Independent Chief Inspector of Borders and Immigration

An inspection of applications to enter, remain and settle in the UK on the basis of marriage and civil partnerships.

April – October 2012

John Vine CBE QPM

Independent Chief Inspector of Borders and Immigration

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Email us: chiefinspectorukba@icinspector.gsi.gov.uk

Write to us: Independent Chief Inspector of Borders and Immigration,
5th Floor, Globe House,
89 Eccleston Square,
London, SW1V 1PN
United Kingdom

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Independent Chief Inspector of Borders and Immigration

Every year a substantial number of foreign nationals seek to enter or remain as married or civil partners of people already in the UK or overseas. This inspection examined how the UK Border Agency deals with these applications. It focused on assessing the consistency of decision-making across different locations and work-streams.

I assessed the Agency's decisions on marriage applications against the Immigration Rules and found that in most cases these were reasonable. I was also pleased to see that all the applicants in my file sample had been checked against the Police National Computer and the Home Office Warnings Index.

Once again, I was concerned to find that the Agency had a backlog of cases amounting to 14,000 requests from applicants to re-consider decisions to refuse them further leave to remain. This had been growing by approximately 700 cases a month. In addition, there were a further 2,100 cases where people were awaiting an initial decision on their application for further leave to remain. Some dated back nearly a decade. This is completely unacceptable and I expect the Agency to deal with both types of case as a matter of urgency

I found that the Agency was not adopting a consistent approach to the requirement that applicants should be able to maintain themselves without recourse to public funds. Overseas, entry clearance officers routinely used the income support threshold as a guide in assessing whether applicants could be adequately maintained, whereas caseworkers in the UK did not. This is a cause for concern, as there is a risk that some individuals who are being granted further leave and settlement may be unable to support themselves adequately.

In marriage cases, specific consideration should be given to Human Rights when an application is refused under the Immigration Rules. While I found that caseworkers in the UK routinely considered Human Rights, this rarely happened when the application was made overseas.

In respect of the Agency's duty to consider the best interests of children, I was disappointed to find that specific consideration of this was given in only 1 of the 21 relevant cases I examined where caseworkers in the UK refused further leave or settlement. Although the legal obligation to consider the best interests of children does not apply overseas, the impact of refusal on any children in the UK should still be taken into account. I found no evidence that this was done in any of the 39 entry clearance refusals where either the applicant or the sponsor had a child in the UK.

The percentage of allowed appeals in marriage cases is too high. Work was being done to review appeal outcomes, but there was scope to do more. The creation of a new Appeals and Litigation Directorate within the Agency should result in a more strategic approach to the analysis and review of appeals and lead to better quality initial decisions.

John Vine CBE QPM

Independent Chief Inspector of Borders and Immigration

1. Executive Summary

1. The UK Border Agency is responsible for deciding applications made by foreign nationals seeking to enter, remain or settle in the UK on the basis of a marriage or a civil partnership. During the period from April 2011 to March 2012, the Agency received 3,747 such applications at the overseas visa posts we inspected and 70,445[1] in the UK.

The Agency made good use of information obtained by its overseas Risk Assessment Liaison and Overseas Network (RALON) to detect people who should not be allowed to enter or remain in the UK

2. This inspection examined the efficiency and effectiveness of the Agency's handling of marriage and civil partnership applications, with a particular focus on the extent to which a consistent approach was adopted overseas and in the UK. It did this by comparing the handling of marriage applications at four overseas visa posts and two locations in the UK.

3. The Agency had checked all the applicants in our file sample against the Police National Computer (PNC) and the Home Office Warnings Index (WI) in order to establish whether they had previous convictions in the UK, adverse immigration histories or were of concern on other grounds. We found that PNC checks had been carried out on more than one occasion in some applications for settlement made in the UK, due to the time that had elapsed between the initial check and the Agency's decision. This mirrors what we found in our report on the Agency's handling of legacy asylum and migration cases. We believe this is inefficient.

4. The Agency made good use of information obtained by its overseas Risk Assessment Liaison and Overseas Network (RALON) to detect people who should not be allowed to enter or remain in the UK. RALON staff at the two overseas posts we visited, Bangkok and Kingston, worked effectively with local law enforcement agencies and other foreign embassies to identify individuals with criminal records or who had been deported from other countries. This information could then be taken into consideration when entry clearance officers or caseworkers came to make their decisions on applications.

5. We found that staff had differing views on the merits of using interviews and home visits to inform decisions. The Agency was undertaking a pilot to assess the benefits of interviews in overseas cases. This encompassed but was not limited to marriage cases. We believe the Agency needs to develop a strategy on the use of interviews and home visits to inform decision-making in marriage cases.

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6. We were pleased to find that there were effective processes in place for managing the personal data of applicants and their sponsors. We also noted that less than one per cent of the files contained information that related to another person without a clear explanation. This was an improvement on the eight per cent of such cases that we found in our inspection on the Agency's handling of Foreign National Prisoners.[2]

1 This included applications made by unmarried partners and same-sex partners.
2 http://icinspector.independent.gov.uk/wp-content/uploads/2011/02/Thematic-inspection-report-of-how-the-Agency-manages-Foreign-National-Prisoners.pdf

7. In previous inspections we have raised concerns that the Agency has not retained adequate evidence or notes to support its decisions in individual cases. The Agency has clearly taken some steps to address this. As a result we were able to assess the reasonableness of the decisions made under the Immigration Rules in 99 per cent of the entry clearance cases that we sampled, but less evidence had been retained on applications made in the UK: therefore we were only able to assess the reasonableness of the decisions in 88 per cent of further leave and 65% of settlement cases. The Agency needs to extend its good practice overseas on the retention of evidence to its casework functions in the UK.

While entry clearance officers overseas routinely used the income support threshold when making assessments on maintenance, caseworkers considering further leave and settlement applications in the UK did not

8. Where the evidence did allow us to make a full assessment, we found that 87% of decisions made under the Immigration Rules were reasonable. However, the Agency did not adopt a consistent approach in assessing whether an applicant could be maintained without access to public funds. Case-law[3] and the Agency's own policy are clear that the income support threshold should be used as a guide for determining whether an applicant can be maintained adequately. While entry clearance officers overseas routinely used the income support threshold when making assessments on maintenance, caseworkers considering further leave and settlement applications in the UK did not. We were concerned to find this inconsistency of approach.

9. The Agency also adopted an inconsistent approach to the consideration of Human Rights in cases where it refused applications under the Immigration Rules. It gave specific consideration to Article 8 of the European Convention on Human Rights (right to private and family life) in most cases where the individual had applied for further leave to remain or settlement. In contrast, we found no evidence that the Article 8 rights of family members in the UK were being routinely considered overseas. Staff overseas had differing views on whether Human Rights needed to be assessed at all.

10. We examined the extent to which the Agency was meeting its legal obligation to consider the best interests of children living in the UK. We were disappointed to find that specific consideration was given to the best interests of the child in only 1 of the 21 further leave and settlement cases where leave was refused outright. While there is no legal obligation to consider the best interests of children in entry clearance cases, they should still be taken into account as part of the consideration of the Article 8 rights of any children in the UK. However, we found no evidence that the best interests of the child had been referred to specifically in any of the 39 cases that had been refused and involved children in the UK.

11. While we found that most initial decisions under the Immigration Rules were reasonable, the percentage of such decisions overturned at appeal is high. Staff and managers told us that there were a variety of reasons for this, such as: new evidence being provided after the initial decision; the sponsor or applicant providing credible evidence at the appeal hearing; or appeals being allowed on grounds other than the Immigration Rules, including human rights.

We found no evidence that the best interests of the child had been referred to specifically in any of the 39 cases that had been refused and involved children in the UK

12. We found that work was taking place in individual business areas to review the reasons why appeals were being allowed. However, we believe that more could be done to learn valuable lessons, both positive and negative, from appeal determinations, with a view to improving the quality of initial decisions and reducing the amount of costly and unnecessary litigation. The Agency's recently created Appeals and Litigation Directorate offers an opportunity to adopt a more systematic and

3 http://www.bailii.org/ew/cases/EWCA/Civ/2008/1082.html

strategic approach to the review and analysis of appeals. However, the Agency needs to provide clarity to individual business areas on the role and remit of the new Directorate and whether it expects individual business areas to continue reviewing appeal outcomes as well.

13. During the first seven months of 2012, the Agency's Specialist Appeals Team was consistently reviewing less than half of all allowed appeals to assess whether they could be challenged. In April 2012, the figure fell to only 22% due to a lack of available resources. This is a cause for concern, as a consequence of this is that individuals may have been granted entry clearance and leave, including settlement, on the basis of appeal determinations that could have been challenged successfully had they been reviewed.

Of particular concern were an additional 2,100 cases where the Agency had not made an initial decision. In some instances, these applicants had been waiting for almost ten years

14. We found a growing number of cases where applicants had asked the Agency to reconsider its decision to refuse to grant further leave. The figure stood at 14,000 cases at the end of September 2012 and had been rising by approximately 700 a month. These cases had been placed on hold while the Agency awaited and implemented a policy to deal with them. Of particular concern were an additional 2,100 cases where the Agency had not made an initial decision. In some instances, these applicants had been waiting for almost ten years. The Agency's management information on these cases and re-consideration requests was poor. As a result, it did not know how many in either category related to marriage. The Agency must deal swiftly and effectively with both types of case.

2. Summary of Recommendations

We recommend that the UK Border Agency:

1. Assesses all relevant aspects of the Immigration Rules in marriage cases and ensures that this is done in a consistent manner.
2. Ensures that Human Rights are considered consistently in all relevant cases, including overseas applications.
3. Ensures that reasons for its decisions under both the Immigration Rules and Human Rights are properly evidenced, recorded and communicated to applicants.
4. Ensures that the best interests of the child are considered in all relevant cases and that these are expressly referred to in both notes and decisions to refuse applications.
5. Urgently addresses the backlog of 14,000 cases where an application for reconsideration has been made, and makes an initial decision in the 2,100 temporary migration cases.
6. Adopts a systematic approach to reviewing and analysing appeal outcomes in marriage cases in order to improve the quality of decisions.
7. Introduces processes to minimise the need for repeat PNC checks.
8. Develops a strategy on the use of interviews and home visits in marriage cases.

3. The Inspection

3.1 The role of the Independent Chief Inspector of Borders and Immigration was established by the UK Borders Act 2007 to examine the efficiency and effectiveness of the UK Border Agency. The initial remit was to consider immigration, asylum and nationality issues but this was subsequently widened when the Borders, Citizenship and Immigration Act 2009 gave the Chief Inspector additional powers to look at customs functions and contractors employed by the Agency.

3.2 The Chief Inspector's responsibilities in respect of immigration and customs issues continue following the separation of the UK Border Agency and Border Force as of 1 March 2012.

3.3 The Chief Inspector is an independent public servant, appointed by and responsible to the Home Secretary.

Purpose and Aim

3.4 The impact of the Agency's decisions on whether or not to grant a person leave on the basis of marriage or civil partnership is significant for the individual, their families and wider society. People whose application has been refused may appeal against the decision to the Tribunal.[4] This can be at significant cost to the public purse. People who are granted permanent settlement are entitled to access the social welfare system and, eventually, to apply for British citizenship.

3.5 It is important that decisions are made correctly and consistently. A previous inspection,[5] which examined the quality of the Agency's settlement decisions at an entry clearance post overseas, identified 'significant weaknesses in decision-making. In some cases we found it almost impossible to determine why visas had been issued, when others had been refused on identical or very similar evidence.'

Scope

3.6 This inspection examined applications made by foreign nationals to join or remain with a person permanently and lawfully settled in the UK. It did not examine those applications made where the resident sponsor was an EEA national who was not British. This is because the Rules under which applications to enter or remain are made in these circumstances are subject to the EEA Regulations, which are significantly different.

3.7 The inspection examined the quality and consistency of decision-making in cases where people had applied for:

- temporary settlement through leave to enter (LTE) and leave to remain (LTR) on the basis of marriage or civil partnership[6] which could lead to permanent settlement; and
- permanent settlement (indefinite leave to remain - ILR) made from within the UK on the basis of marriage or civil partnership.

4 Her Majesty's Courts and Tribunals Service (Immigration and Asylum Chamber)
5 An inspection of the UK Visa Section: Pakistan settlement applications, 2010
6 Throughout this report, reference to 'marriage' includes civil partnerships. The requirements for those seeking LTE or LTR on the basis of a civil partnership are the same as for those seeking LTE or LTR on the basis of marriage. References to spouses also include civil partners.

The inspection did not include applications for indefinite leave to enter made overseas, as the numbers of these applications are low and we were made aware by the Agency that this route was likely to be withdrawn as part of anticipated changes to the Immigration Rules, hereafter referred to as 'the Rules'. Indeed, these changes were introduced in July 2012.

3.8 The inspection examined decisions made by the Agency in respect of marriage and civil partnerships at three stages:

- pre-entry (entry clearance), by reviewing entry clearance decisions from four overseas posts (Bangkok, Dhaka, Kingston and Moscow);
- further leave, by reviewing decisions made by the Agency in Sheffield; and
- settlement, by reviewing decisions made by the Agency in Liverpool.

Methodology

3.9 The inspection took place between 16 April 2012 and 2 October 2012. A range of methods were used during the inspection, including:

- File sampling. We asked the Agency to provide us with details of all applications decided between 1 April 2011 and 31 March 2012. From these, we requested a sample consisting of 260 files in order to review:
  - 50 files where an application was made in the UK for further leave, split equally between grants and refusals;
  - 50 files where an application was made in the UK for settlement split equally between grants and refusals; and
  - 160 files where a pre-entry application was made overseas. These were from four overseas posts (Kingston, Jamaica; Bangkok, Thailand; Dhaka, Bangladesh; and Moscow, Russia) and divided between applications that were granted and refused.
- nterviews and Focus Groups. We conducted interviews and focus groups with 48 people including caseworkers, entry clearance officers (ECOs) and managers at various grades.

3.11 The inspection team provided feedback on the high level emerging findings to the UK Border Agency on 18 October 2012.

3.12 The inspection identified eight recommendations for improvement. A full summary of recommendations is provided on page nine of this report.

4. Background

4.1 People who are not nationals of an EEA country who are spouses of people settled (or planning to settle) in the UK can apply to join (or accompany) that person and live in the UK. The length of time that a person is entitled to remain will depend on the couple's circumstances. Spouses who are abroad are able to make an application overseas for leave to enter (LTE) to join their partner. Spouses already in the UK can, in certain situations, make an application for leave to remain as a spouse.

4.2 Marriage applications made before 9 July 2012 were considered under paragraphs 277 – 286[7] of the Immigration Rules, whilst those made on or after this date are considered under Appendix FM of the Rules.[8] The length of time that a successful applicant is granted depends on whether their application is made from within the UK, or elsewhere. Successful applications for LTE are given leave for 27 months, whilst applicants who successfully apply for FLTR from within the UK are given leave for 24 months. These periods of leave are commonly termed the 'probationary period.'[9] Shortly before the end of this period, the spouse can then apply for permission to settle permanently in the UK. Instead of applying for settlement, they may apply for a further period of leave to remain.

4.3 Applications for settlement are considered under paragraphs 287 – 289 of the Immigration Rules. People successfully applying for settlement are given Indefinite Leave to Remain (ILR). Fees for these applications at the time of the inspection are shown below:

Figure 1: Application fees

Type of application	Postal	In person
Entry clearance	Not available	£826[10]
Leave to remain	£561	£867
Settlement	£991	£1,377

4.5 Data provided by UKBA shows that in the year ending March 2011, 42,000 spouse and settlement visa applications were made worldwide.

4.6 Where an application for leave to enter, remain or for settlement on the basis of marriage is refused by the Agency, it generally[11] attracts a full right of appeal to the Tribunal, which will be heard in the UK.

7 http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationRules/part8/spouses_civil_partners/
8 http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/app-family-members/
9 UKBA explained that to qualify for indefinite leave to remain, a person needed to complete a probationary period of 24 months. If entry clearance was granted for only 24 months then it would be impossible for the applicant to meet this requirement, as there was an inevitable delay between entry clearance being issued and the applicant travelling to the UK. Therefore, entry clearance is issued for 27 months.
10 When applicants submit their application at a Visa Application Centre.
11 Applications that are refused under some subsections of paragraph 320 of the Immigration Rules do not attract a full right of appeal.

4.7 Applicants who do not meet the requirements of the Immigration Rules should, in certain circumstances, have their application considered under Article 8 of the Human Rights Act.[12] Where the Agency considers that an applicant does not meet the requirements of the Immigration Rules, but refusing the application would be contrary to its obligations under Article 8, it grants leave outside of the Rules.

4.8 Recent changes to the Immigration Rules have sought to include Article 8 considerations as part of the Immigration Rules where the application is made in the UK. There is no longer a separate consideration of Article 8 in the decision-making process. This inspection did not examine the Agency's handling of applications made after these changes were introduced.

4.9 Applications for leave to enter as a spouse are made overseas. They are considered at either visa sections overseas or at the UK Visa Section based in Croydon. All entry clearance applications we reviewed were considered by posts overseas.

4.10 People wishing to apply in the UK for further leave to remain as a spouse are able to do this either by submitting a postal application, or 'in-person'. Postal applications are considered by UKBA staff in Sheffield, whilst 'in-person' applications can be made at one of the Agency's seven Public Enquiry Offices (PEOs), which are located around the country.

4.11 Similarly, people with temporary leave to enter or remain as a spouse are able to make an application in the UK for indefinite leave to remain either by post or 'in-person'. Postal applications are decided in Liverpool, whilst 'in-person' applications can be made at any of the Agency's PEOs.

12 Under Article 8 of the Human Rights Act 1998 everyone has the right to respect for his private and family life, his home and his correspondence. The Act states that '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 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.'

5. Inspection Findings:

Decisions on the entry, stay and removal of people should be taken in accordance with the law and principles of good administration.

Quality Of Decision-Making

5.1 Foreign nationals may apply to enter or remain in the UK as the spouse of a person present and settled in the UK, under paragraphs 281-289 of the Immigration Rules.[13] Where a person makes an application under these provisions, it is also considered against paragraph 320 of the Immigration Rules,[14] which provides for the refusal of applications when certain criteria relating to criminality and previous immigration history are met.

5.2 We assessed the quality of the Agency's decision-making on marriage and civil partnership applications on the basis of the information available to the entry clearance officer or caseworker at the time of the initial decision. In order to do this, we asked the Agency to provide us with a total of 260 files where a person had applied to enter or remain in the UK on the basis of their marriage or civil partnership to somebody settled in the UK, evenly split between applications that were granted and those that were refused.

5.3 The Agency provided us with 257 of the requested files, 30 of which fell outside the scope of the inspection. The 227 files we sampled were broken down as follows:

Figure 2: Breakdown of files that were in-scope

Type of application	Number of cases refused with no grant of DL / LOTR[15]	Number of cases granted leave within the Rules	Number of cases refused but granted DL / LOTR	Total
Further leave to remain	20	23	0	43
Settlement	7	24	18	49
Entry clearance	69	66	0	135
TOTAL	**96**	**113**	**18**	**227**

NOTE: we deal with the issue of files that were not in scope in Chapter Seven.

Immigration Rules

5.4 We first assessed whether the Agency had decided all of the 227 cases that we sampled against the correct Immigration Rules. We were pleased to note that they had, in all of the cases.

13 http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationRules/part8/spouses_civil_partners/
14 http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationRules/part9/
15 Leave outside the Rules (LOTR) in entry clearance cases.

5.5 In the light of evidence provided at the time of the decision, we also assessed whether the decision that the Agency made to issue or refuse an application under the Immigration Rules was reasonable. To do this, we reviewed the evidence that had been retained on the file and the Agency's electronic caseworking systems,[16] having regard to the requirements of the Immigration Rules.

Retention of documents and information

5.6 To assess whether decisions were reasonable, it was necessary to review all the evidence that the Agency had used in order to reach its decision and / or the notes that were kept in its caseworking systems. The documentation and / or notes that had been retained in some cases were limited and it was therefore not possible for us assess the reasonableness of the decision.

5.7 An example of how the inadequate retention of documents or case notes affected our ability to assess a case is set out below:

Figure 3: Case study 1 – Failure to retain sufficient documentation or keep adequate notes

The applicant:

- applied for further leave to remain on the basis that she had married a British citizen;
- supplied bank statements, wage slips and a P60 certificate;
- earned £400 per month and claimed to also receive £200 per month from a friend. Her rent was £316 per month;
- stated that her partner was in receipt of income support.

UKBA:

- did not retain copies of the documents supplied;
- did not make notes of what the documents supplied showed;
- did not make further enquiries about the £200 per month provided by a friend;
- granted the application.

Chief Inspector's Comments:

The lack of retained evidence either in paper form or on CID notes made it impossible to say whether the decision was reasonable. In order to assess whether the applicant could have been maintained adequately, I would have expected to have seen either copies of the bank statements, wage slips and P60 or detailed notes summarising what these showed. No evidence had been retained, nor detailed notes made, to show that the friend had offered to provide £200 a month to the couple on an ongoing basis and could afford that commitment.

5.8 Sufficient documentation and / or notes had been kept to allow us to make an assessment of the reasonableness of the decision in:

- 99% (133 cases) of the decisions taken overseas;
- 88% (38 cases) of decisions for further leave to remain in the UK; and
- 65% (32 cases) of settlement cases made in the UK.

5.9 In some cases, information was missing that should have been retained or noted, but this did not affect our ability to assess the overall reasonableness of the decision. An example of this was a case in

16 The Casework Information Database (CID) for applications considered in the UK and Proviso for applications considered overseas

which insufficient evidence had been retained relating to the applicant's ability to maintain or accommodate themselves without recourse to public funds. However, as the applicant was ultimately refused leave to remain or enter on the basis that they did not fulfil the English language requirement, we were able to assess the overall decision.

The Agency's International Operations and Visas Group had made significant efforts to ensure that relevant documents were retained and that notes were kept on its electronic caseworking system

5.10 We noted that the Agency provided guidance for both ECOs and caseworkers to advise them what documentation should be retained and in what form.

ECOs were instructed to:

> *'…ensure that only documents specifically required are retained. This should include copies of supporting documents that are directly relevant to the decision and documents addressed to the visa section. If it is not possible to retain such documents… they should be clearly referenced in issue notes/refusal notices.'*

5.11 Caseworkers were instructed solely to copy and retain evidence of 'particular relevance to the decision'.

5.12 It is clear from the results of both our file sampling and our interviews with staff that the Agency's International Operations and Visas Group had made significant efforts to ensure that relevant documents were retained and that notes were kept on its electronic caseworking system. These steps, which were taken following recommendations in some of our previous reports,[17] have allowed us to assess the reasonableness of the decisions in the overwhelming majority of overseas cases that we sampled. Whilst similar instructions had been issued to caseworkers in the UK, it had not resulted in them adopting the same approach as ECOs overseas. More needs to be done to ensure that the Agency has a consistent approach to the retention of documents across all its business areas.

Reasonableness of decisions

5.13 Of the 227 cases reviewed we were able to assess the reasonableness of the Agency's decision under the Immigration Rules in 203 (89%) of the cases. Of these, we were satisfied that 77 out of 90 (86%) of the Agency's decisions to issue a person leave to enter or remain were reasonable, whilst 99 out of 113 (88%) of its decisions to refuse leave to enter or remain were reasonable.

More needs to be done to ensure that the Agency has a consistent approach to the retention of documents across all its business areas

5.14 Of the 133 overseas decisions where we were able to assess reasonableness, we found that 15 (11%) were unreasonable.[18] There were:

- nine cases where the Agency's conclusion that the applicant could be adequately maintained without recourse to public funds was unreasonable;
- six cases where the Agency's conclusion that the applicant could be adequately accommodated was unreasonable;
- seven cases where the Agency's conclusion that the relationship between the applicant and sponsor was genuine and subsisting was unreasonable; and
- one case where the Agency refused the application having incorrectly assessed the English language requirement.

17 Including our inspections of Amman, Istanbul and Guangzhou

18 There were various reasons why we found that the decision had been unreasonable and in some cases we found more than one reason.

5.15 Of the 38 cases where we were able to assess reasonableness in further leave to remain decisions, we found that seven (18%) were unreasonable. There were:

- four cases where the Agency's conclusion that the applicant could be adequately maintained without recourse to public funds was unreasonable;
- two cases where the Agency's conclusion that the applicant could be adequately accommodated was unreasonable; and
- three cases where the Agency's conclusion that the relationship between the applicant and sponsor was genuine and subsisting was unreasonable.

We were satisfied that 77 out of 90 (86%) of the Agency's decisions to issue a person leave to enter or remain were reasonable, whilst 99 out of 113 (88%) of its decisions to refuse leave to enter or remain were reasonable

5.16 Of the 32 cases where we were able to assess the reasonableness in settlement cases, we found that five (16%) were unreasonable. There were:

- four cases where the Agency's conclusion that the applicant could be maintained or accommodated was unreasonable; and
- one case where the Agency incorrectly assessed the English language requirement.

An example of an unreasonable decision is shown below in Figure 4:

Figure 4: Case study 2 – Failure to make a reasonable decision

The applicant:

- applied for leave to remain on the basis of her marriage to a British Citizen;
- had extant leave to remain as a highly skilled migrant worker;
- indicated that she satisfied the English language requirement by virtue of her degree taught in English at Brunel University.

The Agency:

- incorrectly noted that the applicant ticked the box on her application form stating that she satisfied the English language requirement as a national of a majority English-speaking country;
- did not check other electronic records relating to the applicant, which contained full details of her degree qualification from Brunel University;
- refused the application on the basis that she did not satisfy the English language requirements of the Immigration Rules.

Chief Inspector's comments:

The Agency had previously granted the applicant leave to remain as a Highly Skilled Migrant Worker. To be satisfied of her eligibility, they had sight of her degree certificate. However, despite having this information on the caseworking system, they went on to refuse the application. The decision to refuse was therefore unreasonable.

It is also a cause for concern that the caseworker wrongly identified the type of exemption the applicant was seeking to rely on.

Maintenance

5.17 The Immigration Rules require that an applicant must demonstrate that they will be able to maintain and accommodate themselves (and any dependants applying with them) without recourse to public funds.[19] This does not prevent a UK-based sponsor from claiming public funds themselves, but ensures that there is no increased reliance on those funds because of the presence of the applicant and additional dependants in the household.

5.18 While the Agency did not define a minimum income level at the time of inspection, case-law has established[20] that as a guide, the minimum level of income necessary to satisfy the maintenance requirement is equivalent to Income Support levels. This was because the Tribunal held that:

> *'There is a good reason for using the levels of income support as a test. The reason is that income support is the level of income provided by the United Kingdom government to those who have no other source of income. It follows from that that the Respondent could not properly argue that a family who have as much as they would have on income support is not adequately maintained.'*

5.19 This approach was subsequently maintained in a further judgment[21] where the Secretary of State argued that the decision quoted above was 'properly decided and provided helpful guidance as to the objective standard for the adequacy of maintenance.'

5.20 Given this, we were surprised to find that that the Income Support threshold was not used consistently across the Agency to assess whether a person could adequately maintain themselves.

We were surprised to find that that the Income Support threshold was not used consistently across the Agency to assess whether a person could adequately maintain themselves

5.21 At the time of this inspection, the level of Income Support for a couple was £105.95 per week, with other supplements for those with children. Therefore, an applicant should be able to demonstrate that, after housing costs have been considered, they have the equivalent of this sum in disposable income available to them.

5.22 We noted that entry clearance officers overseas routinely used the Income Support threshold as a basis to assess whether a person could adequately maintain themselves. However, we noted that this approach was not adopted consistently by caseworkers considering applications in the UK.

5.23 Caseworkers and managers told us that couples making settlement applications in the UK would have to show they had been supporting themselves for at least 27 months in the UK, even if they had done so on an amount that was less than the Income Support level. They would only refuse an applicant on the basis of maintenance where they had existed solely on public funds. We noted a similar reluctance to use the Income Support threshold among staff considering applications for further leave. Staff and managers both said that they believed that if they refused such cases, they would be allowed at appeal.

19 Public funds for the purposes of immigration applications are: Attendance allowance; carer's allowance; child benefit; child tax credit; council tax benefit; disability living allowance; income-related employment and support allowance; housing and homelessness assistance; housing benefit; income-based jobseeker's allowance; income support; severe disablement allowance; social fund payment; state pension credit; working tax credit.

20 http://www.bailii.org/uk/cases/UKIAT/2006/00065.html

21 http://www.bailii.org/ew/cases/EWCA/Civ/2011/35.html

'We would rarely refuse on maintenance and accommodation alone as it is often hard to make a judgement call on what we consider to be an acceptable level of income for a family. Standards vary and what one person might consider to be an acceptable way to live might not be the view of another. We would, however, look more closely at cases where the evidence submitted indicates that the couple are consistently living entirely on public funds, which are of a greater value because of the applicant's presence in that relationship. We would not penalise an applicant for benefits that the settled sponsor is entitled to claim, legitimately, for himself. We might also probe more deeply into the situation if there is evidence of a substantial amount of debt that cannot be covered by income.'
Senior caseworker

5.24 An example where the Agency did not adequately assess the maintenance and accommodation element of the Rules is provided at Figure 5 below:

Figure 5: Case study 3 – Failure to adequately assess maintenance requirements

The applicant:

- applied for settlement on the basis that he was married to a person present and settled in the UK;
- stated that his sponsor earned £600 - £800 per month;
- stated that he worked, but provided no evidence;
- supplied a single bank statement showing a deposit from the sponsor's employer of £618.42; and
- stated that he and his spouse paid £420 per month in rent.

UKBA:

- did not make any notes of its consideration of the maintenance requirement;
- granted indefinite leave to remain.

Chief Inspector's comments:

There was no apparent consideration of the maintenance requirement in this decision.

The sponsor has a disposable income of c £200 per month which falls significantly below the minimum Income Support level. Although the applicant stated that he worked, there were no further details of his earnings and nothing was submitted to support the claim that he worked. No further enquiries were made about this. On the evidence provided, retained and noted, we do not believe that the decision to grant indefinite leave to remain was reasonable.

5.25 Since this inspection began, changes to the settlement Rules on family migration have introduced a minimum income requirement[22] that applicants are expected to meet in order to satisfy the maintenance requirements. These changes have led to precise guidance on how to assess this aspect of the Rules and limited the scope for subjective assessments.

Removing subjectivity is likely to result in a more consistent approach to assessing maintenance in applications that will be considered under the new Rules

22 http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2012/june/13-family-migration

5.26 Removing subjectivity is likely to result in a more consistent approach to assessing maintenance in applications that will be considered under the new Rules. However, we noted that there were some cases in which people had applied under the old Rules, which had yet to be decided. Therefore it is important that these older cases are assessed in a consistent manner.

Accommodation

5.27 Applicants must be able to demonstrate that they will be adequately accommodated in the UK. The proposed accommodation should be:

- owned or legally occupied for the exclusive use of the couple; and
- capable of accommodating the couple and any children, without overcrowding as defined in the Housing Act 1985.

> *'Exclusive use' refers to the availability to the couple and their dependants of separate room/s and does not apply to the communal areas of a property. A couple can therefore share accommodation with other family members or share a multi-occupancy property and still meet this requirement.*

5.28 The Agency does not prescribe any particular evidence that applicants should provide in order to demonstrate that they can be adequately accommodated. However, sources might include:

- Local Authority or private formal assessments of accommodation;
- photographs;
- Council Tax bills; and
- landlord's statements.

5.29 We noted that the standard of the assessments of the adequacy of accommodation varied. We found that some of these were unreasonable, whilst others had been carried out in a detailed and logical manner, an example of which can be seen at Figure 6 below:

Figure 6: Case study 4 – An example of a case where the Agency's approach to assessing accommodation requirements was good

The applicant

- applied for entry clearance as a spouse;
- submitted a tenancy agreement as evidence that accommodation was available to him.

The Agency

- noted that the tenancy agreement was not in his or his spouse's name;
- noted that the evidence did not prove that the requirements of the Housing Act 1985 could be satisfied;
- noted that there was no evidence that the person named on the tenancy agreement would allow him to reside there;
- noted that there was no evidence that the landlord would allow him to reside there;
- refused the application on these grounds.

Chief Inspector's comments:

I was pleased to see that this decision carefully considered the accommodation requirement in the Immigration Rules and clearly noted the reasons why this requirement was not met in the refusal letter to the applicant.

5.30 However, in other cases we found that the approach taken was unreasonable, an example of which can be seen at Figure 7 below:

Figure 7: Case study 5 – Failure to adequately assess accommodation requirements

The applicant:

- submitted an application for settlement for her and seven dependent children on the basis of her marriage;
- submitted a tenancy agreement for her current property, but did not provide evidence that it could adequately house her and her dependants;
- submitted an inspection report for a property she proposed to move to, but did not provide evidence of a tenancy agreement;

The Agency:

- did not request a tenancy agreement for the proposed property;
- did not request evidence that the current property could adequately accommodate the applicant and her family;
- accepted that the accommodation was sufficient and granted the application.

Chief Inspector's comments:

In the absence of an inspection report or a tenancy agreement for the property that the applicant said she would be moving to, it would not have been possible to assess whether the accommodation could adequately accommodate the applicant and her family. I therefore consider that the approach taken when assessing the accommodation requirement was unreasonable.

5.31 Although changes to the Rules have recently been made, these did not alter the accommodation requirements. Therefore, it is a matter of concern that decision-makers are sometimes failing to consider these appropriately.

We were pleased to find that the Agency had approached this component of the Rules appropriately in all the settlement cases that we reviewed

Is the marriage 'genuine and subsisting'?

5.32 Applicants applying for leave to enter or remain on the basis of marriage are expected to intend to live together in a subsisting relationship. The Agency provides guidance to applicants on the type of documentation that they may wish to submit in support of their application. Caseworkers and ECOs can make further enquiries if they have any reason to doubt that the relationship is genuine. This could be for a number of reasons, including: a declaration from the sponsoring spouse that they are no longer in a subsisting relationship; a report from a Local Authority registrar stating that they are concerned about the marriage; lack of a common language between the couple; or a lack of evidence of contact maintained during periods of separation.

5.33 In our file sample, we found that the Agency's approach to the assessment of whether the relationship was genuine and subsisting was unsatisfactory in eight of the 15 overseas cases and three of the eight further leave cases where we considered its decisions 'unreasonable'. We were pleased to find that the Agency had approached this component of the Rules appropriately in all the settlement cases that we reviewed.

5.34 An example of a case where we believed that the approach taken by the Agency to the assessment of this issue was poor is set out below:

Figure 8: Case study 6 – An example of a case where the Agency's approach to assessing whether a relationship was genuine and subsisting was unreasonable

The applicant:

- applied for entry clearance to join her spouse in the UK;
- had lived with her spouse and their child (born 2003) lawfully in the UK between 2005 and 2010;
- had returned to Burma in 2010 with their child while her spouse remained in the UK to complete his studies (he was granted indefinite leave to remain in 2011); and
- was visited by the sponsor in Burma in 2011.

UKBA:

- carried out an interview of the applicant in Burma and noted discrepancies in how the couple claimed to have maintained contact between 2000 and 2005;
- was not satisfied that sufficient contact had been maintained from 2010 to the time of application; and
- refused the application on the grounds that the ECO did not believe the marriage was genuine and subsisting.

Chief Inspector's Comments:

The Agency gave significant weight to concerns about how the applicant and sponsor had maintained contact between 2000 and 2005 (at least six years prior to this application), rather than the claimed cohabitation between 2005 and 2010.

If the interview with the applicant had examined the contact between the applicant and her spouse between March 2010 and the application in a more comprehensive manner, doubts about the nature of the relationship may have been resolved. No weight was given to the fact that the couple have a child together.

Indeed, we noted that the applicant made another application less than three months after her case had been refused and was issued a visa.

Had a more comprehensive assessment of the relationship taken place initially, the applicant is unlikely to have had to make this second application, with the additional cost that she incurred.

5.35 Clearly this is an important component of the Rules and it is therefore essential that a proper assessment takes place and that this is reflected in the notes or refusal letter.

We recommend that the UK Border Agency:

- Assesses all relevant aspects of the Immigration Rules in marriage cases and ensures that this is done in a consistent manner.

Human Rights

5.36 Article 8 (1) of the European Convention on Human Rights (ECHR) states:

> *'Everyone has the right to respect for his private and family life, his home and his correspondence.'*

5.37 The protection afforded by Article 8 can, in certain circumstances, also extend to others. In marriage cases, for example, it can extend to the person sponsoring the application and to other family members in the UK who might be affected by the decision. However, as a 'qualified right' the law allows for a person's rights under Article 8 to be interfered with in certain circumstances, provided that the interference is 'proportionate'.

The Agency's instructions for considering Article 8

5.38 We were told that if an applicant did not meet the requirements of the Rules, staff would consider whether leave outside of the Rules should be granted. The decision-maker would assess whether refusing the application would result in a disproportionate interference with the applicant's Article 8 rights or those of their sponsor or other family members. This applied to decisions made both in the UK and overseas. The Agency's instructions[23] advised staff to undertake a 'five stage consideration process', which is set out below:

- Stage 1: Does the claimant have a family or private life in the UK?
- Stage 2: If family life exists, will refusal/removal interfere with that family life?
- Stage 3: If there is interference with family life, is it in accordance with the law?
- Stage 4: Is the interference in pursuit of one of the permissible aims set out under Article 8(2)?
- Stage 5: Is the interference proportionate to the permissible aim?

In-Country decision-making

5.39 We sampled a total of 92 cases where a person who was in the UK had applied for either further leave or settlement.

- 47 of these applicants were granted leave under the Immigration Rules;
- 17 of these applicants were refused under the Immigration Rules but granted Discretionary Leave[24] (DL);
- one was refused under the Immigration Rules but granted Leave Outside of The Rules (LOTR);
- 20 were refused under the Immigration Rules and not granted DL; and
- seven were refused under the Immigration Rules, were not granted DL but had extant leave in another capacity.

23 http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/consideringanddecidingtheclaim/guidance/article8oftheechr?view=Binary

24 Discretionary Leave to Remain (DL) is a form of leave granted by the Secretary of State outside the Immigration Rules where exceptional and compassionate circumstances in a case are considered and accepted. The duration of leave granted depends on the exact circumstances of each case but it is unlikely to be more than three years initially.

5.40 All the cases where DL had been granted were cases where the applicant had applied for settlement.

5.41 Caseworkers understood that they were required to consider Article 8 as part of the decision-making process. Indeed, of the 37 cases that were refused under the Immigration Rules where the applicant did not have leave in another capacity, caseworkers considered Article 8 in 34 (92%) of cases.

5.42 However, we were disappointed to find that in 3 of the 20 cases (15%) in which a person without extant leave had been refused outright, there was no evidence that Article 8 had been considered, either in the Agency's refusal letter to the applicant or in looking at the decision-maker's notes on the Agency's electronic caseworking system.

5.43 It is important that caseworkers consider whether their decisions are going to result in a disproportionate interference with people's Article 8 rights and for these reasons to be clear for applicants.

We were disappointed to find that in 3 of the 20 cases (15%) in which a person without extant leave had been refused outright, there was no evidence that Article 8 had been considered

Private and family life

5.44 The first stage in the five-stage approach used by caseworkers is whether an applicant has a family and / or private life in the UK. Unless caseworkers are satisfied that this is established, they do not go on to consider the other four elements of the five stage approach set out above.

5.45 In six cases where Human Rights had been considered, the Agency was not satisfied that the applicant had a family or private life in the UK for the purposes of Article 8. In three of these, the Agency had reasonably concluded that the applicant had not provided sufficient evidence to demonstrate that their relationship with their partner was continuing. However, in the other three cases, the Agency concluded that the length of time that the applicant had been in the UK was insufficient for them to have developed a family or private life. An example of such a case is set out below:

Figure 9: Case study 7 – Failure to demonstrate reasons for rejecting claim to family or private life in the UK

The Applicant:

- was a national of the USA;
- married a British woman in 2008;
- had a British child with his wife (born in August 2010);
- travelled to the UK for the birth of his child and again in December 2010; and
- applied for further leave on the basis of his marriage

UKBA:

- refused the application for further leave under the Immigration Rules; and
- stated that the applicant's time in the UK was not sufficient to have developed a private and family life:

  '*It is noted that you have only ever entered the United Kingdom in a temporary capacity as a visitor for six months at a time. This is not sufficient time to have established a family or private life in the United Kingdom for the purposes of Article 8.*
  Your Article 8 rights are not engaged and therefore these rights are not infringed by this decision.'

Chief Inspector's comments:

Given the circumstances in this case, I am concerned that the Agency did not recognise that the applicant had a family life in the UK and thus failed to assess whether its decision under the Immigration Rules would cause a disproportionate interference with this.

Proportionality

5.46 If the Agency makes a decision that causes an interference with a person's family and / or private life, this has to be proportionate in order for it to be lawful.

5.47 The Agency's approach to proportionality changed in 2008, following a judgment from the House of Lords in the case of Chikwamba v The Secretary of State for the Home Department.[25] Prior to this case, the Agency's policy had been to argue that where there was a procedural requirement that applicants leave the UK and make an application for entry clearance, this is what they should do.

5.48 However, the House of Lords found that the Agency's use of the policy in most cases was wrong and that it would be relatively rare for the Agency to lawfully require an applicant with family in the UK to return home and apply for entry clearance, particularly if children were involved. Consequently, the Agency changed its guidance to say:

> *'Returning an applicant to his/her home country in order to make an entry clearance application may still be proportionate in a small number of cases. All cases must therefore be considered on their own merits and a decision made about whether it is appropriate to expect the individual to go abroad and apply for entry clearance.'*

5.49 In its judgment the House of Lords considered factors that might be relevant to assessing whether requiring a person to leave the UK to apply for entry clearance would be proportionate. These included the degree of disruption to the family, the length of time that it would be for and an applicant's immigration history.

5.50 We found that in four out of 20 (20%) cases where the applicant did not have extant leave and had been refused under the Immigration Rules, the Agency had, as part of its reasoning, stated that the applicant could return to their country and apply for entry clearance and therefore any interference would be proportionate. The applicants in three of these cases had entered the UK legally but had overstayed, while the fourth had entered the UK illegally. All had developed family lives in the UK and two had a child in the UK.

5.51 Requiring the applicants to leave the UK and apply for entry clearance clearly interferes with the family life of both the applicant and their family. Given the House of Lords' judgment, which envisaged that it would be relatively rare for such a requirement to be proportionate, we were concerned to find that the Agency had felt it appropriate to adopt this approach in 20% of the relevant cases in our sample, particularly as two of these cases involved a child. The details of one of these cases are set out below:

25 [2008] UKHL 40

Figure 10: Case study 8 – Example of a case where the Agency said that the applicant could return to their country and apply for entry clearance

The applicant:

- arrived in the UK in October 2006 as a student;
- remained in the UK after her leave had expired in February 2010;
- was married to a person who was settled in the UK, with whom she had a 1 year old child; and
- applied for further leave on the basis of her marriage.

UKBA:

- refused the application under the Immigration Rules; and
- stated as part of its refusal that the applicant could return to her country to apply for entry clearance:

  'It would not be unreasonable for the Secretary of State to expect your client and her family to return to [the applicant's country] to continue family life there or at least return to attempt an application to gain the correct entry clearance. Your client may decide to leave the United Kingdom voluntarily and her husband and child are free to accompany her, should this be their wish, to enable your client to obtain entry clearance.

  In [the applicant's country], all settlement EC applications submitted in April 2011 were outcomed (sic), 98% within 60 days and 100% within 120 days. In view of this, if your client's spouse and child do not wish to travel, there would only be a short period in which your client would be separated from her family should they not wish to accompany your client.'

Chief Inspector's comments:

One potential consequence of requiring the applicant to leave the UK and apply for entry clearance was that she would be separated from her family (including her one-year-old child) for approximately four months. Although the applicant had overstayed her leave, I do not believe that this is the type of case where the House of Lords envisaged that such a requirement would be proportionate.

Recording of reasons

5.52 We found that where Article 8 had been considered and a decision made not to grant on human rights grounds, caseworkers routinely used the five-stage approach referred to above. We noted that there were differing approaches between caseworkers in terms of where they recorded the reasons for refusing cases. Some recorded the reasons for their decisions on both the electronic caseworking system and the reasons for refusal letter that was sent to the applicant. Others only recorded them in the reasons for refusal letter. However, we were able to see the reasons why these cases had been refused.

5.53 Applicants who are refused under the Immigration Rules but who are granted DL are not provided with a letter detailing why they were granted DL. However, we noted that in these cases caseworkers were less likely to set out the reasons for granting DL using the five-stage approach to the consideration of Article 8. Consequently, the extent of the reasons for granting DL that were

recorded on the Agency's caseworking system varied significantly. Whilst all made reference to Article 8, it was not always possible to see why this decision had been reached. An example of such a case is set out below:

Figure 11: Case study 9 – Failure to demonstrate consideration of Article 8 ECHR rights

The applicant:

- applied for indefinite leave to remain on the basis that he was married to a British citizen.

UKBA:

- refused the application as the applicant did not meet the Immigration Rules;
- considered the Article 8 rights of both the applicant and sponsor; and
- noted its electronic caseworking system with the following:

ECHR consideration	Meets family life under Article 8
Main Applicant:	Grant Discretionary Leave? Yes

Chief Inspector's Comments:

I would have expected to have seen the factors that the caseworker considered relevant and why a grant of DL was appropriate on the grounds of Article 8.

Overseas decision-making

5.54 We sampled 135 applications for entry clearance on the basis of marriage. The applicants in:

- 66 cases were granted Entry Clearance under the Immigration Rules; and
- 69 cases were refused under the Immigration Rules.

5.55 If the Agency believes that a decision to refuse an applicant under the Immigration Rules would interfere disproportionately with the Article 8 rights of a person in the UK, it will grant the applicant 'leave outside the Rules' (LOTR). We noted that this had not been issued in any of the cases that we sampled.

5.56 All of the overseas cases sampled were applications for entry on the basis of marriage to a person in the UK. We were therefore surprised to find that Article 8 had not been specifically referred to, either in the decision notice that was issued to applicants, or on the Agency's electronic caseworking database. Indeed, the only overseas post that referred to Article 8 in its decisions was Dhaka, which referred to Article 8 in 18 (95%) of its decisions to refuse the application.

5.57 Although Dhaka's refusal decisions referred to human rights, the wording used was largely standardised and there was no evidence that the individual factors of each case had been considered. Each of the cases included the following:

> *'In reaching this decision to refuse your application, I have given careful consideration to your rights under Article 8 of the European Convention of Human Rights'*

5.58 In our interviews with staff and managers in Bangkok and Kingston, we found that there were differing views about whether, and if so, when, Human Rights should be considered. Some staff told

us that they did not think that they had to consider Human Rights at all, because their guidance[26] stated:

- An entry clearance officer must take Human Rights considerations into account when reaching a decision; and
- UK Ministers believe that the Immigration Rules are compatible with the Human Rights Act. Any proper decision to refuse entry clearance should not be in breach of an individual's rights.

5.59 They had read the second part of this to mean that provided they were satisfied that the correct decision had been made under the Immigration Rules, the decision would not breach an applicant's human rights. Indeed, another set of instructions[27] told staff that they must not:

> *'Routinely include a comment about Human Rights. Entry clearance decisions are already deemed to be compliant with the UK Human Rights legislation.'*

5.60 Others believed that they should consider the human rights of the applicant's family members in the UK, but only if these had been raised specifically in the application, or in cases that had been refused, in the grounds of appeal. Other staff believed that they should consider the human rights of the family members in the UK irrespective of whether they had been specifically raised in the application.

5.61 All staff said that they were able to refer cases that had 'compelling and compassionate' circumstances to the Agency's Referred Cases Unit (RCU) in London, which was able to authorise grants of leave outside of the Rules. Those who thought that they were able to consider Human Rights said that they would refer any cases to RCU, where they thought a decision to refuse entry clearance would cause a disproportionate interference with a person's Article 8 rights.

Figure 12 below shows the number of referrals to RCU:

Figure 12: Number of referrals to RCU for marriage applications[28]

Overseas post	Total applications[29]	Referral following appeal allowed under ECHR Art 8	Other referrals
Bangkok	995	1	2
Dhaka	1690	8	0
Kingston	752	5	1
Moscow	310	0	0
TOTAL	**3747**	**14**	**3**

5.62 The number of referrals to RCU is low in comparison to the number of marriage applications made. Given this, the lack of reference to Article 8 in the majority of cases sampled, and the lack of consensus amongst ECOs about whether they should consider human rights, we do not believe that human rights were being considered by Entry Clearance Officers as frequently as they could, or should have been.

5.63 Applications for entry clearance on the basis of marriage are made on the basis of a familial relationship. Therefore, we believe that where applications are refused under the Immigration Rules,

26 http://www.ukba.homeoffice.gov.uk/policyandlaw/guidance/ecg/ecb/ecb2/
27 'Refusal notices – non PBS'
28 Data provided by the Agency covering Aug 2011 to Aug 2012
29 Data provided by the Agency covering Apr 11 to Feb 2012

ECOs should expressly consider the likely impact of their decision on the Article 8 rights of the applicant's family members in the UK, irrespective of whether they have been specifically raised. Where ECOs believe that the decision would cause a disproportionate interference with these rights, they should refer the case to RCU, who can consider granting LOTR. If, however, they do not believe that their decision would breach a person's Article 8 rights, their reasons for this should be clearly set out in the refusal decision.

Conclusion

5.64 We accept that the Agency's legal obligations to consider human rights are narrower in overseas cases than in those where the applicant is in the UK. Nonetheless, we do not believe that the Agency is giving adequate consideration to Article 8 in all relevant cases. This creates unnecessary uncertainty and stress for those involved and also potentially results in incorrect decisions being appealed, which is costly.

We believe that where applications are refused under the Immigration Rules, ECOs should expressly consider the likely impact of their decision on the Article 8 rights of the applicant's family members in the UK

5.65 It is intended that applications for further leave and settlement assessed under the new Immigration Rules will include an assessment of Human Rights. However, the Agency has yet to consider some[30] applications that were made under the old Immigration Rules. It is therefore important that the Agency takes steps to ensure that these cases are considered appropriately and that the human rights of those involved are approached in a consistent way.

We recommend that the UK Border Agency:

- Ensures that Human Rights are considered consistently in all relevant cases, including overseas;
- Ensures that reasons for its decisions under both the Immigration Rules and Human Rights are properly evidenced, recorded and communicated to applicants.

Timeliness of decision-making

5.66 The Agency had targets, known as 'service standards', for making decisions in applications that are on the basis of marriage..

In-country

5.67 People wishing to apply for further leave or settlement in the UK are able to do so either by applying in person at one of the UKBA's seven regional PEOs or by making an application by post.

5.68 The Agency's service standards for considering in-country applications are set out in Figure 13 below:

Figure 13: UKBA in country service standards

Application type	In Person	Postal
Further Leave to Remain	95 % within 24 hours	20 working days from date of biometric enrolment
Settlement	95% within 24 hours	95% within 6 months from date of application (date of postmark)

30 As of 30 October 2012, 7,157 applications for entry clearance that had been made under the old Immigration Rules had not received a decision.

Temporary migration

5.69 Data provided by the Agency, showed that between April 2011 and March 2012, five of the Agency's regions failed to meet the service standard for applications made in person. Only one region (Scotland and Northern Ireland) achieved the service standard, doing so in four out of 12 months.

5.70 Similarly, the Agency did not meet its service standards for postal applications, with performance ranging from 50% in March 2012 to 87.2% in November 2011.[31]

Permanent migration

5.71 The data showed that two of the Agency's six regions (Scotland & Northern Ireland and Midlands & the East of England) had regularly met the service standards for applications for settlement that had been made in person. However, the other 4 regions had not met the service standard in any of the 12 months that the data covered.

5.72 We noted that the time that the Agency took to consider applications for settlement made by post varied depending on which of the Agency's units considered them. Applications considered in Liverpool were always considered within the service standards for each of the 12 months; those considered in Croydon were sometimes considered within the service standards; whilst those considered in Sheffield were not considered within the service standards in any single month that the data covered.

We do not believe that the Agency is giving adequate consideration to Article 8 in all relevant cases. This creates unnecessary uncertainty and stress for those involved and also potentially results in incorrect decisions being appealed, which is costly

5.73 Given the financial cost for applicants and the emotional impact that waiting for a decision can have on them and their families, we believe that the Agency needs to do more to ensure that it consistently meets its service standards across all of its business areas.

Overseas

5.74 The Agency's service standards for considering applications for entry clearance on the basis of marriage are set out at Figure 14 below:

Figure 14: UKBA overseas service standards

Application type	In Person	Postal
Settlement entry clearance	N/A	95% within 12 weeks from date of biometric enrolment 100% within 24 weeks from date of biometric enrolment

5.75 The Agency had its own performance targets for making decisions within a specific period of time after the application was made. It aimed to make 95% of decisions within 12 weeks and all decisions within 24 weeks. We reviewed data on the Agency's performance at the four overseas posts between April 2011 and February 2012, which showed the following performance in making decisions within 12 weeks:

- Bangkok 99%
- Dhaka 92%

31 Figures apply to postal applications for temporary migration dealt with at UKBA's Sheffield office only.

- Kingston 94% and
- Moscow 99%

5.76 The Agency's performance against the target that all decisions would be made within 24 weeks was:

- Bangkok 100%
- Dhaka 98%
- Kingston 98% and
- Moscow 100%.

Cases outside of service standards

5.77 During our inspection in Sheffield, we found that there were 2,100 cases where people had submitted applications for further leave, which had not been decided and were outside of the Agency's own service standards. We discuss these cases in more detail in Chapter 8.

6. Inspection Findings:

Customs and immigration offences should be prevented, detected, investigated and, where appropriate, prosecuted in accordance with the law.

6.1 We examined how the Agency ensures that applicants do not present a danger to the UK and that applications contain the correct information. We also examined how they ensure that marriages are genuine and subsisting and how applicants who are refused leave are managed following any appeal.

Standard Checks

6.2 The Agency undertakes a number of checks, which it refers to as 'standard checks', to satisfy itself of the above. The Agency's guidance requires that these checks be undertaken on every application. As part of this process, applicants' biometric details are checked against the Police National Computer (PNC) and the Agency's own Warnings Index (WI). Caseworkers and ECOs also carry out a visual check of the passport or travel document submitted.

We were pleased to note that these standard checks were completed as a part of the assessment process in all cases within our file sample

6.3 These checks are carried out automatically once an application record has been created on the Agency's caseworking systems. The results are placed on file and entered onto the Agency's Casework Information Database (CID) or Proviso, for the caseworker or entry clearance officer to refer to when the application is assessed.

6.4 These checks are an integral part of the consideration process as they are designed to minimise the risk that an individual who has a serious criminal record or otherwise poses a threat to the UK will be granted entry clearance, further leave or settlement. We observed caseworkers carefully reviewing the results of these checks as part of their decision-making process.

6.5 We were pleased to note that these standard checks were completed as a part of the assessment process in all cases within our file sample.

PNC checks

6.6 We noted that PNC checks were conducted at the beginning of the process. In settlement cases this was sometimes done many months before a caseworker began to consider the application. Caseworkers informed us that they could only make a decision on a case if the PNC check had been carried out less than three months prior to their decision. Managers told us that the Agency had decided that this was necessary, as if the PNC check was older than three months people might in the meantime have been convicted of offences that could impact on the decision. The Agency's guidance to caseworkers reflected this. As a result, where PNC checks were older than three months when the case was considered, another PNC check had to be requested. We found that this meant that, in some cases, the same PNC checks were requested more than once during the application process, in anticipation of the application being considered in the following three months. This applies to both in-country and overseas applications.

6.7 The Agency's policy was that checks that were less than three months old were reliable. However, it was not clear to us on what basis that decision had been reached and whether the risk of somebody having committed an offence was significantly less if, for example, the PNC check was ten weeks old, as opposed to fourteen weeks.

6.8 Given the potential for undertaking repeated PNC checks, we explored why the Agency did not request them shortly before an application was considered. Staff believed that it was feasible to manage workflow to enable those cases which required additional PNC checks to be identified shortly before they were allocated to a caseworker. However, a senior manager informed us that the Agency's existing case management system was not sufficiently sophisticated to do this. The manager was confident that, when the Agency introduced its Integrated Casework (ICW) programme to this area of work, it would be possible for PNC checks to be undertaken in such a way.

The Agency needs to evaluate whether amendments to its existing process can be made to allow it to manage workflow and thereby carry out PNC checks shortly before applications are considered

6.9 We believe that the Agency needs to evaluate whether amendments to its existing process can be made to allow it to manage workflow and thereby carry out PNC checks shortly before applications are considered. Not only would this reduce the likelihood of repeated checks but it would also ensure that PNC checks are recent.

6.10 Based on the Agency's approach to caseworking described above and assessing the time taken to reach a decision in each case, it is likely that 22 unnecessary PNC checks were undertaken within our in-country sample of 96 cases.

We recommend that the UK Border Agency:

- Introduces processes to minimise the need for repeat PNC checks.

Further checks

6.11 In addition to the standard checks discussed above, the caseworker or ECO has the ability to conduct checks on documents or other evidence that have been included as part of an application.

Checks can, for example, be carried out with:

- HM Revenue and Customs, which can confirm whether employment is registered, and therefore whether payslips or P60s presented are genuine;
- the Department for Work and Pensions, which can confirm whether public funds have been paid to a sponsor or applicant;
- local councils, which can advise whether a single-person discount is given on a property for council tax purposes, (this might be relevant to assess whether an applicant and sponsor cohabit as claimed); and
- the NHS, which can confirm whether any treatment costs are outstanding for the applicant.

6.12 Caseworkers and ECOs were able to obtain information from foreign embassies, High Commissions and law enforcement agencies, via the Agency's Risk and Liaison Overseas Network (RALON). This assisted them to identify applicants who had been refused visas to other countries or who had committed criminal offences which could be relevant when deciding whether or not to issue a visa.

6.13 However, we were told by staff and managers that the Agency had restrictions on the number of further checks it could conduct with some partner agencies. At the time of inspection we were told

that only 250 HMRC checks could be conducted over the course of any calendar month. This had recently been increased from 100 checks per month. These limits are for all in-country casework, not just further leave to remain or settlement through marriage cases. This would frequently mean that the Agency's allocation of checks ran out within days of the beginning of a month. This could result in the consideration of cases being delayed until the following month so that a check could be conducted.

6.14 The value of these checks was acknowledged by all we spoke to. The limits are set as part of a Memorandum of Understanding with HMRC and as a result the Agency had developed a prioritisation system for using this allowance. These are as follows:

- Improving Visa decisions;
- Investigating sham marriages;
- Increasing intelligence capability in relation to criminality and immigration abuse;
- Strengthening caseworker decisions; and
- Providing information to locate absconders.

Both in-country and entry clearance applications on the basis of marriage fall into at least three of these five categories.

6.15 We asked for sight of the policy guidance for caseworkers and ECOs in relation to further checks. We were told that there was no official guidance and that these were conducted at the discretion of the officer or caseworker. While we appreciate that it is important to allow caseworkers to retain the flexibility to conduct checks when they believe it is necessary, clear guidance in this area would assist caseworkers to identify relevant cases and would lead to greater consistency of approach.

6.16 We noted that in some cases further checks might have been of assistance, however these were not always done, as can be seen from the example below:

Figure 15: Case study 10 – Where further checks may have assisted a decision

The applicant:

- applied for indefinite leave to remain on the basis of his marriage to a British Citizen;
- declared that he had no income and that neither he nor his spouse were employed;
- declared that his spouse claimed Working Tax Credits.

UKBA:

- did not note the anomaly between the benefits declared and the income and employment information;
- did not query how much income was derived from the benefits declared;
- were satisfied that maintenance and accommodation were adequate despite the declarations of zero income and no employment.

Chief Inspector's Comments:

Checks with the DWP and/or HMRC would have produced firm evidence of the income and benefits claims of the couple and therefore an accurate picture of whether the applicant had been satisfying the conditions for maintenance and accommodation during his probationary period. I therefore have concerns about the approach that was taken in this case.

6.17 Where further checks had taken place, caseworkers reported that these were meant to be returned within 10 working days from HMRC. While this appeared to happen in the main, caseworkers said they kept a watchful eye on cases where checks had been requested, to ensure that a response was always received. Clearly, these checks had the greatest impact on the service standards of FLR(M) cases, where decisions are meant to take no longer than 20 working days.

6.18 The limit on these checks to 250 per month for an organisation processing several hundred thousand applications a year is insufficient. We were told that steps were being taken to increase this facility to 1,200 per month.

6.19 We believe that the Agency must ensure that it undertakes checks when it is necessary to do so.

Interviews

6.20 We were told that, prior to making a decision on a case, it is possible for the caseworker or ECO to request that an interview of the applicant and / or sponsor be carried out. This could be in the form of either a face-to-face or telephone interview. If a caseworker thinks that an interview is necessary in applications for further and indefinite leave to remain, they seek the agreement of a Marriage Interview Team manager. If approved, the applicant and / or the sponsor will be interviewed by a dedicated Interview Team.

6.21 We noted that an interview had not taken place in any of the 49 settlement cases in our file sample. However, we considered that it would have been beneficial in eight (16%) of these cases.

6.22 The following case study is an example:

Figure 16: Case study 11 – Where an interview may have assisted a decision

The applicant:

- applied for settlement following two years' leave to remain as a spouse;
- submitted his passport, which showed he had been present in the UK for a maximum of only four of the requisite 24 months of his probationary period;
- submitted only two documents to demonstrate that he was living at the marital address; a Job Centre Plus letter and a single bank statement.

UKBA:

- noted the applicant's lengthy absence from the UK and lack of employment and was concerned about this;
- refused the application for indefinite leave to remain because of his absence from the UK, but granted discretionary leave under Article 8.

Chief Inspector's Comments:

In view of the caseworker's doubts about the applicant's employment and the lack of contact with his spouse, an interview with both the applicant and sponsor, or a pre-decision visit, could usefully have assisted the caseworker to reach the correct decision.

6.23 We were told that face-to-face interviews were more difficult to organise for entry clearance applicants and their sponsor(s) and would more frequently be conducted by telephone. This was particularly the case where a person made an application in a country where the Agency did not consider applications (referred to as a 'spoke' location) but sent them to another country (referred to as a 'hub' location). However, it was clear from both our interviews with staff and our file sampling that these practical

difficulties did not prevent posts from interviewing applicants or sponsors. Indeed, we found that applicants were far more likely to be interviewed, albeit by telephone, if they were applying for entry clearance than if they were applying in-country, as can be seen from Figure 17 below:

Figure 17 : Interviewing of applicants and sponsors

Type of application	No. of cases where applicant interviewed	No. of cases where sponsor interviewed	No. of cases where an interview was not conducted but we believe it would have been beneficial
FLR (M)	1 (2%)	1 (2%)	2 (5%)
SET (M)	0 (0%)	0 (0%)	8 (16%)
Entry Clearance	27 (20%)	17 (13%)	14 (10%)

6.24 Both of the overseas posts that we visited had the facilities to carry out face-to-face interviews and ECOs were far more likely to interview a sponsor or applicant than their UK-based counterparts.

6.25 Staff had differing views on whether interviews assisted them to make decisions. Some believed that interviewing assisted them greatly; some others believed that they were of most assistance when refusing a case, whilst others believed that they were of little, if any benefit.

6.26 We believe that if conducted correctly, interviews would benefit the decision-making process. However, it is clear that there is no consensus among staff on the value of interviews and when they should be conducted. Given this, we are pleased that the Agency is conducting an interviewing pilot scheme overseas, in which it is evaluating the benefits that interviews can have in decision-making.

We believe that if conducted correctly, interviews would benefit the decision-making process

Pre-decision visits

6.27 Staff and managers in the UK told us that although interviews were beneficial, greater benefit could be obtained through the use of unannounced visits to an applicant and / or sponsor's address. This method was more likely to result in both a quick and accurate assessment of whether the relationship was subsisting as claimed. Caseworkers cited their concern that it was easy for those sharing communal accommodation, such as students, to satisfy the documentary requirements for cohabitation when the relationship was not, in fact, a genuine one. An example that caseworkers cited was the ease with which an applicant could provide bills or other documents which carried the same address for both the applicant and the sponsor when they were genuinely residing in the same property but were not in a subsisting relationship. Caseworkers told us that an unannounced visit would prove more effective than an interview, as applicants and sponsors could not pre- prepare their answers.

6.28 Home visits can only be conducted by enforcement officers based in Local Immigration Teams (LITs). However we were told that this type of activity was not a national tasking priority for them. Their priority was generally expected to be enforcing the removal of those without a right to remain, rather than conducting enquiries on behalf of another part of the Agency.

6.29 We spoke to two LIT managers, both of whom recognised the benefits of this type of activity. However, they both stated that their priority in relation to marriage cases was to attend wedding ceremonies where there was evidence that the relationships were not genuine.

6.30 One of the managers told us that their LIT had a good relationship with barrier caseworkers working in the Migration Refusals Pool[32] and occasionally received requests to conduct marriage visits from them. The other reported less interaction with caseworkers. Both considered that the current level of resourcing and tasking gave limited scope for work that was not directly related to removals.

6.31 While we recognise the resourcing challenges that carrying out such visits may present, we consider that the information obtained could potentially allow case-owners to make better informed decisions, especially where applicants live in multiple occupancy housing.

We recommend that the UK Border Agency:

- Develops a strategy on the use of interviews and home visits in marriage cases.

32 The Migration Refusal Pool (MRP) is a count of records of refusals of leave where UKBA lacks evidence of departure from the UK or a separate grant of leave. Records will flow into the pool as applications are refused or leave expires and out of the pool as people leave the UK (forcibly or voluntarily), are granted leave, lodge an appeal or new application.

7. Inspection Findings: Safeguarding Individuals.

Functions should be carried out having regard to the need to safeguard and promote the welfare of children.

All people should be treated with dignity and respect and without discrimination in accordance with the law.

Personal data should be treated and stored securely in accordance with the relevant legislation and regulations.

7.1 Section 55 of the Borders, Citizenship and Nationality Act 200933 places an obligation on the Secretary of State to have regard for the need to safeguard and promote the welfare of children who are in the UK, when making immigration decisions.

7.2 The way that this obligation should be approached was considered by the Supreme Court in the case of ZH (Tanzania),34 where a number of important key principles were established, including that:

- the best interests of the child are a primary consideration; and
- children who were British citizens had rights which they would not be able to access if they were removed from the UK; whilst British citizenship was not a 'trump card', the intrinsic importance of it should not be downplayed.

In-country decision-making

7.3 During interviews, staff and managers who were responsible for considering applications for both leave to enter / remain and settlement told us that they were aware of the Agency's obligations under Section 55 and had undertaken a mandatory 'Keeping children safe' electronic training course.

7.4 Given the importance of the case of ZH (Tanzania), we were pleased that staff were both aware of and had received guidance on it. However, some staff told us that, due to the extent of changes to the legal landscape surrounding Article 8 generally and particularly in relation to children, they would have welcomed more tailored guidance. They believed this would have assisted them when considering applications.

33 http://www.legislation.gov.uk/ukpga/2009/11/section/55
34 ZH (Tanzania) –v-SSHD (2011) UKSC11

7.5 Caseworkers we interviewed in both Sheffield and Liverpool told us that they regularly considered cases that involved children. This was supported by the findings of our file sampling, where we noted that 39 of the 92 applications we examined involved at least one child.[35] Staff also told us that where a refusal under the Immigration Rules was likely to have an adverse impact on a child, they would grant Discretionary Leave (DL).

7.6 Leave was granted under the Immigration Rules in 18 of the 39 cases involving children. Of the 21 refused cases, the Agency subsequently granted DL in 10 (48%) cases and a further 1 had extant leave in another capacity. All the grants of DL followed a refusal of settlement, rather than further leave, under the Rules.

7.7 Given the Agency's obligations to consider the best interests of a child, we examined the reasons why the Agency had not granted DL in the remaining 10 cases where an application had been refused under the Rules and did not have extant leave in another capacity.

7.8 We noted that in one case the caseworker had specifically considered Section 55 and the potential impact on the child of the refusal of leave to the child's parent. In doing so, they considered a number of factors, including whether the child could continue to have a family life if, following refusal, they returned to their country of origin, and particularly the accessibility and standards of education and healthcare that the child might require in their country.

7.9 However, in the remaining nine cases we noted that there was no specific consideration of Section 55. The courts have held[36] that the Agency's decisions do not have to refer specifically to Section 55 in order for them to be lawful. What is important is the substance of attention given to the overall well-being of the child. However, as a matter of best practice we would have expected caseworkers' notes and their decisions to have made specific reference to the best interests of the child.

7.10 The case below is an example where we had concerns that the Agency had not specifically considered the best interests of the child:

Figure 18: Case study 12 – Failure to consider the best interests of children in UK-based decision-making

The applicant:

- arrived in the UK as a visitor;
- applied within the visitor period for leave to remain on the basis that he was married to a British citizen;
- had an 8-month-old child with his wife.

UKBA:

- refused the application on the basis that the applicant did not meet the requirements of the Immigration Rules;
- considered the applicant's human rights noting '*you have only ever entered the United Kingdom in a temporary capacity as a visitor for six months at a time. This is not sufficient time to have established a family or private life in the United Kingdom for the purposes of Article 8. Your Article 8 rights are not engaged and therefore these rights are not infringed by this decision.*'
- did not consider the impact of its decision on the child of the relationship.

35 For our inspection of applications we defined children as being the offspring of either the applicant or the sponsor (or both) being under 18 years old at the time the application was submitted.

36 AJ (India) v Secretary of State for the Home Department [2011] EWCA Civ 1191

Chief Inspector's Comments:

Given that the best interests of the child are a primary consideration, we would have expected that these would have been expressly considered, including what, if any, impact refusing to grant further leave to the applicant was likely to have on the child.

7.11 The lack of specific reference to the best interests of the child in the paper files or the Agency's electronic caseworking system meant that we were unable to determine whether the Section 55 duty had been considered. Given the potential impact of the Agency's decisions on children, we would expect the Agency's notes to be explicit in setting out a consideration of the best interests of the child.

Overseas decision-making

7.12 Entry Clearance staff told us that the majority of applications for entry clearance on the basis of marriage did not involve children. Where they did, the child would often be overseas with its parent at the time of the application, rather than in the UK. Of the 157 overseas cases that we sampled, 57 involved a child. Of these, leave had been granted under the Immigration Rules in 20, whilst it had been refused in 37.

7.13 The Agency's statutory obligations under Section 55 do not apply to children who are outside the UK. However, the Agency's guidance for overseas decision-makers advises that they must act in the spirit of this duty where they have reason to suspect that a child may need protection or safeguarding, or has welfare needs that require attention, as is set out below:

> *'The statutory duty in section 55 of the 2009 Act does not apply in relation to children who are outside of the United Kingdom. However, UK Border Agency staff working overseas must adhere to the spirit of the duty and make enquiries when they have reason to suspect that a child may be in need of protection or safeguarding, or presents welfare needs that require attention.'*[37]

7.14 Staff whom we interviewed in Bangkok and Kingston were aware of this instruction and told us that they applied it when considering relevant cases.

A decision to refuse entry clearance to an applicant who has a child in the UK could breach the Article 8 rights of the child if their parent is unable to join them. Therefore a consideration of the best interests of the child, as part of any Article 8 assessment, may also be necessary in overseas cases involving children in the UK.

We reviewed the 37 cases where an application for entry clearance on the basis of marriage had been refused under the Rules and involved a child who was in the UK. The best interests of the child were not specifically referred to in any of these cases

7.15 We reviewed the 37 cases where an application for entry clearance on the basis of marriage had been refused under the Rules and involved a child who was in the UK. The best interests of the child were not specifically referred to in any of these cases.

7.16 In the absence of any reference to the best interests of the child, in either paper or electronic files or notes, we were unable to determine whether Entry Clearance Officers had considered the Agency's guidance on acting in the spirit of the legislation or not.

37 'Every Child Matters: Change For Children. Statutory guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children.' November 2009. Para 2.34

7.17 The consideration of a child's best interests will only take place when a case is to be refused under the Immigration Rules. It should then form a component of the assessment of whether the decision is proportionate under Article 8 ECHR.[38] However, as we reported previously in Chapter 5, the Agency tended not to set out a detailed consideration of Human Rights legislation when considering applications made overseas.

7.18 If consideration of Article 8 ECHR is not taking place, it is not necessarily surprising that decision-makers overseas do not routinely set out their assessment of the impact of a decision on children in cases where they should. Giving explicit consideration to the best interests of the child in all relevant cases, irrespective of whether Article 8 has been specifically raised by the applicant, should ensure that children's best interests are fully taken into account when decisions are made, which, in turn, will improve the quality of initial decisions.

We recommend that the UK Border Agency:

- Ensures that the best interests of the child are considered in all relevant cases and that these are expressly referred to in both notes and decisions to refuse applications.

Keeping applicants informed

7.19 The Agency's service standards are published on its website, which allows applicants to see how long they can expect to wait for decisions to be made on their cases.

7.20 The Agency requires that its posts overseas ensure that information about processing times is up to date.[39] We were pleased to find that current processing times for a range of different types of visa are readily available on UKBA's website.[40] In addition, we welcome the fact that some of the Agency's overseas posts had taken additional steps to provide potential applicants with information on periods of peak demand for visas. This allowed them to plan when to submit their applications. For example, applicants considering submitting an application to Bangkok were informed that the number of applications increased in the run up to Songkran[41] and that potential applicants could submit their application earlier.

7.21 Given the uncertainty and the costs involved for applicants, we asked the Agency whether it contacted applicants when it appeared that a decision was likely to take longer than the Agency's service standards. We were told that the Agency did not routinely contact individuals, however more generic information on delays was available on either an individual post's website (for applications made overseas), or the Agency's main website (for decisions made in the UK). Indeed we noted that on 22 June 2012 the Agency's website was updated to advise of 'Delays in making decisions to settlement applications in the UK'.

The Agency should ensure that children's best interests are fully taken into account when decisions are made, which, in turn, will improve the quality of initial decisions

7.22 A senior manager told us that writing to individual applicants to inform them of delays in their cases would be an ineffective use of resources, which could otherwise be used to consider applications and reduce processing times. They also suggested that writing to applicants in this way might cause them to respond. This would require the Agency to use more resources to deal with correspondence, which in turn would divert staff from making decisions. This emphasises the importance of making decisions quickly.

38 Assuming that it is accepted that family / private life exists and will be interfered with by the decision.
39 UKBA's Operational Process Instruction (OPI) 164.
40 http://www.ukba.homeoffice.gov.uk/visas-immigration/general-info/processing-times/
41 Thai New Year.

7.23 During our inspection we found that there were two groups of people who had, in some cases, been waiting for a decision on their application for a significant amount of time. These were individuals who had applied for further leave but had not had a decision and those who had been refused further leave but had then submitted reconsideration requests. We discuss these in more detail in Chapter 8.

7.24 However, despite applicants having waited in some cases for nine years for a decision, the Agency did not have processes to ensure that they were kept informed about what was happening on their case. We believe that the Agency should do more to ensure that applicants who have waited for prolonged periods for a decision are kept informed in a timely and accurate manner about progress on their case.

We were pleased to find that current processing times for a range of different types of visa are readily available on UKBA's website

Personal data

7.25 The Agency is subject to the provisions and restrictions of the Data Protection Act 1998 (DPA). The DPA is the law that regulates the 'processing' (collection, storage, sharing and deletion) of 'personal data' (information that identifies a living individual, for example: name, date of birth, nationality, address).

7.26 The Agency's files relating to applications for leave to enter and remain contain personal data and, in some cases, sensitive personal data. In order to comply with its obligations under the DPA, the Agency needs to process such information fairly and lawfully. In particular, it should take the appropriate measures to prevent unauthorised or unlawful processing, accidental loss or destruction of, or damage to, personal data. Previous inspections have made recommendations for the Agency in this area.[42] Several recommendations have been made about safeguarding the personal information of applicants by ensuring that files contain data relevant only to the subject of that file.

7.27 We observed the handling of documents and files both in the UK (Liverpool and Sheffield) and overseas (Kingston and Bangkok). We were pleased to note that each of these operated a 'clear desk' policy which was adhered to closely. Access to original documents was restricted to those who had a clear need to handle them, files were kept in pouches and locked away at the end of each working day. In Bangkok, very sensitive data (relating to intelligence held on applicants or their sponsors) was restricted to a single room and access was monitored by a 'gatekeeper'.

We believe that the Agency should do more to ensure that applicants who have waited for prolonged periods for a decision are kept informed in a timely and accurate manner about progress on their case

Data Handling

7.28 As part of file sampling, we reviewed three areas relating to data handling:

- Whether requests by a third party (such as a sponsor or MP) which would have revealed personal data or circumstances, were handled correctly;
- In SET (M) cases where the sponsor and applicant were estranged, whether requests for data from the sponsor were handled correctly; and
- Whether files or electronic records contained inappropriate data which did not relate to the original application.

42 Recent reports containing relevant recommendations include those on the Detained Fast Track, and the management of Foreign National Prisoners. These reports, and others, can be viewed here:http://icinspector.independent.gov.uk/inspections/inspection-reports/

7.29 Of the 227 cases sampled, we were pleased to note that there were only two cases (less than 1%) where information about an unrelated person was held on file. This is an improvement on the file management observed in the FNP inspection where 8% of files contained personal information unrelated to the case.

File Management

7.30 The Agency had some difficulty in identifying files that were in scope for our inspection. We requested data on applications relating solely to applications for FLR (M), SET (M) and entry clearance to join or accompany a spouse. Of the 100 selected for sampling from in-country applications, eight of these were out of scope. Of the 157 cases received out of 160 cases requested from entry clearance applications, a total of 22 were out of scope. A breakdown of the cases that were out of scope is set out in Figure 19:

Figure 19: Files that were out of scope

Post	No. of out of scope files received	Reason files were out of scope
Other	1	Marriage application from 2003 which was dealt with as an administrative refusal because the applicant left the UK in 2010.
Sheffield – FLR(M)	4	1. Related to a decision under the Points Based System, where an Immigration Judge allowed the appeal as a spouse of a person settled in the UK. 2. 3 partner applications where the partner was not a spouse or civil partner
PEO – FLR(M)	3	3 partner applications where the partner was not a spouse or civil partner
Bangkok	6	Fiancée applications sent in error
Dhaka	0	
Moscow	14	Fiancée applications sent in error
Kingston	2	Fiancée applications sent in error

8. Inspection Findings: Continuous Improvement

The implementation of policies should be continuously monitored and evaluated to assess the impact on service users and associated costs.

Risks to the efficiency and effectiveness of the agency should be identified, monitored and mitigated.

Applications awaiting initial consideration

8.1 Agency staff in Sheffield told us that there were a large number of cases where applicants had sought further leave to remain that had not had initial decisions. Sheffield had inherited approximately 2,100 temporary migration cases in March 2012, following a decision to transfer these from a unit in Croydon. We were told that these cases tended to be 'complex' and that some dated back to 2003. The Agency was unable to tell us how many of the applications related to marriage.[43]

Sheffield had inherited approximately 2,100 temporary migration cases in March 2012, following a decision to transfer these from a unit in Croydon. We were told that these cases tended to be 'complex' and that some dated back to 2003

8.2 We are concerned that this backlog of cases has been allowed to develop. As a result, some applicants have been waiting for considerable periods of time for their cases to be resolved. This situation causes anxiety, uncertainty and frustration for those individuals and their family members. Delays in deciding applications also mean that enforcement action is likely to be more difficult in the event that the case is ultimately refused. This is because the individual will have been in the UK for a number of years and may have developed a family and / or private life.

8.3 We were told that the Agency had agreed to promote 38 permanent members of staff on a temporary basis and to recruit additional temporary staff to deal with these cases. It was anticipated that the applications would be decided within six months.

8.4 We welcome the fact that the Agency is taking a proactive approach to the management of these cases. Nonetheless, as some of the staff allocated to this exercise have been moved from considering new applications, there is a risk that there will be an impact on the Agency's ability to meet service standards for those cases. It must take steps to ensure that delays in deciding new cases are kept to a minimum while the older cases are cleared.

43 Information provided to us by the Agency following our inspection suggested that 180 of these related to marriage.

Reconsideration of applications that had been refused

8.5 The Agency informed us on 27 September 2012 that it had approximately 14,000 cases where applicants had been refused further leave to remain and had subsequently requested re-consideration of these decisions. Staff and local managers whom we interviewed in Sheffield told us that these cases had been placed 'on hold', pending the implementation of a policy on the handling of reconsideration requests.

The Agency informed us that it had approximately 14,000 cases where applicants had been refused further leave to remain and had subsequently requested re-consideration of these decisions

8.6 The circumstances in which applicants might ask that their case be reconsidered included where the Agency had reached the wrong decision based on the evidence; where it had failed to consider evidence that had been submitted; or where the applicant had submitted new evidence and / or reasons why the decisions should be reconsidered. The Agency's own management information indicated that the number of cases that had been placed on hold pending a decision on reconsideration was increasing at the rate of approximately 700 a month, as can be seen below:

Figure 20: Number of temporary migration applications awaiting reconsideration[44]

Month end	Number
Mar 2012	10000
Apr 2012	10,500
May 2012	11,300
Jun 2012	12,000
Jul 2012	12,700
Aug 2012	13,444

8.7 The Agency told us that the figures related to a number of different types of application. They had not broken these down by category and were therefore unable to specify how many reconsideration requests related to marriage or civil partnership applications. We believe that this is unacceptable.

8.8 Staff and local managers in Sheffield told us that their understanding was that any request for reconsideration had to be dealt with before the Agency could take enforcement action. This is the correct legal position where a reconsideration request is made on human rights grounds. In such circumstances, the request would need to be examined by the Agency under paragraph 353 of the Immigration Rules to establish whether it should be dismissed as further representations or accepted as a fresh human rights claim. Under paragraph 353A of the Rules, removal cannot occur until the submissions have been considered.

The Agency were unable to specify how many reconsideration requests related to marriage or civil partnership applications. We believe that this is unacceptable

8.9 However, an Agency senior manager told us that they were not aware that cases had been placed on hold pending the introduction of a policy on the handling of reconsideration requests. In their view, there was nothing to stop the cases from being progressed in the absence of a policy. We were concerned to find that they were unaware of the decision to place the cases on hold, as, given the numbers involved, we would have expected such a decision to have been approved by the Agency Board. A policy on the handling of reconsideration requests needs to be put in place without further delay, so that the cases can be progressed and applicants and their families given greater certainty about their future.

44 Data provided by the Agency described as 'best approximation'.

8.10 Once a policy is introduced, managing these cases efficiently and effectively will be challenging, as the Agency will still need to deal with new applications for further leave and new reconsideration requests from those who are refused leave. To do this, the Agency will require sufficient resources and careful workflow management. In the first instance, it must improve its management information on reconsideration requests, given that it was unable to tell us how many of the cases that it had placed on hold related to marriage and civil partnership applications. Unless it can improve the data it holds, it will not be able to plan and allocate resources effectively to ensure that the cases are dealt with.

A policy on the handling of reconsideration requests needs to be put in place without further delay, so that the cases can be progressed and applicants and their families given greater certainty about their future

We recommend that the UK Border Agency:

- Urgently addresses the backlog of 14,000 cases where an application for reconsideration has been made, and makes an initial decision in the 2,100 temporary migration cases.

Analysis of appeal data

8.11 People applying to enter or remain on the basis of marriage whose application is refused can appeal against this decision to HM Courts and Tribunals Service (Immigration and Asylum Chamber). They can appeal on a number of grounds, which include that the decision was:

- not in accordance with the immigration Rules;
- unlawful under the Race Relations Act; and
- unlawful under the Human Rights Act.

8.12 Data provided by the Agency showed that between April 2011 and March 2012, the majority[45] of people whose application had been refused appealed against this decision. According to data from Her Majesty's Courts and Tribunals Service, over 50% of applicants who appealed against the refusal of their application were successful, as can be seen below:

Figure 21 : Appeal outcomes April 2011 – February 2012

Post/Workstream	Allowed	Dismissed	Other6[1]
Overseas posts	54%	39%	7%
FLR(M)7[2]	51%	36%	13%
SET(M)	53%	35%	12%
TOTAL	**53%**	**38%**	**9%**

8.13. We believe that the number of decisions that are overturned at appeal is too high. The Agency needs to improve the quality of its initial decision-making, to avoid the cost of unnecessary legal challenges and to reduce the proportion of allowed appeals where its refusal decisions are challenged. Better initial decisions would also remove the uncertainty and associated stress placed on applicants and their families while an ultimately successful legal challenge is ongoing.

45 The following percentages appealed: 79% of those whose application for further leave to remain was refused; 69% of those refused settlement; and 55% of those whose application for entry clearance was refused.

8.14. One way that the Agency could improve the quality of its initial decisions is by making better use of the information contained in appeal determinations,[46] both allowed and dismissed, in order to understand why some decisions are overturned and others are not. As well as minimising unnecessary litigation, improving the quality of the Agency's initial decisions would also give applicants and their representatives greater confidence in the reliability of the Agency's decision-making process.

8.15 Each of the Agency's business areas had undertaken some analysis of appeal data in an attempt to understand why appeals were being allowed. In Liverpool, for example, staff kept a spreadsheet of all allowed appeals in permanent migration cases, which set out the reasons why the Agency's initial decisions had been overturned. Deputy Chief Caseworkers regularly reviewed the spreadsheet and emerging trends were analysed and communicated to senior caseworkers on a monthly basis. The spreadsheet demonstrated that of the 524 permanent migration appeals allowed between January 2011 and March 2012, 28 related to marriage applications, of which 27 had been analysed.

The Agency needs to improve the quality of its initial decision-making, to avoid the cost of unnecessary legal challenges and to reduce the proportion of allowed appeals where its refusal decisions are challenged

8.16 In addition, we saw examples where individual units were carrying out their own analysis of appeal determinations. Staff in Bangkok informed us that between April 2011 and February 2012 they had received 722 appeals against their decisions. Of these, 378 related to settlement applications, including marriage. Analysis of each of these received appeals by an Entry Clearance Manager (ECM); this meant that the Bangkok appeals review team could:

- readily identify the outcome of all received appeals;
- analyse and categorise the reasons why challenged decisions had resulted in a successful or unsuccessful appeal;
- identify trends or patterns emerging from the appeal determinations; and
- issue local updates and advice to the decision-makers relating to individual scenarios or overarching trends.

8.17 This was good practice and in line with recommendations we have made in previous reports[47] that the Agency needs to do more to analyse allowed appeals.

8.18 However, we found that while caseworkers and ECOs often saw appeals that had been allowed, they did not routinely see determinations in cases where their initial decisions had been upheld at appeal. We believe that if staff were given the opportunity to review all of their determinations, it would allow them to better understand why some of their decisions are overturned, whilst others are upheld, and to use this information to improve the quality of their decisions.

8.19 We welcome the focus on appeals analysis in individual business areas. Nonetheless, there is scope for a more strategic, Agency-wide approach to the analysis of appeals in marriage cases, given that similar issues arise both overseas and in-country. This would allow emerging trends to be identified and lessons to be learnt and applied across business areas. Responsibility for appeals within the Agency was centralised under the Appeals and Litigation Directorate in August 2012. The Agency told us that this would facilitate the introduction of a strategic approach to the analysis of appeal determinations. In advance of the introduction of strategic appeals analysis for marriage cases, we believe that information on appeal outcomes should be shared proactively between business areas that consider marriage applications.

46 Immigration Judge's written decision.
47 E.g. Asylum: Getting the Balance Right? (2010) & A thematic inspection of how the UK Border Agency manages foreign national prisoners (2011).

8.20 We found, in light of the centralisation of responsibility for appeals, that there was some confusion over whether the Appeals Directorate or individual business areas were expected to analyse allowed appeals. If the full benefits of the new structure are to be realised, the Agency needs to ensure that all staff understand the remit of the centralised team and what, if any, additional analysis is expected of each of the Agency's business areas.

We recommend that the UK Border Agency:

- Adopts a systematic approach to reviewing and analysing appeal outcomes in marriage cases in order to improve the quality of decisions.

Inconsistent challenge to allowed appeals

8.21 Where an Immigration Judge allows an appeal in the applicant's favour, the Agency may seek permission to appeal against that decision if it believes that there is a material error of law in the determination. Staff that we spoke to believed that the ability to challenge allowed appeals was an important safeguard, meaning that decisions that were considered by the Agency to be wrong in law could be challenged. The unit within the Agency that is responsible for analysing allowed appeal determinations and deciding whether to seek that permission is the Specialist Appeals Team (SAT).

There is scope for a more strategic, Agency-wide approach to the analysis of appeals in marriage cases, given that similar issues arise both overseas and in-country

8.22 During our inspection, staff and managers raised concerns that the SAT had, on occasion, declined to review allowed appeals due to a shortage of staff. Indeed, during our file sampling we found evidence to corroborate these concerns. In one entry clearance case the following minute dated 3rd April 2012 was written by SAT:

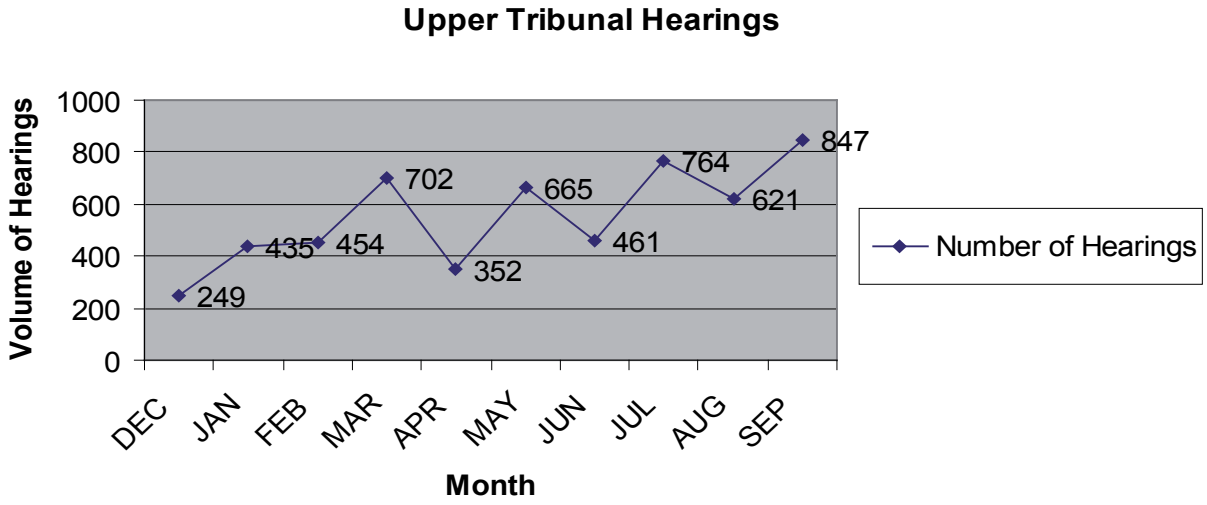
> ' **To ECM/ ECO:**
>
> *The high volume of allowed appeals received by the Specialist Appeals Team and the pressure on our resources have meant that we have not been able to consider whether there are any errors of law in this determination. A late application for permission to appeal will not be accepted by the Tribunal.*
>
> *I would be grateful if you could now act in accordance with any directions given by the Tribunal or, if none have been given, the spirit of the determination in light of the applicant's current circumstances.'*

8.23 The failure to consider whether or not an allowed determination contains an error in law is of concern, as:

- there is a risk that the Agency might not be challenging determinations that it would have considered wrong in law had it reviewed them. Consequently, it might have granted leave on the basis of these; and
- Agency staff who made the decision may feel demoralised, given their view that the Agency has not challenged the determination in support of their decision.

8.24 When we raised our concerns, we were informed that the Agency was aware that there had been a lack of resources in SAT and that, as a result, it had not reviewed all allowed appeals. We were told that this had arisen because SAT had received a large number of allowed appeals and the number of hearings at the Tribunal's Upper Tier, where SAT represented the Agency, had increased. Data provided by SAT detailing the increase in these hearings between December 2010 and September 2011 is set out below:

Figure 22: Tribunal Upper Tier Hearings Dec 2010 – Sep 2011



Note: Management information provided by UK Border Agency SAT.

8.25 The Agency had prioritised the use of SAT to represent it at Upper Tier hearings. However, this affected its ability to review allowed appeal determinations. We noted that SAT's inability to review all determinations had been ongoing for some time. Indeed, the Agency's paper, which we refer to above, which dated from 2011, said, 'SAT managed to review roughly 90% each month.'[48] This performance deteriorated further during 2012, as the following figures provided to us by the Agency in October 2012 demonstrate:

Figure 23 : Volume of Allowed Appeal Determinations (Dets) Reviewed by SAT

Month/Year	Det's Received	Dets' Allocated	Percentage (%)
January 2012	3798	1818	48
February 2012	3523	1114	32
March 2012	3790	1111	29
April 2012	2774	603	22
May 2012	2666	789	30
June 2012	3160	1335	42
July 2012	2893	1280	44
August 2012	2713	1674	62
September 2012	2265	2341	100

48 UKBA: 'Specialist Appeals Team: Report V'

8.26 We were told that the Agency had taken steps to recruit additional staff for SAT, so that the Agency could be represented at Upper Tier appeal hearings and consideration could be given to all allowed appeal determinations. This may be reflected in the much improved performance during September 2012, when more appeal determinations were reviewed by SAT than were received by it. Whilst we are pleased that steps had been taken to recruit new staff, it is, nonetheless, a cause for concern that these additional resources were not put in place earlier. As the table above demonstrates, between January and July 2012, SAT was consistently reviewing less than half of all appeals determinations. In April 2012, this figure fell to only 22%. This is unacceptable, as it means there is a risk that individuals were granted entry clearance or leave on the basis of appeal determinations that the Agency could have successfully challenged.

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Implementation of the new Rules

8.27 Changes to the family migration Immigration Rules were announced by the UK government on 11 June 2012 as part of their programme of reform of the existing immigration routes and came into effect on 9 July 2012.[49]

8.28 Given the timing of this inspection, we did not examine in any detail the steps taken by the Agency to manage applications that were made under these Rules. However, during the inspection we saw detailed plans for the development of training for and implementation of these Rules. We were pleased to be told by staff and managers working across the Agency's business areas that there had been effective communication about the new changes and that comprehensive training and guidance was in place to support them when considering applications under the new Rules.

49 http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2012/june/13-family-migration.

Appendix 1: Glossary

Term	Description
A	
Agency	Refers to the United Kingdom Border Agency.
Article 8 (European Convention of Human Rights)	A person may claim that their removal or deportation would breach Article 8 where it would interfere with their family and private life.
Audit Trail	Chronological list of events.
B	
Biometrics	All applicants are now routinely required to provide 10 digit finger scans and a digital photograph when applying for a United Kingdom visa or leave to remain. There are some minor exceptions to this rule, e.g. Heads of State and children under five.
British Citizenship	A person who holds British citizenship has the right to apply for a British passport, live in the UK permanently and leave and re-enter the UK at any time.
C	
Case Owner/ Caseworker	The UK Border Agency term for an official responsible for processing applications for leave to remain.
Case Information Database (CID)	An electronic record management database used by the Agency. It is designed to record all applications for leave to remain and all casework activity to provide an audit trail of each case.
Case Reference System (CRS)	An electronic record management database used by the Agency in the UK to view applications and casework activity on entry clearance applications. Similar to Proviso.
D	
Discretionary Leave (DL)	A form of immigration status granted when an applicant would not qualify for leave under the immigration Rules but where there is significant reason why they should not be removed from the UK
E	
Entry Clearance	Also referred to as a visa. Leave to enter granted by an Entry Clearance Officer at a UK High Commission or Embassy overseas, or by an Entry Clearance Officer at UK Visas based in the UK.
Entry Clearance Officer	An officer of Executive Officer level who makes decisions on entry clearance applications.

H	
Hub and spoke	Prior to 2007, virtually all British diplomatic missions had a Visa Section. Each worked largely independently, handling all aspects of visa processing including taking decisions on site. The 'Hub and Spoke' system was introduced to move away from the traditional model that was based on the physical presence of the Visa Section. Applications can be moved from the collection point (the spoke) to the processing point (the hub). This separation between the collection network and the decision-making network aims to improve the quality and consistency of decision-making, efficiency and flexibility. Work can be moved to staff rather than the other way round.
Human Rights Act (1998)	Legislation, which took effect on 2 October 2000, which meant that the UK's domestic courts could consider the European Convention of Human Rights.
I	
Immigration Liaison Manager (ILM)	UK Border Agency job title which encompasses posts previously known as Airline Liaison Officers (ALOs) and Risk Assessment Managers (RAM).
Immigration Tribunal (Immigration and Asylum Chamber)	An independent court where applicants with the right of appeal can appeal against immigration decisions made by the Agency. The Tribunal is presided over by an Immigration Judge and the UK Border Agency is often present to defend the initial decision to refuse asylum. It replaced the Asylum and Immigration Tribunal (AIT) on 15 February 2010.
Independent Chief Inspector of Borders and Immigration	A publically funded inspectorate established by the UK Borders Act 2007 to examine the efficiency and effectiveness of the UK Border Agency. The Chief Inspector is independent of the UK Border Agency and reports directly to the Home Secretary.
International Operations and Visas	The overseas arm of the UK Border Agency, responsible for running visa operations in 135 countries. Formerly known as UK Visas and then International Group.
L	
Local Immigration Team (LIT)	A LIT is a local team undertaking as many functions as possible at a local level for the Agency. They focus on enforcement work and community engagement, although functions of LITs can vary between regions.
O	
Omnibase	UK passport database.

P	
Proviso	The database used by overseas visa sections as the audit trail of entry clearance applications. It records all details of an entry clearance application from the date of application.
R	
Risk and Liaison Overseas Network (RALON)	An amalgamation of the former Airline Liaison Officer Network and Overseas Risk Assessment Unit Network. RALON has responsibility for identifying threats to the UK border, preventing inadequately documented passengers from reaching UK shores, providing risk assessment to the UK Border Agency visa issuing regime and supporting criminal investigations against individuals and organisations which cause harm to the UK.
S	
Settlement application	Application to come to the UK on a permanent basis, most commonly as the spouse or other dependent of a British Citizen or a UK resident.
U	
United Kingdom Border Agency	The agency of the Home Office responsible for considering applications for permission to enter and stay in the UK. The UK Border Agency has been a full executive agency of the Home Office since April 2009.
V	
Verification checks	Checks to assess the authenticity or validity of documents submitted by applicants or their sponsor's when making an application for entry clearance.

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Assistant Chief Inspector:	**Mark Voce** **Dr Rod McLean**
Lead Inspector:	**Gareth Elks**
Inspection Officers:	**Sally Allbeury** **Chris Thompson** **Melanie Harris**