

STATEMENT OF CHANGES IN IMMIGRATION RULES

*Presented to Parliament pursuant to section 3(2) of
the Immigration Act 1971*

*Ordered by The House of Commons to be printed
19 January 2012*

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STATEMENT OF CHANGES IN IMMIGRATION RULES

The Home Secretary has made the changes hereinafter stated in the rules laid down by her as to the practice to be followed in the administration of the Immigration Acts for regulating entry into and the stay of persons in the United Kingdom and contained in the statement laid before Parliament on 23 May 1994 (HC 395) as amended. The amending statements were laid before, or presented to, Parliament on 20 September 1994 (Cm 2663), 26 October 1995 (HC 797), 4 January 1996 (Cm 3073), 7 March 1996 (HC 274), 2 April 1996 (HC329), 30 August 1996 (Cm 3365), 31 October 1996 (HC 31), 27 February 1997 (HC 338), 29 May 1997 (Cm 3669), 5 June 1997 (HC 26), 30 July 1997 (HC 161), 11 May 1998 (Cm 3953), 8 October 1998 (Cm 4065), 18 November 1999 (HC 22), 28 July 2000 (HC 704), 20 September 2000 (Cm 4851), 27 August 2001 (Cm 5253), 16 April 2002 (HC 735), 27 August 2002 (Cm 5597), 7 November 2002 (HC 1301), 26 November 2002 (HC 104), 8 January 2003 (HC 180), 10 February 2003 (HC 389), 31 March 2003 (HC 538), 30 May 2003 (Cm 5829), 24 August 2003 (Cm 5949), 12 November 2003 (HC 1224), 17 December 2003 (HC 95), 12 January 2004 (HC 176), 26 February 2004 (HC 370), 31 March 2004 (HC 464), 29 April 2004 (HC523), 3 August 2004 (Cm 6297), 24 September 2004 (Cm 6339), 18 October 2004 (HC 1112), 20 December 2004 (HC 164), 11 January 2005 (HC 194), 7 February 2005 (HC 302), 22 February 2005 (HC 346), 24 March 2005 (HC 486), 15 June 2005 (HC 104), 12 July 2005 (HC 299), 24 October 2005 (HC 582), 9 November 2005 (HC 645), 21 November 2005 (HC 697), 19 December 2005 (HC 769), 23 January 2006 (HC 819), 1 March 2006 (HC 949), 30 March 2006 (HC 1016), 20 April 2006 (HC 1053), 19 July 2006 (HC 1337), 18 September 2006 (Cm 6918), 7 November 2006 (HC 1702), 11 December 2006 (HC 130), 19 March 2007 (HC 398), 3 April 2007 (Cm 7074), 4 April 2007 (Cm 7075), 7 November 2007 (HC 28), 13 November 2007 (HC 40), 19 November 2007 (HC 82), 6 February 2008 (HC 321), 17 March 2008 (HC 420), 9 June 2008 (HC 607), 10 July 2008 (HC 951), 15 July 2008 (HC 971), 4 November 2008 (HC 1113), 9 February 2009 (HC 227), 9 March 2009 (HC 314), April 2009 (HC 413), 9 September 2009 (Cm 7701), 23 September 2009 (Cm 7711), 10 December 2009 (HC 120), 10 February 2010 (HC 367), 18 March 2010 (HC 439), 28 June 2010 (HC 59), 15 July 2010 (HC 96), 22 July 2010 (HC 382), 19 August 2010 (Cm 7929), 1 October 2010 (Cm 7944), 21 December 2010 (HC 698), 16 March 2011 (HC 863), 31 March 2011 (HC 908), 13 June 2011 (HC 1148), 19 July 2011 (HC 1436), 10 October 2011 (HC 1511), 7 November 2011 (HC 1622), 8 December 2011 (HC 1693) and 20 December 2011 (HC 1719).

The changes set out in this Statement in paragraphs 1- 9 shall take effect on 13 February 2012.

Review

Before the end of each review period, the Secretary of State must:

- (a) carry out a review of the changes made by HC 1733 to the extent that they are still in force,
- (b) set out the conclusions of the review in a report, and
- (c) publish the report.

The report must in particular:

(a) set out the objectives intended to be achieved by any regulatory system established by HC 1733,

(b) assess the extent to which those objectives are achieved, and

(c) assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation.

“Review period” means:

(a) the period of five years beginning on 13 February 2012, and

(b) subject to the paragraph below, each successive period of five years.

If a report under this provision is published before the last day of the review period to which it relates, the following review period is to begin with the day on which that report is published.

Changes

1. Before paragraph 34 insert –

“A34. An application for leave to remain in the United Kingdom as a Tier 2 Migrant or a Tier 5 Migrant under Part 6A of these Rules, or the family member of a Tier 2 or Tier 5 Migrant under Part 8 of these Rules, must be made either by completing the relevant online application process in accordance with paragraph A34 (iii) or by using the specified application form in accordance with paragraphs 34A to 34D.

(i) “The relevant online application process” means the application process accessible via the website of the United Kingdom Border Agency and identified there as relevant for applications for leave to remain as a Tier 2 Migrant, Tier 5 Migrant or family member of a Tier 2 or Tier 5 Migrant.

(ii) “Specified” in relation to the relevant online application process means specified in the online guidance accompanying that process.

(iii) When the application is made via the relevant online application process:

(a) any specified fee in connection with the application must be paid in accordance with the method specified;

(b) if the online application process requires the applicant to provide biometric information that information must be provided as specified;

(c) if the online application process requires supporting documents to be submitted by post then any such documents specified as mandatory must be submitted in the specified manner within 15 working days of submission of the online application;

(d) if the online application process requires the applicant to make an appointment to attend a public enquiry office of the United Kingdom Border Agency the applicant must, within 45 working days of submission of the online application, make and attend that appointment; and comply with any specified requirements in relation to the provision of biometric information and documents specified as mandatory.

2. At the beginning of paragraph 34A (i) insert “Subject to paragraph A34”.

3. Delete paragraph 34A (vii).

4. Insert after paragraph 34C –

“34CA. Where an application for leave to remain in the United Kingdom as a Tier 2 Migrant or a Tier 5 Migrant under Part 6A of these Rules, or the family member of a Tier 2 or Tier 5 Migrant under Part 8 of these Rules, is made by completing the relevant online application process the application will be invalid if it does not comply with the requirements of paragraph A34 and will not be considered.”

5. In paragraph 34E -

(i) after the second “purpose” insert “, or paragraph A34 applies,”;

(ii) after “paragraph 34A” insert “ or paragraph A34”.

6. For paragraph 34G (iv) substitute –

“(iv) where the application is made via the online application process, on the date on which the online application is submitted.”

7. After paragraph 353A, insert:

Exceptional Circumstances

353B. Where further submissions have been made and the decision maker has established whether or not they amount to a fresh claim under paragraph 353 of these Rules, or in cases with no outstanding further submissions whose appeal rights have been exhausted and which are subject to a review, the decision maker will also have regard to the migrant’s:

(i) character, conduct and associations including any criminal record and the nature of any offence of which the migrant concerned has been convicted;

(ii) compliance with any conditions attached to any previous grant of leave to enter or remain and compliance with any conditions of temporary admission or immigration bail where applicable;

(iii) length of time spent in the United Kingdom spent for reasons beyond the migrant’s control after the human rights or asylum claim has been submitted or refused;

in deciding whether there are exceptional circumstances which mean that removal from the United Kingdom is no longer appropriate.

8. After paragraph 395, delete the heading “Administrative Removal”.
9. Delete paragraphs 395A-F.



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**EXPLANATORY MEMORANDUM TO
THE STATEMENT OF CHANGES IN IMMIGRATION RULES
PRESENTED TO PARLIAMENT ON 19 JANUARY 2012 (HC 1733)**

1. This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the Instrument

2.1 The purposes of these changes are:

- To provide migrants applying in the United Kingdom under Tier 2 or 5 of the Points Based System the opportunity to complete and submit their application online. The current option of making an application by post or in person by making an appointment at a Public Enquiry Office will continue. As such, this change provides an alternative on-line process for migrants in addition to existing application routes. These regulations support the shift towards online services to help transform the relationship between UK Border Agency and those subject to immigration control.
- To delete the requirement, in paragraph 395C, for the Secretary of State to consider all relevant factors known to her before a decision to remove under section 10 of the Immigration and Asylum Act 1999 or section 47 of the Immigration, Asylum and Nationality Act 2006 is made. The deletion will mean that refusal of an application for leave to remain and a removal decision can be made together.
- To delete paragraphs 395A, 395B, 395D, 395E and 395F because they replicate provisions in primary legislation.
- To make provision for when and what the decision maker should have regard to, when considering “exceptional circumstances” when an unsuccessful asylum or human rights application is being reviewed.

3. Matters of special interest to the Joint Committee on Statutory Instruments or the Select Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 The Immigration Rules, as laid before Parliament by the Home Secretary, constitute a statement of practice to be followed in the administration of immigration legislation for regulating entry into, and stay of persons in, the United Kingdom.

4.2 This Statement of Changes in Immigration Rules has been incorporated into a consolidated version of the Immigration Rules, which can be found under the ‘Policy and Law’ page at www.ukba.homeoffice.gov.uk, where there are also copies of all the Statements of Changes in Immigration Rules issued since May 2003.

4.3 The changes in this Statement shall take effect on 13 February 2012.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 As this Statement of Changes in the Immigration Rules is subject to a negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy Background

What is being done and why

7.1 A summary of the policy changes contained in this Statement of Changes in Immigration Rules follows:

Introduction of online applications for Tier 2 Migrants and Tier 5(Temporary Worker) Migrants and their family members

7.2 Paragraphs 34 to 34G of the Immigration Rule make provision for the procedure for making a valid application in relation to immigration. Currently, applications can be made by post or by in person making an appointment at a Public Enquiry Office. From 13 February it will be possible to make an online application for leave to remain by a person in the United Kingdom as a Tier 2 or Tier 5 Migrant or the family member of a Tier 2 or 5 Migrant. It will remain possible for an application to be made by post, although appointments with the Public enquiry office will need to be made via the online process.

7.3 Paragraph A34 sets out the process for making a valid online application.

7.4 Why Tier 2 & 5

7.5 Plans are already underway for the introduction of online applications for Study (Tier 4) later this year. As such the early introduction of online applications for Skilled Workers (Tier 2) and Temporary Workers/Youth Mobility (Tier 5) in advance of Tier 4 will enable UK Border Agency to test and review such provision before implementing online applications for all PBS sponsored routes. These improvements are part of a wider UK Border Agency customer transformation programme.

Deletion of Administrative Removal paragraphs (395A-F)

7.6 Paragraphs 395A, 395B, 395D, 395E and 395F replicate provisions in primary legislation and are therefore not required in the Immigration Rules.

7.7 Paragraph 395C states that before making a removal decision under section 10 of the Immigration and Asylum Act 1999 or section 47 of the Immigration, Asylum and Nationality Act 2006 the Secretary of State must have regard to all relevant factors known to her. Where an application for leave to remain on a

temporary basis in the UK is refused, the UK Border Agency asks the migrant to leave the UK voluntarily and does not always at the same time make a removal decision. In recent judgments (Mirza [2011] EWCA Civ 159 and Sapkota [2011] EWCA Civ 1320), the Court of Appeal has found that a removal decision should normally be made following a refusal of leave to remain. The effect of these judgments is to require the UK Border Agency to make approximately 20,000 additional removal decisions each year.

- 7.8 For the majority of migrants who have an application for leave to remain refused there are no additional factors relevant to the decision to remove and the Secretary of State's view is that if there are reasons why a person should not be removed the onus should be on them to make the relevant application rather than require the Secretary of State to have the responsibility of identifying and considering all factors known to her and identifying those which may be relevant. Paragraph 395C is therefore being deleted and the UK Border Agency is changing its processes so that refusal and removal decisions can be made as required in the judgment of the Court of Appeal in Sapkota.
- 7.9 If a migrant has other reasons why they claim they should not be removed from the UK, for example compassionate factors or protection issues, they should make an application on those grounds, but the burden will be on the migrant to specifically apply for such consideration.

Exceptional Circumstances (353B)

- 7.10 Where a migrant has unsuccessfully made an application on human rights or asylum grounds and the case is being reviewed we want to make it clear that compliance with immigration laws and other breaches of the law, for example criminality, are factors that will be considered alongside any consideration of the length of time the person has spent in the UK. We also believe that there must be a reason beyond the person's control to explain why they have not departed from the UK, such as awaiting an outstanding decision from the UK Border Agency, when deciding whether there are exceptional reasons why removal from the United Kingdom is no longer appropriate.

8. Consultation outcome

Tiers 2 & 5

- 8.1 There has been no specific consultation on the content of this rules change.

Deletion of Administrative Removal paragraphs (395A-F)

- 8.2 Internal consultation with staff within the UK Border Agency has been conducted.

9. Guidance

- 9.1 Information on these changes will be made available to applicants and UK Border Agency staff, through updates to websites and guidance.

10. Impact

Deletion of Administrative Removal paragraphs (395A-F)

- 10.1 An impact assessment has been completed and is available on the UK Border Agency Website at:
<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/ia/adminremoval-para>

Introduction of online applications for Tier 2 Migrants and Tier 5(Temporary Worker) Migrants and their family members

- 10.2 There is limited or no impact on business, charities, the public sector or voluntary bodies such that an impact assessment is unnecessary.

11. Regulating small business

- 11.1 The legislation has no impact on small businesses.

12. Monitoring & review

All changes introduced by this Statement will be monitored on an on-going basis as part of the review of progress towards meeting Public Service Agreement 3: 'ensure controlled, fair migration that protects the public and contributes to economic growth'.

13. Contact

- 13.1 Queries specifically regarding this Statement of Changes only should be addressed as follows:
- on exceptional circumstances and deletion of the admin removal paragraphs, queries should be addressed to Harvey Palmer by email:
harvey.palmer15@homeoffice.gsi.gov.uk
 - on the introduction of online applications for Tiers 2 and 5 Migrants and their family members, queries should be addressed to
Robert.Walker6@homeoffice.gsi.gov.uk
- 13.2 Other queries not related to this Statement of Changes, such as queries relating to individual cases should be addressed as per the Contact page on the UK Border Agency website at www.ukba.homeoffice.gov.uk/contact/