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The ‘pure’ relationship, sham marriages and immigration control

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“What first attracted you to short, balding millionaire Paul Daniels?” (Mrs Merton, parody chat show host to Debbie McGee, younger wife of celebrity magician Paul Daniels)

“ ‘... Will you tell me how long you have loved him?’

‘It has been coming on so gradually, that I hardly know when it began. But I believe I must date it from my first seeing his beautiful grounds at Pemberley’” (Jane Austen *Pride and Prejudice*, Penguin Classics, p.301)

Introduction

This chapter investigates the circumstances in which marriage rites that involve a non- EEA migrant spouse are subject to additional controls or do not give rise to the right to live together in the UK. Marriages which involve immigration, here called cross-border marriages (Williams 2012: 24) for a discussion, are one of the few instances in which it is considered acceptable to impose added conditions, reflecting, as Abrams (2012) has observed, the particular interest that the state has in immigration control and the substantial benefits which are presumed to flow from immigration status. There are many such conditions (financial, good character etc.) but the focus here is on those that aim to detect whether a marriage is only for immigration purposes, a sham marriage.¹ Few people would dispute the right of the state to withhold immigration rights from a sham marriage even though, if such a marriage occurs between two citizens, it generally has the same legal consequences as any other marriage.²

¹ Sham marriages are also called bogus marriages, marriages of convenience or immigration marriages. For convenience, the term ‘sham marriage’ is used throughout this article.

² See, for example, *Silver v Silver* [1955] 1 WLR 728; *Vervaeke v Smith* [1983] AC 145.

Sometimes, a marriage is entered only for immigration purposes, ‘with the sole aim of circumventing the rules on entry and residence’.³ Commonly however, sham marriage controls capture marriages where one or more of the elements associated with a ‘genuine’ marriage (such as sexual relations, the raising of children, cohabitation, financial support, affection) is present but the relationship is regarded as tainted by immigration considerations and to be insufficiently ‘genuine’. This judgment involves scrutiny of the character of the marriage, from how the parties meet to the wedding celebrations to their daily post-marriage life but also of their personal characteristics: their age, social and immigration status and ethnicity. It may be adapted to reflect understandings of cultural difference – so that, for example, an arranged marriage is held to a different standard – but it is problematic. Firstly, it is normative and will tend to dismiss marriages that are unconventional, not sham. Secondly, the breadth of regulation and the subjectivity of the assessment process mean that controls expand to include marriages where immigration is one reason but not the only reason for the marriage or where the migrant is otherwise regarded as undesirable. Thus, sham marriage controls permit ‘moral gatekeeping’ (Wray 2006), protecting the cultural and moral heart of the nation from invasion through exploitation of the naive and against corruption from within by foolish citizens intent on making unsuitable matches. This chapter aims to build on the ‘moral gatekeeping’ concept, through a closer examination of what is actually determined by sham marriage controls.

Governments often hold migrant families to standards that do not apply where there is no immigration element (Strasser et al 2009). The analysis here suggests that sham marriage controls are also used to identify not only ‘poor quality’ marriages but ‘poor quality’ marriage migrants. They cannot be detached from the wider functions of immigration control. The last few years have seen, particularly in Northern and Western Europe, the importation into the regulation of family migration of criteria more commonly associated with economic migration, such as high financial thresholds, integration conditions and language tests (Bonjour and de Hart 2013; Wray 2014). Spousal migrants are now being assessed in similar ways to labour migrants and for the same purposes, to ensure that they will be of value to the host society. Controls against sham marriage are a part of that process, a means of detecting not only those who do not sufficiently value the institution of marriage but those whose presence is otherwise undesirable. ‘Moral gatekeeping’ is not separate from but inherent to the wider gatekeeping functions of immigration control.

Legal definitions of sham marriage may rely on the reasons for the marriage, its present character or both. The definition used in EU law, a marriage entered ‘with the sole aim of circumventing the rules on entry and residence’, relies on the former.⁴ S.24 Immigration Act 1999 adopts a similar test but

³ Council Resolution 97/C 382/01 of 4 December 1997 (Official Journal C 382 of 16.12.1997).

⁴ See n.3 above.

excludes the word 'sole' thus potentially broadening its application. The current test in the immigration rules considers the present character of the marriage, requiring both that a marriage be 'genuine and subsisting' and that the parties intend to live together permanently in the UK.⁵ The most recent definition, in s.55 Immigration Act 2014, considers both the purpose of the marriage and the current nature of the relationship. When this chapter refers to a sham marriage, it will mean a marriage that is sham according to the EU test, that it was entered solely for immigration purposes. This is a useful starting point because it includes only marriages which have no content other than an immigration motive.

Assessing the number of sham marriages is difficult and contentious. S. 24 Immigration and Asylum Act 1999 requires marriage registrars to report suspected sham marriages to the Home Office. In 2001, the first year of implementation, 756 such reports were received, rising to 2,712 in 2003 and 2,251 in the first half of 2004, after which the government introduced the certificates of approval scheme discussed later in this chapter (Wray 2011: 161-3). The number of reports dropped substantially after that but rose again, reaching 2,135 in 2013.⁶ These figures are often said to be an underestimate although the inaccuracy could also go the other way as they are reports of suspicions and it is unknown how many are later confirmed. Widely reported claims of larger numbers, such as the well-publicised estimate made in 2004 that one in five register office marriages in London (or 8,000 marriages per year) were sham, often turn out to be speculative (Wray 2006:00). In April 2011, the Prime made a familiar elision of categories when he claimed that many student visa applications include bogus dependants:

Consider this: a sample of 231 visa applications for the dependants of students found that only twenty-five percent of them were genuine dependants. The others? Some were clearly gaming the system and had no genuine or loving relationship with the student. Others we just couldn't be sure about.⁷

The most recent Home Office estimate is that 3,000 to 10,000 applications to stay in the UK are made each year on the basis of sham marriages although how that figure was reached is not clear (Chief Inspector 2014a: 8).

The focus of control has expanded in the past decade. In the past, questions about the marriage were asked only at the point that immigration rights were claimed. This still occurs but, increasingly, it is also the marriage ceremony itself which is subject to regulation. It is true that the fact of marriage

⁵ HC 395, Appendix FM, paras E-ECP.2.6 and E-ECP.2.10

⁶ HC Deb, 18 June 2014, c604W

⁷ <http://www.bbc.co.uk/news/uk-politics-13083781>

strengthens rights in European law (both Article 8 ECHR and EU law) but such rights do not flow from sham marriages. It is certainly more convenient from an immigration control perspective to prevent marriages from taking place but it is not necessary. However, the wedding ceremony itself and not just its consequences have increasingly become enmeshed in the immigration process. As controls have rarely been confined only to the detection of sham marriages as defined here, the effect is that any marriage involving non-EEA migrants is now controlled at multiple points both before and after the wedding.

The next section of this chapter identifies four broad and porous categories of marriage placed on a spectrum according to the degree to which immigration considerations played a part in their formation and trajectory. Of these four categories, only one conforms to the definition of ‘sham marriage’ in the sense of a marriage entered only for immigration purposes. However, marriages in the other categories are often caught by sham marriage controls. The chapter then draws on various episodes in the control of spousal migration in the UK to demonstrate this wider impact before, during and after marriage and argues that it is not an accidental by-product of controls but a central feature.

Sham marriages: Determining the (almost) indeterminable:

The concept of a sham marriage assumes that there is a binary divide between marriages entered for ‘good’ reasons (such as emotional intimacy, sexual fulfilment, raising children) and ‘bad’ reasons (such as financial gain, immigration, social status). Except where a marriage is entered solely for immigration purposes, a comparatively unusual occurrence which sometimes involves organised crime, this is a false dichotomy (for a discussion, see Wray 2006) and one that is rarely drawn when marriages do not have an immigration aspect to them. While Mrs Merton’s mischievous question to Debbie McGee cited at the start of this chapter implied an obvious dominant reason for her marriage, she and Paul Daniels have been married, apparently successfully, since 1988, a long time by entertainment industry standards. Elizabeth Bennet is, as usual, teasing her sister and her marriage to Mr Darcy is one of the great romances of English literature but it is hard to imagine Mr Darcy as romantic hero without the grace, power and ease that Pemberley confers.

Sham marriage controls aim, so far as possible, to neutralise the immigration incentive to enter a marriage so that only relationships which are sufficiently untainted are granted immigration advantages. The implied contrast is with a ‘pure’ marriage (Giddens 1991; 1992), an individualistic relationship based on voluntarism, mutual self-disclosure, equality and the absence of ulterior or instrumental motives: “the relationship exists solely for whatever rewards that relationship can deliver” (Giddens 1991: 6). Although the social reality of the ‘pure relationship’ and its correlation

with intimacy have been questioned (see Eggebo 2013 for a discussion), it is nevertheless seen in modern European culture as the ideal condition. It is not only the immigration authorities who rely on this model. Applicants may also place their relationship within the template of a 'pure' relationship, existing independently of conventional criteria for compatibility, as a defence against what they consider to be unfair conclusions about their relationship based on its external characteristics (Eggebo 2013: 785).

The powerful hold of the 'pure' marriage ideal is problematic for those who marry within different cultural frameworks, notably who enter arranged marriages where both the reasons for choosing a partner and the nature of the marital relationship are different (see, for example, Ballard 2008). However, immigration laws can adapt (and have done so to some degree) to accommodate these; the problem is that the underlying suspicions of international arranged marriages mean that such adaptations are often rigid and based on stereotypical assumptions (Shah 2010) so that, just as with non-arranged marriages, those whose relationships do not conform to pre-defined norms have difficulty in meeting expectations (see Carver 2014 for an example). To be acceptable, an arranged marriage must tread a sometimes narrow path between being too 'modern', and thus rejected as lacking credibility, and too traditional, and therefore risk being designated as a forced marriage. There is also a tendency to believe that some things must be true of all 'genuine' marriages, whatever the cultural background (see, for example, Satzewich 2014).

The other problem with the 'pure marriage' ideal is that it treats the immigration advantages of a marriage as a discrete source of corruption that renders the marriage without value. The error is to see the immigration advantages as different in type to the other social advantages that marriage may offer and to ignore the centrality of these in creating 'genuine' marriages. This is in part a professional deformation on the part of the immigration authorities, a tendency to see all actions through the defensive prism of immigration control, but it is also symptomatic of a broader lack of perspective, a failure to appreciate how the world appears to those who enter marriages involving emigration to more developed countries. Looking at marriage migration "from below" (Beck-Gernsheim 2011: 61) shows how, in an unequal world with few opportunities for movement from poor to rich countries, marriage is an important means of procuring global and thus social mobility, as it always has been. In this light, it is the artificial barrier presented by controls, not the means adopted to surmount it, which represents manipulation and injustice. Marriage to secure the ability to move is no more morally reprehensible and no more sham than aspiring to social advancement through marriage within a state. It is also often the only available avenue for those with relatively little human capital or personal wealth, with gender implications (Palrawala and Uberoi 2008). That it may require a confrontation with state power, the use of intermediaries, displacement over great distances and sometimes sophisticated strategizing by individuals and families does not change that.

Although marriage can sometimes be a highly instrumentalised component of a migration strategy (see, for example, Kim 2011), most have substance beyond their immigration purposes and may hold real emotional significance for the parties (Palriwala and Uberoi 2008; Charsley 2012:7-8). If immigration status represents a considerable material advantage, those who can provide it often appear more glamorous and more desirable. This spouse, in their turn, may be attracted by the chance of a higher status match than they might otherwise aspire to in terms of appearance, education, age and so on or by the embodiment of 'old-fashioned', 'family' or 'simpler' values in an apparently less sophisticated partner. Apparently unlikely intimacies can arise through shared labour market niches or experience of isolation or marginalisation. The 'cultural logic of desire' (Del Rosario 2008) means that emotional attachment is not separate to but enmeshed with the other gains that marriage may bring and these are, in turn, connected to global power relations and their cultural manifestations and, via this route, to immigration status.

The extent to which potential immigration gains means that other disadvantages are overlooked is something which even the parties themselves may not know and certainly cannot easily be uncovered through an administrative process. This is a difficulty which those engaged in the adversarial frontline of immigration control, whether on behalf of the state or of migrants, find it difficult to acknowledge. States often talk about the inherent improbability of certain marriages taking place, concluding that this indicates a sham marriage and no hardship is caused by an immigration refusal. Advocates for migrants will present such marriages as unconnected to immigration; to acknowledge the presence of such motives risks playing into the hands of those advocating tougher controls. Legal scholars will focus on legal definitions and categories. The assumption in all cases is that a marriage is either sham or genuine, and it is a question of drawing the boundaries in the right place.

This discussion however shows that the term 'sham marriage' has little meaning from the perspective of migrant spouses and their partners except in those comparatively few cases where parties enter an arrangement to undergo a marriage ceremony with no consequences for the lives of either beyond an immigration status and, perhaps, a cash exchange. However, states often seek to regulate a much wider range of marriages under the designation of 'sham marriages'. These over-inclusive measures show the weight that is placed on marriage when immigration is involved. As Abrams (2012) points out, the state expects different things of marriage in different contexts and expects a great deal in the immigration context where the advantages attaching to recognition of a marriage-related claim are regarded as momentous and where the exercise of national sovereign power is considered to trump personal interests.

Of all the possible functions of controls, those connected with culture, morality and national identity have attracted particular attention from scholars, including this author (Wray 2006, 2006a, 2009;

Bonjour and de Hart 2013; Strasser et al 2009). Marriage is a social institution, the site of actual, cultural and moral reproduction. Marriage migration permits outsiders into the heart of the nation state and the importation and reproduction of harmful cultural practices, undermining presumed national values of gender equality and individual freedom (Bonjour and de Hart 2013: 64), a 'peaceful penetration' (Abrams 2011) that has the potential to change and corrupt from within. It is unsurprising that controls on marriage migration, including on sham marriage, can be characterised as moral gatekeeping, focusing on accepted models of marriage and excluding those that are culturally or socially deviant. However, moral gatekeeping is not, itself a discrete concept. What is socially or morally unacceptable is closely entwined with questions of social class, race, ethnicity and, in the case of immigration, legal status. As well as marriages that have no meaning or content other than to secure an immigration advantage, sham marriage controls may impact upon marriages in which immigration played a variable role in either the decision to marry or the way that the marriage is conducted. Which of these marriages ends up being included within controls depends not only on the character of the marriage but on the characteristics of the protagonists. As this chapter will show, even marriages in which immigration advantages are entirely absent may be caught by controls that are concerned with the individual, not the marriage.

The relationship between these two factors - individual characteristics and the character of the marriage - is critical. Certain personal characteristics will trigger a closer scrutiny of the marriage (Wray 2006b: 126). This may not always be unjustified; an irregular migrant has more motivation than others to enter a sham marriage. However, this more intense examination itself increases the likelihood of an unfavourable judgment. And what if the additional scrutiny is because the migrant's nationality is associated with non-compliance or because it is believed that there is an economic incentive to emigrate to the host state? While there is extensive attention paid to marriage migration involving some nationalities, others, such as South Africans, Americans and Australians although numerically significant, are rarely mentioned or examined (Charsley 2012: 877-879). Guidance to marriage registrars suggests that some nationalities are over-represented in sham marriages (Charsley 2012a: 17). To what extent is an apparently objective investigation not discovering but constructing a sham marriage because it uncovers an underlying instrumentalism that is present in many or even all marriages but which only becomes visible when placed under such harsh lights?

Focusing on whether or not a marriage is 'sham' is therefore usually not the point. The key issue is to understand the circumstances in which states consider themselves justified in withholding immigration rights from couples engaged in international marriage and, increasingly, in intervening in the wedding ceremony itself. The next part of this chapter attempts to unpack the highly compressed concept of the sham marriage, examining more closely the nature of the marriages that may be affected.

A typology of cross-border marriages

Although their prevalence is uncertain, it is likely that sham marriages do take place. They may be entered for commercial reasons, including as part of an organised scheme, or between two friends or acquaintances in which case money does not always change hands. Such marriages are contracted “with the sole aim of circumventing the rules on entry and residence” and fall within the narrow EU definition of abuse of rights under which admission may be refused to spouses in marriages contracted by EU citizens exercising free movement rights. Where these occurs, few would argue that governments should be obliged to recognise claims for admission and the issue is more often around burden and standard of proof.⁸

States however often wish to restrict a much wider range of marriages. For instance, in the Tribunal case of *Papajorgji*, the parties were refused on the ‘sole aim’ grounds even though they had been married for fourteen years, had two children and were living in a common household, facts which precluded any plausible finding that the marriage had been entered solely for the purpose of obtaining an immigration advantage many years later.⁹ National regulation is not so constrained and, as this chapter will show, often controls a much wider range of marriages than those entered solely for immigration purposes. For example, the current guidance to UK immigration officers for determining a sham marriage includes factors associated with forced marriage, itself a concept with blurred boundaries (Siddiqui 2005: 290-294), so that marriages where there is considered to be insufficient equality between the parties may be treated as sham. The sham marriage can easily become a free-floating concept capable of being attached to almost any marriage of which there is disapproval, although some marriages are more vulnerable than others to such a designation. Understanding how this is possible requires an understanding of the complex ways in which immigration factors may act upon marriage decisions and how these are regarded, a typology of cross-border marriages (although one in which boundaries are fluid and blurred) on a spectrum between a marriage entered solely for such an advantage and one where it played no part at all.

If the fixed point at the start of the spectrum is a marriage that is solely for immigration purposes, the next broad category is those marriages where the usual characteristics of a married relationship such as cohabitation are present but it is suspected that the marriage would not have happened had the

⁸ In contrast to the immigration rules where the applicant must show that he meets the criteria, states have the burden of proof of showing a sham marriage under EU law: European Commission *Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States* COM 2009 313 2 July 2009.

⁹ *Papajorgji (EEA spouse - marriage of convenience)* Greece [2012] UKUT 38 (IAC).

potential advantages of immigration not been present. This is the most complex and controversial category as marriages that are deemed to fall within it are often treated as sham and, for this reason, it receives most attention here.

One sub-group often placed in this category is arranged marriages. Cross-border arranged marriages are common in some UK minority populations, particularly those from South Asia (see Charsley 2012: 869-872). From the mid 1960s to the late 1990s, they were almost always treated as vehicles for immigration under the primary purpose rule (discussed below). In an arranged marriage, love is expected to follow rather than precede the marriage so that evidence of prolonged courtship and familiarity is not usually available and it was relatively easy to fill the void with a presumption of immigration-related motives. The complex social functions of these marriages were often ignored, as was the parties' personal commitment, even though such marriages often proved themselves resilient and stable during many years separation when visas were persistently refused (Wray 2011: chapter 5).

Practice did improve during the 2000s although the level of understanding was variable and sometimes unreliable (Wray 2006b; Shah 2010; Wray 2011: chapter 9; Shah 2010). The most recent published guidance to immigration officers however contains a renewed focus on a European version of marriage (Carver 2014) or a very narrowly defined version of arranged marriages, and an emphasis on forced marriage which suggests that arranged marriages are again likely to be treated sceptically although this may be less visible now that other, recently introduced conditions have made marriage migration much harder generally.

Emigration may indeed be one motive for entering an arranged marriage particularly when other opportunities for migration are not available (Ballard 2008) but that is rarely the only factor. Cross-border arranged marriages are seen as carrying advantages besides immigration, partners are usually carefully selected and they are regarded as a lifelong commitment in which the spouses themselves and their families have invested heavily, emotionally and financially (see, for example, Shaw and Charsley 2006 although the UK parties may now be more willing to contemplate exit if the marriage does not work (Charsley 2013: 11). Although it is a flexible and adaptable practice that evolves in response to other social changes (for a summary of the literature, see Grillo 2011: 85-88), the reasons for such marriages commonly include traditions of caste or cousin marriage, the reinforcement of cultural values, the consolidation or enhancement of family assets and the maintenance of wider affective family ties. However, these non-migration reasons are largely antithetical to the values of individualism and equality represented by the ideal 'pure' marriage, and thus they carry little weight against suspicions of immigration instrumentalism, while the lack of relationship before marriage means that the hardship of refusal may be regarded as insignificant. Even if it is accepted that these

marriages are not sham, in the sense that they were not entered solely for immigration purposes, there may be indifference to or even support for their inclusion within that category.

Also within this second group are what might be called ‘opportunistic’ marriages, including the French concept of *mariage gris* which imagines a unilateral deception; the migrant spouse develops an intimate relationship, enters the marriage and even has children always with the intention of leaving once residency has been attained, a judgment that, by definition, can only be made retrospectively (Kofman et al 2010). In the UK, the term is not used but similar suspicions can be detected in the government’s criteria for a sham marriage, which include former sponsorship of an overseas spouse and a previous immigration refusal or irregular status.¹⁰ While prolonged deception may be rare in practice, these suspicions reflect the belief that mixed motives may be involved. Wray (2006a) found that such judgements have a gender dimension being often made against men marrying older women who were castigated as naive or even foolish for failing to recognise that their only attraction is their passport (see also in respect of the Netherlands, Bonjour and de Hart 2013: 66). Marriages between migrant women from relatively impoverished backgrounds and British men which may involve similar instrumental motives do not receive the same attention although they are not uncommon. Charsley et al (2012:874), for example, report that women comprise 93% of Thai marriage settlement applicants (compared to 60% overall; Charsley 2012: 866) and their marriages have often been facilitated by British men travelling to Thailand or using introduction agencies for this purpose (see also Sim 2012) but this is rarely problematized or even discussed.

In all the marriages in this category, it is generally established that the parties have a relationship and an assessment of either deceit or opportunism can only be made by drawing on the template of an acceptable marriage or by detecting a lack of commitment in interview, inevitably a subjective judgment (Wray 2006a; 2006b). Gender and ethnicity are often implicit factors here; migrant men, particularly from certain countries, have often been regarded as more likely to be calculating and manipulative in their relationships (Wray forthcoming; Strasser et al 2009; Bonjour & de Hart 2013). Citizen women meanwhile have a particular duty to maintain and reproduce national culture (Yuval-Davis 2008: 43–45, 67) and fail to live up to their responsibilities if they marry ‘unsuitably’, paying the price through separation or exile.

The danger is that the immigration aspect of these marriages will be over stated because the marriage is scrutinised outside its overall context. It may be that the migrant has chosen a partner who is older, more encumbered or less attractive than they might otherwise expect. However, for an irregular migrant who lacks a settled home and stability, an established family unit may offer much needed emotional security. For an aspiring migrant, including in an arranged marriage, an individual’s

¹⁰ Appendix FM-02, para. 3.2.

personal attractiveness may be enhanced by the opportunities they offer for a more interesting and comfortable life. The immigration advantage is entwined with the other social advantages that the relationship offers and these advantages are entwined with, not apart from, the affective ties between the parties.

Such an observation becomes banal once immigration is regarded not as an exceptional circumstance but as one possible social advantage amongst the many that may result from marriage and once it is appreciated that affective ties between married couples are, in any event, of varying intensity and duration. Where individuals have limited life choices, they will use marriage strategically for the opportunities it offers but they do not regard themselves as any less married or even less loving for that. There is no reason to imagine that marriages in which immigration advantages add lustre to otherwise unlikely partners differ in that respect.

Some such marriages may last and be as emotionally satisfying as marriages in which immigration considerations played no part. Others will end and it is possible that this happens more often than in other relationships but then there are particular strains on cross-border marriages (Charsley 2005) which rigorous immigration controls may exacerbate, creating a self-fulfilling prophecy. The ideal of the 'pure' relationship is anyway predicated on the parties remaining committed only while the relationship offers them non-instrumental benefits so subsequent divorce does not necessarily place the marriage outside that paradigm. Sometimes, the non-migrant partner may consider, in retrospect, that they have been used to some degree or that they were unrealistic in their expectations but such feelings are not confined to the breakdown of relationships involving immigration. It is anyway not apparent that it is the function of immigration control to prevent people making unwise marital choices.

Further along the spectrum of marriages is another loosely bounded category of relationships which begin with no consideration for immigration factors but whose character or course is partially determined by them. They include marriages that take place sooner than they otherwise might because that is the only way for the couple to stay together or where, as a couple must live somewhere, they decide to go where there are the best economic or other opportunities. In other cases, dowry payments may be inflated in recognition of the benefits that a cross-border marriage represents (Charsley 2012a: 26). Described in this way, few would describe these marriages as 'sham' and it is possible that, if asked, many couples in international relationships would place themselves at this point of the spectrum, reflecting the social ideal of the 'pure' marriage, although Eggebo (2013: 783) found that her interviewees sometimes demonstrated understanding of how motives may be mixed.

Such marriages are not explicitly targeted by restrictions although they may be affected by blanket measures. The difficulty arises in making a reliable judgment that the marriage falls into this category

and not the more ‘opportunistic’ one just discussed, as couples in both categories sometimes have much in common: there is evidence of a relationship between them but they may have married relatively soon after meeting, perhaps in a small ceremony; a larger than average dowry may change hands; the migrant partner lacks status in the UK or comes from a poorer country. The only way to judge the difference is to assess the probability that this couple would have decided to marry irrespective of any immigration considerations, comparing the relationship to the template of the ‘genuine’ marriage and importing its cultural and social norms.

In this scenario, it is the ability to present the facts of the marriage in a persuasive light that is critical, overcoming the disadvantage of characteristics that cannot be changed such as immigration status, age or ethnicity: ‘displaying genuineness’ (Carver 2014). An arranged marriage will be accepted into this category only if it complies in all respects with the assumed template for such a marriage, which often includes patrilocal residence although this is a flexible tradition and reversal of gender roles is not uncommon when marriage involves migration (Kofman 2004; Ballard 2005; Charsley 2005). Despite this, men applying for entry are often regarded as having economic or other instrumental motivations, reflected in their higher refusal rates (Wray 2006b; Charsley 2012a: 23), and their marriages are considered to be in the second more opportunistic category. Considerations of who is a ‘good’ migrant will also affect this judgment; the same facts about a relationship are likely to be differently interpreted depending on the country of origin, immigration status and other factors. Even if it is accepted that a couple falls within this category, that does not necessarily mean that they are excluded from blanket measures directed at sham marriages.

At the end of the spectrum are marriages untouched in any way by immigration factors. These marriages are relatively rare as they require equality of resources and prospects between the parties (or an imbalance in favour of the migrant) that is usually unrealistic given the UK’s comparative wealth. As Williams (2010: 83) points out, cross border marriages are more likely than marriages between citizens to involve inequalities. Arranged marriages and couples where the aspiring migrant spouse party has a relatively impoverished background or does not have an immigration status will usually be unable to demonstrate that they fall into this narrow group, particularly if they cannot present a persuasive relationship narrative that will enable immigration officers to feel comfortable in accepting the marriage (see Wray 2011:219 for an absurd example of how this can unfold). Those couples also find it hard to show that they belong in the third category for the reasons already discussed and may find that they are regarded as belonging to the second ‘opportunistic’ category, or that they are caught by blanket measures based on their situation or attributes..

There are thus four broad and porous categories into which a cross-border marriage may be placed: the sham marriage where immigration is the only purpose, marriages where immigration was one

purpose, marriages whose course has been partially determined by immigration and marriages in which opportunities for immigration were not a factor at all. In reality, the vast majority will fall into the middle two categories and this creates serious regulatory difficulties. If the right of governments to refuse rights to those in the first category is undisputed, the history of immigration control shows that this is rarely sufficient and governments usually want to go further, bringing into the ambit of the ‘sham marriage’ the ‘opportunistic’ marriages of the second category. The problem however is that such marriages are not ‘sham’ and, whatever their initial motivation, the emotional and other costs of refusal may be high particularly but not only if children are involved. A further difficulty is that the boundary between this category and the third one, where the course of events is influenced by the existence of migration controls, is blurred. Deciding which side of the line a particular marriage falls is a subjective judgment which will involve normative assessments of the quality of the relationship and which is likely to be influenced by the inherent value attached to that particular migrant, a product of factors such as nationality, culture and social class. Finally, governments may resort to blanket measures that affect certain categories of migrants irrespective of where they are placed on the spectrum.

Regulating sham marriage – or regulating marriage?

This section discusses how the regulation of sham marriages in the UK controls a far wider range of marriages than those entered only for immigration purposes and has expanded its reach beyond the immigration system into the marriage arrangements and ceremony.¹¹ This enlargement, part of the overall expansion of immigration control beyond the physical border, means that couples where one partner is a non-EEA migrant must overcome protracted and multiple hurdles before they can exercise a right that non-migrant couples take for granted.

Pre- marriage controls

As already mentioned, s. 24 Immigration and Asylum Act 1999 requires marriage registrars to report suspected sham marriages to the Home Office although Church of England marriages were excluded, their procedures being regarded as sufficient to deter sham marriages (Stevens 2001: 421). The guidance to marriage registrars is not publicly available but was reported in 2012 to include factors such as the absence of mutual knowledge, use of notes to answer questions about the other person, reluctance to provide personal information, absence of a mutual language, payment to one of the parties, absence of interaction and apparent direction by a third party. Certain national pairings are noted to be common subjects of reports, creating a potentially self-reinforcing cycle (Charsley 2012a: 16-17). While these factors might indicate a sham marriage, they are certainly not conclusive and can only be judged during the brief official interactions that take place before the ceremony.

¹¹ For a more detailed chronological account to 2010, see Wray 2011; chapters 2 and 7.

A report might result in enforcement action at the marriage and this has become more likely since the start of Operation Mellor in January 2013, an ‘intelligence-led’ enforcement initiative to, amongst other things, disrupt suspicious weddings. Between 14 January and 30 September 2013, there were 500 operations, leading to 334 arrests for immigration offences and 78 removals (Chief Inspector 2014a: 10). Caution is needed in interpreting these statistics. One of the aims of the initiative was to penalise immigration offenders and it may not be the case that the arrests were for sham marriage offences. There has been at least one report of a genuine marriage being raided.¹² A wedding is one of the few occasions when irregular migrants must notify the authorities in advance of their presence at a particular place and time and it is arguable that ceremonies are now an opportunity for pure immigration control, as demonstrated by the arrest at her daughter’s wedding of the Colombian cleaner whose illegal employment had caused the resignation of Immigration Minister, Mark Harper.¹³

The approving description of an enforcement operation by the Independent Chief Inspector for Borders and Immigration (2014a) appears excessively complacent about the seriousness of disrupting a wedding ceremony on the basis of unproven suspicions. It describes the entry of uniformed enforcement staff into the waiting room, followed by separate interview to determine if the marriage is sham (depending, for example, on answers to questions about the bedroom flooring), arrest and possible handcuffing. Immigration concerns, and in particular the detection of illegal immigrants, are clearly seen as trumping all other considerations. There appears also to be a performative element here, a display of state power over immigrants at even the most significant moments of life.

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Pre-marriage controls developed further with ss. 19-25 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 which provided that all those under immigration control, unless they had indefinite leave to remain or had entered from abroad on a fiancé or marriage visit visa, had to obtain permission to marry through a certificate of approval. The application cost £135 later rising to £295. Irregular migrants, asylum seekers and those who only had short-term leave were routinely refused. Exceptions were made only where there was terminal or long-term illness or inability to travel due to pregnancy. The scheme had an instantaneous effect; by June 2005, four months after implementation, there were 60 per cent fewer notices of marriage in some London Boroughs and around 25 per cent fewer in Birmingham and Leicester. Between 2004 and 2005, the number of marriages celebrated in

¹² ‘“Sham marriage” police storm real wedding’ *Camden New Journal* 7th November 2013.

¹³ ‘Border police arrest cleaner at heart of Mark Harper immigration row’ *The Guardian* 18th July 2014.

the UK fell by 10 per cent to their lowest level since 1896 and this was attributed to the scheme (Wray 2011:161-167).

In 2008, the House of Lords held the legislation was discriminatory because of the exemption for Church of England marriages, while the blanket nature of implementation and the cost breached article 12 (right to marry and found a family).¹⁴ There were similar findings in the European Court of Human Rights.¹⁵ There were some changes in implementation to meet these objections, but the statute, including the discriminatory provision, was not amended until 2010 when the scheme was finally abolished.

Part 4 of the Immigration Act 2004 has enacted a successor to both the 1999 reporting requirements and the certificates of approval scheme although it has not, at the time of writing, been implemented. It avoids the blanket ban which was one reason the certificates of approval scheme failed by providing that, while all marriages involving non-EEA migrants without indefinite leave, permanent residence or a marriage visa will be referred for possible investigation, decisions on whether to investigate will be made on an individual basis. Closer examination however reveals that the process is not primarily concerned with the nature of the marriage but with administrative compliance. There are increased evidential requirements (and the evidence may be rejected if 'reasonably' believed to be false) before notice of the marriage is accepted and the outcome of the investigation (and therefore the ability to marry) depends not on the character of the marriage but on compliance with the investigation.

Pre-marriage controls have become a major element in the regulation of sham marriage. In all cases, however, they seem to be a blunt instrument capable of disrupting or preventing a far wider range of marriages than those that are sham. There is assumed to be a strong correlation between lack of long term immigration status and a sham marriage. The certificates of approval scheme affected all marriages involving non-nationals as will the new scheme in the 2014 Act. The reporting requirements, in principle, attempt to identify only sham marriages but rely on external indications coupled with a focus on immigration status as the basis for disruption of a wedding ceremony. In all cases, the process of getting married and even the ceremony itself have become an exercise in immigration control affecting all migrants.

Post-marriage controls

In 1969, the admission of Commonwealth husbands and fiancés was limited to those 'presenting special features'. The rationale was that, because 1,676 applications had been made during 1968,

¹⁴ *R (on the application of Baiyai) v SSHD* [2008] UKHL 53.

¹⁵ *O'Donoghue v UK* [2010] ECHR 2022.

marriage was being used as a means of entering, working and settling in the UK outside immigration controls. Many (although not all) white Commonwealth men were exempt from controls and the new measures severely affected the non-white Commonwealth husbands of non-white British citizens and residents. The wives of non-white husbands of white women were more likely to plead successfully that they could not relocate to places where they would be culturally isolated (Dummett and Nicol 1990: 206-7; Bhabha and Shutter 1994: 57-9 and chapter 4). Nonetheless, white women were adversely affected by the prohibition (only 10 Australian and 6 Canadian husbands were admitted during 1973; Wray 2011: 52 fn 56) and it became the subject of extensive campaigning, based primarily around the hardship endured by these white women. The rule was too crude an instrument to be politically acceptable and was removed in 1974, soon to be replaced by the primary purpose rule. The primary purpose rule was first introduced into the immigration rules in 1977, was refined over the next period and became a major means of restricting marriage migration, particularly by men, from 1985 when the government was compelled to equalise the immigration rules after the *Abdulaziz* case.¹⁶ It was removed from the rules in 1997. The rule required an applicant to establish that the primary purpose of the marriage was not admission to the UK. Proving a negative is always difficult and was especially onerous for those in arranged marriages who could not show a prior relationship and the personal familiarity that usually characterises non-arranged marriages. It was widely used against men, particularly from the Indian sub-continent, whose tradition of patrilocal marriage was apparently breached by their desire to move to the UK, raising the inference that the primary reason for the marriage was emigration. The rule was only one way in which non-white spousal migration to the UK was severely curtailed in the three decades before 1997. Other methods included hostile interviews and reliance on minor discrepancies in answers, lengthy delays and protracted application processes, excessive demands for documentation, and dubious medical examinations, including virginity testing (for a more detailed account of the rule and of these practices, see Wray 2011: chapters 3, 4 and 5; Juss 1997: chapters 2 and 3; Sachdeva 1993).

The primary purpose rule, on its face, affected a wider range of marriages than those in the first category outlined in this chapter, drawing in marriages in the second category where there is a relationship but immigration was a factor in the decision to marry. Because of the political and institutional hostility to these marriages and the refusal to acknowledge the complexity of South Asian marriage arrangements, it also drew in couples who were in the third and fourth categories, where immigration was only incidental or had no impact at all. All this is evident from its application to couples who quite clearly had a continuing relationship, including the birth of children and visits over many years. Even where the parties had an alternative explanation for how their marriage came about this was disbelieved, so fixed was the assumption that South Asian families were determined to

¹⁶ *Abdulaziz, Cabales and Balkandali v UK* (1985) 7 EHRR 471.

emigrate even at the cost of unsuitable and unhappy marriages. The consequent distress and loneliness for all concerned was considerable (see, for example, Menski 1999) and caused immense and lasting anger amongst the UK's population of South Asian origin.

One rather unusual example from contemporary reports shows how individuality and attachments were routinely discounted in favour of stereotyped assumptions. A husband seeking to join his wife in the UK was refused on primary purpose grounds. His wife, the sponsor, was a deaf-mute and the immigration officer could not understand why she had been chosen over her non-disabled sister other than because she lived in the UK. In fact, the applicant had been orphaned as a child and taken in by the sponsor's family. Two lonely children had formed an exceptionally close bond, communicating through an invented, private sign language. The sponsor had moved to the UK to access better medical facilities but the separation had left both parties distraught (Powell 1993: 83-98).

The primary purpose rule was finally removed by the new Labour government in 1997. After that the main way of testing for a sham marriage upon first application was the requirement that the parties have a subsisting marriage and intend to live together permanently, requirements that had been present in the immigration rules for many years but only became widely used after the demise of primary purpose. The tests are concerned with the current state of the marriage and the parties' intentions for the future rather than reasons for marriage and do not require a retrospective evaluation of motives. This point was appreciated by the Tribunal but not always by immigration officers who sometimes refused marriages on 'intention' grounds because of their inferences about why the marriage had been entered when the parties lived together and even had children (for a discussion, see Wray 2006a; Clayton 2014: 273-275).

On the other hand, by focusing on one major characteristic of most marriages (cohabitation) and the current state of the relationship, the rule fails to acknowledge the variability and complexity of marriage. Evidence that the relationship has continued in some form during a past period of separation should enable both elements of the rule (subsisting and intention to live together) to be met,¹⁷ but the rule can affect those who are 'living apart together' (Levin 2004) i.e. maintaining a committed relationship without cohabiting. The Tribunal has found that the rule is satisfied in some such situations (as when couples are separated by work commitments) but not in others (as when separation was due to the husband's imprisonment).¹⁸ There is also potential for cultural normativity; in *AB (Bangladesh)*,¹⁹ a husband in a polygamous marriage who intended to divide his time between his UK-based wife and his wife in Bangladesh was found to lack the intention to live permanently with

¹⁷ *Goudey (subsisting marriage – evidence) Sudan* [2012] UKUT 00041(IAC)

¹⁸ *SB v Entry Clearance Officer, Islamabad* [2002] UKIAT 06623; see discussion at Clayton 2014: 274.

¹⁹ *AB Bangladesh* [2004] UKIAT 00314.

his wife in the UK even though the durability of the relationship was not in question. In *ZB and HB*, intention to live together was found to be absent when the parties had lived together in Pakistan and had a child.²⁰ However, the sponsor was mentally and physically disabled (capacity was also an issue in this case) and the Tribunal decided that the applicant did not intend to live with him ‘as his wife’ although the intention to live under the same roof was not questioned. It is not clear if this was a reference to their future sexual relationship (which should have been irrelevant) or the likely nature of the interaction between them in the absence of mutual communication and understanding. This case betrays a preoccupation with marriages that involve an element of caring which has become more prominent in recent years (see below).

The ‘subsisting’ and ‘intention to live together’ test is thus capable of being applied to a wider range of marriages than those entered solely for immigration purposes although it comes closer to addressing the issue of sham marriages than some of the other controls discussed in this chapter. It also seems to have been applied in the period after the abolition of the primary purpose rule with some degree of cultural sensitivity (Wray: 2006b; 2011; chapter 9). It relies on a conventional model of marriage based on lifelong cohabitation and has, in practice, been used to refuse marriages where there is an element of disapproval for the reasons of the marriage (see also Wray:2006a). It nudges parties towards the model of the ‘pure’ relationship’ but the emphasis on outward characteristics and intention gives it a more pragmatic slant.

In July 2012, the immigration rules were amended as part of a series of changes that made most family migration, including spousal migration, much more difficult. The ‘subsisting’ and ‘intention to live together’ tests were separated and are now two separate conditions; applicants must show both that the relationship is ‘genuine and subsisting’ and that they intend to ‘live together permanently in the UK’. More significant is new guidance which sets out factors ‘associated’ both positively and negatively with genuine and subsisting marriages.²¹ While these are said not to be a checklist, it seems that a very wide range of marriages could now be brought within the ambit of the criterion.

Factors which indicate a genuine and subsisting relationship include evidence of a current, long-term relationship, cohabitation, shared responsibility for children, shared financial arrangements, practical arrangements by the parties or their families for living together in the UK and (in the case of an arranged marriage) consent by both parties. There is a much longer list of twenty-two possible negative indicators which include public statements that the marriage is sham or forced, involvement of other family members in or evidence here of forced marriage, apparent lack of capacity to consent (even if not independently verified), failure to attend or otherwise avoiding an interview, lack of

²⁰ *ZB and HB (Validity and recognition of marriage) Pakistan* [2009] UKAIT 00040.

²¹ Annex FM 2.0.

arrangements for living in the UK, the circumstances of the wedding (for example, few guests), lack of mutual knowledge, disagreement as to the “core facts of the relationship”, absence of a common language, exchange of money unless part of a dowry, lack of shared responsibilities or cohabitation, one partner who needs care and the other is a medical professional, and previous entry or sponsorship as a spouse, unlawful residence or refusal of an application to come to the UK.

It is easy to see how some couples, particularly newly-weds without children, a history of cohabitation or joint finances might struggle to show evidence of the positive factors. The negative factors may be present outside a sham marriage. The conflation of forced marriage with sham marriages reinforces the impression that the decision-maker is being invited to judge the quality of the marriage rather than whether it fits into the narrow category of sham marriages as does the reference to disability and carers. Disability is sometimes a factor in forced marriage but coercion is an independent reason for refusal. Individuals without capacity are already protected by laws on the validity and recognition of marriage.²² Beyond that, including in this list marriages between those with disabilities and their potential carers implies a strong judgment about what marriage should be for.

There is also scope to make a judgement on the quality of the migrant through reference to factors such as previous sponsorship, refused immigration applications and unlawful residence. This is consonant with the rest of the reforms of July 2012 which also introduced very onerous financial requirements and a long list of suitability requirements which exclude those who have failed to comply even in minor ways with the authorities (for example, recent minor offending, failure to attend for interview or the unknowing submission of false information). There is also the pre-entry English language test, introduced in 2010. Immigration rights, it seems, are to be the preserve of the respectable and capable middle classes.

On the other hand, some of the factors may indeed be present in a sham marriage, the list avoids some crude stereotyping (differences in age, social or cultural background or religion are not mentioned, for example) and the need to make an individualised decision is stressed. The sense that it goes further arises from the number of negative indicators, the emphasis on forced marriage and immigration status, which demonstrates how easily measures against sham marriages blur into other forms of control, and the general anti-immigration context in which they were introduced. At the time of writing, however, there is little evidence as to how this guidance has been operated.

Other post-marriage controls include the probationary period, during which residence is conditional and which has been, at various times, one year, two years and, since 2012, five years. The significance of the probationary period is not only that it tests the durability of the relationship but it tests the level

²² See, for example, *KC and NNC v City of Westminster* [2008] EWCA Civ 198.

of commitment as life is more difficult for the couple while it is in place. In particular, the migrant spouse is barred from receiving public funds or benefits such as home tuition fees, a major drawback now that the probationary period is so protracted. It also increases the vulnerability of the migrant spouse to domestic abuse.

Commitment is also tested by requiring migrant spouses in the UK to leave in order to make their application from abroad. This has the added benefit, from a government point of view, of ensuring that those perceived as having bypassed the immigration system do not 'jump the queue'. The certificates of approval scheme required those refused permission to marry to leave the UK to apply for the necessary visa. The prohibition on those either without leave or with only short term leave from switching to marriage, a change made in 2002 and which was explicitly linked to the prevention of sham marriages, has a similar effect (Home Office 2002: 101). The impact of this change was drastic particularly on failed asylum seekers and irregular migrants who had married and started families in the UK and were now faced with removal at enormous cost to their family lives, often to unstable regions where accessing visa facilities might be dangerous, difficult and costly. Two examples give a flavour of the consequences. In one instance upheld by the Tribunal, the applicant was required to return to a highly unstable Iraq shortly after the Gulf War, obtain travel documents, negotiate Jordanian border controls, endure the cost and danger of travelling from Iraq to Jordan and remain in Jordan to obtain a visa that would previously have been given without his leaving the UK. In another, the father, an overstayer, was deeply involved in the care of his two children, one of whom was disabled. It was unclear that the mother could cope on her own and the family was likely to need welfare support as a result of the father's departure, making a successful application for admission under the rules less likely (Wray forthcoming). The policy was later found by the House of Lords to breach article 8 although that finding had limited impact in practice (see Wray forthcoming for a discussion).

Post-marriage controls have often widened the meaning of the sham marriage to include within controls those outside the first category of marriages discussed in this chapter. The primary purpose rule attempted to include marriages within the second category but often went much wider. The 'genuine' and 'subsisting' and 'intention' tests are related to the task of identifying sham marriages although with a focus on the existing and future relationship rather than the motives for the marriage. However, they involve an assessment of the marriage that permits judgments about the quality of the marriage rather than whether it is sham while the growing focus on immigration status evident in the recent guidance suggests that immigration motives are being reintroduced as a factor, targeting the 'opportunistic' marriage of the second category. The probationary period and the requirement to leave

the UK to obtain leave test the parties' commitment to the marriage with the implicit aim of distinguishing between the second and third categories.

Conclusion

The controls cited in the previous section demonstrate that sham marriage controls are almost never concerned only with detecting marriages entered with the sole aim of procuring an immigration advantage. Several controls aim to limit the second category, marriages where immigration was a factor in the decision to marry. Sometimes, controls affect all migrants of a particular type, usually those without immigration status or only short-term status.

Controls that aim to determine the quality of the marriage in order to exclude the first and second categories of marriage may compare the marriage to an ideal template (as with 'genuine and subsisting') or require the parties to show their commitment by overcoming additional hurdles and obstacles, as with the ban on switching into marriage from within the UK. These latter techniques shade into blanket controls, such as the certificates of approval scheme (under which an application from outside the UK might eventually be successful) and the ban on Commonwealth husbands between 1969 and 1974. Even if an application has a prospect of succeeding, these tools are blunt instruments and the outcome depends less on the nature of the relationship and more on questions of immigration status, nationality, ethnicity and financial, social and cultural capital. This, it is suggested, is not accidental; controls over sham marriage have always been entwined with the wider purposes of immigration control. Whether parties are able to enjoy married life in the UK (or even to marry at all) depends less upon the genuineness or otherwise of the relationship and more upon the extent to which their presence in the UK undermines those purposes.

The question that emerges is not the point at which a marriage becomes sham or even the model of marriage that is presented as the template but the circumstances in which states are justified in interfering with the rights of couples to marry and live together. As discussed earlier in this chapter, the immigration factor in marriages cannot be painlessly identified and neutralised; it is not easy to determine the purposes for which individuals marry and, in any event, these may not correlate to the level of affective commitment. It is unrealistic to imagine that irregular migrants and asylum seekers, often present in the UK for many years, will not form attachments whose disruption will cause hardship not only to them but to their UK partners and children.²³ The right to enjoy family life in

²³ The position of children in the UK whose parents do not have leave is a separate issue that has been recently invigorated by the UK's removal of its immigration reservation to the Convention of the Rights of the Child and the enactment of a statutory duty in s. 55 Borders, Citizenship and Immigration Act 2009 to promote and safeguard a child's interests in immigration decisions; see the Supreme Court decision in *ZH (Tanzania) v SSHD* [2011] UKSC 4 and subsequent case law.

one's own home may be regarded as an aspect of citizenship in the broad if not the legal sense. Yet, control over immigration is regarded not only as an aspect of national sovereignty but of government competence. Governments feel unable to abandon their attempts to ensure that immigration is both managed and limited. There is no easy way to resolve these dilemmas and it is not surprising if governments instrumentalise concerns about sham marriage as a way of reconciling these tensions.

The sham marriage is a deeply troubling concept. It does occur although its prevalence is unclear but it is often also a construct, drawing on an imagined opposition to the imagined ideal of the 'pure' relationship in order to justify wide control measures. By compressing and simplifying a complex and ambiguous term, governments have been able to justify intrusions into the married lives of couples that would otherwise be unacceptable. Such intrusions have usually focused on the granting of immigration rights consequent to marriage. Increasingly, however, the rites aspect, the right even to marry, is also contested.

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