



Right to Marry Judgment

29th May 2007

Last week, the Court of Appeal handed down judgment in *Secretary of State for the Home Department v Baiai & Ors*. This case is about the requirement, imposed in 2005, that immigrants must seek permission from the Home Office if they wish to be married in the UK. This is the certificate of approval scheme. The Court of Appeal agreed with the High Court that the scheme is unlawful.

The certificate of approval scheme

The scheme means that any person who wishes to be married in the UK must apply to the Home Office for a certificate of approval. The application costs £295. If the Home Office refuse to grant a certificate of approval, the person may not be married in the UK. To marry, both partners must get a certificate.

There are some exceptions. The following people do not need a certificate in order to marry:

- a British national
- an European Economic Area (EEA) national
- a person who has indefinite leave to remain in the UK
- a person who has entry clearance for the purpose of getting married in the UK

However, unless the person's partner also fell within one of these exceptions, the couple could not marry until the partner obtained a certificate.

There is also an exemption for some marriages in Anglican churches.

The scheme's purpose

The Home Office say the scheme is necessary for immigration control. They gave evidence making two points. Firstly, they said that marriage could be used by people to escape immigration control. Secondly, they said there were a high number of sham marriages, where the purpose of the marriage was simply to escape immigration control.

By escaping immigration control, the Home Office meant two things. Firstly, that some people might use marriage as a way to avoid being removed from the UK. Secondly, that some people might use marriage as a way of getting status in the UK, and using this status to bring other relatives to the UK.

The challenge to the scheme

The legal challenge to the scheme was brought under Article 12 of the European Convention on Human Rights, which has effect in UK law under the Human Rights Act 1998. Article 12 says:

"Men and women of marriageable age have the right to marry..."

It was also said the scheme is discriminatory by only exempting Anglican weddings.

The Court of Appeal decision

The Court of Appeal essentially agreed with the High Court that the scheme is contrary to the Article 12 right to marry; and discriminates by treating Anglican weddings differently. The Home Office accept the last point; and had told the Court of Appeal they would be changing the

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scheme so it no longer discriminated in this way.

The Court of Appeal accepted the Home Office is entitled to restrict the right to marry for immigration control reasons. However, any restrictions must be justified and proportionate. This means there must be a good reason to restrict the right to marry. Also, any restriction must be no more than is reasonably necessary.

The Court of Appeal decided the Home Office scheme was not proportionate. Firstly, the Home Office argument that people could use marriage to escape immigration control went too far. It was clear that marriage did not, of itself, give a person a right to stay in the UK or bring family to the UK. Indeed, it was clear that the scheme applied to some marriages where it was clear the marriage would not enable people to stay or come to the UK. Secondly, the Home Office had not shown how the scheme targeted the problem of sham marriages.

What happens next?

The Home Office are seeking permission to appeal to the House of Lords. If that is refused by the Court of Appeal, they may ask the House of Lords for permission directly.

If the Home Office cannot bring an appeal or the appeal is unsuccessful, they must withdraw the scheme or make very substantial changes to the scheme. The Court of Appeal judgment certainly gives good reason to hope that the scheme may have to be withdrawn. However, even if that turns out to be correct, it may still be many months away. In the meantime, many people will continue to be unable to marry in the UK.

A copy of the Court of Appeal judgment is available at
<http://www.bailii.org/ew/cases/EWCA/Civ/2007/478.html>