Immigration Bill: Rights of Women written evidence to the Bill Committee

About Rights of Women

1. Rights of Women specialises in supporting women who are experiencing or are at risk of experiencing, gender-based violence, including domestic and sexual violence. We support other disadvantaged and vulnerable women including Black, Minority Ethnic, Refugee and asylum-seeking women (BMER women), women involved in the criminal justice system (as victims and/or offenders) and socially excluded women. By offering a range of services including specialist telephone legal advice lines, legal information and training for professionals we aim to increase women's understanding of their legal rights and improve their access to justice enabling them to live free from violence and make informed, safe, choices about their own and their families' lives.

Evidence on the Immigration Bill

2. The Immigration Bill proposed is not in accordance with the principles underlying the UK's un-codified constitution or with core European or domestic case-law. The Bill proposes to undermine the rule of law and raises questions about the separation of powers. It is submitted that the Bill is also detrimental to women and children's safety and will increase the risks for migrant women who suffer violence as a result of domestic abuse, trafficking, or sexual assault.

3. Rights of Women submits that this is an issue of rule of law; both in terms of the limits to appeals for certain applicants and in the powers granted to the Secretary of State for the Home Department by the legislature. These powers step outside the separation of legislature and judicature. Given our area of expertise is in violence against women and girls; we aim to demonstrate the potentially life-threatening impact of a removal of an appeal for migrants through the example of the domestic violence rule.

Rights of Appeal – Paragraph 11

4. The current governing Act, the Nationality, Immigration and Asylum Act 2002, allows for an appeal where the immigration decision is "*not in accordance*

with immigration rules" (NIAA 2002 s84(1)(a)) or "*not otherwise in accordance with the law*" (NIAA s84(1)(e)). An immigration decision is defined in the current s82(2). However, the affect of paragraph 11 would be to repeal the definition of an immigration decision and restrict appeals to those required under international obligations only.

5. This is based on a misconceived notion of the rights of appeal available. At the time of the 2002 Act, the stated aim was to reduce the number of appeal rights to one right against a variety of different immigration decisions.

   The scheme is based on the principle that there is one right of appeal against any of the listed "immigration decisions". Where multiple decisions would result in multiple rights of appeal these are subsumed into one appeal[1]

6. However, it seems clear that given the publicity given by the Government, and statements made in public, that a removal of an appeal right for "law-abiding migrants" while retaining rights of appeal under international obligations, acts to punish those who make valid applications in time and through errors in evidence, the exercise in discretion or incorrect Home Office decisions are denied a right of independent appeal. This is in fact the opposite of what Immigration Minister Mark Harper stated was the aim of the Bill:

   "*We will continue to welcome the brightest and best migrants who want to contribute to our economy and society and play by the rules. But the law must be on the side of people who respect it, not those who break it*."[2]

Appeals and Domestic Violence

7. Under the current rule 289 of the Immigration Rules, a spouse in the UK as a dependant of a British citizen or someone with Indefinite Leave to Remain (ILR) may apply for ILR in the event that their relationship breaks down due to domestic violence. This is mirrored in Immigration Rule Appendix FM DVILR for those who made applications as a spouse after 9 July 2012. The numbers of applications using the Domestic Violence Rule route has remained at around 1500 over a number of years. In 2011, we made a number of Freedom of Information Act requests for the number of successful applications under the DV rule, and the number that succeeded after appeal. In Jan - March 2011 for example, 74% of initial applications were successful. Whilst this suggests good practice among decision makers, of those who went on to appeal 82% were successful. This is higher than success rates for other types of appeal.

8. We believe that the explanation for this can be found in how the rule operates. There is a wide discretion for Home Office caseworkers to decide a

[1] Explanatory Notes, Nationality, Immigration and Asylum Act 2002
[2] Direct quote taken from http://www.bbc.co.uk/news/uk-politics-24469584 10 October 2013, last accessed 30 October 2013.

case where the application is based on the DV rule. The modernised guidance available to case-workers states:

> *The Immigration Rules do not specify documents which must be provided. Each case must be considered on a case-by-case basis.*
>
> *To prove domestic violence has occurred the applicant must submit supporting documents with their application.*
>
> *You must consider all evidence submitted before making a decision.*

9. The guidance to caseworkers has been reiterated in case law which has developed through the appeals system. In the case of Ishtiaq[3], the court looked at what was expected of caseworkers and set out the following:

> *(10) A caseworker should usually start the evaluation of the evidence by applying the guidance given in section 4 of chapter 8 of the IDIs. But if the applicant is unable to produce evidence in accordance with that guidance, the caseworker should seek an explanation for her inability to do so. If the applicant provides a reasonable explanation for her inability to produce such evidence, then the caseworker should give the applicant the opportunity to produce such other relevant evidence as she wishes to produce.*
>
> *(11) A caseworker can rarely decide whether a report by the applicant is unfounded without interviewing the applicant and asking questions about the alleged domestic violence.*
>
> *(12) The exercise required of a caseworker in this area is often difficult and usually fact-sensitive. It involves the exercise of professional judgment or discretion which should be carried out using a structured decision-making process and a review of, and reliance so far as possible on, the entirety of the evidence presented. In doing this, the caseworker in reaching a decision should use the IDIs as guidance and not as a mandatory series of prescriptive steps which must lead to an unfavourable decision for the applicant if any step provided for in the guidance cannot be fulfilled.*

10. Whenever each of the stages set out is not followed correctly, there is a risk that a caseworker will make a serious error and may then find that there has not been domestic violence. A lack of independent evidence is typical in cases involving domestic violence because of the nature of gendered violence It is likely that in all cases without an independent appeal, the standard of decision making would fall.

11. In respect of domestic violence, the Home Office was criticised by the court in 2012[4], for a failure to check with a victim of domestic violence whether the

[3] *Ishtiaq v SSHD* [2007] EWCA Civ 386
[4] *R ota Balakoohi v SSHD* [2012] EWHC 1439

allegations made by her former husband were correct. Instead, case-workers curtailed her visa without informing her and this removed her right of appeal. It was said in that case that:

> *This does not provide as full or as satisfactory a remedy for HB as an appeal would have done since the judicial review process involves a review rather than the rehearing that she ought ordinarily to have been entitled to when challenging a paragraph 289A decision*.

12. If an appeal is removed for immigration decisions within the immigration rules, this lack of rehearing would affect anyone whose case was incorrectly decided. We know that this occurs because of the high success rate on appeal. It is also important that the removal of a right of appeal is viewed in tandem with the proposals to limit judicial review and public funding available for judicial review. This would negatively penalise domestic violence victims and their children. It would mean that they would be unable to obtain any sort of permanent settlement, access to benefits or to healthcare if a decision was made inaccurately.

Clause 34
Sexual Assault Referral Centres

13. In addition to the risks inherent in removing appeal rights, we also wish to draw the Committee's attention to the impact of requiring payment for the use of NHS services. In particular, the Department of Health provides services to sexual assault and rape victims through Sexual Assault Referral Centres (SARCs) these function as both centres of healthcare and evidence gathering. The centres are jointly funded by the Department of Health and local police, together with local partners, including Rape Crisis, Solace Women's Aid, and organisations which work with victims of sexual violence The SARCs are independent centres offering the full range of sexual health and counselling services together with forensic evidence gathering. The CPS Legal Guidance on forensic evidence states:

> *One aim of the examination is to recover evidence to support the victim's assertion that a sexual assault has taken place without consent. External and internal areas of the complainant's body can be swabbed for samples that can be submitted for forensic examination with a view to revealing evidence, to identify or eliminate the suspect and the nature of the activity that has taken place.*

14. The centres operate to allow victims to access these services, including evidence gathering, without reporting to the police. A victim who has undergone forensic evidence gathering at a SARC may then chose to make a report to the police at a different time and evidence may be stored for up to one year after examination. In some areas, the centres replaced police rape suites and reports of sexual violence made to the police are referred to SARCs.

15. An alternative that required some sexual assault victims to pay a fee before receiving these services would place the UK at odds with the Istanbul Convention, Article 50(2); although the UK has not ratified the Convention, as a signatory, the UK must not take steps that are in direct opposition to the aims and Articles of the Convention. Article 50(2) requires that in respect of evidence gathering:

    2 *Parties shall take the necessary legislative or other measures to ensure that the responsible law enforcement agencies engage promptly and appropriately in the prevention and protection against all forms of violence covered by the scope of this Convention, including the employment of preventive operational measures and the collection of evidence.*

16. We do not accept that it is in the public interest for those who have been sexually assaulted to be deterred from giving vital forensic evidence to the police. Those who are affected include anyone in the UK legally but also women who are trafficked and at risk of sexual assault, or any other marginalised migrants who are vulnerable to sexual assault and rape.

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