

Submission to the UKBA Family Migration Consultation

October 2011

Migrants' Rights Scotland

Migrants' Rights Scotland (MRScotland) was established as an independent organisation in 2010 but looks back on a longer history of active engagement on issues affecting migrants' rights and social justice, especially through the Migrants' Rights Network (MRN). Through two Scotland-based Directors of MRN, we have been involved in a migrants-led development for a rights-based approach to migration since 2006. The establishment of MRScotland thus builds on earlier work and specifically aims at building solidarity and working alongside the growing number of migrants, MCOs and other civil society organisations in Scotland, as well as at highlighting the specific situation and needs in Scotland which are often not sufficiently reflected in public debate and policy-making in the UK.

MRScotland's network stretches from the Highlands to the Borders, bringing together migrants of various backgrounds, residency status, ethnicities and nationalities; they connect us with thousands of other migrants who are trying to make their lives here. We work towards getting their voices heard and towards strengthening their meaningful participation in developing the policies that affect their lives, through open discussions, sharing experiences and knowledge, lobbying and campaign activities.

Introduction and summary

The government proposes to reform rules relating to family migration with the aims of driving down net migration to "sustainable levels", "preventing and tackling abuse, promoting integration and reducing burdens on the taxpayer".

We reiterate¹ our objection to using the level of net migration as the basis for or target of immigration policies, as the government has yet to establish how net migration constitutes an adequate indicator for what might be "sustainable immigration". We also reaffirm our position that the current immigration system, the recently introduced changes to immigration rules and those proposed here fail to consider the various contexts and needs of different parts of the UK to the detriment, for example, of Scotland. Scotland does not only need to attract migrants and their families but also to ensure that they settle here, thereby contributing to the effective management of Scotland's decreasing and ageing population, keeping services and communities alive and promoting sustainable economic growth. In this regard, we consider the motivation behind this consultation as flawed.

Moreover, we object to the vast majority of the changes proposed here as the government seeks to use the prevention of 'sham' and 'forced marriages' to justify drastic measures that would cause significant hardship on a wide range of persons, British citizens, settled migrants and non-EU nationals alike, who wish to live in the UK together with their partners, children, or parents. We are highly alarmed by the way in which the government incriminates and stirs up suspicion of people who have established perfectly genuine relationships; and the way in which the consultation seeks to win the public's approval for interfering with what is a universal human right, the right to a private and family life. At the same time, the government completely fails to evidence how the proposed changes would be conducive to integration or would reduce "burdens on the taxpayer".

¹ See our submission to the UKBA consultation on Employment-related Settlement, Tier 5 and Overseas Domestic Workers, Sept 2011.

The consultation document indicates that the governments in Scotland and Northern Ireland will be asked to adopt some or all of the proposals relating to England and Wales. We want to make clear that - should these proposed changes be adopted in England and Wales – we intend to advise the Scottish Government not to follow suit.

Lastly, as many questions in the consultation are misleading and give an inaccurate impression of existing rules, human rights, UK and EU law, we feel very strongly that it is disingenuous of the government to collude with certain sections of the media in misinforming the public about the rights of individuals and, more specifically the rights of migrants in British society.

NB: Our submission builds on discussions with migrants, MCOs, trade unions and academics from across Scotland. Some of their voices and concerns about the proposed changes are gathered in a short video response to this consultation, which can be viewed here: <http://www.youtube.com/watch?v=-xic6A92yJ0>.

Questions for consultation

MARRIAGE AND OTHER CIVIL AND OTHER PARTNERSHIP

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 government does not offer a clear proposal to define what constitutes a “genuine and continuing relationship” but instead suggests various factors that could be included in a definition. However, most of these would not contribute to any clearer definition, especially as applicants wanting to come to the UK on the basis of marriage or partnership already need to satisfy specific requirements, which are then considered and assessed case-by-case by UKBA Entry Clearance Officers (ECOs). This already allows individual and cultural differences between couples to be taken into consideration.

The introduction of a new set of criteria would be likely to introduce new hurdles for many perfectly legitimate couples, and lead to applications failing for the wrong reasons, unjustifiably causing hardship to those affected. Examples given in the consultation document are arbitrary and demonstrate the relativity of any assessment. While this suggests that no such “clearer definition” can be created,² the government would increase confusion and the risk of (legal) disputes about UKBA decision-making in this area.

We suggest the Home Office should seek to ensure that the current rules are applied consistently and fairly by UKBA officials, and that applicants are given clear and consistent information about the rules in existence so that they can meet all necessary requirements.

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? No**
- c) help safeguard against forced marriage? No**

A new ‘attachment to the UK’ requirement would be unlikely to act as evidence of a ‘genuine relationship’, or to support integration or safeguard against sham or forced marriages. In fact, it has not been made clear how the UKBA sees such a requirement would in any way contribute towards either integration or prevention of sham or forced

² See also ILPA (2011), Information Sheet – Family Migration Consultation 1, <http://www.ilpa.org.uk/resources.php/13529/family-migration-consultation-1>.

marriages. Besides, we believe such a requirement could effectively act as a new version of the old 'primary purpose' rule, which was widely criticized for being discriminatory and providing cruel and unnecessary barriers for people wanting to bring their spouse to the UK.

In our opinion, the government is wrong to suggest adopting (elements of) the Danish rules on family migration. The government fails to consider or inform in the consultation document that the Danish 'attachment requirement' coupled with the '28-year exemption rule' has, since its introduction, been under continued criticism for its discriminatory effects and hardship it creates for affected individuals, exemplified most recently in documents submitted by the Danish Institute for Human Rights³ and other Danish civil society organisations⁴ to the UN Human Rights Council.⁵

Also, the UN Committee for the Elimination of Racial Discrimination has highlighted its concerns about the restrictive conditions under Danish law with regard to family reunification, particularly referring to the requirement "*that their aggregate ties with Denmark must be stronger than their ties with any other country unless the spouse living in Denmark has been a Danish national or has been residing in Denmark for more than 28 years. The Committee reiterates its concern that this may lead to a situation where persons belonging to ethnic and national backgrounds other than Danish are discriminated against in the enjoyment of their right to family life, marriage and choice of spouse (art. 5 (d)(iv)).*"⁶

Bearing this in mind, we think it is very alarming that the UK government is even considering the introduction of such or similar rules. In fact, no EU-country nor Australia or Canada has adopted the 'national attachment requirement' since it was introduced in Denmark in 2002⁷.

Moreover, a requirement (analogous to the Danish version of the rule) that the sponsor should have resided in the UK for at least 15 years would discriminate against migrants who arrived in the country as older teenagers or adults. We also feel discrimination would occur if the Danish requirement that the non-resident partner should have visited the host country at least twice prior to the application was introduced. Spouses/partners coming from low-income countries would experience significant if not impossible hardship to pay the cost of foreign trips; strict visa procedures and high rates of refusal would also likely deter many from undertaking what would essentially be holiday visits to the UK. Thus, the mere fact that a prospective spouse/partner has not undertaken such a trip cannot be considered an indicator as to whether the relationship is 'genuine' or not.

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

No.

Sponsors of spouses or partners coming to the UK must already meet a minimum income threshold, set at the level of income support in the UK. This is a perfectly clear threshold for applicants. We see no reason to introduce a new requirement which would risk raising the

³ Danish Institute for Human Rights (2011), UN Human Rights Council - Universal Periodic Review of Denmark 2011 – Selected Human Rights Concerns and Suggestions for Recommendations, p. 22, <http://humanrights.dk/files/pdf/UPR/Universal%20Periodic%20Review%20of%20Denmark%202011%20-%20recommendations.pdf>.

⁴ Danish Association of Legal Affairs et al. (2011), Joint Stakeholder Submission to the Universal Periodic Review of Denmark, p. 2, http://www.humanrights.dk/files/doc/UPR/JS3_JointSubmission_3-eng-1.pdf.

⁵ On the 'human costs' of the Danish policy, see also McElroy/Stolovitskaya (2005), Divorced from Reality (Online article), <http://www.humanityinaction.org/knowledgebase/235-divorced-from-reality-the-true-impact-of-denmarks-24-year-old-rule>.

⁶ UN CERD (2010), Concluding Observations on Denmark, CERD/C/DNK/CO/18-19, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/451/62/PDF/G1045162.pdf?OpenElement>.

⁷ Migrant Integration Policy Index (2011), <http://www.mipex.eu/blog/uk-biggest-overturn-of-right-to-family-reunion-may-be-ineffective-for-integration>.

bar for applicants with no clear rationale.⁸ Given that the current level of income support is set at a level considered adequate for recipients to live on in the UK, it is inconsistent to require migrant sponsors to demonstrate a higher level of income than this.

Any new requirement which increases the minimum threshold for earnings would disadvantage British citizens and settled persons on low-incomes or those who have claimed benefits in the past, from bringing their spouse or partner to the UK. This would be both unfair and unjustifiable, especially since under existing rules sponsors are already required to financially support their partners.⁹

The consultation document, furthermore, includes a proposal that could remove the current entitlement to rely upon the support of third parties (e.g. family members) to satisfy the requirement to be able to financially support a partner joining a British or settled person in the UK. This would unfairly increase the prospect that those British or settled persons who are not independently wealthy may be excluded from having their partners join them in the UK.

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.

Sponsors currently need to demonstrate that they have adequate accommodation for the couple to live together in the UK and that there is no risk of overcrowding in their current place of residence. They have the option, particularly if they do not own their own property or have a copy of a tenancy agreement, of certifying their situation by paying for a local authority representative to visit and issue a housing certificate.

Requiring such sponsors to obtain a housing certificate (rather than maintaining it as an *option* for those who choose to provide additional evidence to verify their circumstances) would place an unfair burden of cost, additional difficulties and bureaucratic compliance for the applicants, sponsors AND local authorities who would be required to administer the proposal.¹⁰ It is also ethically questionable that local authority junior employees should be required to report on suspicions that a couple are not living together as proposed by the UKBA in this consultation. It is likely to produce misunderstanding and misreporting as a result of the unclearly defined and subjective concept of 'genuine relationship'. Further, we believe this proposal raises the question whether it complies with other legal requirements to promote good relations and cohesive communities.

5. Should we extend the probationary period before spouses and partners can apply for settlement in the UK from the current 2 years to 5 years?

No.

It is unnecessary and unfair to make it more lengthy and difficult for spouses and partners to apply for settlement in the UK, particularly since there is no clear rationale in this consultation paper for doing so. Such action will only exclude people from various services to which settled individuals are entitled and is thus more likely to establish grounds for increased discrimination and inequality across the country, whether in housing, employment, health or simply a secure life.

Leading Scottish Third Sector groups working with victims of domestic violence have

⁸The Migrant Integration Policy Index also suggests that anything more than proof of basic income at the level of a country's social assistance or minimum wage is unnecessary for promoting equal outcomes for immigrants and nationals, see <http://www.mipex.eu/blog/uk-biggest-overturn-of-right-to-family-reunion-may-be-ineffective-for-integration>.

⁹ILPA (2011), Information Sheet – Family Migration Consultation 1, <http://www.ilpa.org.uk/resources.php/13529/family-migration-consultation-1>.

¹⁰ See also MIPEX, *ibid*.

pointed out this change would have significant impact on victims of domestic violence, men and women alike. Some may find themselves trapped in abusive relationships for even longer than the current two year period of time, and more vulnerable as a result of the No Recourse to Public Funds rule.¹¹

Extending the period of insecurity for spouses in the UK would be counter-productive in terms of their integration. Rather than ensuring that people have the rights and security to be able to integrate, the proposal would have a negative impact on integration by prolonging situations of insecurity. It would risk increasing resentment and a feeling of alienation among families affected by the change. This rule change would compare negatively to other, comparable countries. The UK would have the longest route to settlement for spouses and partners in Europe, alongside Austria and the Netherlands. It would move the UK away from other liberal democracies including the US, Canada and Australia, which currently permit spouses to apply for settlement after just two years, moving them to a more secure situation much more quickly than is proposed here.

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?

No.

Currently, spouses of British citizens or people settled here can apply for indefinite leave to enter in the UK, if the couple married or registered their partnership at least 4 years ago; spent those four years living together outside the UK; are both coming to the UK to settle here together; and meet English & LIUK thresholds.

The current system operates in order to recognise that couples within an established relationship of some years should be treated differently to newer couples. There is a rational reason for this – that the chances of a relationship being established for visa purposes are extremely low if the relationship is long-standing. As such, the introduction of a five year probationary period would rightly be viewed as unfair, even penalizing of long-standing (4 years or more) couples wishing to settle in the UK.

7. Should spouses and partners applying for settlement in the UK be required to understand everyday English?

No.

We do not think this is the right approach. All spouses and partners applying for settlement in the UK are already required to meet an English language requirement, with most (81%) doing so by passing the Life in the UK test at B1 level, and those with lower language ability able to take an ESOL course at a lower level instead. By requiring everyone to take the B1 test and not offering ESOL courses to support those at a lower ability level to do so, the government would make it significantly more difficult for some spouses and partners to pass this test. We believe that, rather than raising the bar for those few with lower proficiency in English, the government should be supporting people of different skill levels to learn English in the UK in order to move them to a point of security more quickly.

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

Speaking **Yes**
Listening **Yes**
Reading **No**
Writing **No**

SHAM MARRIAGES

¹¹ Representatives attending the UKBA Consultation event in Glasgow on 20th Sept 2011.

Regarding the following questions in this chapter:

The consultation document highlights the number of reports made by registrars raising doubts about whether a marriage involving a foreign national is genuine. However, no information is given about the number of times an investigation of the report shows the marriage to be sham. In fact, the extent to which registrars are being unduly suspicious or uncovering sham marriages is left entirely unclear. This does not form an appropriate basis for the introduction of more barriers for couples wishing to marry in the UK.

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.

This proposal risks inappropriately blurring the line between two entirely different occupations. Moreover we do not think that registry offices should be the site for immigration enforcement action.

10. Should more documentation be required of foreign nationals wishing to marry in the UK to establish their entitlement to do so?

No.

The UKBA has not adequately made the argument that there is a need for any further documentation confirming that no lawful impediment to marry exists. We think that this new requirement would disproportionately impact on applicants from countries with poor bureaucratic systems and particularly those who married in rural areas, many of whom would be likely to find it difficult to secure the right documentation and would thus experience an external impediment to marriage.

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.

This proposal is highly objectionable. It makes the presumption that a couple including a non-EEA national has a suspect relationship and, as such, pre-determines that an immigration interview with the UK Border Agency is needed. Selecting couples based on nationality rather than on any evidence regarding their relationship would be an act of direct discrimination, leaving the UKBA open to legal procedures.

12. Should 'sham' be a lawful impediment to marriage in England and Wales?

In considering this proposal the government should be aware that what are currently termed 'sham marriages' – marriages entered into without the intention of establishing cohabitation – are also contracted for non-immigration purposes. These can extend from the 'legitimation' of a child born or about to be born, to meet the terms of a will, or to secure apparent conformity with social norms which might increase the prospects of employment, promotion or other types of desired social status.

A further problem would arise from the status of marriages which were, after the act of marriage, found to have been entered into without the intention to cohabit. Would the marriage be voided in such circumstances?

The truth is that 'sham marriages' as defined by the consultation paper might be more common (including among British citizens) than is believed even by the General Register Office. Unless the government is prepared to deal with the implications which arise from criminalizing all such marriages, including those entered into for non-immigration purposes, it seems ill-advised to proceed down that route.

Furthermore, registrars are not permitted to conduct 'sham marriages' anyway, so this proposal contributes in no way to "preventing abuse".

13. Should the authorities have the power in England and Wales to delay a marriage from taking place where 'sham' is suspected?

No.

Local authority officials are generally in no position to assess the basis for a marriage, particularly if the couple are from cultures with different marriage practices which may require more detailed understanding of these variations. Allowing local authorities to delay weddings on the basis of suspicions of a marriage could lead to completely unjustified problems and distress for many couples. In particular, it would be likely to lead to unlawful discrimination against couples of particular backgrounds.

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

No.

It is highly questionable why financial incentive is even being considered in official functions whether operated by government offices or local authority channels. Such incentives serve to create unequal systems that could lead to accountability and management issues, not to mention accusations of unfairness and discrimination against couples of particular backgrounds.

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.

A sponsor could have perfectly legitimate reasons for wanting to sponsor a spouse or partner within five years of being granted settlement in the UK. There is no evidence to indicate that doing so is a definitive sign of intention to break the Immigration Rules.

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.

The definition of 'serial sponsor abusing the process' given in the UKBA consultation document is someone who has been judged to have partaken in a marriage of convenience on one previous occasion. In our view this is not a justification for preventing someone from sponsoring another person for a ten-year period.

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

No.

This would introduce the risk that applicants would incur an unnecessary additional cost in order to secure counter-signing of applications by solicitors, but at no extra benefit to them. However, as many solicitors' competencies are not within the immigration context, this may well serve to open up a new income source for legal firms, increasing the scope for corruption and exploitation of applicants by unscrupulous solicitors and advisors.

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?

No.

Although local authorities are currently involved in the nationality checking service, this is a very different task. Assessing marriage applications is a complex process, and local authorities are likely to lack the resources and training to do so accurately. As a result, this change would introduce the risk of poor decision-making affecting the success of marriage applications. We would also be concerned about the potential for discriminatory decision-making against applicants from particular countries.

TACKLING FORCED MARRIAGE

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?

We do not think that the causes of domestic violence can be tackled under the rubric of immigration law –preventing a violent individual from being an immigration sponsor would not tackle the root cause of their violent behaviour and so should not be viewed as a solution to the problem. Besides, the specific laws that deal with domestic violence and forced marriage should have their own in-built provision for safe management of perpetrators of such acts.

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?

No.

We would be concerned about the capacity of social services departments (in particular given current pressures caused by spending cuts) to make such an assessment; and in the case of groups vulnerable to forced marriage, to have the necessary competencies in cultural differences and needs.

OTHER FAMILY MEMBERS

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

No.

We believe a minimum income threshold is likely to act as an unfair restriction on many children and elderly dependents' ability to join their relatives here – this would serve to undermine the principle of access to a family life and cause significant hardship, especially for children and parents alike who would otherwise be forced to live separately.

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.

We think this proposal would be an unfair and disproportionate measure. It would result in a prolonged period of uncertainty for elderly people, with the possibility of removal at the end of five years if not granted settlement. This would be neither humane nor appropriate.

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

Yes.

This is a rational and clear threshold which can be understood by both applicants and the general public.

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?

No.

The Immigration Rules already require that the applicant should have no other close relative in their own country to whom they can turn for support. It is unclear what is meant by 'other ways' short of settlement. The implicit may need to be made explicit in this particular proposal as it seems to hint at unworthy intentions towards elderly persons.

25. Should there be any change to the length of leave granted to dependants nearing their 18th birthday?

No.

We do not understand either the purpose or the operation of this proposed rule change, but as it stands we would not agree with it.

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 the UK?

No.

We do not agree with pre-entry English language requirements as part of the family reunification process in any circumstances, including for children and elderly dependants.

The introduction of a pre-entry English language requirement for spouses and partners has, according to accounts from migrant community organizations in our network, had the effect of disadvantaging applicants from countries with poor or even no provision of approved language testing. We argue therefore that it has had a discriminatory impact which we would expect to be replicated or worsened if applied to dependants as proposed here. In any case, we believe that the best place to learn English is in a country where it is spoken.

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

No.

We think it is not fair or realistic to require elderly dependants to learn English to such a level before being granted settlement. This would make it more likely that some elderly dependants would face removal on the basis that they could not meet this requirement – a cruel and disproportionate outcome.

POINTS-BASED SYSTEM DEPENDANTS

28. Should we increase the probationary period before settlement for points-based system dependants from 2 years to 5 years?

No.

This proposal will neither verify the genuineness of the relationship between the couple, nor encourage integration into British life. Instead, it will serve only to make life more insecure for points-based system dependants.

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

No.

Firstly, we do not agree with an extension from 2 to 5 years probationary period. Proposal 29 would be an unfair and arbitrary change in the rules. Time spent in the UK with limited leave to remain should be considered to be just as valid as time spent in the UK on a visa as a main applicant. This proposal would result in unnecessary confusion and insecurity for

points-based system dependants.

30. Should we require points-based system dependants to understand everyday English before being granted settlement (permanent residence) in the UK?

No.

We do not think this is the right approach. All PBS dependants applying for settlement in the UK are already required to meet an English language requirement when applying for settlement. This change would make it significantly more difficult for some to reach settlement. Instead, we believe the government should support people of different skill levels to learn English in the UK in order to move them to a point of security more quickly.

OTHER GROUPS

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?

Overall, we think that the appeals process should be retained for family visit visas, as a means of redressing poor decision-making by the UKBA, should it occur. Currently, the only way for applicants to challenge bad decisions is by lodging an appeal. There is no evidence that appeals are lodged out of any other motivation than to address poor decision-making. Rather, the ability for applicants to lodge appeals serves to make the UKBA accountable to applicants – removing this would undermine confidence in the system.

In order to reduce appeal levels, we would recommend that the UKBA reviews the way that initial decision-making as regards family visit visa applications is carried out by UKBA Entry Clearance Officers (ECOs). The high success rate of appeals over decisions in this area indicates that first instance decision-making regarding these applications by ECOs may be flawed. Consideration might be given to a more systematic approach to reviewing the work of ECOs whose decisions give rise to a high level of successful appeals, including retraining, reprimand and/or removal from post.

In addition to reviewing UKBA decision-making processes, it is likely that some applicants do not fully understand the application process, resulting in the submission of new evidence on appeal by some. This could be addressed by reviewing and improving the guidance available to applicants, to ensure that they submit all necessary information first time and do not have to endure the cost of lodging an appeal or making a second application.

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

Yes.

The right to appeal against a negative outcome from a family visit visa should be retained for all applicants as a standard part of the application process.

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

No.

ECHR ARTICLE 8

We are highly concerned that this section includes inaccurate and misleading

statements about human rights, UK and European law, and tries to re-use arguments the UK Border Agency has lost before the courts by way of a public consultation, as has been pointed out by organisations such as the British Institute of Human Rights¹² and ILPA¹³.

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?

No.

This question is flawed as it gives an inaccurate impression about how human rights law works in immigration cases. Human rights law in relation to Article 8 already contains adequate provision for respect for family life to be balanced against considerations 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.” (ECHR Art. 8.2) What the Human Rights Act stipulates, however, is that limitations must be lawful, necessary and proportionate to the legitimate aim being pursued.

We believe that this accounts for all the wider interests which need to be taken into account when considering family reunion rights.

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?

No.

This is another misleading question as it gives an inaccurate impression about human rights protection in immigration situations. Further, it exemplifies how the government is fixated on questions relating to the deportation of persons suspected or convicted of crimes and wrongly conflates this with the general issue of family migration in order to justify the proposals under consultation here .

The government already has considerable powers to remove foreign nationals who have been convicted of criminal offences. What human rights law does require is for deportation decisions which interfere with the right to respect for private and family life to be lawful, necessary and proportionate to the legitimate aim pursued. Thus, as currently, a foreign national who has committed a crime in the UK should be treated in accordance with the law. His or her basic human rights under Article 8 should not be infringed by immigration law in any circumstances; trying to establish a hard-edged rule – as the question suggests – would be incompatible with the complex evaluation which Art. 8 requires.

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?

No.

This question gives the misleading impression that human rights are dependent on citizenship or immigration status, and that a person may lose their human rights if they have an uncertain immigration status. This is flawed as human rights apply to all people irrespective of immigration status, which means that everyone in the UK has the right to respect for their family and private life regardless of their entitlement to be in the UK. The government is on a dangerous path if it seeks to question the universal application of human rights.

¹² British Institute of Human Rights (2011), Briefing on the Family Migration Consultation, <http://www.bih.org.uk/documents/policy/bihrs-briefing-on-the-family-migration-consultation-highlighting-some-key-concerns-on-proposals-to-r>.

¹³ ILPA (2011), Information Sheet – Family Migration Consultation 2, <http://www.ilpa.org.uk/resources.php/13530/family-migration-consultation-2>.

Further, many people become irregular in the UK because of changes in the rules over which they had no control, and through no intention of their own. Lacking regular status does not strip people of basic human rights. In fact, a person's insecure immigration status makes it all the more vital that their human rights are recognised, as they are likely to have little recourse to other protection.

In addition, it is necessary to consider the human rights of other parties to the relationship – the spouse or civil partner and children who are a part of the family. The effect on them of being separated from a family member, particularly when relationships of dependency and close emotional bounds have been established, has to be given proper weight when considering these matters. This is particularly the case when family life abroad cannot be considered possible, or available only at too great a cost in terms of the loss of security and the practical advantages of the life which has been established.

GENERAL QUESTIONS

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

We believe it is inappropriate that the Immigration Rules are being viewed as a key means to addressing 'sham' and forced marriages. In the case of the latter, the Forced Marriage (Civil Protection) Act 2007 should provide the safeguards necessary for the vulnerable, or it should be amended to exercise proper authority.

There are many complex issues at play in both types of marriage which are not in any way related to immigration issues and deserve to be dealt with in their appropriate and unique contexts.

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

Certainly the proposals for family migration have not been received by Scottish migrant communities and community organizations as conducive to integration or cohesive communities. There is inadequate justification provided by the UKBA for the changes; instead, this approach is likely to generate resentment and mistrust from migrants and their families.

Rule changes that make it more difficult for people to live here or to legitimately come here to stay, do not promote good relations or community cohesion. If the government wishes to promote integration, it needs to acknowledge that the real motivation of the majority of family migrants is perfectly legitimate; that migrants make full contribution to all aspects of life here, from tax-paying to cultural, social and economic areas at local and UK-wide level.

As such, the UKBA would be well-advised to devise family migration policies which treat family migrants with respect, and which facilitate rather than inhibit their moving to a position of security as quickly as possible in the UK.

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

There is no evidence that family migration is a significant burden on the public purse. It is an extremely misleading feature of this consultation that a distinction is drawn between 'the taxpayer' and 'family migrants'. Many family migrants are able to work in the UK, meaning that they, as well as their spouses or partners, are also taxpayers. As such they have a right to expect that this contribution is not disregarded by UK politicians.

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?

A balance is already struck between individual rights and wider policy goals around immigration. It is misleading to imply that the only public interest is in 'protecting the public and controlling immigration'. The public benefits widely from immigration and the economic and social benefits it brings. The public also benefits from the existence of the ECHR Article 8 and the universal application it has to the most vulnerable in society.

We feel very strongly that it is disingenuous of the government to collude with certain sections of the media in misinforming the public about fundamental human rights, the rights of individuals and in this case the situation and rights of migrants in British society.