A0151

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13 March 2003

Family settlement (with special reference to South Asia)

- Problems inherent in advising and representing clients from different cultural backgrounds; identifying and challenging the assumptions of ECOs and Adjudicators in dealing with cases from South Asia

- (a) Problems frequently encountered in settlement applications
  i. maintenance and accommodation
  ii. intention to live together
  (b) presumptions in favour of valid marriage in English law, Hindu law, and Muslim law

- Children, included those adopted within the family
  age estimates

- Practical considerations: what to do after winning an appeal

- the value of local enquiries, with special reference to "compassionate circumstances", "serious and compelling family or other considerations", "sole responsibility", applications for certificates of entitlement where (i) DNA fingerprinting cannot establish relationship (after the death of parent/s); (ii) the applicants' age is disputed; Sources of information and evidence; verification of birth, marriage, and death certificates; the value of school records in cases where age is disputed; what to do in the absence of reliable documentation

1. **Problems inherent in advising and representing clients from different cultural backgrounds**

Although at undergraduate level a few lawyers study Islamic law (hardly anyone studies Hindu law anymore), lawyers' training and background in general provide no preparation whatsoever for dealing with clients from diverse ethnic minorities. In many ways the situation is even worse than in 1990 (when Werner F. Menski set out some of the problems in his I&N L&P article). Many clients speak dialects for which no reliable dictionary is available (indeed, for many dialects spoken in London - such as Sylheti - there is no dictionary at all - though **Sylheti Translation and Research** have published translations of Sylheti poetry). Even a tiny number of simple misunderstandings may be magnified, in the suspicious minds of ECOs and some Adjudicators, into "discrepancies", which cause serious problems with credibility.

Practically speaking, one needs to be very precise when taking instructions, and it is frequently necessary to ask the same question in a number of different ways, to check that there are no misunderstandings. When a man from Bangladesh mentions his "brother", does he really **mean** "brother", or does he mean "cousin"? When he mentions "cousin", does he really mean "the son or daughter of (either) parent's brother or sister", or does he mean "the grandson of a man from our village who was very friendly with my grandfather (by which I mean my grandfather's brother"). Tracing family relationships step by step is a vitally important task in many cases; clients who may appear vague about the exact nature of the relationship may well, when pressed, be able to give very precise information. In many cases involving intention to live together, where the couple were related before marriage, the ECO will draw adverse inferences from the applicant's (perceived) inability to say exactly how he and his wife were related before marriage; usually, the ECO could have obtained the information sought had the matter been pursued.

The precise meanings of words is important, but words must be seen in cultural context. Some older women in Bangladesh calculate a baby's age from the onset of pregnancy, so a baby is born when 9 months old. This is one example of a vast number.

That misunderstandings arise at interviews at High Commissions abroad is inevitable (despite the fatuous statement "the appellant confirmed that he was fit, well and willing to be interviewed and that he understood all the questions" that appears in most explanatory statement.) In an interview in Dhaka on 24 January 1996, the applicant husband was recorded as having said that he had had "an affair" with the cousin who was now his wife, in 1982 (when she would have been five years of age). The ECO described this as "pure fantasy", and based his attack on credibility on this statement. At the hearing of the appeal, the Presenting Officer agreed that "affair" was quite obviously a mistranslation for "understanding within the family that the couple would at some stage marry", and the ECO's approach was wrong. The explanatory statement was formally amended to show this. Not all HOPOs are as reasonable.

Routinely blaming the interpreter is never a good strategy. But explaining that confusion might have arisen because of language difficulties is, in many cases, perfectly valid. The very worst

misunderstandings are when both parties believe that they understand, and are understood by, one another.

Body language is also something of which one should be aware. Normal English politeness may strike a client from one part of the world as cold aloofness, while a client from another culture may regard it as embarrassingly intimate. An educated urbanite will come with assumptions quite different from those in the mind of an illiterate person from a rural background. "In Anglo-American cultures, people who avert their gaze when answering a question, or seem nervous, are perceived as untruthful. In other cultures, however, body language does not convey the same message. In certain Asian cultures, for example, people will avert their eyes when speaking to an authority figure as a sign of respect. This is a product of culture, not necessarily of credibility" (INS **Considerations for Asylum Officers Adjudicating Asylum Claims from Women** June 1995, 7, quoted in Heaven Crawley, **Women as Asylum Seekers: A Legal Handbook (ILPA 1997).**

There are certain institutions, commonplace abroad, with which the British feel decidedly ill at ease. For example, although many people are quite happy with the notion of one- or two-parent families, they have acute problems with the notion of polygamy (families with three or more parents). Such bigotry was not always reflected in the law: until **Immigration Act 1988**, it was possible for persons settled here to be joined by more than one wife. To what extent are lawyers (including adjudicators) influenced, and misled, by ethnocentric views? There are many instances where what is deemed acceptable abroad is not acceptable here, and vice versa. The whole field is both sensitive and complex. (The best exploration is still Sebastian Poulter's excellent **English Law and Ethnic Minority Customs (Butterworths 1986)**, despite being somewhat out of date - stating the law as at 1 December 1985; the same writer's **Ethnicity, Law and Human Rights: the English Experience (Clarendon Press 1998)** is very helpful. In some cultures, as we shall see below, it is possible for a woman to marry her mother's brother; when a case involving this point arose last year, it was instructive to see how even reputedly liberal lawyers reacted: many were horrified by the very idea (just as their colleagues a generation ago would have been horrified by the idea of same-sex relationships). See **Cheni v Cheni [1965] P 85, [1962] 3 All ER 873** involving an uncle and niece validly married by Sephardic Jewish rites in Egypt, the country of domicile, who subsequently acquired a domicile of choice here, for Sir Jocelyn Simon P's analysis of the development of judicial attitudes to marriages deemed incestuous by the "laws of all Christian countries".

Certain clients may wish to see their lawyer when accompanied by other family members. Some women may be reluctant to talk without a male relative present. But there are some things that they cannot say in the presence of a family elder. Sometimes a father or elder brother will be sent out to put a coin in the parking meter, to give the younger persons a chance to talk about an intimate matter such as pregnancy (and the situation here is quite different from those arising where younger members want to avoid elders finding out about something which has been kept secret. (Some ECOs seem incapable of understanding that it is as possible for secrets to exist within an Asian family as within any other family; the fashionable and persistent myth of "closely-knit societies/communities" distorts ECOs' attitudes towards evidence gathered in the course of village visits.)

Systems of respect and deference in certain cultures may prevent a person contradicting or appearing to know more than an elder, even when he or she **does** know more. And there are certain matters (for instance, sentimental interest in another person) on which it would be most improper (and excruciatingly embarrassing) to address one's parents directly. The conventions of certain family structures mean that, although one has a "respectful" relationship with parents or elder brother, one might have a very relaxed relationship with grandparents or maternal uncle. So, if a Bengali Muslim boy would rather like his parents to arrange his marriage to a particular girl, he may mention it obliquely to his maternal grandfather **(nana)** who will mention it to another of **his** grandsons who will mention it to **his** maternal uncle **(mama)** who will mention it to **his** younger sister (who is the boy's mother). When the question is asked "how did your marriage come to be arranged?", the answer may well be intricate. Clients may (a) fear that explaining all this to a lawyer will result in them being thought "devious" or (b) they may fear (usually correctly) that a lawyer will just not be able to follow the intricacies involved (to understand which one needs the training not of a lawyer but of an anthropologist) or (c) decline to go into the details since these are private matters. Many problems in "primary purpose" cases and now in "intention to live together" cases arise because the parties to the marriage want to "simplify" the steps leading up to the decision to marry, the "simplification" is interpreted by ECOs and Adjudicators as "dishonesty" and a perfectly genuine case is refused.

The myths of "credibility" and "discrepancy evidence"

The (largely bogus) notion of "credibility" is central to our legal system. Some Adjudicators are prone to adverse findings on credibility, and, with such a finding against one, it is very difficult to get leave to appeal to the IAT: not having heard the oral evidence, the Tribunal is in no position to substitute their view of a witness for that of the adjudicator who heard the appeal. A moment's reflection will show that the whole thing is nonsense. Particularly in immigration cases, a finding (positive or negative) as to credibility cannot, on any sane view, be a finding of fact: it is merely a matter of opinion. **Scrutton LJ** once observed "I have never yet seen a witness who was giving evidence through an interpreter as to whom I could decide whether he was telling the truth or not". **Lord Bingham** correctly identified the problem:

> "If a Turk shows signs of anger when accused of lying, is that to be interpreted as the bluster of a man caught out in deceit or the reaction of an honest man to an insult?. If a Greek, similarly challenged, becomes rhetorical and voluble and offers to swear to the truth of what he has said on the lives of his children, what (if any) significance should be attached to that? If a Japanese witness, accused of forging a document, becomes sullen, resentful and hostile, does this suggest that he has done so or that he has not? I can only ask these questions. I cannot answer them. And if the answer to be given is that it all depends on the impression made by a particular witness in the particular case that is in my view no answer. The enigma usually remains. To rely on demeanour is in most cases to attach importance to deviations from a norm when there is in truth no norm" **(Current Legal Problems, 1985, p1,** quoted by **Webster J** in **R v SS ex parte Dhirubhai Gordhanbhai Patel [1986] Imm AR**, page 208).

There are numerous examples of ECOs engaging in precisely the false reasoning against which Lord Bingham warns: "attaching importance to deviations from a norm where there is in truth no norm".

In **Daniel (13623) 2 July 1996** the Tribunal stressed the requirement for caution in relying upon the demeanour of a witness whose language and culture is different. Unfortunately, many adjudicators do not heed this advice.

Assessing the "credibility" of a person abroad

Adjudicators who hear oral evidence from sponsors in this country frequently come to adverse credibility findings in respect of persons from countries they have never bothered to visit, whose languages they do not understand, and in respect of whose culture they are both ignorant and incurious. In assessing the credibility of the appellant, who is usually abroad, some adjudicators rely heavily on the impressions of entry clearance officers abroad. In **Abdul Haroon (TH23814/96)** R N Barton decided that "the respondent who conducted the interviews in Dhaka is best placed to assess credibility and I therefore give weight to the conclusions she reached". Such an approach is wholly unacceptable: an adjudicator cannot delegate to the respondent the assessment of the appellant's credibility. (Imagine if this approach were adopted in criminal cases: nobody would ever be acquitted if magistrates accepted the prosecution's assessment of the accused's credibility "and gave weight to the conclusions reached").

In some cases, it may be essential for the appellant abroad to be interviewed by his legal representatives. Few lawyers (one hopes) would go into court to represent criminal clients they had never bothered to interview in person: why do they (almost invariably) do so in immigration cases? Sometimes (where the appellant knows good English and has access to the Internet) instructions can be taken on-line. In other cases, a face to face meeting is essential. Interviewing the sponsor is only half the job: one should also interview the appellant.

There is a danger that some adjudicators may assume that an ECO is "best placed" to come to reliable findings of fact, on the basis of rigorous training and long years of experience in the country concerned. In fact, with almost no exceptions, ECOs know nothing of the language and almost nothing of the culture and religion of the country in which they are temporarily posted. Sometimes, a reading of the explanatory statement will reveal the most appalling blunders: IMM\ECR 0224\91 was a case where the ECO in Delhi laboured under the misapprehension that Gurgao - just outside Delhi - was a village in the Punjab, and criticised the appellant for "departing from rural Punjabi tradition" in his marriage arrangements. Where there is time (between the receipt of the explanatory statement, and the hearing of the appeal) it is sometimes illuminating to write to the ECO to ascertain the extent of the knowledge and experience on which are based culture-related assertions in the statement. In reply to one such enquiry, A J Kirkpatrick (ECO in Islamabad) wrote (on 22 February 1997, IMM/D7659) as follows:

> As to experience of Pakistani custom and tradition, all Entry Clearance Officers (ECOs) receive a thorough training both in the United Kingdom and on arrival at Post. They also

receive in-service training. These are opportunities for formal discussion among ECOs and our locally-engaged interpreters who come from a variety of backgrounds and are drawn from throughout our catchment area. They offer specific advice about local practices and customs as well as actually translating at interviews. With this in mind, you note that I used an interpreter. This seems to imply that ECOs' knowledge of local customs and society is linked with their knowledge of local languages, which is not the case.

ECOs also undertake a programme of village visits which ensures that they become acquainted with both rural and urban Pakistani society. Their work is constantly monitored by senior officers for accuracy and consistency.

Departure from tradition

The approach to "departure from tradition" adopted by certain adjudicators in "primary purpose" cases is still frequently seen in "intention to live together" cases. An extreme example appears in a Determination of J C Bartlett TD (TH/3191/96, 7 Feb 1997):

> Such customs and traditions have a great relevance in the culture of the communities abroad and to those who live in the UK who accept and follow them
>
> If the culture of an arranged marriage is important to the parties and is being followed then a good reason must be given why the customs and traditions which are seen as going hand in hand with that culture are selectively reversed or varied. Where the evidence supported such a custom or tradition is being followed this will be regarded by me as an important fact, to which I give substantial weight, that the primary purpose of the marriage was not entry into the UK.
>
> Tradition has been breached. I am not satisfied that appellant and sponsor were without first cousins to marry. It is probable such first cousins could be found in the present countries of residence of each. Why overlook such potential matches? For the appellant it is probable, giving his experience of working abroad, that he saw marriage to the sponsor as the key to the UK where he would expect a better life
>
> Tradition is that the wife on marriage joins and gives allegiance to the husband's family. Pakistan is a male dominated society and it is unlikely a male would be prepared to leave Pakistan and travel around the world to a foreign land at the request or demand of the proposed wife before marriage or the wife after marriage. It is unlikely irrespective of whether it is a permanent migration or not.

The "cousin marriage" point is still used in "intention to live together" cases. ("Why did you marry an older divorced woman settled in London when you could have married a nice young cousin in Bangladesh?"). Cousin marriage, although permitted in Islam, was never the norm; a typical family tree taken in Maulvibazar in 1985 covering three generations includes 45 married

members - of whom not one had married a cousin. There is some evidence that parallel cousin marriages (the marriage of son and daughter of two brothers) is favoured by "more well-to-do peasants in order to keep the property within the lineage and to reduce the expenses of marriage (see **Rural Bangladesh: Competition for Scarce Resources**, by Eirik G Jansen, University Press Ltd Dhaka 1987, page 81) but the numbers are far fewer than sometimes suggested by ECOs: in a survey of 1719 first time Muslim marriages, 62 (3.6%) were parallel-cousin marriages and 84 (4.9%) were cross-cousin marriages (marriages between children of brother and sister): K M Ashraful Aziz, in **Kinship in Bangladesh** (International Centre for Diarrhoeal Disease Research, Bangladesh 1979, p 59).

Where one needs evidence about the attitudes of the parties, one can easily ask them. Where evidence is required on general matters of culture, then a suitably qualified expert may be instructed.

> In **Arshad Begum (17309)** (I&N L&P vol 12 no 4 1998, p 159) a deportation case, expert evidence was given by a Dr Ballard, concerning the situation of single women in the Mirpur area of Pakistan; according to the Tribunal "although the family structure is highly supportive, loyalty is expected and this puts strict limits upon the personal freedom of all involved especially the women of the family". The expert had written that "marital breakdown, and especially the possibility of women seeking to live outside the extended family structure, and hence without the protection of a male patriarch - be that her husband, her father in law, or her father - is regarded as highly shameful. Moreover in the absence of such protection a lone woman is extremely vulnerable to physical, financial and sexual exploitation. Remaining within the supportive context of a biraderi (extended family) structure of one kind or another is therefore crucial to a woman's personal survival, and is also the foundation for personal social security for any children she may have".

Although a "departure from tradition" may be held against an applicant, a desire to uphold a tradition can seldom be relied upon. For example in **Walayat Bibi (17103)** (I&N L&P vol 13 no 1, 1999, p19) Mr Rapinet found that a 63 year old widow financially dependent on sons here but with daughters nearby to whom she could turn for "material and emotional support" could not show that she was living alone "in the most exceptional compassionate circumstances", and the requirement of the rules could not be displaced by the cultural tradition of the eldest son being responsible for his widowed mother.

Approaches to "tradition" and "culture" presume uniformity

ECOs and Adjudicators sometimes fail to understand that "traditions" vary (1) from region to region (2) from class to class and (3) from generation to generation. In recent years, the rise of the urban middle class, and the increase of the number of women in professional roles must be taken into account. In one family grandfather may disapprove of cameras and photographs; father might be happy with photographs but may draw the line at videos; one son might regard videos as quite acceptable, while the other son, a madrassa student, may disapprove of videos even more than his grandfather. Some who regard themselves as religious will disapprove of all forms of

music, and television. ("Do you have any wedding photographs or a video?" "No, my husband is from a very religious family" - though evidently not so religious that they object to passport photographs).

Differing attitudes between generations of the same family may well be central to an understanding of "discrepancies". Immigration authorities (from ECOs to the Tribunal) have for almost forty years proceeded on the assumption that immigrants come from "tightly-knit" communities (whatever that means), and that all members of a family will have access to the same information. But there are many circumstances in which information available to some members will be withheld from others, and although this is usually understood by the person concerned, it is not always readily acknowledged.

In addition to differing attitudes between generations, persons of near-identical age may have startlingly different attitudes. The teenager who came to London at the age of three and who grew up in the salubrious atmosphere of Ben Jonson Road will have (in reality) very little in common with his cousin who grew up in Sylhet and who arrived last week.

The role of the lawyer in preparing applications and appeals

Many "discrepancies" arise because of cultural (including linguistic) confusion, and the lawyer's most important function in many cases is to explore the ways in which that confusion might have arisen, and elucidate matters to which neither the applicant nor ECO might have given a moment's thought. Frequently, cultural assumptions - things which one takes for granted, and assumes (quite incorrectly) that everyone else takes for granted - lie at the root. The following are some of the more obvious (all have occurred in cases during the last two years):

- the question "why did you get married?" may strike a person from South Asia (where everyone does get married, and remaining single is simply not an option) as puzzling - a sort of trick question; for an ECO, coming from a culture where one in three households is a person living alone and marriage is not the invariable rule, the question appears perfectly reasonable, a simply matter of fact
- social organisation is perceived quite differently; a Bangladeshi man may say he is living alone (when he means he lives with his wife) or say that his sponsoring wife in London lives alone (when in fact she lives with her children); anyone who has conducted enquiries in rural Bangladesh will have been told by women that "there's nobody at home" (meaning, "there are no responsible adult males with whom you can talk")
- family members are categorised differently; when asked to name children, the vast majority of Bangladeshis will name all their sons first, and their daughters afterwards, and the notion of naming them in order of age would appear very unnatural; frequently, married daughters are not mentioned unless specifically requested, and offspring who died in infancy are hardly every included; in cases where one needs precise family tree details, it may therefore be helpful to indicate at the outset that one wants names of all the children (married or single, boys or girls, alive or dead) in order of birth

Maintenance and accommodation

Many clients ask how much they need in terms of earnings and savings in order to succeed in an application to bring a wife and children for settlement. Each case is different, and figures for income and savings cannot be given in isolation. A person earning £150 a week who is living with his parents (who receive benefit) and paying £23 a week as his share of the rent is in a better position that a person earning £210 a week, who is renting privately in Green Street. There are however a number of mistakes that sponsors make when preparing applications. Clients who seek advice only after being refused sometimes have cases in such a mess that a fresh application is the best way forward; persons with more sense who seek advice before making the application will be advised to avoid the following:

- borrowing £3000 from a friend to put in his bank account the month (in some cases the week) before the interview (with every intention of paying it back when the entry clearance has been granted)
- producing, fresh from the accountant, a stapled bundle of pay slips (which the ECO will sarcastically describe as being "in pristine condition") and then sending them to the ECO without first checking the figures (in some cases the name!); "Of course they are genuine; I paid the accountant £5 each for them!"
- submitting pay slips showing a salary of £120, on the basis that, if refused, one can appeal, saying that the restaurant owner has (the week after the refusal) suddenly decided to give a 50% pay rise; for the moment, why pay tax unless you need to?
- submitting pay slips for work done when the worker was in fact (a) on three months' holiday in Bangladesh getting married or (b) in hospital having a baby
- submitting pay slips from one of the companies (many are quite well-known) with reputations for issuing pay slips for cash to persons not actually working there
- the month before making the application to bring your wife, resigning from your job as Assistant Manager with a Supermarket (where you have worked for several years) in order to open a take-away in partnership with your cousin (an undischarged bankrupt), investing your life savings in the venture
- sending in a tenancy agreement for one of the frequently-used addresses in Katherine Road in respect of which British Posts abroad have been deluged with tenancy agreements, showing a rent far below the market rate
- the month before going to get married, borrowing £5000 to buy a posh car, when the repayments are equivalent to more than half your stated income

In practice, even quite modest incomes will suffice. In most cases, the ECO does not complain about the amount of the income, but rather questions whether the sponsor is really employed at all. Three pay slips in respect of a part-time job at Tescos showing £160 a week are much better than ten pay slips for £200 a week from X&Y Fashions (Prop. Mr A Miah) trading from premises formerly occupied by Y&X Fashions (Prop Mr B Miah, no relation), which tragically went bankrupt last year).

Where the income is modest, a covering letter sent with the application can usefully emphasise as many of the following as apply:

- the sponsor lives with her mother, so does not need to pay for child care
- the factory where she works is a short walk (or 70p bus ride) from home (sometimes it helps to enclose a map)
- where a longer journey is involved, perhaps a fellow worker or employer gives a lift to and from work
- in addition to her wages, she gets free lunch/staff discount on food products/clothes etc
- the sponsor's unmarried younger brother also lives in the home; he works, and buys a significant amount of the family's food at the cash and carry
- buying in bulk at the cash and carry, the family can really live very cheaply (it can sometimes help to get them to keep a diary for a month, recording all purchases of food, clothing etc, utilities bills)

There are of course limits to the extent to which one can survive on a tiny salary. Mr Ockelton's Tribunal rejected the argument that applicants from Bangladesh intending to settle among the Bengali community in the East End could be expected to live more modestly than the UK average; the requirement that they should be adequately maintained means that they cannot be admitted if their standard of living is going to fall below the minimum considered acceptable nationwide. (One fears that not all Adjudicators are familiar with the East End - or Southall, Green Street, or indeed any other area with a predominantly Asian population; in a recent appeal where the ECO had doubted whether a man travel each night between home in Poplar and a restaurant in Kent, the witness said he drove through the Blackwall Tunnel; the Adjudicator said he had never heard of the Blackwall Tunnel; fortunately, the Presenting Officer was happy to confirm that the journey described could be accomplished in 20 minutes).

When the income put forward includes rental income, one should have regard to the tax implications. Mr Shrimpton's Tribunal (in **Shaheen (20057),** I&N L&P, no 1, 2000, p32, a case in which rental income had not been declared to the Inland Revenue) held that the maintenance rule required the income available to maintain the parties to be earned lawfully, without fraud on third parties. (Many clients in restaurant work seem unaware that free food, free accommodation etc will have tax consequences). Where a sponsor with a small income and a big mortgage on a three bedroom property and wishes to take in a lodger, then a House or Flat Share Agreement (Resident Owner) (Lawpack form F203) might be the appropriate way forward.

Judge Cotran (in **Hasna Begum (15629))** thought that the income which any dependent children might obtain by working after admission could be included in the calculation; another Tribunal thought otherwise: if the children are working, "they are not dependants, and they are not entitled to admission at all" **(Belaith Hussain [11372])** In fact, in the light of the comments of Collins J in **ex parte Ali**, it appears that Judge Cotran's approach is the correct one.

ECOs routinely reject documents such as pay slips, P602, and employers' letters because of perceived irregularities. ECOs (and, lamentably, even some adjudicators) are enamoured of the phrase "I am unable to exclude the possibility" (that some document or other might be a forgery,

or that a person might have recourse to public funds etc), but the use of this phrase shows that the correct standard of proof has not been applied **(Adedeji (16415).** Most adjudicators accept that where apparently genuine documents are produced, the ECO has the burden of proving that the items are forgeries (and this the view, which is really nothing more than common sense, was affirmed by the Tribunal **(Makozo (20033) 12 Feb 1999)**.

Where an ECO is "unable to rule the possibility" that a sponsor might already be receiving public funds, check the file to see whether in fact the sponsor had given written authorisation for the ECO to investigate his tax/NI affairs. If such authorisation was given, the ECO's comment is even less appropriate than it would be in any case.

The objection to pay slips is usually that they appear to have been produced in a batch for the purpose of the application, rather than issued weekly. ("The pay slips were in a pristine condition"). ECO's objections frequently amount to mere assertions, with no reasons given for the doubts harboured. Adjudicators are rightly puzzled by these cases ("The evidence includes two P60s from two different companies and wage slips from no less than three different companies. Despite this the respondent has argued that these documents are fraudulent. I can find absolutely no evidence that these documents are fraudulent. I have no idea why the respondent says that the last pay slips produced were obviously prepared in one batch. They all are separate payslips of the sort with a front cover that are not physically attached to one another, as you might see on documents all printed at the same time on continuous stationary. They are clearly in the same form but that would no be surprising. They each bear different dates and they have somewhat different information ...The appellant has now produced wage slips from another employer again appearing on the face of them entirely straightforward" (Mrs H S Coleman Jan 2003).

ECOs sometimes go behind the backs of sponsors and representatives, and make their own investigations. The danger here is that until the explanatory statement is received, it may not come to light that the ECO was acting under a misapprehension. In a statement dated 7 January 1999, C A Edwards (ECO Dhaka) reports that

> I wrote a letter to (the sponsor's) alleged employers requesting certain details about the sponsor's employment and about the restaurant itself. The answers to the questions were written on my original letter and therefore it was possible that the responses were not from the actual manager himself. However a notice from the Inland Revenue regarding the collection of the employer's National Insurance contributions was included. This showed that the total National Insurance contributions for the 1997/8 financial year was only £413.40. The restaurant employed 6 staff so this would reflect an average payment of approximately £70 each. The contributions paid by the employer are more than those paid by the employee. The sponsor allegedly paid £9.93 National Insurance a week, so £516 per annum. The restaurant would therefore have to pay more than this amount for just one employee and considerably more for any other workers. The National Insurance details did not tally with those of a business employing 6 staff. They were consistent with a business employing only one member of staff, at a lower rate of pay than the wage quoted by the sponsor.

The revised APP200 Rev 10/02 refusal forms give much more detail than was previously the case, and so one can start preparing the groundwork from the date of decision (rather than having to await the explanatory statement). An entirely typical refusal (D Jones ECO Dhaka on 10 February 2003) sets out the objections (on accommodation and maintenance) as follows:

> Your sponsor has not provided an Environmental Health Officer letter stating that your proposed accommodation is suitable and that your addition will not cause overcrowding. Whilst you have produced a letter from Hodsons Estate Agents stating that your proposed accommodation is adequate for 2 adults it has not been stated how many occupants presently live there.
>
> As evidence of your sponsor's ability to maintain you he has submitted evidence of his employment in the form of an employer's letter, payslips and bank statements. The pay slips are all fresh and new in appearance and have been produced as part of a batch failing to satisfy me that they have genuinely been issued with the sponsor's weekly remuneration. Your sponsor's ban statements show what appears to be a loan of £11000 transferred to his account on 10 December 2002. I note that most of this currently appears to have been exhausted and that your sponsor's closing balance on 7 January was £432.46. I further note that your sponsor arrived in Bangladesh subsequent to this date and is still here at the time of your application. In light of your sponsor's loan repayments, the rate of his outgoings and his current absence from employment where he earned £6550 gross last year, I am not satisfied that your sponsor is in a position to maintain you.
>
> No evidence of employment has been arranged for you by the sponsor but given your lack of previous employment experience I consider that you would be able to secure employment upon your arrival in the United Kingdom.

do not

(In the above case, the sponsor had called in at the High Commission without an appointment, and had been refused on the spot; the applicant herself was not interviewed).

Accommodation

ECOs in Dhaka routinely demand letters from Environmental Health Officers. The Tribunal have said that letters from EHOs and other council officials should not be made a requirement in every case. "Evidence from the council is of course helpful but it is not the only evidence, and indeed, independent corroboratory evidence is not and never has been a requisite feature of this jurisdiction (**Mohammed Shabir (15665)**; In **Wajidur Rehman (16671) [1998] INLR 500**, the Tribunal held that "the provision of a report from a local authority as to the fitness of the property should not be regarded as evidence which an applicant should be expected to produce in every case. The primary evidence as to the adequacy of accommodation should come from the applicant and sponsor. In most cases the issue will not be the adequacy of the accommodation, but whether the accommodation is in fact available. It may only be in borderline cases that a report from the local authority takes the matter any further ....The production of a letter from the local authority regarding statutory overcrowding should no longer be regarded as the normal practice"

The reality is that, as seen in the refusal set out above (D Jones ECO Dhaka on 10 February 2003), EHO's letters are highly prized, and, whatever the law, it is frequently easier and quicker just to give in to ECOs' demands. However reluctantly, most councils will eventually oblige. In cases where a report is required urgently, Health & Housing (120 Wilton Road, London SW1V 1JZ) provide an excellent and very fast service for about £100 (payable at the time of the inspection).

In a case where the local council stated that the matrimonial home would not become statutorily overcrowded if the appellant were admitted, their comment that it was "congested" is irrelevant (according to Mrs Mannion's Tribunal in **Sultana (19218)**.

"Accommodation which they own or occupy exclusively" (281(iv))

This still causes problems. In a Determination as recent as May 2002 (TH01796/2002), an Adjudicator (District Judge RDI Adam) failed to be satisfied on this matter where the proposed arrangements were for the appellant and family to have "two rooms plus use of kitchen and bath" (with the landlord and his wife occupying the other bedroom.). It is (and has been for at least ten year) well established that, provided that the sponsor and appellants have their own bedrooms, the fact that they share other facilities cannot defeat an application: **Zia (Raja) [1993] Imm AR 404 at 412; Kasuji [1998] Imm AR 587; IDI Dec/00, Ch 8, s1, Annex H, para 6)**

Third party support

Putting forward evidence of third party support is an admission that the sponsor cannot himself or herself satisfy the requirements of the rules unaided. There is a substantial and mutually-incompatible case law. For years it was though that third party support was permissible "~~if it was clear that such an arrangement may be accepted exceptionally~~ if it is clear that it would only be in effect for a limited period and the couple have a realistic prospect of supporting themselves thereafter" (Annex to the Immigration Directorate's Instructions of June 1997 **(I&NL&P vol 12, no 2, 1998, p74)** but the correct approach was that "evidence of support to be given by others can satisfy the rule if sufficiently cogent to be accepted, and this is more likely to occur in the case of short-term support from the third party" **(MacDonald 4th edition p322)**. Much confusion was caused by the consent order handed down by the Court of Appeal in Ishaque Ahmed, but from **Taye [22184] I&N L&P vol 14, no 1, 2000, p35** it is now clear that decisions involving long term support must be taken in the light of guidance given by Collins J in **ex parte Ali**; the consent order handed down by the Court of Appeal was not binding, but it would be "rare for applicants to be able to satisfy an ECO, the SoS or an Adjudicator that long term maintenance by a third party will be provided..., it was a question of fact to be determined on the evidence. Collins J could "see no reason in principle" to rule out a minor dependent child's contribution towards maintenance".

Circumstances in which third party support has been accepted by the Tribunal include

- In **Parkar (17948)** the sponsor was still at school, and would then begoing on to university, so would be unable to support for several years; the appellant was well-educated and had a good job in Bombay, and had savings and investments; the Tribunal accepted that he was likely to obtain employment within a reasonable time of arrival here, and in the meanwhile, according to Mr Care, third-party support from the sponsor's father was acceptable, and such support was to be expected for "families within the culture group from which the parties come"
- In **Ali (19736)** Mr Warr's Tribunal allowed the appeal of a sponsor who was not working because she had recently given birth to twins; she and other members of her family had been running various businesses for years and had no history of recourse to public funds; as part of a prosperous Asian family, the sponsor would be maintained along with her husband by the other family members until she could go back to running her business
- In **Shibli Begum (18771)** Mr Parkes' Tribunal thought that "natural cultural propensity for wider family support" may be taken into account, with any evidence of such a propensity

Intention to live together.

The refusal rate is high, but so is the success rate on appeal. Indeed, an Adjudicator must work very hard indeed to find ways of dismissing an appeal. (Some, as we shall see, succeed). Seldom do these cases turn on objective questions of fact, but rather on ECOs' (and some adjudicators') subjective impressions. The usual approach is a direct attack on the husband's credibility:

- an earlier unsuccessful asylum claim (while pursuing which the appellant married), or otherwise unsatisfactory immigration history)

  "the appellant initially stated he had gone to the UK with a false passport for a visit but later stated that he had gone to look for work. He had been granted Temporary Admission but had failed to comply with the terms and had absconded. He applied for asylum, but I considered that he had done so as a means to secure entry .. his claim was fraudulent" (and this is seen to have been borne out by the fact that the appellant had had no problems on return to Bangladesh)

  "the husband had entered the country unlawfully from Ireland (having gone to Dublin to study English) in suspicious circumstances"
- answers given at interview (about the wife, her family, job, her interests and hobbies, her best friend, and a range of other matters), with a failure to give detailed and accurate information leading the ECO to doubt whether the husband is all that interested in her as a person; (applicants are frequently criticised for failing to give a satisfactory answer to questions such as "what have you and your wife planned for the future?")
- reasons given for the marriage

"As the appellant was in the United Kingdom illegally his uncle told him that if he married he could obtain permission to stay"

- circumstances surrounding the marriage

  "None of the appellant's family came from Bangladesh for the wedding" (D C Bradley Dec 98/Jan 99!)

  "It did not appear to be a traditionally arranged marriage in which both families were involved in the proposals and arrangement, but appeared to have been arranged in haste"

  discrepancies in the parties accounts ("he stated that they had not met before the marriage was arranged three weeks before the wedding, yet she stated that she had met him two or three months before the marriage")

  "the dowry of £2500 was paid immediately at the time of marriage"

Objections raised by an ECO in a typical case include

1. the husband did not know the name or whereabouts of his wife's first husband, nor how long the marriage had lasted
2. he knew that the marriage had ended in divorce but did not know when
3. he knew there was a legal divorce but did not know who had divorced whom, nor did he know (or want to know) the reason for the divorce
4. he did not know exactly how he and his wife were related; (in fact, this is unfair; he told the ECO that the wife was "somehow related to [his] paternal grandmother" and the ECO did not pursue the matter further
5. he appears to have known very little about his wife before the marriage (apart from the fact that she was a divorcee)
6. he said she had told him nothing about life in London
7. the ECO points out that when asked about the wife's living arrangements, he said she lived alone (in a two bedroom house), and did not mention her daughter; (this might have a cultural explanation)
8. although he knew his wife worked as a machinist "in London City" since returning from Bangladesh, he did not know how she travelled to work, nor what hours she worked, nor whether she had a lunch break or a day off, nor whether she worked days or nights; he knew the company produced ladies coats, but did not know how many other people worked there
9. he had no idea about what child care arrangements the wife had, and could not say who looked after the daughter when she went to work, and who picked her up from school

(The lack of knowledge pinpointed in 8 and 9 might be very easily explicable, for reasons not related to "intention" but to another paragraph of the immigration rules).

Expectations as to what a person should know about his or her spouse are frequently a reliable indication of the attitudes of the ECO or Adjudicator. Deciding what weight (if any) to give to perceived lacunae in the appellant's knowledge of the spouse is, as a moment's thought will reveal, quite impossible. The question of intention and lack of information about backgrounds was recently examined by the Tribunal (**Kari Shahjad Miah v ECO [2002] UKIAT02533**), and Mr Ockleton observed that

> It may be that the adjudicator or indeed the entry clearance officer would have expected the appellant to know more about what his wife was doing and the time for which she had worked and the amount she was earning and so on. That perhaps was an appropriate expectation, but as it turns out, the Appellant did not have that knowledge or was not persuaded by the entry clearance officer to reveal it. However, given the evidence of the Appellant, which was not directly challenged, that he wanted to live with her, it appears to us that there was no proper basis for refusing the application or dismissing the appeal on grounds of intention. Our view is that the evidence taken as a whole establishes, on balance of probabilities, that at the date of the decision the Appellant and the sponsor intended to live together permanently as husband and wife".

Much less frequent than attacks on the husband's credibility are criticisms of the wife's behaviour:

> "you were only 18 at the time of the marriage, while your husband was 10 years older"
> "the marriage was arranged very quickly after your husband's illegal entry"
> "the sponsor had not accompanied the appellant when he was removed to Bangladesh"

Occasionally, there are criticisms arising from the documentation:

> "there was no evidence to show that the couple had lived together after the marriage, until the husband's removal"
> "the period of the tenancy was from 1.1.98 when the appellant was still in the UK yet he did not mention having lived at this address. I considered that this lent further doubts to their claim to have lived together as he was not named as a tenant"
> "the appellant did not even know the names of the relatives with whom he had supposedly lived"

On occasions, the attack on credibility goes much further, and involves allegations of criminal behaviour.

> In the case of a man wishing to bring his wife from Bangladesh, one of the reasons for refusal was the fact that British passports issued to the husband and siblings were (allegedly) found in the possession of a third party at Singapore Airport, in vaguely suspicious circumstances; the ECO suggested that the person "off-loaded" in Singapore was an "impostor", using the sponsor's passport with his full knowledge, and so the sponsor may well have been party to an attempt to deceive the authorities in

Singapore (and, ultimately, in the United Kingdom); even accepting that the sponsor had indeed been party to an attempt to deceive (which he denied), it is not clear why the ECO considers that this would throw doubt on the couple's marriage - married men (and women) can deceive, just as much as single ones.

Although in immigration appeals the burden of proof is on the Appellant (and the standard is the balance of probabilities), in a case such as this (where the Appellant has made out a prima facie case by producing an apparently valid marriage certificate) the burden shifts to the Respondent, to prove specific allegations. Where the Respondent's case involves allegations of criminal conduct, then the standard of proof is correspondingly higher.

Halford v Brookes [1991] *The Independent*, 1 October, involved a claim for damages arising out of an alleged murder. Because a conclusion that the defendant was liable in damages would amount to a finding that he was guilty of murder, the court specifically required that the plaintiff should satisfy it on the criminal standard. Similarly in the undoubtedly civil case of *R v Commissioner Rowe QC (Mr) ex parte Mainwaring* [1992] 4 All ER 821, the Court of Appeal said that the criminal standard of proof must be satisfied in order to establish allegations of malpractice by a candidate during an election campaign.

It is simply not acceptable for the Respondent to say that (1) something odd happened in Singapore (2) therefore the sponsor may have been party to an attempt to practise criminal deception (3) therefore he is probably not married.

Where a husband applies for entry clearance, after a marriage in the United Kingdom, it is wise to prepare for the interview as follows:

- assemble as much documentary evidence as possible to prove that the couple did in fact live together in this country throughout the period from the marriage until his departure
- keep all pieces of evidence of contact between husband and wife during the months leading up to the application (including photographs taken and diaries kept during any trips the wife pays to her husband, letters, cards and itemised telephone bills for the time they are apart); some adjudicators place a very high value on such documentary evidence - even where the oral and other evidence really ought to suffice - and will draw adverse conclusions for its absence or paucity
    - evidence of contact would in many cases include brief statements from relatives and friends who, while travelling between the UK and Bangladesh, had been asked to convey gifts from one party to the others

Should the sponsor travel abroad to attend the interview? One view, **(JCWI Handbook 2002, p340)** is that it is "helpful for the British or settled spouse/partner/fiance(e) to be present at the interview, so that he or she can be available if the ECO wants to check anything about the situation in the UK". In most cases, certainly those involving intention to live together, it is questionable whether much is gained by the wife being present at the interview: the ECO hardly ever has reason to doubt the wife's **credibility**, and will be interested only in attacking (or at least raising doubts about) what they will perceive as her **credulity**: that is, they will imply that although she genuinely intends the marriage to last, she has been "taken in" by her husband, and does not understand that he is using her. (This has now become almost an invariable practise with ECOs in Dhaka)

Should a **legal representative** be present at the interview? Representatives are allowed to attend "provided that the representative clearly understands that, as an observer, he or she must not intervene while the interview is taking place. At the end of the interview, the observer may then make comments on the case to the ECO" (JCWI Handbook 2002, p340). Presumably, the representative will not be allowed to make a tape recording (see the judgement of **Pitchford J** in **Regina (Mapah) v Secretary of State for the Home Department (Times Law Reports, 5 March, 2003)** Many persons refused will leave the interview with a wholly mistaken understanding of what has happened, and of the reasons the ECO has for refusing; interviewees' accounts of what happened will prove, when the notes of interview are made available, to differ markedly from the account given by the ECO. It may be useful for the applicant, as soon as possible after the interview, to make a written account of what was said. (Indeed, in one case **(Rohit Saina TH/05473/01)**, an Adjudicator Mr J C Emmerson thought that the detailed record made after the interview by a person refused in Delhi was more cogent that the ECO's account, and refused to accept the ECO's version as credible: "the Appellant is clearly an intelligent man ....it is difficult to imagine such a person openly admitting at interview that he had married simply to obtain entrance to the UK if the question had been put to him in the form recorded by the Respondent and had been fully understood").

Although the refusal rate in Dhaka is very high, the system is erratic. Most clients complain that they know of at least one case exactly like their own where the husband or wife was let in without being asked any questions at all. This gives rise to a wholly unfounded optimism, and applicants go to interviews very badly prepared and seek advice only at the appeal stage (when the damage done might be irremediable).

> In interviewing a wife whose husband has been refused on the basis of intention to live together, you are informed that the husband said at interview that he and his wife had no

children, and his wife was not pregnant; in fact, as he was well aware, his wife had given birth three days before the interview. Why did family members instruct him to tell this lie?

The outcome on appeal depends very largely on the attitude taken by the adjudicator. In almost every case, a sympathetic adjudicator could allow the appeal, while an unsympathetic adjudicator would dismiss it. In each case, perfectly good reasons for the decision can be given. In deciding to dismiss an appeal, an adjudicator will in effect be preferring the assessment an ECO has formed of the husband's intentions after an interview of under an hour, to the assessment of the wife, who believes that the marriage is a genuine one and that her husband intends to live together permanently. One might well ask, why should the views of an ECO (speaking no Bengali and having only a basis knowledge of Bengali culture) prevail over the views of a woman who is a member of that community, and has had a chance to assess her husband's behaviour over an extended period? There has long been a strong anti-immigration culture when it comes to Asian males, and some adjudicators believe that they are doing the wife a favour by dismissing the appeal. In doing so, they may feel that they are following the lead from the very top: as reported in *The Times* newspaper on 8 February 2002, Mr Blunkett's White Paper set out the government's view that "the Asian communities should discuss whether arranged marriages should be undertaken within the "settled community"". That is, Blunkett believes that Asians in this country should marry other Asians in this country, and that the days of "importing" husbands (nobody seems to be bothered by imported wives) from South Asia are numbered. He said the issue "was of particular importance for young Asian women who had been educated in Britain and who wanted to marry someone who spoke their own language". If the Home Secretary believes he knows best when it comes to an Asian woman's marriage life, who can blame an adjudicator for agreeing with an ECO who says the same thing?

Significance to be attached to the birth of a child, in assessing intention to live together

Several adjudicators (Mrs P H Drummond-Farrall, Diana Witts etc) have misdirected themselves that pregnancy/birth post-dating the decision was not reasonably foreseeable (!!!).

Some ECOs have taken the view that the birth of a child adds nothing to the case:

> "The child was only conceived after the appellant (an illegal entrant) first applied to regularise his stay. My colleague had to consider that the child was conceived merely to improve the appellant's chance to remain in the United Kingdom and was no reflection that this was a genuine marriage with the intentions that the appellant and the sponsor would live together". (J Short ECO Dhaka, TH 00142 2000)

It is course "well established that evidence of matters which occur subsequent to the appeal may well be considered if they bear on important facts relevant to the decision .. That two people continue to live together after the decision may well be considered as it reflects on their intention

at the time of the decision" (Mr Culver's Tribunal in **Sabil Ahmed [2002 UKIATO1854]**; indeed in this case the Presenting Officer Mr Pichamuthu, having seen medical evidence of pregnancy "accepted that he could not oppose the appeal")

Intention to live together, and "primary purpose"

Most ECOs (and far too many adjudicators) do not understand the need to distinguish between "Primary purpose" points (relating exclusively to the mental state at the time of the marriage, the immigration history and the steps leading up to the decision to marry) and "intention to live together" (which relates to the future). It is wrong to assume that a man who freely admits "I married to stay in the UK" must fail under "intention to live together". Cases which would have failed under "primary purpose" may be wholly unobjectionable from the point of view of future intentions.

320(12)

Many men classified as illegal entrants have returned abroad (voluntarily and involuntarily) and now wish to apply for entry clearances to return to join wives whom they married while here unlawfully. Some were advised by immigration officials that such applications to British Posts abroad would be very straightforward. Letters from CIOs suggest that "the major obstacle to the issue of an entry clearance is the question of the genuineness of the relationship" and make no mention of 320(12)

There was always a a danger that such applicants would fall foul of 320(12) of HC395. In **Ibeakanma**, Ms D Levine held that "deception practised at the time of the first entry [in March 1990] was so serious that even if the appellant and sponsor were able to comply with the requirements of paragraph 281, the respondent would still, on balance, be entitled to refuse leave under paragraph 320(12)". In practise, where the application is refused on other grounds, there is no need for the ECO to consider 320(12), and this was the position here. Mr Ockleton's Tribunal **(18632),** satisfied that the marriage was genuine and all other requirements of the rules were met, found that they themselves could not exercise a discretion which had not yet been exercised by the respondent; they were permitted only to review the exercise of his discretion. The refusal under 320(12) "was not in accordance with the law because the respondent failed to exercise the relevant discretion. The question relating to the exercise of that discretion remains outstanding before the respondent", so the appeal was allowed, with a recommendation that "despite the provisions of 320(12) entry clearance be granted to the appellant"

In **Wells (HX 265)** I&N L&P vol 14 No1, 2000, p35, Professor Casson's Tribunal rejected the argument that, if all the requirements of paragraph 281 were satisfied, paragraph 320 should not defeat an application. It was necessary to balance previous breaches against the circumstances of the marriage.

Presumptions in favour of the validity of marriage

English law
"Where there is evidence of a ceremony of marriage having been followed by cohabitation of the parties, the validity of the marriage will be presumed, in the absence of decisive evidence to the contrary." **Russell v A-G [1949], applied in Radwan v Radwan (No 2) [1972] 3 All ER 1026 at 1030**

That the evidence must be "decisive" is clear from **Mahadervan v Mahadervan [1962] 3 All ER 1108 at 1117**, where Sir Jocelyn Simon, P, said that the presumption

> cannot be rebutted by evidence which merely goes to show on a balance of probabilities that there was no valid marriage; it must be evidence which satisfies beyond reasonable doubt that there as no valid marriage. In other words the presumption in favour of marriage in such circumstances is of the same weight as the presumption of innocence in criminal and matrimonial causes.

(though in the light of the House of Lords decision in **Blyth v Blyth [1966] 1 All ER 524** it is likely that the standard of proof is the civil standard, and not as high as was once supposed.

In any event, it is questionable whether an adjudicator has jurisdiction to go behind a marriage certificate; **Marriage Act 1949** section 65(3) provides that a certificate "shall be received as evidence of the marriage", and once a validly-issued certificate has been produced, the only course open to a person (including the Home Office) wishing to question the validity of the marriage is by way of an application for a declaration under **Family Law Act 1986** (section 55) and the only court competent to declare the marriage invalid would be the High Court or a County Court (under section 63 of **FLA 1986**).

The validity of an English marriage certificate was raised in **Abdul Kadir Babul (16466)**, and the Tribunal approached the matter (as they did in **Harrison (5366)**) on the basis that it was for the Home Office to show "on firm and clear evidence that that marriage was invalid". In **Obie (16428)** an ECO disputed the validity of a marriage certificate, since the appellant had, in a previous application, claimed to be married to someone else, and there was no evidence that the marriage had been dissolved; the applicant now said he had lied about the marriage, in order to improve his chances of getting a visitor's visa. Faced with a valid marriage certificate to the sponsor, the ECO had the burden of proving that the appellant really had married his "first wife".

(Presumptions of marriage easily arise in English law. Indeed, it sometimes necessary (and difficult) to prove that one is **not** married. **Jactitation of marriage** was a false assertion that one is married to a person to which one is not in fact married. Proceedings for jactitation were abolished by **Family Law Act 1986** but an injunction may be sought to restrain such claims being made and may be helpful in preventing a presumption of marriage from arising).

Hindu Law

Hindu Law does not favour concubinage, and marriage is presumed from long cohabitation **(Alagammal v Rakkammal (1983) 1 M.L.J. 311)**. In **Bikash Kumar Mukherjee AIR 1979 Cal 358,** the Calcutta High Court held that where a man and woman were living together for a long time and the man acknowledged the woman's children as his own treating the woman as his wife, and they were recognised by all persons concerned as man and wife and they were so described in documents such as ration card, voters list and school registers, a strong presumption arises that the woman was the wife and the children are her legitimate children.

ECOs in India frequently point out that **Hindu Marriage Act (XXV of 1955)** provides in section 8 for the registration of Hindu Marriages. The same ECOs sometimes forget to point out that section 8(5) provides that "the validity of any Hindu marriage shall in no way be affected by the omission to make the entry [in the Hindu Marriage Register]."

The immigration rules provide, if certain conditions are satisfied, for a person to enter if "the parties are legally unable to marry under United Kingdom law (other than by reasons of consanguineous relationships or age" (295A(iii)).

Consanguineous marriages in India are not allowed unless "the custom or usage governing each of them permits a marriage between the two" (Indian Marriage Act).

The ECO Bombay refused entry clearance to a man who had married his sister's daughter (a person settled in the UK), on the basis that, although the marriage was recognised in Indian Law, it could not be recognised in England (where the sponsor was domiciled) . The appeal was conceded at the hearing by those then instructed, and the Adjudicator (T R Cockrill) "did not consider it appropriate to make any recommendation" (although he found that the parties had a genuine and loving relationship).

A fresh application (2001), referring to the fact that the couple now had a child, and raising the matter of Article 8, was successful, and the ECO issued entry clearance without question.

Dr Werner F Menski (SOAS) can be approached for expert opinion. A very useful contact is Ranjit Malhotra, an ILPA member and Advocate of the Supreme Court of India, and Punjab & Haryana High Court (Bungalow 584, Sector 16 -D, Chandigarh 160 015 India, telephone 91 172 542443, fax 91 172 545443).

Islamic Law

Recent marriages pose few problems. Almost all (certainly those involving intending migrants) are registered, since applicants are aware that the original certificate (with English translation - best, and most cheaply, obtained contemporaneously in the country of original) is required by ECOs when the application is made. One still encounters cases where the lack of satisfactory records causes difficulties. Theses are generally applications for certificates of entitlement to the right of abode, where the disputed marriage took place before 1990 (and in some cases, very much earlier, where registration - certainly in Bangladesh, and to a lesser extent in Pakistan - was the exception rather than the rule).

A common sense approach was adopted by Mr Maddison's Tribunal in **Hanufa Begum (11107)** where although there was no reliable documentation, there was (1) DNA evidence that the couple had children (2) evidence in the form of a village visit report. "Mr Smith ... says however that although adulterous relationships occur in Bangladesh as elsewhere, it is highly improbable that a family would live openly in rural Bangladesh without being married and continue to do so over many years. There is we think force in that submission".

In **Begum (Nazir) [1976] Imm AR 31** the Tribunal accepted, in Islamic law,

> marriage will be presumed in the absence of direct proof, from
> (a) prolonged and continued cohabitation as husband and wife; or
> (b) the fact of the acknowledgement by the man of the child born to the woman: or
> (c) the fact of the acknowledgement by the man of the woman as his wife.

Spouses under 16

Although a marriage contracted by a spouse domiciled here is not valid if s/he is under 16 **(Matrimonial Causes Act 1973, s 11(a)(ii))**, marriages of persons under 16 are permitted abroad. If both parties are domiciled abroad, the marriage should be valid in English Law, but the immigration rules prevent a person from actually coming to join a spouse, until the person has reached the age of 16. Cases from Pakistan involving child-marriages are not uncommon.

Children

Age estimates

Dr Latif's reports (and subsequently those of Dr Hamid) are still relied upon by ECOs in Dhaka, but most adjudicators accept that age estimates are based on "the visual impression of the age which obviously cannot be infallible" (Mr B S Grewal, in Baktear Osman Ullah (THE/65117/93) allowing the appeal of a person said to have been born on 10 July 1974, although in November 1992, Dr Latif pronounced him 25 years old - which would have made him 7 years older than his stated age).

What to do after winning an appeal

Do not assume that the system will operate efficiently and (1) that copies of Determinations will reach any sentient being at the Home Office or (2) that the Home Office will notify the ECO promptly (or at all). Always fax the Determination to the ECO, who will (if they bother to reply at all) write back claiming that until they receive a copy from the Home Office they cannot issue. If there is no news within a month, write again. Referring the matter to the Complaints Unit seems to be a total waste of time and a postage stamp. In serious cases of delay, one can consider (1) asking the MP to refer the matter to the Ombudsman, or (2) applying to the High Court for mandamus.

Additional sources of evidence

What kind of School Register is kept in the primary schools in Bangladesh. How accurate and reliable is the information contained in such registers. Can one have access to such documents?

1 It is impossible to generalise about primary school records. Much depends upon the individual head teacher. Though some teachers have held the same post for many years (Abdul Malik whom I met on 24 December 1985, had been at Mandaruka school for the previous 19 years, and kept records going back to March 1952), most teachers, including heads, are from other villages (and many are from other Districts), there is a fairly high staff turn-over, and, in many schools I have visited, the present incumbent has told me that he was only recently appointed, and has no idea where his predecessor kept the records. For example, Mohd Iqbal, the headmaster at Kotlipara whom I visited on 7 February 1985, was from Mymensingh, and had been in post for less than a year; he said the school had records - which he kept at his lodgings in Deulgram - going back to 1968. Mohd Mahtabur Rahman, at Deulgram Primary School (which I visited on 29 October 1984) had taken up his post only ten days earlier.

2 Diligent and responsible heads guard the admissions registers carefully, keeping them lock and key either in the school (although school buildings are only very seldom secure, and some contain nothing but desks and chairs, the pupils keeping all their books at home) or at their lodgings in the village. (Some heads take the school keys with them when they go away for visits - as I discovered at Rashidpur Primary School on 31 January 1984, and at Alipur Primary School on 23 February 1985.) Sometimes the register is kept locked up at the home of the Union Chairman (as I found in a village I visited on 27 January 1986).

3 Less diligent heads have given me to understand that admissions registers I have asked to see have been

(1) stolen by thieves - such as the case at Brahmongram Primary School where I was told on 9 February 1984 that all the records had been stolen 2 or 3 years previously, and at Rashidpur Primary School, where I was told on 13 February 1984 that the admissions register had been stolen three months previously, and Chandshirkapon, where I was told on 28 February 1987 that all the admissions registers had been stolen; or

(2) eaten by voracious insects (such as the 1972-1978 Admission Register for Protompasha, which I inspected in February 1985, when it had been almost entirely eaten away by ants), or

(3) destroyed during particularly savage storms or floods (and some have shown me the high tide mark on the wall, where the flood-waters reached; on 6 February 1984 at Syedpur High School, I was told that all records prior to 1979 were lost when the school building was destroyed in a cyclone; at Protompasha (which I visited on 9 February 1985), the headmaster Rotish Bhattacharya had, since the school building was destroyed by a cyclone 1[illegible] years previously, conducted lessons in the open air, though he assured me that there were records going back to 1972, kept in a teacher's house).

On 1 January 1986, I visited Bohorgram Primary School, where the headmaster Abdul Malik said that there were no records earlier than 1982.

3 Teachers are not well paid and may be vulnerable to bribery or intimidation by powerful villagers, and I have come across cases (including one where the teacher was a lodger at the sponsor's home) where the teacher had been told to prevent me seeing the records (and so pretended that they have been lost or stolen). In other cases, the records contained so many alterations and corrections as to be of only very limited evidential value. (Rustompur Primary School, which I visited in February 1985, had an admissions register in which entries form 1973 to 1978 did not give the guardian's name, and every single page had crossings out, in inks of 4 different colours; each page had some blank spaces - possibly to facilitate later false entries).

4 In some cases, the school records are incomplete; when I visited Dayamir Primary School on 29 January 1984, the head-teacher Ahmod Ali told me that he had records going back to 1980, but the earlier records had been stolen. At Minajpur Primary School, I found (on 5 February 1984) a register containing entries from as far back as 1966 - but there were no entries at all for 1977, and only one in 1978: when I asked the headmaster Bhupendra Chowdhury what details he would put on the transfer certificate (when the child moved from Primary School to High School) he admitted that, in many cases, these certificates were drawn up on the basis of guesswork. On 9 February 1984, the headmaster of Brahmonshashon Primary School said that he did not keep an admissions register; when I asked him how he would complete the transfer certificate, he told me that, when the time came, he would ask the child concerned for the details required, and the child would tell him! At Asirganj Bazar Primary School on 14 January 1987, I found records for 1975 to 1980, and for the period 1983 to date, but nothing for 1980 to 1983. At Hobibpur Primary School (the headmaster was Mohi Uddin Ahmed), in November 1984, I found excellent records going back to 1972. (The paucity of records for the period of the Liberation War is hardly surprising). On 31 August 1986 I found, at Barmordan School (Headmaster Nipendra Chandra Debonath) impressive records going back to 1952 to 1968, but there is then a fourteen year gap in the records, until 1982. On 27 November 1985, I met Abdus Salam, headmaster (since 1979) of Khidirpur Primary School, and found very impressive records for 1973.

5 Potentially the most valuable record in a school is the admissions register, in which, at the start of a child's education, an entry is made, giving the child's name, address, the name of the parent/guardian, date of birth (which column is frequently left blank) and the child's age on admission, which is normally given simply as "5+" (which, according to some teachers, covers children who might be as old as 7 when they start). Although there is little uniformity, it is seldom that a date of birth would be given - although I found examples of such registers at Killogram Primary School on 14 February 1984, where children's dates of births and their dates of admission were carefully recorded, and, on 16 February 1984, at Banigram Primary School (though records went no further back than 1982. One must recall that, although the situation may be improving somewhat, very few births were actually recorded contemporaneously.

6 The lack of uniformity extends to the form the records take: some schools (such as Kurarbazar Primary School, which I visited on 28 November 1985) have records kept in printed registers (with columns headed "serial number", "date of admission", "name", "caste", "father's name", "father's occupation", "village", "date of birth", "age on admission", and "class to which admitted". Other schools simply use large exercise books, ruled in columns, with the headings hand-written (such as at Doshghor Primary School, which I visited on 27 January 1986, and saw a (hand-written) volume containing entries for the period from 6 January 1958 to 30 January 1975 (though entries from 1 February 1983 had been kept in a bound book in printed form).

7 One sign of a genuine document is that the head teacher unhesitatingly opens a locked steel almirah or some other secure cupboard, and produces a set of bound books (**not** loose leaves), in which entries are neatly made, in the same handwriting, with very few crossings-out. I saw an excellent example (on 21 January 1987) at Kalijuri Government Primary School, Bagisar Bazar,

with very impressive records going back to 1967; but even here, the headmaster Shoshil Ranjan Chowdhury complained to me that guardians hardly ever came with their offspring on admissions day, so the headmaster had to make his own educated guess at each child's date of birth. I found other impressive records at Tajpur High School - where Mohd Jinullah had been headmaster for the previous ten years, with entries going back to at least 1973. Some records are kept in Bengali, others (such as the register at Nurpur Primary School in Comilla covering the period from 1975 - earlier records were destroyed in a cyclone - which I inspected on 13 January 1986) are kept in English. The headmistress (Koruna Rani Sen) at Islampur Primary School (whom I visited on 20 February 1985) kept excellent records (under lock and key) with entries from 1973.

8 If records actually exist, and an appropriate official can be located, school records are available for inspection, and, in most villages, officials are extremely obliging. The only occasion on which I have been denied sight of the records (and ordered off the premises!) was by the Headmistress of a Girls High School in Sylhet Town. Such obstructiveness is very rare indeed.