



**THE UK BORDER AGENCY RESPONSE TO THE
INDEPENDENT CHIEF INSPECTOR'S REPORT:
THE INSPECTION OF APPLICATIONS FOR LEAVE TO
ENTER, REMAIN AND SETTLE IN THE UK ON THE BASIS
OF MARRIAGE AND CIVIL PARTNERSHIPS
APRIL – OCTOBER 2012**



This inspection by the Independent Chief Inspector, conducted in 2012, reviewed applications and data prior to the introduction of the new family Immigration Rules in July 2012.

On 9 July 2012 changes were made to the Immigration Rules for family migration as part of the Government's programme of reform of the migration routes. The new Rules ensure that those who come here, do so on the basis of a genuine relationship; that once here they can pay their way; and that they can integrate properly into British society. The Government's Statement of Intent setting out the changes was published on 11 June 2012 and can be found at:

<http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2012/june/13-family-migration>

These changes followed a consultation during 2011 proposing reforms to family migration and on how the qualified nature of Article 8 (the right to respect for family and private life) of the European Convention on Human Rights (ECHR) should operate in immigration cases.

The previous requirements of the rules did not adequately reflect the factors which can weigh in favour of a person's Article 8 claim, e.g. a child's best interests, or against, for example, criminality and poor immigration history. These factors were previously considered separately from the rules, both by the UK Border Agency and the Courts. The lack of clear rules had also effectively left the Courts to develop public policy, for example, as to what constitutes adequate maintenance for family migrants, through case law. This led to an inconsistent approach and was unclear for applicants and the public.

The new Immigration Rules bring together consideration under the rules and Article 8, by defining the basis on which a person can enter or remain in the UK on the basis of their family or private life. They have to meet clear, transparent requirements on the face of the rules, e.g. that they have no significant criminality, are in a genuine relationship, and meet the minimum income threshold and English language requirements.

This inspection found that the UK Border Agency was making reasonable and well-founded decisions in most cases; that we have shown improvement and acted responsibly in areas such as data handling and the protection of personal data; and that we demonstrated that security checks were undertaken and repeated if they had expired and results of these checks were carefully reviewed as an integral part of the decision making process.

The UK Border Agency acknowledges and welcomes the recommendations made by the Independent Chief Inspector and where these have not yet been implemented, will work assiduously and concertedly to ensure that they are actioned.

The UK Border Agency response to the Independent Chief Inspector's recommendations:

Recommendation 1: We recommend that the UK Border Agency assesses all relevant aspects of the Immigration Rules in marriage cases and ensures that this is done in a consistent manner.

UK Border Agency response: accepted.

New family Immigration Rules, introduced in July 2012, provide a new basis for clear and consistent decision making in marriage cases. The new rules set a minimum income threshold of £18,600 to sponsor the settlement in the UK of a non-EEA spouse or partner. Higher thresholds to sponsor a child under the age of 18 before the spouse or partner reaches settlement also apply. Detailed rules and guidance set out the various sources of income which may be taken into account. The income threshold is inherently a more objective criterion than the previous one of "adequate" maintenance and will lead to more consistent decision making.

New guidance has been published setting out a list of factors associated with genuine and non-genuine relationships to help decision makers focus on these issues in considering spouse and partner applications. The list of indicators provides the basis for objective, evidence-based decision making. Decision makers continue to reach a decision on each application on a case-by-case basis taking account of all the circumstances.

Prior to implementation of the new family Immigration Rules, training was provided to decision makers across the UK Border Agency, including in-country senior caseworkers and Entry Clearance Officers overseas. A core training package was produced and adapted for individual areas dealing with family casework, including teams in Sheffield, Liverpool, the Public Enquiry Offices, Presenting Officers Units, asylum teams and visa issuing posts overseas.

Guidance for decision makers on the new rules was published in July 2012 and updated in December 2012 following subsequent changes to the rules. This guidance is available to all decision makers and replaces separate guidance previously issued to in-country caseworkers and Entry Clearance Officers. The guidance includes standard lines to be used in refusal letters.

The training package along with the new guidance and regular meetings, which are held within each work stream, will ensure the Agency maintains a consistent approach in considering applications under the new rules.

For entry clearance cases, it is already standard practice for Entry Clearance Officers to assess all elements of the relevant Immigration Rule; the same approach is taken to in-country applications. Officers are taught this on their training course and it is further emphasised as part of their induction when they arrive at their overseas posting. Entry Clearance Managers (ECMs) currently review a minimum of 20% of marriage decisions and provide feedback to Entry Clearance Officers where deficiencies in the decision are identified. UK Border Agency made improvements to the ECM review function in 2012 to ensure decisions reviewed had been correctly assessed and to better evidence the review of the decision. As part of its commitment to continuous improvement in decision quality UK Border Agency is looking to review and further improve the overseas review function in 2013.

Recommendation 2: We recommend that the UK Border Agency ensures that Human Rights are considered consistently in all relevant cases, including overseas.

UK Border Agency response: accepted.

The Immigration Rules in force before 9 July 2012 did not properly embody the qualified right afforded by ECHR Article 8 (the right to respect for their private and family life). The previous requirements of the rules did not adequately reflect the factors which can weigh in favour of a person's Article 8 claim, for example a child's best interests, or against, for example, criminality and poor immigration history. Family life applications were first considered by the UK Border Agency under the rules and, if the application did not meet the requirements of the rules, it should have been considered whether the decision was compatible with Article 8. If the UK Border Agency thought that the decision was not compatible with Article 8, leave was granted outside the rules. In entry clearance cases this was done by referral of cases to the Referred Cases Unit. However, this approach detracted from clear, consistent, predictable and transparent decision-making, and the Independent Chief Inspector identified differences in approach between overseas posts.

The Immigration Rules in force from 9 July 2012 bring together consideration under the rules and Article 8 and provide a clear application route for a person to apply to enter or remain in the UK on the basis of their family or private life. For the first time the rules reflect the factors which can weigh for or against an Article 8 claim and make clear where the public interest in preventing someone from entering or remaining in the UK should outweigh individual rights to family and private life. Applicants have to meet clear, transparent requirements on the face of the rules, for example that they have no significant criminality, are in a genuine relationship, and meet the minimum income threshold and English language requirements. The rules set proportionate requirements that reflect, as a matter of public policy, the Government's and Parliament's view of how individual rights to respect for private or family life should be qualified in the public interest to safeguard the economic well-being of the UK by controlling immigration and to protect the public from foreign criminals. This means that failure to meet the requirements of the rules will normally mean failure to establish an Article 8 claim to enter or remain in the UK, and no grant of leave on that basis. The purpose in including provisions in the rules which properly reflect Article 8 consideration is to ensure efficiency and consistency. This is important to applicants and decision makers and to ensure public confidence in the immigration system.

The new Immigration Rules apply to all decisions, whether made in the UK or overseas. We accept that no set of rules can deal with 100 per cent of cases. However, in the light of the new rules, which reflect the principles set out in domestic and Strasbourg jurisprudence, it is expected that a decision made in accordance with the rules will only lead to a disproportionate or unjustifiably harsh outcome – i.e. one that is incompatible with Article 8 – in exceptional cases. In such cases, leave outside the rules may be granted.

Recommendation 3: We recommend that the UK Border Agency ensures that reasons for its decisions under both the Immigration Rules and Human Rights are properly evidenced, recorded and communicated to applicants.

UK Border Agency response: accepted.

Reasons for decisions are recorded and evidenced on UK Border Agency databases and in our refusal letters to applicants. Decision makers are aware that there is a need for consistency in how decisions are recorded and evidenced. The recent policy changes and new guidance have prompted revisions in decision letters and record keeping and we are committed to keep these under review to ensure consistency.

Overseas, the rollout of the Immigration Casework (ICW) system will give the facility to Entry Clearance Officers to more precisely record the outcome of the consideration of individual parts of the immigration rule(s). In tandem, we are also working on a project to scan into our systems supporting documents submitted by applicants, to allow copies of those documents to be stored electronically on our systems. Until these technical improvements come on stream, we have strengthened our guidance regarding the retention/recording of evidence.

Recommendation 4: We recommend that the UK Border Agency ensures that the best interests of the child are considered in all relevant cases and these are expressly referred to in both notes and decisions to refuse applications.

UK Border Agency Response: accepted.

We recognise the importance of the statutory duty under section 55 of the Borders, Citizenship and Immigration Act 2009 to safeguard and promote the welfare of children in the UK. We have reinforced our approach by bringing consideration of the welfare – or best interests – of children into the Immigration Rules.

The new Immigration Rules set out a clear framework for weighing the best interests of the child against the wider public interest in removal and deportation cases. The rules create a route for applications for leave based on a child's best interests. This means that a child's best interests are always considered in the relevant cases and according to best interests criteria that are now expressly mentioned in the rules. Other relevant factors raised by the applicant that involve children's interests are also considered where appropriate, but in practice these may not always be raised at the same time as the application. Even so, factors raised by the applicant as to how a particular decision will affect family life or children's best interests will always be addressed in decisions and communicated to the applicant.

Updated guidance for decision makers published on the UK Border Agency's website now ensures greater transparency and consistency in the consideration of a child's best interests.

Section 55 does not apply to entry clearance cases, even where the applicant (who will be outside the UK by the nature of the application) has a child who is in the UK. The new family rules are compliant with Article 8, but where an applicant for entry clearance has a child in the UK and fails to meet the requirements of the rules, they can raise any exceptional circumstances which would mean that a refusal under the rules would result in an unjustifiably harsh outcome – i.e. one that is incompatible with Article 8 – for the applicant or their child. The UK Border Agency's assessment of these exceptional circumstances will involve a consideration of the best interests of the child and could result in a grant of leave outside the rules where appropriate.

We will review the way that these decisions are considered and recorded, and revise our caseworker guidance and minute sheets if appropriate.

Recommendation 5: We recommend that the UK Border Agency urgently addresses the backlog of 14,000 cases where an application for reconsideration has been made and makes an initial decision in the 2,100 temporary migration cases.

UK Border Agency response: partially accepted.

The Agency accepts that these are important areas of work and was aware and taking action prior to the Chief Inspector's report. To be clear, the 2,100 migration applications were the

residual case load which transferred to Sheffield when the Temporary Migration Operation in Croydon was closed. Initial decisions have now been taken in all cases received and the applicants informed of the outcomes.

The 14,000 requests for reconsideration are not ‘applications’; rather they are requests from people whose applications for leave to remain in the UK have already been considered and refused by the Agency. There is no legal obligation to consider them, and the Agency has already taken the following steps to deal with them:

- Implemented a policy in November 2012 to prevent this kind of request being made and allowing the Agency to deal, by means of a straightforward standard letter, with any attempted requests.
- Contracted with Capita to deal with the Migration Refusal Pool [the pool of people whose applications to remain in the UK have been refused, but who may not yet have left the UK], which contains the individuals who have submitted requests for reconsideration. All of these cases will be systematically worked through during the term of the contract.

Recommendation 6: We recommend that the UK Border Agency adopts a systematic approach to reviewing and analysing appeal outcomes in marriage cases in order to improve the quality of decisions.

UK Border Agency response: accepted.

UK Border Agency has already begun implementation of the recommendations that appear in the report – for example, increasing resources within the Specialist Appeals Team has ensured that we are able to both maintain 100% representation in the Upper Tribunal and to review the majority of allowed appeals received.

Over the past two quarters we have been examining appeal determinations from the Tribunal in different types of case so that we can understand the reasons behind particular judicial decisions and assess whether there are any discernible trends. The findings and recommendations from this analysis have been shared and agreed with the relevant units responsible for the decisions under appeal, and support is given to them by the Appeals team where required to progress actions. The impact on the win rate – the percentage of appeals in which the UK Border Agency is successful - is being monitored. Although a number of these reports include appeals against marriage refusals, we have not yet done a report specifically on marriage applications, which cut across more than one case-type. This is something which we plan to do in the future.

The Specialist Appeals Team will conduct specialist monthly reports on allowed appeals to identify current themes and trends, and will engage with stakeholders, thus helping with the overall objective of continuous improvement of initial decision making.

We already have in place a mechanism by which presenting officers can provide constructive feedback to decision-makers on individual cases; this exists both in the form of an internal web-based proforma that is shared following completion of the appeal hearing or where it is decided that UK Border Agency’s decision should be withdrawn (rather than continuing to an appeal hearing). We plan now to increase the use of this ‘e-feedback’ loop so that decision quality or procedural issues can be highlighted in advance of the appeal outcome and/or analysis.

As part of the new agency structure and a centralisation of the appeals function the team will have the ability to connect the various strands of work going on across the business to ensure that trends are identified at an earlier stage and decision makers are able to use the information more directly to impact their decision quality.

On China specifically, the post in Beijing has established a dedicated appeals team to review all incoming appeals and determinations. The team aims to improve data quality by quantifying dismissed/allowed determinations and gathering information to inform lessons learned and training needs. The revised way of working is under review to assess its benefits and it is being discussed at an International Operations & Visas workshop in February.

Recommendation 7: We recommend that the UK Border Agency introduces processes to minimise the need for repeat PNC checks.

UK Border Agency Response: accepted.

Certain checks are triggered by the recording of an application on UK Border Agency databases. The need to repeat checks is dependent on the results of various checks and the length of time the case consideration process lasts. UK Border Agency is currently focussing on service improvement plans which aim to drive down the number of cases awaiting decision by introducing process improvements and extra caseworking capacity, delivering quicker throughput and better customer service. The successful delivery of these plans will also reduce the need for repeat checks. However, some cases are subject to further, more in-depth consideration where they are more complex and repeat checks are advisable to reduce risk and safeguard security.

Recommendation 8: We recommend that the UK Border Agency develops a strategy on the use of interviews and home visits in marriage cases.

UK Border Agency Response: accepted.

UK Border Agency is developing a strategy to re-introduce interviewing as a core part of the immigration system. In 2013, we will increase the number of those who submit applications for Immigration Rules based marriage visa and EEA Family Permit, both in country and overseas. All interviews will be targeted according to our risk indicators, and we will use the evidence from these interviews to further develop our evidence base, therefore enabling us to target future interviewing and visiting approaches in the most effective way, as well as to identify displacement and trends in abuse.