ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

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BRIEFING: Changes to the General Grounds for Refusal in the Immigration Rules to be introduced by Statement of Changes in the Immigration Rules HC 321

ILPA is a professional association with some 1000 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through teaching, provision of high quality resources and information. ILPA is represented on numerous government and appellate authority stakeholder and advisory groups.

Introduction:
Statement of Changes in Immigration Rules HC 321 was laid before Parliament on 6 February 2008. Some of the changes to the Immigration Rules to be made by HC 321 are to implement the first part of the Points Based System. These changes are not addressed in this briefing. Other changes to be made by HC 321 are to the general grounds for refusing immigration applications ("general grounds for refusal"). This briefing addresses these changes.

ILPA is not aware of, and has certainly not been privy to, any prior consultation about the changes to general grounds for refusal. This is of particular concern given that:

- the changes (as explained further in this briefing) may have dramatic effects for immigration advice and immigration control in the future
- there are to be no transitional provisions in relation to these changes
- the changes will have a retrospective application in that many individuals who have previously overstayed or breached conditions of stay, entered illegally or used deception will be affected by the changes
- this retrospective application may affect currently outstanding applications if these applications are not decided by an entry clearance officer or the Border and Immigration Agency before the coming into force of the changes
- the changes affect all alike – including individuals who first came to the country as victims of trafficking or asylum-seekers; and including children
- the changes will require the refusal of applications made by individuals who are themselves innocent of any wrongdoing
- the changes will provide a strong motivation for many individuals to evade immigration control or bring appeals or judicial reviews in circumstances where they may have made voluntary departures in the past
- the changes will interfere with individual's Article 8 rights in an entirely arbitrary and disproportionate way

Some examples of how the changes will affect individuals are given as case studies in this briefing.

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In view of the seriousness of our concerns, ILPA wrote to Liam Byrne MP, Minister for Immigration, Citizenship and Nationality, on 7 February 2008. A copy of that letter is appended to this briefing. We have received no reply as yet.

In summary, the changes to the general grounds for refusal are:

> From 29 February 2008 refusal of entry clearance or leave to enter, cancellation of leave or refusal to vary leave will be mandatory where false representations have been made or false documents submitted, whether or not these are material to the application and whether or not the applicant knew that such representations were being made or documents submitted.
>
> From 1 April 2008 for those who have previously overstayed, breached their conditions of stay, entered illegally or used deception, refusal of a fresh entry clearance or leave to enter application will be mandatory for fixed periods – except those who have done no more than overstay for 28 days or less. The fixed periods are 12 months from when the person made a voluntary departure at their own expense, 5 years from when the person made a voluntary departure that was paid for and 10 years from when the person was removed or deported. In the case of a person who used deception in an entry clearance application, the fixed period will be for 10 years from the time of that deception.

The Explanatory Memorandum to HC 351 also states that the government intends to bring forward primary legislation requiring a person removed to repay the costs of the removal before entry clearance can be granted.

A fuller explanation of the changes to be made by HC 321 to the general grounds for refusing immigration applications follows:
The Immigration Rules set out the legal framework for considering whether a person may obtain permission to enter or remain in the UK. Part 9 of the Rules sets out general grounds for refusing the applications of those seeking to come to the UK (enter) or stay in the UK (remain). Part 9 is to be changed by HC 321.

<u>General grounds for refusal</u>
These are grounds (or reasons) that apply whatever the type of application (to enter or remain in the UK) that is being made.

For example, someone hoping to come to the UK in order to work may have his or her application refused on these grounds in just the same way as someone else hoping to come to join his or her partner. Similarly, someone hoping to continue studies in the UK may have his or her application to stay refused on these grounds in just the same way as someone who hopes to stay here having got married.

Some of the grounds are mandatory – i.e. if the ground applies, the application must be refused. Some of the grounds are discretionary – i.e. even if the ground applies, the application may still be granted.

Changes to the general grounds for refusal

Some of the changes being made will come into force on 29 February 2008. Others come into force on 1 April 2008.

The changes being made will mean that in certain circumstances an application for permission to enter or remain in the UK must be refused. Currently, although in the same or similar circumstances the application can be refused, it is not the case that the application must be refused. In many instances, applications are not refused; and this is often for very good reasons.

Some circumstances that are relevant to these changes relate to the particular application being made. Other circumstances relate to past conduct by the applicant.

Changes that relate to the application for permission to enter or remain in the UK

These changes are to come into force on 29 February 2008. The types of conduct that are relevant for these changes are:

- making false statements with the application
- submitting false documents with the application
- failing to disclose relevant facts with the application

When the changes come into force, any application for permission to enter or remain in the UK must be refused if any of these things have been done. There will be no discretion and none of the following will make any difference:

- where the applicant believed and had good reason to believe that the statement was true or the document was genuine and valid
- where the applicant did not know that the statement had been made or the document submitted
- where the applicant did not understand that the relevant fact needed to be disclosed or made a completely innocent mistake in not disclosing it
- where the false document or statement was totally irrelevant to the application and not in any way material.

These changes will affect applications made by adults and children in the same way. However innocent of any wrongdoing the applicant may be, it will not matter. Applicants who instruct agents to make their applications will have their applications refused even though it was the agent, without their knowledge, who submitted the false document or made the false statement. Similarly, where the application includes documentary evidence from a third party (e.g. an employer, an educational institution or a financial institution), any error by that third party may lead to the application being rejected regardless of the innocence of the applicant.

Case Study A:

A instructs an agent to assist with her entry clearance application. Although A meets the criteria for entry, the agent includes a false document or statement which he believes will strengthen the application. A does not know the agent has done this. Despite the fact that A is entirely innocent of any wrongdoing and she clearly meets the criteria for entry, her application must be refused.

Case Study B:
B asks a third party (e.g. a financial or educational institution) for documentary evidence in support of his application for entry. The third party provides it, but includes a false statement – whether innocently or otherwise. In any case, B is wholly unaware the statement is not true. Even if neither the statement nor document is necessary for B to meet the criteria for entry, and even though B is entirely innocent of any wrongdoing, his application must be refused.

Changes that relate to past conduct by the applicant

Changes relating to this type of conduct are to come into force on 1 April 2008. The types of past conduct that are relevant for these changes are:

- overstaying (i.e. the person has stayed in the UK after the time for which he or she had been granted permission to be in the UK has passed)
- breaching an immigration condition (e.g. the person has been working in the UK when his or her permission to be in the UK was on condition that he or she must not work)
- entering the UK illegally (i.e. the person did not have permission to enter the UK at the time he or she entered)
- obtaining permission to enter or remain in the UK by using deception

When the changes come into force, the effect will be that any applicant, who has previously done any of these things, will have his or her application for permission to enter the UK refused if it is made within certain fixed periods. The only exception relates to overstaying. If the applicant had overstayed for no more than 28 days, and then left the UK voluntarily and at his or her own expense, this will not be a reason to refuse his or her application. This is a change to current practice whereby applications made outside this timescale can nonetheless be considered, it will affect those who are in the UK and would have expected to have their applications considered in current practices. This group will include those who failed to meet the deadline through no fault of their own, including those who submitted an in-time application that was subsequently determined to be technically invalid and returned to them as such by the Home Office once leave had expired. There is no transitional protection.

Otherwise, where a person's past conduct falls into one of the categories above any subsequent applications from that person for permission to re-enter the UK will be refused if made within:

- 10 years of when the applicant obtained permission to enter or remain in the UK by using deception
- 12 months of when the applicant left the UK voluntarily at his or her own expense
- 5 years of when the applicant left the UK voluntarily but, directly or indirectly, the UK state paid for his or her departure
- 10 years of when the applicant was removed or deported from the UK

These changes will affect applications made by adults and children in the same way. They will also affect the adult or child regardless of the circumstances in which he or she came to the UK. Thus an asylum-seeker, who was forced to use an illegal or deceitful method of entry into the UK in order to be able to escape their home country will be caught by these provisions. It will not even matter that the asylum claim was

unsuccessful only because the real risk to the individual had passed by the time the claim was ultimately decided. Similarly, a trafficking victim, who was forced to use an illegal method of entry into the UK will be caught by these provisions.

Case Study C:
C is trafficked into the UK. Her traffickers use deception or smuggle her into the UK so her entry is illegal. Although she escapes her traffickers she has no funds to make a voluntary return to her home country. Even assuming she feels safe to make a return, she is reliant upon the UK to pay for that return. Either she is now excluded from the UK for 10 years in view of the deception used to gain her entry to the UK, or she is excluded from the UK for 5 years because her voluntary return has been paid for by the UK.

Case Study D:
D is a child fleeing persecution in his home country. He is smuggled to the UK with the assistance of an agent. He has no travel documentation of his own so is forced by circumstances and by the agent to effect an illegal entry to the UK and use deception. He has no funds of his own. He is given discretionary leave. When his asylum claim is ultimately decided it is refused (this may be because the conditions in his home country have improved or his circumstances do not meet the Refugee Convention persecution threshold). Even if he agrees to a voluntary return, it will have to be paid for by the UK. Either he is now excluded from the UK for 10 years in view of the deception used to gain entry to the UK, or he is excluded from the UK for 5 years because his voluntary return has been paid for by the UK.

Case Study E:
E has developed a settled family life in the UK with a partner and children. E's past conduct falls within the new changes. He may have overstayed or worked when his conditions of entry to the UK included that he must not work. He may have made an illegal entry or used deception to enter the UK. He seeks immigration advice because he wishes to regularise his stay. Previously, his immigration adviser might have advised that he comes clean with the immigration authorities and makes a voluntary departure in order to seek entry clearance on the basis of his family life. He meets all the standard requirements for entry under the Immigration Rules. However, if he comes clean to the immigration authorities he may be excluded from the UK for a period of several years – 10 years if he has previously used deception, 1 year if some other conduct.

Postscript:
Currently, immigration advisers often advise individuals in similar situations to make a voluntary departure in order to seek entry clearance; and encourage individuals to make a full disclosure of any previous breaches of immigration law. Entry clearance officers have had discretion to refuse on the basis of past breaches but have usually not done so – especially in cases involving family and partnership matters. However, individuals are unlikely to consider this an option where they will face a separation from their family of at least a year.
Currently, a standard passage give in refusal letters in Article 8 cases involving non-

EEA partners who are in a relationship with a British citizen is currently:

> "*Whilst it is acknowledged that your client may have established a family and private life in the United Kingdom… [the sponsor] is free to remain in the United Kingdom and support any application your client makes to return to the United Kingdom in the proper manner… if your client's application is successful, any interference to her private and family life will only be temporary and minimal in nature.*"

However, the changes drive a coach and horses through that approach, and the jurisprudence that has developed in this area.

Consequences of these changes

We envisage a number of practical consequences of these changes:

- individuals will elect to challenge all decisions that include any allegation of a breach of immigration law, because of the consequences of such a finding (mandatory refusal)
- individuals will elect not to leave the UK: many will elect to go underground and try to live their lives on an irregular basis
- individuals will elect to make fresh applications on human rights (especially Article 8) or discretionary grounds rather than leaving the UK and making entry clearance applications from abroad; and if they fail will then elect to go underground
- individuals will elect to pursue appeals and judicial reviews rather than accept a decision that they ought to leave the UK; and if they fail will then elect to go underground
- by discouraging individuals from complying with immigration control and returning home to seek entry clearance, a huge backlog of cases will build up with consequent costs (in terms of both administrative time and public funds)

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