

IN THE MATTER OF PRE-ENTRY ENGLISH LANGUAGE REQUIREMENTS

ADVICE

Introduction

1. We are asked to advise Liberty on the compatibility with the European Convention on Human Rights (“the Convention”) of the new pre-entry language requirement for those wishing to join a spouse or partner in the UK on a spousal visa. In short, and for the reasons set out below, we advise that the imposition of the pre-entry requirement risks breaches of Articles 8 and 14 of the Convention, and may also be capable of challenge under the Race Relations Act 1976.

Current language requirements for spousal applicants

2. The current requirements for those seeking to leave to enter the UK with a view to settlement as the spouse or civil partner of a person present and settled in the UK, or being admitted for settlement, are set out in paragraphs 281-282 of the Immigration Rules. The rules require, *inter alia*, that the parties have met, that they intend to live permanently as spouses or civil partners, that “there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively; and [that] the parties will be able to maintain themselves and any dependants adequately without recourse to public funds”. No pre-entry language requirements are imposed except in the case of an applicant who is seeking indefinite entry under a spousal visa to the UK who must (Rule 281(i)lb)(ii)) have “sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application”. Applicants in this category who do not satisfy the pre-entry language

requirement may, however, be granted temporary entry for a period not exceeding 27 months, and such leave can be made indefinite where (para 287(a)(vi)) the applicant shows “sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom”. The requirement to have “sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom” also applies to those who seek to have temporary leave converted to indefinite leave to remain (para 287(a)(vi)).

3. On 9 June 2010, the Home Secretary announced to the House of Commons that a pre-entry language requirement would be imposed on spouses/ civil partners from non-majority English-speaking countries applying to come or stay in the UK from autumn 2010. Applicants subject to the requirement will have to demonstrate that they have level A1 proficiency (“basic user” level) of the common European framework of reference by taking a test provided by a UKBA approved test provider. The UKBA considers that, to achieve the A1 level (which requires spoken English only), most individuals will require 40 to 50 hours’ tuition. Individuals will have to pay for their own tests.
4. On 26 July 2010 the Government announced that the pre-entry language requirement would come into force via a change to the Immigration Rules on 29 November 2010 (Hansard, HC, 26 July 2010: Column 640W). According to our Instructions, the Home Office has informed Liberty that “the test will be modelled on the current in-country test for citizenship” and that “there will be a discretion to waive the requirement in exceptionally compelling circumstances and an exception for spousal applicants with a physical or mental impairment”. Further, Liberty are “in discussion with UKBA and the relevant ministers about this, but have still not been provided with a draft of the new rule or any detail on the exemptions that might be applied.”

5. The Home Secretary's announcement of June 2010 followed a number of consultations on marriage visas for overseas partners carried out by the UK Border Agency since December 2007.¹ Pre-entry English language requirements were proposed on the basis that they would (i) help newcomers integrate more quickly into the UK; (ii) increase newcomers' prospects of getting work; and (iii) make it clear to newcomers the importance of learning English in order to prepare for the tests required for permanent residence and citizenship.²
6. The majority of those who responded to the first consultation document (68 out of 101 responses) opposed the introduction of pre-entry language tests, primarily because of potential difficulties in accessing English language lessons overseas because of limited provision or affordability, and the belief that English was best learnt in the UK where facilities are already available and newcomers would be immersed in British life. Concerns were also raised that the requirements would be discriminatory; that they would pose particular difficulties for those living in areas affected by war or military conflicts; that the test would potentially lead to unjustified and disproportionate interference with the right to respect for family life; and that it would not achieve the stated aim of integration.
7. It was proposed in July 2008, in recognition of the inadequacy of English language provision in certain countries, in particular in rural areas, that the proposed changes would be staged. Applicants for UK spousal visas would initially be required to undertake to learn English as part of the visa application process with failure to make or comply with such undertakings resulting in refusal or cancellation of visas, and pre-language requirements would be introduced only after measures had been established to increase English language learning capacity overseas

¹ UKBA, *Marriage to partners from overseas* (December 2007) and *Marriage visas: pre-entry English requirement for spouses* (December 2007).

² *Marriage to partners from overseas*.

by a working group to be established for this purpose.³ An equality impact assessment (“EIA”) was carried out in respect of the policy in July 2009. The EIA, which noted the high levels of opposition among respondents to the 2007 consultation exercises to pre-entry language requirements, stated that the UKBA had “carefully considered” the concerns expressed but was “bringing this requirement forward at the recommendation of” the Government working group set up to advise on the implementation of the requirement.⁴ That group “felt that announcing an implementation date we would generate a supply of sufficient English tuition in order to meet the demand created by a requirement. However, we agree with the group that it will take around 18-24 months to develop sufficient capacity, and that is why we are giving applicants for marriage sufficient time (2 years) in which to learn English so that they have sufficient preparation time to meet this requirement”.⁵ The EIA continues:

Does this policy have the potential to cause unlawful discrimination?

“There is unlikely to be any significant change in the patterns of nationalities or races which seek to enter the UK on the basis of marriage due to these proposals ?? why - because of the lead in time - giving 2 years to meet the requirement? [question marks in original]

We do not believe that this policy has the potential to cause unlawful discrimination. However we acknowledge the possibility that the reforms, or the way in which we operate them, might have unintended consequences in terms of disproportionate impact on particular groups. We do consider that any impact is outweighed by the benefits of the policy.

How will you mitigate any negative impacts this policy may have?

We are giving applicants two years lead in time to the introduction of the requirement. This gives sufficient time to prepare and will mitigate against any negative impacts.”⁶

³ *Marriage visas: the way forward.*

⁴ EIA, p.12.

⁵ EIA, p.12.

⁶ EIA p.13.

8. A further consultation paper proposed, in August 2009, that pre-entry language requirements be imposed without the interim step proposed in the previous consultation paper,⁷ repeating, in para 3.13, the language of the EIA set out above and continuing:

“A pre-entry English requirement for spouses will be an important mechanism for promoting integration... improving employment chances for spouses who have access to the labour market; raising awareness of the importance of speaking English; and helping prepare spouses for the English tests they will need to pass to obtain probationary citizenship. A pre-entry English requirement will also lead to reduction in the costs to the taxpayer of translation services for non-English speakers as more spouses speak English on arrival in the UK. This policy is in line with thinking in other EU states: the Netherlands, Germany and Denmark have all introduced pre-entry language requirements, with France also introducing new exams on French language and culture pre-entry for family reunification applications in the near future.”⁸

9. The decision, announced in June 2010, that the pre-entry language requirement would be imposed from November 2010, rather than summer 2011, appears to be in tension with the repeated assertions in the July 2009 EIA that the equality and other concerns raised in the consultation exercise would be met by the two year lead-in time previously proposed. It is not clear on our Instructions whether the decision to bring forward the date of introduction has itself been subject to any equality impact assessment.

The Law

10. Articles 8 and 14 of the Convention (which are set out in Sch. 1 to the Human Rights Act 1998) provide, respectively, as follows:

Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of

⁷ *Earning the Right to Stay: A New Points Test for Citizenship*.

⁸ *Earning the Right to Stay: A New Points Test for Citizenship*, para 3.14.

national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

11. In addition, the Race Relations Act 1976 provides (s.76A) that public authorities must, in carrying out their functions, “have due regard to the need— (a) to eliminate unlawful racial discrimination; and (b) to promote equality of opportunity and good relations between persons of different racial groups”.

12. Articles 8 and 14 of the Convention are amongst those to which the Human Rights Act 1998 gives effect, breach of these provisions being unlawful by virtue of section 6 of the Act unless (broadly) required by primary legislation. In **Abdulaziz, Cabales and Balkandali v United Kingdom** (1985) 7 EHRR 471, para 67, the ECtHR accepted that Article 8 does not create a general right to respect for a married couple's choice of matrimonial residence, and thus to acceptance of the non-national spouse for settlement in that country. Nor does Article 8(1) protect a right of entry to create a family. But the existence of a formal union between adults accompanied by some evidence of cohabitation or consummation is sufficient to give rise to the existence of family life as may an engagement to marry, when accompanied by sufficient evidence of the strength of intention or establishment of relations (**Abdulaziz, Cabales & Balkandali v UK** (1985) 7 EHRR 471). A refusal of entry or deportation can violate Article 8 if it separates an existing family, and so may found a right to reside in a particular state where (**YO (Togo) v Secretary of State for the Home Department** [2010] EWCA Civ 214

[2010] All ER (D) 97 (Feb)) it is unreasonable to expect the spouse to leave to UK to join the unsuccessful applicant.

13. Where a couple are already living in a Convention state, Article 8 challenges are easier to win than in cases in which this has yet to occur. Having said this, in **Huang** the House of Lords ruled that, where Article 8 was engaged, account had to be taken of all the relevant facts. It might be unreasonable to expect a UK resident spouse to join an unsuccessful applicant in his or her state of origin where, for example, the applicant's spouse is a British citizen who has always lived in the UK, or is a refugee with a well-founded fear of persecution in the applicant's state of origin, or has children who live in the UK; or where the couple have children who are settled in the UK. In such cases the imposition of a pre-entry English language test will interfere with the right to respect for family life, and will breach Article 8 where it is not justified under Article 8(2).

14. Where Article 8 is engaged, any interference must be in accordance with law and also necessary and proportionate in pursuit of a legitimate aim. The aims set out by the UKBA in the early consultation documents would appear to be legitimate. The question is, however (**Huang**, para 20), whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8.

15. Taking a case in which (UK non-resident) applicant and (UK resident) spouse had a pre-existing family life (as where, for example, the two had married and co-habited for a period outside the UK before the spouse came to (or re-entered) the UK with the intention of being joined here by the UK non-resident), a blanket pre-entry language requirement will threaten a disproportionate interference with the UK non-resident's

Article 8 rights in at least some cases, given the other requirements which apply as regards entry (in particular, co-habitation intentions and self-sufficiency), and the potentially permanent nature of the sanction for failure to pass the pre-entry test. Such might be the case, for example, in any of the scenarios outlined in para 13 above, where the applicant for a spousal visa cannot pass the English language test in his or her country of origin because of, e.g., the lack of available courses nearby, and/or inability to finance or to fit courses around work or family commitments, age, illness and/or physical or mental disability/ies. More generally, it is difficult to assert that the application of pre-entry language requirements is a proportionate means of reaching the espoused aims of the government when it is perfectly possible to encourage or even require spouses to learn English on arrival in the UK.

16. The real difficulty is the application of a blanket rule in a situation in which the assessment of the application of Article 8 is fact-sensitive. We are instructed that the Home Office has stated that there will be a discretion to waive the requirement in exceptionally compelling circumstances and an exception for spousal applicants with a physical or mental impairment. It is not yet known what circumstances (if any) would be considered “exceptionally compelling” such as to justify a waiver of the rule, or how the exception related to mental or physical impairment may be operated, but it must be assumed that the “exceptionally compelling circumstances” cases will be extremely rare, and will likely not cover all those cases in which Article 8 might require the waiver of the pre-entry language requirement. The “exceptionality” approach to proportionality is reminiscent of the approach adopted by lower courts and tribunals before the decision of the House of Lords in **Huang** (above) and which was rejected in that case. The true test under Article 8 is proportionality, not exceptionality. A blanket rule which applies to all cases without reference to the individual facts is classically the kind of rule which the European Court of Human Rights has held to

be disproportionate: e.g. *Hirst v United Kingdom (No. 2)* (2006) 42 EHRR 41.

17. Those instructing us point out that the application of pre-entry language requirements may:

“operate more as a bar to entry to the UK than as a means of encouraging integration... The policy was presented as part of a wider package to strengthen immigration control, alongside measures such as the numerical limit on work visas and providing for more effective regulation of students who come to study in the UK. In the recently produced Home Office Draft Structural Reform Plan produced in July 2010 the English language pre-entry requirement is placed broadly under the heading ‘*Secure our borders and control immigration: Limit non-European Economic Area migration....*’, and directly under the sub-heading ‘*Minimise abuse of the immigration system by strengthening the system of granting student and spouse visas*’.”⁹

18. It is difficult to see how the imposition of a pre-entry language requirement can have any relationship with minimising “abuse of the immigration system”. It may be that the changes to spousal visas referred to by the Home Office were those concerning the age of the parties. Certainly, were the avoidance of abuse to be called into play as a justification for the imposition of pre-entry language requirements it is unlikely to assist the UKBA’s position, and might instead suggest that one of the purposes of the requirement is simply to reduce immigrant numbers.

19. Further, the particular way in which the pre-entry language requirement is likely to impact causes potential difficulties under Article 14 as well as Article 8 of the Convention. It has been noted above that the pre-entry language requirement will not apply in respect of potential immigrants from countries in which English is the majority language (Antigua and Barbuda, Australia, the Bahamas, Barbados, Belize, Canada, Dominica, Grenada, Guyana, Jamaica, New Zealand, St Kitts and Nevis, St Lucia, St

⁹ www.homeoffice.gov.uk/publications/about-us/corporate-publications/structural-reform-plan/pdf-version?view=Binary

Vincent and the Grenadines, Trinidad and Tobago, and the United States). According to the Equality Impact Assessment carried out in 2009, the “top five nationalities granted leave to enter the UK as a spouse or fiancé in 2007 were Pakistan (8570), India (5110), Bangladesh (2780) USA (2110) and Thailand (1770).”¹⁰ Those prospective applicants from Pakistan, Bangladesh and Thailand, as well as other non-English-speaking countries, will be put at a disadvantage by being subject to the test. More particularly, those prospective applicants who come from countries in which English language provision is particularly scarce, expensive or otherwise inaccessible, will be particularly disadvantaged by it. There may therefore be an element of discrimination on grounds of ethnicity/ nationality/ national origin associated with the operation of the pre-entry English language test.

20. It is difficult to be more specific in the absence of information as to the availability etc of English language classes in (for example) remote areas of the Indian sub-continent, but in our view there must be a significant risk of disparate impact by nationality, national origin and/or ethnicity. Such disparate impact is sufficient, following **Thlimmenos v Greece** (2000) 31 EHRR 411 and **DH v Czech Republic** (2008) 47 EHRR 3, to call for justification under Article 14, which justification requires “very weighty reasons” where ethnicity, national origins or nationality are concerned. For the reasons set out above, in particular the availability of post-entry language testing and the other requirements imposed on prospective spousal entrants to the UK, in our view there is considerable force in the argument that such disparate impact, if established, would result in breaches of Article 14 read with Article 8. It is possible that similar arguments might apply as regards gender, given the particular difficulties which women might experience in accessing English language classes as a result of societal hostility in particular regions to women’s education, and/or to caring obligations and/or a lack of resources. The potential discriminatory impact on grounds of disability and/or age

¹⁰ EIA, p.3.

would depend on the nature of any exceptions to the pre-entry language requirements. Furthermore, what has to be justified under Article 14 is the discrimination, not just the underlying measure: **A v Secretary of State for the Home Department** [2005] 2 AC 68, para 68, *per* Lord Bingham. A blanket rule such as the one in question is likely to be disproportionate, not least because it is framed in terms of a country as a whole and whether English is the “majority language” there. So the policy could have the effect that: (i) the requirement will be applied to a person who has a degree in English literature from India (because English is not the majority language in that country); but (ii) will not be applied to a person who comes from California and can only speak Spanish.

21. Turning briefly to the possible application of the Race Relations Act 1976, it is well established that the fulfilment of the “positive duty” requires, *inter alia*, that public authorities assess existing and proposed policies likely to impact differentially by race/ ethnicity in order to determine any disproportionality of impact across different racial/ ethnic groups, consider whether any such impact is necessary and proportionate to the aims pursued, and take appropriate steps to minimise any disproportionality where the aim pursued is such as to justify the means (see, for example, **R (Elias) v Secretary of State for Defence** [2005] EWHC 1435 (Admin), [2005] IRLR 788, affirmed [2006] EWCA Civ 1293, [2006] 1 WLR 3213, **R (Baker) v Secretary of State for Communities and Local Government** [2008] EWCA Civ 141, [2008] LGR 239, **R (Kaur & Anor) v London Borough of Ealing** [2008] EWHC 2062 (Admin)). The EIA provided with our Instructions appears to be in draft form (see, in particular, the extract at para 7 above). More particularly, it is a matter of concern that the factor upon which it relies to conclude that the imposition of pre-entry language requirements is “unlikely to [result in] any significant change in the patterns of nationalities or races which seek to enter the UK on the basis of marriage”, i.e., “the lead in time” of two years, has subsequently been reduced without clear explanation to a mere 15 months. It may be that more exploration of the

change in the proposed start date of the pre-entry language requirement is merited, but on the face of it it suggests that the positive obligations imposed by section 76 of the Race Relations Act 1976 may have been breached.

22. For the reasons set out above we advise that there are serious grounds for concern as to whether the imposition of pre-entry language requirements, as proposed by the UKBA, is consistent with the UK's obligations under Articles 8 and 14 of the European Convention on Human Rights, and also with the positive obligations imposed on public authorities (specifically here the UKBA) by the Race Relations Act 1976.

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