ILPA response to *Marriage to partners from overseas: a consultation paper*, February 2008

ILPA is a professional association with some 1000 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through teaching, provision of resources and information and to work towards just and non-racist immigration laws.

ILPA recognises that the Border and Immigration Agency (BIA) paper raises serious issues. We are concerned that the main effect of several of the solutions proposed, if implemented, will be to put greater barriers in the way of the vast majority of marriages including a partner from abroad, from all countries, which are intended to last. The proposals are clearly aimed at partners from countries where arranged marriages are common, but would have very much wider and unjustified effects and put greater barriers in the way of the vast majority of marriages when one of the partners is from abroad, irrespective of their country of origin. The experience of our members is that many couples have their intention to live together thwarted by a particularly narrow interpretation of the rules on maintenance and accommodation. It is feared that this will be exacerbated by the proposed changes. The impact would be felt disproportionately among different sections of the community, without any proper justification. We are also surprised that no mention is made of civil partnerships in the document, as the development of the rules has been to ensure that they are treated in the same way as marriage.

It is regrettable that since it was issued this paper has been overtaken by the publication of the *Path To Citizenship* consultation. This has put respondents in the position of replying to questions on the circumstances in which it might be appropriate to curtail Indefinite Leave to Remain granted to a spouse while the government is consulting on proposals to replace indefinite leave with probationary citizenship. The impression is not one of joined up or clear, thought-out, policy-making.

Forced marriage is a very sensitive subject and there are conflicting views in majority and minority communities on the need for change. The paper deals with forced marriage only in the context of inter-country migration to the UK. It is inappropriate to seek to tackle the immigration questions touched in the paper in isolation from consideration of a broader strategy to deal with forced marriages whatever the immigration status of the parties, dealing with matters such as people forcibly married abroad who are then forced to remain in the partner's country, people brought to the UK for marriage who are then deceived into going back to the country of origin and abandoned, those from abroad who may be pressurised into coming because they do not want to leave their family abroad or because they fear being exploited or abandoned when in the UK. For example, information about sources of help for spouses within the UK who have not yet been granted settlement, and help for those who have been taken back to their countries of origin by deception and abandoned are two matters of relevance. If the concern is forced marriage, then the propriety of greater immigration control

as opposed to policing, educational and access to justice measures is a question to be addressed prior to making any detailed proposals.

There is extensive literature on aspects of forced marriage in the UK and on strategies for supporting those affected.[1] ILPA recognises the work that the government has done to combat forced marriage and to make it illegal in the UK[2]. The BIA should work with other authorities and proactively consult with other relevant organisations.[3] It should ensure that the communities most directly affected by forced marriage are aware of this consultation to ensure that they can put their comments in. Groups more vulnerable to being forced into marriage, or those who are more likely to be part of the community hierarchy making decisions, need to be consulted separately.

Pressures may be put on people to assist others in coming to the UK other than in the context of marriage and another weakness of the consultation paper is the failure to put proposals on forced marriage into that wider context.

Question 1: Do you think we should increase the minimum age at which someone could sponsor or be sponsored as a spouse, from 18 to 21?

ILPA members have different views on Question 1. The proposal is aimed at the communities where most marriages to partners abroad take place, Pakistan, India and Bangladesh, which produced 17,000 of the 47,000 spouses from abroad in 2006 and 13,265 of the 42,110 decisions to grant settlement as spouses. ILPA is yet to be persuaded that increasing the age of sponsorship is the best way forward.

While this proposal is bringing the UK closer to some other European countries (Denmark has an age of 24 for example) and as stated in the document only some 5000 people were given leave on marriage grounds in 2005 who were under 21, the change would still restrict many other marriages. There is no breakdown by nationality of those granted leave to enter, or of those whose marriage was in the UK, to know whether there is any correlation between country of nationality and early marriage within the UK. The government would need to produce more detailed figures, as well as an estimate supported by evidence of how many forced marriages there are, if it is to make the case for measures that would affect all marriages with an immigration aspect. In the case of *R(Baiai et ors) v SSHD* 2007 EWCA Civ 478 (case now pending before the House of Lords) one of the reasons why the Court of Appeal found the Certificate of Approval scheme to be disproportionate was that it failed properly to investigate individual cases, to show that it had come close to isolating those cases that the measure was designed to address, or to show that the measure would make a substantial difference to the enforcement of immigration control. These proposals can be criticised on the same grounds.

[1] For example, An-Na'im, A., *Forced Marriage* (London: CIMEL (SOAS) 2000); Phillips, A. and Dustin, M., *UK Initiatives on Forced Marriage: Regulation, Dialogue and Exit* (Political Studies 2004, vol. 52, 531-552); Razack, M., *Imperilled Muslim Women, Dangerous Muslim Men and Civilised Europeans: Legal and Social Responses to Forced Marriages,* Feminist Legal Studies, 2004, vol. 12, 129-174; Samad, Y. and Eade, J., *Community Perceptions of Forced Marriage* (Foreign and Commonwealth Office) 2002.

[2] From the working group led by Baroness Uddin and Lord Ahmed which produced *A choice by right* in 2000 through to the Forced Marriage Bill 2007 CHECK, and current consultations on how it will be put into effect

[3] This was envisaged in *Secure borders, safe haven,* the 2002 White Paper

There is no mention in the paper of couples who marry within the UK and then apply for variation of leave. Would this proposal be applied to them, or would a certificate of approval for marriage not be issued when either partner was under 21? ILPA opposes such an interference in the right to marry.

Question 2: Should someone intending to sponsor a partner from overseas declare this intention before they leave the UK on the visit/trip?

No. ILPA does not see this as a reasonable proposal to apply to all marriages. The proposal is disproportionate; while such a requirement might protect some young people from being surprised into marriage abroad while on a visit, it takes no account of all the different ways in which couples meet and decide on a marriage or civil partnership. People can go abroad on holiday with no intention of marrying and then do so in all sorts of circumstances. If that meant that the couple could never live together in the country of origin of one of them the provision would be so disproportionate as to be unlawful under the terms of Articles 8 and 12 of the ECHR.

The difficulty of establishing intention is well-known in immigration law and practice. Entry clearance officers not being satisfied about visitors' intentions to leave the UK at the end of their visit is a frequent ground of refusal which may be overturned at appeal. In the context of the majority of marriages, a declaration about an intention to marry, which could change after spending more time with the intended spouse, or meeting someone else, is not a protection against forced marriage but an extra imposition. It is also not clear what the status of such a declaration would be; if the marriage did not take place, or it broke down. Could it be considered as 'false representations' under para 33 of HC321 (Statement of Changes in Immigration Rules) or 'using deception in an application for entry clearance' under para 47 of HC321?

In relation to forced marriages, the mechanisms of extracting any such declaration could be complicated, in that it would be important that such a declaration should be free from all outside pressure. Therefore the same issues as those relating to the marriage itself arise and the usefulness of such declarations is questionable. Making such a declaration should not be used to make it harder for a person to sponsor someone else in future if the marriage about which the declaration was made did not in fact take place.

The danger touched on in the paper, that girls in particular might be taken abroad in order to avoid these restrictions and to be married and kept abroad is a real one.[4] The detail of actions which should be taken is outside ILPA's area of expertise. ILPA strongly supports the effective and sensitive work of the Foreign and Commonwealth Office Forced Marriage Unit. As an organisation working in immigration law we are not best placed to speak with authority on all the ways in which forced marriage can be resisted but support the detailed guidelines for professionals prepared by the Forced Marriage Unit.

Question 3: Should potential sponsors be given more opportunities to have a confidential interview if they request one?

[4] Southall Black Sisters evidence to the Select Committee on Home Affairs, Report on Immigration Control, 2006, vol. III, p.334, and as discussed in *A choice by right*, p.15

The Entry Clearance Procedures at Chapter 13 state:

> **'13.19 – Reluctant spouses (fiancé(e)s)**
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> Where a sponsor (usually a wife/fiancée but occasionally a husband/fiancé) tells you that he/she has been forced into a marriage and does not support the entry clearance application, he/she may ask that this information is not divulged as their family may take action against them. Where a sponsor gives such confidential information to an ECO it will not usually be appropriate to record these statements in the main body of the Q + A interview notes. The interview notes will form an integral part of any appeal and this information might result in adverse consequences for the sponsor. It will be more appropriate to record the statement separately. You should ask the sponsor to sign and date this statement and signify that it is true and has been given freely.'

The Operating Standards and Instructions (OSI), November 2007 state:

> 'UKvisas current policy is that Posts have discretion on whether or not to admit sponsors to interviews. There is no blanket ban on sponsors attending. Equally they have no automatic right to attend. It is preferable to conduct the interview with the applicant alone, seeing the sponsor separately if necessary. ECOs should, therefore, refer to the following when sponsors make such requests:
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> i. if a sponsor wants to speak to an ECO it can help to do this separately from the interview with the applicant. This helps ECOs to verify that the information presented by both is consistent;
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> ii. in considering an application, ECOs must concentrate on the circumstances and intentions of the applicant. Information from (and support of) a sponsor can be very helpful, for instance, when assessing maintenance/accommodation. It should be given full weight, but will rarely impact on the intentions of the applicant;
>
> iii. Posts may encounter reluctant applicants/sponsors (For example spouses, civil partners, fiancés, domestic servants). In order not to compromise the confidentiality and safety of such applicants, ECOs should ask to see them on their own. Maintaining a standard of procedure for all applicants ensures an even handed approach and avoids drawing attention to the cases where reluctance is believed to be a factor.'

Paragraph 13.8 of the Entry Clearance Procedures is written in similar terms.

As the consultation paper states 'a confidential statement that cannot be produced as evidence may not lead to a visa application being turned down'. ILPA has serious reservations about the practical use of taking statements which cannot then be used in a court or in a refusal letter. If the statement cannot be used for any purpose, it might give a reluctant spouse a false sense that this would stop the partner from coming. If the purpose of the interview is for the Home Office to research how people are pressured into marriage, rather than to produce any effect on the individual case, this must be made absolutely clear to the potential interviewee before she or he consents to an interview.

It is a requirement of natural justice that a person know the reasons for a decision, see the evidence and is able to comment on the reasons and evidence and be cross-examined on it. If the consultation paper were proposing an exception to this, we should expect to see much more detailed proposals as to what might be contained in any Code of Practice, including what would happen on appeal, both in cases where the applicant were represented and where the applicant were unrepresented. There is no evidence in the consultation paper that this proposal has been thought through. The Independent Monitor wrote in her report published 22 November 2007:

> '71. In her Report for 2004, my predecessor recommended that the human rights and race relations aspects of the Entry Clearance Officer course be written and taught by an expert. UKvisas agreed that an expert on human rights and other legal issues would be a valuable addition to the training programme and, in 2005, said that it was working to provide training in these areas. In December 2006, this was marked For Action. I note, however, that the human rights element is still being delivered by the UKvisas internal training team and it appears that this recommendation was not followed through: the current training team members do not know why this was so. Given the lack of indepth expertise and training it is unfair on Entry Clearance Officers, as well as on applicants, to expect the Officer to identify what might be relevant.'

UKvisas response of the same date to that report deals only with the human rights element and not with training on legal issues. In circumstances where ECOs do not have a detailed understanding of the relevant law on fair trials there would be particularly grave risks in seeking to implement any Code of Practice, which would be a complex matter in the best of circumstances.

Sponsors at present often request an interview with an entry clearance officer in support of their spouse or partner's application and this is normally refused. To encourage an interview to stop a person coming to the UK but discourage it when it could be used as part of the evidence to show that a person fits into the rules is unacceptable.

If these proposed provisions were used in different ways at different entry clearance posts or to different sections of the population, they could, following the *Prague Airport* case, give rise to a claim of direct race discrimination against those groups.[5]

Question 4: Do you think we should introduce a Code of Practice as outlined in this consultation paper?

As stated in our response to the previous question, ILPA would want to see much more detail of any proposed Code of Practice suggested before commenting further. Other proposals listed in this section would have a disproportionate effect on all marriages involving someone from abroad. The proposals come close to some of the aspects of the discredited primary purpose rule and risk serious injustice. If a disparity in age in itself is a ground for refusal then there is no way in which a couple could show that they have a genuine and unpressured marriage as this disparity would always remain. The suggestion of an appeal where the

[5] *R (on the application of European Roma Rights Centre and others) v Immigration Officer at Prague Airport* [2004] UKHL 55

burden of proof would be on a sponsor to show that she was not vulnerable is also very problematic: as with the primary purpose rule, a person is being required to prove a negative. Concerns about confidentiality again arise – if a sponsor is under great pressure it would not be possible to reveal this at an appeal and asking for a confidential hearing could in itself arouse suspicion while also risking violating the principle of *audi alteram partum*.

Question 5: We have suggested some of the factors which might indicate vulnerability to a forced marriage; what additional factors do you think there might be?

None of these listed factors can be conclusive. Pressure to marry is more prevalent in some communities than others; and current evidence suggests that more women than men are pressured into marriage or deceived by marriage partners.[6] Without addressing the power balances in society and women's economic and social disadvantage – way beyond ILPA's areas of expertise – the problems will continue and making the immigration rules more restrictive for all is not the answer.

Question 5A: If some of the factors that create vulnerability were present, should there be a power to refuse on these grounds alone, without the sponsor having to prove an evidential statement?

No. The sponsor can be given the opportunity of an interview and made aware of all the different forms of support that should be available to her of she does not want to go ahead with the marriage, but to refuse on circumstantial evidence is wrong.

Question 6: Do you think we should do more to bring about revocation of indefinite leave to remain if individuals abuse the marriage route to gain settlement?

The Home Office already has the power to remove a person who has obtained leave by deception (Immigration and Asylum Act 1999), revoke indefinite leave under section 76 of the Nationality, Immigration and Asylum Act 2002 and to cancel leave at a port of entry under para 312A of HC 395, the Immigration Rules. Thus the BIA has all the powers it needs to do what is proposed in this paragraph.

Question 7: Do you think we should be able to revoke indefinite leave after it has been granted if the sponsoring partner is abandoned?

The immigration rules already permit this where it can be shown that the leave was obtained by deception or fraud. If there is no deception, then one is not dealing with the situations described in this paper, but with a case of marriage breakdown. When indefinite leave has been validly granted, it should be final.

Question 8: Do you think we should do more to investigate allegations of abuse of marriage for immigration advantage after entry?

We are not aware of what investigation is done now. Allegations of abuse may be well-founded or ill-founded, and it will always be a question of allocation of resources in accordance with policies how much effort the Border and Immigration Agency puts into

[6] See sources listed above, note 1

investigating allegations, including those that at first sight may appear to it to be malicious or frivolous.

Question 9: What sanctions could we use if individuals abuse the marriage route to gain settlement?

The Border and Immigration Agency already has such sanctions (see answer to question 7). When a marriage breaks down, either or both parties may feel aggrieved and make allegations and counter-allegations. Not all marriages which break down have been the result of deception or force. But when it seems on the balance of probabilities that deception has been used, the Border and Immigration Agency can use its existing powers to curtail or revoke leave, with the protection of an appeal right. On appeal, it is for the BIA to satisfy an immigration judge to show that the leave was properly curtailed or revoked.

A failed marriage should not mean that a person should forfeit rights to remain in the UK on some other basis. Often the spouse will also have his or her own relatives in the UK, including any children of the marriage, and should not be barred from being able to visit them in the future. A refusal of settlement, or curtailment of leave after a marriage has failed should not be a bar to getting a visit visa in the future. Where the spouse has expressed fear, the criminal law powers of taking out an injunction to prohibit the person from getting in contact with the ex-spouse can be used.

If a spouse from abroad has been deceived by a British spouse into returning to the country of origin and been abandoned there, the spouse should be permitted to return. Access to or custody of children may also be a reason to ensure that a spouse can return. Where there are children involved it is important that both parents should have an equal chance of contesting custody in the British courts if they both wish this and that the spouse from abroad is not barred from making an application based on rights of access to a child, for which provision is made within the immigration rules and which can also be granted on a discretionary basis outside the rules.

The proposals about giving sponsors rights to information about their former spouses has not been developed in a way that shows how questions of confidentiality are to be addressed. It is unclear why these matters are felt to need an immigration law response rather than a response through the criminal justice system where the sponsor is at risk from his/her former spouse.

ILPA would not support a longer period than two years before settlement is granted.

Question 10: What provisions might be necessary for safeguarding women, in particular, after the entry of a sponsored spouse?

ILPA supports all initiatives to ensure that quality independent free or affordable legal advice is available to all those who need it. Thus both parties to the marriage should be able to know what will be required of them in the two-year probationary period. Should the marriage not work out, either before or after settlement is granted, both parties should have access to information about the law and about any action they can take. Support available to couples also be available to couples where there is an immigration aspect to the marriage. Thus if assaults or criminal deception have taken place, the police can take action. It is not appropriate to consider in isolation cases where the British or settled spouse has suffered, for example, violence. When it is the sponsored spouse who has suffered from violence, she must

have access to refuge provision and to support. The restriction on recourse to public funds for the probationary period should be lifted, to enable women's refuges and councils to provide safe housing for women and children.

Question 11: What is wrong with the current system in relation to abandoned spouses that could be improved?

Question 11a: What changes could be made to improve communications with abandoned spouses?

There appears to be no current system. Sponsoring spouses are given no information about what they can do or even who they should contact – they may be passed around between Croydon and the local enforcement office; information may be taken from them but they will never be told anything further.

If a sponsor has been abandoned, and tells the BIA about the experience, she or he should be given the courtesy of a prompt response. If the spouse has not yet been granted settlement, an explanation that the question of whether the marriage is subsisting forms part of the decision on an application for settlement would be reassuring. If settlement has been granted the response could include a clear explanation of the existing rules on the power to revoke it when deception is proven.

Again, it is a weakness of the paper that it deals only with British or settled abandoned spouses and not with the situation where the abandoned spouse is the one who has come from abroad. It would have been useful to address what should happen when the abandoned foreign spouse has been deceived into leaving the country, for example ensuring that she or he can return to the UK within the currency of the two years leave granted to try to make the marriage work or to take legal action in relation to any children of the marriage or, if the foreign spouse is abandoned within the country, circumstances in which the prohibition on having recourse to public funds should be lifted.

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