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TRAFFICKING IN PERSONS AND SHAM MARRIAGES IN AUSTRALIA
Current as on: October 22, 2009

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1. Introduction

In the literature and popular media so-called ‘sham marriages’ are frequently associated with the topic of trafficking in persons. The case of *Kovacs and Kovacs*,¹ discussed earlier,² also illustrates how a sham marriage may be used to bring a person into Australia for the purpose of exploitation.

Sham marriages in this context refer to situations where a person misuses the immigration system which permits Australian citizens and permanent residents (and also New Zealand citizens living permanently in Australia) to sponsor a partner who lives abroad, so that the person may migrate to Australia permanently. ‘Sham marriages’ is a term used to refer to instances where there is no genuine intention that the two parties are in — or will continue to be in — a relationship with each other once the migrant is in Australia.

This document examines instances and allegations of sponsors using the immigration system for the purposes of trafficking, and explores the question whether the partner sponsorship system is vulnerable to be used as a venue through which people may be trafficked into Australia. Related to this issue is the issue of serial sponsorship of partners and the possibility that people who repeatedly sponsor different foreign partners (typically Australian males sponsoring foreign females) may be using the visa system to bring people into Australia for the purpose of exploitation. General fraud related to the partner sponsor visa system will not be explored further.

2. Partner and Spouse Visa Scheme

Partner visas are designed for persons who seek to enter and remain in Australia on the basis of their married or de-facto relationship. One of the partners must be either an Australian citizen, Australian permanent resident, or an eligible New Zealand citizen. They must also be willing to provide sponsorship for the migration of their partner to Australia.³

The visa requirements for spouses, fiancées, and de-facto partners are very similar.⁴ The first step in partner migration is the application for a temporary spouse visa.⁵ The temporary spouse visas have a two year period of temporary residency. If the marriage or relationship is determined to be genuine and continuing, holders of subclass 820, 309 or 300 visas will be automatically granted permanent residency after the two-year waiting period.⁶ Interdependency visas are a separate subclass, intended mainly for people in a same-sex relationship.⁷ The two year waiting period also applies before permanent residency can be attained, at which time temporary visa holders will be automatically granted a permanent interdependency visa.⁸

¹ *R v Kovacs* [2008] QCA 417; *R v Kovacs* [2007] QCA 143; *R v KO* [2006] QCA 34.

² See below.

³ Regulation 1.20 2(c) *Migration Regulations 1994* (Cth).

⁴ For a general overview of the operation of partner visas, see the explanation of partner visa provisions at DIAC, *Partner Visa Options*, available at www.immi.gov.au/migrants/family/family-visas-partner.htm (accessed 17 Feb 2009).

⁵ The visa subclass will mainly depend on whether or not the visa application was made onshore (subclass 820) or offshore (subclass 309). There is also a prospective marriage visa (subclass 300), for migrants who wish to move to Australia to marry their fiancée.

⁶ Regulation 2.08G *Migration Regulations 1994* (Cth).

⁷ Similarly to the temporary spouse visas, there are separate visa subclasses for onshore (subclass 826) and offshore (subclass 310) applications.

⁸ Visa subclasses 814 or 110

To determine whether or not a relationship is 'genuine and continuing', DIAC requires evidence that the applicant is a 'spouse' within the meaning of Regulation 1.15A of the *Migration Regulations 1994* (Cth). In making this determination, several circumstances of the relationship are considered,⁹ including, but not limited to, whether or not the applicants live together, the financial aspects of the relationship, the nature of the household, the social aspects of the relationship; and the nature of their commitment to each other.

2.1 Domestic violence exception

The two-year waiting period for permanent residency may be waived in cases of family violence, which is defined in Division 1.5 of the *Migration Regulations 1994* (Cth) as:

a reference to conduct, whether actual or threatened, towards

- the alleged victim
- a member of the family unit of the alleged victim
- a member of the family unit of the alleged perpetrator
- the property of the alleged victim
- the property of a member of the family unit of the alleged victim
- the property of a member of the family unit of the alleged perpetrator

that causes the alleged victim to reasonably fear for, or to be reasonably apprehensive about, his or her own wellbeing or safety.

There are various forms of evidence which may be used to substantiate a claim of family violence. Such evidence includes, but is not limited to, a court order against the spouse or partner, police records of assault, and statutory declarations — both from the victim and 'competent persons' — that outline the allegation of violence, who is alleged to have committed the violence, and (in the case of 'competent persons') sets out the evidence upon which they have based their decisions that family violence has occurred.

If there is reasonable doubt regarding the truthfulness or reliability of a claim, DIAC will make a referral for an assessment by an independent expert. This expert will provide an opinion to the Department either that family violence has or has not occurred, and their opinion must be taken as correct by the Department. This referral mechanism only applies to non-judicially determined claims of family violence.

2.2 Limitations on serial sponsorship'

Division 1.4B of the *Migration Regulations 1994* (Cth) outlines some limitations on the sponsorship of foreign partners. Under Regulation 1.20J, prospective sponsors are restricted to only two approved sponsorships or nominations. The sponsorships or nominations made must also be at least five years apart.

Exceptions to the limitation may be granted if the Minister is satisfied that there are compelling circumstances affecting the sponsor. Under the *Procedures Advice Manual 3*, 'compelling circumstances' include instances in which the applicant and their sponsor have a child who is dependent on each of them; a previous partner has died; a previous partner has abandoned the sponsor, leaving dependent children who require care and support from the sponsor; or the new relationship is longstanding.

⁹ Regulation 1.15A (3) *Migration Regulations 1994* (Cth).

Despite the availability of this exception, the courts have generally been reluctant to allow a third sponsorship or nomination for partner migration,¹⁰ although they have been more willing to do so in cases involving dependent children.¹¹

3. Contrived or 'Sham' Marriages as Immigration Fraud

Entering into a contrived marriage or relationship, or pretending to be in a 'genuine and continuing relationship' for immigration purposes, is recognised as a form of immigration fraud. In a 2005 report, the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA, now Department of Immigration and Citizenship (DIAC)) reported several incidents of contrived marriages and relationships.¹² Of the 3,999 allegations of fraud received by the department, 48% were incidents of contrived or 'sham' relationships.¹³ The definition of 'fraud' in this category was said to include:

- arranging a contrived marriage, de facto relationship or interdependency relationship to obtain permanent residence;
- providing certain false or misleading information about a marital, de facto or interdependency relationship;
- applying or nominating for permanent residence on the basis of a contrived marriage, de facto relationship or interdependency relationship; and
- using or possessing a visa granted to another person, or presenting false or forged documents or making a false or misleading statement in connection with entry or stay in Australia.¹⁴

R v Kovacs

A recent case, *R v Kovacs*,¹⁵ demonstrates the potential link between fraudulent marriage and exploitation. Kovacs and his wife wanted to employ a worker and domestic helper from the Philippines, so they organised a sham marriage between a woman from the Philippines and an Australian citizen, a personal friend. The couple were married in the Philippines, to facilitate the woman's entry into Australia, and she was aware that the marriage was fraudulent. After her arrival into Australia, however, she was taken to Weipa and forced to work extremely long hours in the Kovacs' business and home. Although she had been promised monthly payments for her employment, the woman never received a regular salary. She was also repeatedly raped by Kovacs, who threatened her with deportation and jail if she went to the police. The woman was only able to flee the Kovacs' residence with the help of their daughter, who provided financial assistance for the woman to fly to Cairns.

Mr Kovacs and his wife were convicted of arranging a fraudulent marriage, as well as further offences relating to slavery. Kovacs was also convicted of two counts of rape, as well as a further count of sexual assault against his wife's niece.

This case clearly demonstrates the potential vulnerability of partners in a fraudulent marriage. Although the woman was aware that her marriage was a sham, it is reasonable to assume that she did not consent to be working in such poor conditions, as they were described by the court

¹⁰ See, for example, *Babicci v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 77 (19 May 2005); 071176030 [2008] MRTA 58 (30 Jan 2008).

¹¹ See, for example, 071810442 [2008] MRTA 1183 (3 Nov 2008).

¹² DIMIA, *Managing the Border: Immigration Compliance – 2004-05* (2005) 89.

¹³ DIMIA, *Managing the Border: Immigration Compliance – 2004-05* (2005) 89.

¹⁴ DIMIA, *Managing the Border: Immigration Compliance – 2004-05* (2005) 90.

¹⁵ [2008] QCA 417.

as 'slave-like'. She also did not consent to be raped by Kovacs. Due to her immigration status, however, she was reluctant to go to the police, as she feared she would be sent to jail.

Although the issue of fraudulent or 'sham' marriages is not itself related to trafficking in persons, it is important to recognise the potential risk for exploitation of the partner visa provisions, particularly with regards to 'serial sponsorship'.

4. Serial Sponsorship and Links to Exploitation

The term 'serial sponsor' refers to an Australian who has sponsored more than one partner, with an unfavourable record from their previous relationship.¹⁶ The term also implies some form of abuse or exploitation in the partnership.¹⁷ Concerns about domestic violence against migrant partners led to legislative amendments in 2005,¹⁸ preventing a person from sponsoring more than two partners except in 'compelling circumstances'. Despite these provisions, however, domestic violence concerns still persist.

Fieldwork conducted by the then Department of Immigration, Local Government and Ethnic Affairs (now DIAC) in 1992 over a 3 months period revealed 110 repeat sponsors within the preceding 2 years.¹⁹ Of these 110 sponsors, 80 (or 73%) were known to have perpetrated some form of domestic violence (not necessarily physical violence). 101 of the 110 cases involved women from Asia. This figure is said to be an underestimation, due to the manner in which the data was gathered – through interviews, questionnaires and discussions with government and non-government organisations.²⁰

The exploitation that occurs in these cases does not automatically mean that the victim involved has been trafficked. The situation of trafficking using the partner sponsorship system would be where a person is brought into the country specifically for the purpose of exploitation. This must be distinguished from the type of situation where a person is sponsored and subsequently subject to domestic violence in the relationship once in Australia. The available data, however, does not differentiate between these two situations. Additionally, it is very difficult to know what motives a sponsor may have for sponsoring a partner.

5. Vulnerability of Sponsored Migrants

In a report published in 1994, the Australian Law Reform Commission recognised the increased vulnerability of migrant women to violence.²¹ The report recognised the significant power imbalance between migrant women and their Australian partners. Often the woman has a much lower level of education compared to the sponsor and there may be also be a significant age difference, with the women often being younger than their partner. In addition, a lack of English

¹⁶ I Cabilao Valencia Minda, 'Responding to the needs and interests of women in intermarriage: the Philippines experience', speech delivered at the *International Council on Social Welfare 31st International Conference*, Kuala Lumpur, 20 Aug 2004, 162–163.

¹⁷ I Cabilao Valencia Minda, 'Responding to the needs and interests of women in intermarriage: the Philippines experience', speech delivered at the *International Council on Social Welfare 31st International Conference*, Kuala Lumpur, 20 Aug 2004,, 162–163.

¹⁸ Schedule 3 *Migration Amendment Regulations 2005 (No.4)* (Cth).

¹⁹ Robyn Iredale, 'Serial Sponsorship: Immigration Policy and Human Rights' (1995) 3 *Just Policy* 37 at 40-41.

²⁰ Robyn Iredale, 'Serial Sponsorship: Immigration Policy and Human Rights' (1995) 3 *Just Policy* 37 at 38-39.

²¹ Australian Law Reform Commission, *Equality Before the Law: Justice for Women*, Report No 69 Part 1 (1994).

language, unfamiliarity with Australian culture, lack of knowledge of rights under Australian law, and isolation from family and friends make migrant women especially vulnerable.

Furthermore, the fact that under the visa system a marriage or relationship needs to be genuine and continuous for two years in order for the migrant woman to obtain permanent residency, means the woman is completely dependent on her partner for that period,²² a factor which leaves the woman especially vulnerable to domestic violence. Similar waiting periods applying to partner visas in the United States have also been criticised,²³ as they increase the level of dependence on a partner and potentially heightens the risk of emotional or physical abuse.²⁴

Despite the 'domestic violence' exception to the 2-year waiting-period, some migrants may not be aware of this exception. Even if they are aware, reporting domestic violence is never easy for victims. Violence against women is generally under-reported due to factors such as fear and perceptions of poor response by the criminal justice system.²⁵ These factors are often exacerbated for migrant women who are exposed to violence from their partners.²⁶ The Australian Law Reform Commission also noted that 'women from different cultures may be especially reluctant to approach the police, particularly where they are afraid of being deported'.²⁷ Immigrant women may also be too ashamed to seek assistance from domestic violence support groups or agencies.²⁸

A further issue is raised by cultural differences regarding marriage, separation, and divorce. In many countries, divorce is not culturally acceptable and may lead to social isolation.²⁹ Fear of the shame of separating from their spouse, or reporting incidents of domestic violence, may also result in exploitation or continuing abuse.³⁰

Another potential cause of exploitation results from the fact that many immigrant women may depend on their spouse for emotional, social, and financial support. As Uma Narayan notes, 'dependent immigration status legally prohibits [spouses] from seeking employment. Many lack fluency in English, a factor that impedes their ability to negotiate the routines of everyday life'.³¹ A lack of social and family networks, as well as poor English skills, may exacerbate situations of spousal violence or exploitation.³²

²² See, for example, Carina Hickling, 'Standing up for Basic Rights: A case study of Illawarra Filipino Women's Group', paper presented at the 1st *International Conference Women and Politics in Asia*, Halmstad, Sweden, 6-7 June 2003, 4, 7.

²³ Uma Narayan, "'Mail-Order' Brides: Immigrant Women, Domestic Violence and Immigration Law' (1995) 10(1) *Hypatia* 104 at 111-112.

²⁴ See, for example, *Meroka v Minister for Immigration and Multicultural Affairs* (2002) F.C.A. 482, 5.

²⁵ E Odhiambo-Abuya, 'The Pain of Love: Spousal Immigration and Domestic Violence in Australia — A regime in Chaos?' (2003) 12(3) *Pacific Rim Law & Policy Journal* 673 at 695-696.

²⁶ Carina Hickling, 'Standing up for Basic Rights: A case study of Illawarra Filipino Women's Group' paper presented at the 1st *International Conference Women and Politics in Asia*, Halmstad, Sweden, 6-7 June 2003; 1, 5-7.

²⁷ Australian Law Reform Commission, *Equality Before the Law: Justice for Women*, Report No 69 Part 1 (1994) para [10.18].

²⁸ See, for example, *Kaur Manjeet* (2001) MRTA 2657, 6.

²⁹ Chris Cuneen & Julie Stubbs, 'Violence Against Filipino Women in Australia: Race, Class and Gender' (1996) 4(1) *Waikato Law Review* 131 at 137-139.

³⁰ Chris Cuneen & Julie Stubbs, 'Violence Against Filipino Women in Australia: Race, Class and Gender' (1996) 4(1) *Waikato Law Review* 131 at 137-139

³¹ Uma Narayan, "'Mail-Order' Brides: Immigrant Women, Domestic Violence and Immigration Law' (1995) 10(1) *Hypatia* 104 at 145.

³² E Odhiambo-Abuya, 'The Pain of Love: Spousal Immigration and Domestic Violence in Australia — A regime in Chaos?' (2003) 12(3) *Pacific Rim Law & Policy Journal* 673 at 696-698.

6. Observations

Apart from isolated cases there is, at present, no evidence to suggest that women are being trafficked into Australia using the partner and spouse visa system. The current laws preventing a person from sponsoring a partner/spouse more than twice do prevent more organised criminal elements from using the visa system as a regular channel for trafficking women. In addition, the exception to the two-year waiting period needed to gain permanent residency in cases of family violence, does go some way to reducing the risk of exploitation of women who have arrived in Australia under this scheme.

Nevertheless, there remains the possibility that the partner/spouse visa scheme could be used by individuals to exploit women. As earlier studies have shown, serial sponsorship has been strongly linked to domestic violence. There is no reason to think that merely because of the above mentioned changes to the law women are now protected from exploitation by their sponsors. The problems associated with reporting domestic violence and other factors which increase the vulnerability of sponsored women have been discussed and remain an issue.

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