Statement of Changes in Immigration Rules HC 1511

ILPA comments for 9 November 2011 debate in the House of Lords

The Merits Committee's 40th report draws HC 1511 to the attention of the House saying http://www.publications.parliament.uk/pa/ld201012/ldselect/ldmerit/207/20703.htm

> *"Even though this policy change will be given effect as part of an omnibus instrument, the Committee stresses the importance of providing appropriate levels of explanation and visibility for Parliament."*

Is it not time that Statements of changes in immigration rules were subject to the affirmative procedure? Concerns are:

i) The number of rule changes that have been the subject of successful legal challenges – see the example of *Quila* below;

ii) The numbers of errors in to Statements of Changes and corrections to them that needs to be made. Often Statements correct errors in earlier statements. Sometimes errors are spotted even before the instrument becomes law, see e.g. HC 908 laid in March http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/statementsofchanges/2011/hc908.pdf?view=Binary . A correction is published, but in addition the notes give the following unfortunate history of errors:

> *"3.1 The Committee is invited to note that this Statement of Changes makes a number of significant changes to Tier 4 of the Points-Based System ...*
>
> *3.2 Changes which correct minor drafting errors in HC 863 in relation to the Rules requiring individuals to be free of unspent convictions and to clarify the application of HC 863 to migrants applying for indefinite leave to remain under the terms of the HSMP ILR Judicial Review Policy Document will come into effect on 6 April 2011. These were inadvertently missing from HC 863.*
>
> *3.3 The Government regrets that it is not possible to comply with the convention that changes should be laid before Parliament for no less than 21 days before they come into force. The Statement of Changes which contains the errors being corrected comes into force on 6 April 2011. Therefore the corrections referred to in paragraph 3.2 need to come into force on the same day as the provisions they are correcting."*

iii) The numbers of Statements of Changes the Merits Committee has had occasion to draw to the attention of the House.

iv) The frequency with which these are laid introducing changes to come info force.

For a full list of statements of changes see

http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/statementsofchanges/

Provisions on payment of NHS charges

See briefing from the National Aids Trust. The House of Lords Select Committee on HIV and AIDS in the UK had recommended amendment to the charges to overseas visitors regulations to remove charges for HIV treatment and care. See para. 249 *et seq.* at:

http://www.publications.parliament.uk/pa/ld201012/ldselect/ldaids/188/18810.htm#a58

The committee says

> *257.* ***Charging people for their HIV treatment and care is wrong for public health, practical and ethical reasons. We recommend that HIV should be added to the list of conditions in the National Health Service (Charges to Overseas Visitors) Regulations 1989, for which treatment is provided free of charge to all of those accessing care, regardless of residency status.***

The Government response is at:

http://www.parliament.uk/documents/lords-committees/hivaids/HAUKGOVRESPONSE.pdf

The argument can be extrapolated to denying people leave until NHS charges have been paid and can be extrapolated to other cases where one had rather people seek treatment than try to manage without for fear of charges: infectious diseases, pregnancy being just two examples.

An example of a rule change criticised by the court: *Quila*

The Supreme Court, by a majority, rejected the Secretary of State's appeal in *R(Quila) & anor. v SSHD* [2001] UKSC 45 and ruled that in both the cases before it the requirement that both parties be over 21 for the purposes of an application for leave as a spouse was a breach of their human rights under Article 8. Congratulations to all involved in the case. The aim of ending forced marriages (for be aware that the identified aim in this case was not immigration control) was held to be a legitimate one, but the interference was disproportionate, especially as the Secretary of State was not in a position to quantify how many forced marriages stood to be prevented. Lord Wilson stated "*58....On any view it is a sledge-hammer but she has not attempted to identify the size of the nut."* There Supreme Court gave a clear indication that the overwhelming majority of cases with no element of force would go the same way. Lord Wilson states

> *"...while decisions founded on human rights are essentially individual, it is hard to conceive that the Secretary of State could ever avoid infringement of article 8 when*

applying the amendment to an unforced marriage. So in relation to its future operation she faces an unenviable decision."

The court declined to follow the European Court of Human Rights decision in *Abdulaziz v United Kingdom* (1985) 7 EHRR 471, holding that subsequent jurisprudence of the court was not consistent with the decision. Today (7 November 2011), the Minister for Immigration has in a written Ministerial Statement confirmed that the Government is to revert to the previous threshold in the Rules, 18 years, see:

http://www.parliament.uk/documents/commons-vote-office/5-HO-ImmigrationRulesChange.pdf

As to the instrument

HC 1511 came into force on 31 October 2011 save for provisions relating to the new Olympic or Paralympic Games Family Member Visitor which come into force on 30 March 2011. Do not be misled by the words 'family member' – we are talking about members of the Olympic 'family.'

The headline change is the change to paragraph 6 so that a person subject to immigration control who has failed to pay National Health Service treatment charges of £1,000 or more invoiced after 1 November 2011 should normally be refused permission to enter or remain and in appropriate cases leave should be cancelled.

The Statement of Changes addresses the evidence to be produced by Tier 2 migrants and work permit holders applying for settlement, introducing a requirement to provide specified documents to confirm earnings. A *Pankina* [2010] EWCA 719 - inspired change?

HC 1511 amends the rules for spouses and civil partners following changes that came into effect on 6 April 2011 ((HC 863), which knocked out a section of the rules, the Explanatory Note seeks to suggest by accident although it is very coy on the point. There are many references to 'clarificatory' 'technical' "correction".

HC 1511 amends the rules, incorporating the current concession, so that person's in-country with leave to enter can switch into the categories of unmarried and same sex partners, but only if they have leave to enter for more than six months. It incorporates a concession that has been operating for some time, which originally appeared to address an oversight in drafting, into the rules.

HC 1511 makes changes to paragraph 317(i) on applications for indefinite leave to enter or remain in the UK as a parent, grandparent or other dependent relative of a person present and settled in the UK. The Explanatory note describes this as a response to the Court of Appeal in the case of *MB (Somalia)* [2008] EWCA Civ 102 in which case the Agency has not exactly acted with alacrity. Divorced, separated and single parents/grandparents over the age of 65 will now be treated in the same way as widowed parents/ grandparents when applying under the Rule and the Rule is being extended to include parents/ grandparents travelling together who are under 65 to bring the policy set out in the Immigration

Directorate Instructions, Section 6 of Chapter 8, Annex V, o consider these categories of person under Rule 317(i) (e), into the rules. These changes are also reflected in changes rules for other family members of refugees and those with humanitarian protection.

What are described as "technical corrections" are made to the provisions for other family members of refugees and persons with humanitarian protection (paragraphs 319V to Y). The requirement for them not to have one or more unspent convictions within the meaning of the Rehabilitation of Offenders Act 1974 ((paragraph 319V (i) (f) (viii) and 319X (ix)) is removed. It is stated that this requirement should be applied only in relation to settlement. The rules are also 'clarified', i.e. changed, to make provision for switching in country to the route for other dependent relatives. The Explanatory Note says *"At present the Rules do not make it clear that it is possible for children to switch in county for further leave to remain as a child of a relative (paragraph 319X). The same applies to those who wish to switch in country for indefinite leave to remain as an 'other dependent relative' where the sponsor is a refugee or beneficiary of humanitarian protection and is now present and settled in the United Kingdom (paragraph 319W)."* For "do not make it clear" read "do not permit", but the change is welcome. Less welcome is the change, *sub nom.* "clarification" (Explanatory Note) so that to qualify for settlement as another dependant relative/child of a relative, the applicant must have valid leave under the rules.

As to Tier 4, there are minor drafting changes and corrections and the definition of "UK recognised body" is amended to include for the purposes of Tier 4 foundation programme offices. The question of who benefits from the streamlined application process has had to be addressed as its definition solely in terms of nationality and country failed adequately to deal with Hong Kong and Taiwan, which are territories. The rules are amended to "confirm" that holders of British National (Overseas), Hong Kong and Taiwan passports can benefit from the streamlined process when applying in the relevant territory.

As to the changes coming into effect in March 2012 (and disappearing again on 9 November 2012), these will exempt certain persons accredited for the 2012 Olympic and Paralympic Games from requiring a visa to enter the UK and create two new visitor categories within the Immigration Rules for persons accredited for the 2012 Olympic and Paralympic Games. The International Olympic Committee rules require that Olympians and their entourage (known as "Games Family Members") can travel to the UK on their Olympic documents. Amendments are made to Appendix 1 to the rules to give effect to this obligation. There are a number of provisions to try to stop people travelling on Olympic documents having not participated in the Olympics and merely coming for a visit when the Games have finished. The UK Border Agency will take the biometrics of non-visa nationals so travelling when they arrive. It had much rather that they opted for the visa route, which would enable them to stay longer in the UK and would send them through the normal UK entry clearance processes. Those on that route will however be allowed to work, although there are restrictions on the type of work and it must be associated with the Games.

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