

Attitudes to polygamy in English law

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1. Introduction

This article¹ documents recent developments in British legal policy towards polygamy.² The issue of polygamy became linked to the arrival and the different cultural patterns of Asian and African migrants to Britain in the post Second World War period. At first, questions were raised about the recognition of polygamous unions or the possibility of English law's control over men in such situations. Thus polygamy came up as an issue in official legal arenas in the context of the complex choice of law rules that fell to be considered under English conflicts of law or private international law. From the late 1970s, however, these were directly related to immigration matters, notably where there was a refusal to recognise the validity of a marriage when an application for entry clearance was made by a second wife. In the late 1980s, with the Immigration Act of 1988, a ban on the entry of second wives was prominently announced by statute with the background of family reunion among Bangladeshi migrants. It is also notable that legislation against polygamy in this way, if not necessarily directed at Muslims, has been closely associated with controlling the of immigration of Muslims as the case law appears to indicate. Interestingly, the ban on second wives coincided with the high point of political agitation against the Muslim presence in Britain in education and was very soon overshadowed by the *Satanic Verses* affair.³ It could thus also be seen as a redrawing of culturally articulated battles lines in the 'clash of civilisations'.⁴ It will be argued that such culture wars, while not achieving the aim of eliminating polygamy as ethnic minorities continue to navigate among various legal levels to circumvent official laws, are being waged potentially at the expense of women and against the best interests of their children.

2. Control through choice of law rules

2.1 The comparative law context

As far as many Asian and African societies are concerned polygamy has been a long-standing practice which has often received recognition by the official legal sphere. Different states have

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² 'Polygamy' denotes the practice of either women or men taking more than one spouse – known as 'polyandry' and 'polygyny' respectively. In this article polygamy is used to mean polygyny.

³ Lewis (1994: 2-7) in his Bradford-focused study highlights education and the burning of the *Satanic Verses* as the two most prominent features publicly connected with Muslims in the Britain of the 1980s. Both issues had their legal impacts in different ways. The Education Reform Act of 1988 sought to reinforce the notion that worship and religious education in English schools ought to reflect Christian traditions (see Bradney 1989), while the Satanic Verses affair led to a debate on the scope of English blasphemy law (see Jones and Welhengama 2000: 179-212).

⁴ This phrase is borrowed from Huntington (1993) who argues that the interactions among the highest order agglomerations of human communities - civilisations, among which seven or eight major ones can be identified as being Western, Confucian, Japanese, Islamic, Hindu, Slavic-Orthodox, Latin American and (possibly) African – will be significant determinants of global politics in the post-Cold War era. Although the phrase has a conflictual connotation, Huntington does not appear to envisage interactions of this sort only. The phrase in its more recent *avatar* has metamorphosed into the 'dialogue among civilisations' since the initiative of President Khatami of Iran that resulted in 2001 being declared the 'United Nations Year of Dialogue among Civilisations'.

adopted various approaches to its legal control, however, though few can be said to have achieved its outright abolition despite the advent of legal modernity. Among South Asian states, from which a large proportion of migrants in Britain originate, various approaches to legal regulation have been attempted. Modern Hindu law in India, which covers Buddhists, Sikhs and Jains too, goes furthest in this respect and potentially criminalizes it and also has the potential effect of a second marriage being declared void under the Hindu Marriage Act 1955. This has not prevented Indian courts from recognising the legal consequences of polygamy, however, as the full enforcement of the statute law is seen as often leading to injustice for the women and children concerned. In Pakistan and Bangladesh, Hindus continue to be regulated by Hindu personal law, which allows polygamy. Interestingly, the Indian Hindu legal provisions were also applied in similar form in Kenya and Uganda though not in Tanzania just prior to independence, with as yet unascertained consequences. On the other hand, the Muslim *shari'a* is recognised in India, permitting Muslim men to marry up to four wives, although the absence of statutory regulation has not meant absence of control by the courts. In Pakistan and Bangladesh observance of certain statutory conditions prior to contracting a second marriage are stipulated by the Muslim Family Laws Ordinance of 1961. Non-compliance with these conditions does not however, result in voiding of the marriage, although judges have still had to grapple with the difficult position of first or second wives who reluctantly find themselves in polygamous situations. The trend of case law in South Asian countries indicates a gradually stricter approach being applied over time, with particularly strong judicial disquiet being expressed in Bangladesh (see in detail Menski 2001: 139-230 on India, Hinchcliffe 1970 and Pearl and Menski 1998: 237-273 on Muslim law in South Asia and elsewhere, Derrett 1963: 535-556 on Hindu law in East Africa).⁵

In all these jurisdictions polygamy continues to be observed as a social practice among Hindus and Muslims and others although its incidence has noticeably reduced over time. It is notable, however, that no state law, and arguably no customary, personal or religious law recognises an untrammelled power of men to take as many wives as possible and that there are some norms regulating the practice at the different levels. This is especially when the first wife objects to a second marriage, or is effectively deserted without being accorded the rights of a wife or the dues owed to her consequent to divorce, or when a second wife is duped into believing that no prior marital relationship exists. On the other hand, despite the views of many academic commentators that an outright ban is the right or obvious course for South Asian countries, this may not in fact be the right approach. Although this has occurred in official terms under modern Hindu law in India, and in Turkey and Tunisia, this will not absolve official fora from finding appropriate solutions to the plight of women and children and results rather in the practice 'going underground' (Menski 2001: 201-202 on Turkey and Tunisia, Yilmaz 1999: 228-234 on Turkey). The uncritical acceptance of the official view that polygamy has been legislatively abolished in the countries of origin may be part of the explanation as to why there are so few reported cases in Britain on such issues concerning Hindus or Sikhs or migrants from Turkey (for earlier Hindu cases in British courts see Parashar 1982: 192-193).⁶ On the other hand, the failure to perceive

⁵ Mole (1987: 44) observes that: 'The form of Hindu and Muslim marriage is broadly the same amongst the East African Asian communities as in the Indian subcontinent except that polygamy is rare amongst East African Asian Muslims and is not condoned by most communities.' Hinchcliffe (1970: 27-28) similarly notes the rarity of polygamy among Ismailis in Africa and points to a *firman* issued by the Aga Khan in 1962 that forbade the practice.

⁶ In the English case of *Prakasbo v Singh* [1966] P 233, [1967] 1 All ER 737 the neglected wife's right of recourse to the court was resisted by the husband on the basis that their Sikh marriage celebrated in India had been entered into on the basis that it was potentially polygamous. In order to provide a remedy, however, the Divisional Court found it necessary to hold that the Hindu Marriage Act 1955, which had been enacted since the marriage took place, converted the marriage into a monogamous one. English law also criminalizes polygamy under section 57 of the Offences Against the Person Act 1861. *R v Sagoo* [1975] Q.B. 885 is a reported case of a Sikh man from Kenya who was married prior to the adoption of the Indian legislation there in 1960, and who then married another woman in England. His conviction for bigamy was upheld on the basis that while his first marriage had been potentially polygamous, this marriage had been converted to a monogamous marriage as a domicile of choice had been acquired in England. Marrying

socio-legal realities among ethnic minorities more clearly may well reflect wishful thinking about English law's claims of also having legislatively 'abolished' polygamy, along lines of what Menski (2000) has called 'legocentric hubris'.

2.2 English private international law and the refusal to see 'personal' law

Since at least the mid-nineteenth century English law has found the concept of polygamy difficult to deal with or even to recognise for the purposes of disputes within its courts, which upheld a self-consciously Christian viewpoint, even in cases where parties had married under an overseas legal system that accorded recognition to polygamy.⁷ This reluctance to accord recognition or award relief in polygamy cases, not least because of the long shadow cast by the decision in *Hyde v Hyde* ((1866) LR1 P&D 130; see Poulter 1986: 47-51, Jones and Welhengama 2000: 109-118), has been seen subsequently as clearly 'influenced by the rather condescending and intolerant attitude that was prevalent at that time towards Afro-Asian culture' (Parashar 1982: 206). This attitude has been seen as changing over time because of the altered political status in the countries concerned, as a result of which Britain was forced to recognise the existence and the effectiveness of other states and their laws. However, the key factor motivating change in the attitude of the courts, as Parashar (1982: 206-207) points out, was the

'... ever-increasing number of immigrants from Asian and African countries. These people who had come from countries which had cultures entirely different from England brought their customs and traditions with them. They were validly married in their countries and could not be expected to go back to their countries for getting matrimonial relief. Hence the English judges found a way out by holding that [the] nature of marriage could change. The change in attitude was from a complete denial of validity to the position that a potentially polygamous marriage could actually become monogamous.'

Besides drawing attention to the link with the increased presence of Asian and African migrants (see similarly Carroll 1984: 63), Parashar's key observation here is that, as a way of conferring recognition, English law had first to mentally convert these marriages to monogamous ones before any application for relief could be entertained. This was an early portent of things that were to follow in that the reaction to increased migration was not to recognise 'alien' customs according to their own terms but rather to make them undergo a process of conversion first.

This assimilationist attitude crucially informed the statutory reforms contained in the Matrimonial Proceedings (Polygamous Marriages) Act 1972 (later incorporated in the Matrimonial Causes Act 1973 (MCA)) that finally accepted that parties to (potentially or actually) polygamous marriages could obtain relief under English law. The Report of the Law Commission (1972: 14) put forward one of the key considerations that informed the statutory reforms in the following way:

'Finally, it is rightly argued that immigrants to England are not in a privileged position and are expected to conform to English standards of behaviour. However, it seems to us that parties to polygamous marriages are more likely to conform to English standards if English law imposes on them, so far as is practicable, the same family rights and obligations as are imposed on other married people. The denial of all relief cannot achieve any change in the standards of behaviour of people who have made their home in England. On the contrary, denial of relief not only permits parties to escape from

another time in England therefore laid him open to a charge of bigamy. Both cases illustrate different ways in which pressure can be applied to drive polygamy issues underground.

⁷ On the other hand in African countries where Christianity has been accepted a vigorous debate continues about the compatibility of Christian (Catholic) doctrine and traditional African customs including polygamy, particularly since Vatican II in the 1960s (see Kanyadago 1991).

their obligations, lawfully entered into under another legal system, but tends to perpetuate the polygamous situation because the marriage cannot be ended.’

The Law Commission was seeking, laudably it may be said, to provide relief in situations where parties were possibly likely to escape responsibilities incurred by entering into plural marriages, but with the assimilationist, and arguably erroneous, starting point that English legal norms ought ultimately to prevail over any others.

The reforms, while extending remedial protection cast in English normative terms to parties to polygamous marriages, also added hurdles in a move possibly designed to frustrate further judicial innovation. What became section 11(b) of the MCA 1973 provided that a party to a subsisting marriage cannot validly contract a second or subsequent marriage and that second or subsequent marriage would be void *ab initio*. As far as the ‘domestic’ law was concerned therefore plural marriages celebrated in England and Wales would not be recognised, and it was already the case that attempting to enter into such a marriage could lead to criminal charges.⁸ Section 11(d) of the MCA 1973 then added to the list of grounds by which a marriage, celebrated overseas after 31 July 1971, could be treated as void:

‘(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.’

This subsection, Poulter (1986: 55-56) points out, was specifically inserted as an apparent ‘codification’ of a pre-existing rule of private international law, despite (or possibly because of) some controversy as to the pre-existing position at common law, and despite the fact the Law Commission’s recommendations in their 1971 report did not specifically advocate action in this area. Carroll (1984: 67) records Prof. Morris’s recollection that the sub-section was introduced in response to Parliamentary opposition based on the erroneous supposition that the Bill legalised polygamous marriages. Very critically, Poulter (1986: 56) suggests that the subsection was inserted without heed to the likely consequences for ‘immigrant’ men and their wives:

‘... the ‘codification’ of this supposed rule into statute law seems to have occurred without sufficient regard being paid to the likely consequences. This is because the provision did not merely prevent a white Englishman who is domiciled here from circumventing the ban on contracting polygamous marriages in this country by purporting to do so abroad. It was framed so widely that it appeared to apply equally to immigrants who had come to Britain from countries where capacity to marry is governed by a personal or religious law which permits polygamy. All the indications are that quite a large number of Muslim immigrants, for example, particularly from the Indian subcontinent, have not been marrying in England but have returned to their countries of origin and there entered into potentially polygamous marriages arranged by their families in accordance with the local and religious law. The return of men to find wives in the Indian subcontinent is partly explained by the comparative shortage of single Asian women living in this country. The apparent effect of the new statutory provision in the case of any such person who had acquired a domicile of choice in England was to render his or her marriage totally void.’

Clearly domicile was the key determinant here as non-English domiciliaries were considered as remaining free to conduct their affairs according to their personal or religious laws with the proviso that key facts such as marriage solemnisation took place outside the UK. Even here problems were being stored up as domicile and how it is acquired or lost was hardly an uncontentious issue as we see later (2.3).

The potential consequences of the developing social scenario, under an English conflicts law that was working itself into a corner, were brought to a head in the well-known case of *Hussain v Hussain* ([1982] 1 All ER 369, (1983) 4 FLR 339). The case of course concerned a matrimonial dispute and involved a couple who were in a *de facto* monogamous marriage. They

⁸ See footnote 6.

had married in Pakistan in 1979, and the wife later applied to the court for a decree of judicial separation on grounds of the husband's 'unreasonable behaviour'. The husband relied on MCA section 11(d) to deny that he was married at all, the marriage being potentially polygamous, an interpretation then in accord with the views of most commentators (Carroll 1984: 66-67, Poulter, above). The Court of Appeal, however, wisely disallowed him to rely on this specious reasoning, as he clearly appeared to have been married. The Court found that he could not possibly have been potentially polygamously married because, being an English domiciliary, his capacity to marry was governed by English law which only allowed monogamous marriages. He was therefore validly, though monogamously, married. The Court was also mindful of Britain's 'increasingly plural society' and, had its decision gone the other way, Poulter (1986: 58) observes that it would have had 'widespread and profound repercussions on the Muslim community here'. Yet, the reasoning adopted by the Court of Appeal caused several academics and the Law Commission to comment on its potentially adverse or unclear implications.

Notably, the complaints have focused on the fact that the decision applies only to marriages solemnised after 31 July 1971 and does not clarify the status of those solemnised earlier (Pearl 1986: 46); the status of persons who conducted their affairs prior to the *Hussain* decision in the belief that under the MCA 1973 their marriages were void remained unclear (Pearl 1986: 47); and where the woman was an English domiciliary, marriages celebrated in a jurisdiction allowing polygamy would still be considered potentially polygamous and therefore invalid under section 11(d) (Carroll 1984: 68-71, Poulter 1986: 58, Pearl 1986: 47). The Law Commission (1985) since advocated recognising actually monogamous marriages of English domiciled women married abroad under laws allowing polygamy, thus removing what now seems like obvious discrimination, although their legal position was weak at least since the reforms of the early 1970s if not earlier. Meanwhile the validity under English law of the marriage of any such woman remained subject to being questioned, and could have had immigration related consequences that have already been seen under the hated primary purpose rule, and which are thus not difficult to imagine occurring in practice. In that parallel scenario, characterised as a manifestation of heavy-handed 'state masculinism', judges acceded to the idea that Asian women in Britain effectively could not choose to marry a partner abroad (Menski 1999, see *Sumeina Masood* [1992] Imm AR 69 and Sachdeva 1993: 155-158). Reported immigration cases raising validity issues on the basis of potential polygamy do not appear however, and it seems that parties were normally informed about the invalidity of their marriage under English law but yet granted entry clearance as discussed further below (2.3).

In another light, the *Hussain* decision reinforces the problematic nature of English conflicts law while trying to find a way out of the legal impasse caused especially by the MCA 1973's drafting. The key issue here, which is symptomatic of a wider problem for English law (and perhaps European private international law more generally - see Foblets 1999), is that there is a continuing failure to distinguish between personal law and the relevant jurisdictional law. When English domicile is established therefore a person is simply not regarded as capable of contracting into an actually polygamous marriage. The underlying message is that English law seeks to control a person's personal law absolutely in such situations. Given then that the concept of domicile has been seen as the dominant determinant of capacity and that this concept itself is unwieldy and uncertain, this leaves room for all sorts of assimilationist assumptions to be played out by discretionary manoeuvres in actual cases. Marginalizing the essentially hybrid legal reality of migrants in such situations will also have an immigration bearing.⁹ Even in the *Hussain*

⁹ One line of cases concerns the imputation of polygamy where a prior divorce has not been recognised for failure to comply with the expectations of the official law. *Rukshana Begum Choudhury* ((9665), 20 January 1993) concerned a refusal to recognise a divorce given to a wife in Bangladesh on the basis that the husband had acquired a domicile in England by that time, and for that reason his subsequent marriage was also not recognised. The Immigration Appeal Tribunal reversed this finding however and held that he had never lost his domicile in Bangladesh. In *Mohammed A. Hamid* ((14314), 10 December 1996) the Immigration Appeal Tribunal heard the appeal of a wife initially refused leave to enter on the basis her marriage to her Yemeni husband was polygamous. The Tribunal held, however, that neither the husband's prior *talaq* to his long-standing first wife pronounced before an imam in Liverpool nor the subsequent marriage at the Liverpool Islamic Cultural Centre, an unregistered building, were legally effective. See

type scenario, given the couple's actually monogamous marriage, the attribution of English domicile to a Muslim man could still be read as a means of controlling his future freedom of action by barring him from contracting further valid marriages abroad altogether, thus obviating in advance the prospect of future settlement applications by a second wife and her children.

Poulter (1986: 60-61) pointed out that the underlying problem requiring a more radical solution here is the way in which the concept of domicile operates, and notes that the Law Commission in its post-*Hussain* Working Paper of 1982 did consider the option of allowing Muslim husbands to marry a second wife in Bangladesh or Pakistan, for example, and to give full recognition to such marriages even where the man is considered an English domiciliary. This option was, however, rejected in the Commission's 1982 Working Paper pending a general rethink about the law of domicile, though not revisited in its Report of 1985. Instead the recommendations limited themselves to advocating recognition of actually monogamous marriages of English domiciled women married abroad under laws allowing polygamy. It seems that Poulter was rather generous in his interpretation of the Law Commission's (1982: 84) Working Paper which specifically ruled out recognition for actually polygamous marriages on the grounds that it would not meet with 'general approval' and because of the difference in treatment among English domiciliaries that this would lead to. Any settlement, if it were to follow the Law Commission's thinking, would therefore be limited to reinforcing the notion that English law seeks to rule out countenancing actually polygamous marriages for English domiciliaries, still thereby treating many ethnic minority men and women, once deemed to have acquired domicile in England, as if their personal laws are subject to absolute control by English law. (A similar position presumably prevailed in Scotland despite the absence of an equivalent to section 11(d) MCA (Law Commission 1982: 107)). The recommendations of the Law Commission have now been incorporated into statute by section 5 of the Private International Law Miscellaneous Provisions) Act 1995 (see section 7 for Scotland), which limits itself to holding valid *de facto* monogamous marriages celebrated in jurisdictions allowing polygamy. While clearly attempting to solve the problem of the potential non-recognition of a huge number of marriages contracted abroad, this legislation also ends up preserving the fiction that English domiciled men and women cannot but enter into monogamous marriages. This mirrors the assimilationist position of English 'domestic' law which clearly also disallows polygamous arrangements and even Poulter (1990) raises human rights and discrimination objections to alteration of the official stance here. While reality will again be more complex, immigration control purposes may well be served by refusing to recognise plural marriages in these ways.

2.3 The emergence of immigration related cases and the response of private international law

By the mid-1980s immigration cases could be counted as one of the areas of litigation where questions relating to polygamous marriages had featured prominently, matrimonial and social security cases representing the other key areas (Pearl 1986:40).¹⁰ The gradual build up of reported and unreported cases in this area can be linked to the changing migration pattern particularly among South Asian groups in Britain on the one hand, and the tighter controls that were being applied against their migration to the UK on the other. Whereas in earlier decades the migration of men who are referred to by Poulter (2.2 above) dominated the scene, the 1970s onwards saw the consolidation of families in Britain. It appears that even *among* the South Asian groups the patterns have varied and, to a certain extent, generalisations can be made about this. Ballard (1996: 126), writing of the Pakistani experience, states that during the 1970s there was a marked shift towards comprehensive family reunion. He continues:

further, Pearl and Menski (1998: 382-398) on the problem of recognition of divorces of Muslims in Britain, and Jones and Welhengama (2000: 118-132) on ethnic minorities more generally.

¹⁰ In the recent case of *Bibi v Chief Adjudication Officer* [1998] 1 FLR 375, [1998] 1 FCR 301, [1997] Fam Law 793, the Court of Appeal upheld a refusal to allow a widow of a polygamously married husband to claim a widow's pension. The case highlights the wide gap in protection for wives under official law other than in the area of matrimonial relief.

‘While their British citizenship meant that male settlers’ rights to reunite families could not be gainsaid, all sorts of administrative obstacles which hindered their ability to exercise those rights began to be introduced, and by the late 1970s lengthy queues had developed at each of the many stages in the process of gaining leave to enter. Yet although this was an effective way of reducing headline figures in the short term, it did not prevent the eventual arrival of persistent applicants, especially when they took their cases to the courts. Thus while the process of family reunion took much longer to complete among the Pakistanis than it had among the Indians ... by 1991 the overwhelming majority of families had been reunited.’

Ballard here, apart from identifying the problems encountered in seeking to reunite families among Pakistanis, draws attention to the fact that this process was delayed as compared with groups from India (see also Ballard 1990).

Still slower to take off and to peak was the process among Bangladeshis as Ballard (1994: 20) mentions elsewhere. Gardner and Shukur (1994: 150) point out that in the earlier period Bangladeshi migrant men were ‘international commuters’ who divided their time between working in the UK and their families in Bangladesh. However,

‘By the early 1970s this pattern began to change. New legislation had made movement back and forth between the two countries increasingly difficult, and many migrants had begun to fear that unless they claimed British nationality and brought their dependents to join them, their rights of free movement might evaporate altogether. The whole character of migration swiftly altered: new arrivals were now most likely to be the wives and children of earlier settlers entering officially as dependents.’

This movement then appears to have peaked in the 1980s (Eade, Vamplew and Peach 1996: 151), although it was continuing well into the 1990s (Ballard 1994: 20). It also appears therefore that there was a mutually reinforcing effect as between the perception of tighter immigration regulations and the desire to reunite the family rapidly in order avoid stricter controls. This would not however rule out the influence of other factors, particularly, the perception that a home abroad or ‘*desh pardesh*’ as captured by Ballard (1994) could be safely established in externally alien conditions (see Gardner 1995: 114-121 for Sylheti Bangladeshis).

When we turn to the process of immigration control we find that marriage relationships have often been doubted in South Asian family reunion cases for various reasons (see Sachdeva 1993: 108-111, Juss 1997), but the validity of marriages on the basis of polygamy only seems to be raised in Pakistani and Bangladeshi Muslim cases. One can only speculate at this stage as to the comparative absence of polygamy cases involving applicants from other Asian and African regions or traditions, although it may well be that the comparatively delayed family reunification processes among Pakistanis and Bangladeshis and the immigration controls consequently applied to this movement may provide one explanation. However, we cannot at this stage rule out the role of perceptions about official laws in the countries of origin (see 2.1) in determining South Asian Muslims as more obvious targets of control.

It was known that entry clearance officers (ECOs) were expected to conduct routine inquiries about the validity of marriages when dealing with spouse applications. Pearl (1986: 40-41) uses the example of a Bangladeshi man who returns to Bangladesh and marries a second wife there, who subsequently gives birth to a son there and then applies for entry clearance to come to the UK to illustrate the type of consideration involved in such an inquiry. A three-stage test needed to be performed in this illustration:

(1) What is the appropriate ‘choice of law’ rule’ which is used to determine the validity of the marriage? In other words, should the officer apply English law, or should he apply the Bangladesh law? Is there an English-law rule which enables him to make this choice of legal system?

(2) The traditional ‘choice of law’ rule is that the capacity to contract a marriage which is *actually* or *potentially* polygamous depends on the antenuptial domicile of both parties. If

this rule is applied, and, as we shall see there are some authorities which suggest that other tests should apply, then two further questions are raised. First, what test is used to determine the parties' domiciles at the time of the marriage? Secondly, assuming it is held that the man is domiciled in England, what is the English law on capacity to contract *actually* or *potentially* polygamous marriages?

(3) Even if the [second] marriage ... is void in English law, does the child have a right of abode as the legitimate son of his father, independent of his mother's claim?

The rules leave considerable discretion in the hands of ECOs who were certainly not obliged to automatically accept the validity of either potentially or actually polygamous marriages. Although the test appears complicated, it does not seem that ECOs found it impossible to apply to find that second wives did not qualify for entry clearance simply on the basis that the second marriage was void under English conflicts law. In order that ECOs could ascertain how the marriage in question ought to be treated a domicile questionnaire appears to have been in use since at least the mid-1970s. The Commission for Racial Equality pointed out, in evidence to the Law Commission (1982: 47-48), that domicile, 'an abstract concept of legal art', was not generally understood and that individuals were not aware that the domicile questionnaire was used for the purpose of ascertaining the husband's domicile at the time of the marriage. It found this objectionable because the document neither explained its purpose nor indicated that it might be desirable for the person required to complete it to obtain prior advice.

In practice, wives of men who were considered as domiciled in Britain were admitted if the marriage was actually monogamous. However, parties to actually monogamous unions were still warned by ECOs that their marriages may not be recognised in the UK if in polygamous form where the husband's domicile was in doubt (Law Commission 1982: 52). As the CRE pointed out in its evidence to the Law Commission (1982: 47-48), there was inevitably an adverse effect on parties when they were told by Home Office officials that their marriage was void and that, for their protection, they should go through a further ceremony of marriage in the UK. Here again we can see indirect pressures to convert potentially polygamous marriages to monogamous form. On the other hand, by allowing entry in practice, ECOs and the Home Office avoided openly raising the issue of the potential invalidity of marriages, and we have seen that the issue only came to a head in *Hussain* when a recalcitrant husband sought to take advantage by claiming that under English law his marriage was never valid.

As for the status of children, as raised by Pearl in his third question (above), the Legitimacy Act of 1976 provided that a child of a marriage considered void would still be deemed legitimate if at the time of intercourse resulting in birth both or either of the parties reasonably believed that the marriage was valid (Pearl 1986: 48). It appears therefore that refusals were generally made in cases where a wife was party to an actually polygamous marriage and it was concluded that the husband had acquired an English domicile prior to the marriage at issue, even though the children of the marriage may well be considered legitimate and therefore entitled to citizenship (see 3.1) or entry clearance.

The key reported case that reached the Immigration Appeal Tribunal in the early phase of development from the mid-1970s is *Zahra and Another v Visa Officer, Islamabad* ([1979-80] Imm AR 48, Pearl 1986: 42-43). Tasleem Zahra and Yasar Arafat, citizens of Pakistan, both applied in November 1975 to the visa officer in the British Embassy in Islamabad for entry clearance to join Mr Talib Hussain Shah for settlement in the UK as his second wife and their son.¹¹ The marriage took place in October 1974. The visa officer was satisfied that the applicant was the sponsor's second wife. However, because he already had a first wife at the time of the marriage and because the view had been formed that the sponsor was domiciled in England at the time, although the marriage may be valid by Pakistani law, under English law the sponsor had no capacity to contract an actually polygamous marriage. The marriage was thus declared void. On appeal, the adjudicator and the Immigration Appeal Tribunal upheld this approach. The Immigration Appeal Tribunal leaned in favour of the sponsor's response to the domicile questionnaire that he found the climate in Pakistan 'too bad' and therefore wished to retire in the

¹¹ In this case, it appears that the son could not benefit from the Legitimacy Act 1976 as the application pre-dated the statute.

UK. Applying section 11(d) of the MCA 1973 it was agreed that the marriage was void. Therefore UK immigration law had quite early on adopted the so-called ‘traditional’ or ‘dual domicile’ (or ‘prenuptial’ or ‘ante-nuptial’) test to exclude second wives by simply refusing to recognise the validity of their marriages. Pearl (1986: 43) informs us that this meant specifically excluding from the picture the legal view taken in the foreign legal system, in this case Pakistan, as to validity of marriage although that consideration was specifically mentioned in a sort of saving provision in section 14(1) of the MCA 1973. A similar approach was apparently followed in other immigration cases that reached the Immigration Appeal Tribunal – Pearl (1986: 43) mentions two such cases of applicants from Bangladesh – *Johanara Begum and Others v ECO, Dacca* ((1261), 9 June 1978) and *Arifun Nessa and Others v ECO, Dacca* ((3392), 1984) (both unreported).

At this time the Immigration Rules carried a provision stating that a ‘woman who has been living in permanent association with a man ... may be admitted as if she were his wife, due account being taken of any local custom or tradition tending to establish the permanence of the association’ (HC 81 (1973) para. 37, equivalent paragraphs also to be found in other Rules in force at the time). It was also therefore argued before the IAT in *Zabra* that the applicant ought to be allowed entry clearance under this provision. The IAT, however, followed its own ruling in a case involving a Bangladeshi applicant *Johanara Begum* ((1261), 9 June 1978) that had raised essentially the same point, and held that the Rule in question:

‘... is intended to deal with, so to speak, a monogamous situation. If it were to be otherwise an oriental pasha with a harem of several wives might be entitled to bring them all to this country, even if he were domiciled here, provided that he otherwise satisfied the requirements of this paragraph. This is clearly absurd.’

The case, we are informed (at [1979-80] Imm AR 51), was also followed by the Tribunal again in *Visa Officer, Islamabad v Zaitoon Begum* ((1642) 5 November 1979, unreported). New Immigration Rules of 1980 – HC 394 – then, in restating the above-mentioned paragraph, carried a general proviso that,

‘A woman is not, however, to be admitted under this provision unless any previous marriage by either party has permanently broken down. Nor may she be admitted if the man has already been joined by his wife, or another woman admitted under this paragraph, whether or not the relationship subsists.’

This new paragraph was obviously inserted as a means of ‘codifying’ the effect of the decided cases thus reducing room for judicial discretion in future, but it also indicated that the immigration judiciary here were influencing the gradual hardening of attitudes by invoking imagined oriental pashas!

The *Zabra* decision may have been a turning point in that while, in later cases, the Tribunal’s approach to retention or loss of domicile seems to have kept shifting somewhat, it remained the benchmark as far as the choice of law rules were concerned (Pearl 1986: 43, 45). In other words, here was a decision giving priority to English conflicts of law thus establishing the essential parameters of legal relevance and perhaps it is not surprising that ECOs were now concentrating on domicile as a means of denying the validity of marriages, and thus denying entry. Corroborating this, Fransman (1989: 204) recalls also that ‘the respondent in many immigration appeals has sought to argue that the domicile of origin has been abandoned in favour of a domicile of choice’.

The straight jacketing effect of the dominant conflicts discourse meant that there were occasionally very awkward moments for the Tribunal which saw the injustice behind some decisions refusing entry. In one case – *Fazalan Bibi and Others v VO, Islamabad* ((3080) (1984, unreported; Pearl 1986: 44) – the Tribunal took into account, as one of several factors indicating the sponsor’s retention of the domicile of origin, the fact that: ‘The sponsor is a Muslim and undoubtedly there are aspects of Western culture which he would find repugnant.’! A right result for the wrong reasons? Perhaps, but it may be noted that the Tribunal appeared also fairly impressed with the fact that the sponsor’s first wife remained in Pakistan. Pearl (1986: 44-45) and Fransman (1989: 204), however, cite several other determinations in which the Tribunal appears

to adopt a more balanced approach and leans more often in favour of retention of the domicile of origin, thereby also facilitating the recognition of the validity of second marriages.

With Professor Jackson's ascension to Vice-Presidentship of the Tribunal we find, among the reported decisions, two in which a definite change of approach can be seen since *Zabra. Rokeya and Rabby Begum v Entry Clearance Officer, Dacca* [1983] Imm AR 163 was another Bangladeshi case of a second wife and daughter of the male sponsor who typically led an 'international commuter' life between Sylhet in Bangladesh and Britain, having first arrived in Britain in 1962. His first marriage took place in Bangladesh in 1969, he became a citizen of the UK and colonies in 1972, and he married the first applicant in 1975 and his daughter by her was born in 1980. It was decided by the ECO and on appeal by the adjudicator that because the sponsor was domiciled in England at the time of the second marriage, that marriage was void. The Tribunal took care to set out factors for and against the conclusion that the sponsor had acquired a domicile of choice in England and, unlike in *Zabra*, cited authorities that underlined that the burden of proof on those alleging that the domicile of origin had changed was a heavy one and stated that 'in the typical immigration case of a family split between England and another country the difficulty of satisfying the criteria is considerably increased.' It held that the sponsor's domicile had not changed at the time of his second marriage and allowed the appeal. So here we have a case in which the basic parameters of the so-called 'traditional' or 'dual domicile' test were not challenged by the Tribunal but, rather, it sympathetically found a way to hold that the marriage was valid by adopting the view that the loss of the domicile of origin had not been convincingly established.

In the second case, *Entry Clearance Officer, Dhaka, v Ranu Begum and Others* [1986] Imm AR 461, the 'traditional' test itself was challenged by the Tribunal. This case also involved a Bangladeshi sponsor's second wife and their children. It was found here that the sponsor had initially married an English woman with whom he had four children but that since about 1953 he had not seen her, although he never went through divorce proceedings to end that marriage. He married the first applicant in 1969 in (then) East Pakistan. By the Tribunal stage the sole question was about the validity of the second marriage, although at earlier stages it seemed the main issue had been whether the applicants were related as claimed, a frequent inquiry in Bangladesh cases. The question of the sponsor's domicile therefore became a key point in the appeal. It was actually concluded by the Tribunal that although he had acquired a domicile of choice in England at the time of his first marriage, he had subsequently *re-acquired* his Pakistani domicile by 1969 so that his second marriage too was valid under the 'dual domicile' or 'pre-nuptial domicile' test.

The Tribunal did not stop there, however. Since the second marriage in this case predated the dateline of 1 August 1971 drawn by the MCA, the Tribunal saw no reason to be restricted by section 11(d). Instead, it drew on the recent decision of the Court of Appeal in the matrimonial case of *Lawrence v Lawrence* ([1985] 2 All ER 733) in which either the 'pre-marital domicile' or the 'intended matrimonial domicile' tests (this latter also expressed as the 'intended matrimonial residence' or the law with which the marriage has a real and substantial connection) were thought to be useful as a way of recognising the marriage at issue. The relevant dicta in *Lawrence* had found support in one Tribunal decision – *Rafika Bibi* ((4603) unreported, see Mole 1987: 42-43) already, although as in that case the Tribunal in *Ranu Begum* also found that it was difficult to establish the intention of the sponsor after the marriage with certainty as he had intended to return to the UK for work each time after having visited Pakistan/Bangladesh. However, the Tribunal went on to find that:

'In so far as the dicta in *Lawrence v Lawrence* opened the gate to consideration of the law which has the most substantial connection with the marriage, we have no doubt that this was the law of Pakistan. All the factors point to Pakistan being the country most connected with the marriage. Even if we had not been able to find that the sponsor had lost his domicile ... we would still have concluded that the law that has the most substantial connection with the marriage was that of Pakistan. We realise that *Lawrence v Lawrence* was not concerned with the validity of polygamous marriages in English law and was concerned with a case where the intended domicile was English. However, as in *Rafika Bibi* we are thankfully relieved from the task of deciding whether, had the

sponsor's domicile been English, the marriage should still be considered valid as the law with which the marriage had the most real and substantial connection was Pakistan.'

The marriage was held to be valid according to English law as the findings on the two tests coincided, although as reflected in this statement, the Tribunal was certainly aware that it had narrowly escaped the burden of ratifying the idea that an English domiciliary was capable of contracting a polygamous marriage in an overseas jurisdiction (albeit only for marriages celebrated prior to 1 August 1971).

The impression that the law, as far the older marriages were concerned at any rate, was slowly moving to consideration of the overseas law is reinforced by some remarks made by Webster J in the unsuccessful application for judicial review in *R v Immigration Appeal Tribunal, ex parte Rafika Bibi* ([1989] Imm AR 1). In that case, although the Tribunal had been impressed by the remarks favouring the 'real and substantial connection' test in the *Lawrence* judgement, they could not decide either that the sponsor's second marriage actually had a real and substantial connection in Bangladesh or that he had retained his domicile there. They had therefore upheld the finding that the second marriage was void, while allowing the appeals of four children of this union. The second wife then trounced the Tribunal by somehow arriving at Heathrow some months later and claiming entry. When this was refused a judicial review application challenging both the Tribunal decision and the immigration officer's refusal was made. Webster J was not persuaded that the Tribunal's approach had been unreasonable or perverse. He also refused to entertain the argument that the Tribunal ought to have made a decision that Bangladesh law was the most appropriate as the 'marriage was a Muslim marriage, celebrated in a Muslim community in Bangladesh; that at its date both the sponsor's wives were resident in Bangladesh, and that the only land or property owned by the sponsor was in Bangladesh.' However, in the course of the judgment, the judge made the following observation:

'Whatever the doubts or dispute there may be as to which of the two rival tests should be applied, I will assume that the real and substantial connection test should be applied if it results in upholding the validity of the marriage which would be invalid tested against dual prenuptial domicile.'

This observation also seemed to favour the application of alternative tests, as had the Tribunal, with the aim of upholding the marriage if possible.¹²

At the very least, therefore, these newer cases indicate a more relaxed approach. *Rokeya and Rabby Begum* shows that the Tribunal was willing to find that the domicile of origin had been retained to uphold a second marriage, and in *Ranu Begum*, that it had actually *been recovered*, with the same result. It is possible that the implications of the finding in *Ranu Begum*, that the 'dual domicile' test was likely to be ceased from having a monopoly over the validity of earlier polygamous marriages, may have also worried law makers. That this approach found the support of the High Court could have caused such worries to rise. However, by the time the High Court gave its decision in *Rafika Bibi* on 11 February 1988, the wheels of legislation were already moving to introduce a statutory 'ban' on the entry of second wives, pushing domicile and choice of law questions firmly to the background.¹³

3. The ban on second wives: the intervention of statutory control

¹² The approach was followed in *Sofura Bibi* ((8601), 24 February 1992), in another case involving a marriage entered into prior to 1 August 1971.

¹³ Another reason for refusal continued to cause problems, however. This was the contradiction that was often apparent in sponsors declaring that they saw the UK as their future home for the purpose of supporting their spouse's settlement application, and the same information then being used by ECOs to argue that the sponsor's domicile of origin had therefore been lost, leading to a declaration of invalidity of the marital relationship. This line of reasoning was successfully challenged however before the Tribunal in *Rukshana Begum Chowdhury* ((9965), 20 January 1993), and before Sedley J in *R v Immigration Appeal Tribunal, ex parte Miab* (CO/2100/92, 14 June 1994). See Jackson (1999: 58).

3.1 The Immigration Act 1988 and accompanying restrictions

By late 1980s UK immigration law was already heavily involved in controlling the movement of South Asians by legitimating the denial of entry to family members (Juss 1997), while the fully fledged primary purpose rule that served to effectively exclude a huge number of men married to South Asian women resident in the UK was also in full operation by this time (Sachdeva 1993). By the Immigration Act of 1988 and accompanying Immigration Rules UK law then effectively imposed an outright ban on the admission of a wife where another wife had already been admitted.

The sequence of events leading to the passage of the 1988 Act, as well as the other provisions in it, are also of interest in this context. Many South Asian men, Bangladeshis (formerly East Pakistanis) being the most important group here, who came to work in the UK in the earlier periods of post-war migration acquired, since the Immigration Act of 1971, a right of abode under that Act's 'partiality' provisions. While South Asian men could not generally establish such a right through ancestral connections or birth in the UK, many could have done so after five years residence in the UK, or by registering in the UK as citizens of the UK and colonies as indeed Gardner and Shukur (1994: 150, see 2.3 above) indicate. Importantly under the patriality provisions such men could also pass a right of abode on to their wives, including second wives, and therefore an unfettered right to enter the UK without being subject to immigration control. There was a proviso under section 3(9) of the Immigration Act 1971 that would have applied to most such wives that they should obtain a 'certificate of entitlement to partiality' (later 'right of abode') before travelling to the UK. Further, under the 1971 Act children of partial men who had registered themselves as CUKCs themselves acquired a right of abode and upon the coming into force of the British Nationality Act 1981 these children were entitled to claim the status of British citizens and to travel to the UK without the need for certificates of entitlement, even on Bangladesh passports, and without being subject to immigration control (see in detail Fransman 1986, Fransman 1989: 210-231, especially at 227-228).

The key events that then led to the 1988 Act being passed very much lead the observer to conclude that the main target of control were family members from Bangladesh, a group which appears to have suffered much of the worst forms of immigration control partly because of the relatively delayed trend to reunite families as compared with other South Asians (see 2.3 above). As Fransman (1989: 215) recounts:

'The Bangladesh British citizens by descent began to arrive in 1985 and during 1986 the numbers increased substantially. However, as of 16 October 1986, the UK government made Bangladeshis visa nationals. As a matter of law, those claiming British citizenship by descent did not require visas but the airlines, fearful of financial penalties, simply refused to carry any Bangladesh passport holder without a visa. The result was that in all but a few isolated cases the flow of claimants from Bangladesh was halted.

'The government, however, was not satisfied with a mere *de facto* prevention of direct arrivals of claimants of British citizenship by descent. The introduction of visas may have placed a hurdle in the path of claimants wishing to travel direct to the UK but did not affect their legal right to do so. Accordingly, after the 1987 election the government announced its intention to amend the law and so to extinguish the statutory entitlement.'

Thus, section 3(1) of the Immigration Act 1988 replaced sections 3(9) and 3(9A) of the 1971 Act with a new section 3(9) that imposes a requirement on all claimants to the right of abode or British citizenship when seeking to enter the UK to establish that status by obtaining a certificate of entitlement or a British passport. This provision obviated the risk of claimants to entry simply arriving at a British port, and rather attempted to ensure that controls were applied at diplomatic posts abroad where any adverse publicity could be avoided.

Not content with this draconian interference with rights of abode already in existence, the 1988 Act also removed, by its section 1, the protection contained in section 1(5) of the 1971 Act that wives and children of those Commonwealth citizens who were already settled by 1

January 1973 would not be subject to any more onerous requirements than in existence on that date. Section 1(5) was 'originally enacted to give confidence to Commonwealth citizens settled here that increasingly restrictive immigration policies were not aimed at driving them away or preventing their families joining them in the UK' (Sachdeva 1993: 40). Judging by the anthropological accounts discussed above (2.3), it does not appear that this section alone was able to inspire such confidence as other restrictions soon came to bear upon these migrants that spurred them on to hasten the process of family reunion. However, as a consequence of the change, this group of men and their families have also been subject to the significantly harsher requirements for family reunion that have been imposed since 1973 such as the primary purpose rule and maintenance and accommodation requirements. The change has also meant that further restrictions can be applied simply by way of changes to the Immigration Rules, which are subject to alteration by the executive. As a result, the changes to the Rules on polygamously married couples also affect them.

The key provision of the 1988 Act applying to polygamously married wives is found in section 2, although that only relates to their exercising a right of abode or obtaining a certificate of entitlement. Accompanying changes to the Immigration Rules, as amendments to the then prevailing statement H.C. 169, paras. 1B-1D (in force 1 August 1988) (see Moss 1988) extended the reach of the prohibition to preclude such wives obtaining entry clearance, leave to enter or variation of leave to remain (the same were later to be found in H.C. 251 (1990), paras. 3-5 and now to be found in H.C. 394 (1994), paras. 278-280 in virtually identical terms).

Section 2 of the 1988 Act applies to a wife, A, who acquired a right of abode by virtue of a marriage to a man who also had a right of abode as provided for in the Immigration Act 1971. Such a wife is prevented from exercising her right of abode, or from acquiring a certificate of entitlement if there is another woman, B, living who is the wife or widow of the husband and who is or has, since her marriage to the husband, been in the UK or has been granted either a certificate of entitlement or an entry clearance. The Act does not therefore envisage A from ever enjoying a right of abode acquired as a result of the 1971 Act's partiality provisions if B has previously been or remains in the UK, regardless of whether the husband remains alive. A may only exercise this right where B has been in the UK as a visitor, an illegal entrant or has been granted temporary admission. An exception is also provided if A was present in the UK before 1 August 1988 or if A had been in the UK at any time since her marriage before B became a wife.

The Rule changes prevent wife A from obtaining entry clearance, leave to enter or remain or a variation of leave to remain as a wife of a man who is married to B, if B is or has at any time since her marriage to the husband been in the UK or if she has been granted a certificate of entitlement. Similar exceptions apply in this case, so that entry clearance, leave to enter or variation of leave may still be granted if A has been in the UK before 1 August 1988 having already come for settlement as the wife of the husband or if she has, since her marriage to the husband been in the UK at any time when there was no wife B. Apart from that, again, A may only obtain entry clearance, leave to enter or variation of leave if B has been in the UK as a visitor, an illegal entrant or has been granted temporary admission. The Rules do not, however, envisage a total ban and wife A could theoretically obtain entry as a visitor, as the prohibition applies to entry or stay as a wife only. It is to be noted that both under the Act and the Rules B and A may not be first and second wives respectively, but rather it is the presence of either wife in the UK that precludes the other from enjoying her right of abode or obtaining entry clearance, leave to enter or variation of leave.

Unlike the impact of the other key changes in the 1988 Act, that of the polygamy provisions were certainly not seen by legislators as making a great impact on the presence of South Asians in the UK in terms of numbers. Home Secretary, Douglas Hurd, speaking of what became section 2 (H.C. Debs. Vol 122, col. 785), stated:

I do not wish to exaggerate the point. The number of polygamous wives coming here is quite small: we estimate that perhaps 25 or so polygamous households are set up here every year. However, polygamy is not an acceptable social custom in this country. I have no doubt that it would cause serious damage to community relations if it became generally understood that men settled here could continue to bring in a number of wives each. I very much hope that, on reflection, the Opposition will not make an issue of the

change. The numbers involved are quite small, but the principle is not acceptable. The sooner we make that clear in the law of the land, the less likely it will be that damage to community relations will result.’

Responding to the provisions of the Bill, Roy Hattersely MP stated that the Bill was ‘less concerned with legislation than with propaganda’ (ibid., col. 189) and others saw the measure as more politically motivated than about the numbers involved (Stuart Randall MP, ibid., col. 846). Still others saw it as justifiable given its gender equality undertones. For example, Anne Widdecombe (ibid., col. 826) observed:

‘We have heard of about the 25 cases of polygamy – not a great deal many ... But, speaking as a woman, I find polygamy and arranged marriages wholly at odds with what the European Court of Human Rights has said about the equality of women.’

Thus, it seems that unlike some other parts of the immigration control agenda at this time, this was hardly an issue directly relevant to the ‘numbers game’ as it had come to be known. Rather, it appears more to do with the continuance of alien customs and cultures regarded as unacceptable in Britain. As we have seen, there is a long history of uneasiness about polygamy in Britain and although the initial defences against it were built upon the doctrinal presuppositions of Christianity, these have now metamorphosed into the unacceptability of the custom on grounds of ‘community relations’ or the norms of gender equality and the human rights of women (see Poulter 1990, 1995). Of course, it may be argued that by focusing on the pluralisation of cultural norms in Britain, wider immigration control agendas could be pursued or justified, as indeed seems to be true of the 1988 Act.

3.2 The one-wife policy in the courts and minority responses

The 1988 legislation meant that for actually polygamous couples the prospect of securing full family reunion rights was now overridden by statute, although as seen earlier (at 2.3), the position under private international law had still allowed some room for manoeuvre at the official legal levels. This does not, however, mean that validity of marriages is not a concern of the immigration authorities as we are still told that ‘polygamy is the issue of validity most commonly faced in the context of immigration’ (Jackson 1999: 57). On the other hand, the case law that came after the 1988 legislation is much less concerned with the validity of marriages under private international law than was the case before then, but rather tends to be concentrated on the limits of the exercise of administrative discretion that now governs the admission of polygamously married wives.

A valiant attempt to declare the Immigration Rules on polygamously married wives *ultra vires* by means of a judicial review challenge in *R v Immigration Appeal Tribunal, ex parte Hasna Begum* ([1995] Imm AR 249) did not succeed. The case actually involved a long-standing second wife in Bangladesh who had never had accommodation of her own and it appears that her mother and brother had no longer wanted to maintain her nor to allow her to remain in the same house as them, the brother’s wife and their seven children. It is this situation that appears to have motivated the application in the first place although this is hardly discussed and Tucker J, while sympathetic, did not find the Rules to be *ultra vires*.

Attempting to circumvent the official ban on second wives could lead to the jeopardisation of immigration status as found out by the applicant in *R v Secretary of State for the Home Department, ex parte Zeenat Bibi* ([1994] Imm AR 326, QBD). The case concerns a young second wife of a sponsor who had been in the UK since 1967, registered as a ‘British citizen’ (probably rather as a ‘citizen of the UK and colonies’) in 1974, and returned to Pakistan to marry and return with his wife in 1975. The couple appear to have been childless, as was revealed only at the Court of Appeal stage (*Zeenat Bibi v Secretary of State for the Home Department* [1994] Imm AR 550), and it may be that that was the reason (although we are not informed) that the couple returned to Pakistan in 1989 where the husband married the applicant. The applicant arrived in the UK in 1991, but as a visitor, having informed the authorities that she was already engaged to

a man in Saudi Arabia. She later revealed that she had been informed by someone who was 'educated' that if she disclosed her true marital status, she would not have a chance of obtaining admission to the UK. After arrival she soon became pregnant and had two children by the time of the hearings. Upon her first pregnancy she applied for variation of leave as a spouse and upon being interviewed with her husband she was declared an illegal entrant, and later informed of the refusal of her application to remain in the UK.

Not much argument seems to have ensued about the validity of the marriage when the application for leave for judicial review was heard, nor when it was renewed in the Court of Appeal. The Secretary of State's letter described the second marriage as 'invalid and polygamous'. Pill J in the lower court assumed that the second marriage was not valid because the sponsor had an English domicile, while Russell LJ in the Court of Appeal, assuming validity, pointed out that the Immigration Rules would have frustrated any application as a spouse. Although the Home Secretary's refusal letter proposed to remove the applicant and her two children, neither Court was moved to hold that removal was unreasonable in light of the fact that the children, as British citizens, had a right of abode in the UK. This is a particularly disappointing case with the judges blindly following the statutory rules without regard to the human factors involved, but also a logical consequence of the 1988 Act where a party to a marriage seeks at first not to disclose her true status, indicative as we shall see of a wider phenomenon of polygamy 'moving underground', rather than ceasing altogether. Women in this situation find themselves in an extremely weak legal position, subject to harassment and removal by state officials who are free to make hurtful allegations implying *zina* (unlawful sexual intercourse), and potentially by the other parties to the marriage, although that does not appear to have been the situation in this case.

The final reported case, *R v Secretary of State for the Home Department, ex parte Lailly Begum* ([1996] Imm AR 582), involves a widow from Bangladesh who bore four children before her husband died. She was his second wife. She was refused a certificate of entitlement in 1992 as a direct consequence of the 1988 Act although her four children were issued with British passports. She then sent them to the UK upon which they were sent into local authority care. Some two and half years later she managed to arrive in the UK and claimed asylum when she was refused leave to enter on false American visas. She was allowed to live with her children who were in foster care, although she was refused exceptional leave to remain on the basis that she and the children could continue life in Bangladesh. One of her sons was 18 at the time of the hearing, although she had with her two daughters aged 14 and 16 and another son aged 12. Two of the four children were said to have suffered from severe emotional problems. Among the arguments raised in the application for leave to apply for judicial review was that the Secretary of State had not treated as paramount the interests of the children as would be the case under the Children's Act 1989. Dyson J felt, however, that the Secretary of State was not bound by the Children's Act and that what weight he placed on the children's interests was for him to decide. This case again therefore reinforces the impression that even where children have British citizenship UK immigration law regards their mother as removal or deportable from the UK, as well as highlighting the different standards of child protection thought appropriate as between the family court jurisdiction and the immigration context. Nobody seems to have thought it relevant to argue that the mother in this case was initially separated from her children because of the retroactive removal of her right of abode.

It is apparent that particularly since the 1988 legislation English law draws a particularly hard line against the admission of polygamously married wives, although under the 'domestic' matrimonial law recognition was already refused with the possibility of criminal charges being brought. However, it can be questioned whether the purported ban on polygamy either by prohibiting the contraction of more than one marriage in Britain or by preventing the admission of second wives achieves its actual abolition, assuming of course that this is itself desirable in all situations. There is now considerable evidence to the effect that Muslims living in Britain have generally been able to adapt *shari'a* to the British scene by taking cognisance of multiple legal levels in what Menski has termed *angrezi shariat* (Pearl and Menski 1998: 74-77). On the other hand, some Muslims have consciously preferred to keep, or have had to keep, certain legal acts 'within the community' so to speak, a situation which the official legal position colludes in

perpetuating by the pretence that only English law (or Scottish law¹⁴) is being followed (Pearl and Menski 1998: 77-80, Yilmaz 1999).¹⁵ Yilmaz (1999: 167) presents specific evidence about the practice of polygamy in that one marriage is contracted under *shari'a* while another marriage may take place under both the official law as well as *shari'a*. The same result may be achieved by declaring only one marriage for immigration purposes while another marriage may well take place in the UK under *shari'a* only, although the image that the marriage is a monogamous one is retained officially. The evidence cited shows, consistently with that in other jurisdictions, that official bans on social practices such as polygamy, based in this case on civilisational chauvinism, are ill-advised and drive the phenomenon underground. The risks of abuse here are many as is the potential vulnerability of women and children who may simply be abandoned without a divorce recognised under the personal law of the parties and without recourse to official legal fora for remedy. If anything, the official law exacerbates the weaker legal position of women and children often dividing families across continents by disrespecting their choices, as seen particularly in the operation of the post 1988 immigration regime. On the other hand, the polygamy example also shows that ethnic minorities have not remained passive recipients of official dictates. Rather, there is evidence of their reliance on their own cultural resources to secure acceptable outcomes for themselves, and are often able to negotiate between different legal levels in order to do so, thereby calling into question the claims about dominance of the official legal system.

4. Conclusions

English law changed its attitude to polygamously married couples in the post-Second World war period as a result of the increasing migration of Asians and Africans to Britain for whom polygamy was a long standing social practice. The key change was the extension of remedial protection to parties to such marriages by the reforms of the early 1970s. However, English law still attempted to retain control over English domiciliaries to the extent that they were not considered eligible to undergo marriages in a polygamous form and this led to the potential nullification of the marriages of many migrants. While the *Hussain* case attempted to limit the damage by extending recognition to the marriages of men domiciled in England, it did so on condition that they were not actually in polygamous unions. This principle was eventually extended to women too under the Private International Law (Miscellaneous Provisions) Act 1995. The attempts to make English law the sole factor governing capacity to contract into polygamous marriages, however, meant the exclusion of the personal laws of the migrants concerned and this marginalisation was carried over to the immigration control system.

UK immigration law as such began to become involved in controlling the entry of second wives especially with the onset of family reunion processes among Pakistani and Bangladeshi migrants. This was achieved by declaring migrants as having become English domiciliaries prior to their second marriages and to thereby declare those marriages void. This stance was, however, mitigated in some of the reported and unreported decisions of the Immigration Appeal Tribunal from the mid-1980s. At first the Tribunal demanded that a change of domicile of origin be proven to a high degree thereby facilitating recognition of second wives. In later stages, it began to accept that the validity of polygamous marriages need not be dependent solely on the 'pre-nuptial' domicile, but that recourse to the overseas legal system could also be had in an effort to uphold validity. Before this line of cases law was much advanced, however, intervention by Parliament in the form of the Immigration Act 1988 and changes to the Immigration Rules blocked off entry to one wife where there was already another

¹⁴ It appears that the long-standing ambiguity about the position of persons deemed to have acquired Scottish domicile prior to a second marriage has been resolved by the Immigration Appeal Tribunal in favour of following the English approach, that is, to treat the second marriage as void. See *Abida Naseem* (11415), 12 October 1994. The principle is arguably superseded now by the Private International Law (Miscellaneous Provisions) Act 1995, section 7, to similar effect however (see text at 2.2).

¹⁵ The growing literature about alternative dispute resolution offered by *shari'a* councils of various types in Britain testifies to the widening chasm between Muslims and the official legal system (Badawi 1995, Carroll 1997, Pearl and Menski 1998: 77-80, 393-398, Shah-Kazemi 2001).

one in the UK. Post 1988 case law therefore concentrated on challenging the exercise of executive discretion which now governs the admission of second wives, whereas validity questions have been pushed to the background. In the immigration field, however, UK law continues to collude in separating family units, thus hardly proving its commitment to protecting the rights of women and children. Meanwhile, there is growing evidence that the purported ban on second wives, either through the immigration law system, private international law or English 'domestic' law, is not having the intended effects as Muslims continue to resort to unofficial means of regulating their affairs highlighting the inability of English law to legislate away ethnic minority legal facts in a chauvinistic way.

Glossary

<i>Angrezi</i>	English
<i>desh pardesh</i>	a home abroad
<i>firman</i>	
<i>shari'a</i>	the divine law of Islam
<i>talaq</i>	unilateral divorce issued by a man
<i>zina</i>	illicit sexual relationship

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