



information sheet

Right to Marry Judgment 2

4th August 2008

In May 2007, the Court of Appeal handed down judgment in Secretary of State for the Home Department v Baiai & Ors. They held that the scheme, imposed in 2005, that required immigrants to obtain permission from the Home Office if they wish to be married in the UK (the certificate of approval scheme) was unlawful – see the May 2007 “Right to Marry Judgment” information sheet.

The Secretary of State appealed against that judgment to the House of Lords; and on 31 July 2008 the House of Lords gave its judgment. The Secretary of State’s appeal was dismissed. This information sheet provides information about the House of Lords’ judgment.

The certificate of approval scheme

The scheme is briefly explained in the May 2007 information sheet. However, the application fee for a certificate of approval has been increased (from 2 April 2007). The current cost of an application is £295.

House of Lords judgment

The House of Lords dismissed the appeal of the Secretary of State. In doing so, the House of Lords stated that:

“A national authority may properly impose reasonable conditions on the right of a third-country national to marry in order to ascertain whether a proposed marriage is one of convenience and, if it is, to prevent it. This is because article 12 exists to protect the right to enter into a genuine marriage, not to grant a right to secure an adventitious advantage by going through a form of marriage for ulterior reasons.”

In other words, the House of Lords accepted that the Home Office is entitled to regulate marriages in the UK where one or both of the parties to the proposed marriage are not British nationals. The Home Office may regulate these marriages for the purpose of preventing marriages of convenience (sometimes called sham marriages).

Article 12 of the European Convention on Human Rights provides the right to marry. It is made part of UK law by the Human Rights Act 1998. The House of Lords decided that Article 12 did not prevent a reasonable scheme that was properly aimed at preventing marriages of convenience.

The House of Lords also accepted that the legislation introduced in 2005 in order to establish the certificate of approval scheme was “unobjectionable”. There were two important exceptions to this:

- the House of Lords agreed with the lower courts that by exempting Anglican weddings from the scheme, the scheme had discriminated against other religions; and was therefore unlawful unless Anglican weddings were also included
- the House of Lords also objected to the cost of the applications – see below

Although the legislation that provided for the scheme was unobjectionable, the House of Lords decided that the way the Home Office had put the scheme into practice was unlawful. This was because the internal guidance, issued by the Home Office, went much further than the legislation. Instead of simply providing an opportunity for the Home Office to make checks as to whether a proposed marriage was one of convenience or was genuine, the internal guidance simply

ILPA information service

funded by JRCT

www.ilpa.org.uk/infoservice.html

Steve Symonds

ILPA legal officer

020 7490 1553

steve.symonds@ilpa.org.uk

Immigration Law Practitioners' Association

www.ilpa.org.uk

T 020 7251 8383

F 020 7251 8384

Information sheets provide general information only.

ILPA members listed in the directory at www.ilpa.org.uk provide legal advice on individual cases. ILPA does not.

provided for specific circumstances in which permission to marry would be refused. Under that guidance, permission to marry was to be refused if one of the parties to the proposed marriage:

- did not have current permission to be in the UK
- had current permission to be in the UK, but that permission had been granted for a period of no more than 6 months
- had current permission to be in the UK, but that permission had no more than 3 months left to run

As the House of Lords explained, none of these specific circumstances was of itself relevant to whether or not the proposed marriage was one of convenience or genuine. Hence, the House of Lords concluded that the scheme operated by the Home Office was unlawful.

Application fees

The House of Lords made clear that a fixed fee of £295 was not justified; and requiring this fee where someone could not afford it was unlawful. They said:

“It is plain that a fee fixed at a level which a needy applicant cannot afford may impair the essence of the right to marry which is in issue. A fee of £295 (£590 for a couple both subject to immigration control) could be expected to have that effect.”

In other words, it was not lawful for the Home Office to require an individual to pay a fee which he or she could not be expected to afford. To require such a fee would deny that individual the right to marry protected by Article 12.

Fees for immigration applications have risen steeply in recent years – particularly since 2004 when the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 was passed. Section 42 of that Act introduced a power to set fees for immigration applications that exceed the administrative cost of dealing with those applications. As is highlighted in this case, the levels at which immigration fees are now set may discriminate against or unlawfully exclude some individuals.

What happens next?

The Home Office may decide to keep the scheme. However, if they do so, they will have to change the way they operate it. They will not be entitled to simply refuse permission to marry on the basis of a person’s immigration status. They can only lawfully refuse permission in two circumstances:

- for a reasonable period in which to investigate whether a proposed marriage is one of convenience or is genuine;
- if there is reason to conclude that the proposed marriage is one of convenience

However, someone who has not current permission to be in the UK will remain at risk of removal. If someone in this situation applies to the Home Office for permission to marry, he or she may still be at risk of detention and removal before permission is granted or before the marriage takes place. Someone in this situation may be well advised to seek legal advice before applying to the Home Office for permission to marry.

A copy of the House of Lords judgment is available at:

<http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080730/rhome.pdf>