An Ideal Husband? Marriages of Convenience, Moral Gate-keeping and Immigration to the UK

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1. Introduction

From a British perspective, there is an admirable simplicity in the definition of a marriage of convenience adopted in 1997 by the Council of Ministers of the European Union: a marriage concluded “with the sole aim of circumventing the rules on entry and residence”. Where immigration is the sole aim of a marriage, refusal to recognise rights acquired on marriage is unobjectionable.

Since the mid 1960s, the UK has frequently excluded not only those whose marriages were contracted with the ‘sole aim’ of avoiding immigration control but those for whom immigration played a contributory or even negligible role in the decision to marry.

The article begins, in part 2 below, by describing the difficulties in defining a ‘marriage of convenience’ or ‘sham marriage’. The legal response to immigration through marriage is then analysed in four sections representing different phases in this response. Part 3 describes the early response to marriage through immigration, a ban upon the entry of husbands, in the period from 1969 to 1985. Part 4 considers the application of the ‘primary purpose rule’ from 1985 to 1997. The period after 1997 is considered in two parts. The first, part 5, looks at the requirement for aspiring immigrant spouses to show that the parties intend to live together and draws upon prior empirical work carried out by the author. The second, part 6, considers legislative changes implemented in February 2005 which are argued to be, in large measure, a response to perceived abuse of Community law.

The aim of these measures has, in large part, been to prevent, not only the entry of those who may have entered a sham marriage, but immigration through marriage generally. While moral gate-keeping, in the sense that preference is given to those whose marriages comply with majority values in the UK, is undoubtedly a characteristic of immigration control, the broader exclusionary impact of these laws must not be overlooked.

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2. Defining the Undefinable: Genuine and Sham Marriages

A marriage of convenience is valid under UK law. Whether it gives rise to residence rights is determined by immigration law. Both the terms ‘marriage of convenience’ and ‘sham marriage’ have been used to describe marriages supposedly entered for immigration purposes. The latter term describes more accurately the problem that immigration controls profess to address. However, content matters more than terminology. The Council of Ministers’ “marriage of convenience” is a narrower definition than that of a “sham marriage” in S. 24(5) Immigration and Asylum Act 1999 which defines such a marriage as one entered into “for the purpose of avoiding the effect of” UK immigration law.

Whatever the terminology, a broad conception of such marriages is problematic. It is trite to observe that many successful marriages in many cultures are motivated by pragmatism. English fiction has long debated the factors that should determine a decision to marry and there is an extensive academic literature on the economics of marriage. The ‘marriage market’ is universal although its form differs between cultures and there is a tendency to choose spouses who resemble or complement oneself in terms of age and background. There is thus no binary divide between marriages entered into for ‘good’ reasons such as sexual compatibility or companionship and those entered for ‘bad’ reasons such as social or economic gains. The latter may partly determine the former and motives cannot be neatly disentangled.

An immigration motive for marriage must be seen in that context. Immigration status may add to a potential spouse’s attractions without it being the only reason for marriage. This is obvious but it exposes the problem of measures that aim to neutralise the immigration consequences of a marriage. Where immigration is the only reason for a marriage, it will come within the definition adopted by the Council of Ministers and the major difficulty is the practical one of detection. However,