House of Lords Motion re:
Statement of Changes in Immigration Rules (Cm 7944)
25 October 2010

BRIEFING

INTRODUCTION

This is a joint briefing from the Joint Council for the Welfare of Immigrants (JCWI) and the Immigration Law Practitioners' Association (ILPA).

Statement of Changes in Immigration Rules (Cm 7944) makes changes to the Immigration Rules restricting entitlement to family unity in the UK for:

- British citizens and settled migrants; and
- refugees who have naturalised as British citizens

These two sets of changes are dealt with in turn below.

CHANGES AFFECTING PARTNERS SEEKING TO JOIN BRITISH CITIZENS AND SETTLED MIGRANTS

1.1 Currently British citizens and non-EEA nationals with settled status/being admitted for settled status are able to bring their spouse/fiancé(e)/unmarried/civil partner to the UK if they can satisfy various requirements.[1] There is presently no pre-entry language requirement for these groups save for spouses/partners seeking indefinite leave to enter the UK (as opposed to temporary leave) in limited circumstances.[2] However even in this case, those who do not satisfy the English requirement will be granted temporary leave to enter the UK which can subsequently be made indefinite providing that all of the other requirements are met.[3]

1.2 The effect of these changes is that as of 29 November 2010 (save for European nationals[4]/those joining settled European nationals and those who are expressly exempted from the requirements) applicants will need to show that they have passed an English language test[5] from an 'approved provider'[6] **BEFORE** they can

[1] Part 8, HC 395 as amended. These amongst other things require applicants to show that they can financially support and house themselves without additional assistance from the welfare state, and that their relationship is on-going.
[2] Para. 281(i)(b)(ii), HC 395 as amended.
[3] Under para 282 (c) applicants can be admitted for a period not exceeding 27 months where all of the other requirements are satisfied.
[4] From the EEA and also Switzerland, Norway, Iceland and Lichtenstein.
[5] This must meet or exceeds level A1 of the Common European Framework of Reference (CEFR)
[6] http://www.ukba.homeoffice.gov.uk/sitecontent/documents/partners-other-family/english-tests-partners.pdf

come to the UK. Those who are already in the UK but seek to extend their leave in one of the above categories will also need to do so.

1.3 The following will be exempt from language testing: a) nationals from specified countries'[7], b) those with specified academic qualifications deemed by NARIC[8] to meet the standard of a Bachelor's degree in the UK,[9] c) those aged 65 and over, d) those with 'physical and mental conditions that the *Secretary of State thinks* would prevent them meeting the requirement', and d) those cases in which the *Secretary of States thinks* 'there are exceptional and compassionate circumstances which would prevent an applicant meeting the requirement.'

1.4 The Rule changes are formally justified[10] on the basis that they will: a) integrate migrants, b) promote the economic well being of the UK by 'encouraging integration and protecting services,' c) ensure 'that migrant spouses are equipped to play a full part in British life.' We note however that the Immigration Minister also listed these proposals as part of a range of initiatives instead designed to reduce numbers.[11] This was also identified as one of two objectives by the Conservative MP, Andrew Rosindell during a televised debate on this issue.[12] These appear to be contradictory aims.

Reasons why these Rule changes should be withdrawn

2.1 Splitting and keeping families apart

2.1.1 These tests will apply to couples who have been living abroad together for some time who may in some cases have children together as well as to cases where one non-UK resident party is seeking to join another UK resident. It is estimated that these tests will affect somewhere in the region of 25,000 applicants.[13]

2.1.2 Whilst we are aware the tests are set at the lowest standard of the CEFR[14], the Government estimates that the tests will lead to a 10% reduction[15] in applications of this kind. This suggests that there are a sizeable number of applicants who will either fail the test or have insufficient skills to be able to take it. Accordingly it is not unreasonable to assume that a key effect of this rule change will be the prolonged and indefinite separation of partners and spouses in cases where they do not have linguistic skills to satisfy the requirements. Whilst it may be said that it is always open to the UK resident to relocate in order to reside with their spouse, there are many cases in which this would generate extreme hardship or risks to life. A British citizen who is a former refugee who would be at risk of torture or death upon relocation offers one example of this. Another might simply be a British citizen who has lived in the UK for the entirety of their life

[7] Antigua, Barbuda, Australia, the Bahamas, Barbados, Belize, Canada, Dominica, Grenada, Guyana, Jamaica, New Zealand, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Trinidad and Tobago, USA.
[8] http://www.naric.org.uk/index.asp?page=2
[9] See new para 281(i)(a)(iii)-(iv)
[10] Memorandum to Cm 7944
[11] *Migrants marrying UK citizens must now learn English*, Home Office Press Release, Wednesday 09 Jun 2010.
[12] The Politics Show, BBC 1, 13 June 2010.
[13] Human Rights Lawyers Condemn English Tests for spouses coming to the UK, Guardian, 27.09.10, http://www.guardian.co.uk/uk/2010/sep/27/lawyers-condemn-migrants-english-tests
[14] http://www.coe.int/t/dg4/linguistic/cadre_en.asp
[15] Interview with Andrew Rosindell, Conservative MP, The Politics Show, BBC 1, 13 June 2010.

and has employment, housing and existing family ties - perhaps even children from a former relationship.

2.1.3 In their legal opinion for Liberty, leading barristers Rabinder Singh QC and Aileen McColgan concluded that:

> '*there are serious grounds for concern as to whether the imposition of pre-entry language requirements, as proposed by the UKBA, is consistent with the UK's obligations under Article 8 [the right to private and family life].. of the European Convention on Human Rights…*'[16]

2.1.4 The existence of the specified exemptions[17] in the form of a blanket rule applicable to all cases was not considered to have been sufficient to comply with Article 8 European Convention on Human Rights (ECHR) requirements as ECHR obligations require consideration of *all factors* relevant to a case in which Article 8 ECHR is engaged rather than simply 'exceptional ones' or those relating to age/illness. Furthermore in the light of subsequent statements[18] which suggest that the measures are inspired by the need to reduce numbers it is conceivable the measures themselves cannot be justified by reference to a specified Convention reason and that they may also be inconsistent with ECHR obligations for this reason.

2.2 Discrimination

2.2.1 There are a number of ways in which this scheme would disadvantage and potentially discriminate against various groups. Most obviously global disparities mean that opportunities to acquire even basic English language skills are unevenly distributed. Those people in non-English speaking zones of conflict, countries in which there have been natural disasters such as flooding, would struggle to access English language classes and testing facilities. So too would those living in developing countries - in particular those located in rural areas. Additionally applicants residing in countries in which testing at the A1 level is not available/reasonably accessible would also be disadvantaged as they may ultimately be required to sit a higher level test or incur the cost and difficulty of travelling to the nearest country that offers the test at A1 level. [19]

2.2.2 Additionally it should be noted that Pakistan, India, Bangladesh, and Thailand all appear in the list of the top five nationalities granted leave to enter the UK as a spouse or fiancé. [20] Whilst the application of the English language test would automatically apply to these groups and nationals from other 'non-English' speaking countries (and in so doing disadvantage them), it would not apply to applicants who speak no English from 'majority English speaking countries.' As such an applicant from Quebec in which French is the main spoken language who cannot speak English would be exempt from the test. So too would a non-English speaker from the US who is fluent only in Spanish.

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[16] Advice in the matter of pre-entry language requirements, para. 22
[17] See para 1.4 of this briefing.
[18] See para. 1.5 of this briefing.
[19] Perry in his article exemplifies this by pointing out that the University of Cambridge does not offer the A1 test in Nicaragua. They offer A2 in Costa Rica. This would necessitate further cost, travel and indeed a visa to Costa Rica to take a higher level test. See Marrying someone from abroad- how easy will it be for them to take the new English test? http://www.migrantsrights.org.uk/migration-pulse/2010
[20] Equality Impact Assessment, UK Border Agency, p.3.

2.2.3 Whilst it is repeatedly suggested by the UK Border Agency[21] that pre-entry language testing will assist women and children by opening opportunities to them, this entirely misses the point that it will disproportionately impact on far more fundamental rights of women and children by reducing their opportunities to be reunited with family members. If, for example, a woman cannot meet the requirement because there are no suitable, affordable or otherwise available lessons or test for her in her country of origin, she will simply be excluded from being united with her partner in the UK – including from the opportunity this might give her to learn English. Approximately 60% of spousal visas are granted to women.[22] Opportunities for women to learn English throughout the world vary considerably on account of levels of societal hostility to women's education and/or availability of child-care facilities.

2.2.4 In their advice for Liberty, Rabinder Singh QC and Aileen McColgan concluded that these requirements may not be consistent with statutory equality obligations and that:

> '*There may therefore be an element of discrimination [under Article 14 in conjunction with 8 ECHR] on grounds of ethnicity/nationality/national origin associated with the operation of the pre-entry English language test…It is possible that similar arguments might apply as regards gender*'[23]

2.3 Unnecessary

2.3.1 It is noteworthy that knowledge of English language and culture, approximately 24 months after arrival in the UK, is already a prerequisite for settlement for spouses who ultimately go on to remain in the UK.[24] Furthermore, the UK Border Agency's own evidence shows that the pass rate for this requirement is actually improving[25]. This indicates that the aim of improving migrant partners' opportunities and integration in the UK by improving their ability in the English language is already being met, and a further pre-entry test is unnecessary.

2.3.2 In any event, as Professor Adrian Blackledge,[26] professor of bilingualism notes, there is little evidence that testing English language learners is in itself an effective way to develop linguistic skills. The National Association for Teaching English and other Community Languages to Adults (Natecla) argue that the UK is the best place for people to learn the English language.[27]

2.3.3 Even however if it is accepted that the scheme could theoretically have some merit from the point of view of developing linguistic skills, there appear to be a number of more practical problems with it. Professor Alderson, professor of applied linguistics[28] observes that the UK Border Agency's August 2010[29] list of

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[21] Equality Impact Assessment, and see also The Politics Show, BBC 1, 13 June 2010.
[22] *Control of Immigration: Statistics United Kingdom 2008*, August 2009, Published by the Home Office, p. 54 http://rds.homeoffice.gov.uk/rds/pdfs09/hosb1409.pdf
[23] Paras 19-20.
[24] Para 287 (vi) HC 395 as amended. There are exemptions for those aged 65 or over or those aged under 18 at the date of application.
[25] UK Border Agency Equality Impact Assessment, 2.1.
[26] Professor Blackledge is a professor of bilingualism at the University of Birmingham. See his comments on Sunday Morning Live, BBC 1, 03.10.10 available at http://www.youtube.com/watch?v=9ECwI5-DWpY&feature=related
[27] http://www.natecla.org.uk/content/509/press_releases/
[28] Lancaster University.
[29] http://www.ukba.homeoffice.gov.uk/sitecontent/documents/partners-other-family/english-tests-partners.pdf

approved providers of the English test has been developed by unknown agencies with 'absolutely no evidence of their validity, reliability etc'. [30]

2.3.4 Further the scheme itself lacks intellectual coherence given that those with academic qualifications equivalent to the standard of a UK Bachelor's degree are exempt from the English language requirement whilst those with PhD and Masters qualifications are not. This is due to the limitations in the NARIC scheme which can only assess whether Bachelor's degrees were taught in English.[31]

2.3.5 Furthermore, given the clear scope for the establishment of commercial providers who market inadequate courses for this purpose to applicants, such a requirement could open migrant applicants up to exploitation in the absence of appropriate regulatory and enforcement mechanisms. Yet it is not easy to see how effective regulatory mechanisms could be introduced given that the new requirement must be satisfied prior to entry to the UK.

2.3.6 If the Government wants migrants to learn English at an earlier stage, a more cost effective and human rights compliant approach would simply entail removing the existing restriction in relation to English tuition in the UK. This would mean that spouses/partners and fiancés are able to access English language classes at subsidized rates as soon as they arrive in the UK.[32] This has the advantage of generating fees for the private sector English teaching industry, whilst minimizing public expenditure - this scheme will cost £26.9-£51.1 million to implement[33] at a point in time when the Government is seeking to instigate significant public expenditure cuts and encourage growth of the private sector.

2.4 An ineffective tool for integration

2.4.1 Integration is a two-way process requiring both acceptance of newcomers by the host community and participation in various spheres by newcomers. Research by Human Rights Watch into the operation of these tests in the Netherlands suggests that these tests are actually counterproductive from the perspective of facilitation of integration. In relation to the host community it was suggested that tests reinforced views that migrants did not wish to learn the language or participate in society. At the same time the tests were received by migrants as indirectly communicating that they were unwelcome.[34]

Points for clarification

3.1 If these Rules are not to be withdrawn we would welcome clarification of the following:

a) The circumstances in which the 'exceptional/compassionate circumstances' exemption will be met. In particular, will the following automatically be treated as meeting the exception?

[30] E mail correspondence between Professor Alderson and JCWI dated.
[31] E mail between UK Border Agency and Kathryn Denyer, 18.10.10. Masters and PhD qualifications are recognised for the purpose of the Points Based System English requirements but these are due to be changed in the future.
[32] Presently spouses/partners cannot access English classes at subsidised rates and must wait 12 months after arrival to do so.
[33] Impact Assessment, UK Border Agency, 27.07.09, p.2.
[34] The Netherlands: Discrimination in the name of integration, Human Rights Watch 2008, p. 37-38.

i. cases in which English language classes are not reasonably accessible e.g. because of geographical location, cost, internal conflict
ii. cases in which Level A1 testing is not available in a particular country or more generally reasonably accessible
iii. cases in which an impecunious applicant seeks to join their spouse[35]
iv. cases involving sponsors who were formerly refugees/formerly enjoyed Humanitarian Protection Status who are unable to take/pass the test.[36]

b) On the 'physical or mental condition' exemption is it intended that someone who is 'disabled' for the purposes of the Equality Act 2010 would automatically be exempted from the requirement in circumstances where they assert that they will be unable to fulfil the requirement or where they fail the test? [37]

c) Will A1 testing be internationally available in every country subject to language tests? What arrangements are to apply where this is not the case? How are such tests to be conducted? What verification process will there be to ensure that tests are suitable for their purposes and in their ability to meet CEFR requirements? How are commercial providers of English language services to be regulated in order to ensure that migrants are not exploited?

d) The UK Border Agency previously recognized the potentially discriminatory impacts that could arise from lack of English language provision, and concluded in July 2009 that the 2 year lead in would provide the 18-24 months necessary to develop capacity to avoid difficulties in this respect.[38] Why has implementation been brought forward? Was this decision subject to an equality impact assessment? What steps have been taken to expand provision since July 2009?

CHANGES AFFECTING REFUGEES WHO HAVE NATURALISED AS BRITISH CITIZENS

Family reunion is a critical concern for many refugees, who in fleeing persecution often become disunited from family members. In several cases, refugees may also lose all contact with family members. The reasons why a refugee is at risk of persecution often place his or her family members at similar risk. This may force the family members to flee, and sometimes they may be lost in the country of origin or in other countries. For some, tracing of family members may take several years. However, for refugees struggling to rebuild their lives, disunity from family and uncertainty as to the safety of family members provide profound obstacles to refugees' integration in the UK. Research published by the Scottish Refugee Council in April 2010 attests to all of these matters[39]. In concluding the 1951 UN Refugee Convention relating to the Status of Refugees, the Conference of Plenipotentiaries unanimously considered that "*the unity of the family... is an essential right of the refugee*"

[35] Following the judgement in *R (Baiai et ors) v SSHD* [2008] UKHL 53.
[36] See related briefing on refugees.
[37] Equality Act 2010, s6(1). See also Schedule 1 6(1) of the Act. A person is 'disabled' if they have a 'physical or mental impairment that has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities.' Anyone who suffers from cancer, multiple sclerosis, HIV is automatically treated as disabled under the Act.
[38] Equality Impact Assessment p.12-13.
[39] *One Day We Will Be Reunited*, Scottish Refugee Council, April 2010; report available at: http://www.scottishrefugeecouncil.org.uk/assets/0000/0099/Family_reunion_research_someday_we_will_be_reunited.pdf

and recommended that States take necessary measures to ensure refugee family unity.

Changes to be made by Cm 7944

The Immigration Rules currently provide particular benefit to refugees to permit family reunion (with partners and children) in the UK once a refugee has been recognised as a refugee in the UK. Unlike others whom the Rules may permit to be joined in the UK by partners or children, refugees are not required to meet the accommodation and maintenance requirements – that they are able to financially support and accommodate (without recourse to public funds) their family members – for their family members to be permitted to join them in the UK. Cm 7944 would modify this, from 22 October 2010, so that where a refugee has naturalised as a British citizen, the Rules would require those requirements to be met. Where the person was recognised as a refugee, but not naturalised, his or her family members could still benefit from there being no accommodation and maintenance requirements.

Many refugees will secure family reunion in the UK long before they may naturalise as British citizens. However, there are two key reasons why some may not do so. In some cases, family members remain missing for many years. For some refugees, their traumatic experiences are so profoundly distressing (and this may include guilt over the separation of the family) that they may simply be psychologically unable to face family reunion for several years. Some may be too traumatised to attempt to trace family for fear of discovering their family are dead.

The Secretary of State's stated justification for change

The Explanatory Memorandum to Cm 7944 gives the following explanation for this change (at paragraph 7.10):

> "*In the Secretary of State's view, a former refugee who is now a British citizens should not be able to reunite with his or her family under Part 11* [this is the part of the Immigration Rules providing the particular benefit to refugees outlined above]. *That does not mean that family reunion should not be allowed, but it is the Secretary of State's policy that it should be subject to the normal settlement Rules under Part 8 where accommodation and maintenance requirements should be met. This will avoid discriminating between British citizens who were not formerly refugees, who can only apply for family reunion under the normal settlement route, and a former refugee who has acquired British citizenship...*"

That explanation is wholly unsatisfactory. The circumstances of refugees and other British citizens are profoundly different. The differences, described in more detail below, essentially relate to:

- the causes of family disunity,
- ongoing dangers facing both refugees and their family members, and
- impediments to refugees establishing themselves in the UK sufficiently so as to be able to meet accommodation and maintenance requirements.

These are considered in turn below, but it must be remembered that in any individual case these circumstances have a combined effect.

The benefit to refugees, which Cm 7944 will remove for those who have naturalised, only applies in respect of partners or children who were part of the refugee's family prior to his or her flight from persecution. Thus, the benefit only applies where

family disunity is caused by reason of the risk of persecution that has required the refugee to flee his or her country of origin. This cause of family disunity is not changed by the refugee having naturalised as a British citizen.

That the refugee has naturalised also does nothing in itself to remove the risk of persecution in his or her country or origin. There will, therefore, normally be no option for family reunion in that country. If the refugee's family have fled to another country, there may nonetheless be no practical or lawful option for family reunion in that country. Thus, the only option for family reunion will be in the UK.

Refugee's family members will often be in danger themselves. Those, who remain in their country of origin, may be targeted for the same reasons as the refugee or as a means to 'punish' the refugee or to coerce him or her to return. Alternatively, family members may find themselves in inhumane or unsafe situations in other countries, whether in refugee camps or not, where they are barely able to sustain themselves and where they may be at risk of discrimination or exploitation.

Refugees face considerable hurdles establishing themselves in the UK. Accommodation and maintenance requirements may simply be unaffordable and therefore preclude family reunion. Refugees generally spend several months or years excluded from work while their asylum claims and appeals are dealt with. Many suffer serious mental health difficulties arising from the trauma of past persecution, experiences of the UK asylum system and separation from family members. These difficulties are often compounded by the very isolation and marginalisation they cause. Thus, even when permitted to work, refugees (including the highly skilled and well educated) may be unable to find work or anything other than poorly paid work. Even after naturalisation, many refugees may remain unable to afford family reunion if the changes to be made by Cm 7944 are introduced. If so, the distress of continued family separation will likely continue to adversely affect their mental health and their ability to integrate and secure more stable or better paid employment.

Additional adverse impact of these changes

Article 34 of the 1951 UN Convention relating to the Status of Refugees requires that the UK shall "*as far as possible facilitate the assimilation and naturalization of refugees...* [including] *in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings*". By contrast, the changes to be made by Cm 7944 increase impediments to refugees' naturalisation as British citizens because of the significant financial burdens that may preclude their family reunion.

Absence of Impact Assessment or consultation

The Explanatory Memorandum to Cm 7944 states (paragraphs 8.2 and 10.2 respectively) that there has been no consultation or Impact Assessment of these changes. The reasons given for that are:

> "*...consultation... would be disproportionate given the minor nature of the changes and the fact that they reinforce rather than change existing policy...* [and] *there are no financial implications involved.*"

These reasons are misconceived. For reasons explained above, the changes, far from minor, will have profound implications for refugees – their family life, their well-being (particular mental health), their ability to integrate, to rebuild their lives and to

naturalise. The changes are not a reinforcement of existing policy. The existing policy is that set out currently in the Rules. While the Government has litigated to defend an incorrect understanding of the Rules, resolved by the Supreme Court in May 2010 in *ZN (Afghanistan)*[40], the fact is that the Government was incorrect. Following the Supreme Court's ruling, the Government seeks to reverse the policy position by changing the Rules. Far from being minor or inconsequential, these changes are profound. For those refugees affected by these changes, the result may be permanent family separation.

Conclusion

The Government should withdraw these changes to the Rules. Alternatively, the Government should make clear it will continue to permit refugees to be reunited with partners and children, where the refugee has naturalised, by exercise of discretion outside the Rules to not apply maintenance and accommodation requirements where the refugee cannot meet these. Those currently recognised as refugees, including those who have naturalised, have had no realistic opportunity to adjust their expectations and for family members to make applications as there was no warning before Cm 7944 was laid before Parliament on 1 October 2010. If the Government is determined to make this change, it should exercise discretion to not apply the changes to family members of those already recognised as refugees for a significantly longer transitional period.

Postscript

On 10 August 2010, the Upper Tribunal (Immigration and Asylum Chamber), in allowing an appeal on human rights grounds in favour of the grant of entry clearance for the spouse of a refugee, where the marriage had been contracted after the refugee had fled his country of origin, held:

> "*The Immigration Rules make no provision for the admission of post-flight spouses of refugees with limited leave* [on recognition as a refugee in the UK, leave to remain is generally granted for a limited period of 5 years]. *The Rules should be changed...*"[41]

Cm 7944 provided an opportunity to remedy this defect in the Immigration Rules. We do not know why the Government has chosen not to take that opportunity, and suggest that peers question the Government as to why the opportunity has not been taken and when it will be.

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[40] *ZN Afghanistan & Anor v Entry Clearance Officer* [2010] UKSC 21
[41] *FH (Post-flight spouses) Iran* [2010] UKUT 275 (IAC)