

LIBERTY

PROTECTING CIVIL LIBERTIES
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Liberty's briefing on the *Statement of Changes in Immigration Rules*

June 2012

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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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Introduction

1. In its June 2012 Statement of Intent, the Home Office announced a raft of changes to the *Immigration Rules* that will 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*.

2. The Statement of Changes includes plans to introduce many more obstacles to settlement for all applicants, whether their relationship is accepted as genuine or not, including more onerous English language requirements, higher financial hurdles and a greatly restricted route to settlement for adult dependents seeking to join UK based relatives. The Government is also placing strict limits on the extent to which the interests of children living in the UK can be taken into account in considering applications, and removing the Discretionary Leave procedure currently used as a means of ensuring compliance with Article 8 of the *Human Rights Act 1998* (HRA).

3. The changes will come into effect on 9 July 2012 unless disapproved by resolution in either House.

Article 8: getting the balance right

4. Earlier this month the House of Commons were 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 balancing exercise 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. A motion reaffirming the qualified nature of Article 8 is nothing more than a re-statement of the current legal position under the HRA and Liberty further accepts that the Immigration Rules should reflect the requirements of Article 8. We do not accept, however, that the proposed changes to the Immigration Rules properly accommodate the fact-sensitive balancing exercise that the right demands. Many of the proposed changes will decrease the likelihood that cases are handled in a way that is compliant with the UK's obligations under Article 8, 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.

5. The Government claims that proposed changes to the Immigration Rules will ensure that Article 8 is better reflected in the *Immigration Rules*,¹ and therefore that the fall-back Discretionary Leave procedure will not be required. The proposed changes follow various statements, including most emphatically by the Home Secretary herself at last year's 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 briefly consider Article 8 in general terms before dealing with the particular concerns raised by the proposed changes to the *Rules*.

6. 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 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.² 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.³ All that Article 8 demands is that decisions which will separate families are lawful and proportionate

7. 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. To demonstrate how this balancing act already works in practice, it is useful to look back over some of the decisions of our Courts.

¹ *Statement of Intent*, para 31.

² Article 8(2) of the ECHR.

³ 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).

The case of AB⁴

In a 2009 case which reached the UK Court of Appeal, AB, a Somali national, sought leave to remain in the UK on the grounds of family life. In 2005 AB's husband fled Somalia for the UK - he was granted leave to remain in the UK on humanitarian grounds as a result of the security situation in Somalia. In the same year AB and her young children left Somalia for neighbouring Ethiopia, where they lived without permission and in straitened circumstances. An Immigration Judge dismissed AB's appeal against the refusal of leave to enter this country. He found that the family could continue family life in Ethiopia, albeit that none of the family members were legally entitled to be there and that this would cause '*no more than a degree of hardship*'. The Court of Appeal found that this decision was compatible with Article 8.

The case of PT⁵

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 case of VN⁶

VN was a 19 year old woman in full time education in Uganda. VN's father came to the UK in 1990 and was granted exceptional leave to remain, he was granted indefinite leave to remain in the UK in 2000. VN's mother was unwell and as a result VN and her brother resided with a family friend in Uganda. VN's mother died in 2003;

⁴ *VW (Uganda) and AB (Somalia) v SSHD* [2009] EWCA Civ 5.

⁵ *PT (Sri Lanka) v SSHD* [2010] EWCA Civ 251.

⁶ *VN (Uganda) v ECO* [2008] EWCA Civ 232.

after their mother's death VN and her brother applied to join their father in the UK. Their father was, at this time, a British national and resided in the UK with his two minor children who were both also British nationals. VN's brother was granted leave to enter the UK as he was under the age of 18 at the time of his application. VN's application was refused; this refusal was upheld by the Courts. The Courts accepted that VN was still financially dependent on her and would lack a support network in Uganda when her brother travelled to the UK. However, the Court ultimately concluded: "[s]he is now aged 19 and although this is still young and she will still require the guidance and support of her father or other responsible adult, there was no evidence before me why this could not be achieved through the same means as it has been provided in the past – regular telephone calls and occasional visits." The refusal of VN's application to join her family in the UK was found not to be in breach of Article 8 in a decision upheld by the UK Court of Appeal in 2008.

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 the case law. Liberty is concerned that the new *Immigration Rules* represent a one-size-fits-all approach to complex immigration decisions. This is alarming given that many of the 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, the proposed changes seek to circumvent the crucial fact sensitive consideration of decisions involving fundamental rights.

The best interests of a child in the UK

9. The Government claims that the new *Rules* will "*reflect the duty on the Secretary of State to ensure that immigration decisions are made having regard to the need to safeguard and promote the welfare of children who are in the UK.*"⁷

⁷ *Statement of Intent*, para 54. Section 55 of the Borders, Citizenship and Immigration Act 2009 places a duty on the Secretary of State to put in place arrangements for ensuring that regard is given to the need to safeguard and promote the welfare of children in the UK in the

However the Statement of Changes seeks to limit that duty, by imposing thresholds at which those interests will cease to be taken into account. Even where the threshold is met, the impact of the child's interests will be limited, and automatically counterbalanced by various other factors. The Government has enshrined the Secretary of State's duty in regulation ostensibly in order to place limits upon it.

10. As part of its new Appendix FM to the *Immigration Rules*, the Government is introducing a new Section EX, purportedly aimed at ensuring, when deciding on an application, that immigration officials are required to have regard to the best interests of any relevant child living in the UK. Section EX applies in cases where an applicant has a genuine and subsisting parental relationship with a child who has been living continuously in the UK for at least the last 7 years, providing that the applicant also has a genuine and subsisting relationship with a partner who is British or settled in the UK, and that there are insurmountable obstacles to a family life with the partner continuing outside the UK.

11. As well as placing tight limitations on the duty to consider the best interests of the child in relation to certain immigration decisions, the changes also seek to exclude this consideration in other areas of immigration decision-making. Section EX is incorporated into the Immigration Rules only for applications for limited leave to remain. It will not have any effect on applications for indefinite leave to remain, applicants for entry clearance or for the bereaved partners' route. It simply acts as an exception to certain eligibility requirements for those seeking limited leave, which include the Government's revised test for the existence of a genuine relationship between the sponsor and their partner, as well as the income threshold and the English language test, discussed elsewhere in this briefing. However, under the new *Rules*, the best interests of a child are not required to be taken into account where the Secretary of State deems the applicant unsuitable for entry or leave to remain in the UK, whether because of a past criminal conviction, for failing to produce a document or piece of information when required, or where for any reason the Secretary of State considers it "undesirable" to grant the application.⁸

12. It is clear from the Government's proposals that it is paying little more than lip service to the importance of UK children's interests in immigration decisions. Surely

discharge of any function of the Secretary of State in relation to immigration, asylum or nationality.

⁸ *Statement of Changes in Immigration Rules*, June 2012, proposed Sections S-LTR 1.2–2.4.

the interests of a 12 year old child, who has spent half their life in the UK, need at least to be considered when determining their parent's application for leave to remain? Even where the interests of the child do come in to play, for example in the case of a 14 year old who has been in the UK almost since birth, that child's interests are still to be disregarded if their parent fails to pass any of the Secretary of State's suitability tests (which could mean as little as failing to turn up to an interview, or losing a relevant document). Far from placing children at the heart of immigration decisions, the proposed changes seek to relieve officials of the responsibility for weighing up the interests of a child in any but the most clear cut cases.

The private life settlement route

13. The Home Office has stated that the new rules will "*provide a basis on which a person without family life can remain in the UK through long residence and social integration*".⁹ However, the current law already provides such a basis, in the 14 year 'long stay' settlement route at 276B(i)(b) of the *Immigration Rules*. That route requires officials to perform a public interest balancing act, under which they must take into account an applicant's personal history, employment record, domestic circumstances, and other factors. The Government now wishes to abolish the 14 year 'long stay' settlement route in favour of a requirement of 20 years of continuous residence in the UK which will trigger a further 10 year settlement route. That means a person must have spent a total of 30 continuous years living in the UK before being granted settled status on the basis of their private life.

14. The *Rules* provide a different approach for under 18 year olds, who are required to have spent 7 years in the UK, and for 18-25 year olds, who must have spent at least half their lives in the UK. Liberty is pleased to see special provision made for younger applicants; however, its interaction with the over 25s threshold creates some alarmingly arbitrary results: if, for example, a 25 year old has lived in the UK since they were 12, they will be able to apply to commence the settlement route on grounds of private life, but if they wait one more year before applying, they will then be disqualified until they are 32 years old.

15. It is also concerning that the Government has chosen to exclude from its new 30 year settlement route the list of public interest factors at 276(b)(ii) of the *Immigration Rules*. That guidance requires officials to take into account various

⁹ *Statement of Intent*, para 58.

considerations relevant to striking a balance compatible with Article 8. It is surprising that in proposals purportedly intended to better reflect Article 8 within the *Immigration Rules*, the Government is removing from its 'long stay' settlement route the requirement on officials to have regard to factors such as employment history, personal character, and strength of connection to the UK. The new private life route represents a backward step in the endeavour to produce *Immigration Rules* that engage with the Government's responsibility under Article 8.

Income Threshold

16. 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 introduction of an £18,600 income threshold, which also disregards relevant factors such as whether the British sponsor is validly receiving child support, will do nothing more to address this concern than the current *Rules* already do, and will instead operate as a bar to entry for families of modest means who have a genuine right to be in the UK and can fully support themselves once here.

17. Rule 281(iv) and (v) of the current *Immigration Rules* already require that the sponsor and their partner have adequate accommodation and an ability to maintain themselves and any dependants without recourse to public funds. Rules 297 and 298 ensure that a child seeking leave to enter or remain in the UK will 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.¹⁰ 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, and the current law ensures they are not able to do so.

¹⁰ *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.

18. It is therefore misleading for the Government to state that its proposed income threshold is aimed at ensuring applicants “*do not become a burden on the taxpayer*”.¹¹ The law already sets a clear requirement that the applicant will not be maintained by taxpayer money. The Government now seeks to replace 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.

The Impact of Criminal Convictions

19. The Government is proposing changes to the *Rules* that will create a very strong presumption against granting applications made by people who have in the past been sentenced to a term of imprisonment of 12 months or more, or who have committed a series of less serious crimes.¹² Where the new ‘criminality thresholds’ apply, the proposed *Immigration Rules* will require no consideration of an applicant’s circumstances, their connection to the UK or the details of their offence. The Government’s Statement of Intent had suggested that the *Rules* would only impose such a restrictive approach on those with a prison sentence of four years or more, and that Section EX would operate to prohibit deportation where a prison sentence was less than four years and the interests of a child would be seriously harmed by deportation, but even this limited exception does not appear to have found its way into the *Rules*.

20. Liberty fully recognises the paramount importance of public order and safety. However, it is equally essential to make sure, before a person is forcibly removed or kept from their family, that any perceived risk to public safety is real, and that officials are required to consider the circumstances under which an offence was committed and the extent of the applicant’s connection to the UK. The strength of Article 8 is that all relevant factors will be weighed in the balance when a person’s deportation is considered: the threat they pose, the seriousness of their offence, how long they have been in the UK, whether they have genuine and longstanding family ties, etc. Is it not right that the courts consider the rights of children who have no control over the acts of their parents? Or that someone who has been in the UK almost since birth has their family connections taken into account? You don’t need to tamper with the

¹¹ *Statement of Intent*, para 71.

¹² *Statement of Changes in Immigration Rules*, June 2012, proposed Sections S-LTR 1.3-1.5.

protection of fundamental rights and freedoms to ensure that those who pose a risk and have no right to be here should not be allowed to stay.

Adult Dependants

21. The Government is proposing 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, will only be able to 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 heavy burden of proof, and essentially reduces the right to family life of a UK settled individual to the role of caregiver.

22. The Government has proposed these measures as a cost saving initiative, but it is misleading to suggest that adult dependents of UK citizens or settled individuals are a drain on the public purse. The current law already imposes 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.

Removal of Appeal Rights

23. Liberty also notes the Government's proposal to introduce transitional restrictions on families' appeals rights in anticipation of more sweeping changes planned to come into effect in 2014. Liberty has briefed against the provisions contained in the *Crime and Courts Bill 2012* that will remove the right to appeal for those who wish to challenge a refusal to grant a family visit visa for the UK.¹³ Notwithstanding ongoing Parliamentary consideration, the Government is going ahead with interim restrictions which will remove appeal rights for uncles, aunts, nephews, nieces and cousins of British citizens, and exclude from the full right of appeal any family member of a person who does not yet have settled status in the UK. Liberty is unsure why those living lawfully in the UK but without settled status should be targeted in this way, or why extended family should be treated any differently to close family in respect of appeals procedures. If the aim is to cut the overall numbers of those visiting the UK we suggest the arbitrary removal of appeal

¹³ See [Liberty's Second Reading Briefing on the Crime and Courts Bill in the House of Lords](#), May 2012.

rights is an inappropriate tool. The UK Borders Agency has a poor track record in first time decision making and the possibility of appeal is crucial to ensure that the Agency properly implements the Government's rules on family visit visa applications.

Conclusion

24. The Prime Minister has made a point of stressing his commitment to the family – his message is clear: a “*family test*” should be applied to all domestic policy.¹⁴ It is therefore deeply disappointing that the present proposals for reform of the family migration system show such scant regard to the impact they will most certainly have on 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, planned reforms to the *Immigration Rules* set out in the Home Office's Statement of Changes variously disregard the protections against abuse already built in to law and policy and will extend far beyond those individuals seeking to play the system, separating committed spouses and partners and splitting children from their parents, including many British nationals.

25. The proposed changes 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. On closer analysis these proposals have more to do with cutting net immigration, regardless of the consequences for genuine families, than discouraging abuses or reducing burdens on the British taxpayer.

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¹⁴ In a speech in Witney, 15th August, for example, the Prime Minister said: “*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.*”