

ILPA comments for the Chief Inspector of Borders and Immigration Review of Sham Marriages

Terms of reference of the review

To examine changes in process and performance after the introduction of relevant provisions in the Immigration Act 2014 by focusing on -

- *the work of the Marriage Referral Assessment Unit;*
- *Home Office statistics on sham marriage enforcement activity and outcomes, including prosecutions; and*
- *the experience of the Local Registration Services.*

Has enforcement via those new provisions has delivered what was planned?

On 8 April 2016 ILPA wrote to Mr Kristian Armstrong of the Home Office setting out our concerns. We copied the Chief Inspector. That letter is appended hereto. We received a holding response from Mr Clive Peckover of the Home Office on 11 April 2016 to say that Mr Armstrong had left the Immigration and Border Policy Directorate and that the letter had been passed to Ms Niva Thiruchelvam, but no further response from the Home Office.

Concerns persist and are not confined to Liverpool. For example, a member's account of a marriage interview in Sheffield June 2016:

My client and his wife have been interviewed re marriage of convenience on two separate occasions by UK Visas and Immigration in Sheffield, once in February 2015 and once in June 2016. Both interviews were conducted by the same officer. Having decided that their marriage was one of convenience in 2015, he reached the same conclusion in June 2015. The second interview was very short, the officer telling my client's wife that he did not need to ask much as he had interviewed her before i.e. he had already reached his decision.

... it has been alleged that there are discrepancies in the answers given. I have looked through the most recent interview record today and these are minor and the main points are the same e.g. the names and ages of his wife's five children / his wife's medical problems/ their finances.

On the latest occasion we have been provide with a transcript on request but this has been a problem with earlier interviews

In general, wherever the marriage interview is held and by whomsoever it is conducted, in our experience, marriage interviews still often take place after the couple has married rather than in the 70 days before the wedding can take place. People continue to be detained after Home Office marriage interviews which take place subsequent to the wedding. See the comments on "Operation Mellor", in the Inspectorate Immigration's report "A Short Notice Inspection of a Sham Marriage Enforcement Operation 14-24 October 2013", in ILPA's letter to the Home Office appended hereto. All couples experience delay, couples where one partner is a third country national experience longer delay, both to getting married and to subsequent immigration

applications. In addition, extra work is being created for registrars by the obligation to refer cases to the Home Office. The justification for this, we suggest, depends upon the Home Office scrutinizing referrals and taking action accordingly at that stage and, too often, that is not happening.

Work of the Marriage referral assessment unit

Although the marriage and civil partnership referral and investigation scheme was introduced on 2 March 2015 following the implementation of Part 4 of the Immigration Act 2014, Chapter 30 of the Enforcement Instructions and Guidance on sham marriages, civil partnerships and marriages of convenience, only referred to this as a future legislative change and was not updated after the publication of the statutory guidance on the scheme in March 2015.¹

The version of Chapter 30 of the Enforcement Instructions and Guidance in use when the statutory guidance was published dated from 27 February 2014. That guidance was not replaced until 25 July 2016.² Applicants and their representatives were left without published guidance. There was not any transparency about policy and work on marriages of convenience until that date.

Changes to the Enforcement Instructions and Guidance are minor. The guidance on marriage investigations makes small changes to the sections on forced marriages, arranged marriages and marriage by proxy. The language of forced marriage is clarified, recognising that pressure or abuse 'of various types' is used to coerce the parties. The guidance also now states that persons with learning disabilities may be forced into marriage whereas previously it had stated that they could not consent to marriage. Arranged marriages are defined as marriages where there is 'full and informed consent' of the parties involved rather than in terms of the absence of coercion. There is also a new addition to the guidance on marriage by proxy requiring that proxy marriages in EEA applications should be referred for a full marriage interview as standard practice.

There is no longer a section on the conduct of marriage interviews. Instead the chapter refers to a new guidance document on enforcement interviews which contains the same information in a chapter on marriage interviews³.

ILPA is disappointed that in issuing new guidance, the Home Office did not take the opportunity to address the concerns it had raised in its letter to Mr Armstrong about the quality of marriage interviews and the decisions taken following these.⁴

¹ Home Office, *Visas and Immigration Enforcement Guidance: Immigration Act 2014: Marriage and civil partnership referral and investigation scheme: statutory guidance for Home Office Staff*, March 2015

<https://www.gov.uk/government/publications/marriage-and-civil-partnership-referral-and-investigation-scheme>

² Home Office, *General Instructions, Immigration Removals, Enforcement and Detention: Marriage Investigations* (version 1.0), 25 July 2016

<https://www.gov.uk/government/publications/chapters-23-to-45-operational-enforcement-activity>

³ Home Office, *General Instructions, Immigration Removals Enforcement and Detention: Enforcement Interviews* (version 1.0), 12 July 2016

<https://www.gov.uk/government/publications/powers-and-operational-procedure>

⁴ Letter of ILPA to Kristian Armstrong, Head of Criminality and Enforcement Policy, Criminality and Enforcement Directorate, Home Office, *Home Office's investigation of marriages*, 08 April 2016 at:

<http://www.ilpa.org.uk/resource/32040/ilpa-to-kristian-armstrong-head-of-criminality-and-enforcement-policy-criminality-and-enforcement-di>

Under s 51(1) of the Immigration Act 2014, where the Secretary of State decides to investigate a proposed marriage or civil partnership the notice of this decision given to both parties under s 48 of that Act will set out the requirements with which they must comply as part of the investigation and the consequences of not doing so. The requirements which may be imposed are those specified in the Proposed Marriages and Civil Partnerships (Conduct of Investigations, etc.) Regulations 2015 (SI 2015/397) in regulation 14. The Home Office statutory guidance⁵ goes beyond regulation 14. It indicates that failure to respond to a question asked when interviewing under the marriage and civil partnership referral and investigation scheme may be treated as a failure to comply with the requirement to be interviewed. This is also picked up in the guidance on enforcement interviews. We consider that the designation of failure to respond as non-compliance is arbitrary and goes beyond what is envisaged by the statute or by regulations. There are a myriad of reasons for not answering, including confusion and embarrassment. The inspection should look at how this requirement is being applied.

Home Office statistics on marriage enforcement activity and outcomes, including prosecutions

The Home Office wrote to Fiona Mactaggart MP on 3 August 2016 in the context of an enquiry about an alleged sham marriage. In correspondence about constituents who have been deceived by husbands from abroad she had asked for information about the numbers of cases in which this had resulted in the Home Office taking any action against either party to the marriage and about any changes in policy and practice following the Inspectorate's previous report on sham marriages; the questions could not be answered. The response included:

You would like us to confirm what procedures we will follow when made aware of allegation about an individual who has used fraudulent information to gain Indefinite Leave to Remain in the UK. We treat any information received seriously and any such information will be forwarded to the relevant department and investigated accordingly. We are unable to inform you "in how many cases has the extended notice period for marriages resulted in enforcement action" as this information is not readily available and to gather the information is not cost effective.

...Where we have reasonable grounds to suspect a sham, we can extend the notice period from 28 days (the new period for all couples) to 70 days in order to investigate the genuineness of the couple's relationship and, where a sham is established, take appropriate enforcement or casework action. This gives us a much stronger platform for effective, systematic action to identify, disrupt and deter sham marriages and civil partnerships.

We understand this to mean that the information is held centrally but is not collated.

The letter stated:

Where we have reasonable grounds to suspect a sham, we can extend the notice period from 28 days (the new period for all couples) to 70 days in order to investigate the genuineness of the couple's relationship and, where a sham is established, take appropriate enforcement or

⁵ Immigration Act 2014: Marriage and civil partnership referral and investigation scheme: statutory guidance for Home Office staff, *op.cit.*

casework action. This gives us a much stronger platform for effective, systematic action to identify, disrupt and deter sham marriages and civil partnerships.

Without collecting statistics on any action taken the claim in the final sentence cannot be evidenced or tested. Without such statistics 'it is not possible to monitor whether any action is effective or systematic, or on whether it disrupts any marriages and/or civil partnerships, and if so, whether these are the marriages or civil partnerships which the legislation was intended to disrupt.

The experience of local registration units

We have had sight of the case file minute UK Visas and Immigration is/was using, which a member obtained as part of a subject access request. It is appended hereto. It contains a list of reasons, 'Reasons for Referral', that might provoke referral for an interview. We invite particular scrutiny of "Sponsor is self-employed or became self-employed following a previous refusal on treaty rights" and "Plausibility in question (large age difference, culture differences etc.)" and "The EEA sponsor commenced employment shortly before marriage". It would be helpful to know which reasons are relied on most frequently as reasons for suspicion and which reasons relied upon most often give rise to a decision that suspicions are founded.

Where at least one partner is not an EEA national, both parties will be required to attend in person to give notice of the marriage at a designated Registry Office and the Background Information paper has a list of those offices it is proposed to designate. For notice of a marriage to be taken at a designated Registry Office, specified evidence, including of nationality, must be provided. This would appear to be more onerous than the previous scheme, under which nationality could be proved in different ways, provided that the registrar is satisfied of nationality, as set out in the Freedom of Information request appended hereto. This creates real difficulties for those without documentation, even where there is no question that they would pass any investigation with flying colours.

The duties for registration officials to report suspicions of sham marriages and sham civil partnerships, under sections 24 and 24A of the Immigration and Asylum Act 1999, previously arose when a couple gave notice of marriage or civil partnership. Those duties are amended by s 56 the Immigration Act 2014 so that reports of suspicions may now be made at an earlier stage, whenever the registration official (in the case of marriages), or registration authority or person attesting a notice (in the case of civil partnerships) receives information in advance of a person giving notice of marriage or civil partnership. This is achieved by amending the definitions in ss 24 and 24A of the Immigration and Asylum Act 1999. The Explanatory Notes to the 2014 Act say that these amendments state "clarify" that a report of suspicions should include such of that information as is available. This is not a clarification but an extension of the duty, independent of the broader revised scheme. It was made independently of the introduction of the broader scheme.

We draw particular attention to the Immigration Act 2014 s 59 *Information* and Schedule 6 *Information*. These permit the disclosure of information between registrars/registration authorities and the Secretary of State and from one registrar/registration authority to another. A registration official can disclose any information or supply any document held to the Secretary of State or to another registration official for immigration purposes as (very broadly) defined and for purposes connected to the referral of proposed marriage and civil partnership notices. A registration official can disclose to another registration official that a suspicion about a marriage or civil partnership has been reported to the Secretary of State under s 24 or 24A of the 1999 Act and the content of that report. We suggest that the inquiry attempt to understand how these powers are being used

The Secretary of State can disclose information and supply documents to registrars and registration officials for “verification purposes”: the verification of information provided by a person giving notice of marriage or of a civil partnership and/or of the immigration status of a person who gets in touch with an official and/or whether the person is suspected of involvement in crime related to immigration and/or has been convicted of an offence relating to immigration. Information can be disclosed to a broader group of persons for “crime-fighting”. Powers as to retention and disposal of information are similarly broad. If a superintendent registrar /registration authority refers a proposed marriage/civil partnership, the Secretary of State can disclose relevant information, including supplying a document containing relevant information, as defined, to a registration official. We suggest that the inquiry attempt to understand how this power is being used. Is it being interpreted as permitting the disclosure of watch lists containing information pertaining to persons who have never evidenced the slightest desire to enter into a marriage or civil partnership with anyone?

A registration official can disclose any information or supply any information to anyone who falls within the extensive definition of an “eligible person” or another registration official in England and Wales for the purpose of fighting crime. The definition, this purpose and the powers of disclosure are very broad. The registration official must have reasonable grounds for suspecting that a criminal offence has been, is being, or will be committed. Once they have such grounds they can disclose information they hold or supply a document they hold for assisting in the prosecution, investigation, detection or prevention of a criminal offence. Is this being interpreted to mean the same criminal offence as the one that they suspect is being committed, or more broadly?

The schedule does not authorise disclosure in contravention of the Data Protection Act 1998 of personal data not exempt from the provisions of the Act or disclosure prohibited by Part I of the Regulation of Investigatory Powers Act 2000. Those who apply to marry or enter into a civil partnership are required to consent to the sharing of their information. We consider that the enquiry should look at what steps are taken to ensure that this is informed consent and at what those who give such consent understand might happen to their data.

Schedule 6 permits a person who is supplied with a document under the Schedule to retain it, copy it or dispose of it “in such a manner as [the person] thinks appropriate. The enquiry should consider the disposal of documents.

Adrian Berry
Chair
ILPA
30 August 2016

Appendices

Appendix one (in this document) ILPA letter of 8 April 2016 to Kristian Armstrong, Home Office re marriage interviews

Appendix 2 Example of a UK Visas and Immigration Case File Minute on Reasons for Referral for interview (separate document)

Appendix 3 8 July 2013 response to freedom of information request on proving nationality (separate document)

Appendix ILPA letter of 8 April 2016 to Kristian Armstrong, Home Office re marriage interviews

Kristian Armstrong
Head of Criminality and Enforcement Policy
Criminality and Enforcement Directorate
Home Office

By email: kristian.armstrong@homeoffice.gsi.gov.uk

08 April, 2016

Dear Mr Armstrong,

Re: Home Office's investigation of marriages

We are writing to express our concern about interviews in Liverpool about marriages and the question of whether these are marriages of convenience.

Standard Home Office practice appears to be to require both partners to travel to Liverpool and to be interviewed separately. We are concerned at both the way in which these interviews are conducted and the outcomes of them.

We recall the judgment of the Court of Appeal in the EEA case of *Agho v SSHD* [2015] EWCA 1198:

*“What it comes down to is that as a matter of principle a spouse establishes a prima facie case that he or she is a family member of an EEA national by providing the marriage certificate and the spouse's passport; that the legal burden is on the Secretary of State to show that any marriage thus proved is a marriage of convenience; and that that burden is not discharged merely by showing "reasonable suspicion". Of course in the usual way the evidential burden may shift to the applicant by proof of facts which justify the inference that the marriage is not genuine, and the facts giving rise to the inference may include a failure to answer a request for documentary proof of the genuineness of the marriage where grounds for suspicion have been raised. Although, as I say, the point was not argued before us, that approach seems to me to be correct – as does the UT's statement that the standard of proof must be the civil standard, as explained by the House of Lords in *Re B (Children)* [2008] UKHL 35, [2009] 1 AC 11.*

We add that in EEA cases there continue to be applications for a residence card on the basis of marriage taking longer to determine than the very maximum permitted by EU law. There are cases where we take issue with the Home Office method of calculating time, but even with such calculations there are

delays which exceed the limits set down in Directive 2004/38/EC under which six months is an absolute maximum.

You will no doubt be aware that concerns were raised just under a year ago in the journal of the Law Society of Scotland⁶. There continues to be cause for concern.

One lawyer describes four clients called to Liverpool where he could see nothing to suggest that there was anything untoward about the marriages and concludes “these were just fishing expeditions”. The clients were allowed to go after the interviews but their applications were refused. Three were successful on appeal. Another case is pending.

Representatives have highlighted what appear to be fishing expeditions in cases of EEA nationals married to African or Asian men. One describes couples where applications for EEA registration cards were refused following perhaps half a dozen different answers in over 100 questions. In another case a Pakistani/Polish couple were refused on the basis that their marriage was one of convenience following visit to their address. This took place two months after they had moved out, the Home Office having been informed of the new address. It was reported that ‘a man said they had never lived there’. The legal representatives put in a copious 250 page bundle for the appeal confirming their residence over two and a half years, including recorded delivery and biometric residence permit deliveries from Home Office to the husband at the address. The Home Office Presenting Officer withdrew the refusal the day before the hearing. The couple then received an interview request from Liverpool. The lawyers protested, pointing out that any questions could have been asked at the appeal hearing and arguing that this fishing exercise was an abuse of process. Following the interview there was a further refusal on the grounds that this was a marriage of convenience. The representative identifies some 10 minor differences out of 100 questions, including whether he knelt down to propose on Tower Bridge. The couple still disagree about whether he did or not. Ten months later, the couple are still waiting for a hearing date.

In another case an application for further leave on the basis of marriage was refused on the grounds of discrepancies within the interview. The current lawyer obtained the interview record – and there were seven questions answered differently out of 79. Poor representation at the time of the initial refusal had led to the client being served with a section 120 notice. A statement of additional grounds was served by the current representatives but the client has been detained, and served with removal directions. While it is the Home Office case that the couple do not live together at the common address, following the detention they took the client to that ‘allegedly common’ address to collect his belongings. His wife and step-sons were all at home and all distressed.

The current guidance⁷ states

Interviews must be conducted in a properly probing, but balanced way, with the questions directed to establishing whether the relevant parties are in a genuine relationship and whether their proposed marriage or civil partnership is a sham. For example, the relevant party or parties might be asked about:

- *The background to, history of and subsistence of the parties’ relationship.*
- *The general background and the immigration history of the parties.*
- *The living arrangements of the parties.*
- *The arrangements for the proposed marriage or civil partnership.*
- *The parties’ future plans.*

⁶ Home Office “marriage interviews”, and related procedures, frequently present as conducted in an unfair manner, and require well prepared legal representation to safeguard the couple’s interests, Mohammed Sabir, <http://www.journalonline.co.uk/Magazine/60-5/1019250.aspx>

⁷ Immigration Act 2014 Marriage and civil partnership referral and investigation scheme: statutory guidance for Home Office staff, March 2015, at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/419313/Statutory_guidance_March_2015_.pdf

If interviewers consider that a prima facie case of a marriage of convenience has been established, very often the non-EEA partner is detained immediately after the interview, usually first in Pennine House, following which they are removed to another immigration removal centre.

The original focus of “Operation Mellor”, as indicated in the then Chief Inspector of Borders and Immigration’s report “*A Short Notice Inspection of a Sham Marriage Enforcement Operation 14-24 October 2013*”, purported to be preventative, investigating possible marriages of convenience before or at the time of the official ceremony. We are however aware of significant numbers of persons detained following an interview in Liverpool subsequent to their marriage.

A number of those interviewed have been unrepresented at the time of their interview and we are aware of at least one interview where the legal representative on record was not permitted to remain with their client.

There are reports of clients being kept waiting prior to the interviews’ taking place.

While there are reports of interviews that have been conducted in an objectionable manner, this is not the case for all interviews. We were very struck by what Stephen Shaw said in his January 2016 *Review of the Welfare in Detention of Vulnerable Persons*⁸ about questions asked of couples:

3.71 A surprisingly large number of those who attended the detainee forum I organised had been detained because of allegedly sham marriages. Most had been detained after Home Office interviews in Liverpool or Manchester. The questions they said they had been asked by caseworkers to ascertain whether their marriage was a sham included their knowledge of their wife’s National Insurance number, the colour of her underwear, and her bra size. If this was indeed the case, it is questionable whether such questions were either appropriate or useful.

This tallies with what has been reported to us. One lawyer comments that interviews appear “more designed to get wrong answers on trivial things than to test the genuineness of the relationship.” Questions described have included:

What was the name of the coffee shop where you met [many years previously]
Was the table at your wedding ceremony round or square?
How many pictures are there on the wall of your sitting room?
What is the colour of the walls and shutter in the shop where your wife works?

One woman described being asked difficult questions about her husband’s religion (which is not her own) and about his complex studies.

Another man reported being asked the exact ages of his parents-in-law whom he had never met. Another was asked about his wife’s country of origin which he has never visited.

One reasons for refusal letter states “you said the electric toaster is white. She said it is silver”. Another stated that the grounds for refusal were that incorrect answers had been given to the interview questions but the couple were not given transcripts and the letter did not set out what those incorrect responses were; it just said that on the basis of the discrepancies in interview the application had been refused.

There are also reports of personal and intrusive questions such as those described by Stephen Shaw.

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/490782/52532_Shaw_Review_Accessible.pdf

There are reports of aggressive interviews and harsh and inappropriate questioning, of shouting and banging the table. In one case the interviewing officer told the client's wife that her account was inconsistent with his, that the Home Office arrests people and detains them in the building where the interview took place, and that the outcome was likely to be her and his removal from the UK. The lawyer describes manipulative comments and oppressive language being used throughout the interview to the extent that he drew an analogy with the Police and Criminal Evidence Act to argue that no weight should be given to the transcript.

We understand that transcripts have not always been given to those interviewed including cases where transcripts have not been available even in time for the resultant appeal hearing.

One seven months' pregnant woman whose husband was detained had to find her own way back to London (see the Chief's Inspector's report of 2013 at 4.63 which expressed concern that there had been no risk assessment carried out by Home Office staff in relation to the possible distress of a pregnant woman). In another case, the EEA national was pregnant. Her husband was detained and told at the end of the interview that his application for a residence card was refused. His lawyers applied for bail which was granted, with reporting conditions of signing every two weeks. His appeal was heard when his child was some five months old. A DNA test proved he was the father and the appeal was allowed.

Another woman was detained. A judge granted a stay of removal after considering the interview notes and an appeal is pending. She is pregnant.

Persons who had travelled by car had cars parked in car parks at the time of their detention and no arrangements were made to move these.

A number of detainees who had travelled to Liverpool by car and whose spouse had no driving licence were understandably concerned that their vehicle had been subject to parking charges and penalties before someone they knew and trusted was able to access keys, travel to Liverpool and retrieve it.

We understand that couples have been prevented from meeting after the conclusion of their interviews where one has been detained which seems harsh. One man reports being unable to give his wife access to funds for her return travel and to make arrangements for her to be met.

In EEA cases a person who had overstayed a period of leave under the Immigration Rules may now be lawfully present because of their marriage to an EEA national. We have seen two cases where EEA spouses were discovered in raids on properties. In one the EEA spouse was called and both parties were interviewed and detained. The EEA spouse was soon released and the non-EEA spouse was released when the appeal was lodged. The appeal was successful. In another case the non-EEA spouse was detained despite the partner being phoned at work. The non-EEA national was detained over the Christmas holiday. A bail application was heard in early January. The immigration judge who heard it questioned why the person had been detained at all. Bail was granted but an application for a residence card submitted at the time of detention was refused on the morning of the bail hearing without any interviews having taken place. An appeal is pending.

We urge that the decision to interview, the decisions resulting from interview and the conduct of the interviews be looked into as soon as possible.

Yours sincerely,

Adrian Berry
Chair, Immigration Law Practitioners' Association (ILPA)

- cc. Clive Peckover, Head of Family Policy, Immigration and Border Policy Directorate, Home Office
David Bolt, Independent Chief Inspector of Borders and Immigration

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