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10 DOWNING STREET

From the Private Secretary

24 June, 1985

IMMIGRATION AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The Prime Minister has considered the Home Secretary's minute of 20 June about changes which need to be made to our Immigration Rules to respond to the recent judgement of the European Court of Human Rights on the rules governing the admission of husbands.

The Prime Minister disagrees with the Home Secretary's recommendations. We shall therefore need an early meeting. Mrs. Ryder will be in touch to arrange this.

I am copying this letter to the Private Secretaries to members of H Committee, to the Foreign and Commonwealth Secretary and to Richard Hatfield (Cabinet Office).

(C.D. Powell)

H. Taylor, Esq.,
Home Office.

(1)

PRIME MINISTER

IMMIGRATION AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The attached paper contains the Home Secretary's proposals for implementing the recent judgment of the European Court of Human Rights on the Immigration Rules.

You will recall that the judgment found that the fact that wives are admitted under more favourable conditions than husbands amounted to sex discrimination.

There are two possible ways to deal with this.

The first is to achieve equality by removing the right which wives at present have to join men who are settled here. This would reduce immigration. But the Home Secretary judges that it is too controversial politically and in breach of commitments given by this and earlier governments.

The second is to allow husbands to join women settled here in the same way that women are allowed to join men; but at the same time to impose on women the same tests and requirements for entry - e.g. the primary purpose test - as are imposed on men. The Home Secretary estimates that this will lead to an increase in settlement from all parts of the world of 2000 a year, of whom 600 will be from the Indian sub-continent. It is the course which he recommends.

Agree the Home Secretary's recommendation, subject to views of colleagues?
or
Hold a meeting to discuss it?

I disagree very strongly indeed

C.D.P.

(C. D. POWELL)
21 June 1985

cc PM
cc H.B

PRIME MINISTER

IMMIGRATION AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

In my minute of 17 May I forewarned you and colleagues of the impending judgment of the European Court of Human Rights on the Immigration Rules governing the admission of husbands.

As you know, judgment was given on 28 May and, although in many very important respects it upheld our Immigration Rules, it held that sex discrimination existed in the difference between the Rules governing the admission of husbands and the admission of wives, and that this constituted a breach of the Convention.

The Court judgment, in so sensitive a matter as immigration, has, of course, excited much interest. We need to indicate quickly how we propose to respond to the judgment, with which, under our obligations to the European Convention, we are obliged to comply. I have therefore been considering urgently what changes we must make to the Immigration Rules. I attach a paper setting out my proposals.

The conclusions to which I have come are as follows:

We must allow husbands to join women who have been allowed to settle in this country, in line with the existing provisions of the Rules which allow wives to join men settled here;

the maintenance and accommodation requirements which apply to the admission of wives should be extended to cover husbands;

the requirements, and in particular the primary purpose test which at present husbands must meet before being allowed to

Join British citizen women in this country should be extended to the admission of wives joining men here;

the similar requirements to which male fiances are subject, including the requirement to obtain entry clearance before travelling, should be extended to the admission of female fiancees.

Meeting the requirements of the European Court that the Immigration Rules should not have provision for the admission of husbands which differs from those for the admission of wives makes controversy inevitable. But I judge that this package gives us the best balance we can achieve. I should draw attention to the most important considerations.

The Rules for the admission of husbands and wives could be made the same and sex equality achieved by removing the right which wives at present have to join men who are settled here. I believe, however, that the practical and political difficulties in the way of doing this are overwhelming. It would mean going back on the commitment given by this and previous Governments to allow wives to join men accepted for settlement here and it would mean refusing admission to the wives of men who had settled here from all parts of the world, including the old Commonwealth and America.

Although the judgment was not directly concerned with the primary purpose test, and the other requirements or tests such as that the parties should have met which we introduced to prevent men using marriage as a means to settle here, we cannot meet the Court's finding of sex discrimination unless we either abandon the tests, or apply them to women as well. It will be recalled that the primary purpose test requires men to satisfy the authorities that the primary purpose of their marriage is not to obtain admission to this country.

In my view it would be quite wrong to abandon the test for men. To do that would unacceptably damage our present system of control. They will, therefore, have to be extended to apply to the admission of women. This will be controversial, particularly as the practical difference this will make is not substantial. But the argument for doing so can be sustained, and it is essential to do so in order to be able to retain sufficient control on the admission of men.

There is, however, one significant limitation on our ability to apply the marriage tests to women. The statutory protection which the Immigration Act 1971 affords Commonwealth citizens settled here when the Act came into force means that the marriage tests cannot be applied to the wives of such citizens. The new Rules will therefore have to reflect this statutory entitlement. We cannot, however, afford to weaken the primary purpose test for men by exempting those who marry women settled before the coming into force of the Act; and to this extent the Rules will still be unequal in their effect. I believe, however, that this degree of sexual discrimination is defensible, and I have been advised by our lawyers that there is a reasonable defence against any further complaint under the European Convention on this point, on the basis that the 1971 Act is a transitional provision.

The primary purpose test and other requirements apply to the admission of fiances as well as to husbands. Extending the requirements to the admission of wives makes it necessary to extend them to the admission of fiancees as well. At present fiancees, unlike wives or husbands or fiances, do not have to obtain entry clearance before entering this country. Extending the marriage tests to their admission means that they will have to be subject to the entry clearance requirement.

The net result of these changes is likely to involve an increase in settlement of about 2,000 a year from all parts of the world. No more than about 600 of these will come from the Indian sub-continent. Any increase in immigration is, of course, unwelcome; but this should be seen in the context of the substantial fall in settlement since we came into office, to which I referred in my minute of 17 May.

As the paper notes, the proposed Rule changes will mean new work for an immigration control system which is already under strain. Queues in the Indian sub-continent and work at other posts abroad (both of which are managed under the Foreign and Commonwealth Secretary's responsibility), and work here will be affected. Bureaucratic delays at all points in the system are constantly criticised. Without changes in procedures and some increases in staff, we will not meet publicly

announced targets for service to applicants, the majority of whom in this country have valid claims. I cannot rule out the need to bid for new resources, but the objective will be to absorb the increased demand.

Subject to your views and those of our colleagues, I shall press ahead with the preparation of Immigration Rule changes to be made, subject to detailed agreement in H Committee, before Parliament rises for the summer.

I am sending copies of this minute to members of H Committee, to the Secretary of State for Foreign and Commonwealth Affairs, to the Attorney General and to Sir Robert Armstrong.

L.B.

20 June 1985

E.R.

EUROPEAN CONVENTION ON HUMAN RIGHTS: CHANGES IN IMMIGRATION RULES

I. JUDGMENT OF EUROPEAN COURT OF HUMAN RIGHTS

1. On 28 May the European Court of Human Rights delivered judgment in three test cases brought by the wives of three men refused permission to settle in this country under the 1980 Immigration Rules.

2. Under the Immigration Rules the admission of husbands is subject to a number of restrictions which do not apply to the admission of wives. The provision challenged in these cases was one limiting the admission of husbands to those of women who were citizens of the United Kingdom and Colonies born in this country or had one parent born here. This provision has now been replaced, under the 1983 Immigration Rules made when the British Nationality Act 1981 was brought into force, by a restriction that only husbands of British citizen women may settle here. But the principle, and therefore the relevance of the judgment, remains the same, namely that the admission of husbands is subject to more stringent requirements than the admission of wives. In particular, wives are admitted to join men who have been allowed to settle here even though the men do not have British citizenship.

3. The judgment endorses the aim of the Immigration Rules to curtail primary immigration in order to protect the labour market at a time of high unemployment. It found that there was no violation of the right to respect for family life (Article 8). The Court also found that there was no breach of the Convention on grounds of degrading treatment or discrimination on grounds of race or birth.

4. The Court did, however, find that the fact that wives are admitted under more favourable provisions than husbands amounted to sex discrimination in violation of Article 14 with Article 8. On the basis that sex equality is a major goal in the Member States of the Council of Europe, the Court held that while protecting the domestic labour market was a legitimate aim of the Immigration

Rules, the justification for permitting more favourable treatment for wives in this context was insufficient to avoid violation of Article 14.

5. The Court also found that the absence of effective remedy within the United Kingdom domestic law for the breach of the Convention amounted to a violation of Article 13.

II. ISSUES ARISING

6. It will be necessary to remove distinctions between the sexes from the Immigration Rules insofar as such differences affect rights guaranteed by the European Convention, in practice the right of respect for family life. (So far as the Article 13 violation is concerned removing the substantive breach should be sufficient remedy).

7. The specific provisions on which action will be necessary are:

(i) the citizenship difference in the rules applying to the admission of wives and husbands;

(ii) marriage tests which at present apply to the admission of husbands but not wives.

8. The citizenship requirement alone was the specific issue in the husbands cases. Only one of the marriage tests, namely the requirement that the couple must have met before a husband may be granted admission, was referred to by the Court. Its aim was endorsed (though with the comment that it was not at issue) in the context of the applicants' argument that the rules amounted to racial discrimination. This rule, together with the other tests,in particular the primary purpose test, have the same objective of protecting the domestic labour market. We may be confident that, in the light of this judgment, the European Court will not find them in breach of Article 8 as such. But equally the judgment gives no room for supposing that the Court would find the arguments for applying the tests to husbands but not wives (essentially the same as those advanced for the

difference in the citizenship requirement) sufficient justification to avert violation of Article 14 with Article 8 on grounds of sex discrimination.

9. There are other provisions in the Immigration Rules in which distinctions between the sexes are at risk as a result of the European Court judgment, for example the provisions which allow male students to bring in their wives but prevent female students from bringing in their husbands, and similar rules applying to men and women admitted for a limited period for employment; but these are not affected directly in the judgment in the husbands' cases. Whether there is "the right to respect for family life", needed to bring the rules within the ambit of the European Convention, is not a question to which the judgment yields an immediate answer. We shall have to consider the implications of the judgment for these rules. They may well be in breach of the Convention. But no violation has (yet) been found by the Court requiring immediate remedy.

III. CITIZENSHIP REQUIREMENT

10. So far as the matter directly at issue in the judgment is concerned, we have one of two options. We can extend the right to bring in a spouse to settled women as well as women who are British citizens, thus making the rules applying to the admission of husbands the same in this respect of those applying to wives; or we can restrict the right to bring in a spouse to British citizens, whether male or female, thus removing the right which wives now have to join settled men. Either approach would appear to meet the requirement of the judgment to remove differences of treatment between the sexes.

11. The restrictive approach would not be a breach of Article 8 as such, at least in the type of case considered by the Court where the women married after settlement. However, the practical difficulties in the way of removing the right of wives to join settled men appear overwhelming. Successive Governments have undertaken to allow wives to join men allowed to settle in this country; and the Immigration Act 1971 gives statutory protection to this principle in respect of wives of Commonwealth citizens

settled here when the Act came into force on 1 January 1973. The controversy which going back on this commitment would arouse would be very considerable and very damaging. And the removal of the right of settled men to bring in their wives would affect people from all parts of the world. It would not only affect those heads of household from the Indian sub-continent who have not become British citizens; it would also affect the considerable number of men from the Old Commonwealth and America and elsewhere who settle here without becoming British citizens. It would not be in our interests to prevent foreign businessmen and others with scarce skills of value to the country from bringing their wives here, a restriction which might well dissuade them from coming.

12. Accordingly it appears necessary to allow husbands to join women settled here. The initial impact of such a change on the numbers settling here is unlikely to be great - perhaps about 2,000 a year from all parts of the world. Within that total there might be some 600 from the Indian sub-continent, though in due course the numbers from Bangladesh, from where few husbands come at present, are likely to increase (though most of the women are British citizens).

IV. RESTRICTIONS ON THE ADMISSION OF HUSBANDS

13. Husbands joining women who are British citizens are already subject to tests designed to ensure that the marriage is not a means to gain admission. To minimise the impact of extending the right of admission to the husbands of settled women additional tests might be considered.

14. This might take the form of an employment prohibition, in order to protect the labour market; or means test, to protect public funds.

15. At first sight an employment prohibition would be an attractive way of respecting family unity while at the same time protecting the domestic labour market. But it would be very difficult to defend a provision which allowed a man to come here to join his wife but prevented him from supporting himself and his family.

Furthermore it would be very difficult to enforce an employment prohibition effectively and the attempt would involve a significant move to after-entry immigration checks which could cause considerable difficulties with the ethnic minority communities.

16. A means test which limited admission to husbands who could show that they had adequate means to support themselves would be one way of protecting public funds. It would be a natural corollary of a prohibition on employment, designed to ensure that a husband admitted without the right to work would not be dependent on public support. Without an employment restriction it would not, however, be appropriate to have a general means test since husbands admitted on the understanding that they would be allowed to work could not be expected to support themselves and their families out of means available to them before coming to this country.

17. The most promising form of test to apply to husbands admitted to join settled women is an extension of the tests in the present Immigration Rules designed to ensure that there is adequate maintenance of accommodation for dependants joining heads of households settled here. This is designed to ensure that dependants are only admitted if their sponsors can show that they can maintain and accommodate them without recourse to public funds. The application of such a test to husbands would be different to the extent that the husband could not be treated as a dependant for whom adequate provision for maintenance and accommodation must exist before immigration. But it would be appropriate to assess whether a couple could maintain and accommodate themselves on the admission of the husband before granting admission. The test would equally apply to the admission of wives.

V. MARRIAGE TESTS

18. Although the requirements which a husband must satisfy under the immigration rules before he is allowed to join a woman who is a British citizen were not directly at issue in the husbands' cases, the fact that they are applied to husbands but not wives makes them open to complaint of sex discrimination. It is clear in the light of the judgment that we have no answer acceptable to the Court

to such a complaint. We shall, therefore, either have to abandon the tests in order to bring the provisions for the admission of husbands into line with those for wives; or extend the tests to wives to bring them into line with husbands.

19. The requirements are:

(1) the "primary purpose" test that the marriage was not entered into primarily to obtain admission to the United Kingdom;

(2) the intention to live together permanently;

(3) the requirement to have met;

(4) a 12 month probationary period on admission, with settlement only being granted at the end of that period if the marriage continues to exist.

20. Abandoning the tests on the husbands is not a realistic option. The strengthening of the controls over primary immigration through marriage, in particular through the introduction of the primary purpose test, has been a fundamental Government commitment. In the face of much controversy the primary purpose test has been upheld in our Courts; and the European Court has endorsed the object of the Immigration Rules - explicitly so far as the requirement to have met is concerned. It is out of the question to remove the tests now merely in order to meet the European Convention requirements of sex equality. To do so would involve an increase in settlement of the order of 2,000 a year, mostly from the Indian sub-continent.

21. Extending the tests to the admission of wives would meet the requirement of sex equality. On the basis that the tests are designed to prevent marriage being used for immigration purposes, it should be possible to rebut any claims that the tests violate the right of respect for family life.

22. In terms of immigration policy as such there has never appeared to be a strong case for applying the tests to the admission of wives. In the context of the Indian sub-continent, where it is a man's choice to join his wife rather than a woman's to join her husband which requires explanation, the primary purpose test at least will be virtually meaningless. But attempts to use marriage for immigration purposes is not unknown in the case of women from other parts of the world, such as Ghana and the Philippines. Although it will be highly controversial it will be possible to offer a defence of substance for applying the test to women as the response forced on the Government by the European Court judgment.

23. The statutory guarantee to wives of Commonwealth citizens settled here when the Immigration Act 1971 came into force do, however, constitute a major difficulty. Section 1(5) of the 1971 Act preserves the entitlements under previous provisions of Commonwealth citizens settled here when the Act came into force (1 January 1973) and their wives and children. Under the previous legislation such wives had a statutory right of admission and we cannot, therefore, limit that right now by applying the marriage tests to them. Instead the existing saving in the Immigration Rules for such wives will have to be extended to exclude them from the primary purpose test. Though the beneficiaries of section 1(5) form a defined group it is a very big one. Perhaps as many as half the wives admitted for settlement from the Indian sub-continent are protected by the provision.

24. To achieve sex equality in the provisions applying marriage tests to both husbands and wives it would be necessary to exempt husbands joining Commonwealth citizen women settled here on 1 January 1973 from the requirements of the marriage tests (in particular primary purpose). That would mean that up to half the husbands coming from the Indian sub-continent might be exempt from the marriage tests. Perhaps as many as 1,000 additional men who do not now qualify might gain admission in a year. This is not in my view acceptable.

25. It has, however, to be acknowledged that the failure to achieve full sex equality in the husband and wife rules could give rise to further challenge under Article 14 with Article 8 of the European Convention. To resist that challenge successfully it is necessary to be able to show reasonable and objective justification for the distinction between the sexes. A reasonable case can be mounted. Section 1(5) was incorporated into the Immigration Act 1971 in order to protect the position of Commonwealth immigrants and their families under previous legislation. We could argue that it is a transitional provision to safeguard the position of immigrants who had achieved a close connection with the United Kingdom through their Commonwealth citizenship and settled status. Good arguments could be advanced, in relation to the Immigration and Nationality law in force prior to the 1971 Act and the pattern of immigration in the 1950s and 1960s, to justify the fact that section 1(5) is couched in terms of Commonwealth citizens and their wives and children. The sex discrimination in the provisions of the Commonwealth Immigrants Acts 1962 and 1968 was retained in the 1971 Act as a transitional provision as an act of good faith to those who enjoyed entitlement under the earlier legislation.

VI. FIANCE(E)S

26. Fiances are subject to essentially the same requirements as husbands. Although it does not appear strictly necessary to treat fiancees the same as fiances in order to comply with the European Court judgment (since family life has not been established and there is, therefore, no issue under Article 8), extending the marriage tests to the admission of wives without extending them to the admission of fiancees as well would be open to objection on two grounds.

27. Even if it is not necessary to extend the tests to fiancees in order to comply with the judgment, to retain so total a distinction between the sexes in a provision of the Immigration Rules to which the Court's judgment is closely, if indirectly, relevant would be very difficult to defend. To appear to be doing mo more than the very minimum necessary to meet the requirements of the judgment would only add to the difficulties of getting a favourable reception for the Government's response.

28. From the point of view of immigration policy extending the marriage tests to the admission of wives without corresponding tests over the admission of fiancees would risk the credibility of the policy since a woman who might fail the marriage tests on seeking entry as a wife would be able to evade the tests by gaining admission as a fiancee and once here and having marriage would be extremely difficult to remove.

29. The principal difficulty which extending marriage tests to fiancees raises is the need to require fiancees to obtain entry clearance before entering the country. This would add to the workload of entry clearance officers, particularly in the Indian sub-continent; but from an immigration point of view it would be unavoidable since it would be quite impossible to apply the marriage tests at the time a woman arrived at a port of entry to this country.

VII. EC DIMENSION

30. The immigration rules applying to the admission of nationals of European Community countries and their families are separate from those applying to other nationalities. They are more generous, in particular in not including marriage tests. No action is needed following the European Court judgment so far as these provisions are concerned. The fact that they are more generous than those applying to non-EC nationals (and to the spouses of British citizens) is inevitable. A challenge under the European Convention on the basis that the rules discriminate on grounds of national origin is unlikely to succeed in view of the fact that the EC rules fulfil our international treaty obligations. New rules for the admission of husbands and wives will in any case not alter the principle that the EC rules are more generous.

VIII. RESOURCES

31. The resource implications of these proposals for the immigration staff of the Home Office and Foreign and Commonwealth Office are not inconsiderable. There would be additional work arising from extra cases as a result of allowing husbands to join non-British

citizen settled wives and by extending marriage tests and entry clearance requirements to fiancees; and the work associated with both husbands and wives before and after entry would become more complicated. So far as the Home Office Immigration and Nationality Department is concerned, the increase might be of the order of 15% in the number of cases handled, the equivalent of perhaps 35 additional staff. So far as entry clearance work carried out by the Foreign and Commonwealth Office overseas is concerned, the increase outside the Indian sub-continent appears likely to be slight; but the implications for posts in the Indian sub-continent, where delays are already the subject of controversy, the increase could be considerable. There might be an annual addition of about 4,000 entry clearance applications, about 1,000 additional husband applications and 3,000 fiancee applications. This represents about a 20% increase in the main entry clearance categories, or the equivalent of at least five entry clearance officers.

IX. SUMMARY

32. This paper proposes that:

(1) husbands should be allowed to join settled women (paragraphs 10-12);

(2) the admission of spouses might be subject to a maintenance and accommodation test (paragraph 17);

(3) the existing marriage tests should be extended to wives (paragraphs 18-22);

(4) there should be a saving for wives joining husbands settled here on 1 January 1973 (paragraph 23), but not for husbands joining wives so settled (paragraphs 24 and 25);

(5) the marriage tests should be extended, with entry clearance requirements, to fiancees (paragraphs 26-29):

Lawyers Committee for Human Rights
NW 80