

# Shorter Articles, Commentaries and Case Notes

## The phenomenon of the (UK) officially inspired forced marriages

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Recent anecdotal evidence, from both lay and professional sources, suggests that the British High Commission ('BHC') in Kenya is refusing to recognise perfectly lawful Hindu marriages contracted there for lack of an 'official' form of certification, and is insisting that the parties should re-marry under the Kenyan civil marriage procedure before one or both of them can be granted UK entry clearance – notwithstanding that in the past the BHC itself has, as a matter of general practice, accepted such marriages as valid and, in particular cases, may even have acted to record or alter the status of the individuals concerned accordingly.

### The historical background

Hindu marriages as such have been lawful in Kenya since British colonial days, under a pluralistic system of personal laws which sought to accommodate the religious and ethnic diversity of the population of the colony. They were first put on a statutory footing in 1946 by the Hindu Marriage, Divorce and Succession Ordinance (No 43 of 1946)<sup>1</sup> and since 1960 have been governed by the Hindu Marriage and Divorce Act (No 28 of 1960 – Chapter 157 of the Laws of Kenya).<sup>2</sup> The 1960 Act envisaged, as did the 1946 legislation, that rules would be prescribed for the registration of Hindu marriages, but it is common knowledge that none have been made, whether before independence in 1963 or since then to this day.<sup>3</sup>

Instead, again dating back to colonial times, a practice had sprung up, with bureaucratic approval, of an unofficial scheme of registration and certification structured on the various diasporic caste-based community organisations whose office-bearers made the necessary entries in their books and issued certificates of marriage to couples married under their auspices. These certificates came to be accepted not only by various Kenyan government departments (eg immigration, civil service, revenue, education etc), but also by employers and the courts (in matrimonial or probate matters), and more pertinently, after independence, by the BHC as

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1. Section 3(1) of which provided: 'The marriage in the Colony of Hindus ... shall if ... contracted in the manner customary ... among persons professing the religion of either party to the marriage, be deemed for all purposes to be a valid marriage.'
  2. It should be noted that in both measures, the definition of 'Hindu' includes, *inter alia*, Jains, Sikhs and both Arya and Brahmo Samajists, and additionally, under the 1960 Act which is currently in force, Buddhists of Indian origin as well. The Act was inspired by the Hindu Marriage Act 1955 (of India) which, of course, was a reformist piece of legislation and provided a statutory framework for divorce and other matrimonial reliefs.
  3. This was touched on in the Report of the (Kenyan) Commission on the Law of Marriage and Divorce (1968) at para 44 (and repeated at para 152), which stated: 'The Hindu Marriage and Divorce Act empowers the Minister to make rules requiring and prescribing the manner of registration of Hindu marriages but it appears that no such rules have been made.'

well. This was clearly because the community organisations concerned were implicitly trusted to carry out their self-appointed task properly, and indeed as far as is known there have been no instances of wrongdoing in this regard.

### **Typical case scenario**

Until the BHC recoiled from the long-standing convention described above, a typical situation might have involved a Kenyan citizen man marrying a British (ie a Citizen of the United Kingdom and Colonies ('CUKC')) Asian woman, say in 1965. At some point, their customary Hindu community marriage certificate would have been produced to the BHC in connection with the wife's status and would have been noted and endorsed on the reverse with a dated stamp to indicate this fact, with a corresponding endorsement in her passport. Thereafter, all subsequent renewals or replacements of her passport would have been in her married name, and indeed so would her registration as a full British Citizen under the more recent *Nationality, Immigration and Asylum Act 2002*.<sup>4</sup>

On this basis, there can be no doubt that the BHC would be deemed to have treated her, and by implication her spouse, as legally married. However, what has been happening is that, in such cases, when the Kenyan husband now applies for entry clearance for settlement in the UK to accompany or join his wife, or in other situations where the marriage is crucial to the application, the BHC is querying the validity of the marriage and is requiring the parties to go through a civil ceremony and obtain an official certificate of marriage before it will process the application.

It is reported on the grapevine that even many elderly couples, who may have been married for decades and have children and grandchildren, are having to revalidate their marriages in this way, and that a number of mass civil ceremonies have been organised or planned. Such couples are doing so because East African Asians are characteristically disinclined to challenge authority; they would rather keep their heads down and do as they are bidden if that would achieve the desired result. What is important to them is the outcome rather than the process, but they are, alas, either not being given the right advice or choosing the easier option and thereby setting a bad precedent – even if the spectre of elderly men and women reaffirming their marital vows may have a salutary effect on their personal lives. The fact remains, however, that this is a parody of the 'forced marriage' syndrome, which incidentally may also cause both expense and inconvenience to the hapless victims.

### **Issues of principle**

The conundrum outlined here clearly raises issues of some fundamental importance. First, how can the reversal of an extra-statutory practice that has or had been going on for decades be justified when it would operate retroactively? If the BHC had announced that it would no longer accept community certificates from a future date, or in other words, if it had given advance warning of a change of practice, then that would have been less objectionable, as prospective applicants would have been put on notice of what was required. But to unscramble an established methodology clearly interferes with existing relationships and legitimate expectations, with extraordinary complications.

Secondly, there is the inconsistency inherent in the whole equation. It is plainly wrong for the BHC to accept the marriage for the purposes of the wife's change of name or the grant

4. See Ramnik Shah 'A wrong righted: full status for Britain's "other" citizens' (2003) Vol 17, No 1 IANL 19.

of citizenship to her and to refuse to recognise it for immigration clearance for her husband or for other purposes. The denial of the validity of their marriage might also have far-reaching implications. What about the position of the children born of such a union? Given the complex nature of the interlocking provisions as to nationality arising from Kenya's independence settlement,<sup>5</sup> it is theoretically possible for their citizenship status also to be called into question. A variation of the typical scenario discussed above could be that the husband himself too was a CUKC at the time of the marriage in 1965 and remained such, say, for the next five years (before acquiring Kenyan citizenship), so that any children born to the couple during that period would also have become CUKCs by descent, and would have been recognised as such by the BHC (later to be redesignated as British Overseas Citizens) on the assumption that they were legitimate. Would they now be regarded as illegitimate? Even though under the Kenyan Legitimacy Act (No 23 of 1930 – Chapter 145 of the Laws of Kenya), modelled on the UK Act of 1926, the subsequent marriage by the parents of illegitimate persons has the effect of legitimating them, to seek to upset a *fait accompli* in this fashion could open up, in common parlance, a 'whole can of worms'.<sup>6</sup>

Thirdly, and most importantly, there is the doctrine of the legality of the marriage. The elements of registration and certification are concerned with proof of marriage, rather than its validity.<sup>7</sup> Subsection (4) of section 6 (dealing with registration) of the 1960 Hindu Marriage and Divorce Act also underlines this distinction<sup>8</sup> between the underlying reality, or the assertion, of the marriage and the mechanics of its proof, so that while a marriage is not to be negated by a lack or insufficiency of documentary evidence thereof, nor should a certificate preclude an enquiry into the existence or validity of the marriage itself if it is called into question. There are many anecdotal instances in Kenya where the fact of marriage may have been proved through witness testimony in the absence of documentary evidence, while recent case law in India suggests that occasionally even the validity of the marriage may be challenged despite such evidence.<sup>9</sup> In addition, in Kenya it has always been possible, in non-contentious matters, to prove Hindu marriages by affidavit or statutory declaration of two witnesses, commonly in cases of marriages contracted a long time ago before the days of either official (in India) or community-based (in Kenya) registration.

Above all, there is the moral dimension. It simply cannot be right for the BHC to seek to question a couple's long-standing marriage, respected by the society at large and even, to some extent, by themselves, on a tenuous technicality when the consequences of doing so can be so far-reaching and uncertain.

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5. See articles by RKD Shah on Britain and Kenya in this Journal (at the time known as *Tolley's Immigration and Nationality Law and Practice*) (1992) Vol 6, Nos 2 and 4.
  6. The writer is not aware if the Kenyans have adopted and reproduced the provisions of the UK's *Legitimacy Act 1976*, under section 1 of which a child of a void marriage is treated as legitimate if both or either of the parties believed the marriage to be valid.
  7. 'We have given much thought to the question whether a ceremony of marriage should be invalidated by failure to register. At present, lack of registration does not go to validity.' Kenyan Commission Report, *supra* n 3, para 154. The Commission's Recommendation No 48 made the position even clearer: 'We recommend that the validity of a marriage should not depend on registration.'
  8. Section 6(4) reads: 'Notwithstanding anything contained in this section, the validity of a marriage shall in no way be affected by the omission to make an entry in any marriage register, nor shall registration render valid any marriage which would otherwise be invalid.'
  9. Werner Menski in his *Hindu Law – Beyond Tradition and Modernity* (Oxford University Press, 2003) at pp 305–306 cites and discusses the case of *Sanjay Mishra v Eveline Jobe* (AIR 1993 MP 54), where the appeal court observed that 'the registration certificate ... is valid only when it is found that there is a valid marriage [but where] the factum itself is disputed, essential ceremony constituting the marriage ... in accordance with Hindu rites must be pleaded and proved ...', which reinforces the wording of section 6(4) of the 1960 Kenyan Act (*ibid*).

## **Summary and solutions**

Experience has shown that the BHC in Nairobi (much like other British missions elsewhere) is a law unto itself when it comes to immigration matters. The rationale behind its change of practice as regards Kenyan Hindu marriage certificates remains a mystery. One can only speculate as to whether the explanation lies in a misreading of the historical position or of the legal principles involved, or in a conflation of misperceptions about transnational marriages and divorces, especially in relation to the Indian sub-continent. The fact remains that there is a large dose of irrationality in the BHC approach. The Hindu marriages in question are undoubtedly valid; they are monogamous and can only be dissolved or annulled by a judicial act on defined grounds. However, the rejection of the unofficial community certificates goes to the root of entrenched family relationships. If the issue is one of proof, and if such certificates will not do (even though they are routinely accepted by the Kenyan authorities), then why not accept alternative evidence by affidavit or statutory declaration to fill the documentation gap? If, however, the real concern is as to the validity of the marriages, then the Kenyan Hindu community have a great problem on their hands and they will simply have to get off their fence and fight to secure recognition and justice.

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