



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/13269/2018
HU/13271/2018

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre
On 12 December 2019

Decision & Reasons Promulgated
On 24 December 2019

Before

UPPER TRIBUNAL JUDGE GRUBB
DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

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Y B
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Respondent: Mr C. Howells, Senior Home Office Presenting Officer
For the Appellant: Mr A. Moran, of Alex Moran Immigration and Asylum

DECISION AND REASONS

We make an anonymity direction under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) in the light of the matters raised in, and parties to, this appeal. This order prohibits the disclosure directly or indirectly (including by the parties) of the identity of the appellants. Any disclosure in breach of this order may amount to a contempt of court. This order

shall remain in force unless revoked or varied by the Upper Tribunal or an appropriate Court.

Introduction

1. The appellants are a mother and her 8 year old son. They are Syrian nationals. They appeal decisions refusing them leave to enter as the polygamous wife and child of a Syrian national businessman in the UK with leave as a Tier 1 Entrepreneur which expires in January 2020.
2. The marriage is a factually polygamous Muslim marriage contracted in Syria. Syria is a country where the law allows a man to have up to four wives. As the parties were domiciled in Syria at the time and the marriage was in accordance with their national and personal civil and religious laws, reflecting the national social mores, it is a valid marriage and recognised as such under UK domestic law by s.11(d) of the Matrimonial Causes Act 1973.
3. The sponsor has two wives, and already has one of his polygamous wives in the UK along with his two children by that wife.
4. The applications were made in March 2018. The ECO's refusals are dated 29 May 2018 and were upheld by the ECM on 10 January 2019.

The Appeal

5. The appellants appealed. The appeal against refusal was dismissed at the First-tier Tribunal.
6. On appeal to the Upper Tribunal DUTJ Chapman concluded that the decision contained errors of law not least because the reasoning described the public interest as immigration control in the context of such being directed at the legitimate aim of the economic well-being of the country. The rules against polygamy involved the additional public interest question of the protection of morals. The Upper Tribunal concluded this was a mischaracterisation which meant that the assessment of the weight of the public interest was not demonstrated as having been properly assessed. Further, there was no reasoned separate consideration of whether the circumstances of his child (the second appellant) and his best interests were sufficient to outweigh the public interest considerations. The decision was set aside. The appeal was retained in the UT for rehearing.

The Re-hearing of the Appeal

7. So it was that the matter came before us for rehearing. Additional evidence has been submitted by the parties and neither party objected to the production of the additional evidence. Bearing in mind the appeal involves a minor child, we exercised our discretion to admit it under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended). At the end of the hearing, we reserved our decision.

8. The basis for refusal as maintained before us are two-fold:

(1) Immigration Rules:

- (i) The wife does not meet the spouse requirements under Appendix FM because she does not have the requisite English language skills. In respect of the entry clearance requirements for children set out at appendix FM there are no exceptional circumstances operating to make exclusion of the child undesirable;
- (ii) The Rules at paras 278-280 require the refusal of entry clearance to a polygamous wife when a sponsor already has a wife in the UK (in line with the statutory provisions of s.2 of the Immigration Act 1988 in relating to a polygamous wife seeking to assert her right of abode). The Rules at para 296 similarly require the refusal of entry clearance to the child of a polygamous marriage.

(2) Article 8 ECHR outside of any specific Rules-based entitlement as encompassed by Appendix FM Gen.3.1:

whilst the relationships constitute family life, and the decision was an interference sufficient to engage Article 8, the decision was proportionate to the public interest in refusing leave because:

- (i) the Rules were not met because of the lack of English language which impacted upon integration and because the marital relationship was polygamous and with another wife already here the appellants' entry would facilitate the forming of polygamous households here;
- (ii) it concerned out of country family life which had been enjoyed at a distance since 2015 when the sponsor entered as a visitor;
- (iii) since April 2017, when the sponsor successfully switched status to a Tier 1 entrepreneur and so could leave the UK with a legitimate expectation of return, the sponsor had gone twice each calendar year to Damascus which had resulted in his having spent 10 months of the following 32 months with the appellants;
- (iv) the relationships could continue to be enjoyed outside the UK;
- (v) the circumstances of the appellant and son in Damascus did not show that there were compelling circumstances that outweighed the public interest in refusing them because of the failure to meet the Rules.

9. At the outset, the legal representatives indicated agreement as to the legal framework applicable. Article 8 ECHR sets out that where an individual's private and family life is of a character and quality sufficient to justify respect, the convention protects that family and private life. If the State makes a decision, such as here refusing leave to enter, which interferes with that private and family life to a severe degree article 8 is engaged. The rights are not absolute rights but qualified and must be balanced against any competing public interest. Our task is to decide the disputed components of that principle.

Discussion

10. There was no issue before us that both the appellants have established family life with the sponsor, based on marriage and paternity respectively. It is accepted the parties enjoy a family life of a character and quality that engages article 8. It is accepted that the refusal decision interferes with their prospective enjoyment of that family life because they want to enjoy it in the United Kingdom, and the interference with the right is of a severity sufficient to engage article 8.1. The decision is in accordance with the law and, as we shall see, in particular is for the legitimate aims of the protection of morals, for the protection of the rights and freedoms of others and for the economic well-being of the country (i.e. effective immigration control). Accordingly, the dispute before us features what is often described as the 5th question in the case of Razgar [2004] UKHL 40, that of proportionality.
11. In assessing proportionality, we must give significant weight to the public interest as expressed through the correct application of the Immigration Rules (s.117B(1), NIA Act 2002 and R (Agyarko and another) v SSHD [2017] UKSC 11). The relevant Rules are set out in paras 278 and 296 and the 'partner' provisions at Appendix FM, Section EC-P.
12. We have rehearsed their content in terms of the impact on the factual matrix in the summary of the respondent's reasons for refusal. Nothing in dispute before us turned on the wording of the Rules and so we do not set them out in detail. The representatives were agreed that the Rules' test of exceptional circumstances making exclusion of a minor undesirable would be adequately encompassed in our assessment of the proportionality of the refusal, and we were invited to frame our discussion in the context of whether or not the decisions result in unjustifiably harsh consequences without additional, separate specific Rules-based reasoning.
13. To help us with the specific context of polygamous marriages we have the benefit of the guidance of the Upper Tribunal in the case of SG (child of polygamous marriage) Nepal [2012] UKUT 00265 (IAC) (Blake J and UTJ Dawson). In that case it was held that:
 - “(i) Educational advantages and economic betterment, which might be enjoyed by a child, if admitted to the United Kingdom, are not compelling considerations to make that child's exclusion undesirable, whether biological mother has cared for the child, and will continue to do so, in the country of origin:

(ii) There is a legitimate aim in excluding from admission to the United Kingdom a woman who is party to a naturally polygamous marriage and that aim justifies the indirect effect of that exclusion on the child of such a marriage, in that it will be more difficult for the child to satisfy the immigration rules relating to full responsibility and circumstances making exclusion of the child undesirable:

(iii) (not relevant here and omitted);

(iv) Paragraph 296 of HC 395, as presently applied, does not prevent the admission of such children and would probably be contrary to Article 8 and 14 ECHR if it did:

(v) In these circumstances it is not unreasonable to expect a sponsor to choose between coming to the United Kingdom with part of the family or remaining in Nepal with all its members, where there has been no previous resident and establishing a family life in the United Kingdom:

(vi) The wishes of the child and both parents are relevant to ascertaining what her best interests are in the context of an application for admission to the United Kingdom but are not decisive of the proportionality balance:

(vii) The proportionality balance in such cases is a fact sensitive one rather than determined by the rules."

14. We also have the benefit of the 1992 Strasbourg case of Bibi v UK (application number 19628/1992) which found the restriction on more than one foreign wife joining a husband already settled in the UK was intended to prevent the formation of polygamous households in the UK:

"the practice of polygamy being deemed unacceptable to the majority of the people who live in the UK. The aim of the provision would appear therefore to be the preservation of the Christian based monogamous culture dominant in that country. The Commission considers that *such an aim is legitimate and falls within the scope of the protection of morals and rights and freedoms of others* within the meaning of article 8 of the Convention." (our emphasis)

15. We must bring forward our factual findings to our proportionality assessment. We must take into account the family and private life of the appellants, their finances and the wife's abilities in the English language (to see if they are adverse or neutral), along with the factors brought forward in terms of the position in Syria including the best interests and welfare of the child in the context of his health and the character and quality of the relationships enjoyed, before conducting an overall balancing exercise weighing the individuals' circumstances against the public interest.
16. The expectation is that the proportionality of the decision will follow the outcome of the proper application of the Immigration Rules, and only rarely will a family's circumstances otherwise be sufficient to warrant leave to remain.
17. We must decide whether there are 'compelling' circumstances such that the decisions will result in "unjustifiably harsh consequences" sufficient to outweigh the public interest (see, R (Agyarko and another) v SSHD at [60]). The burden of proof is on the appellants to establish, on a balance of probabilities, their circumstances and the

consequences of refusal. It is for the respondent to show that decisions are proportionate to the public interest considerations (i.e. immigration control as it encompasses the economic well-being of the country and the protection of public morals and the rights and freedoms of others), on the facts as we find them.

18. We note that the Rules have been amended by CM4851 to cover the position of polyandrous husbands.
19. The appellants' case as it was put to us was on two bases.
20. First, too much weight had been given to the public interest considerations. Although the formation of a polygamous household was against the public interest the weight to be attached to that position was not so high as might appear from the outright societal disapproval of polygamy as expressed in the 1988 Act (preventing the exercise of a right of abode by a polygamous wife) and the Rules. That disapproval had to be seen in the wider context that Parliament had also decided polygamous wives could, for example, still be granted entry clearance in their own right, as for example a student or business person. Accordingly, polygamy was not so wrong as to mean that any party to a polygamous marriage was banned from entry to the UK. Another example was that our Welfare State made provision to pay polygamous wives public funds in qualifying circumstances.
21. We find no merit in this submission. The public policy considerations of the examples are entirely different. The relevant provisions in the 1988 Act and the Immigration Rules have as their aim the prevention of the establishment of polygamous households in the UK directly facilitated by immigration provisions. The instances relied upon are not examples of the State supporting or facilitating the formation of polygamous households here. They are directed at entirely distinct matters such as the ability of individuals to study and the prevention of destitution. The application of individually applicable provisions such as those facilitating studying, whilst incidentally applicable to parties to a polygamous marriage, are not contrary to the express public policy of not facilitating the establishment of polygamous households in the UK. The provisions protecting individuals from destitution are similarly only incidentally applicable to parties to a polygamous marriage. The submission conflates and confuses the issue of the public interest in not facilitating the formation of polygamous households with the entirely separate position of the State not penalising the individuals who are party to what the State recognises to be a valid, albeit a polygamous marriage, in matters which are not directly concerned with facilitating the establishment of a polygamous household.
22. Mr Moran invited us to find that because in this case there is no formation of a household, because the polygamous household was established in Syria several years ago, the relevant public policy has no application or is reduced. That too is misconceived. The public policy is expressly directed to the question of facilitation of the households in the UK which are polygamous, it is not about the first inception of the polygamous household per se. That position reflects the Matrimonial Causes Act

which sets out the circumstances in which foreign polygamous marriages are recognised.

23. Mr Moran invited us to note that in the context of the comments in the briefing documents - such as the Swedish government's view - contained in the respondent's bundle, that polygamous marriages denigrate women and were adverse to gender equality, was not the position on the facts of this case. The sponsor was a committed husband who supported his family, but even if that were not the case it could be said that the appellant would be better off in the UK: able to access the gender equality safeguards provided here. That submission takes the argument no further. The policy is the policy. Parliament has seen fit to legislate on it. It is not our role to disapply it. Nor is it the aim or purpose of our domestic immigration provisions to improve the gender equality of women in Syria or elsewhere in the World.
24. This is a case in which there is a polygamous foreign marriage recognised under UK law and where the sponsor has already benefited from the entry to the UK of one of his polygamous wives. The full weight of the public policy, without reduction, applies to these applications. The weight to be attached to the refusal of entry clearance is to be assessed in accordance with the provisions set out in ss.117A and 117B of the Nationality Immigration and Asylum Act 2002 and we return to this in the reasoning in our proportionality assessment.
25. The second limb of the appellant's appeal is that the decisions are disproportionate because the weight of the public interest is in any event outweighed by the family circumstances. In summary, the sponsor's son has PTSD as a result of living in a war zone and needs to live outside Syria in a safe place, and he also needs to benefit from daily contact with his father. Although his father does not assert an asylum or humanitarian protection claim based on a fear of the regime or indiscriminate violence in the context of internal armed conflict, his evidence is that he cannot reasonably be expected return to Syria to live with his family to provide daily support to his son, not least because his son psychologically needs to leave Syria and live in a safe place, but also because as a result of the economic down turn, as a wealthy businessman returning from the West he is at risk of kidnap by criminals. On one of his 2018 visits the sponsor was with his wife and child in a car when a window was smashed, and everything was taken from the back seat and the sponsor believes he was at risk of kidnap. He reported the incident to the police, but did not submit the report in these proceedings or earlier mention the incident at the First-tier Tribunal because, for him, the risk to himself is not at the heart of the reason he wants his son to come to the UK. He wants his son to come because he needs to be out of Syria for his safety and mental well-being. The sponsor in his oral evidence explained that when he is in Syria he minimises the risk of exposure to kidnap by not going out.
26. The issue for us to decide, put shortly, is whether the decisions result in unjustifiably harsh consequences.

27. There are medical reports from Dr Mohammad Al Faori who has a PhD in Special-Needs-Education and is variously described as a Consultant in Behavioural, Educational and Emotional Disorders, a lecturer at Damascus University and Consultant in Psychological Behavioural and Academic Problems and Disorders.
28. The first report is dated 25 August 2018. This is an initial assessment which confirms that the child was referred because of a lack of fluency in his speech, and language and speech delay. At that time tests revealed that the child suffers from behavioural and memory problems, sleep disorder, medium to severe ADHD and various symptoms resulting from trauma. He was found to have medium to severe speech delays, poor cognitive skills which impact negatively on his learning, and some problems in his development skills. Analysing his drawings, particularly the Draw A Person Test revealed he suffered emotional problems resulting from trauma. The report states:

“enquiring about the circumstances surrounding the child, Mother has indicated he has suffered many traumas. The most important traumas he is exposed to are his separation from his siblings. He constantly asks about them and why they do not visit him and why he cannot see them. He extremely misses his father. This child does not understand the reason that forced them to be separated.”
29. The report continues:

“The results of Azayat Autism Battery indicate poor academic ability. Mother states the child has become afraid of going to school because of the bombing. In the past when he was coming back home from school a missile landed right near him. He ran away but fell, and his arm was broken as a result.”
30. We pause to note that photographs of the second appellant receiving treatment for a broken arm in May 2018 are in the bundle.
31. Under the heading conclusion and diagnosis Dr Mohammad Al Faori states that the child appellant has PTSD resulting in speech delay and poor development skills which have impacted on his cognitive skills:

“his productive ability is poor compared to his mental age. His behavioural difficulties are a natural outcome of the disorder he has. “
32. We pause to note that the behavioural problems are clarified in the later report. He is overly dependent on the mother, poor attention to studies, and as featured in the oral evidence before us bedwetting, and on occasion, anxiety attacks requiring additional calming medication.
33. There follows a treatment plan which recommends medication under the supervision of a paediatrician and neurologist. In this regard the oral evidence of the sponsor is that this includes medication for bedwetting, ADHD, with additional medication from time to time as required. Dr Al Faori also recommends intensive speech therapy as well as cognitive and behavioural therapy, academic therapy and generalisation exercises, with bimonthly IQ tests and an annual EEG.

34. At the time of the hearing before the First-tier Tribunal in November 2018 the sponsor's evidence was that the child appellant had lost weight and was taking vitamins but was in receipt of no other treatment.
35. There is a second report from Dr Mohammed Al Faori dated February 2019 in the additional evidence submitted before the Upper Tribunal. The doctor says that the child appellant does not seem to be benefiting from the therapy as his problems are still the same in severity with the following symptoms: insomnia, difficulty in falling asleep, hyper arousal. He is easily scared or startled, has difficulty concentrating, absent mindedness, poor memory, irritability and anger outbursts, involuntary urination (Enuresis) and social withdrawal. The doctor says the following:
- "I enquired about the family situation and I have found out that the child's father and siblings are away. As a result of this he has developed a severe attachment to his mother. He is extremely afraid he might lose her. The emotional gap is demonstrated by the Draw A Person Test. The child's drawings are random. The symbol father and siblings are missing. The sun symbolises the father. Trees symbolise siblings. Based on the above, the child suffered emotional insecurity which results from being away from his family members. There is an absence of a very important therapeutic and supportive factor which helps him to feel secure and safe. This impacts adversely on any treatment he receives."
36. Dr Al Faori concludes that the child appellant needs constant therapy dealing with the developmental and psychological issues alongside support from his family members to reduce the problems he suffers from and bridge the emotional gap he suffers from as a result of family deprivation. Prescriptions in the bundle show that he is in receipt of 10 mg of Ritalin twice a day and 2 mg of risperidone nightly.
37. Mr Howells invited us to question the evidence that the son suffers from PTSD because the evidence lacks consistency and is limited in its quality. The oral evidence of the sponsor that his son has been diagnosed and in treatment for PTSD since 2017 was not borne out in the medical evidence dated 25 August 2018, in which Dr Al Faori only refers to the child entering treatment in June 2018 which is after the application in March and the refusal in June. The sponsor explained in cross examination that this was because he had changed doctors. The sponsor had concluded that the previous doctor was not achieving any success as his son was still not sleeping well and continued to bed-wet, and so decided to change practitioners. Asked why Dr Al Faori, who provided the report, seemed to have no knowledge of the previous treatment as he made no reference to that earlier period of treatment, the sponsor said that he had told him that his son had previously seen a doctor. Asked if the previous medical records had been requested by Dr Al Faori, the sponsor said that they had not been, and this was unsurprising because he had wanted Dr Al Faori to start afresh and so he had not given specific details to Dr Al Faori about the earlier period of treatment including who had treated his son and for what. Mr Howells also queried why, and asked us to take note, that the report failed to set out, contrary to usual practice in medical reports to which the Tribunal gives weight, the relevant medical qualifications of Dr Al Faori to make the diagnosis of PTSD. The sponsor's evidence was that Dr Al Faori was eminently

qualified because he had recently returned to Syria from abroad where he had had work with the UN concerning the treatment of children affected by war zones.

38. Despite the limitations of the evidence identified by Mr Howells we are satisfied that the child has seen a specialist and has a diagnosis of PTSD. Dr Al Faori explains that the prescriptions are supervised by a paediatrician and so whilst it may be that Dr Al Faori's expertise is based on a doctorate and his expertise in special educational needs we are satisfied that he is working in tandem with other medical professionals and there is a medical evidential basis for the diagnosis.
39. Even allowing for the absence of evidence as to the history of treatment, we can see no reason to doubt the evidence of Dr Al Faori and we are satisfied that it meets the burden of showing on balance that the child is suffering from PTSD. As a matter of common sense, we see no reason to disagree with the evidence of the Dr Al Faori. We reach our findings in the context of the country information. For a child to suffer trauma as a result of living in Damascus is not inherently implausible. There is nothing inherently implausible in the child having been close to a missile attack and running away and breaking his arm. Dr Al Faori's evidence is that the child appellant suffers PTSD, is missing his father, is missing his half siblings, and is overly reliant on his mother.
40. The area where the appellant lives is described as upmarket, in oral evidence the sponsor described 60% of the people who live there are wealthy. Mr Howells made the point that it was an area of Damascus that had been less impacted by the conflict than other areas of Damascus. The sponsor acknowledged as much in his oral evidence. The country information shows, as the sponsor acknowledged in his oral evidence before us when he said that fighting is very reduced, that there is not currently a significant generalised risk to the inhabitants of this area, or any other in Damascus, from armed conflict, nonetheless incidents do occur. The sponsor pointed out that Israelis had bombed his area in Damascus recently, targeting a Hamas leader's residence in the building behind his own. Indeed, the country evidence shows that an Islamic Jihad Politburo member had a Damascus home in the Mezze district of Damascus, and that the Israelis carried out a targeted bombing of his residence on 13 November 2019. The sponsor also points out that the area has a military airport in the vicinity and that this makes the area a potential target. The real thrust of the sponsor's evidence was that this was case where the subjective fears of his son arose from real past experience and, whilst the fighting along with actual danger was now significantly reduced, it was not extinguished, and his son needed to be living with him, outside of Syria, to recover and restore his life.
41. We conclude on the evidence before us that the risk of bombing is not significant and does not carry significant weight in our balancing exercise.
42. So far as the risk of kidnapping to the sponsor is concerned, we note the evidence that has been put before us in respect of the practice of kidnapping. The sponsor is not a foreign national as several victims have been however the evidence is that he is very wealthy, and he comes from a very wealthy family and so his subjective

concerns are not entirely unreasonable. It is not suggested that the appellants themselves are at risk and that is borne out by their proven ability to continue to live in Mezze going about their daily business including taking the son to his bus to go to school and attending appointments. The sponsor himself has spent a considerable period of time in the country and managed to avoid that risk

43. We concluded that any risk of kidnapping does not weigh heavily in our balancing exercise.
44. That the child appellant would be best off outside of Syria, and benefit from the daily face to face support of his father as well as contact with his siblings, is as a matter of common sense in his best interests, and as reflected in the evidence of Dr Al Faori.
45. The son does have his mother living with him. The appellants are amply financially provided for and comfortably accommodated. The child appellant is going to school and receives supplemental academic and behavioural assistance. He is receiving medical treatment including pharmacological treatment, cognitive and behavioural therapy, as well as additional academic assistance. He also has the benefit of the presence in the country of extended family members through his mother's bloodline, including his maternal grandmother. As the history of visits show he enjoys regular periods where his father is able to be present. The son is described as being unable to understand why he is not in the same place as his siblings. That is understandable. The sponsor's evidence is however that he did not live with his siblings, and that they lived in a different district in Damascus before they came to the UK. He can maintain contact with his siblings.
46. The factors relevant to the circumstances of the child appellant do not all point one way. However it is his circumstances and his best interests which are at the heart of (and the only) substantive factor that counts positively in our balancing exercise and we take that matter forward to balance against the public interest.
47. These appeals raise immigration control considerations because the appellants fail to meet the Rules on two counts. However, Mr Howells did not place significant emphasis on the English language point. We deal with it briefly in light of the arguments presented and findings we have made. Mr Howells did not suggest that in the hypothetical position that it was the only reason in the context of this polygamous marriage, where no other wife had been admitted and on the facts as we have found them, it would be sufficient to justify the refusals as proportionate. Although it is adverse in our consideration, we do not give it much weight.
48. We find, standing back and looking at the evidence in the round, that the evidence falls far short of establishing that as a result of the refusal decisions the interference with family and private life is unjustifiably harsh vis à vis the public interest considerations and we conclude that the public interest in refusing entry clearance is not outweighed.
49. It is of course open to the sponsor to ameliorate the impact of separation from his child by either returning to live in Syria or by continuing his visits. The evidence is

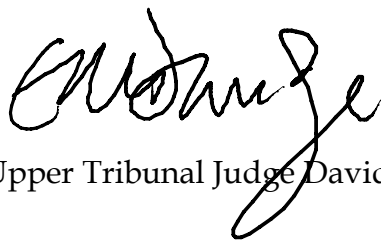
that the father has spent almost a third of the last three years in Syria. The information recorded in the report as being provided to Dr Al Faori is that he is absent, which does not reflect that evidence. Indeed, when it was put in those stark terms Mr Moran was taken by surprise and queried the source, but accepted when Mr Howells took him through the detail, meticulously setting out and counting up the periods of time spent in Syria as described in the witness statements and shown in the passports, it was self-evident that Mr Howells was correct.

50. The sponsor told us that he appreciated that the law prevented him bringing more than one wife to the United Kingdom, but he simply could not understand why because, as UK law recognises, his marriages are valid. He told us that it was always his intention when he came to the United Kingdom using his pre-existing visit visa that he would settle here, and that he would bring both wives and all their children to join him here. As our law shows by respectfully treating both of his marriages as valid because they have been conducted by parties who are domiciled in countries where polygamy is lawful and culturally acceptable, his position is understandable from the subjective viewpoint of the parties to a polygamous marriage. However, by choosing to reside in this country he makes himself subject to the laws of this country, including those which reflect the Christian social mores of this country.

Decision

51. The appellants' appeals are dismissed.

Signed



Date 12 December 2019

Deputy Upper Tribunal Judge Davidge