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**CHAPTER 8
SECTION 1**

SPOUSES (GENERAL)

RECOGNITION OF MARRIAGE AND DIVORCE

1. MARRIAGE IN THE UNITED KINGDOM

All marriages which take place in the United Kingdom must, ***in order to be recognised as valid***, be monogamous and must be carried out in accordance with the requirements of the Marriage Act 1949, as amended by the Marriage Acts of 1970, 1983 and 1994, the Marriage Regulations of 1986 and other related Acts (eg; the Children Act 1989).

A claim to be married in the United Kingdom must be supported by a marriage certificate (normal green style in all cases) issued by one of the following:

- * Superintendent Registrar;
- * Registrar;
- * Clergyman (of Church of England or Church in Wales);
- * Authorised person of a Non-Conformist Church;
- * The General Register Office;
- * Secretary of Marriage for a Synagogue;
- * Registering Officer for the Society of Friends; and
- * in a building approved for civil marriages under the Marriage Act of 1994.

1.1. Marriage in a foreign embassy

A foreign embassy, high commission, consulate or other diplomatic premises in the United Kingdom are not regarded as being outside the United Kingdom because in the case of RADWAN V RADWAN (1972) ALL ER 967 it was found that a diplomatic premises forms part of the state in which it is situated. Since the Marriage Act of 1994 (which came into effect on 1 April 1995) it would be possible for an embassy to be listed as an approved building for a civil marriage in the United Kingdom

2. MARRIAGE OVERSEAS

The recognition of any marriage which has taken place overseas is governed by the following:

- is the type of marriage one recognised in the country in which it took place?
- was the actual marriage properly executed so as to satisfy the requirements of the law of the country in which it took place?
- was there anything in the law of **either** party's country of **domicile** that restricted his freedom to enter the marriage?

If the answers to the above questions are respectively, "yes", "yes" and "no" then the marriage is valid whether or not it is polygamous.

2.1. Polygamy

Whether a marriage is to be regarded as monogamous or polygamous must initially be determined by **where** the marriage is celebrated.

If the law of the country where the marriage takes place prohibits polygamy, (as English law does) then all marriages celebrated under that law must be monogamous, **regardless of whether a party to such a marriage is permitted to practice polygamy in his country of domicile**. Such a person can nevertheless contract a valid marriage here, as long as he is **not** already married, either here or abroad. Any further marriage contracted in this country would be void as it would be bigamous.

If the country in which the marriage is celebrated permits polygamy, any marriage contracted there by a person whose country of domicile permits him to enter into a polygamous union will be polygamous.

ANNEX C (below) provides further guidance on polygamous or potentially polygamous marriages.

The 1988 Immigration Act does not affect the validity or otherwise of polygamous marriages. They are to be addressed as set out above. The 1988 Act mainly acts to limit the consequential immigration rights of actually polygamous wives.

3. TRANSNATIONAL MARRIAGES

Proxy and telephone marriages should initially be considered in line with paragraph 2 above. A transnational marriage may entail the sponsor appointing a "proxy" to stand in for him at the ceremony or, on other occasions, the exchange of vows between the two parties may take place over the telephone.

The law of the United Kingdom does not allow for marriages to be contracted in this country, either by proxy or over the telephone. However, the laws of certain other countries can recognise such a form of marriage as valid, provided it is contracted in that country.

The issue in cases involving proxy or telephone marriages is whether that form of marriage is valid according to the law of the country in which it was contracted (see paragraph 2 - **MARRIAGE OVERSEAS** - above). Paragraphs 3.1. and 3.2. (below) provide some advice concerning the recognition of "proxy" and "telephone" marriages.

If further guidance on the marriage laws of a particular country is required, then caseworkers should seek advice from the entry clearance officer or refer to INPD.

3.1. Proxy marriages

Where the law of the country requires a ceremony, and a ceremony takes place with the participation of a proxy *in* that country, then the country where the marriage is celebrated *is* the country in which the ceremony occurred, *not* the country from which the proxy was appointed by the sponsor. Thus, such a marriage would be valid.

3.2. Telephone marriages

The formal validity of a telephone marriage is to be determined according to the laws of the countries in which *both* parties are physically present when the marriage takes place. Therefore, a telephone marriage celebrated whilst one of the parties is in the United Kingdom will *not* be valid as telephone marriages are not valid in this country.

In cases where the UK based sponsor was overseas when a telephone marriage took place and the laws of both countries recognise such marriages, we cannot deny that the marriage is valid. Enquiries about the marriage laws of other countries may be referred to Section 1 of INPD.

4. DIVORCE IN THE UNITED KINGDOM

The only valid way of divorcing in the United Kingdom and Islands is by obtaining on application a decree from a civil court. A decree nisi is the court's *decision* to grant a divorce provided that nothing comes to light which may alter that decision within the period of time specified on the certificate. If nothing comes to light, a decree absolute is then issued. ***A decree absolute is the only acceptable evidence of divorce.***

As a foreign embassy, high commission, consulate or other diplomatic premises are for legal purposes regarded as being *inside* the United Kingdom, ***a divorce obtained from any such premises in the United Kingdom is not valid here.***

4.1. Void and voidable marriages

Under Section 11 of the ***Matrimonial Causes Act 1973*** a marriage celebrated in the United Kingdom on or after 31 July 1971 shall be void on the grounds that:

* it is not a valid marriage under the provisions of the ***Marriage Acts 1949 to 1970*** where:

- i) the parties are within the prohibited degrees of relationship; or
- ii) either party is under the age of 16; or
- iii) the parties have intermarried in disregard of certain requirements as to the formation of marriage.

- * at the time of the marriage either party was already lawfully married;
- * the parties are not male and female respectively;
- * in the case of an actually polygamous marriage entered into outside England and Wales, either party was at the time of the marriage domiciled in England and Wales (see **ANNEX C**).

A **void** marriage is one that is deemed never to have existed, and in such cases a decree of nullity does not alter the status of the parties but is merely a declaration that they were never lawfully married. This is not the same as a decree of nullity of a **voidable** marriage which must be accepted as having existed until the date of the decree. Prior to 1 August 1971 there was no difference between void and voidable marriages because any annulment obtained before 1 August 1971 would render the marriage as being void regardless of the grounds.

5. RECOGNITION OF OVERSEAS DIVORCES

The recognition of overseas divorces should be considered under the provisions of current legislation - **The Family Law Act 1986** - which came into force on 5 April 1988. If a divorce fails to be recognised under the provisions of the 1986 Act Sections 52(4) and (5) of that Act allows you to "step back" to the previous legislation - **Domicile and Matrimonial Proceedings Act 1973** and **Recognition of Divorce and Legal Separations Act 1971**.

The Recognition of Divorce and Legal Separations Act 1971, which came into force on 1 January 1972 provided the first statutory criteria for recognition in the United Kingdom of overseas divorces, whether they took place before or after the Act came into force. An overseas divorce will be recognised if:

- * it is obtained by means of **judicial or other proceedings** in any country outside the United Kingdom; and
- * it is valid in that country; and
- * either spouse was habitually resident in, or was a national of that country.

The use of the words **judicial and other proceedings** requires that there should have been some formal proceedings, either before a court or some other formal body recognised by the state for that purpose, for example in Pakistan it would be the Union Council. It is an important aspect that the judicial or other body should be impartial as to the outcome of the proceedings. Thus, a meeting of family members convened to dissolve a West African customary marriage or to hear the pronouncement of talaq does **not** fulfil the requirements of the Act.

The 1971 Act was amended on 1 January 1974 by the **Domicile and Matrimonial Proceedings Act 1973**. As well as continuing the recognition of overseas divorces obtained by means of proceedings the 1973 Act **also** provided for the recognition of other types of overseas divorce, such as a "bare" talaq in Kashmir. These divorces are recognised if **both** parties were domiciled in a country which recognise such a divorce. If, however, either party was domiciled in the United Kingdom at the time of divorce then the divorce would not be recognised. In addition, Section 16(2) of the 1973 Act provided

that an overseas divorce obtained other than by a proceeding instituted in a court of law should not be recognised if **both** parties had, throughout the year immediately preceding the institution of the proceedings, been habitually resident in the United Kingdom. This section is not retrospective.

Section 46 of the **Family Law Act 1986** instituted new provisions for the recognition of divorces which took place on or after 4 April 1988.

5.1. Divorce obtained by means of proceedings

An overseas divorce obtained by means of proceedings shall be recognised under Section 46(1) of the Family Law Act 1986 if:

- * it is valid in the country in which it was obtained; and
- * at the relevant date **either** party was:
 - (i) habitually resident or domiciled in that country; or
 - (ii) a national of that country.

5.2. Divorce obtained other than by means of proceedings

An overseas divorce obtained other than by means of proceedings shall be recognised under Section 46(2) of the Family Law Act 1986 if:

- * it is valid in the country in which it was obtained; and
- * at the **relevant** date, **both** parties were domiciled in that country or one was domiciled there and the other was domiciled in a country which recognised the divorce; and
- * **neither** party had been habitually resident in the United Kingdom throughout the period of the year immediately preceding that date.

The "**relevant date**" means either the date on which proceedings were begun or, if there were no proceedings, the date on which the divorce was obtained.

Under Section 49 of the 1986 Act, in relation to a country comprising territories in which different systems of law are in force (eg United States of America) certain modifications are made to the recognition of divorce under **Section 46**. These are:

- * in the case of a divorce whose validity depends upon satisfying us that either party was habitually resident or domiciled in that country or that on the relevant date both parties were domiciled in that country, or one was domiciled there and the other in a country which recognises the divorce, each territory should be treated as if it were a separate country.
- * in the case of a divorce whose validity depends upon being a national of that country then the divorce must be effective **throughout** the country in which it was obtained.

6. TYPES OF OVERSEAS DIVORCE

6.1. Talaq divorces

Talaq divorce is most commonly encountered amongst Pakistani Muslims. In traditional Islamic law a bare talaq is the pronouncement by the husband taking the form of a triple declaration meaning "I divorce you". This has the effect of dissolving the marriage instantly. This bare talaq is the only form of **talaq** available in the Pakistani- controlled part of Kashmir or to Indian Muslims. A bare talaq is not a "judicial or other" proceeding.

Talaq divorce for the rest of Pakistan (including East Pakistan (now Bangladesh) and all Pakistani nationals overseas) was formalised by the Muslim Family Laws Ordinance 1961, which remains in force in Bangladesh. This requires that when a man pronounces talaq he must give written notice to his wife and also the Chairman of the Local Union Council. After this, a period of 90 days (or the end of pregnancy if the wife is pregnant) must elapse before the divorce becomes effective. There is a process for reconciliation between the parties which may be attempted during this period. This form of "full" talaq is a proceeding for the purposes of Section 46(1) of the Family Law Act 1986.

Instances are sometimes encountered of bare talaqs in Kashmir purporting to have been converted into full talaqs by notification to the Union Council. However, the Muslim Family Laws Ordinance does not apply in Kashmir and therefore such notification has no effect and the divorce is still a bare talaq.

It should be noted that it *is* possible to obtain a dissolution of marriage in either a Family Court or the High Court in Azad Kashmir. Such divorce decrees are "proceedings" and should be considered under Section 46(1) of the Family Law Act 1986.

6.2. Transnational divorce

To be capable of recognition, an overseas divorce **must** be instituted and obtained in the same country. Therefore no form of talaq pronounced in the United Kingdom is capable of recognition as a valid form of divorce. Divorces **purporting** to be a full talaq where the proceedings started in this country with the man pronouncing talaq 3 times here then writing to the Union Council and his wife in Pakistan are not recognised here. This was held by the House of Lords in 1986 in the Case of Ghulam Fatima.

6.3. West African customary divorces

Although there is statutory provision for marriages and divorces throughout West Africa, the form of marriage and divorce most commonly encountered, especially amongst citizens of Ghana and Nigeria, is one that has taken place according to tribal custom. Tribal divorces are essentially an agreement between the heads of both families that the couple's marriage has broken down and that they be divorced and any dowry be returned. It is not necessary for either party to be present when the families agree to the dissolution of the marriage.

There are customary courts which may dissolve customary marriages. The recognition of such a divorce would fall to Section 46(1) of the Family Law Act 1986. A customary

divorce may fall to be recognised under Section 46(2) of the Act, but special attention should be paid to the whereabouts of the parties during the 12 months preceding the divorce.

Since 1985 there has been a statutory requirement in Ghana for customary divorces and marriages to be registered. It is the practice of the General Register Office to accept as evidence of a customary divorce:

- * affidavits sworn by persons who state themselves to be the heads of both the parties' families; and
- * the registration document; and
- * certification from the Ministry of Foreign Affairs (the certificate provides evidence that the affidavits and registration document are genuine).

The divorce is effective from the date the heads of family agree the divorce. That date should also be the effective date for consideration by caseworkers.

6.4. Divorce in the Philippines

At present it is only possible to obtain a divorce in the Philippines which allows both parties to re-marry if both parties are Muslims. A decree of legal separation may be obtained in certain circumstances but this does not terminate the marriage. Article 41 of the Philippines Family Code allows for a person to re-marry if their spouse has been missing for 4 consecutive years (where there is a well founded belief that the absent spouse is dead), or 2 years (if there is a danger of death in the circumstances prescribed in Article 391 of the Civil Code). In order for a person to re-marry, he **must** institute a summary proceeding for a "declaration of presumptive death". If the absent spouse at a later stage reappears and makes an "affidavit of reappearance" the second marriage is automatically terminated (Article 42). If a Filipino were to re-marry in the United Kingdom it would normally be for the Registrar to decide whether to accept the declaration of presumptive death. **All** applications for leave from Filipinos on the basis of marriage in the United Kingdom who were previously married should be treated with caution, **especially where the Registrar was not aware of the previous marriage.**

7. POSSIBLE BIGAMY/PERJURY

Cases where it would appear that one or both parties to a marriage contracted in the United Kingdom have committed bigamy and/or perjury should be reported to the Office for National Statistics (ONS).

7.1. Referral to the Office for National Statistics (ONS)

Notifying ONS of such cases is only justified where there is documentary evidence of the offence on file. Perjury and bigamy are criminal offences and therefore need to be **proved beyond reasonable doubt**. In such circumstances ONS will normally only accept referrals where there is documentary evidence to indicate that bigamy or perjury

has been committed. Oral and written statements given to immigration officials are not accepted by ONS as evidence of a previous marriage. Such evidence may, however, be used as a basis for further enquiries.

Where the marriage appears to be bigamous but the couple submit evidence at a later date to the effect that one or both were in fact divorced these documents should be referred to ONS for their consideration, as they will need to be satisfied that the documents are genuine and satisfy current legislation. Documents already seen and accepted by a registrar should not be referred to ONS unless there is evidence to suggest that the documents may be forgeries.

Caseworkers should notify ONS by completing the ONS stock letter (see Chapter 24, Section 9, Proforma Z) and forward it with photocopies of the documentary evidence to the relevant office listed below:

Marriages contracted in England and Wales

Marriages and General Section
ONS
Smedley Hydro
Trafalgar Road
Birkdale
Southport
PR8 2HH

Marriages contracted in Scotland

The Registrar General
General Registrar Office for Scotland
New Registrar House
Edinburgh
EH1 3YT

Marriages contracted in Northern Ireland

The Registrar General
General Records Office
Oxford House
49-55 Chichester Street
Belfast
BT1 4HL

ONS will usually confirm either that there is no case to pursue or that the matter of bigamy and/or perjury has been referred to the police. If the matter is with the police caseworkers may contact the police for progress on the outcome of any charges brought. The police action may take some months to come to court if at all.

7.2. Refusing an application

It is ultimately for a Court to decide whether a marriage or divorce is valid. However, although the standard of proof required before referring a suspected case of bigamy to the ONS must be **beyond reasonable doubt**, the appropriate standard of proof to support a decision in an immigration case is that of the **balance of probabilities, albeit at the higher end of the scale. It may still be appropriate to refuse an application even if the evidence on file would not be sufficient for police action.**

Caseworkers should bear in mind that in refusing an application in these circumstances we are seeking to argue that a marriage is not valid in the face of prima facie evidence of a genuine marriage certificate. It is not sufficient therefore to rely upon statements made on VAFS/landing cards; the onus is on the Home Office to make further enquiries.

7.3. Previously declared marriages

When considering a case where an applicant has married after arrival in the UK and there is evidence on file of a previously declared marriage, the following procedure should be followed:-

- Where there is a statement on the VAF to indicate that the applicant has a spouse in their country of origin, we should put this to the applicant, together with the full name of the spouse and any other information we have, for comment.
- If the applicant does not reply, the application should be refused on the grounds that the applicant has failed to respond satisfactorily to our enquiries.
- If the applicant produces satisfactory evidence that he/she is divorced/widowed, the application may be granted (but see the guidance in paragraph 7.1 above).
- If the applicant is a West African who claims/states that the earlier marriage had been customary and that a customary divorce had taken place before he or she married in the United Kingdom, the caseworker should refer to 6.3 above. The caseworker should make enquiries of either INPD or the ECO where there is any doubt concerning the status of customary marriages and divorces in the applicant's home country. Enquiries may also be appropriate where there are substantial grounds for believing that the marriage was not customary as claimed or the ECO could obtain evidence from local sources about the marriage and divorce.
- If the applicant admits that the information on the VAF is false, we should then consider asking the ECO to make what enquiries he can. ECOs should **only** be asked to make local enquiries **in cases where there is a reasonable chance that such enquiries will produce evidence which is likely to be strong enough to satisfy the burden of proof placed on the Home Office.** However, cases should not be conceded without further enquiry unless it is quite clear that such enquiry is unlikely to produce results. In cases of doubt, the ECO is the person best placed to decide whether enquiries are worthwhile.

In deciding an application the caseworker must consider the onus placed on the Home Office in arguing that a marriage registered in the UK is invalid. All the evidence on file must be carefully assessed and where the applicant produces a fair response and we have been unable to obtain further information to the contrary, it may be appropriate to take the view that we do not have sufficient evidence to conclude that the applicant and sponsor are not related as claimed. In such cases the application should be granted.

An application should be refused where there is documentary evidence of a previous marriage which has not been dissolved. All cases should be referred to the ONS as detailed above. Where enquiries do not produce documentary evidence of a pre-existing marriage, it may still be appropriate to refuse the application if the available evidence strongly indicates that the applicant was not free to marry and he/she has not provided a convincing explanation. A statement on the VAF or to the immigration officer on arrival in the United Kingdom is not on its own sufficient ground for refusing the application. The caseworker will need additional evidence such as a report from the ECO or corroboratory evidence from the family of either the applicant or the sponsor. Vague allegations which cannot be substantiated would not be sufficient to support a refusal.

8. CHILD SPOUSES

When dealing with applications involving child spouses caseworkers must consider:

- * the age of the applicant
- * the age of the sponsor
- * the validity of the marriage.

8.1. Effect of HC 395

Paragraph 277 of HC 395 as amended by HC 538 and HC 1113 prevents the granting of admission or leave to remain to applicants whose **only** basis of stay is their **marital status** if the applicant is aged under 16 or the sponsor is aged under 21 at the time the **decision** is made. This includes both applications for settlement where the sponsor is settled here and applications for leave to enter or remain where the sponsor is only here in a temporary capacity.

A person who is party to a child marriage but who is applying for leave to enter or remain in his **own right** under some other category of the Rules should **not** be considered under this instruction.

8.2. Validity of the marriage

No valid marriage can take place in the United Kingdom if one of the partners is aged under 16. Any case involving a marriage which has taken place in the United Kingdom, where the marriage certificate or other evidence (eg the passport) shows that one or both the partners was under 16 at the time of the marriage should be refused and the details to be passed to ONS.

The law of a number of countries permits children under the age of 16 to contract a valid marriage. A marriage which was contracted when one or both partners was aged under 16 is recognised under English law if:

- * the marriage was valid in the country in which it took place; and
- * both parties to the marriage had the legal capacity under the law of their domicile to marry each other.

An application on the basis of a marriage that would not be recognised as valid is to be refused on that ground alone.

8.3. Domicile

No one who is domiciled in England and Wales has the capacity to enter a marriage where either spouse is under 16, no matter where the marriage was celebrated (cases involving people domiciled in Scotland or Northern Ireland should be referred to INPD for advice). However, cases may arise where, although the child may be a British citizen or has lived here all his life, he may be **domiciled** in a country that permits marriage under the age of 16 (because his domicile is dependent on that of a parent). It would therefore be possible for a United Kingdom based child to contract a valid marriage overseas before he was 16.

ANNEX D (below) provides guidance relating to domicile.

8.4. Countries which permit marriage under 16

Caseworkers should be aware that the minimum age for marriage is below 16 in a number of countries. Countries that permit marriage before 16 include: Canada (Quebec Province), South Africa and certain States in the USA. Full details of countries which permit marriage before 16 and the restrictions they place on such marriages are held in INPD. It is also not uncommon for countries to have a different minimum age for marriage depending on the sex of the spouse.

8.5. EEA nationals

All cases involving spouses under the age of 16 of EEA nationals should be referred to the International Policy Directorate for action.

9. CHILD SPOUSES - USE OF DISCRETION

If an application is covered by Paragraph 277 of the Rules then refusal would normally be the appropriate course of action. However, in cases where the applicant is within a couple of months of his 16th birthday, the exercise of discretion may be appropriate. In the case of an entry clearance application the post should be advised not to issue the entry clearance until the applicant is 16.

