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Abstract of Thesis

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Title of thesis A STRANGER IN THE HOME:
IMMIGRATION TO THE UK THROUGH MARRIAGE
FROM 1962 Degree PH.D

This thesis is concerned with the British state's response to marriage immigration after 1962. Admission of foreign spouses places strangers at the symbolic heart of national life and their claims have often been denied. Meanwhile, British residents who enable such claims may be regarded as having thereby partially excluded themselves from national life. This has been particularly so for women for whom marriage is often considered a statement of public allegiance as well as a private act.

The thesis establishes this argument through analysis of decision-making by the legislature, the judiciary and the entry clearance service. It argues that all decision-makers exercise discretionary powers and will usually do so in accordance with their sense of their institutional function informed by their understanding of the nature of the world. Where this understanding is shared across institutions, congruity in patterns of decision-making may emerge. This is argued to be largely the case for the period from 1962 to 1997.

The thesis argues that, since 1997, perceptions of the threat posed by marriage immigration have become more complex and less uniform. Skin colour, gender and formal married status have become less significant. Obedience to state-erected hurdles, cultural conformity and social class have become more prominent although tempered by other competing priorities, particularly human rights values which the courts have recently begun to assert more vigorously.

The conclusion places these arguments within the context of the continued desire of nation states to prevent unwanted immigration despite global movement and porous borders. Many British residents are now part of international diasporas or are themselves recent immigrants. It is even more difficult to use immigration control to reinforce the role of marriage and family in maintaining an idealised conception of national life even if recent indications are that efforts to do so will continue.

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**A stranger in the home:
immigration to the UK through marriage from 1962**

**By
Helena Wray**

Thesis submitted for the Degree of Doctor of Philosophy

**Department of Law
School of Oriental and African Studies
University of London**

September 2008

Declaration

The work presented in this thesis is my own:

Helena Wray

September 2008

Abstract

This thesis is concerned with the British state's response to marriage immigration after 1962. Admission of foreign spouses places strangers at the symbolic heart of national life and their claims have often been denied. Meanwhile, British residents who enable such claims may be regarded as having thereby partially excluded themselves from national life. This has been particularly so for women for whom marriage is often considered a statement of public allegiance as well as a private act.

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Chapter 1: Introduction

This thesis is centrally concerned with regulation by the British state of marriage immigration (i.e. immigration status achieved through marriage) from 1962 until the present day. It is also a study of discretion in decision-making. It analyses decisions made by three institutions: the legislature, the judiciary and the entry clearance service. It identifies the beliefs, values and assumptions upon which decisions were and are predicated and finds that they were consistently held across institutions through much of the period between 1962 and 1997. Since 1997, decisions appear to show more fluidity and ambivalence, suggesting the adoption of more complex and less consistent attitudes.

The introduction to the thesis is presented in two parts. The first introduces the thesis, explains its structure and places it within the existing literature. The second provides a preliminary context by briefly considering two episodes that predate the main period under consideration.

1.1 Introduction to the thesis

1.1.1 Subject of the thesis

The specific subject of study in the thesis is that part of immigration law which, from 1962 until the present day, has controlled the admission of the spouses of British nationals or permanent UK residents. In these cases, the entering spouse usually becomes a permanent resident and it is this feature that has particularly provoked anxiety and stringent regulation.

At the start of the period considered here, those applying to enter were usually seeking family reunification.¹ They were typically the spouses of recent immigrants from New Commonwealth countries. As primary migration ceased and migrants' families matured, there was a switch to family formation, essentially the creation of a new family unit. Applicants were typically men and women engaged or married to those who had travelled to the UK as children or who had been born in the UK. The overwhelming focus was on applicants from the Indian sub-continent entering arranged marriages although other nationalities, including from the Caribbean, also

¹ The terms 'family unification' and 'family formation' are used as defined in Kofman (2004).

featured. In the recent period, the sub-continent has continued to feature strongly but marriage immigration has also involved larger numbers from other nationalities. Attention has partially switched to short-term entrants, failed asylum seekers and over-stayers who form relationships while in the UK. However, a growing focus on cultural conformity means that the South Asian arranged marriage system and its implications have recently come under renewed scrutiny.

All these forms of immigration have been seen as problematic and different means have been used to defeat them. Those specific to marriage are described and analysed in detail in later chapters of this thesis. Others, such as financial criteria, which apply to many types of immigrant, are considered only so far as they specifically affect marriage immigration. Common reasons for refusal have evolved alongside the circumstances of applicants. Absence of formal documentation rationalised rejection of many claims for reunification. The infamous primary purpose rule (Sachdeva 1993) was used mainly against male applicants seeking to join the daughters of first generation immigrants. Following abolition of primary purpose in 1997, some of these applicants were still refused on grounds that the parties did not intend to live together. The requirement to leave the UK to obtain entry clearance has become a major way to control short-term and illegal entrants who rely on marriage to found a claim to remain. Measures ostensibly aimed at preventing forced marriages have, especially more recently, been viewed as a means to reduce culturally unacceptable immigration. These methods of control have been enabled, executed and supported or, more rarely, challenged by the institutions examined here: Parliament, the judiciary and the entry clearance service.

The thesis also represents ~~also a~~ study in the exercise of discretion. The perspective adopted here is that discretion is an inescapable part of all decision-making and that, while its extent and context differ widely, all discretionary decisions share some common features. Notably, all decisions rely eventually if not at once upon values, beliefs and assumptions about the world. Where members of institutions hold broadly similar beliefs, values and assumptions, consistent patterns of decision-making within the institution may emerge despite the absence of explicit norms. Where beliefs, values and assumptions are shared across different institutions, decisions made by these institutions will be broadly congruent with each other. The thesis suggests that this was the case in much of the period between 1962 and 1997. It identifies a

consistently held set of attitudes that determined decision-making at all levels. However, the picture since 1997 has been less clear-cut.

The thesis synthesises information from a wide range of sources including archived and other contemporary material and also relies on a brief field study. The theoretical approach adopted permits the analysis of a range of institutions and is concerned not only with what decisions are made but also with how they have been reached.

1.1.2 The law

Regulation of immigration is to be found primarily in the Immigration Rules made by the Home Secretary under S.3(2) Immigration Act 1971. Prior to the Immigration Act 1971, entry was regulated either under the various Aliens Acts (since 1905) or under the Commonwealth Immigrants Acts 1962 and 1968, supplemented by Aliens Act Orders or instructions to officials. The characteristics of the regime prior to the 1971 Act are discussed in chapter 3.

Revisions to the Immigration Rules must be laid before Parliament and become law unless they are subject to negative resolution of either Chamber, a very rare occurrence. The current provisions affecting marriage are found in part 8 (paras. 277-295) of the Immigration Rules (HC 395). These regulate the admission (or extension of leave) of spouses and civil partners (who are now treated identically), unmarried partners and fiancés. There are a number of requirements that all applicants must meet including:

- i. The UK sponsor must be present and settled² in the UK or being admitted for settlement on the same occasion (para. 281). Non-national residents have, since 1985, been treated identically to British nationals although, under recent proposals to replace indefinite leave to remain, gaining the status necessary for sponsorship may be delayed, possibly indefinitely, for those immigrants who are perceived as failing to integrate adequately (Border and Immigration Agency 2008a and 2008b).
- ii. Only one spouse to a polygamous marriage is permitted to enter (para. 278). An application will usually be refused if the other spouse has been in the UK other than as a visitor or illegal entrant.

² Under para.6 HC 395, 'settled' means (i) free from restrictions as to the period in which the person may remain and (ii) ordinarily resident in the UK without having entered or remained in breach of the immigration laws or, if so, leave to remain has been subsequently given.

- iii. Entry clearance for Commonwealth nationals seeking admission as family members became compulsory in 1979 and its effects are examined in chapter 5. Applicants for entry must obtain entry clearance before arrival under paras. 281, 290 and 295. Those seeking leave to remain in the UK without entry clearance for marriage must now have been given prior leave to enter as a fiancé or for a period of more than 6 months. The prohibition on 'switching' is a recent development that is discussed in chapter 6.
- iv. The parties must have met (para. 281), excluding those who married by proxy and have not met subsequently. The requirement applies also to fiancé(e)s (para. 290), a requirement that has proved problematic in some arranged marriages. Judicial interpretation of the requirement is discussed in chapter 5.
- v. The marriage must be subsisting and the parties intend to live together (after the marriage, in the case of fiancés); paras 281, 290 and 295A. Following the abolition of the primary purpose rule in 1997, this rule is now the principal means of testing that a marriage is genuine. From 1983 until 1997, parties also had to establish that it was not the primary purpose of the marriage to obtain admission to the UK.³ The primary purpose rule was the principal means of preventing non-white, particularly male, marriage immigration and is discussed at length in chapters 3, 4 and 5. The role played by 'intention to live together' is discussed mainly in chapter 6.
- vi. There will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively and that the parties will be able to maintain themselves and any dependants adequately without recourse to public funds (paras. 281, 290 and 295A). 'Maintenance and accommodation' requirements apply throughout the immigration rules and are mostly considered only tangentially in this thesis. A specific issue, discussed in chapter 6, is the restriction upon third party assistance to couples, undermining Asian traditions of extended family support. A more general point is that, while a policy of protecting the public purse may be relatively uncontroversial, the requirements have the effect of excluding the poorest UK residents from participation in international family

³ The final version of the rule was in paras. 47 and 50 HC 251.

reunion or formation. The way in which social class interacts with race and culture is discussed in chapter 6.

- vii. Both parties must be aged at least 18 at the time of arrival in the UK or of grant or variation of leave (para. 277). The minimum age has been raised progressively in the recent period and, at the time of writing, is due to be raised again to 21.⁴ This contrasts with a minimum age for marriage in the UK of 16 (with parental consent). Issues of the minimum age, forced marriage and the acceptability of very early marriages are considered in chapter 6.

In recent years, in addition to the Immigration Rules, immigration has been increasingly controlled by statute. Relevant to marriage applications are S.24 Immigration and Asylum Act 1999 and Ss. 19-25 Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. These measures govern the conduct of marriages involving non-EEA nationals and are discussed at length in chapter 6.

1.1.3 The literature

There is now a vast literature on migration as a subject of study within or across a variety of disciplines including anthropology, geography, politics, sociology and economics. This literature is not separately considered in the thesis but aspects of it have informed the analysis, particularly where it challenges conventional assumptions about the ability and moral right of sovereign nation states to control immigration, for example, Van Amersfoort (1996); Carens (1987); Dummett (2001); Harris (2002); Joppke (1998); Juss (2004); Juss (2006); Sassen (1996); Sciortino (1991).

There exist already many detailed accounts of the history of immigration into the UK from sociological, historical or political perspectives. These include Holmes (1991); Layton-Henry (1992); Paul (1997); Spencer (1997); Hansen (2000); Winder (2004). Major textbooks deal with the law current at the time of publication, for example, Macdonald and Blake (various editions); Bevan (1986); Evans (1993); Supperstone and O'Dempsey (1996); Mole (1987); Clayton (2004, 2006). Early or out-of-date editions of these texts often provide valuable historical insight.

⁴ 'Marriage visa age raised to prevent forced marriages', UK Border Agency Press Release 23rd July 2008.

There have been several texts concerned with the law in its political, social or historical context. Evans' (1983) early chapters contain a historical account. Bevan (1986) looks at the law thematically highlighting consistent trends. Juss (1993) similarly examines how problems of secrecy, reactivity, accountability and discrimination characterise the legal framework. Dummett and Nicol (1990) put the law and its practice into a longer historical perspective, which permits persistent themes to be identified. Recently, Clayton (2004, 2006) has taken a contextual view of the law.

Others have emphasised particular characteristics of decision-making. Legomsky's comparative study (1987) of immigration and the judiciary drew attention to the consistent restraint shown by the judiciary both in the UK and the US when asked to review immigration decisions. Griffiths (1997) makes a similar point in his broader study. Desai (1996) updated Legomsky's analysis in respect of the UK judiciary. She found that decision-making could still be described as conservative despite the significant development of judicial review during the previous decade. Debate as to judicial conservatism generally has revived following the Human Rights Act (Clayton 2004; Edwards 2002; Elliott 2001; Ewing 1999, 2004; Fredman 2006; Judge 2004). A critique of judicial decision-making in relation to marriage immigration is offered in chapters 4 and 6 of this thesis.

There has been work concerned principally with the effect upon family life of immigration controls. Sachdeva (1993) carried out a detailed investigation of the operation of the primary purpose rule, arguing that the rule was aimed at the exclusion of South Asian men and the eradication of the international arranged marriage. Bhabha et al (1985) and Bhabha and Shutter (1994) considered the impact of immigration and refugee law including the marriage laws upon women. Menski (1999) discusses the impact of primary purpose upon British resident women. Cheney (1994) links the treatment of women within the immigration system to the culture and language of imperialism and notes how rigid administrative categories deny the complexity of actual lives. The operation of entry clearance during the 1970s and 1980s was subject to extensive contemporary critique, notably Chowdhury (1982); Commission for Racial Equality (1985); Lal and Wilson (1986); Martin (1975); Powell (1992, 1993); Runnymede Trust (1977) and Sondhi (1987). These are considered in chapter 5 while the entry clearance service in the recent period is discussed in chapter 6.

Juss (1997) is principally concerned with decision-making by entry clearance officers (ECOs), adjudicators and tribunals, particularly in relation to family members. He argues for the development of a 'cultural jurisprudence' to secure justice and fairness in a multicultural and diverse society. He links his findings specifically to issues of 'due process' and the substantive issue of using social science research as evidence in immigration cases. While he encompasses tribunals, adjudicators and the entry clearance service in his study, his main emphasis is upon ensuring that tribunals reach culturally sensitive decisions that will, in turn, affect the culture within entry clearance.

Gender is an inescapable sub-theme of any discussion of marriage. While the effect of gender and family on migratory patterns and the intersection of race and gender in migration were arguably under-researched for a long period (Kofman 2004:247; Calavita 2006), they have become a recent focus of study (Phizacklea 1998; Kofman et al 2000; Kofman 2004; Piper 2005; Calavita 2006; Kofman and Meetoo 2008).⁵ New conceptions of family and migration "see them as fluid and as constantly being reconstituted and negotiated, adapting across spaces and through time" (Kofman 2004:249). The literature demonstrates how assumptions about gender have infected policy-making, a particularly relevant point in explaining the perceived urgent necessity of primary purpose (chapter 3) and the gendered assumptions about power and agency that have underpinned much decision-making about couples from the Indian sub-continent (chapters 4 and 5). The relationship between gender and race is a complex one. The thesis argues that, for decision-makers, the two were often mutually reinforcing (see chapters 4, 5 and 6).

Another strand is the study of marriage patterns amongst the UK's minority ethnic communities. There is now a substantial literature focusing largely upon the South Asian community and the arranged marriage (Ballard 1982, 1990, 2002, 2005, 2006; Bradby 1999; Brah 1978; Butler 1999; Charsley 2006). Much of this is concerned with how young people negotiate and reconcile the possibly conflicting expectations of their parents, their community and themselves, an important theme in this thesis but one that demands careful delineation given the frequent reliance upon the forced marriage, itself now the subject of substantial literature (Phillips and Dustin 2004; Razack 2004; Samad and Eade 2002), in order to justify restrictive immigration

⁵ An EU funded project analysing family migration policy in 8 EU member states is also under way at the time of writing.

controls. It is easy for debate to become framed as one of conflict between 'modern' indigenous culture and 'backward' immigrant culture (Lewis 2005; Razack 2004). Critics have observed the ambiguous or negative cultural weight ascribed to the 'immigrant woman' (Lewis 2005; Roggeband and Verloo 2007). There is a link here to other recent writing about cohesion and belonging, some of which is considered in chapter 6 (for example, Gedalof 2007; Yuval-Davis et al 2005). Regulation of marriage immigration has frequently relied upon the distinction between insiders and those who remain at least partial outsiders.

As already indicated, the thesis is also a study of discretion. The literature on discretion is vast and varied. There is a considerable empirical literature (Halliday 2000a, 2000b; Hawkins 1984; Loveland 1994) and various analyses often concerned with the limited role of law in its regulation (Adler and Asquith 1981; Allott 1980; Baldwin 1990, 1995; Davis 1969; Galligan 1986, 1996, 2001; Grey 1979; Hawkins 1992, 2002; Kadish and Kadish 1973). Judicial discretion has been the subject of extensive theoretical debate, most particularly in relation to Dworkin's (1977, 1985) critique of Hartian positivism which has given rise to a literature too extensive to summarise here but which is explored in chapter 2. Out of this literature is developed the theoretical perspective adopted in this thesis.

The thesis draws upon the wide range of literature discussed here to develop its arguments. By adopting a relatively narrow focus, it is able to make a deep investigation of the multiple and complex elements that have contributed to the development and application of the law and enables consistent features to be identified in a range of contexts. These features reveal deeply held attitudes about the lineaments of legitimate state power, about who does and does not belong in the UK and the shifting and contingent nature of that belonging particularly for some populations and about how, particularly for women, marriage constitutes a public declaration of allegiance as well as a private commitment. The identification of patterns of decision-making also permits arguments to be made about the relationship between institutions in the execution of policy.

1.1.4 Structure of the thesis

Chapter 2 considers the wide literature on discretion, both judicial and administrative, and uses it to develop the theoretical perspective used in the rest of the thesis. This

perspective allows an examination not only of what decisions are made but why they are made in the way they are. Chapter 3 considers decisions made by the legislature between 1962, when immigration from the Commonwealth was first formally regulated, and 1997. It traces the evolution in legislative approach towards marriage emigration from broad permissiveness to severe restriction. In doing so, it identifies beliefs and assumptions about race, immigration, gender and marriage as well as specific institutional values of Parliament. Chapter 4 examines judicial decision-making during the same period in areas relevant to marriage immigration and identifies similar values to those in chapter 3 as well as specific judicial values. Chapter 5 contains a detailed investigation into the conduct of the entry clearance service until 1997, a period during which it achieved notoriety for its exclusionary decision-making particularly on the Indian sub-continent. Chapter 6 considers the position since 1997. It outlines changes in perception of older immigrant groups and discusses new fears about immigration, security and social cohesion. Later subsections consider legislative, judicial and administrative decision-making since 1997. They reflect these new emphases and the contradictions contained within them. Chapter 7 concludes the thesis.

1.2 Context

In chapter 3, the thesis begins a detailed examination of the period since 1962. Marriage immigration occurred in earlier periods but did not invoke large-scale controversy. Prior to 1962, Commonwealth nationals had freedom of movement despite attempts in the 1950s to introduce administrative curbs on Commonwealth emigration (Bhabha and Shutter 1994:33-4; Dummett and Nicol 1990:177-81). Chapter 3 discusses how, even after 1962, the admission of Commonwealth wives and children remained, for a period, uncontested.

The admission of aliens, on the other hand, had been regulated since the Aliens Act 1905. The 1905 Act did not specifically provide for the entry of those married to British nationals, being concerned with regulating the entry of mainly Jewish refugees and their families. Under the Aliens Orders implemented under the Aliens Acts 1914 and 1919, female British residents born in the UK, “with a substantial connection” to or “well-established” in the UK were permitted to bring in alien husbands if refusal would result in hardship, a question left to the immigration officer’s discretion. Until

the British Nationality Act 1948, the alien wives of British men automatically became British nationals on marriage and were free to enter. After the 1948 Act, they were still normally permitted to enter (see the discussion in Bhabha and Shutter 1994:31-2). The Aliens Orders also provided that the wife and children of alien male workers should be admitted for the same period of time as the worker provided they could be supported while female workers had no such corresponding right. Neither the sex discrimination nor the immigration rights conferred by these orders seem to have caused comment. Dummett and Nicol (1990:188) note that alien immigration as a whole remained uncontroversial even after non-white commonwealth immigration became the focus of scrutiny.

The attitudes discussed in this thesis only became evident in response to the perceived threat of mass non-white Commonwealth secondary immigration. Yet, despite the apparent preceding calm, it is submitted here that these attitudes did not emerge at once and fully-formed but had a latent presence in the minds of decision-makers. This is suggested by evidence of aspects of them, relating particularly to marriage, women and family, in even earlier periods. These are discussed briefly in this introduction. ✓

It has been noted that women are seen as the reproducers of nationality and ethnicity, literally as mothers and figuratively in terms of embodying and reproducing culture (Yuval-Davis and Anthias 1989:6-10). In recent times, as chapter 6 notes, this has been observed mainly in the context of minority cultures. However, women in majority British society have also carried this burden. Specifically in relation to the concerns of this thesis, a woman's choice of spouse has been considered a statement of allegiance as well as of personal preference. This is apparent from the long debate on married women and nationality. Women's role in safeguarding the moral health of the nation is also suggested by aspects of the implementation of the Aliens Act 1905 although the focus here was on the immigration of women married to other aliens. The Act's implementation also prefigures, in a minor way, the strong unofficial culture in the entry clearance service discussed in chapter 5. Both of these episodes are considered briefly here by way of context to the detailed investigation that begins in chapter 3. ✓

1.2.1 Married women's nationality

The rule that a married woman must adopt her husband's nationality upon marriage was a major example of conjugal unity. Under this principle, a wife's personality was incorporated into that of the husband but "(t)he wife was not reduced to the position in law of, say, a dog" (Williams 1947:18); it was a question of guardianship rather than ownership. Writing in 1947, Glanville Williams cites the Bible as the origin of the common law concept and quotes Shakespeare and Byron to demonstrate its deep roots in our culture.

Conjugal unity should not be mistaken for a principled attachment to the family unit for the sake of the pleasures of married life or the security of children. It was concerned primarily with reproducing patriarchy and hierarchy within the family. It applied to areas of law such as taxation and domicile where it reinforced the authority of a male head of household. This was also the case as regards the nationality of married women where conjugal unity was consistently enforced by law from the mid 1800s until 1948.⁶

The Naturalisation Act of 1844 (S.16) provided that a foreign-born woman automatically became British upon marriage to a British man and S.10(1) Naturalisation Act 1870 stated that "a married woman shall be deemed to be a subject of the state of which her husband is for the time being a subject". Commentators (for example, Dummett and Nicol 1990:87-8; Jones 1947:72) as well as the Select Committee (1923) argue that the prior common law position had been that a woman's nationality did not change upon marriage.⁷

The effects of the rule could be severe. Expatriated women were liable to deportation, lost their voting rights (after enfranchisement in 1928) and, until 1933, had to register with the police. They might become stateless.⁸ Women married to Germans were liable to have their property confiscated in the aftermath of the First

⁶ As well as provision in the Naturalisation Acts, parliamentary drafters of the period between 1905 and 1948 were meticulous in ensuring that the law reflected the status of wives as sharing the nationality of their husbands. The Aliens Restriction (Change of Name) Order 1914, for example, prohibits aliens from changing their names but provides that nothing shall affect the right of a woman who marries an alien from using her married name. Such a woman, even if of British nationality, would have become an alien on marriage and would otherwise have been affected by the Order.

⁷ Baron Parke in *Countess de Conway's Case* (1834) 2 Knapp 364 at p.368.

⁸ According to reports in the Times, this was regularly the case in the 1930s for women married to American citizens as America required a residence period of one year before it permitted naturalisation.

World War.⁹ Access to increasingly important social benefits such as pensions or health insurance were more difficult for these women (Baldwin 2001:533).

After implementation of the Aliens Act in 1905, the rules on nationality interacted with immigration law so that British-born women married to aliens had no absolute right to re-enter their country of birth.¹⁰ Admission would, in law, have depended upon ability to meet the criteria for entry. During the currency of the Aliens Act 1905, women would have had the protection of S.1(3) of the Act which provided that an alien should not be refused for want of means if they were born in the United Kingdom and their father was a British subject. There was no provision for women who failed on health grounds. The Aliens Restrictions Acts of 1914 and 1919 and the consequent Aliens Order 1920 contained no exceptions. There do not seem to be reports of women being refused entry although there must have been cases in which they could have failed to qualify for admission. Such women would have been immediately identifiable as aliens after passports became compulsory in 1920.

Refusals are likely to have received publicity given the controversial nature of the issue. It is possible that the wide discretion given to immigration officers was always exercised in favour of such women. Some support for this may be found in a Jewish Chronicle report,¹¹ shortly after commencement of the Aliens Act 1905, describing officials' surprise when they detained the wife of a Dutchman only to find she was an Englishwoman. While she may have been English-born, she was no longer a British national although the report suggests ignorance of the point.

However, officials were fully aware of the legal position when 'forces sweetheart' Gracie Fields married an Italian film director, and thus enemy alien, in 1940.¹² Her passport was renewed and she returned to the UK during the war to entertain troops and factory workers but there was official concern that "by naturalising her we may be naturalising a woman who has practically severed her connection with this country." However, fear of "propaganda" by "Women's Societies" seems to have prevailed.

⁹ *Fasbender v Attorney General* [1921] F 1082.

¹⁰ The same principle was adopted in other countries. US citizenship was automatically conferred on foreign women who married US citizens from 1855 while the Expatriation Act 1907 expatriated American women who married foreigners. Independent citizenship was achieved in 1934 (Calavita 2006:114). Women automatically adopted their husband's nationality in Holland until 1964 (de Hart 2003).

¹¹ 21st September 1906.

¹² 'Our Gracie "lost her nationality"' BBC News 1st June 2007 (<http://news.bbc.co.uk/go/pr/ft/-/1/hi/englnd/manchester/6711189.stm>).

This was probably prudent given the state of public opinion. During the 1930s and 1940s, many public figures across the political spectrum expressed sympathy for women forcibly deprived of their nationality. One of the many parliamentary bills to remedy the situation was introduced "amid general cheers".¹³

Yet, notwithstanding apparent popular support, the law did not change until 1948. Although practical problems such as ensuring consular protection to women abroad or statelessness were cited, the critical issue was the maintenance of a uniform imperial identity (Baldwin 2001). At the outset, this was linked to the necessity of maintaining good order and the role of the family in maintaining and reproducing imperial hierarchy in miniature (Klug 1989:22). Writing in the nineteenth century, Cockburn (1869:216) said:

"By a system of law, founded upon and giving effect to these principles (including the adoption by a wife of her husband's nationality), aliens would be placed on the footing which a generous comity should dictate; the inconvenience of a double nationality would be prevented; everyone would know where his allegiance was due, without being exposed to the danger of having conflicting claims made on it, and if in need of protection, would know where to look for it; governments would not be troubled by claims for protection involving doubtful and embarrassing questions of nationality".

In 1923, the Foreign Office still believed that it was "desirable that the family should be a unit which is all subject to the same administration and control" (Select Committee 1923:41-2). Baty (1936:247) found the argument of female subordination so compelling that he could barely comprehend that it might ever have been otherwise:

"When we consider the enormous power with which a husband is invested over his wife by the Common Law, it seems monstrous that she could ever conceivably be thought to be subject to a competing control exercised by an alien power. Her duty to her husband and her Sovereign could never be at variance in so shocking a fashion ... These antimonies ... are flatly incompatible with the unity of person which is the essential basis of the common law view of marriage."

Women who disrupted the normal order by allying themselves with aliens were seen as having excluded themselves from the imperial family. Wyndham Bewes, Secretary of the Nationality Committee of the International Law Association, argued that a woman knew the consequences of marrying an alien and should take them into

¹³ Times 26th February 1930.

account when deciding whether to marry (Select Committee 1923:paras 1301-9). At para 1302, he said:

"If she does not want to change her nationality and must change her nationality on marriage, she will not marry and I think in that case she had better not marry."

A Home Office official is quoted by Baldwin (2001:541) as saying, in 1925, that:

"it seems right and reasonable that a British woman who voluntarily throws her lot in with an alien by marrying him, ought to be prepared to assume his nationality as part of the transaction".

The rule was also presented, somewhat bizarrely, as being for women's own protection, were she tempted to marry a polygamous "Oriental". The prospective loss of her nationality was the only disincentive likely to dissuade her. If women who married aliens were lost to empire, men who married alien wives thereby extended it by maintaining the "British character" of the family (Baldwin 2001:538-9).

Feminist demands for women to be recognised as independent actors cut across such notions of female subordination but were not a challenge to empire (see Baldwin 2001:523-5 for a discussion of feminist participation in the imperial identity). Quite the reverse, feminists saw the opposition as being between automatic obedience and allegiance freely given through personal commitment:

"... a woman is as attached to her nationality as a man is. She considers it quite as important a personal right as does a man, and it is a very serious thing to deprive her of a privilege of this kind without her consent. ... It is not treating her with due respect and it is not treating nationality with due respect" (Chrystal Macmillan, Select Committee 1923:127).

However, while there was sympathy for women's claims, it was easily subordinated to the more urgent need to maintain legal uniformity within an increasingly restive Commonwealth. Relations with the Commonwealth were seen as critical as Baldwin (2001) and others (for example, Hanson 2000:43-4) make clear. Women's claim to decide their own nationality was legitimate but relatively unimportant.

It was impossible to impose change on the Dominions, there was no agreement on the question and separate legislation would have meant acknowledging the crumbling of the single imperial nationality (Baldwin 544-554). The Second World War provided further reason for delay even while the problem was exacerbated by

marriages between British women and allied service men.¹⁴ By the end of the war, the necessity for nationality legislation in the light of Canada's intention to act unilaterally provided the opportunity for reform (Paul 1997:14-5) and the law was finally changed in the British Nationality Act 1948.

1.2.2 The Aliens Act 1905 and the entry of spouses

According to Juss (1993:32), "[t]he modern control of immigration begins with the Aliens Act 1905". Although it was not the first legislation to control the entry of aliens (see Dummett and Nicol 1990:83, 106; Stevens 2004:19-32), it initiated a permanent system of control, which, although soon repealed, is the ascendant of modern immigration control.

The origins, structure and application of the Act have been discussed widely elsewhere (Dummett and Nicol 1990; Gainer 1972; Garrard 1971; Gartner 1960; Landa 1911; Roche 1969; Shah 2000; Stevens 2004; Winder 2004; Wray 2006d). They are not considered here except so far as relevant to the argument made here that aspects of the application of the Act anticipate attitudes that became far more marked in later eras.

Under S.1 of the Act, leave to land would be refused if the immigration officer believed the immigrant to be 'undesirable' because he:

- Could not show that he had in his possession or was in a position to obtain the means of decently supporting himself and his dependants (if any);
- Was a lunatic or idiot, or owing to any disease or infirmity appeared likely to become a charge upon the rates or otherwise a detriment to the public;
- Had been convicted of certain crimes; or
- Had an expulsion order against him.

Political and religious refugees were not to be refused for want of means or the probability of becoming a charge on the rates. Despite this exemption, most refusals were on the first two grounds. Under S.2, immigrants who were refused could appeal to the Immigration Board.

Detailed accounts of the Act's implementation appeared in the Jewish Chronicle from commencement in January 1906 until 1914 when war supervened. These reports appear comprehensive, encompassing also the minority of cases involving non-Jewish

¹⁴ Times 5th July 1933, 26th July 1938, 25th January 1939, 1st April 1941 and 25th March 1942.

aliens. Refusal rates remained low throughout the period (Wray 2006d:314) and too much cannot be extrapolated from the relatively few refusals reported. Nonetheless, they do suggest the adoption, at least in some cases, of patterns of decision-making that will become familiar in later eras.

The Act's wording assumes that wife and children would accompany a married male alien and the family would be considered as a unit. Yet husbands frequently came in advance of their family and called for them only when established. These applicants were sometimes treated with suspicion. It was feared that they would earn insufficient money to support the family abroad who would then seek entry to the UK and become a burden. Yet there was no automatic right of entry for a spouse and children and, upon arrival, they had to meet the criteria in their own right. Refusals of lone husbands on these grounds were arguably unlawful and placed them in a dilemma. If they came ahead of their families, they were disadvantaged but, if they came accompanied, the financial criteria were more difficult to meet.

Wives and children who followed husbands were sometimes rejected. Officials seemed to place little weight on claims for family reunion although, when challenged by immigrants' representatives, initial refusals were sometimes overturned. There were no reported cases of women who had come ahead being joined later by husbands, although one young tailor did try to join his fiancée. Although the man had some funds, these had been provided by his fiancée and he was refused.¹⁵

Where families came together, the Act required the alien to be able to "decently support" himself and any dependants. While reasoning was often absent or sketchy, it seems that in a number of refusals, officials and the Board took into account irrelevant factors or placed the evidential bar too high. For example, employers who gave evidence that they were willing to employ the alien were regularly asked whether they could not find an Englishman to do the work, although this was not a requirement under the Act. Officials also insisted that the alien should have a prior job offer in the same trade as he had exercised in his home country. Guidelines suggesting how aliens could establish their means were rapidly transformed into rigid minimum requirements, which were necessary but not sufficient to establish the right to enter.¹⁶

¹⁵ Jewish Chronicle (JC) 5th January 1906, 5th July 1907, 3rd December 1909, 23rd August 1912, 30th August 1912, 26th September 1913.

¹⁶ Letter by Joseph Prag, JC 19th September 1913.

Some officials showed little compunction in splitting families in defiance even of the statutory exception for refugees as some early examples demonstrate. One applicant fleeing the pogroms sent his wife and children ahead but stayed behind for two weeks to sell the family furniture. The wife and children were accepted but the husband was refused despite more than minimum funds. A man who arrived with his wife and sister was refused because he had contracted tuberculosis after hiding in damp cellars. The women were admitted. Providing an insight into the human dimension of these accounts, the wife was granted permission to take her meals on board the boat on which her husband was held pending return.

One striking case involved a deaf-mute child of 9 who arrived with her parents and 5 siblings. All except her were accepted. Her rejection was of doubtful legality given that the family had fled the pogroms and wished and was able to look after her but the family had little option but to return the child alone. She was sent to Germany where the Jewish community cared for her. Her refusal was one of the few to receive attention beyond the immediate Jewish community and, following a deputation to Parliament and other adverse publicity, she was permitted to return.¹⁷

Occasionally, officials were swayed the other way by an access of romantic sensibility. A young male refugee was admitted after an initial refusal when he described his bravery in defiance of orders to shoot demonstrators. A young Polish woman who had also been refused was permitted to stay after she announced her intention to marry the young hero. As a "good-natured" officer explained: "We must not spoil such a romance".¹⁸

Following the case of the deaf-mute child in early 1906 and other representations, Home Secretary Gladstone had a letter sent to the Boards, expressing his view that Parliament had not intended the Act to be applied with a rigidity which excluded consideration of great personal hardship or suffering caused to women and children (Landa 1911:316). While there were perhaps fewer cases of brutal separation in its immediate aftermath, by August 1906, the Jewish Chronicle was reporting that the recent mood of generosity had already receded. Individual family members continued to be refused including, in one case, a girl of 6 travelling with her mother and 5

¹⁷ JC 26th January 1906, 23rd February 1906, 2nd March 1906, 16th March 1906.

¹⁸ JC 19th January 1906.

siblings, although the child was eventually admitted for treatment at the Jewish Shelter.¹⁹

Foreshadowing later practice, discrepancies were sometimes used to cast doubt upon parties' credentials, including as to whether they were really married. Under the Act, marriage did not have to be proved to establish dependency. It is not clear from the reports whether decision-makers believed that the parties had to be married to qualify, whether they disapproved of their conduct in living together unmarried or whether they feared that the women were coming to work as prostitutes.²⁰ The lack of an obligation to give reasons means that the officials may not have articulated to themselves the grounds of suspicion.

As these instances suggest, refusal seems to have been more likely where there was disapproval of an aspect of the parties' conduct. A tragic example involved a family where the husband was drunk on arrival. As an orthodox Jew, he had not eaten for several days as Kosher food was not available. Overcome and faint, he had been persuaded to take a little "intoxicating liquor" which unsurprisingly had gone straight to his head. The family was refused without explanation.²¹ In other cases, a more traditional form of double standards prevailed. A 38-year-old man landed with a young woman described as his domestic servant. The man had considerable funds and explained that he had a wife and family in Russia. When the girl admitted that the parties were living together, she was refused while the man was accepted.²²

The Boards sometimes took an active role in ensuring that proprieties were observed. In one case where there was doubt over the marriage, the parties were admitted only after the Board had enquired whether the husband would look after his wife "as a husband should".²³ Women were admitted on condition that they married within a certain period or were required to live at a separate address pending the marriage.²⁴

There was, throughout the whole period of the operation of the Aliens Act, much anxiety about the 'white slave trade'. Women whose situation was irregular or who were assessed to be "good looking" were subject to closer examination. Comments as to a woman's personal attractiveness were a regular feature in deliberations. Single

¹⁹ JC 17th August 1906, 5th February 1907, 23rd September 1910, 30th September 1910.

²⁰ JC 7th September 1906, 8th July 1910, 10th September 1910, 28th July 1911.

²¹ JC 15th March 1912.

²² JC 10th May 1907.

²³ JC 7th September 1906.

²⁴ JC 24th March 1911, 8th August 1913.

women were routinely detained while the respectability of their connections was verified.²⁵ As a means to prevent prostitution, these measures were ineffectual. The Jewish Chronicle²⁶ pointed out that traffickers and their victims could evade detection by travelling first or second-class. Nor were refusals effective in protecting vulnerable women from exploitation. Lone women without language skills or an obvious source of income might be at risk in London but returning them penniless to a hostile environment was not safer for them. Proposed solutions such as the setting up of hostels did not materialise.

1.2.3 Discussion

The necessarily brief account here of the rules on married women's nationality and the implementation of the Aliens Act suggests that some characteristics of decision-making that are noted later in this thesis were anticipated in these earlier episodes. They suggest that commitment to the unity of the family was shallow, easily displaced and dependent upon the family replicating and preserving in miniature, wider social values. Those perceived as deviant in some respect did not receive the same acknowledgement of their family life. This would suggest that later extreme measures such as the primary purpose rule or the ban on Commonwealth husbands were not an aberration but an exaggerated form of a pre-existing regulatory tendency.

As discussion of the Aliens Act suggests, there were observable fears about family immigration similar to those which dominated immigration policy from the 1960s onwards. As in later eras, the entry of spouses and children may be perceived as an insidious form of immigration in which humanitarian claims are pitched against deep-seated anxieties about labour displacement and numerical domination. However, it is not necessary to explain all restrictive measures in terms of personal animosity. In the case of married women's nationality, there was widespread support for a change in the law but this was, for a considerable period, subordinated to the cause of imperial unity.

In this thesis, I argue that a hierarchy of acceptable marriages emerges from an overview of decision-making. The location of a marriage in the hierarchy depends upon the weight attached at a particular moment to factors such as gender, race and

²⁵ JC 10th January 1912, 10th November 1911, 5th September 1913.

²⁶ 29th May 1914, 17th July 1914.

compliance with legal and social norms, the relative priority of these shifting throughout the period under discussion. Only a relatively small number of refusals were made under the Aliens Act 1905, but when these are taken together with the rule on married women's nationality, the outlines of an early hierarchical ordering may be detected.

The only claim to be absolutely protected in law was the right of a British husband to bring in a wife, who until the British Nationality Act 1948 was also considered to be British. All other claims depended upon discretion. British-born women married to aliens were themselves aliens and had no absolute right to enter but there is no evidence to suggest that they were liable to be refused.

Decision-making under the Aliens Act suggests that those who failed to conform to contemporary standards of morality were regarded less favourably even though this involved the importation of standards not sanctioned by law. In the next chapter, I argue that discretion, including unofficial discretion, is an inescapable part of decision-making. In later chapters (chapters 4, 5 and 6), I suggest that this type of unofficial 'moral gatekeeping' is characteristic of the control of immigration through marriage although its actual nature and extent should be carefully delineated (see also Wray 2006a).

Unsurprisingly given contemporary values, women married to aliens were treated differently to men in a comparable position. Later in this thesis, it is argued that, where women marry in unapproved ways, not only do their husbands face rejection but such women are perceived to have excluded themselves from national membership. This tendency was given concrete form by the uncompromising legal rule on the adoption of a husband's nationality. While the rule does not seem, in practice, to have been used to prevent their admission to the UK, it did cause affected women other substantial difficulties.

Thus, assumptions, beliefs and values akin to those prominent in the period discussed in later chapters were in evidence at an earlier time. It seems that they represented deep-seated beliefs about the world and were not provoked only by the onset of mass non-white immigration. However, they were not dominant in these earlier eras as, for example, the overall low refusal rates under the Aliens Act demonstrate. Once fear of even small quantities of non-white immigration became the predominant concern, it intertwined with and reinforced these other attitudes, with the dramatic consequences discussed later in this thesis.

Chapter 2: Discretion as a framework for analysis

As well as focusing on marriage migration, this thesis critically examines the exercise of discretion by the legislature, the judiciary and the entry clearance service in granting permission to enter or remain in the UK because of marriage. The present chapter investigates the meaning of discretion and its role in decision-making. Discretion is defined further below but, in essence, it is taken here to mean the power to make choices within a constraining context (see, for example, Dworkin 1977).

It is not immediately obvious that studying discretion will permit the identification of a common framework for analysing organisations of such widely different powers and functions. The nature, extent and even existence of discretion within them have often been contested. While administrators may sometimes feel that they have no choice about what they decide, the literature suggests the prevalence of wide 'unofficial' discretion (Lempert 1994; Loveland 1999; Halliday 2000b). Given Parliament's theoretically unfettered power, discretion, with its suggestion of accountability, may seem an inappropriate term. "Judicial discretion" has been seen as a particular case engaging specialist forms of argument.

Nonetheless, in this chapter, I propose a common analytical framework based on an understanding of discretion. This requires identifying a common feature in fields of study that have usually been considered separately. There is a substantial modern literature on legal regulation and administrative discretion (for example, Black 1997; Galligan 1976, 1986, 1996, 2001; Hawkins 1984, 1992, 2002). This draws largely upon theories derived from sociology and political science. Judicial discretion has generally been considered using jurisprudential and philosophical modes of enquiry. This chapter proposes reliance on an essential common characteristic present in all discretion despite other profound differences. This is that, while decision-makers will, in most cases, use their powers to further what they perceive to be the purposes of their institution, this perception rests upon values, beliefs and assumptions about the world that may be common-place and widely-shared, but which are not subject to logical proof.

The chapter starts from the now uncontroversial premise that discretion informs all types of decision-making (see, for example, Galligan 1986). There is a common pattern of reasoning behind all discretionary decision-making despite the different

contexts in which it arises. The discretionary element may be disguised because decision-makers must rely, to a greater or lesser extent, upon assumptions and beliefs about the world and do not consider themselves to be making a choice in doing so. Where these assumptions and beliefs are held in common within a society, they may give rise to consistent patterns of decision-making within and between institutions. Identifying these helps to explain why organisations may seem to be working towards the same ends despite the absence of overt political direction.

2.1 What is discretion?

The essence of discretion is the exercise of choice within constraints imposed externally by an official or unofficial grant of power. Davis (1969:4) says that a "public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action and inaction". Dworkin (1977:31) compares discretion to the hole in a doughnut. The analogy is not in all ways appropriate (see Galligan 1986:32) but emphasises that discretion is a generic term whose significance and extent is determined by its context.

Discretion implies that the decision-maker remains in some way accountable for the choices made (Christie 1986:754). The constraints implied by discretion must be linked to the power itself rather than be part of the general conditions of life. Dworkin (1977:31) draws an analogy with a house buyer. There may be many constraints upon a prospective purchaser (availability, price, location and so on) yet one would not say that one has discretion to choose a property. Discretionary power must be used to further the purposes for which it was endowed: "Central ... is the idea that within a defined area of power the official must reflect upon its purposes, and then settle upon the policies and strategies for achieving them" (Galligan 1986:22).

There are differing degrees of discretionary power. Dworkin (1977:31-3) draws a distinction between 'strong' and 'weak' discretion. 'Strong' discretion occurs when the decision-maker "is simply not bound by standards set by the authority in question" (Dworkin 1977:32). Dworkin uses the example of a sergeant told to pick any five men for patrol without further qualification. The sergeant has complete freedom to set his own standards as to who would be most appropriate. He contrasts this with two types of 'weak' discretion. In the first place, an official is bound by standards set by a higher authority but "the standards an official must apply cannot be applied mechanically but

demand the use of judgement" (Dworkin 1977:31). Continuing his example, if the sergeant were told that he should choose his five most experienced men, he would have 'weak discretion' of the first kind. The second type of weak discretion, according to Dworkin (1977:32), is when "some official has final authority to make a decision and cannot be reviewed and reversed by another official". Dworkin draws upon the sorts of decisions which sporting umpires have to make as examples.

Dworkin has been criticised for relying too heavily upon formal controls to determine the extent of discretion (Galligan 1986:14-20; Greenawalt 1975:363-6; Guest 1992:217). A formally 'strong' power may be so hedged about by unofficial standards that actual discretion is very limited. The instruction to pick any five soldiers for patrol may be made in a context in which there are many unspoken understandings as to who should be chosen. On the other hand, apparently specific instructions may, in reality, confer wide discretion, such as an instruction to choose the five most experienced soldiers when all have approximately equal experience. Moreover, a grant of power will always contain some standard implied by the power itself. A power to select soldiers for patrol requires that those chosen are identifiable as soldiers.

Dworkin (1977:33) acknowledges that strong discretion does not equate to license but sees a qualitative difference between general standards such as fairness or rationality and explicit standards set by the power-granting authority. Yet, either a standard constrains an official's exercise of discretion or it does not. If it does not, then, while we may be critical of an irrational decision, the requirement of rationality is not a constraint upon the official's exercise of power. If it does, then it is not material whether it is an express or implied requirement; the power-granting authority requires the decision-maker to act rationally.

It is therefore not possible to separate the constraints on an official's powers from the nature and purpose of the powers themselves or to categorise discretion as purely 'strong' or 'weak'. The extent and nature of discretionary power cannot be detected in the form of words alone but has to be understood in context. It is perhaps more accurate to say that it will vary in degree across a spectrum from 'strong' to 'weak' and that its relative strength or weakness may be detected only by looking at the totality of power, express, official or otherwise (Bankowski and Nelken 1981:249; Grey 1979:109).

Due to the various, often informal ways, that discretionary powers may be granted, it is not always easy to determine exactly how much discretion a particular decision-maker may possess. Feldman (1994:165) notes that "[t]he lack of constraint may be more apparent than real in the organizational setting, since informal rules and norms are often relevant". Dworkin (1977:32) recognises that discretion may appear lesser or greater according to the perspective from which it is viewed, or it may even disappear altogether when examined in a particular light: "... in some cases the official may have discretion from one stand-point though not from another" (Dworkin 1977:31). This chameleon-like quality suggests a critical approach is appropriate towards claims that there is no discretion to act in a particular matter.

Discretionary powers are thus not susceptible to easy definition and cannot easily be captured by formal mechanisms. They exist as part of the overall power structure of an institution. Adler and Asquith (1981:12) point out that, as a consequence, attempts to modify the nature of discretionary powers must acknowledge social and political forces within the decision-making environment. This perspective helps to explain why legal standards may not have the anticipated effect if they are competing with unofficial grants of power operating to unofficial norms. Baldwin and Hawkins (1984) compare discretion to toothpaste; pressure at one point will simply cause it to emerge elsewhere. This question is pursued later in this chapter.

2.2 Discretionary decision-making

If discretion is the exercise of choice, then the question is the type of choices that are available. The literature often focuses on the power that a decision-maker has to decide which rule or standard to apply. Galligan (1986:21-2), for example, defines "a central sense of discretionary power" as:

"powers delegated within a system of authority to an official or set of officials, where they have some significant scope for settling the reasons and standards according to which that power is to be exercised, and for applying them in the making of specific decisions. This process of settling the reasons and standards must be taken to include not just the more obvious cases of creating standards where none are given, but also individualising and interpreting loose standards, and assessing the relative importance of conflicting standards."

This emphasis upon standards is another reason why discretionary powers may not always be visible. It is only relatively high-level officials and courts that have much official power to decide which standard is to be applied, and this is usually subject to

many other constraints. Lower level officials and adjudicators are more often concerned with fact-finding. This may be presented as an objective exercise not connected with the exercise of discretion. The judicial discretion involved in fact finding may also be minimised (for example, Iglesias Vila 2001:7). Yet, as Galligan (1986:33) also points out, fact-finding is itself a discretionary process that may be "imprecise and variable". Facts must be inferred from evidence and this involves choices as to the significance of that evidence. The history of immigration control demonstrates how membership of apparently straightforward factual categories such as spouse or child can easily be subject to doubt and controversy (chapter 5 of this thesis). Therefore as Galligan (1986:9) observes, discretion involves finding facts, setting standards and applying facts to standards.

In reality, however, given the unofficial nature of much discretionary power, decisions as to facts cannot be isolated from decisions as to standards. Chapter 5 describes how, despite sometimes overwhelming evidence, entry clearance officers declined to acknowledge the existence of factual situations leading to the refusal of many South Asian applicants. The officer may have been drawing perverse factual inferences or may have adopted an unofficial rule such as a higher standard of proof or that only certain applicants would be accepted. The boundaries between the adoption of a standard and the finding of a fact are blurred particularly as the exercise of discretion is a process rather than a moment of decision (Galligan 1986:10).

This raises questions as to the decision-making process. Decisions are not "simple, discrete and unproblematic as opposed to complex, subtle and woven into a broader process" (Baldwin & Hawkins 1985:580). Rational models of decision-making have been challenged in various ways. Rational choice theory has acknowledged the role of the institution in determining individual decision-making (McCrudden 2006:642). While some conceptions emphasise the random nature of decision-making (including the 'garbage can model' described by Black 1997:59 where the common thread is contemporaneity), others have argued that decision-making is structured but that these structures are not determined in the way rational models suggest. Some commentators (for example, Hawkins 2002: chapter 2) have argued for a naturalistic perspective that acknowledges the range of non-legal rules and influences and "the processes of sense-making and interpretation that lie behind a decision" (2002:31). Black (1997) proposes institutionalism as a way of bringing into account the role of the institutional environment, interpreted to include not only the organisational framework but also

interpersonal relationships within the institution and between the institution and the individual.

Whatever conception of decision-making is adopted, once a decision has been made, it implies a series of second-order decisions even if these are not easily identifiable or have been made using unofficial and unacknowledged standards and factual inferences. Galligan (1986:9) describes discretionary decision-making as an equation: "On finding facts *F*, and on the existence of conditions *XY*, official *O* may/shall do *Z* [taking into account factors *S2*, *S2*, *S3*]." The process arguably bears further reduction to the syllogism: "If facts *F* and standard *S*, then decision *D* shall be made", an argument made by MacCormick (1994: chapter 2) in relation to legal reasoning. This is not to minimise the complexity of decision-making but to acknowledge its common characteristics. It is usual to refer to 'administrative' or 'legal' discretion as distinct entities or to create typologies of discretion (for example, Shapiro 1983; Goodin 1986:235) as if there were different types of discretion when in fact all discretionary decisions share the same essential characteristics. Use of terms such as 'administrative' or 'legal' discretion is a form of synecdoche. It is not the discretion itself which is 'administrative' or 'legal' but the function of which the discretion is a part (Grey 1979:112). This is not to deny the complexity and uncertainty of the decision-making process but to recognise how easily the discretionary nature of decisions may be disguised. It is elementary reasoning that while a syllogism carries a sense of inevitable logic, its validity depends on the truth of its premises.

That discretionary decisions are based on reasoning, however complex and diffuse, is supported by the development of computer programmes which can assist in the making of discretionary legal decisions in areas such as the division of assets upon marriage breakdown (Stranieri et al 2000). Every decision that is reached implies, even if it is not articulated, that a particular factual situation is presumed to obtain and a particular standard is being applied. These factual assessments and standards may be presented as if they were immutable and inevitable particularly in administrative situations. Yet they are, eventually if not immediately, dependent on second order justifications which are not the product of deductive reasoning alone but rely upon analogy or induction. They depend, in the final analysis, upon the decision-maker's perception of the existence and relative weight of the factors to be taken into account. As MacCormick (1994:101) observes, these "second-order" justifications are present

in legal decisions although he regards them as having a role only in the absence of "valid rules of law" or of "proven fact". It will be argued later in this chapter that all decisions, legislative, judicial or administrative, rely on assumptions and beliefs which may be widely held and defensible but nonetheless depend eventually upon something other than deductive logic.

The above account suggests that, to adopt Shapiro's typology of administrative discretion, determining whether an official is making a "distributive decision", a "high volume, low-level decision" or a "subtle and complex assessment of human characteristics" (Shapiro 1983:1500-4) has limited relevance in understanding discretion. The extent of and constraints upon discretion will differ depending on the decision-making context but the discretionary process always requires, even if not articulated as such, a decision as to standards, a decision as to facts and the application of the standard to the facts in order to reach a final decision. However, decision-making does not involve a single moment of decision but is a process involving myriad complex and often concealed choices that result in the selection of a single final outcome. Thus Grey (1979:107) writes: "Discretion may best be defined as the power to make a decision that cannot be determined to be right or wrong in any objective way". The decision cannot be proved to be absolutely right or wrong not because, from the decision-maker's perspective, there is more than one 'right' answer, but because the thought processes involved in arriving at a solution require a myriad of prior judgements about any of which dissent is possible.

This view of discretion is reminiscent of Dworkin's 'right answer' thesis (see Dworkin 1977: chapter 4, 1985: chapter 5), discussed further below. The 'right answer' is not an objectively verifiable truth but describes how a decision appears to those who have made it. According to Dworkin, the exercise of judicial discretion will be consistent with the judge's own "general theory" of law and thus appears, to him or her if not to others, as uniquely correct. Whether Dworkin is arguing that there is a single identifiable 'best' theory is not the point here.

This connection with Dworkin's writings about judicial discretion brings out another critical point. It is not suggested that discretionary decisions are no more than the expression of personal belief. The definition of discretion is that it is the freedom to choose subject to constraints. Constraints will be multi-dimensional, frequently unofficial and represent a complex and particular combination of personal, local and broader factors; see, for example, Hawkins' (2002:47-50) typology of surround, field

and frame. However, the constraints will have a particular relationship with the institution from which the individual derives discretionary power, a characteristic acknowledged by perspectives such as those of institutionalism and organisational culture and discussed later in this chapter. Dworkin's writings on discretion and interpretation are concerned, in part, with the relationship between individual beliefs and other, particularly institutional, constraints that informs the exercise of discretion including judicial discretion. These are considered in the next section so as to identify the common element underlying both jurisprudential and other forms of analysis.

2.3 Discretion and legal theory: Austin, Hart and Dworkin

Until the challenge to classical positivism mounted by Hart in "The Concept of Law" (first published in 1961 although references here are to the second edition published in 1994), the theoretical understanding of law in British jurisprudence was dominated by Austinian concepts of positive law and sovereignty. Austin supposedly (see Morrison 1997:6 for a critique of this view) viewed law as a phenomenon clearly distinguishable from other social phenomena such as morality or social custom. It is a species of command, non-compliance with which may be punished. Legal commands are given by a sovereign institution (whether represented by an individual or a body such as a legislature) to members of the society subject to that sovereign who, by definition, cannot be subject to legal limitation (Cotterrell 1989:57-72). Such a conception of law marginalises discretion. The diffusion of power suggested by discretion is inconsistent with the absolute power of a sovereign. If subordinate bodies do gain discretionary power, then this must be as a form of delegation that may be withdrawn or amended at any time by legal command.

Moreover, the substance of law and thus of discretionary power is only to be found within the content of the law itself, the "plain fact view of law" (Dworkin 1986:33) or "the view that law is only a matter of what competent legal institutions – legislatures, city councils, administrative agencies, and courts – have decided in the past" (Wasserstrom 1986:205). It is possible to extract from positivism a simplistic conception of law as a closed system of deductive logic, a view which Hart (1994:129) described as the "vice known to legal theory as formalism or conceptualism". It assumes that judges are required only to apply pre-existing objectively determinable legal rules to factual situations. Austin himself rejected such

a simplistic reduction (see Morrison 1997:241-2) and it is quite obviously highly unrealistic. While this conception is a distortion of most thinking about formalism (see, for example, Forsyth 2007), it arguably had a long grip on lawyers' psychology as a kind of ideal model, confirming both the supremacy of law and its rationality.

This model views those who apply legal rules as the passive agents of sovereign authority. It does not deny the existence of discretion, but sees it as peripheral to the central workings of law. It has an existence only to the extent that the sovereign power has either expressly granted discretionary power or has inadvertently created it through, for example, defective or incomplete legislative drafting. From this perspective, if the sovereign wishes to eliminate discretion from law, there is no reason, in principle at any rate, why this should not happen (Himma 1999). Thus, for example, Ormerod (1987:123) describes discretionary powers as "all deliberately created by parliament and bestowed upon, often unenthusiastic, recipients".

While this account of law does not exclude discretion, it is marginalised. Yet a credible explanation of law must take account of the role of discretion. Hart, in his desire to revitalise the positivist enterprise, had to confront the discretionary nature of law if he was to construct a persuasive argument for positivism. Hart (1994:128) saw discretion as arising from the inevitable "open texture" of legal rules and noted:

"In every legal system a large and important field is left open for the exercise of discretion by courts and other officials in rendering initially vague standards determinate, in resolving the uncertainties of statutes or in developing and qualifying rules only broadly communicated by authoritative precedents." (Hart 1994:136)

Hart does this in the context of his rejection of the apparent simplicity of a command theory of law (1994: chapter IV). This allows him to view legal rules as having effect not just because they are backed by coercion but because we accept and internalise their validity. His focus is upon how individuals and law enforcers perceive law, upon the "internal point of view" (Hart 1994:98). Law does not take effect simply as a result of external authority but because people, for the most part, accept that there is an obligation to obey the law and are critical of those who do not.

Hart (1994:v) described his work as "an essay in descriptive sociology" but, while he was concerned with how society uses law (see Morrison 1997:352), he restricted the values that underlie the content of law and thus its legitimacy in the minds of those who must accept it, to the "minimum purpose of survival" (Hart 1994:193). This

is consistent with his reluctance to examine the moral and political underpinnings of legal rules (see Cotterrell 1989:104) and the marginalisation of discretion. Hart (1994:128) accepted that discretion is a feature of the application of law but saw it as an aberration due to human imperfection rather than as a necessary component of law: "... the necessity for such choice is thrust upon us because we are men, not gods".

The meaning of rules is to be discovered by a linguistic analysis of their content. On occasion, the language used may be inadequate to the task and the judge is in a "penumbra of uncertainty" (Hart 1994:12). When this occurs, the judge must exercise discretion. Discretion thus arises principally because of linguistic uncertainty: "In all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide" (Hart 1994:126).

This is true, but it is also the case that arguments as to the meaning of language may represent deep divisions upon political or moral values and, as Dworkin (1986:15-20) points out, arguments about the meaning of a rule may arise even when the linguistic sense is clear. In viewing discretion as the result solely of linguistic inadequacy however universal and inevitable, Hart avoids recognising the potentially political nature of discretionary decisions. Yet there is also a contradiction here. A well-canvassed criticism of Hart's positivism (see Dworkin 1977:33-4) is that it suggests that if a legal rule does not cover a particular situation, then that situation is not governed by law at all. Where law runs out, judges may act with unconstrained freedom. In those situations, a judge has only policy in the sense of political or moral values to guide him or her.

While Hart does not deny that policy choices have to be made, he minimises the possibly controversial nature of these decisions. He talks, for example, of "an answer which is a reasonable compromise between many conflicting interests" (Hart 1994:132) or of "striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case" (Hart 1994:135). Hart seems to take an optimistic view of society, assuming that consensual decision-making is generally achievable (see Morrison 1997:352-3 for a discussion of Hart's outlook).

In summary, Hart views discretion as the result of the inability of language to encompass all possible factual situations. The exercise of discretion is an abnormal activity separate from the usual legal practice of applying legal rules and is governed by standards different to those which apply when legal rules are applied, but about which there is wide agreement. The view that discretion arises only in the exceptional

and not the routine case is at odds with the account of discretionary reasoning earlier in this chapter, which argues that discretion is present on almost any occasion that a decision is made. It also implies that where discretion is exercised, it is free from the types of constraint which we usually associate with the law.

Dworkin (1977: chapters 2 and 3) took up the question of the nature of the constraints upon judicial discretion. Dworkin's disagreements with Hart are part of a far wider debate, but his perspective is examined here so far as it considers the role of discretion in legal reasoning.

Dworkin (1977:34) argues that Hart was bound by a concept of law that only recognises positive legal rules. If no binding rule applies, discretion is exercised in a vacuum without binding standards of any nature; in other words, the judge exercises "strong" discretion. He sees this as unrealistic. When judges decide cases for which there is no pre-existing legal rule, they do not refer only to their own inclinations and personal beliefs as "law is not a matter of personal or partisan politics" (Dworkin 1985:146). Rather they make use of principles abstracted from "the interaction of their personal and institutional morality" (Dworkin 1977:87). Dworkin (1984:260) sees the distinction between rules and principles in the following way: "Rules bind in all-or-nothing fashion, while principles argue in favor of a decision but not necessarily conclusively, so that someone does not abandon a principle in recognising that it is not absolute." Where a rule does not dictate a satisfactory answer, a judge will be guided by legal principles in order to reach a decision. A judge's discretion is always confined and cannot be characterised as 'strong' (Dworkin 1977:69).

The confines upon a judge's discretion are thus essentially institutional in nature. A judge's discretion and the confines upon that discretion are inseparable. Discretionary power is granted to a judge not as an individual but as a member of an institution and he or she will seek to exercise that discretion in ways consistent with that institutional role. This seems a plausible account. The formal constraints upon higher court judges are actually very few, given that they are nearly incapable of being removed from office. Yet judges almost universally express themselves in ways which respect the limitations imposed by judicial and constitutional convention. It is possible that this is a mask to cover the imposition of their personal preferences but, if so, it is remarkably consistently held through many hundreds of pages of detailed legal argument. At the very least, at the conscious level, judges view themselves as institutionally bound in

the way that they exercise their discretion, even if their own personal beliefs will at times affect their perception of what the institution demands.

Dworkin's argument is an observation about the behaviour of individuals working within institutions as well as an argument about judicial decision-making. The individual will, unless alienated from the institution of which he or she is a member, seek to make decisions which reflect their own sense of what is required by that institution in terms of the purpose and history of that institution. This sense of institutional values will, in part, be determined by the individual's perceptions and preconceptions. Yet these personal beliefs, on the whole, do not translate unmediated into discretionary decisions but contribute along with other factors to a concept of institutional values.

This much is relatively uncontroversial (see, for example, MacCormick 1994:231). Yet Dworkin (1987:87) goes much further than that. He argues that judges are concerned to fit their judgements within the framework of the law and aim for a "comprehensive theory of general principles and policies that is consistent with other decisions also thought right". Judges, far from being free of guiding standards, make their decisions within the context of the "seamless web" (Dworkin 1977:115) of legal principles. Dworkin argues that the nature of legal argument pre-supposes that there is a right answer to every disputed case. Even if this cannot be objectively proved in reality, a hypothetical omniscient judge would be able to show what this right answer should be (see Dworkin 1977: chapter 13).

The 'right answer' thesis has been the subject of a huge amount of debate and criticism. One interpretation is that there exists a determinably correct answer to every legal problem even if this cannot be established (see, for example, Kress 1986:374 or Galligan 1986:15). If that is the case, not only does it make very particular claims for law of doubtful applicability outside the field of adjudication, but it effectively eliminates discretion in any meaningful sense (Kress 1986:374 although see Iglesias Vila 2001: chapter 1).

Others (for example, Guest 1992:138-40 or Wasserstrom 1986:272) have argued that Dworkin is not claiming that a 'right answer' is objectively verifiable. As a philosopher, he argues that it is not possible to distinguish between one's personally held moral beliefs and objective moral truth. From the perspective of the individual they are identical (see Dworkin 1985:171-4). A judge in a hard case applies his own "general theory" of the law which includes judgements not only as to the individual

moral rights attaching to the parties but the institutional morality of the law as evidenced by its history (Dworkin 1977:105-23). By applying this general theory, a correct answer can, in principle, be reached according to that theory. But judges will not hold identical theories of law. They may thus reach different conclusions and yet each will believe their conclusions to be correct if the answer conforms to his or her general theory. Hercules' omniscience extends to the coherence and integrity of his theory rather than to its objective correctness which is unprovable (see, for example, Dworkin 1977:126-7). Disagreement between equally skilled practitioners does not signal the existence of more than one correct answer (Iglesias Vila 2001: chapter 6).

Dworkin is writing from the perspective of the participants in the decision-making process. His theory is about the nature of argument and reasoning rather than about discovering objective truths. Once we have reasoned our way to a decision, we consider that, on the basis of the theory we hold, it was the only answer we could reach. If we are wrong, it is because some part of our reasoning or the values upon which that reasoning was based were faulty. We cannot prove the correctness of our answers but can only seek to persuade others by using the same sort of arguments as we used in arriving at our own answer: "I have no arguments for the objectivity of moral judgments except moral arguments, no arguments for the objectivity of interpretive judgments except interpretive arguments and so on" (Dworkin 1985:171).

This understanding of Dworkin's argument is consistent with the description of discretion given earlier in the chapter, i.e. that discretion is not a choice made between two equally good alternatives but is the result of a reasoning process which points to a particular choice. It also acknowledges its essentially political character as Dworkin (1977:104) makes explicit. Nonetheless, Dworkin envisages an institutional politics which draws its authority and values from the institution which it represents rather than from the individual who gives it expression.

The influence of the institution is thus the means by which discretionary decisions retain their political nature but represent something more than the personal beliefs of the individual. Recognising the prevalence of legal discretion does not lead inexorably to the conclusion that decisions are arbitrary, unpredictable and reflect little more than the judges' or administrators' personal political morality. Rather, it is contained by something not so easily identified but nonetheless powerful: the collective values of the institution of which the official is a member and of which articulated legal norms form only one part.

This thesis is concerned with the interaction between personal and institutional values that Dworkin identifies. Nonetheless, Dworkin was writing about judges who operate in a particular arena. The question is whether the type of analysis adopted by Dworkin can be applied to decision-makers operating in other contexts, notably, for the purposes of this thesis, legislative and administrative bodies. The following section considers Dworkin's writings on interpretation and the critique made of them by other scholars. It argues that out of this debate may be detected a basis for a common analytical approach to other institutions including the judiciary.

2.4 Discretion and interpretation

Interpretation is closely related to the concept of discretion. It has been already argued that the exercise of discretion requires a decision as to the meaning of a standard, the existence of a factual situation and the application of the standard to the facts. While deciding the meaning of a legal rule may require interpretation as the term is usually understood, so arguably does the determination of facts. A fact cannot be proved absolutely but only inferred from evidence. If interpretation is "the imposition of meaning on an object" (Marmor 1992:13), then factual evidence, in the form of texts, photos and other pictorial representations, verbal statements or objects, is capable of interpretation. Thus, while debates about interpretation usually focus around the meaning of a rule, the conclusions drawn are also applicable to the other, often underestimated, part of discretion; the determination of facts.

Dworkin's account of interpretation is principally taken here from his works "A Matter of Principle" (1985) and "Law's Empire" (1986). He is seeking to establish a general theory of interpretation and in his preliminary analysis takes the interpretation of literary texts or of social practices as his paradigms rather than judicial reasoning (for example, Dworkin 1985:149-58). In doing so, he is intending to raise the activity of legal interpretation to the level of conscious and critical analysis adopted in other fields of human endeavour.

Dworkin's theory of interpretation has been widely debated. It is intended to be of wide application although Wasserstrom's (1986:217, fn 76) considers that it is more convincing as an account of how social practices are understood than in interpreting the creative work of an individual. It involves three stages of analysis although these will not usually be consciously undertaken (Dworkin 1986:66-7). In the first place, at

the "pre-interpretive" stage, there must be a consensus as to the content of the thing being interpreted (Dworkin 1986:65-6). The object of interpretation must be identified as a discrete entity of a particular genre such as a novel or social practice. The actual interpretative process then requires two value judgements to be made. Firstly, the underlying purpose, "some general justification" of the particular genre or practice in question must be identified. There does not need to be a complete fit with the purpose identified for it but it must fit well enough so that the interpreter is interpreting the existing genre or practice not inventing a new one. Having identified the underlying purpose, the interpreter will make a judgement as to how well the object of interpretation in question fits this purpose or whether some adaptation or extension is required (Dworkin 1986:66). Thus, interpretation is, in Dworkin's (1986:52) view, "constructive" in that it "is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong".

Dworkin sees interpretation not as an isolated individual act but as a contribution to a greater coherent enterprise. A 'good' interpretation is sensitive to the values and principles of the enterprise as a whole. The freedom to interpret is confined by the nature of the enterprise. A judge, for example, must justify his interpretation of a particular law according to the general purposes of the law as identifiable in its history although exactly what that history requires may be contended: "A judge's duty is to interpret the legal history he finds, not to invent a better history. The dimension of fit will provide some boundaries" (Dworkin 1985:160).

Thus while a judge does not have unlimited freedom to interpret as he chooses, the judgements which lie behind the interpretation are acknowledged. "There is, of course, no algorithm for deciding whether a particular interpretation sufficiently fits that history not to be ruled out" (Dworkin 1985:160). Each judge will have his or her own theory of what the institutional history requires, although that does not mean that some theories may not be better than others and will produce superior decisions even if this is not immediately recognised. The value of a particular interpretation may not be immediately apparent so that what, at first glance, appears to conflict with law's purposes may, in reality, herald a change in the sense of what this underlying purpose should be or what it requires in the way of interpretation (Dworkin 1986:89-90).

Dworkin's view of interpretation is consistent with his earlier account of judicial discretion. He recognises that applying the law requires interpretation and discretion

but maintains that these are confined by the greater enterprise of law founded on the purposes of morality and justice. He envisions, in law as in other social practices, that those who interpret it will share a broadly common but not identical view of its purpose. It “enables Dworkin to show when is agreement necessary and when is controversy possible without causing the practice to be indeterminate” (Iglesias Vila 2001:95). There are substantial factors encouraging convergence while still allowing for sufficient disagreement so that the law remains dynamic (Dworkin 1986:87-8). Dworkin (1986:225) describes this sense of law as a coherent shared enterprise as “law as integrity”.

In "Law's Empire", Dworkin (1986:chapters 4 and 5) identifies two alternative viewpoints to his own, characterising these as "conventionalism" and "pragmatism". His argument is that the problems of both conventionalism and pragmatism point in the same direction, towards the central ground of "law as integrity" and constructive interpretation. By “conventionalism”, Dworkin means the view that law is understood as being a matter of “[l]egal conventions ... identified by reference to the plain facts of legal practice” (Honeyball and Walter 1998:52). While conventionalism may possess virtues such as predictability, Dworkin sees it as a conception that ignores law's deeper purposes relying solely upon the fact of conventionality for the justification of a legal rule. Moreover treating as law only explicit and agreed legal rules would, as with Hart's positivism, leave large gaps in the law which would have to be filled by judges using “strong” discretion defeating conventionalism's predictability. Many conventionalists respond that, as a matter of convention, judges may agree that law also comprises the implicit extension of legal rules including principles. At that point, says Dworkin (1986:127-8), conventionalism turns into “a very abstract, under-developed form of law as integrity”, having lost its distinguishing virtues of clarity and predictability. Many critics have disputed Dworkin's dismissal of conventionalism (see, for example, the discussion in Honeyball and Walter 1998:51-4), but it is hard to deny that actual legal practice requires the type of abstraction from legal rules which Dworkin attributes to “law as integrity”. Whether such qualities can also be accommodated within a conception of “conventionalism” is not the question here.

“Pragmatism” is how Dworkin characterises theories associated with 'legal realism'. A pragmatic judge, says Dworkin (1986:164-75), may well behave in a way that appears similar to a judge undertaking “constructive interpretation”. However

that is not because he or she believes past decisions are important in their own right but because taking them into account enables him or her to reach the best decision upon that occasion. "Law as integrity" is to be preferred because it offers a conception of law that is ultimately based upon principle rather than expediency.

"Law as integrity" undoubtedly represents something of a romantic ideal. Nonetheless, it does make central to the analysis the role that institutional history plays in the interpretation of law. For Dworkin, this is not just a question of what judges do but of what they should do. As Lord Hoffman wrote while still a High Court Judge: "... readers who want to know what judges are supposed to be doing will do better to buy Law's Empire" (quoted in Honeyball and Walker 1998:104).

Dworkin's theory of 'constructive interpretation' has been the subject of huge critical comment and reflection. His writings are part of a wider debate that took place between mainly US academic writers during the 1980s on interpretation and law (see, for example, *Texas Law Review*, volume 60, 1982 and *Southern California Law*, volume 58, 1985). It is impossible to do justice here to the complexity and sophistication of much of the debate. Nevertheless, the principal strands of the critique help to elucidate ways in which judicial interpretation partly differs from and partly resembles interpretation carried out within other settings.

One school of thought (for example, Schauer 1985, Marmor 1992), connected to Hart's view of positivism, sees interpretation as the exception not the rule. These arguments rely on linguistic theories associated with Wittgenstein which deny that interpretation is required to mediate between a rule and the actions which accord with that rule. The meaning of words is to be discovered in their use. Interpretation is "an exception to, and parasitic on, the prior knowledge of literal meanings, as it normally concerns those aspects of communication which are under-determined by rules or conventions" (Marmor 1992:34).

Understood in this way, interpretation becomes a marginal and unregulated activity. If the meaning of a rule is to be discovered in its application, then interpretation is the creation of a new rule whose meaning will be discovered through its application. Interpretation seems set to go the way of discretion in Hart's positivism, something which happens because of linguistic imperfection and which is incidental to, if parasitic upon, the primary activity of the application of pre-existing rules to paradigm cases.

Interpretation
as
discretion

Earlier in this chapter, I suggested that discretion is only absent when a decision-maker simply processes information provided by another. Thus most decisions involve a degree of discretion, and the adoption of Hart's thesis regarding discretion would mean that most decisions are made using unregulated discretion. Similarly, the meaning of a word or situation may be so self-evident that no reflection is needed to know, for example, that the form on an official's desk is an application form or the person in front of them is a human being. Such examples are described by Marmor (1992:134) as "standard examples", i.e. one which is conventionally held to be applicable within the community so that failure to recognise it as coming within the meaning of a word indicates that one has not grasped the sense of that word as held by that community. The existence of conventional meanings cannot be denied without undermining the communal nature of language (see Iglesias Vila 2001:46-50). Yet, as Dworkin (1986:72) points out, such paradigms may be challenged or may evolve over time. They may also vary between different communities or sections of it. As the history of immigration control demonstrates, the standard examples of words such as "family" may be disputed. The choices implied by discretion or interpretation may be disguised but are nonetheless present. And, according to Schauer (1985:436), "once the text and precedent have drastically narrowed the range of permissible arguments and outcomes, it is hopeless to suppose that choices among these outcomes will be anything but political, sociological and psychological". So interpretation, when it does take place, is unconfined and discretion is strong. Dworkin resists such a conclusion but, it will be argued later, 'constructive interpretation' cannot altogether dismiss reflexive decision-making.

Another challenge to Dworkin may be found in philosophical (rather than legal) realism. This argues that the moral virtues of a system cannot be gauged purely through internal argument but must be measured against 'real' moral values. Moore (1985:376), for example, argues that "values can and should enter into the decision of every case and that real values, not just conventional mores, are the values that should be looked to by the judges". Yet he does not explain how we are to know what these values consist of or how they are to be agreed. Belief in 'real values' does not avoid arguments about whether a particular decision is morally correct, and moral arguments will include arguments about the weight to be attached to the institutional values of the law.

Yet Dworkin's views here are perhaps problematic (Rodriguez-Blanco 2001). Dworkin does not explain in any detail what should happen when institutional or conventional values are so obnoxious that moral judgement requires their rejection altogether. Dworkin (2001) holds a belief in the internal dynamic of the law which means "the law gets better and more sophisticated as a mechanism for organising human affairs" although, in the same interview, he also acknowledges that this has to be a "guarded claim" and matters can get worse. There is a potential tension between such claims of integrity and the demands of justice which Dworkin (1986:400-7) acknowledges and which cannot be resolved through the internal dynamic of law alone but through the philosophical vision which governs its unfolding (Dworkin 1986:407-10). It may be necessary to look beyond law itself for a moral guide.

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Moral realists therefore have a point when they say that 'constructive interpretation' cannot offer a complete, closed system of argument although it is not clear that this is what Dworkin (see, for example, 1984:254-60) is suggesting. Yet, in actual practice, a judge or other decision-maker, unless already deeply alienated from the enterprise of which they are a part, will start from the premise that he or she should do what the institution's values as expressed in its rules and practices require. Only if a decision appears unsatisfactory, will there be debate about what those values are or should be. As mentioned above, Dworkin himself views 'law as integrity' as consistent with moral values and assumes that there will rarely be fundamental conflict between institutional and more widely-held moral values:

Yet another challenge comes from sceptics who reject realism in the sense of a correspondence between words and real objects. However, they do not, for that reason, also reject the need for debate. Fish (1982:501) notes that "far from impeding the search for truth, the forceful and polemic urging of particular points of view is the means, and the only means, by which the truth is established". What sceptics deny is that this debate can amount to more than the urging of particular points of view supported, in some cases, by power structures and institutions. Thus, Levinson (1982:401) may believe that a "united interpretive community simply does not exist", but he accepts that "the social world consists not of isolated individuals, but rather of persons acting together in some kind of community enterprise, and that this community in fact constantly assesses and judges the use made of its terms by any given individual" (Levinson 1985:447). Levinson (1985:452) says that we all engage in "conversations about the structure of the world, including its moral aspects", but he

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does reject the belief that certain interpretations are privileged because of who makes them: "Interpretation is the task of everyone, not merely of judges." (Levinson 1985:453).

These arguments, particularly those of Fish (1982 and 1987), imply a criticism of Dworkin that has been made more explicitly by others (see, for example, Marmor 1992:73-82 and Honeyball and Walter 1998:75-87). The point is that Dworkin sees interpretation as the imposition of value upon an identified pre-existing object but assumes consensus as to this earlier stage of identification. Those who do not accept the truth of this earlier judgement are excluded from the interpretive community. Yet, unless infinite recess occurs, at some point some things must just be assumed to be true. Thus for Dworkin, "history in the form of a chain of decisions has, at some level, the status of a brute fact" (Fish 1982:559).

Interpretation as collective exercise

The critique has force but it does not, on its own, provide a better framework for interpretation. It does not fundamentally challenge the view of interpretation as a collective exercise. Fish (1982:552) himself acknowledges that there is inevitably much in common between the conclusions he draws from his more sceptical view and Dworkin's position. Nor is the argument universally accepted. Iglesias Vila (2001: chapters 4 and 5), for example, argues that complex internal coherence is the only way to judge the truth of any proposition. But Fish's view presupposes that all the elements in an argument will have been checked and compared for their compatibility with other beliefs, an ideal of the same sort as law as integrity. Fish perhaps does not so much refute Dworkin's theory as weaken it when he argues that there will eventually be reliance upon presumed facts.

Of the three critical perspectives offered here, the first considers 'constructive interpretation' to be an inaccurate description of decision-making in most cases as it exaggerates the extent of conscious reflection. The other perspectives argue that there is a failure properly to acknowledge that interpretation is not a closed process of reasoning but must engage, at some point, with externally determined values whether these are real moral values, as proposed by realists, or unspoken assumptions as proposed by sceptics. I argue here that constructive interpretation offers a persuasive account of certain types of decision-making and that acknowledging these criticisms enables it to find common ground with other perspectives.

The strength of 'constructive interpretation' is that it places the institutional nature of interpretation at its centre. Members of institutions are concerned to resolve the

particular problem in front of them as members of a social institution rather than as private citizens. This is particularly so for the judiciary. Privately-held moral or philosophical values may sometimes be detected, but judges do not generally regard the expression of these as a their primary task. They view themselves as bound by the requirements of their institutional role and private beliefs are likely to be explicitly articulated only - but not always - where there is conflict between these and the choices which the institution permits them to make.

Other theorists have also argued for the same "middle ground" (Fiss 1985:183) as Dworkin occupies, whereby both complete freedom and determinism are denied in favour of a focus upon "communicative and interpretive practices existing within social, linguistic and political communities." (Nickel 1985:486). Fiss (1982), for example, argues that interpretation is governed by disciplining rules recognised by the community as authoritative. Theories of institutionalism also focus on the relationship between the individual decision and the institutional framework (Black 1997). Dworkin's writings are also consistent with particular strands of broader hermeneutic theory. Honeyball and Walter (1998:142-57) observe, for example, that Dworkin's theory of fit and justification has much in common with Gadamer's theory of a hermeneutic circle and his view of the nature of the interpretive process.

Dworkin's theory is therefore representative of an important strand of thinking about decision-making and evokes some of its complexities. However, critics associated with the linguistic theory have a point when they say that the theory exaggerates the extent of self-conscious reflection that typically occurs.

'Constructive interpretation' may perhaps be most plausibly applied to the judiciary. Judges will usually be in sympathy with the values of the legal system because historically they themselves have been instrumental in shaping it. They tend to be relatively socially homogeneous and will usually wish to depart only incrementally from the values of their predecessors and in ways which do not challenge shared underlying moral conceptions.²⁷ A judge's adherence to the values of the legal system will be, to an extent at any rate, a matter of conscious agreement.

It is also the case that members of the legislature will usually have a personal commitment to its institutional values as suggested through its history. This is less a

²⁷Appellate court decisions that, at first glance, signal an abrupt breach with past values, may on closer examination be revealed as the culmination of a long process of attrition (for example *R v R* [1992] 1 AC 599, concerning marital rape).

question of the content of new laws and more of how they are created. Many radical politicians are also deeply committed parliamentarians. The same may be true for high-level officials engaged in policy work which requires a degree of self-conscious reflection about the history and values of the institution. However, it is less clear that it is the case for administrative workers. Many, particularly those engaged in routine tasks, are likely to have recourse to assumptions which are not critically examined or even consciously adopted. These will be influenced by the institutional history of the service just as Dworkin suggests that particular values will be rooted in the institutional history of the law, but will not be subject to the self-conscious reflection of the type which Dworkin suggests judges undertake.

Spectrum

What is described here, then, are points on a spectrum. Many decision-makers operate at some point midway between 'constructive interpretation' and automatic reliance upon assumptions depending upon the nature of their task, their personality and the pressures of their working environment. Relying upon institutional culture represents a less intellectually complex way of reaching decisions which 'fit' with the point of the institution but may be a more appropriate way of describing the process in many cases. The effect of both is similar. Individuals will tend to interpret materials and exercise discretion in ways which reinforce the values of the institution as the individual perceives them, but the way in which they do so may not always be the same. Decision-makers who have the time and capacity, such as judges, may reflect upon the degree to which they are bound by and contribute to the dominant values of the institution. Others are likely to be engaged in a less self-conscious process. Moreover, the role of the individual must not be discounted. Some officials will have better integrated institutional values while others may, for reasons of principle or personal gain, actually try to subvert these. Nonetheless, in most cases, decision-makers will try to make decisions that are congruent with their sense of what the institution requires.

Earlier, I observed that the theory of interpretation put forward by Marmor and others, drawn from Wittgenstein's linguistic theories (described here as 'non-interpretation' as it denies that interpretation is usually required to understand a rule), was incomplete as it did not deal with what happens when interpretation does occur. Similarly, Dworkin's theory of interpretation does not seem appropriate in situations in which conscious reflection does not take place. It is thus not a complete account either. Taken together, however, it can be seen that they deal with different types of

behaviour so that instead of being competing theories, each applies in particular situations. Hershovitz (2002) returns to Wittgenstein's original text to make a similar argument. 'Constructive interpretation' is a more accurate way to describe what happens when a judge or official interprets a rule by reflecting upon the institutional purposes for which he or she has been granted their powers. This is particularly likely in adjudication given that this will involve only contested cases. 'Non-interpretation' is a more appropriate description of how a decision-maker (either the same one in a different situation or a different individual with different powers, responsibilities or capabilities) will reflexively assume that a rule carries a particular meaning and will give effect to that meaning. In those instances, an official will rely on what Wittgenstein called the 'bedrock' (quoted in Hershovitz 2002:629), what some organisational theorists have described as "schemata" or "mental models" (Whiteley 2006:65) and what Tamanaha (2001:214) describes as the "unarticulated substrate":

"... those elements that exist and operate *beneath awareness* while contributing to the coordination of behaviour. In one sense, they *enable* behaviour; in another sense, they *are* behaviour just being carried on" (italics in the original).

Such conformity, if it is reflected upon at all, will be seen as simple common-sense or as reliance upon self-evident truth and, as Tamanaha (2001:214) points out, reflects Wittgenstein's emphasis upon "unthinking, routine rule-following behaviour, and shared practices".

Having argued that the two theories are complementary rather than competing, I also suggest that they represent ends of a spectrum of possible behaviours with most conduct falling somewhere in between. Such an observation appears to accord with reality. Judges do not on every occasion interpret constructively. The meaning of many words and phrases contained within rules is simply taken for granted. Equally, most administrative officials are not robots mindlessly reiterating patterns of behaviour without reflecting upon whether these serve the purposes of their institution. Yet 'constructive interpretation' and 'non-interpretation' derive from such different premises that their co-mingling in this way may appear unlikely.

The question therefore is whether 'constructive interpretation' and 'non-interpretation' may be coherently incorporated into a spectrum of behaviour. That it may is suggested by the critique of Dworkin offered by, among others, sceptics such as Fish (1982, 1987) and discussed earlier in this chapter. Their point is that there is a

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circular quality to Dworkin's argument in that an interpretation must rest either upon another interpretation or, either at that stage or ultimately, upon an assumption about the nature of the world. The point at which something is assumed may arrive immediately or only after a protracted interpretive process but it will eventually happen. 'Constructive interpretation' may thus be carried out to a greater or lesser extent with a more or less profound degree of reflection. Where 'constructive interpretation' ends, 'non-interpretation' begins. It is not inconsistent with either theory to suggest that decision-makers engage in differing degrees of reflection at different moments and that 'constructive interpretation' and 'non-interpretation' can be found together not only within one official but within the same decision.

It may be objected that this approach fails to take account of the range of factors which also influence the way discretion is exercised, for example what Tamanaha (2001:217-8) calls "self-interested instrumental behaviour". Individuals may sometimes act in ways which are at odds with habitual institutional behaviour in order to further personal aims. I am talking about a general tendency. Where self-seeking or dishonest behaviour is habitual within an organisation, it is likely that the values or assumptions upon which such conduct is predicated have become part of the culture of the organisation.

It may also be argued that there is nothing particularly institutional in quality about 'non-interpretation'; it is an observation of human behaviour in general rather than institutional behaviour. However, it is a question of identifying what Tamanaha (2001:207) calls the "social arena" from which beliefs, values and assumptions are drawn. Some theories of 'new institutionalism' (see Black 1997, Di Maggio and Powell 1991) argue that preferences in decision-making will be created endogenously, interests and actors being "constituted by institutions" resulting in reliance on "unreflective, routine, taken-for-granted nature of most human behaviour" (DiMaggio and Powell 1991:14).

'Organisational culture' views organisations in an organic way as "miniature societies" 'Organisational configurations of heroes, myths, beliefs and values' (Brown 1998:5). An organisation may have its own well-articulated cultural values. Schein's hierarchy (1985:13-21), for example, identifies three levels of culture: artefacts by which he means technology, art and visible and audible behaviour patterns, values which are the beliefs that support the activities of the organisation and assumptions i.e. beliefs about the nature of the world which are so taken for granted within a group

that its members would find behaviour based on any other premise inconceivable. They include assumptions about the nature of reality and truth, the nature of human nature, activity and relationships (Schein 1985:86). Values may be consciously held and articulated and be discoverable through documentation or interview while assumptions may not be consciously held but may be expressed through official or unofficial values. Schein (1985:15-21) suggests that a value is a working hypothesis which is open to question whereas an assumption is accepted as universally true. Thus, as Brown (1998:11) observed, the boundary between them is porous. An assumption may be subject to challenge and be transmuted into a consciously held value or eventually discarded. Alternatively, unquestioned values may harden into assumptions. This is particularly likely if they coincide with the assumptions held in the wider society or the section of it from which the members of the organisation are predominantly drawn.

Thus it is consistent with both mainstream conceptions of judicial reasoning and of political and sociological theory to argue that discretion will usually be exercised in ways that comply with what the decision-maker understands to be the official or unofficial purposes of the institution to which he belongs. The outcome may be the result of conscious reflection upon the institution's purposes or a non-interpretive reflexive conclusion or, in most cases, a combination of the two.

All decision-makers will rely upon beliefs, values and assumptions. Beliefs represent what an individual understands a factual position to be while values represent a moral position based on that factual position. Both of these are arrived at through observation and reasoning and will involve an interpretive process however truncated. Assumptions, on the other hand, represent the substrate, the unconsciously held understanding of the world from which beliefs and values emerge. An institution will have its own unarticulated substrate which has much in common with that of the broader society but may also differ from it in a variety of ways. Where institutions hold common elements in the substrate, this may lead to common patterns of decision-making despite the absence of formal interaction.

It is not, in most cases, possible or necessary to distinguish precisely between assumptions, values and beliefs. As already indicated, the categories are porous and the position may differ between individuals. Taken together, they represent a valid way of analysing the conduct of decision-makers in a range of arenas.

2.5 Law, discretion and the conceptual framework

This thesis uses the conceptual framework just described to identify the beliefs, values and assumptions which informed decisions by the legislature, the judiciary and the entry clearance service on marriage immigration after 1962. It seeks to explain decisions in terms of these underlying attitudes.

The approach cuts across the idea that legal norms are the dominant factor governing administrative conduct. The limitations of legal regulation have often been observed empirically. Hawkins (1984:207), for example, observed that, in relation to pollution control, formal legal processes were employed only when supported by a perceived moral consensus. Loveland (1994:229) found, in his study of homelessness decision-making, that external pressures meant "administrative reality bears little resemblance to prescriptive legality". Even where there was compliance with the law this was for reasons of professional career development rather than an overriding respect for legal ideals. Halliday (2000b) found that judicial review failed to control the bureaucratic cultures of local authority housing departments. Allott (1980: chapter 5) argues that legal norms are ultimately persuasive in nature and have to compete with other types of norm. Galligan (2001) notes 'authoritarian' tendencies within organisations that may cause them to resist or subvert the infiltration of alternative normative systems including legal values.

It would be wrong however to overstate the position. Legal changes do have an effect. To take an example central to this thesis, the abolition of the 'primary purpose rule' in 1997 led to an immediate increase in the number of successful applications, even though the composition and outlook of the entry clearance service did not also change overnight (and although the rate of refusal still remains relatively high for applicants from certain countries). Institutional values and assumptions may also include belief in the importance of compliance with legal norms and individuals may internalise legal values (Aubert 1983).

However, as chapters 5 and 6 discuss, legal compliance may be inconsistent and superficial. Attitudes are complex and contradictory. ECOs I have met expressed relief at the abolition of the primary purpose rule. They would presumably argue that, prior to its abolition, respect for legality prevented them from allowing applications which fell foul of the rule. That explanation may be sincere but it does not explain why the rule only applied to certain applicants (Macdonald and Blake 1994:15) and

why, as chapter 6 also demonstrates, unfavourable decisions on intention to live together continue to be concentrated in certain areas. Institutional culture may exert a very powerful force even on an official who, with their conscious mind, dislikes its visible consequences. A decision-maker may disapprove of a particular outcome while believing it is inevitable given the assumptions, values and beliefs upon which they have based their reasoning. Chapter 6, for example, describes how assumptions may be transmitted from one generation of official to another and result in particular patterns of decision-making that appear inconsistent with the generally good intentions of the decision-maker. These types of observations are familiar to scholars of 'new institutionalism' (for example, Zucker 1991).

If the congruity in decision-making observed in this thesis cannot be explained only in terms of compliance with legal norms, it must be explained in another way. One way is to consider whether decision-makers relied on similar values, beliefs and assumptions, cutting across institutional differences. This, however, assumes a great deal. Assumptions, beliefs and values may not be universally held even within an institution. Dworkin recognised this possibility when he addressed the 'coherence' critique in his work. Critics argue that Dworkin assumes that the different values with which an institution is concerned are capable of co-existing in a way which permits each to be measured by the same standard or as Finnis (1987:375) expresses it, Dworkin relies upon the "commensurability of basic goods". Dworkin has himself acknowledged this (see, for example Dworkin 1984:272) but argues a judge's own theory of law should allow him or her to reach a particular decision which represents the correct balance of all values according to the judge's own theory.

This does, in some respects, correspond with real judicial activity. Appellate court judges in particular generally seek to justify their decisions by evaluating and reconciling the various principles of law which apply to the case before them. But, even so, coherence over a whole system is unrealisable as Dworkin (1986:245) acknowledges. As Raz (1998:279) points out, courts do not, in practice, reflect upon the whole range of possible legal implications for their decisions. But a judge is not aiming at theoretical coherence alone but at a satisfactory solution to a particular problem, which does not conflict with the wider principles and values under consideration at that moment. In many cases, a judge's horizons may be narrower than 'constructive interpretation' suggests. Thus, coherence may be localised through

what Dworkin calls "local priority" (1986:250) and the wider conflict not acknowledged.

If judicial coherence is likely to be imperfect, then this will be even more so in other settings where there is not the time for or tradition of the type of reflection and analysis that judges undertake. Administrative officials exercise discretion and interpret the law under time and resource constraints, so that while they may aim to make decisions consistent with the values of the institution, it is not always practicable for them to reflect more than approximately upon what these require. There may also be a conflict between a 'local priority', for example, meeting a target and a stated institutional value such as delivering an individualised service. Coherence in administration will therefore exist, but it is likely to be at a relatively local level and may take a form which is not identical to and even conflicts with the stated purposes of the institution. Thus Hawkins (2002: chapter 2) talks of how the decision-making 'frame' may vary between different locations within an organisation despite the same 'surround' and 'field'.

While a legislature's powers may be less diffuse than, for example, an administrative body, irreconcilable conflict is perhaps even more probable due to the complexities of the democratic mandate. Legislators may pass laws to deal with an immediate situation even though these may conflict with apparently fundamental principles.

Given local priority and the non-supremacy of law, the framework suggested here helps to explain why institutions may appear to act in concert. Assumptions may sometimes be so commonly held within a society that they permeate all institutions and predominate even over legal requirements or institutional values. Being commonly held, they become invisible, part of the atmosphere in which all of us move and so do not attract comment.

On occasion however, even when there is broad agreement, values within an institution may become, to a degree, disconnected from those within the wider society. Chapter 5 describes the public outrage that greeted reports in 1979 of 'virginity tests' on Asian women seeking entry as fiancées. This was clearly a step too far and suggested that the service had become detached from social consensus as to acceptable measures. Chapter 6 describes how the fluidity and changing environment of the last ten years make it more difficult to identify a consistently held set of assumptions although some strands do emerge. However, the approach advocated

here does help to explain the strong congruity between the approaches taken by the legislature, the judiciary and the entry clearance service during much of the period under consideration here.

2.6 Conclusion

This chapter has set out the theoretical framework to be adopted in this thesis. It relies upon a range of literature including jurisprudential discussion of discretion and interpretation to make a number of relevant arguments to prepare the ground for later chapters. It starts by ⁽¹⁾ defining discretion as power granted to make choices within constraints and goes on to suggest that all decision-making involves an element of discretion. Discretionary powers exist on a spectrum from weak to strong and their extent and nature may only be detected through considering the purpose of the grant of power and the power structures, official and unofficial, within which the decision-maker operates.

2. The chapter then went on to consider what happens when discretion is exercised. It argues that there is a common reasoning process that occurs each time discretion is exercised. This process may appear to be based on deductive logic but it rests upon value judgements which, once accepted, point towards a particular decision. Parallels are drawn with Dworkin's 'right answer' thesis.

Jurisprudential discussion of discretion and interpretation were then utilised to develop further a mode of analysis that takes into account the tendency to exercise discretion in ways that reflect the conception that the decision-maker holds of the purposes of the institution of which he or she is a member. Competing theories of discretion and of interpretation were considered. A contrast was drawn between theories favoured by positivist thinkers who see discretion and the interpretation of rules as marginal and unregulated activities and Dworkin's and allied theories who see these as being carried out in ways that are intended to further the purposes of the institution in which the decision-maker works. Dworkin, in particular, elevates interpretation into a conscious and critical activity, described by him as 'constructive interpretation'.

It is argued that, while Dworkin's theory captures, albeit in an idealised way, the highest level of reasoning, particularly judicial reasoning, it is less apt to describe the type of decision-making that occurs in other contexts. In many cases, the type of 'non-

interpretation' favoured by Hartian positivists is a more accurate description. The two conceptions are arguably complementary rather than opposed. The chapter goes on to consider some of the critiques made of Dworkin's theories which suggest that it also relies eventually on the type of taken-for-granted assumptions that feature in other types of decision-making. There is a spectrum of interpretive behaviour ranging from 'constructive interpretation' at one end to what is called here 'non-interpretation' at the other. Most decisions will be made using interpretation that is somewhere along the spectrum but all decisions rest eventually on taken-for-granted assumptions: the substrate or 'bedrock'. While institutions, operating as 'mini societies' will have their own substrate, this will probably have elements in common with society at large and with other institutions. There may therefore be congruence between patterns of decision-making in different institutions.

The following three chapters of this thesis consider decision-making by the legislature, the judiciary and the entry clearance service respectively between 1962 and 1997. They seek to identify the values, beliefs and assumptions held by each of these institutions in relation to marriage immigration and where these might be held in common between institutions.

Chapter 3: Legislative decision-making between 1962 and 1997

only the period only

This chapter is specifically concerned with the legislative control of marriage immigration from 1962 until 1997. It seeks to identify the underlying assumptions, values and beliefs which determined the extreme reaction to secondary immigration during the period. Succeeding chapters undertake a similar task in relation to the judiciary and the entry clearance service.

The history of immigration control after the influx of New Commonwealth immigrants in the 1950s is well documented. Historical accounts with varying emphases include Holmes (1991), Layton-Henry (1992), Paul (1997) and Hansen (2000). Dummett and Nicol (1990), Bevan (1986) and Evans (1983) have dealt specifically with law and policy. Mole (1987) provides a contemporary account of family policy at the time. Two works have been particularly important in this and succeeding chapters: Bhabha and Shutter's (1994) study of women and immigration and Sachdeva's detailed account of the 'primary purpose rule' (1993).

The chapter relies heavily although not exclusively on parliamentary reports contained in Hansard. Politicians may choose to be more guarded or more provocative in what they say in a public forum. My argument is that, even when words are chosen carefully, underlying assumptions are often detectable. A debating chamber contains a wide range of views and it is tempting to rely upon extreme and unrepresentative statements to make an argument. In this section, the emphasis is on statements made by the leading representatives of the major political parties, with a discussion of the nuances and variations of view where appropriate.

3.1 The Commonwealth Immigrants Act 1962

Commonwealth citizens, including many non-white citizens, retained the right of entry to the UK after the British Nationality Act 1948. The possibility of immigration controls against non-white Commonwealth citizens was widely canvassed from the early 1950s onwards (Holmes 1988:256-7) and may be contrasted with the relative post-war enthusiasm for European immigration (Dummett and Nicol 1990:176-7; Bhabha and Shutter 1994:32-3). Early and unsuccessful attempts to regulate entry of non-white Commonwealth nationals took the form of pressure upon colonial and

Commonwealth governments to restrict the issue of passports (Layton-Henry 1992:75-6) while other administrative measures were also canvassed (Dummett and Nicol 1990:177-81). The difficulty was that a "frankly admitted colour bar" (Dummett and Nicol 1990:178) would have been unacceptable even while it was "coloured" immigration that was perceived as problematic.

The Commonwealth Immigrants Act 1962 placed immigration restrictions for the first time upon Citizens of the United Kingdom and Colonies (CUKCs). The 1962 Act provided that only those whose CUKC passports had been issued by the British government or by a representative of the government were free from controls. Essentially, this comprised only those who had been born in the UK or who had obtained their passport from the High Commissioner of an independent state. Those whose passports were issued by a colonial authority were now subject to controls as were nationals of independent Commonwealth countries. These new provisions were supplemented by instructions to Immigration Officers (Cmnd 1716) and secret instructions and gave officials sufficient discretion to discriminate against non-white Commonwealth citizens (Dummett and Nicol 1990:183-4).

The Act required Commonwealth citizens subject to control to satisfy an immigration officer that they were entitled to enter on one of a number of grounds: that they were a returning resident or the wife or child under 16 of a returning resident, that they were in possession of an employment voucher, intended to study, or they had enough funds to support themselves and any dependants without working (for a more detailed discussion of the Act's provisions, see Dummett and Nicol 1990:183-5).

Many concerns were expressed during parliamentary debate including the need to avoid (open) race discrimination and the maintenance of Commonwealth ties. Fears about secondary immigration were only occasionally expressed and then indirectly and by well-known anti-immigration figures. Sir Cyril Osborne, for example, made reference to the supposed high birth rate amongst immigrants¹ and to Indian citizens, who arrived without proper documentation and, after regularisation, sent for their families.²

Within the mainstream of political debate, there seems at first to have been a strong presumption in favour of married relationships. Initially, the right of wives and

¹ HC Hansard 22nd June 1961 col. 1657.

² HC Hansard Written Answers 11th July 1961 col. 35.

children to enter was considered so self-evident that it was omitted from the Bill and was to be dealt with through instructions to immigration officers. It was argued in debate that, given the treatment of aliens, Commonwealth immigrants' rights needed firm protection.³ Later events proved this fear to be justified.

R.A.B. Butler, the Home Secretary, moved amendments in Committee to put the right of wives on a statutory basis, saying: "There has never been any doubt in our minds that returning residents, wives and dependent children ought to be admitted".⁴ Such a matter was so important that "it should not be left to be framed in administrative instructions".⁵ Refusal on medical grounds or because of a criminal record did not apply to wives or to children under 16.

There was also a strong commitment to ensuring the admission of unmarried women living in 'permanent association' with a man, so that "the rights of these women should be respected in the same way as if they were already married under our system",⁶ a sentiment expressed by an opposition MP but assented to by the government side. However, the provisions were only to be found in instructions to immigration officers which provided that a woman "living in permanent association with a man, even if not married to him, should be treated for this purpose as a wife" and, the immigration officer "should bear in mind any local custom or tradition tending to establish the permanence of the association".⁷ Although this provision seems to have been conceived with Caribbean families in minds, Sachdeva (1993:48) points out that it had the potential to benefit South Asian families where reliable marriage records were often absent. This may help explain why such a stance did not last.⁸

There was some opposition to this provision on the grounds of principle particularly in the Lords, Lord Milverton asking: "Are we trying to turn this Bill into a kind of legitimisation of concubinage?".⁹ For the most part, however, the view was, as Lord Silkin put it, that it was a question of recognising the existence of "the unmarried wife".¹⁰

³ HC Hansard 5th December 1961 col. 1293.

⁴ Ibid 6th February 1962 col. 318.

⁵ Id.

⁶ Ibid 6th February 1962 col. 322.

⁷ Cmnd 1716, May 1965 para. 25.

⁸ See the remarks of George Brown HC Hansard 1st November 1961 col. 169 and *Zahra v Visa Officer, Islamabad* 1979-80] Imm AR 48 discussed in Chapter 4.

⁹ HL Hansard 20th March 1962 col. 484.

¹⁰ Ibid col. 488.

This permissive treatment of Commonwealth immigrants' families was arguably not based primarily upon a commitment to family life. It depended upon the close relationship between Commonwealth immigrants and the UK while the entry of large numbers of unaccompanied males was seen as problematic.¹¹ The presumption in favour of marriage in immigration was therefore, even in its moment of maximum impact, contingent.

There are also suggestions in the debate of a hierarchy of acceptable relationships, a recurrent theme of the thesis. It was implicitly expected that unmarried women should regularise their position as soon as possible once they were in the UK as the extract quoted above ("as if they were *already* married" - emphasis added) suggests. Married Commonwealth women were immune from deportation, but a woman living in permanent association but unmarried was not. The Lord Chancellor emphasised that while he expected discretion to be frequently exercised in favour of such women, they were not accepted unconditionally:

" ... it is not right to separate people living a family life together. But it is different when an immigrant has been proved to have abused the hospitality of this country by committing a serious offence. Any such person is *prima facie* suitable for deportation, and exemptions must be narrowly and precisely drawn".¹²

This points to another assumption that recurs during the thesis. People are free to make decisions as to their personal lives, but they must accept the adverse consequences of their failure to conform to dominant values. The suffering caused by deporting an unmarried woman living in 'permanent association' might be equal to that of a married woman but, by failing to marry once exposed to British mores, such a woman lost the right to absolute protection.

Above all, the Act assumed that only men were primary migrants. This did not accord with reality, however, as Bhabha and Shutter (1994:37-9) point out and women MPs moved an amendment to replace the word 'wife' with 'spouse'. This was not selected for debate but was briefly discussed in Committee.¹³ It was acknowledged that a husband might sometimes wish to follow a 'career wife', but the matter should be dealt with through instructions to immigration officers and such

¹¹ Single male immigrants were explicitly linked with rising rates of VD; see, for example, HC Hansard 5th December 1961 col. 1224.

¹² Ibid col. 493.

¹³ HC Hansard 6th February 1962 cols. 326-33.

husbands would normally be admitted. However, the Minister, Mr Renton, argued that:

"... we have strong reasons for not treating husbands and wives in exactly the same way in the granting of unrestricted right of entry. In the Bill, as in our nationality law, we have assumed that the husband is the head of the family and that the wife acquires his domicile".¹⁴

He also maintained that a wife who had been ill treated and deserted might obtain a voucher, come to the UK and obtain a good job. The husband, hearing of this, might "follow her to batten onto her". The comment anticipates later arguments that immigration restrictions are in the interests of vulnerable women.

In the event, instructions to immigration officers provided that the normal rule was to admit a Commonwealth husband coming to join a wife ordinarily resident in the UK even without an employment voucher, unless there were reasons to refuse on the grounds of health, criminality, likely recourse to public funds or that the wife did not wish the husband to join her. In doubtful cases, the strength of the wife's connections with the UK should be taken into account.¹⁵

This suggests another characteristic of the hierarchy of acceptable marriages. Marriages that did not conform to the norm of male breadwinner and head of household were less favourably viewed but those where the wife had a strong connection with the UK stood somewhat higher. The hierarchy depended not just on the conformity of the marriage, but the extent to which the UK-based party was a 'belonger', a theme that was to become increasingly prominent.

3.2 The 1965 changes

The Commonwealth Immigrants Act 1962 had been presented as an emergency measure and was opposed by Labour. Its effects were not entirely as anticipated. Immigration from India and Pakistan increased as a result of the employment voucher system (with which the present study is not concerned). New Commonwealth secondary immigration also increased rapidly. Many commentators see the restrictions in the 1962 Act as the cause of this rise as it encouraged immigrants to bring over their families and entrench their rights (for example, Holmes 1988:26). Hansen (2000:20, fn.60) disputes this arguing that immigrants will always be

¹⁴ Ibid col. 330.

¹⁵ Cmnd 1716 May 1962 para. 29.

disinclined to leave and that secondary immigration is an inevitable consequence of immigration. Regardless of cause and effect, the rising numbers of dependants soon became a major source of debate.

Parliamentary discussion over the period in which the first controls on secondary immigration were put into place reveals a familiar pattern. Marginal figures strongly opposed to immigration persistently alluded to the 'problem' of excessive New Commonwealth immigration. This took various forms including reference to immigrants' birth rate,¹⁶ incidence of sexually transmitted disease,¹⁷ polygamous marriage habits,¹⁸ inhumane and unsafe child care practices,¹⁹ and the sheer number of dependants either already present²⁰ or waiting to come over, described by one peer as a "frightful shadow".²¹

More moderate politicians sought to resist these insinuations but with increasing difficulty. While the virtues of immigration and immigrants continued to be defended, the debate was shifting onto terms set by those opposed to further immigration: numbers, over-crowding and abuse. The Commonwealth Immigrants Act had framed the issue as one of immigration, reflecting the predominant belief at the time and, as this became entrenched, it was inevitable that subsequent proposals would also be formulated in these terms. By the time of the return of a Labour government in 1964, further control of immigration was a prominent issue following the unexpected return of a Conservative MP in Smethwick after a racially charged local campaign (Bevan 1986:79). By this time, the necessity of immigration control was taken for granted. Immigration had become synonymous with New Commonwealth immigration. Alien immigration remained subject to a more restrictive regime while immigration from the Old Commonwealth was barely mentioned. When it was discussed, it was seen as unproblematic even where there was abuse of the rules.²² There were, in some cases, overt references to 'coloured' or 'Afro-Asian' immigration,²³ but use of such terms was

¹⁶ See, for example Sir C. Osborne HC Hansard Written Answers 1st April 1965 col. 268 or 31st May 1965 cols. 141-142, Lord Elton HL Hansard 6th July 1965 col. 1163 and others.

¹⁷ Sir C. Osborne HL Hansard Written Answers 18th February 1963 col. 4.

¹⁸ Captain Kerby HC Ibid 9th December 1963 col. 40.

¹⁹ Sir C. Osborne HC Hansard Oral answers 4th June 1964 col. 1226.

²⁰ Miss Quennell HC Hansard Written Answers 16th April 1964 col. 82, Mr N. Pannell HC Hansard Oral Answers 9th July 1964 col. 617 and others.

²¹ Lord Hawke HL Hansard 10th March 1965 col. 149.

²² See, for example, HC Hansard Oral Answers 9th July 1964 cols. 617-619, HL Hansard 23rd February 1965 col. 681, HL Hansard 10th March 1965 col. 94.

²³ See, for example, Lord Elton HL Hansard 6th July 1965 col. 1162.

avoided by mainstream politicians who emphasised that the policy was not intended to operate on colour or racial lines even though that is what happened.²⁴

In this period, there seemed to be little appetite for the draconian restrictions of later years. Nonetheless, the commitment to family reunion had to compete with unceasing arguments in favour of further controls based on premises that almost all politicians now accepted. The way out of the impasse, adopted then as in later eras, was to crystallise discontent around the undeserving case of the fraudulent application. Abuse had been regularly raised by those promoting further controls in the period leading up to 1965 particularly around dependants²⁵ including the apparent ease with which the admission of polygamous or common law wives could be abused.²⁶

In February 1965, Sir Frank Soskice, the Home Secretary, agreed that there was "evidence that under the existing control evasion on a considerable scale is taking place" including among dependants and announced that fresh instructions would be given to immigration officers.²⁷ These would include, among other measures, greater scrutiny of dependants' claims, the start of an administrative process, discussed in Chapter 5 of this thesis, that had catastrophic consequences for immigrants but from which politicians could distance themselves.

Early in 1965, monthly statistics started to be kept, detailing the country of origin, the category and the numbers of immigrants, a tacit admission that numbers mattered.²⁸ Shortly afterwards, Soskice agreed that there were at least 500,000 Commonwealth citizens with the right of admission mostly from the West Indies, Pakistan and India, although he did not know whether they intended to come to the UK and he had no intention of removing their rights.²⁹ Despite this measured response, the numbers question was becoming linked to the abuse issue and genuine dependants with a legal claim to come to the UK were beginning to lose legitimacy. This was made explicit in a parliamentary question by Mr Wingfield Digby:

"... in view of the sharp increase in the number of dependants accompanying or joining Commonwealth citizens subject to immigration control, what steps he is taking to ensure that there is no abuse of dependants?"³⁰

²⁴ The Prime Minister HC Hansard 8th July 1965 col. 1812.

²⁵ See, for example, HC Hansard Written Answers 30th July 1964 col. 377.

²⁶ Lord Elton HL Hansard 30th June 1964 col. 504.

²⁷ HC Hansard 4th February 1965 cols. 1284-1288.

²⁸ HC Hansard Written Answers 16th March 1965 col. 252.

²⁹ Ibid 1st April 1965 col. 268.

³⁰ Ibid 30th July 1964 col. 377.

From being regarded as an occasional unfortunate by-product of regulation, the prevention of abuse rapidly became a driving motivation. Some abuse is inevitable under any regulatory regime, but anti-abuse measures are not solely a function of its actual prevalence. Abuse may be tolerated because measures taken against it risk also affecting the innocent; hence, for example, the high standard of proof in criminal cases. The stronger the anti-abuse measures, the less weight is implicitly awarded to recognising, to their fullest extent, the claims of the genuine or innocent.³¹

While the measures taken to prevent abuse by dependants in 1965 were minor by later standards, they indicate that the downgrading of dependants' claims had begun, rationalised by the association between numbers and fraud. New Commonwealth immigrants were under scrutiny simply because of their numbers and all began to be tainted with suspicion. Measures that might adversely affect them became increasingly acceptable. From this period there were fewer statements of unequivocal support in favour of family reunion and fewer sentimental paeans to the immigrant contribution to health and other public services. A downward spiral had been initiated which later made possible restrictive measures which would have been inconceivable only a few years before.

After Lord Mountbatten, sent as an emissary in 1965, failed to persuade Commonwealth countries to introduce their own curbs on emigration, he recommended a variety of further restrictions including health checks for all immigrants, dependants and students. The subsequent White Paper contained a number of proposals for restrictions which clearly went counter to the spirit if not the letter of the 1962 Act.³² The government could not introduce a compulsory register of dependants or entry certificates without repealing the absolute obligation to admit under the 1962 Act. However, immigration officers would:

"with a view to preventing evasion, be instructed to apply strict tests of eligibility, and will take into account whether the would-be entrant produces on arrival an entry certificate issued in the country of origin or other

³¹ This has sometimes been openly acknowledged. The government's response to the Select Committee on Race Relation and Immigration in 1979 said that it was "a regrettable though inevitable consequence of the need to prevent abuse that some genuine applicants suffer inconvenience" (Juss 1997:54). In 1983, Malcolm Rifkind weighed up the competing claims of applicant and immigration control and said: "It is no fairer to allow someone in who is not entitled than to exclude anyone who is." ("Fair and foul ways to bring down the immigration barrier" Guardian, 2nd March 1983. See also Bonham Carter (1985).

³² HMSO Cmnd 2739, August 1965.

appropriate documents establishing his or her identity. An entry certificate will not be issued unless the head of the household, whether resident in this country or intending to come in the future, has furnished ... particulars of his dependants ..." (para. 19 Cmnd. 2739).

The register of dependants proved both burdensome and ineffective and was soon dropped.³³ Entry certificates, however, became increasingly important and were presented as being in the interests of immigrants as it enabled a decision to be made in the country of origin rather than after departure. They remained voluntary, however, and take-up was low at around 20%,³⁴ even though immigration officers were instructed that a holder should be assumed to be qualified for admission unless there was evidence to the contrary.³⁵ However, the Wilson Committee did not recommend that they become compulsory on the grounds that this would align Commonwealth citizens too closely with those aliens who required visas.³⁶

3.3 The 1969 changes: The ban on husbands and compulsory entry certificates

After 1965, hostility towards New Commonwealth secondary immigration did not abate. The association between numbers and fraud continued to be made ever more emphatically,³⁷ and the number of dependants coming to the UK was described by one peer as "rapidly assuming alarming proportions".³⁸ One MP alleged that up to 60% of dependants had been wrongly admitted.³⁹ As well as the usual calls for the cessation of all immigration (apparently supported by 93% of the population according to one poll cited),⁴⁰ there were calls for children over 14 to be barred.⁴¹ The loss to the Inland Revenue due to alleged fraudulent claims for dependants' allowances was raised,⁴² an issue that became central to administrative practice in relation to family admission and is discussed in Chapter 5. The wives and children of

³³ Roy Jenkins HC Hansard Written Answers 2nd August 1966 col. 91.

³⁴ Report of the Committee on Immigration Appeals Cmnd 3387 p. 22.

³⁵ Ibid p. 14.

³⁶ Ibid p. 22.

³⁷ See, for example, Earl of Albemarle HL Hansard 26th July 1967 col. 3, Sir C. Osborne and Captain Kerby HC Hansard 9th May 1968 Written Answers cols. 125-6.

³⁸ Lord Ailwyn HL Hansard 25th October 1967 col. 1650.

³⁹ Mr Anthony Buck HC Hansard 22nd January 1969 cols. 547-8.

⁴⁰ HL Hansard 14th May 1968 cols. 206-11.

⁴¹ Ibid 14th May 1968 col. 208.

⁴² Ibid 8th February 1968 cols. 1268-1269.

polygamous marriages were also the subject of several parliamentary questions.⁴³ With the exception of some female politicians, critics of polygamous marriages confined their arguments to the number of extra immigrant offspring likely to result as well as the scope for tax evasion. The standard government response was that the number of such families was insignificant (although there was also a defence of the international law principle of recognising lawfully contracted marriages). The dominance of the numbers debate was apparent even in such an apparently culturally charged issue.

The government's tone in response to pressure became more defensive. That the number of dependants was problematic was common ground, so it was a question of demonstrating that they were competent at limiting their entry. The right of children over 16 to join a single parent and of dependant fathers over 60 was curtailed in 1968, the fear being that these were disguised workers. Family unity continued to be defended by the government on the grounds of preventing "social problems in the community" and "common humanity",⁴⁴ but, increasingly, only in terms of the rights of wives and children under 16.⁴⁵ It is not surprising therefore that the first moves against spouses were against husbands whose acceptance had always been more conditional than that of wives.

In a written parliamentary answer on 30th January 1969, James Callaghan, the Home Secretary, announced restrictions on husbands.⁴⁶ Numbers of male Commonwealth citizens admitted for marriage under a 'concession' had risen in 1968 to 1,676. The rise was said to be on such a scale that marriage was being used as a means of entering, working and settling in the UK outside the employment voucher scheme.⁴⁷ In future, the admission of husbands and fiancés would be limited to those "presenting special features" and an entry certificate must be obtained prior to departure. Those already present in the UK for temporary purposes would not be permitted to settle here following marriage save in exceptional circumstances. The new regime was to be implemented through revised instructions to immigration officers.

⁴³ Ibid 23rd April 1968 cols. 621-2 and 2nd May 1968 cols. 1195-1200.

⁴⁴ HC Hansard 7th November 1968 col. 1048.

⁴⁵ See, for example Lord Stonham HL Hansard 25th October 1967 or David Ennals HC Hansard Written answers 5th March 1968 col. 57.

⁴⁶ HC Hansard 30th January 1969 col. 367.

⁴⁷ A counter-view was that rumours of restrictions had fuelled the rise in numbers; see 'Guardian Miscellany', the Guardian 3rd June 1974.

The new measures severely affected non-white New Commonwealth husbands. They were in a worse position than alien spouses who continued to be allowed to enter in most cases (Dummett and Nicol 1990:206-7). Husbands of white women were less severely affected as their wives were more likely to plead successfully that they could not relocate to places where they would be culturally isolated (Bhabha and Shutter 1994:57-9 and chapter 4).

Only six South Asian men were permitted entry during the whole of 1973.⁴⁸ }
Particularly badly affected were around 400 stateless Asian husbands expelled from Uganda and refused entry to the UK even though their wives and children held UK passports. The supremacy of the 'numbers' issue is encapsulated by one proposed solution which involved other countries accepting some of these 400 husbands, so that their families who lived in the UK would leave, compensating for other new arrivals.⁴⁹

There seems to have been little debate as to whether such drastic measures were justified or their effect upon the rights of UK resident women. It was assumed that males were desperate to gain access to the labour market, that fraudulent applications were commonplace and that these had to be prevented even at a cost to some genuine applicants. The hierarchy of marriages already referred to is more starkly apparent here. Marriages in which a husband sought to join his wife rather than the conventional reverse pattern lacked credibility and legitimacy.

The ban on Commonwealth husbands did not pacify those opposed to secondary immigration; rather, by conceding the underlying argument, it made a defence of such immigrants more difficult. Having permitted government competence to become associated with the control of New Commonwealth immigration, ministers had no choice but to continue to play the numbers game.⁵⁰

The use of entry certificates was made compulsory for all dependants by the Immigration Appeals Act 1969. The justification was to protect immigrants from giving up homes and jobs only to be refused entry on arrival. It was also hoped to prevent long queues and evidential difficulties when applicants arrived at ports tired

⁴⁸ Id.

⁴⁹ Their position was eventually rectified by Roy Jenkins; 'Uganda cases strike at women's rights', *Guardian* 11th January 1973, 'Petition on split Asian families' *Guardian* 23rd January 1973, 'Plan for Asian husbands' *Guardian* 31st January 1973, 'Guardian Miscellany', the *Guardian*, June 3rd 1974.

⁵⁰ See, for example, the exchange between the anti-black immigration MP Sir Cyril Osborne, Home Secretary Merlyn Rees and the back-bench Labour MP Sid Bidwell HC Hansard 20th March 1969 cols. 721-3.

and confused and had to establish their right to enter with inadequate and incomplete documentation. Immigrants, including the elderly and children, were being detained or returned and their treatment had been widely criticised.⁵¹ Their interests under the entry clearance system would be protected by the new appeals procedures. The administrative practice for aliens' dependants was brought into line with Commonwealth dependants except where agreements for visa abolition prevented this, meeting the objection, at least to an extent, that Commonwealth citizens were being treated less favourably than aliens. The less favourable general treatment of aliens was also maintained.⁵²

While those promoting the amendment may have sincerely hoped to avoid the problems of eligibility for entry being decided at the port, there were also less noble motives (Juss 1997:44-5). The amendment to the Immigration Appeals Bill was introduced in the Lords at a late stage shortly before Committee Stage. This was explained as being to "reduce to a minimum the risk of a rush to enter in advance of the alteration of the law",⁵³ although an effort was later made to disassociate the government from this suggestion.⁵⁴ Clearly, a measure that was in the best interests of immigrants should not give rise to a rush of applicants to beat it. Critical voices argued that compulsory entry certificates would permit bad practice to be concealed,⁵⁵ would negate the objectives of the new appeal system,⁵⁶ and that delays (already a problem) would inevitably increase,⁵⁷ suspicions that were justified as discussed in chapter 5. The measure caused the resignation of the National Council of Civil Liberties and the Joint Council for the Welfare of Immigrants from the Home Office Committee on Immigrant Welfare on the grounds that its work had been rendered meaningless.⁵⁸

The assumption of fraud and of the necessity of combating it was now so entrenched that the alternative possibility of reducing queues by carrying out fewer checks was beyond realistic contemplation. Rather, the emphasis was upon ensuring

⁵¹ 'Asians' reception "inhumane", welfare leader says' Times 23rd December 1968, 'Vetting at home for future immigrants' Guardian 2nd May 1969.

⁵² See HC Hansard 1st May 1969 cols. 1630-6, HL Hansard 6th May 1969 cols. 1098-1142.

⁵³ Lord Stonham HL Hansard 6th May 1969 col. 1100.

⁵⁴ Lord Gridley Ibid col. 1126.

⁵⁵ Lord Gifford Ibid col. 1107.

⁵⁶ Lord Foot Ibid cols. 1121-1126.

⁵⁷ Lord Gifford Ibid 6th May 1969 col. 1110.

⁵⁸ 'Give them a proper chance' Guardian 20th May 1969, 'Home Office funds for immigrants' Sunday Telegraph 15th June 1969.

adequate systems for advising and supporting applicants in the country of origin.⁵⁹ The desire to conceal rather than prevent the harsh treatment of immigrants and their family members introduces another recurring theme in immigration legislation, suggesting a strong institutional commitment to providing outwardly palatable answers to public anxiety.

3.4 Reversing the ban: The 1974 rule changes

The Immigration Act 1971 introduced a new framework for controlling immigration. Section 1(5) provided that the Immigration Rules would be formulated so as to protect the pre-existing rights of men settled in the UK prior to 1st January 1973 to bring spouses and minor children to the UK, fulfilling earlier pledges (Hansen 2000:230). All other Commonwealth citizens and their dependants were to be governed by what Shirley Williams described as the "weak vessel"⁶⁰ of the Immigration Rules.

The first set of Rules⁶¹ acknowledged the advantageous position of EEC nationals compared to Commonwealth citizens (other than patrials⁶² and those exempted under the then S.2(2) of the Act) whose rights were now broadly aligned to those of aliens. Wives of Commonwealth citizens were to be admitted if the husband was already settled or was coming for settlement, provided he was willing and able to support and accommodate them without recourse to public funds.⁶³ The position of women "living in permanent association" was also maintained,⁶⁴ and there were provisions for fiancées.⁶⁵

The husbands and fiancés of Commonwealth citizens or aliens were not to be admitted for settlement unless the Home Secretary was satisfied there were "special considerations" which rendered exclusion undesirable,⁶⁶ or unless, in the case of Commonwealth citizens, he had a grandparent born in the UK.⁶⁷ Special considerations included, as an example, the hardship caused to a woman forced to live

⁵⁹ See, for example, Lord Brockway HL Hansard 13th May 1969 cols. 83-5 and 'Home Office funds for immigrants' Sunday Telegraph 15th June 1969. However, advice services were not established until the mid-1970s (Lyon 1975).

⁶⁰ HC Hansard 22nd November 1972 col. 1350.

⁶¹ HC 79, 80, 81 and 82 25th January 1973.

⁶² S. 2(1)(a) Immigration Act 1971 (now amended).

⁶³ HC 79 para.41, HC 81 para. 36.

⁶⁴ HC 79 para. 42, HC 81 para. 37.

⁶⁵ HC 79 para. 50, HC 81 para. 45.

⁶⁶ HC 79 para. 47, HC 81 para. 42.

⁶⁷ HC 79 para. 48.

with her husband outside the UK.⁶⁸ Both exceptions would have principally benefited white women. Women's continuing dependent status was reflected in the deportation clauses of the after-entry Rules,⁶⁹ which provided that women and children could be deported alongside their husbands in some circumstances.

Black The hierarchy of acceptable marriages, already alluded to, was now more clearly linked to race. Its maintenance was facilitated both by the actual law and by the discretionary powers of immigration officers. Yet its sexism rendered it imperfect. White British men could count on being able to bring in spouses more or less as they chose. Black and Asian men settled here had, formally speaking, the same rights but were increasingly subject to discrimination through administrative practices in the entry clearance system. A woman who married a white male of British descent may have been able to take advantage of the rules on patriality. In other cases, she could claim that she should not have to suffer the hardship of living in an alien environment, a claim which women of New Commonwealth origin found far harder to make (Bhabha and Shutter 1994:57-9 and Chapter 4 below). Nonetheless, white women were adversely affected by the Rules,⁷⁰ and the contrast with the new EEC free movement provisions rendered this discrimination even starker.

There were several attempts to bring the matter to the attention of Parliament.⁷¹ On 11th April 1974, Home Secretary Roy Jenkins announced that he was reviewing the wider aspects of the question and that, in the interim, he was issuing instructions for a more "sympathetic and flexible" approach to be taken.⁷² In June 1974, Lena Jeger introduced a Bill into Parliament to achieve equality for women in immigration and citizenship; the Spouses of UK Citizens (Equal Treatment) Bill 1974.⁷³ Later that same month, Roy Jenkins announced that he would present new Rules allowing the admission of husbands and fiancés of women settled in the UK.⁷⁴

Almost completely absent from parliamentary debate was reference to women of New Commonwealth descent or origin who had been most severely affected by the ban on husbands. Lord Brockway, in his question to the Lords, gave only examples of

⁶⁸ HC 79 para. 47-8 and HC 81 para. 43.

⁶⁹ HC 80 paras. 33-48 and HC 82 paras. 40-55.

⁷⁰ For example, it was reported that only 10 Australian and 6 Canadian husbands were admitted during 1973 ('Guardian Miscellany', the Guardian 3rd June 1974).

⁷¹ See HC Written answers 21st March 1974 col. 136, HL Hansard 28th March 1974, cols. 774-95.

⁷² HC Hansard Written Answers 11th April 1974 cols. 260-1.

⁷³ HC Hansard 21st June 1974 cols. 879-941.

⁷⁴ HC Hansard Written Answers 27th June 1974 cols. 535-36.

hardship caused to women of British descent married to foreign men.⁷⁵ Lena Jeger, in moving her Private Member's Bill stated that, among the enormous postbag she had received on the question, only a few cases concerned Asian countries.⁷⁶ Concerns about arranged marriages started to become explicit during these debates. Lord Harris, speaking for the government, asserted that the arranged marriage system made it more likely that women of Asian origin would contract marriages abroad so that lifting the ban would lead to considerable increased immigration.⁷⁷ Even those sympathetic to change viewed arranged marriages simplistically or negatively. Bryan Magee, for example, foresaw a particular danger of such marriages being arranged for payment in order to achieve immigration.⁷⁸ Others argued, by contrast, that young Asian people would increasingly reject the international arranged marriage.⁷⁹

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A few MPs did see the question as one of principle and of race as well as of sex equality. Sid Bidwell spoke of the benefit of reform to young women of Pakistani and Indian origin.⁸⁰ Martin Flannery pointed out that regardless of whether young Asian women did or did not tend to marry within the UK, "they have an inalienable right to marry men who live outside this country and be allowed to have these men come here and live with them".⁸¹ Predominantly, however, the underlying premise was that reform was desirable provided it resulted in only a few Asian males coming to the UK. The Home Secretary Roy Jenkins' (1991:374) memoirs record that the Home Office estimated that a change to the law would result in 5,000 new entrants and he initially declined to act. In subsequent debate, however, he said: "When I first considered this I believe that I put too high the likely immigration consequences and did not fully allow for the stark and unacceptable nature of the discrimination".⁸²

The lifting of the ban on husbands, while undoubtedly a progressive step, did not demonstrate a fundamental shift in the assumptions which by that stage underpinned the discussion on marriage and immigration. It represented an evolution in and refinement of the hierarchy of marriages so that the claims of mainly white women

⁷⁵ HL Hansard 28th March 1974 cols. 778-80.

⁷⁶ HC Hansard 21st June 1974 col. 884. It is possible, of course, that Asian women did not consider appealing to their MP as a likely source of relief.

⁷⁷ HC Hansard 28th March 1974 col. 794.

⁷⁸ Ibid 21st June 1974 col. 936.

⁷⁹ See, for example, Lena Jeger and Gwyneth Dunwoody HC Hansard 21st June 1974 cols. 883 and 933.

⁸⁰ HC Hansard 21st June 1974 col. 910.

⁸¹ Ibid 21st June 1974 col. 929.

⁸² Ibid 27th June 1974 cols. 535-6. See also 'Guardian Miscellany', the Guardian 3rd June 1974.

were acknowledged. However, the grant of equality depended upon a number of other beliefs also holding true. One was that those of Asian descent brought up in the UK would be less likely to enter international arranged marriages.

A number of other key assumptions about immigration were by now also firmly in place. Numbers had become the hard currency of the immigration debate. Immigration was seen as a one-way process, a simple accretion of numbers posing problems of labour displacement. Emigration simply did not figure in the debate. Immigration from the New Commonwealth was considered to be qualitatively different to other immigration and to be undesirable. The only means of reducing these numbers, it appeared, was through ever more restrictive measures.

3.5 *The defence of equality*

As well as the usual series of parliamentary questions on polygamous wives, arranged marriages, impecunious immigrants and the never ending queue of dependants, immigration was debated in the Commons in January 1975,⁸³ May 1976,⁸⁴ in the Lords in June 1976,⁸⁵ and again in the Commons in July.⁸⁶ During these debates, a major focus remained the (admission of husbands even though between 1974 and 1976, the number of arrivals of Commonwealth husbands and fiancés rose from around 500 to around 1800 (Evans 1983:133), hardly an inundation.

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Alex Lyon, the Minister for Immigration, undertook a tour of the Indian sub-continent during which he criticised the bureaucracy, delays and errors of the entry clearance system. He also recommended that the officials adopt the civil standard of proof in immigration cases (unknown to Lyon, the Divisional Court had also found in such terms in 1972, the immigration service having apparently acted unlawfully since that time).⁸⁷

Lyon was especially concerned with the level of error and the hardship that existing procedures were causing to genuinely married couples. This, he said, had "to be put into the balance as well as the number of bogus applications".⁸⁸ He also pointed out that the entire notion of a 'bogus' application should be treated with

⁸³ Ibid 23rd January 1975 cols. 1998-2020.

⁸⁴ Ibid 24th May 1976 cols. 33-104.

⁸⁵ HL Hansard 24th June 1976. Spouses and dependants were discussed in cols. 529-60.

⁸⁶ Ibid 5th July 1976 cols. 964-1094.

⁸⁷ *R v Home Secretary ex p Hussain* (1972). See also Alex Lyon's response to the Hawley Report in the Runnymede Collection. — from Reference! cited in Juss (see ref)

⁸⁸ HC Hansard 23rd January 1975 col. 2013.

caution. If Western levels of proof were demanded in a largely undocumented society, it was unsurprising that people sometimes turned to those able to furnish them with what was apparently needed. While this reflected the reality that many South Asian marriage procedures were customary and unofficial, Conservative politicians were aghast at the suggestion of any relaxation. They argued that the single biggest cause of delay and hardship was immigrants failing to call over their families promptly and that the absence of documentation and the level of illegal immigration meant that robust and time-consuming checks were necessary.

Lyon also argued that there was a finite pool of dependants so that speeding up the process "would not be increasing the total commitment of this country towards immigration from the sub-continent".⁸⁹ Whether the 'queue' was finite was the subject of much disagreement, the debate reflecting an anxiety, almost a panic, disproportionate to the actual rise in numbers after 1974.

In 1976, D.F. Hawley, Assistant Under-Secretary in the Foreign and Commonwealth Office, toured entry clearance posts on the sub-continent and wrote a series of confidential reports that may now be viewed in the Runnymede Collection. The reports comprise a series of anecdotal reports and impressions including an account of a former illegal entrant described as "mildly pickled", whose recommendation was 5 years imprisonment for illegal entrants. Less comically, Hawley made allegations about the extent of fraud, polygamy, the abuse of marriage for immigration purposes (the relaxation of the rules in 1974 was described as a "bonanza") and the possibility of a never-ending chain of migration. His major thrust was that attempts to implement Lyon's instructions, combined with an appeals system "weighted in their [applicants'] favour", made the system too favourable to immigrants. Any further move in that direction would turn ECOs into "rubber stamps" and "the pride of an ECO in doing a professional job would be destroyed", a perspective considered further in chapter 5. He also made reference to South Asians being "men of two worlds" retaining an Asian domicile, building property and marrying locally. He thereby articulated a further recurrent and persistent theme, examined further in chapters 4 and 5 below, mistrust of immigrants who adopt their new residence only equivocally.

⁸⁹ Ibid col. 2011.

Despite the absence of evidence beyond anecdote, the Hawley Report was welcomed by those opposed to New Commonwealth immigration. During the debate in May 1976, Enoch Powell referred to the Report as evidence that, far from there being a finite pool, "we are bailing out an ocean".⁹⁰

Alex Lyon's confidential reply to Hawley (available in the Runnymede Collection) indicates the careful balancing act performed even by politicians sympathetic to the immigrant cause. He defended his record on overturning refusals and the imposition of the balance of probabilities. His arguments were nonetheless predicated on the assumption that non-white secondary immigration was problematic but would reduce over time. He was sympathetic to re-assessing the pool of dependants and even to a quota "to contain the numbers argument".

His public response was also to reiterate that the pool was finite and that the international arranged marriage would inevitably decline as a source of immigration. This argument's weakness was that it relied almost wholly on one premise of uncertain validity. It left intact the other premises upon which anti-immigration arguments were based: that numbers were the primary issue and that immigration was solely or principally a New Commonwealth phenomenon (although some Labour MPs did challenge this).⁹¹

It is true that there were finite numbers of Commonwealth immigrants with a statutory right to bring in spouses and children⁹² and that some immigrants' children would marry within the UK, but patterns of migration are complex. The modern literature on migration does not view it as a single discrete journey to a destination country but as part of a broader and long-term pattern of transnational movement and change. An immigrant community is likely to maintain links with the home community as well as the wider diaspora so that there will be a continuing flow of traffic including through marriage, involving a number of countries. It was perhaps unwise to place so much emphasis on the anticipated decline of the international arranged marriage.

Conservative MPs were openly sceptical about the role of the arranged marriage in immigration. Bhabha and Shutter (1994:62) refer to comments by Conservative

⁹⁰ Ibid 24th May 1976 col. 49.

⁹¹ See, for example Syd Bidwell: "A certain nonsense emerges if one is thinking genuinely in terms of immigration as a whole-white and black, brown, and black and white" (HC Hansard 5th July 1976 col. 989).

⁹² According to Juss (1997:190), this particular commitment had been fulfilled by the 1990s.

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politicians that the liberal regime on husbands was a mistaken concession to "the women's lobby" and contrary to both British and Indian culture. Such explicit comments were made only by marginal figures, but the premises upon which they were based informed other more measured contributions. Thus William Whitelaw in opening the July debate recognised the right of a head of household to bring in one wife ("We are a basically monogamous society")⁹³ and children. There were renewed calls for a register of dependants. Arranged marriages were viewed as being primarily a source of immigration, principally because, it seems, Tory MPs could not imagine any other motivation for such a marriage.

Thus, neither Tory nor Labour MPs consistently argued a principled defence of the international arranged marriage. The difference between them was that Labour MPs believed that the arranged marriage would disappear once families had been exposed to superior Western models, while Tory MPs believed their usefulness as a tool for immigration would ensure their survival.

Roy Jenkins' took a more sophisticated although less liberal approach than either of these positions. He saw the truth as lying somewhere between finite pool and infinite ocean, thus avoiding the trap of relying too heavily on the decline of the arranged marriage. He was committed to preserving husbands' rights even if he was not willing to go further and he rejected the assumption that the 'bogus marriage' was a particular characteristic of South Asian immigration, pointing out that arranged marriages "can be just as real and longlasting as any other marriages," and "[s]uch contrivances are not confined to those wishing to immigrate from, or avoid removal to, the subcontinent".⁹⁴ Equally, he declined to treat as "morally reprehensible", the "lively sense of extended family in Asian culture" even if he was not ready to permit entry by extended family members. He also argued the case for going beyond the numbers debate:

"The basic issue here is not simply one of numbers. We cannot avoid this addition to numbers unless we either keep out all husbands - which would be across-the-board sex discrimination - which would affect the right of English-born wives to bring in an American or Australian husband, or by keeping out those from the sub-continent which would be straightforward racial discrimination. I could not, and would not, defend either of these two forms of blatant discrimination".⁹⁵

⁹³ HC Hansard 5th July 1976 col. 969.

⁹⁴ Ibid 5th July 1976 col. 984.

⁹⁵ Ibid 24th May 1976 col. 104.

Jenkins' approach rested upon the assumption that numbers mattered and that immigration meant New Commonwealth immigration. At that time and in that climate, this was almost the universal view, although MPs such as Joan Lester and Syd Bidwell did point out the racially based assumptions upon which contemporary immigration control rested.⁹⁶ Jenkins also did not acknowledge the role that administrative measures played in permitting hidden discrimination. Nonetheless, he sought to uphold a position of principle on the admission of husbands in the face of constant and unremitting pressure from both press and opposition MPs. By the end of 1976, neither he nor Alex Lyon, who had sought to ensure that the rules were applied fairly on the sub-continent, remained in post.

3.6 *The birth of primary purpose*

The association between abuse and husbands or fiancés was now accepted as fact and frequently raised in Parliament, although without firm evidence as to the scale of deceit. Government ministers emphasised that it was not confined to New Commonwealth immigrants but such was the clear sub-text of much of the discussion. Conservative shadow minister William Whitelaw, for example, drew an explicit connection between harmonious race relations and the prevention of abuse.⁹⁷

Government competence was now inextricably linked with effective control of New Commonwealth immigration. Dislike of overt sex and race discrimination meant that the rights of New Commonwealth husbands had been, for a period, able to achieve reluctant acceptance as the price of allowing equality to white couples. Once alternative means were found through the strengthening of administrative measures, arranged marriages sponsored by a woman returned to their lowly position in the hierarchy.

Before he left the Home Office, Jenkins had established a small parliamentary group under Lord Franks to look into the feasibility of a register of dependants. Their report was published in February 1977 and the government concluded that such a register would not be desirable or practicable.⁹⁸ Following rumours of a revival of the ban on husbands,⁹⁹ in March 1977, the government amended the Immigration Rules, to prevent men being accepted for settlement through marriages of convenience. The

⁹⁶ See fn. 92 above and HC Hansard 24th May 1976 cols. 73-9.

⁹⁷ HC Hansard 9th February 1977 col. 1435.

⁹⁸ *Ibid* cols. 1433-4.

⁹⁹ 'Rees blocks aisle route into Britain' *Guardian* 10th February 1977.

new rules introduced for the first time the concept of primary purpose. However, at that time it was linked closely to the idea of marriages of convenience, a concept from which it later became separated. Thus entry or settlement would be refused:

" if the officer to whom the application is made has reason to believe that the proposed marriage would be one of convenience entered into primarily to obtain admission here with no intention that the parties should live together permanently as husband and wife" (HC 238 para. 47).

In addition, husbands were to be admitted or given leave to remain for a period of twelve months initially unless the marriage had taken place more than twelve months previously. Commonwealth and non-Commonwealth citizens were now treated alike, except that a Commonwealth fiancé, one of whose grandparents was born in the UK, would be admitted for immediate settlement, a privilege which would predominantly benefit white men.

The obligation to find both that the marriage was one of convenience and that the parties should not intend to live permanently together meant that the Rule had only limited impact at that stage. Evans (1983:133) suggests that the small numbers of men refused leave to settle after the newly introduced 12 month probationary period indicate that abuse was not a widespread problem at the time. Alex Lyon argued, during debate,¹⁰⁰ that the measures were a panicked response to an exaggerated problem. It was increasingly apparent that the primary means of controlling unwanted immigration would be administrative. The Select Committee Report on Race Relations and Immigration, despite a mostly restrictive tone, drew attention to the lengthy delays and sceptical attitudes of entry clearance officials.¹⁰¹

A government operating in the climate of the time and explicitly committed to the 'numbers game', had imperatively to be seen as in control of immigration. Yet, politicians did not want to confront voters with the actual consequences of this. Administrative practices carried out principally abroad made controls appear more palatable, particularly when backed by a discourse of 'abuse' (see chapter 5 for a detailed account). By using administrative measures, governments sought to meet their electorate's (and perhaps their own) dual desire to limit immigration and to maintain a clear conscience about how this is achieved.

¹⁰⁰ HC Hansard 24th May 1977 cols. 1336-7.

¹⁰¹ First Report from the Select Committee on Race Relations and Immigration HC 303 (HMSO 1978) pp.177-87.

The danger of this strategy is exposure of the unattractive underbelly of immigration control. This happened when press reports appeared in early 1979 that single women from the sub-continent were being subjected to 'virginity tests', creating an explosive scandal (see chapter 5 for a full discussion). The Home Secretary, Merlyn Rees, refused to order a departmental inquiry or support disciplinary action against the officers involved, merely stating that action had been taken to prevent a recurrence.¹⁰² His replies to parliamentary questions on the subject suggest a strong desire to distance himself from the affair with terse answers couched in legalistic and bureaucratic terms.¹⁰³ It must have been highly embarrassing for it to be so clearly apparent that the government's strategy for controlling immigration permitted such practices. Eventually, the issue was deflected by the Yellowlees enquiry into medical examinations.¹⁰⁴

Falling numbers of primary migrants enabled the government to present the immigration 'problem' as being under control although some Conservative MPs continued to call for further measures.¹⁰⁵ These MPs rejected any moral obligation towards immigrant communities to ensure family reunion and excluded them from the population whom they were tasked to represent, claiming that "the only moral commitment that matters is the interests of the British people here as a whole".¹⁰⁶ Government ministers adopted a less crude view relying on the necessity for good race relations to justify policy: "The United Kingdom is now, and will remain, a multiracial society. Our overriding responsibility is to do all in our power to make it a harmonious one".¹⁰⁷

3.7 Refining primary purpose

These differing understandings of what constituted the 'British people' were increasingly crudely drawn after the election of a Conservative government in 1979. Margaret Thatcher was influenced by thinkers who viewed hostility to the 'alien wedge' as natural and morally defensible, a view represented by her famous

¹⁰² HC Hansard 9th February 1979 cols. 312-3.

¹⁰³ See, for example, HC Hansard 9th February 1979 cols. 312-3 or 14th February 1979 col. 539.

¹⁰⁴ 'The Medical Examination of Immigrants, Report of Chief Medical Officer' Home Office, December 1980 — *See file. See Jones*

¹⁰⁵ See, for example Mr Dudley Smith HC Hansard 6th April 1978 col. 650 or Mr Budgen HC Hansard 6th April 1978 col. 651.

¹⁰⁶ Ivor Stanbrook HC Hansard 6th April 1978 col. 657.

¹⁰⁷ Merlyn Rees *Ibid* 6th April 1978 col. 648.

'swamping' comment in 1978 (Dummett and Nicol 1990:238-41). The Conservative manifesto had contained a commitment to preventing the admission of all husbands and fiancés. However, that would have been too crude an implement affecting white as well as black women and a more racially discriminatory approach was eventually proposed.

In November 1979, the new Home Secretary William Whitelaw announced a series of new measures including several concerning the admission of husbands.¹⁰⁸ The test of primary purpose was to be separated from that of intention to live together. This would have consequences for the meaning attributed to 'primary purpose' in law (see chapter 4 for further discussion).

The proposals also required the parties, whether fiancés or spouses, to have met, a provision clearly aimed at discouraging Asian arranged marriages. Lord Scarman described it to the Home Affairs Select Committee as "an attack on the social habits and custom of people who have come to this country and who are living in accord with the customs in which they were brought up".¹⁰⁹ Equally clearly targeted was the provision allowing entry to only one wife.

Of most immediate concern was the proposal that only the husbands or fiancés of British citizen women born in the UK would be eligible to apply at all. Whitelaw conceded that this discriminated but viewed it as necessary to prevent disguised primary male immigration.¹¹⁰ He saw the ban as "the price that we have to pay to stop marriage being used as a device to achieve admission to the United Kingdom."¹¹¹ Timothy Raison, Minister for Immigration, meanwhile acknowledged that the affected marriages "may perfectly well last as enduringly as love marriages",¹¹² undermining the abuse argument.

The Home Affairs Select Committee warned that the proposals breached the European Convention on Human Rights.¹¹³ Opponents repeatedly drew attention to the tiny numbers actually suspected of abuse and the limited effect the measure would have on overall immigration figures.¹¹⁴ Even the Times wondered if it was "really

¹⁰⁸ HMSO Proposals for revision of the Immigration Rules Cmnd 7750 November 1979.

¹⁰⁹ 'New immigration rules breach Convention, Lord Scarman says' Times 18th January 1980.

¹¹⁰ 'Immigrant plan has sex bias - Whitelaw' Guardian 5th November 1979.

¹¹¹ HC Hansard 4th December 1979 col. 255.

¹¹² 'Immigration needs rules when too many try to play at once' Daily Telegraph 4th December 1979.

¹¹³ House of Commons First Report from the Home Affairs Committee 1979-80, Proposed New Immigration Rules and the European Convention on Human Rights HC303.

¹¹⁴ 'Protest at entry bar on husbands' Guardian 4th December 1979.

necessary for the British Government to show itself to be in deliberate breach of its moral and legal international undertakings for such a puny result".¹¹⁵ Political opposition was nonetheless muted by acceptance of the premise that New Commonwealth male immigration was highly undesirable.

Reference has already been made to the hierarchy of acceptable marriages. Fiancés and husbands of black and Asian origin had long been placed on the bottom rung and their interests, although given passing acknowledgement, were easily displaced by the need to prevent even a few non-white immigrants. The refinement here was that the colour of the wife as well as the origin of the husband determined the extent of the right to decide where a couple should live. The clarity of the racial distinction between the privileged 'belongers' and those with only a partial status was apparent from the exception eventually incorporated after much public complaint for women born abroad to parents born in the UK.¹¹⁶

This implicit notion of who did or did not 'belong' was fluid and given added complexity by the confused state of the UK's nationality law. Ivor Stanbrook, a prominent anti-immigration MP, asked the Home Secretary to make it clear that "this country is governed in the interests of its inhabitants and not those of immigrants" suggesting that 'belongers' were a closed category which immigrants could not enter. Tony Marlow was even more explicit, saying that brown and black families "can go home and rejoin their families in the country of origin".¹¹⁷

Senior members of the government avoided such crude rhetoric. Whitelaw's reply to Stanbrook was that the country was "governed in the best interests of all its citizens",¹¹⁸ a questionable assertion given that the new proposals discriminated between different types of citizen. There was a lack of congruity between Whitelaw's status as a "humane Tory"¹¹⁹ and the discrimination contained in the proposals. Trying to reconcile this involved asserting that 'belongers' included those of immigrant descent as "girls born in this country, of any race, colour or creed, have exactly the same rights".¹²⁰

There was still unease, however, at treating more recently settled communities as complete outsiders. This was resolved by claiming, however unconvincingly, that the

¹¹⁵ 'In Breach of the Convention?' Times 6th March 1980.

¹¹⁶ 'New immigration rules could hit overseas appointments' Guardian 19th November 1979.

¹¹⁷ HC Hansard 14th November 1979 col. 1344.

¹¹⁸ Ibid col. 1337.

¹¹⁹ Mr Bidwell Ibid col. 1339.

¹²⁰ HC Hansard Ibid col. 1345.

measure was in the interests of those affected by it. Thus Whitelaw said during the debate: "Many Asian girls in this country would wish to make their own choice. Indeed, that may well happen after the change in the rules rather than at present". A professed concern to protect women from oppressive non-British practices was becoming a recurring theme in rationalising restriction,¹²¹ called by Timothy Raison in support of the new requirement for the parties to have met:

"Whatever we may think of arranged marriages, I doubt whether it is right to have an arranged marriage when the parties have never met. In recent weeks I have met large numbers of Asian women. Many of them, when describing what they regard as a satisfactory arranged marriage, agreed that the bride and groom should meet before the marriage".¹²²

While the hierarchy of marriages rested upon assumptions about gender and culture, the fear was not the abuse of marriage alone but labour market displacement. Raison also said, during the debate on the new rules, that the arguments as to abuse:

"do not apply with the same force to women entering the United Kingdom to join husbands. In the main, they join husbands who are in the position of having the prime responsibility for providing for their families ... Men entering the country to join women settled here ... are not joining the family's breadwinner but expect, and are expected to make, a major contribution themselves to the earnings of their new family unit".¹²³

Whether or not this was the case, it did not follow that such a marriage was not genuine or that the woman entered it unwillingly. Yet arguments as to abuse were cited too fervently to be mere pretexts for preventing unwanted economic immigration. Rather, the cultural assumptions and the economic ones intertwined and reinforced each other. Not all marriages where the wife joined the husband were abusive and ministers carefully avoided being led by backbenchers into making such generalisations.¹²⁴ Yet, such a marriage was viewed as more prone to abuse both because it was considered culturally deviant and because it enabled male economic activity. This was compounded by a belief that arranged marriages could, more easily than other forms of marriage, be exploited for immigration purposes.

The distinction between crude discrimination and assertions of cultural superiority was often employed as a defence against charges of racism. Thus Whitelaw argued

¹²¹ See, for example, 'Immigration needs rules when too many try to play at once' Daily Telegraph 4th December 1979, 'Help for unhappy brides' Daily Mirror 19th April 1980.

¹²² HC Hansard 4th December 1979 col. 371.

¹²³ HC Hansard 10th March 1980 col. 1026.

¹²⁴ See, for example, Timothy Raison HC Hansard 24th June 1982 col. 424.

that the measures were not racist as women of Asian origin born in the UK would be able to bring in husbands.¹²⁵ Fears about labour displacement and the belief that arranged marriages were loveless affairs and therefore mere vehicles for immigration should have applied to Asian women born in the UK who married men from overseas. The underlying assumption here was that second generation women, exposed to the superior marriage patterns of the West, would resist such arranged marriages, a belief to which both Labour and Conservative MPs subscribed. The attack on the arranged marriage thus rested on a combination of economic, cultural and gender assumptions.

3.8 The forced march back to equality

In a white paper “quietly slipped out”,¹²⁶ the government ‘postponed’ a manifesto pledge for a register of dependants.¹²⁷ Although the number of dependants admitted was declining, senior politicians were unhappy that, due to second-generation marriages, the ‘pool’ of secondary immigrants from the subcontinent was not proving to be finite.¹²⁸ The White Paper adopted a rather bizarre proposal that the pattern of marriage of Asian men born in the UK should be monitored to assess future long-term trends in immigration,¹²⁹ reflecting the reality that there was little now that the government could do to restrict admission further; on the contrary, pressure was mounting elsewhere for liberalisation. The existing law was attracting claims to the European Court of Human Rights and in May 1982, the European Commission on Human Rights found that the UK government had a case to answer. A discriminatory regime was becoming untenable particularly when contrasted with the rights accorded to spouses under EC law (Sachdeva 1993: 83-4, 165-9).

It was also perhaps becoming less urgent. Sachdeva (1993:72-4) suggests that, anticipating an unfavourable result, officials were sharpening their use of primary purpose as a means of refusal, perhaps causing the reduction in numbers just alluded to. Certainly, the rate of refusal of husbands and fiancés increased from 10% in 1981 to 47% in 1982. (Bhabha et al. 1985:69). Moreover, a measure of reform could be rationalised as anticipating the new law on nationality due to come into effect on 1st

¹²⁵ HC Hansard 14th November 1979 col. 1337.

¹²⁶ ‘The numbers game’ New Society 2nd December 1982. ← γειε ΝΟ.

¹²⁷ In fact, the proposal had been effectively discarded following recommendations from the Home Affairs Committee; ‘Tories shelve register plan for immigrants’ dependants’ Guardian 8th December 1981.

¹²⁸ ‘Minister rejects “finite” migration’ Times 27th April 1982.

¹²⁹ ‘The numbers game’ New Society 2nd December 1982.

January 1983. In December 1982, the government introduced proposals to permit all women who were British citizens to sponsor husbands or fiancés regardless of how that citizenship was acquired.¹³⁰

The government aimed to meet objections by introducing two additional restrictions; a probationary period of two years and a shift in the burden of proof to the applicant. The government's priority was to head off a backbench revolt by those who viewed immigration as purely a question of the numbers of non-white immigrants and who were unable to accept even a modest rise. There was little effort to deny the racist underpinning of the controls. Whitelaw admitted that the rationale for favouring women born in the UK was disappearing, as a new generation of girls of Asian descent born in the UK reached marriageable age.¹³¹ Relying on the assumption that any man coming from the subcontinent to join his wife "would be doing so primarily for immigration purposes" might have "awkward consequences with regard to people marrying Australians, Canadians, Americans and so on."¹³² The assumption that the arranged marriage was particularly suited to exploitation for immigration was explicit.¹³³ Sponsoring a husband to come to the UK was a privilege that should be reserved only for those who truly belonged. This category could now be conveniently redefined as comprising British citizens, a more restricted category than the old CUKC.¹³⁴ However, fear of increased numbers and a misjudgement as to opposition intentions¹³⁵ led to government defeat for the measures through an alliance of its own backbenchers opposed to any liberalisation and opposition members opposed to further restriction.

Obliged to lay new rules before Parliament, the government responded with HC 169, which eventually came into effect on 16th February 1983. The extension of the probationary period was dropped although the critical change, the reversal of the burden of proof, remained. This, coupled with an increasingly hostile administrative climate, was the major factor in enabling the primary purpose rule to be used to such deadly effect in the coming period. Refusals on primary purpose grounds, as a percentage of all refusals of husbands and fiancés, rose from 18% in 1982 to 73% in 1983. It seems that right wing backbenchers received reassurance that primary

¹³⁰ Cmnd 8683.

¹³¹ HC Hansard 15th December 1982 col. 361.

¹³² Ibid col. 362.

¹³³ Timothy Raison ibid col. 431.

¹³⁴ Timothy Raison ibid col. 429-30.

¹³⁵ 'Misjudgment caused immigration defeat' Times 18th December 1982.

purpose would prevent male Asian immigration before accepting the rule changes (Bhabha et al. 1985:68-9).

Debate covered similar ground as in December although the government's tone was now more confident. Some Conservative MPs such as Nicholas Budgen and Jill Knight,¹³⁶ while defending the arranged marriage as appropriate abroad, argued that "it should not be a means of entering Britain". This was acceptable as "[it] cannot be said that the arranged marriage creates suffering if it is not allowed, because the girl does not know the man who may be selected for her in far away Jullunder. Such a girl is increasingly coming to the view that she does not wish a man to be selected for her in Jullunder".¹³⁷

The belief was that a woman would not be an active or willing participant in an international arranged marriage and therefore the marriage must be made for the benefit of others, principally the immigration advantage of the man. Thus David Waddington, Minister of State, justifying the reversal of the burden of proof, said that: "There cannot be anything wrong in principle with expecting a man who is seeking a major benefit to prove that he is entitled to it".¹³⁸ Meanwhile, primary purpose could be presented as being for the protection of female sponsors. For instance, in the wake of a sensationalist press report about Asian girls being 'sold' by their parents to Asian men who followed them home from school, Waddington commented that "[t]he so-called 'primary purpose' rule has been much attacked but these stories show that it can protect women against exploitation".¹³⁹

Again, assumptions reinforce each other. That of female passivity dovetailed with the denial of the rights of women to choose the place of marital residence. This absence of rights could also be justified in terms of identifying belongers. As David Waddington put it, "[i]f they do not wish to be British, why should they have the right to bring in their husbands?".¹⁴⁰

This forthright tone was typical of the Conservative government of the time. David Waddington, in particular, adopted an abrasive style that, over the next period, made explicit values, beliefs and assumptions which had been present but were muted or implied under previous regimes. Typical examples include crude head-counts of

¹³⁶ HC Hansard 15th February 1983 cols. 213-6.

¹³⁷ Ibid col. 226.

¹³⁸ Ibid col. 241.

¹³⁹ 'Scandal of the brides for sale' Daily Mail 5th August 1985.

¹⁴⁰ HC Hansard 15th February 1983 col. 242.

potential (black and Asian) immigrants,¹⁴¹ treatment of all New Commonwealth fiancés and husbands as primary migrants,¹⁴² unofficial designation of "pressure to emigrate" countries,¹⁴³ and a crude assertion of the superiority of life in the UK.¹⁴⁴ This confidence was matched by belief in the ability of the entry clearance service to do the unpleasant work of refusal at a distance aided, in particular, by the 'primary purpose rule' repeatedly described by Waddington as an anti-abuse measure.¹⁴⁵ Complaints about entry clearance procedures were marginalised or dismissed.¹⁴⁶ On occasion, however, the reality of these processes punctured the rarefied parliamentary atmosphere. One such was the debate¹⁴⁷ on the Commission for Racial Equality report on immigration procedures (CRE 1983). For the most part, however, there was a severe lack of congruity between the bland assurances by Waddington and others as to the professionalism of entry clearance staff,¹⁴⁸ and the actual position as discussed in chapter 5 of this thesis.

The government still had to face the challenge of the *Abdulaziz*¹⁴⁹ case in the European Court of Human Rights. The government's defence of its policy in that case rested on labour market protection, the right to control immigration and the necessity of preventing abuse (see Evans 1982:140-1 and Sachdeva 1993:92). Its arguments emphasised that these applicant wives remained outsiders. One was described as having "no strong ties with the United Kingdom, having acquired nationality merely through a very short-lived marriage". In fact, this applicant had lived in the UK for

¹⁴¹ Ibid 23rd May 1985 col. 1172.

¹⁴² Ibid.

¹⁴³ Ibid 28th February 1985 cols. 454-455.

¹⁴⁴ Ibid 23rd May 1985 col. 1173.

¹⁴⁵ See, for example, HC Hansard 4th July 1985 col. 519. The lack of congruity between the stated intention of preventing marriages of convenience and the true position was occasionally made explicit. On one occasion, a Home Office spokesman acknowledged that it had never been the practice to allow a husband or fiancé to enter simply because it was accepted that the marriage was genuine. ("Husband banned from rejoining mother-to-be". Guardian 3rd January 1984).

¹⁴⁶ See, for example, 'Immigration from the Indian sub-continent' Fifth report of the House of Commons Home Affairs Committee Cmnd 8725 (HMSO 1982) when criticism by advisory agencies of entry clearance practices was dismissed. The issue was raised again in evidence given to the Commons sub-committee on race relations but to little apparent effect; 'Entrants to UK "quizzed in police fashion"'. Guardian 19th March 1985. Again in 1985, the Home Affairs Committee dismissed complaints about the service (House of Commons Home Affairs Committee, session 1984-5, report on Immigration and Nationality Department of the Home Office). The Chair of the Committee, John Wheeler, controversially described the complaints as "ill-founded allegations and unsubstantiated anecdotes" ('Race equality groups "do serious harm"' Daily Telegraph 27th June 1985, 'In the cause of racial harmony' Guardian 9th July 1985, 'Liberals slam Home Office department' Asian Times 12th July 1985).

¹⁴⁷ HC Hansard 23rd May 1985 cols. 1166-1206.

¹⁴⁸ Ibid col. 1166-7.

¹⁴⁹ *Abdulaziz, Cabales and Balkandali v United Kingdom* judgment of 28th May 1985, Eur Ct HR, Series A, no. 94.

seven years before marrying her applicant husband and the couple had a UK-born child.¹⁵⁰

The problem for both government and applicants was that the European Court found only that the sex discrimination involved in the rule could not be justified. A change in the law was required but, in the absence of adverse findings as to race discrimination or violation of Articles 3 or 8 of the Convention, it could be achieved simply by levelling down the rights of women applicants to those of men.

Thus the government was able to use the judgement as a means of creating an equality of misery for all. The outcome was that all the requirements which applied to husbands and male fiancés were now to be applied equally to wives and fiancées with additional tightening for all parties with regard to public funds, now defined to include family income supplement and housing benefit.

Leon Brittain, for the government, relied on the assumptions which had informed previous debate and which do not need reiteration. The obsession with numbers was emphasised by the explicit trade off between the reluctantly given concession and announced intention to repeal the statutory guarantee in S.1(5) Immigration Act 1971 of family unity for male Commonwealth citizens settled in the UK on 1st January 1973. The mechanistic and dehumanising approach belies the concern for family unity expressed earlier in Lord Brittain's speech:

“As a result, therefore, of the court's judgement and of this change taken by itself, we expect that the numbers accepted for settlement each year are likely to rise by about 2,000 a year. However, this increase will, at least to some extent, be offset by the changes, which I will come to in a moment, concerning the admission of wives and families”.¹⁵¹

The new immigration rules were initially announced only in a Commons written answer, a debate being conceded only after strong opposition pressure.¹⁵² The government's approach caused an outcry from immigrant groups, the opposition and the Parliamentary Group on Race Relations,¹⁵³ but protest was ineffective. After the new rules came into effect on 26th August 1985, both a man and a woman who were settled in the UK were able to sponsor a spouse or fiancé(e). Entry clearance would be refused unless applicants had met five separate conditions. For spouses, these were:

¹⁵⁰ “Policies for a race apart” Guardian 25th October 1982.

¹⁵¹ HC Hansard 23rd July 1985 cols.895-6.

¹⁵² ‘Change in immigration rules to be debated’ Daily Telegraph 12th July 1985.

¹⁵³ ‘Immigrant wives controversy grows’ Times 12th July 1985.

- that the marriage was not entered into primarily to obtain admission to the United Kingdom; and
- that each of the parties has the intention of living permanently with the other as his or her spouse; and
- that the parties to the marriage had met; and
- that there would be adequate accommodation for the parties and their dependants without recourse to public funds in accommodation of their own or which they would occupy themselves; and
- that the parties would be able to maintain themselves and their dependants adequately without recourse to public funds.¹⁵⁴

Subjective facts

Objective facts

Say had different subjective intention

Similar provisions applied to fiancés and fiancées¹⁵⁵ and those seeking extension of stay (with the additional requirements that the marriage had not been terminated, there had been no breach of the immigration laws and that the marriage did not take place after deportation or removal proceedings had commenced).¹⁵⁶

The disposability of the family rights of even long-established Commonwealth males was emphasised by the subsequent removal under the Immigration Act 1988 of the statutory guarantee in S.1(5) Immigration Act 1971, announced as the trade off for permitting the entry of husbands. Such summary dispatch of the longstanding family reunion rights of men suggests that principled attachment to them had, for a long period, been superficial and provisional. While wives who joined their husbands stood higher in the hierarchy of deserving unions than husbands who joined their wives, all were subordinate to the need to prevent even a few thousand unwanted black and Asian immigrants.

It was claimed that removal of S.1(5) was an attempt to erect additional hurdles when it was realised that DNA testing would make it impossible, in most cases, to refuse on the grounds that the parties were not related (a question discussed further in chapter 5).¹⁵⁷ In 1986,¹⁵⁸ the Rules were amended to prevent entry where the incoming spouse was under 16 and again in 1990¹⁵⁹ to prevent entry when either spouse was under 16 (more recent rises in the minimum age are discussed in chapter

¹⁵⁴ HC 503 para 46.

¹⁵⁵ Ibid para. 41.

¹⁵⁶ Ibid para 124.

¹⁵⁷ 'Home Office erects further barriers' New Life 23rd June 1989.

¹⁵⁸ HC 306 para.1A.

¹⁵⁹ HC 555 para. 3.

6). While the advisability of very young marriages was (and remains) a legitimate subject for debate, the history of exclusion meant that this was understood only as further cultural discrimination. Similar sentiments were evoked by the amendment of the Rules to prevent the entry of more than one wife to a polygamous marriage,¹⁶⁰ an issue which the government eventually acknowledged affected about 25 households per year.¹⁶¹ This was despite earlier and well-publicised exaggerated claims by the Select Committee on Race Relations and Immigration. It is not clear from the reports whether the misleading claims on polygamous wives were due to misrepresentation by staff at the High Commission in Bangladesh or were wilfully misinterpreted by the anti-immigration Chairman of the Select Committee.¹⁶²

Throughout the period, the government's tone was harsh and overbearing towards those separated by law from their spouses abroad. The implicit assumption was that individuals had themselves rendered their claims illegitimate through marrying in unsanctioned ways. David Waddington, for example, used his usual combative style to reply to a question in the House about constituents separated by the Rules:

“Opinions may differ on whether parents should be encouraging children to marry boys abroad who have been brought up in an entirely different way rather than their contemporaries in British society. But the primary purpose rule is in the general public interest and those cases do not illustrate any defect in the rules, rather the refusal of people to accept immigration requirements approved by a democratically elected Parliament. All too often a girl goes through a marriage and has a child and then the Home Office is asked to pick up the pieces when ... anybody with a scrap of sense could have seen before the marriage that the man could not qualify to come here and would have no claim to come here”.¹⁶³

In the twenty-two years between 1985 and 1997, many thousands of genuinely married couples were separated by the primary purpose rule. There was the occasional chink of light prompted in part by the embarrassing liberality of European Community law as demonstrated by the well-known case of *Surinder Singh*.¹⁶⁴ Following that case and in the light of domestic case law on 'intervening devotion' (see chapter 4), concessions were announced in June 1992. Applications would no

¹⁶⁰ Ibid para. 3.

¹⁶¹ HC Hansard 16th November 1988 col. 786.

¹⁶² 'Inquiry into clash on Bangladesh wives' Times 28th November 1985, 'MP in retreat on wives claim' Guardian 28th November 1985, 'MPs scale down claims on immigrant wives' Times 3rd November 1985, 'MPs move to close immigrant loophole' Times 27th November 1985.

¹⁶³ HC Hansard 19th February 1986 cols. 457-8.

¹⁶⁴ *R v Immigration Appeal Tribunal ex parte Home Secretary (Surinder Singh case)* Case C-370/90, [1992] ECR I-4265.

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longer be refused on primary purpose grounds where it was accepted that the marriage was genuine and subsisting and the parties had been married for at least five years or one or more children had the right of abode in the UK. This provided at least partial relief even if at the cost of a lengthy separation, an unofficial waiting period (Menski 1994:118).

In 1997, a Labour government was elected after 18 years of Conservative rule. In its manifesto, the party had promised that the current immigration system would be reformed 'to remove the arbitrary and unfair results that can follow from the existing 'primary purpose' rule'.¹⁶⁵ Actual abolition came soon after Labour came to power and enabled the government to establish radical credentials on a matter of high symbolic importance, but which would make only a small difference to immigration totals.¹⁶⁶ It thus was able to position itself as the natural party of the ethnic minority population at relatively little cost.

in May 1997

Jack Straw described the law as 'arbitrary, unfair and ineffective'.¹⁶⁷ He also made reference to the disadvantage accruing to British citizens compared with other EU nationals resident in Britain. This must have been an important consideration for a government aiming to be 'new and distinctive', a 'leader in Europe'.¹⁶⁸

Despite concerns about the effect of abolition and support for other highly restrictive measures, there has been little support since then even amongst anti-immigration groups for the return of primary purpose.¹⁶⁹ The rule was illogical, ineffectual and outmoded.

3.9 Conclusion

Although Enoch Powell had praised the contribution of immigrants to the National Health Service in the early 1960s, by 1964 he believed that Commonwealth immigration should be controlled. Nonetheless, he accepted those immigrants already present to be 'part of the community' and stated that 'there is an inescapable obligation of humanity to permit the wives and young children of immigrants already here to

¹⁶⁵ Labour Party Manifesto 1997 (<http://www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml>).

¹⁶⁶ House of Commons Hansard Written Answers for 5th June 1997 col. 219.

¹⁶⁷ Id.

¹⁶⁸ Labour Party Manifesto 1997 (<http://www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml>).

¹⁶⁹ See, for example, Migration Watch UK's briefing available on www.migrationwatch.org/briefingpapers/other/immigration_marriage.asp.

join them.' (Dummett and Nicol 1990:196). By 1967, the commitment to family reunification could be best achieved by immigrants returning home (Dummett and Nicol 1990:196). In 1968, his infamous 'rivers of blood' speech legitimised and gave voice to discontent at the immigrant presence:

"We must be mad, literally mad, as a nation, to be permitting the annual inflow of some 50,000 dependants who are for the most part the material of the future growth of the immigrant-descended population. It is like watching a nation busily engaged in building up its own funeral pyre" (quoted in Layton-Henry 1992:80).

Powell was an atypical figure but the dramatic changes in his position represent, in stark terms, the wider shift in attitudes in the legislature towards the admission of Commonwealth spouses over the period discussed in this chapter. These attitudes relied upon assumptions, beliefs and values relating to race, immigration, marriage and the purposes of parliamentary processes. They were often mutually reinforcing and intertwined. While some politicians expressed themselves more abrasively or acted more directly than others, consistent threads may be identified throughout the many changes of policy described in this chapter.

The most obvious was the assumption that immigration policy is a matter purely to be decided according to the self-interest, enlightened or otherwise, of the nation state. No parliamentarian proposed a different ethical basis for determining policy. This was and is an assumption shared throughout most of the wider society but was particularly marked in parliamentary debates due to the representative nature of the parliamentary process.

Nonetheless, it was differentiated by the various conceptions that politicians held of who comprised, in its widest sense, their constituency, the 'belongers'. For some, this was only the white population apparently under siege from ceaseless black immigration. Discrimination against those born outside the UK relied on a somewhat more refined view. For others, it was all those who were long-term residents lawfully present. The shifts in law over the period discussed here reflect the temporary victory of one or other of these competing conceptions.

Another universal assumption, only challenged by marginal figures, was that non-white immigration was uniquely problematic. White immigration was not counted, scrutinised or even acknowledged while even small numbers of non-white immigrants provoked anxiety and drastic measures. The fear seemed to be that permitting a few to

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enter would open a breach through which virtual hordes might pour with dire consequences. In this respect, secondary immigrants, particularly men, were perceived as a particularly insidious threat. The public persona of spouse or dependant, with their humanitarian claim, concealed a less welcome identity as economic migrant and as a link in a never-ending chain.

This fearful perspective rested on other beliefs and assumptions: that immigration was a single one way process, that poverty and lack of opportunity made the pool of potential migrants infinite, that indigenous workers could be displaced by migrant labour and that the problems of accommodating these migrants by far outweighed any advantages. These fears were provoked only by non-white immigration. While immigrants from the subcontinent undeniably brought linguistic and cultural challenges, hostility towards earlier immigration from the Caribbean, with its British-oriented culture, supports the argument that these concerns were, at least to an extent, an indication of deep-rooted racial fears.

Over the period, the constant emphasis on abuse and fraud rendered the act of asking for admission, particularly by men, to be seen as illegitimate. The main exceptions to this perspective amongst senior politicians were Alex Lyon and Roy Jenkins. Lyon tried to make his defence of immigrants more acceptable by relying on the doubtful premise that non-white secondary immigration was largely finite. Jenkins did not challenge the underlying assumptions of immigration control but was arguably more honest in acknowledging that the issue was the acceptability of non-white immigration within British society rather than 'abusive' applications by immigrants. For the most part however, belief in the ubiquity of abuse was dominant. The unwillingness to acknowledge reports to the contrary suggest that this belief was, to some degree, willed in order to rationalise harsh policy or was so consonant with other beliefs that the perception was difficult to challenge.

These general beliefs and assumptions about immigration supported and reinforced those concerning the admission of spouses in particular. Despite rhetoric as to the importance of family life, support for the reunification of immigrant families was always conditional. A hierarchy of marriages is discernible so that some relationships were considered more sympathetically than others. The precise nature of the hierarchy evolved over the period. Most notably, race became a more important factor than gender although both played a part throughout and were intertwined. Immigration factors were constantly weighed against the rights of the UK resident spouse and the

You don't
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differential treatment of UK residents makes it clear that some were considered to have only a small claim to 'belong', a claim that was itself partially undermined by the act of marrying an outsider.

At the outset, it was assumed that the primary immigrant would be male and there was no appetite for restricting the admission of Commonwealth immigrants' families. This was the case even where the parties did not conform to British marriage norms although there was some expectation of eventual compliance. Marriages where the man accompanied or came to join his wife lacked full legitimacy and became ever less acceptable, particularly when the parties were not full 'belongers'. In these instances, choosing the 'wrong' husband underscored the wife's outsider status and entailed consequences that she must accept. Male secondary immigration was, from early on in the period, viewed as disguised primary immigration, an exploitation of the humanitarian impulses of the host state. Then, as overt and generalised gender discrimination became less acceptable over the period, race and cultural factors predominated and crystallised around the international arranged marriage.

The continuation of international arranged marriages was one reason why the 'pool' of dependants on the subcontinent did not prove to be finite and became the subject of intense scrutiny. The arranged marriage thereby came to prominence as a source of unwanted immigration and was always tainted by this association. It was only a short step from seeing it as a cause of immigration to regarding it as an abusive vehicle of immigration, a familiar elision in immigration control.

The claims of all marriages were thus, to a degree, conditional and relationships that conformed to preconceived norms were more sympathetically treated. The arranged marriage was especially vulnerable not only because it permitted unwanted immigration but also because it was poorly understood and was usually viewed as inferior to Western models. Those sympathetic to the claims of immigrants argued that it would disappear as second-generation immigrants grew up. This was not simply an assertion of cultural superiority; it is likely that some members of a second-generation immigrant community will find spouses within the country in which they have been brought up, or indeed in other countries. But many MPs underestimated the centrality of the arranged marriage to the maintenance of the global Asian diaspora and their negative beliefs about it made a principled defence of such marriages less likely. It is not necessary to idealise the arranged marriage system to appreciate that

scrutinising its drawbacks in a way that did not occur with other forms of marriage assisted those seeking to challenge the legitimacy of such marriages.

Those who were anti-immigrant believed that the international arranged marriage continued merely because it was a useful vehicle for immigration. The assumption was that the dominant motivation for ethnic minority conduct was to secure an immigration advantage and that Asian parents cared so little for their children's future happiness, howsoever conceived, that they would submit them to an otherwise undesirable marriage purely for such an advantage.

Arranged marriages where the husband moved to the UK were regarded as doubly illegitimate as arranged marriages that did not comply with Asian patrilocal custom. The sole reason for such adaptation was believed to be the immigration advantage thereby accruing to the husband. From this, it was a short step to believing that the sole reason for the marriage itself was immigration and the husband was a disguised primary migrant. Again, there is mutual reinforcement, non-conformity of the marriage leading to assumptions about its motivation that reinforce its lack of legitimacy. These beliefs rested upon a view of the Asian husband as primarily motivated by immigration and of the Asian wife as passive participant. To the extent that such a judgement was unfair, little damage resulted as there was assumed to be no emotional investment in the marriages by either party. Harsh exclusionary policies could therefore be rationalised as causing little distress to the parties involved.

It is more difficult to determine the extent to which the arranged marriage, in itself, created hostility towards South Asian immigration. I have cited assertions of cultural superiority throughout this chapter. In most cases, these functioned as post-hoc rationalisations of policy rather than as reasons for it. While a poor understanding of arranged marriages enabled them to be too easily understood as mere vehicles for immigration and while their apparent strangeness reduced sympathy for separated couples, the primary motivation was always the minimisation of South Asian immigration.

If the claims of Asian spouses were regarded as weak, they nonetheless existed even if they were persistently sacrificed to more urgent political imperatives. The effect of the legislative measures described here was mostly concealed by the entry clearance system (see chapter 5) or rationalised as a reaction to abuse. This enabled the government to present black and Asian immigration as being under control and the public to avoid confronting the consequences of these policies.

This is unsurprising. Governments wished to meet the expectations of their largely white electorate and present themselves as competent in controlling immigration. However, it does suggest a more complex public attitude than straightforward hostility towards immigration and immigrant communities. It seems that there were limits to the visible hardship which politicians were willing to impose and which the public would accept. The hierarchy of acceptable and deserving marriages might place some marriages on the bottom rung, but the necessity of concealing the hardship involved in their rejection suggests that they had, at the least, some claim. Even under the full force of primary purpose, a proportion of applications succeeded while efforts were made to rationalise discriminatory policies in non-discriminatory terms. Obligations incurred under statute such as those to wives and children under the Commonwealth Immigrants Act 1962 and S1(5) Immigration Act 1971 were slow to be repealed.

There was not therefore unlimited public appetite for harsh exclusionary measures at any cost. Rather, governments, anxious to ensure every possible political advantage, aimed to give the electorate what they wanted without making plain the price that was paid for it, upholding the illusion of pain-free immigration control.¹⁷⁰ Immigrant communities and their foreign spouses might be strange and sometimes unwelcome, but the manner in which their applications were dismissed paradoxically recognised the force of their claim.

¹⁷⁰ Politicians occasionally acknowledged this. David Waddington defended policy in 1983 by saying, "Everyone pays lip service to the need for immigration control. But no one likes to see the logical result – individuals being refused the right to come and stay here and some as a last resort having to be removed". ('Discrimination against women is defended' Oldham Evening Chronicle 28th November 1983).

Chapter 4: Judicial decision-making before 1997

This chapter considers judicial attitudes towards marriage and immigration before 1997, including marriages believed to have been entered into for immigration reasons, often described as 'marriages of convenience', 'immigration marriages' or, more recently, 'sham marriages'. It is argued here that the judiciary were largely indifferent to these marriages before the era of mass non-white Commonwealth immigration. When cases involving New Commonwealth immigrants came before the courts, judicial attitudes became more complex and inconsistent. The chapter argues that there was, at least in the early stages, some sympathy. However, this came to be tempered by anxiety about non-white immigration, albeit only occasionally overtly expressed, and a hardening of attitude. The courts did not check and often assisted government and administrators in ensuring that the 'primary purpose' rule applied to marriages that were acknowledged not to be a sham.

Commentators have argued that the judiciary has shown greater deference to executive power in immigration than in other matters (Bevan 1986:16-22; Legomsky 1987; Desai 1996; Griffiths 1997:182-204;). However, this has not been uniform and the picture is complex as these authors and others have acknowledged (see, for example, the discussion in Stevens 2004: chapter 8; Bevan 1987:20-1 and Thomas 2003). There have been various explanations for the apparent oscillations in judicial decision-making. Stevens (2004:365) notes the consistent involvement of particular judges in more liberal decisions. Thomas (2003:509-10) considers, in relation to asylum, that the courts have been more active and have achieved more long-term successes when intervening in matters of good administration and procedure than in policy. Legomsky (1987:246) attributes judicial conservatism in immigration matters to political pressure prevailing during periods of high immigration.

This thesis argues that decisions in immigration and marriage cases illuminate decision-makers' values, beliefs and assumptions about immigration, marriage, the judicial or administrative function and other related matters, these, in turn, being rooted in often unarticulated assumptions about the nature of the world. This chapter specifically considers judicial decision-making in this area. It argues that the beliefs and assumptions identified here, although not identical to, had much in common with

those held within government and by administrators and resulted in a large degree of congruity in the formulation and application of policy.

The role of the Tribunal during this period is ambiguous. Juss (1997: chapters 4 and 5) is critical of its tendency to defer to and reinforce the wider discriminatory culture, a point also made by others (Harlow and Rawlings 1997:519; Grant and Martin 1982:355). There may have been a recent tendency towards “judicialisation” (Thomas 2003:484), a trend observed elsewhere and arguably an inevitable characteristic of dispute resolving mechanisms (Stone Sweet 1999, 2000: chapter 1) but, during the period under discussion here, the Tribunal also operated as an administrative body deeply enmeshed with other immigration administrative processes. The decisions that Juss (1997) criticises are principally those in which the Tribunal was complicit in supporting the exclusionary culture of the Entry Clearance Service and which did not, on the whole, require the Tribunal to engage in discussions of legal principle. These are more appropriately discussed in chapter 5. However, in other respects, the Tribunal was also principally or jointly responsible for the development of aspects of legal doctrine and these decisions are discussed here alongside higher court decisions. In these cases, the Tribunal was not uniformly complicit with administrative practices.

The era was dominated by the primary purpose rule. Nonetheless, the judiciary was also required to decide other matters relating to immigration through marriage. These are analysed in detail in several sub-sections under 4.1, while 4.2 below considers specifically primary purpose case law.

4.1 ‘Having it both ways’: judicial attitudes in non-primary purpose cases

4.1.1 The marriage of convenience

The concept of a marriage of convenience for reasons of immigration unsurprisingly predates control of New Commonwealth immigration. Earlier case law focused on the validity of the marriage rather than the immigration consequences that flowed from it. The usual rule was that a marriage of convenience was valid even if entered for immigration purposes (*Silver v Silver*,¹⁷¹ and see also Lord Hailsham in *Vervaeke v*

¹⁷¹[1955] 1 WLR 728.

Smith),¹⁷² but the courts occasionally adopted a more flexible approach when their sympathies were aroused.

In *H v H*,¹⁷³ the wife, a Hungarian national, entered a marriage of convenience with a French citizen in order to leave Hungary as she was in fear of being killed or imprisoned by the Communist regime. In the UK, she successfully applied to have the marriage annulled on the grounds of duress, Karminski J finding that the fear she was under negated her consent to the marriage.

H v H was followed in *Szechter v Szechter*,¹⁷⁴ involving Polish dissidents. The husband, with his wife's agreement, divorced her and married the petitioner to secure the latter's release from prison and emigration. Once in the UK, they wished to rectify the position. The facts of the case are harrowing, the petitioner in *Szechter* was in more immediate danger than in *H v H* and it is evident that the judge desired to assist the parties.¹⁷⁵

There was tenuous legal authority for these decisions. Duress had always previously been specifically directed towards forcing the petitioner to enter the marriage.¹⁷⁶ Karminski J in *H v H* cited no authority for his novel interpretation. In *Szechter*, Sir Jocelyn Simon relied on *H v H* and *Buckland v Buckland*,¹⁷⁷ in which the duress was again directed at ensuring that the marriage took place. It is hard not to suspect a willing extension of legal principle in order to justify a desired outcome (Cretney et al. 2002:60, fn 60).

A further instance of relative liberality was *Silver v Silver* where a marriage of convenience took place to enable the German wife to cohabit in the UK with a married man. Following his death, she wished to marry someone else. Her husband was by now living with another woman by whom he had three children. The High Court refused a decree of nullity, but exercised its discretion to grant a divorce, viewing this as in the interests of not only the parties and their children but of the community at large.

¹⁷² [1983] AC 145 at 152.

¹⁷³ [1953] 2 All ER 1228.

¹⁷⁴ [1971] P 286.

¹⁷⁵ Perhaps aware of the dangers, Sir Jocelyn Simon set a very high objective threshold for duress that proved problematic in later cases (see *Singh v Singh* [1971] P 226, 2 All ER 828 CA) until replaced by a subjective test in *Hirani v Hirani* (1982) 4 FLR 232. See Poulter (1986:27-32); Deech (1973:111); Bloom (2003 1/418).

¹⁷⁶ The leading case at the time was *Scott and Sebright* (1886) 12 P.D. 21, 56 LJP 11 in which the applicant had been subjected to threats of violence and of destruction of her reputation to ensure her compliance.

¹⁷⁷ [1968] P 296.

In contrast to these benevolent decisions stands the memorable case of *Vervaeke v Smith*.¹⁷⁸ A Belgian woman entered a marriage of convenience to obtain British nationality and avoid deportation as a prostitute. The price paid to her destitute husband was £50 and a ticket to South Africa. She later underwent a marriage ceremony with a wealthy Italian national who died during the wedding party. To secure her inheritance as a widow, she needed to annul the first marriage. She obtained an annulment only to have it overturned by the High Court due to her perjury. She was then granted an annulment in Belgium, and sought recognition of it in the UK.

The House of Lords rejected her application on the grounds of *res judicata*, which would have been sufficient. However, they also, by a majority, found against her on grounds of public policy. Although the case was described as “a horrible and sordid story”,¹⁷⁹ Lord Simon maintained (at p.166) that neither her career as a prostitute nor her previous perjury were relevant to the decision, while the reasoning deployed was consistent with authority. Nonetheless, it is apparent that the court was not, as in *H v H*, looking for a way to relieve the difficulties of a party with whom they were in sympathy.

By contrast, where an undeserving applicant stood to benefit from a finding of validity of marriage, the courts sought to negate that benefit. In *Puttick*,¹⁸⁰ Astrid Proll, a member of a terrorist group, fled Germany after being charged with serious criminal offences. She entered the UK under a false identity and used that identity, as well as other forged documents, to marry a British man. To avoid extradition, she sought to have the marriage declared valid so she could register as a British citizen.¹⁸¹ The Family Division of the High Court declined to make such a declaration.¹⁸² The Divisional Court found the marriage valid but declined to direct registration as a British national. This required the court to extend the principle in *R v Chief National Insurance Commissioner, ex p. Connor*.¹⁸³

¹⁷⁸ [1983] AC 145.

¹⁷⁹ Lord Hailsham quoting Ormrod J at 151.

¹⁸⁰ *R v Secretary of State for the Home Office ex p. Puttick* [1981] 1 QB 767.

¹⁸¹ Under S.6(2) of the British Nationality Act 1948, in force at the time, a woman who was married to a citizen of the United Kingdom and Colonies (CUKC) was entitled to be registered as a CUKC.

¹⁸² *Puttick v Attorney General* [1980] Fam. 1.

¹⁸³ [1981] Q.B. 758. *O'Connor* found that statutory public duties were subject to an implied policy limitation to prevent those guilty of wrongdoing. In that case, there was a conviction for homicide. In *Puttick*, perjury and forgery were admitted but there was no conviction.

These cases are too few to permit more than tentative interpretation. However, they suggest that the courts sought to reach decisions congruent with their sense of justice. In all cases, the immigration advantage resulting from the marriage of convenience was a marginal factor. In *H v H* and *Szechter v Szechter*, a humanitarian motive was clearly present as it was, to a lesser extent, in *Silver v Silver*. Nonetheless, there was no concern expressed at the use of marriage to obtain an immigration advantage.

H v H and *Silver v Silver* pre-dated mass New Commonwealth immigration and involved European nationalities. *Szechter* came in 1971 but involved persecuted Polish nationals with whom the court had sympathy. *Vervaeke* and *Puttick* in 1983 and 1981 respectively, also involved European nationalities and, despite the dominance of the immigration issue at the time, the courts' disapprobation focused on other aspects of their conduct. Judges in all these cases showed themselves to be flexible and creative in ensuring an outcome consistent with their sense of justice in the case.

In contrast to these cases, non-European migrants found to have entered a marriage of convenience were treated with maximum severity. In *Malik v SSHD*,¹⁸⁴ the parties underwent a civil marriage intending to live together after the religious ceremony. This did not take place, however, as the appellant began a relationship with his wife's sister. As the civil ceremony had taken place early due to the imminent expiry of the applicant's visitor's visa, it was found to be a marriage of convenience and deportation was justified on the grounds that his continued presence was not conducive to the public good. In *Cheema*,¹⁸⁵ the court again found that the mere fact of a marriage of convenience justified deportation on the grounds that the parties' continued presence was not conducive to the public good under S.3(5)(b) Immigration Act 1971.

These decisions were particularly harsh as there was no appeal against deportation on these grounds. The argument put on the applicants' behalf was that 'public good' deportations had been conceived to deal with rare instances of extreme wrongdoing. That argument carried little weight until House of Lords dicta in *Khawaja v SSHD*¹⁸⁶

¹⁸⁴ [1981] Imm AR 134.

¹⁸⁵ [1982] Imm AR 124.

¹⁸⁶ [1983] 2 WLR 321.

made it apparent that S. 3(5) (b) was indeed not the appropriate mechanism and that the parties should have been removed as illegal entrants (see *R v IAT ex p. Khan*).¹⁸⁷

4.1.2 Degrees of hardship

Between 1969 and 1974, Commonwealth husbands were permitted to enter or remain in the UK on the basis of marriage only if:

“refusal would be undesirable because of the degree of hardship which, in the particular circumstances of the case, would be caused if the woman had to live outside the United Kingdom in order to be with her husband after marriage.”¹⁸⁸

The courts rapidly became involved in the determining the kind and degree of hardship that would trigger the exception. As Bhabha and Shutter (1994:57-9) point out, criteria were adopted that were more easily met by white women of British descent.

The first reported case was *Hector*,¹⁸⁹ heard in the Tribunal. The couple, both Mauritian nationals, feared harassment by the husband’s former mistress although the evidence seemed insubstantial. Describing the danger as a “rod which the appellant made for his own back”, the Tribunal considered that, in framing the rule, the Home Department had in mind:

“difficulties of a more serious and lasting nature such as, for example, might face a woman settling in a strange country on account of differences in race, language, customs or religion or on account of political intolerance” (at p.44).

The Tribunal here seized on factors that, with the possible exception of political intolerance, would be more likely to affect women of European descent. In the subsequent reported cases, the only claims that succeeded involved white women moving to less developed countries (*Ahmet*,¹⁹⁰ *Constantinides*,¹⁹¹ and *Papadopoulos*).¹⁹² By contrast, in *Sadhu Singh*,¹⁹³ a British-born woman of Sikh descent was reluctant to move to India due to the rural environment, the position of women and her dislike of the food and climate. Her claim was not allowed, as “there

¹⁸⁷ [1983] Imm AR 32.

¹⁸⁸ Cmnd 4295 para. 24. For discussion of the political background of this, see chapter 3.

¹⁸⁹ [1972] Imm. AR 41.

¹⁹⁰ 27th June 1972 Imm AR TH/3018/71(24).

¹⁹¹ 21st June 1973 Imm AR 30 TH/3043/72 (160).

¹⁹² [1974] Imm AR 46.

¹⁹³ 19th March 1973 Imm AR 67 TH/581/72(126).

would be no differences in race or religion" (at p.70) and it was believed that the other problems could be alleviated through financial assistance from her father. The Tribunal quoted the adjudicator without disagreement as saying that the wife was looking for "the best of both worlds". She wanted to avoid the scandal that would ensue if she did not fulfil the engagement in accordance with tradition, but she also "wanted the more free and affluent life of England and detested the idea of becoming the serflike wife of an Indian peasant smallholder".

An unreported case before the adjudicator shortly afterwards was this time decided in favour of the applicant. In this instance, an Indian woman who had lived in the UK since the age of 7 was described as "extremely involved in the cultural life of the white-born British" with "firm views on the emancipation of Asian women and the anglicised approach to the status of women".¹⁹⁴ This appears to have been an exceptional instance and lends support to the argument, made elsewhere in this chapter, that the right to bring in a spouse was 'awarded' more readily to immigrants who unequivocally adopted British values. In other instances, the Tribunal refused claims where the wife had also been brought up in the UK, suffered acute anxiety or faced poverty.¹⁹⁵ Differences in race or religion were privileged over those arising from a low standard of living, these being hardships to which a woman was expected to adjust. In *Papayianni*,¹⁹⁶ for example, the Tribunal was deeply critical of the wife's reluctance to live in a village without gas or electricity. Constable (1974) refers to a series of decisions establishing that "starvation is not hardship".

In one case reported in the press, however, a British woman who had made "valiant efforts" over seven years in India was permitted to return with her husband after the Tribunal was told of the "squalor", health hazards, food shortages and economic difficulties facing the family. There is a suggestion that class was a factor, the wife being described as from a "respectable Gloucestershire family". She also had difficulty accepting the religion and way of life of the region where she was "the only English woman living in 50 square miles of the Indian Punjab". The overall tone suggests that the court wished to rescue this plucky white middle-class adventurer from poverty that other women were expected to endure.¹⁹⁷

¹⁹⁴ 'Asian bride wins appeal for husband to join her.' Yorkshire Post 3rd July 1973.

¹⁹⁵ 'The "Jenkins husbands" row' The Observer 31st March 1974.

¹⁹⁶ [1974] Imm AR 1.

¹⁹⁷ 'Wife wins place for immigrant husband' Guardian 11th April 1974.

If differences in standard of living had been routinely brought into account, many more applications by women married to non-white men would have succeeded (Constable 1974). The suspicion that immigration considerations overrode every other is corroborated by the position of Ugandan Asian women who held British passports and who came to the UK with their children after expulsion (already discussed in chapter 3). Their non-British husbands who had also been expelled were not permitted to enter the UK and, now stateless, were finding it difficult to gain acceptance by other countries because of their dependants. The Immigration Appeals Tribunal upheld Home Office decisions to refuse admission on the grounds that the hardship, including lack of a settled home elsewhere, was insufficiently severe.¹⁹⁸

4.1.3 Intention to live together

Despite the later predominance of 'primary purpose', there was some early case law on intention alone. The Immigration Rules applicable after 1977¹⁹⁹ required the Secretary of State always to refuse leave to remain if the marriage was entered primarily to obtain settlement with no intention to live together, but only normally to refuse when intention was absent whatever the reason for the marriage. Thus, if the marriage was genuine at inception but had later broken down, there was discretion to grant leave to remain. Tribunal cases on when discretion should be favourably exercised demonstrated sympathy for hapless husbands whose status was placed in jeopardy due to apparently selfish or inconstant wives.

In *Subhash*,²⁰⁰ the husband was refused indefinite leave after his wife left him for another man shortly after the wedding. The marriage was not one of convenience and the husband had given up a good job in India and was unlikely to obtain another. The Tribunal agreed with the adjudicator that the reason for the breakdown of the marriage should be brought into consideration when deciding whether to exercise discretion favourably. In *Anseereeganoo*,²⁰¹ the parties were living in the same household and shared domestic tasks although the wife had announced her intention of eventually seeking a divorce. The husband had abandoned work-permit employment at the wife's insistence and was reliant upon his leave as a husband. The

¹⁹⁸ 'Uganda cases strike at women's rights' Guardian 11th January 1973.

¹⁹⁹ HC 241 para 24A.

²⁰⁰ [1979-80] Imm. AR 97.

²⁰¹ [1981] Imm AR 30.

Tribunal agreed with the adjudicator that it was incorrect to say that the wife did not have “any” intention of living with her husband and indefinite leave should be granted.

However, the High Court later found²⁰² that refusing to grant leave was the norm, even where the break-up was not at the instigation of the applicant, as the purpose of the rule was to allow people to stay because of marriage. The judiciary were, it seemed, prepared to show compassion provided the underlying purpose of control was not subverted.

The amendment of the rules in 1979 so that primary purpose became a separate test in all cases, made the distinction less important as primary purpose became the most common reason for refusal although the relationship between intention and primary purpose was the subject of later case law.

4.1.4 Parties have met

The requirement to have met became part of the Immigration Rules in 1979 and particularly affected fiancé(e)s in arranged marriages. There was considerable uncertainty as to the nature and quality of the required meeting. In *Jaffer* (4284), the parties had stayed in the same house when the sponsor was 14 and had seen each other from one room to another but had not spoken. They were found not to have met. The decision made difficult the admission of fiancé(e)s in traditional arranged marriages and was modified in *Hashmi* (4975) where the rule was taken to have been satisfied when the parties were brought together at a relative’s house and saw each other but, in keeping with tradition, did not speak.

In two reported cases,²⁰³ the Tribunal provided guidance. Given the ambiguity of the term, the Tribunal were sympathetic to applicants caught by this provision but rejected a purely nominal interpretation that would have included parties who had met in early childhood but had no distinct recollection of each other. On the other hand, they found that the rule did not require the parties to have met in the context of the marriage arrangements nor, as argued by the Home Office, that there must be a degree of personal relationship. They approved the decision in *Hashmi* and adopted an interpretation of ‘met’ as meaning ‘made the acquaintance of’. In this way, the Rule

²⁰² *R v Immigration Appeal Tribunal ex p. Jarnail Singh Sandal* [1981] Imm AR 95.

²⁰³ *Rewal Raj v Entry Clearance Officer, New Delhi* [1985] Imm AR 151 and *Mohd Meharban v Entry Clearance Officer, Islamabad* [1989] Imm AR 57.

was not treated as a meaningless formality, but there was no attempt to undermine fundamentally the practice of traditional arranged marriage (although it was rendered more expensive if an additional meeting had to be organised).

4.1.5 Validity of the marriage

A major cause of refusal in this period was the allegation that the parties did not have a valid marriage. Barriers included the absence of formalities, uncertainty as to the date, incapacity to enter a polygamous marriage or the invalidity of prior divorce proceedings. Most of these matters were decided by entry clearance officers without involving the courts and are discussed in chapter 5.

The courts were called on to address certain questions, however, and these have been extensively discussed elsewhere (Pearl 1972; Poulter 1976; Jaffey 1978:38-43; Pearl 1986; Poulter 1986:11-22; Jones and Welhengama 2000:109-34; Murphy 2000a and 2000b; Mayss 2000; Shah 2003). They go beyond immigration questions into the recognition of laws and practices of minority communities, an issue that is outside the scope of this thesis. The numbers of polygamous marriages resulting in the admission of additional spouses, for example, was tiny but there is a long and complex case law and legislative history on the recognition of polygamous marriages (see Poulter 1976 and Shah 2003).

Nonetheless, in dealing with those cases that arose in an immigration context, the courts at times betrayed particular attitudes about their expectations of immigrants. One such was the approach taken towards domicile, a question that arose repeatedly in deciding the validity of earlier proceedings. Another was the 'transnational divorce'. The common feature was resistance to immigrants seeking, in the words of the adjudicator in another context,²⁰⁴ "the best of both worlds", to enjoy the benefits of life in the UK while retaining the right to rely, to their advantage, on practices in their country of origin.

4.1.5.1 Domicile

Domicile was a recurrent issue as the validity of a marriage undertaken in the country of origin might be questioned because it was polygamous, under-age or otherwise did not conform to English law. In these cases, the domicile of the UK party at the time of

²⁰⁴ *Sadhu Singh*, 19th March 1973 Imm AR 67 TH/581/72(126).

the marriage was critical. Through domicile, an immigrant of many years' residence, and who may even have been naturalised, could retain his or her connection with the country of origin including its legal system. Commentators have criticised the general treatment of domicile by the courts as inconsistent (Jones and Welhengama 2000:109-18) and this inconsistency seems to have extended to those cases where it affected immigration status (see, in relation to the Tribunal, Juss 1997:125-6). Nonetheless, on balance, a restrictive approach was preferred.

Domicile was critical in spouse applications because, in determining the validity of overseas marriages, the courts used the test of the parties' antenuptial domicile (see Pearl 1986:41-3). In doing so, they rejected the test of the system of law with which the marriage had a real and substantial connection (*R v IAT ex p. Rafika Bibi*,²⁰⁵ see further Fentiman 1985) or the law of the intended matrimonial home (*Radwan v Radwan (No.2)*,²⁰⁶ Pearl 1986:42). Thus the validity of a polygamous marriage depended upon the parties' domicile at the time of the marriage, a position confirmed by S.11(d) Matrimonial Causes Act 1973.²⁰⁷

Domicile of origin was and remains very difficult to lose. There was the "strongest possible presumption in favour of the continuance of the domicile of origin" (Macdonald and Blake 1995:328), a position that has been maintained (Macdonald and Webber 2005:595). It could be displaced in favour of a domicile of choice by evidence of intention to continue to reside in a different place "not for a limited period or particular purpose, but general and indefinite in its contemplation" (Lord Westbury, *Udny v Udny*,²⁰⁸ quoted in Macdonald and Blake 1995:327).

Given the presumption in favour of domicile of origin, it was for immigration officers to establish that the domicile of origin had been lost. Renunciation of domicile of origin had to be unequivocal and ascertainable through objective criteria. Statements as to domicile in a will, by a taxpayer on an Inland Revenue form or by an applicant for naturalisation or registration were not reliable according to Macdonald and Blake (1995:328). Juss (1997:125-6) argues that, in unreported cases, the Tribunal often wrongly placed the burden of proof upon the applicant to show that he had retained his domicile of origin.

²⁰⁵ [1989] Imm AR 1. However, see Shah (2003:387-8) for an account of later cases where the test of 'real and substantial connection' was still applied.

²⁰⁶ [1973] Fam 35.

²⁰⁷ Although Pearl (1986:43) has argued that this approach misunderstands the effect of S14(1) MCA 1973 on the operation of S.11(d).

²⁰⁸ (1869) LRI Sc & Dir 441.

Domicile has an awkward relationship with immigration. Contrary to common perception, immigration is often not a single discrete movement from country of origin to country of destination. Immigrants may initially intend only a temporary stay or become 'international commuters' (Gardner and Shukur, quoted in Shah 2003:381; Pearl 1986:8). Many immigrants from the subcontinent did not call for their families until their hand was forced by immigration restrictions and, in doing so, they did not necessarily view themselves as making a definitive choice of residence. Immigrants frequently maintain property, business interests and other connections in the country of origin and may anticipate the possibility of a later return, perhaps for retirement.

This ambivalence defies easy categorisation and proved problematic for immigrants caught between two systems. Immigrants who returned home to marry had to rely on their domicile of origin to establish the validity of their marriage if it would not be valid in English law. Yet, they may have been unaware of the significance of domicile when interviewed and over-stressed their commitment to the UK believing that this would assist their case. Nonetheless, immigration officers and the courts relied upon questionnaires as a means of claiming the adoption of a domicile of choice in the UK, a proceeding that was subject to much criticism (Pearl 1986:45; Shah 2003:382-3). Reported cases on domicile in immigration matters suggest that the courts were also inclined to resist finding a domicile of origin if this brought the immigrant advantages unavailable under UK law.²⁰⁹

Two early reported cases involving the adjudicator were decided in favour of polygamous spouses, the husband being found to have retained his domicile of origin.²¹⁰ In neither of these cases had another wife already entered the UK, the marriage, in one case, being only potentially polygamous.²¹¹ In these cases there was a dispassionate consideration of the law that may be contrasted with the emotive tone in the later Tribunal case of *Zahra v Visa Officer, Islamabad*,²¹² where immigration

²⁰⁹ This attitude seems to have been shared by other government departments; see Fransman 1998:331-2.

²¹⁰ *Mussarat v SSHD* 12 January 1971 (Imm AR 45) and *Ishiodu v ECO, Lagos* 29th August 1974 (Imm AR 56).

²¹¹ At the time, even potentially polygamous marriages were void under English law (a position remedied by the Private International Law (Miscellaneous Provisions) Act 1995). Despite the case law discussed here, it was reported that ECOs persisted in relying on domicile to declare potentially polygamous marriages void. Parties were expected to undergo a new ceremony of marriage in the UK sometimes after having regarded themselves as married for many years; 'Home Office denies classing Pakistani marriages as invalid' Times 3rd September 1975, 'Anomalies in law on polygamy' Times 6th September 1975; see also chapter 5.

²¹² [1979-80] Imm AR 48.

factors seem to have been more prominent. In *Zahra*, the sponsor husband had already brought one wife to the UK with whom he had “a large number of children, four of whom were born in this country” (at p.49). However, this wife had since returned to Pakistan. The sponsor had made several visits to Pakistan, during one of which he contracted a second marriage. He owned a house, a shop and a bank account in Pakistan but, relying on his answers to a domicile questionnaire, he was found to have adopted an English domicile and the marriage was held to be invalid.

The sponsor’s lawyer also argued that the second wife should be admitted as a woman ‘living in permanent association with a man’, a discretionary provision in the Immigration Rules. The Tribunal declined saying the measure had been intended to apply only to monogamous relationships, inferring this from the reference to a woman being admitted ‘as if she were his wife’. It went on to say that:

“If it were otherwise an oriental pasha with a harem of several wives might be entitled to bring them all to this country, even if he were domiciled here, provided that he otherwise satisfied the requirements of this paragraph. This is clearly absurd”.

The assumption that the wife in a polygamous marriage barely merits description as such recalls the speech of Lord Penzance in *Hyde v Hyde* (1886) quoted in Jones and Welhengama (2000:111-2; see also the critique in Poulter 1976). This contrasts with the more sympathetic position established after *Hyde v Hyde* (Poulter 1986:50-8) and arguably reflects the fear that mass immigration might result in large numbers of polygamous marriages. The reference to an oriental pasha places the polygamous marriage in the realm of the exotic, obviating the need to take seriously the claim for entry. The strong impression is that the Tribunal did not wish this application to succeed and the unfavourable decision on domicile was part of that process.

Case law after *Zahra* was inconsistent with some Tribunals adopting a more balanced and sympathetic approach. For example, in *Rokeya and Rably Begum v Entry Clearance Officer Dhaka*,²¹³ a careful determination found that the burden of proof to establish a domicile of choice had not been discharged. This may have been a more dispassionate Tribunal but it is interesting that, in this case, unlike in *Zahra*, the first wife had never been in the UK.²¹⁴

²¹³ [1983] Imm AR 631.

²¹⁴ In 1988, the immigration rules were amended to permit the entry of only one wife in any event (HC 555, para. 3).

Shah (2003:388, fn.75) notes that, in other cases, the Tribunal resisted ECOs' attempts to place immigrants in a Catch 22 situation, whereby their declared intention to live in the UK with their wife, necessary if the spouse application was to succeed, counted against them on domicile. Nonetheless, despite these and other cases that took a more sympathetic view, *Zahra* remained the dominant case permitting officials to use domicile to deny the validity of marriages (Shah 2003:384-5).

4.1.5.2 Divorce

In other cases, the contentious issue was whether a previous marriage had been satisfactorily dissolved. The rules for recognition of divorce were complex and changed during the period (see, for example, Pearl 1972, 1974/5 and 1986, North 1975, Macdonald and Blake 1991:255-6) and it is not possible to recite them here. As with other questions of validity, the implications went well beyond immigration considerations. However, one issue that does throw light on the courts' attitudes towards immigrants was the 'transnational divorce', where part of the divorce took place in the UK and the other formalities required under the law of the country of origin were performed in that country.

These divorces fell between two sets of legislative provision. Following *Qureshi v Qureshi*,²¹⁵ which had recognised a *talaq* divorce performed entirely in the UK, albeit in the Pakistani High Commission, statutory law was introduced to plug that perceived loophole. Under S.16(1) Domicile and Matrimonial Proceedings Act 1973, recognition of divorces carried out in the UK was now confined to those instituted in the UK courts. Thus a *talaq* divorce pronounced in the UK was invalid under UK law regardless of its validity under the law of the parties' domicile or nationality. Divorces carried out abroad were recognised provided either of the parties were habitually resident or a national of the country in question (S. 3 Recognition of Divorces and Legal Separations Act 1971, later amended by S.46(1) Family Law Act 1986) subject to considerations of policy (S.8).

Statute thus governed the situation where the parties either sought to divorce within the UK or divorced abroad. However, problems arose when immigrants pronounced the *talaq* in the UK and sent notice of it to a body abroad such as the Union Council in Pakistan. In the Pakistani instances, unless revoked within 90 days,

²¹⁵ [1972] Fam. 173.

the divorce became effective under Pakistani law (S. 7 of the Muslim Family Laws Ordinance, 1961)

The question of whether such a divorce was also valid under UK law arose in *R v IAT and Saeda Bi and others*²¹⁶ in the Queen's Bench Division. The claim of the three wives to enter the UK depended upon the validity of the husbands' prior 'trans-national' divorces. The court found that these were not recognised under UK law, a view upheld unanimously by the Court of Appeal (under the name *R v SSHD ex p Ghulam Fatima*²¹⁷) and the House of Lords.²¹⁸ Clearly, a *talaq* divorce performed in the UK lacked validity. The question was whether, on the facts, it was performed in Pakistan. The court reasoned that the *talaq* itself formed part of the proceedings and so these could not be said to have taken place wholly in Pakistan. An overseas divorce was only recognised if the entire proceedings took place in the overseas country as, under Ss.2 and 3(1) of the Recognition of Divorces and Legal Separations Act 1971, an overseas divorce meant a single set of proceedings instituted in that country.

Lawyers for the applicants argued that the purpose of that statute was to give effect to the Hague Convention on the Recognition of Divorces and Legal Separations which aimed to prevent 'limping marriages' where the divorce was recognised in one jurisdiction but not in another. This argument received short shrift, the courts relying on S.16(1) Domicile and Matrimonial Proceedings Act 1973, passed as indicated above in order to reverse the decision in *Qureshi v Qureshi*,²¹⁹ recognising a *talaq* divorce performed entirely in the UK.

The decision in *Ghulam Fatima* was criticised for lack of logic (Young 1987:87-88; Berkovits 1988), as inconsistent with the principles of statutory interpretation (Berkovits 1988:74) and as increasing the likelihood of a 'limping marriage' (Mayss 2000:62). Its effect was principally upon the poorer immigrant as the wealthy could afford to circumvent it by returning to Pakistan to perform the *talaq* (Mayss 2000:62; Berkovits 1988:77). On the other hand, as Lord Ackner made explicit in his speech, having removed recognition of *talaq* proceedings performed inside the UK through S16(1) DMPA 1971, "(i)t would seem contrary to that policy to encourage the

²¹⁶ [1983] Imm AR 82.

²¹⁷ [1985] QB 190.

²¹⁸ [1986] AC 527.

²¹⁹ [1972] Fam. 173.

obtaining of divorces essentially by post by Pakistani nationals resident in this country by means of the talaq procedure".²²⁰

Two competing values are in play here; recognising divorces valid in another country and preventing (mainly male) British residents from using unilateral and relatively informal forms of divorce to disadvantage wives. As Berkovits (1988:77-78) comments, the decision "indicates an unenunciated presumption that the policy of eliminating limping marriages is less important than the policy factor of subordinating all residents of England to a uniform municipal jurisdiction". He goes on to point out that the parties here were not opportunistically forum shopping, but had a close connection with the country and religion under which the divorce had been sought. While there is not space to discuss this further here, it is a question that continues to be problematic outside the sphere of immigration.²²¹

4.1.6 Right of abode

*R v SSHD ex p Phansopkar*²²² is worth considering briefly as Lord Denning's speech brings into strong relief attitudes that were usually more muted and nuanced. The case, which is well known, found that wives who claimed the right of abode in the UK should not be required to wait in the same lengthy queue as those seeking entry clearance. Lord Denning (at 615-7) described the right of abode as "the most precious right anyone can have" and commented that "Parliament made it very easy for many an immigrant to become a patrial and get this precious right". He acknowledges that these immigrants' rights and those of their families who have "never been to England and cannot speak a word of English" is equal to that of "(y)ou and I and our families...born here and (who have) lived here from time immemorial". He describes the law as "wide and generous". He went on to find that this right should be given practical recognition. He did so in equally lofty terms, saying (at 621) that the applicant "can invoke Magna Carta: 'To none will we sell: to no one will we delay or deny right or justice'". Both Lawton and Scarman LJ also made reference to Magna Carta.

²²⁰ Berkovits (1988:79); see also Pilkington (1988) who argues that the decision in *Fatima* was inadvertently over-ruled by Part II Family Law Act 1986. However, this does not seem to be the courts' view; see *Berkovits v Grinberg* [1995] Fam 142 and Reed (1996).

²²¹ See the House of Lords decision in *Quazi v Quazi* (1980) AC 744 and subsequent case law, for example, *Sulaiman v Jaffali* (2002) 1 FLR 479.

²²² [1975] 3 All ER 497.

The case provided a welcome relief to those who had been frustrated in the exercise of a statutory right (although at a cost to other applicants; see chapter 5). Even given Lord Denning's predilection for a high-blown style, the emphasis on these applicants' 'outsider' status, reference to residence as "a precious right" and reliance on the primordial sources of the Magna Carta are suggestive. Justice, an ancient and fundamental judicial value, was graciously extended even to those who had been included almost inadvertently and undeservedly in the privileged class of 'belongers'.

4.1.7 Non-primary purpose case law: discussion

In some respects, there were some sympathetic decisions made within the confines set by the value of respect for the legislature particularly earlier in the period (see also Legomsky 1987:232-3, and, in relation to the Tribunal, Juss 1997:163-8). The rule on 'intention to live together' was interpreted, for a period, to take account of the predicament of an immigrant whose marriage ended against his wishes. The requirement to have met was applied in a way that would permit traditional arranged marriages to continue with minimal contact between the parties prior to the marriage albeit with the expense of an additional trip. This latter finding suggests that there was no inclination to undermine the traditional arranged marriage as such, despite the hostile tone of political debate reported in the previous section. In *Phansopkar*, the favourable decision was associated with historical 'British' values, suggesting that too much hostility would be incongruent with the courts' self-perception as an instrument of justice despite, in the case of Lord Denning, an almost self-parodying emphasis on the applicants' outsider status.

In other instances, and particularly as time went on, judicial sympathy was absent or ambivalent. The sympathetic cases on 'intention' were over-ruled. The case law on domicile indicates that, while there was some resistance to manipulation by immigration officers, the courts were also reluctant to acknowledge a domicile of origin where it permitted a well-established immigrant to gain an advantage not otherwise available to him. This was more markedly so when it would have led to the entry of more than one wife, even though the immigrant was relying upon well-established legal principles. A similar preoccupation was evident in the rejection of the 'trans-national divorce'. There was resistance to immigrants 'having it both ways',

becoming long-term residents of the UK but also relying on their connection with the country of origin to gain advantages that conflicted with British values.

This resistance was expressed overtly during discussion on what constituted the necessary 'degree of hardship' for an exception to the ban on husbands to apply. Criteria were adopted that were clearly likely to favour women of British descent. Differences in race and culture were privileged above differences in living standards, difficulties to which a Tribunal expected women to adapt despite the resulting unaccustomed domestic labour. This may have been the result of a calculation that, if differences in living standards were to be a factor, few cases would be refused.

While it was perhaps predictable that settled women were considered able to readapt to life in their country of origin, the failure to apply consistently the exception to women of immigrant descent suggests a conditional attitude towards their acceptance. By selecting a husband from the country of origin, such women demonstrated a lack of commitment to the UK and must accept the consequences. A similar sentiment was detectable, as discussed in chapter 1, in the earlier debate on married women's nationality and, in chapter 3, during parliamentary debate. As the reproving remarks in *Sadhu Singh* (1972) suggest, such women could not reasonably expect to have the best of both worlds. By contrast, where a woman had wholeheartedly adopted British values, sympathy was more apparent.

A trend may be discerned here. Immigrants were not treated with hostility purely by virtue of being immigrants or because their marriage customs were different. When the demands they made were perceived as reasonable, they were liable to be treated with a degree of sympathy. However, sympathy was limited when immigrants' expectations suggested that they wished to retain the benefits of both identities, retaining allegiance to 'foreign' or 'alien' values. This was so even when, as with the cases on domicile, immigrants were not attempting to circumvent or extend the law.

This absence of sympathy became outright hostility when immigrants were seen as abusing the UK's hospitality. Thus, the presence of men found to have entered marriages of convenience was considered to be not conducive to the public good, the most serious grounds for deportation. This was particularly harsh in *Malik* (1981) where the marriage had been entered prematurely but in the expectation that it would endure. In the earlier cases of *Vervaeke v Smith* (1983) and *Puttick* (1980), the court also disapproved of the parties' conduct, but their abuse of immigration control was not the focus of disapprobation. In the cases involving refugees from Eastern Europe,

no moral censure was attached to a marriage of convenience. Instead, the court actively sought ways to relieve their difficulties.

It seems that the immigration status of non-white immigrants was a defining characteristic in a way that did not occur for other nationalities. This was certainly the case for Lord Denning in *Phansopkar*. It was not that non-white immigrants were necessarily unwelcome, but they were first and foremost immigrants even in the second generation as *Sadhu Singh* (1972) suggests. As tolerated guests, they had particular obligations, both moral and legal, not to abuse the generosity of their hosts and transgression of these brought sometimes severe retribution. Becoming a 'belonger' required an unequivocal adoption of host-country values.

Control of non-white immigration was a major political priority throughout the period under discussion here. If judges demonstrated some limited sympathy for the victims of these controls, this did not, in the majority of cases, persuade them to challenge these controls. Instead, they relied on the value of judicial self-restraint in ways that arguably sometimes sanctioned unbalanced decision-making, suggesting that a low priority was ascribed to protecting the family life of sponsors and applicants.

The case law discussed here was decided prior to the stream of primary purpose cases that began with *Vinod Bhatia* in 1985. Commentators (Scannell 1992:3 and Sachdeva 1993:119-21) observed that early primary purpose case law was also relatively sympathetic to immigrants although, by the early 1990s, attitudes were starting to change. The reluctance of the judiciary to confront the misapplication of the primary purpose rule was a major characteristic of case law and is considered in detail in the next section.

4.2 The judicial response to 'primary purpose'

As discussed in chapter 3, from July 1985 onwards, both men and women settled in the UK could sponsor a spouse. Entry clearance for either party would be refused unless five separate conditions had been met. These included:

- that the marriage was not entered into primarily to obtain admission to the United Kingdom; and
- that each of the parties has the intention of living permanently with the other as his or her spouse.

The following years were a period of intense judicial involvement in primary purpose. There was a wide body of contemporary commentary including Griffith (1997:182-90), Macdonald and Blake (1991:260-5), Macdonald and Blake (1995:336-44), Marrington (1985), Pannick et al (1993), Sachdeva (1993: chapter 4), Scannell (1992), Supperstone and O'Dempsey (1994:207-11) and Vincenzi and Marrington (1992). This section considers the major case law in a thematic way consistent with the concerns of this thesis; to identify underlying beliefs and attitudes towards immigration through marriage.

4.2.1 Relationship between intention and purpose

Early Tribunal case law remained unreported but was the subject of commentary (Mole 1987, Marrington 1985, Sachdeva 1993:119-27). The central issue was the relationship between primary purpose and intention to live together, which had become separate requirements in 1979. Given this, it was improbable that any court, however sympathetic, would have found that satisfaction of one meant automatic satisfaction of the other. The key issue was the extent to which a favourable finding on intention informed the decision on primary purpose.

Naresh Kumar (3278) found that that once the parties had established the necessary intention, the burden of proof was reversed and it was for the Secretary of State to show that the primary purpose of the marriage was nonetheless immigration. This decision was followed in other Tribunal decisions, notably those chaired by Professor Jackson.

This sympathetic approach did not endure. The first major reported case under primary purpose was *Vinod Bhatia* in the Tribunal (unreported),²²³ the Queen's Bench Division,²²⁴ and then in the Court of Appeal.²²⁵ All agreed that a finding on intention did not remove the obligation upon the applicant with respect to primary purpose.

The genius of the primary purpose rule as applied to arranged marriages was that the applicant had to demonstrate that the main purpose of the marriage was something other than immigration. It was immaterial how many other motives might be present; unless the applicant could demonstrate that one of these was the primary motive, the

²²³ Blake (1984) says that, under pressure from the Home Office unhappy at the guidance in *Naresh Kumar*, this Tribunal was exceptionally constituted for a special hearing before three legally qualified chairs.

²²⁴ [1985] Imm AR 39.

²²⁵ [1985] Imm AR 50.

application failed. In the High Court, Forbes J ensured this function was fulfilled by minimising the impact of a favourable finding on intention. He rejected engagement with a “philosophical inquiry into the concept of marriage” preferring to engage in selective legal and factual argument. For example, he supported his interpretation by reference to the rules of statutory interpretation although these were not appropriate to the Immigration Rules.²²⁶ He also asserted “the fact that many marriages in the sub-continent have been entered into whose primary purpose was, in fact, to obtain admission to the United Kingdom” (at p.46), a statement of doubtful validity (see Sachdeva 1993:115-6) described as “a piece of expedient political mythology” (Rees 1989:92). Against this background, an entry clearance officer should approach his task with “cautious pessimism” (at p.46). It seems likely that Forbes was feeling the pressure of 200 further cases on the same point awaiting his decision.²²⁷ Interestingly, however, he sought to distance himself from the actual consequences of his decision, rejecting any evaluation of the underlying policy of the Rules.

The Court of Appeal supported the essential findings in Forbes’ judgement but in a more nuanced fashion. In one respect, however, the Court of Appeal went further in finding that the primary purpose rule presumed that the purpose of the marriage was admission to the UK. As with Forbes, however, there was also a certain distancing from the impact of the rule. They noted that no criticism was made of the parties’ honesty and that there was no dispute that the proposed marriage was genuine.

In *Vinod Bhatia*, the courts chose to facilitate rather than subvert the discriminatory effects of primary purpose. They did so despite acknowledging that, as in the present case, parties to a genuine marriage would suffer the consequences. It seems that the right of these parties to live in the UK were easily subordinated to the necessity of restricting immigration. Commentators have indicated the difficulties that applicants faced in the period after *Vinod Bhatia* (Sachdeva 1993:128-30; Pearl 1986:25).

In *Arun Kumar*,²²⁸ the Court of Appeal took a more humane approach finding that the function of primary purpose was to distinguish between “genuine” and “immigration” husbands and fiancés (even though this was arguably not the case). Thus, findings on intention would “often cast a flood of light” on primary purpose. Lord Donaldson distinguished between a theoretical approach based on speculation

²²⁶ Lord Roskill in *Alexander v Immigration Appeal Tribunal* [1982] WLR 1076 at 1081.

²²⁷ O’Connor LJ [1985] Imm AR 50 at p.50.

²²⁸ [1986] Imm AR 446.

about possible motivation and the practical reality of a marriage that was, on the evidence, clearly extant:

“Again, the adjudicator was right to say that under the rules a marriage primarily entered into in order to obtain admission to the United Kingdom would still retain its non-qualifying character whatever happened afterwards and even if the husband applied for entry on their Golden Wedding Day. For my part, I do not think that any violence would be done to this country’s immigration policy if entry clearance officers put out of their minds the theoretical possibility that a marriage which at the time of application is, on the evidence, undoubtedly a very genuine and soundly based marriage could, at its inception some time before, have had a different character”.

As *Vinod Bhatia* had found, primary purpose had to mean something beyond having an intention to live together, or it would have been otiose. However, Lord Donaldson awarded it the minimum content compatible with an existence independent of intention.

There were a few other chinks of sympathy, Mole (1987:32) suggesting that the courts took a more detached view than the Tribunal. She quotes Simon Brown J in *R v IAT ex p Singh*,²²⁹ who referred to the “enormity” of binding oneself for life in marriage to obtain entry to the UK and envisaged a primary purpose marriage as one where:

“... the husband had plainly gone to considerable length to find a wife who could secure him entry to the UK, that plainly being his essential object rather than entry into a lifelong union”.

Scannell (1992:3) argues that this represented the high water mark of judicial sympathy. It was appealed by the Home Office and heard in the Court of Appeal with another case under *Immigration Appeal Tribunal v Hoque and Singh*.²³⁰ The court set out ten well-known propositions drawn from the decisions in *Bhatia* and *Kumar*. Approving the passage by Lord Donaldson in *Arun Kumar* quoted above, it found that, while a favourable finding as to intention did not “suffice” to ensure satisfaction of primary purpose, it meant the applicant was better placed to ensure this. Nonetheless, in Sachdeva’s words (1993:142), “this apparently liberal stand was immediately nullified by Slade LJ” when he said that: “However, in the end, it must be left to entry clearance officers to decide how they do their work”.

²²⁹ The Times 15th April 1987.

²³⁰ [1988] Imm AR 216.

In this way, the court respected the separate sphere of authority of the immigration officer, highlighting the problematic relationship between law and fact discussed in chapter 2 of this thesis. The assumption that the quest for fact is a neutral process separate to the application of the law may permit the application of unofficial policy that the law is then powerless to challenge. Sachdeva (1993:142) argues the Court of Appeal's stance in *Hoque and Singh* "was as far as one could go without endangering the policy aims of British immigration control". It suggests that the courts were reluctant to use their powers if this would undermine government policy on immigration.²³¹

Debate ensued as to whether a specific finding as to intention was needed before considering primary purpose. If so, it would prevent vague and subjective findings on primary purpose being made without considering the essential character of the marriage. Some decisions, mostly unreported, considered this in a broadly sympathetic way (see *Bashir*,²³² and, for commentary, Sachdeva 1993:142-4; Rees 1989; Scannell 1989). Amongst reported cases was *R v IAT ex p Shameem Wali*,²³³ in which Farquharson J found that the applicant was entitled to be informed of the court's findings on intention. In *R v IAT ex p Mohammed Khatab*,²³⁴ Henry J saw the finding on intention as "no formal technical point" but essential to ensuring adequate reasoning on primary purpose. These cases clearly caused some anxiety. The Independent²³⁵ reported that the Treasury Solicitor had written to adjudicators (and possibly tribunal members; the article conflates the two) advising them that High Court judges, and Henry J in particular, had placed "glosses" on the primary purpose rule which deprived them of their force. The letter referred to an unidentified judgement by Henry J (presumably *Khatab*), saying that "it represents the high water mark of primary purpose 'jurisprudence', in the sense that I do not think anything more can be done to undermine the primary purpose rule than is done in this Judgment. In certain respects, it seems to me the Judge goes much too far". The report is a rare glimpse of the intense pressure towards a restrictive policy.

²³¹ The Court of Appeal, perhaps unsurprisingly, declined to find that the primary purpose rule was sufficiently uncertain, unclear and unfair to be *ultra vires* (*R v Home Secretary ex p Rajput* Independent 8th February 1989).

²³² *R v IAT ex p Bashir* (DC) 15th March 1988.

²³³ [1989] Imm AR 86.

²³⁴ [1989] Imm AR 313.

²³⁵ "Judges' decisions in immigration cases 'too liberal'", Independent 6th June 1989.

Restraint was more evident in other cases. In *R v IAT ex p Naushad Amad Kandiya*,²³⁶ Simon Brown J found that a finding on intention was not necessary as an applicant could fail on primary purpose regardless of intention. The tone was exasperated. Provided there was implicit consideration of 'intention', there was no requirement for adjudicators "to follow slavishly some pre-ordained route, let alone to recite routinely as an incantation certain particular assumptions or conclusions which could as well be implied in their decisions" (at p. 495). Roch J reached a similar conclusion in *R v IAT ex p Aurangzeb Khan*.²³⁷

Appeals from *Kandiya* and *Khan* were heard together in the Court of Appeal.²³⁸ In the meantime, the same point came before the Court of Appeal in *Mohamed Numanul Islam Choudhury v Immigration Appeal Tribunal*.²³⁹ In both cases, the Court found that, despite the relevance of intention to primary purpose, no specific finding on intention had to be made before finding on primary purpose. This denied the close connection, in reality if not in theory, between intention and purpose as acknowledged by Lord Donaldson in *Arun Kumar* and reduced the likelihood that a favourable finding as to intention would affect the decision on primary purpose. While a few judges continued to assert the link between the two (Scannell 1992b), primary purpose had become a subjective free-floating concept devoid of the context provided by an assessment of the reality of the marriage.

Dillon LJ observed in *Choudhury* that "in an enormous number of arranged marriages between girls settled here and young men coming from the Asian Sub-Continent, the husband wishes to live in the United Kingdom". This public allusion to contemporary immigration preoccupations stands alone. Yet, legal reasoning in these cases was also either absent or surprisingly superficial. Thus, Taylor LJ in *Kandiya and Khan* said that, while the propositions in *Hoque and Singh* asserted the "evidential relevance" of a finding on intention to a finding on primary purpose, they did not demand a "specific finding" as to intention before proceeding to consideration of primary purpose. This was technically true, but it is difficult to see how a finding as to intention could "cast a flood of light" on primary purpose unless evidence as to intention was evaluated.

²³⁶ [1989] Imm AR 491.

²³⁷ [1989] Imm AR 524.

²³⁸ [1990] Imm AR 377.

²³⁹ [1990] Imm AR 211.

This loosening of the relationship between primary purpose and intention was justified, when it was rationalised at all, as enabling decision-makers to act “sensibly and realistically” (Taylor LJ in *Kandiya and Khan* at p.385), a debatable proposition. The courts may have feared a rash of technical challenges but that was not the only practical consideration. Other, more sympathetic decisions referred to “the intrinsic improbability” of a marriage that satisfied the requirement of intention failing on primary purpose.²⁴⁰ Sense and realism were fickle resources.

There followed the much criticised case of *Sumeina Masood v Immigration Appeal Tribunal*.²⁴¹ It was acknowledged here that the parties, who were cousins, had entered a traditional arranged marriage but for the decision to live in the UK. The couples’ economic prospects were far better in the UK and their decision was unsurprising. Despite acknowledging that this was a genuine marriage, the Court found that, as it was conditional upon the husband’s admission, the necessary intention to live together was not present, a point rather surprisingly conceded by Counsel for the couple. Certainly, Lord Prosser believed it was “wrongly or too widely made” when he considered it in *Raja Zafar Zia v SSHD*.²⁴²

The court then concluded that the applicant must also fail on primary purpose. In doing so, the Court adopted an unusual interpretation finding that, if entry was a precondition of the marriage, it was also its primary purpose. This is plainly illogical. It may be that a wedding will not take place before the couple have a home, but that does not mean that the primary purpose of the marriage is to procure a home. There is a strong impression that the couple were regarded as presumptuous in assuming the power to decide where they should live (see also the comments in Sachdeva 1993: 157).

The harshness of the decision in *Sumeina Masood* was a step too far for some members of the judiciary. Schiemann J in *R v IAT ex p Iram Iqbal*²⁴³ saw the argument as relevant only to intention and declined to follow it on primary purpose. In a well-known passage, he also acknowledged the logical fallacy of assuming that because one common motive for marriage was absent, the only alternative explanation must be immigration:

²⁴⁰ Simon Brown J in *R v IAT ex p Matwinder Singh* (The Times 15th April 1987) and Lord Prosser in *Mohammed Saftar v SSHD* [1995] AR 1 at p.11.

²⁴¹ [1992] Imm AR 69.

²⁴² [1993] Imm AR 405 at p.415.

²⁴³ [1993] Imm AR 270.

“ ... the fact that an American heiress was so keen to be a duchess that she was prepared to marry an Englishman whom she did not love, would not lead one to suppose that the primary purpose of the marriage was for her to obtain admission to the United Kingdom.” (at p. 276)

In *Raja Zafar Zia*,²⁴⁴ Lord Prosser was critical of the finding that the requirement as to intention was not met when this was conditional on the granting of entry clearance:

“The concept of intention is no doubt a complex one, but it appears to me that one can indeed have a genuine intention, notwithstanding that the carrying out of that intention is dependent on, or could be frustrated by, some extraneous event” (at p. 415).

4.2.2 Intervening devotion

As already discussed, *Arun Kumar* was one of the more sympathetic cases.²⁴⁵ It found that the rules should receive a “broad common sense construction” and opened the way to use of ‘intervening devotion’ i.e. correspondence, cohabitation and other evidence of the post-marriage relationship that demonstrated it to have been genuine at inception. It thus created an arena within which couples could hope to succeed. While the case suggests that, in this instance, there was little desire to use primary purpose for the mass refusal of arranged marriages, there was not unconditional acceptance. The endorsement of ‘intervening devotion’ permitted couples whose marriages were self-evidently genuine to comply with primary purpose but only after a period of separation.

Although *Arun Kumar* brought a measure of relief, the Tribunal did not always follow its spirit, although sympathy was more likely when the parties had cohabited overseas (Mole 1987:32). In effect, ‘intervening devotion’, as well as permitting yet more intrusive questioning, created an unofficial waiting period, a hurdle that became detached from any meaningful conception of ‘intervening devotion’ and suggests that applicants were expected to prove their merit through endurance.²⁴⁶

²⁴⁴ *Raja Zafar Zia v SSHD* [1993] Imm AR 405.

²⁴⁵ As well as condoning ‘intervening devotion’, the court rejected the proposition that the rules ‘presumed’ the purpose of a marriage to be immigration and that, because a marriage was arranged, immigration was a likely motive for the marriage. However, the officer could bear in mind that it was less difficult to achieve an ‘immigration’ marriage in an arranged marriage as the personal feelings of the parties may be more easily set aside.

²⁴⁶ A similar observation may be made about the concessions granted to couples who had been married five years or had a child (see chapter 5 and Menski 1994:118).

Thus in the Tribunal decision in *Mohammed Afzal v Visa Officer, Islamabad*,²⁴⁷ the applicant had been refused as a fiancé by the ECO and the adjudicator but the parties married before the Tribunal hearing, not unreasonably, given the two year wait. They then cohabited for three months in Pakistan and argued intervening devotion. The Tribunal took a hostile view of the marriage, saying it could be interpreted “as an attempt to force the hand of the Home Office by presenting them with a *fait accompli*, a further suggestion that couples should defer to state power if they wish to gain acceptance. The short period of cohabitation here was compared unfavourably with the longer period in *Kumar*, even though it is arguably the fact - rather than the length - of cohabitation that is the strongest indication of the purpose and nature of an Asian marriage.

4.2.3 Deception

Where parties had misled the authorities, even many years previously, this counted heavily against them. For example, the Court of Appeal found against the applicant in *Pervez Iqbal v Immigration Appeal Tribunal*²⁴⁸ in part because of a deception made when he was 11. In *R v IAT ex p Sukhivan Singh*,²⁴⁹ described by Simon Brown J as “another application ... arising out of the vexed primary purpose rules”, the application failed under primary purpose due to deceit even though the marriage was accepted as genuine.

There was detectable a drift away from the legal issue towards moral judgement.²⁵⁰ Deceit in primary purpose cases might be so major that the parties’ statements as to their motives could have little credibility. However, once the relationship was accepted as genuine, it should have had only limited relevance as there are many possible reasons for deception. However, evidence of deception was sometimes reason in itself to dismiss an application.

In *R v IAT ex p Girishkumar Somabhai Patel*,²⁵¹ the application failed on primary purpose despite intervening devotion including the birth of a child. The Tribunal supported the adjudicator in finding that the intervening devotion “was outweighed by

²⁴⁷ [1986] Imm AR 474.

²⁴⁸ [1988] Imm AR 469.

²⁴⁹ [1988] Imm AR 527.

²⁵⁰ This approach seems to have been a reflection of attitudes within the entry clearance service; see chapter 5.

²⁵¹ [1990] Imm AR 153.

the deceit practised by the appellant and his wife," and an application for judicial review was refused.

However, the deception was not material to the motivation for the marriage. The applicant had entered as a visitor to attend a religious festival (described in somewhat dismissive terms by Farquharson J) and, while there, called the sponsor's family, having been previously engaged to the sponsor. After meeting, the engagement was renewed. Having been given poor legal advice, the couple falsely stated that they met by chance at the festival.

Whether they met by chance or by arrangement had little bearing on the purpose of the marriage. Even if the applicant had always intended to renew contact but failed to reveal this in his visitor's application, the omission is explicable in other terms. He did not know how he would be received. He may not have been certain whether he wished to revive the engagement. Leaving aside personal reticence, admitting such a possibility was likely to cause refusal for absence of intention to leave the UK. It is a far leap therefore to suggest that his reason for entering had always been marriage and the purpose of the marriage was settlement in the UK.²⁵²

In *R v IAT ex p. Syed Akhtar Hussain*,²⁵³ the applicant was refused after concealing a previous visit to the United Kingdom, found to have been the occasion of the parties' first meeting. The subsequent account of the marriage was therefore seen as suspect without considering what light the deception cast upon the motive for the marriage.

The negative impact of deception was emphasised by the Court of Appeal in *Mohamed Numanul Islam Choudhury v IAT*.²⁵⁴ The husband had made some misleading statements about the purpose of his visit and was granted only temporary admission. While in the UK, he married the sponsor. Both parties maintained the marriage was a love match, but the adjudicator believed that it was a marriage arranged before the applicant came to the UK. The applicant was refused on primary

²⁵² Equivocation of any kind, although understandable in matters so personal as marriage, was sometimes unsympathetically treated. In *Sukhinder Singh* (5329, reported in *Legal Action* (November 1987, pp. 15-16), an applicant who was unsure whether he intended to remain in the UK after marriage failed both as a fiancé and as a visitor. The case was particularly harsh given that a firm declaration of intent to live in the UK risked a finding of 'primary purpose'. That point was appreciated by Simon Brown J in *R v Immigration Appeal Tribunal ex p. Rafique* [1990] Imm. A.R. 235 who, adopting the approach of Professor Jackson in an earlier Tribunal case, found that an applicant who was undecided as to permanent residence should be treated as applying for settlement.

²⁵³ [1989] Imm AR 382.

²⁵⁴ [1990] Imm AR 211.

purpose grounds and eventually came before the Court of Appeal. In the leading judgement, Dillon LJ said that:

“It is one of the unfortunate features of this case that one has the strong suspicion that if the truth, as found by the adjudicator, had been candidly stated at the outset ... there would have been no difficulty about the grant of entry clearance ... But lies were told and persisted in. I cannot say that the adjudicator was not entitled to consider that the object of telling the untruths was possibly to cover up that the primary object was a marriage to enable the husband to gain entry to the United Kingdom” (at p. 218).

Dillon LJ found “with considerable regret ... because it seems likely that the price the parties will have to pay for untruthfulness is so severe” that the appeal should be dismissed. In other words, despite a genuine marriage and the birth of a child, the court would not interfere with an inference of primary purpose arising principally from deception.

Sometimes, deception was treated more dispassionately. In *R v IAT ex p Kulbinder Kaur*,²⁵⁵ the applicant had told some lies in a previous visitor’s application. In the spouse application, the adjudicator disbelieved the applicant as to his desire to live in the UK. McCullough J found that the adjudicator was wrong to leap from a finding that some of the applicant’s statements were untruthful to rejecting the applicant on primary purpose. After referring to Sir John Donaldson’s speech in *Arun Kumar*, he said, at p. 110:

“ ... it is easy but wrong to treat the fact that a man has lied about the strength of his desire to obtain admission to the United Kingdom as evidence that this was the primary purpose of the marriage”.

However, the weight of the case law did not take such an approach but viewed evidence of dishonesty as grounds for an unfavourable finding on primary purpose. The subjective nature of primary purpose, established earlier by the courts, permitted the refusal of applicants who had failed to demonstrate the qualities demanded of those aspiring to belong.

²⁵⁵ [1991] Imm AR 107.

4.2.4 Deference to the fact-finder

In *R v IAT ex p Naushad Amad Kandiya*,²⁵⁶ Simon Brown J said that it was trite law that questions of weight (challenges on which basis were described by him in an aside as suggesting “intrinsic want of promise”) are for the fact-finding body. Roch J reached a similar conclusion in *R v IAT ex p Aurangzeb Khan*.²⁵⁷ The courts, probably fearing a flood of applications on this point, did not often intervene.²⁵⁸

The courts were also unwilling to overturn decisions where the decision-maker had not referred to all the relevant evidence. Again, it is likely that the courts feared encouraging a flood of applications based on minor omissions but the effect was that the courts upheld decisions that stressed points against the applicant while ignoring those in their favour. An example is *R v IAT ex p Shivprasad Bhagwandas Gondalia*,²⁵⁹ before Henry J in the Queen’s Bench Division. The parties damaged their credibility by falsely claiming a love match and the adjudicator found that the applicant was from a poor background and could not marry in India. Thus there was “an enormous economic incentive” to make a marriage that could “result in his achieving settlement in the United Kingdom”. The court did not question the reasoning that, because the applicant could only marry if he emigrated, emigration was the primary purpose of the marriage. It also declined to take into account that the applicant had not previously applied for a passport (when the converse was often held against applicants) and that the initiative for the marriage had come from the wife’s family. The justification was that, as these matters had been brought before the adjudicator, they must have been considered by him.

Similar reasoning may be found in *R v IAT ex p Aftab Hussain*.²⁶⁰ Relying on *Kandiy*, the High Court found there was no obligation upon the adjudicator to:

“isolate every piece of evidence and to indicate whether or not he regards it as being material. What he must do is look at the evidence as a whole in the way that a jury would look at the matter...” (at p.214).

²⁵⁶ [1989] Imm AR 491.

²⁵⁷ [1989] Imm AR 524.

²⁵⁸ Although it did on occasion; see, for example, *ECO, Islamabad v Mohammad Jahangir Hussain* [1991] Imm AR 476 at 480.

²⁵⁹ [1991] Imm AR 519.

²⁶⁰ [1992] Imm AR 212.

The outcome was that unbalanced decision-making went uncorrected. In this case, only fleeting reference was made to two important factors in favour of the applicant while findings as to his economic circumstances were brought into consideration.²⁶¹

In upholding these decisions, judges showed themselves conscious of the presumed limitations of the judicial role. Deference to the decision-maker on findings of fact is correct to the extent that it acknowledges that the court did not hear the parties or observe the interviews. Yet it is arguable that too much restraint results in legal error. The weight attached to a finding of fact engages a question of law if the outcome is that the wrong legal test or standard of proof is applied (see *Juss* 1997:148-9). This was a critical issue given the excessive reliance by decision-makers on minor discrepancies (see chapter 5) and the way in which a finding as to dishonesty would result in an imputation of primary purpose.

Yet it is not clear that the courts were themselves actively pursuing an anti-immigration agenda. It is equally plausible that judicial self-restraint enabled them to avoid direct confrontation on such a charged issue.

4.2.5 Tradition, love and other reasons for marriage

The requirement to show that the primary motive for the marriage was not immigration required applicants to demonstrate that another motive was more important. This permitted decision-makers to pass judgement on the likelihood of these other factors predominating.

If parties claimed they were marrying in accordance with custom, any departure from perceived tradition could result in rejection by entry clearance officers on primary purpose grounds, an issue discussed in chapter 5. The courts relied heavily on ECOs' presumed knowledge of custom and did not question its claimed inflexibility (Powell 1992). This potentially affected all male applicants who were found to have apparently deserted the custom of requiring their wives to join them and who thus entered any proceedings at a disadvantage.

The courts treated some of these cases sympathetically. The Court of Appeal in *Arun Kumar* identified the "Catch 22" for applicants. A British-based wife who wished to remain in the UK would only marry a man who also wished to live there.

²⁶¹ The reliance upon stereotypical forms of reasoning such as economic background is discussed in chapter 5.

Yet it was “fatally easy” to treat that wish as an admission that coming to the UK was the primary purpose of the marriage. The solution was to consider the evidence as a whole:

“What is or was the real, the primary, the basic object of the exercise in this couple agreeing to get married? Was it to live together as man and wife, preferably in the United Kingdom, or was it to enable the fiancé or husband to obtain entry to the United Kingdom, the matrimonial relationship being of subsidiary importance?” (at p.455)

In *R v IAT ex p. Shameem Wali*,²⁶² Farquharson J found it “perfectly proper” for a sponsor to insist on remaining in the United Kingdom and no adverse inferences should be drawn. In *R v IAT ex p. Mohammed Khatab*,²⁶³ Henry J criticised an adjudication that described a British women’s insistence on living in the UK where she had a job, savings and a home, as a “whim”. However, he did not consider that the “unusual feature” of a husband joining his wife should always be left out of account.

In 1990, the Court of Appeal in *Mohamed Numanul Islam Choudhury v Immigration Appeal Tribunal*²⁶⁴ declined to regard as “irrelevant” two assumed facts. The first was that Bangladeshi Muslim men would not permit their wives to decide the location of the matrimonial home and the other was that, “in an enormous number” of such marriages, the husband wished to live in the United Kingdom. These ‘facts’, regularly relied on by entry clearance staff, are discussed in chapter 5.

The harshest decision, in this respect was *Sumeina Masood* (1992), already discussed, which found that there was no intention to live together if intention was conditional upon entry. These decisions legitimated the suspicious approach adopted by immigration officers and discussed in chapter 5.

Love matches were also subject to inconsistent treatment. Where decision-makers accepted a love match, the parties were better able to show a primary motive other than immigration and could succeed. However, applicants who claimed a love match were often suspected of contriving this and failed accordingly. The courts failed to acknowledge that conceptions of ‘love’ might vary according to culture and individual expectation (Powell 1992; Scannell 1993), a problem discussed further in chapter 5. In *R v IAT ex p. Manjula Jethva*,²⁶⁵ the applicant was a poor labourer who

²⁶² [1989] Imm AR 86.

²⁶³ [1989] Imm AR 313.

²⁶⁴ [1990] Imm AR 211.

²⁶⁵ [1990] Imm AR 450.

could not afford to marry in India. He met the sponsor at a circus and the couple said they had fallen in love almost immediately. The adjudicator was sceptical that a love match could arise so swiftly and, in the High Court, Popplewell J said:

“Falling in love is a perfectly normal concept which is understood by everybody in the world, and I do not imagine that falling in love is any different in India than it is in this country; these two people contended that they had in fact fallen in love. The adjudicator said that that was how it was presented to him, and he did not accept it” (at p. 455).

The failure to recognise that the concept of ‘love’ is partially culture-dependent also featured in *Aurangzeb Khan* (1989), discussed above, Roch J supported the adjudicator’s rejection of the appellant who, when asked why he wished to go the UK, replied “I love her and I want to live there”. The adjudicator commented: “However, the appellant did not speak to the sponsor before the engagement, and I have heard little in evidence which suggests that he is in fact in love with her” (at p. 527). However, by ‘love’, the applicant may have meant, not the romantic attachment associated with being ‘in love’, but that he was committed to the marriage and his responsibilities towards his future wife’s happiness (see chapter 5). As counsel in *Manjula Jethva* unsuccessfully argued, love is a word with many meanings.

The requirement to show that a motive other than immigration was the primary cause of the marriage invited decision-makers to assess the likelihood and thus the rationality of the stated reasons for marriage. For example, in *R v SSHD ex p Jagdishchandra Jinabhai Prajapati*,²⁶⁶ Potts J quoted the adjudicator as saying:

“I ... find difficulty in accepting that less than a year after her divorce was finalised’ – this is a reference to the wife’s previous matrimonial history – ‘she was prepared to embark on a courtship as speedily as this allegedly was. I accept that she wanted to choose her own spouse this time, but it would appear more natural to proceed cautiously bearing in mind her previous experience.’” (at p. 516).

Potts J upheld the adjudicator’s primary purpose refusal despite a subsequent period of cohabitation and resulting pregnancy. The argument seems thin. An early remarriage may have been unwise, but was hardly unnatural and may have been entered for any number of reasons. As Scannell (1987:6) observed, in relation to another case, “(t)he Court of Appeal seems to have forgotten that Indian people have independent sexuality”. This tendency to view applicants only through the prism of an

²⁶⁶ [1990] Imm AR 513.

immigration motive and thus to diminish their humanity is a marked characteristic of immigration control throughout the period.

4.2.5 Gender

Assumptions about gender lay at the heart of primary purpose. Its successful application depended upon a belief in the powerlessness and passivity of the Asian woman and the absence of any right to determine her place of residence after marriage. Yet in the majority of cases, the focus of discussion was the credibility of the man's statements as to his motives. The belief that women lacked agency was so widespread that it rarely merited mention.

If the aim was to reduce male non-white immigration, the belief was a convenient one. Stripping women of their responsibilities enabled their rights to be also ignored. When women did demonstrate a degree of power, this could be turned against the couple. In *Sumeina Masood*, (1992), already discussed, Glidewell LJ referred to the wife having the "whip hand" and relied on this to find that, as the wife was unwilling to leave the UK, intention to live together was absent.

In some cases, female agency was acknowledged. One such was *Mohammed Saftar v SSHD*,²⁶⁷ where Lord Prosser in the House of Session pointed out the importance of the sponsor's beliefs about the marriage. He also, uniquely in the cases considered here, pointed out that the rules not only granted a right or privilege to the applicant but were:

"... protecting or preserving for the sponsor, a United Kingdom citizen, the ability to marry and live permanently with the man that she wants to marry and live with, without being forced to leave the United Kingdom in order to do so." (at p. 10)

A further instance was McCullough J in *R v IAT ex p Kulbander Kaur*²⁶⁸ in which he criticised the adjudicator for failing to take account of the sponsor's devotion to the applicant when determining the primary purpose of the marriage. He said:

"There can be few young women who are prepared to be married to a man whom they believe is primarily marrying them not for themselves but in order to obtain entry to the United Kingdom. No doubt some are more easily fooled than others, and there are men with such primary purpose who are able to

²⁶⁷ [1992] Imm AR 1.

²⁶⁸ [1991] Imm AR 107.

conceal it from the women whom they marry. But the sponsor was young and intelligent ...” (at p. 109).

Lord Prosser also mentioned that the entry clearance officer had found the sponsor “to be a lively, attractive, intelligent young lady who answered his questions honestly and without guile” (at p. 4). It seems that an attractive young woman might persuade a judge that she was an active participant in the proceedings and that the applicant had chosen to marry her for her own merits. Less fortunate sponsors did not have that advantage. One adjudicator dismissed a primary purpose appeal (overturned on further appeal to the Tribunal), commenting that his impression of the sponsor was that:

“she was a rather unimpressive young woman who left school with no qualifications and is of limited intelligence. Her most striking feature is that she wears thick glasses which suggest bad eyesight ... some people might find such glasses a discouraging feature but obviously I cannot assess their effect on a young Indian man” (Scannell 1993a).

That underlying beliefs about Asian female passivity conveniently reinforced primary purpose does not suggest that they were insincerely held but that, being congruent with the other major assumption, that non-white male immigration is undesirable, they were unlikely to be displaced. It was only in rare cases that female applicants were able to persuade judges that they had agency in such matters. These cases seemed to occur when women conformed to the judge’s conception of a how a woman with such agency would present. Women who were young and, by the decision-maker’s standard, attractive and intelligent were thus predictably more fortunate.

4.2.6 Primary purpose case law: discussion

There were some sympathetic decisions on ‘primary purpose’ particularly early in the period. For example, *Arun Kumar, Hoque and Singh* and other cases enabled some applicants to succeed. However, as Sachdeva (1993:144) observes, there was a slowly growing tone of judicial hostility. It was not apparent that the courts were in sympathy with primary purpose but, given that it was the law, they became exasperated with immigrants who persisted in importuning them. The intense pressure to reinforce highly restrictive practices was made explicit only occasionally, but it is probable that

it was present, at least in the background, throughout the period and accounts for the irritable tone adopted on occasion.

The outcome was a series of cases in which, with some exceptions, the dispassionate consideration of evidence was displaced by excessive stress on unfavourable factors and illogical decisions in which the conclusions reached seemed barely justified by the reported facts. These were rationalised by the judicial value of respect for the administrative decision-maker and fact-finder but, as I have argued, this respect amounted, at times, to an abdication of judicial responsibility for ensuring that the correct legal test was applied.

A more critical stance by the courts would have exposed the poor fact-finding and the impossible position in which primary purpose placed applicants. While this would not have, in itself, exceeded the interpretative function of the courts, it would have inevitably created conflict with the government. With some exceptions, the courts chose to avoid confrontation on this issue. Their acquiescence suggests that, for the most part, the judiciary accepted the central premises upon which policy was founded; the urgent necessity of controlling non-white immigration and the small weight to be placed upon the hardship caused by controls. Securing the power to refuse unwanted immigrants was a primary aim, trumping the right of female British residents to decide where to live after marriage. Belief in the passivity of these women made the denial of their autonomy more palatable.

As observed in relation to the non-primary purpose case law, judges did not betray personal hostility towards the non-white applicants before them unless these had transgressed the perceived boundaries of good conduct. Nonetheless, interpretations of aspects of primary purpose, intervening devotion and the effect of deception, had the effect of creating additional unofficial tests of endurance and probity suggesting that aspiring immigrants had to prove themselves worthy of acceptance.

To avoid a finding of primary purpose, a couple had to present a narrative that matched official expectations as to either a 'traditional' or 'love' marriage. A love marriage had to conform to the pattern familiar in the West. Other types of complexity were ignored or discounted as self-serving. It was assumed that immigrants were motivated overwhelmingly by an urgent desire to come to the UK. As so often, applicants from the subcontinent were defined and confined by their status as aspiring immigrant and every action and decision was viewed through that

prism. All other aspects of their lives were invisible, the effect being a one-dimensional and dehumanised portrayal.

4.3 Conclusion

With some exceptions, judges rarely passed open comment on the political issues underlying the law. Nonetheless, the outcome of the cases and the reasoning employed suggest that certain attitudes and beliefs were implicitly held.

Most obviously, the necessity for strong controls to prevent non-white immigration was rarely challenged even implicitly. This is unsurprising given its overwhelming dominance. Thus, in a number of instances, the courts adopted interpretations of the law that favoured restrictive immigration policies. The legal reasoning upon which these were based was sometimes questionable. In a few cases, judges did adopt interpretations that assisted the immigrant but these were few in number.

Another universal and unsurprising assumption was that a foreign applicant was an 'outsider' whose claims should carry relatively little weight. However, the British-based applicant was sometimes also considered to be at least a partial outsider. Comparison with the small number of cases decided before mass non-white immigration suggests that non-white applicants and their British-based spouses were viewed predominantly as immigrants in a way that did not occur for white applicants even when there was disapproval of the latter's conduct. The lives of these non-white parties tended to be simplified so that complex human actions were explained only in immigration terms.

Perhaps unsurprisingly given the status of human rights law at the time, there was a marked absence of human rights-related discourse in any of this case law. Applications did not represent the exercise of a right by a British resident but the granting of a privilege. Such a privilege was extended only to those who acknowledge the supremacy of state power in deciding these matters and was certainly not available to those who deceived or misled. In some cases, only those who proved themselves in various ways were considered worthy. There was resistance to assisting those who, despite extensive residence in the UK, continued to rely on the law or values in their country of origin. The 'privilege' of British residence should be repaid by an unequivocal adoption of British ways. This expectation was not absolute, though. Judges did not display a dislike of the arranged marriage in the manner of some MPs

and there was sometimes empathy with the distress caused to these by the exclusion of a spouse. However, this kind of sympathy was easily displaced.

Judges generally expressed themselves formally and in ways that were consistent with their institutional values, rarely commenting on political issues and deferring to the fact-finding role of the primary decision-maker. Decisions were often justified in terms of the principles of precedent and statutory interpretation. Yet, it has been argued throughout this chapter that this was done selectively and in ways that led to decisions that largely reflect the values and assumptions discussed here. In doing so, courts sometimes adopted an interpretation which, to those unconvinced of the urgency of strict immigration control, was less coherent than the alternative, despite employing the conventional discourse of logic and reasoning. These cases, explored in some depth above, support the theoretical points made earlier in this thesis; in particular, that the process of legal reasoning, despite its appearance of ineluctable movement towards a single conclusion, is ultimately based on the same unprovable (and sometimes tendentious) beliefs, values and assumptions as other forms of decision-making. These beliefs, values and assumptions were largely congruent with those held within the other institutions discussed in this thesis and their decisions supported and enabled the implementation of policy created elsewhere. This tendency was reinforced by specifically judicial values that encouraged the deference identified in this chapter.

Chapter 5: entry clearance on the Indian subcontinent between 1969 and 1997

This chapter analyses the behaviour of decision-makers in the administration of immigration control on the sub-continent from 1969, when compulsory entry clearance was introduced, until 1997 when the primary purpose rule was abolished. Sondhi (1987:18-9) however suggests that the culture and practices described in this chapter took root soon after the introduction of a voluntary system of entry certificates in 1965.

The task of the entry clearance service was not straightforward. They were obliged to apply a bureaucratic system in a largely undocumented society. Decision-makers, acting under pressure, had to decide upon matters that were difficult to judge without extensive investigation and knowledge, such as the existence of a relationship for which there was no formal record or the compliance of a marriage with the norms of local society. A perusal of refused applications (see, for example, Runnymede Trust 1977:37-147) reveals some of the difficulties they faced. The service also operated in a political climate where the reduction of non-white immigration was a paramount aim of immigration control.

While the sub-continent was the focus of attention, it is not clear that it was the largest source of bogus applications. 'Marriage rackets' were regularly reported in the British press. The nationalities involved were various and included Algeria, "Arab" nations, Cyprus, Egypt, Ghana, India, Iran, Israel, Morocco, Nigeria, Pakistan, Poland, Portugal, Turkey, US and "West Africa".¹ Yet, while there was the occasional report of adverse treatment of other nationalities,² the overwhelming focus of public discussion practice was on the 'problem' of South Asian immigration. It was argued, in the press and by politicians,³ that pressure to emigrate from poor countries, and most especially the Indian sub-continent, led to frequent forgeries and bogus

¹ See Appendix A for citations.

² 'Britain barred Jamaican clergyman because love letters were too cool.' *Guardian* 3rd February 1984, 'Love story without a happy ending' *The Guardian* 28th December 1989 (Hong Kong), 'I had to wait 4 years before they let me live with my husband. Woman, 11th November 1992 (Philippines), 'Knickers quiz bars wife from Britain' *The Sun* 10th December 1992 (Jordan).

³ See chapter 3 and, for example, 'How many migrants in the queue?' *Daily Telegraph* 10th January 1975, 'FO official accused of inquiry influence' *Guardian* 26th November 1985, 'Immigration: the first hurdle' *Daily Telegraph* 2nd December 1985.

applications. The entry clearance service was doing an unpleasant task to the best of its abilities. Immigrant groups and some academics, on the other hand, were deeply critical, judging the service to be discriminatory and unfair. Juss (1997:22) captured the essence of the critique when he wrote of “an internal culture of deep-rooted doubt and cynicism”. The CRE (1985:52) found that:

“The procedures ... operate on the basis that few applications, and virtually no family cases can be believed without extensive and painstaking cross-checking. The genuine applicant is faced not with a presumption that he or she is genuine, nor with a presumption of neutrality, but with the requirement in effect to persuade the officer that he or she is not presenting a well-prepared bogus application”.

It is not the aim of this chapter to reach a definitive view on such matters as the relative levels of abuse. Rather, by reporting the competing claims that were made, its objective is to demonstrate that decision-makers almost invariably made choices and exercised their discretion in ways that favoured restriction and minimised the chances of an applicant succeeding. The consistency of practice suggests reliance upon commonly held assumptions and beliefs and that countervailing institutional or other values were weak or absent.

These assumptions were manifested in the particular ways discussed in this chapter and it is arguable that the burden of proof on the applicant frequently went beyond that of the balance of probabilities (see Runnymede Trust 1977:22-3; Chowdhury 1982:3). It was persistently argued that these practices were part of a deliberate strategy condoned or even directed by government to control covertly the level of non-white immigration.⁴

There was much contemporary critical commentary including Runnymede Trust (1977), Chowdhury (1982), Commission for Racial Equality (CRE) (1985), Sondhi (1987), Powell (1992, 1993a and 1993b) and Juss (1997). Defence of the entry clearance service was confined to occasional newspaper articles and political speeches. In addition to newspaper and journal reports, the chapter draws upon a number of documents (such as Lyon 1975 and the Hawley Report) now found in the archives of the Runnymede Trust.

⁴ ‘Immigrant entry “being controlled by stealth”’ Guardian 1st November 1983, ‘Black marks for Whitehall’ Guardian 9th May 1984, ‘Making racism respectable’ Observer 15th July 1984; see also the sections below on delay, medical evidence and primary purpose.

Contemporaneous to the institution of compulsory entry clearance was the establishment of a two-tier appeals system of adjudicators and Immigration Appeals Tribunal (for detail, see Juss 1997:124-5). While this aimed to provide a check against poor decision-making, the inability of parties to attend their own appeals made them less effective. Juss (1997:125-52; see also Chowdhury 1982:3-4) is critical of appellate bodies' failure to challenge entry clearance practices. Some of their reported attitudes were similar to those observed and criticised in the entry clearance service.⁵ This may have been because they shared similar values and assumptions or because, lacking expert knowledge of their own, they relied on entry clearance service claims as to local conditions (Chowdhury 1982:60-1). The outcome was that, while the appeals process assisted some individuals, it had limited effect upon the daily practices of the entry clearance service.

5.1 Delay

Delay was endemic throughout the period and a source of anger within the Asian community.⁶ Before entry clearance became compulsory in 1969, queues on arrival were visible and politically controversial.⁷ As previously discussed (chapter 3), the rationale for compulsory entry clearance was to prevent lengthy waits in an unsuitable environment and to ensure immigrants did not incur the expense and disruption of emigration only to be refused admission on arrival. However, immigrant groups warned that problems at entry clearance posts were inevitable given the staffing levels.⁸ Even immigration staff found themselves dismayed, although their principal concern was that inexperienced staff would issue too many certificates.⁹ In response, the government increased the staff at High Commissions, but by only ten.¹⁰

⁵ See also 'Immigrants' inquisition' Guardian March 14th 1975, 'The immigration appeal system needs to be made just' Guardian 23rd April 1980, 'Immigration adjudicator under fire' Observer 26th July 1981, 'Controls "unfair to legal migrants"' Guardian 11th February 1985. Some applicants did succeed upon appeal - 25% of settlement applications in 1978 according to the Home Office in 1978 (Letter from Home Office to Runnymede Trust 1st September 1978, Runnymede Collection).

⁶ See, for example, JCWI quoted in Juss (1997:59).

⁷ 'Asians' reception "inhumane", welfare leader says' Times 23rd December 1968.

⁸ 'Migrant Attack on Callaghan' Daily Telegraph 3rd May 1969, 'New permit rules upset immigrants' Times, 3rd May 1969.

⁹ 'Migrant attack on Callaghan' 3rd May 1969.

¹⁰ 'Give them a proper chance' Guardian 20th May 1969. However, ECOs at Dacca were increased from 5 to 12 in 1974 (Martin 1975:1). In this context, it is interesting to note that, in 1988, the number of staff employed in the UK to investigate and detain illegal entrants and overstayers was doubled ('Home Office to double number of visa staff' Guardian 14th November 1988).

The result was lengthy delays. Even before compulsory entry clearance, applicants might wait a year for a decision.¹¹ Two, three or even four-year delays for interview, often only the first step in a lengthy process,¹² were reported for wives in Bangladesh by the mid-1970s,¹³ while in Pakistan, the queue was 18 months and in Bombay, six months.¹⁴ Pressure started to mount. In 1975, the Court of Appeal found, in *Phansopkar*,¹⁵ that the lengthy wait for admission of patrilial wives and children was unlawful and those applicants were placed in a priority queue. Following intervention by the minister for immigration, Alex Lyon in 1975,¹⁶ recently married wives and those with small children were also given priority.¹⁷ The queue for husbands and fiancés however remained long and it was suggested that this was a deliberate policy to limit the number of husbands admitted after the rule change in 1974.¹⁸ Concerns were explicitly linked to the fear, discussed in chapter 3, of an 'infinite pool' of immigrants.¹⁹

Queues for interview were generally somewhat shorter in the 1980s but were still between eighteen months and two years in Bangladesh and between six months and a year in Pakistan and India (CRE 1985:136). Actual resolution of an application frequently took many years. Sondhi (1987:71) found that, where applications were repeatedly refused, the entire process might take ten or fifteen years. The Home Office Select Committee found in 1990 that delays remained unacceptable.²⁰

The response to staff shortages and increased numbers was thus to allow queues to grow rather than to reduce the time taken to consider applications. It was reported that staff at Dhaka, for example, interviewed wives at the rate of three every two days in 1974,²¹ although, by 1975, they reportedly managed two interviews per day (Martin

¹¹ New permit rules upset immigrants' Times, 3rd May 1969.

¹² According to Martin (1975:1), only one case in five at Dacca was, at the time he was writing, settled at first interview.

¹³ 'Two-year holdup for wives' Guardian 28th February 1974, 'Pledge to help women waiting to join husbands', Guardian 30th August 1974, 'Britain to speed up entry of immigrants' dependants' Times 6th January 1975.

¹⁴ 'Pledge to help women waiting to join husbands' Guardian 30th August 1974.

¹⁵ R v Secretary of State for the Home Department ex p. Phansopkar [1975] 3 All ER 497.

¹⁶ Letter from Alex Lyon 8th August 1975, Runnymede Collection.

¹⁷ 'Priority categories for entry clearance applicants in the Indian sub-continent' JCWI briefing February 1977.

¹⁸ 'The Law's Delays' Guardian 21st May 1975.

¹⁹ See 'We must control the numbers of immigrants for their own good' Times 3rd May 1977 in which a Conservative MP stated that entry clearance officers operate a "sluice gate quota system" and that increasing the number of officials would increase the length of the queue due to raised expectations.

²⁰ Report on Administrative Delays in the Immigration Department (1989-90 HC 319) para 38.

²¹ 'Two-year hold-up for wives' Guardian 28th February 1974.

1975:2). This was rationalised by the need to be vigilant against abuse although a spokesman “could not give the ratio of fraudulent to genuine claims”.²² Alex Lyon (1975) pointed out that the standard of proof did not require all doubt to be eliminated so that a more rapid examination was appropriate.²³ However, it seems likely that, save during the brief period when he was minister, delays due to extensive enquiries received political support.²⁴

The suspicion that queues were manipulated was a persistent theme. The suggestion that long queues were used to delay the entry of husbands in the 1970s has already been alluded to. Lyon (1975) found that the queue at Karachi had been kept artificially long to match that at Islamabad and there was suspicion at the sudden lengthening of the queue at Bombay.²⁵ Evans’ (1983:128) argues that queues were a form of concealed rationing of all applications, although this was denied.²⁶ His suggestion however is given credence by a leaked government briefing written in 1983. The number of entry clearance officers was described as “the primary regulator” of the numbers of entrants and that “a system of queues operates to regulate the flow of immigrants ... Provided the queues do not become too long this form of administrative regulation can continue”. The briefing went on to say that this policy of delay, if openly acknowledged, would be unlawful unless backed by legislation authorising quotas.²⁷

The ‘administrative regulation’ of numbers through queues continued and, following the *Abdulaziz* decision in 1985, when husbands and fiancés became entitled to equal treatment, wives and fiancées lost their priority and all spouses and fiancés were placed in a slower queue. Refused applicants making renewed applications were put in the final, “dustbin” queue.²⁸ There were also considerable delays in the appeals process, so that the hearing might take place between one and six years after first interview (Runnymede Trust 1977:24). A major factor was the requirement upon the ECO to draw up an explanatory statement for which there was no time limit (raising

²² ‘Two-year hold-up for wives’ *Guardian* 28th February 1974.

²³ The impact of Lyon’s intervention is discussed later in this chapter.

²⁴ See, for example, David Lane’s comment that unless illegal immigration was drastically reduced, there could be no speed-up in the issue of entry certificates on the sub-continent (Runnymede Trust 1974: 6).

²⁵ ‘The Law’s Delays’ *Guardian* 21st March 1975.

²⁶ ‘Queues used to stem immigration’ *Guardian* 21st March 1985.

²⁷ *Id.*

²⁸ ‘Long queues separate families’ *JCWI Bulletin* September 1985, ‘Asian wives go to back of queue’ *Guardian* 31st August 1985, ‘Migrants face long delays’ *Daily Telegraph* 25th July 1985.

issues also as to their accuracy).²⁹ The Home Affairs Committee in 1990 accepted that delays were dictated by deliberate Home Office policy (Juss 1997:60), a policy that seems to have spanned two decades or more.

Delays gave rise to obvious distress. However, as sponsors had voluntarily left their families for many years, further delay was regarded as a minor self-imposed hardship; the Hawley Report, for instance, quoted approvingly a comment on the 'barbaric' nature of these voluntary separations. Consistent with this was the priority given to the recently married in queues for interview.³⁰ However, even the recently married were subject to long delays particularly after 1985. One report (Smith 1984) encapsulated the impossible position facing applicants and their sponsors. Faced with a two-year wait just for interview, the British wife lived with her husband in Bangladesh despite severe health problems and homesickness. The British High Commission advised her to return but, leaving aside her wish to be with her husband, she feared that doing so would be used against the application when it was eventually heard.

5.2 Tax fraud

Bangladeshi applications often encountered particular problems due to the 'Sylheti tax pattern' (CRE 1985:21-5; Juss 1997:77-84). Some early immigrants to the UK, not expecting to settle or to call over their families, had claimed income tax allowances for non-existent wives and children. Over time, these men returned home and established real families whom they then wished to bring to the UK. Unless the tax fraud was to be admitted, the prior account had to be reconciled with the true position for entry clearance purposes. Previous fictitious wives had to 'die' or be 'divorced'. Fictitious children might also 'die' or be listed as non-applicants. Alternatively, the true wife and children might impersonate the fictional ones or another relative might stand in for an invented child. In all instances, an element of deception was involved and aspects of the claim might be misleading. Divorce or death certificates would be absent or faked, wives and children would appear to be younger than claimed and oral accounts would be confused or contradictory.

²⁹ See 'Interviews conducted by entry clearance officers overseas', paper prepared for submission to the Minister of State by UKIAS, 29th January 1985 (Runnymede Collection).

³⁰ Joint Council for the Welfare of Immigrants briefing paper February 1977 (Runnymede Collection).

While the 'Sylheti tax pattern' caused obvious confusion and difficulty, in immigration terms, it was material only if impersonation led to the entry of non-entitled individuals. An internal briefing produced in 1976 by the British High Commission at Bangladesh stated as fact that "most" applications were artificially constructed to fit a bogus tax pattern and bogus children assumed the identity of those shown in the tax affidavit. This was revised in 1978 to "many". Indications of tax fraud were said in this briefing to include a wife who does not look her stated age, a second wife, an early marriage by the husband, age-estimate discrepancies for the children and a sparse family tree.³¹

Thus fears about tax fraud contributed to the style of questioning and consequent reliance on 'discrepancies' described below. However, while many applications did include references to non-existent dependants, it seems that most applicants did not seek entry clearance for other than their real dependants. The CRE (1985:21-4; see also Lal and Wilson 1986:19) found that, of the cases they observed, this was suspected in only a few and that, of wives and children confessed to be bogus up to 1980, fewer than one in six had been applicants for entry clearance. An investigation into 'tax confessions' by the Foreign and Commonwealth Office found that only 6.7% of these involved false applications for entry. It was improbable, in the context of Bangladeshi culture, that a man would seek to present as a wife, a woman to whom he was not married (Chowdhury 1982:40; Juss 1997:75, 84).

The problems with tax fraud were, to an extent, of officials' own making. Difficulties could have been partially avoided had applicants been advised at the outset that there would be no contact with the Inland Revenue, no cross-checking for consistency with tax forms and no investigation of possible tax fraud. This was not the approach adopted, however, although it is not clear at which level the decisions were made since the Hawley Report suggests ECOs favoured a "tax amnesty". Sponsors of applicants from Bangladesh were required to authorise the Inland Revenue to divulge information about their tax affairs (CRE 1985:24). Despite apparent initial reluctance by the Inland Revenue,³² later reports suggest that information was obtained, the practice being abandoned only after the CRE Report was published (Chowdhury 1982:18-9; Hussain 1994:18). Principal applicants were

³¹ Both briefings are in the Runnymede Collection.

³² 'Why family cannot have entry permit' Birmingham Post 11th July 1969. In this instance, entry clearance had been refused because the sponsor could not obtain a letter from the Inland Revenue showing the dependants for whom he had claimed tax relief.

also required to list on the application the names of any children not applying for entry clearance. There was thus pressure to ensure that applications were consistent with previous tax forms.

The misleading information or inconsistencies that resulted formed the basis of detailed investigations and many refusals (Chowdhury 1982:18-9; CRE 1985:21-4). Some ECOs disregarded false information that did not represent an attempt to evade control (perhaps recording that they did not accept the existence of the non-applicants). Many however were keen to obtain 'confessions' of tax fraud, concerned that non-applicant children might make a later claim for admission or considered that the deception cast doubt on the credibility of the whole application. Applicants would be asked for evidence to confirm the claimed history even when ECOs did not doubt that the applicants were, in reality, the wife and children of the sponsor. The CRE (1985:37) found that sponsors were frequently threatened with refusal unless they made a 'tax confession'.

The 'Sylheti tax pattern' thus provided a rationale for suspicion and exhaustive investigation of credentials. Applicants were seen as tainted by the prior dishonesty, as lacking credibility and as undeserving by both ECOs and adjudicators (see, for example, Juss 1997:82-3; Sondhi 1987:54-5). It also permitted applications from the sub-continent to be publicly presented as abusive.³³ This was notwithstanding that it is likely that, in only a minority of cases, was there an attempt to bring bogus family members to the UK.

5.3 Documentary evidence

In the largely undocumented society from which immigrants came, it was often impossible for them to establish their status in ways that were usual in the UK. Menski (2000:10-20), for example, describes the absence of state input and the impossibility of ensuring consistent registration of marriage in India, resulting in lack of documentary evidence of many marriages. Moreover, 'customary' marriages, whether or not supported by registration, varied enormously so that identifying a valid marriage was not straightforward and, indeed, was a matter that the Indian courts themselves had difficulty in resolving. According to Powell (1992), customary divorces were not recognised by the UK authorities, leading to severe practical

³³For press coverage, see 'Immigrant fraud cases "top 2,600"' Times 16th February 1982, 'Immigrant "confessions"' Times 26th February 1982.

problems many years later for some applicants. Providing other evidence of the relationship might also prove problematic. Illiterate people would not communicate by letter and remittances were often sent indirectly (Martin 1975:2).

Decision-makers chose to deal with this situation in particular ways. The Muslim presumption of marriage appears to have been accorded little weight (see Chowdhury 1982:43; Pearl and Menski 1998:151). Although posts officially maintained that documentation was not essential for a successful application, in reality, an extensive array of documents was expected (Martin 1975:2; CRE 1985:30-1; Lal and Wilson 1986:14-6; Sondhi 1987:29; Runnymede Trust 1977:9-10). Such demands are likely to have caused anxiety, expense and delay.

Yet, while applicants were expected to go to lengths to obtain documents, once presented, they were accorded little weight (Sondhi 1987:30-2; CRE 1985:31-2; Runnymede Trust 1977:10). One officer at Dhaka was reported as saying that they counted neither for nor against an application. The CRE observed no instance where documentary evidence was considered sufficient in itself to justify issue of entry clearance although failure to produce supporting documentation often contributed to a refusal. Producing an 'excessive' number of documents might also lead to suspicion.

Documents were frequently discounted as likely forgeries although allegations of fraud were rarely investigated. Instead, refusals frequently referred to the ease with which forged documents could be obtained. Thus, in the 58 cases examined by the Runnymede Trust, in all cases the documentary evidence was considered insufficient, but a specific allegation of forgery was made in only 32 of the cases (Runnymede Trust 1977:8-11). Internal guidance to ECOs in Pakistan and Bangladesh suggested that forgeries were commonplace and that even genuine documents may have been obtained by impersonation, a difficult allegation to disprove particularly at a distant appeal. The guidance concluded that "(r)elationships can only be established with any degree of accuracy by personal interview and exhaustive cross-checking". Prepared in the mid-1970s, the guidance was still considered reliable in the 1980s (Juss 1997:90, 106-7).

Martin (1975:3) argues that local documentation was more reliable than ECOs believed (although see Chowdhury 1982:15-7). However, some applicants did rely either on forged documents or on genuine documents obtained years after the original event. In some cases, this was on the advice of agents, but Chowdhury (1982:20-1) argues that ECOs often requested documents during interview that the applicant then

felt obliged to obtain. These may have contained errors and inconsistencies due to misunderstandings or ignorance or because applicants were trying to make documents consistent with tax affidavits. While ECOs often concluded that they represented a bogus application, this was not necessarily the case (Runnymede Trust 1977:11-3; Chowdhury 1982:20-1; Sondhi 1987:20, 32).

Scepticism appears to have been sometimes extreme. Until the Tribunal intervened,³⁴ ECOs and adjudicators refused wives if the date of marriage remained undetermined even if the fact of marriage was in no real doubt (Chowdhury 1982:4). Documents such as correspondence, remittances, voters' lists, land deeds, school records and medical or bank records were described by critics as highly reliable yet were not requested by ECOs or, if produced, were given little weight (Chowdhury 1982:22-6; Sondhi 1987:34-7, Juss 1997:91-108). Juss also describes instances, both at post and on appeal, when doubts about the veracity of individual documents resulted in refusal even when, taken together, the evidence overwhelmingly supported the existence of the relationship or when discrepancies at interview, often trivial, were used to undermine otherwise consistent documentary evidence. Documents produced after an application had been refused were usually disregarded even when forging them would have required an improbable degree of skill and sophistication (Sondhi 1987:33; see also the rejection of 'intervening devotion' in Powell, 1993a:116). By contrast, it was alleged that denunciatory letters (even when anonymous) and documents that were unfavourable to the applicant's claim were scrutinised less critically (Sondhi 1987:38-9).

Juss (1997:105) argues that scepticism increased over the years. Attitudes seem to have gone beyond a cautious approach to disbelief in the integrity of the entire community (Sondhi 1987:30-2). Certainly, the problems that sometimes existed in obtaining reliable documentary evidence were used to rationalise the delays, the 'discrepancy system', reliance upon medical examination and other practices described here. In other instances, where documents were beyond doubt, ECOs applied principles such as domicile (discussed in chapter 4), nationality, accommodation and maintenance or the requirement to have met to assert that a marriage was not valid or the parties did not fulfil requirements (Sondhi 1987:60-3, 102-3; Menski 1994:113-4). Where an applicant had previously misrepresented his

³⁴ *Bibi Barkat* TH/36849/78 (1761) unreported.

position, even strong evidence of the true situation was treated sceptically, effectively punishing the applicant for his prior deception (Hussain 1994:20).

5.4 Interviews

As documentary evidence was considered insufficient on its own, applicants were always interviewed (CRE 1985:33) which often involved a long journey in difficult conditions. Applicants from Sylhet District, for example, would have to travel to Sylhet town using local transport or foot and then undertake a 13-hour train journey to Dhaka, often accompanied by small children (CRE 1985:48; Chowdhury 1982:11). Many applicants would not previously have travelled so far while women were unused even to leaving their own homes (Juss 1997:68-9). Journeys might take place during the rainy season when travelling was difficult (and ECOs themselves suspended their village visits). Having arrived at the capital, applicants would usually stay overnight as they were expected to report at 7am. All of this involved immense cost, potential loss of income and significant stress.

There was however resistance to the establishment of local consulates (CRE 1985:49; Sondhi 1987:21-2). There also seems to have been little priority given to minimising discomfort and anxiety. Applicants had to wait long hours in uncomfortable conditions. At Dhaka and Islamabad, for example, the waiting room was the only part of the building not to be air-conditioned (Lal and Wilson 1986:11; Sondhi 1987:22).

Fatigued and aware of the importance for the entire family of a successful outcome to this long-awaited interview, applicants found lengthy questioning by an authority figure, often the first white male ever encountered, to be intimidating and exhausting (Chowdhury 1997:50-1; Juss 1997:69). At the outset, applicants should have been asked if they were tired or unwell and if they understood the interpreter although this did not always occur. Requests for postponement were rare for fear of further delay although it seems that applicants did frequently feel unwell or were unable to understand interpreters who were sometimes poorly matched to applicants. Translators recruited locally were reported to be incompetent in dialects or local languages (the Sylheti language, for instance, is very different to standard Bengali) leading to fundamental misunderstandings and, on occasion, to be rude, aggressive or even corrupt (Chowdhury 1982:10-2, 56; Powell 1992).

Given these difficulties and the problems associated with cross-cultural communication,³⁵ it is unsurprising that misunderstandings were frequently reported (see, for example, Powell 1993a:109, 170). ECOs were said to ask questions whose answers were unknown to the applicant or were misunderstood by the interviewee (Sondhi 1987:22-3; Chowdhury 1982:10-2; Runnymede Trust 1977:14-7). Powell (1993a:109), for example, cites a woman who understood a question about whether she was related to her husband prior to marriage as one asking whether she had sexual relations with him before the marriage and responded with an indignant negative. Adjudicators tended to be dismissive of appeals arising from such errors despite the critical importance of accurate translation (Sondhi 1987:22-3; Runnymede Trust 1977:14-7).

It was expected that female applicants would be accompanied by a male relative who was also interviewed. Unaccompanied applicants seem to have been regarded unfavourably (Sondhi 1987:24). It was usual to interview each family member in turn (CRE 1985:35). Juss (1997:63) found that children as young as 5 had been interviewed.³⁶ Following adverse comments at Tribunal, interviews of children under 14 were officially ended although, in practice, accompanied children over ten were still interviewed (CRE 1985:35; Sondhi 1987:23-4).

ECOs usually put questions through the interpreter, failing to address the applicant directly and were reported as appearing bored, irritated or, in some instances, intimidating. Chowdhury (1982:58-9) found that the interviews he observed were "grim", formal and impersonal. Elsewhere, it was found that interruptions, even for personal matters, were frequent but were neither explained nor apologised for. Children reported that they were threatened with being thrown out of the window or into the river. One woman reported that disbelieving staff tore up her affidavit in front of her. Parties described how they were so anxious that they gave inaccurate answers that they were then too frightened to retract or pruned family trees to avoid prolonging the interview (Martin 1975:9; Runnymede Trust 1977:16-7; CRE 1985:36-7).

Powell (1992) found that of 69 refused applicants in Pakistan, 38 claimed they had been treated rudely or harshly and 34 said that they had not been given a proper chance to explain themselves. He criticised the reported interviewing style as

³⁵ Ballard, undated, discusses these in relation to the judiciary and many of his points are equally apt here given the imbalance of power.

³⁶ See also CRE 1985:35.

resembling a cross-examination in which leading questions invited answers that would unfairly condemn the applicant. Typical was a series of reported questions on residence that permitted the inference that applicants were acting against religious principle in seeking to join their wives. Applicants were not encouraged or even permitted to expand on or qualify their answers. In the same work, Powell also reports frequent allegations that interviews were wrongly recorded by the ECO and even that answers and confessions were fabricated.

Each interviewee was asked to provide a family tree and there would follow questions about the family, significant events and the circumstances of the applicants' lives. Taking the family tree was a laborious procedure that the Home Office privately acknowledged as being of little probative value (Lal and Wilson 1986:13). ECOs had discretion over the areas of questioning and practice was inconsistent. Recall might be expected of events that had occurred years previously such as a sponsor's visit or a wedding as well as matters such as the construction and location of the family house or the characteristics of the family's livestock, which might easily be described differently by different people.³⁷ Sondhi (1987:45) details an intensive series of questions asked by an ECO concerning the order and circumstances of various marriages and births in an extended family. The implications for refusals on discrepancy grounds are discussed below.

Applicants might have felt inhibited from revealing, in such a context, personal matters such as their feelings for a spouse (Powell 1993a:4) and some reported questions were embarrassing (Martin 1975:4). There were several press reports, particularly during the early part of the period, of personal questions such as use of contraception or the colour of underwear.³⁸ Most of these involved immigration staff in the UK but applicants on the sub-continent also complained of questions about their sex lives.³⁹ Instructions to entry clearance officers issued in 1987 warned against such questions, suggesting it was a continuing problem.

Parties had reason to be anxious and might confer or take advice beforehand. Evidence that they had been coached or had otherwise prepared would result in a loss of credibility (Sondhi 1987:33). In some cases, parties did tell untruths or partial

³⁷ For example, 'Interviews conducted by entry clearance officers overseas', paper prepared for submission to the Minister of State by UKIAS, 29th January 1985 (Runnymede Collection).

³⁸ 'Police carry out sex snoop on migrants' Guardian 22nd April 1977, 'Newly-weds' bloomer' Daily Star 10th December 1992.

³⁹ 'Secret immigration guide "biased to refuse entry"' Guardian 21st March 1984. See also Bhabha et al 1985:70.

truths at interview often on the advice of others, with predictably damaging results. This was said to result from the widespread perception that the truth would be disbelieved or misinterpreted (see, for example, Powell 1992 and 1993a:332, 380). ECOs also used interviews to make a visual assessment of the ages, family likeness and general demeanour of applicants. This permitted ECOs to draw subjective and often distressing conclusions about whether an individual was truly a family member (see, for example, Sondhi 1987:56-7).

A decision might be made immediately after interview or deferred for a village visit, medical examination or a sponsor interview (Sondhi 1987:24). The CRE found that the clarifications sought from sponsors were frequently of a peripheral nature (CRE 1985:35-7). Lal and Wilson (1986:14) cited an instance in which the sponsor was to be asked why he failed to father a child during a visit to Bangladesh. However, such enquiries could cause considerable delay particularly if the sponsor happened to be absent from the UK at the time he was called for interview (Martin 1975:9).

After sponsor interview, 're-interview' of the applicants might follow (with a repeat of the lengthy and stressful journey) causing further delay. This was often several years later involving a different ECO and interpreter. Applicants would be expected to explain discrepancies between the answers given at first interview, at the sponsor interview and in applications made by other family members (Sondhi 1987:25).

It is unsurprising that answers at interview were frequently confused or inconsistent. When these were later described in an explanatory statement away from the context in which they were made and without reference to other more consistent answers, they could suggest substantial dishonesty and evasion. It was frequently difficult to persuade appellate bodies to overturn refusals based on these contradictory answers (Juss 1997:73-4). The Runnymede Trust (1977:27) cites instances where an applicant's dishonesty or inaccuracy in one aspect caused the whole application to be regarded as discredited on appeal. One adjudicator commented of an applicant who had lied to the ECO: "If she is hoist on the petard of her own dishonesty (which destroys the whole of her credibility) she must not be surprised".

5.5 *The 'discrepancy system'*

The interviewing techniques described above supported the so-called 'discrepancy system'. Discrepancies in the answers given to questions would be used to justify refusal on the grounds that the parties were not related as claimed. There was widespread contemporary criticism of the system (CRE 1985:34-6; Juss 1997:62-7) centring not only on the way that interviews were carried out but on the evidential weight given to discrepancies.

While interview may have been the only way to assess family relationships on the sub-continent, discrepancies formed the basis of refusal even where other evidence supported the relationship (Juss 1997:62-3). Of 58 refusals examined by the Runnymede Trust (1977:6-8, 14), 55 were believed by the investigators to be genuine, two (involving children, not spouses) fraudulent and one inconclusive. Of these 58, 49 were refused at least partly due to alleged discrepancies as to domestic circumstances and 24 as to the family tree. Of these, 12 were refused on discrepancies alone unsupported by other evidence against the relationship while in 19 cases, evidence had been taken from children 12 years old or younger (Runnymede Trust 1977:34).

The conduct of interviews has already been discussed. The Runnymede Trust (1977:16-9) and CRE (1985:34) demonstrate how questions might focus on minor domestic details, be ambiguous, permit more than one correct answer, ask for information that was unknown to one of the parties or permit different recollections. Intimidated by the interview process, applicants gave inaccurate answers rather than admit that they could not answer.

As well as extensive interviews, applications were crosschecked with files relating to previous applications by family members or sponsors' declarations in the UK for tax or nationality purposes to see these were consistent. Applicants who 'pruned' their family trees lost credibility (CRE 1985:36; Chowdhury 1982:21; Sondhi 1987:37-8) although this was a natural temptation given the potentially catastrophic consequences of error. Applicants who came from small families were treated with disbelief, even though Powell (1992) argues that infertility was common. Applicants were advised in writing that their application would not proceed further unless an undertaking was given that "full" or "complete" details would be given (Martin 1975:8-9).

Village visits were also a source of possible discrepancies. Sondhi (1987:50-2) is critical of their execution arguing that this was perfunctory and aimed at discrediting

rather than confirming applications, a criticism also made, in rather more circumspect terms, by Webb (1986). A critique of an unsatisfactory village visit may be found in Powell (1993b:20-43). JCWI (1987) was particularly critical of their execution in Bangladesh comparing them to "military operations". Lal and Wilson (1986:39) describe them as "an exercise in neo-colonial administration" and the example they cite does seem to have been characterised by an arrogant highhandedness, typified by the officials driving a Landrover over newly planted paddy fields (Lal and Wilson 1986:37-8).

The reliability of the 'discrepancy system' is doubtful. One unnamed official admitted that, "probably you would get as good results by sticking a pin into a list."⁴⁰ In some cases, the system may have detected a bogus applicant's inadequate knowledge of the claimed family. However, as CRE (1985:38) point out, a bogus applicant could be very well-drilled or know the family well while, even leaving aside the difficulties in interview discussed above, those genuinely related may suffer memory lapses, have varying conceptualisations of relationships, use different terminology or misunderstand peripheral matters. Other possible explanations abound. People might be known by a pet name (Sondhi 1987:44, Chowdhury 1982:49) or names might take various forms (see, for example, Runnymede Trust 1977:151). Elder relatives were often addressed in terms of the relationship rather than by name (Chowdhury 1982:47-9). Parties might be reticent about revealing information regarded as shameful, such as a divorce, or give incorrect information for reasons of self-interest, ignorance or on the advice of agents (Runnymede Trust 1977:13, 18-9). Matters that an ECO might regard as elementary, such as dates, intervals of time or the sequence of events, often held little meaning for illiterate people from a culture where events are not recorded and birthdays not celebrated. Questions as to schooling (when children might only attend a *madrassa*) or the numbers of rooms in a house (which might be partitioned or have a partially exposed kitchen) often gave rise to different answers. Parties failed to appreciate the importance of accuracy on these matters (Chowdhury 1982:49-56; Juss 1997:67-70).

Examples of discrepancies used to justify refusals are cited in the literature or contemporary reports. Juss (1997:66) reports refusals based on disagreement as to the number of visits, how long the family had owned their buffalo, the location of a

⁴⁰ "How science can unite families" *New Society* 22nd November 1985.

school, the number of children belonging to a relative, the correct full name of another relative and the name of a party's barber and tailor. There were reports of 'discrepancies' as to how many eggs the chickens laid or the number of chairs and tables in a house.⁴¹ Smith (1984) reports a 'discrepancy' as to the names of the sponsor's stepbrothers. The applicant said they were Sadad, Azad and Ahad while the sponsor called them Hahdad, Samad and Ahad. In another case, the applicant's son who was about twelve but was described as "slow" did not recall the names of his aunts and made an error as to the number of cousins.

Applications might be refused because of one 'major' discrepancy or an accumulation of minor discrepancies. For an account of how a multiplicity of minor discrepancies can be otherwise explained, see Runnymede Trust (1977:155-62). Chowdhury (1982:5; see also Runnymede Trust 1977:21) found that explanatory statements only included those parts of the interview in which discrepancies occurred presenting a distorted picture. This was not always well received at appeal. Chowdhury (1982:5) quotes an adjudicator's exasperation at "a declining standard of objectivity by the Dacca office in assessing the reality or otherwise of family relationships. It seems to me that the search for 'kitchen sink' discrepancies is becoming almost an obsession". Juss (1997:70-2) also notes that the Tribunal sometimes took a critical stance. This was not uniformly the case however (see also Juss 1997:73-4 and Runnymede Trust 1977:24-8).

Reliance on discrepancies was defended as being the only reliable way to ascertain whether parties were related as claimed. The advent of DNA testing in the 1980s rendered redundant, in most cases, the original stated purpose of the discrepancy system.⁴² The claim that its true purpose was otherwise is given credence by the delays and other hurdles put in the way of those who could benefit from DNA testing,⁴³ and by the seepage of the use of discrepancies into other types of application (Lal and Wilson 1986:13).

⁴¹ Letter from M. Akram to Home Office 28th June 1978, Runnymede Collection.

⁴² DNA testing could demonstrate that children were related to their claimed parents substantiating the spouse's as well as the children's claim. Where there were no children, DNA testing could not assist.

⁴³ 'Renton disowns DNA test memo' Independent 23rd June 1989, 'Home Office erects further barriers' New Life 23rd June 1989.

5.6 Medical evidence 1: X-rays

X-rays were frequently used to assess age. This was of some approximate use in the case of children (Juss 1997:111-2), but X-rays of adults were of little evidential value even though they were used until 1979 (Juss 1997:117-9; Chowdhury 1982:31-7). Juss (1997:118-9), Chowdhury (1982:31-6) and Lal and Wilson (1986:17) cite refusals of wives on the basis that X-rays suggested that they were younger than they claimed to be. In some cases, the age gap was minimal (37 as against 40 in one case cited by Lal and Wilson 1986:17-8). In others, it was more substantial. This may have been related to Sylheti tax fraud (so that they were wives but had misstated their ages to comply with the prior tax declaration). In others, the disparity was more likely due to the very approximate nature of such estimates particularly given the possible effects of malnutrition and an impoverished lifestyle. In some instances, however, not only ECOs but adjudicators and the Tribunal preferred such X-ray evidence over other forms of evidence supporting the applicant's claimed age.

The World Health Organisation condemned the routine use of X-rays.⁴⁴ Their manner of administration also caused concern. It was reported that they had been carried out by unqualified staff at Heathrow, defended on the grounds that "the requirements ... for health screening owe more to the demands of immigration legislation than to the demands of normal NHS screening programmes".⁴⁵ It was also reported that pregnant women in Dhaka had been subjected to X-rays that were prohibited in the UK other than "in cases of absolute medical necessity" to avoid possible harm to the foetus.⁴⁶ These were subsequently ended,⁴⁷ while all X-ray examinations ended in 1982 (CRE 1985:40).

5.7 Medical evidence 2: gynaecological examinations

Gynaecological examinations or 'virginity tests' first received national attention in February 1979.⁴⁸ It was reported that a male doctor carried out an intimate internal examination of a fiancée applicant at Heathrow to establish whether she had given

⁴⁴ 'Asian emigrants X-rayed by UK officials' Guardian 8th February 1979, 'X-ray tests on migrants banned' Guardian 27th February 1979.

⁴⁵ 'Heathrow X-ray risk to migrants' Guardian 9th February 1979.

⁴⁶ 'Asian emigrants X-rayed by UK officials' Guardian 8th February 1979.

⁴⁷ 'X-ray tests on migrants banned' Guardian 27th February 1979.

⁴⁸ 'Virginity tests on immigrants at Heathrow' Guardian 1st February 1979, 'Medical controls' New Society 8th February 1979.

birth or was pregnant. The Home Office's extraordinary defence was to deny that the examination was internal, saying that a "cursory" examination had taken place to establish "whether she was, in fact, a bona fide virgin". They also maintained that the woman had the option of being examined by a female doctor at a local hospital.

The press report led to an international outcry involving immigrant groups,⁴⁹ race equality bodies,⁵⁰ politicians, press and pressure groups on the sub-continent⁵¹ and the United Nations Commission on Human Rights.⁵² The Home Secretary immediately instructed officials at ports and overseas that these examinations should not occur and established the Yellowlees inquiry into the object and nature of all medical examinations. Nonetheless, he maintained that the reported instance was "exceptional".⁵³

This, it soon became apparent, was not the case. Despite official claims that only two other such tests had been carried out at Heathrow,⁵⁴ the Indian Workers Association said that it knew of eight cases there, while doctors at the airport admitted that the tests had been carried out for several years.⁵⁵ The Commission for Racial Equality referred to reports of instructions given in 1969 for gynaecological examinations to be stopped.⁵⁶ The practice was not confined to the UK. Alex Lyon revealed that, when he was immigration minister between 1974 and 1976, he had been aware of examinations being carried out "fairly frequently" in Dhaka and that he had given instructions to end the practice.⁵⁷ Lal and Wilson (1986:50) report at least one personal examination of a 14 year-old girl. It was alleged in the Indian Parliament that there had been at least 34 instances at the Delhi British High Commission.⁵⁸ The High Commission effectively admitted that this was the case, saying that no specific

⁴⁹ 'Medical controls' *New Society* 8th February 1979.

⁵⁰ 'Virginity Testing: Joint Statement by CRE and EOC' Commission for Racial Equality press release CR/9/79 1st February 1979.

⁵¹ 'Virginity tests alleged in India' *Guardian* 7th February 1979, "'Fiancée tests" end in India' *Daily Telegraph* 6th February 1979, 'India talks of "retaliation" over virginity tests' *Daily Telegraph* 5th February 1979.

⁵² United Nations press release HR/718 6th March 1979.

⁵³ Letter from Merlyn Rees, Home Secretary, to David Lane, Chairman, Commission for Racial Equality 1st March 1979.

⁵⁴ 'I knew about virginity tests, says former Minister' *Guardian* 2nd February 1979.

⁵⁵ 'Row grows over airport virginity test on Indian woman' *Daily Telegraph* 2nd February 1979.

⁵⁶ Letter from David Lane, Chairman Commission for Racial Equality to Merlyn Rees, Home Secretary, 12th February 1979.

⁵⁷ 'I knew about virginity tests, says former Minister' *Guardian* 2nd February 1979.

⁵⁸ 'UK "lied" about tests on virgins' *Guardian* 21st February 1979.

instructions to undertake these examinations had been issued to the doctors involved who, moreover, had all been female.⁵⁹

Medical examination without consent is self-evidently unlawful. Consent on Home Office headed paper "to a gynaecological examination which may be vaginal if necessary" was obtained from the woman in the Heathrow case,⁶⁰ who maintained that she had been too frightened to refuse, reasonably so, given that refusal "would be taken into account" in reaching a decision.⁶¹ It was claimed that asking for consent to such an examination was not usual practice and it was not known why it happened in her case.⁶² The description of her psychological state afterwards suggests that consent, even if formally obtained, was not freely given,⁶³ a supposition given strength by a subsequent offer of compensation by the Home Office.⁶⁴ Juss (1997:110-1) description of the procedure for medical examinations at posts abroad suggests that applicants there could not be regarded as having given informed consent to such a procedure. It barely needs iteration that, illegality and offensiveness aside, such examinations were an unreliable guide to a woman's status either as a virgin or as a fiancée.

After the scandal became public, no staff involved were disciplined,⁶⁵ while the Yellowlees Report assumed that the examinations had ceased, so that the degree of official knowledge and collusion remained unexamined. Yet, it is improbable that these examinations would have occurred on such a scale without some official knowledge if not sanction. The consent form in the Heathrow case suggests otherwise. Moreover, the examinations would have served little purpose unless used in reaching decisions. Juss (1997:119-21) refers to Tribunal cases in which reference was made to gynaecological examinations and argues that it is "difficult to believe that they [the Home Office] were unaware of what went on" (p.119).

⁵⁹ "Fiancée tests" end in India' Daily Telegraph 6th February 1979.

⁶⁰ 'Virginity tests on immigrants at Heathrow' Guardian 1st February 1979.

⁶¹ 'Ordeal has put our wedding at risk' Daily Telegraph 2nd February 1979.

⁶² 'Virginity tests on immigrants at Heathrow' Guardian 1st February 1979.

⁶³ Her fiancé described how she emerged from the ordeal "in tears and trembling" and was subsequently barely able to speak and refused to eat or leave the house ('Ordeal has put our wedding at risk' Daily Telegraph 2nd February 1979).

⁶⁴ 'Offer of £500 over airport virginity test' Times 18th June 1980, 'Indian woman in virginity test row "will reject Home Office cash offer"' Guardian 19th June 1980, 'Home Office sued over test of virginity' Times 11th February 1982, 'Virginity Test' Times 13th July 1982. The offer was rejected and legal action was commenced by the husband (it seems the wife may have returned to India) but was struck out.

⁶⁵ Letter from Merlyn Rees, Home Secretary, to David Lane, Chairman, Commission for Racial Equality 1st March 1979.

5.8 *The admission of husbands and the primary purpose rule*

In 1983, rule changes led to the burden of proof, including as regards primary purpose, being placed upon the applicants. The significance of this was appreciated by the entry clearance service. New guidance (available in the Runnymede Collection) was issued pointing out that where an application is evenly balanced, the application should now be refused. The guidance outlined six areas of questioning to be pursued in assessing primary purpose including, most critically, the relevance of the sponsor's UK residence to the decision to marry. Three examples were given of hypothetical questions that might help clarify the primary purpose issue:

1. If your fiancée did not live in the United Kingdom, would you still go to her home to live?
2. If you were not able to live with your fiancée in the United Kingdom, would you still marry her?
3. If your family had asked you to marry a local girl, would you have done so?

According to the guidance, a negative response to any of these would lead to refusal if the applicant's "general circumstances or background together indicate that the marriage is primarily for immigration purposes". This implicitly sanctioned greater scrutiny of applicants from poor countries. Sondhi (1987:85-8) points out that characteristics that would normally be commended, such as eagerness to work or remit funds, could now be counted against the applicant.⁶⁶

Sondhi (1987:82-4) also demonstrates how even affirmative answers to these questions could result in refusal. A positive answer to the first question when the marriage was otherwise traditional might be considered to lack credibility. If other members of the family had complied with 'tradition', then an immigration motive could be ascribed. On the other hand, where other family members had migrated, then an immigration motive might equally be assumed. An applicant who claimed he would have married the sponsor even if she did not live in the UK might not be believed if his home circumstances were such that he could not support a wife. An

⁶⁶ The introduction in 1985 of the requirement to show that there will be no recourse to public funds complicated this still further as it was feared that arranging a job would lead to an inference of primary purpose while not having it would cause refusal for reason of public funds: 'A Machiavellian policy' *New Society* 30th August 1985. The guidance issued in 1987 said that having a job should not be held against applicants on primary purpose grounds.

applicant who answered 'yes' to the third question would be asked about efforts made to find a suitable wife at home.

An application would also be refused if the applicant admitted that the primary purpose of the marriage was to gain entry to the UK or if "the overall tenor" of the applicants' answers suggested primary purpose. Sondhi (1987:97) notes the "remarkable candour" with which applicants admitted to primary purpose, suggesting persistent problems with interpretation or accurate reporting (discussed earlier) although the appellate authorities rarely acknowledged this. Some of these 'admissions' seemed to have been obtained by leading questions inviting an affirmative answer such as "[h]ave you always, since you were a child, wanted to go to the UK?".⁶⁷

Guidance issued in 1987 and reported by Grant (1987) was slightly more guarded. It identified eight likely areas of questioning including the applicants' prospects if he remained in his country, previous attempts to settle overseas and the relevance of the sponsor's residence to the marriage. However, it was noted that questions that were essentially hypothetical should not be pursued while a purported breach with custom was not, of itself, a reason for refusal (although it presumably was still a factor).

5.9 'Tradition' and 'custom'

Despite this slightly more cautious guidance, perceived 'custom' and 'tradition' were often critical factors in applications. Marriages that failed to fit within an ECO's template of a typical marriage could be rejected as 'primary purpose' marriages.

Elsewhere in this thesis, I have identified the tendency to reduce aspiring immigrants to a single dimension, concerned only with emigration and lacking the complexity and nuance of full human beings. This tendency is observable in the treatment of marriage practices. Powell (1992), for example, is critical of the oversimplification of marriage customs that he encountered in ECO refusals. Marriage traditions and rituals on the Asian sub-continent reflect a rich and complex heritage and are not reducible to a single set of inflexible rules. They vary not only by country or major religion, but are subject to myriad differences depending on caste, class, tribe, family or personal preference. A flavour of their complexity may be

⁶⁷ See 'Interviews conducted by entry clearance officers overseas', paper prepared for submission to the Minister of State by UKIAS, 29th January 1985 (Runnymede Collection).

gained from Menski's (2000:24-33) description of the many possible versions of the Hindu ritual of *saptapadi*. Families and individuals attached varying degrees of importance to tradition and breaches were commonplace (Powell 1992). Wider social changes will inevitably lead to changes in customary practice and Sondhi (1987:101-2; see also Ballard 2005:15) argues that 'tradition' was much less rigid than ECOs believed precisely amongst those communities who migrated.

Questions as to custom and tradition provided a potential trap for the unwary applicant. In primary purpose cases, applicants would typically be asked whether the wedding had conformed to custom as to the arrangements and ceremony. Having gained assurances that the marriage was 'traditional', the ECO would query why, only in respect of the place of residence, the applicant was breaking with custom by moving to join his wife's family (Sondhi 1987:81, Powell 1993a:22). In practice, and despite judicial dicta to the contrary (see *Arun Kumar* discussed in chapter 4), the simple fact of a spouse application by a male was enough to raise an inference of primary purpose (see, for example, Powell 1993a:50).

ECOs referred frequently to the practice of a wife joining her husband as a 'religious' requirement and asked applicants if they were 'good Muslims' (see, for example, Powell 1993a:22, 178). Powell states repeatedly (1990, 1992, 1993a:54, 82, 125, 170) that the custom was not a rule, had no religious significance and its strength could not be deduced from the level of societal religious feeling.⁶⁸ Rather, it was a flexible custom, breach of which did not in itself incur disapproval and that might be summarised as that a wife will move to her husband's residence unless there is a good reason to do otherwise. It had previously been breached in India due to patterns of urbanisation (Shah 1979) and another important reason for its breach was the difficulty that British resident women had in adapting to life on the sub-continent (Powell 1990). Economic betterment is likely to have played a role. It is usual for a married couple to live where their prospects are better and that decision casts little light on the motive for the marriage.

Marriages that did not conform in other respects, perhaps because the wife was divorced or older were treated sceptically (Sondhi 1987:81). ECOs assumed that a divorced woman, if it were not for her UK residency, would find it very difficult to find a husband and the man who married her would do so only on account of that

⁶⁸ Note also that Pearl and Menski (1998) do not include such a practice in their extensive survey of Muslim family law.

residency. The belief was that divorce was rare and a catastrophe particularly for women. Menski (2000:47-57, 63-72) demonstrates, with respect to India, that, during the period under consideration, while there was resistance to a state-sanctioned system of easy divorce, exit routes from marriage, official and unofficial, were longstanding and well used. Muslim divorce law is well established in South Asia (Pearl and Menski 1998:292-382). Powell (1992, 1993a:121-2; see also, more generally, Ballard 1990 and Butler 1999:145) argues that, throughout the sub-continent, while divorce was a blow, it was by no means an insurmountable one. Divorced women often remarried and not only other divorcés, widowers or husbands of lower social standing. In particular, women who had suffered at the hands of a violent or drunken husband would be regarded sympathetically. Nonetheless, the UK-based community was frequently more rigid in this regard than people on the sub-continent, so that a UK-based divorced woman might find it easier to attract a husband from the subcontinent.

ECOs also had firmly held conceptions as to the likely relative ages of the parties, the customary ages for marriage, order of marriage among siblings and preference for cousin marriages (Sondhi 1987:45; Chowdhury 1982:41-42; Powell 1992; Powell 1993a:164-6). In all these instances, critics argued that practice was more complex and less rigid than ECOs believed (see, in particular, Powell 1992 for an extended discussion).

Yet adherence to perceived tradition was sometimes insufficient if primary purpose was suspected due to the absence of prior emotional involvement or detailed knowledge of the other (Sondhi 1987:88-92; Powell 1993a:16). In this regard, ECOs were criticised for failing to appreciate the particular nature of the spousal relationship in an arranged marriage. They were suspicious of marriages where the parties were of differing educational levels (a characteristic that Ballard 2005:21 regards as more probable in Muslim than in Hindu or Sikh marriages). They could not understand how an applicant who claimed to love his wife would not be familiar with her day-to-day activities, interests or friends. Correspondence might be deemed insufficiently affectionate.⁶⁹

Critics argued that these beliefs mistook the nature of the South Asian marital relationship. Spouses did not necessarily expect to share intellectual or cultural

⁶⁹ 'Secret immigration guide "biased to refuse entry"' Guardian 21st March 1984. This tendency was not confined to the sub-continent. In one instance, a Jamaican clergyman was refused because his letters to his wife were deemed insufficiently affectionate ('Britain barred Jamaican clergyman because love letters were too cool.' Guardian 3rd February 1984).

interests and daily activities and friendships were not usually matters of discussion between them. They demonstrated the strength of their feelings through the exercise of their marital duties, expressions of concern for their health and physical well-being and by the husband taking account of his wife's wishes (see, for example, Powell 1992 and 1993a:145, 244, 268; Bhabha et al 1985:70).

It was also argued that ECOs' beliefs in the absolute patriarchy of Asian society misunderstood the nature of gender relations. Thus, where an applicant stated that he wished to live in the UK to please his wife, the assertion would be treated with incredulity if there was no evidence of open affection. ECOs were said to have failed to appreciate that notions of male superiority carried with them, concomitant obligations, including consideration of a wife's wishes. These gave wives more agency than might first appear (Powell 1992, 1993a:82, 179, 244; for a discussion on Muslim law in this respect, see Pearl and Menski 1998:177-8, 186-90) despite the asymmetry in power (see Siddiqi 2005:290-4 for a discussion in relation to Bangladesh).

Applicants who established a love match were at an advantage so far as primary purpose was concerned and ECOs enquired closely into such claims. However, they assumed a binary divide between a 'love match' similar to relationships in the West on the one hand and an arranged marriage on the other, failing to acknowledge that the concept of love is at least partially culturally determined and that there is no inevitable opposition between the two. For example, a love match might be presented as an arranged marriage to save face within the wider family or parents might be manipulated by ingenious offspring assisted by other relatives. Couples, unfamiliar with the extended courtship in the West, would regard an expression of preference or a few minutes spent alone in shy and formal conversation as sufficient to create a 'love match'. Parents might engineer a meeting so as to permit their children to believe that they had initiated the relationship. Couples would use indirect means of discovering more about the other. Young men might exaggerate and young women minimise the length and frequency of unaccompanied contact for reasons unconnected with the hope of obtaining a visa (Powell 1993a:125, 331-2, 357).

In none of these cases would a couple experience the familiarity and intimacy of a typical Western couple and ECOs saw the assertion of a 'love match' in the context of an arranged marriage as an attempt to deceive them (see, for example, Divided Families Campaign 1978:5). Yet many could be credibly described as 'love matches'

as well as 'arranged marriages'. As one failed applicant told Powell (1993a:218), "... they didn't understand that both things are true – it is an arranged marriage and a love match".

The tone of refusals suggests that ECOs did not accept that, for most, an arranged marriage was an accepted and welcome part of their lives and they expected to achieve happiness and fulfilment through it. Powell (1992) argues that, contrary to popular Western preconceptions and with some exceptions, parents and children perceived little opposition of interest on the subject of marriage. While this may have been the case for the spouse on the sub-continent, it is less clear that this was always so for British-based families (see, for example, Brah 1978, Bhopal 1999, Ballard 1990 and 2005 and discussion in chapter 6).

ECOs seemed to regard entering an arranged marriage as a grim duty governed by unchangeable rules, from which romantic expectations or consideration for a wife's feelings must be entirely absent. One explanatory statement (quoted in Powell 1993a:340) expressed this more starkly than most:

"... as he [the applicant] had clearly demonstrated (as had his father-in-law) that he held strictly traditional views, I considered it pertinent to ask him why he was therefore intending to join the sponsor in the United Kingdom. He had quite simply explained that, though he could happily withstand the rigours of a United Kingdom winter, his sponsor would be unable to cope with the heat of a Pakistani summer. Regrettably, I found his contention somewhat unbelievable. Additionally, he informed me that all of the male members of his family had previously complied with tradition in that their wives had joined them after marriage. Had the appellant succeeded in convincing me that his marriage had been motivated by love or even a degree of mutual affection, I would, of course, have disregarded the customary aspect as being largely irrelevant. He had, however, failed to do so. I would therefore respectfully submit that, if one is to expect that the appellant should be granted settlement in the United Kingdom on the basis of a marriage arranged to a girl picked entirely because tradition dictated that she was a suitable choice, one must also accept that the same traditions should be followed to their logical conclusion".

ECOs were criticised for a lack of comprehension of the complexity and flexibility of the arrangements for marriage (Powell 1992; Powell 1993a:166, 245, 261; for a general discussion, see Ballard 1982, 2005). While a male head of household usually undertook formalities, women frequently initiated discussions informally and might continue to play a leading role. Children might not be aware of all the discussions particularly informal ones or that other offers had been refused because a particular match was desired. A lengthy period of 'understanding' might precede formal

negotiations, a first match might not proceed or members of a family might promote different candidates, the outcome indicating the site of dominant power. For reasons of family diplomacy, parties might be permitted to believe that their views carried greater weight than they did or a 'love match' might be presented as an arranged marriage. An individual's inclination for a match could be gauged indirectly without denting a father's ostensible authority.

All of these could result in 'discrepancies' as to when and how a match was decided (see, for example, Powell 1992, 1993a:377). Meanwhile, failure to differentiate between the distinct systems of 'dower' or 'bridewealth' and 'dowry' led to claims that men were 'buying' a British-based wife (Shah 1979; Ali 1987; on these generally, see Pearl 1976; Pearl 1986:30-7; Poulter 1986:40-2 and Pearl and Menski 1998:178-81). These claims made their way into the British press with predictably sensationalist results.⁷⁰

5.10 *Emigration as a motive for marriage*

By requiring the application to be made abroad, the administrative process created an in-built bias towards detecting an emigration motive. Had, as immigrant groups requested, the sponsor made the application, the 'story' would have been the wish of a British resident to be joined by their spouse.⁷¹ Instead, the initial tone was determined by the applicant's situation including a wish to emigrate that was an inescapable part of the application but that was, in this way, given immediate prominence.

Critics (for example, Powell 1990 and 1992) argued that the entry clearance service exaggerated the importance of emigration. It is possible that some critics, acting within the highly adversarial arena of entry clearance, tended, in their turn, to minimise its impact. It is improbable that such a major phenomenon would not have had some effect and commentators such as Ballard (2005:12) suggest that it did. The question was not whether emigration was a factor in deciding whom to marry but its importance in relation to other reasons. Clearly, this is not a question that can easily

⁷⁰ 'Scandal of the Brides for Sale' and 'Who has caused this heartache?' Daily Mail 5th August 1985. The reports, which implied such marriages were commonplace, caused an angry reaction within the Asian community ('Daily Mail sold out to white prejudice?' New Life 9th August 1985, 'Furious Asians plan picket of Daily Mail' New Statesman 9th August 1985).

⁷¹ This is not an academic point. Appeals frequently succeed because the sponsor, more competent than the applicant at negotiating British officialdom, manages to persuade the decision-maker of their case.

be retrospectively determined, but it seems likely that the entry clearance service did overestimate its role.

While Asian parents might conceive their children's welfare differently to parents in the West, they were no less interested in securing it. Writers (for example, CRE 1978:16-9; Ballard 1982 and 1990) emphasise the corporate nature of Asian families and the expectation that an individual will subordinate individual preference to the family's overall welfare and honour. That does not mean that Asian parents regarded their children's happiness as unimportant but that it was best secured through supporting and having the continuing protection of the family. Concern for the individual may be compounded by knowledge that their conduct, particularly a girl's, will reflect on the wider family and parents may be anxious to secure matches for wayward children (Bhopal 1999). However, a conceptual distinction would not necessarily be drawn between the welfare of the child and that of the family. There is obvious potential for tension particularly when children have been exposed to the more individualistic ethos of Western family life but such tension does not, in itself, connote absence of affection. Thus, except perhaps for a few blinkered individuals, few parents would favour a marriage that was only or even mainly for immigration purposes while the social importance attached to securing a suitable and lasting union also made a casual disposition unlikely.

The impetus towards an international marriage did not originate always on the sub-continent. While some British-based groups were more likely than others to seek an international marriage (Pearl 1986:5; Ballard 2005:13-4), commentators (CRE 1978:26; Brah 1978; Ballard 1990; Powell 1992; Menski 1999; Ballard 2005) describe why families settled in the UK might choose such marriages for their children. Parents, anxious lest children abandon their culture and values, saw marriage as a way to cement these and to reinforce links with their country and culture of origin. They also perceived pressure from the overseas community for an active demonstration of their own continuing adherence to tradition (Poulter 1976:590; Butler 1999:145). Children, by contrast, displayed ambivalent and even contradictory attitudes towards arranged marriages in general and international arranged marriages in particular. Brah writing in 1978 (199-200) found that, while some young people adopted aspects of British mores outside the home and were critical of traditional arrangements, few displayed a firm intention of defying their parents' wishes. They were not persuaded that the benefits of choosing their own spouse outweighed the loss

of familial security and relationships and they were aware of the particular pressures on non-arranged marriages. Writing twenty years later, Bradby (1999:156) also found that women sought to modify rather than undermine the arranged marriage system. Wholesale rejection of the system was thus elusive, although Poulter (1986:26-7) reports that while many acknowledged the benefits of an arranged marriage, they were less convinced that it would survive long in Britain. They were also much less enthusiastic about marriage to a partner brought directly from the subcontinent (CRE 1978:28-9). Ballard (1990:18-9 and 2005:13-14) argues that Sikh and Hindu children were more likely than Muslims to resist an international marriage and more successful at diverting their parents from such a course or at persuading them to look to the wider diaspora.

International marriages nonetheless remained common. Apart from the preference of some children to trust their parents' judgement or to comply with their wishes, some British-based young men regarded women raised in the UK as insufficiently domesticated and preferred a wife from the subcontinent. As men found wives from the subcontinent and elsewhere, British Asian women were forced to face the consequences of a growing gender imbalance in the marriage market (Menski 1999). British-born women, particularly those at a disadvantage in the marriage market, might therefore welcome an international marriage. In promoting international marriages, UK-based parents made adjustments to minimise potential difficulties for their children, perhaps preferring families with whom they were already familiar or conceding their children a prior meeting and a right of veto. It was thus plausible that, irrespective of any immigration considerations, some UK-based parents would seek and their children accept a spouse, including a male spouse, from the sub-continent.

Having decided upon an international marriage, there would be little point entering into discussions with families unwilling to contemplate emigration. In terms of identifying a suitable spouse, Ballard (1990:9-10) distinguishes between endogamous marriages undertaken in Hindus and Sikh communities, on the one hand, and Muslims (in his study, those from Mirpur) who would feel bound to offer their children to relatives. In the former case, parents could enter into negotiations with any suitable family. Ballard (2005:12) describes British families of Punjabi origin as "besieged" by offers including from those of higher status. Powell (1992) argues however that only a relatively small segment of society was involved. The poor, uneducated or feckless had little hope of making such a match while the wealthy and educated

usually had no need to emigrate. In Muslim families, on the other hand, obligations of kinship meant that UK-based families usually turned first to members of their own family. Failing to do so could have serious implications for family relations.

From the perspective of those on the subcontinent, emigration might be one of the attractions of a UK marriage. However, this is not as straightforward as first appears. Powell (1992; see also Ballard 1990:12) argues that a man who emigrated was not necessarily the primary beneficiary of his move.⁷² He exchanged his social networks and personal autonomy outside the home for relatively low social status and poorly paid unskilled work in the UK. His earnings provided remittances for those left behind and domestic appliances that made his wife's life easier. He may well have preferred not to join his wife's family, regarding it as a comparative loss of status. His gains except in terms of local prestige were less evident.

If emigration benefited his entire family as much as or more than himself, then, even discounting, as ECOs did, gains in terms of personal fulfilment, it is difficult to see how an applicant's primary motive for the marriage could have been emigration. It would be more accurate to say that his reason for accepting the match was to please or assist his family. ECOs tended to conflate the two motives. Yet, if the applicant's family is brought into consideration, it becomes even harder to identify a single predominant motive. The previous account describes some of the complexities of the arranged marriage, the multiplicity of interests and the web of spoken and unspoken arrangements that preceded its fulfilment. Emigration may have been a factor but it was usually only one amongst many (see, for example, Ballard 2005:12; see also the case studies in Powell 1992, 1993a and 1993b). In most cases, it would be hard to identify a single dominant reason. Certainly, it would be difficult for the applicant to do so with any accuracy in the interview conditions already described. Failure however would, in all likelihood, mean refusal on primary purpose grounds.

The issue becomes clearer if the question of emigration is separated from that of the arranged marriage. Elsewhere (Wray 2006d), I have suggested that the literature on marriage demonstrates that it is not possible to establish a binary divide between 'good' and 'bad' reasons for marriage. In non-arranged marriages, people may marry for 'love', but they do not fall in love by chance. They seek out and are attracted to

⁷² Migration theorists have pointed out the complexity of reasons for emigration including family-related emigration. Smith (2004), for example, is critical of the tendency to reduce motivation to the purely economic.

those whose qualities and circumstances complement and enhance their own. Those who are interested in emigrating are likely to be attracted to a spouse who can offer that possibility. Yet, the 'emigration' motive cannot easily be disentangled from the other reasons for wishing to marry and, in Western discourse, the specific motivation that may underlie mutual attraction is downplayed and rarely specified.

The problem for those in arranged marriages was that, just as in other forms of marriage, emigration may have been a partial motive but they were unable to persuade entry clearance officers that other motives existed. These concerned questions of family obligation, caste, social or professional status rather than the individual characteristics that would normally be cited in non-arranged marriages. However, in the absence of the conventional discourse of romance, these less familiar reasons for choosing a partner were either poorly understood or discounted and the immigration motive assumed to predominate. As described so often in this thesis, the entry clearance officer viewed the applicant only as an aspiring immigrant.

ECOs were thus able to over-apply the primary purpose rule. The rule did not state that any immigration motive was fatal. The applicant should fail only if the immigration motive was the primary one. ECOs assumed that a marriage that was not a 'love match', and where the husband wished to join the wife, was predominantly motivated by immigration.

5.11 The invisible sponsor

If the applicant was perceived only as an aspiring immigrant, the sponsor was largely invisible. In part, this was a function of the process in which, at least until appeal, the sponsor was more a bystander than a participant. However, this lack of presence was arguably more than an accidental by-product of administrative systems. It represents part of a persistent tendency to marginalise British residents and citizens who, by conducting their personal lives in unapproved ways, display insufficient regard for the need to prove themselves as entirely British and to qualify as full belongers. This was particularly true of women.

There were two major categories of sponsor in the period under discussion. In earlier years, in the system of family reunification, husbands who had emigrated alone wanted their wives and children to join them. In later years, the children of these immigrants, born in the UK or moving there during childhood, grew up and entered

into international marriages. In this scenario of family formation, the typical failed sponsor in these instances was a young Asian woman whose husband or fiancé was refused on primary purpose or, in later years, on financial grounds.

In both cases, legislative and administrative measures were used to minimise the numbers of non-white immigrants accepted. In both cases, the usual defence was the need to detect the presumed large number of bogus applications. The position of the sponsor was only occasionally considered but when it was, it was the alien aspect of their conduct that was emphasised.

In relation to men who had emigrated for work, I have already described the rationalisation given in the Hawley report, that these men had chosen to leave their families for many years, in a way described as 'barbaric' and were therefore presumably unconcerned at further separation. Ballard (1990:3) paints a different picture. Migrants were torn between their desire to be with their families and the gains in these families' material welfare that their UK work permitted. Ballard (1994:16) also describes immigrants' reluctance to reconstitute their families in the alien environment of the UK, a reluctance that was particularly marked amongst Bangladeshis. It was only over a period, and at varying paces within the different communities, that men accepted that what had started as temporary was now permanent and called for their families, only to be refused or delayed by many additional years.

There was little official contemplation of the hardship caused to young female sponsors. The belief was that, consistent with tradition, such women should join their husbands on the subcontinent. Critics argued that this was often not a practical option as, unused to the climate and environment, women frequently endured continuous ill health and depression-related complaints (see Powell 1992). In the same work, Powell provides a vivid first person account of a British woman who attempted to live with her much-loved husband and his family in Pakistan. She eventually attempted suicide, became seriously ill and returned to the UK, but her husband's application to join her was nonetheless refused.

The suffering of women who remained in the UK without their husbands was perhaps even more invisible. Menski (1999) drew attention to increases in reports of psychological and physical ailments. Outside the small sphere of critics, arranged marriages were discussed principally in terms of immigration, coercion and oppression (see, for example, the comments made by parliamentarians in chapter 3)

that precluded acknowledging the loneliness and sexual frustration of the 'immigration widows', emotions that Asian women anyway had difficulty expressing.⁷³ Instead, they were criticised for their "manipulation and selective regard of a tradition" (Powell 1993a:224; see also at 179-80, 362).

In all instances, the suffering imposed on victims of a restrictive policy was minimised or they themselves were held responsible for their distress. The state declined to enable British residents or citizens to exercise family life in their own country. A recurrent theme in this thesis has been a hierarchy of deserving marriages, this being determined by both the character of the marriage and the extent to which the parties are belongers. The parties here suffered the double disadvantage of having entered marriages that were not easily comprehended by the majority population and of being, at best, only partial belongers.

This was perhaps predictable in respect of those who had themselves previously emigrated to the UK as children or adults. It is more remarkable in the case of those who had been born in the UK. As indicated in chapters 3 and 4, non-white residents were often seen predominantly as immigrants even in the second generation. They had to prove that they deserved to enter the privileged category of 'belonger'. Non-white males were the least desirable of immigrants and the women who married them had, by that act, further marginalised themselves.

In choosing correctly, sponsors had to reject ambiguity and ambivalence. Hawley, defending restrictive policies, described South Asian men as "men of two worlds" and the family as having "a foot in both camps". There were similar criticisms of female sponsors. An explanatory statement quoted in Powell (1993a: 224), makes the point (punctuation added):

"While I accepted that she had been born in the United Kingdom, had spent most of her life there, might well have preferred to remain there, I considered that by entering into an arranged marriage she had shown herself to be constrained by the traditional dictates of her society".

A woman was either 'traditional', entering an arranged marriage and residing on the subcontinent or 'modern', which presumably meant marrying a UK spouse. Like the judiciary, ECOs did not view favourably UK residents who attempted to have 'the best of both worlds'. It also points up another recurring theme, the reduction of

⁷³ The 'Immigration Widows' were a campaigning group established in 1985; 'She has never seen her father' Observer 6th January 1985.

complex individual lives to simplistic categories that permitted their marginalisation or exclusion.

5.12 *The two-dimensional applicant*

In more sympathetic accounts, individuals break the bounds of these reductionist categories. Powell (1993a and 1993b), for example, carried out detailed investigation into a number of refused applicants. His careful interviews and observations emphasise these applicants' humanity. For example, he describes their shyness, embarrassment, inexperience, blind romanticism and even their giggling. Some of his accounts are deeply moving, such as the deaf and dumb sponsor whose husband was refused on primary purpose grounds (Powell 1993a:83-98). The ECO was dismissive, believing the sponsor to be an unattractive prospect and that the applicant would surely have preferred to marry her younger sister. Investigation by Powell revealed that the applicant had been orphaned as a child and had come to live with the sponsor's family. Both had been lonely children and had developed an exceptionally close bond using their personal sign language. The sponsor had moved to the UK because of the better facilities there, but the couple were deeply attached and distraught at the separation.

If Powell's observations bring to mind the empathy and attention to human detail of good literature, the responses of ECOs suggest the stereotyping and oversimplification of poor fiction. It will be apparent from the prior commentary that ECOs regarded applicants as governed by rigid rules of conduct, guided by a single overwhelming motive and ready to compromise their entire future family life for the sake of emigration. This portrayal lacked the complexity and nuance that are characteristically human.

From this reductionism, other judgements followed. Applicants were not regarded as capable of the tangled relationships, uncertainty and ambiguity that are the stuff of human life. An ECO, for instance, could not believe that a poor husband would have tolerated an affair between his wife and a wealthy friend who paid money that enabled the family to eat (Powell 1993b:63-86).

The earlier reference to fiction is deliberately made in a context in which decision-makers' function was to establish fact. In earlier chapters, I argued for the central function of interpretation in decision-making. That interpretation is based, whether

immediately or at several removes, on what the decision-maker ultimately assumes to be true about the world. In deciding whether to accept or reject, the decision-maker constructs a narrative out of facts as he perceives them. An administrative decision-maker does not have the luxury of being able to ponder, as a novelist may, the endless permutations of possible motivation. But it is precisely for this reason that the baseline assumptions are so important. It is according to these that the pressing and immediate decision will be made.

The reductionist assumptions described here were sometimes applied to an entire population. Hawley describes Sylhet in the following terms:

“The villagers themselves are quiet, decent farming folk living in a countryside which is, at least in November, very beautiful. They produce considerable quantities of rice and seem to live relatively well. Their houses are clean and those of the ‘Londonis’ ... are usually larger and more pretentious than others.”

Hawley, it must be recalled, was an advocate of strong restrictions on the admission of dependants. Elsewhere in his report, he talks of an emigration ‘industry’ and widespread forgery. These ‘decent’ folk in their ‘clean’ homes were unwelcome outsiders so far as the UK was concerned. There is even a suggestion that this was for their own good; ‘pretentious’ is preferred to ‘comfortable’ or even ‘luxurious’ in describing the improved homes of ‘Londonis’. The tone recalls the paternalistic ideology of colonialism and its representation of the simple native. The reduction, described in this chapter, of complex human beings to cardboard cutout figures desperate to emigrate did not arise as a purely spontaneous response to administrative pressures. While it conveniently rationalised the refusal of unwanted immigrants, it was also directly connected to the assumptions that had made the immigration of these individuals such an apparently potent threat.

5.13 Conclusion

This thesis argues that decision-makers at all levels have discretion and that, in exercising that discretion, they make choices that rely, eventually if not immediately, on assumptions about the nature of the world. The entry clearance service made distinct choices that suggest particular assumptions were held. They defended these by asserting certain factual positions described in this chapter and which critics disputed. This chapter has not set out to refute or justify definitively the correctness of

these positions. It has however argued that the entry clearance service consistently interpreted and responded to applicants' claims in ways that minimised the chances of an application succeeding and, in doing so, reduced applicants to diminished human beings whose every action was dominated by the desire to emigrate.

It is thus consistent with the administrative practices described here to argue that the essential premise of decision-making was that immigration from the subcontinent must be minimised and that this outweighed the damage caused by the refusal of entitled applicants or the manner of their refusal.⁷⁴ The imperative was particularly strong in the case of family members due to fear of an endless chain of migration,⁷⁵ and entry clearance staff saw themselves as gatekeepers protecting the integrity of the host society.⁷⁶ The premise that non-white immigration must be minimised thus arguably amounted to an informal internal policy. It was applied with remarkable consistency and thoroughness throughout the period. The reported approach taken towards queues, documentary evidence, interviews, medical examinations, factual findings and local customs all converged towards the same end, namely that the applicant should be refused if possible. The CRE (1985:50-1; see also Lal and Wilson 1986:21) saw material indicating that "in some cases, at least, the prospect of securing refusals of entry clearances would generate greater enthusiasm than that of issuing them". File notes suggested that even where entry clearances were issued, staff did so with reluctance. The Hawley Report argued that applying the correct standard of proof would reduce job satisfaction amongst entry clearance staff, who would be nothing more than "rubber stamps". Refusal was arguably the unofficial primary function of the service.⁷⁷

In minimising the number of successful applications, decision-makers acted as if certain other propositions were true. These may be summarised as:

- There was a strong desire on the part of many people from that region to emigrate to the UK;
- This desire was so strong that even life-long decisions such as marriage would be determined by it;

⁷⁴ See 'Natural selection' Times Education Supplement 7th June 1985.

⁷⁵ See, for example. 'The Law's Delays' Guardian 21st March 1975.

⁷⁶ 'The bridal path to Britain' Daily Mail February 28th 1978, 'Immigration: the first hurdle' Daily Telegraph 2nd December 1985.

⁷⁷ This was widely alleged at the time; see, for example, 'The Middle Class Asian Vote' New Statesman 30th November 1984.

- Many applicants were willing to forge documents and lie in order to come to the UK. These forgeries and fabrications might be very elaborate and demanded minute examination of claims;
- Sponsors, presumably for financial reward or for reasons of family obligation, would frequently try to pass others off as their own wife or child;
- Errors and inconsistencies in interview were attributable usually to the non-existence of the claimed relationship;
- South Asian people were governed by a set of inflexible social customs, deviation from which was usually the outcome of a wish to emigrate;
- Arranged marriages took little account of the perceived welfare of the parties and might just as easily be arranged for immigration reasons as for any other.
- The parties to an arranged marriage had no feelings of obligation or affection towards each other.

The emphasis on fraud and deceit suggests that, as well as the official requirements of the rules, entry clearance officers perceived themselves as moral gatekeepers. Non-white applicants faced the unofficial hurdle of demonstrating that, despite appearances to the contrary, they merited even provisional admission to the club of 'belonger'.

Sponsors were less commonly the focus of specific attention but their claim to live in their home with their choice of spouse carried little weight against the imperative of controlling non-white immigration. Even those born or raised in the UK remained partial outsiders. Moreover, in marrying and seeking entry for unwanted immigrants, they threw into question even their partial status as 'belongers'. The binary divide between the 'modern' UK and the 'traditional' subcontinent did not permit ambivalence. British-based women, in particular, were afforded little credibility if they claimed to have determined the place of residence when entering an arranged marriage. Female agency was thus confined only to those acting in accordance with Western norms, the stereotype of Asian female oppression and passivity being presumed unbreakable.

It was stated above that entry clearance officers acted "as if" the propositions described were true because, if the dominant priority was the minimisation of South

Asian immigration, their adoption could have been self-serving. It is likely that not all entry clearance officers believed them to be universally true. The official quoted earlier on the reliability of discrepancies suggests that some individuals had a degree of perspective. In recent informal conversations (see chapter 6), several entry clearance officers expressed relief that the primary purpose rule no longer applies and one longstanding official spoke of "shame" at earlier practices. The oversimplification of applicants' lives may have been partially the outcome of administrative pressure, a question explored at more length in chapter 6. The extreme nature of some refusals raises the possibility that decision-makers were seeking to justify what they knew to be unjustifiable, the over-use of discrepancies being the most egregious example of specious reasoning called in aid of a pre-determined end.

Yet, had the application of these propositions been utterly incongruent with how most decision-makers viewed the world, it is difficult to see how they could have been applied so consistently. The interviewing style described earlier suggests a degree of personal commitment, and the CRE (1985:50) reported that file notes sometimes betrayed a "contemptuous or dismissive attitude to applicants". The toleration of intimate physical examinations of women from a culture known for its emphasis on personal modesty particularly for women suggests contempt for that culture projected onto its most vulnerable members. There were frequent allegations of racism throughout the immigration service as a whole.⁷⁸ Doubtless, some applicants on the subcontinent were lacking in honesty or motivated purely by the wish to emigrate, and false documents and incorrect information were put forward although not necessarily for reasons of dishonesty. To conclude, as ECOs seemed to, that every application therefore required minute dissection suggests a dismal view of that entire society.

The exclusionary logic was circular. I have demonstrated in chapter 3 how political debate was characterised by extreme anxiety about non-white immigration. Non-white immigrants were unwanted because of underlying assumptions of racial difference and superiority. These assumptions were given more specific expression in order to rationalise refusal.

There is little evidence that the beliefs discussed here were qualified by other values. In the two preceding chapters, the decisions made by the legislature and by

⁷⁸ 'Migrant "rackets" protest' Guardian 9th January 1969, 'Fool or Liar' Caribbean Times 7th December 1984.

judges were scrutinised. In both cases, it was observed that, while certain assumptions could be detected, these were tempered, at least momentarily, by the presence of other values connected with their self-perception as legislators or as judges. In other instances, these professed values (for example, humanity or justice) were in direct conflict with the immigration policies that they were creating or enforcing. Yet, legislators and judges avoided having to confront this lack of congruity because, for the most part, the inconsistent acts were performed by the immigration service out of sight. Thus, politicians could present the primary purpose rule as an anti-abuse measure or judges could avoid challenging unbalanced decision-making by deferring to the fact-finder. These evasions notwithstanding, they were institutions that had to explain themselves publicly in terms that would be considered morally acceptable both by outsiders and, presumably, by the institution's own members.

The entry clearance service does not appear to have been subject to these countervailing pressures. The need to minimise non-white immigration was accepted by all three bodies discussed in this chapter, but the entry clearance service did so with least equivocation. It adopted modes of thinking and procedures that suggest a strong and unregulated culture. Despite having the fewest formal powers, the service was, in practice, the least accountable. This is consistent with the ubiquity of discretion argued for in this thesis and was, it may also be argued, not coincidental. Its relative autonomy enabled the unpleasant work of exclusion to be carried on, without compromising more than necessary, the apparent integrity of the other bodies. The means by which an institutional culture may fulfil vital but unofficial purposes was discussed in chapter 2 of this thesis. There was a largely invisible but vital connection between the daily prevarication and scepticism displayed by the most junior members of the entry clearance service, the political preoccupations of legislators and government described in chapter 3 and the pattern of judicial decision-making identified in chapter 4. This connection consisted of the values, beliefs and assumptions identified in this chapter and which were also, with modifications, identified in the preceding chapters. The extent to which they continue to hold is going to form the subject of the analysis in chapter 6.

Chapter 6: Marriage immigration since 1997

The previous three chapters were concerned with control of marriage immigration from 1962 until 1997. They argued that, while attitudes evolved throughout the period and there was some variation between institutions, there was also present a consistent strand of shared assumptions that resulted in common patterns of decision-making. This chapter considers the period after 1997 and argues that it has been one of fluidity and ambivalence and that this is reflected in the treatment of marriage immigration by the same institutions.

The first section of this chapter briefly reviews immigration policy generally since 1997. The following section considers the position of the communities of South Asian origin who were the main focus of measures discussed in earlier chapters. Subsequent sections consider legislative, judicial and administrative activity in respect of marriage immigration since 1997 and contain the evidence of ambivalence that this thesis has identified as a significant element in recent developments in this field.

6.1 *The right kind of immigrant: immigration policy since 1997*

In the comparatively lengthy period discussed in the three preceding chapters, the dominant policy priority was clearly the reduction of non-white immigration. Marriage was an essential link in the apparently never-ending chain of migration from poor non-white countries particularly the Indian sub-continent. Attempts to break this chain absorbed large quantities of political and administrative effort.

New priorities have emerged since 1997. Government policy has been largely directed towards the management of immigration in a changed global and national context. This context includes the presence of well-established non-white communities, the increased movement of workers, refugees and asylum seekers from all parts of the world, an enlarged European Union, an ageing domestic population and labour shortages (see the discussion in Lewis and Neal 2005:424-6). Race equality and human rights laws have been extended to immigration control (with qualifications)¹ and racialised discourse has been rejected at least in part (Flynn

¹ Immigration officers may discriminate on grounds of nationality or ethnicity if authorised by a minister of the Crown (S.19D Race Relations Act 1976). The relationship between race discrimination and immigration control merits detailed study following *R v Immigration Officer at Prague Airport ex*

2005:484; Yuval-Davis et al 2005:521). On the other hand, public anxiety, the electoral potential of far right parties and security concerns have encouraged restrictive policies and curbs on the civil liberties of illegal immigrants and asylum seekers (see Flynn 2005; Sales 2005; Wolton 2006 and Yuval-Davis et al. 2005). In attempting to balance these opposing forces, the government has made strenuous efforts to present immigration as a force to be managed for the national benefit, a strategy that carries obvious risks.

Since the London bombings in July 2005, there has also been heightened concern about cohesion and integration. The government has sought to minimise social tensions by encouraging or even forcing integration by immigrants, measures that have had significant implications also for longer-established communities and which have led to a renewed focus on international arranged marriages.

The benefits of immigration were given cautious prominence in the early days of the Labour government. Flynn (2005:464) notes that IND policy, as summarised in its Annual Reports, switched in 1997 from being “to restrict severely” immigration to its “regulation”. Politicians also began to give voice to this change of emphasis.² There followed large increases in immigration for instrumental purposes. While skilled workers, innovators and entrepreneurs had privileged status and were encouraged to settle, unskilled workers were permitted only temporary entry without family members (Flynn 2005:465). At the time of writing, even these limited opportunities are in decline except for nationals of recent EU Accession States.

Another major priority during this period has been to limit the number of successful asylum claims. These have been persistently associated with welfare abuse, criminality, terrorism and other security issues (Chakrabarti 2005; Sales 2005:448). Numbers of asylum claims have declined since their peak in 2002 (Heath et al. 2005) although a major issue has been the government’s inability to remove failed asylum seekers (Home Affairs Committee 2006I:141). The rise in asylum seekers prompted major efforts to reduce the number of applicants and speed up processes including withdrawal of welfare support, an unsuccessful attempt to oust the judicial review function of the courts (discussed in Rawlings 2005) and restrictions on in-country

p. ERRC [2004] UKHL 55(see Wray 2006b:125 fn 67). Obligations under the Human Rights Act 1998 have sometimes been interpreted conservatively by the UK courts; see the discussion on the judicial attitudes later in this chapter.

² First indications were in a speech ‘UK migration in a global economy’ by the former Home Office minister, Barbara Roche, to a conference organised by the Institute of Public Policy Research in September 2000. See also Sales (2005:445-6).

appeals. These have been criticised as failing to differentiate adequately between 'genuine' claimants and the non-entitled (Hassan 2004; Chakrabarti 2005) and have become associated with an authoritarian trend in government. Asylum decision-making has been criticised in terms that are reminiscent of the critique of the entry clearance service made in the previous chapter (see. for example, Amnesty International UK 2004; Independent Asylum Commission 2008).

The immigration service has also faced huge administrative problems. Badly managed computer systems and rising numbers of applicants caused long delays, administrative chaos and loss of control at least over asylum applications (McKee 2005:254; Home Affairs Committee 2006.III:190).

These problems combined to create a perceived loss of governmental control. The government has fought this impression through constant organisational and regulatory reform. Six Acts of Parliament have been passed since 1997. The Immigration Rules were amended more than 25 times in just the three years between the start of 2004 and the end of 2006. There have been numerous White Papers, Consultation Documents and reorganisations. Managerialist terminology such as "managed migration", "five year plan" or "new asylum model" has been adopted to describe these programmes of regulatory or organisational reform. Despite the frenetic pace of change, however, critics doubt whether the reassertion of state power is a realisable objective given multiple and conflicting internal and external pressures (Flynn 2005).

Nonetheless, the aim remains the "*comprehensive management of all forms of migration, whether forced or voluntary*" and the "reassertion of the capacity for state control" (Flynn 2005:464-5; emphasis in the original). The increasingly harsh rhetoric and measures against those present without leave reflects the growing predominance of this goal so that it has sometimes trumped even economic benefit as with the prohibition on asylum seekers working, even when they have skills in short supply.

Various areas of immigration policy have been reoriented towards greater state control. Switching between categories has been curtailed. Plans for e-borders, biometric visas and identity cards are under way and the internal surveillance of immigrants has increased. Entry for work is to be decided on a points basis that can be more easily adjusted to changing economic requirements. Residence, naturalisation and, it is planned, admission itself, depends or will depend upon compliance with state-generated criteria for demonstrating sufficient integration.

Given global inequalities, the new emphasis does not make race irrelevant but it has become less prominent (Sales 2005:458). Wealthy non-white entrepreneurs may encounter fewer difficulties than before but it is doubtful whether poor migrants who are often but not exclusively non-white receive better treatment. Criticism of decision-making has not been confined to the asylum system. Muslims from poor countries seem to have been particularly disadvantaged in the period after 9/11 (Citizens Advice Bureau 2003; Lindsley 2006). Social class is arguably becoming more important in immigration control at the partial expense of race.

Skin colour and national origins however seem still to remain the unspoken standard for judging the moral seriousness of transgression. For instance, a national newspaper published a first-hand, humorous account of an American national planning to enter a sham marriage so as to remain in the UK and who was deflected only by falling in love at the last moment with another woman (fortunately also British).³ The skin colour of the protagonists is unknown but it is difficult to envisage an Asian or African national being uncritically permitted to say that, "I'd viewed marriage as an administrative hurdle to be cleared on my way to a visa". Non-white immigrants may be less unwelcome than before but they must establish themselves as the right kind of immigrant. Such an expectation extends also to some British communities of immigrant descent. This is discussed in the next section.

6.2 An uneasy belonging: residents of South Asian origin and international arranged marriages

Previous chapters argued that some immigrants and even their British-born descendants were perceived as permanent outsiders. Others have made similar observations (Yuval-Davis et al 2005:529). Those entering international arranged marriages are even less likely to become 'belongers'. This tendency has persisted particularly if 'belonging' is to be understood as more than the ownership of formal legal rights (Yuval-Davis et al 2005:526-7). The argument made in this thesis, that choosing a spouse has always been considered a statement of allegiance as well as a personal choice, remains valid.

The period discussed in the previous chapters ended in June 1997 with the abolition of the primary purpose rule. A Labour government had been elected on a

³ The Guardian Weekend 25th May 2002 p.57.

wave of popularity after eighteen years of Conservative rule. Removal of primary purpose had symbolic as well as practical importance, enabling a clear distinction to be made with the outlook of the preceding regime. Asian communities were now well established in the second or third generation and were an electoral force particularly for Labour MPs. Unusually for a liberalising measure, removal of the rule had been promised in the 1997 election manifesto.⁴

There followed efforts to develop a new paradigm in the conceptualisation of integration and citizenship. 'Citizenship' became a compulsory part of the state school curriculum in 2002. Acquiring indefinite leave to remain or naturalisation now requires knowledge of language and life in the UK and, for those naturalising, participation in a citizenship ceremony. From 2008, those entering for work will have to demonstrate English language competence. It has recently been proposed that this should be extended to spouses and this remains a 'medium-term' goal even if the government has retreated from implementation for the present (Border and Immigration Agency 2007a; UK Border Agency 2008a).

There have been attempts to move away from the racialised discourse of the past while not avoiding controversial questions as to the common values implied by citizenship (see, for example, Spencer 1995; Goodhart 2004a and 2004b; Parekh 2005). This has proved difficult given the mutability of national identity and the absence of agreed notions of 'Britishness' (Parekh 1995; Spencer 1995; Ballard 2002; Ascherson 2005), the problems of separating race, ethnicity and culture (Ballard 2002), the coded meanings that may be present (Gedalof 2007) and the rise of 'cultural fundamentalism' (Kofman et al. 2000:37). The problem has frequently been framed as a "crisis of multiculturalism" (Lewis and Neal 2005:431), without offering an acceptable alternative framework, underscoring for minorities their fragile sense of belonging (see Kymlicka and Banting 2006:300-4 for a more extended discussion).

This tendency has been exacerbated by the 'war on terror', given the Manichean division implied by the term (Lewis and Neal 2005:434). Discussion, particularly since the London bombings of July 2005, has become enmeshed in broader debate about the continuing reliance by minorities on their own social, cultural, linguistic and legal frameworks. The academic literature on pluralism and multiculturalism has long investigated and argued about precisely these issues (for example, Goulbourne 1991;

⁴ Labour Party Manifesto 1997 (<http://www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml>).

Okin 1997; Jones and Welhengama 2000; Murphy 2000; Yilmaz 2002; Yuval-Davis et al 2005:523). Popular discussion has not always been successful in finding mutually acceptable terms of debate, causing polarisation and mistrust.⁵

The situation is complex and fluid. Publicly racist discourse is generally now unacceptable, arguably representing a substantive shift in attitudes (Goodhart 2005) although how far it has disappeared from private speech is debatable. New waves of immigration have made older immigrant communities relatively familiar and there has been some incorporation of these longer-standing groups (Ballard 2002; Yuval-Davis et al. 2005:521). The growing strength of the Indian economy has begun to undermine the assumption that economic betterment is a one-way journey with reports of British Asians returning to the subcontinent.⁶

But this is not the entire story as demonstrated by continuing problems of poverty, unemployment and underachievement among these communities (Samad and Eade 2002: chapter 2; Peach 2006), the riots in Northern cities in 2001 and the presentation of 'integration' issues. In acknowledging the insecurities of the ethnic British (and particularly the English), it is sometimes difficult to avoid legitimising those who see race as the paramount determinant of difference (see, for example, Hildyard's 2003 critique of Rowthorn 2003). Racism has arguably focused on new targets including ethnic groups less easily distinguishable by skin colour such as Roma and Travellers (ECRI 2004:6), religion (particularly Islam), cultural practices and asylum seekers. Commentators (for example, Ballard 2002) have argued that concern at cultural difference and calls for integration have replaced visible racial difference as a means of asserting dominance.

Many have pointed out the one-sided nature of the integration process (Parekh 2005, Yuval-Davis et al. 2005:527; Gedalof 2007:81). The greatest challenge to traditional concepts of sovereignty and identity is arguably the supra-national force of globalisation which "brings into question the very meaning of citizenship" (Shaw 2002:511). Yet responsibility for cohesion and protecting national identity has been placed most heavily upon the weakest and most marginalised whose personal lives are seen as critical in creating the threat to nationhood (Gedalof 2007:91-2).

⁵ Typical was the 'veil debate' conducted through the press after Cabinet minister, Jack Straw revealed in October 2006 that he asked veiled women to remove their *niqab* during constituency surgeries.

⁶ 'Role reversal Brits head to India' BBC News 12th December 2006 (<http://news.bbc.co.uk/go/pr/fr/-/1/hi/uk/6171837.stm>).

This focus on the personal lives of the immigrant and of those of immigrant descent encourages complacency within the majority population. It is less challenging to frame the debate between alien immigrant values and coherent majority values than to acknowledge the divisions within British society (as Wolton 2006 argues in relation to the political elite). Immigration is perceived (whether correctly or not) to be one area in which national sovereignty may still effectively assert itself (Dauvergne 2004), while the tendency for minority communities to choose a wider-ranging set of allegiances and arenas than are conventionally encompassed within national identity may easily be presented as a threat to a cohesion (Vertovec 2001).

Nonetheless, while 'cultural difference' may rationalise or disguise unequal power relations and while responsibility for maintaining or creating a shared national identity is unfairly distributed within society, the complexities and problems of ethnic identity must also be acknowledged. This critique of pluralism and multiculturalism has been frequently made (Goulbourne 1991; Okin 1999; Bano 2000; Samad and Eade 2002:2; Parekh 2005; Yuval-Davis et al. 2005:523-9; Sales 2005:523-4). Communities are not "bounded, homogeneous groupings, each fixedly attached to its ethnicity and traditions" (Parekh 2000:26). Individuals may define themselves, or be defined, in a multiplicity of ways in addition or in contrast to their ethnicity. Many young British people of South Asian descent identify themselves predominantly as Muslims rather than through their ancestral nationality (Samad and Eade 2002:84). Gender, family position, age, sexuality, professional status or other characteristics may be more significant than, or may intersect with, ethnic origin. Moreover, the burden of maintaining ethnic identity may be unfairly distributed within groups. Women frequently perform a critical role in the embodiment, preservation and reproduction of culture (Barot et al. 1999:15). The difficulties raised by this critique are exemplified by the ongoing debate on forced marriage, discussed later in this chapter.

The rises in immigration discussed earlier have also provoked a complex and diverse response (for some of the competing arguments, see Browne 2002; Rowthorn 2003; Hildyard 2003; Rowthorn 2006). In public debate, there have been attempts to express reservations about immigration in non-racialised terms (for example, Goodhart 2004a and b; Goodhart 2006). These arguments usually centre on the compatibility of needs-based state welfare with mass immigration (Lloyd 2002; Gibney 2004: chapter 2; Goodhart 2004a), arguments that long preceded this period

(see, for example, Freeman 1986; Kymlicka and Banting 2006:286 fn.15) and have been contested (Kymlicka and Banting 2006). They can and have been extended to a 'diverse' i.e. multi-cultural society (Goodhart 2004a; Klausen 2000; Kymlicka and Banting 2006) in a way that resonates with longer-established communities (Goodhart 200b). In a globalised and multicultural society, questions of cohesion cannot be detached from those of immigration.

Against this fluid background, the international arranged marriage, for many years the direct target of immigration policy, has received more ambiguous treatment. Earlier chapters described how its demise had long been predicted. This has not happened. Arranged marriages, domestic and international, remain common in Asian (and some other) communities although with wide variations in practice. Many young people continue to accept the principle, perceiving 'love marriages' as at greater risk of breakdown and themselves as less likely, in such an event, to receive family and community support (Samad and Eade 2002:41-8). Samad and Eade (2002:30-5) also found that, in the Muslim communities they studied, marrying out remains relatively unusual. While cousin marriage is declining among the more educated and, to some extent, amongst Bangladeshis, it remains common amongst the Pakistani community (and may even be increasing, as Shaw 2001 indicates).

Many arranged marriages are international (or transnational, now the preferred adjective; see chapter 7 for a discussion). According to Charsley (2006:1169), international marriages arranged between British Pakistanis and Pakistani nationals have increased and now account for the majority of marriages in that community. Samad and Eade (2002:48-52) quote statistics as high as 75% in some areas and Ann Cryer has stated that 80% of marriages by her Muslim constituents are transcontinental.⁷ The perpetuation of international marriages has been attributed to a shortage of suitable UK candidates due to gender ratios and endogamous marriage patterns. Some young men prefer a wife from the sub-continent, believing she will be more compliant (Beck-Gernsheim 2007:282) and British women therefore have difficulty finding partners. Shaw (2001) observed, in the Pakistani community that she studied, a desire to maintain links with the wider family in Pakistan, a feature that Beck-Gernsheim (2007:279-80) notes in other communities also. Beck-Gernsheim (2007:281-3) also argues that a higher status partner may be available to the UK-

⁷ HC Hansard 2nd November 2006 col. 165WH.

based spouse in an international marriage while a British wife may expect to gain more power in a marriage where in-laws are at a safe distance and she has the advantage of familiarity and language. This however is an expectation that may not be realised and, as Samad and Eade (2002:90) found in the communities they investigated, young people as a whole are less enthusiastic about international marriages than their elders. Beck-Gernsheim (2007:283) argues that some parents, too, are beginning to doubt the wisdom of such matches.

Nonetheless, the persistence of the international South Asian marriage is reflected in the immigration statistics since the abolition of primary purpose. 8,500 spouses and fiancé(e)s were admitted from the Indian sub-continent in 1995 (Home Office 2005). Following the abolition of primary purpose, admissions rose to 18,100 in 1998 (Jackson and Chilton 1999) followed by a drop to 14,200 in 1999 (Jackson and McGregor 2000) since when it has climbed again to 17,100 in 2005 (Home Office 2005). The age profile of the Bangladeshi community, in particular, suggests that numbers may continue to rise for the foreseeable future (Samad and Eade 2002:108).

For a period, the official response was less hostile than previously but was always ambivalent, and it has recently again become more combative. Complacency about majority family practices has been challenged by social changes (that started long before 1997) including sharp rises in divorce, lone parenting and unmarried cohabitation. Berthoud's (2000) study of family formation points to the high rate of marriage and the relatively low rates of divorce and separation amongst Asian families compared to families of white or Caribbean descent. Gedalof (2007) reflects upon how family life is viewed as a means of preserving or undermining nationhood. While, as she argues and as discussed below, the arranged marriage, particularly the international arranged marriage, is perceived principally as a threat in this respect, there has been occasional recognition of the ability of Asian families to participate in this type of nation-building (Lewis 2005:550-1; see also the occasional favourable newspaper report).⁸ However, this has been the exception. As Lewis (2005:546-7) expresses it:

“While they retain their visibility through their distinctiveness, such communities can never symbolically stand for the nation/national, they can only provide the terrain upon which the ‘host’ nation can make its claim to tolerance, civilisation and indeed modernity itself”.

⁸ ‘Asians fly the flag for traditional family life’ Guardian December 18th 2000, ‘Arranged marriages can work, say couples’ Daily Telegraph 8th February 2002.

'Modernity' may conveniently be asserted through distinctions drawn with more 'backward' communities, removing the Asian family still further from the moral centre of gravity. Forced marriages, in particular, but also 'honour' killings and similar violence have received extensive attention during the period. Reporting of these emphasises the cultural context and reinforces the widely held suspicion that Asian (and particularly Muslim) family practices are inherently oppressive (Samad and Eade 2002:99-103). Aspects of the forced marriage that do not fit within this template, for example, the 15% of victims who are male or the range of communities involved,⁹ receive less attention.

In relation to this thesis, the forced marriage discussion is particularly relevant. Whether, as many believe (see Samad and Eade 2002:99-106), it has been excessively emphasised, the issue demands consideration here precisely because of its salience. In the past, the reluctant bride was frequently deployed to justify restrictive immigration control including primary purpose by those otherwise unsympathetic to Asian communities. Such claims were criticised for their opportunism (Menski 1999:92).

The critique is still made today (see, for example, the opening paragraphs of Ballard 2006) while the forced marriage has been recently used to claim immigration restrictions are in the interests of young Asian women (Migration Watch 2004: para 6) and are a feminist cause (Cryer 2003) although the association between immigration and forced marriage is uncertain (Samad and Eade 2002:57-9; Home Affairs Committee 2006I:77-8, 2006.III:321). It has been alleged that "vulnerable adults" with conditions such as depression or schizophrenia have been "manipulated" into sponsoring a spouse (Home Affairs Committee 2006III:321). Such abuse is possible but it is clearly a delicate question as to whether these individuals truly lack capacity to decide for themselves.¹⁰

Discussion of 'forced marriage' frequently elides immigration, cultural and other concerns. Ann Cryer MP (Home Affairs Committee 2006.III:231-6), for example,

⁹ 'Ministers to get tough on forced marriages' Times 27th January 2005.

¹⁰ The issue of marriages involving disabled adults of migrant origin is also current in family law; see (1) *KC* (2) *NNC v (1) City of Westminster Social and Community Services Department (2) IC* [2008] EWCA Civ 198. In that instance, the marriage was valid under Bangladeshi law but not under UK law due to the spouse's mental incapacity. The spouse had UK domicile and the court declined to recognise the marriage. However Wall LJ (at para. 44) acknowledged that the family's intentions were not abusive, a point that does not seem to be generally acknowledged in the immigration context even where there is capacity.

cites as problems associated with immigration control, forged documents, forced marriages, sham marriages, chain migration, first cousin marriages, lack of integration and educational underachievement. Elsewhere in Europe, these issues have resulted in significant immigration restrictions. In Denmark, the minimum age for sponsorship is now 24, couples must show that the couple's connection to Denmark is greater than that to any other country and must also meet stringent financial criteria (Razack 2004:153), measures described as necessary for ensuring the successful integration of immigrants.¹¹ Norway, Netherlands, Belgium and Germany have also adopted measures that make immigration by young spouses more difficult (Razack 2004:159-60)¹² although some of these measures have recently run into difficulty.¹³

Until very recently, the role of British immigration control in intervening in forced marriages has been limited although the minimum age for entry and sponsorship were raised to 18 in 2003 with limited impact on minority communities.¹⁴ Forced marriage units have existed at Dhaka and Islamabad for some time, but they are not part of the entry clearance post and are staffed independently. Entry clearance staff observed during the field trip described later in this chapter were not pro-active in identifying forced marriages.

This looks set to change under the most recent government proposals (UK Border Agency 2008a). The minimum age for entry and sponsorship will rise to 21 and sponsors will have to declare their intention to marry before leaving the UK. There will also be a Code of Practice to provide guidance where a party to a spouse application is perceived as vulnerable to a forced marriage although it is not clear whether the government is intending, as originally proposed (Border and Immigration Agency 2007a:7), to permit a visa to be refused even in the absence of direct evidence that a marriage is forced. Indicators of a forced marriage may include significant disparities in age, language, education and time spent in the other's country (Border and Immigration Agency 2007a: 7) and family and economic background, mental or physical disability or evidence from previous marriages or spousal applications (UK Border Agency 2008a: 20). These factors may all apply in non-forced marriages and

¹¹ Migration News Sheet September 2004, October 2004 and February 2006.

¹² See also Migration News Sheet April 2004, January 2006, April 2007 and December 2007 and ILPA European Update June 2007.

¹³ "Dutch court overturns another immigration law", Radio Netherlands, July 22, 2008: "Danish immigration law under fire after EU court ruling", EUObserver.com, July 29th 2008.

¹⁴ According to Samad and Eade (2002:22) fewer than 10% of Bangladeshis in Tower Hamlets, one of the largest concentrations in the UK, marry before the age of 20.

they increase the scope for subjective and stereotyped decision-making reminiscent of earlier eras.

Prior to these recent moves, official initiatives mainly promoted exit from the marriage as a solution to the forced marriage (Phillips and Dustin 2004:534). Exit alone is increasingly seen as an insufficient solution, because the price paid by the victim is so high in terms of isolation from the community. These recent measures and proposals suggest a switch to a regulatory emphasis.

Regulation enables the government to demonstrate it is taking action. However, its efficacy is doubtful. The risk is that it may cause resentment and concealment rather than changes in attitude. Southall Black Sisters, for example, argue that the rise to 18 has already resulted in young people being forced into marriage on the sub-continent and abandoned until they reach 18, when they may be pregnant or have children (Home Affairs Committee 2006.III:334), although the government do not accept that this is generally the case (UK Border Agency 2008a:15). It is also uncertain that regulation alone will provide adequate protection for victims. If a complaint is made during a confidential interview and a visa refused, families may guess the real reason for refusal and victims will be vulnerable to retribution unless they leave the family. Regulation does not obviate the problems caused by exit.

Nor does it promote self-regulation or critical self-examination by communities, regarded by many critics as the only viable long-term solution. Ballard (2006), for example, sees solutions lying in acknowledging the ability of communities to address these problems and in redressing the imbalances of power within families and communities. Phillips and Dustin (2004:545-6) regard dialogue with affected communities as essential. The effective involvement of the immigration service in such dialogue is improbable, which may be one reason why there has, until now, been caution about its involvement.¹⁵

The motives for forced marriages are complex (see Samad and Eade 2002:56-60) and are, in part at least, “profoundly affected by a community’s sense of peril” (Razack 2004:151-5), including from immigration control. Members, particularly older members, of affected communities strongly suspect an immigration motive (Samad and Eade 2002:103-4). Increasing involvement by the immigration service may well act against long-term resolution.

¹⁵ See, for example, Angela Eagle HC Hansard 17th December 2001 col. 86W.

While these new proposals are therefore of doubtful efficacy, it is more difficult to determine whether they are little more than a pretext for restricting unwanted immigration. There is undoubtedly genuine concern at the abuse represented by the forced marriage, but it is also clear that some international, non-forced marriages, already barely acceptable, are considered a fair, even welcome, sacrifice. The boundaries of debate are blurred. Despite its narrow legal meaning, the concept of the forced marriage is an imprecise one. An-Na'im (2000:3-4), Phillips and Dustin (2004) and Ballard (2006) all make the point in varying ways that it represents a culturally specific example of the universal phenomenon of family violence. The cultural context includes the conception of the family as a corporate enterprise in which the individual's interests are subordinate to those of the family. While many parents now accept more autonomy by their children, some arranged marriages still involve psychological pressure stopping short of coercion. Such methods are not perceived as force by many, particularly older, members of the South Asian communities (Samad and Eade 2002:72). Forced marriages are thus the end of a continuum rather than a category of their own (Siddiqi 2005:290-4).

These blurred outlines mean that the forced marriage does not need to be expressly invoked to legitimise otherwise contentious generalisations about immigration. When the government called for "a discussion within those communities that continue the practice of arranged marriages as to whether more of these could be undertaken within the settled community here" (Home Office 2002:18), its words would be read against a background belief that these marriages are often tainted by coercion. The forced marriage functions tacitly as paradigm rather than exception. As already suggested, debate about immigration has become enmeshed in debate about culture, integration and assimilation and the parameters of the argument are difficult to define. Yuval-Davis et al. (2005:518) observe that much recent immigration through marriage has been to those places considered to represent the failure of multiculturalism. The assumption that minorities' family life is the arena for insularity and abuse becomes part of the 'common sense' background against which policy, including immigration policy is formulated.

6.3 *Legislative control of marriage and immigration since 1997*

The preceding discussion highlights ambiguities in attitudes towards immigration, settled ethnic minority communities and the arranged marriage. This section argues that these ambiguities may be detected also in the legislative treatment of immigration through marriage. In certain respects, the government has put in place controls more authoritarian than those under 'primary purpose'. It has also expressed anxiety at the continuation of the international arranged marriage. Yet, until recently, it has generally avoided enacting measures that may be interpreted as specifically targeting affected communities. This looks set to change if the most recent proposals are enacted.

In July 1998 the government published a White Paper, "Fairer, Faster, Firmer: A Modern Approach to Immigration and Asylum" (Home Office 1998). It was mostly concerned with asylum but also referred to "ample evidence to show that large numbers of bogus marriages are being contracted in the UK every year". It defined a 'bogus marriage' as "one arranged for the sole purpose of evading statutory immigration controls" (para. 11.4). Asked in Parliament to estimate the number of 'sham marriages', the Secretary of State for Immigration stated that precise figures were not readily available but that "(t)he perception of some agencies most involved in tackling this abuse is that it is considerable and widespread".¹⁶

Proposals were limited to giving registrars power to require documentary evidence of age, identity and marital status (para. 11.5). The Immigration and Asylum Bill that followed went further, also requiring parties to give 15 days notice of their marriage and attend to give notice personally (now Ss. 160-163 of the Immigration and Asylum Act 1999). More significantly, registrars were also required under S. 24 to report suspected sham marriages to the Home Office, turning a previously informal practice into a statutory obligation.

The Bill was referred to a Special Standing Committee in the Commons. The Immigration Advisory Service, numerous campaigning groups and backbenchers expressed concern at the marriage clauses. The government denied that these represented what Diane Abbott described as the "domestication of the primary purpose rule",¹⁷ emphasising that they were concerned only with detecting sham

¹⁶ HC 16th February 1999, col. 657.

¹⁷ Immigration and Asylum Bill, Special Standing Committee 17th March 1999.

marriages,¹⁸ which were stated to have increased substantially although firm evidence was not provided of their extent. Registrars already reported around 500 marriages per year as suspicious.¹⁹ Later in the debate, the government referred to 236 arrests for offences connected with sham marriages, 118 cautions and charges and 42 removals.²⁰

The problem was regarded as sufficiently serious to justify further measures that were potentially divisive and discriminatory. Marriages in the Churches of England and Wales were exempted, as there was no evidence of sham marriages in those churches. A sham marriage was defined as one entered “for the purpose of avoiding the effect of one or more provisions of United Kingdom immigration law or the immigration rules”, a definition (now found in S. 24) that strongly recalled the primary purpose rule (Stevens 2001:420). Critics suggested inserting the word “sole” before “purpose” reflecting the wording used by the Council of Ministers in its resolution on marriages of convenience²¹ and which would have excluded marriages where immigration was only one of the purposes.²² The government rejected such an amendment arguing that it would make the registrar’s task too difficult and defended the entire set of proposals on the grounds that “we have the balance right”.²³

Although these new measures had limited impact, they demonstrate that, from this early stage, the government, under pressure from backbenchers,²⁴ regarded control of this route of potential immigration as sufficiently important to override other professed values. The limited scope of the measures meant that the values and beliefs implied by them were not widely debated. However, as in earlier eras, the relatively anodyne measures paved the way for more restrictive laws later.

During this period, the government also sought to rectify some longstanding injustices. The White Paper had proposed a concession for immigrant spouses suffering domestic violence during their probationary period. This was introduced in

¹⁸ Geoff Hoon HC Standing Committee Bill Part 7.

¹⁹ Geoff Hoon, HC Standing Committee part 7.

²⁰ Lord Williams of Mostyn HL 12th July 1999 col. 143.

²¹ Council Resolution 97/C 382/01 of 4 December 1997 (Official Journal C 382 of 16.12.1997).

²² Immigration Advisory Service memorandum to the Standing Committee 17th March 1999.

²³ Lord Bassam of Brighton HL 18th October 1999, col. 808. The debates may be found at HC 22nd February 1999 cols. 37- 131, House of Common Special Standing Committee 17th March 1999, HL Hansard 29th June 1999 cols. 176-257, HL Hansard 12th July 1999 cols. 11-164 and HL Hansard 18th October 1999 cols. 747-926.

²⁴ See, for example, HL Hansard 21st March 2001, cols. 1422-3, HC Hansard 7th March 2002, col. 516W.

1998 and later incorporated into the immigration rules.²⁵ Implementation, however, has proved problematic as the spouse remains subject to the requirement of ‘no recourse to public funds’ and, consequently, victims cannot be offered places in refuges. This has been the subject of extensive campaigning by Southall Black Sisters but, while it has provided limited emergency funds, the government has been reluctant to suspend the public funds requirement (Home Affairs Committee 2006III:333-4), prioritising the ‘integrity’ of immigration control.

Debate during the passage of the 1999 Act had avoided adverse commentary on the arranged marriage. However, a more assertive tone was evident by the time of the White Paper, “Secure Borders, Safe Haven” (Home Office 2002). The Executive Summary (2002:18) drew attention to the “tradition of families originating from the sub-continent wanting to bring spouses from arranged marriages to live with them in the UK”. The succeeding paragraph referred to the “large profits and financial rewards” obtainable through arranging bogus marriages and went on to say:

“We also believe there is a discussion to be had within those communities that continue the practice of arranged marriages as to whether more of these could be undertaken within the settled community here”.

Many regarded the passage as an unacceptable intrusion into the minorities’ personal lives, although it was defended by the combative Home Secretary, David Blunkett.²⁶ Gedalof (2007:84-8) examines how the White Paper, as a whole, presents certain ‘alien’ forms of family life as problematic. This passage and the juxtaposition of bogus and arranged marriages are consistent with that. The White Paper went on to say that:

“As time goes on, we expect the number of arranged marriages between UK children and those living abroad to decline. Instead, parents will seek to choose a suitable partner from among their own communities in this country” (2002:18).

While succeeding paragraphs reiterated the government’s refusal to acknowledge polygamous marriages, its disapproval of forced marriage and the need to prevent sham marriages, new proposals were confined to increasing the probationary period to two years and an end to switching from other categories. These were ‘balanced’ by a proposal to allow immediate indefinite leave to those who had lived together abroad

²⁵ HC Hansard 24th June 1998 cols. 1026-30, paras 289A-C HC395.

²⁶ “Blunkett in clash over marriages” Guardian 8th February 2002; see also HC Hansard 24th April 2002 cols. 376-7 and 411.

for a lengthy period and relaxation of the requirements for the admission of unmarried partners. There may be detected here the emerging contours of an acceptable 'modern' applicant; not too young, but not necessarily formally married.

The focus on switching indicates the government's determination to control the terms of entry. The White Paper (2002:101) states that, in 1999, 76% of those granted leave to remain on the basis of marriage had been admitted for another purpose and that 50% of those switching did so within 6 months of entry although there is no evidence cited for the claim that many of these had lied about their intentions on entry or had entered sham marriages. These cases were later described as 'literally tens of thousands' of applicants, a claim that seems exaggerated.²⁷ The published immigration statistics (Mallourides and Turner 2002:3-4) for 2001 show that there were 23,080 probationary grants of leave to remain as a spouse. In 2000, the number had been 26,440 but this was attributed to a backlog clearing exercise. If even 50% of these were short-term entrants who switched to marriage, they did not represent tens of thousands in any one year and remained a tiny proportion of the more than 8 million non-EEA visitors who entered the UK.

The following paragraph says that in-country switching is "unfair to those applicants who follow the correct procedures by applying for entry clearance overseas and pay for the appropriate visa". The final paragraph of this section (2002:102) acknowledges the hardships that result from forcing someone to go abroad for entry clearance to re-enter as a spouse, but argues that hardship is less likely in the case of short term entrants.

The ban on switching was implemented in 2002.²⁸ While the stated purpose was to prevent visitors and short-term entrants entering sham marriages, the measures had a severe impact on asylum seekers and illegal entrants who might have spent many years in the UK. The genuine nature of these relationships was not in issue, but they were sacrificed to the government's need to establish its authority in the immigration and, particularly, the asylum arena.

These applicants have been required to return to unstable regions in an effort to regularise their position. If the application fails, the government is saved the trouble

²⁷ Lord Rooker, HL Hansard 7th February 2002 col. 752.

²⁸ HC 164.

of removing them.²⁹ There have been reports of victimisation by the authorities after returning and that some applicants have gone into hiding. Practical obstacles may render visa applications time-consuming, expensive or effectively impossible. New passports or exit visas may not be obtainable. If visa facilities are not available, applicants may have to travel to neighbouring countries, where they may be refused admission or where they have to remain while the application is processed. The delays involved may render documentation such as wage slips or bank statements out of date. At the end of that process, the applicant may be interviewed for only a few minutes and the visa granted or refused.

Where visas cannot be obtained, it is usually suggested that the UK resident spouse should accompany the spouse to the country of origin including those that may be unsafe or have poor human rights records such as the DRC, Iraq, Iran or Afghanistan.³⁰ One woman was told that if she wished to live with her husband, she should return with him to Iran and “submit to the way of life there”. This would have required not only conversion to Islam and conformity to dress codes, but the adoption of Iranian nationality and the loss of British diplomatic protection. Another woman was told that she should accompany her husband to Iraq which, even leaving aside obvious issues of security, would have meant abandoning her son by a previous marriage. One woman whose poor health needed constant monitoring and medication, who was her disabled parents’ main carer and who had shared residence of her 8 year old daughter was told that it would be “reasonable” for her to accompany her husband to the DRC (Home Affairs Committee 2006.III:285-8, 346-54). These letters were signed by government ministers suggesting government approval (Home Affairs Select Committee 2006.III:351). The Home Affairs Select Committee (2006.I:77) recommended that applicants should not have to return to a country where the Foreign Office advises against all travel, which would have assisted some but not all of these cases.

While clearly unafraid of restrictive policies, the government at this time refrained from acting directly against the international arranged marriage, even if backbenchers sometimes tried to draw them on such a commitment.³¹ Nonetheless, the government

²⁹ See case studies from the Brides Without Borders campaigning group (<http://www.brideswithoutborders.org.uk>).

³⁰ See, for example, “Forced to choose ... my husband or my life” *Glamour* magazine, February 2006, pp. 106-11 and HC Hansard 10th October 2005 col. 129.

³¹ See, for example, HC 8th February 2002, col. 1241W, HC Hansard 9th May 2002, col. 334W.

proved itself determined to force the pace on integration through tests on knowledge of language and life in the UK as a prerequisite for naturalisation including for spouses.³²

There were three adjournment debates on immigration and forced marriage during 2003,³³ during which it was proposed that the minimum age for both entry and for sponsorship should be raised to 21 and that only British citizens should be permitted to sponsor.³⁴ It was assumed that forced marriage is primarily an immigration issue³⁵ and forced and sham marriages were conflated.³⁶ Beverley Hughes, the Immigration Minister, in her response emphasised the necessity of breaking organised rackets but she also showed some sympathy towards these proposals³⁷ and the minimum age for entry and then sponsorship were raised to 18.³⁸ Raising the minimum age to 21 later received express government support in the 2005 White Paper *Controlling Our Borders* (Home Office 2005:22) and was also proposed by the Kirkhope Commission on Immigration (2004:25-26) established by the Conservative Party. As mentioned above, it is now due to be implemented (UK Border Agency 2008a).

The assertion of state authority over immigration continued with new measures against sham marriages in the Asylum and Immigration (Treatment of Claimants etc) Bill. These were not signalled in advance. On the contrary, in February 2004, a written parliamentary question asked whether it was policy to permit people to marry without verification of their immigration status. Beverley Hughes' reply cited the existing law and efforts against suspicious marriages without referring to plans for reform.³⁹ However, a "Bogus Marriage Task Force" was later established while press reports presented 'sham marriages' as a growing problem associated with organised crime with several high profile convictions.⁴⁰ One figure given wide publicity and

³² Ss. 1 and 2 Immigration, Asylum and Nationality Act 2002.

³³ HC Hansard 19th March 2003 cols. 276-9WH, HC Hansard 17th July 2003 cols. 517-9, HC Hansard 17th September 2003 cols. 264-71WH.

³⁴ HC Hansard 19th March 2003 cols. 276-8WH.

³⁵ "... I believe the solution to all these problems would be for Asian parents to arrange marriages for their sons and daughters within the settled community", Ann Cryer HC Hansard 17th July 2003 col. 519.

³⁶ See, for example, HC Hansard 17th September 2003, col. 266WH.

³⁷ HC Hansard 17th September 2003, col. 269WH.

³⁸ HC 164.

³⁹ HC Hansard 23rd February 2004, col. 239W.

⁴⁰ "I'm asked to conduct many sham weddings" says registrar', Daily Telegraph, 21st March 2004, 'Sham marriages soar as illegal immigrants try to beat curbs' Daily Telegraph 15th June 2004, "Beating the sham wedding cheats" BBC News 22nd September 2004 (http://news.bbc.co.uk/go/pr/fr/-/2/hi/uk_news/3679482.stm), "Fake marriages network" smashed' BBC News 22nd September 2004

quoted in parliament (although not by ministers) was that one in five register office marriages in London (or 8,000 marriages per year) were bogus.⁴¹ This claim originated in a questionnaire to marriage registrars sent by the Superintendent Registrar at Brent Register Office, Mark Rimmer. Such evidence might be persuasive and some of the observations reported by registrars suggested possible sham marriages.⁴² The results however were not published, but were described as 'impressionistic'⁴³ and findings seem to have been based, partly at least, upon subjective judgements as to the probability of a marriage being genuine when it involved a foreign national and other factors such as a large age gap, religious differences or language difficulties (Home Affairs Committee 2006.III:225). In the absence of publication, it is impossible to evaluate the claims made in the research.

Another claim, made in a leaked email, was that 15,000 bogus marriages took place annually, an assertion however from which politicians distanced themselves.⁴⁴ One backbencher claimed that marriage registrars reported 9,000 marriages annually as suspicious under S.24 IAA, although the figures quoted below suggest this is an exaggeration.⁴⁵

The outcome was the announcement by the Home Secretary of plans to restrict the ability of foreign nationals to marry within the UK. Details were sparse but focused on requiring couples to give notice of marriage at a specially designated register office. Plans to allow registrars to refuse to carry out ceremonies were also under consideration. The plans were to be refined following consultation to "achieve the necessary balance between facilitating the vast majority of genuine applicants and protecting the system from abuse."⁴⁶

The period for consultation was brief, less than one month, and the resulting clauses went much further than those put forward for consultation (Immigration

(http://news.bbc.co.uk/go/pr/fr/-/2/hi/uk_news/3678784.stm), "25 jailed for bogus marriage scam" The Scotsman 18th January 2005, "£1m bogus marriage woman jailed" The Scotsman 26th April 2005.

⁴¹ Stephen Pound MP HC Hansard 13th May 2004 col. 563, Baroness Carnegy of Lour HL Hansard 15th June 2004 col. 693. "Sham marriages soar as illegal immigrants try to beat curbs." Daily Telegraph 11th June 2004.

⁴² For example, money changing hands, the bride kissing the wrong man, the wedding rings not fitting or the groom being unable to remember the name of the bride (see HC Hansard 13th May 2004 col. 563).

⁴³ Telephone interview with Mark Rimmer 23rd August 2005.

⁴⁴ The Home Secretary David Blunkett commented that: "We don't think there are anything like the 15,000 that have been outlined, but we think there are more than the 3,000 we have been aware of." "Blunkett targets sham marriages and bogus courses" (Guardian April 23rd 2004).

⁴⁵ HC Hansard 13th May 2004 col. 564.

⁴⁶ HL 22nd April 2004 WS16.

Advisory Service 2004). They were presented as amendments in the House of Lords avoiding substantive second-reading debate in the Commons. Restrictions were to be placed on all marriages in which one or both parties were subject to immigration control except for Church of England weddings.⁴⁷ In addition to the requirement to give notice at a designated register office, the marriage could not proceed unless the non-British party had entry clearance for the purpose of marrying, written permission from the Secretary of State to marry or belonged to a class specified by the Secretary of State.

In arguing for the clauses, the government avoided the tendentious statistics quoted above in favour of more circumspect claims. It relied principally on the increased number of suspicious marriages reported by registrars under S. 24 Immigration and Asylum Act 1999. In 2001, 756 such reports were received, rising by 2003 to 2,712 while 2,251 were received in the first half alone of 2004.⁴⁸ It is not clear whether the rise represented increased numbers of suspicious marriages or increased reporting nor whether suspicion was justified although marriage registrars believed there was under-reporting.⁴⁹ Until April 2004, most reports were not investigated,⁵⁰ and there was no central record of consequent prosecutions or convictions.⁵¹ However, in 2003, at least 110 people were arrested and 37 people charged.⁵² The enforcement effort begun in April 2004 resulted in 200 suspected sham marriages being visited, more than 100 individuals being arrested and 28 marriages that did not proceed.⁵³ These claims however were problematic. If existing measures, applied more intensively, were detecting sham marriages, the rationale for new measures was questionable. The number of reports made in the second half of 2004 was just only over half those made in the first half even though the measures in the 2004 Act were not yet in force.⁵⁴

In the Lords, Lord Rooker for the government argued for the necessity of preventing sham marriages taking place, the unfairness of queue jumping and the

⁴⁷ This is not stated explicitly in the Act but is a consequence of its application.

⁴⁸ HC Hansard 15th June 2004 col. 681.

⁴⁹ Lord Rooker HL Hansard 15th June 2004.

⁵⁰ See speech by Humfrey Malins MP HC Hansard 5th July 2005 cols. 261-2.

⁵¹ Des Browne Minister of State (Citizenship, Immigration and Counter-Terrorism) Written Answer HC Hansard 8th March 2005 col. 1704W. However, the Minister also stated that there were at least 32 convictions in London in 2004 SCAH, Minutes of Evidence, Tuesday 9th May 2006, question 704).

⁵² HC Hansard 13th May 2004 col. 567.

⁵³ HC Hansard 15th June 2004 col. 682.

⁵⁴ HL Hansard 23rd February 2005 col. 1268, HC Hansard 18th April 2006 col. 363W.

importance of detecting sham documentation.⁵⁵ His reasoning lacked coherence. He claimed that it was difficult to remove parties after the marriage had taken place.⁵⁶ However, the recent no-switching rule already required short-term and illegal entrants to leave the UK and submit to entry clearance to gain leave as a spouse. Despite claiming to be aimed at detecting sham documentation, those whose documents proved genuine would still be unable to marry if they lacked the necessary immigration status. The Joint Committee on Human Rights (“JCHR” 2004:21-4) foresaw a possible breach of Articles 12 and 14 ECHR due to the failure to discriminate between genuine and bogus marriages and the exemption for the Church of England. There was insufficient time in the Lords debate to respond to their concerns causing embarrassment to Lord Rooker in speaking for the government,⁵⁷ and it is possible that he was personally unconvinced of the proposals’ merits.⁵⁸

If the reasoning was unconvincing, it is perhaps because the true motivation was not, at first, given prominence. The measures applied to British and EEA nationals who wished to marry those subject to immigration control. The impact upon EEA nationals was, initially, only briefly mentioned.⁵⁹ However, when other justifications were challenged, the defence switched to prevention of abuse by these.⁶⁰ In such cases, while the government might refuse residence on the grounds that the marriage is one of convenience, this is defined narrowly, powers of investigation and enforcement are limited and the burden of proof remains on the government (Macdonald and Webber 2005:286-9). The ability to remain in the UK after marriage to an EEA national had started to be described as a ‘loophole’.⁶¹ It was stated that 61% of reports by registrars of suspicious marriages involved a non-British EEA national and there were some well-publicised arrests.⁶² A possible further aim,

⁵⁵ Lord Rooker for the government HL Hansard 15th June 2004, cols. 680-5.

⁵⁶ HL Hansard 15th June 2004 col. 682.

⁵⁷ HL Hansard 6th July 2004 col. 723-4.

⁵⁸ He conceded that it was unclear whether the rise in the number of reports of suspicious marriages was due to increased incidence or increased reporting (HL Hansard 15th June 2004 col. 686). He later admitted that he expected a challenge to the measures and that he had been placed “in a position where I cannot do my job of representing the Government to this House” (HL Hansard 15th July 2004 col. 724).

⁵⁹ For example, HL Hansard 15th June 2004 col. 684.

⁶⁰ See HL Hansard 28th June 2004 col. 70, 6th July 2004 cols 716-7 and 725-6, HC Hansard 12th July 2004 col. 1219.

⁶¹ Des Browne, Minister for Citizenship and Immigration, HC Hansard 13th May 2004 col. 569, “Beating the sham wedding cheats”, BBC News (http://news.bbc.co.uk/go/pr/fr/-/2/hi/uk_news/3679482.stm) 22nd September 2004.

⁶² HC Hansard 12th July 2004 col. 1219, “Marriage scam for migrants broken” Guardian 23rd September 2004, “LCCG Bust Sham Wedding Racket” Interport News 13th January 2006.

unmentioned but hinted at in later court proceedings, may have been to minimise the possibility of Article 8 claims succeeding by inhibiting the establishment of family life.⁶³

In the Commons, during the third reading, the Minister for Immigration, Des Browne, adopted a more robust tone than Lord Rooker. He defended the proposals as more efficient than investigation of individual cases.⁶⁴ Human rights concerns were dealt with only cursorily.⁶⁵ He alluded to the enhanced rights of those married to a non-British EEA national and it was, by now, apparent that curbing these was a major motive.

The clauses became Ss. 19-25 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004. Unless they have indefinite leave to remain or entered from abroad on a fiancé or marriage visit visa,⁶⁶ all those subject to immigration control must obtain a certificate of approval to marry in the UK, costing £135 (later raised to £295), creating an estimated income of £1.6 million annually (Home Affairs Committee 2006.III:288) Under the scheme, those without leave, whose leave is about to expire or who entered with six months leave or less would be refused unless compassionate circumstances (narrowly defined) were present. If, in the opinion of the decision-maker, the parties were not free to marry, a certificate would also be refused, arguably usurping the role of the marriage registrar. The refusal template in the Immigration Directorate's Instructions suggests that the burden of proving freedom to marry lies with the applicant and it has been suggested that applicants may be penalised for a previous misleading statement.⁶⁷

The measures affected equally those who had complied with immigration law and those who had not. Non-EEA parties refused a certificate of approval had to leave the UK and apply to re-enter unless exceptional circumstances applied, confined to terminal or long-term illness or inability to travel due to pregnancy.⁶⁸ Otherwise, parties who had been entirely compliant with immigration control for lengthy periods

⁶³ *SSHD v Baiat and others* [2007] EWCA Civ 478 para 13.

⁶⁴ HC Hansard 12th July 2004 cols. 1217-18.

⁶⁵ HC Hansard 12th July 2004 cols. 1223-5.

⁶⁶ Those who meet the criteria for a fiancé visa may apply to remain in the UK after marriage. Those applying for a marriage visitor visa must demonstrate intention to leave the UK after the marriage.

⁶⁷ HL Hansard 15th June 2004 col. 684-5, 22nd June 2004 col. 1380W, correspondence between Brenda Hawkyard of IND and ILPA in ILPA's members' mailing, March and April 2005, IDIs, chapter 1, section 15, para. 3 and Annex MM. Ms Hawkyard suggested that 'evidence' of an existing marriage might take the form of a previous statement to an entry clearance officer.

⁶⁸ IDIs, chapter 1, section 15 and annex NN.

could be refused because they applied too late or lacked the necessary form of leave (see Home Affairs Committee 2006.III :285-8).

Although the measures were arguably a response to the more liberal EU regime, they could not be wholly successful in that regard as couples where one party is an EEA national may marry abroad and then apply for a family permit. However, applications for these at entry clearance posts are reportedly now subject to more careful scrutiny. Meanwhile, dedicated marriage case working teams are conducting an increased number of interviews with spouses of EEA nationals.⁶⁹ In this way, the measures support efforts by the UK government, after *Akrich*, to restrict rights of entry by non-EEA family members to those legally resident in the EU or who meet domestic criteria.⁷⁰ Under current UK regulations,⁷¹ non-EEA spouses of non-British EEA nationals may be admitted if they have a passport and an EEA family permit, a residence document or a permanent residence card. While documents issued by other member states must be recognised, the UK government will issue a family permit only if the non-EEA national has lawfully resided in another member-state or meets the requirements of the immigration rules. Meanwhile, non-EEA nationals married to British nationals exercising Treaty rights are required under the UK regulations to have resided with their spouse in an EEA state other than the UK or to meet the requirements of the Immigration Rules. Both these regulations are arguably too narrow and may be subject to future challenge, particularly after the ECJ decision in *Metock*.⁷²

The severity of the new rules caused great anger. The failure to distinguish between genuine and sham marriages and the favour shown to the Church of England recalled previous eras of discriminatory policy, particularly the primary purpose rule. The JCWI immediately announced its intention of making a legal challenge.⁷³ There was official censure also. The views of the JCHR have been discussed. The Independent Race Monitor criticised the Act's Race Equality Impact Assessment for failing to analyse the unequal impact of the laws on different nationalities, whether they were proportionate or if the same goal was achievable in other ways (Coussey 2005:33).

⁶⁹ Mandie Campbell, Head of UKvisas, Home Affairs Committee II:88 and memorandum submitted by IND to Select Committee on Home Affairs, Additional Written Evidence 27th February 2006.

⁷⁰ *SSHD v Akrich* Case C-109/01.

⁷¹ SI 2006/1003.

⁷² *Metock and others v Minister for Justice, Equality and Law Reform* Case C-127/08.

⁷³ "Marriage Registrars Campaign: Help us challenge the new marriage rules".

Instead, the Assessment makes a generalised defence, stating that circumvention of the Immigration Rules creates “mistrust” and “resentment”. Marriage “has increasingly been seen as being used for this end, and has been widely reported in the media as such”. Strengthening the procedures “will therefore contribute to better race relations in the UK”.⁷⁴ It was reported that this sketchy analysis was deliberate, a “quick and dirty” assessment being necessary to ensure inclusion of the clauses in the Bill (Home Affairs Committee 2006.II:84).

The compatibility with ECHR of Ss. 19-25 AI(TC)A was later successfully challenged in judicial review proceedings in 2006, in the Court of Appeal in 2007 and in the House of Lords in 2008 (the case law is discussed later in this chapter). At the time of writing, changes consequent on the House of Lords decision had not yet been announced. The UK Border Agency website⁷⁵ suggests that certificates of approval are still required (for a fee of £295 which is likely to be unlawfully high).⁷⁶ Those who would have been refused under the original regime must provide extensive evidence and are warned that enforcement action may be taken against applicants who have no leave. The evidence required covers areas such as the arrangements for the wedding and reception, plans for the future and of the relationship and must be provided in affidavit form. It is possible that the government will seek to render the scheme compatible by making modifications (for example, as to the fee) and permitting the marriages of those whose evidence does not suggest a sham marriage.

Until its partial suspension, the new regime had a dramatic effect on the number of marriages in certain areas. By June 2005, there were about 60% fewer notices of marriage in some London Boroughs and around 25% fewer in areas such as Birmingham or Leicester.⁷⁷ In 2005, the number of reported suspicious marriages fell to 247.⁷⁸ The number of marriages celebrated in the UK fell by 10% between 2004 and 2005 to their lowest level since 1896 and this has been attributed to commencement of the new laws on 1st February 2005.⁷⁹

⁷⁴ Asylum and Immigration (Treatment of Claimants etc) Bill Race Equality Assessment: New clause.

⁷⁵ <http://www.ind.homeoffice.gov.uk/visitingtheuk/gettingmarried/certificateofapproval/> accessed on 25th August 2008.

⁷⁶ See the comments of Lord Bingham in *R (On the application of Baiai and others v SSHD* [2008] UKHL 53 at para. 30.

⁷⁷ Migration News Sheet June 2005 p.5.

⁷⁸ Migration News Sheet May 2006 p.9.

⁷⁹ “Marriage rates fall to lowest on record” Press Release, National Statistics, 21st February 2007.

Defenders of the measures argue that the reduction vindicates their claim that bogus marriages were widespread.⁸⁰ This is doubtful given that the rules affected all marriages involving non-EEA nationals. There was a surge in marriages before implementation, many involving, according to one registrar, “Asian couples who legitimately want to marry a partner from abroad”.⁸¹ Entry clearance applications take time to organise and process so that a short-term drop in numbers was probable. Entry clearance may also be refused for reasons, such as failure to meet financial criteria that are unconnected with whether the marriage is genuine. The number of overseas applications by spouses of EEA nationals has increased since implementation suggesting displacement rather than prevention.⁸² Nonetheless, it is likely that the new measures have prevented some sham marriages taking place; the issue is the price paid by genuine applicants. It is clear that the judiciary considers that, under the original scheme, it was unlawfully high.

In any event, it is clear that the government intends to continue regulating the international marriage, although with recent emphasis upon the cultural acceptability of certain marriages as the most recent proposals suggest, including those discussed above in relation to the forced marriage. Other measures to be implemented include extended powers to revoke indefinite leave when marriages are retrospectively found to have been coercive and an obligatory commitment by applicants for entry to learn English after entry, with the medium term goal being to require some English language competence prior to entry (UK Border Agency 2008a). These measures go beyond regulating forced marriages and are consistent with the shift in emphasis discussed earlier in this chapter away from skin colour alone as a criterion for entry. They are unmistakably aimed at poorer, less well-educated and less well-integrated immigrants, an increasingly common strand in European immigration policy⁸³ and which is also evident in recent proposals as to naturalisation (Border and Immigration Agency 2008a and 2008b).

⁸⁰ See “Tough rules expose scale of bogus marriages”, Daily Telegraph 16th May 2005.

⁸¹ Migration News Sheet June 2005 p.5.

⁸² In the first three months of 2006, 51 applications were made from Ghana compared to 9 in the same period of the previous year (Select Committee 2006III:125).

⁸³ Best known perhaps are the integration requirements of the Netherlands although these have been subject to international criticism and to successful legal challenge (Human Rights Watch 2008 and “Netherlands: Court Rules Pre-Entry Exam Unlawful” at <http://hrw.org/english/docs/2008/07/17/nether19386.htm>).

The legislative changes discussed here are consistent with the themes identified in the opening section of this chapter. They betray ambivalence towards ethnic minority and immigrant communities. Favour is now based less on race or skin colour and more on conformity to cultural and legal norms and, arguably, on considerations of social class. Out of the myriad changes described here, emerge the contours of an acceptable spouse and an acceptable 'victim'. An acceptable spouse is not too young, is keen to integrate, economically active and is compliant with any hurdles that British immigration law may erect. They need not be married or heterosexual. Some vulnerable individuals have aroused compassion, notably (and to a limited extent) the victims of domestic violence or forced marriage. However, there is a telling absence of sympathy in other cases, such as for those separated by the rules on switching or refusal of a certificate of approval. Such couples may eventually be reunited, but only after considerable hardship, recalling the ordeal by endurance noted in earlier chapters. Nor is there regret at the effective prohibition on early international marriages within the UK; such marriages are seen as culturally unacceptable (despite remaining legal within the UK), raising the possibility of new forms of cultural discrimination.

Previous chapters suggested an implied hierarchy of acceptable marriages based primarily on gender and race. Race and gender still feature although more implicitly than before (Gedalof 2007:88-91, for example, analyses the 'production' of the problematic immigrant woman) but married status and a heterosexual relationship are no longer prerequisites, providing an implicit contrast with less 'modern' forms of family life such as the arranged marriage. Marriages that do not conform to the cultural standards of majority British society are increasingly regarded with disfavour, a tendency noted in previous chapters, but which was muted during the early part of the period discussed here. Problematic marriages include very young marriages and international arranged marriages, particularly those that result in the entry of a poorly educated non-English speaking and/or related spouse. The distinction between 'modernity' and problematic 'tradition' intersects with the other division discussed here, of those who accept the state's authority and those who do not. Attempts to demote the non-compliant include the ban on switching and Ss 19-25 AI(TC)A.

All these measures suggest that those who marry in officially unapproved ways, whether sponsor or applicant, may find themselves outside the realm of inclusion. The assumptions and beliefs that shaped the policy described here are not identical to

those discussed in earlier chapters but the conditional nature of acceptance and belonging remains. While freedom and plurality in personal matters are prioritised for the majority settled population (Eekelaar 2006:23-6), there is little sign that the state is retreating so far as migrant families are concerned: in fact, the most recent developments suggest that the converse is true.

6.4 *Judicial decision-making on marriage and immigration since 1997*

The previous section argued that legislative control of immigration through marriage has, for the last ten years, been dominated by a strong drive towards more government control of immigration. This section considers the judicial response over the same period.

Primary purpose, as we saw in chapter 4, generated much case law. Since its removal, questions such as intention to live together, domestic violence and third-party support have continued to receive some attention. One significant issue, already alluded to, has been those who marry (or, more recently, wish to marry) when they have no or limited leave. Their position is discussed next, following which the other questions are considered.

6.4.1 Refusal of leave to remain as a spouse

6.4.1.1 Introduction: the regulatory framework

The legal framework for these cases has evolved during the period. The power of removal was introduced in S.33 Immigration Act 1971 but only for illegal entrants or those refused entry. Other cases were subject to deportation. S. 10 of the Immigration and Asylum Act 1999 extended removal to overstayers, those who breached conditions of leave or who obtained leave by deception.

At the start of the period, most of those considered here were liable to deportation while, after implementation of S. 10, they became subject to removal. A deportation order must expire or be lifted before the deportee may apply to re-enter the UK. Married life in the UK might be deferred for some years and case law has focused on whether it could continue abroad. Those who are removed may apply immediately to rejoin the UK-based spouse and the focus switched, after S. 10, to difficulties in obtaining entry clearance.

Until the Human Rights Act, those resisting removal due to marriage could rely only on Home Office policy or the general exercise of discretion. Until 1996, policy was contained in DP2/93, which purported to incorporate the UK's obligations under ECHR. This was succeeded by DP3/96, which did not explicitly refer to the ECHR. Since implementation of the Human Rights Act, most applicants have argued their claim on Article 8 grounds, although DP3/96 may still sometimes be relevant (Clayton 2006:589; see also the recent cases of *AB*⁸⁴ and *CH*,⁸⁵ both in the Court of Appeal).

DP2/93 provided that enforcement action should not normally be initiated if marriage pre-dated enforcement action or there was conclusive evidence of a genuine and subsisting relationship akin to marriage. Other factors included a spouse of long-standing residence or who could not otherwise be reasonably expected to live abroad, and children by a former relationship if these had the right of abode and lived with or had frequent contact with the resident spouse.

DP3/96 is more restrictive. It does not acknowledge unmarried relationships and requires marriages to have pre-dated enforcement action by two years and for it to be unreasonable to expect the resident spouse to accompany the deported spouse abroad. Marriages that post-date enforcement action should only put an end to action in "the most exceptional circumstances".

The more severe terms of DP3/96 are one reason that the numbers of those unable to remain in the UK after marriage increased over the period. While, initially, only those who were without any valid leave were affected, in 2002, those on short-term leave of less than six months were also prohibited from switching to marriage. Ss. 19-25 AI(TC)A attempted to prevent these individuals and those whose leave is about to expire from even marrying in the UK, attempts that have been frustrated by the courts (see discussion below).

Despite the permutations described here, legal argument has consistently focused on the same issues: the extent to which the court will intervene and which circumstances will trump the imperatives of immigration control.

⁸⁴ *AB (Jamaica) v SSHD* [2007] EWCA Civ 1302.

⁸⁵ *CH (Jamaica) v SSHD* [2007] EWCA Civ 792.

6.4.1.2 The role of the courts

Prior to implementation of the Human Rights Act in 2000, applicants refused leave to remain in the UK because they did not comply with the immigration rules could have recourse only to the policies referred to earlier or to executive discretion. The courts were frequently asked to review cases which fell outside the precise terms of the policies, but where discretion might be exercised or where the Secretary of State did not accept factual assertions that would bring applicants within the policies. These cases were decided according to judicial review principles. ECHR considerations might be imported only to the extent permitted by the law as it then stood.⁸⁶ The policies represented the balance struck by government between Article 8 and immigration control and could not be disturbed on the grounds that, in themselves, they were not compliant with ECHR.⁸⁷

Cases were rarely decided in favour of the immigrant because the bar for intervention was set so high. Provided all relevant factors had been considered, the decision stood. Hardship was not, without procedural error, enough to suggest irrationality. In *Gbadegesin*,⁸⁸ for example, the court found that, provided the interests of the child had received consideration, the court would not interfere with a decision that separated parent and child.

Home Office refusals were often formulaic even being described, in one court, as an “incantation”.⁸⁹ The rationale was the need for consistent treatment. Yet there is tension between use of standard wording and the obligation to demonstrate that all factors in a case have been properly taken into account, a tension the courts declined to acknowledge.

After commencement of the HRA, there was extensive debate as to the role of the court in Article 8 cases often played out in marriage cases. In *Mahmood*,⁹⁰ a judicial review case, Laws LJ in the Court of Appeal found that, while “anxious scrutiny” was demanded, the judicial function required that a “margin of discretion” be permitted to the executive. The court in *Mahmood* had not taken account of a contrary approach approved by the Court of Appeal in *B*.⁹¹

⁸⁶ See *R v Secretary of State ex p Brind* [1991] 1 AC 696. As regards Article 8, see the speech of Master of the Rolls in *R v Ministry of Defence ex p. Smith* [1996] 1 All ER 257 at 263.

⁸⁷ *R v SSHD ex p. Gangadeen and another* [1997] EWCA 2799.

⁸⁸ *R v Chief Immigration Officer ex p. Gbadegesin* [1998] EWHC Admin 408.

⁸⁹ *R v SSHD ex p. Otusi* [1997] EWHC Admin 1165.

⁹⁰ *R v SSHD ex p. Mahmood* [2000] EWCA Civ 315.

⁹¹ *B v SSHD* [2000] Imm AR 478.

Nonetheless, and despite criticism the following year in the House of Lords,⁹² the restrictive approach set out in *Mahmood* was followed in subsequent immigration cases, which also failed to determine whether it should be confined only to judicial review. The Court of Appeal in *Isiko*⁹³ preferred *Mahmood* and considered itself not bound by *B* as the point in that case had been conceded and not argued. In *Samaroo*,⁹⁴ the Court of Appeal found that, while scrutiny might be more intense than under *Wednesbury*, it remained a review.

In *Noruiwa*,⁹⁵ the Tribunal distinguished an appeal from a judicial review and found that the Tribunal could adopt its own view on proportionality. However, in *Edore*,⁹⁶ the Court of Appeal distinguished *B* and reiterated the review function of the judiciary including, in the absence of factual dispute, the adjudicator in an appeal. The Tribunal in *M*⁹⁷ found that, only in “a truly exceptional case” would it be right to overturn a decision that lay within the Secretary of State’s own assessment of the range of reasonable responses as manifested by previous decisions.

In *Huang*,⁹⁸ the Court of Appeal found that in cases decided under the immigration rules, the rules represent the balance between competing interests as decided by the Secretary of State under Article 8. It is for the court (including the adjudicator) to form its own judgement as to whether a particular case “is so exceptional on its particular facts that the imperative of proportionality demands an outcome in the appellant’s favour notwithstanding that he cannot succeed under the Rules”(Laws LJ at para 59).

While adjudicators and the Tribunal now had authority to decide issues of proportionality for themselves, the requirement of exceptionality meant that successful Article 8 claims remained rare. Cases decided prior to *Huang* were upheld on appeal after *Huang*.⁹⁹

In 2007, the House of Lords¹⁰⁰ upheld the Court of Appeal’s decision that appellate bodies should decide questions of proportionality for themselves but overturned their finding that such cases must be exceptional. Their Lordships were critical of the

⁹² *R v SSHD, ex p Daly* [2001] UKHL 26 at para 27.

⁹³ *R v SSHD ex p. Isiko* [2000]EWCA Civ 346.

⁹⁴ *Samaroo and another v SSHD* [2001] EWCA Civ 1139.

⁹⁵ *Noruiwa (Proportionality appeal: assessment, not discretion) Nigeria* [2001] UKIAT 00016*.

⁹⁶ *Blessing Edore v SSHD* [2003] EWCA Civ 736.

⁹⁷ *M(Croatia)* [2004] UKIAT 00024*.

⁹⁸ *Huang and others v SSHD* [2005] EWCA Civ 105.

⁹⁹ For example, *Chikwamba v SSHD* [2005] EWCA Civ 1779.

¹⁰⁰ *Huang (FC) v SSHD* [2007] UKHL 11.

“tendency ...to complicate and mystify what is not, in principle, a hard task to define, however difficult the task is, in practice, to perform” (para. 14). They observed the need to balance not only the competing interests of state and individual but of individual and society. The individual should not bear consequences that are too severe.

They noted that the immigration rules are not the product of active debate in parliament “where non-nationals seeking leave to enter or remain are not in any event represented”. They also referred to the core value, which Article 8 exists to protect:

“Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives” (para.18).

At the time of writing, it is too early to know the full effects of *Huang*. While the return to a focus on the actual requirements of Article 8 is welcome, it is unlikely to make a difference in most cases and the Court of Appeal has emphasised that, in normal circumstances, interference in family life will be justified.¹⁰¹ It has remitted some cases for rehearing as the wrong test had been applied,¹⁰² but in others, unfavourable decisions have been upheld as still presenting an insufficiently strong claim.¹⁰³ The Court of Appeal however has recently adopted a more nuanced approach in interpreting questions such as ‘insurmountable obstacles’ in the light of *Huang* (see discussion below).¹⁰⁴ As regards the Tribunal, Clayton (2007:316) suggests that it has not always fully appreciated that the observation that only a few cases will succeed under Article 8 is not the same as a test of exceptionality resulting in “the practice of guiding oneself as to outcome by reliance on a prediction”. An example of this faulty reasoning may be found in *AM*.¹⁰⁵

Finally, the House of Lords found in *Beoku-Betts*,¹⁰⁶ that the powers to determine human rights questions granted to the judiciary under S.84 Nationality, Asylum and Immigration Act (formerly contained in S.65 Immigration and Asylum Act 1999) permitted the court to take into account the position of the entire family unit and not

¹⁰¹ *LK (Serbia) v SSHD* [2007] EWCA 3rd December 2007.

¹⁰² For example, *J (Uganda) v SSHD* [2007] EWCA Civ 802.

¹⁰³ For example, *R (on the application of Bujar Semanaj) v SSHD* [2007] EWHC 1704 (Admin), *PM (Jamaica) v SSHD* [2007] EWCA Civ 937.

¹⁰⁴ *LM (DRC) v SSHD* [2008] EWCA Civ 325.

¹⁰⁵ *AM (3rd party support not permitted R281(v))* [2007] UKAIT 00058.

¹⁰⁶ *Beoku Betts v SSHD* [2008] UKHL 39.

only the appellant. This settles an issue that has been litigated over a long period and will, in future, avoid the artificiality of the appellant's human rights being decided in one forum while those of his family members must be decided in separate proceedings elsewhere.

6.4.1.3 Living together abroad

This section considers those numerous cases where it was found that the UK resident spouse could reasonably join the deported spouse abroad. In these instances, the plight of the spouse or of affected children carried little weight even when these were UK nationals and/or faced extreme poverty or destitution.¹⁰⁷ In one instance the planned deportation of a stepfather was described by the family's GP as "catastrophic" for the children, "who have for the first time in their lives had stability". The wife and children had no prior connection to India. One child had severe asthma and a consultant paediatrician was concerned about adequate treatment in rural India. However, as the impact upon the children had been considered, the decision to deport was upheld.¹⁰⁸

The standard formulation was that the couple had to establish 'insurmountable obstacles', a phrase derived from *Mahmood*.¹⁰⁹ This rapidly became a way to defeat almost any claim. In *PK*,¹¹⁰ for instance, the Tribunal found that it was for the parties to establish that there were insurmountable obstacles preventing the UK-resident refugee wife from accompanying her husband to the Democratic Republic of Congo. In *SS*,¹¹¹ changes in the situation in Sri Lanka meant the Secretary of State had acted lawfully in finding no insurmountable obstacles to the return of the refugee husband. In both instances, the Tribunal denied that their findings required the parties to re-litigate their asylum claim. Unsurprisingly, given these findings, a spouse with exceptional leave could not rely on this to demonstrate insurmountable obstacles to return.¹¹² However, recently, in *AB*,¹¹³ the Court of Appeal found that, where there is reliance upon a third party's refugee status, the starting point for the Tribunal is that

¹⁰⁷ *R v SSHD ex p. Ahmed and Patel* [1998] EWHC Admin 453.

¹⁰⁸ *R v SSHD ex p. Singh* [1997] EWHC Admin 59.

¹⁰⁹ *R v SSHD ex p. Mahmood* [2000] EWCA Civ 315.

¹¹⁰ *PK (Article 8, Return, Marriage-Refugee) Democratic Republic of Congo* [2002] UKIAT 05220.

¹¹¹ *SS (ILR, Article 8 return) Sri Lanka* [2004] UKIAT 00126.

¹¹² *R (Sri Lanka) [2003] UKIAT 00093, V (DR Congo) [2003] UKIAT 00131, JF (Article 8: inconsistency, family members) Angola* [2005] UKIAT 00173.

¹¹³ *AB (Democratic Republic of Congo) v SSHD* [2007] EWCA Civ 1422.

this person cannot reasonably be expected to return to the country of origin unless there is some basis to suppose otherwise.

Moses J, in the Administrative Court,¹¹⁴ found that insurmountable obstacles required impossibility due to external factors such as refusal by the state to admit the parties. It was not sufficient to show disruption to the spouse or children. In *EH*,¹¹⁵ it was acknowledged that the appellant's pregnant wife could not accompany him to Iraq but this was due to security considerations alone. In all other cases, state supremacy should prevail:

“All the other factors, language, family and social conditions were factors which represent the consequences of her choice of husband. They cannot impose their choice of residence upon the United Kingdom for those reasons”.

Rarely, when there was an identifiable flaw in the reasoning, the court intervened. In one instance, a psychiatrist reported that forcing the family abroad would aggravate the mother-in-law's heart condition. The Home Office responded that the increased stress would not be long lasting. The court quashed the decision as failing to deal properly with the medical evidence. The judge however counselled against over-optimism, warning that the Secretary of State could take such evidence properly into account and still decide to deport.¹¹⁶

By contrast, the Tribunal regularly found that decisions by adjudicators in favour of spouses were outside the range of reasonable responses.¹¹⁷ In one case, the Tribunal agreed that the family could not move to Bangladesh but considered that the adjudicator erred in finding the Secretary of State unreasonable in ordering the husband's deportation, even though the family would not be reunited for at least 3 years.¹¹⁸

More recently however, and since the House of Lords decision in *Huang*, the Court of Appeal has adopted a more balanced interpretation. In *AB (Jamaica)*,¹¹⁹ the wife's prior breach of immigration control had been minor and rapidly acknowledged while the Home Office had acted tardily. The husband was a British national and it was disproportionate for him to disrupt his life in order to follow his spouse. While the

¹¹⁴ *R (on the application of Surinder Singh) v IAT and SSHD* [2003] EWHC 248.

¹¹⁵ *EH (Palestinian – entry clearance- proportionality) Iraq* [2005] UKIAT 00062.

¹¹⁶ *R v SSHD ex p. Khaira* [1998] EWHC Admin 355.

¹¹⁷ *R (Serbia & Montenegro)* [2003] UKIAT 00187, *F (Jamaica)* [2003] UKIAT 00152, *J (Serbia and Montenegro)* [2003] UKIAT 00151, *A (Pakistan)* [2004] UKIAT 00034.

¹¹⁸ *MD (14 years not disproportionate) Bangladesh* [2004] UKIAT 00208.

¹¹⁹ *AB (Jamaica) v SSHD* [2007] EWCA Civ 1302.

Tribunal subsequently found that the test of ‘insurmountable obstacles’ remained extant,¹²⁰ the Court of Appeal has, in another recent case, *LM (DRC)*,¹²¹ emphasised that ‘insurmountable’ should not be interpreted literally. It means that it is not realistic or reasonable rather than it is not possible for the family to move abroad.

6.4.1.4 “Temporary removal”

From 2000, when most applicants became subject to administrative removal, argument shifted to whether the applicant should leave in order to apply for entry clearance as a spouse. Two issues have repeatedly presented themselves: when an applicant would not come within the immigration rules particularly if this is due to the disruption of removal, and when entry clearance facilities are absent or difficult to access in the country of origin.

The first question received attention in *Mahmood*.¹²² It was argued that the applicant met all the criteria for entry as a spouse except for valid entry clearance. Leaving the UK might result in loss of his employment and, as a consequence, failure of the entry clearance application. The court found that it would be unfair to other more compliant applicants if individuals who breached immigration law were permitted to jump the queue. Article 8 considerations would be brought into account during the entry clearance process.

Following *Mahmood*, the Tribunal found in *BS India*¹²³ that only in “exceptional circumstances” would an Article 8 claim succeed where the possibility of entry clearance exists. Moses J supported this approach in the High Court,¹²⁴ finding that any interference with Article 8 rights arose from the couple’s decision to marry despite the husband’s precarious immigration status rather than from any action of the state.

That the application for entry clearance might fail could not be a factor according to the Court of Appeal in *Ekinici*,¹²⁵ Simon Brown LJ finding that “(i)t would be a bizarre and unsatisfactory result if, the less able the applicant is to satisfy the full requirements for entry clearance, the more readily he should be excused the need to apply”. This principle was upheld in numerous succeeding cases. Even where the

¹²⁰ *VW and MO (Article 8-insurmountable obstacles) Uganda* [2008] UKAIT 00021.

¹²¹ *LM (DRC) v SSHD* [2008] EWCA Civ 325.

¹²² *R v SSHD ex p. Mahmood* [2000] EWCA Civ 315.

¹²³ [2002] UKIAT 00660.

¹²⁴ *R (on the application of Swinder Singh) v IAT and SSHD* [2003] EWHC 248.

¹²⁵ *R (on the application of Ekinici) v SSHD* [2003] EWCA Civ 765.

applicant's child was severely disabled, the mother was unable to cope alone and the family's sole income would be benefits, the case was insufficiently exceptional to waive an application for entry clearance that might not, on the facts, succeed.¹²⁶ As this instance demonstrates, removal of the main earner might not only make compliance with the rules more difficult, but could create new reliance on public funds, something immigration control usually seeks to avoid.

Applicants must still leave the UK if there is no entry clearance post in the country of origin, provided facilities can be accessed in a neighbouring country.¹²⁷ In consequence, the Tribunal has become involved in assessing the feasibility and danger of travel in various troubled locations. For instance, in *HC*,¹²⁸ it was considered reasonable for the applicant to return to Iraq, obtain travel documents, negotiate Jordanian border controls and endure the cost and danger of travelling from Iraq to Jordan to obtain a visa. There was not established "a reasonable likelihood that the claimant could not make the journey without adverse consequences or a violation of his human rights". A similar view was taken in *SA*,¹²⁹ where the Tribunal held that:

"Although there are extensive dangers, we are not satisfied in the light of this evidence that the dangers are so extensive that it is unreasonable to expect the appellant to make the same journey being made regularly by others seeking entry clearance."

Some decisions acknowledged the difficulties. In *AM*,¹³⁰ the Tribunal found that the impossibility of obtaining entry clearance in Somalia prevented removal of the husband of a Somalian refugee, given that it would probably result in permanent separation. In *KJ*,¹³¹ the Tribunal found that travel within Iraq was too dangerous for a Kurd and the parties' precarious financial position made the cost disproportionate. The Tribunal found in *SM Afghanistan*¹³² that, as there was no queue to join, allowing Afghan applicants to remain in the UK did not legitimise queue jumping. In *R(S)*,¹³³ Collins J found that the absence of entry clearance facilities in Afghanistan, and the delay in considering the asylum claim, meant that the claimant could make his

¹²⁶ *LH (Truly exceptional- Ekinici applied) Jamaica* [2006] UKIAT 00019.

¹²⁷ *J (Serbia and Montenegro)* [2003] UKIAT 00041.

¹²⁸ *HC (Availability of Entry Clearance Facilities) Iraq* [2004] UKIAT 00154.

¹²⁹ *SA (Entry clearance in Jordan – proportionality) Iraq CG* [2006] UKAIT 00011.

¹³⁰ *AM (Inability to make entry clearance application) Somalia* [2004] UKIAT 00276.

¹³¹ *KJ (Entry clearance proportionality) Iraq CG* [2005] UKIAT 00066.

¹³² *SM and others (Entry clearance, proportionality) Afghanistan GC* [2007] UKAIT 00010.

¹³³ *R(S) v SSHD* [2007] EWHC 51 (Admin).

marriage application in-country. He referred (at para. 203) to the human cost of such decision-making:

“People cannot be expected to put their lives on hold, particularly if they are young. The claimant was when he arrived in genuine need of protection and he has been condemned to a cruel limbo of worry and uncertainty over his future”.

Nonetheless, *Huang* did not make much immediate material difference to the bulk of decision-making as, for example, *SM Iraq*¹³⁴ demonstrates. However, the recent House of Lords decision in *Chikwamba*,¹³⁵ should lead to a change of emphasis at least in cases involving children or disproportionate hardship. Lord Scott expressed “astonishment” that the case had come so far given the inevitability of the outcome. He was critical of the failure to acknowledge the particular circumstances of applicants:

“...policies that involve people cannot be, and should not be allowed to become, rigid inflexible rules. The bureaucracy of which Kafka wrote cannot be allowed to take root in this country and the courts must see that it does not” (para. 4).

In this instance, a failed Zimbabwean asylum seeker had not been removed due to the conditions in Zimbabwe. She married a Zimbabwean refugee in the UK and gave birth to a child. After the policy on removals changed, the government argued that she should return to Zimbabwe to seek entry clearance as a spouse. Their Lordships found this to be disproportionate to the real aim of the policy (detering illegal entry) rather than the stated intention of preventing unfair queue jumping. The position here could be distinguished from that in *Ekinci*,¹³⁶ where there had been prolonged deception and the applicant faced only a brief removal to Germany.

Chikwamba, decided only very shortly before the time of writing, offers hope that future decisions will take account of all the circumstances of applicants’ lives rather than just their immigration status.

6.4.1.5 Delay

Delay by the UK authorities was often argued to make a case ‘exceptional’ and resulted in some successes before the Tribunal.¹³⁷ Given the extensive delays in

¹³⁴ *SM (Entry clearance application in Jordan, proportionality) Iraq CG* [2007] UKAIT 00077.

¹³⁵ *Chikwamba v SSHD* [2008] UKHL 40.

¹³⁶ *R (on the application of Ekinci) v SSHD* [2003] EWCA Civ 765.

¹³⁷ *GX v SSHD (Kosovo)* [2002] UKIAT 03352, *MH v SSHD (Pakistan)* [2002] UKIAT 04685.

decision-making, many applicants might rely on family life established while awaiting a decision to resist refusal and the issue soon came before the higher courts.

In *Shala*,¹³⁸ the Court of Appeal found that the four years taken to decide the applicant's asylum status made removal after his marriage disproportionate. Had his claim been dealt with more promptly, he would have been granted exceptional leave to remain, entitling him to make an in-country marriage application.

Later cases distinguished *Shala*, limiting its potential impact. In *N*¹³⁹ and in *K*,¹⁴⁰ the Tribunal found that the applicant did not clearly fall into a category that, but for the delay, would have been allowed to apply in-country. In other cases, the delay was caused, in part, by the applicant's own conduct. In *RS*,¹⁴¹ the delay was insufficiently exceptional, permitting the Home Office to benefit from its own systematic inefficiency. In *Strbac*,¹⁴² the Court of Appeal held that *Shala* turned on its own particular facts and did not establish a general principle although it accepted in *Jaha*¹⁴³ that delay should be taken into account.

By contrast, in *Abbas*,¹⁴⁴ the Court of Appeal criticised the inefficiency and persistent delays of the Home Office, concurring with the adjudicator that the application had been dealt with "in an abject manner" and requesting that formal note be taken by the Home Office. Similarly, in *Akaeke*,¹⁴⁵ the Court endorsed the Tribunal chair's description of the IND's handling of the application as a "public disgrace" which made temporary removal for entry clearance disproportionate. The Court distinguished *Strbac* as, in that case, the claim was based on delay alone; there was no separate claim to enter under the rules.

The Court of Appeal sought to establish some general principles in *HB*.¹⁴⁶ It emphasised that *Shala* was concerned with procedural rather than substantive questions. The applicant had a claim under the immigration rules and the only question was whether he should be required to leave the UK to apply for entry clearance. There was no guarantee of leave if the other criteria were not met. Following *Razgar* and the Court of Appeal in *Huang*, the substantive Article 8

¹³⁸ *Shala v SSHD* [2003] EWCA Civ 233.

¹³⁹ *N (Kenya)* [2003] UKIAT 00102.

¹⁴⁰ *K (Russia)* [2003] UKIAT 00082.

¹⁴¹ *RS (Spouse's pending claim: removal bar?) Sri Lanka* [2004] UKIAT 00195.

¹⁴² *Strbac v SSHD* [2005] EWCA Civ 848.

¹⁴³ *Jaha v SSHD* [2005] EWCA Civ 968.

¹⁴⁴ *SSHD v Abbas* [2005] EWCA Civ 992.

¹⁴⁵ *SSHD v Akaeke* [2005] EWCA Civ 947.

¹⁴⁶ *HB and others v SSHD* [2006] EWCA Civ 1713.

question was governed by the requirement for exceptionality (although that part of the judgement must now be considered as modified after the House of Lords decision in *Huang*; see May LJ in *R(A) v SSHD*¹⁴⁷ at para. 30).

In *EB Kosovo*,¹⁴⁸ the House of Lords clarified that the question of delay affects the proportionality of removal in article 8 claims. By a majority, it also found that delays that are “shown to be the result of a dysfunctional system” (para. 16) reduce the weight to be attached to the requirements of a firm and fair immigration control. The clarity of this recent judgement cuts across some of the complexities in the earlier case law.

6.4.2 Intention to live together

In a few cases, the courts have addressed the meaning of para 281 of the immigration rules requiring that the parties demonstrate that the marriage is subsisting and that the parties intend to live together. In *Olofinusi*,¹⁴⁹ Sullivan J found that intention was present although the UK settled spouse was unwilling to live elsewhere than in the UK, an issue that had previously been decided the other way in *Sumeina Masood* (see chapter 4).

Not every married couple cohabits all the time. In some unreported cases, the Tribunal has shown itself sympathetic to couples separated by economic necessity or similar circumstances (Clayton 2006:293-4). The reported cases, however, demonstrate little sympathy for unorthodox relationships. Where the husband was in prison, intention was found to be absent as cohabitation would have been unlawful in the circumstances.¹⁵⁰ Where a polygamous husband intended to spend six months of the year in the UK with his second wife, intention was also considered to be absent even though the couple had a child. The tribunal distinguished this instance from others involving periods of separation because of the regularity and permanent nature of the polygamous arrangement.¹⁵¹

In *BK*,¹⁵² the parties had experienced difficulties in their marriage but now intended to cohabit. The Tribunal found that a marriage is subsisting if it exists in law. The requirement to show intention provides the opportunity to investigate whether it

¹⁴⁷ [2007] EWCA Civ 655.

¹⁴⁸ *EB Kosovo v SSHD* [2008] UKHL 41.

¹⁴⁹ *R (on the application of Olofinusi) v IAT* [2002] EWHC 2106.

¹⁵⁰ *SB v Entry Clearance Officer, Islamabad* [2002] UKIAT 06623.

¹⁵¹ *AB Bangladesh* [2004] UKIAT 00314.

¹⁵² *BK and others v ECO Ankara* [2005] UKAIT 00174.

has substance. However, in the starred determination of *GA*,¹⁵³ the Tribunal held that this was mistaken and that “subsisting” refers to the present state of the marriage while “intention” looks to the future.

6.4.3 Maintenance, public funds and third party support

In recent years, the courts have been asked to adjudicate on two particular issues relevant to marriage and family life: third party support and the disabled sponsor. There has been a recent turn towards a restrictive approach.

The government regards reliance on third party support as insufficiently secure and credible to ensure long-term financial stability. This assumes a Western model of the nuclear family in which financial responsibility is likely to be undertaken only in respect of very close relatives and ignores the wider-ranging reciprocal obligations that exist within extended or “corporate” (Ballard 2008) Asian families. In *Arman Ali*,¹⁵⁴ Mr Justice Collins found that, given the underlying purpose of the rules was to prevent reliance on public funds, it would breach Article 8 to exclude reliance on third party maintenance or accommodation. Following *Arman Ali*, short-term support for spouses was upheld in the starred determination of *Amjad Mahmood*.¹⁵⁵

The immigration rules were subsequently amended to require children to be maintained by and accommodated with the sponsoring relative and the Tribunal in *AA*¹⁵⁶ found that *Arman Ali* could no longer be relied upon in respect of the rule on children, a position upheld “with some regret” (para 20) by the Court of Appeal in *MW*.¹⁵⁷

As regards spouses, the Tribunal in *AK*¹⁵⁸ distinguished between short-term third party support and a long-term commitment, which was regarded as less credible “particularly to one who is neither an ascendant nor descendant relative”. The Tribunal did not exclude it but found that it would require “more detailed and broader evidence and enquiry and more thorough assessment”. However, in *KA*,¹⁵⁹ the Tribunal found that the wording of the rule on spouses also precluded all third party support. The evidence of support offered in this case was in any case unsatisfactory.

¹⁵³ *GA* (“Subsisting” marriage) *Ghana** [2006] UKAIT 00046.

¹⁵⁴ *Ex p Arman Ali v SSHD* [1999] EWHC Admin 830.

¹⁵⁵ *Amjad Mahmood v ECO Islamabad* [2002] UKIAT 01819.

¹⁵⁶ *ECO (Dhaka) v AA* [2005] UKIAT 00105.

¹⁵⁷ *MW (Liberia) v SSHD* [2007] EWCA Civ 1376.

¹⁵⁸ *AK and others (Long term third party support) Bangladesh* [2006] UKIAT 00069.

¹⁵⁹ *KA and others (Adequacy of maintenance) Pakistan* [2006] UKAIT 00065.

More reliable evidence was offered in *AM*¹⁶⁰ but the position was affirmed. In this case, the Tribunal went on to consider the Article 8 implications, but did so in a way that arguably misunderstood the effect of *Huang*. In *AB*¹⁶¹ however, the Tribunal found that third party assistance with accommodation is acceptable. The issue of third party support was recently aired before the Court of Appeal and a judgement is expected shortly (McKee 2008).

The Tribunal has also adopted a restrictive approach to public funds and disabled sponsors. Previous case law had found that these sponsors could use their enhanced benefits to sponsor a spouse, provided sufficient surplus income was established (Clayton 2006:287-8). However, in *MK*,¹⁶² the Tribunal found that disability benefits were a recognition of the disabled person's enhanced needs and did not represent a 'bonus' to be spent as she chose. Alongside this rather controlling tone seems to have been a fear that additional benefits would eventually be required. In *AM*,¹⁶³ the Tribunal found that these benefits were awarded out of necessity and confirmed that they could not be used to sponsor a spouse. When *MK* went to the Court of Appeal,¹⁶⁴ the Court of Appeal found that a sponsor could rely on disability living allowance to sponsor a spouse and the status *quo ante* seems to have been re-established. In a dissenting judgement, Pill LJ hinted that he feared abuse by able-bodied spouses.

6.4.4 Domestic violence

The government recognised that the probationary period for spouses means that immigrants might remain in an abusive marriage to avoid removal, particularly if they feared hostility or ostracism in the country of origin due to the 'failed' marriage. A concession permitting indefinite leave to be granted if the marriage ended during the probationary period due to domestic violence was, in 2001, incorporated into the immigration rules (para 289A HC 395).

Some problems in implementing the provision have already been discussed. Another difficulty is that the rule requires an applicant to "produce such evidence as may be required by the Secretary of State". The Immigration Directorate Instructions (IDIs) specify the types of evidence that should be produced.

¹⁶⁰ *AM (3rd party support not permitted R281(v))* [2007] UKAIT 00058.

¹⁶¹ *AB (Third party provision of accommodation) v ECO Islamabad* [2008] UKAIT 00018.

¹⁶² *MK (Adequacy of maintenance-disabled sponsor) Somalia* [2007] UKIAT 00028.

¹⁶³ *AM (3rd party support not permitted R281(v))* [2007] UKAIT 00058.

¹⁶⁴ *MK (Somalia) v Entry Clearance Officer* [2008] EWCA Civ 1521

In a series of cases, the courts were asked to decide whether the list contained in the IDIs was exhaustive or whether other forms of evidence might satisfy the rule. Two competing values were in play. From the government's perspective, the domestic violence provisions represent an exceptional concession whose boundaries must be strictly delineated to avoid abuse (see, for example, *Ishtiaq*).¹⁶⁵ The opposing view is that decisions should be made according to the merits not the ability to produce evidence in a particular form.

A restrictive view was adopted in some cases,¹⁶⁶ but there has been some recent flexibility. In *JL*,¹⁶⁷ the Tribunal found that the evidential requirements contained in the IDIs were not binding on them. Parliament would not have permitted one party to control an independent tribunal's fact-finding. The outcome was supported by the Court of Appeal in *Ishtiaq*. It found that the rule should not be construed strictly against applicants, but interpreted purposively so as to further the policy of allowing victims to acquire indefinite leave. Even were the IDIs binding, their wording equally implies a degree of flexibility.

Nonetheless, victims of domestic violence face formidable hurdles. They must establish that violence caused the break-up of the marriage during the probationary period. The requirement assumes expectations and knowledge that may be absent in immigrant women struggling with language, culture, shame and dependency.

The courts showed some sympathy. In *B*,¹⁶⁸ the wife left the matrimonial home after the husband made an allegation of assault against her (she was later acquitted on the grounds of self-defence). After divorce and termination of her leave, but in response to continued harassment, she obtained an injunction against the husband. The Court of Appeal accepted that the husband's violence predated the parties' separation and that, while his assault allegation had been the precipitating cause of the separation, it was his prior conduct that had caused the marriage to break down.

On the other hand, in *IN*,¹⁶⁹ the violence was not reported until after expiry of the wife's probationary period. She told her GP that she did not report it earlier "because of the Asian culture" and even the sceptical immigration judge accepted that there had been "difficulties ...at a relatively low level" during the probationary period,

¹⁶⁵ *Ishtiaq v SSHD* [2007] EWCA Civ 386.

¹⁶⁶ For example, *S (India)* [2003] UKIAT 00162, *R on the application of Manpreet Kaur* [2004] EWCA Civ 818, *RH (Para 289A/HC395-no discretion) Bangladesh* [2006] UKAIT 00043.

¹⁶⁷ *JL (Domestic violence: evidence and procedure) India* [2006] UKAIT 00058.

¹⁶⁸ *R (on the application of B) v SSHD* [2002] EWCA Civ 1797.

¹⁶⁹ *IN (Domestic violence – IDI-policy) Pakistan* [2007] UKAIT 00024.

including at least one incident of physical and verbal abuse. However, because the wife attempted reconciliation and did not finally leave her husband until after more abuse, the Tribunal found that the separation was not due to the earlier violence. This rigid application of the criteria ignores victims' vulnerability. In this instance, and consistent with his abusive conduct, the husband refused to assist his wife in making an application for indefinite leave so that, without a flexible application of the exception, she remained indefinitely subject to removal.

The Court of Appeal recently found that a woman with two small children who had left a violent marriage could not rely on Article 8 to remain in the UK although, quite obviously, each case would be fact-dependent and it was hinted that an application that included the children might have had a better chance of succeeding.¹⁷⁰

6.4.5 Developments under Ss. 19-25 AI(TC)A

The legislative history and nature of these clauses have already been discussed. There have now been three High Court decisions, a Court of Appeal decision and a recent judgement in the House of Lords.

In the first High Court decision,¹⁷¹ Silber J found that measures to prevent sham marriages did not breach Article 12 ECHR and that substantial deference is due in respect of restrictions imposed on Article 12 rights. He accepted government arguments as to the prevalence of sham marriages particularly among EEA nationals. Nonetheless, he found that the statutory scheme breached Articles 12 and 14 as it was not rationally connected to the legislative purpose, was disproportionate and discriminated by race and nationality. This was due to its inflexibility and the effective presumption that certain marriages are sham, the exemption for Church of England marriages, the absence of assessment of the individual relationship and the inability of those affected to make representations.

The judgement is closely worded and extensive consideration is given to the arguments put forward by the Secretary of State and to ECHR case law. Its tone suggests anxiety about overstepping the boundaries of the judicial role. Two subsequent judgements by Silber J applied the principles established in the first decision to the parties in the case and suggest that this anxiety was, in his subsequent view, somewhat realised.

¹⁷⁰ *NG (Pakistan) v SSHD* 4th December 2007.

¹⁷¹ *R (on the application of Baijai and others) v SSHD* [2006] EWHC 823 (Admin).

It is unsurprising, given the current law, that damages were not awarded. However, the reasoning in the damages decision makes it clear that the inconvenience and delay caused to applicants would have been permissible had the scheme not been discriminatory and disproportionate.¹⁷² More surprising is the third judgement by Silber J.¹⁷³ This was required because the previous court had not been asked to rule specifically on the position of a claimant who was present illegally in the UK. The judge found that refusal of a certificate of approval to such an applicant was not incompatible with the ECHR. His reasoning is not entirely convincing. He found that the necessity of effective immigration control and the particular advantages accruing to the spouse of an EEA national weighed more heavily in the decision as to proportionality when illegal entrants were involved. That is arguably so, but the scheme still does not distinguish between those entering sham and genuine marriages so that, unless it is presumed that all marriages involving illegal entrants are sham, a rational connection between the scheme and the problem is not established. The discrimination part of the claim was dismissed because the claimant had chosen a register office ceremony, an argument that applied equally to the other claimants present legally. This third judgement implies sympathy for the priority awarded by government to ensuring that those who have not complied with the rules for entry do not benefit from their misconduct. Their transgression excludes them from the careful consideration and weighing of factors that characterise the decisions in respect of the other claimants.

The Court of Appeal¹⁷⁴ found that Silber J had accorded too much deference to the Secretary of State. The qualifications to Article 12 did not permit interference with genuine marriages for the purposes of immigration control. The protection afforded by Article 12 extends to those present illegally although the court suggested that a differently constructed scheme might be compatible.

The House of Lords found unanimously that the scheme breached Article 12 of the ECHR.¹⁷⁵ The distinction in S.19(1) of the statute between Church of England and other ceremonies was discriminatory and the declaration of incompatibility was maintained in respect of that part. The rest of the scheme could be applied compatibly if, where there is no evidence of a sham marriage, a certificate of approval is granted

¹⁷² *R (on the application of Baiai and others) v SSHD* [2006] EWHC 1035 (Admin).

¹⁷³ *R (on the application of Baiai and another) v SSHD* [2006] EWHC 1454 (Admin).

¹⁷⁴ *SSHD v Baiai and others* [2007] EWCA Civ 478.

¹⁷⁵ *R (On the application of Baiai and others) v SSHD* [2008] UKHL 53.

and the application of the scheme (including the fee) does not “unreasonably inhibit” the exercise of the right to marry. The House upheld the reversal by the Court of appeal of Silber J’s third judgement. Immigration status is not material; the only lawful consideration is the nature of the marriage.

6.4.6 Judicial decision-making: discussion

The previous section of this chapter has argued that, in the period examined here, the government has sought primarily to exclude those who undermine state hegemony over immigration. In many of the cases discussed here, particularly in the early part of the period, the courts have upheld the exclusion of such spouses regardless of the hardship faced by the UK resident party who may face exile or separation due to their choice of spouse. The courts have rarely expressed views as to the conduct of the parties and where they have done so, they have as often as not expressed sympathy but this was not often reflected in the outcome.

Thus, until recently, they may be criticised for excessive deference and, in consequence, a selective approach to the law.¹⁷⁶ The maintenance for a long period of a ‘review’ function in Article 8 cases and the rigid application of criteria such as ‘insurmountable obstacles’ or, prior to *Huang*, ‘exceptionality’ arguably reflected an out-of-date approach to Strasbourg jurisprudence and failed to take account of more recent developments (Rogers 2003; Macdonald and Webber 2005:430-1). The refusal to give primacy to the interests of children in removal cases is out of step with recent Convention and EU law (Lambert 2006:170). Meanwhile, in decisions relating to public funds, domestic violence and the meaning of ‘subsisting’, the courts have often (although not always) tended towards enabling restrictive policies to be maintained.

Judicial conservatism in immigration has been widely noted in the past (see the discussion in chapter 6). Without a full evaluation of the range of case law, it is not possible to assert that judges have demonstrated more restraint in immigration issues than in other areas under the Human Rights Act, although some have suggested the possibility (see Clayton 2007:317 and Leigh 2002:276-7 for a critique of *Mahmood* and *Samaroo* in relation to other Article 8 cases). It must also be noted that, as discussed below, a more assertive stance is currently observable.

¹⁷⁶ The term ‘deference’ is used here although it is argued by some to be inapt as it suggests that the judiciary is refraining from legitimate intervention; see Dickson (2006:340-1).

Nonetheless, for a period, many were disappointed by the courts' overall approach to deference, arguing that this was mandated neither by the Human Rights Act itself nor the ECHR jurisprudence (Edwards 2002; Leigh 2002; Clayton 2004; Ewing 2004). The legal formulation of deference, the 'margin of discretion', is a domestic judicial creation and has arguably been applied too broadly and uncritically (Craig 2001; Edwards 2002).

This self-limiting must be seen in the particular contemporary context. The Human Rights Act represented "an unprecedented transfer of political power from the executive and legislature to the judiciary" (Ewing 1999) and there was much anxiety prior to its enactment at the "serious question of democratic legitimacy" it posed and at the potential politicisation of the judiciary (Stevens 1999:368-72). Judicial self-restraint acknowledges that the legitimacy of judicial intervention remains contested (Nicol 2006) and may bring retaliation as in the failed attempt to impose an ouster clause (Rawlings 2005). Judicial reticence has perhaps had more to do with judges' "self-limiting institutional norms" (Judge 2004:693) than with attitudes towards litigants.

However, Judge (2004:691-2) comments that it is "based upon an idealised conception of parliamentary sovereignty rooted in an acceptance of the Westminster model. Rarely does the reality of executive dominance and 'executive' sovereignty intrude into this view". Failing to acknowledge this reality has permitted an impoverished view of democracy to prevail.

Recent case law, however, including some discussed here, suggests a more value-driven approach and that the courts, inspired by their human rights jurisdiction and led by the House of Lords, "have begun to see human rights as constitutive of democracy rather than ranged against it" (Fredman 2006:54). The House of Lords judgement in *Huang* recalls that human rights apply to human beings even if their presence is unsanctioned. There is also the assertion of a distinct role for the courts in protecting those excluded by majoritarian politics. *Baiai* makes it clear that even illegal immigrants have rights. *EB Kosovo* and *Chikwamba* demonstrate a readiness to place greater weight on the human cost of immigration control. *Beoku-Betts* suggests a will to give practical effect to human rights. Some recent Court of Appeal judgements (*AB Jamaica*, *LM (DRC)* and *Baiai* for example) suggest that this new emphasis is having an effect on their decision-making although it is currently less visible in Tribunal decisions. Fredman (2006:80) has argued that the "UK courts are beginning to

construct a system of fundamental values, based on liberty, democracy and equality: but so far only the contours of such values are visible". The recent higher court decisions discussed here support her contention. Whether, over the long term, the courts will better protect those whom immigration control has otherwise stripped of rights remains to be seen. Others have previously warned against undue optimism (Ewing 2005).

6.5 Administrative decision-making

Chapter 5 offered an extensive critique of entry clearance decision-making prior to 1997. It argued that administrative attitudes were congruent with and contributed to broader policy aims. This section looks at the position after that period. It does not offer a comprehensive analysis of entry clearance procedures (see Wray 2006b for discussion of these) but considers ECO decision-making in marriage applications on the sub-continent. It notes that some decisions emerging from that region still bear the characteristics identified in chapter 5, notwithstanding important changes in administrative approach and staff attitudes. It is not sufficient to account for this minority of poor decisions by reproducing, in attenuated form, the critique offered in chapter 7. Instead, it argues for a more nuanced analysis that acknowledges the changed situation since the periods discussed earlier.

6.5.1 Public perception

In chapter 7, it was observed that, of the three institutions considered in this thesis, the entry clearance service was the least accountable. Complaints about its decision-making and culture of refusal were widespread. The difficulties faced by the Commission for Racial Equality in making their investigation suggest a closed official culture.

Criticisms of the entry clearance process continue to be made. JCWI described entry clearance decision-making as:

“...poor and inconsistent between UK missions, manifesting a lack of understanding of the law, lack of transparent criteria which can be understood by applicants and a reliance on personal value judgements as reasons for entry refusal.” (Home Affairs Committee 2006.II:82-6).

Independent Monitors' Reports have been persistently critical (see, for example, Lindsley 2005, 2006) although the latest report notes improvement (Costelloe Baker

2007:46). In respect of marriage applications, practitioners have expressed frustration at the quality and style of some refusals (Wray 2006b:113). Commentators have observed an increase in refusals on 'intention to live together' since the abolition of primary purpose and some of these appear to re-import primary purpose considerations. The sub-continent appears to be over-represented in appeals against refusals on 'intention to live together' suggesting continued focus on the South Asian arranged marriage (Wray 2006c:164-5). Stereotyped decision-making has also been reported from those entering civil partnerships (Home Affairs Committee 2006II:127).

The type of decision that causes criticism has been documented elsewhere (Wray 2006b and 2006c). Reasons for refusal on the grounds of intention include absence of "a realistic commitment" to the marriage or "of a strong bond of affection". Applicants have been told that the marriage "would not be regarded as a suitable match on the sub-continent". They have also been told that they may "have cynically fathered a child" to improve the application. Reliance on discrepancies has not been abandoned. Applicants have been refused, in part, because of differences as to the number of telephone calls, the address of the sponsor's parents, the precise date of meeting and the date when the sponsor started to learn the partner's language, in this case *Bangla*. These raise questions about ECOs' understanding of evidential issues.

However, important differences with the past must be noted. Accountability and transparency in all areas of government have increased including in UKvisas. Previously private instructions have been placed on web sites. User panels meet regularly. ILPA members' mailings publish correspondence between practitioners and the service. Commentators have access to Independent Monitors' Reports, UKvisas Annual Reports, National Audit Office investigations and Select Committee Reports. Some of these are considered and synthesised in Wray (2006b). Other more recent documentation is referred to here. The Independent Monitor has noted ECOs' "open-minded responsiveness" and "thirst for good practice development and guidance" (Costelloe Baker 2006:8). My field visit discussed below was arranged swiftly and I was treated throughout with courtesy and openness. At one post, I was asked to brief senior staff as to my impressions, and was later advised that this had led to some changes in practice.

Refusal rates in marriage cases are now significantly lower than under primary purpose (Wray 2006c:164). Making an application is now quicker and easier due to

outsourcing and the creation of local offices. While long queues for settlement decisions have mostly been eliminated on the subcontinent (Wray 2006b:115-6), those reapplying or with an 'immigration history' may be subject to a longer wait (Home Affairs Committee 2006.III:287). The emphasis on speed has arguably been at the expense of quality (Home Affairs Committee 2006.I:144) but dissatisfaction tends to be focused on a minority of poor decisions.

6.5.2 The field study

In January 2006, I visited three entry clearance posts on the Indian sub-continent over ten days. In total, I interviewed 13 Entry Clearance Officers, 7 Entry Clearance Managers, 5 locally appointed staff and 3 senior staff, using semi-structured interviews that frequently merged into wide-ranging informal discussions on a range of issues. I observed all aspects of the decision-making process, including twenty-two interviews (not all marriage). I looked at pending appeals at each post and, at one post, had meetings with the High Commissioner and Forced Marriage Unit. I spent social time, outside working hours, with staff at two posts.

Many interesting points beyond the scope of this thesis arose out of my visit and these are discussed elsewhere (Wray 2006b). The focus in this section is upon the entry clearance officer as a decision-maker in marriage applications.

6.5.3 The entry clearance officer

Only ECOs may issue or refuse a visa. They are supported by administrative staff, often locally appointed, and supervised by Entry Clearance Managers although, as discussed elsewhere (Wray 2006b:127-8, Costelloe Baker 2007:41, Home Affairs Committee 2006.I:40), the adequacy of supervision and quality control remain live issues.

ECOs are civil servants appointed at executive officer level from the Home Office or the equivalent grade in the Foreign and Commonwealth Office. I met some staff who were educated beyond the minimum requirements, with graduate or post-graduate qualifications. I was advised that the FCO has difficulty recruiting sufficient volunteers for visa work. The immigration service has recruited widely in recent times and senior staff commented that not all new staff seem sufficiently experienced (a concern not confined to entry clearance, see Woodfield et al. 2007:vi) and which is now being remedied (Home Affairs Committee 2006.II:50).

Staff seemed tightly knit, often socialising with each other or with other High Commission staff. In two posts, accommodation and facilities such as a bar, shop and swimming pool were available on the High Commission compound. While not cited as a reason for taking the job, staff enjoyed a better lifestyle than they might reasonably expect in the UK with cooks, cleaners and drivers. Life seemed relatively carefree, with fair amounts of leisure time and disposable income by comparison with similarly situated individuals in the UK.

A number of staff expressed an interest in and sympathy for local culture. I was struck, in my informal discussions, by the predominance of socially liberal views and the absence of the type of hostile or contemptuous attitudes towards immigrants that might be expected from the account given in chapter 5. It is possible that staff who held such views chose not to express them in my presence, but the staff I did talk to told me that such officers were a tiny minority.

Relationships between local and UK staff were cordial. However, I did not get the impression that UK staff frequently mixed socially with them or with others in the local population (see also Home Affairs Committee 2006.I:39). I was advised that several ECOs are of South Asian descent although, except for one who said she was posted close to relatives, they were not necessarily matched to their area of origin.

As well as being somewhat detached from the society in which they work, ECOs are removed physically and perhaps psychologically from the UK, even given modern forms of communication and transport. Some ECOs undertake regular postings abroad, although these may be interspersed with periods in the UK and this is one of the attractions of the job. Too much should not be extrapolated from a few social meetings, but there seemed to be relatively little interest in or discussion of current events in the UK. This detachment may help explain how the entry clearance service, in the past, easily adopted an exclusionary culture that was arguably out of step with contemporary values.

During my visit, the debate about terror, immigration and integration, so prominent in the UK and discussed earlier in this chapter, seemed of relatively little interest. More significantly, cultural issues that might have local implications such as forced or arranged marriages were not of great concern either. ECOs spoke sympathetically about the wish of diasporas to maintain family links and of local family life and marriage arrangements. The official (not an ECO) who ran the forced marriage unit that I visited had a sophisticated understanding of the problem, its extent and the

limits of intervention. She opposed raising the minimum age for sponsorship to 21 because of the genuine marriages it would affect. It is arguable that the staff I encountered were, on average, more knowledgeable about and accepting of cultural difference than the majority UK-based population. While they may not have been entirely representative, I was struck by the gap between my expectations, based on the literature discussed in chapter 5, and the actuality.

These qualities were reflected in much of the work I saw ECOs do. I observed them treat applications pragmatically and humanely, for example, issuing a visa to a son, just over-age, when the rest of the immediate family were entering the UK. I saw ECOs search an application for evidence that could satisfy them and express regret when they had to refuse. One application failed on maintenance, but the sponsor had applied for a job with the police. Issuing the refusal, the ECO commented, "I hope he gets his job before the appeal". There was thus some lack of congruity between the outlook and attitudes of the ECOs I met and the problematic type of decision discussed above.

6.5.4 The entry clearance process

Shadowing ECOs gave me some sense of how they experience the work. I sat beside them as they processed applications and sat behind them as they conducted interviews. They were mostly happy to discuss their reasoning.

Entry clearance is a large-scale administrative process with much emphasis on targets, systems and turnover. The emphasis of internal reform in the past period has largely been upon improving efficiency with some welcome results (Wray 2006b:113) although there seems to have been more emphasis recently on quality (Costelloe Baker 2007:5-6, 16). However, the drive to efficiency combined with increased numbers of applications (Brodie 2007:147-8) means ECOs may have to process a large number of applications in a short period. Pressure is ameliorated by use of outsourcing to receive applications and of local staff to undertake administrative processes. Additional staff may be seconded to cope with seasonal peaks. Nonetheless, on a day-to-day basis, the time available to consider an application is primarily determined by the number of applications received (for a further discussion, see Wray 2006b:115-7, Home Affairs Committee 2006.I:40-3). Several ECOs mentioned that they found the job pressurised.

Once submitted and processed, all applications are seen by an ECO who decides whether to issue or refuse a visa or call for interview. Unofficial rules of practice seem to apply. I was told several times that settlement visas would not be refused without an interview, unless the ECO believed that the applicant clearly could not meet the rules. They did not envisage refusing on 'intention to live together' without an interview.

Interviews take place some weeks after the initial application and may involve a different ECO. Reasons for interview may be noted briefly on the file, but ECOs have discretion as to the questions asked. This may lead to deeper inquiry into issues that would have been accepted on the paperwork had the applicant not been called for interview for another reason. After the interview, the ECO will either issue a visa or write and serve a refusal notice. ECOs use standard paragraphs that are adapted to the particular case. Some of the instances of poor decision-making discussed above were due to poor quality standard wording, although I was assured that the worst examples I saw were no longer in use.

Administratively, it is easier to issue than to refuse a visa and several ECOs commented that, far from there being an institutional bias towards refusal, the pressure was to issue (an argument made elsewhere in the immigration system; Woodfield *at al.* 2007:22). I did observe ECOs issue visas where they had some doubts, but it was not clear that, taking the standard of proof into account, they were wrong to do so.

It is likely that ECOs do not have time to ensure all refusals are well formulated, an observation that has been made elsewhere (Wray 2006b:122; Costelloe Baker 2006:39-40). Refusals are not always closely tied to the Immigration Rules (Home Affairs Committee 2006I:37). However, a recent improvement in the quality of (non-settlement) refusal notices has been noted (Costelloe Baker (2007:19).

6.5.5 ECOs and the legal system

ECOs were conscious of the element of judgement required in their work. When asked about the skills and attributes of a good entry clearance officer, qualities such as fairness, open-mindedness and objectivity were mentioned alongside administrative skills. However, they did not relate these qualities to the legal requirements of their decision-making and some seemed alienated from the legal system. The Home Affairs

Committee (2006.I:150) also refers to “a lack of mutual confidence between front-line staff and Immigration Judges”.

Immigration judges were described as failing to understand the reality of entry clearance, of having a romanticised view of the sub-continent and of being over-persuaded by plausible sponsors,¹⁷⁷ while appeal decisions were described as too numerous and too inconsistent to offer useful guidance. The main purpose of studying appeals was to learn which phrases judges dislike, so that they may be avoided. ECOs told me that they sometimes issued visas because they believed an appeal would succeed rather than being personally persuaded of the application’s merits.

This superficial approach may be related to poor understanding of legal decision-making. At one post, I was asked what immigration judges look for. I went through a marriage application refusal notice explaining the likely objections to particular findings. Staff were unused to such reasoning, but were interested in my explanations.¹⁷⁸

ECOs thus aspired to be fair and objective but saw legal standards as exterior to and even in tension with such values. They were a hurdle to be negotiated or compromised with rather than being integral to and supportive of their decision-making. This tendency has been observed elsewhere and was discussed in chapter 2.

Although one interviewed ECO had legal qualifications, most had no formal training in law.¹⁷⁹ Materials other than the Immigration Rules and the Diplomatic Service Procedures were not routinely used or even available. I observed occasional significant gaps in knowledge, as when an ECO dealt with an application for children to join their UK-resident father without taking account of the rules applying to children joining one parent. It was easy to understand why complex cases might be poorly understood and become mired in confusion (for an example, see Menski 2007).

Most ECOs, however, were aware of the content of the rules and sought to apply them to the best of their ability. But it was less apparent that they had internalised legal values relating to proof and evidence. So, while most whom I asked correctly identified and explained the standard of proof, not all understood that, in practice, it requires a visa to be issued even if there are substantial doubts. One ECO, for

¹⁷⁷ Another explanation of high success rate when sponsors appear is the frequent absence of a Home Office representative (around 35% of appeals in 2003-4 although the position has since improved: Home Affairs Committee 2006.I:248-9).

¹⁷⁸ The service is taking steps to provide additional training to ECOs in this area: Wray (2006b:115).

¹⁷⁹ See Wray (2006b:114) and Home Affairs Committee (2006.I:38-40) for a discussion of ECO training.

example, told me that she liked to see “real hard evidence” before issuing. In other instances, ECOs expressed a strong preference for certain forms of evidence, such as a local authority property inspection report, although the immigration rules do not specify how compliance is to be demonstrated. This arguably imprecise approach to evidential questions is critical when combined with the fact-finding role of ECOs.

6.5.6 ECO fact-finding: documentary evidence and forgery

Fact-finding is central to visa work. To determine whether the evidence presented by the applicant shows compliance with the Immigration Rules, the ECOs must draw factual inferences from evidence. Evidence may be purely documentary including marriage certificates, bank statements, photo albums or phone records. In other cases, the applicant may be called for interview. This section discusses the attitudes ECOs adopted towards documentary evidence generally. These usually arose out of the requirement to show that the parties are able to maintain and accommodate themselves without recourse to public funds. The following section considers how ECOs approached the test that is unique to marriage and allied applications: that the parties intend to live together.¹⁸⁰

Forgery was a major preoccupation at all the posts I visited. ECOs believed that, for many living in the region, entry to the UK is highly desirable and that forged documents and other types of fraud are commonplace. During my stay, I saw documents that were, on their face, questionable. In one case, the same head had been superimposed on several wedding photos. In another, a PAYE slip purported to originate from ‘Norwich’. I was told that forged bank statements are commonplace, although I did not see any. I was also shown a website which offers forged documentation for sale.

Only a relatively small number of applications involved clearly forged documentation. More frequently, the issue shaded into questions of evidential value. ECOs believed that documents might be forged or might misrepresent the true position, for example, wage slips, tenancy agreements, bank statements and used phone cards. These are frequently dismissed as of little evidentiary weight as they might be manufactured or manipulated, although they could equally represent the only evidence available to the applicant. ECOs became involved in making judgements as

¹⁸⁰ All these requirements are found in para. 281 HC 395.

to the 'credibility' of certain propositions. For example, one doubted the probability of a new immigrant without English being offered the post of manager in a jewellery shop.

At some posts, Risk Assessment Units (discussed further in Wray 2006b:125) now investigate suspect documents, for example, checking that bank statements are genuine or phoning employers named in job offers. In other cases, the document may be rejected as being of insufficient evidentiary value without further enquiry although unsupported allegations of forgery should not now occur (Costelloe Baker 2006:27-8).

ECOs must therefore judge the probative value of any document. They must also determine the relative priority to be attached to detecting forgery. The ECOs I interviewed held a range of attitudes. Some were pragmatic, recognising that onerous evidential requirements encourage the submission of forged documents in otherwise genuine applications (see also Costelloe Baker 2006:27) and that almost any document, including those usually considered highly probative, may be forged or misleading. For example, a sponsor may take employment for the duration of the entry clearance process or local authority housing inspectors may be misinformed about the actual number of people resident. Some also regretted that the immigration rules do not acknowledge the support provided by extended Asian families, saying that they did not investigate documents too closely if they were confident that a couple would be supported.

On the other hand, some ECOs were more preoccupied with detecting and preventing fraud or misleading evidence and felt it important to send a clear message of deterrence. They argued that an applicant refused for these types of reason could either submit genuine documents at appeal or renew their application. Elsewhere (Wray 2006b:122-6), I have offered a critique of an over-emphasis on fraud, arguing that this may lead to the incorrect application of the standard of proof and the subordination of other institutional objectives.

6.5.7 ECO fact-finding: 'intention to live together'

ECOs have also to determine whether parties intend to live together. As with fraud, the actual extent of sham marriages is unknown (Home Affairs Committee 2006.III:90). ECOs must again make judgements based on their assessment of the risk and the priority they attach to detection. In chapter 5, I described decision-making that

seemed to rest on the assumption that nearly all family applications were fraudulent and an overwhelming preoccupation with detection of deceit.

This was not the case at the posts I visited. I was told repeatedly that the vast majority of marriages are genuine and that refusals on intention are rare. However, they were fairly frequent amongst appealed refusals where they had often been combined with other grounds, suggesting that 'intention' may be used to 'strengthen' a refusal. As with fraud, attitudes varied. Some ECOs took a pragmatic (and arguably legally correct) approach. They were aware that they could not detect every possible case and were reluctant to clog up the appeals system with doubtful refusals. Others were more stringent, arguing that post-entry controls were ineffective. One told me, in this context that "we are the gatekeepers".

When considering intention, ECOs searched for the signifiers of a bogus marriage, relying on their personal template of a genuine marriage in the region. Suspicions might be aroused by characteristics such as a large age gap, disability, a prior divorce or, according to some ECOs, a male applicant. Aspects of the marriage such as hasty arrangements, absence of photographs and lack of communication between or knowledge of each other might also be significant, particularly if the marriage was otherwise atypical. Thus, an arranged marriage between spouses deemed to be of typical age and relationship received relatively little attention. For example, an ECO considering what he regarded as a typical sub-continent marriage application between cousins, told me he was unconcerned at the absence of contact between them. In less conventional cases, however, evidence of the relationship was critical and the subject of lengthy interview.

The basis for beliefs about the appropriate degree of scrutiny was not clear. There seemed to be no reliable information as to the incidence and characteristics of bogus marriages on the sub-continent. There have been recent moves towards improving the quality of local information, but this seems to be confined to financial and related issues (Wray 2006b:126-7). I saw ECOs rely on information from local staff who told them, for example, that a method of sending money or a particular marriage ceremony were probable. There are dangers which I have discussed elsewhere (Wray 2006b:126-7) in such reliance. Most relevantly here, it is not uniformly available and

may not always be accurate.¹⁸¹ ECOs also often relied on their own beliefs, some of which they articulated for me as they made their decisions. These included that young South Asian men seek emigration to the UK, that it is unusual to marry a divorcee, that sophisticated urban Indians would have substantial knowledge of their spouse, that a loving couple would happily live anywhere and that adultery “does not happen” in traditional Bangladeshi society.

In cases viewed as atypical, the application was not predestined to fail, but ECOs were alert to a possible bogus marriage. Applicants would be called for interview and expected to give a sufficiently persuasive account of the marriage. This expectation was often fulfilled. In interviews, ECOs often seemed pleased and even made comments such as “that’s better” when applicants gave the ‘right’ answer.

However, some applicants failed to give an account regarded as sufficiently likely and refusal followed. I observed only one such instance during my visit. The applicant wife (aged 31) had married a man 27 years her senior. Her previous application had been refused partly on the grounds that the match would not be considered suitable in India. Before the interview, the ECO commented that parents might well consider that marriage to an older man in the UK was the best option for a daughter and that the previous refusal was reminiscent of primary purpose.

When asked to account for her husband’s divorce, the applicant said that the first wife had had a boyfriend whereas, in the first application, she had attributed it to the parties’ inability to have children. She also said that her husband worked in a clothes shop, whereas she had previously said he worked in a grocery. There were also problems with maintenance and the application was refused on those grounds and on intention to live together.

Despite the ECO’s good intentions, I found the renewed intention refusal also weak. The applicant maintained that her husband had not previously disclosed the boyfriend out of embarrassment, certainly a credible explanation. The inconsistency as to the job was puzzling, but seemed insubstantial to support a conclusion that intention to live together was absent. My impression was that this particular omission was the only tangible evidence of more subjective suspicions arising out of the applicant’s off-hand manner and brief answers.

¹⁸¹ At one post, I stayed with a friend’s family, prosperous business people. However, the area where they lived was described in a local country report as poor and working class.

This unfavourable impression may be contrasted with a fiancée interview (by a different ECO). The applicant had a sister and brother in the UK. No plans had been made for the wedding and while she recited the names of her fiancé's employer and his immediate family, she knew little else. The ECO issued the visa, in part, because of her "straightforward and honest demeanour". He also commented that he would not have issued, had the applicant been male.

Decisions on intention are thus highly subjective and rely upon whether the ECO's personal impression coincides with their conception of how a genuine applicant would appear. The risk is that ECOs may misinterpret the behaviour of the person in front of them, particularly if they already have negative pre-conceptions. This is further illustrated by another interview.

The UK husband was divorced and it was the wife's first marriage. Before the interview, the ECO told me he suspected the husband's bank statements were forged as the totals did not tally with the entries. Already suspicious, he found himself dissatisfied with the parties' inability to explain the bank statements and with the wife's lack of familiarity with the grounds of divorce. He intended to refuse both on maintenance (as discounting the bank statements, there was insufficient evidence of his finances) and intention to live together. However, a final perusal at the end of the interview revealed that he had misunderstood the statements and they were genuine. The 'intention' point fell away and the visa was issued.

There was sometimes a ritualistic air to questioning. One ECO apparently felt obliged to investigate 'intention' however improbable the alternative explanation. The interview involved an illiterate rural wife with two children who wanted to join her husband. The application had been referred for interview on the question of accommodation (the husband lived and worked in a hotel). This having been clarified, the ECO pursued the question of intention at length, asking both parties repeatedly about the other's interests and hobbies. The couple, used to a subsistence lifestyle, were baffled. The ECO became increasingly frustrated and was relieved when he established that the husband knew that the wife liked cooking rice and the wife knew that the husband ate at the hotel. He then felt able to issue a visa.

In the instances discussed here, it is clear that, in applying the rule on intention, ECOs make a series of judgements as to the probability of certain things being what they are. These judgements will not be consciously articulated on each occasion and

perhaps correspond to what Woodfield et al. (2007:25) describe as the 'instinct' felt by immigration officers at ports.

The first judgement is the probability of a particular marriage being sham. This depends upon the ECO's view as to the prevalence and characteristics of sham marriages in the locality. The ECO must also decide whether further investigation is merited, which may depend on the importance that the ECO attaches to detecting suspected bogus marriages and on other organisational factors including pressure of work. Having decided to pursue the question of intention, the ECO must decide whether the picture presented of the marriage conforms to his conception of how a genuinely married couple would behave. At all points, evidence will be tested according to the ECO's view as to the evidential burden on the applicant.

This series of judgements explains why decisions can go wrong despite good intentions by ECOs. They have little firm evidence to rely on and small calibrations in their views may make a significant difference in a few cases. A marriage that is atypical is scrutinised more intensely and misinterpretations are necessarily more probable. Suspicion as to one aspect of the application may affect the view taken of other aspects. Personal impressions, however misleading, clearly count (as they do elsewhere in the immigration system; see Woodfield et al. 2007:20). Experienced and skilled ECOs may usually avoid these pitfalls. Others may not.

While this analysis explains how controversial decisions on intention get made, it is less clear why they seem to be confined to particular posts. Refusal rates for settlement applications in Africa and South Asia are similar at around 20%, but are tiny (often less than 0.5%) elsewhere (Wray 2006c:164). Higher refusal rates in poor countries are usually attributed to pressure to emigrate, prevalence of fraud and corruption and lesser ability to meet financial criteria. It is not possible here to evaluate the truth of these assertions. However, refusals on 'intention to live together' seem to be over-represented on the Indian subcontinent. Wray (2006c:165) found that 33 out of 52 (63.5%) tribunal appeals on intention were from the Indian subcontinent,¹⁸² although this region accounted for around a third of all settlement applications. More than half of these appeals were successful. It seems that, as with primary purpose, refusals on intention to live together are particularly associated with the subcontinent. Yet prejudice and crude stereotyping were largely absent among the

¹⁸² The remaining cases were from other poor, often Muslim, countries.

ECOs I met there, and a plausible explanation for the over-representation must lie elsewhere.

It was mentioned earlier that ECOs look for the signifiers of a bogus marriage. All those I met appreciated that the indications usual in a Western relationship might be absent. However, they had little other material to rely on. Lacking other tools, they fell back upon modes of investigation inherited through generations of ECOs who have worked at these posts. This may account for the ritualistic aspect of questioning that I observed. Senior staff did not accept this suggestion, arguing that those who had been present during the era of primary purpose would, by now, have moved on. However, when I asked ECOs how they learnt about their job, they often told me that it was through observing more experienced colleagues in post (as noted elsewhere in the immigration service; Woodfield et al. 2007:23). Elsewhere (Wray 2006b:120), I noted that a few ECOs had adopted an aggressive and confrontational interviewing style reminiscent of that described in chapter 5.

This is consistent with the emphasis placed by management on local knowledge (Wray 2006b:126-7, Brodie 2007:151). The drawback of this otherwise laudable aim is that inaccurate assumptions and inappropriate local practices may be inadvertently perpetuated over generations. In this case, while ECOs were not personally hostile to the arranged marriage, they were, through their institutional legacy, inclined to a particular style of investigation and refusal in those instances where suspicions were aroused.

6.5.8 Administrative practice: discussion

Throughout this thesis, I have argued that all those engaged in the control of immigration through marriage have used their powers to reflect and give effect to particular assumptions and beliefs. To the extent that these have been held in common, they resulted in a degree of consistency across institutions. This section suggests that, so far as entry clearance is concerned, the position has somewhat changed. Earlier in this chapter, I identified as a key political priority, a growing drive towards conformity on cultural issues. Early marriages, first-cousin marriages and other traditionally arranged marriages are increasingly seen as problematic. Yet it is precisely these marriages that seem least likely to attract particular scrutiny. There remains a residue of refusals that are reminiscent of the attitudes described in chapter 5. I have argued that they are consequent on the particular issues and legacy of entry

clearance on the sub-continent. Unlike the practices discussed in chapter 5, they do not represent an attempt to fulfil a specific political objective.

The other major preoccupation discussed in this chapter is that of compliance. I have also argued that an undesirable immigrant is one who does not acknowledge state supremacy in immigration matters. There are some indications of support for this perspective at entry clearance level, for example, the longer queues for those who have an 'immigration history' and I observed an aggressive interview of a failed asylum seeker who had married and now sought to regularise his position. The individual, however, received his visa.¹⁸³

In general, however, my observations suggest that, compared to the past, entry clearance is not deeply engaged in ensuring the fulfilment of these priorities in the way described in chapter 5. The ECOs I met seemed to have little personal commitment towards these aims and management was preoccupied with efficiency and quality control.

This preoccupation, and the attitudes that support it are, however, arguably aligned at a deeper level with broader political aims. In the past, the over-riding aim of immigration control was to minimise non-white immigration, and entry clearance was the means chosen to achieve this. The first part of this chapter described how this has changed. Some state-sanctioned immigration is now seen as both inevitable and desirable and skin colour is no longer so decisive a factor. Despite anxiety about certain practices, there is no desire to alienate minority communities who are substantial electoral constituencies. A culture of refusal at entry clearance level acts against the UK's wider interests in a globalised economy.¹⁸⁴ The perception is that the introduction of e-borders, biometric visas and a points system for economic migration will reduce the discretionary element of entry clearance (although less in marriage than elsewhere). The Home Affairs Committee (2006.I:152) found that the focus of control "can no longer remain so heavily weighted towards initial entry and border control". These considerations may have influenced the managerial culture in which ECOs work; certainly, many of the attitudes I observed were consistent with them.

¹⁸³ Evidence submitted by Brides Without Borders to the Home Affairs Committee suggests varying attitudes to these applicants. Staff conduct at Jordan is described as "wonderful" and at DRC as "unacceptable" (Home Affairs Committee 2006.III:346-54).

¹⁸⁴ This point was made to me explicitly by the High Commissioner at one of the posts I visited. Significantly, the Home Affairs Committee persistently refers to applicants as 'customers'; see, for example, 2006.I:155.

If the reputation of entry clearance has started slowly to improve, other areas such as asylum decision-making have become the focus for criticism. Most relevantly for this thesis, I analysed earlier in this chapter the treatment of couples where one party has no status in the UK and faces removal. Rather than disappearing, harsh decision-making and exclusionary practices may have been displaced to other parts of the immigration system where they are more effective and do less damage. The change in attitudes of ECOs between those reported in chapter 5 and those I have described here may be less coincidental than first appears. The position may also change again in the future, as political priorities turn again in a more exclusionary direction, at least so far as certain immigrants or types of immigrants are concerned. The most recent proposals, discussed earlier in this chapter, may spark a reorientation of the entry clearance service back towards subjective and stereotyped decision-making in certain situations.

6.6 Conclusion

This chapter has attempted to capture the complexity and fluidity of the past ten years, during which control of marriage immigration has become enmeshed in wider debates about integration, cohesion and the limits of state power. 'Modern' forms of relationship such as cohabitating couples and same sex relationships have been afforded official recognition in the UK, while the arranged marriage among migrant communities has been implicitly associated with the archaic and coercive. Yet, despite clear unease at the continuation of early international arranged marriages, until very recently, the government did not act decisively against them, circling repeatedly around the issue without daring to strike. The situation is about to change, given recent proposals aimed at the forced marriage, but the government has hitherto been cautious about introducing measures that may alienate well-established communities. To that extent, these communities have achieved a protected status and a status of belonging that eluded them in earlier periods. Nonetheless, the terms of the current forced marriage and 'integration' debates make it clear that this is not without reservation. Most affected will be poorly educated and less prosperous families of migrant origin, establishing a new fault line that may intersect with or even cut across older demarcations.

If communities of South Asian origin have achieved some limited and provisional measure of inclusion, others have felt the force of exclusionary measures. They are targets not specifically because of their racial or national origins (although the prevalence of certain nationalities may have increased the perception of threat) but because, as illegal entrants, failed asylum seekers or over-stayers, they lack status in the UK. There have been substantial efforts made to ensure that these individuals do not gain rights through marriage to UK or EEA residents without going through the hurdle of entry clearance. The difficulties they face in doing so represent an ordeal unrelated to the quality of the marriage but which ensures that only those with sufficient commitment succeed. Where applicants fail, their UK-resident spouses must choose separation or exile. The dismissive manner of their treatment suggests that their choice of spouse has placed into question their own status as belongers where this challenges the primacy of state power. It is only recently that the courts have begun to challenge absolute state power over these individuals.

These two themes, the partial and ambivalent incorporation of minorities and the assertion of state supremacy, may be detected in many of the legislative changes described here, which have seen attempts to override human rights and other norms. The analysis of judicial decision-making suggests that, for most of this period, the courts have been unwilling to interfere with these priorities even when government power has seemed over-bearing and disproportionate. This seems to be connected to wider institutional concerns about the role of the courts after the Human Rights Act perhaps reinforced by the traditional deference of the courts in immigration matters. Recent decisions suggest that the courts are becoming less willing to be complicit in the exclusion of certain individuals from the arena of rights and justice because of their immigration status. However, judges are careful to ground their authority for doing this in the legal principles of the ECHR, which they are now mandated to observe. Their challenge to government supremacy is set within the traditional confines of judicial authority. It nonetheless represents the making of particular choices within those confines and suggests a lack of congruence between legislative and judicial priorities that was largely absent in earlier periods.

In the period discussed in earlier chapters, entry clearance played a vital role in ensuring the exclusion of undesirable spouses. The strategies and techniques developed during that era have been analysed in depth in chapter 5. While some recent entry clearance decisions are still reminiscent of this earlier period and have

contributed to a continuing poor public perception of the service, the available evidence suggests that the service is no longer so deeply engaged in perpetuating an exclusionary style of decision-making. This is not because harsh decisions are no longer made but because, in the light of the new priorities discussed in this chapter, an exclusionary entry clearance service no longer serves the dominant goals of policy as well as it used to. The decisions discussed earlier and highlighted by, among others, *Brides Without Borders*, suggest investigation elsewhere in the immigration service may be called for, an investigation that is beyond the scope of this thesis. It is also a position that may change, given the recent attacks on certain types of marriage applicant.

Previous chapters identified a set of beliefs and assumptions that were held with some consistency across three institutions. These were not often articulated, but formed part of the unspoken substrata of attitudes that enabled a pattern to emerge. It is more difficult to identify a constant set of beliefs in the period discussed in this chapter. This ambivalence suggests that a number of competing and overlapping values are now in play. These include a belief in personal freedom, anxiety about aspects of minorities' personal lives and broad acceptance that these minorities are now part of civil society even while the state maintains a role in regulating family forms viewed as oppressive or otherwise unsatisfactory.

Similar observations may thus be made about the other major theme: the assertion of state power in immigration matters. This has always been central to immigration control and was an unspoken assumption during most of the period described in earlier chapters. The recent period has seen new challenges in immigration, demanding new responses. These have been played out in Parliament and in the courts, requiring these institutions to act decisively and explicitly on behalf of the state. This has been particularly apparent in the legislative field. Yet, there is also the distinct impression of overkill; if the state were able to control immigration, it would not be necessary to keep legislating on the subject. Furthermore, there is a price for "firm" immigration control and it is paid not only by the unwanted immigrant, but by all members of society (for more discussion on this, see Hollifield 2000; Joppke 1998). The point at which accepting state authority causes irreconcilable conflict with other deeply held values will vary by individual and institution, but the account given in this chapter suggests that for some, this point has been reached. In particular, some of the House of Lords and Court of Appeal decisions discussed here suggest that it is

the case for some members of the judiciary (even if, as already acknowledged, they derive their authority to challenge the government from powers granted to them by the legislature).

The excessive quantity of legislation and the first stirrings of judicial resistance suggest that the assumption of state supremacy has become something less powerful, a value that must compete with other values. This may be a transitory event provoked by an excess of government zeal. The discussion of case law in chapter 4 suggests that the judiciary also briefly entertained moments of rebellion during the era of primary purpose without lasting effect. On the other hand, global forces are here to stay while the style of judgement in, for example, *Huang* and *Baiai* suggests that judges are starting to draw inspiration from human rights discourse that may indicate a deeper shift in their sense of their responsibilities.

If, at least momentarily, the unfettered authority of the state has moved from assumption to value, this is because of the growing weight of competing incongruent beliefs. In previous chapters, I identified assumptions about the outsider status of immigrants and their spouses, although I suggested, that even then, they were not unqualified. The changes discussed in this chapter have made it much more difficult to distinguish between 'belongers' and others. That it is not a simple task to identify, isolate and exclude strangers has become part of the background against which individuals and institutions work and this is reflected in some of the ambiguities discussed here.

This problem of identifying the stranger is particularly acute in marriage questions where state power reaches deep into individuals' personal lives. Legal measures have had a fraught judicial history in the past ten years suggesting that amongst the values competing with the supremacy of state power is a belief in limits upon its powers in this regard. However, the struggle looks likely to continue for the foreseeable future. The most recent proposals, discussed earlier in this chapter, including close scrutiny of certain marriages, suggest the state is not yet ready to abandon the assertion of its power in this area.

Chapter 7: Conclusion - A Stranger in the Home

7.1 Summary of the thesis

Chapter 1 introduced the thesis and provided historical context that suggests that some of the attitudes identified in the rest of the thesis had deep roots. In particular, the long struggle over the nationality of married women supports the argument that marriage and national belonging have long been linked especially for women, while aspects of the implementation of the Aliens Act 1905 anticipate later administrative practices.

Chapter 2 developed the theoretical perspective used in the thesis. It adopted the premise that discretion is involved in almost all decision-making, including where powers may appear almost unconstrained (such as a legislature) or where discretion may be thought to be absent or minimal (such as administrative decisions). It argued that there is a common element in all decision-making, which is that the decision-maker relies, eventually if not at once, upon values, beliefs and assumptions that cannot be proved through deductive reasoning. It also argued that there is no incommensurable conflict between the specialised nature of judicial reasoning and the reasoning adopted in other settings. The approach proposed in the chapter is consistent with major strands of jurisprudential thought as well as with the approach adopted in other disciplines. There is a spectrum of decision-making behaviour ranging from conscious reflection of the type described by Dworkin at one end to unreflective reliance upon assumptions at the other with most decisions lying somewhere along the spectrum. Nonetheless, all decisions rest eventually on taken-for-granted assumptions. Where these are held in common there will be congruence in decision-making between institutions. The value of the approach is that it permits examination not only of what decisions are made but why they are made in the way they are.

Chapter 3 considered decisions made by the legislature between 1962 (when immigration from the Commonwealth was first formally regulated) and 1997. At the beginning of the period, there was a firm commitment to the entry of wives to join their immigrant husbands. Husbands seeking to join wives were always treated more conditionally. Over time, this gave way to deep suspicion about claims by both husbands and wives, particularly when these originated on the Indian sub-continent.

Women and children seeking family reunion were dealt with mainly through the administrative means discussed in chapter 5 while the primary purpose rule targeted husbands and some wives seeking to enter the UK to form new families. The chapter identifies beliefs and assumptions about race, immigration, gender relations and marriage as well as specific institutional values of Parliament.

Judicial decision-making during the same period was considered in chapter 4. It discussed decisions reached not only in the major battlefield of primary purpose but also in other less well-publicised areas including marriages of convenience, domicile, intention to live together and the requirement that the parties have met. While judges were cautious in expressing beliefs that supported decision-making and while there are suggestions of judicial ambivalence, doubts were subordinated to judicial deference both to legislators and administrative decision-makers. While judges were undoubtedly conscious of the limitations of their role, the chapter argued that not all decisions were mandated by existing legal principles and the choices made reveal values, beliefs and assumptions similar to those identified in chapter 3.

Chapter 5 contained a detailed investigation into the conduct of the entry clearance service from inception until 1997, a period during which it achieved notoriety for its exclusionary decision-making particularly on the Indian sub-continent. Drawing on contemporary accounts and newspaper reports, the chapter described a consistent pattern of decision-making that relied upon highly unfavourable assumptions about the applicants before them. While such attitudes were to a degree tempered or concealed within the other institutions, the entry clearance service worked in a largely unregulated environment where countervailing pressures and values were absent. Thus, there was not only congruity in the assumptions upon which all institutions worked but a degree of symbiosis also. The work of the entry clearance service, largely hidden from view, permitted other institutions to distance themselves from the practices necessary to achieve an aim desired by all; the minimisation of non-white immigration.

Chapter 6 considered the position since 1997. It argued that, while the legacy of the era discussed in earlier chapters lingers on, important changes must also be acknowledged. There has been partial incorporation of older immigrant groups and they represent an electoral force even while there is concern about integration and cohesion. New forms of immigration and ongoing anxiety about security have led to new fears and new measures. Race and racism have become more complex

phenomena and are not always detectable through an emphasis on skin colour. The assertion of state hegemony has been increasingly crudely drawn particularly in relation to immigration and security issues. Legislative, judicial and administrative decision-making since 1997 reflect these new emphases and the contradictions contained within them. The picture has become more complex and difficult to analyse coherently.

7.2 Values, beliefs and assumptions

The thesis focuses on beliefs, values and assumptions held by decision-makers in relation to marriage immigration. It divides into two unequal segments, one covering 1962 to 1997 and the other the period after 1997. While it is convenient to divide the period in this way, it is also an obvious oversimplification. Attitudes did not alter overnight in 1997. Nonetheless, the election of the Labour government and the removal of 'primary purpose' was a pivotal moment of change.

It would also be inaccurate to claim that the same attitudes prevailed to the same extent from 1962 until 1997. While chapters 3, 4 and 5 do identify consistent strands, their evolution and fluctuation relative to each other are also brought out. Some values, beliefs and assumptions seem to have been consistently held for much of the entire period. Others did not emerge straight away or were modified. Subject to these qualifications, however, it is possible to summarise together the findings of chapters 3, 4 and 5 and to consider the position after 1997 separately.

7.2.1 Race

Underlying almost all discourse between 1962 and 1997 was the assumption that skin colour mattered and that further non-white immigration was highly undesirable. The racial aspect of this was often understated and 'immigration' treated as synonymous with 'non-white immigration'. Decisions made by all three institutions considered here were predicated on the basis that its minimisation was a priority.

Government figures usually avoided explicitly racial discourse although some were more outspoken than others. However, whatever their private beliefs, almost all tolerated or encouraged administrative practices that were directed towards the exclusion of particular communities. Aspects of administrative conduct suggest attitudes within the entry clearance service went beyond willingness to execute a

distasteful but necessary task to contempt for these communities and even a wish to punish them, including, as the 'virginity tests' suggest, sexually, for their persistence in making illegitimate claims for entry. The judiciary expressed opinions only very rarely but decision-making mostly supported exclusionary purposes, particularly as the period went on. Although non-white individuals were occasionally treated sympathetically, skin colour and national origin were almost always critical defining characteristics. For all three institutions, perception of the threat posed by non-white immigrants and their families resulted in their reduction to stereotypes, a flattening of their individuality.

In the period after 1997, there was some challenge to these assumptions due to increases in immigration including white immigration and the partial integration of non-white communities. Signifiers of difference now, it is suggested, centre more on culture or religion with some regard for social class. This does not represent an abrupt switch. Cultural difference has always intertwined with hostility towards non-white immigration, as the distaste for the arranged marriage discussed in earlier chapters demonstrates. However, the role played by skin colour alone has arguably diminished and certain types of cultural difference have increased in importance, explaining the continued focus upon the arranged marriage.

7.2.2 The arranged marriage

Attitudes towards the arranged marriage intersect with assumptions about race. During the period discussed in chapters 3, 4 and 5, the arranged marriage was openly seen as inferior to Western models. Many assumed it would die out over time; others believed it would continue as a vehicle for immigration. It was widely assumed that there was little or no emotional investment in such marriages and that separation would cause little hardship. The complexity of the system, its place in Asian family life and the personal commitment of protagonists towards its fulfilment were barely understood.

Recent acknowledgement of the plurality of relationships has mostly not extended to international arranged marriages. Their perceived inferiority to the liberal Western model is largely assumed and the government has made clear its reservations about their continuation. While aspects of such marriages are problematic as the discussion

of the literature in chapter 6 demonstrates, all familial models have drawbacks and the particular critical focus upon arranged marriages suggests other concerns are in play. Nonetheless, and perhaps against expectation, the thesis found some disparity between this hostility and current entry clearance practice. Provided marriages conform to an officer's preconception of a traditional arranged marriage, they are usually prepared to accept it. Refused cases tend to be those perceived as atypical. This lack of congruity arguably reflects ambivalence within society about the extent of justifiable government interference in the personal lives of well-established minorities. It remains to be seen how and whether this will be resolved and a more consistent set of attitudes adopted.

7.2.3 Immigration

If, for much of the period between 1962 and 1997, the non-white character of immigration was seen to be its fundamental problem, this was reinforced by many other beliefs. Immigration was seen as an accretion of numbers sharing a limited pot of resources and a single one-way journey rather than part of a pattern of global movement. While emigration did not usually feature in accounts, immigration was widely perceived as fundamentally disadvantageous for the host society causing labour displacement and a drain on social resources. Its benefits, economic and social, were rarely if ever articulated in the UK and the gains were assumed to be purely to the immigrant.

Family migration was viewed through the prism of these beliefs. It posed a particular threat because, under the guise of humanity, it permitted the entry of new workers and established a potentially endless chain of migration. These beliefs, compounded by the attitudes towards race and the arranged marriage just described, ensured that potential immigrants were viewed with deep scepticism and abuse was assumed to be ubiquitous and endemic.

The benefits of immigration were better understood after 1997, provided it involved the right sort of immigrant, entering in a state-approved manner. The rise of the 'sham marriage' and the treatment of those without leave who married or have sought to marry in the UK reflects this preoccupation. The recent past has seen a resurgence of anxiety about immigration mainly from the eastern fringes of the EU expressed by senior politicians once again in terms of labour displacement and the

strain upon social resources. There is a clear degree of political strategy at play here but one which assumes that the public perception of immigration remains largely negative.

7.2.4 Gender

Assumptions about gender have been a major force. This has had several manifestations. It was for many years assumed that only men move for work and that wives and children were 'secondary' migrants. Parties who conformed to this conventional pattern were treated more favourably than those who did not. The families of male alien workers were usually permitted to enter. In the early period of Commonwealth immigration control, married men with families were arguably seen as a safer prospect than single (impliedly sexually predatory) men. This is consistent with the particular protection offered to wives and children in the 1962 Act, and which was not repealed until 1988, although the entry of family members soon became the focus of administrative measures.

Where husbands sought to join wives, they were assumed to be disguised 'primary' migrants entering for economic purposes. This assumption was given explicit expression in immigration control through the ban on husbands. When overt sex discrimination was no longer possible, the primary purpose rule was applied as if male immigrants moved primarily for economic reasons.

Also present have been corresponding assumptions about women. In particular, they have often been seen as the passive instruments of the will of their husbands and fathers, their identity subsumed into that of their male relatives. This was literally the case with the rules on married women's nationality discussed in the introduction, but was implicitly so during most of the period under discussion here, particularly where South Asian women were concerned, assumptions about race and gender dovetailing. Women who married outsiders lost their British identity and became outsiders themselves.

Paradoxically however, women were expected to accept the consequences of marriages that had been, it was implied, decided almost without operation of their will, even where this meant leaving the country of their birth or long term residence. In this respect, the assumptions of decision-makers recall the underlying premise of much nineteenth century fiction; that women make only one significant decision in

their lives, whom to marry. All else leads up to or flows from the wisdom of that choice.

Attitudes towards gender have changed. Sexually discriminatory rules would have been unacceptable in the period after 1997 and not only for legal reasons. The debate has become framed in different terms. 'Modern' forms of relationship including unmarried and same sex partnerships have been officially acknowledged. 'Modern' marriages, including those where the husband joins the wife, are largely seen as normal. Nonetheless, there are implicit parameters of 'normality' that are gender determined and relationships that fall outside these are still treated sceptically, as chapter 6 demonstrates. Thus men who marry much older women are subject to particular doubt (and may now be suspected to be party to a forced marriage). Men are also still more likely to be considered as economic migrants particularly if the relationship is not otherwise 'modern'.

7.2.5 Who belongs?

In this thesis, there has been frequent reference to 'belongers' and 'outsiders'. The distinction has been essential in determining who may enjoy family life in the UK on their own terms. Decision-making, as analysed in this thesis (and as the literature suggests; see Yuval-Davis et al. 2005:526-31), suggests that belonging is a fluctuating not a static concept and cannot be determined solely by reference to nationality or other formal status. The thesis has argued that non-white residents including nationals and those born in the UK are not unqualified 'belongers'. This status must be earned through adoption of a British identity in certain key respects. Thus, men who rely on domicile in the sub-continent to assert legal rights to certain forms of divorce or marriage have been treated unsympathetically. Women who marry 'wrongly' and, in consequence, wish to import unwanted male immigrants face loss of belonging in the sense that they are unable to enjoy married life in this country. Those who challenge state authority in immigration matters, through deceit or circumvention of the rules, are liable to be excluded even where this has no bearing on their claim as a spouse.

Exclusion has never been completely synonymous with skin colour except in extreme cases. Nonetheless, the status of non-white populations has always been contingent and provisional even into the second generation. Since 1997, skin colour and 'belonging' have become even more decoupled so that some white immigrants

(notably those from Eastern Europe) have been seen as a threat, while factors such as cultural conformity, social class and compliance with state regulation have become more critical in determining the belonging status of the non-white population.

7.2.6 A hierarchy of marriages

It has been noted at various places throughout the thesis that there is an implicit hierarchy of acceptable marriages. The place that a marriage occupies in the hierarchy depends partly upon formal legal rules but also, it is submitted, upon how it is perceived and the assumptions that are made about it. At the top are those that command acceptance in that entry of the non-resident spouse is virtually assured. At the bottom are those where entry is very difficult or even impossible. These marriages may be believed to be 'bogus' because they lack credibility or the non-resident party may belong to a category whose entry is considered undesirable. Very often, the two reasons are conflated.

Gender, race and class have always been important factors in determining the place of a marriage on the hierarchy. Male entrants married to British-resident women are generally placed below women joining British husbands. The measures described in chapters 3, 4 and 5 ensured that non-white applicants, particularly from the sub-continent, were most frequently refused. After 1997, non-white countries remained the major source of refusals but it is becoming difficult to disentangle issues of race from those of social class as the maintenance and accommodation requirements mean that poor entrants have more difficulty securing entry while the most recent proposals are clearly aimed at poor often Muslim immigrants.

Over the period described in this thesis, the role played by various factors in determining the hierarchy has fluctuated. At the beginning gender arguably predominated over or acted as a proxy for race. By the 1970s, race was the single most important factor and this became more explicit as sex discrimination became more difficult. In the recent past, there has been more emphasis on the cultural conformity of the marriage, economic self-sufficiency, the degree of likely integration into British society and compliance with state authority in immigration matters.

The hierarchy is strongly connected to the concept of 'belonging'. Adjustments were sometimes made to reflect subtle but important distinctions or evolution in the sense of who does or does not belong. For instance, the pure sex discrimination

involved in the ban on husbands needed adjustment as it affected too many white British women. The restriction of the right to sponsor to women born in the UK was a subtler device. Primary purpose permitted administrative means to be used to distinguish between acceptable and unacceptable spouses, especially husbands. More recently, the prohibition on the entry of more than one polygamous spouse and the raising of minimum ages for entry and sponsorship suggest cultural concerns have started to win out over skin colour as a factor. The ban on switching and Ss. 19-25 IA(TC)A 2004 have made plain the low ranking of marriages entered into with illegal or short-term migrants who have or who are suspected to have defied the state's authority. Immigrants who are compliant or persistent are more likely to achieve eventual acceptance even if they begin with other disadvantages.

7.2.7 State authority and its limits

Another major assumption held throughout the period discussed in chapters 3, 4 and 5 was that immigration policy was a matter of national self-interest and legitimate state power. The right to enter or remain in the UK was a privilege to be accorded only to those who complied with requirements both official and, it is argued here, unofficial. For the most part, this was assumed and did not need iteration. It drew its legitimacy from the apparently overwhelming public support for firm immigration control. Since 1997, the assertion of state hegemony became ever more emphatic with repeated attempts at legislation and other forms of regulation. Submission to state-generated criteria not only in respect of entry but also in terms of process has become a vital condition for acceptance, even while such compliance has become more difficult given almost continuous legal change.

There may be an electoral demand for 'tough' immigration controls. But it is also true that implicit within many manifestations of state power are acknowledgements of its limitations. This becomes apparent if other taken-for-granted assumptions about immigration control are brought onto sharper focus. The predominant discourse surrounding such controls is that of abuse. Measures are rationalised by the need to prevent fraudulent applications even though the evidence of actual fraud is often contested or exaggerated. This discourse has become so familiar that critics barely question its function. Yet it is clearly necessary. The electorate may have a preference

for a restrictive immigration policy but also require to be convinced that it is justified ethically.

Other such prevarications may be observed. Overt racist sentiment was almost never expressed by leading political figures despite the racially discriminatory content of much policy. Forced marriages have also been used over many years to support restrictive policy whose effects go much wider. Most significantly perhaps, the discussion of the period between 1962 and 1997 suggests that the judiciary and the legislature were able to maintain at least a superficial appearance of fairness by refusing to acknowledge the highly discriminatory but mostly covert practices of the entry clearance service. As chapter 6 discusses, the position has changed somewhat since 1997 for various reasons and the worst aspects of decision-making have arguably shifted to elsewhere in the immigration service.

The assumption that underlies reliance on this type of argument or conduct is that, without it, support for measures would be more equivocal. This does not mean that a more honest approach would remove all support for immigration control but there might be less comfort and more ambivalence. In other words, as well as wishing for firm controls, many individuals acknowledge that claims to enter as a spouse have some validity. Governments will often try, for electoral reasons, to reconcile restrictive measures with moral rationalisations, but the conflict is almost always there if it is looked for.

Linked to this implicit acknowledgement of the need to reconcile the irreconcilable is the tacit recognition, discussed in chapter 6, that whatever government and the electorate might wish to happen, there are limits on what may be achieved, at least if other essential values are not to be unacceptably compromised. Commentators have criticised the both the necessity, morality and effectiveness of immigration controls and the exclusion of free movement from formulations of fundamental rights (Carens 1987; Dummett 2001; Harris 2002; Juss 2006). Over-restrictive immigration controls may be incompatible with the values of a liberal state and impossible to implement without interfering excessively in the freedoms of those entitled to enter and remain.¹⁸⁵ Yet politicians may feel that they have little choice on the matter. Caught up in the race to demonstrate competence in immigration matters, governments promise more than they can deliver. The result is endless legislation and

¹⁸⁵ As Joppke (1998:292) expresses it, "At the risk of stating a tautology, accepting unwanted immigration is inherent in the liberalness of liberal states".

organisational reform. This may bring some immediate results but pressure often rapidly appears elsewhere in the system necessitating a further round of changes so that, paradoxically, repeated legislation serves only to underline the growing difficulty faced by states in preventing unwanted arrivals. At the same time, as discussed in chapter 6, the growth in human rights-related case law and discourse has challenged, to some degree, the legitimacy of unbridled state power based on majoritarian politics, although it remains to be seen whether this will have any lasting or substantive effect.

7.2.8 Institutional values

The thesis has found that the values discussed above were shared across institutions for much of the period discussed here. It is plausible that decision-making would also be affected by particular institutional values. Yet, once the different functions of each institution are taken into account, it is arguable that institutional factors affected more the style than the content of decisions. This is particularly so in the period between 1962 and 1997 when there was a strong degree of congruity in all decision-making. Judges, for example, mostly expressed themselves 'judicially' but, as chapter 4 discusses, made decisions that supported exclusionary purposes, sometimes at the expense of more coherent legal alternatives. In a few cases, though, such as interpretation of the requirement to have met, decision-making suggested reservations about excessive intrusion into personal arrangements, perhaps reflecting institutional caution in this area. Parliament rationalised its decisions through its electoral mandate, but rarely questioned whether its values extended beyond majoritarian politics. It was also able to maintain a formal commitment to family reunification knowing that the entry clearance service ensured that unwanted family members were refused. The entry clearance service was largely unregulated and had little sense of any institutional purpose beyond exclusion. It certainly had an institutional culture but it was one that, except for lapses such as 'virginity tests', complemented and fulfilled political aims.

It was clearly found that the position has become more complex since 1997. Parliament has retained its strong commitment to majoritarian politics, tempered only marginally, if at all, by human rights or other countervailing values. As discussed in chapter 6, the judiciary has, in some instances, become more assertive, drawing added authority from human rights values. The entry clearance service has become less

enmeshed in the execution of unofficial policy and more pre-occupied by institutional concerns such as efficiency. A local culture is still nonetheless observable on the sub-continent, possibly inherited through generations of officials. It seems that the fluidity and ambivalence discussed in chapter 6 have provided more opportunity for institutions to reflect upon their particular values. Yet, in general, the impact of these is less powerful than might have been anticipated at the start of the thesis.

7.3 *Marriage migration: the future*

Family migration, including marriage, is now the dominant mode of legal entry into many developed countries (Kofman and Meeto 2008:1). This is true of the UK if those granted settlement rather than limited leave to enter are counted (although the statistics do not include EEA nationals who enter for work or family reasons).¹⁸⁶ It is also the source of persistent regulation both in the UK and elsewhere (see chapter 6). Chapter 6 considered evidence that international marriages are likely to continue amongst the populations of South Asian origin, particularly those from Bangladesh and Pakistan. International arranged marriages also remain common in those communities outside the South Asian community who have traditionally practised them (Beck-Gernsheim 2007:275-7). Even within communities, including the indigenous British population, where international marriages are not the norm, a proportion will enter them and this is made more probable by recent immigration and increased global travel. Marriage immigration, situated at the controversial intersection between private rights and public responsibilities, looks likely to remain a live issue for the foreseeable future.

This thesis shows that marriage immigration has been regarded by governments as purely an 'immigration' issue and one that is particularly problematic, because it cannot be 'managed' in the same way as labour migration.¹⁸⁷ The invocation of marriage and family has always been a potent (if risky) political weapon serving a variety of ends but, in relation to immigration, the emotional significance and

¹⁸⁶ In 2006, approximately 145,000 work-permit holders and their dependants were admitted compared to just over 47,000 spouses and fiancé(e)s and nearly 6,000 dependent children. However, there were just under 135,000 grants of settlement, of which 65% were to dependent relatives (Home Office 2007).

¹⁸⁷ The most recent manifestation of this was the proposal for pre-entry language testing for spouses, which was explicitly linked to its introduction in work-based migration despite the very different reasons for entry in each case. As discussed in chapter 6, the government has, for the moment, retreated from this proposal although a 'commitment' to learning English will be required (Border and Immigration Agency 2007b:6; UK Border Agency 2008a:4).

nurturing function of marriage have been minimised in favour of reliance upon its role as a cause of immigration. Family formation or reunion has often been seen as a kind of Trojan horse, the apparently straightforward humanitarian claim to live with one's family members carrying less desirable consequences: the importation of unwanted - often male - workers and the recreation on British soil of alien forms of family life. It says much about attitudes towards non-white immigrants that, for many years, their family life was seen to be so potent a danger that they could not be permitted to carry it on within the UK. Such attitudes, in embryonic form, may be observed in the implementation of the Aliens Act, became even more apparent in the period discussed in chapters 3, 4 and 5 and remained important after 1997. Chapter 6, which discusses the period since 1997, thus identifies a complex and fluid picture. That fluidity is a continuing characteristic, with the latest proposals (raising the age for entry and sponsorship to 21 and related measures, as already discussed, and other measures affecting the route to naturalisation; UK Border Agency 2008a) awaiting implementation as this conclusion is being written.

Recent literature suggests that regulation of the complex ties represented by family (including marriage) migration may yet prove elusive. This literature (see Kofman 2004; Smith 2004 and Kofman and Meeto 2008 for a discussion) is less parochial and more theoretical than conventional government analysis, viewing family migration as more than a single discrete act whereby an entire family either relocates to or is created in a new location. Recent literature on migration has used the term 'transnationalism' because it challenges a state-centred perspective on migration, viewing it as a dynamic and multi-stranded process whereby individuals forge and sustain connections in both the new and the old state (Levitt 2004:2). These connections affect more than the migrant individual and have an impact upon family members as well as the wider community in both the country of origin and the country of destination. Transnational families, according to Bryceson and Vuerola (2002:3 quoted in Kofman and Meeto 2008:3), "live some or most of their time separated from each other, yet hold together, managing to maintain a feeling of unity and collective welfare, despite geographical distance".

Transnational marriages take many forms: arranged and non-arranged marriages within the same ethnic group, marriages between British nationals and individuals from abroad encountered in the UK or through foreign travel and marriages between individuals from different migrant communities. While these may occur

predominantly in urban areas, recent immigration to rural areas means that it may become a feature there. It is no longer sufficient to divide the population into a homogenous native community who may occasionally draw in an outsider and distinct peripheral groups with links to one country of origin (Beck-Gernsheim 2007:274-5).

While many international marriages are not arranged, the international arranged marriage remains the most controversial category of all such marriages. At the same time, the extended South Asian family with its international ties of which marriage forms a major strand is a paradigmatic transnational family. The resulting ties may be much wider than a simple binary connection between the UK and the country of origin. Marriages may be contracted with those who have migrated elsewhere in the world forming a complex web of international links. As chapter 6 demonstrates, the international arranged marriage system continues to thrive despite both government efforts to disrupt it and evidence of ambivalence by the young people involved. This is arguably because, not despite, of the distance involved (Beck-Gernsheim 2007: 277).

Transnationalism creates new motivations, hopes and pressures affecting marriage decisions. The motives for entering an international arranged marriage include a desire to respect tradition but also encompass more forward looking objectives including the cementing of international family relationships, a renegotiation (not always successful) of 'traditional' gender relations and the possibility of trading the chance of migration for a higher status spouse than would otherwise be expected (Beck-Gernsheim 2007:279-85).

This helps to explain why international arranged marriages persist and are unlikely to disappear. The government clearly regards continued intervention in these marriages as legitimate. Raising the minimum age for entry and sponsorship to 21 and the other related measures discussed in chapter 6 will overwhelmingly affect arranged marriages, while having relatively little impact elsewhere. They may have some effect on the number and type of such marriages but there is equally the risk that they will reinforce exclusion and defensiveness. It is improbable that they will encourage self-reflection and organic change, but may result in attempts to circumvent what are seen as administrative obstructions. This thesis has demonstrated that the government has frequently believed mistakenly that international arranged marriages will decline over time and has attempted to accelerate that process through legal restrictions. There is

no reason to believe that these new policies will be more effective and they may have the unintended consequence of increasing rather than reducing divisions.

Given the continued pressure of marriage migration and its decreased distance from the mainstream of British life, the government is faced with a dilemma. Some of this marriage migration is regarded as highly undesirable, notably arranged marriages involving very young or poor immigrants with few skills to assist them in adapting to UK life. Concerns about fraud remain a live issue despite the government setbacks described in chapter 6. The management of immigration (or the appearance of it) is a pre-condition for the perception of governmental competence.

Yet, fewer tools are available. Distinctions directly based on nationality or race are no longer possible. Broad policies such as that implemented under Ss. 19-25 AI(TC)A are liable to successful legal challenge. Measures that affect too many marriages also risk electoral unpopularity particularly now that populations of immigrant descent are a significant part of the electorate. The challenge for the government is to formulate non-discriminatory measures that target the undesired immigrant without unduly alienating minority communities and parties to other more acceptable marriages. The most recent proposals, discussed in chapter 6, rationalised by the forced marriage and targeted quite clearly at only a segment of the population of immigrant descent, show the likely direction of travel. Nonetheless, as recent legal challenges demonstrate, the task is likely to be a difficult one.

7.4 Conclusion: back to belonging

Cohesion, integration and the politics of 'belonging' have become central concepts in political debate over the past period and are now subject to an extensive literature (see chapter 6 for discussion of this; for a summary of ideas of 'belonging', see Yuval-Davis et al. 2005). This thesis has argued that the legal boundaries of marriage immigration reflect who is considered able or deserving to belong.

'Belonging' is a protean concept that may be understood in many different dimensions. It is about personal experience and feeling as well as official status sanctioned through policy and law. In this thesis, however, the emphasis has been on interpreting the decisions of state institutions in order to understand state-generated conceptions of belonging. Decision-makers, it is argued, rely on beliefs, values and assumptions that create official and unofficial categories of belonging and exclusion.

Family immigration in general and marriage immigration in particular are particularly problematic in creating these categories. In most cases, excluding a particular class of immigrants does not directly impinge upon the 'belonging' of those already within the polity. It may do so indirectly if individuals perceive that those similar to themselves are generally rejected. However, there are ways to minimise a close identification. For example, race equality legislation was for many years the explicit trade-off for race-orientated immigration control. Long-term residents have not usually encountered many obstacles to obtaining nationality and formal equality for themselves and their children, although the route to settlement and naturalisation is becoming more complex. Immigration control may be understood as economically necessary rather than as a reaction to an external threat. These techniques have not always been successfully applied, but they do provide a form of discourse that is, on the surface, inclusive.

But these rationalisations work less well where family migration is concerned, as the UK-based individual is more likely to feel personally implicated in the rejection of a close family member. There may also be a visible contrast between the quality of family life that he or she enjoys and that of those who are more fortunate. This, on its own, may be sufficient to qualify that individual's own sense of belonging.

The problem is accentuated in the case of marriage immigration. This is not only because marriage or an equivalent relationship may be the necessary core to an individual's well-being, so that being refused the right to enjoy it in a particular place becomes a strong indicator of whether one belongs in that place. It is also because, from the point of view of both decision-maker and affected individual, marriage represents a choice in a way that a blood tie does not. So it is doubly significant as an important and personal relationship which is chosen. Whom one chooses is seen as telling in terms of values, culture and allegiances, particularly for women who, as previously noted, have special responsibility for morality and culture and are still assumed to absorb more than they transmit where these diverge within a relationship.

Where an individual chooses the 'wrong' spouse, the state must also choose: whether to accept into its symbolic heart, a stranger whom it would otherwise wish to exclude, or, at least partially, to exclude and make into a stranger, the UK resident. The decisions analysed in this thesis suggest that deciding who is to become the stranger depends upon what is believed or assumed about both parties and the marriage.

Yet, it is not apparent that the state will have the last word. Individuals and communities have persistently resisted the imposition of such absolute categories in this most personal and complex area of their lives necessitating, from a state perspective, the numerous regulatory changes described in this thesis. It is probable that such resistance and the ensuing battles will continue.

Appendix A

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- 'Counsellor's advice led to dismissal' Times 26th July 1976
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- 'Asian "married sister to beat ban"' Daily Telegraph 4th August 1976
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