or that of his wife. Nor does it indicate that the children's best interests necessitated that they uproot from the ties with their existing extended family in Bangladesh. No evidence was produced to indicate otherwise.

22. For the above reasons I conclude that the judge did not materially err in law. Accordingly his decision to dismiss the appellant's appeal is upheld.

Signed Date

Upper Tribunal Judge Storey