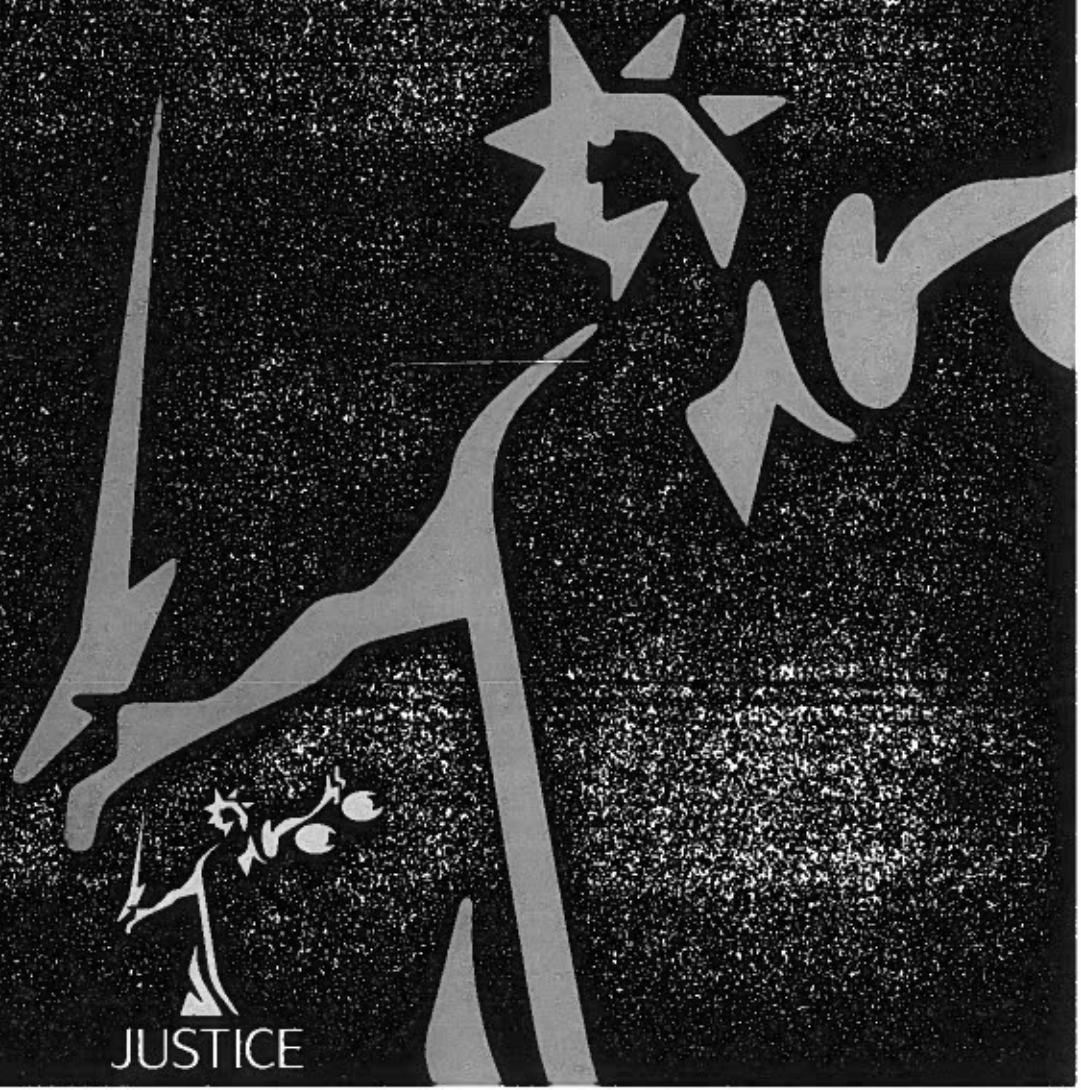
A report by Young JUSTICE

The primary purpose rule: a rule with no purpose



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The primary purpose rule: a rule with no purpose

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JUSTICE
London 1993

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ISBN 0 907247 19 9

Statement of Changes in Immigration Rules, HC 251, paras. 47(a), 50(a), 131(a)

The 'primary purpose' rule is to be found in various parts of the immigration rules. Under the rule, a person seeking admission to the United Kingdom as the spouse or fiancé(e) of a person settled in the United Kingdom is to be refused leave to enter, or an extension of stay, unless the Secretary of State is satisfied that the primary purpose of the marriage was not settlement in the United Kingdom.

The rule, and the relevant accompanying rules regulating the entry of spouses and fiancé(e)s, can be extracted from paragraph 47 of the immigration rule:

'A passenger seeking admission to the United Kingdom for marriage to a person who is present and settled in the United Kingdom or who is on the same occasion being admitted for settlement, and who intends to settle thereafter must hold a current entry clearance granted for that purpose. An entry clearance will be refused unless the entry clearance officer is satisfied:

(a) **that it is not the primary purpose of the intended marriage to obtain admission to the United Kingdom;** and

(b) that there is an intention that the parties to the marriage should live together permanently as husband and wife; and

(c) that the parties to the proposed marriage have met . . . '

This working party was established by young JUSTICE, the JUSTICE Young Lawyers' Group, to review the primary purpose rule, in response to concern amongst legal practitioners about the rule's operation, particularly in the light of recent developments.

The members of the working party approach their terms of reference from the perspective of practising lawyers. Our experience of the field of immigration law comes from acting for both applicants and the Home Office. We are aware that we are adding our particular concerns to those expressed by many other organisations, specifically concerned with immigration or race, over the years of the rule's operation.

This report describes the history of the primary purpose rule; reviews the criticism which the rule has received from the judiciary in cases that have come before the courts; and sets out conclusions and recommendations.

It is the unanimous recommendation of the working party that the primary purpose rule should be abolished immediately.

History of the primary purpose rule

Traditionally, British nationality and immigration law centred on the male. It was assumed that family members would migrate to where the husband and father lived; and therefore immigration law and rules gave preferential treatment to wives and fiancées. In 1974 the new Labour government decided to end some of this sex discrimination. Rules were adopted whereby either the husband or wife of a person indefinitely resident in the United Kingdom could obtain entry clearance for permanent residence.

However, a regime which referred only to 'husbands' and 'wives' would include marriages of convenience: marriages entered into solely as a device to facilitate immigration, without the parties having any intention to live together as husband and wife.

In 1977, therefore, the immigration rules were amended to allow a husband's application to be refused if the Home Office was satisfied that the marriage was one of convenience. This was defined as a marriage which was entered into primarily to obtain settlement *and* in which the parties had no intention of living together. Further, a new rule was introduced whereby a man was initially given leave for twelve months only, and would normally be given indefinite leave at the end of that period only if the parties intended to live together. These restrictions applied only to men.

The Home Office experienced some difficulty in applying these rules, for several reasons. First, the burden of proving that the marriage was one of convenience was on them. Second, even if it could be shown that the primary purpose of the marriage was for the husband to obtain settlement, the marriage would not be considered one of convenience if the parties intended to live together. Third, the refusal of settlement if the relationship had broken down within the first year was only discretionary. It was open for a husband to argue even then that the discretion should be exercised in his favour because of the hardship he would suffer on return to his country of origin.

In 1980 the new Conservative government changed the rules in the following ways:

- If an applicant failed to meet any one of a series of qualifications for admission, refusal became mandatory. There was no discretion that could be exercised more favourably either at the time of decision or on appeal.

- An applicant had to satisfy an entry clearance officer (ECO) *both* that the parties had an intention to live together as man and wife *and* that the primary purpose of the marriage was not to obtain admission to the United Kingdom. The two elements of the definition of a marriage of convenience were thus separated for the first time as two distinct tests.
- A husband could be admitted only if the female sponsor was a British citizen, who either had been born in the United Kingdom, or had a parent who was born here.

The primary purpose part of the rule had little impact for some years, because the rules relating to the nationality and status of the female sponsor were more significant in excluding husbands.

In 1982, faced with a challenge at the European Court of Human Rights, the government decided to amend the rule by removing the requirement that the woman or one of her parents should have been born in the United Kingdom. This proposal was defeated in January 1983 and so, in February 1983, the government reintroduced its proposals with a new element added to the primary purpose part of the rule. From now on the burden of proof was to be on the applicant: entry clearance was to be refused unless the applicant could satisfy the ECO that the primary purpose of his marriage to a British citizen was not to obtain admission to the United Kingdom.

In mid-1983 the first cases on the interpretation of the new rule reached the Immigration Appeal Tribunal. At first a number of decisions suggested that a marriage was unlikely to be disqualified on the primary purpose ground if there was clear evidence of an intention to live together. But this line of authorities was overruled by the Court of Appeal in *Bhatia*. The court stressed the separate nature of the elements of the rule.

In 1984, in the case of *Abdulaziz*, the European Court of Human Rights found that the marriage rules violated the prohibition on sex discrimination in the European Convention on Human Rights. As a result, in 1985, the marriage rules, including the primary purpose rule, were amended so as to apply to wives as well as to husbands. The class of women to whom it applied was extended in 1988 but, in essence, the current version of the rule had come into being by 1985.

Recent developments

The rule has, however, undergone informal modification recently. In an answer to a Parliamentary question on 30 June 1992, the Home Office minister, Charles Wardle, announced that guidance had recently been issued to staff on the application of the primary purpose rule, in the light of judicial rulings in the English courts and at the European Court of Human Rights. Those rulings required the Home Office to take account of a couple's 'intervening devotion' (their continuing close relationship after marriage); and of the rights to family life of any children born to them .

'This guidance states that in principle an application from a spouse for an entry clearance or for leave to remain should be allowed when it is accepted that the marriage is genuine and subsisting and either the couple have been married for at least five years or one or more children of the marriage have the right of abode in the United Kingdom.'

Surinder Singh [1992] Imm AR 565

The application of the rule has further been thrown into doubt by the decision of the European Court of Justice in *Surinder Singh*, in which it was held that, if a British citizen has worked abroad in another member state of the European Community, his or her admission and that of his or her spouse into the United Kingdom can be governed by Community law as well as national law. Accordingly, rules such as the primary purpose rule can be displaced by the more generous treatment afforded by the European Community directives on the free movement of workers (and others) within the Community. Those directives confer a right of entry on the spouse of a national of a member state even if the spouse is not him- or herself a national of any member state. The directives do not contain any equivalent of the primary purpose rule.

Judicial criticism of the primary purpose rule, its effect and application

Judicial comments in primary purpose cases which have reached the courts show that:

- The judges are conscious of the unfairness and arbitrariness of the rule and have tried to mitigate this in their decisions.
- The assessment, by any fact-finding body, of the parties' primary purpose in contracting the marriage is fraught with subjectivity and difficult and delicate analysis. The assessment is characterised by fatally easy pitfalls. Even if those pitfalls are avoided, the process is likely to confuse rather than illuminate. There is a considerable danger that legitimate applications will be improperly rejected.
- Even where the truth is accurately discovered, there are very few cases in which it is used to reject illegitimate applications which would not be rejected anyway.
- The rule is productive of complex, confusing and contradictory jurisprudence. The consequent uncertainty brings the law generally into disrepute and makes decisions (whether by ECOs or appellate authorities) unpredictable and prone to error.

Judges attempting to interpret the rule, after 1985, have wrestled with the question of when and whether a marriage can fail the primary purpose test as defined in paragraph (a) of the rules (see page 3) if the couple have satisfied the requirement in paragraph (b) that they intend to live together for the rest of their lives; and have sought to define what constitutes the 'primary' purpose of a marriage.

R v IAT, ex parte Arun Kumar [1986] Imm AR 446, page 455

In *Arun Kumar* Sir John Donaldson MR said:

'. . . a couple may *theoretically* decide to marry primarily in order to enable the husband to gain a right of entry into the United Kingdom, whilst at the same time concluding that if they were to be married for this purpose, they might as well live together permanently. In such a case paragraph (b) would be satisfied but not paragraph (a).' (emphasis added)

The Master of the Rolls clearly regarded it as only a 'theoretical' possibility that paragraph (a) would sift out illegitimate applications which paragraph (b) would not.

Nor has the Master of the Rolls been alone in his evident

Matwinder Singh (23 March 1987, unreported), pp 10–11 of transcript

scepticism of the value of paragraph (a). In *Matwinder Singh*, Simon Brown J said:

'In my judgment – and I have little doubt that this consideration informed the Master of the Rolls' judgment in *Kumar* – it is necessary to recognise the *intrinsic improbability* that any two people, even from a culture where arranged marriages are the norm, will bind and commit themselves together for life in marriage with all that that implies primarily in order to achieve the husband's settlement in the United Kingdom. The mere fact that a husband may well be the readier to marry a wife settled in the United Kingdom in the hope and expectation that he may thereby himself be permitted to settle would not, in my judgment, be a sufficient basis to conclude that the primary purpose of such a marriage was to gain admission to the United Kingdom any more than it could properly be said of a man who, contemplating matrimony, is anxious if possible to secure a wealthy rather than an impoverished wife, and then marries such a wife, that his marriage was entered into primarily to secure his financial position. Unless the fact that the sponsor is settled in the United Kingdom and can secure her husband's settlement is his overriding and compelling motive in the sense that it outweighs all other factors which together would not merely be insufficient to induce him to marry the sponsor but would tend positively to disincline him, it would not in my judgment be right to regard it as his primary purpose. It would certainly be insufficient to find the disqualifying purpose merely in the fact that the marriage would not take place if it involved living in India . . . it will always be important when considering condition (a) and addressing oneself, as condition (a) inevitably requires, to the antithesis between, on the one hand, marriage to obtain admission and, on the other hand, marriage to bind oneself for life to a particular person, to bear in mind the *enormity*, as it seems to me, and the corresponding improbability of undertaking the latter to secure the former . . . that is essentially the correct approach to this rule.' (emphasis added)

IAT v Hoque and Singh [1988] Imm AR 216

When that case was appealed, Simon Brown J's dicta were not disapproved. (It was said that the 'improbability' must still not deter the entry clearance officer from giving separate consideration to paragraph (a) and requiring affirmative satisfaction as to that also but that does not appear to be inconsistent with Simon Brown J's views). If, then, that is the 'correct approach to this rule', it is very difficult to see how there can be more than a very few cases where the practical operation of the rule of itself combats any mischief.

R v IAT, ex parte Mukta Meah (2 December 1988, unreported) pp. 9–10 of the transcript

Henry J also took the same view in *Mukta Meah* in quashing a decision in which the appellate authorities had wrongly failed to view the appellant's desire for economic betterment against the genuineness of the marriage and thereby held it against him under paragraph (a). He said:

'I take it to be a universal truth that every responsible man on entering a genuine marriage is likely, if his economic circumstances are not favourable, to choose that moment to look to his economic betterment . . . As the desire for economic betterment is, in my judment, entirely natural and predictable against the background of a genuine marriage, it seems to me that in not apparently having regard to that fact, the adjudicator made the fatally easy mistake of jumping to the conclusion that the desire to come here as the base for the marriage (predicated by the fact of the application) was the primary purpose of the marriage.'

Arun Kumar, supra, pp. 454 and 455

Although striving to give the rule 'a broad common sense construction', the Master of the Rolls in *Arun Kumar* continued:

'under the rules a marriage primarily entered into in order to obtain admission to the United Kingdom would still retain its non-qualifying character whatever happened afterwards and even if the husband applied for entry on their Golden Wedding Day. For my part I do not think that any violence would be done to this country's immigration policy if entry clearance officers put out of their minds the *theoretical* possibility that a marriage which at the time of application is, on the evidence, undoubtedly a very genuine and soundly based marriage could, at its inception some time before, have had a different character.' (emphasis added)

p. 455

He also demonstrated the danger of artificial reasoning and false assumptions to which the rule has given rise:

'Detailed analysis also introduces a "Catch 22" element. If neither party to the marriage wishes to live in the United Kingdom, *caedit quaestio*. If, however, the wife is already settled here, is a British citizen and wishes to continue to live here, it is idle for her to marry a man who does not wish to obtain admission to the United Kingdom. Yet it is fatally easy to treat his admission that he does indeed wish to obtain admission as evidence that this is the primary purpose of the marriage.'

IAT v Hoque and Singh, supra, p. 222 (Proposition 9)

The need to avoid placing applicants and sponsors in that 'Catch 22' situation was approved and adopted by the Court of Appeal in *Hoque and Singh*.

R v IAT, ex parte Iqbal, Times, 24 December 1992

The High Court has also recognised in *Iqbal* that the absence of a passionate relationship, or indeed of being 'in love', is not, in the context of an arranged marriage in Muslim society, indicative of itself that the primary purpose of a marriage is to obtain settlement in the United Kingdom. In the same case, Schiemann J expressed his sympathy for adjudicators who were expected under the procedures in force to rule on the credibility of persons they had never seen or heard, and recognised that at times they could do no more than adopt the reasons of the ECO for the reasons given by him.

However, despite judicial warnings, adjudicators continue to make mistakes: for example, the Divisional Court in *Wali* quashed the

R v IAT, ex parte Shameem Wali [1989] Imm AR 86 pages 90–91

decision of an adjudicator who had fallen into the 'fatally easy' trap of holding against an appellant the fact that his sponsor had made the marriage conditional upon his being able to live with her in the United Kingdom. Farquharson J held that there was no reason why a British citizen living in the United Kingdom should not properly make it a condition of her marrying that she would only do so to somebody who, like herself, was going to live in the United Kingdom since she did not wish to live anywhere else. The same approach was taken by Lord Prosser in the *Saftar* case (see below).

Sumeina Masood v IAT (1992) Imm AR 69 pages 77–78

Even more worrying is that in *Masood*, the Court of Appeal appears to have fallen into the same error when assessing a 'conditional marriage'. Glidewell LJ said this:

'The wife . . . had made it entirely clear . . . that she had no intention at all of living in Pakistan. Thus, if the parties were going to live together as man and wife for more than a short period of time, it was essential that the husband should be able to come to the United Kingdom. Thus it followed that the obtaining of an entry clearance certificate for the husband was a necessary precondition to him being able to live with his wife . . . the entry clearance officer was quite entitled to take the view at that point that the husband's intention to live with her, which was no doubt based upon a sincere wish to do so, was itself contingent upon him obtaining an entry clearance certificate. Once the entry clearance officer and the adjudicator both reached that stage in their reasoning, it followed that it was but a short step to the conclusion that the marriage was entered into primarily to obtain admission to the United Kingdom. The adverb 'primarily' in that passage is an important one. *I know that it puts some intending immigrants in a very real difficulty, but it is not enough for someone like Mr Khalid Masood to convince the entry clearance officer that he likes his wife, it may be he even loves her though that question did not arise in this case, and that if given the chance he intends to make a permanence of his marriage. This could be a perfectly genuine long-lasting marriage. But that is not enough.*' (emphasis added)

In our opinion, the words underlined not only demonstrate a judicial awareness of the difficulties to which the rule unfairly subjects immigrants; they also show the absurdity of a rule whose only function is to exclude genuine marriages. If *Masood* is a correct interpretation of the rule, it creates the surprising position that any British citizen (or anyone settled in the United Kingdom) cannot marry and be joined by their spouse unless they are prepared not to live in the United Kingdom.

Of course, there is also the jurisprudential objection to *Masood* that the reasoning of Glidewell LJ contradicts that consistently set out in *Arun Kumar*, *Hoque and Singh* and *Wali* that it is wrong to treat evidence of the sponsor's wish to live in the United Kingdom as evidence that the applicant's primary purpose is to obtain entry. Lord Justice Glidewell's approach to the distinction between a 'wish' and

an 'intention' for the purpose of discovering a party's motive in marrying appears inconsistent with his own approach to the same terms in *Brakwah*. It is suggested that such inconsistencies would not occur but for the unsatisfactory nature of the rule in general. A rule which necessarily contains a 'fatally easy' trap must be productive of serious injustice in a great number of cases which are never taken on appeal or judicial review. In our experience, many entry clearance officers and adjudicators are unable to avoid the trap. As a matter of jurisprudence it also brings the law generally into disrepute.

R v Secretary of State for the Home Department, ex parte Brakwah [1989] Imm AR 366 (DC)

As recently as February 1991 the danger of ECOs, the appellate authorities and the courts alike making this 'fatally easy' mistake was re-emphasised in the Court of Session in *Saftar*. Lord Prosser said:

Mohammed Saftar v Secretary of State for the Home Department [1992] Imm AR 1, page 12

'an applicant may well not merely intend to settle in the United Kingdom with his wife, but may be very keen to do so for that reason or for countless extraneous reasons. In such a case, it will be even more 'fatally easy' to treat an admission of his wishes as evidence that this was the primary purpose of the marriage. That again would in my view be quite wrong. A desire, or a strong desire, to leave some other country, and perhaps to come specifically to the United Kingdom, will no doubt often, and perhaps normally, lie behind an intended marriage the primary purpose of which is to obtain admission to the United Kingdom. But there may be an equally strong desire to leave some other country, or to come to the United Kingdom, in the mind of the man whose matrimonial purpose is entirely normal and genuine, with his wish to come to the United Kingdom constituting no part or certainly not a primary part in his own purposes, far less the primary purpose of the marriage as such . . . No doubt if the Appellant had loved living in Pakistan, and had disliked the idea of coming to Britain, the idea that his primary purpose in marrying was to come here would have been positively inconsistent with these general attitudes. But *wanting to come here is also perfectly consistent with marrying for ordinary and genuine reasons*. In my view it would be silly as well as cynical to believe that where a marriage brings advantages, the acquisition (or conferring) of those advantages must be seriously regarded as the primary purpose of the marriage, justifying not only the marriage itself, but lifelong union.' (emphasis added)

Saftar was a case where the appellant had given all the 'wrong' answers to the questions habitually put by ECOs. To the question 'Is the primary purpose of this intended marriage to obtain your admission to the United Kingdom?' he had answered 'Yes'. Subsequent replies only reinforced that answer: see page 6 of the report. Despite that, the refusal of entry clearance was quashed. *Saftar* demonstrates the inherent difficulty of discovering the 'primary purpose' of the parties to any marriage. The Court of Session recognised that even such unequivocal and apparently damaging answers do not, in fact, highlight those cases where the alleged mischief is at work.

These, however, are the questions which the ECO must ask if he is to seek to apply the rule at all. The assessment of answers is 'a delicate and detailed analysis of the motives for a marriage', as Sir John Donaldson MR said in *Arun Kumar*. The practical result is that the application of the rule is inevitably to mislead rather than to elucidate, to obfuscate rather than to focus.

Arun Kumar, supra, page 455

Our experience is that the High Court does in practice look very carefully at determinations of the Immigration Appeal Tribunal upholding primary purpose refusals and that a very high proportion of judicial review applications are successful. This demonstrates, first, the difficulties for ECOs and the appellate authorities in applying the primary purpose rule and, second, judicial unease about the rule. Of course, it is no answer to the deficiencies of the rule that errors may be rectified in the High Court. Legal aid may not be easily available to mount such a challenge. If a challenge is successful, it is itself an acknowledgment that persons with a legal right to live in the United Kingdom with their spouse will have been denied that right for four years or more (the normal length of time between refusal of entry clearance and judgment in the High Court). In addition, the limitation of all judicial review challenges to errors of law may leave crucial mistakes of fact and findings on credibility (and therefore the refusal itself) unscathed: see, for example, *Jaifrey*.

Jaifrey v Secretary of State for the Home Department [1990] Imm AR 6 (CA)

Conclusions

We recommend the abolition of the primary purpose rule for the following reasons:

1. The rule is not necessary.

The ostensible purpose of the primary purpose rule is to prevent the abuse of immigration control by applicants who use marriage as a device for obtaining settlement in the United Kingdom. However, under the current immigration rules, true marriages of convenience are caught by the rules which require a passenger seeking admission to the United Kingdom as the spouse or fiancé(e) of a woman or man settled here to prove that each of the parties has the intention of living permanently with the other as man and wife, and, after entry, to do so for at least a year.

Paragraph (b) of Rules 47 and 50, and Paragraph (f) of Rule 131 of HC 251

The primary purpose rule of itself *only* excludes applicants who have proved that their marriage is intended to be a genuine and lasting union. As Sir John Donaldson MR pointed out in *Arun Kumar* (see page 10 above), a spouse who is party to a marriage which has fallen foul of the primary purpose rule will continue to be excluded from the United Kingdom whatever happens after the marriage, and no matter how loving and permanent it has become.

2. The rule is anomalous and inconsistently applied.

The rule is not applied to the spouses or fiancé(e)s of non-British European Community (EC) nationals who wish to live and work in the United Kingdom. British citizens who wish to live in their own country with their spouse are thus treated less favourably than similarly-situated nationals of other EC countries.

Following the Minister's Commons statement of 30 June 1992 (see page 6 above), it is clear that it is government policy that in principle an application from a spouse for an entry clearance or for leave to remain should be allowed when it is accepted that the marriage is genuine and subsisting and either the couple have been married for at least five years or one or more children of the marriage have the right of abode in the United Kingdom. Couples with a child are thus treated more favourably than couples who are unable to, or do not wish to, conceive children.

Following the European Court of Justice's decision in *Surinder Singh* (see page 7 above), the rule is no longer applied to the spouses or fiancé(e)s of British citizens or persons settled in the United Kingdom who have worked or studied for a period in EC countries other than the United Kingdom. Citizens who have lived and worked in Britain all their lives are thus less favourably treated than citizens who have lived and worked abroad.

The above concessions make it relatively straightforward for an applicant who is determined to obtain entry to the United Kingdom by marriage to do so: genuine couples who have difficulty in satisfying the burden of proof are more likely to be adversely affected.

Furthermore, for obvious jurisprudential reasons, it is undesirable that the immigration rules should not mean what they say. The rules do not reflect Home Office policy for couples married for five years or more, nor for couples with children; they do not mention the difference in application where EC Treaty rights come into play. In short, the rules do not accord with reality, and therefore bring the law into disrepute, as well as being a source of confusion for applicants and their advisers.

3. The rule has, in practice, proved to be impossible to implement fairly.

The rule places upon applicants the burden of proving, on the balance of probabilities, that, at a particular date which may be months or years earlier, settlement in the United Kingdom was *not* the primary purpose of their marriage. It thus requires applicants to undertake the extremely difficult task of proving a negative. In so doing, it runs contrary to the well-established common law rule, described by Viscount Maugham in *Joseph Constantine Steamship Line* v *Imperial Smelting Corporation Ltd* as 'an ancient rule founded on considerations of good sense [which] should not be departed from without strong reason': that a party who affirmatively asserts a matter must prove it.

Joseph Constantine Steamship Line v Imperial Smelting Corporation Ltd (1942) AC 154, at 174

The matter to be proved by applicants is highly artificial and difficult to define. People have many reasons for marrying, many of them far from rational, some of them unsusceptible to logical analysis. Lord Justice Bowen's 1885 dictum that 'the state of a man's mind is as much a question of fact as the state of his digestion', seems especially unrealistic in this context. As Sir John Donaldson MR commented in *Arun Kumar*

Arun Kumar, supra, page 455

> 'Any attempt to achieve a delicate and detailed analysis of the motives for the marriage is more likely to obfuscate than enlighten. The motives will often, and perhaps usually, be complex and defy such analysis'

Yet the rule requires applicants to make precisely this 'obfuscating' analysis, and to convince the entry clearance officer that settlement in the United Kingdom was not the most important reason for the marriage.

No matter how hard they try, entry clearance officers are unlikely to understand the complex social reasons why two people from a different culture have decided to marry. Applicants are required to prove their case in an interview with an ECO that is very often conducted through an interpreter. The only evidence of the parties' intentions is often the evidence of the applicant, obtained in answer to questions which may be of a highly personal or tendentious nature, during the course of an interview lasting some hours. The assessment of the motivations of the parties is usually a subjective one, depending upon the ECO's impression of the credibility of the applicant. There is a high probability of error in the taking of decisions on topics as complex and personal as the primary purpose for a marriage.

A large number of cases fail on an adverse finding of credibility. ECOs are not anthropologists or psychologists, and are simply not equipped to make such judgments. They have often shown themselves to be insensitive to unfamiliar cultures and behaviour patterns, and reliant upon misleading and stereotyped cultural assumptions – unsupported by expert evidence, and poorly understood. For example, an ECO may conclude that a husband from rural Pakistan who does not know the date of his wife's birthday knows little about her, without considering whether birthdays are usually celebrated, or even recorded, in the applicant's community. Similarly, there is widespread reliance by ECOs upon the 'tradition' that a woman normally lives with her husband's parents after marriage, and that a 'good Muslim' will expect his wife to join him, rather than move to join her. From these cultural assumptions an inference is drawn that, where fiancés or husbands wish to live with the wife's family in the United Kingdom, the primary purpose of the marriage is settlement.

Immigration adjudicators and the Immigration Appeal Tribunal are presented with evidence in the form of interview notes, often filtered through an interpreter, and must reassess credibility in the absence of the applicant, who ought to be the key witness (Schiemann J has expressed sympathy for the difficulties of adjudicators carrying out this task: see page 10 above). In other areas of immigration law, damning findings based upon the credibility of applicants can be challenged by objective scientific evidence, such as DNA testing to prove relationships. Indeed, in a distressingly large proportion of such cases, where the decisions of ECOs and adjudicators have been tested by objective evidence, those decisions have been shown to be erroneous. However, in primary purpose cases no similar objective means of checking adverse findings exists: the assessment is purely subjective.

The rule is applied unevenly. It is our experience that applicants from the Indian subcontinent are subjected to much closer scrutiny than applicants from, for example, the United States and Canada. Home Office statistics show the large and growing impact of the rule on couples from the Indian subcontinent. In 1985, the initial refusal rate for husbands and fiancés from those countries was 47%; by 1990 it had reached 69%. Because detailed statistics are not published for countries outside the Indian subcontinent, it is not possible to make direct comparisons with refusal rates in other countries. However, the appeal statistics provide an indirect means of assessing the incidence of refusals of entry. In 1991, 2872 appeals were determined against refusal of entry as a husband or fiancé; 2709 of the appellants were men from the Indian subcontinent. It is therefore scarcely surprising that the rule is not only regarded as a glaring example of race discrimination in itself, but has also become the focus for claims of a more general racial bias affecting the whole of immigration policy and practice.

HC 251 para 4(d)

4. The mischief which the rule is designed to prevent is far outweighed by the hardship it causes to applicants and sponsors.

If entry clearance is refused, a British citizen is faced with the dilemma of being separated from his or her spouse, or compelled to leave the United Kingdom.

The examination of applications and appeals from refusals of entry clearance necessitates enquiries into intimate details of the relationship of the couple concerned, including the public examination by an adjudicator of love letters, and an assessment by him of the degree of devotion displayed by the couple. Such an investigation is embarrassing at best, and often a humiliating and degrading experience.

The process of appeal from a refusal of entry clearance to an adjudicator, and thence to the Immigration Appeal Tribunal may take months, or even years, during which the couple cannot make definite plans for their future together. The couple are usually compelled to separate pending the resolution of the appeal. This is particularly the case because a further requirement of the immigration rules requires the couple to prove that they will be able to support and maintain themselves without reliance on public funds. It is therefore usually necessary for the sponsor to have, and to keep, employment in the United Kingdom.

The primary purpose rule is productive of considerable human misery. Those to whom immigration law is applied (whether they are British citizens or foreigners) simply cannot understand why they should be forced to choose between their spouse and their country; why their private motives for marrying should be subjected to suspicion and to minute analysis; how they are expected to articulate to the satisfaction of strangers in an interview (or, even worse, in a public hearing) their emotional and private reasons for wanting to spend the rest of their life with a particular person; and how a legal system that respects human dignity should tolerate the pronouncement of adjudications that purport to assess the adequacy of

asserted reasons for marriage by reference to whether any rational person could possibly choose to marry this appellant, or this sponsor, for any reason other than admission to the United Kingdom.

The courts are well aware of the injustices for which the primary purpose rule is responsible. Judges do their best to mitigate the wrong. But there remain many lives blighted by the agony of separation while efforts are made, often in vain, to explain why the couple decided to marry. There may be occasional and exceptional cases where marriage is abused as a route to entry into the United Kingdom, even though the parties intend to live together permanently as man and wife. But, we conclude, any public interest in preventing this mischief is more than outweighed by the damage to innocent victims and to the reputation of English law.

Recommendation

- **The immigration rules relating to the primary purpose of a marriage are, in our view, grossly unfair and unnecessary; they lead to a quantity of human misery that more than outweighs any mischief which they prevent.**
- **We therefore conclude that the argument for repeal of the primary purpose rule is overwhelming. We recommend its immediate abolition.**

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Designed by Pat Kahn. Typeset by Boldface, 071-253 2014
Printed by Crowes, Norwich