ILPA Response to the Statement of Changes to the Immigration Rules: HC 1849 (20 December 2018)

The Statement of Changes to the Immigration Rules (HC1849) released on 20 December 2018 pertain purely to Appendix EU of the immigration rules. Thus all that is contained within them concerns the EU Settlement Scheme. Most important to note is that "*the Government has decided to proceed, as planned, with the start of the wider public implementation of the scheme from 21 January 2019*."[1]

Alongside this, the explanatory memorandum provides a whistle-stop update on the second private beta phase test of the Settlement Scheme. As ILPA members are no doubt aware, this second private beta phase test focussed on vulnerable users of the Settlement Scheme. A report of the results of this second private beta phase test will be published by the Government in January 2019. "*By 13 December 2018, more than 15,500 applications had been made and more than 12,400 of these had been concluded… 71 per cent of the concluded applications were granted settled status, with the rest granted pre-settled status, and many received their decision within 24 hours*."[2]

It is worth noting that currently, the Settlement Scheme is open only to those resident EU Citizens (and their family members) who hold a valid passport. However, when the scheme fully opens (30 March 2019), an EU Citizen will be able to rely upon a biometric national identity card to prove their identity, rather than only a passport as is currently the case.[3] Further changes are expected to the Immigration Rules pertaining to Appendix EU, and these will be "*laid before Parliament in early March 2019, so that the scheme will be fully open by 30 March 2019*."[4]

ILPA notes that the most important changes contained in this Statement of Changes are:

1. Changes to the suitability provisions of the EU Settlement Scheme,
2. Clarification of the evidential requirements for family members; and
3. Clarification on how Administrative Review of decisions pursuant to Appendix EU work.

This paper will go through each major change in turn.

Suitability Provisions

Paragraph EU15 stays the same insofar as it specifies that an individual who is subject to either (a) a deportation order, or (b) an exclusion order, will fall to be refused on suitability grounds. This is relatively uncontroversial, and ILPA welcomes the clarity that this brings. EU15(c) has been changed in that this provision is now contained within EU16.

EU16 stays the same, insofar as EU16(a) retains what EU16 contained prior to this Statement of Changes. Further, an applicant who is "*subject to a removal decision under the EEA Regulations on the grounds of their non-exercise or misuse of rights under Directive 2003/38/EC*" will also fall for refusal on suitability grounds (EU 16(b)).

[1] Explanatory Memorandum to the Statement of Changes in Immigration Rules (HC1849) para. 3.8.
[2] *Ibid* at para. 3.6
[3] *Supra* [1]
[4] *Ibid* at para 3.10

ILPA retains grave concerns regarding the changes to paragraph EU16. In the first instance, ILPA notes that the drafting of EU16 is so wide as to function in a manner akin to paragraph 322(5) of the Immigration Rules. In the widely publicised scandal of UK Visas and Immigration ('UKVI') caseworkers routinely used a broadly defined category to deny leave to people who had made (what HMRC believed to be) honest mistakes, which they remedied, in their tax returns. Given that EU16 does not require an applicant to "knowingly" submit "*false or misleading information*," ILPA are concerned that self-employed EU Citizens will become an easy target for broad refusals.

ILPA are further concerned that EU Citizens from either the A8 or A2 countries that acceded to the EU in 2004 and 2007 respectively, and were required to comply with the Worker Registration Scheme may also fall for refusal. If an applicant did not register with the WRS, but nevertheless worked in the UK, even if this was done in genuine error could be accused of relying on "*false or misleading information*" as part of their application.

Overall, ILPA submit that EU16(a) and (b) are drafted in brush strokes that are so broad that they run the risk of repeating earlier UKVI mistakes. Not only this, but the scope for discrimination and abuse of these suitability requirements is vast. ILPA will be very interested to see refusals on the grounds of suitability, and who they are used against. In particular, ILPA would be interested to monitor refusals to see if suitability refusals disproportionately impact the nationals of A8 and A2 countries, or ethnic minority EU Citizens such as the Dutch Somali community.

With regards to refusals arising due to "non-exercise or misuse of rights", ILPA is concerned that the Government have shifted their position late on in the game. It was, and remains, ILPA's understanding that the relevant test for settlement pursuant to the Settlement Scheme is presence in the United Kingdom. Therefore, a self-sufficient EU Citizen need not prove they hold comprehensive sickness insurance in order to obtain e.g. pre-settled status. Therefore, this provision serves merely to muddy the waters. ILPA welcomes the move of EU15(c) to EU16(b), thus allowing for a proportionality criterion. ILPA further welcomes the clarity that EU17 now provides, insofar as any removal decision based on non-exercise or misuse of Treaty Rights must be extant at the date of decision. Nevertheless, ILPA are concerned that the EU 16(b) provisions will be applied primarily on rough-sleepers and short-term prisoners. Not only this, but ILPA maintains that these provisions are inconsistent with those who are not under a removal order already, which is an irrational distinction.

Currently, EU law allows for the exclusion of EEA nationals when the relevant individuals pose a current threat to public policy, security or health. EU16(b) is drafted in such a way as to exclude all those subject to an extant removal/exclusion decision, irrespective of whether the individual poses a current threat to public policy, security or health. It is ILPA's position that EU16(b) will require qualification in order to achieve consistency with Directive 2004/38/EC and relevant EU law.

Evidential Requirements

Annex 1 of Appendix EU is being modified to explain what will, and will not constitute evidence, particularly for family members of EU Citizens seeking to regulate their stay pursuant to the scheme. This includes, e.g. "*a permanent residence card…issued or renewed within the last 10 years… under regulation 19 of the EEA Regulations*."

Administrative Review

ILPA notes that the Government do not intend to extend a statutory right of appeal to EU Citizens refused pursuant to Appendix EU in the event of 'no deal' with the EU. In light of this, at paragraph 34QA, an application for Administrative Review "*must be made while the applicant is in the UK*."

ILPA remain concerned that EU Citizens will be unable to appeal incorrect decisions before the Immigration and Asylum Chamber of the First-tier or Upper Tribunals. Aside from the obvious curtailment of rights that this creates, it is worth noting that no mention is made of conferring appeal rights upon EU Citizens. Currently, the explanatory memorandum contains the important caveat that paragraph 34QA is drafted in this manner "*for now*."[5] ILPA will continue to monitor any changes to the Administrative Review system pursuant to Appendix EU, and will continue to lobby for a right of appeal attached to decisions pursuant to Appendix EU.

Relevant Dates

The above changes take effect on 21 January 2019. Therefore, applications made in the second private beta phase test (on or after 1 November 2018 and before 22 December 2018) will be decided in accordance with the Immigration Rules in force on 21 December 2018.

20 December 2018

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[5] *Ibid* at para 7.1