Practice Pointer: Navigating the Complexities of Polygamy in Immigration Law

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Introduction

In recent months, particularly in response to the arrival of Afghan parolees in the United States, immigration practitioners have experienced uncertainty on issues surrounding polygamy and what constitutes "practicing polygamy" when assessing their client's eligibility for certain immigration benefits. This lack of certainty is understandable as the Immigration and Nationality Act (INA) does not define "polygamy" or what constitutes "practicing polygamy." Instead, advocates must rely on varying interpretations found in case law and agency policies.

This practice pointer offers practitioners guidance on navigating various scenarios that arise when representing a client in a polygamous marriage and attempts to address the many ambiguities and confusion surrounding the definition and practice of polygamy. First, we discuss a recent case from the Third Circuit that adopts a broad interpretation of "practicing polygamy" in assessing the noncitizen's eligibility for naturalization. We then discuss the potential implications of this decision on noncitizens throughout the country and offer practitioners guidance by examining hypothetical situations. Finally, we recommend what advocates can argue before government agencies to maximize the chance of a successful outcome for clients in polygamous marriages.

Recent Decision From the Third Circuit in *Al-Hasani v. DHS Secretary*

In August 2023, the Third Circuit adopted a broad interpretation of "practicing polygamy" and found that a lawful permanent resident (LPR) who was married simultaneously to two women within five years before filing for naturalization practiced polygamy within the meaning of INA § 212(a)(10)(A). *Al-Hasani v. Sec'y United States Dep't of Homeland Sec.,* No. 22-1603, 2023 WL 5600964 (3d Cir. Aug. 30, 2023). As a result, he was precluded from naturalizing because he lacked good moral character.

Facts and Procedural History: Mr. Al-Hasani is a native of Syria, where he formerly worked as a human rights lawyer. In February 2003, he married Ms. Khalili, a native of Morocco who lived in Syria. When Ms. Khalili became pregnant with the couple's son, she returned to Morocco. Syria later executed a travel ban on Mr. Al-Hasani because of his human rights work, preventing him from visiting his wife and son in Morocco. In 2005, Mr. Al-Hasani married Ms. Jouni, a Syrian woman. He did not divorce his first wife, Ms. Khalili, because Syrian law did not require it. Mr. Al-Hasani was later imprisoned in Syria for four years for his human rights work. Upon his release in 2011, he fled Syria. His second wife, Ms. Jouni, did not join him, and they had not seen each other since he fled.

Mr. Al-Hasani was paroled into the United States and eventually granted LPR status in October 2012. After becoming an LPR, he petitioned for his first wife, Ms. Khalili, and their son to join him. However, after living in the United States for several years, both Ms. Khalili and their son returned to Morocco because her mother became ill. Soon afterward, the couple's relationship ended, but there was no formal divorce. In September 2017, Mr. Al-Hasani applied to naturalize. He disclosed his dual marriage to USCIS but explained that he could not divorce his wife in Morocco because, to do so, Ms. Khalili would need to allege specific untrue facts, such as cruel treatment by her husband. He could not divorce his second wife, Ms. Jouni, because it would be too dangerous for him to try to do so in Syria and because New Jersey, his domicile, did not recognize the legality of his second marriage. Mr. Al-Hasani also explained to USCIS that he did not want either wife to face the stigma of a divorce in their respective countries. In 2022, Mr. Al-Hasani eventually divorced his first wife, Ms. Khalili, under New Jersey state law.

U.S. Citizenship and Immigration Service (USCIS) denied Mr. Al-Hasani's naturalization application despite his candor in describing the circumstances of his two marriages. In its decision, USCIS found that the practice of polygamy is a bar to establishing the required good moral character during the statutory period before filing a naturalization application, usually five years. INA § 101(f)(3). Notably, polygamy, in addition to being a conditional bar to establishing good moral character, is also a ground of inadmissibility under INA § 212(a)(10)(A), which makes any applicant for admission or adjustment of status inadmissible if they are coming to the United States to practice polygamy.
Mr. Al-Hasani filed Form N-336, Request for a Hearing on a Decision in Naturalization Proceedings, with USCIS, which affirmed its denial. He then petitioned for review in district court under 8 USC § 1421(c). The district court granted summary judgment for the Department of Homeland Security (DHS), holding that Mr. Al-Hasini lacked good moral character as set forth in the statute at INA§101(f). In the alternative, it held that USCIS reasonably interpreted the good moral character provision, which was ambiguous on this issue. The Third Circuit affirmed the district court's decision.

Legal Analysis: The issue on appeal to the Third Circuit was whether the district court erred in affirming USCIS's denial of Mr. Al-Hasani's naturalization application. Naturalization applicants

like Mr. Al-Hasani must show they have good moral character during the five years preceding the filing of their application.

The appellate court reviewed both the plain language of the statute and the legislative history and concluded that Mr. Al-Hasani practiced polygamy within the statutory period, which barred him from establishing good moral character.

In reviewing the statute's plain language, the Third Circuit recognized that the INA does not define polygamy. However, in reviewing dictionary definitions of the term when the word was first used in immigration law beginning in 1891, the Third Circuit was satisfied that the term encompasses anyone who is legally married to more than one person with that person's permission or as an expression of a right or a religious or cultural belief. As to using the word "practice" in the statute and regulations, the Third Circuit held that the term connotes doing something intentionally rather than passively, mistakenly, or through oversight and is an action that can be ascertained objectively without requiring an inquiry into a person's subjective state of mind.

Mr. Al-Hasani argued that the statute at INA§ 212(a)(10)(A) is forward-looking and concerned with behavior *after* an individual arrives in the United States rather than before. The statute changed in 1891 to be more prospective than it had been. The Third Circuit rejected this argument and instead held that it reads both the old and current inadmissibility provision as applied to someone who believes in and observes the practice of polygamy in the United States or who intends to do so when applying for a visa at a U.S. consulate.

Addressing the specific statutory phrase — the term "coming" — the Third Circuit appears to agree that the statute is indeed forward-looking but believes that Mr. Al-Hasani's actions satisfy the inadmissibility ground. According to the Third Circuit, Mr. Al-Hasani came to the United States to practice polygamy because he was practicing polygamy both at that time and while he was here by being married to two people simultaneously. The fact that he was not residing in the United States with either wife was of no consequence. The court noted that Mr. Al-Hasani chose to remain married to both his wives. Notably, Mr. Al-Hasani managed to divorce his first wife in New Jersey while the case was on appeal to the Third Circuit, demonstrating to the court that he could have divorced his first wife earlier but chose not to. The Third Circuit noted that he must wait five years from the date of his 2022 divorce from his first wife to be eligible to reapply for naturalization.

Implications for Practitioners

While this Third Circuit decision is only binding on USCIS adjudications arising within the court's jurisdiction — Pennsylvania, New Jersey, Delaware, and the Virgin Islands — it can guide adjudications that arise outside that judicial circuit. Neither the agencies nor courts have provided any specific guidance on what constitutes polygamy. The USCIS Policy Manual defines

the term as "the custom of having more than one spouse at the same time."[1] The Department of State (DOS) Foreign Affairs Manual (FAM) similarly defines it as "the historical custom or religious practice of having more than one wife or husband at the same time."[2] The FAM provides the following additional context for what it means to "practice polygamy:"

> The applicant must intend to actually practice polygamy in the United States to be ineligible. The applicant's mere advocacy of or belief in the practice, or the fact that the applicant in the past may have practiced polygamy, would not be sufficient to render a finding of ineligibility. To sustain an ineligibility, an officer would have to find the applicant will maintain a married relationship with more than one spouse while in the United States. If one spouse is traveling with the applicant while the other spouse remains overseas, the applicant can only be found ineligible, if you believe the applicant will continue a relationship with the left-behind spouse — for example visiting the spouse, providing financial support, keeping in phone contact, or submitting an application for humanitarian parole on behalf of the spouse. If an applicant is legally married to a second spouse but maintains no active relationship with that spouse, then that would not be practicing polygamy and would not sustain an ineligibility.[3]

While this definition is quite broad in many respects and could potentially lead to a finding of inadmissibility merely for keeping in telephonic contact with a second spouse, in other respects, it is narrower than the definition the Third Circuit adopted in the Al-Hasani case. Under the DOS's reasoning, Mr. Al-Hasani was not "practicing polygamy" because he was not maintaining a relationship with the left-behind spouse.

Practitioners should carefully consider how the Third Circuit's broad interpretation may impact their clients' eligibility for various immigration benefits. This topic is particularly noteworthy now as many legal service providers represent Afghans, and Afghanistan has typically allowed polygamy as a cultural and religious practice.

Naturalization

In reviewing a noncitizen's eligibility for naturalization, practitioners should be aware of this bar to establish good moral character, especially if their client is from a country where polygamy is legal and regularly practiced. Practitioners should advise clients interested in naturalization who are legally married to more than one person to consider divorcing one of them. Practitioners should also be advised that if the client remains legally married to two individuals simultaneously, they are likely to be denied naturalization until they have been divorced for at least five years. As in the case of Mr. Al-Hasani, New Jersey law did not recognize his marriage to his second spouse, Mr. Jouni. As a result, he could not seek a divorce under that state's laws.

[1] *See 12* USCIS Policy Manual pt. F, ch. 5.
[22] 9 FAM 302.12-2(B)(1).
[3] 9 FAM 302.12-2(B)(3).

However, he successfully divorced his first wife, Ms. Khalili, under New Jersey law. A noncitizen may seek a divorce in the state of their current residence, even if the marriage took place overseas, so long as they follow state court procedures and establish jurisdiction over the other party.

Practitioners may also consider exploring the option of seeking a customary divorce, even when parties to a divorce are not living in the home country and did not return there for a divorce. *See Adjei v. Mayorkas, 59* F. 4th 659 (4th Cir 2023). However, there are limitations on when customary foreign divorces will be recognized, and it often turns on complex state law issues. Practitioners should also ensure the client continues supporting any dependents from both marriages, as a willful failure to support dependents is also a bar to establishing good moral character.

Lawful Permanent Residency

Notably, the Third Circuit did not discuss or comment on Mr. Al-Hasani's potential inadmissibility at the time of adjustment for practicing polygamy. According to INA § 212(a)(10)(A), an immigrant who is coming to the United States to practice polygamy is inadmissible.

When assessing inadmissibility under this ground, the agencies have typically accepted the view that the applicant is not inadmissible if they are no longer maintaining an active relationship with more than one spouse. This is a more generous standard than that advanced by the Third Circuit in the *Al-Hasani* case. It is also not clear how Mr. Al-Hasani obtained his permanent residency or whether there may have been a waiver of inadmissibility available to him. Practitioners representing noncitizens seeking adjustment of status should consider the basis for seeking LPR status and whether a waiver for polygamy exists, as outlined below.

Asylees Applying for Legal Permanent Resident Status

Asylees applying to adjust status are eligible under INA § 209(c) for a generous waiver of most grounds of inadmissibility, including for practicing polygamy. Specifically, USCIS may grant a waiver if the applicant can establish it would serve humanitarian purposes, preserve family unity, or be otherwise in the public interest. The applicant is not required to have a qualifying relative or establish hardship to that person. This waiver is requested on Form I-602 and should be submitted along with the application for adjustment of status.

Employment-Based Applicants (Including SIV Recipients) and Family-Based Applicants Applying for Legal Permanent Residence Status

For practitioners representing employment-based applicants, including Special Immigrant Visa (SIV) recipients or family-based applicants who are applying to adjust their status, there is *no* waiver available for the inadmissibility ground under INA § 212(a)(10)(A).

In most contexts, with a few exceptions for refugees and asylees,[4] if a marriage is valid in the place where the marriage is performed (the place of celebration), the marriage is legally valid under U.S. immigration law. U.S. authorities look to the law of the place where the marriage was celebrated and the requirement that the marriage was "properly and legally performed" in that jurisdiction.[5] To determine whether INA § 212(a)(10)(A) applies, practitioners should first assess the requirements for a valid marriage in the place of celebration by consulting the DOS Visa Reciprocity Schedule.[6] The reciprocity schedule lists the requisite documents required for each country in the civil documents section. The practitioner should request a copy of the client's marriage certificate, if one exists, and carefully review it. Practitioners should also recognize that a marriage can still be valid in several countries, such as Afghanistan,[7] even if not formally registered. Thus, it is important to consult with the client regarding the circumstances of the marriage to assess its validity under the country's laws.

As noted, in assessing a noncitizen's inadmissibility under INA § 212(a)(10)(A), the person must *intend* to practice polygamy in the United States. Thus, a person's mere advocacy of or belief in the practice, or the fact that the person at one time in the past may have practiced polygamy, is insufficient for a finding of inadmissibility. Practitioners should inquire where each respective spouse lives, and the extent of the relationship and support the applicant provides them. Furthermore, the practitioner should consult with the noncitizen about the options for divorce and the legal process for seeking it. Practitioners should also request a copy of any previous applications for adjustment or a visa through the FOIA process and review the record for any inconsistencies or omissions. CLINIC highly recommends that practitioners consult the International Refugee Assistance Project (IRAP) resource entitled "Overview of Marriage for Immigration Purposes-Practice Guide," which discusses the legal requirements for marriages in Afghanistan in particular.[8]

Potential Implications of Polygamy on Other Applications for Immigration Relief

Asylum: Asylum applicants are not subject to the grounds of inadmissibility, and practicing polygamy is *not* a bar to asylum. However, an asylum applicant who is legally married to more than one spouse should still disclose this information on their I-589, Application for Asylum and Withholding of Removal, to avoid any allegations of misrepresentation, especially in the context of future applications for adjustment of status and naturalization. While the I-589 provides

[4] For more information on refugee and asylee informal marriage exceptions, please review the USCIS Memorandum from Ted H. Kim, Acting Associate Director, Refugee, Asylum, and International Operations (RAIO), USCIS, to All RAIO Employees (February 14, 2022) (re: Revised Guidance on Informal ("Camp") Marriages, https://www.uscis.gov/sites/default/files/document/memos/Revised_Guidance_on%20Informal_%28_Camp_%29_Marriages.pdf.

[5] 9 FAM 102.8-1(B).

[6] *See* Department of State Reciprocity Schedule, https://travel.state.gov/content/travel/en/us-visas/Visa-Reciprocity-and-Civil-Documents-by-Country.html/.

[7] *See* Department of State Reciprocity Schedule for Afghanistan, https://travel.state.gov/content/travel/en/us-visas/Visa-Reciprocity-and-Civil-Documents-by-Country/Afghanistan.html, recognizing that Afghan marriages are only often recorded when evidence is required for an official purpose such as immigration.

[8] To view this practice guide, please visit https://refugeerights.org/news-resources/overview-of-marriage-in-u-s-immigration-law-practice-guide.

space for just one spouse, the applicant may consider including an addendum with information on the additional marriage or addressing it in their declaration.

Temporary Protected Status (TPS): While TPS applicants are subject to most grounds of inadmissibility, there is a waiver of inadmissibility for INA § 212(a)(10)(A) under INA § 244(c)(2)(A). This waiver should be filed on Form I-601 and requested along with the application for TPS.

Hypothetical Scenarios

This practice pointer explores several hypothetical situations that practitioners might confront when representing clients in polygamous marriages. We provide some helpful considerations for practitioners when advising their clients. However, CLINIC cautions practitioners to carefully assess the client's individual facts and circumstances and potentially consult other practitioners on local practices and adjudication trends.

Scenario One:

Facts: Abdullah is a citizen of Afghanistan living in the United States with his wife and their four children. He is an SIV recipient preparing to apply for adjustment of status. In consultation with Abdullah, the practitioner learns that Abdullah legally married a second wife in Afghanistan. She and their two biological children are currently living in hiding in Afghanistan. Abdullah regularly sends money to his second wife to support their children. Abdullah informs the practitioner that he would like to include his children abroad in his adjustment of status application and file for humanitarian parole for his second wife and children as soon as possible.

Considerations for Practitioners:

- The practitioner should first ask to review Abdullah's marriage documents with his second wife and ensure that it is indeed a valid marriage in the place where the celebration occurred. Remember that Afghanistan does not require marriages to be registered to be considered legally valid.[9]
- If the marriage complies with the requirements for a legal marriage, the next step for the practitioner is to speak with Abdullah about his intentions with his second wife and the extent of his relationship with her. While this can be a difficult conversation, obtaining more information from Abdullah regarding his intentions is necessary. The practitioner can inform Abdullah that practicing polygamy in the past, as the DOS FAM states, should not be sufficient to render a finding of inadmissibility. However, if

[9] *See* IRAPS's *Overview of Marriage for Immigration Purposes Practice Guide*, page 28, citing *The Introduction to the Laws of Afghanistan*, part of Stanford Law School's Rule of Law Program (4th Edition, 2017), noting that while the Afghan Civil Code requires that marriages be registered with a competent authority, usually the district court of the area where the married couple resides, marriages can still be valid in Afghanistan even if not registered, accessible via *https://law.stanford.edu/wp-content/uploads/2017/11/ALEP-Intoduction-to-Law-of-AFG_4th-Ed_ENGLISH.pdf*.

Abdullah states that he intends for his second wife to come to the United States and for them to be together as husband and wife, the practitioner must warn Abdullah that USCIS could deem him inadmissible under INA § 212(a)(10)(A) for "coming to the United States to practice polygamy." The practitioner should also advise Abdullah that if he does not disclose the existence of his other legal marriage in his application, then USCIS could also deem him inadmissible under INA § 212(a)(6)(C)(i) for misrepresenting a material fact.

- The practitioner should inquire if Abdullah has considered or would consider divorcing a spouse, as the broad interpretation of practicing polygamy in *Al-Hasani* suggests. Many practitioners nationwide report that USCIS adjudicators often inquire if the applicant in a polygamous marriage intends to divorce a spouse. The practitioner should also advise Abdullah that filing for humanitarian parole for his second wife and agreeing to sponsor her could demonstrate to USCIS his intentions to continue practicing polygamy in the United States. The practitioner should also consider the ethical implications of representing Abdullah in filing the humanitarian parole application for the second spouse while simultaneously representing Abdullah in his adjustment of status application.
- Lastly, if Abdullah proceeds with his adjustment application while simultaneously married to both spouses, he must disclose his second marriage on his I-485 application and be prepared to testify that he does not intend to practice polygamy in the United States. As noted previously, USCIS might require at least a showing of Abdullah's intentions to divorce a spouse, such as producing a copy of the application for divorce or an explanation as to why he has been unable to file for divorce.
- Regarding Abdullah's biological children in Afghanistan, he should include their information on his I-485 application and file a Form I-824, Application for Action on an Approved Application or Petition. Since the children were born out of wedlock, Abdullah must demonstrate he has a bona fide relationship with his children, such as an active concern for their financial well-being, instruction, and general welfare. *See* INA § 101(b)(1)(D), 8 CFR § 204.2(d)(2)(iii). Abdullah and his children should also be prepared for the possibility of USCIS requesting a DNA test to establish paternity.
- The second spouse might also consider pursuing refugee status or some other legal avenue to enter the United States.

Scenario Two:

Facts: Farid is a citizen of Afghanistan living alone in the United States. He legally married three wives who live in Afghanistan, two of whom he is estranged from. Farid is an SIV recipient preparing to apply for adjustment of status. Farid prepared and filed his I-485 application and only consulted with an immigration practitioner after the filing. Farid only included information about his first wife and failed to disclose information about his second and third wives. After consulting with Farid and reviewing his marriage documents, the practitioner concludes that he legally married all three women in Afghanistan. The practitioner is concerned about addressing this during Farid's scheduled adjustment interview.

Considerations for Practitioners:

1) The practitioner should advise Farid that he must disclose the marriages to his two other wives during the interview. For the question on the I-485 regarding "prior marriages," it may be acceptable not to amend this portion since Farid included information about his first wife and, at the time of this marriage, he had no "prior wives." However, in responding to the question on Form I-485 regarding the number of wives, Farid *must* disclose the other two marriages.
2) Practitioners nationwide report varying experiences with USCIS officers in reviewing the question on Form I-485 regarding the number of spouses the applicant has had. Some USCIS officers elect to leave the number of marriages as "one" while annotating that the applicant has another marriage. Other USCIS officers prefer to amend the number of marriages from one to include the other marriages. Whether the USCIS officer elects for the applicant to amend Form I-485 or not, the most important advice for the client is to disclose the other marriages and to be prepared, if asked, to describe the nature of their relationship with each of their spouses.
3) Practitioners also report that USCIS officers appear to be adjudicating SIV adjustment of status applications with less scrutiny, including on issues of polygamy. However, despite these anecdotal reports, CLINIC urges practitioners not to take issues of polygamy lightly, even in the SIV adjustment of status context, as it is still a bar to inadmissibility for these SIV applicants, and there is no waiver available.
4) Lastly, Farid can only file Form I-824 (pre-adjudication) or I-130 (post-adjudication) to petition for his first spouse.

Scenario Three:

Facts: Stephen is considering applying for naturalization. In consultation with him, the practitioner learns that he is currently married to two spouses, although one is estranged and lives abroad in Pakistan.

Considerations for Practitioners: There is a risk of denial of naturalization based on the reasoning of the *Al-Hasani* decision. That decision would require him to divorce one of his spouses and then wait five years from the final divorce decree to file for naturalization. The practitioner might also want to advise Stephen to consult a family lawyer to assist with divorce filing. Additionally, the practitioner should review Stephen's prior application for LPR status to confirm that the necessary information was disclosed when the application was filed.

Scenario Four:

Facts: Zia is a naturalized U.S. citizen. He wants to submit an I-130 application for his wife abroad in Mali. In consultation with Zia, the practitioner learns that Zia is indeed married to two wives, and the spouse he seeks to petition is his second wife.

Considerations for Practitioners: U.S. immigration law does not recognize Zia's second marriage. Thus, he cannot petition for his second wife. The practitioner should consult with Zia about his first marriage and whether he would consider divorcing this wife. The practitioner can also explore with Zia other legal avenues for his second wife to enter the United States.

Conclusion

While the Third Circuit held in a recent precedential decision that "practicing polygamy" is merely being married to two people at the same time, immigration practitioners and USCIS adjudicators still struggle to define the term, especially in the context of determining inadmissibility under INA§ 212(a)(10)(A). Practitioners should advocate for a much narrower interpretation of "practicing polygamy," particularly considering that continued support of minor children is common and expected. Some advocates have suggested that the correct inquiry is whether the spouses are holding themselves out as being in a polygamous marriage in the United States and that anything outside of that definition should not be considered "practicing polygamy." While advocates should continue to argue that the definition of the term "practicing polygamy" should be as narrow as possible, they must also counsel their clients on how this term has been interpreted by the agencies and federal courts.