Rights of Women’s response to ‘Family Migration, A Consultation’

About Rights of Women

Celebrating our 35th anniversary this year, we work to secure justice, equality and respect for all women. Our mission is to advise, educate and empower women by:

- Providing women with free, confidential legal advice by specialist women solicitors and barristers.
- Enabling women to understand and benefit from their legal rights through accessible and timely publications and training.
- Campaigning to ensure that women’s voices are heard and law and policy meets all women’s needs.

Rights of Women specialises in supporting women who are experiencing or are at risk of experiencing, gender-based violence, including domestic and sexual violence. We support other disadvantaged and vulnerable women including Black, Minority Ethnic, Refugee and asylum-seeking women (BMER women), women involved in the criminal justice system (as victims and/or offenders) and socially excluded women. By offering a range of services including specialist telephone legal advice lines, legal information and training for professionals we aim to increase women’s understanding of their legal rights and improve their access to justice enabling them to live free from violence and make informed, safe, choices about their own and their families’ lives. We received the Mayor of London’s Award for Distinction for outstanding and innovative work in relation to domestic violence (November 2007) and the Lilith Project’s Best Voluntary Sector Violence against Women Campaign (November 2005).

Rights of Women is an Industrial and Provident Society and an exempt charity. Our Rules set out our charitable purposes. Pursuant to the Charity Act 2006 we are in the process of registering as a charity.

Summary
In our response to this consultation we have focussed on the proposals that will have most impact on women, particularly women who are at risk of or who are experiencing violence.¹ This summary of our concerns about the consultation relates to all of the questions asked.

Our families, our lives, our rights

The ability to marry, enter into a civil partnership or form other significant relationships, have children and support elderly relatives are issues that are central to our identity as individuals and therefore to most people’s lives. We know from our experience of advising women on our three national, legal advice lines that entering into a relationship of a woman’s choice, founding a family and making meaningful choices about family life are issues that are of vital importance to our service users. As the House of Lords explain in Huang [2007]:²

“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.”

Baroness Hale made a related point in Beoku-Betts [2008], the “central point” she said about family life is that the “whole is greater than the sum of its individual parts.”³

The right to marry and to respect for private and family life are fundamental human rights protected under UK law through the common law and the Human Rights Act 1998 (the HRA, the HRA incorporated Articles 8 and 12 of the European Convention on Human Rights (ECHR) into domestic law). We believe that the proposals set out in the consultation do not represent an appropriate balance between the Government’s objective of reducing net migration and the rights of UK citizens, and those settled in the UK, to live here and enjoy family life. While we respect the Government’s desire to reduce net migration we believe that this must be achieved through measures that do not interfere disproportionately with individual’s fundamental human rights.

The Government’s Commitment to Ending Violence Against Women and Girls

¹ The definition of violence used in this response is that found in Articles 1 and 2 of the UN Declaration on the Elimination of Violence against Women, adopted by UN General Assembly resolution 48/104 of 20 December 1993.
² Huang v Secretary of State for the Home Department [2007] 2 AC 167, 186
³ Beoku-Betts (FC) (Appellant) v Secretary of State for the Home Department [2008] UKHL 39: 4
The Home Secretary, Teresa May MP:

“The ambition of this government is to end violence against women and girls.”

In its Call to End Violence Against Women and Girls and its associated Action Plan the Government set out its absolute commitment to work towards the elimination of violence against women and girls. Central to the both documents is prevention, as the Home Secretary states in her forward to the Call:

“However, at the heart of our approach will be prevention. We will work across the whole of government on preventative measures to stop violence from happening in the first place.”

There is no legal definition of what conduct or forms of harm constitute violence against women within UK law. However, the UN Declaration on the Elimination of Violence against Women (1993) defines violence against women in Article 1 as:

“any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”.

It is upon this that the Government’s definition of violence against women, as set out in the Call, is based. However, the consultation document fails to recognise the impact that some of the changes suggested will have on women who are experiencing domestic violence. This is all the more surprising when it is considered that in the Call and its Action Plan the vulnerability of women on spouse / partner visas is recognised and a comprehensive system for their protection and support announced. No reference is made in the consultation to the increased number of women who are likely to be vulnerable to violence and abuse if the probationary period is increased from 2-5 years or if the language requirements are increased in the way suggested. No reference is made to the increased vulnerability of older dependant family members if the same changes are imposed on them. It is submitted that these proposals completely contradict the Home Secretary’s commitment to prevention, as outlined above. The references to violence against women that are made in the consultation serve only to justify measures which aim to reduce net migration, not which offer women and girls meaningful protection from violence. The consultation does not ask

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4 Call to End Violence Against Women and Girls page 3.
5 Ibid
6 A/RES/48/104
7 At the moment the Sojourner Project operates to enable these women to access support, this will be replaced in April 2012 with a system that enables this group of women to access welfare benefits, see page 16 of the Call to End Violence Against Women and Girls: Action Plan.
respondents, for example, what could be done to the family migration route to implement’s the Home Secretary’s commitment to ending violence against women and girls.

In addition to the failure to formulate proposals that are in line with the Government’s Call to End Violence Against Women and Girls (and its associated documents and commitments) it is also a cause for concern that no reference is made to the UK’s domestic and international legal commitments to respond to violence against women. For example, the UK is a signatory of the Convention on the Elimination of Discrimination Against women (CEDAW). General Recommendations are issued by the Committee that monitors compliance with CEDAW. General Recommendation 12 (1989) sets out the positive obligations on States to eliminate gender-based violence while General Recommendation 19\(^8\) goes further in describing the positive obligations on States to eliminate gender-based violence and makes clear that States may be responsible for private acts if they fail to act with due diligence to prevent the violation of rights or to investigate and punish acts of violence.\(^9\) The UK Government has removed the immigration reservation to CEDAW and so is legally required to ensure that migrant women receive equal protection from violence to that available to UK women. The European Court of Human Rights has found that a State's failure to protect women against violence is unlawful discrimination because it breaches their right to equal protection of the law\(^10\).

Legal aid

Rights of Women would like to take the opportunity afforded by this consultation to emphasise the importance of legally aided advice and representation to vulnerable migrants. Legal aid is a vital tool for the protection of women from violence\(^11\). We believe that the impact of these proposals cannot be properly evaluated without a simultaneous examination of the impact of the Legal Aid, Sentencing and Punishment of Offenders Bill 2011.

We have very serious concerns about the removal of immigration and some asylum-support law from the scope of legal aid and the impact of this on women vulnerable to, and experiencing, abuse and exploitation including:

- Victims of domestic violence who are the family members of EEA nationals and who are seeking to remain in the UK under Regulation 10 of the EEA Regs 2006.
- Women challenging decisions in relation to ‘cash only’ asylum support.

\(^8\) General Recommendation No. 19 (11\(^{th}\) Session, 1992) on Violence against women.
\(^9\) For further information on the UK’s internationals obligations in relation to violence against women see From Rights to Action, K Perks, Rights of Women, 2011 (available to download from here www.rightsofwomen.org.uk/pdfs/VAW_toolkit_From_Rights_to_Action_Amended.pdf.
\(^10\) Opuz v Turkey [2009] (Application no. 33401/02) para 191
• Women with refugee leave or humanitarian protection seeking reunification with children and other close family members separated from them in their country of origin (family reunification).
• Individuals who have been trafficked into the United Kingdom for the purposes of sexual and other exploitation.
• Migrant domestic workers.

These cases raise complex issues and affect particularly vulnerable women whose fundamental human rights, including the right to be free from inhuman and degrading treatment, are at risk. Unlike with other areas of law, there are no alternative advice providers in these cases as it is a criminal offence for anyone (such as the advice organisations that the Ministry of Justice suggests can provide practical help and assistance) to give immigration advice or services unless they are qualified to do so.

Marriage and Civil and Other Partnership

Question 1: Should we seek to define more clearly what constitutes a genuine and continuing relationship, marriage or partnership, for the purposes of the Immigration Rules? If yes, please make suggestions as to how we should do this.

No.

The immigration rules currently require applicants seeking to enter the UK to marry, enter into a civil partnership or join their partner to be in a ‘subsisting’ (continuing) relationship:

“each of the parties intends to live permanently with the other as his or her spouse or civil partner and the marriage or civil partnership is subsisting”

The Entry Clearance Guidance confirms that:

“Intention to live permanently with the other means an intention to live together, evidenced by a clear commitment from both parties that they will live together permanently as husband and wife immediately following the outcome of the application in question or as soon as circumstances permit.”

The same requirements are in place for applicants who wish to switch into this category from another immigration status (e.g. from being a student to being a spouse).

Applicants must provide evidence that their relationship is subsisting, this evidence, and the applicant’s commitment to their spouse or partner is scrutinised by Entry Clearance Officers. We believe that these requirements

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12 See paragraphs 281 and 284 of the current immigration rules.
13 [www.ukba.homeoffice.gov.uk/policyandlaw/guidance/ecg/set/set3/#header6](http://www.ukba.homeoffice.gov.uk/policyandlaw/guidance/ecg/set/set3/#header6)
offer sufficient protection to the UKBA against applicants who are not in a
genuine or subsisting relationship. However, we would not object to the UKBA
amending the Immigration Rules to include a reference a relationship being
“genuine and subsisting” to improve clarity. Clarity and transparency could
also be improved by providing greater detail to applicants about the forms of
evidence that they need in order to make a successful application.

However, it is neither possible nor desirable to attempt to develop a definition
or criteria to determine the ‘genuineness’ of a particular relationship. What
constitutes a genuine relationship varies from person to person, generation to
generation, culture to culture and religion to religion. Any attempt to reach a
definition of what constitutesthe ‘genuine’ relationship will only serve to
privilege one particular experience, one particular cultural and temporal
construction of a ‘relationship’ over others which are no less valid. In relation
to some of the indicators suggested in the consultation for example, we reject
the idea that factors including whether or not a couple have a difference in
their ages, or have eloped, or have few guests at their wedding could be
considered reliable indicators as to the genuineness or otherwise of their
relationship. Consequently, we believe that any definition developed along
these lines would be potentially discriminatory, either directly or indirectly on
the grounds of race, religion or age. As set out above, guidance already exists
to assist entry clearance officers and other decision makers assess whether
or not “each of the parties intends to live permanently with the other as his or
her spouse or civil partner and the marriage or civil partnership is subsisting”\(^\text{14}\)
this guidance includes the Immigration Directorate Instructions and the Entry
Clearance Guidance\(^\text{15}\). We do not believe that any further guidance on this
point is needed.

Question 2: Would an ‘attachment to the UK’ requirement, along the
lines of the attachment requirement operated in Denmark:

a) Support better integration? No.
b) Help safeguard against sham marriage? Yes, but the adoption of such a
measure would be a disproportionate response to the legitimate aim of
combating sham marriages.
c) Help safeguard against forced marriage? No.

This question raises the idea of requiring applicants to show that their
attachment to the UK is greater than to any another country if they want to be
able to settle with their UK partner in the UK.

We believe that attachment to the UK is demonstrated sufficiently by being
either a UK citizen or resident. Indeed, the ability to live and found a family in
the country of one’s nationality or residence may be described as the essence
of a person’s national identity and a central part of citizenship. We do not
accept that the introduction of additional evidence of a person’s attachment to
the UK would serve to either improve integration or respond to forced

\(^\text{14}\) Requirement of paragraphs 281 (iii) and 284 (vi) of the current immigration rules
\(^\text{15}\) Chapter 8, Sections 1.2,3 and 9 of the IDIs and SET1.7 to 1.9 (fiancés), SET 2.7 to 2.9
(PCPs), SET 3.6 to 3.8 (spouses), SET 4.6 to 4.8 (CPs) and SET 5.7 to 5.9
marriage. While such a change may reduce the number of marriages or other equivalent relationships that are entered into only for the purposes of securing entry or leave to remain in the UK (‘sham marriages’), it is submitted that the proposed change is wholly disproportionate to this goal.

The consultation suggests adopting a similar ‘attachment’ test to that which operates in Denmark. We understand that the Danish test is not applied to the partners of Danish Citizens. We do not believe therefore, that if the test introduced in the UK were based on the Danish model, that it would be applied to the majority of applications made (as it would apply to UK residents only, not UK citizens). We do not believe that a difference in treatment between UK citizens and UK residents in this regard could be objectively justified.

Integration

It is difficult to envisage how separating families, whether by compelling a UK citizen or resident to live abroad with their partner or ending their relationship by preventing them from living together in the UK could possibly be argued to aid integration. Integration is best achieved by enabling individuals to make meaningful choices about their and their families lives and facilitating these choices (by, for example, supporting new arrivals to the UK who seek to improve their English language skills or contribute to life in the UK through paid work or volunteering).

‘Sham’ marriages

The introduction of such a requirement may prevent some ‘sham’ marriages from occurring, however, we do not believe that the adoption of a blanket rule which affects all marriages or equivalent relationships is a justified or proportionate response to achieving this legitimate aim (see further below).

Forced marriages

A forced marriage is a marriage which takes place without the full and free consent of both parties. Those who seek to coerce others into a marriage may do so for a number of reasons, including to seek to maintain or develop family relationships, to enforce heterosexual norms, to maintain so-called ‘family honour’ or out of a perception of what is in the best interests of a child or young adult. While facilitating the entry of a particular person to the UK may be a motivation for some perpetrators, there is no evidence to suggest that this is the case in a majority or even in many forced marriages. This is evidenced by the number of cases that require intervention from the Forced Marriage Unit outside of the UK which involve UK citizens who are taken abroad for the purposes to facilitate a forced marriage and for whom no plans are made for their return to the UK. The motivations of perpetrators of forced

16 Paragraph 2.15
marriage are therefore complex and interconnected and cannot be reduced to any one factor or goal. Forced marriage cannot be compared or equated to ‘sham marriages’; these problems require separate policy responses. Any legislative or policy response to forced marriage should be proportionate to the harm that it causes. In the case of Quilla the Court of Appeal examined a change in the immigration rules which increased the minimum age of a sponsor of a spouse, civil partner or partner from 18 to 21 years of age. The purported justification for this change was to reduce the incidence of forced marriage. The Court of Appeal found that this change was disproportionate to the legitimate aim of preventing forced marriage because while there was some factual link between age and the prevalence of forced marriage, this could not justify the introduction of a rule that so negatively affected the vast majority of genuine relationships. As Lord Sedley concluded:

“The critical question was why the protection of the vulnerable justified a blanket rule which invaded the fundamental rights of a far greater number of innocent people. This was apparently not addressed.”  

If and when the Supreme Court upholds the judgement of the Court of Appeal in Quilla it is submitted that this will have considerable implications, not just in terms of the increase in marriage age, but also for these proposals which appear to make the same mistakes in reasoning and justification as those which were so completely rejected by the Court of Appeal.

Finally, rather than combating forced marriage, the imposition of an ‘attachment to the UK’ requirement will only serve to put those who have been forced into a marriage at greater risk of experiencing additional violence and abuse by making it harder for the individuals affected (who are disproportionately women) from returning to the UK where they will be able to access support services, annul the purported marriage and seek other legal protections from those from whom they are at risk. For example, the proposals as they stand could prevent a UK woman forced to marry abroad from retuning here with her spouse (if the couple could not show that their attachment to the UK was greater than to any other country). This would increase the risk that she remains abroad in the forced marriage.

Rights and Freedoms

In addition to failing to respond to the issues outlined in the question (integration, sham and forced marriages) the introduction of an ‘attachment to the UK’ requirement would interfere with the rights of UK citizens and residents to marry and to enjoy private and family life. These rights, or freedoms, are protected by both the common law and HRA 1998 (Article 8 ECHR protects respect for private and family life while Article 12 protects the right to marry). They are also protected by international human rights law to which the UK is a signatory, such as the Universal Declaration of Human Rights (1948) and the International Covenant of Civil and Political Rights.

18 Diego Quilla and others v the Secretary of State for the Home Department [2010] EWCA Civ 1482.
While neither are absolute rights, they are recognised as being of 'fundamental' importance, as Lord Bingham explained in relation to the right to marry in \textit{R(Baiai)} [2008]:

"If by "absolute" is meant that anyone within the jurisdiction is free to marry any other person irrespective of age, gender, consanguinity, affinity or any existing marriage, then plainly the right protected by article 12 is not absolute. But equally plainly, in my opinion, it is a strong right. It follows and gives teeth to article 16 of the Universal Declaration of Human Rights (1948) and anticipates article 23(2) of the International Covenant on Civil and Political Rights (1966). In contrast with articles 8, 9, 10 and 11 of the Convention, it contains no second paragraph permitting interferences with or limitations of the right in question which are prescribed by law and necessary in a democratic society for one or other of a number of specified purposes. The right is subject only to national laws governing its exercise. The Strasbourg case law reveals a restrictive approach towards national laws. Thus it has been accepted that national laws may lay down rules of substance based on generally recognised considerations of public interest, of which rules concerning capacity, consent, prohibited degrees of consanguinity and the prevention of bigamy are examples .... .... But from early days the right to marry has been described as "fundamental", it has been made clear that the scope afforded to national law is not unlimited and it has been emphasised that national laws governing the exercise of the right to marry must never injure or impair the substance of the right and must not deprive a person or category of person of full legal capacity of the right to marry or substantially interfere with their exercise of the right ...."\textsuperscript{19}

We accept that neither the right to marry nor the right to enjoy private and family life automatically confer the right of a couple to live permanently in the UK. However, that does not mean that opposite of this is true, that these rights confer \textit{no} right to live in the UK. Rather, legislative or other measures which restrict the ability of UK citizen’s or residents to live in the UK with their partners must, according to common law and domestic and international human rights law, be proportionate and for a legitimate aim. As Lord Sedley explains in \textit{Quila} [2010]:

"In the eyes of the common law it is not simply the right to marry and not simply the right to respect for family life but their combined effect which constitutes the material right: that is to say a right not merely to go through a ceremony of marriage but to make a reality of it by living together. For the state to make exile for one of the spouses the price of exercising the right to marry and embark on family life requires powerful justification.... In Convention terms the two rights are discrete, but their practical relation to each other is in my view very much the same.

\textsuperscript{19} \textit{R(Baiai) v Home Secretary} [2008] UKHL 53: 13
It is not disputed, even so, that there will be measures which a state is entitled to take which impede the right, for instance by excluding spouses with serious criminal records or – materially – parties to forced marriages. In deciding whether to apply such measures it is established by Abdulaziz that the state may place weight on the fact (if it is a fact) that neither spouse has a citizen’s right of abode here. But I accept the appellants’ case that the starting point is not, as the Home Secretary suggests, a thin entitlement which, so long as it can be exercised somewhere in the world, can legitimately be stultified here. It is a fundamental right which, whether at common law or by virtue of article 8 read with article 12 of the Convention, the state is ordinarily required to respect.\footnote{Diego Quila and others v the Secretary of State for the Home Department [2010] EWCA Civ 1482.}

**Question 3: Should we introduce a minimum income threshold for sponsoring a spouse or partner to come to or remain in the UK?**

No.

This question implies that there is currently no minimum income threshold for sponsoring a spouse or partner to come to or remain in the UK. This is incorrect as the immigration rules require that sponsors be able to maintain and accommodate their spouse or partner without additional recourse to public funds. In order to meet this requirement an applicant must show maintenance equal to, or in excess of, the funds available to an equivalent UK family relaying on income support (and any other welfare benefits they would be entitled to). If the UKBA, or indeed the Government as a whole, does not believe that the current levels at which welfare benefits are set are sufficient for families to be able to live on they should say so and take immediate steps to remedy this situation.

It is not accepted that change is justified in this regard to protect the taxpayer as no evidence is presented in the consultation that suggests that migrant families are accessing welfare benefits or other forms of financial support. Indeed sources of public assistance, such as welfare benefits and housing support, are unavailable to those who are ‘persons subject to immigration control’ by virtue of section 115 of the Immigration and Asylum Act 1999. Other exclusions apply in relation to other publicly funded sources of support, such as community care services provided by the local authority. Furthermore couples who rely on additional public funds because of the arrival in the UK of the new spouse or partner seriously jeopardise that partner’s ability to remain in the UK permanently.

The other justifications for this change put forward in the consultation are also rejected. For example, if decision-makers at the UKBA are indeed finding difficult to apply this rule consistently then that is evidence of a need for clearer guidance on this point, not for a different rule. Similarly, the fact that one partner is likely to be financially dependent on the other is not a reason
for changing the rule. In many UK households one partner is financially dependent on the other, perhaps because he/she is in engaged in caring for children or other relatives or studying. It cannot be suggested by the UKBA that these UK households are in anyway a problematic or a threat to ‘the taxpayer’. It is also submitted that failing to take into account the income and/or savings of the applicant or their potential earnings in the UK will do nothing to protect the taxpayer as both of these factors are indications that the applicant will be significantly less likely to be a ‘burden on the taxpayer’. The same is true of third parties who are in the UK and are in an excellent position to demonstrate their ability to support the applicant and their sponsor.

**Question 4: Should there be scope to require those sponsoring family migrants to provide a local authority certificate confirming their housing will not be overcrowded, where they cannot otherwise provide documentation to evidence this?**

No.

Housing certificates may already be used by applicants who wish to provide evidence of the suitability of their accommodation. If the use of these certificates is to be increased local authorities must first be consulted to ensure that they have the capacity to meet this increased demand. The UKBA should not introduce additional requirements that will create burdens and cost implications for third parties such as local authorities.

**Question 5: Should we extend the probationary period before spouses and partners can apply for settlement (permanent residence) in the UK from the current 2 years to 5 years?**

No.

**Non-abusive relationships**

The fact that a minority of marriages end in divorce does not mean that these marriages were invalid or marriages of convenience. The evidence relied on by the UKBA in relation to average length of marriages indicates that marriages are lasting longer now than they did in the 1990s²¹. The consultation does not refer to the average length of time unmarried partner’s relationships last (or the fact that they have been together for two years before entry clearance or leave is granted), to civil partnerships or break down the statistics in relation to other relevant factors, such as age or immigration status. There is no evidence to suggest that the fact that EEA nationals and their family members have to wait for 5 years before being eligible for permanent residence results in their being fewer ‘sham marriages’ being entered into by this group. It is submitted that ensuring the genuineness of a

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marriage or equivalent relationship remains the best way of ensuring that this migration route is not abused.

The ability to plan for the future is important to all families; a probationary period of 5 years will inhibit couples from being able to do this and will have serious negative consequences for applicants who have committed to building a life in the UK. Once again proportionality is an issue here as the proposals will have deleterious consequences for all applicants because of the behaviour of a very small number of people.

The consultation envisages the applicant having to make an additional application mid-probationary period for further leave to remain. This additional application would require a fee. This will have considerable cost implications for families at a time when many families are experiencing financial hardship. The proposed changes also increase the likelihood of individuals being left without leave to remain in the UK following the breakdown of their relationship, even after they have spent a considerable period of time here. It cannot be seen how this meets any of the UKBA’s stated aims of tackling abuse, promoting integration or being fair to applicants.

Finally, we are very concerned that no mention is made in the consultation of the effect that this change will have on children as per the UKBA’s duty under s55(1) of the Borders Citizenship and Immigration Act 2009. Factors such as greater uncertainty about a family’s future in the UK and greater financial pressures impact negatively on children and should therefore be properly taken into account when assessing the proportionality and necessity of these proposals.

Abusive relationships

As stated above in our introduction to this response, it is shocking that no reference is made in the consultation to the Government’s commitment to end violence against women and girls as set out in its Call to End Violence Against Women and Girls and its associated Action Plan. This is incomprehensible when it is considered that the Action Plan contains specific measures aimed at protecting migrant women on spouse / partner visas from domestic violence.

The dependence of one partner on another creates a power imbalance that will be exploited by a perpetrator of domestic violence. The dynamics of a violent relationship involve the exercise of power and control by one partner over the other. Rights of Women knows from its experience of advising migrant women who are experiencing domestic violence that control and exploitation of their immigration status is frequently used by perpetrators of domestic violence, this may manifest itself in:

- threats to have the applicant removed if she attempts to seek help or fails to comply with the perpetrators demands;
- the theft of her passport and other relevant documentation;
- the provision of false information about the applicant’s immigration status to ensure that she becomes an overstayer (by stating that an application for ILR has been made when it has not);
- threats to report a partner to the police if she seeks assistance or to leave the relationship.

An insecure immigration status also heightens and intensifies a woman’s experience of abuse as many women with an insecure immigration status are deterred or prevented from accessing support services. The Government’s Call and Action Plan recognise this by committing to enabling applicants under the domestic violence rule to receive welfare benefits while they are preparing their claim and it is decided by the UKBA.\(^{23}\) No reference to the impact of the proposed change to the probationary period on this commitment is made in the consultation. Notwithstanding this commitment, increasing the probationary period will increase the period of time an applicant is dependent on her sponsor and is therefore at risk of, or experiencing, abuse. Given the lack of knowledge among applicants of their ability to make applications under the domestic violence rule or seek protection from violence, it will also increase the amount of time applicants believe that they are under the control of their abusive partners. It is our belief that this proposal, if implemented, will result in an increase in the number of domestic violence homicides and suicides amongst this group of women.

**Question 6: Should spouses and partners who have been married or in a relationship for at least 4 years before entering the UK, be required to complete a 5-year probationary period before they can apply for settlement (permanent residence)?**

No.

Couples who have been in a relationship for 4 years outside of the UK have sufficiently demonstrated the genuineness of their relationship and their commitment to each other. Indefinite leave to remain is not given simply because a person has contributed financially or otherwise to the UK. Indefinite leave to remain is a recognition of someone’s commitment to the UK. We submit that someone who has been in a relationship with someone who is a UK citizen or resident for this considerable period of time has sufficiently demonstrated this commitment and is entitled to certainty about their immigration status if they accompany their partner to the UK.

**Question 7: Should spouses and partners applying for settlement (permanent residence) in the UK be required to understand everyday English?**

No.

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\(^{23}\) Call to End Violence Against Women and Girls: Action Plan, page 16.
The current provisions in relation to knowledge of English language and life in the UK aid integration and enable applicants to contribute meaningfully to UK life. Increasing these requirements will only serve to disadvantage vulnerable applicants such as those with mild learning difficulties or those who are experiencing domestic violence who are prevented from accessing English classes. In both cases applicants may be forced to remain permanently on limited leave to remain in the UK and be unable to achieve settlement. In cases involving domestic violence this will result in applicants remaining under the control of their abusive partners for even longer period of time.

Question 8: Which of the following English language skills should we test?

No. See our answer to question 7 above.

Tackling Sham Marriage

Question 9: Should we (in certain circumstances) combine some of the roles of registration officers in England and Wales and the UK Border Agency as a way of combating sham marriage?

No.

It is difficult to evaluate this proposal as the consultation does not provide any information about how this change would work in practice or would represent an improvement on the current powers and duties that registrars already have to report suspicious marriages or civil partnerships.

This proposal appears to confuse entering into a marriage with securing a benefit from that marriage – namely leave to enter or remain in the UK. The consultation explains in detail the current legal situation, which is that ‘marriages of convenience’ or ‘sham marriages’ cannot result in the granting of either a residence permit or leave to remain in the UK. Given this is the case; it is unclear how seeking to prevent foreign nationals entering into marriage (or civil partnerships) is a proportionate response to achieving the aim of preventing them from benefiting from it. It is submitted that the UKBA’s energies would be better spent in seeking to ensure that leave is only granted to those who are in genuine relationships.

Question 10: Should more documentation be required of foreign nationals wishing to marry in England and Wales to establish their entitlement to do so?

No.

The introduction of additional requirements for foreign nationals seeking to marry or form a civil partnership risk breaching Articles 12 and 14 ECHR (the right to marry and non-discrimination). The UKBA has already caused significant financial and other hardship to applicants as well as costs to the
taxpayer with its introduction of the Certificate of Approval Scheme and its subsequent revocation following *Baiai and others [2008] UKHR53*. The introduction of additional requirements on a similar basis to that which has already been found to be unlawful discrimination cannot be justified.

**Question 11: Should some couples including a non-EEA national marrying in England and Wales be required to attend an interview with the UK Border Agency during the time between giving notice of their intention to marry and being granted authority to do so?**

No.

See our answer to question 9 above. If a UKBA decision-maker was minded to refuse an application for entry clearance or leave to remain in the UK because he/she had concerns about the genuineness of the marriage or other relationship then an interview could be used to enable the applicant and her/his sponsor to respond to those concerns.

However, we reiterate the points made in relation to question 1 that factors like a disparity in age cannot be used to assess the genuineness of a relationship. Training would have to be provided to interviewers to ensure that couples being interviewed were not unlawfully discriminated against.

**Question 12: Should ‘sham’ be a lawful impediment to marriage in England and Wales?**

No.

See our answers to questions 9 and 11 above.

**Question 13: Should the authorities have the power in England and Wales to delay a marriage from taking place where ‘sham’ is suspected?**

No.

See our answers to questions 9 and 11 above.

**Question 14: Should local authorities in England and Wales that have met have high standards in countering sham marriage, be given greater flexibility and revenue raising powers in respect of civil marriage?**

No.

This proposal risks creating financial incentives for referring relationships to the UKBA for further investigation on grounds which may be discriminatory, such as immigration status, ethnic or national origin or age. Again, this proposal rests on the incorrect assumption that it is the marriage or civil partnership that in and of itself confers leave to remain in the UK. This is not the case and the UKBA can and does prevent those who have entered into a marriage of convenience from obtaining an immigration benefit from it.
Question 15: Should there be restrictions on those sponsored here as a spouse or partner sponsoring another spouse or partner within 5 years of being granted settlement in the UK?

No.

Question 16: If someone is found to be a serial sponsor abusing the process, or is convicted of bigamy or an offence associated with sham marriage, should they be banned from acting as any form of immigration sponsor for up to 10 years?

No.

This proposal contradicts the presumption that a person should only be punished once for having committed a crime and that once that punishment has been completed, that they should be able to re-enter society with their debt to it having been paid.

The consultation also fails to distinguish between cases where a person was convicted of bigamy and their motivation was to secure an immigration advantage and other, unrelated cases. For example, a person may be convicted of bigamy because they did not understand that their overseas and/or religious marriage was a legal marriage in the UK which could only be ended by divorce proceedings (rather than simply by securing a religious divorce).

Question 17: Should we provide scope for marriage-based leave to remain applications to be counter-signed by a solicitor or regulated immigration adviser, as a means of confirming some of the information they contain?

No.

The introduction of such a measure will only incur costs for applicants without increasing the confidence that UKBA decision makers could have in the documents and evidence provided to them. A solicitor or immigration advisor is not in a position to confirm information contained in documents or their veracity.

Question 18: Should there be scope for local authorities to provide a charged service for checking leave to remain applications, including those based on marriage, as they can do for nationality and settlement applications?

We are concerned that this question has been included in the section of the consultation which deals with sham marriages. If the service is the same as that which operates in relation to nationality checking, this would be advantageous to applicants and the UKBA, provided of course that those who checked the applications were suitably trained, qualified and regulated.
However, if the service is to go beyond that and seek to establish the credibility of the applicant or the genuineness of the relationship then this would represent a significant departure from the current scheme and create significant conflicts of interest.

**Tackling Forced Marriage**

**Question 19: If someone is convicted of domestic violence, or has breached or been named the respondent of a Forced Marriage Protection Order, should they be banned from acting as any form of immigration sponsor for up to 10 years?**

No.

We do not believe that this proposal will offer women meaningful protection from violence. Only a small proportion of women experiencing domestic violence report that violence to the police or support a criminal prosecution.\(^{24}\) Even in cases where women do report, the conviction rate for offences that relate to domestic violence or other forms of violence against women remain of concern.\(^{25}\) This proposal will therefore only prevent a small minority of perpetrators of violence from being able to sponsor a spouse or other partner; it will not prevent them from forming other abusive relationships, for example, with UK women.

Similar arguments apply in relation to forced marriage protection orders (FMPOs); only a small number of FMPOs are made each year in contrast with estimations of the prevalence of this form of violence against women\(^{26}\). Furthermore, the purpose of a FMPO is not to establish factually who may or may not be seeking to force the applicant(s) into marriage, but to prevent any or all of those who may seek to achieve this from doing so. Given the preventative approach taken by FMPOs, it is wholly inappropriate that these be used in the way suggested by the UKBA to impose a ban on sponsorship as being named in an order is in no way comparable to being convicted of a criminal offence.

Indeed, the proposals risk putting women at greater risk of violence or abuse as perpetrators of violence who are intent on bringing a new partner to the UK from abroad (to enable them to control that person through control of their immigration status, see our comments on domestic violence and control of immigration status above) will seek instead to bring that person to the UK on a

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\(^{26}\) Evidence given to the Home Affairs Select Committee suggests that 293 forced marriage orders were issued between November 2008-February 2011, *Forced Marriage*, Home Affairs Committee, 8\(^\text{th}\) Report of Session 2010-12, 10\(^\text{th}\) May 2010 [www.publications.parliament.uk/pa/cm201012/cmselect/cmhaff/880/880.pdf](http://www.publications.parliament.uk/pa/cm201012/cmselect/cmhaff/880/880.pdf).
route that does not offer them the protection of the domestic violence rule. For example, Rights of Women is aware of cases of perpetrators bringing new wives and partners to the UK on fiancée or other visas in the knowledge that women with these visas will be unable to rely on the domestic violence rule or the financial support available to these applicants.

If the UKBA wishes to use the family migration route to protect women from violence if should give respondents the opportunity to provide suggestions for how this could be achieved. We submit, for example, that the domestic violence rule should be available for those who are not on spouse or partner visas (for example, those on fiancée visas or others with limited leave to remain in the UK) and that the recently adopted criminality requirement should be removed from the domestic violence rule. We are concerned that no reference is made in the consultation in relation to this question to the Government’s domestic and international commitments to respond to violence against women with due diligence or to the Home Secretary’s Call to End Violence Against Women and Girls and its associated Action Plan.

Finally, this proposal also contradicts the presumption that a person should only be punished once for having committed a crime and that once that punishment has been completed, that they should be able to re-enter society with their debt to it having been paid.

**Question 20:** If the sponsor is a person with a learning disability or someone from another particularly vulnerable group, should social services departments in England be asked to assess their capacity to consent to marriage?

We agree that those who do not have the capacity to make a decision about whether or not to enter into a marriage or other significant relationship should be offered meaningful protection from forced marriage. However, we are concerned that social workers do not have the necessary skills and expertise to carry out such an assessment. The consultation also fails to explain how such an assessment could be challenged, if necessary, by the individual concerned. It is unclear whether or not local authorities have been consulted separately about this proposal to ascertain whether or not this is an additional responsibility that they are able or willing to discharge. It may be that this role is best carried out by an Independent Mental Capacity Advocate. For this reason we believe that the Public Guardianship Office should be consulted about this proposal, as well as specialist organisations such as Respond www.respond.org.uk and Mencap www.mencap.org.uk.

**Other Family Members**

**Question 21:** Should there be a minimum income threshold for sponsoring other family members coming to the UK?

No.
Question 22: Should adult dependants and dependants aged 65 or over complete a 5-year probationary period before they can apply for settlement (permanent residence) in the UK?

No.

Question 23: Should we keep the age threshold for elderly dependants in line with the state pension age?

No.

Question 24: Should we look at whether there are other ways of parents or grandparents aged 65 or over being supported by their relative in the UK short of them settling here? If yes, please make suggestions.

No.

Question 25: Should there be any change to the length of leave granted to dependants nearing their 18th birthday? If yes, please make suggestions.

No.

Question 26: Should dependants aged 16 or 17 and adult dependants aged under 65 be required to speak and understand basic English before being granted entry to or leave to remain in the UK?

No.

Question 27: Should adult dependants aged under 65 be required to understand everyday English before being granted settlement (permanent residence) in the UK?

No.

Points-Based System Dependents

Question 28: Should we increase the probationary period before settlement (permanent residence) in the UK for points-based system dependants from 2 years to 5 years?

No.

Question 29: Should only time spent in the UK on a route to settlement count towards the 5-year probationary period for points-based dependants?

No.
Question 30: Should we require points-based system dependants to understand everyday English before being granted settlement (permanent residence) in the UK?

No.

Other Groups

Question 31: In what other ways could the UK Border Agency improve the family visit visa application process, in order to reduce the number of appeals?

Improve the quality of decision making and the quality of the guidance provided both to applicants and UKBA decision makers.

Question 32: Beyond race discrimination and ECHR grounds, are there other circumstances in which a family visit visa appeal right should be retained? If so, please specify.

The right to appeal should be retained in its entirety. We do not agree that the figures given in the consultation document in relation to evidence provided at appeal stage indicates any ‘abuse’ of the family visit application process. Indeed, the suggestion that applicants knowingly fail to submit the evidence required because they can do so at appeal makes little sense given the UKBA’s assertion that most applicants seek to enter the UK for visits at a particular time and / or for a particular occasion. If the UKBA wishes to reduce the number of appeals against refusals to family visit visas it should focus on improving the quality of decision making and the guidance given to applicants and decision makers.

Question 33: Should we prevent family visitors switching into the family route as a dependent relative while in the UK?

No.

If the applicant meets the dependant relative requirements it makes no sense to require them to leave the UK to make the application. Such a requirement would only increase costs for the applicant and uncertainly for the family, to the detriment of all those involved.

ECHR Article 8

Question 34: Should the requirements we put in place for family migrants reflect a balance between Article 8 rights and the wider public interest in controlling immigration? Please comment further if you wish.

This question cannot be answered in any of the ways suggested as the right to private and family life protected in the HRA/ECHR (by which the UK is bound under domestic and international law) already involves balancing the rights of the individual against the rights of other members of society:
Article 8: Right to respect for private and family life
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Decisions on how this balance should be resolved in individual cases are made by the Courts. If the UKBA disagrees with a particular decision it is open to them to appeal against it. It is not open to the Government to seek to usurp the role of the Courts, or interfere with the separation of powers between the legislative and judiciary.

**Question 35:** If a foreign national with family here has shown a serious disregard for UK laws, should we be able to remove them from the UK? Please comment further if you wish.

No.

The UKBA already has considerable powers to remove foreign nationals who have been convicted of criminal offences. The consultation does not provide any evidence that these powers are insufficient or details as to how they could be improved if they are.

**Question 36:** If a foreign national has established a family life in the UK without an entitlement to be here, is it appropriate to expect them to choose between separation from their UK-based spouse or partner or continuing their family life together overseas? Please comment further if you wish.

No.

A person may become an overstayer or have an insecure immigration status for a number of reasons, because of the violence or abuse they have experienced, because of a change in the Immigration Rules or because of the length of time taken to make a decision on their case. The ‘foreign national’ referred to in the question may during this time go on to form a family relationship with someone who is UK, settled here or someone who themselves has either limited or no leave to remain in the UK. As stated above in relation to question 34, Article 8 involves balancing the rights of individuals and their families with the interests of society as a whole. This balancing exercise offers sufficient safeguards to the state as the question of whether or not it is proportionate to deny the foreign national leave to remain in the UK based on their family life will depend on an assessment of all the circumstances of the case, including who the relationship is with and the
circumstances under which it was formed, the best interests of any children and the ability of the family to relocate.

In General

Question 37: What more can be done to prevent and tackle abuse of the family route, particularly sham marriage and forced marriage?

The provision of publicly funded advice and representation, alongside the funding of specialist violence against women services are the best ways of protecting women and girls from forced marriage. As stated above, the legal responses to forced and sham marriages should not be conflated.

Question 38: What more can be done to promote the integration of family migrants?

The integration of family migrants is best achieved through the development of a just and fair immigration system. Family migrants contribute to life in the UK, their contribution should be valued and not diminished as this consultation does.

Question 39: What more can be done to reduce burdens on the taxpayer from family migration?

There is no evidence that family migration places any financial or other burden on the taxpayer. Indeed, migrants are taxpayers if they work in the UK or purchase goods and services.

Question 40: How should we strike a balance between the individual's right under ECHR Article 8 to respect for private and family life and the wider public interest in protecting the public and controlling immigration?

See above our answer to question 34.

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