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Sham Marriages – The Legal Position

1 It has become increasingly apparent in recent years that there is much resort to sham marriage as a means of obtaining leave to enter for persons who would not otherwise be able to obtain it. The Court of Appeal in a decision delivered on 23 May 2007, *Baiai and others* [2007] EWCA Civ 478, ruled that legislation designed to restrict the possibility of such marriages, contained in the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 is incompatible with Article 12 of the European Convention on Human Rights [ECHR] which states: "Men and women of marriageable age have the right to marry and found a family according to the national laws governing the exercise of this right." As noted below, this decision has been varied by the House of Lords on a further appeal. ([2008] UKHL 53)

2 Section 19 of the 2004 Act applies to any civil marriage solemnised in England and Wales in which one party is subject to immigration control. Other sections make corresponding provision for Scotland and Northern Ireland. "Person subject to immigration control" means any person who is not a national of a European Economic Area Member State (i.e. EU states plus Norway, Liechtenstein and Iceland) and who under the Immigration Act 1971 needs leave to enter or remain in the United Kingdom. The reference to the Immigration Act 1971 means that a non-EEA national who has settled status in the United Kingdom, usually because he has obtained indefinite leave to remain, is also excluded from the definition of "person subject to immigration control". Notice of any such marriage must be given to the superintendent registrar of a district specified for the purpose by the Secretary of State. The superintendent registrar may not enter notice of the marriage in the marriage notice book unless he is satisfied by appropriate evidence issued by the Registrar General that the person subject to immigration control

- has entry clearance for the purpose of marriage, or
- has the written permission of the Secretary of State to marry in the United Kingdom, or
- falls within a class specified for the purpose of the legislation by regulations made by the Secretary of State.

This means that persons subject to immigration control need the approval of the Secretary of State to marry in the UK.

3 At the original hearing of the case in the High Court much evidence was given by Home Office officials and by the Superintendent Registrar for the London Borough of Brent of the large numbers of sham marriages, defined as marriages entered into purely to obtain a more advantageous immigration status. Evidence was given that couples were often complete strangers to each other, were frequently unable to converse with each other in the same language and needed interpreters to communicate. Evidence was also given of many cases in which forged documents were used to establish the place of residence. Under section 24 of the

Immigration and Asylum Act 1999 registrars were required to report suspicious marriages to the Home Office. Figures from Brent alone showed that increasing numbers of such marriages were reported year by year: 1205 in 2002, 2700 in 2003 and 3700 in 2004. Reports from Registrars indicated that the majority of such marriages involved persons in the United Kingdom illegally or on a short term basis. The judge at first instance was satisfied that the evidence demonstrated a disturbing problem.

4 The main rationale of the Court of Appeal's decision was that the procedure imposed by section 19, that of imposing alternative preconditions before a notice of marriage could be entered (see paragraph 2 above), went far beyond what was needed to pursue the professed objective of detecting and preventing sham marriages and was therefore disproportionate. "Person subject to immigration control" covers anyone from outside the European Economic Area, including holders of work permits, those entering with student or spouse visas, asylum seekers and illegal immigrants. The Court took the view (paragraph 44 of the judgment) that Section 19 suffered from a serious defect in that it affected the right to marry conferred by Article 12 of many more people than would be necessary to achieve the legislative purpose of preventing sham marriages. Although evidence was given at the original trial that there were many such marriages, the Secretary of State had no reliable figures which would enable him to say how many genuine marriages out of all marriages to which a person subject to immigration control is one of the parties would be caught within the ambit of section 19.

5 There were two cases raising the same issues before the Court of Appeal. In one there was an appeal by the Secretary of State against a judgment in favour of a former Yugoslav national whose original claim was allowed by the court at first instance. The appeal by the Home Secretary was dismissed. The Court's rationale in that decision is summarised in paragraph 58 of the judgment as follows:

...the Secretary of State can only interfere with the exercise of Article 12 rights in cases that involve, or very likely involve, sham marriages entered into with the object of improving the immigration status of one of the parties. To be proportionate, a scheme to achieve that end must either properly investigate individual cases, or at least show that it has come close to isolating cases that very likely fall into the target category. It must also show that the marriages targeted do indeed make substantial inroads into the enforcement of immigration control.

The other was the case of an illegal immigrant from Algeria, in which the High Court judge ruled that the Secretary of State's refusal had been lawful because the appellant was in the United Kingdom unlawfully. The illegal immigrant's appeal was allowed. The Court of Appeal's rationale for this decision was: "The objection inherent in the [section 19] scheme, that it inhibits marriages on grounds of immigration status rather than by a reliable consideration of the genuineness of the marriage, applies just as much in the case of an illegal entrant...as in the case of persons with very limited permission to be here..."

6 Section 19 suffers from the further defect that it applies only to civil and not to Anglican marriage and is therefore incompatible with Article 14 of the ECHR:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion...

This weakness was apparent from the start, but the Home Office justified the distinction on the dubious ground that the Anglican Church exercised proper controls over the exercise of its matrimonial powers which rendered control by the Secretary of State in the case of marriages which involved a party subject to immigration control unnecessary. The judge at first instance declared section 19 to be discriminatory and incompatible with Article 14 and in the Court of Appeal the Secretary of State did not seek to appeal this declaration.

7 In the final appeal mentioned in paragraph 1 above the House of Lords decided that section 19 of the 2004 Act was lawful but only to the extent that permission to marry might be withheld only where the proposed marriage was one of convenience. The practical result of this decision is summarised in Jackson and Warr "Immigration Law and Practice" at paragraph 17.21 as follows:

At the time of writing Certificates of Approval are being readily issued to applicants who have leave to enter or remain in the United Kingdom, while applicants who have no leave may be issued with a certificate after a more stringent check that the marriage is not one of convenience.

Effect of the Human Rights Act 1998

8 Section 3 of the Human Rights Act 1998 says that legislation "must be read and given effect in a way which is compatible with the [ECHR] rights". Section 3(2)(b) makes it clear that these words do not affect the validity, continuing operation or enforcement of any incompatible primary legislation. In principle it is therefore possible for the Home Office to continue administering the section 19 scheme, and as noted in paragraph 6 this is now happening following the decision of the House of Lords. The Home Office has in any event conceded that the scheme is incompatible with Article 14 (because it discriminates favourably in not requiring approval of Church of England marriages) and will not be appealing on that ground. Section 3(1) provides for the Court to make a declaration that a provision of primary legislation is incompatible with the ECHR. The High Court made such a declaration in relation to section 19 of the 2004 Act as incompatible with the right to marry contained in Article 12 of the ECHR, a declaration subsequently confirmed by the Court of Appeal. The decision of the House of Lords is that the section is valid, but falls to be interpreted in the limited fashion explained in paragraph 7.

9 In spite of the final decision just mentioned, the view somehow seems still to be held widely in apparently authoritative quarters that the government has no power to question or interfere with a marriage which is manifestly a sham. Statements to this effect were made by the Immigration Minister in the previous government on television in January 2010. Even if section 19 of the 2004 Act had been declared by the House of Lords to be incompatible with Article 12 of the ECHR, which is not the case, this did not affect the operation of section 24 of the Immigration and Asylum Act 1999, mentioned in paragraph 3 above. This section requires superintendent registrars to report to the Home Secretary any marriage which he has reasonable ground for suspecting of being a sham marriage, i.e. a marriage entered into in which one of the parties is neither a British citizen nor a citizen of another state of the European Economic Area, for the purpose of enabling that party to avoid the provisions of the United Kingdom's immigration laws. The validity of that

section has not so far been questioned in court.

10 The present situation is unsatisfactory and fresh legislation is needed to restate the means by which marriages with persons subject to immigration control are regulated so that planned sham marriages can be detected and prevented before they take place. Legislation to this effect will need to make church marriages subject to the same regulation as civil marriages so as to avoid attacks on the ground of discrimination under Article 14 of the ECHR. There is no present prospect of such legislation in the present parliamentary session.

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