



Response to
UK Border Agency consultation
Family Migration

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Introduction

1. JUSTICE is an independent all-party legal and human rights organisation, which aims to improve British justice through law reform and policy work, publications and training. Its mission is to advance access to justice, human rights and the rule of law. It is the UK section of the International Commission of Jurists.
2. JUSTICE has for many years produced briefings and consultation responses on proposed asylum and immigration laws and policies and their interaction with domestic and international human rights law. Most recently, we have briefed Parliament on the Bills that became the Borders, Immigration and Citizenship Act 2009 and the Criminal Justice and Immigration Act 2008. This response highlights some of JUSTICE's major concerns regarding the consultation's proposals: silence on any question should not be taken for assent.

Spousal and other migration: general principles

3. The right to marry is protected by Article 12 European Convention on Human Rights (ECHR) and incorporated in the Human Rights Act 1998. It is not a qualified right and both the UK courts and the European Court of Human Rights have underlined that 'national laws governing the exercise of the right to marry must never injure or impair the substance of the right and must not deprive a person or category of person of full legal capacity of the right to marry or substantially interfere with their exercise of that right.'¹ The leading case of *Baiai* emphasises that while the state may impose reasonable conditions on the right of a third-country national to marry in order to ascertain whether a proposed marriage is a marriage of convenience, and if it is, to prevent it, such conditions may not impose restrictions upon genuine marriages.
4. The right to family life under Article 8 ECHR protects both marital and other familial relationships (including partners, children and other family members). Any interference must pursue a legitimate aim listed in Article 8(2) (eg national security, public safety, economic well-being of the UK, prevention of crime) and be proportionate to that aim.

¹ R(Baiai) v SSHD [2008] UKHL 53. See further O'Donoghue v UK, ECtHR, no 34848/07, 14 December 2010.

5. Article 14 ECHR provides that these rights are to be enjoyed without discrimination on the basis of status such as race, national origin, language, colour, birth or association with a national minority.

Q1. Should we seek to define more clearly what constitutes a genuine and continuing relationship, marriage or partnership, for the purposes of the Immigration Rules? If yes, please make suggestions as to how we should do this.

6. JUSTICE agrees with the principles at para 2.8 of the consultation paper; the aim of defining a genuine and continuing relationship should be to prevent marriage migration based upon marriage of convenience for migration purposes and upon forced marriage, and thus to discourage forced marriage in particular. Paragraph 284(vi) of the Immigration Rules provides 'each of the parties intends to live permanently with the other as his or her spouse or civil partner and the marriage or civil partnership is subsisting'. The Entry Clearance Guidance states:

Intention to live permanently with the other means an intention to life together, evidenced by a clear commitment from both parties that they will live together as husband and wife immediately following the outcome of the application in question or as soon as circumstances permit.

7. Any expansion of the Immigration Rules in this area should, we believe, be aimed at ensuring that each of the parties must intend of his or her own free will (ie not due to coercion) to become or to continue as the other's spouse or partner in a genuine and subsisting relationship. However, we do not believe that some of the factors specified in this part of the consultation paper have any bearing upon this and that great care is needed in relation to others.

8. In relation to the age of the parties, provided in the case of age that both parties are of sufficient age at the time of the application to give meaningful consent to the marriage/partnership or its subsistence, age can only be relevant as part of a factual inquiry into the presence of absence of coercion, since many genuine marriages/partnerships with large age gaps exist. Indeed in *R (Quila) v SSHD* [2010] EWCA Civ 1482 the application of r277 of the Immigration Rules (which limits spousal visas to over 21s) to two spouses aged under 21 was held to be unlawful. The rule violated the claimants' rights under Articles 8 and 12 European Convention on

Human Rights. Judgment of the Supreme Court is currently pending in this case under the name *Bibi*.

9. Similarly, care is needed in relation to the type of wedding ceremony and guests present, while it may provide grounds for questions to the parties/further investigation. The absence of any/many guests and/or elopement may of course indicate a genuine relationship, perhaps conducted against familial wishes, rather than a 'sham' marriage. Similarly, the presence of close family members at a ceremony may occur as frequently in forced marriages as in genuine ones. Unless a person has been convicted of previously fraudulently applying for or obtaining a visa or of a similar offence, immigration history and/or their previous presence in the UK cannot have any relevance to whether their relationship is genuine or subsisting.

Q2. Would an 'attachment to the UK requirement', along the lines of the attachment requirement operated in Denmark:

- b) help safeguard against sham marriage?**
- c) help safeguard against forced marriage?**

10. While some forced or sham marriages might in fact be outwith the criteria of the Danish attachment test, the intention of such requirements is clearly not to safeguard against sham or forced marriage since none of the criteria relate to the marriage or its genuineness. The effect of such restrictions would be to limit the numbers of potential migrants by requiring close links to Denmark for successful candidates, and would prevent many legitimate spouses/partners from entering/obtaining leave to remain. The requirement that the applicant must have visited Denmark at least twice would operate as a barrier to couples of limited means and be more difficult for nationals of countries already requiring visas for entry; it could therefore indirectly discriminate on the grounds of race/ethnic or national origin, in particular in relation to communities where marriages are frequently arranged and the applicant is unlikely to have visited the UK.

11. There may also be unintended consequences of the adoption of such criteria, as recent research published by the Home Office has recognised (also of relevance to age-related criteria):²

² K Charlsey, N Van Hear, M Benson and B Storer-Church, Marriage-related migration to the UK, Home Office Occasional Paper 96, August 2011, p17.

The recent raising of the minimum age for both migrant and sponsoring spouses to 21 was portrayed as combating coerced marriages of the young, but other research raises the fear that young people may still be forced into marriage, but kept abroad until they reach the age at which they can sponsor their spouse (Hester et al., 2008), whilst young couples whose marriages were demonstrably not contracted under duress complained at enforced separation... Recent Danish research has also traced unintended effects of their new restrictions on spousal migration. Increased minimum ages, a 'combined attachment' regulation requiring couples demonstrate greater ties to Denmark than to the country of residence of the other spouse, and other restrictions, may have led some to postpone rather than avoid transnational marriage; to an increase in unregulated religious marriages; and created new communities of cross-border marital commuters in neighbouring Sweden where spousal immigration requirements are more lenient

Q10. Should more documentation be required of foreign nationals wishing to marry in England and Wales to establish their entitlement to do so?

12. The requirement for such documentation cannot lawfully operate as an impediment to genuine marriages involving third-country nationals. In particular, 'a fee fixed at a level that a needy applicant cannot afford may impair the essence of the right to marry'.³ Any documentation required should therefore be firstly, rationally connected to establishing whether the marriage is genuine or of convenience; and readily obtainable for no fee or only a minimal fee. Potential refund of the fee on grounds of hardship is insufficient.⁴

Q14. Should local authorities in England and Wales that have met high standards in countering sham marriage, be given greater flexibility and revenue raising powers in respect of civil marriage?

13. Local authorities should not be financially incentivised to identify 'sham' marriages since this evidently gives rise to a danger of over-identification.

³ *Baiai*, n1 above, para 30.

⁴ *O'Donoghue*, n1 above, para 90.

Q15. Should there be restrictions on those sponsored here as a spouse or partner sponsoring another spouse or partner within 5 years of being granted settlement in the UK?

14. No. The emphasis should be on a factual inquiry in each case rather than on arbitrary restrictions which may violate Articles 8 and 12 ECHR. Such a restriction would be unlikely to be found to be proportionate to the legitimate aim of preventing fraudulent applications from succeeding. While the fact that a previously sponsored person is sponsoring another spouse or partner within a short time of obtaining settlement may cause the UKBA to wish to scrutinise the second application carefully in order to establish its validity (and this may involve investigating the circumstances of the first application and fate of that relationship), it does not without more provide evidence of fraud or sham. Genuine relationships may, of course, end and new relationships begin within the relevant timeframe.

Q16. If someone is found to be a serial sponsor abusing the process, or is convicted of bigamy or an offence associated with sham marriage, should they be banned from acting as any form of immigration sponsor for up to 10 years?

15. No. If someone is guilty of bigamy or an immigration offence the appropriate sanction/deterrent is prosecution and sentence for the relevant offence. In relation to subsequent attempts at sponsorship by that person, again the emphasis should be on factual inquiry; the fact that a person has previously abused the process should cause the UKBA to investigate the application carefully for evidence of fraud. A ban, however, may prevent a genuine partnership/marriage/family reunion and therefore unlawfully interfere with the Article 8 and 12 rights of innocent applicants as well as the sponsor.

Q19. If someone is convicted of domestic violence, or has breached or been named the respondent of a Forced Marriage Protection Order, should they be banned from acting as any form of immigration sponsor for up to 10 years?

16. No. See answer to Q16, above.

Q20. If the sponsor is a person with a learning disability or someone from another particularly vulnerable group, should social services departments in England be asked to assess their capacity to consent to marriage?

17. While we recognise the legitimate aim behind this question, to prevent vulnerable adults from being forced into marriage, the rights of disabled adults to marry and found a family should be respected. Any assessment should be based on the legal tests regarding capacity to marry⁵ and should be available in any case where such capacity is in issue; investigation should not be targeted at cases involving third country nationals.

Q34. Should the requirements we put in place for family migrants reflect a balance between Article 8 rights and the wider public interest in controlling immigration?

Q36. If a foreign national has established a family life in the UK without an entitlement to be here, is it appropriate to expect them to choose between separation from their UK-based spouse or partner or continuing their family life together overseas?

Q40. How should we strike a balance between the individual's right under ECHR Article 8 to respect for private and family life and the wider public interest in protecting the public and controlling immigration?

18. These questions are misconceived. Article 8 already expressly includes the potential for lawful qualifications of the rights to private and family life provided that they serve one of the broad range of legitimate aims listed in Article 8(2) – including the economic well-being of the UK, national security and the prevention of disorder or crime - and are proportionate to that aim. The case-law in this area has emphasised that '[t]he search for a hard-edged or bright-line rule to be applied in the generality of case is incompatible with the difficult evaluative exercise which article 8 requires'.⁶ It will therefore be difficult to specify further principles in the Immigration Rules, etc, that will adequately reflect the requirements of Article 8. Any dilution or removal of Article 8 rights in the Rules would be unlawful and would result in their being struck down or read so as to be compatible with Article 8 under s3 HRA.

⁵ See *City of Westminster v IC and others* [2007] EWHC 3096 (Fam).

⁶ *EB (Kosovo)* [2008] UKHL 41, para 12.

19. The domestic and ECtHR case-law establishes that Article 8 does not impose a general obligation to respect an immigrant's choice of the country of matrimonial residence or to authorise family reunion. The appropriate question (as identified in Huang [2007] UKHL 11, the leading case on proportionality under Article 8 (at para 20); *EB (Kosovo)* (see n6) and *Gul v Switzerland* (1996) 22 EHRR 93 (para 38) is whether the family can reasonably be expected to enjoy their family life elsewhere. In cases where a child is involved the best interests of the child must be a primary consideration (see *ZH (Tanzania) v SSHD* [2011] UKSC 4 and see further the duty to safeguard and promote the welfare of children under s55 Borders, Immigration and Citizenship Act 2009).

20. The ECtHR has, as the consultation paper recognises, further dealt with the point of family rights obtained whilst a person does not have lawful status in the country of residence (see para 8.14 of the consultation). Further legal change is therefore not required.

Q35. If a foreign national with family here has shown a serious disregard for UK laws, should we be able to remove them from the UK?

21. The law already provides for the power to deport a foreign national who has been recommended for deportation by a court following conviction for an imprisonable offence, or whose presence the Home Secretary has determined is not conducive to the public good. Further, s32 of the UK Borders Act 2007 provides for the automatic deportation of offenders jailed for one of a series of offences punishable by imprisonment for over 12 months. All these powers are, however, subject to obligations under the ECHR and the Refugee Convention

22. The question is therefore, we believe, intended to justify the consultation's proposals to amend the Immigration Rules so that they provide for the watering down or removal of rights to family life under Article 8 ECHR for certain categories of foreign national offender. However, as the Rules are secondary legislation, any attempt to compromise or remove incorporated ECHR rights in the Rules will have no effect upon the legal duties of the UK Border Agency, the Home Secretary, the immigration tribunals and the courts to act compatibly with the Human Rights Act 1998 as public authorities subject to section 6 of the Act. Any decision-maker failing to afford a person his Article 8 rights will, therefore, be acting unlawfully.

23. In relation to the interpretation of Article 8 to determine the content and extent of those rights, decision-makers will be bound by the decisions of the higher courts in the UK. The courts are obliged under s2 HRA to take into account the jurisprudence of the European Court of Human Rights. In relation to foreign offenders, the law is as stated in *JO (Uganda) v Secretary of State for the Home Department* [2010] EWCA Civ 10, which applied the criteria laid down by decisions of the Strasbourg court and emphasised that the cases were highly fact-sensitive.

24. In the recent ECtHR decision of *AA v UK* the Court summarised the Strasbourg case-law thus:⁷

The assessment of whether the impugned measure was necessary in a democratic society is to be made with regard to the fundamental principles established in the Court's case-law and in particular the factors summarised in Üner, cited above, §§ 57-85, namely:

- *the nature and seriousness of the offence committed by the applicant;*
- *the length of the applicant's stay in the country from which he or she is to be expelled;*
- *the time which has elapsed since the offence was committed and the applicant's conduct during that period;*
- *the nationalities of the various persons concerned;*
- *the applicant's family situation, such as the length of any marriage and other factors expressing the effectiveness of a couple's family life;*
- *whether the spouse knew about the offence at the time when he or she entered into a family relationship;*
- *whether there are children of the marriage, and if so, their age;*
- *the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled;*

⁷ (8000/08, 20 September 2011, Fourth Chamber), paras 56-58,

- *the best interests and well-being of any children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and*
- *the solidity of social, cultural and family ties with the host country and with the country of destination.*

...the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case. Further, not all the criteria will be relevant in a particular case....

It should also be borne in mind that where, as in the present case, the interference with the applicant's rights under Article 8 pursues the legitimate aim of "prevention of disorder or crime", the above criteria ultimately are designed to help evaluate the extent to which the applicant can be expected to cause disorder or to engage in criminal activities...

25. The Strasbourg and domestic case-law therefore allows the deportation of individuals where this is in the public interest; in a serious case where deportation is not ordered this is likely to be because, as in AA, factors exist demonstrating that the individual does not present a substantial risk to the public. The consultation paper's question is therefore misconceived; no further change to the law is necessary and any change that diluted or purported to remove Article 8 rights would be unlawful unless made in primary legislation, in which case a s19 HRA declaration of compatibility would not be possible.

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