



Sham Marriages – The Latest

1 Sham marriages have been for long a scourge and a means by which people traffickers and other criminals earn illicit fortunes for arranging them. Recent changes in the law have made it necessary to issue a new briefing paper on the subject, superseding the three previous papers, 8.13, 8.38 and 8.49. At the same time a revised version of [Legal Briefing Paper MW 68](#) “Immigration and marriage – the legal position” is being issued.

Definitions

2 Section 24(5) of the Immigration and Asylum Act 1999 provides the following definition:

“Sham marriage” means a marriage (whether or not void) –

- (a) entered into between a person (“A”) who is neither a British national nor a national of an EEA State other than the United Kingdom and another person (whether or not such a person or such a national); and
- (b) entered into by A for the purpose of avoiding the effect of one or more provisions of United Kingdom immigration law or the immigration rules.

“EEA State” in this definition means any of the 27 Member States of the European Union plus Norway, Iceland, Switzerland and Liechtenstein. Marriage of itself, whether sham or genuine, does not confer on A as defined in the subsection the automatic right to reside in the United Kingdom even if the other spouse is a United Kingdom citizen or is settled here. A still has to obtain permission to stay under the Immigration Rules applicable to marriage, which include showing that the parties have met and intend to live together permanently as man and wife, that they have adequate accommodation for themselves and any dependants and will be able to maintain themselves and any dependants, in both cases without recourse to public funds. Being able to produce a marriage certificate is however a start.

Evidence of the scale of the problem

3 Reference will be made later to the case of *Baiai and others [2007] EWCA Civ 478* in the Court of Appeal. 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 are 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. In July 2010 a vicar of a parish in Sussex was convicted of various offences arising out of his having conducted over 300 sham marriages, knowing them to be shams, and was jailed. In

recent months the UK Border Agency's officials and the police have been active in prosecuting parties to sham marriages, in many cases arresting them in church or the registry office before they have tied the knot.

Effect of the ECHR on attempted legislative remedies

4 By Sections 19 to 24 of the Asylum and Immigration (Treatment of claimants, etc) Act 2004 the government sought to introduce a system of control over civil marriage involving persons who were subject to immigration control in all parts of the United Kingdom. A person is subject to immigration control for the purpose of these sections if he is not an EEA national and under the provisions of the Immigration Act 1971 needs leave to enter or remain in the United Kingdom. The sections required the superintendent not to enter notice of such a marriage unless the person so subject unless he either (a) had entry clearance expressly for the purpose of enabling him to marry in the United Kingdom, or (b) had the written permission of the Home Secretary to marry in the United Kingdom or (c) fell within an exempted class specified in regulations made by the Home Secretary. For the most part route (b) was used and the documents issued by the Home Secretary were known as Certificates of Approval. However, in the case referred to in paragraph 3 it was held that these sections were incompatible with Article 12 of the European Convention on Human Rights (ECHR) which provides:

"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."

The Court held that the sections suffered from a serious defect in that they affected the right to marry of many more people than was necessary for the purpose of preventing sham marriages and were therefore disproportionate. The Court held also that the sections suffered from the further defect that they applied only to civil and not to Anglican marriages and were therefore incompatible with Article 14 of 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..."

5 The Home Office accepted the decision on discrimination but appeared to be inclined to appeal the decision on incompatibility with Article 12 to the Supreme Court. In due course, however, it obviously decided that it would have to accept the decisions on both points. A ruling by a court, as in this case, that a particular provision of an Act of Parliament is incompatible with the ECHR, does not invalidate the provision in issue but places the government under at least a moral obligation to amend the law. This the government has now done by repealing the offending sections of the 2004 Act. Somewhat unusually, whereas normally an Act of Parliament can be amended only by another Act, section 10(2) of the Human Rights Act 1998 empowers a Minister of the Crown by order to make such amendments to an Act of Parliament to remove the incompatibility which has been the subject of a court ruling. The necessary amendments to the 2004 Act were made by such an order.

Action by the Church of England

6 So far as the ruling on discrimination is concerned, it would in theory have been possible for Parliament to pass an amending Act making the provisions of sections 19 to 24 of the 2004 Act applicable to Anglican marriages in the same way that they apply to civil marriages, thus eliminating that particular ground of incompatibility. It appears that the Church of England's governing body was not willing to accept such a solution and the government was not willing to force the issue. However, the Church has obviously realised that some action had to be taken to prevent the solemnisation of sham marriages and avoid the scandal of vicars being prosecuted for involvement in the malpractice. That action has now been taken in the form of a paper for the guidance and direction of clergy and diocesan chancellors issued by the House of Bishops on 11 April 2011 entitled "Marriage of persons from outside the European Economic Area".

7 The publication of banns is an announcement of the names of the parties to the intended marriage on three successive Sundays. The paper begins by clearly stating that in any case of an intended marriage where a party is not an EEA national the clergy should not offer to publish banns. Instead the couple should be directed to apply for a common licence to the relevant diocesan registry. The registry will require the couple to complete an application form and supply evidence of identity, including passports as well as evidence of their entitlement to the grant of a common licence. The form should state that any information supplied may be passed to the UK Border Agency for verification. The entitlement to the grant of a common licence will normally be that of residence in the parish in question and evidence of that residence such as entry on the electoral roll or utility bills will have to be supplied. This evidence has to be supported by an affidavit sworn by one of the parties. **The paper instructs diocesan registrars that a common licence should not be granted unless that the basis of the application has been established by satisfactory evidence and that the marriage is genuine.** This latter requirement is to be met by a letter from the minister who will be conducting the marriage, stating that he or she has met both parties, has discussed the marriage with them and is satisfied that the marriage is genuine. The minister should also state that he or she is content to conduct the marriage.

8 Provision is made for cases in which couples insist on having banns published. In such cases the matter should be reported to the diocesan registry and the minister concerned should carry out checks and require evidence of identity and entitlement similar to that summarised in paragraph 7.

9 The instructions from the House of Bishops have been supplemented by guidance notes for the clergy from the UK Border Agency explaining relevant immigration and nationality law.

Civil marriages

10 As already explained the provisions of the 2004 Act which were intended to prevent sham civil marriages have been repealed because they were held to be incompatible with the ECHR. There remains section 24 of the Immigration and Asylum Act 1999 which requires registrars of civil marriages to report suspected sham marriages to the Home Secretary. Unfortunately it does not contain any power to carry out investigations into the genuineness of an intended marriage or to delay or refuse to conduct the marriage. The provisions of the 2004 Act were found to be discriminatory because they regulated only civil marriages and not Anglican church marriages. As a result of the repeal of those provisions, followed by the instructions to clergy issued by the House of Bishops the situation is reversed because there is now no effective regulation of civil marriages whereas there is now regulation of church marriages, not by an immigration statute but by internal instructions to the clergy issued in reliance on the provisions of the Marriage Act 1949. It is to be hoped that the government will be encouraged by the example now set, albeit belatedly, by the Church, to make appropriate statutory provision on comparable lines enabling registrars to investigate any marriage involving non-EEA nationals and if necessary to refuse to conduct such a marriage.

Harry Mitchell QC
Honorary legal Adviser

26 April, 2011