A0152

Family settlement (with special reference to South Asia)

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

language and culture

Identifying and challenging the assumptions of ECOs and Adjudicators in dealing with cases from South Asia and elsewhere

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

Although a few lawyers study Islamic law as undergraduates, lawyers' training and background in general provide no preparation for dealing with clients from diverse ethnic minorities. No organisation is equipped to offer even the most rudimentary courses to lawyers wishing to acquire the necessary skills. As time goes on, the position deteriorates. As the number of persons from South Asia living in England has grown, so opportunities for studying their languages and cultures at university level have diminished. Thirty years ago, the School of Oriental and African Studies provided courses in almost all the major languages of South Asia; it is now no longer possible any where in the United Kingdom to study at undergraduate level many of the languages spoken by hundreds of thousands of this country's residents.

Attempts are made at local level to provide courses so that teachers and health workers can acquire a smattering of Sylheti (the language spoken by the vast majority of those originally from Bangladesh), but there is not even a rudimentary dictionary of Sylheti available. (**Learning Sylheti** by Rod Chalmers, published by **Centre for Bangladeshi Studies**, gives a concise introduction - and warns that there are 52 words meaning "now", of which he gives two: **Sylheti Translation and Research** have published translations of Sylheti poetry, but far too many people still believe that Sylheti is only a spoken dialect that cannot be written down). How can one possibly arrive at an independent assessment of the reliability of a court interpreter, for example, where there is not even an authoritative dictionary of the language or dialect concerned? (**Bangladeser ancalik bhasar abhidhan** published 1965 is seriously out of date). What happens if there is a dispute about the meaning of a particular word?

And what about usage? In some parts of Bangladesh, some elderly persons count a new day as beginning at sunset. At 8 pm they may talk about doing something "today" which westerners would consider as taking place "tomorrow". In some rural areas, some woman calculate a baby's age from the onset of pregnancy, so a baby is born when 9 months old (or 10 months if calculated by the lunar calender). The capacity for misunderstanding is enormous. In a supportive atmosphere, misunderstandings can be resolved: a healthy and curious mind is intrigued by different ways of looking at the world. Unfortunately, when lawyers are involved, a misunderstanding (frequently caused by ignorance on the part of lawyer or adjudicator) quickly turns into a "discrepancy", a reason for doubting the truth of what is being said. Many asylum applications fail because the asylum seeker's credibility has been weakened due to inconsistencies in the application (Refugee Council **The State of Asylum; A Critique of Asylum Policy in the UK** 1996, referred to by Heaven Crawley, **Women As Asylum**

Seekers: A Legal Handbook (ILPA 1997) at page 33.)

Translation of documents is difficult enough, but simultaneous interpretation in a court hearing, particularly when mental states or intentions are being described, is near impossible. 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 statements.) 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 is 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 that the ECO's approach was wrong. The explanatory statement was formally amended to show this. Not all HOPOs are as reasonable.

> *In a footnote to "The Heart of Midlothian", Scott records that, when Porteus was questioned in the House of Lords about what kind of shot had been loaded in muskets, he answered, "Ow, just sic as ane shoots dukes and fools with". This reply was considered as a contempt of the House of Lords, and the provost would have suffered accordingly, but that the Duke of Argyle explained that the expression, properly rendered into English, meant "ducks and waterfowl".*

Of course, 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. Frequently, the worst misunderstandings are when the parties genuinely believe that they understand, and are understood by, one other.

In **Women As Asylum Seekers: A Legal Handbook (ILPA 1997)**, Heaven Crawley warns that, during an asylum interview "both the interviewer and the interpreter should be aware of the difficulties in interpreting particular words, such as "rape" or "assault", which may have different meanings or connotations in the applicant's language. In addition, it is not difficult to imagine the reluctance of a female applicant to testify about her experiences through a male (or even female) interpreter who is a member of her community. (page 23).

Language, although central, is not the only problem. Serious though less obvious difficulties arise in the field of "body language". An understanding of these matters is vital not only in predicting how one's client will fare as a witness in court, but how best to deal with the client when taking instructions. 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 urban client

will come with assumptions quite different from those in the mind of an illiterate man from a rural background. A person from one background will think it disrespectful to look another person in the eye; a person from another culture will regard an avoidance of eye contact as a sign of "shiftiness". "In many authoritarian regimes and cultures, it is impolite, wrong, especially for a woman, to look one's superiors in the eye. The eyes must be cast down. This fact has been beaten into many a torture survivor" (Gill Hinshelwood "Interviewing Female Asylum Seekers", quoted in **Heaven Crawley** page 36). "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** page 37).

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 as recently as the coming into force of the **Immigration Act 1988**, it was possible for persons settled here to be joined by more than one wife, and there are in Britain today many families in which a man lives together with two or more wives and their children. To what extent is a lawyer (or Adjudicator) influenced (perhaps unwittingly) by ethnocentric views? There are many instances where what is deemed acceptable abroad is not acceptable here, and **vice versa**, and the whole field is both sensitive and complex. (The best exploration of these problems is still Sebastian Poulter's excellent **English Law and Ethnic Minority Customs (Butterworths 1986)** but this is now in some respects 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).

> **Heaven Crawley** (p26) records a Somali woman's recollection of the officer who conducted her asylum interview: "When I explained some things about my culture he just laughed. For example I was saying that my father and mother had only me and then he had another woman with whom he had a son. He had five children with her and my father had three wives altogether. He just started laughing. I asked him why. I explained that he should understand and shouldn't laugh. I was very frustrated and humiliated."

British intolerance of polygamy has serious and absurd financial implications: in **Bibi v Chief Adjudication Officer and Another** (Times Law Report 10 July, 1997), the Court of Appeal held that on the death a man who had married polygamously, no wife was entitled to a widowed

mother's allowance, despite the fact that the man had paid national insurance contributions.

Certain clients may wish to see their lawyer when accompanied by other family members. Some young women may be reluctant to talk, without a male relative present. The problem is that there are some things they cannot say in the presence of a close 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 a 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).

Systems of respect and deference in certain cultures may prevent a person contradicting or appearing to know more that 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 to address one's parents directly. Equally, the conventions of certain family structures mean that, although one has a "respectful" relationship with parents or elder brother, one might have a 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). So, when the question is asked "how did your marriage come to be arranged?" the answer may well be intricate. Some clients, fearing that explaining all this to a lawyer will result in them being thought "devious" or (more likely) 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). Many problems in primary purpose cases arose because the parties to the marriage "simplified" the steps leading up to the decision to marry, the "simplification" was interpreted by Entry Clearance Officers and Adjudicators as "dishonesty" and a perfectly genuine case would fail. Also, "women from certain cultures where men do not share the details of their political, military or even social activities with their spouses, daughters or mothers may find themselves in a difficult situation when questioned about the experiences of their male relatives" (from CIRM **Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution: UPDATE November 1996, D (Annex 5, 195)** quoted in Heaven Crawley (page 34).

In the early editions of **Immigration Law and Practice**, Ian A MacDonald quotes the memorable phrase "Thanet House slumbers while Brixton burns". But in those days, most individuals sitting in judgement at Thanet House would at least have had some inkling of where Brixton was; some might even have visited Brixton. Now, almost 20 years

later, we have adjudicators some of whom have never heard of Green Street, and appear to have no curiosity about the thriving and lively ethnic communities in that part of East London. There are no quick or easy answers. In a multicultural society, it is astonishing that people (including lawyers) have so little knowledge, and no curiosity, about the cultures of other ethnic or religious groups who may live a few hundred yards away. A cultured QC may well pride himself on his knowledge of Horace and Plato, while never having read a line of Ibn Khaldun, Kalidas, Ghalib, or Iqbal. The great Muslim Festivals of **Eid** - in which hundreds of thousands of people here participate - are not considered worthy of mention in the national press or on television - other than in the context of a warning of possible traffic congestion in Southall. Until there is vastly more knowledge and understanding of ethnic minorities and their rich and diverse cultures, members of those minorities will continue to have a very raw deal whenever they come into contact with the law.

The myths of "credibility" and "discrepancy evidence"

The (largely bogus) notion of "credibility" is central to our legal system. In many cases, the decision as to whether or not to advise a client to give evidence must depend on one's assessment of the probability of a court coming to an adverse finding on credibility. (It is wrong to assume that oral evidence is always essential: even "primary purpose" appeals could be won without the need to subject the client to the unpleasantness of having to give oral evidence). Many immigration adjudicators are prone to adverse findings on credibility; once you have an adverse finding, the Immigration Appeal Tribunal will refuse to give leave to appeal, because, not having heard the witness - or more likely, the interpreter - the Tribunal is in no position to substitute their view of a witness for that of the adjudicator who heard the evidence. A moment's reflection, of course, will show that the whole thing is nonsense. A finding of credibility is **not** a finding of fact. **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", and **Bingham J** (as he then was) identified the problem in an article in **Current Legal Problems, 1985 page 1**:

> " 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 be given is that it all

depends on the impression made by the 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." (Quoted by **Webster J** in **R v Secretary of State ex parte Dhirubhai Gordhanbhai Patel [1986] Imm AR** p 208).

Immigration adjudicators' findings on credibility are frequently - and demonstrably - wrong. When DNA finger-printing became available in the mid-1980s to establish disputed family relationships, there were large numbers of cases where DNA tests proved that men whose credibility had previously and repeatedly been doubted, had in fact been telling the truth all along. In the case of **Surab Ullah**, a man's application to bring his son to this country from Bangladesh was refused; enquiries in Bangladesh produced overwhelming support for the claimed relationship, but the adjudicator who heard the appeal found the sponsor "a completely unimpressive and deceitful" witness. A DNA test then established that the relationship was 7,000 million million million times more likely than not. That is, this "completely unimpressive and deceitful" man was in reality perfectly truthful, and if anyone was "completely unimpressive", it was the adjudicator, purporting to be a reliable judge of character. There is clearly something seriously flawed in a system where such hopelessly inaccurate assessments of credibility arise. (see **Home truths written in blood**, Graham Smith, **The Independent, 16 December 1988**).

DNA tests are helpful in limiting the damage done by uninformed or erroneous findings on credibility in relationship cases. One of the most disturbing areas of immigration law during the 1980s and 1990s was that involving the notorious and shameful "primary purpose" rule in marriage cases. Persons wishing to come from abroad to join husbands or wives settled here were required to show that settlement was not the "primary purpose" of the marriage. The applicant was interviewed at the British post abroad, the sponsor in this country gave evidence at the hearing of the appeal, and, since what was at issue was the applicant's mental state at the time he or she decided to marry, credibility was all. The burden of proof was on the appellant. There was a very high refusal rate, while the success rate on appeal was dismal, with adjudicators regularly coming to findings on credibility in respect of people from countries they had never bothered to visit, whose languages they did not understand, and of whose culture they were ignorant. In practise, 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". In fact, with almost no exceptions, ECOs too know nothing of the language and almost nothing of the culture and religion of the

country in which they are temporarily posted. (In one case, IMM\ECR 0224\91, 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!). Each new ECO is provided with a "Best Practice Pack", which is supposed to set out details of cultural awareness and local customs, and the Foreign Secretary had in 1998 appointed an adviser on ethnic minority issues within the FCO who provided advice to various posts on a continuing basis. (ILPA Seminar: Entry Clearance and Decision Making 8 September 1998, question and answer booklet, page 14). Sometimes, an adjudicator goes even further than the ECO, finding that a couple had not even lived together in Bangladesh, even where the ECO had made no such allegation (Mrs C M Kennedy, **TH 112 96**); this is an excess of jurisdiction (**R v IAT ex p Akhtar and Bowen (1982) 126 Sol Jo 430 QBD**) where it was held that the appellate authorities' jurisdiction is wholly limited to deciding what is referred to them by the notice and grounds of appeal (as amended) and by the respondent's written explanatory statement). In **Iftikhar Khan (TH 3191 96)** the ECO had given "primary purpose" as the sole reason; dismissing the appeal (without a hearing and with no fresh evidence), **J C Bartlett TD** opined that "the alleged period of cohabitation after the marriage, and other evidence before me, is insufficient to satisfy me that the parties intend to permanently live together as the spouse of the other as required by paragraph 281 or to show any devotion". What adjudicators know about expressions of matrimonial devotion in South Asia is not always clear.

"Credibility" is also central to asylum appeals. In **R v IAT ex parte Nalokweza [1996] Imm AR 230**, a special adjudicator found an asylum seeker from Uganda a credible witness and allowed his appeal; the Tribunal (seeing no reason to disagree with the findings on credibility) remitted the case for hearing **de novo** (on the basis that the Adjudicator had not fully considered the likelihood of persecution in the future), and the second adjudicator concluded that the appellant had not been truthful; the Divisional court held that the second adjudicator (who heard no oral evidence) could not be bound by any of the findings of the first adjudicator.

In **Jaoa Matinkima (14426)** - an asylum case - the Tribunal stated that "it is important to stress however that an assessment of credibility is not indispensable. There will be many cases where the adjudicator finds the person totally credible but nonetheless decides that there would be no well founded fear of persecution for a Convention reason if he returned. There will also be cases where the adjudicator finds the appellant lacking in credibility as to what happened, but when assessing the risk of return, forms the view that there is indeed a well founded fear of persecution. Decision makers at all levels would be well advised not to apply credibility findings too rigidly, because in doing so there is a strong likelihood that they will forget the paramount question which requires an

answer; namely what is the risk of return"

In her introduction to Heaven Crawleys' **Women as Asylum Seekers: A Legal Handbook (ILPA 1997)** Helena Kennedy QC warns that women asylum seekers are "often filled with shame, even though they are the victims, and this feeling of self-disgust may be even greater when they hold strong religious beliefs. Those assessing the credibility of women asylum seekers can misread their demeanour in the absence of knowledge about the long-term effects of such abuse". In the same book (page 23), reference is made to **Salma Jamil (13588)**, where "the representative pointed out to the IAT that the appellant, being a Pathan woman, would have been frightened to explain her fears regarding sexual violence at the asylum interview, because both the counsellor and interpreter were male Muslims . The Tribunal rejected that contention as it appeared to them that

> "the appellant is an educated and sophisticated woman. She was not a rural agricultural worker from a remote village and we do not believe that had she anything to say she would not have done so simply because there were male Muslims present. Accordingly, in our view, our finding must reflect adversely on the credibility of the appellant"

MVD figures for 1997 show that, of 18132 applications received in Dhaka, 5829 (30.35%) were refused. The figures for Islamabad were 33011 applications received, with 5974 (21.72%) refused. In New Delhi, 54137 applications were received, and 7200 (13.24%) were refused

Departure from tradition

The following are passages from a Determination of J C Bartlett TD, dated 7 February 1997 (TH/3191/96)

> "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 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, given his experience of working abroad, that he saw marriage to the sponsor as the key to entry 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"

Cousin marriage, although permitted in Islam (and generally prohibited in Hindu law), was never the norm; a typical family tree taken in Moulvibazar 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 Limited, Dhaka, 1987, p81), but the numbers are far fewer than sometimes suggested by ECOs: in a survey of 1719 first time Muslim marriages, 62 (3.6 per cent) were parallel-cousin marriages and 84 (4.9 per cent) 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.

Approaches to "tradition" and "culture" presume uniformity

The failure 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 in the number of women in professional roles must be taken into account. In one family, grandfather may disapprove of cameras and photographs; father may be happy with photographs but may draw the line at videos; the son might regard videos as quite acceptable.

Is it ever useful to talk about "Islamic culture"? Does the culture of Bengali Muslims have more in common with that of Bengali Hindus than it does with the culture of Muslims in other parts of the world?

"I have tried hard to understand what this "Muslim culture" is, but I confess that I have not succeeded. I find a tiny handful of middle-class Muslims and well as Hindus in north India

> influenced by the Persian language and traditions. And looking to the masses, the most obvious symbols of "Muslim culture" appear to be: a particular type of pyjamas, not too long and not too short, a particular way of shaving or clipping the moustache but allowing the beard to grow, and a lota with a special kind of spout".

Nehru, Jawaharlal, **An Autobiography** (London 1953), quoted (disapprovingly) in **Islamic Culture in Pakistan**, by Dr Abdur Rauf (Lahore 1988).

Assertions such as "Bangladesh is a strict Muslim country" are no more than meaningless generalisations. In 1974, the population of Sylhet was 4,760,000, of whom 3,932,000 were Muslim, and 492,000 (over 10%) were Hindus. In some areas of Sunamganj, the proportion of Hindus is greater. In the 1991 census, Hindus accounted for 12.2 per cent in Bangladesh as a whole.

See Manisha Roy's **Bengali Women** (University of Chicago Press 1972) for a detailed description of middle class urban Hindu women.

In **Arshad Begum (17309)** (I&N L&P vol 12, no 4, 1998, page 159), a deportation case, expert evidence was given by one 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 an 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"

Typically, 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)** 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 (I&N L&P vol 13, no 1, 1999, p19)

1b Problems remaining after the abolition of "primary purpose"; maintenance and accommodation; intention to live together

How much money does one need?

Comparing a wage (at the time of the hearing) of £132.47 with the income support figures for a family of that size (£104.85), G D Thompson Esq (TH/4535/96) accepted that the income was "well above the total income support figure .. and sufficiently far above it to take account of the extra factor mentioned in the decision of Azem". (In Azem (7863) the Tribunal held that, to the income support figures had to be added a sum for the free entitlements which a person on income support receives, such as prescriptions, eye tests and free school meals.)

Mr Ockelton's Tribunal (**Momotaz Begum + 5 (18699)** though that income support was "an appropriate comparator in order to assess whether the income available to the sponsor and his family would be adequate"

Where the sponsor was earning £125 per week but there was no evidence of her outgoings (she had children and was repaying jointly with her brother a mortgage of £150 per month) it was (thought Mr Parkes' Tribunal in **Md Irshad (L 17973)** not possible to say whether the appellant would be adequately maintained. At least one Tribunal Chairman (Mr Fox) has expressed the view that a standard sponsorship declaration would be helpful, giving full details of income and expenditure. But in many cases, this approach would be unjustifiably intrusive: a person who sponsors another to come from abroad should not as a result lose his or her right to privacy. Practitioners should not encourage the "nosey parker" tendency. A more useful formula would be one where set amounts are used in calculating the sponsor's ability. If, for example, a person with a certain income and a given number of dependants would not qualify for free advice under the Green Form Scheme, then it should be accepted that he meets the requirements of the immigration rules.

The "Green Form" argument was rejected by G D Thompson Esq in **Md Lal Miah (TH/2223/97)**, who directed himself that the correct test was that set out in **Azem**. In **Lal Miah**, the sponsor's income exceeded the income support figures by £15, which Mr Thompson held was insufficient. In **Monwara Begum (16022)** the sponsor's Severe Disablement Allowance and Disability Living Allowance totalled £106, which was held to be sufficiently above the level of Income Support paid to a couple (£77 at the time) for the sponsor to be able to maintain the appellant without additional recourse to public funds. In **Chowdhury (16572)** Mr Rapinet found that £140 a week was not enough for a couple and 5 children. In **Gurbinder Singh (16570)** Mr Maddison found that £140 was enough for the sponsor and her husband. In **Ejaz Ahmed (16575)** Mr Maddison found that £120 a week was adequate for a couple.

"additional" reliance on public funds

In **Md Habibur Rahman (14257)** an application to join a wife for settlement was refused on the grounds of maintenance and accommodation. At the date of decision, the sponsor was living with her parents, who received housing benefit. The appeal was dismissed by the adjudicator, but the Tribunal decided that the correct test was whether the appellant's entry would cause additional recourse to public funds. (**I&NL&P, vol 11, no 4, 1997, page 135**)

Kausar v ECO, Islamabad [1998] INLR 141-264 Number 2, 141

Accommodation

IAT in **Mohammed Shabir (15665)**:

> "There appears to have grown up a practice for Adjudicators to look for evidence from the Council as to overcrowding, as requisite independent evidence that suitable accommodation is available. 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. In this particular appeal there is sufficient evidence that there was accommodation available and both the owner and the sponsor give evidence that it is suitable and not overcrowded. There is no reason that we can see not to accept this and we are satisfied therefore as to the issue of accommodation"

The same view was expressed in **Wajidur Rehman (16671), [1998] INLR 500** , where 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 application or appeal. The primary evidence as to the adequacy of accommodation should come from the applicant and the 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"

Where the local council stated that the matrimonial home would not become statutorily overcrowded if the appellant were admitted, the council's comment that it was "congested" is irrelevant: the requirements of the rules are met (according to Mrs Mannion's
Tribunal in **Sultana (19218)**

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.

For a brief period, ECOs in Dhaka used to annex a report from **The Express on Sunday** (3 August 1997), to the effect that pay slips and P60s and P45s are "extremely easy to obtain".

> **R v IAT ex p Rehana Begum [1993] Imm AR1**
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> **Macpherson J** held "that the right test was applied and that the right time was looked at, both at the date of the decision and, alternatively, on the facts then in existence as to the date that they would be able to do so were the appellant granted entry clearance; that is to say, the date in the future, which might be the date of which the appellant would arrive in this country".

According to Mr Ockelton's Tribunal (**Momotaz Begum + 5 (18699)**

a. if the requirements of the rules were met within six months of the date of decision, that of itself does not mean that the test has been passed; it must be shown that what happened during those six months was reasonably foreseeable

b. contrary to Judge Cotran's approach in **Hasna Begum (15629)** the income which any dependent children might obtain by working after admission cannot be included in the calculation of the income available, since, if the children are going to be working, "they are not dependants, and they are not entitled to admission at all" (as held in **Belaith Hussain (11372)**

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). The approach revealed by the use of this phrase is, of course, highly objectionable, and shows that the correct standard of proof has not been applied. (**Adedeji (16415)**.

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 complete misapprehension. In one case, ECO C A Edwards (Dhaka) recorded (in a statement dated 7 January 1999):

> 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 employer's National Insurance contributions was included. This showed that the total National Insurance for the 1997/98 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 that the wage quoted by the sponsor

320(12)

Illegal entrants who marry and have children are still liable to be removed (and there was no legitimate expectation that the Home Office would follow the European Convention on Human Rights in the exercise of discretion; no distinction could be drawn between the exercise of a discretion derived from statute and one derived from the prerogative, **R v SSHD ex parte Mohammed Hussain Ahmed and Idris Ibrahim Patel [1998 3rd Quarter] Imm AR 375**). [In a written answer on 24 February 1999 to a Parliamentary Question, Mike O'Brien confirmed that "for a number of years it has been the practice of the IND not to pursue enforcement action against people who have children under 18 living with them who have spent 10 years or more in this country, save in very exceptional circumstances. We have concluded that 10 years is too long a period. Children who have been in this country for several years will be reasonably settled here and may, therefore, find it difficult to adjust to life abroad. I future, the enforced removal or deportation will not normally be appropriate where there are minor dependent children in the family who have been living i the United Kingdom continuously for 7 or more years. In most cases, the ties established by children over this period will outweigh other considerations and it is right and fair that the family should be allowed to stay here. However each case will continue to be considered on its individual merits"]

During the last few years, 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 illegally. Some were advised by immigration officers that such applications to British Posts abroad would be very straight forward! Where immigration officers propose to remove a spouse as an illegal entrant, the standard advice given is that "the major obstacle to the issue of an entry clearance" is the question of the "genuineness of the relationship", and IOs make no mention at all of the provisions of paragraph 320(12). (**Alan Birch's letter concerning the case of B A New**)).

There was of course always a danger that such applications would fall foul of 320(12) of HC395. In **Ibeakanma** (TH/22257/96), **Ms D Levine** held that "The 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 practice, where the decision is refused on other grounds, there is of course no need to consider 320(12), and this was the position in **Ibeakanma**. Mr Ockelton's Tribunal (18632), satisfied that the marriage was genuine and all other requirements of the rules were met, found that they could not themselves exercise a discretion which has 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".

Third Party support

The Tribunal have on occasions taken the view that sponsors must support themselves and should not rely on support given by others (Ahmed (Bashir) [1991] Imm AR 130; Hussain (Mohammed Jahangir) [1991] Imm AR 476, and, more recently, in **Chowdhury (16572)**, Mr Rapinet thought that "an undertaking by a third party .. could be of little or no value."

(The wording of 41(vi) of HC395 does, in the context of applications made by visitors, distinguish between the two: "will maintain and accommodate himself and any dependants adequately out of resources available to him without recourse to public funds or taking employment, or will, with any dependants, be maintained and accommodated adequately by relatives and friends").

The correct approach to be adopted in settlement case is that "evidence of support to be given by others can satisfy the rule if sufficiently cogent to be accepted" (**Macdonald 4th edition p322**); "this is more likely to occur in the case of short-term support from the third party". (Azad(5993), Khan(6283), Modi(9714) where the wife of a 62-year-old unemployed man in receipt of public funds was admitted on the basis of an undertaking of support by the sponsor's son.

Some adjudicators now believe - apparently relying on **Ishaque Ahmed and others CA 14-11-96 order of consent** - that "evidence of third party support may satisfy the requirements if cogent and for short periods of time. It needs clear evidence that other members of the appellant's family will be able to maintain the appellant and sponsor and their dependents for a very limited period of time until they can maintain themselves in the United Kingdom", and the (meaningless) phrase "very limited period of time" now appears in letters from Dhaka. In **Ishaque Ahmed** Stuart-Smith LJ stated that "..although applicants .. must normally provide evidence that they would be able to maintain "themselves", if there is clear evidence that other members of the applicant's family will be able to maintain them for a very limited period of time until they can maintain themselves, that is a fact which the immigration and appellate authorities may take into account".

Annex H to the Immigration Directorate's Instructions of June 1997 states that "A couple who are unable to produce sufficient evidence to meet the maintenance requirement, may provide an undertaking from members of their families that they will support the couple until they are able to support themselves from their own resources. This is not acceptable, as the Rules require the couple to support themselves and any dependents **from their own resources**. Nevertheless, 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". (I&NL&P vol 12, no 2 1998, p74).

But Professor Jackson held (in Yousaf (9190) that long-term third party support is acceptable, and it is clear from cases such as **Khayrul Alam Mozumder (16582)** that Judge Slinger's Tribunal is perfectly happy with the notion of third party support over a lengthy or indefinite period. ("Ms Jeffery accepted in principle that third party support did not disqualify the Appellant. It was always a question of fact whether it was a relevant factor - third party support in the short term calling for less rigorous scrutiny than long term support"; the Tribunal decided that "the assessment of financial support as any other fact is a matter for decision in the particular circumstances of each case".)

In **Parkar (17948)** the sponsor was still at school, and would then be going to university, so would be unable to support for several years; the appellant was well-educated, had a good job in Bombay, and had savings and investments; the Tribunal accepted he was likely to obtain employment within a reasonable time of arrival here, and, in the meanwhile, according to Mr Care's Tribunal, third-party support from the sponsor's father was acceptable, and such support was to be expected of "families within the culture group from which the parties come".

The belief that third party support must be for "a limited period only" was affirmed by Mr Hatt's Tribunal in **Khan + 6 (16392)**. But Mr Rapinet's Tribunal (in **Nguyen (18738)** "would not rule out third party support for an indefinite period if a sufficiently large sum of money were settled upon the couple, or a deed of covenant drawn up binging on the covenantor's successors."

Mr Warr's Tribunal in **Ali (19736)** 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: see Richard McKee "Primary purpose by the back door? A critical look at "intention to live together", I&N L&P, vol 13, no1, 1999, p3.

In **Satnam Singh (19068)** Judge Cotran's Tribunal allowed the appeal of a man refused indefinite leave to remain, where the Home Office thought he did not intend living with his wife because "he worked a night shift, and when he got home in the morning he slept next door, as his wife and her parents lived above a shop". The Tribunal held that "intention to live together" has "nothing to do with sleeping together in the same bedroom every night"

In **Mahmood (16197)** the ECO was satisfied the couple would live together, albeit only in the UK, but the HOPO raised at the hearing the issue of intention, and the adjudicator dismissed the appeal on that basis (!). The Tribunal held that all the evidence pointed the other way (the couple had cohabited for one month after the wedding, the wife had moved in with her in-laws, and the husband had been back to visit her in Pakistan) and allowed the appeal

Factors deemed significant by ECOs include

1 past immigration history: "the appellant initially stated he had gone to the UK with a false passport for a visit but later stated 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

2 reasons given for the marriage; "As the appellant was in the UK illegally his uncle told him that if he married he could obtain permission to stay"

3 circumstances surrounding the marriage; "none of the appellant's family came from Bangladesh for the wedding"; "it did not appear to be a traditionally arranged marriage in which both families were involved in the proposals and arrangements, but appeared to have been arranged in haste"

the parties' account of the relationship (the initial meeting in 1994 in Bangladesh when the sponsor was on holiday)

discrepancies in the parties' accounts: "he stated that they had not met before the marriage was arranged two weeks before the wedding, yet she stated that she

had met him two to three months before the marriage"

dowry of £2500 was paid immediately at the time of marriage, and the ECO thinks that this is unusual and suspicious

4 "you were only 18 at the time of marriage, while your husband was ten years older"

5 "the marriage was arranged very quickly after your husband's illegal entry"

6 there was no evidence to show that the couple had lived together after the marriage, until the husband's departure from this country

7 the sponsor did not travel abroad with the husband when he was forced to go back to Bangladesh "the sponsor had not accompanied the appellant when he was removed to Bangladesh although she did attend the interview in August 1998"

8 husband said that the wife would not be prepared to live with him in Bangladesh ("I don't think she would come to live here as she has a job there")

9 doubts about whether the couple lived together in UK after marriage, and before 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"

(above quotes taken from statements prepared by D C Bradley, Dhaka, December 1998/January 1999.)

2 Making an application for entry clearance; practical considerations

> A man from Pakistan settled here seeks advice on the steps he needs to take to prepare the ground for an application to the British Post in Islamabad for an entry clearance to enable him to bring his future wife (a distant cousin, who is currently a student in Pakistan and whom he plans to marry within the coming year) to join him for permanent settlement. He currently works as a controller in a minicab office. He lives with his brother, but is currently exploring the possibility of buying a home of his own. He plans to set up his own business.

In **Rafiq (G0049)**, the Tribunal held that where the sponsor runs as small business (in that case a partnership not a limited company) it was unwarranted to demand fully audited accounts.

ECOs believe that many P60s and payslips are forged, (but seem to have abandoned the practice of annexing to explanatory statements a press cutting from **The Express on Sunday**, about an organisation called **Multimedia Bookkeeping**.)

Although the Post in Dhaka prefer drafts from ANZ Grindlay Bank (the High Commission's bankers) they do still accept **Sonali Bank** drafts. In a letter dated 26 January 1999 (reference 46909), the Registrar (Immigration) at Dhaka (Anne-Marie Burton) confirmed that:

> An application is accepted as valid provided we have received a completed IM2A for **each** applicant including children. The other forms .. are the IM2B, which must be completed with the sponsor information and also information regarding the applicant's prospective employment in the UK. The IMM.1 is a locally produced form, which assists with our research and the COMP2 [is] again a local form assisting us with computer input. Neither of these forms is mandatory to accept an application, however the more completed forms received at time of application helps to speed up the processing. I must stress however that the IM2A must be fully completed by each applicant otherwise the application cannot be processed and will be returned to the sender.

It is questionable whether an application, with the correct fees, can be rejected as invalid just because a particular form has not ben completed. The rules specify the payment of fees, not the completion of the correct form.

2 a if refused, should one appeal, or make a fresh application?

although the situation is constantly changing, it can still take a year to get from refusal to appeal hearing.

1 ECOs can take 9 months or more to prepare an explanatory statement; (ECO Accra refused (their reference 000773/98) a child an entry clearance on 30 January 1998, notice of appeal was sent on 9 April, and the explanatory statement was not despatched until 3 February 1999) "The delay was due to an increased number of applicants here for entry clearance which unfortunately led to delays in much of our subsequent paper work" ((ECO's letter 19 May 1999)

2 Some Adjudicators can take more than four months to produce a Determination

Sultana Akter, heard by Mrs N Bird on 18 September 1997, determination dated 6 February 1998

Rizwan Ahmed (TH 4589 96), heard by Ms A C McGavin on 30 September 1997; determination dated 4 February 1998, not sent out until the following month

Md Lal Miah (TH 2223 97) heard by G D Thompson Esq on 24 February 1998; determination dictated on 21 May 1998, but not posted until 6 August 1998

In the event of the appeal going to the Tribunal, the situation is even more dire:

In **Ibeakanma**, an application for leave made on 3 June 1997 was not granted until 2 October 1997 (4 months later), and the Tribunal did not here the case until 25 June 1998

An application for leave in **Abdul Kadir Babul (TH 1395 96)** made 30 October 1997 was granted on 27 March 1998 (5 months later)

Against this background, Judge Pearl in **Ahmed (17388)** thought that for an adjudicator to take 8 weeks to write up his determination was "far too long in a case of this type" (and there was a further four weeks before the determination was sent by post. By the time the matter came before the Tribunal they had to examine what the situation had been three years previously.

In Milad Ahmed (**Aysha Bibi TH 3088 96**), the Adjudicator heard the appeal on 12 March 1997, and dismissed it on 13 May 1997; leave to appeal was granted on 18 July 1997, the case was heard by the Tribunal on 12 February 1998, and the Determination finally arrived, 7 months later, dated 3 September 1998. A copy of the Tribunal Determination was sent to Dhaka, the ECO sent faxes to the Home Office seeking confirmation, no reply was received, and, on 15 January 1999, more than 4 months after the appeal was

allowed, an application for **mandamus** was made. Collins J directed the Home Office to attend an oral hearing not later than 14 days after service "to show cause why an immediate order of mandamus should not issue and they should not pay the costs of this application". The EC was finally issued on 3 February 1999

Recommendations.

In **Ayed Ali** (13077), Professor Jackson's Tribunal dealt with a case where, in the light of an adjudicator's favourable recommendation, representations were made to the Home Office on behalf of an appellant submitting current evidence relating to accommodation and maintenance; the Home Office replied that consideration of fresh evidence was a matter for the ECO who would probably insist on a fresh application being made but who would no doubt take account of the adjudicator's recommendation. The Tribunal stated that bearing in mind the history of the application, the lengthy delays which had already occurred, the Home Office letter "can only be called unhelpful" and added that "we see no purpose whatsoever in insisting on a fresh application to the Entry clearance officer who is an officer of the home Office, particularly when the matters at issue are wholly focused on this country. Given that .. the maintenance and accommodation requirements are complied with to the satisfaction of the presenting officer (and) to the adjudicator and to us, it seems to be as unnecessary as it is lacking in compassion for the appellant to go through the formal hoops of another fresh application".

Recommendations made by adjudicators, quoting the Tribunal's comments in Ayed Ali were generally accepted by British Posts abroad, though this has now changed. For example, in **Mostafa (16271)**, the Tribunal recommended that the ECO grant entry clearance, without requiring a fresh application, but Geoff Brindle at the Home Office wrote to say that such recommendations would not be acted upon.

The situation is terribly unfair, since everyone knows of cases where the MP has taken the matter up, and a recommendation has eventually been acted upon, where the HO and ECO had previously insisted that it would not be. This unpredictability makes it difficult to advise whether (1) to pay the fees and make a fresh application, drawing the ECO's attention to the recommendation, or (2) ask the Home Office to act on the recommendation hoping that the outcome will be positive, but fearing that, after many wasted months, the Home Office will remain obdurate. With 17 year old children, there is of course the danger that, if it is finally decided not to act on the recommendation, it may be too late to make fresh applications by the time the Home Office decision is finally confirmed.

2b When an appeal is allowed.

> "With regard to our procedures it is the responsibility of the After Entry and Appeals Directorate Appeals Section at Lunar House when an adjudicator has allowed an appeal (and when it is not intended to challenge the decision) to notify the Entry Clearance Officer of the outcome and to issue instructions concerning the issue of entry clearance. If an ECO appeal is dismissed or if. in an allowed appeal leave to appeal to the Tribunal has been granted, the responsibility lies with the Presenting Officers Unit to notify the outcome to the Entry Clearance Officer. This is only possible once the Adjudicator's Determination has been promulgated. It is unfortunate that copies of determinations are not always copied to the Home Office and that we can thus remain unaware of the outcome of an appeal. **It is usually following representations from the appellant's representatives that such matters are drawn to our attention.**. Due to the volume of papers involved all determinations are sent via the diplomatic bag. Only in exceptional circumstances will determinations be faxed to the Entry Clearance Officer. The majority of decisions concerning a case are completed by the appropriate Directorate, and in order to take a decision the officer needs to see the file to ensure that there are no other outstanding matters which needed to be considered: this is especially true when the issue of entry clearance is involved. In your client's case a decision could not be taken as the file was at the Presenting Officer Unit - where they do not have the authority to make such a decision. It was therefore necessary for it to be returned to the appropriate Group before instructions could be issued to the Entry Clearance Officer" (Letter to Bindman & Partners dated 16 July 1998 from Mary Bowden, Assistant Director, AEAD, HO ref: A539983; my emphasis)

After an appeal is allowed, it is frequently necessary to press the Home Office for action; it is very frustrating to ring the Home Office, quote the name and date of birth of the sponsor and appellant, and then be told that they have no file in either identity. Giving them the ECO's reference number leads nowhere, and the HO reference number is almost never quoted on the explanatory statement). To avoid this problem, it helps always to ask the Presenting Officer at the hearing for the Home Office reference number.

In a letter dated 15 September 1998, Kim Head of Asylum & Appeals Policy Directorate (reference A539983) wrote

> "we would expect an Entry Clearance Officer to act upon receipt of a determination from an appellant or his representative, in the absence of his own copy, by faxing the Immigration and Nationality Directorate for confirmation chiefly that no application for leave to appeal has been granted"

What should one do where the ECO **does** send a fax (or faxes) to IND, but receives no reply?

The sensible approach is that adopted by Mr B I Knight at Islamabad, who wrote on 23 February 1999 concerning a case which was allowed after terrible delays (at Taylor House) to confirm that he had sent an urgent fax to the Home

Office requesting that they expedite the matter. (Home Office confirmation was required under DSP chapter 10.11). "Should they fail to respond within 1 months we will request that Mr A attend for issue of his visa". Such an approach was also used in Dhaka under D J Wilson in the 1980: a fax was sent to the Home Office, and, if they could not be bothered to reply, the ECO would issue.

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 1½ 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.

Birth certificates in Bangladesh

It is still the case that very many births go unregistered, and the number of births where the event is recorded timeously must be very small indeed. Different procedures have obtained in different areas at different times. In most rural areas, the prime responsibility lies with the village chowkidar (a sort of village constable) - some of whom are very diligent and conscientious - and the Sanitary Inspector - some of whom, in my experience, keep very patchy documentation. An ambitious plan to introduce identity cards was considered a few years ago; a official I met in Rajnagar who was conducting a pilot survey told me that most people did not know their date of birth, and choosing a date to put on an identity card would inevitably be somewhat arbitrary; there is a widespread perception that current systems of registration are inadequate. Records kept by many Sanitary Inspectors are well-organised and scrupulous, but many people still consider the registration of births and deaths to be a waste of time, so the records are inevitably patchy.

3 **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] P 391 at 394, per Barnard, J; 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 [1964] P 233 at 246; [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 was 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 section 55 of the **Family Law Act 1986** and the only court competent to declare the marriage invalid would be the High Court or a county court (under section 63 of **Family Law Act 1986**) (Although this was raised as an issue in **Abdul Kadir Babul TH 1395 96 (16466)**, the Tribunal decided the appeal (as did the Tribunal in **Harrison (5366)**) on the basis that it is 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 appellant now said he had lied about that 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"

Hindu law

Hindu law does not favour concubinage, and marriage is presumed from long cohabitation and repute (**Alagammal v Rakkammal (1983) 1 M.L.J 311**); in **Bikash Kumar Mukherjee A.I.R 1979 Cal. 358**, the Calcutta High Court held that, where a man and a 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 his legitimate children

Although **Hindu Marriage Act (XXV of 1955)** provides in section 8 for the registration of Hindu marriages, 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]"

Islamic Law

Visa Officer Islamabad v Channo Bi [1978] Imm AR 182 and **Inayat Begum & others v Visa Officer, Islamabad [1978] Imm AR 174**

Hanufa Begum
Presenting Officers appear now to accept that, if DNA proves a couple in a Muslim country to be parents of a child, then the couple are probably married in accordance with local law

Naseem Akhtar (15412) concerned the validity of the sponsor's divorce from his first wife (in Azad-Kashmir) in 1989, and whether the divorce had been obtained by way of "proceedings" so as to come within the 1986 Family Law Act of whether it was obtained "other than by proceedings". The Appellant contended that the divorce had taken place pursuant to the Pakistani Muslim Family Law Ordinance 1961 and was thus a divorce obtained by way of proceedings The Respondent contended that the Ordinance did not apply in Azad Kashmir, and that the divorce was thus by way of bare talaq. The Tribunal found "a conflict of views as to whether or not the Muslim Family Law Ordinance applies to Azad Kashmir" and, following the case of **Maqsood Bi (10144)** "the fact that some procedures under the Muslim Family Law Ordinance had been carried out subsequent to the pronouncement of talaq (if they were) would no affect the position and the divorce was thus not conducted by way of proceedings and was not valid in the UK. (**I&NL&P**, volume 12 no 1 1998, page 30).

"It was the view of the Home Office that Muslim Family Law Ordinance did not apply in Azad Kashmir and bare Talak was

not capable of recognition (Section 46(2) of Family Law Act 1986). The Home Office had recently, however, been seen to confirm that Talak could be recognised after all" (ILPA Seminar: Entry Clearance and Decision Making, 8 September 1998, question and answer booklet, page 18)

The point came before the Tribunal again in **Akhtar (17071)**. The report and comment in I&N 1&P vol 12 no 4 1998 page 146 is as follows:

> "The sponsor pronounced **talaq** before witnesses at the Union Council offices in Azad Kashmir. The Council then drew up a divorced deed and sent it to the sponsor's first wife, who was elsewhere in Pakistan. But the Tribunal held that this was not a divorced "obtained by means of proceedings" under s 46(1) Family Law Act 1986. Because both parties had been habitually resident in England during the year preceding the divorce, they did no qualify for a divorce obtained "otherwise than by means of proceedings" under s 46(2) either.
>
> **Comment**: When a divorce is obtained through the Union Council in Pakistan proper, this is regarded as "obtained by means of proceedings". In the instant case, an attempt was made to imitate this procedure in the pseudo-autonomous Azad Kashmir. But the IAT would not have it. The trouble seems to be that the Muslim Family Law Ordinance 1961, which authorises the Union Council procedure, does not officially extend to Kashmir. The revised edition of Pearl & Menski on **Muslim Family Law** challenges this view. In another **Akhtar** (15412) which reached the same conclusion, Mr Maddison said that David Gordon's 1988 book on Foreign Divorced was the latest analysis known to the IAT. It says that the government of Azad Kashmir has not adopted the Ordinance, but its procedures are followed **de facto** by many Muslims, and Union Councils and Chairmen operate there."

 (footnotes on pages 39-42)

Just as it was right to abolish the "primary purpose" rule because (apart from anything else) it discriminated against applicants from cultures where arranged marriages are the norm, so it is necessary to look again at paragraph 310 (viii) and (ix) of HC395, which, in adoption cases, discriminates against United Kingdom residents from other cultures: namely, those cultures where childless couples are given infants born to relatives who already have several of their own.[1]

A couple in the Philippines, for example, may decide to dedicate their next-born child to a childless sister who lives with her husband in the United Kingdom. Such an arrangement strengthens bonds within an extended family, and would appear to most reasonable persons to be a broadly humanitarian gesture. It would however be looked upon with disapproval by British immigration law, which will admit an adopted child only where the adoption results from "the inability of the original parent(s) or current carer(s) to care for him" and where he "has lost or broken his ties with his family of origin"[2].

In **Re H (A Minor) (Adoption:Non-Patrial)**[3] a childless couple sought to adopt a 16-year-old boy, the sixth child of a related couple living in Pakistan. The Home Office argued that a breach of immigration regulations or policy could only be outweighed by the promotion of the welfare of the child, and accordingly the adoption order should have been refused because the applicants were not seeking to promote the welfare of the boy but "to resolve the personal tragedy of infertility." The Court of Appeal held that adoption applications were to be disposed of by reference principally to the Adoption Act 1976, s 6, whereby regard was to be had to all the circumstances of the case, with first, but not paramount, consideration to be given to the welfare of the child. "In cases such as the present it was an important consideration that immigration regulations and policy should be upheld. The courts would not allow an application to succeed that was used as a device to circumvent immigration controls."

(Paragraph 310 (x) of HC395 requires one to show that "the adoption is not one of convenience, arranged to facilitate .. admission to or remaining in the United Kingdom".)

Anxiety not to allow adoptions which the Home Office thought contrary to immigration policy led the courts into error. In **Re B (a minor) (adoption order:nationality)**, the Court of Appeal drew a curious distinction between the purpose of the adoption on the one hand, and the benefits of residence in this country[4] but, on appeal to the House of Lords, it was held that the court should not ignore benefits which would result solely from a change in immigration status when determining whether a child's welfare called for adoption, since this would be contrary to the express terms of s6 of **Adoption Act 1976** which required the court to have regard to all the circumstances and to trear the welfare of the child throughout his childhood as the first consideration. It would be wrong to exclude from consideration any circumstances which would follow from the adoption, whether they were matters

which would occur during childhood or afterwards.[5]

Where a child adopted abroad by an aunt or uncle cannot meet the requirements of paragraph 310, an application might succeed under paragraph 297(i)(f), but only where the adopter can show "serious and compelling family or other considerations which make exclusion of the child undesirable". Such cases are rare.

The problem does not arise where the adoption takes place in a country designated under the **Adoptions (Designation of Overseas Adoptions) Order 1973**, but, in practice, a great many cases of adoption within the family occur in non-designated countries, such as the Philippines.

In **Lewis (16953)** Mr Care's Tribunal thought that, for the purposes of immigration law, there are 4 kinds of adoption: (1) those authorised by a court in the UK, (2) those approved in a country specified in the Adoption (Designation of Overseas Adoptions) Order 1973, (3) those made by court order in a non-designated country, (4) informal de facto adoptions. Under 243 of HC 395 read with paragraph 6(d), children can only join adoptive parents who are here with limited leave if the adoption took place in a designated country. But under 310(v) children can join adoptive parents who are settled here if they were adopted "in accordance with a decision taken by a competent authority or court" in a non-designated country. In **Lewis**, there was an adoption order from the Philippines, and Mr Care accepted that it satisfied 310(v); but that paragraph imposes further conditions, and one of these was not satisfied. 310(vii) requires the adopted child to have the same rights and obligations as natural children, and there was no evidence whether this was the case under Filipino law. According to the note dealing with this case in I&N L&P vol 13 no 1, 1999, page 19, Home Office policy with respect to de facto adoptions is that 3 conditions must be fulfilled: (1) the adoptive parents(s) have been living and/or working abroad for a substantial period of time; and (2) during their time abroad, they have been caring for the child for a substantial period and have decided to permanently treat the child as their own and to accept all the responsibilities that involves; (3) the child in turn regards himself as the child of the adoptive parents and part of their family to the exclusion of his natural parent(s) and any family they may have (and this may well pose problems where the adoption is within the family).

In **Gurpreet Singh + 1 (18363)** Mr Parkes' Tribunal found that a deed of adoption registered in India by a Sub-Registrar under the Hindu Adoption and Maintenance Act 1956 was not "a decision taken by the competent administrative authority", within the meaning of 310(v) of HC395; the Registrar had not decided anything, but merely recorded a fait accompli

In **Satvinder Singh (L 18038)**, where the adoptive mother was the child's aunt, Mr Parkes' Tribunal thought that a legal adoption in India could not be recognised here, as India was not a designated country. The adjudicator had taken the view that the "strong cultural need" of the adoptive parents to have a son meant that the child's exclusion was undesirable, but the Tribunal disagreed. "To western eyes", the child "was growing up

in entirely satisfactory circumstances" with his natural parents. The cultural background of the natural and adoptive parents could not override the requirements of the rule.

A couple settled here are likely to be refused a visa to bring an adopted nephew or niece from abroad, despite having complied with the rigorous requirements of the law of the country in which the baby and his natural parents live. Such a couple are legally and financially responsible for a child, but cannot bring him or her to live with them in the United Kingdom.

Re Valentine's Settlement[6] provides for the recognition here of an adoption order of a court of a foreign country as conferring on the adopted infant the status of a child of the adopting parents. But the decision is usually read as affording recognition only if the adopting parents were domiciled in the foreign country at the time of the adoption order. (Arguably, questions of domicile and residence are **not** decisive, and were significant in **Valentine** only because they were at that time requirements for English adoptions; in his dissenting judgement Salmon L.J. observed that

> "It has been suggested that according to the theory of our law no foreign adoption should be recognised unless, at the time it was made, both adopted child and adoptive parents were domiciled within the jurisdiction of the foreign country and that this appeal should be decided accordingly. Our law, however, develops in accordance with the changing needs of man. These have always been ascertained by experience rather than by the rigid application of abstract theory. Adoption - provided that there are proper safeguards - is greatly for the benefit of the adopted child and of the adoptive parents, and also, I think, of civilised society, since this is founded on the family relationship. It seems to me that we should be slow to refuse recognition to an adoption order made by a foreign court which applies the same safeguards as we do and which undoubtedly had jurisdiction over the adopted child and his or her natural parents" (p 237)

In the event that domicile **is** crucial, there will be many cases where adopting parents (particularly those who have lived here for many years, and have established themselves here) will have difficulty in resisting a finding that they have acquired a domicile of choice in England; if the immigration authorities wish to raise domicile as an issue, enormous delays are inevitable, during which the adopting parents in this country, and the child and carers abroad, will be in a state of great uncertainty about the final outcome.

Just as one of the consequences of the "primary purpose" rule was that it was easier for a French woman working in London to bring her non-EU spouse to join her than it was for a British woman working in London to bring hers, so too in adoption cases, European nationals may find it much easier than British nationals to bring to this country children adopted in non-designated countries, although, in the absence of settled case law, the position is unclear.

In 1994, the Secretary of State instructed the British Embassy in Manila to refuse an entry clearance to a two year old boy, who had been adopted under the law of The Philippines by his aunt, who was settled in London, where she lived with her husband, an Italian national. The couple had no children of their own, and the boy had been "promised" to his aunt before birth. Although it was accepted that the adoption was valid in the Philippines, the Home Office argued that there had not been a genuine transfer of responsibility, and "was not satisfied that a prime consideration in adoption had not been in the sponsor's interests rather than the appellant's".

The significance of the sponsor's husband's Italian nationality, which had been completely overlooked by the Home Office, became the central point on appeal; with no hope of success under the immigration rules, it was argued on the family's behalf that the rules did not apply to European nationals in adoption cases (any more than the "primary purpose" rule applied in marriage cases).

Home Office policy on EEA nationals[7] is that EEA nationals adopting in non-designated countries would have their cases considered "outside European Community law and the Immigration Rules under the Home Secretary's general discretion" but would still have to show that the natural parents or current carers were unable to care for the child. Even more extraordinarily, it is suggested that "applications for entry clearance from de facto adoptees of EEA nationals i.e. children who have lived abroad with the "adoptive" parents for a considerable period will also be considered on a discretionary basis .. with an additional requirement that the child must have been "adopted" at a time when both sponsors were resident together abroad" (applying paragraph 310(vi)(a) of HC395).

It was easy to see that this approach was wrong, and far too restrictive[8]. It was more difficult to decide on what would be the correct approach. The starkly simple argument advanced on behalf of the family was that, for the purposes of ascertaining the immigration law rights of EEA nationals, "children" included adopted as well as natural children (giving "adopted" a definition broad enough to encompass adoptions in non-designated countries), and the boy thus qualified under Regulation 1612/68, Article 10(1) as being within the class "descendants under the age of 21 or dependant", or otherwise under Article 10(2), which provides for the admission of "any member of the family not coming within the provisions of 10(1) if dependant on the worker".

[There appears to be no case-law of the ECJ defining the terms "descendant" or "child", but the wording, scheme and purpose of Article 10 of 1612/68 clearly points to the inclusion of legitimate, illegitimate and/or adopted children within that definition irrespective of whether they are the joint children or those of the EEA national or of his or her spouse. It is important to remember that Article 4(3)(d) of 68/360 specifies that "the document issued by the competent authority of the State of origin or the State whence they came, proving their relationship" is sufficient evidence to secure the grant of the right of residence under 1612/68.]

After a three-month adjournment to consider this argument, the Home Office came up with no reply, and, on 17 January 1997, the appeal was allowed by M H F Clarke Esq[9]. Leave to appeal to the Tribunal was granted.

The first ground advanced by the Home Office ("an adoption in the Philippines is not recognised as valid in the UK in accordance with the **Adoption (Designation of Overseas Adoptions) Order 1973**") was promptly and correctly jettisoned at the first hearing before the Tribunal. Two grounds remained: firstly, the Home Office argued, there was no evidence that the child was in fact dependent on the Italian national, and therefore no claim arose under 1612/68 (a matter simply answered by the production of copious bank receipts covering a four-year period); secondly, the proposition was advanced that 1612/68 "states that "Member States shall facilitate the admission of the family member .." but does not give distant family members an automatic right to reside with an EEA national..", an approach which apparently attempted to define "facilitate" as meaning "refuse an entry clearance unless the child meets the requirements of the immigration rules".

After several further hearings at which various issues were explored (including the meaning of "facilitate", the applicability of **Re Valentine's Settlement**, and the question of the sponsor's domicile), the Home Office suddenly decided in November 1997 to withdraw their appeal against the Adjudicator's Determination, and the child was issued with a visa as "EEA family member/dependent son of an EEA national" by the British Post in Manila, and, on arrival, was granted leave to enter for an indefinite period. From the family's point of view the outcome was satisfactory (if a bit slow in coming: three years and eight months from application to final outcome) but from the legal point of view, the case raised a number of difficult questions to which no clear answers were provided.

On a correct analysis of European law, British immigration authorities may require only the production of an adoption order issued either by (1) the Applicant's state of origin, whether it is a Member State of origin of the worker (if s/he is the adoptive parent) or a non-Member state of origin of the spouse or (2) the country from which the Applicant came to this country, irrespective of whether that country is a Member State or not. Any additional requirement, such as a requirement of recognition of the adoption certificate by UK law is contrary to the requirements of EC law.

If it is correct that an adoption order made in a non-designated country gives rights under European law, the situation could arise where a foreign adoption, which might not be recognised in any European country, would be sufficient for the purposes of 1612/68, Article 10(1). Public policy considerations inevitably arise. Indeed, the **only** basis on which the UK could derogate from their obligations would be on the basis of "public policy, public security or public health"[10] .

5 Local enquiries. Hearsay evidence is admissible (even in habeas corpus proceedings: **in re Saidur Rahman [1997] Imm AR 24**).

(a) compassionate circumstances (para 317 (i) (e) and (f) of HC395); and

(b) "serious and compelling family or other considerations" (para 314 (i) (c); and

(c) "sole responsibility" (para 314 (i) (b); and

(d) applications for certificates of entitlement where

(i) DNA finger-printing cannot establish relationship (after the death of parent/s);

(ii) the applicant's age is disputed

(e) what would a person, whose marriage broke down before the grant of indefinite leave to remain, face if forced to return to South Asia? (A verdict of suicide was, in May 1997, recorded in the case of Monowara Uddin, a twenty three year old mother of two, who jumped from a tower block, fearing being sent back to Bangladesh where she thought her family would blame her for the broken marriage)

(i) investigations in the family home in Bangladesh helped secure a recommendation in favour of a divorced woman whose application for leave after the breakdown of her marriage had been refused by the Home Office

(see **Abida Begum Sattar (11700)** where Mr Farmer's Tribunal decided that deportation was not the right course on the merits in the case of a woman from Pakistan who "had not caused the breakdown of the marriage. She was a simple person who was basically of good character. She had attempted to work and support herself and was a help to her physically handicapped father-in-law")

(in **ex parte Syeda Khatoon Shah** [1997 - 1st Quarter] Imm AR 145, a woman believed that, if returned to Pakistan, her violent husband would accuse her of having conceived a child adulterously and she would be subject to penalties under the Shariah law; the Adjudicator found that she had been persecuted, but not for a convention reason; Sedley J held that the facts established were capable of bringing the applicant within the Convention; the Court of Appeal disagreed **[1998] INLR 97**)

Dr Abdul Latif's reports (and, currently, those of Dr Hamid) are still relied upon by ECOs, but most adjudicators accept that the age estimates are based on "the visual impression of the age which obviously cannot be infallible" **per** (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 had estimated him as being 25 years old, which would have made him 7 years older than his stated age.)

1.**Re J (Adoption:Non-Patrial), [1998] INLR 424** concerned a childless couple, British citizens of Pakistani origin, who had been given the son (born in Pakistan) of the husband's cousin; the child's parents had brought the child to this country, for a family visit, making no mention of this family arrangement, and they then returned to Pakistan, leaving the child with the British couple. At first instance, Singer J had found that "the mother and the father performed an act of great grace with considerable beneficial religious significance for them in giving up their child as a gift to childless relatives", and concluded that his "conclusion would emphatically be in favour of adoption if there were no nationality and residential status issues". In allowing the family's appeal, the Court of Appeal held that, in considering whether to grant an adoption order, sham applications, where the sole aim was to achieve a legal status unsupported by the fundamental foundation of a psychological relationship of parent and child with all its far-reaching manifestations and consequences, had to be distinguished from genuine applications tainted by deception in their history. Where an application is supported by that fundamental foundation then the function of the court was to apply section 6 of the Adoption Act 1976, giving first consideration to the welfare of the child and full weight to the guidance provided by the courts for non-patrial cases". So far as the "deception" (in bringing the child to this country as a visitor) was concerned, the court held that this had to be viewed in the light of the alternative courses of action which were open to the family. Paragraph 310 of HC395 offered the appellants nothing since it imposed two requirements which could not be fulfilled .. namely that the adoption should involve a genuine transfer of parental responsibility on the grounds on the original parents' inability to care for the child and that the child be maintained in the UK without recourse to public funds. Nor could the appellants derive assistance from the Home Office policy document RON/117, which set out the procedures for cases involving child who has not been legally adopted or one who has been adopted in a non-designated country such as Pakistan. So long, therefore, as the Secretary of State's policy remained in its current uncompromising form and made no provisions for a custom that was recognised in many parts of the world, the Secretary of State would be to some extent inhibited in criticising those who concluded that they should use deception in order to effect the adoption. In the circumstances, the welfare considerations outweighed the deception and an adoption order in favour of the appellants was appropriate.

2.The need to show that the child has no ties with the family of origin - clearly impossible where the adoption is within the family - appeared for the first time in May 1994, as paragraph

310 (ix) of HC395; paragraph 53 of the previous rules (HC251) had made no such stipulation

3.Re H (A Minor) (Adoption:Non-Patrial) [1996] 4 All ER 600 CA

4.In The Home Secretary v B (a minor) (97/16330) (4-3-98), and [1998-3rd Quarter] Imm AR324, (reported in Refugee Legal Centre, Legal Bulletin No 36), and [1998] INLR 505, and [1998] 2 FCR 357 the Secretary of State appealed against the judgement of Sumner J to make an adoption order in respect of a 16 year old Jamaican girl in favour of her grandparents, thereby conferring the right of abode in the UK on her. Sumner J had taken the view that inevitably there would be some overlap between the benefits flowing from adoption and those consequent to being allowed to live in the UK. It seems that the latter were not, in his view, precluded from the scope of consideration required by section 6 of the Adoption Act. The Court allowed the appeal stating that the judge had confused the purpose of adoption with the benefits of residence in this country. This was established by the contention advanced by counsel for the Secretary of State (which clearly impressed the Court) that in this case there were no separate benefits which could be ascribed to adoption other than the availability of being able to remain in the UK. Sir Patrick Russell, who "found this case not an easy one", held that "there were no advantages to B to be derived from adoption as such, save the acquisition of British nationality and the right of abode. The adoption order itself did not advance the welfare of the girl, save in the context of nationality. The advancement of her welfare, in a much broader sense, was being achieved already simply by her living with her loving and caring grandparents. Adoption would enable the girl to live in the United Kingdom and thus facilitate the desire of the grandparents to look after her; but that in my judgement is quite a different concept in the setting that adoption had a direct effect on the welfare of the girl or a causative effect upon her welfare".

5.Re B (a minor) (adoption order:nationality), HL [1999] FCR 529

6.Re Valentine's Settlement [1965] 2 All ER 226

7.set out in a letter from G Bridle dated 5 February 1996 (IMG/95 20/552/1), which reads

"As you are aware, the family members of an EEA national exercising treaty rights in the United Kingdom who are not EEA nationals themselves must obtain an EEA family permit before travelling to the United Kingdom. Family members are treated as including adoptive children, but the adoption must have taken place in a country whose adoption orders are recognised under United Kingdom law. These are countries listed in the Adoption (Designation of Overseas Adoptions) Order 1973.

Where a child has not been adopted or has been adopted in a country whose adoption orders are not recognised under United Kingdom law, an application for entry clearance for that child to come to the United Kingdom for adoption through the courts i this country will be considered outside European Community law and the Immigration Rules under the Home Secretary's general

discretion to allow any person to enter or remain in the United Kingdom. The immigration requirements which would have to be met are that the child (i) will be adopted by persons at least one of whom must be an EEA national exercising Treaty rights i the United Kingdom (ii) is under 18 (iii) is not leading an independent life, is unmarried and has not formed an independent family unit (iv) can, and will, be accommodated adequately without recourse to public funds in accommodation which the prospective adoptive parents own or occupy exclusively (v) has the same rights and obligations as any other child of the marriage (vi) was a available for adoption due to the inability of the natural parents or current carers to care for him and there has been a genuine transfer of parental responsibility to the prospective adoptive parents (vii) has lost or broken ties with his natural family (viii) will be adopted, through the United Kingdom courts but the adoption is not one of convenience arranged to facilitate his admission to the United Kingdom.

The prospective adoptive parents would have had to have a home study report competed by the local social services and endorsed by the territorial health department before entry clearance could be granted.

Upon arrival in the United Kingdom the prospective adoptee would normally be granted 12 months leave to enter in the first instance. Once adoption procedures are complete the adoptive child may apply under Community Law for a residence document. This would normally be issued valid for the same period as the residence permit held by the EEA national adoptive parents.

Applications for entry clearance from de facto adoptees of EEA nationals i.e. children who have lived abroad with the "adoptive" parents for a considerable period will also be considered on a discretionary basis. The immigration requirements to be met are the same as above with the additional requirement that the child must have been "adopted" at a time when both sponsors were resident together abroad. However, there is no requirement to adopt the child through the United Kingdom courts and there is no need to involve the social services in advance of a child's admission to the United Kingdom. On arrival in the United Kingdom with the appropriate entry clearance, the child would be admitted without conditions attached to their stay, and, after entry, would be able to apply for a residence document as the family member of the EEA national resident in the United Kingdom."

8.According to Colin Birt (Immigration Policy Directorate) in a letter dated 2 March 1998 (IMG/97 20/552/4)

"Article 10 of Regulation 1612/68 allows for the descendants under the age of 21 and the dependent relatives i the ascending line of an EEA national and his spouse to install themselves with an EEA national who is a worker. More distant family members do not have a right to install themselves, but their entry should be facilitated if they are dependant upon the worker or living under his roof in the country of origin.

There is no definition of a family member in the Article, but we take a family member to be a blood relative or a child adopted

in a designated country. These applicants would be issued with a family permit or residence document as appropriate.

Where an application is made by an adopted child to join or accompany an EEA national to the United Kingdom and the adoption took place in a non-designated country, or the adoption was de facto, the application would be considered along the lines outlined in Mr Brindle's letter of 5 February 1996"

9.TH/20496/95

10. Art. 10 of Directive 68/360