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Baroness Hamwee
House of Lords
London
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5th August 2013

Dear Sally,

DEBATE ON THE REPORT OF THE ALL-PARTY PARLIAMENTARY GROUP ON MIGRATION'S INQUIRY INTO THE IMPACT OF THE FAMILY MIGRATION RULES

I am writing following the debate on the impact of the family migration rules that took place on 4 July. I am grateful to Baroness Hamwee for tabling the motion for debate and to the All-Party Parliamentary Group (APPG) on Migration for producing the report. I am grateful to noble Lords for their valuable contributions to the debate. I summarise some of the key points raised by Peers below, along with the Government's response to those issues. This letter also addresses the substantive points raised during the debate that I did not address on the day.

Income threshold

I am grateful to Baroness Hamwee for providing an overview of the APPG on Migration's report of the inquiry into the impact of the family migration rules implemented on 9 July 2012 and their recommendations for a review of the income threshold. During the debate several noble Lords indicated their support for such a review.

The income threshold was set at £18,600 after considering, in particular, advice from the independent Migration Advisory Committee, who had been asked to advise on what the threshold should be to ensure that the sponsor could support their spouse or partner and any dependants independently without them becoming a burden on the taxpayer. Their report, published in November 2011, recommended that the threshold for a couple should be set in a range between £18,600 (the level at which a couple settled in the UK generally ceases to be able to access income-related benefits) and £25,700 (the level at which the sponsor becomes a net contributor to the public finances).

The aims of the income threshold are to ensure that family migrants are supported at a reasonable level so that they do not become a burden on the taxpayer and they can participate sufficiently in everyday life to facilitate their integration in British society. Overall, the Government's assessment is that the income threshold and other new rules are having the right impact in respect of those aims and are helping to restore public confidence in the immigration system.

However, as with all new policies, the Government will continue to monitor the impact of the family Immigration Rules in the light of feedback on their operation. In doing so, the Government will consider carefully the findings of the APPG on Migration's report.

Baroness Hamwee noted a study by Middlesex University suggesting that preventing 17,800 migrant partners from coming to and working in the UK would cost as much as £850 million over 10 years in lost economic activity.

The Government estimates that the income threshold will benefit the taxpayer by £660 million over 10 years. The £850m referred to by Middlesex University includes the taxes paid by migrant partners, but not their costs to public services, and therefore overestimates the positive effect of family migrants. The net benefit to the taxpayer of £660m includes £530m in reduced welfare benefit claims, £570m in reduced health costs and £340m in reduced education costs over 10 years.

Employment, welfare benefits and savings

Baroness Hamwee noted that there was no evidence that most migrants claimed public funds during their first five years here and noted that most migrants work and pay tax. Baroness Hamwee, supported by Lord Parekh, asked whether it would be sensible to review the exclusion of an incoming partner's employability and potential earnings.

Home Office evidence not does support the claim that most migrant partners work. Most migrant partners are female (68 per cent of partner visa applicants in 2010 were female) and, in 2010, 44 per cent of female migrant partners were employed, which was significantly lower than the UK average in 2010 for female employment (53 per cent). Recently arrived female migrant partners are less likely to be employed – they had an employment rate of 23 per cent after one year in the UK, while 44 per cent of male migrant partners were employed after one year in the UK (Home Office analysis of 2010 Labour Force Survey data). These employment rates contrast with Home Office evidence which indicates that most migrant partners – 67 per cent in a 2010 sample – declared an intention to work. This difference between intentions and outcomes demonstrates that expectations of employment in the UK can be unreliable.

So current or past employment overseas, employment prospects in the UK and even promises of employment in the UK are no guarantee of getting a job here, especially in the current economic climate. Those migrant partners with an appropriate job offer can apply to come here under Tier 2 of the Points Based System.

As a broad illustration of the overall number of people claiming benefits who came to the UK as migrants of non-EEA nationality and the extent of taxpayer burden this represents, analysis published by the Department for Work and Pensions in January 2012 showed that, in February 2011, around 267,000 claimants of working age benefits (around 5 per cent of more than 5.5 million such claimants) are estimated to have been non-EEA nationals when they registered for a National Insurance number (i.e. first entered the labour market). It is not possible to break this number down by the immigration route by which these non-EEA nationals entered the UK. However, the top 5 non-EEA nationalities at National Insurance number registration claiming working age benefits were Pakistani, Somali, Indian, Bangladeshi and Iraqi, which is consistent with nationalities which, in significant numbers in recent years, have been granted asylum in the UK (which include Somali and Iraqi) or have been granted a partner visa on the family route (which include Pakistani, Indian and Bangladeshi).

Lord Rosser, while expressing the Opposition's support for strengthening the family migration rules to protect the taxpayer, cast doubt on the approach of focusing so much on the sponsor's salary.

Introducing a financial requirement linked to income sets a clear, transparent and objective threshold which is easier for caseworkers to apply and makes it easier for applicants and sponsors to determine whether the requirement is met. The income threshold can be met through the employment and/or self-employment earnings of the sponsor (and of the applicant, where they are already in the UK with permission to work) and the couple's non-employment income (e.g. from pension or investment income). The couple's cash savings can be used to make up any deficit in employment or non-employment income. Assessing a sponsor or couple's net worth and potential earnings would require a complex calculation and would not ensure that the migrant partner would not become a burden on the taxpayer and would be supported at a reasonable level.

Baroness Hamwee questioned the length of time that, and the form in which, savings must be held, when an applicant relies on savings in lieu of earnings and provided an example of a high-net worth couple who had relocated to another country because of the rules.

Cash savings must have been held by the applicant, their partner or the couple jointly for at least the 6 months prior to the application. This is to help ensure that the savings are genuinely under the couple's control. Savings that were the product of a short-term loan or were held only for a short period before being used to repay a debt or buy another property would not give adequate assurance that the couple had sufficient means to support themselves in the UK.

High value-migrants will not be refused because their British spouse or partner is not employed. They can count their own private income, e.g. from investments. They can also count their cash savings - £62,500 is the amount required if they have no income. The Government has introduced greater flexibility for those holding investments to liquidate them into cash in order to meet the rules.

Settlement in the UK is a big step. It is reasonable to expect people to organise their finances in order to meet the Immigration Rules. It is also reasonable to expect them to show cash if they do not have income. Entry Clearance Officers are not accountants; it is not reasonable to expect them to consider complex investment reports from across the world. We do not consider the value of investments or the equity value in property – the couple need income and/or cash savings to live on.

Baroness Hamwee and Lord Parekh asked about support from family members and Lord Avebury commented that no account was taken of the provision of free accommodation from friends or family.

Third party support, discrimination issues and children

Promises of support from a third party are vulnerable to a change in another person's circumstances or in the sponsor or applicant's relationship with them: that is not the basis for a sustainable system. Cash savings now under the couple's control can have originated from a gift from a third party. Accommodation can still be provided by a third party, provided it meets the requirement under the rules that it does not breach the statutory overcrowding definition.

Baroness Hamwee asked whether it was right that a couple could move to an EU country and work there before coming back to the UK under the Treaty to exercise their rights as EU citizens.

The rights of EU/EEA nationals and their family members to live and work in other European countries, and to be accompanied by their non-EEA family members, are set out in the Free Movement Directive (2004/38/EC) by which all EU Member States are bound. A family member of a British Citizen can benefit from these free movement rights under EU law if they have resided with the British Citizen in another Member State and the British Citizen was engaged in genuine and effective employment there, prior to travelling to the UK. This reflects the current requirements of EU law and would not apply if someone went to another Member State for a short time to try to circumvent the Immigration Rules.

Lord Parekh indicated that the income threshold would affect half of the ethnic minority population. The Government acknowledges that diaspora communities in the UK of South Asian origin may be likely to seek to sponsor the settlement in the UK of a partner from the Indian sub-continent. However, for the rules to be applied fairly, they must apply to all applicants and sponsors regardless of race, nationality or ethnic origin. The evidence shows that applicant partners of Pakistani and Bangladeshi nationality are likely to have sponsors with lower earnings, compared with the sponsors of applicants of other high-volume nationalities. Further detail can be found in the Policy Equality Statement (PES) published by the Government on 13 June 2012.

Lord Kilclooney questioned whether it was fair to have a standard minimum income requirement when average wages vary in different regions of the UK. The Government agreed with the Migration Advisory Committee's conclusion that there was no clear case for varying the income threshold across the UK. A requirement which varied by region could lead to sponsors moving to a lower threshold area in order to meet the requirement before returning once a visa was granted.

It could also mean that a sponsor living in a wealthy part of a relatively poor region could be subject to a lower income threshold than a sponsor living in a deprived area of a relatively wealthy region. Having a single national threshold also provides clarity and simplicity for applicants and for caseworkers.

Concern about the impact of the family migration rules on families and children was highlighted by a number of peers. Lord Judd indicated that he had seen evidence that in deportation cases the impact of the decision on the children had not been taken into account and asked whether the child is central to immigration decisions by the Home Office in deportations on grounds of criminality. The Earl of Listowel asked whether consideration had been given to the impact of the rules on children, particularly on boys denied contact with their fathers; how many boys were unable to have regular contact with their fathers; how many children were affected; and what steps would be taken to minimise their impact on children.

The new rules have been designed to reflect the requirements of the duty on the Secretary of State to safeguard and promote the welfare of children in the UK under section 55 of the Borders, Citizenship and Immigration Act 2009, which reflects UK obligations under the UN Convention on the Rights of the Child. They also take account of recent case law. The Immigration Rules recognise the proper weight that should be attached to the inherent benefits that accrue to a British Citizen child from growing up in UK. There is now a route for applications for leave to remain (on a 10-year route to settlement) based on a child's best interests, where the family cannot meet certain requirements, such as the income threshold, of the 5-year route.

It is reasonable to expect those who choose to establish or continue their family life in the UK to support their partner and dependants financially without relying on the taxpayer for additional support. There are costs which arise from the migration of children to the UK and their upbringing here. Local education authorities have a legal responsibility to ensure that education is available for all children of compulsory school age irrespective of the child's immigration status and, depending on their precise circumstances, a sponsor may also be entitled to claim Child Tax Credit or Child Benefit for their partner's children, if they have responsibility for them. There may also be costs arising to the NHS.

Although not a protected characteristic under the public sector equality duty in section 149 of the Equality Act 2010, their impact on children was nevertheless considered during the development of the new policies and this is reflected in the PES. We do not separately record the number of children who have been affected by the new rules.

Lord Kilclooney raised a point about the delay in deciding applications, noting one case that had taken 15 months for a decision to be made. I do not know the circumstances of the case and apologise for the delay in deciding the application. Service standards state that we will process 95 per cent of settlement visa applications within 12 weeks, and 100 per cent within 24 weeks, from the date the application was submitted and biometrics information was provided. In 2012-2013, globally 74 per cent of settlement cases were decided within 12 weeks and 98 per cent within 24 weeks.

Lord Kilclooney also provided an example of a British Citizen in Northern Ireland who is running a business which employs 25 people and whose spouse was refused a visa. I am unable to comment on the circumstances of the refusal without further details about the application.

Income threshold – High Court Judgment

Lord Avebury noted that the APPG on Migration's report found the income threshold to be discriminatory because women's earnings are 15 per cent below men's. Lord Avebury also stated that the rules violated the right to family life and will face challenges in the courts.

On 5 July 2013 the High Court handed down its judgment in a Judicial Review of the income threshold. The new rules have not been overturned and the principle of an income threshold for sponsoring family migrants has been found to be compatible with human rights. The judgment confirms that it is a legitimate aim to require sponsors of family migrants to show they can support their foreign partner without them becoming a burden on the taxpayer and at a level which supports their integration. The judgment also confirms that:

- It is acceptable to set a clear financial threshold to test the sponsor's financial independence, and that this can be at a level higher than mere subsistence.
- Such a test is not discriminatory in its impacts as regards ethnic minorities or women or as regards age.
- The threshold should not vary in amount according to the region of the UK where the sponsor lives.
- It is reasonable to set a higher threshold where the migrant is accompanied by children, reflecting the additional costs.

The judgment says that, within these legitimate parameters, we should be more flexible about how income is counted towards the threshold: for example, considering any job offer held by the migrant, how savings are counted, and whether offers of financial support from third parties should count. The Government is pleased that the judgment supports the basis of our approach.

However, we do not agree with the judgment's assessment of certain of the detailed requirements of the income threshold rules. In our view, matters of public policy, including the detail of how the income threshold should operate, are for the Government and Parliament to determine, not the Courts. We also believe that the detailed requirements of the policy, which reflect extensive consultation and consideration, are proportionate to its aims. We are therefore pursuing an appeal against the judgment. We have asked the Court of Appeal to expedite this. In the meantime, where an applicant does not meet the income threshold and there is no other reason to refuse it, the application will be put on hold.

Adult dependent relatives

Baroness Hamwee, Lord Parekh, Lord Judd, Lord Avebury and Lord Warwick spoke about the changes made to the adult dependent relative route and their impact on British sponsors, in particular those in the medical professions, and on other family members.

The new route seeks to ensure that only those who have a genuine need to be physically close to and cared for by a close relative in the UK are able to settle here. Those who do not have such care needs can be supported financially in the country in which they live by their relative in the UK. Those most in need of care remain likely to qualify but not those who would simply prefer to come and live in the UK with a relative here.

The new rules do not provide a route for every parent or grandparent to join their relative in the UK and settle here and it is not intended that they should do so. The new rules represent a fairer deal for the taxpayer, given the significant NHS and social care costs which can arise when adult dependent relatives settle in the UK. The Department of Health has estimated that a person living to the age of 85 costs the NHS on average around £150,000 in their lifetime, with more than 50 per cent of this cost arising from the age of 65 onwards. This amount does not take account of any social care costs met by Local Authorities.

Baroness Hamwee asked for an example of when an application could be successful under the adult dependent relative route. An example, taken from the published casework guidance on adult dependent relatives, is provided below:

> A husband and wife (both aged 70) live in Pakistan. Their daughter lives in the UK. The wife requires long-term personal care owing to ill health and cannot perform everyday tasks for herself. The husband is in good health, but cannot provide his wife with the level of care she needs. They both want to come and live in the UK. The daughter can care for her mother full-time in her home as she does not work whilst her husband provides the family with an income from his employment. Her sister in the UK will also help with care of the mother. The applicant provides the ECO with the planned care arrangements in the UK. This could meet the criteria if the applicant can demonstrate that they are unable even with the practical and financial help of the sponsor to obtain the required level of care in the country where they are living because it not available and there is no person in that country who can reasonably provide it or it is not affordable and other relevant criteria are met.

Family visitor appeals

Lord Parekh argued that family visitor appeal rights should be allowed and that a large number of such appeals were successful because important facts had been overlooked.

Section 52 of the Crime and Courts Act 2013, removing the full right of appeal for applicants for a family visit visa, came into effect on 25 June 2013.

The changes bring appeal rights for visitors coming to see family members in line with those for all other visitor categories. The majority of decisions overturned at appeal resulted from new evidence provided during the appeals process. Where an applicant has new evidence, they should make a fresh application. An appeal can cost almost twice as much to the applicant as reapplying, and can take up to 8 months to be decided. A fresh application is usually decided within 15 days. Maintaining the appeal system for this type of visa costs £10.7m per year. This cost is disproportionate and is it not fair that the burden should lie with the taxpayer.

The Government does not accept that decision quality is poor. Recent reports from the Independent Chief Inspector have been positive and have acknowledged improvements in this area.

Life in the UK test

Lord Roberts of Llandudno spoke about the Life in the UK test and provided examples of facts which a candidate would be expected to learn as part of the test.

The Life in the UK test is one of the ways in which those applying for permanent residence (settlement) in the UK, or naturalisation as a British Citizen, can demonstrate the required knowledge of language and life in the UK. It is based on the Life in the UK handbook, published by The Stationery Office (TSO) on behalf of the Home Office.

The revised Life in the UK test, based on the new Life in the UK handbook, began on 25 March 2013. The new Life in the UK handbook "Life in the UK: a guide for new residents" aims to give the reader an understanding of the history, culture and traditions of the UK in an interesting and accessible way. Study of the book should help the reader understand the development of British democracy, how the UK became the country it is today and some of the cultural and historical references which we all encounter everyday in normal conversation.

Readers are not expected to memorise dates of births and deaths and the two questions quoted by Lord Roberts (about the height of the London Eye and the date the Emperor Claudius invaded Britain) were devised and printed by the media and do not accurately reflect the type of question asked in the new test.

Armed Forces

Lord Rosser asked for an explanation of the decision to extend the new family migration rules to sponsors serving in the Armed Forces. He contrasted this with the decision to allow an exemption for members of the UK Reserve Forces in respect of the Employment Tribunal qualifying employment period when pursuing claims for unfair dismissal on the grounds of reserve service.

The Government published a Statement of Intent on 4 July 2013 setting out its intention to align the rules for Armed Forces families with the rules for other families.

These changes, to come into effect on 1 December 2013, will remove unnecessary differences in the treatment of the dependants of British and Foreign and Commonwealth HM Forces personnel and have been designed to take account of the practicalities of overseas postings. They will ensure that the sponsor can properly support their partner and any dependants financially and that the partner is able to integrate into British society.

The proposed amendment to the Employment Rights Act 1996 provides reservists with direct access to the Employment Tribunal for unfair dismissal on account of their reserve service, by providing an exemption in such a case from the statutory 2-year qualifying period for bringing a claim for unfair dismissal. This proposal will allow greater access to the Employment Tribunal, but it does not provide a right for dismissal in such circumstances to be treated automatically as unfair nor does it prevent dismissal on other grounds (e.g. gross misconduct).

The Government is committed to ensuring that those who volunteer to join the UK Reserve Forces do not lose basic statutory protections as a result of their service and considers that the current protections are insufficient because individuals must complete 2 years' continuous employment before they have the right to raise a claim for unfair dismissal. As time away on operations does not count towards this continuous employment, it can be harder for a reservist to gain the right to challenge unfair dismissal. The proposed change does not exempt reservists from the responsibilities set out in their contract of employment or under employment law.

I am sending a copy of this letter to all those who spoke in the debate and will arrange for a copy of this letter to be placed in the House Library.

With best wishes

Lord Taylor of Holbeach CBE