

## **ILPA to the Migration Advisory Committee re Ongoing Migration Advisory Committee Projects: Family Migration Consultation Paper**

The Immigration Law Practitioners' Association (ILPA) is a professional association with some 900 members (individuals and organisations), the majority of whom are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics and non-governmental organisations are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous Government, UK Border Agency and other, consultative and advisory groups.

ILPA will be providing a full response to the **Family Migration Consultation paper issued on 13 July 2011** paper by the closing date of 6 October 2011.

We note from the document "*Ongoing Migration Advisory Committee Projects, August 2011*" that you been asked a question in connection with the Family Migration Consultation. It states that the government has asked the Committee to answer the following question: -

*"What should the minimum income threshold be for sponsoring spouses/partners and dependants in order to ensure that the sponsor can support his/her spouse or civil or other partner and any dependants independently without them becoming a burden on the State?"*

We appreciate that the Committee has not issued a formal call for evidence but note MAC is happy to receive written views in connection with this matter by mid-September at the latest. This submission provides the view of ILPA.

It is ILPA's position that the minimum income threshold should be equal to the income available to an equivalent British family relying upon income support. This is explained in greater detail below.

However, at the outset, we wish to bring to your attention that this question has already received judicial scrutiny. Independent Immigration Judges of the Asylum and Immigration Tribunal (as it was then known) considered this question in *KA and Others (Adequacy of maintenance) Pakistan* [2006] UKAIT 00065.

They stated in regard to this question:

*"Although it may be said that there is an element of imprecision in the relevant Immigration Rules, the requirement that the maintenance be "adequate" cannot properly be ignored. To our mind the use of that word imposes an objective standard. It is not sufficient that maintenance and accommodation be available at a standard which the parties and their family are prepared to tolerate: the maintenance and accommodation must be at a level which can properly be called adequate.<sup>1</sup>*

<sup>1</sup> Paragraph 6 of *KA and Others (Adequacy of maintenance) Pakistan* [2006] UKAIT 00065

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*“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.”<sup>2</sup>*

We provide below an expansion of the simple point made above, that the answer to the question set for Commission is ‘income support’. We also deal with the justifications for proposed change put forward by the UK Border Agency in the Family Migration consultation paper and ILPA's responses to them.

### **ILPA's position**

The immigration rules already require that the applicant can be maintained and accommodated without recourse to public funds.<sup>3</sup> The visa, or grant of leave to remain, of two years, will clearly show that a successful applicant does not have ‘recourse to public funds.’

The effect is that, to have a successful application, the applicant must provide evidence that they can be maintained without recourse to public funds and, importantly, while present in the United Kingdom during the two year ‘probationary period’, they will not be able to access public funds. The relevant agency will check whether recourse is allowed before granting public funds. If any applicant were to rely on public funds (though they should not have been granted them), they could be refused indefinite leave (permanent residence) at the end of the probationary period, or their leave can be curtailed during the probationary period.

To meet the maintenance requirement, an applicant must show maintenance equal to, or in excess of, the funds available to an equivalent British family relying upon income support.

It is ILPA's position that because

- (1) the immigration rules already require ‘no recourse’,
- (2) ‘no recourse’ is a condition of leave in the United Kingdom, and
- (3) there is a negative consequence of obtaining public funds,

then no change to the current position is required to achieve the aim of ‘reducing the burden to the taxpayer’.

It is further ILPA's position that no change to the level of maintenance can be required because, if income support is not sufficient for this, it must follow that benefits for British citizens are not set at a reasonable level. ILPA does not accept the UK Border Agency's apparent position that welfare benefits in Britain are inadequate.

However, the family migration consultation paper does propose change. It gives justifications for change and proposals and these are dealt with below.

### **Justifications for change in consultation paper**

The justifications for change, given at different points of the paper, are as follows:

- (1) It can be difficult to apply the maintenance requirement consistently.

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<sup>2</sup> Paragraph 7 of *KA and Others (Adequacy of maintenance) Pakistan* [2006] UKAIT 00065

<sup>3</sup> For example, in relation to spouse visas, see paragraphs 281 (iv) and 281 (v) of the immigration rules.

- (2) Although an applicant must show maintenance equal to, or in excess of, the funds available to an equivalent British family relying upon income support levels, it is difficult for the UK Border Agency and sponsors to know if the level of income support is met.<sup>4</sup>
- (3) *“Recent analysis.....highlighted..... the significant differences between income levels of both sponsors and applicants.”*<sup>5</sup>
- (4) 70% of applicants will be reliant upon the sponsor unless they intend to seek employment in the UK<sup>6</sup>
- (5) *“Around 6% of sponsors sampled were not in employment, and around 7 percent earned less than £5000 per annum (the current level of basic income support for a couple), indicating they may struggle to support a spouse or partner, let alone dependents.”*<sup>7</sup>

On these points, ILPA notes the following.

***It can be difficult to apply the maintenance requirement consistently.***

It is ILPA members’ experience that Embassies across the world do currently refuse if they are not satisfied that there are sufficient funds available and/or there is not clear evidence to show those funds and this is indeed confirmed in this section of the consultation paper where it is stated that “A recent survey of visa posts... reported that initial refusal on the basis of maintenance and accommodation was the main reason for refusing the application in at least a quarter of family visa applications.”<sup>8</sup>

Furthermore, the case studies in the paper all show refusals on the basis of maintenance. They are examples of the current system in practice and give no support to proposals for change. In fact, they indicate the contrary.

If the UK Border Agency is finding it difficult to apply the maintenance requirement consistently, then it should rectify this through better training and guidance. It does not require a change to the level of maintenance or how that maintenance can be shown.

***It is difficult for UKBA and sponsors to know if the level of income support is met.***<sup>9</sup>

ILPA does not agree with the statement that it is difficult to know if the sponsors meet the level of income support. The consultation paper itself gives clear guidance<sup>10</sup> on how to calculate the level of maintenance required to income support levels. It is unclear why this is not sufficient. These calculations are not included in the current guidance<sup>11</sup> and this issue could be dealt with by putting the calculations in the published guidance to give the clarity required.

***Recent analysis.....highlighted..... the significant differences between income levels of both sponsors and applicants***

ILPA does not understand the relevance of this. If the sponsor can support the couple without recourse to public funds, the income levels in the country of origin

<sup>4</sup> Paragraph 2.16 of the Family Migration Consultation

<sup>5</sup> Paragraph 2.17 of the Family Migration Consultation

<sup>6</sup> Paragraph 2.17 of the Family Migration Consultation

<sup>7</sup> Paragraph 2.17 of the Family Migration Consultation

<sup>8</sup> Paragraph 2.18 of the Family Migration Consultation

<sup>9</sup> Paragraph 2.16 of the Family Migration Consultation

<sup>10</sup> Pages 20 and 21 of the Family Migration Consultation

<sup>11</sup> See Entry Clearance Guidance at:

<http://www.ukba.homeoffice.gov.uk/policyandlaw/guidance/ecg/maa/#header10>

are irrelevant, and vice versa if it is the applicant who has the greater funds. There will not be a 'burden on the taxpayer' .

**70% of applicants will be reliant upon the sponsor unless they intend to seek employment in the UK.**

The paper suggests that 70% of applicants will be reliant upon the sponsor unless they intend to seek employment in the UK.<sup>12</sup> No figures are given as to whether applicants do find employment in the UK and it is ILPA members' experience that many do. ILPA is concerned that any reliance is put on the 70% figure. Though no figures are given in this paper, 'Family migration: evidence and analysis Occasional Paper 94, July 2011' shows broadly that male partners sponsored to the UK have a generally good employment prospect, as compared to British male citizens already here.<sup>13</sup>

Even if the applicant were not to work in the UK, it is unclear to ILPA why the migrant cannot be reliant upon the sponsor. There remain many British households where both members of the partnership are dependent upon the 'breadwinner'. The issue of concern to UK Border Agency is whether there will be a 'burden on the taxpayer'<sup>14</sup> and, if the sponsor can support the couple, that must be sufficient to address this concern. ILPA would reject as objectionable any suggestion that it is unacceptable for the foreign partner to be a 'homemaker' (or a student, or a volunteer, or forgo employment to raise children), and it is surely not the UK Border Agency's position that an aim of family migration is an increase in those seeking work in the UK.

***From a sample: "Around 6% of sponsors sampled were not in employment, and around 7 percent earned less than £5000 per annum (the current level of basic income support for a couple), indicating they may struggle to support a spouse or partner, let alone dependents."***<sup>15</sup>

On these basic facts, the applicants would not meet the current requirements on maintenance and accommodation. The UK Border Agency needs to provide details as to whether there were other funds available. If there were not, then these applications would be refused at present. Looking solely at the sponsor's income does not provide a full answer to what funds are available. Entry clearance officers assess this and they will reject if below income support. There must be other factors at play here if a visa was granted.

### **Other proposals in the paper**

The Family Migration Consultation papers puts forward a number of proposals relating to maintenance in addition to a proposal to raise the minimum income threshold, but these are outside the remit of the question put to Migration Advisory Committee, which is 'What should the minimum income threshold be for sponsoring spouses/partners and dependants in order to ensure that the sponsor can support his/her spouse or civil or other partner and any dependants independently without them becoming a burden on the State?'

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<sup>12</sup> Paragraph 2.17

<sup>13</sup> Table 6 of 'Family migration: evidence and analysis Occasional Paper 94, July 2011'

<sup>14</sup> Paragraph 1.1 of the Family Migration Consultation

<sup>15</sup> Paragraph 2.17 of the Family Migration Consultation

On 16 September 2011, ILPA, represented by Steve Symonds, attended a meeting organised by the UK Border Agency to discuss the Family Migration consultation. Ms Vanna Aldin and a colleague attended and provided a presentation concerning thinking at the Migration Advisory Committee on the question that has been put to Committee as set out above.

We should like to thank Ms Aldin and her colleague for their time and the helpful presentation. As was discussed at the meeting, there was concern that the Migration Advisory Committee ought to be cautious to confine itself to the question of a minimum income threshold, rather than as appeared from the presentation to stray into consideration of other policy tools that might be used in any attempt to avoid “*a burden on the State*”. As we said at the time, we consider such caution to be particularly important given that

- (i) the Committee has been asked a specific question; and
- (ii) the question put to the Committee, while relevant to the ultimate question for the UK Border Agency and Government, is not the question that the UK Border Agency and Government must answer. That ultimate question concerns the proportionality of any particular measure (in the instant case, a minimum income threshold) for the securing of a specified policy objective having regard to the interference this may cause with the private and family lives of individuals affected by that measure.

If the Committee were to stray beyond the question asked of it, there is a risk that this will only add to the complications inherent in seeking to ensure proportionality in legislation and practice if introducing any new policy objective or measure for its implementation. For this reason, we have not addressed the additional specific proposals in this letter.

In this submission to the Committee, we have given our views on the specific question. We shall send the Committee a copy of our response to the UK Border Agency consultation when it is available. ILPA is happy to provide information on specific matters immediately.

We hope that this information will be of assistance to Committee and should be very willing to provide any further information if requested.

ILPA

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