# Changes to the Immigration Rules (HC 194) concerning private and family life (Article 8 of the European Convention on Human Rights):

**Meeting of Terrence Higgins Trust volunteers on 22 August 2012**

1. This note is to accompany a discussion of the changes to the Immigration Rules, which came into force on 9 July 2012, made by Statement of Changes HC 194. More information about these changes is available from ILPA information sheets (which are freely available on the ILPA website at http://www.ilpa.org.uk/pages/info-service.html) including:

    - Family Migration – Changes in Immigration Rules 1
    - Family Migration – Changes in Immigration Rules 2
    - Article 8 – No. 2
    - Children's Best Interests 3
    - Long Residence Rules 2
    - Deportation
    - Overstayers
    - General Grounds for Refusal – Update

2. In this note, discrete aspects of the changes made by HC 194 are briefly discussed under separate heading. The issues discussed are ones that it is expected may be relevant to some of those living with HIV.

3. **Please note:** These notes only review at a general level the changes made by HC 194 (and related changes). The changes are very complicated. An understanding of how the changes may affect any individual case (or whether they apply to that case) will not be possible from these notes. The notes may, however, help to identify considerations which will require careful consideration of the immigration rules, policy guidance and current and developing caselaw.

**Introduction**

4. For several years, the settled caselaw (both UK and Strasbourg) has indicated that where a person faces suffering because of his or her medical condition, it will only be in the most exceptional circumstances that his or her removal would be contrary to Article 3 of the European Convention on Human Rights (the right not to be subjected to torture, inhuman or degrading treatment or punishment). In the case of N, a Ugandan woman living with HIV, it was accepted that if she was removed she would face "*an early death after a period of acute physical and mental suffering.*" Hers were not, however, the most exceptional circumstances and her appeals were dismissed.[1]

[1] *N v Secretary of State for the Home Department* [2005] UKHL 31; *Case of N v UK* (Application No. 26565/05) [2008] ECHR 453

5. Although this does not mean that people living with HIV cannot have good refugee or Article 3 claims, it does mean that the mere fact of their living with HIV and the health consequences of that are very unlikely to establish a good claim for asylum (whether as a refugee or under Article 3). Particularly for those who have lived in the UK for some substantial period of time and/or who have family in the UK, other claims for permission to stay in the UK – such as under the long residence rules, by way of the asylum legacy programme or under Article 8 (the right to respect for private and family life) – have provided better opportunities of success. As regards Article 8, in March 2012, the Court of Appeal had this to say:

> "*23. The only cases I can foresee where the absence of medical treatment in the country to which a person is to be deported will be relevant to Article 8, is where it is an additional factor to be weighed in the balance, with other factors which by themselves engage Article 8. Suppose, in this case, the appellant had established firm family ties in this country, then the availability of continuing medical treatment here, coupled with his dependence on the family here for support, together establish 'private life' under Article 8. That conclusion would not involve a comparison between medical facilities here and those in Zimbabwe...*"[2]

6. However, recent and imminent changes in law, policy and practice are throwing up new hurdles to migrants seeking to establish a right to stay. The September 2011 note "People living with HIV/AIDS and immigration control" provides brief information about (i) current and future difficulties facing those in need of immigration advice and representation, (ii) the sorts of immigration claims that people living with HIV may make, and (iii) access to health and other services. That short note is available at: http://www.ilpa.org.uk/data/resources/13717/11.09.09-People-living-with-HIV.pdf

7. Among the most important of the imminent changes that are likely to seriously disadvantage migrants, including those living with HIV, are the changes in legal aid intended to be introduced in April 2013. From that time, many areas of law for which legal aid is currently available will no longer be areas of law for which legal aid is available (or its availability will be very limited). Immigration is one area that is to be affected. Generally, it is intended that legal aid will no longer be available for any immigration cases, except for asylum (and Article 3) cases. There are some very limited exceptions to this. Legal aid will not generally, therefore, be available for Article 8 cases in future. Someone who has not sought legal advice or assistance to, for example, regularise their stay in the UK, should consider very carefully whether he or she needs to seek advice now. From April 2013, unless he or she can afford to pay for immigration advice and representation, it may be that there is none available.

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[2] *MM (Zimbabwe)* [2012] EWCA Civ 279 – note that the correctness of the last sentence from the passage extracted may be doubted: once it is permissible to weigh the health and medical circumstances in the balance, it would seem relevant and necessary in order to establish how much weight to give these to have regard to a comparison of the circumstances in the UK with those expected in the country of return.

8. These notes, however, are concerned with recent changes – not to legal aid, but to the immigration rules and to Article 8 cases. On 13 July 2012, substantial changes to the immigration rules were made by Statement of Changes HC 194. On 11 June 2012, anticipating the changes to the rules, the Home Secretary told Parliament:

> "*...for too long, the courts have been left to decide cases under article 8 without the view of Parliament, and to develop public policy through caselaw. It is time to fill the vacuum and put the law back on the side of the British public, so we are changing the immigration rules...*" (*Hansard* HC, 11 Jun 2012 : Column 49)

9. By 19 June 2012, the changes to the rules had been published and on that date the Home Secretary led a debate in Parliament by which it was intended that the following result would be effected:

> "*As the immigration rules will now explicitly take into account proportionality under article 8, the role of the courts should focus on considering proportionality in the light of the clear statement of public policy reflected in the rules. They should not have to consider the proportionality of every decision taken in accordance with the rules on every immigration application. The starting point from now will be that Parliament has decided how the balance under article 8 should be struck, and although Parliament's view is subject to consideration by the courts, it should be accorded the deference rightly due to the legislature on the determination of public policy. That is the approach that the new immigration rules seek to put in place in the immigration system.*" (*Hansard* HC, 19 Jun 2012 : Column 820, *per* Damian Green, Minister for Immigration)

10. The intention, then, is that the immigration rules from 13 July 2012 have set out all the relevant considerations and requirements that will apply in any case where a person seeks to come to or stay in the UK on the basis of his or her family and private life. This includes cases of or affecting children. If the requirements are not met, the immigration rules and UK Border guidance say that it will only be in the most exceptional circumstances that a claim will succeed on Article 8 grounds.

11. Some of the specific changes to the immigration rules are discussed under separate subheadings below.

**Transitional Cases & Discretionary Leave**

12. The immigration rules and UK Border Agency guidance now contain complicated but important 'transitional arrangements'. Ordinarily, a person, who before 13 July 2012 was on a route to settlement (whether under the immigration rules or outside the immigration rules), can continue on that route unaffected by the changes. This includes those granted discretionary leave (e.g. for 3 years, in some cases 2 years) before 13 July 2012, who may apply for further discretionary leave and, after 6 years of discretionary leave, may apply for indefinite leave to remain. Those who had applications under the immigration rules (not outside the rules) outstanding on 13 July 2012, will generally continue to have those

applications dealt with as if there had been no changes and can continue thereafter on a route to settlement unaffected by the changes.

13. Those, who do not benefit from the transitional arrangements but who qualify for leave to remain on grounds that previously would have led to a grant of discretionary leave (e.g. cases which succeed on Article 8 grounds), will now ordinarily only qualify for limited leave to remain for no more than 30 months at any one time and with no recourse to public funds. Ordinarily it will take 10 years of such leave before an application for indefinite leave to remain may be made.

**Long Residence Cases**

14. For many years the immigration rules have included provisions under which some people who have been living in the UK for many years could apply for indefinite leave to remain. There were essentially two types of case for which the immigration rules provided. Someone who had been living in the UK lawfully for 10 years ("the 10 years rule"), and someone who had been living in the UK for 14 years ("the 14 years rule"). Over time the immigration rules were changed so that if the person had any unspent conviction or could not satisfy the English language and life in the UK requirements, he or she might be granted limited leave to remain for 2 years (with the possibility to apply for a further period of 2 years if he or she still had any unspent conviction or could not satisfy the language/life in the UK requirement).

15. On 13 July 2012, the 14 years rule was removed. The 10 years rule remains largely the same.

16. In place of the 14 years rule, a new paragraph (paragraph 276ADE) has been added to the immigration rules. This applies where:
    a. someone has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
    b. a child (someone under 18 years of age) has lived continuously in the UK for at least 7 years (discounting any period of imprisonment); or
    c. a young person (someone who is not a child, but is under 25 years of age) has lived continuously in the UK for at least half of his or her life (discounting any period of imprisonment); or
    d. someone has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) and he or she has no ties to the country he or she would have to go if required to leave the UK.

17. Paragraph 276ADE includes other requirements, but if these are met a person may be granted leave to remain for a period of 30 months. This may be without recourse to public funds. At the end of the period, the person may apply for a further 30 months. He or she would be required to again meet the requirements of paragraph 276ADE. After 10 years (i.e. after periods of 30 months + 30 months + 30 months + 30 months), the person could apply for indefinite leave to remain.

18. A problem with paragraph 276ADE is that it does not give any proper regard to the fact that people get older. A child who may meet the requirement of having lived in the UK for 7 years may, after 30 months, no longer be a child and may not have lived in the UK for half his or her life. A young person who has lived in the UK for half his or her life may, after 30 months, no longer be under 25 years of age and may not have lived in the UK for 20 years. The Home Office has indicated that it accepts this problem should be corrected. It can be expected, therefore, that the immigration rules will be changed again later this year.

19. As to what is meant by "*no ties*", there is some guidance on this in the UK Border Agency modernised guidance on 'Long residence'. This suggests that a person who has spent a considerable period living in another country will be unlikely to be able to demonstrate that he or she has no ties to that country, and that having extended family members should be sufficient where the person can turn to them for support or help to integrate into society on return to that country. It is also stated that having some ability to speak an official language of the country will be sufficient, and that a person who has lived in the UK with a diaspora community from that country may therefore have ties to the country even if he or she has never lived there. It is difficult to imagine many circumstances in which a migrant would have no ties to another country, such as his or her country of origin or nationality. It can be assumed, therefore, that this part of paragraph 276ADE is unlikely to lead to many (if any) grants of leave to remain by the UK Border Agency.

**Children & Families' Cases**

20. The changes to the immigration rules include new financial requirements which now apply to many applications where a person is seeking to join or remain with his or her partner, parent or child in the UK. The financial requirements are complicated, but essentially require the person or his or her partner to have a substantial income or savings. The level of the financial requirement is increased, the more non-British children there are in the relevant family.

21. There are circumstances in which the new financial requirements can be avoided, particularly where the person making the immigration application is here in the UK. However, to avoid the new financial requirements, it will generally be necessary to satisfy one of the following exceptions:
    a. to have a genuine and subsisting parental relationship with a child who is British, and it would not be reasonable to expect the child to leave the UK; or
    b. to have a genuine and subsisting parental relationship with a child who has lived in the UK for at least the last 7 years, and it would not be reasonable to expect the child to leave the UK; or
    c. to have a genuine and subsisting relationship with a partner who is British, settled in the UK (or has refugee leave or humanitarian protection) and there are insurmountable obstacles to continuing family life with that partner outside the UK.

22. Where a person meets either the new financial requirements or the exceptions (and meets other requirements in the rules), he or she will usually be granted 30 months leave to remain without recourse to public funds. However, where the new financial requirements

would ordinarily apply, but cannot be met, a person who is permitted to stay in the UK on the basis of one of these exceptions will usually have to complete 10 years of such leave before being permitted to apply for indefinite leave to remain. A person who meets (and continues to meet the financial requirements) will usually be permitted to apply for indefinite leave to remain after completing 5 years of this leave.

23. However, there appear to be several flaws in the new rules. For example, it is not clear how the child of a parent granted leave to remain under the new immigration rules will qualify for leave to remain if the financial requirements are not met or the child has not lived in the UK for at least 7 years. The requirements in the immigration rules that a person granted leave under the new rules must continue to meet the same requirements at each stage for which he or she applies for further leave to remain do not appear to take account of the fact that children age, and may cease to be children (i.e. reach 18 years of age) before the parent gets to the point when he or she is permitted to apply for indefinite leave to remain.

**Application Forms and Fees**

24. The new immigration rules (paragraph 400) state that where a person is facing removal and claims that his or her removal would be contrary to Article 8, he or she may be required to make a formal application under the rules – even though it may be clear that he or she cannot meet the requirements of the rules. This appears to be intended to impose a fee – formal applications are generally required to be made with a fee (often a substantial sum of money). The rules allow the UK Border Agency to require a formal application and fee, but do not require the UK Border Agency to do this. If a person cannot afford a fee, and is not permitted to have his or her Article 8 claim considered, this would be likely to be a violation of the Human Rights Act 1998/1950 European Convention on Human Rights.[3]

**Deportation Cases**

25. Where someone is facing deportation – e.g. because he or she has been convicted of a criminal offence – the new immigration rules include new requirements setting out when a person may be permitted to resist deportation on the basis of either his or her length of residence in the UK, or his or her parental relationship to a child or relationship with his or her partner. These requirements are generally even more restrictive than those explained above – though there are no financial requirements in the new immigration rules affecting deportation.

**Legacy Cases**

26. The new immigration rules have nothing directly to say about legacy cases. However, those who made an asylum claim before March 2007 and whose cases are in the legacy backlog (which was supposed to have been completed by July 2011) may be affected by some of the policy changes which relate to the changes made to the immigration rules. During the first half of 2011, the UK Border Agency changed its policy on grants of leave in legacy cases.

[3] *Case of GR v The Netherlands* (Application no. 22251/07) provides strong indication that requiring a fee, that a person cannot reasonably be expected to pay, in order to establish or pursue a claim for permission to stay on the grounds of Article 8, would be unlawful.

Previously, where it had decided that a person whose case was among the legacy should be granted leave, the policy was to grant indefinite leave to remain. Shortly before July 2011, the policy was changed to grant discretionary leave for 3 years in such cases. This requires the person to reapply for a further 3 years discretionary leave at the end of the first 3 years period, and after 6 years permits an application for indefinite leave to remain. There is a real concern that the UK Border Agency has changed or intends to change its policy position again so as to only grant 30 months limited leave to remain with no recourse to public funds; and to require that a person accumulate 10 years of such leave before being permitted to apply for indefinite leave to remain.

27. There are currently legal challenges to the UK Border Agency policy position, seeking to show that the change from granting indefinite leave to remain to only discretionary leave is unlawful. It remains to be seen what the courts may decide.

**Conclusions**

28. The aim of the changes to the immigration rules is to set out fixed and rigid requirements to resolve all but the most exceptional cases concerning private and/or family life (Article 8). However, this is an aim which the House of Lords has on more than one occasion indicated to be illegitimate, e.g. in *EB (Kosovo)* [2008] UKHL 41:

> "*12. ...The search for a hard-edged or bright-line rule to be applied in the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires.*"

29. Nor do the new immigration rules include consideration of all relevant factors, as clearly required by established caselaw – both in the UK courts and in the European Court of Human Rights. Nor do the new immigration rules allow for the best interests of a child to be given primary consideration in any case affecting a child, as required by Article 3 of the 1989 UN Convention on the Rights of the Child.

30. It can be expected, therefore, that the new immigration rules, and the way the UK Border Agency intends to apply them, will be subject to legal challenges. For the moment, however, it seems that the situation of anyone caught by the new immigration rules is likely to be very uncertain. Moreover, even assuming (which seems very likely) that many legal challenges do succeed, this does not mean that all of the adverse consequences of the changes to the rules to those to whom they apply will be struck down or reversed; and with the general removal of legal aid in non-asylum immigration cases from April 2013, there is an increased risk that in future people are refused under the rules in circumstances where had they been able to obtain good legal advice and representation a tribunal or court would have allowed an appeal on Article 8 grounds. A related difficulty is that to succeed on Article 8 grounds, it will usually be critical to put together appropriate and detailed evidence. Without legal assistance this may be difficult, and some evidence may not be available unless it can be paid for – e.g. medical expert reports.

31. These notes have referred to long residence, Article 8 and legacy cases and claims. Migrants living with HIV may, of course, have good claims under the immigration rules or other policy, in the same way as any other migrant. Whatever may be thought, and decided by the courts, as to the new immigration rules, it will always be important to give careful consideration to whether a person can satisfy the immigration rules or meet the requirements of any other immigration (or nationality) policy or law. Only where a migrant cannot (or may not) do so, will it be necessary to consider whether an Article 8 claim can be established despite the contents of the new immigration rules.

32. In ILPA's view, having considered the new rules, there are likely to be several cases in which it will be possible (assuming the evidence can and is put together) to make good an Article 8 claim in circumstances where the requirements of the new immigration rules are not met. However, we are yet to see what the courts and tribunals make of these new rules. Of course, ILPA's view is not the view of the Government – as can be seen from the statements made by the Home Secretary and Minister for Immigration in the debates (referred to earlier in these notes). What can certainly be said about the new rules, however, is that:

    a. If applied rigidly (which appears to be the clear intention), they will adversely affect many British citizens (e.g. British partners or children of migrants); and will not therefore be (as claimed by the Home Secretary) on the side of those members of the British public.

    b. They are highly complicated, and appear to contain several omissions or mistakes, some of which the Home Office have acknowledged to ILPA; and it appears that there will need to be various further changes made to the immigration rules – probably before the end of the year.

    c. On the whole, these new rules further emphasise a theme that can be seen in the development of other aspects of the immigration rules over the last few years, which is that increasingly immigration policy tends to preserve the opportunity for (particularly long-term) migration to those who are either rich or at least relatively wealthy. Not only are many of the opportunities under the rules expressly preserved for these groups, but the opportunity to seek effective protection from the courts or tribunals of immigration rights and entitlements, by way of expert legal advice and assistance, is also set to be removed from those who cannot afford to pay.

Steve Symonds
Legal Officer, ILPA

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