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Liberty's submission to the All Party Group on Migration's Inquiry into the new family migration rules

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Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

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Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at
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Contact

Isabella Sankey
Director of Policy
Direct Line 020 7378 5254
Email: bellas@liberty-human-rights.org.uk

Rachel Robinson
Policy Officer
Direct Line: 020 7378 3659
Email: rachelr@liberty-human-rights.org.uk

Sophie Farthing

Policy Officer

Direct Line 020 7378 3654

Email: sophief@liberty-human-rights.org.uk

Introduction

In its June 2012 Statement of Intent, the Home Office announced a series of changes to the *Immigration Rules* that would have a profound impact primarily on non-EU foreign nationals seeking to join, or remain with, close family members present and settled in the UK, and on their British or UK resident family members. On 13 June 2012, amendments were laid before Parliament by way of a Ministerial Statement of Changes (HC 194) under the *Immigration Act 1971*. The changes included the following:

> introducing a new minimum income threshold of £18,600 for sponsoring the settlement in the UK of a spouse or partner, or fiancé(e) or proposed civil partner of non-European Economic Area (EEA) nationality, with a higher threshold for any children also sponsored; £22,400 for one child and an additional £2,400 for each further child; and
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> allowing adult and elderly dependants to settle in the UK only where they can demonstrate that, as a result of age, illness or disability, they require a level of long-term personal care that can only be provided by a relative in the UK, and requiring them to apply from overseas rather than switch in the UK from another category, for example as a visitor.

The changes came into effect on 9 July 2012, and on 20 November 2012, the All-Party Parliamentary Group (APPG) on Migration opened a new inquiry into the impacts of the above two changes. Liberty is pleased to have the opportunity to respond to this inquiry about the impact of the reforms.

Context: the requirements of Article 8

The Government claimed that proposed changes to the *Immigration Rules* would ensure that Article 8 is better reflected in the *Immigration Rules*.[1] The changes followed various statements, including most emphatically by the Home Secretary at the 2011 Conservative party conference and in a Home Office consultation in July 2011, which expressed pointed scepticism about Article 8 and perpetuated a number of misconceptions about how the Courts have applied the right to respect for private and family life in the immigration context. It is therefore necessary to address some of the

[1] *Statement of Intent*, para 31.

misunderstanding surrounding the operation of Article 8 before dealing with the particular concerns raised by the changes to the *Rules*.

In June 2011 the House of Commons was asked to support a motion recognising that Article 8 is a qualified right and that the immigration rules should set out the conditions for migrants to enter and remain in the UK. Article 8 has always been a qualified right requiring a delicate balance to be struck between the rights of the individual and wider social interests in, for example, the reduction of crime and disorder and the protection of the economic interests of the UK. The motion reaffirming the qualified nature of Article 8 was therefore nothing more than a re-statement of the current legal position under the HRA. As to the Immigration Rules, as Liberty noted at the time, any fair immigration policy will be a combination of rules and discretion, allowing both for clarity and compassion in the handling of individual cases and the system as a whole. On that basis Immigration Rules are the obvious way for any Home Secretary to seek to guide both her officials and the judiciary in their handling of cases, remembering of course that such Rules, and their application in individual cases, will always be subject to the requirements of Article 8. We do not believe, however, that the changes to the Immigration Rules properly reflect the requirements of Article 8 and in particular the fact-sensitive balancing exercise that the right demands.

The recent case of *MF (Article 8 – new rules) Nigeria*[2] has reinforced this view. The tribunal held in October 2012 that, even though the government has attempted to codify the Article 8 balancing factors within the new rules, *"these rules cannot be construed as providing a complete code for Article 8 claims"*. Thus, courts must still undertake a two-stage process, firstly to assess the case in accordance with the immigration rules, and secondly to assess whether the government's decision under the rules is contrary to the individual's Convention rights. This approach was reinforced in Izuazu, a decision of the Upper Tribunal promulgated in January 2013.[3]

Myths and misunderstandings continue to abound about the effect of Article 8 in immigration cases. First and foremost, it is important to point out that Article 8 does not provide a guarantee of protection for family life, even for a British national – it simply provides that the organs of state must show *respect* for family life when making decisions that affect individuals. Secondly, Article 8 explicitly sets out wider social factors which are to be placed in a balance and weighed against the right to *respect* for

[2] *MF (Article 8 – new rules) Nigeria* [2012] UKUT 00393 (IAC)
[3] *Izuazu (Article 8 – new rules)* [2013] UKUT 45 (IAC).

family life. These factors include the prevention of crime and disorder, protection of the UK's economic well-being and the protection of the rights and freedoms of others.[4] The Courts in this country have consistently stressed that the family life of the individual can be compromised in order to further the legitimate aim of controlling immigration.[5] All that Article 8 demands is that decisions which will separate families are lawful and proportionate.

Indeed, every time a Court makes a decision under Article 8 it strikes a balance between the rights of the individual and the rights of society at large, this approach is best illustrated by concrete examples:

The case of PT[6]

PT, aged 76 and his wife, aged 65, were a Sri Lankan couple who had come to the UK and claimed asylum in 2007, but were refused leave to remain. PT suffered ill-health related to his age. PT applied to remain in the UK on the grounds of his family life with his daughter and grandchildren. PT's adult daughter, who was settled and residing in the UK, was a single mother who suffered from depression following separation from her husband. PT and his wife moved in with their daughter in 2007 and the Court accepted that the elderly couple provided significant support for her. The Court acknowledged that PT and his wife were very much integrated into the family life of their daughter and grandchildren and that it was of *"considerable benefit for the Appellant and his wife, their daughter and their grandchildren to live under the same roof"*, but nevertheless concluded that they should not be permitted to remain in the UK. An Immigration Judge balanced the impact of the interference with family life against the need to maintain immigration control, and found that removal would be reasonable and proportionate. In 2010 the UK Court of Appeal found that this decision was in accordance with Article 8.

The range of factors taken into consideration by the Courts and the fact-sensitive nature of decisions is obvious from the most cursory glance at case law. Liberty is concerned that the new Immigration Rules represent a one-size-fits-all approach to

[4] Article 8(2) of the ECHR.
[5] See for example the decision of the House of Lords in *Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39* where it was noted that the Immigration Judge had correctly directed himself to *"consider whether the interference with the appellant's family rights, which would obviously interfere with the family as a whole, is justified in the interest of controlling immigration"* (paragraph 12).
[6] *PT (Sri Lanka) v SSHD [2010] EWCA Civ 251.*

complex immigration decisions. This is alarming given that blanket thresholds for consideration, such as the income threshold, the point at which the interests of a child fall to be considered, and the new test for adult dependants, are set so high as to act as an effective bar to entry for many legitimate applicants, before any detailed consideration of their case falls to be made. Far from better reflecting the proportionality required under Article 8, such changes seek to circumvent the crucial fact sensitive consideration of decisions involving fundamental rights. It therefore seems likely that the changes to the rules will decrease the likelihood that cases are handled in a way that is compliant with the UK's obligations under Article 8, potentially leading to more challenges in the Courts, more public expense, and more delay whilst people with a genuine right to be in the UK are kept apart from their loved ones.

Minimum Income Requirement

Liberty understands the public policy reasons for ensuring that family members of economic migrants are not routinely granted leave to enter the UK unless they can be maintained and accommodated without recourse to public funds. However the existing law already made provision for this. Paragraph 281 of the Immigration Rules dealt with requirements for leave to enter the United Kingdom with a view to settlement as the spouse or civil partner of a person present and settled in the United Kingdom or being admitted on the same occasion for settlement. Rule 281(iv) and (v) of the previous *Immigration Rules* already required that the sponsor and their partner should have adequate accommodation and an ability to maintain themselves and any dependants without recourse to public funds. Rules 297 and 298 ensured that a child seeking leave to enter or remain in the UK would be accommodated and maintained by their parent or relative without recourse to public funds. The Courts in this country have held that in order to satisfy the maintenance requirements of the Immigration Rules, family migrants must be able to demonstrate that they will have access to sufficient funds, without recourse to benefits, to put them in a similar position to a settled person claiming income support in the UK.[7] It is entirely reasonable to demand that family members of economic migrants are not living in the UK at a level which is below that deemed acceptable for British nationals claiming state subsidy. It is also reasonable to expect most migrants to find those funds themselves. However, Liberty opposes the

[7] *KA (Adequacy of maintenance) Pakistan [2006] UKAIT 00065 (4 September 2006)*; *MK (Adequacy of maintenance, disabled sponsor) Somalia [2007] UKAIT 00028 (13 March 2007)*. See *RB (Maintenance income support schedules) Morocco* [2004] UKIAT 00142, where voluntary payments from family members reduced the level of income support.

increase of the income threshold over and above income support base rates. It is misleading to suggest that this will reduce the burden on British taxpayers, as new arrivals were already required to support themselves to a standard deemed acceptable in this country.

Under the new rules, British nationals seeking to marry and live with a foreign spouse may find themselves effectively forced to move abroad to achieve this, if they cannot afford to sponsor their partner to come to England. The difficulty in meeting the threshold is further exacerbated by the fact that a partner's overseas earnings will not be taken into account. If, however, the partner is already working legally in the UK, their earnings *will* count towards meeting the threshold. BritCits, a campaigning organisation which is documenting the effects of the new rules on international families, has collected 40 real life, anonymised, case studies illustrating the kinds of unfairness the rules will perpetuate. One of its case studies, set out below, illustrates the arbitrary way in which the new minimum income threshold can operate in practice:

Gary, a British citizen, is married to Lise, a South African human rights lawyer. Gary studies and works in South Africa, also as a lawyer. His parents, sister and grandmother all live in the UK and are British by birth. Gary would like to move back to the UK, with his wife, but is being prevented from doing so by the new Immigration Rules. Last tax year Gary earned less than £18,600 and Lise, a bit more. Together they earn twice the threshold amount. Further exacerbating an already arbitrary and unreasonable system, at the entry level stage, only Gary's income is taken into account. However, in the 2nd phase both the spouses' incomes are taken into account. There is no rational basis for the distinction.

The Government has sought to justify the Rules by arguing that they are necessary to ensure people don't enter the UK to live off public benefits. Lise is a qualified lawyer with four university degrees. She has worked in New York at the UN, and as a Law Clerk to the Chief Justice of South Africa. She owns property which she rents out at a profit. On these facts it is unlikely that she is motivated to enter the UK to "live off benefits." On the contrary, if Lise could get a spousal visa she would most likely start working, paying taxes and contributing significantly to the public purse immediately.

The imposition of such a significant annual income requirement also has the potential to discriminate against British Nationals. For example, a British teacher who takes a

job in Japan and meets and marries a Japanese woman may well fall foul of this proposal. He may find himself forced to choose between leaving his country of nationality permanently and moving to Japan, or living separately from his life partner, if he cannot meet the minimum annual income requirement to sponsor his wife's move to the UK. Meanwhile EU freedom of movement law means a Greek national and his spouse, whatever the nationality of that spouse, will be free to reside in the UK regardless of their separate or combined income. [8] It is surely perverse to create a rule which will effectively discriminate against British citizens, granting greater family life protection and rights of abode to other European nationals?

It is misleading for the Government to state that the new income threshold is aimed at ensuring applicants "*do not become a burden on the taxpayer*".[9] The law already set a clear requirement that the applicant would not be maintained by taxpayer money. The Government has now replaced that law with a far blunter instrument – indeed, the Home Office itself has indicated that in many cases the income threshold will impose a restriction that is higher than that required to protect the public purse. This will simply disadvantage British citizens of modest means, who have a genuine right to live with their families in the UK and can fully support themselves once here, potentially leading to the ongoing separation of close family members.

It is estimated that 47% of the British working population earns less than the new income threshold (and would not, therefore be able to sponsor a foreign partner), which indicates how unreasonably high the figure is. The Home Office anticipates that over 15,000 couples per year will be kept apart as a result of the new rules.[10]

In particular, the new income requirement unfairly discriminates against particular demographic groups. According to the Migration Observatory, the new income requirement will disadvantage women (who are paid, on average, 14.9% less than men in the UK)[11]. For example, 48% of people in Scotland, and 51% of people in Wales, will

[8] Although the exercise of family rights depends on the exercise of EU rights by the principal, in content they are virtually the same as the principal's right to enter, reside in and remain in another EEA country (Case 131/85 *Gül v Regierungspräsident Düsseldorf [1986] ECR 1573*, *[1987] 1 CMLR 501,* ECJ). They are given irrespective of the sex or nationality of the family members. Thus the Pakistani or American husband of a woman who is an EU national is entitled to accompany his wife when she exercises her right, for example, to set up in business, to seek work or to receive or provide services.
[9] *Statement of Intent,* para 71.
[10] http://refugeearchives.wordpress.com/2012/11/21/parliamentary-inquiry-into-new-family-migration-rules/.
[11] Fawcett Society, 2012 http://www.fawcettsociety.org.uk/index.asp?PageID=321.

not qualify to bring in a family member. [12] The Migrants' Rights Network has stated that most of those who have contacted the organisation are British citizens and are based outside London and the South East (where earnings are 16% higher than the national average[13]) – a practical indication that the new threshold is proving to be discriminatory. [14]

Some ethnic minority communities will find it particularly difficult to meet the requirement – for example, over 40% of people in the Bangladeshi and Pakistani communities in the UK earn less than £7 per hour (£14,500 p.a.) compared to the white British rate of 25%.[15] The rule change will also particularly disadvantage young couples who are likely to be lower earners - in April 2011 the average rate of pay for young people was £7.01 per hour, 42% lower than the rest of the workforce aged 25 and above whose average pay was £12.00 per hour.[16]

Further, there are over 6.9 million disabled people of working age in the UK.[17] However only 50% of disabled people of working age are in employment, compared with 80% of non disabled people.[18] A higher income requirement therefore puts many people with disabilities at a disadvantage when applying to bring their spouse or partner here.

So the evidence is that the £18,600 threshold (higher, if dependent children are involved) is too high for those on modest incomes. It ignores the fact that such people can support themselves and their partners in a lifestyle with which they are comfortable, on income below the new threshold. As an illustration, BritCits cites Alice's case study:

[12] Migration Observatory 2012, available at: http://www.migrationobservatory.ox.ac.uk/press-releases/women-young-people-and-non-londoners-are-most-affected-changes-family-migration-polic.
[13] Migration Observatory 2012.
[14] http://www.migrantsrights.org.uk/blog/2012/08/new-family-migration-rules-what-you-can-do-if-you-are-affected.
[15] Migrant Rights Network, *Keeping Families Apart,* http://www.migrantsrights.org.uk/files/publications/MRN-Family_migration-briefing-April_2012.pdf.
[16] Office for National Statistics, *Young People in Work 2012*, pg 5. Available at: http://www.ons.gov.uk/ons/dcp171776_257979.pdf.
[17] Disabled Living Foundation, *Key Facts 2012*, available at: http://www.dlf.org.uk/content/key-facts.
[18] Disabled Living Foundation, *Key Facts 2012*, available at: http://www.dlf.org.uk/content/key-facts.

Alice is a British Citizen living in Norfolk. She is 34 years old, with an 8-year-old daughter from her first marriage. In May 2010 she met a Tunisian man, and more than two years later they got married in Tunisia. They previously applied for him to come here for a 6-week visit in December 2011 and were refused entry, even though they had Alice's father as guarantor and savings to pay for the visit. The UKBA's reason for the refusal was that he did not have enough reason to return to his country following the visit. Alice lives in a small town in Norfolk where a salary of £18,600, particularly in retail – the industry she works in – is very difficult to obtain. Alice is a single mother and has been using her savings to visit her husband in Tunisia because he can't come here, even for a visit. Alice is regretfully beginning to accept that she may never be able to be with her husband, because otherwise it would mean keeping her daughter away from her dad.

Adult Dependants

The Government has introduced a far more restrictive route for adult dependents seeking leave to remain with a British family member. Under the new Rules, adult dependents, including those aged 65 or over, can only settle in the UK if they can show that, as a result of age, illness or disability, they require long-term personal care that can *only* be provided in the UK. This is a prohibitively heavy burden of proof, and essentially reduces the right to family life of a UK settled individual to the role of caregiver. In addition, the stark change in the Rules leaves families who had planned for years for older relatives to join them when this became necessary and/or desirable stuck in a system which suddenly prevents this, even if they can afford to support their relatives completely independently. BritCits uses Clara's case to illustrate this:

Clara is a British citizen; she has been living in the UK for over 12 years. She has worked for the British government, paid her taxes and never claimed benefits. Clara wants to live with her Australian parents, who have no other family in Australia. Clara is happy to provide financial guarantees to the government. She is happy to provide a bond. She is happy to take out private healthcare cover for her parents to reduce their reliance on the NHS. Her parents would bring their assets to the UK as well, thus boosting our economy. Clara's parents would not be entitled to a UK pension or any other benefits. Despite this, the government will not allow Clara to live with her parents.

"If they didn't want my parents here, they should have told me 10 years ago and I'd have planned accordingly, rather than suggesting they could join me here when they were 65, or earlier if circumstances deemed it so. Doing it at this stage, blocking the route off so spectacularly and suddenly (when the route to retired people of independent means has also been closed off), when I have worked so hard, invested everything in the UK, bought a house and made a life here is not acceptable."

The Government has sought to justify these measures as a cost saving initiative that will among other things reduce the burden on the welfare state, but it is misleading to suggest that adult dependents of UK citizens or settled individuals are a drain on the public purse. Prior to these changes, the law already imposed a maintenance and accommodation requirement on those seeking to sponsor adult dependents, rendering empty the Government's claim about the financial benefits of its proposals.

Furthermore, in an analysis dated 15 October 2011, the British Medical Association stated that overly restrictive policies on immigration risk discouraging overseas students and doctors, who make a valuable contribution to the NHS and research, from coming to the UK and integrating into British life once they are here.[19] A case study dated 17 August 2012 illustrates this point, describing how a consultant faces having to uproot his family as a result of the new Rules:

The doctor came to the UK in 2006, having responded to a drive by the Government to recruit Indian medics to the NHS. He took up a permanent position as a consultant radiologist, and he and his family have since taken British citizenship with the hope that his mother, who has osteoarthritis and other health problems, could come to live with them on her retirement.

However, when the Immigration Rules changed in July this year, the doctor realised that if could afford to employ a nurse to look after his mother in India, she would not be eligible to come to the UK. He added: "*But I don't think you should provide a nurse to care for your family thousands of miles away, in a different time zone, and unsupervised. Family ties seem to have been completely ignored in these rules. I think we will have to return to India in 2013, because my daughter is due to start secondary*

[19] http://bma.org.uk/news-views-analysis/news/2011/october/overseas-doctors-deserve-family-rights.

school then and needs to be settled too. I think a lot of senior doctors will be affected by these rules and face having to leave the NHS."

In response to the Home Office's Family Migration consultation in October 2011, the BMA warned that the proposals failed to acknowledge the importance of family ties. Dr John added: *"When the consultation was launched, [home secretary] Theresa May introduced it by saying the government was determined to bring a sense of fairness back to our immigration system. I fail to see what aspect of these rules is fair. Ultimately, the UK healthcare system will be the loser."* [20]

Family life and our immigration system

The Prime Minister has stressed his commitment to the family and his message was clear; a *"family test"* should be applied to all domestic policy: *"if it undermines commitment, if it tramples over the values that keep people together, or stops families from being together, then we shouldn't do it."*[21] Liberty agrees. It is therefore deeply disappointing that reform of the family migration system shows such scant regard for the plight of genuine families. Is the Home Office exempt from applying the Prime Minister's 'family test'? While the UK is, of course, entitled to control its borders, the elevated minimum income requirement and the stringent new rules on sponsorship of adult/elderly dependants disregard the protections against abuse already built in to law and policy. The impact of this ruthless policy extends far beyond those individuals seeking to play the system, separating genuine families and undermining the fundamental rights of thousands of people in the UK .

Conclusion

The changes to the immigration rules contain an armoury of blunt instruments which, far from better reflecting Article 8 in the *Immigration Rules*, may well leave the Rules in breach of it. At best, this will lead to more legal challenges and foster uncertainty in the UK's immigration system. At worst, the Rules will be struck down in the courts if they are found to be incompatible with Article 8, imposing a greater burden on the UK taxpayer. On closer analysis these proposals have more to do with cutting net

[20] http://bma.org.uk/news-views-analysis/news/2012/august/consultant-faces-relocation-owing-to-migration-rule-change.
[21] Prime Minister's speech, Witney, 15th August.

immigration, regardless of the consequences for genuine families, than discouraging abuses or reducing burdens on the British taxpayer.

Jacqueline Clifton-Brown
Rachel Robinson