UK Border Agency: Family Migration, a consultation

Response from Immigration Law Practitioners Association (ILPA)

INTRODUCTION

The Immigration Law Practitioners' Association (ILPA) is a professional association the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with a substantial interest in the law are also members.

Founded in 1984 by leading practitioners in the field, 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 research and opinion that draw on the experiences of members. ILPA is represented on numerous Government, official and non-Governmental advisory groups and regularly provides evidence to parliamentary and official enquiries. [1]

We set out in detail below our response to each of the proposals in the Family Migration Consultation Paper. In this introduction we wish to briefly set out our concerns which apply to most areas of the paper.

In the Judgment in *Quila*[2], handed down by the Supreme Court on 12 October 2011, Lord Wilson, with regard to the Home Secretary's amendment to the immigration rules, concluded:

> "*On any view, the measure was a sledgehammer but the Secretary of State has not attempted to identify the size of the nut*"[3]

This criticism was aimed at the introduction of a minimum age of 21 in applications on the basis of marriage or other forms of partnership, but the same criticism can be levelled at a number of the measures proposed in this consultation paper.

The consultation paper proposes an increase in the period leading to settlement from two years to five years, but the policy reason for this is unclear and the figures given in justification are crude. When ILPA asked for *"evidence for the actual percentage for the breakdown of marriages which involve a migrant on a partnership based visa"*[4], the UK Border Agency responded *"published statistics on this are not available"*[5].

[1] http://www.ilpa.org.uk/pages/about-us.html
[2] [2011] UKSC 45
[3] Paragraph 58
[4] Letter from Wesley Gryk Solicitors LLP dated 7 September 2011
[5] Letter from the UK Border Agency to Wesley Gryk Solicitors dated 3 October 2011

The paper proposes to introduce a minimum threshold for maintenance which is higher is than income support with the justification that the UK Border Agency wishes to reduce '*the risk that a spouse or partner becomes a burden on the taxpayer because the sponsor has to have recourse to public funds to support them'*. However, in response to ILPA's question, *"do you hold any evidence of spouses/partners relying on public funds during the probationary period"*, the Agency answered *"this information is not currently available"*.

These measures are indeed 'sledgehammers' in that they will bar some partners from ever coming to the United Kingdom, and delay the point at which all partners reach settlement and eligibility for British citizenship. The 'size of the nut' is unidentified and, indeed, the nut may not even exist.

The Secretary of State proposes to *"define more clearly"* what constitutes a 'genuine and continuing' relationship when all that is required, if anything, is clearer guidance to caseworkers, who are already making these decisions every day, and use of the powers which already exist, including the power to interview applicants which is rarely used. Instead, the consultation paper proposes to introduce the "sledgehammer" of legislation to change the procedures for marriage, and, furthermore, shows a misunderstanding of what UK Border Agency should be looking to do, that is refuse applications by those who have entered into a marriage of convenience.

There are many more examples highlighted throughout the consultation paper where the Secretary of State is proposing measures which are not justified by the information given and which, in many cases, are simply no improvement on the current position. We ask that our response is read in full to understand our concerns in each area.

Lord Wilson said in *Quila:*

> *59. By refusing to grant marriage visas to the respondents the Secretary of State infringed their rights under article 8. Her appeals must be dismissed. In line with the helpful analysis of the Upper Tribunal (Immigration and Asylum Chamber) conducted in somewhat similar circumstances in FH (Post-flight spouses: Iran) v Entry Clearance Officer, Tehran [2010] UKUT 275 (IAC), I consider that, while decisions founded on human rights are essentially individual, it is hard to conceive that the Secretary of State could ever avoid infringement of article 8 when applying the amendment to an unforced marriage. So in relation to its future operation she faces an unenviable decision.*

If the Secretary of State introduces new requirements into the Rules, or elsewhere, that are 'over-inclusive' or 'blanket' in effect, she will fall foul of the same difficulty. Even assuming the particular policy aim to be generally legitimate, as was the case in *Quila*, the cases on which the requirements bite where the policy aim is irrelevant or not met will be likely to be cases of infringement of Article 8. The 'minimum income threshold' proposal may be one example where this is of particular relevance.

ILPA is concerned that some of the information provided in the consultation paper could mislead those who do not have in-depth knowledge of the immigration system.

In particular, we draw your attention to our response to the chapter on Family Visit Appeals. In that section, appellants are characterised as "misusing" the system because they produce new evidence at appeal. As explained in our response, the number of appeals is a reflection of the lack of confidence in the decisions of caseworkers. Our position is supported by reports by the independent Chief Inspector. To ascertain the true position in connection with family visit appeals, we asked the UK Border Agency for the following information in relation to the figures given in the paper:

> *"Of the allowed appeals, was the new evidence produced, evidence that is clearly required on the application form or website?"* and
>
> *"Of the allowed appeals, was any contact made by the Entry clearance officer making the decision with the applicant to request that the evidence be supplied?"*

The Agency's answer was that:

> *"The information requested was not collated when the sampling was carried out."*

As ILPA has stated before in relation to other consultations, we are concerned by the questions posed in the consultation paper. There are a number of proposals made which are not the subject of questions, and many of the questions do not admit of a simple 'yes' or 'no' answer. As you will see, in the response to the section on Article 8 of the European Convention on Human Rights, we have answered 'yes' because no other answer would be lawful, but we fundamentally, disagree with the misleading information with regards to the current jurisprudence on Article 8.

ILPA wishes to record its concern, in advance, about the consideration and weight which will be given to its response, and the responses of the many others who will have put forward their views. We have spent many hours, and used the time of many legal professionals, to give as clear a response as we can to the consultation paper. However, in recent speeches, the Home Secretary and the Prime Minister have announced changes to immigration law which are the subject of the consultation paper. While ILPA does not object to Government ministers discussing the contents of the paper, we are concerned that by making such announcements before the consultation period closed (and certainly before the responses could be properly reviewed and analysed), both the Home Secretary and the Prime Minister appear to intend to proceed with the measures regardless of the responses received to the consultation.

As you will see from our detailed response, it is ILPA's position that most of the proposed amendments are unjustifiable or unnecessary. If, despite our views, the measures are to be implemented, then transitional provisions must be introduced to ensure that the changes do not affect applicants who have already applied for leave on the basis of their partnership, or are already in the probationary period. They have a legitimate expectation that the rules will remain the same and the rules, policy guidance and application forms should reflect this. To do otherwise will only lead to costly litigation which we all wish to avoid.

In a recent speech[6], the Prime Minister stated:

> "*So: from here on I want a family test applied to all domestic policy… If it hurts families, if it undermines commitment, if it tramples over the values that keeps people together, or stops families from being together, then we shouldn't do it.*"

The proposals set out in the consultation paper will not only harm families, but will do so on the basis of evidence and justifications that do not bear close scrutiny, as we show in our detailed response below.

MARRIAGE AND CIVIL AND OTHER PARTNERSHIP

A Genuine and Continuing Relationship

Question 1: Should we seek to define more clearly what constitutes a genuine and continuing relationship, marriage or partnership, for the purposes of the Immigration Rules? If yes, please make suggestions as to how we should do this.

Please select 1 answer only

☐ YES

☐ **x NO**

☐ NO OPINION

The statement that

> "*Migration (*sic*) based on a marriage or partnership must be based on a genuine and continuing relationship, freely entered into by both parties. It must not be based on a marriage or partnership of convenience, entered into in an attempt to gain immigration advantage. And it must not involve coercion.*"[7]

is uncontroversial and is the current position as reflected in the immigration rules[8] and guidance[9] to decision makers.

The immigration rules for spouses and civil partners require that:

> "*each of the parties intends to live permanently with the other as his or her spouse or civil partner and the marriage or civil partnership is subsisting*".[10]

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[6] Prime Minister's speech 15 August 2011: http://www.number10.gov.uk/news/pms-speech-on-the-fightback-after-the-riots/

[7] Paragraph 2.8 of the consultation paper.

[8] Paragraphs 281(i)(a)(i), (i)(b)(i), (ii) and (iii), paragraph 284(ii), (iii) and (vi) and paragraph 287(a)(ii)-(iii) for spouses and civil partners; paragraph 290(i)-(iii) and paragraph 293(iv) for fiancé(e)s and proposed civil partners; paragraph 295A(i)(a)(i), (i)(b(i)-(iii) and (vii), paragraph 295D(ii), (iii), (v), (vi), (x) and paragraph 295G(ii) and (iii) for unmarried and same-sex partners.

[9] Sections 1,2 3 and 9 of Chapter 8 of the Immigration Directorate Instructions (IDIs) (http://www.UK Border Agency.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/idischapter8/) and SET01-SET06 of the Entry Clearance Guidance (http://www.UK Border Agency.homeoffice.gov.uk/policyandlaw/guidance/ecg/set/)

[10] Paragraph 281(iii) of the current immigration rules.

The Entry Clearance Guidance confirms that:

> "*Intention to live permanently with the other means an intention to live together, evidenced by a clear commitment from both parties that they will live together permanently as husband and wife immediately following the outcome of the application in question or as soon as circumstances permit.*"[11]

The intention to live together permanently can also be found as requirements in the immigration rules and guidance related to the categories of fiancé(e)s, proposed civil partners, unmarried partners and same-sex partners.

Following the publication of the consultation paper, ILPA posed the following question to the UK Border Agency:

> "*Please confirm the criteria currently used by caseworkers to assess whether a marriage or civil partnership or relationship is genuine.*"[12]

We received the response:

> "*UK Border Agency caseworkers assess whether a marriage, civil partnership or relationship is genuine looking at each application on a case by case basis taking account of all the circumstances of each case."*[13]

The requirement for a genuine and continuing relationship is examined and assessed by Entry Clearance Officers regularly around the world. It is ILPA members' experience that applications will be refused if the decision maker is not satisfied on the evidence provided that the relationship is genuine and continuing.

Three Senior immigration judges in a leading case *GA (Ghana)*[14] considered how a genuine relationship should be assessed. The Tribunal summarised the legal reasoning of the determination as follows:

> "*The requirement in para 281 that a marriage be "subsisting" is not limited to considering whether there has been a valid marriage which formally continues. The word requires an assessment of the current relationship between the parties and a decision as to whether in the broadest sense it comprises a marriage properly described as "subsisting*".[15]

The determination of the Tribunal was "starred", meaning that it is intended to bind all Tribunal judges.[16]

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[11] SET3.6 (http://www.UK Border Agency.homeoffice.gov.uk/policyandlaw/guidance/ecg/set/set3/#header6)
[12] Letter from Wesley Gryk Solicitors LLP dated 7 September 2011
[13] Letter from the UK Border Agency to Wesley Gryk Solicitors dated 3 October 2011
[14] *GA ("Subsisting" marriage) Ghana* * [2006] UKAIT 00046
[15] Summary of the determination at page 1.
[16] Paragraph 5 of the determination read in conjunction with paragraph 10 of Upper Tribunal Immigration and Asylum Chamber Guidance Note 2011 No 2: Reporting Decisions of the Upper Tribunal Immigration and Asylum Chamber.

This is a robust test and already requires all Entry Clearance Officers/Immigration Officers and immigration judges to carry out an assessment of all of the factual aspects of the marriage in order to determine whether the marriage is subsisting. The proposed change in the current consultation requiring that the marriage constitutes a continuing relationship is no different from the already existing test set out by the immigration judiciary.

Amendments to either the immigration rules or to current practice are not required as the ambit of the rules and the current method of implementation of the rules is sufficient to comply with the robust test set out above which achieves the desired effective assessment already.

ILPA would welcome expanded guidance to UK Border Agency decision makers, and, very importantly, clearer guidance on published forms and the UK Border Agency website which would assist applicants as many are unaware of the evidentiary requirements.

However, ILPA wishes to emphasise that while we should welcome expanded clear and transparent guidance, the requirements in that guidance must be justified and be relevant to the aim of assessing whether a relationship is genuine and subsisting.

ILPA objects to any guidance which aims to provide hard and fast 'definitions' or 'set criteria' as to what is a genuine relationship. What constitutes a genuine relationship differs as people's relationships are different and unique to the individuals involved. It is not possible to define a genuine relationship or give set criteria.

Proposals, justifications for change and responses

The proposals under the heading 'a genuine and continuing relationship' in this section are as follows:

1. The UK Border Agency wishes to find objective means of identifying whether a relationship, marriage or partnership is genuine and continuing or not.[17]
2. The UK Border Agency wishes to define more clearly what constitutes a genuine and continuing relationship.[18]
3. The UK Border Agency wishes to set criteria for assessing whether a relationship is genuine and continuing because this could help decision-makers focus on the factual aspects of the relationship which indicate that it is not genuine and continuing.[19]

The consultation paper does not acknowledge that there is already guidance available to decision makers in both the United Kingdom and abroad, such as the guidance, referred to above, on whether '*each of the parties intends to live permanently with the other as his or her spouse or civil partner and the marriage or civil partnership is*

[17] Paragraph 2.9 of the consultation paper.
[18] *Ibid*
[19] Paragraph 2.10 of the consultation paper.

subsisting'[20], in the Immigration Directorate Instructions and in the Entry Clearance Guidance. [21]

As stated, ILPA would welcome expanded clear transparent and justified guidance but does not accept that is possible to provide 'definitions' or 'set criteria' as to what is a genuine relationship.

The paper provides possible factors/criteria which could highlight cases which require further scrutiny of applications.[22] The initial suggestions include: the relationship was entered into voluntarily; the relationship was not entered into solely for the purpose of obtaining an immigration advantage; the couple are able to provide accurate personal details about each other; the couple are able to communicate with each other in a language understood by them both; and the couple (or their families) have had a discussion or made definite plans concerning the practicalities of the couple living together in the United Kingdom.

These factors are uncontroversial. It is ILPA members' experience that they simply reflect current practice. Entry clearance officers across the world can, and do, refuse applications if they have concerns about the relationship on the basis of these factors. There is therefore no need to change the status quo.

ILPA does object however to the further suggested indicators of marriages of convenience listed[23] including the age of the sponsor and the applicant at the time of the wedding; the nature of the wedding ceremony or reception (for example, if there were very few or no guests, and whether the couple eloped); whether the sponsor has previously been sponsored for a marriage visa or sponsored a marriage application; and whether the applicant has a compliant history of visiting or living in the United Kingdom.

It is already open to decision makers to look at such matters, and they do. However, ILPA would dispute that these are indicators of marriages of convenience. For example, people of different ages enter into genuine relationships and to consider a large age differential as being somehow a possible indicator of a marriage of convenience is a very crude yardstick, and would inevitably raise considerations of discrimination on the grounds of the comparative age of the couple. There are also inevitable cultural considerations here which render it more likely for there to be large age differential in certain cultures or in certain cross-cultural relationships than in others, and this too could also give rise to such a policy being judicially reviewable and giving rise to public funds being wasted on needless challenges and appeals.

What constitutes a genuine relationship differs as people's relationships are different. It is not possible to define a genuine relationship nor give set criteria as becomes increasingly evident when considering the suggested proposals.

The "specified documents" concept in the points-based system is not transferrable to family applications and any move towards such a concept must be resisted.

[20] Paragraphs 281 (iii) and 284 (vi) of the current immigration rules.
[21] Chapter 8, Sections 1,2,3 and 9 of the IDIs and SET1.7 to 1.9 (fiancés), SET 2.7 to 2.9 (proposed civil partners), SET 3.6 to 3.8 (spouses), SET 4.6 to 4.8 (civil partners) and SET 5.7 to 5.9
[22] Paragraph 2.12 of the consultation paper.
[23] Paragraph 2.13

Relying on a list of specified documents is likely to assist those entering into relationships of convenience where fake specified documents may be easily replicated for visa application after visa application (as may have happened with Tier 4 student applications) while making it very difficult for some couples to apply for a relationship-based visa as they would not necessarily have the set documents. If the aim of the proposal to set out a list of criteria that applicants have to meet in order to deter false applications, such a proposal will merely ensure that those who want to beat the system are better informed.

The consultation paper appears to justify change by stating that a sample of 531 case files from nine of the top 10 marriage visa nationalities (by number of applications) highlighted that when, looking at the sample as a whole, most of the applicants had not been to the United Kingdom before. [24]

ILPA disputes that this is relevant to the issue of whether a marriage is genuine. We are unaware of any link between marriages of convenience and people not having been to the United Kingdom before. Furthermore, the reason why some visa national partners may not have visited the United Kingdom before is that visit visa applications are regularly refused for partners because it is not accepted that they have the requisite intention to leave at the expiry of their leave to enter or remain.

Given our concern about the use of these figures on applicants who had not been to the UK before, we posed the following question to the UK Border Agency:

> *"Please confirm if there is any evidence of a link between 'sham' marriages and people not having visited the United Kingdom previously."*[25]

The Agency responded:

> *"The analysis listed at footnote 27 did not consider if there was any evidence of a link between sham marriage and people not having visited the UK before."*[26]

Finally, there is no mention in the consultation paper that the UK Border Agency currently has the power to conduct interviews of applicants but rarely does so. If the UK Border Agency wishes to scrutinise relationships as to whether they are genuine and subsisting, it can do so using the powers it already has.

Proposal for relationships of less than 12 months

The consultation paper specifically proposes that for those that have not been in a relationship for a minimum of 12 months prior to the application, leave would be granted for an initial period of 12 months only. An application for further leave to remain would then be required at the end of the 12 months to enable a further assessment of the genuine nature of the relationship by the UK Border Agency. [27]

[24] Footnote 27 on page 17 of the consultation paper.
[25] Letter from Wesley Gryk Solicitors LLP dated 7 September 2011
[26] Letter from the UK Border Agency to Wesley Gryk Solicitors dated 3 October 2011
[27] Paragraph 2.12

This proposed additional test for further leave to remain to establish the genuine nature of the relationship is excessive and unjustifiable when the genuine nature of a relationship is already re-tested at the indefinite leave to remain stage after two years of probationary leave and it is unclear why this current arrangement is not already sufficient for the purposes of effective immigration control.

Question 2: Would an 'attachment to the UK' requirement, along the lines of the attachment requirement operated in Denmark:

a) Support better integration?

Please select 1 answer only
☐ YES

☐ **x NO**

☐ NO OPINION

b) Help safeguard against sham marriage?

Please select 1 answer only
☐ YES

☐ **x NO**

☐ NO OPINION

c) Help safeguard against forced marriage?

Please select 1 answer only
☐ YES

☐ **x NO**

☐ NO OPINION

The consultation paper considers the possible use of the Danish concept of 'combined attachment' to test the genuineness of a relationship and promote effective integration.[28]

Importantly, the Danish test is not applied to the partners of Danish Citizens.[29] The UK Border Agency has not expressly exempted the spouses/partners of British citizens in the proposal. The consultation paper does not state the percentage of applications by spouses/partners where the British-based partner is not a British citizen but ILPA's experience is that the majority of sponsors are British and therefore this test, if the Danish model were followed, should not (and would not) apply in the majority of applications. The practical effect is likely to be very limited if introduced in the United Kingdom given that it would not necessarily apply to British citizens.

[28] Paragraph 2.14
[29] Paragraph 2.15

However, ILPA's objection to such a test is more fundamental. The introduction and Executive Summary to the consultation paper sets out the aim of the consultation and its proposals. It states that the consultation paper

> *"focuses on preventing and tackling abuse, promoting integration and reducing burdens on the tax payer. It seeks to deliver better migration, which is fair to applicants, local communities and the taxpayer."*[30]

The combined attachment test appears to achieve none of these aims. Even if the supposed 'combined attachment' to another country were greater, this does not indicate that the relationship is not genuine or that the applicant will need to rely on public funds. It is also very much the case in the modern era with its high levels of global migrant mobility that people will often have an attachment to more than one country.

This test is listed under the section 'genuine and continuing relationship' but no explanation or evidence is provided as to why such a test would assist in identifying or preventing marriages/partnerships of convenience.

Even if it could be argued that the 'combined attachment' test were effective in demonstrating and promoting integration, it arguably does not substantially add to the requirements already in the immigration rules requiring that those who wish to obtain leave to enter or remain in the United Kingdom and indefinite leave to remain in the United Kingdom on the basis of their relationship with a settled person in the United Kingdom to have a suitable grasp of the English language[31], and subsequently a minimum level of knowledge of life in the United Kingdom[32], for integration and settlement in the country and community.

The proposal does not take into account or give indications regarding the welfare and best interests of children of the marriage or relationship in light of the test or what would occur to the considerations of 'combined attachment' where temporary residence abroad becomes part of the family plans and arrangements. As such the proposed test is poorly thought out in the United Kingdom immigration context. ILPA objects to the repeated use of overly simplistic international comparisons in UK Border Agency consultations.

In the UK context, such a test will merely serve to cause resentment of the United Kingdom's system of immigration control among migrants and their settled spouses, fiancé(s) and partners rather than fostering integration which is against the stated aim of the consultation paper. Immigrant communities will inevitably compare themselves to indigenous British communities and also "white" EEA communities risking the perception that such a requirement is predicated on racial lines and discrimination rather than on objective grounds of effective and justifiable immigration policy.

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[30] Paragraph 1.1

[31] Paragraphs 281(i)(a)(ii)-(vi), 284(ix)(a)-(e), 290 (vii)(a)-(e), 295A(i)(a)(ii)-(vi) and 295D(xi)(a)-(e) of the current immigration rules.

[32] Paragraphs 281(i)(b)(ii), 287(vi), 295A(i)(b)(ii) and 295(g)(vi) of the current immigration rules.

MAINTENANCE AND ACCOMMODATION

Question 3: Should we introduce a minimum income threshold for sponsoring a spouse or partner to come to or remain in the UK?

Please select 1 answer only
☐ YES

☐ **x NO – The UK Border Agency does not need to 'introduce' a new minimum income threshold as the current threshold should be maintained. Furthermore, there are six proposals made in this part of the consultation paper but only one is the subject of a question. The other proposals are also dealt with here.**

☐ NO OPINION

The immigration rules already require that the applicant can be maintained and accommodated without recourse to public funds.[33] The entry clearance visa or grant of leave to remain will clearly show that a successful applicant does not have 'recourse to public funds.'

To make 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 probationary period, they will not be able to access public funds. The relevant agency will check if recourse is allowed before granting public funds. If any applicant for settlement were to rely on public funds (though they should not be granted them) during the course of their probationary period, they could then be refused indefinite leave to remain (permanent residence) at the end of the probationary period on the grounds that they had breached a condition of their leave to enter or remain.

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.

Because (1) the immigration rules already require 'no recourse to public funds', and (2) 'no recourse to public funds' 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'. By merely ensuring the effectiveness of the administration of providing benefits only to those who qualify for them, the stated aim would be achieved under the current system of immigration control.

Given that the paper talks extensively of 'burden on the taxpayer' and reliance on public funds, following the publication of the consultation paper, we posed the question:

> "*Do you hold any evidence of spouses/partners relying on public funds during the probationary period? If so, please provide any information held as to how many*

[33] For example, in relation to spouse visas, see paragraphs 281 (iv) and (v) of the current immigration rules.

spouses/partners who are not entitled to public funds have in fact received them (within the last two years or the last two years for which information is available).”[34]

The UK Border Agency responded:

“*This information is not currently available.*”[35]

We recall, in respect of this and similar responses to our questions, as discussed in this response *passim*, Lord Wilson’s discussion in *Quila*[36] setting out the series of pertinent questions to the policy objective pursued, and concluding that the evidence presented by the Secretary of State establishes “*nothing*” (paragraph 53) and “*does not begin to provide an answer*” (paragraph 54).

Furthermore, no change to the level of maintenance can be required to ‘promote integration’ because, if income support is not sufficient for this, it must follow that benefits for British citizens are not set at a reasonable level. It is the UK Border Agency’s apparent position in this consultation paper that current levels of welfare benefits in Britain are inadequate for an individual to participate in everyday life.

This question of sufficient levels of maintenance and accommodation has already received judicial scrutiny. Immigration judges of the Asylum and Immigration Tribunal (as it was then known) considered this question in *KA and Others (Adequacy of maintenance) Pakistan*.[37]

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.”*[38]

> “*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.*”[39]

However, the consultation paper does propose change to the status quo. It gives justifications for this change and puts forward proposals for the change. These changes, their justification and the proposals are dealt with below.

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[34] Letter from Wesley Gryk Solicitors LLP dated 7 September 2011
[35] Letter from UK BORDER AGENCY to Wesley Gryk Solicitors dated 3 October 2011
[36] *Op. cit.*
[37] *KA and Others (Adequacy of maintenance) Pakistan* [2006] UKAIT 00065
[38] *Ibid* at paragraph 6 of the determination.
[39] *Ibid* at paragraph 7 of the determination.

Justifications for change in consultation paper

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

(1) It can be difficult to apply the maintenance requirement consistently.[40]
(2) Even though an applicant must show available maintenance funds 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.[41]
(3) "*Recent analysis.....highlighted.....the significant differences between income levels of both sponsors and applicants."*[42]
(4) 70% of applicants will be reliant upon the sponsor for support unless they intend to seek employment in the United Kingdom.[43]
(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."*[44]

On these above-mentioned points, ILPA notes the following:

RE: It can be difficult to apply the maintenance requirement consistently:

It is ILPA members' experience that overseas posts across the world do currently refuse relationship-based entry clearance visa applications if they are not satisfied that there are sufficient funds available to the applicants and their sponsors, 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."*[45]

Furthermore, the case studies in this section all show refusals on the basis of maintenance. They are examples of the current system effectively succeeding 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 for Entry Clearance Officers and Immigration Officers. The situation facing the UK Border Agency in the respect does not require a change to the level of maintenance or how that maintenance can be shown.

[40] Paragraph 2.16 of the consultation paper.
[41] *Ibid*
[42] Paragraph 2.17
[43] Paragraph 2.17
[44] Paragraph 2.17
[45] Paragraph 2.18

RE: It is difficult for the UK Border Agency and sponsors to know if the level of income support is met:

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[46] 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[47] and this issue could be dealt with by simply putting the calculations in the published guidance to give the clarity required.

Furthermore, supporting evidence is already required to demonstrate income in the form of payslips, P60s, contracts of employment, employers' letter of certification, bank statements and other similar suitable documentation for the decision makers to make an informed analysis of the circumstances of the applicants and sponsors.

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

ILPA does not understand the relevance of this to the stated aim of the consultation paper or with regard to the proposed change to the status quo. If the sponsor can support the couple without recourse to public funds, the income level of the applicant in the country of origin is irrelevant, and vice versa if it is the applicant who has the greater funds. There will not be a 'burden on the taxpayer' where the couple can support themselves without recourse to public funds through their own funds and income irrespective of how those funds and income are balanced out between the sponsor and the applicant, as is the case with the current enquiry based on the current rules and guidance.

RE: 70% of applicants will be reliant upon the sponsor unless they intend to seek employment in the United Kingdom:

The consultation paper suggests that 70% of applicants will be reliant upon the sponsor unless they intend to seek employment in the United Kingdom[48]. No figures are given to substantiate or support whether applicants do find employment in the United Kingdom or not, and when, and it is ILPA members' experience that many do successfully find employment and contribute to the economy. ILPA cautions against any reliance being put on the 70% figure when drawing conclusions about the inability of applicants and sponsors to maintain themselves within the boundaries of the current rules and guidance. Though no indications for the sample size of the statistical analysis are provided in this paper for "Earnings and employment of spouses, civil and other partners and dependants"[49], "Table 7: Employment rates for the largest migrant family route nationalities" shows broadly that male partners sponsored to the UK have generally good employment prospects, as compared to British male citizens already here.[50]

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[46] Pages 20 and 21

[47] See Entry Clearance Guidance at: http://www.UK Border Agency.homeoffice.gov.uk/policyandlaw/guidance/ecg/maa/#header10. See also Annex F to Section 1 of Chapter 8 of the Immigration Directorate Instructions.

[48] Paragraph 2.17

[49] *'Family migration: evidence and analysis, Occasional Paper 94, July* 2011 (2nd edition) at pages 6-8

[50] *Ibid* at page 7

Even if the applicant were not to work in the United Kingdom, it is unclear to ILPA why the migrant cannot be reliant upon the sponsor. There are many British households where both members of the partnership are dependent upon the 'breadwinner'. The issue of concern to the UK Border Agency is whether there will be a 'burden on the taxpayer'[51] and, if the sponsor can support the couple, then the income provided by the sole 'breadwinner' to support the couple and their dependents should 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 a specific aim of family migration is an increase in those seeking work in the UK.

RE: 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."[52]

On these basic facts, the visa applications of the spouses or partners of the above-mentioned sponsors would indeed not meet the current requirements on maintenance and accommodation where the applicants themselves did not have sufficient funds to maintain themselves and their sponsors as a couple in addition to their dependents. The UK Border Agency needs to provide further details in the context of these applicants as to whether there were other funds available to them or not in their circumstances in support of their visa applications. If there were not, then these applications would ordinarily be refused in line with the current rules and guidance. Looking solely at the sponsor's income does not provide a full answer as to what funds are available and is therefore of little significance as a justification for changing the current system. Entry clearance officers and Immigration Officers assess this at present under the current system and they will reject applications if the evidence of funds is below the equivalent level of income support.

Proposals (of which only number 1 is the subject of a question in the consultation paper)

The proposals made are as follows:

Proposal 1: New Minimum Income Threshold

On the basis of the above justifications, the consultation paper sets a proposal to introduce a new minimum income threshold for sponsors.[53] It is stated this will:

(1) set a clear threshold;
(2) ensure spouses and partners are supported at a reasonable level, as a basis for them to participate in everyday life and integrate in British society; and
(3) reduce the risk that a spouse or partner becomes a burden on the tax payer because the sponsor has to have recourse to public funds to support them.[54]

[51] Paragraph 1.1
[52] Paragraph 2.17
[53] Paragraph 2.19

RE: Setting a clear threshold:

There is already a clear threshold in place that is income equal to income support. The paper gives a clear guide to calculating this. ILPA disputes that there can be a clearer threshold than the one that exists at present and any new threshold will be arbitrary and not directed towards meeting the stated aims.

RE: Ensuring 'spouses and partners are supported at a reasonable level, as a basis for them to participate in everyday life and integrate in British society':

ILPA would argue that this reasonable level must be income support as is the case with the current system. If income support is not sufficient for this, it must follow that benefits for British citizens are not set at a reasonable level for those in receipt of them to participate in everyday life. Such a deduction, if accurate and accepted, needs to be addressed outside this consultation paper.

RE: Reducing the 'risk that a spouse or partner becomes a burden on the taxpayer because the sponsor has to have recourse to public funds to support them':

With regard to reducing the 'risk that a spouse or partner becomes a burden on the taxpayer because the sponsor has to have recourse to public funds to support them', we make two points. The first is that, again, income support is the correct comparative level of funds for this assessment. The second is that the comment would suggest that those without recourse to public funds are currently in a position to receive public funds, if needed, which is inaccurate and not presently the case.

A new income threshold will not meet the aim of reducing the burden on the taxpayer. The current arrangement already avoids that burden. If it is believed that somehow a new minimum income threshold for sponsors will assist integration, then a clear statement is required on why the current maintenance levels do not allow this.

Proposal 2: to take into account only the income and cash savings of the UK-based partner and set out guidance as to supporting evidence required

It is unclear why this proposal is relevant to the aim of 'reducing burden on the taxpayer'[55]. If the foreign partner has funds of their own, these assist the couple to support themselves without recourse to public funds and go to the aim of reducing the burden on the taxpayer under the provisions of the current system of family migration. There appears to be no policy reason to justify only looking at the position of the UK-based sponsor.

With regard to evidence required, the UK Border Agency and the entry clearance posts already require clear evidence of funds over a set period. This proposal adds nothing to the current position.

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[54] *Ibid*

[55] Paragraph 1.1

Proposal 3: not to take into account potential earnings of the foreign partner[56].

If the partner has secured employment in the United Kingdom this clearly shows less risk of the applicant being a burden to the taxpayer. The assertion is made that it is difficult for UK Border Agency caseworkers to verify job offers in practice[57] but this assertion is not substantiated in the consultation paper. The UK Border Agency can contact employers or prospective employers by using the contact details provided by the applicant and check the bona fides of the claims of employment.

The consultation paper provides a case study concerning a sponsor on welfare benefits and an applicant (Mrs Y) with a purported job offer.[58] The UK Border Agency did not accept that the job offer was genuine and the application was refused. This is an example of how entry clearance officers are applying the current rules to ensure the accuracy of information and claims made by applicants. It gives no support to the proposals in the consultation, it just illustrates that the rules in place work with regard to preventing and tackling abuse of the immigration system. The application was refused under the current rules and guidance.

Given that this example did not seem to support the UK Border Agency's position, we asked the following question following the publication of the consultation paper:

> *"The page study at the top of 23 (Mrs Y) is an example of a refused application. Is there evidence that other similar applications were granted?"*[59]

The UK Border Agency responded that this information is not currently available.[60]

There are two further case studies in this section.[61] Again, both were refused. They are examples of the current system successfully being put into effect and give no support to proposals for change. They indicate the contrary.

Proposal 4: The paper proposes to review whether support from third parties should be taken into account.

The paper proposes to review whether support from third parties should be taken into account. Again, this does not achieve the stated aim of reducing the burden on the taxpayer. If parents (the usual third parties) are willing to support and, importantly, provide the requisite evidence of their funds, there is no risk to the taxpayer. ILPA does not accept the reason given that this support is not easy to verify[62]. The UK Border Agency and entry clearance posts currently require clear evidence of funds and will refuse a visa application if the required evidence is not available.

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[56] Paragraph 2.21
[57] *Ibid*
[58] Page 23
[59] Letter from Wesley Gryk Solicitors LLP dated 7 September 2011
[60] Letter from the UK Border Agency to Wesley Gryk Solicitors dated 3 October 2011
[61] *Ibid*
[62] Paragraph 2.21

Proposal 5: The UK Border Agency '*will consider the scope for other restrictions which have the effect of increasing confidence in a sponsor's ability to support their foreign spouse or partner in the UK' for example,....if they have claimed certain specified welfare benefits in the last year or if they are an undischarged bankrupt*[63]

The question about maintenance and accommodation must be forward looking. For example, a sponsor may have lost their job within the past year (which is not uncommon in the current climate) and relied for a short time on welfare benefits however they may have then found a new job and will be in a position to support themselves and their foreign partner into the foreseeable future at the time of the relevant visa application. There is no reason why the reliance on benefits should be a bar to a successful application. A previous reliance on benefits is not an indicator or probability of a future lack of funds.

With regards to undischarged bankrupts, ILPA was not aware that this was an issue that had arisen. We therefore asked the UK Border Agency[64] how many undischarged bankrupts acted as sponsors in the last period for which information is available. The Agency stated that no information is available.[65]

Proposal 6: UK Border Agency to do more checks with the Department of Work and Pensions and Her Majesty's Revenue and Customs.[66]

The consultation paper affirms that the UK Border Agency already has this power and undertakes effective verification checks under the current immigration system as it is. Where verification checks are undertaken by the UK Border Agency with other government departments this incurs expense for the taxpayer in terms of IT costs and labour costs among other costs and, unless there is a clearly justifiable reason for increasing the checks undertaken by the UK Border Agency with these other departments, an increase in verification checks would undermine the stated aim of the consultation paper which is to reduce the burden on the already heavily burdened taxpayer.

Question 4: Should there be scope to require those sponsoring family migrants to provide a local authority certificate confirming their housing will not be overcrowded, where they cannot otherwise provide documentation to evidence this?

Please select 1 answer only
☐ YES

☐ NO

☐ NO OPINION

This question does not admit of a yes or no answer.

[63] Paragraph 2.22
[64] Letter from Wesley Gryk Solicitors LLP dated 7 September 2011
[65] Letter from the UK Border Agency to Wesley Gryk Solicitors dated 3 October 2011
[66] Paragraph 2.23

The consultation paper makes a proposal that a housing certificate[67] should be required to be provided in support of an application if no other evidence of accommodation is available for appropriate accommodation that does not breach the definition of overcrowding. It is already the position that there must be no overcrowding as is evident from the current published guidance.[68] If there is to be a greater use of housing certificates, local authorities must be consulted on this and confirm that they will have the capacity to cater for the demand for these certificates as well as ensuring that they have adequately trained staff to provide this service. The UK Border Agency must ensure that it does not introduce a requirement that relies on a third party that is unwilling or unable to provide assistance within a reasonable time.

In addition to this new requirement, the additional condition requiring that only local authorities can provide such certificates denies the probity and probative value of other suitably qualified organisations or individuals, such as chartered surveyors, being able to provide such evidence which is not a reasonable limitation under the circumstances.

The consultation paper also suggests that those who visit accommodation which the applicant and their sponsor intend to claim will satisfy the accommodation requirement in the rules to provide a housing certificate could also have the power to report on suspicions that a couple are not living together.[69] ILPA is very concerned by this suggestion as there are no details or recommendations in the consultation paper as to the extent of these powers, how these powers would be delegated to the authority and what criteria would be used when giving effect to these delegated powers. Any power to report suspicions of a sham relationship and the use of this power should be carefully outlined and transparent in light of the need for the reasonable and lawful exercise of it, and such power should not be delegated to unsatisfactory or unsuitable bodies.

Note on chapter 2 – health.

There is no question posed in relation to this.

The paper proposes to '*consider whether the provision of medical insurance for certain categories of migrant, including spouses and partners, should be a requirement*' and to increase TB testing.[70] It appears that the proposals in this section are directed at the aim of 'reducing burdens on the taxpayer.'

During the probationary period (and indeed their whole lives) in the United Kingdom, the foreign partner or their British partner, or both, will, in the vast majority of cases, make substantial contributions through tax revenues over a lifetime to the public purse. Sponsors and their partners are therefore also taxpayers and the consultation paper therefore makes an artificial distinction in this area which skews the reasoning of the proposals.

[67] Paragraph 2.24
[68] See Entry Clearance Guidance at: http://www.UK Border Agency.homeoffice.gov.uk/policyandlaw/guidance/ecg/maa/#header10. See also Annex F to Section 1 of Chapter 8 of the Immigration Directorate Instructions.
[69] Paragraph 2.25 of the consultation paper.
[70] Paragraphs 2.27 and 2.28

Requiring spouses and partners to pay the high cost of health insurance over a 2 year period (or potentially over a 5 year period), while making substantial contributions to the Treasury which funds the National Health Service, is unjust. ILPA opposes this proposal.

ILPA also requests that in this consultation and others that the source of statistics used to underpin proposals is made clear. In this section, the source of the statistics used is unclear, although it is stated that they are based on Department of Health calculations. Statistics are important here because figures are used to justify the proposals which will have significant financial implications for the applicants and their sponsors if implemented. These higher private costs for migrants and their settled sponsors would arguably damage the promotion of integration which is contrary to the stated aim of the consultation.

A figure of £150,000 over a lifetime is given as the expected cost to the National Health Service.[71] ILPA argues that this figure is irrelevant to the proposal. An individual applying as a spouse/civil partner must be an adult and therefore the proportion of the costs calculated by the Department of Health to be spent in childhood do not apply in the context of spouses/civil partners/fiancé(e)s/proposed civil partners/unmarried partners/same sex partners in the context of family migration.

The Home Office has identified in its research that 87%-90% of partner or spouse visas are issued to applicants between the ages of 21 and 64.[72] The consultation paper makes reference to the cost of caring for the elderly (those between the ages of 65 and 85)[73] but the relevance is unclear given that most people who come to the United Kingdom as a spouse or civil partner will be eligible for naturalisation long before they reach the most 'costly age' and during their lifetimes they will contribute as taxpayers to the public finances which would the fund their care when they are elderly. There can be no differentiation in access to the National Health Service between British citizens and settled persons irrespective of how they obtained their citizenship or settled status.

[71] Paragraph 2.26

[72] *'Family migration: evidence and analysis Occasional Paper 94'*, July 2011 (2nd edition) Table 2 at page 4

[73] Paragraph 2.26 of the consultation paper.

REQUIREMENTS FOR SETTLEMENT

Question 5: Should we extend the probationary period before spouses and partners can apply for settlement (permanent residence) in the UK from the current 2 years to 5 years?

Please select 1 answer only
☐ YES

☐ **x NO**

☐ NO OPINION

The proposed changes will have a significant impact on the spouses and partners of British citizens without a clearly justified reason in the consultation paper why the current requirements of the rules are unsuited or unsuitable to achieve the stated aims of the consultation paper, namely integration and to test the genuine nature of the relationship.[74] ILPA therefore opposes the proposed change to the status quo. The point at which partners reach indefinite leave to remain will be delayed by three years, as will their eligibility for British citizenship if the proposal change is implemented. In the case of those who have lived abroad with their partner for four years, the delay will be five years under the proposed change.

ILPA is extremely concerned that the proposals are made without any reference to children. Under Section 55(1)(a) of the Borders Citizenship and Immigration Act 2009, the UK Border Agency has a duty to "discharge its functions having regard to the need to safeguard and promote the welfare of children". The proposals do not deal in any way with the child's right of access to both parents if the marriage breaks down during the probationary period and are further example of the inadequacy of this proposed change which should not be implemented without due thought to the ramifications involved.

When proposing such significant changes, the UK Border Agency also has a duty to ensure that:

(1) The changes meet the stated objectives;
(2) The justification for the changes are clear, well-evidenced and persuasive;
(3) There are no other means to achieve the objective without a negative impact, for example, by better implementation and management of the existing rules and guidance for family migration.

In the consultation paper, the UK Border Agency has failed on each of these points. ILPA opposes these changes.

Justifications and responses

Increasing the probationary period from two to five years

[74] Paragraph 2.34 of the consultation paper.

The consultation paper states that if the probationary period is five years this will be '*in line with other routes*' [75] There is no policy basis for this - family migration and economic migration are different. There is no reason why making the probationary period for the partners of British citizens equal to that of dependent spouses and partners in the points-based system is necessary or desirable and no justification is provided for this in the consultation paper. Furthermore, elsewhere, the UK Border Agency has stated its intention to break the link between economic migration and settlement.[76] If this happens, an increase in the probation period for partners will still not be in line with other routes.

ILPA does not accept the justification that there will be less incentive to enter into a marriage of convenience[77] if the probationary period is increased to five years. No evidence has been provided in the consultation paper itself to show that those who are willing to commit offences would be put off doing so by the length of the probationary period. The period for permanent residence for family members of EEA nationals is five years and yet there is no evidence to show that this has led to fewer marriages of convenience with EEA nationals. It is plausible that the idea of obtaining five years of leave to remain in the UK under the proposals may even be an incentive to those seeking to abuse the immigration system and would therefore be contrary to the stated aim of the consultation paper to stop abuse of the family route.

ILPA also has concerns about the statistics used in this section to justify the proposal. It is suggested that 10% of marriages end in divorce after five years compared to 3% after two years.[78] The link in the paper is defunct but the statistics can be ascertained from the Office of National Statistics' website and these statistics show that marriages are lasting longer: the median duration of a marriage as of 2009 was 11.4 years as opposed to nearer to nine in the early 1990's.[79] The statistics used were not broken down according to nationality or immigration status, so it is unclear whether these statistics do show that 10% of marriages between a settled person and a person subject to immigration control would end in divorce. Anecdotally, divorce rates in some immigrant communities are lower than the national average. Following the publication of the consultation paper, we asked the UK Border Agency for *"any evidence as to the actual percentage for the breakdown of marriages which involve a migrant on a partnership-based visa. Are there any such figures available?"*[80]

The UK Border Agency responded:

> *"The Office for National Statistics does not breakdown their figures on divorce rates based on nationality or immigration status. The UK Border Agency does not collate the figures for the percentage of the breakdown of marriages which involve a*

[75] Paragraphs 2.32 to 2.36
[76] Paragraph 1.3 of the Employment related settlement, Tier 5 and overseas domestic workers – a consultation: http://www.UK Border Agency.homeoffice.gov.uk/sitecontent/documents/policyandlaw/consultations/employment-related-settlement/
[77] Paragraph 2.36 of the family migration consultation paper.
[78] *Ibid*
[79] www.ons.gov.uk. See also 'Understanding recent trends in marriage' by Ben Wilson and Steve Smallwood of the Family Demography Unit of the Office of National Statistics available on the ONS website.
[80] Letter from Wesley Gryk Solicitors LLP dated 7 September 2011

migrant on a partnership visa and we are only aware of relationship breakdowns we are notified of. Published statistics on this are not available."[81]

Furthermore, divorce or the breakdown of the relationship does not mean that the marriage or relationship was one of convenience at the outset. It is therefore unhelpful and unreasonable to look at these statistics (as crude as they are) and use them as justification for the proposed change.

In any event, the difference in divorce rates two years post marriage and five years post marriage is only seven percent which is not statistically significant and cannot justify such a radical change to the status quo in the current rules and guidance.

The aim in increasing the probationary period appears to be 'tackle abuse' 'and be 'fair to applicants'.[82] As stated above, there appears to be no policy reason underpinning the notion of 'fairness' by comparison with other routes.

As for tackling abuse, we refer you to the section of this response on 'a genuine and continuing marriage' and "tackling sham marriage". As explained in those sections, the current immigration rules and guidance already demand a genuine marriage and there are powers available to the UK Border Agency to check on genuine nature of marriages both at the point of application and at the point of granting indefinite leave to remain.

The UK Border Agency already has wide-ranging powers with respect to offences relating to marriages of convenience and will not grant leave or a residence card when a marriage is not genuine.

With regard to the increase in the probationary period, therefore, ILPA disputes the justification and argues that there are other measures, many of which are already in place, which can achieve the aims.

Furthermore, the paper at no point considers the impact on the partners. They will have met the immigration rules satisfying the decision maker of the genuine nature of their marriage. They will have committed to their life being in the United Kingdom with their partner and will be building a life here, including perhaps a career and bringing up children. They are being severely delayed in obtaining permanent status because of unsubstantiated justifications for aims which can already be met by the current rules and guidance on family migration if these were better implemented by the UK Border Agency, as recommended by the Chief Inspector. It appears that all partners are to be punished for the wrongful acts of a very few by needlessly proposing changes to the currently adequate family migration system in place. This goes against the aim of 'promoting integration,' and calls to mind Lord Wilson's comments, cited above, on the use of a sledgehammer to crack a nut.

Anecdotally, ILPA members are aware that individuals in the probationary period may find it harder to advance in their careers as they do not yet have permanent residence and employers are concerned as to whether they will be able to remain in

[81] Letter from the UK Border Agency to Wesley Gryk Solicitors dated 3 October 2011
[82] Paragraphs 2.31 to 2.39 of the consultation paper.

the UK past their current leave. This issue will be exacerbated by a longer probationary period.

Longer probationary periods could reduce access to employment and go against the aim of integration.

We are also concerned for those who are the victims of violence within their relationships. The psychological impact of increasing the period before which they would be eligible to apply for indefinite leave to remain, may increase their perception that they remain under the control of their abusive partners or can lead to a delay in them seeking assistance for the abuse they are suffering.

Transitional provisions

It is stated in the consultation paper by the UK Border Agency that 'we will consider whether transitional arrangements should apply to this change'[83]. Transitional provisions must be put in place to ensure the lawfulness of any proposed changes and their impact on those already in the United Kingdom under the current provisions. The UK Border Agency has already informed those present in the probationary period that they can apply for indefinite leave to remain after two years thereby arguably giving rise to a legitimate expectation to be allowed to do so. The UK Border Agency must be aware from previous legal challenges (see the Highly Skilled Migrant Programme settlement judicial review policy document[84]) that if they have set out a path to indefinite leave, then those already on that path should be allowed to complete it in the manner originally stated.

Question 6: Should spouses and partners who have been married or in a relationship for at least 4 years before entering the UK, be required to complete a 5-year probationary period before they can apply for settlement (permanent residence)?

Please select 1 answer only
☐ YES

☐ **x NO**

☐ NO OPINION

ILPA opposes the proposal to end the grant of indefinite leave to enter for those in relationships of four years or longer outside the UK and refers to the points made above.

For couples who have lived together for four years outside of the United Kingdom they currently have to show evidence of cohabitation for the full period to confirm the genuine nature and subsistence of the marriage under the current rules and guidance which is clearly sufficient to satisfy the stated aims of the immigration paper.

[83] Paragraph 2.35
[84] http://www.UK Border Agency.homeoffice.gov.uk/sitecontent/documents/workingintheuk/hsmp-review-09-policy

Where couples have been married for a long period of time and cohabited outside the United Kingdom they have an established dependence on each other for their family life which would be disproportionate to interfere with by not giving them the certainty that they will be permanently allowed to live together in the United Kingdom immediately. A long-term, genuine partnership will inevitably lead to settlement and potential naturalisation in the United Kingdom in these circumstances and there is no reasonable justification for prolonging the inevitable as is recognised quite rightly in the current immigration rules and published guidance.

There is no policy reason why these couples should be treated in the same way as couples on other routes.

Question 7: Should spouses and partners applying for settlement (permanent residence) in the UK be required to understand everyday English?

Please select 1 answer only
☐ YES

☐ NO

☐ **x NO OPINION**

ILPA agrees that it is desirable for migrants to be able to speak English to facilitate their integration into British society but there are no proposals made in the consultation paper as to how the UK Border Agency will ensure that migrants have easy, affordable access to courses which will be accepted by the UK Border Agency. It is not acceptable to introduce a requirement but not indicate what steps will be taken to ensure that all migrants will have access to means to meet the requirement.

Furthermore, ILPA is concerned by the arbitrary choice of recognised English language test providers by the UK Border Agency for the purposes of meeting the English language requirement for spouses and partners of British citizens and settled persons.

The current immigration rules require the spouse or partner of a British citizen to demonstrate English language ability at a level equivalent of CEFR A1, or a similar standard, or above in order to satisfy the English language requirement and obtain a visa to reside with their settled spouse or partner.[85] The applicant must provide satisfactory evidence of this either by way of proof of their nationality from an English-speaking country, or by way of acceptable qualifications or by way of a recognised English language test from a list of English language test providers as published on the UK Border Agency website should be used to prove that the applicant satisfies the English language requirement.[86]

One of the challenges faced by migrants and their legal representatives is that the lists of recognised English language test providers on the UK Border Agency can be changed at any time unilaterally by the UK Border Agency so that the migrant who may have spent money and time obtaining an English language test that would have complied with the requirement suddenly finds themselves in a situation where they

[85] See for example paragraph 281(i)(a)(ii) of the current immigration rules for spouses.
[86] *Ibid* read in conjunction with paragraphs 281(i)(a)(iii)-(vi).

do not comply at the time of their application because the English language test they have obtained is not listed on a new list published by the UK Border Agency. The absurd practical result is that the migrant would be regarded as being able to communicate in English to the required level up until a certain date but is not recognised as being able to communicate in English to the required level from another, arbitrary date onwards unless they can show alternative acceptable evidence to the contrary.[87]

Under the current arrangements the UK Border Agency is making a judgement about English language tests and test providers without consultation or oversight and it is very difficult for the migrants to argue that even though their test may be regarded by the broader educational industry and commercial environment as quite suitable to comply with the English language requirements of everyday academic and business usage, they cannot rely on this test evidence because the UK Border Agency has decided unilaterally that it will not accept this evidence for visa application purposes.

This is further argument for better implementation and management of the current immigration system. This would achieve the stated aims of the consultation paper without further revision of the rules.

ILPA is concerned for those who are the victims of violence within their relationships. These may be the individuals who are given the least access to the means to integrate and learn English. Increasing the level of English required for any type of application related to them and their circumstances may mean they remain indefinitely on limited leave to remain, believing they remain under the control of their abusive partners.

Question 8: Which of the following English language skills should we test?

Please select all those that apply

☐ **x Speaking**

☐ **x Listening**

☐ Reading

☐ Writing

☐ No opinion

No change to the current rules and guidance would be required as they address the stated aims of the consultation paper already.

[87] For example, while the edexcel ESOL Entry Level 2 Certificate in Speaking and Listening was recognised as being suitable to prove compliance with the English language requirements for spouse visa applications up until 17 May 2011, it does not appear on the list of suitable English language tests for applications from 18 May 2011 onwards.

TACKLING SHAM MARRIAGE

Introduction to ILPA's response to Questions 9 to 17

Before addressing the individual questions in this section, ILPA emphasises that the UK Border Agency should not put restrictions on marriage which are unlawful in light of the right to marry and found a family enshrined in the European Convention on Human Rights and the Human Rights Act 1998[88]. The UK Border Agency previously introduced a certificate of approval scheme which applied to individuals who wish to marry, but were not British nationals, EEA nationals or permanent residents requiring them to apply for permission to be able to marry in the United Kingdom.

In the case of *Baiai*[89], the scheme was found to be unlawful. It is unlawful to put restrictions on the right to marry solely on the basis of immigration status.

The UK Border Agency must not introduce new unlawful measures which put obstacles in the way of individuals to marry and must abide by the principles set out in *Baiai*. It is of assistance to look at the comments of Lord Bingham in that case. In response to the UK Border Agency's justifications for imposing restrictions on the right to marry, he stated as follows:

> *"12. Ms Carss-Frisk QC helpfully advanced the Secretary of State's case in a series of propositions which it is convenient to consider in turn. She submitted, first, that the right to marry protected by article 12 is not an absolute right...*
>
> *13. If by "absolute" is meant that anyone within the jurisdiction is free to marry any other person irrespective of age, gender, consanguinity, affinity or any existing marriage, then plainly the right protected by article 12 is not absolute. But equally plainly, in my opinion, it is a strong right. It follows and gives teeth to article 16 of the Universal Declaration of Human Rights (1948) and anticipates article 23(2) of the International Covenant on Civil and Political Rights (1966). In contrast with articles 8, 9, 10 and 11 of the Convention, it contains no second paragraph permitting interferences with or limitations of the right in question which are prescribed by law and necessary in a democratic society for one or other of a number of specified purposes. The right is subject only to national laws governing its exercise.*
>
> *...*
>
> *16. ...The Strasbourg jurisprudence requires the right to marry to be treated as a strong right which may be regulated by national law both as to procedure and substance but may not be subjected to conditions which impair the essence of the right.*
>
> *17. The second proposition advanced for the Secretary of State was that conditions on the right to marry that served the interests of an effective immigration policy were justifiable, provided that such measures satisfied the requirement of proportionality.....*

[88] Article 12

[89] *R (On The Application of Baiai and Others) V Secretary of State For The Home Department* [2008] UKHL 53

Question 9: Should we (in certain circumstances) combine some of the roles of registration officers in England and Wales and the UK Border Agency as a way of combating sham marriage?

Please select 1 answer only

☐ YES

☐ **x NO –The consultation paper makes a number of comments concerning marriages of convenience and then asks a question that does not deal with all of those comments. Under this question, we answer the specific question but then comment on the wider points made.**

☐ NO OPINION

Answer to narrow question

ILPA opposes any increase in immigration-related functions being carried out by those who are not officers of the UK Border Agency. It is not the function of other bodies to deal with immigration matters. The consultation paper acknowledges that 'it is not the role of the local registration service to enforce the immigration laws: that is a matter for the UK Border Agency.'[90]

The consultation paper refers to the UK Border Agency and to the General Register Office guidelines for a more effective partnership between the bodies and to the UK Border Agency immigration teams giving presentations to their colleagues in other departments[91]. ILPA is concerned to know what criteria are being used to manage and implement these partnerships; how are these teams delivering this training in a way that is not going to lead to discrimination? There is reference to 'targeting' throughout this chapter but it is not made clear on the basis of what criteria.

There is a vaguely drawn proposal to combine "some of the role and functions of the Registrar and the UK Border Agency"[92]. It is said that it is not to enable Registrars to be immigration officers and vice versa but it is then said that the idea is to enable persons to carry out both functions in the environment of a Register Office for an increase in the UK Border Agency's ability to tackle 'sham' marriages.[93] This is a contradiction. The powers and functions of the UK Border Agency should not be carried out by officials who are not part of this body and who have other obligations and public duties to fulfil. The investigatory powers proposed to be given to the Registrars in this part of the consultation paper are bordering on enforcement powers and duties.

Comments on other points made in the paper

It is uncontroversial that 'marriages of convenience' involving a foreign national should not lead to a grant of immigration status to the foreign national on the basis of that marriage. This is the current legal position in both domestic and EU law. The

[90] Paragraph 3.13 of the consultation paper.
[91] Paragraph 3.6
[92] Paragraph 3.13
[93] *Ibid.*

UK Border Agency has the legal right to refuse applications on the basis of 'marriages of convenience' under the current immigration rules and guidance.

The UK Border Agency should continue to use the powers *already* at its disposal. ILPA draws the UK Border Agency's attention to the findings and recommendations of the Chief Inspector and recommends that proposals to improve the immigration system should be aimed not at delegating arguably unlawful and unsuitable immigration powers to other Government bodies to try to put impediments in the way of the majority of lawful marriages but to focus its efforts at identifying and tackling immigration applications seeking to use a marriage of convenience to obtain an immigration advantage.

Whether the changes to practice and legal powers are necessary to defeat the identified problem

The changes being proposed are not necessary to meet the identified aim of 'tackling abuse'.

The consultation paper acknowledges that marriages of convenience do 'not give a non-EEA national the right to live in the UK'[94] and that the UK Border Agency will refuse to grant leave or an EEA permit/residence card if the subsistence of a marriage or civil partnership is not accepted.

The consultation paper describes the duties on registrars[95] to report 'suspicious' marriages or civil partnerships and the operation of Section 24 reports[96]. It discuses guidelines produced[97] and examples of 'successful joint working with registrars.'[98]

Partial analysis for figures of those suspected by registrars of entering into marriages is provided[99] illustrating that registrars do report marriages under Section 24.

The consultation paper refers to the existing criminal and immigration offences related to marriages of convenience for both those who enter into them and those who facilitate them[100] and gives examples of convictions including the Oxford case.[101]

The UK Border Agency already has ample powers to deal with this matter and there is no justification for making changes.

Three case studies are provided[102] and these serve to illustrate that the current system provides adequate powers. In one case, Mr S and Ms A were sentenced to 14 months and 12 months in prison respectively and Ms A will face deportation from the United Kingdom when she has served her sentence.

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[94] Paragraph 3.2
[95] Paragraph 3.4
[96] Paragraph 3.8
[97] Paragraph 3.6
[98] Top of page 33
[99] Paragraph 3.9
[100] Paragraph 3.11
[101] Paragraph 3.16
[102] Page 33

A misunderstanding as to what is required to 'tackle abuse'

The consultation paper shows a fundamental misunderstanding of what is required to 'tackle abuse'. As stated above, 'marriages of convenience' involving a foreign national cannot lead to the grant of immigration status to the foreign national on the basis of that marriage. This is the current legal position in both domestic and EU law. The UK Border Agency has the legal right to refuse applications on the basis of 'marriages of convenience'.

The UK Border Agency's concern is the immigration advantage that flows from a marriage of convenience and not stopping marriages taking place. If the marriage is one of convenience, the current legal position is marriage itself does not confer any entitlement to an immigration status. If a registrar reports a 'suspicious' marriage, then the UK Border Agency can use its powers to investigate that marriage if an immigration application is made on the basis of that marriage. It has the power not only to refuse the application but to pursue action on the basis of the offences committed.

The stated aim in the consultation paper is to tackle abuse. The abuse the agency wishes to tackle is in the attempt to obtain an immigration advantage rather than the act of entering into a marriage into the first place. We explain this distinction further below in relation to proposals made.

12 month relationships

The consultation paper makes reference to requiring couples to have been in a relationship for at least a year before they will be granted a full spouse or partner visa.[103] There is no explanation of why a relationship of more than a year is considered any more genuine than a relationship of less than a year. In any event, the review of subsisting nature of a marriage takes place under the current rules and guidance at the two-year point when an application for indefinite leave to remain is made. If there are any doubts as to the genuine nature of the couple's intentions and/or subsistence of the relationship, there are powers to refuse further leave to remain. It is unclear why the current rules and guidance are regarded as insufficient to achieve the stated aims of the consultation paper.

Question 10: Should more documentation be required of foreign nationals wishing to marry in England and Wales to establish their entitlement to do so?

Please select 1 answer only
☐ YES

☐ **x NO**

☐ NO OPINION

The consultation paper acknowledges[104] the central point in *Baiai,*[105] that it has been found to be unlawful to require that a person has leave in the United Kingdom

[103] Paragraph 2.12
[104] Page 35

before being allowed to marry. This principle must not be undermined by introducing requirements that couples cannot reasonably meet.

The consultation paper raises the possibility of a requirement for the obtaining of a certificate of no impediment for foreign nationals wishing to marry in the United Kingdom[106]. It is not proposed that these requirements should apply to British citizens. There appears to be proposed unjustifiable discrimination in respecting the right to marry.

ILPA acknowledges that such documents exist in other jurisdictions but shares the UK Border Agency's concern that some applicants might have great in difficulty in obtaining documents from their countries of birth. For example, asylum-seekers and refugees cannot be expected to contact their own Embassy or High Commission.

Before any steps are taken to implement such a proposal, the UK Border Agency would have to have conducted comprehensive research on every country to understand which nationalities can obtain such documents and, importantly, whether such documents will be provided to those who do not have leave. We have already seen, in the case of English language tests for spouses and partners, a failure to establish where tests were available before introducing the requirement. The consequences of this continue to give rise to many difficulties over and above that of meeting the requirement in the first place. The UK Border Agency should not introduce a requirement to marry with which individuals cannot comply for reasons outside of their control. This will undoubtedly lead to legal challenges against UK Border Agency and will directly contradict one of the stated aims of the consultation paper by incurring expense to the taxpayer to defend the UK Border Agency's position, as has been the case with the certificate of approval to marry scheme, the age restriction on marriage, and other policies subsequently held to be unlawful be the courts. Such action shows an unjustifiable disregard for the human right to marry.

Question 11: Should some couples including a non-EEA national marrying in England and Wales be required to attend an interview with the UK Border Agency during the time between giving notice of their intention to marry and being granted authority to do so?

Please select 1 answer only
☐ YES

☐ **x NO**

☐ NO OPINION

The consultation paper proposes requiring couples to attend UK Border Agency interviews within the period between giving notice of an intention to marry and the marriage ceremony. ILPA's opposition to this measure restricting the right to marry on grounds of legality is dealt with elsewhere in this response.

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[105] *R (On The Application of Baiai and Others) V Secretary of State For The Home Department* [2008] UKHL 53

[106] Paragraph 3.14 of the consultation paper.

This proposal demonstrates that the UK Border Agency's focus is misdirected. Even if the couple go ahead and marry, this does not mean that the UK Border Agency has to grant a right to remain on the basis of the marriage. The UK Border Agency can (and does) refuse to grant the right to remain on the basis of a marriage if it is a marriage of convenience (or indeed if another requirement of the immigration rules is not met.)

This misunderstanding is illustrated in another paragraph of the consultation paper. There is a proposal to 'explore the case for legislating to add 'proven sham' to the criteria for voiding or cancelling a marriage, and to enable the UK Border Agency, where it is established that a marriage was a sham, to apply to the courts for it to be declared void.'[107]

ILPA does not understand why the UK Border Agency would wish to go to the trouble and expense of having a marriage made void. If it is shown to be a marriage of convenience, the foreign national will not obtain an immigration benefit from using it as the basis of a leave to remain application because the UK Border Agency will not issue leave or an EEA permit/residence card as a result. If the couple who have entered into the marriage find themselves legally married in a marriage of convenience from which they will have to extricate themselves, that is, quite simply, their problem.

The 'Oxford case'[108] further illustrates this point. The couple were allowed to marry despite the belief that the relationship was not genuine, but following that the foreign national was convicted of perjury and it is assumed not granted leave to remain. He has gained no benefit.

It is the current position that if it is a marriage of convenience, no immigration status will be given under the current immigration rules and guidance. The Chief Inspector has made recommendations as to how the agency can better manage and implement the current rules and guidance and the Agency should consider and report on progress in doing this before concluding that additional measures are necessary.

Question 12: Should 'sham' be a lawful impediment to marriage in England and Wales?

Please select 1 answer only
☐ YES

☐ **x NO**

☐ NO OPINION

ILPA is concerned by the statement at the start of the section that refers to sham marriage as one involving a "non-EEA national without leave to remain in the UK or whose leave is about to expire"[109]. Immigration status is not an automatic indicator of a 'sham' marriage.

[107] Paragraph 3.17
[108] Page 37
[109] Paragraph 3.2

The better definition in the consultation paper of the problem the Agency wishes to tackle is :

> *The marriage or civil partnership takes place **solely** as a basis for trying to enable [the foreign national] to enter, remain in or extend their leave in the UK. **There is no subsisting relationship** and the parties do not intend to live together permanently if at all.*[110]*(emphasis added)*

ILPA encourages the UK Border Agency to make a clear statement that a person's lack of immigration status or short-term immigration status does not create a presumption of a 'sham marriage'.

Furthermore, leading on from the comments in the response to chapter 2 of the consultation paper, decisions on 'sham marriages' should not include stereotyping, discriminatory profiling, race discrimination, gender and gender identity discrimination, age discrimination, or sexual identity discrimination

The consultation paper shows a fundamental misunderstanding of what is required to tackle abuse. As stated above, 'marriages of convenience' involving a foreign national cannot lead to the grant of immigration status to the foreign national on the basis of that marriage. This is the current legal position in both domestic and EU law. The UK Border Agency already has the legal right to refuse immigration applications on the basis of 'marriages of convenience'.

The fact of marriage does not lead to an eligibility to claim any immigration status if the marriage is one of convenience. As stated above, if a registrar reports a 'suspicious marriage', then the UK Border Agency already has powers to investigate that marriage if an immigration application is made, to refuse the application and to pursue action on the basis of any offences committed.

Question 13: Should the authorities have the power in England and Wales to delay a marriage from taking place where 'sham' is suspected?

Please select 1 answer only
☐ YES

☐ **x NO**

☐ NO OPINION

The consultation paper raises the possibility of requiring couples to attend UK Border Agency interviews within the period between giving notice of an intention to marry and the marriage ceremony.[111] This is coupled with a proposal referring to logistical difficulties in carrying out and reaching decisions within 15 days (the statutory notice period) and legislation to be able to delay a marriage where a "sham" is suspected[112]. Then the consultation paper states "the marriage would then

[110] Paragraph 3.2
[111] Paragraph 3.15
[112] Paragraph 3.16

be prevented in law from going ahead where it was established to be a sham. Couples deemed to be in a genuine relationship would be permitted to marry."[113]

ILPA opposes this measure. It has been found unlawful to require that a person has leave to remain in the United Kingdom before being allowed to marry.[114] This principle must not be undermined by delaying marriages for reasons related to immigration status.

We also refer to the points made above.

Question 14: Should local authorities in England and Wales that have met high standards in countering sham marriage, be given greater flexibility and revenue raising powers in respect of civil marriage?

Please select 1 answer only

☐ YES

☐ **x NO**

☐ NO OPINION

ILPA is very concerned by the consultation paper's proposals[115] which refer to the giving of "greater flexibility and revenue-raising powers" to local authorities whose registration services "meet high standards of practice in helping to counter sham marriage" segueing into the possibility of a "highly trusted Registrar" status. These incentives may lead to an increase of referrals of "sham" marriages. These referrals may be discriminatory if they are based on immigration status alone (see the further comments below) or indeed on other factors such as nationality or age. There are dangers associated with any fiscal underpinning of proposals regarding any changes to the current rules and guidance in the sensitive area of family migration.

Question 15: Should there be restrictions on those sponsored here as a spouse or partner sponsoring another spouse or partner within 5 years of being granted settlement in the UK?

Please select 1 answer only

☐ YES

☐ **x NO**

☐ NO OPINION

ILPA opposes the implementation of such a blanket ban for a set period. The current position of the UK Border Agency's assessing each case and application on its own factual merits provide the rule range of powers. The Chief Inspector has made recommendations as to the effective implementation and management of the Agency's work in this area. There are many reasons why a marriage may break

[113] *Ibid*
[114] *R (On The Application of Baiai and Others) V Secretary of State For The Home Department* [2008] UKHL 53
[115] Paragraphs 3.19 and 3.20 of the consultation paper.

down, which are not the fault of the person who was sponsored. To force, for example, a woman who has suffered domestic violence, or a woman deserted by her settled husband because he found a new settled partner, to remain alone for an artificial period, is unjustifiable.

Also, ILPA questions the scale of the problem being presented. The statistics here are based on 719 people who remarried 'quickly' after having settled.[116] Over what period did this sample of 719 people apply? Did the study exclude people whose sponsor had died? Given that only 19% did their second sponsorship within two years of getting settlement, even assuming all 719 were in the same year, this would be 1.5% of all sponsored family migrants. The figures presented do not have the statistical significance to found proposals for change to the current position under the immigration rules and guidance.

Question 16: If someone is found to be a serial sponsor abusing the process, or is convicted of bigamy or an offence associated with sham marriage, should they be banned from acting as any form of immigration sponsor for up to 10 years?

Please select 1 answer only

☐ YES

☐ **x NO – this question is too broad and therefore unhelpful in formulating any policy that could reasonably and lawfully augment the current position in the current rules and guidance**

☐ NO OPINION

ILPA does not object to decisions being made on the basis of criminal convictions in the UK. ILPA does however object to less clear ideas such as that of the 'serial sponsor'. There are many reasons why a marriage may break down which are not the fault of the person who was the sponsor.

Question 17: Should we provide scope for marriage-based leave to remain applications to be counter-signed by a solicitor or regulated immigration adviser, as a means of confirming some of the information they contain?

Please select 1 answer only
☐ YES

☐ **x NO**

☐ NO OPINION

The consultation paper proposes providing for the certification or countersigning of applications by solicitors or immigration advisors.[117] ILPA members are from the legal profession and would potentially benefit from this proposal by an increase in instructions from clients, but ILPA opposes the proposal.

[116] Paragraph 3.23
[117] Paragraph 3.25

It is suggested that the legal advisors could view documents such as proof of identity, nationality and residence.[118] ILPA does not understand why this is being suggested. At present, those documents must be sent to the UK Border Agency with an application. If they are not, the application will be rejected as invalid. If the UK Border Agency has the original documents, it is unclear what the legal advisor can add to this, unless it is being suggested that original documents will not need to be sent in the future.

The consultation paper suggests that applications will be subjected to greater scrutiny if not counter-signed by a solicitor. This would force applicants to engage legal advisors to assist or to represent them. Applicants should not be prejudiced because they make their application without professional legal assistance.

Scope for corruption would be created if there is an expectation of a countersignature by a solicitor or regulated immigration adviser.

The better way to deal with this issue is to provide clearer published guidance on how fully to document applications based on marriage. The UK Border Agency already has powers in the current immigration rules to assess applications on the basis of evidence presented and, in the absence of sufficient evidence, they have powers to investigate further and refuse applications with insufficient evidence to satisfy the requirements in the current rules and guidance in any event.

Community Groups and Charities

The consultation paper proposes that community groups and charities[119] play a sponsoring role in leave to remain applications. ILPA does not understand how such groups could 'sponsor' an application and shares the UK Border Agency's concerns as to the risks involved with forced marriage applications.

ILPA does not object to the suggestion that testimony could be given by such groups, which would be different from a concept of sponsoring, but such testimony should never be a requirement and it should only be *one* factor in assessing a relationship. Testimony should not be limited to such groups, it could also come from friends and family, but always with the understanding by the UK Border Agency that such testimony may not always be available.

Question 18: Should there be scope for local authorities to provide a charged service for checking leave to remain applications, including those based on marriage, as they can do for nationality and settlement applications?

Please select 1 answer only

☐ YES

☐ **x NO**

☐ NO OPINION

[118] *Ibid*
[119] Paragraph 3.33

The consultation paper proposes a local authority checking service for leave to remain applications based on marriage.[120] This proposal is included in the section on tacking abuse by those entering into marriages of convenience. If the aim of the checking service is to tackle abuse of the immigration system in such a way, it is far beyond the service currently provided by the current nationality checking service. The question is disingenuous if the local authority will be seeking to identify marriages of convenience.

If it is a service which simply checks documents, this is a worrying conflation of the role of a solicitor or legal adviser who has to be appropriately regulated and the role of a local authority civil servant, with the severe disadvantage to the applicant that the civil servants' duties are to the state rather than to the applicant. ILPA therefore objects to this proposal.

TACKLING FORCED MARRIAGE

Question 19: If someone is convicted of domestic violence, or has breached or been named the respondent of a Forced Marriage Protection Order, should they be banned from acting as any form of immigration sponsor for up to 10 years?

and

Question 20: If the sponsor is a person with a learning disability or someone from another particularly vulnerable group, should social services departments in England be asked to assess their capacity to consent to marriage?

Please select 1 answer only
☐ YES

☐ NO

☐ **x NO OPINION**

Marriage must be based on the free consent of both parties and there can be no justification – cultural, religious or otherwise – for marriage without free consent.

The UK Border Agency to consult with the appropriate UK social services departments and related professional and social groups for their views on this matter, including Southall Black Sisters.

OTHER FAMILY MEMBERS

Question 21: Should there be a minimum income threshold for sponsoring other family members coming to the UK?

Please select 1 answer only
☐ YES

☐ **x NO – applicants already have to show that there will be maintenance and accommodation without recourse to public funds and so there is already a**

[120] Paragraph 3.32

minimum threshold. The question does not make sense. ILPA wishes to address this question more broadly.

☐ x NO

ILPA welcomes the UK Border Agency's assurance that "We welcome those who want to make a real life here with their family, want to work hard and contribute to their local community, and who are not seeking to abuse the system or the rights of others."[121]

For most people, in the UK as in all other countries, it is part of 'a real life...with their family' that parents should be able to have with them their minor children and that adult children should be able to be close to and look after their elderly parents. The current immigration rules[122] already place considerable restrictions on these and the case for further restrictions is not made out.

Relatively small numbers of persons are involved: 2,700 adult elderly dependent relatives and 5,700 dependent children in 2010.[123]

With respect to whether "a minimum income threshold in sponsoring other family members coming to the UK"[124] should be set, this would depend on whether the purpose of such a threshold would simply be to assist applicants by providing predictable guidelines or, on the contrary, setting a new higher bar which would reduce the ability of families to exercise the fundamental rights of family life with minor children or elderly or other, dependent relatives. The current immigration rules and guidance should be maintained or revised to assist persons present and settled in the United Kingdom to facilitate the protection and promotion of their right to family life by not putting any further stringent barriers to entry for family members of such settled persons.

To the extent that a minimum income threshold is indeed set, the Home Office should reinstate the previous immigration category of "retired persons of independent means"[125]. The revocation of this rule a few years ago has created the anomaly that some elderly parents, whose only offspring to whom they can turn for moral, emotional and physical support in their old age, live in the United Kingdom cannot apply to settle with them here. This is because they cannot demonstrate that they are "wholly or mainly dependent" [in a financial sense] on their children in the United Kingdom, often because they have substantial private means. This seems to go against the general trend in the document of suggesting that changes in policies should to some extent be affected by economic realities.

Question 22: Should adult dependants and dependants aged 65 or over complete a 5-year probationary period before they can apply for settlement (permanent residence) in the UK?

Please select 1 answer only

[121] Paragraph 5.1
[122] Paragraphs 297 onwards to 316F for children and paragraphs 317 to 319 for elderly parents, grandparents and other dependent relatives of persons present and settled in the United Kingdom
[123] Paragraph 5.5
[124] Question 21
[125] Deleted paragraphs 263-265 of the immigration rules

☐ YES

☐ **x NO**

☐ NO OPINION

The suggestion that, rather than being granted indefinite leave to enter, adult and elderly dependants aged 65 or over should be granted a five year probationary period rather than indefinite leave to remain[126] is impractical and unduly harsh. ILPA questions whether it is proposed that, at the end of that five year period, it would be prepared to remove or deport individuals most of whom, by that time, would be in their seventies and whose ties with the country of origin would have been etiolated by their stay in the UK.

The family ties and dependence that have to be proved under the current immigration rules are so stringent already that only a marginal number of applicants can satisfy. In these circumstances it would be disproportionate to interfere with the dependency and family life of the migrants and their settled family members by not giving them immediately the certainty that they will be allowed to live together permanently in the United Kingdom. Not only would it be disproportionate and unreasonable but it would be cruel and degrading to require migrants and their settled family members to have a 'probationary period' of living together before giving them the certainty of being able to live together for the remainder of the dependent relative's days. There is no reasonable justification for prolonging the inevitable as is recognised quite rightly in the current immigration rules and published guidance.

There is no policy reason why these applicants and their settled family members should be treated in the same way as other routes.

Question 23: Should we keep the age threshold for elderly dependants in line with the state pension age?

Please select 1 answer only
☐ YES

☐ **x NO**

☐ NO OPINION

The current immigration rules for elderly dependents do not provide solely for applicants who are 65 or older[127] therefore ILPA cautions against using this age threshold as the basis for proposals to amend the current rules and guidance for purely fiscal reasons.

Question 24: Should we look at whether there are other ways of parents or grandparents aged 65 or over being supported by their relative in the UK short of them settling here? If yes, please make suggestions.

[126] Paragraph 5.8
[127] Paragraphs 317(i)(c) and (e) of the current immigration rules.

Please select 1 answer only
☐ YES

If yes, please make suggestions

☐ **X NO**

☐ NO OPINION

The proposal that "we look at whether there are other ways of parents or grandparents aged 65 or over being supported by their relatives in the UK short of them settling here"[128] does not address any of the stated aims of the consultation paper and would therefore be an unjustified interference with the status quo as set out in the current rules and guidance. To qualify for such settlement, it already needs to be demonstrated that, in their home country, they are wholly or mainly supported by their relatives in the United Kingdom. The rule allowing them to join their children in the United Kingdom reflects that it is a part of family life for children to be able look after their elderly parents. The support such children afford is not only financial support but emotional and physical support.

In *Huang* where the House of Lords finds:

> "...article 8... imposes on member states not only a negative duty to refrain from unjustified interference with a person's right to respect for his or her family but also a positive duty to show respect for it."[129]

Impediments should not be put in the way of settled persons caring for their dependent family members to the best of their ability as this fail to respect for their right to family life in line with the established jurisprudence.

Question 25: Should there be any change to the length of leave granted to dependants nearing their 18th birthday? If yes, please make suggestions.

Please select 1 answer only
☐ YES

If yes, please make suggestions
☐ **xNO**

☐ NO OPINION

The suggestion that there be a change in the length of leave granted to dependants nearing their eighteenth birthday[130] does not address any of the stated aims of the consultation paper and would be an unjustified interference with the status quo as set out in the current rules and guidance. It is suggested in the consultation paper, for example, that the maximum age of a child dependant be lowered to 17.5 years at the time of the application so that the child enters the UK before their eighteenth birthday. As all practitioners know, how quickly entry is achieved after application

[128] Paragraph 5.10 of the consultation paper.
[129] *Huang v SSHD, Kashmiri v SSHD* [2007] UKHL 11 at paragraph 18 of the judgment
[130] Paragraph 5.11

depends on many factors, not least the speed and efficiency of given entry clearance posts. The current rule is clear and predictable and should stand.

Furthermore, the suggestion that children nearing their 18th birthday should not be granted indefinite leave to enter but a finite period of leave since, "once they reach the age of 18, they *will* be able to apply for leave to remain in the UK in their own right"[131], suggests that such children are likely to have some other basis on which they may remain with their parent(s) in this country. This will not always be the case.

See also the citation from *Huang* in response to Question 24 above which are also relevant here.

Question 26: Should dependants aged 16 or 17 and adult dependants aged under 65 be required to speak and understand basic English before being granted entry to or leave to remain in the UK?

and

Question 27: Should adult dependants aged under 65 be required to understand everyday English before being granted settlement (permanent residence) in the UK?

Please select 1 answer only
☐ YES

☐ **x NO**

☐ NO OPINION

The imposition of an English language requirement[132] on children aged 16 or 17 or on adult dependants under 65, many of whom will presumably be accompanying adult dependants over 65 who themselves might be precluded from coming because of the non-ability of their younger relative to meet the requirement, fails to take into account the basic principle inherent in these already stringent rules that, where the individual meets the specified requirements, the families concerned should be reunited in the United Kingdom in line with the established case law. It is an arbitrary and unfair distinction that 16 and 17 year olds, as opposed to 15 year olds, and 64 year olds, as opposed to 65 year olds, must meet such English language requirements. The ability to speak English would assist with achieving the stated aim of integration but this is not a reason to make a mandatory pre-entry requirement.

The suggestion in the consultation paper is that adults aged under 65 should meet a further higher English language requirement eventually to be granted settlement in the model where settlement follows only after five years.[133] It does not appear realistic that people in this situation would be removed or deported from the United Kingdom at this stage in their lives, notwithstanding that they have made their lives here for a five year period with their close family members. It is unreasonable; it would give rise to legal challenges.

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[131] *Ibid*
[132] Paragraph 5.12
[133] Paragraph 5.13

See also the citation from *Huang* in response to Question 24 above which is also relevant here.

POINTS-BASED SYSTEM DEPENDANTS

Question 28: Should we increase the probationary period before settlement (permanent residence) in the UK for points-based system dependants from 2 years to 5 years?

Please select 1 answer only
☐ YES

☐ **x NO**

☐ NO OPINION

ILPA opposes the extension of the probationary period for spouses of settled persons and also opposes it for spouses of points-based system workers. This consultation is taking place in the context the proposal in the consultation on *Employment Related Settlement,*[134] to which a response is currently awaited, to provide an accelerated route to settlement for certain migrants on the basis of their wealth.

Changing the rules so that family members of points-based system migrants can no longer apply for leave in line with them would add unnecessary complications and uncertainty especially where the UK Border Agency is consulting on designating Tier 2 (General) as a temporary route to migration with certain migrants being able to 'upgrade' their route to one that would make them eligible to apply for settlement in due course.[135] Where the Points-Based System dependents are not able to obtain leave in line with the main migrant and settle at the same time as the main migrant, they would be prejudiced unfairly by having a longer than anticipated route to settlement.

Question 29: Should only time spent in the UK on a route to settlement count towards the 5-year probationary period for points-based dependants?

Please select 1 answer only
☐ YES

☐ **x NO**

☐ NO OPINION

See ILPA's response to Question 28 above and ILPA's response to *Employment-related settlement.*[136]

[134] *Employment related settlement, Tier 5 and overseas domestic workers – a consultation:* http://www.UK Border Agency.homeoffice.gov.uk/sitecontent/documents/policyandlaw/consultations/employment-related-settlement/
[135] *Ibid*, paragraph 2.1
[136] *Ibid*.

Question 30: Should we require points-based system dependants to understand everyday English before being granted settlement (permanent residence) in the UK?

Please select 1 answer only
☐ YES

☐ **x NO**

☐ NO OPINION

See ILPA's response to other related consultation papers.

OTHER GROUPS

Question 31: In what other ways could the UK Border Agency improve the family visit visa application process, in order to reduce the number of appeals?

And

Question 32: Beyond race discrimination and ECHR grounds, are there other circumstances in which a family visit visa appeal right should be retained? If so, please specify.

Please select 1 answer only
☐ YES

If yes, please specify
☐ NO

☐ NO OPINION

These questions do not admit of a yes or no answer.

ILPA welcomes the UK Border Agency's acknowledgment that family visits are '*a means of maintaining family links and of enabling family members living abroad to participate in important occasions in the UK such as births, weddings and funerals. Such visits and associated tourism also bring economic benefits to the UK.*'[137]

ILPA draws the UK Border Agency's attention to the observations and recommendations of the Chief Inspector regarding the need for proper training and management of UK Border Agency personnel to implement the current immigration rules and guidance better.

ILPA opposes any proposal to remove the right of appeal against refusals of family visit visas especially in light of the poor record of entry clearance decisions at such appeals. It is necessary to retain independent oversight of visa application through the appeals system.

Arguments in the consultation paper justify the proposal on the basis of the number of successful appeals where the appeal was allowed following fresh evidence being

[137] Paragraph 7.5

submitted at the appeal and the cost to the taxpayer of defending such appeals.[138] Such appeals succeed where an immigration judge exercises powers given under statute to consider relevant information.[139] That taxpayer is footing the bill to defend appeals which are successful is not a waste of public funds but an indication that the UK Border Agency officials could have made further relevant investigations while deliberating the merits of the applications. The taxpayer is funding the UK Border Agency, funding appeals is the insurance policy paid to make sure that what is being spent is being used properly, in accordance with the law.

The consultation paper nowhere acknowledges that the reason there are so many successful appeals is because of very serious failings by the entry clearance officers, failings which have been independently confirmed by the UK Border Agency's Chief Inspector as not being compliant with the UK Border Agency's duties under the Race Relations Act 1976.[140]

The availability of appeals is the only check against the very poor, often racially discriminatory, decision- making. The removal of appeal rights would allow poor decision making to continue without redress, thereby weakening the rule of law.

Justifications for proposal and response

The consultation paper states that '*new evidence is often submitted on an appeal which should have been submitted with the original application. The 'appeal' then becomes in effect a second decision, based on the new evidence, which is often why an appeal is allowed'*[141].

The consultation paper goes on to state that in a sample of allowed family visit visa appeal determinations '*new evidence produced at appeal was the only factor in the Tribunal's decision in 63 per cent of allowed appeals*'[142] and to characterise this as a 'misuse' of the appeal system[143].

ILPA does not accept that the system is being misused or that there is any justification for the right of appeal to be removed.

To accept that applicants are 'misusing' the appeal system, it has to be accepted that applicants would willingly submit an application that does not contain the necessary evidence because they can just go forward with an appeal if refused. ILPA members' experience to the contrary is that applicants want the visa to be granted first time and will make every effort in good faith to get it right first time if there is clear guidance as to how to do so. The consequence of a refused application is that the applicant may very well miss the '*important occasion*[144]*'* in the United Kingdom, even if the appeal is ultimately successful, because the event is time sensitive or time specific. They would not logically wish to go through a protracted appeal process

[138] Paragraph 7.7
[139] Section 85(4) of the Nationality, Immigration and Asylum Act 2002 as amended
[140] *An inspection of entry clearance in Abu Dhabi and Islamabad January – May 2010,* Chief Inspector of the UK Border Agency 2010
[141] Paragraph 7.7 of the consultation paper.
[142] *Ibid*
[143] Paragraph 7.12
[144] Paragraph 7.5

which has additional costs for them too not least of which would be having to re-arrange travel plans. It is also intended soon to introduce application fees to lodge appeals with the Tribunal in the first place.[145]

That so many family visit appeals are successful on the basis of new evidence only indicates serious problems with the guidance given to applicants and serious problems with decision-making at overseas posts.

Fresh applications are invariably decided more quickly than the months taken for appeals to be scheduled. Applicants therefore, would use the fresh application route to submit "new evidence" rather than an appeal if they had confidence in the fairness of the entry clearance application process.

Given that we were concerned that the current situation was being misrepresented, prior to the publication of the consultation paper, we asked:

> *"At paragraph 7.7, the consultation paper states that in a sample of allowed family visit visa appeal determinations 'new evidence produced at appeal was the only factor in the Tribunal's decision in 63 per cent of allowed appeals.' Please provide the following information: (1) Of those allowed appeals, was the new evidence produced evidence that is clearly required on the application form or website? (2) Of those allowed appeals, was any contact made by the ECO making the decision with the applicant to request that the evidence be supplied?"*[146]

The UK Border Agency responded

> *"The information requested was not collated when this sampling was carried out."*[147]

The situation can be improved, without changes to the right of appeal, with the following three practical measures which would go a long way to achieving the stated aim of the consultation paper of reducing the burden to the taxpayer of appeal litigation:

1. Improved decision making at posts
2. Clearer guidance
3. More requests being made by Entry Clearance Officers if further information is required.

Improved decision making

The largest number of refusals of family visit visas is to Pakistani nationals.[148] It is imperative, therefore, to look at the quality of decision making for visa applications made by Pakistani nationals in Pakistan especially in light of the recent report by the

[145] The First Tier Tribunal (Immigration and Asylum Chamber) Fees Order 2011, in draft at the time of writing.
[146] Letter from Wesley Gryk Solicitors to the UK Border Agency dated 7 September 2011
[147] Letter from the UK Border Agency to Wesley Gryk Solicitors dated 3 October 2011
[148] *'Family migration: evidence and analysis Occasional Paper 94, July 2011' (2nd edition)* Table 30 at page 21

Chief Inspector as to the serious deficiencies in decision making and management by the UK Border Agency in Pakistan[149].

In his report concerning operations in Abu Dhabi and Islamabad published in November 2010[150], the Independent Chief Inspector of the UK Border Agency stated:

> *"Most significant among my findings however, was the different approach taken by UK Border Agency staff towards customers from Abu Dhabi, Bahrain and Dubai (members of the Gulf Cooperation Council) and those from Pakistan. I found that staff were applying higher evidential requirements for entry to the UK to customers from Pakistan and this was not made clear to them. Exemptions under Section 19D of the Race Relations Act 1976 (as amended), allow discrimination in relation to particular nationalities for the purposes of carrying out immigration functions, if the appropriate authorisation is given. I am not aware of any such authorisation in this case.*
>
> *I believe this means that the UK Border Agency was not only failing to be open and transparent about their approach towards customers, but also may be discriminating unlawfully in favour of Gulf Cooperation Council customers and against Pakistanis. I believe the UK Border Agency must take immediate action to ensure it is acting in compliance with its duties under the Race Relations Act 1976, and that, where it considers that different criteria are necessary, it ensures that it has the appropriate authorisation. This is a matter to which I shall be paying particular attention in future inspections.*
>
> *Overall, I found that many of the key stakeholders I spoke to had a worrying lack of confidence in the work of the visa section — particularly in Pakistan visa operations. I hope this report's findings and recommendations will prompt the UK Border Agency to act decisively to restore public confidence in its services and to ensure equitable treatment for all visa customers."*

Despite this report in late 2010 that Pakistani nationals, those most likely to be refused visit visas, are being racially discriminated against in terms of evidence, the UK Border Agency in this paper is maintaining that applicants are 'misusing' the system and the evidence could easily have been submitted with the application. This is an unsustainable position in the consultation paper and ILPA urges the UK Border Agency to revise its position in this regard.

Clearer Guidance

The system can be improved if clearer guidance is given to family visitors.

In his report on a short notice inspection in Istanbul published in March 2011[151], the Independent Chief Inspector of the UK Border Agency stated:

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[149] An inspection of the UK Visa Section: Pakistan settlement applications (January – April 2010): http://www.UK Border Agency.homeoffice.gov.uk/aboutus/workingwithus/indbodies/chiefinspector/

[150] http://icinspector.independent.gov.uk/wp-content/uploads/2010/03/An-inspection-of-entry-clearance-in-Abu-Dhabi-and-Islamabad.pdf

[151] http://icinspector.independent.gov.uk/wp-content/uploads/2011/02/A-short-notice-inspection-of-Istanbul-visa-section.pdf

> *"I am concerned about the fairness and quality of decision making in respect of entry clearance work at this post. In* ***Istanbul I found that key evidence provided by applicants was overlooked in deciding a number of cases. I also found that applicants were sometimes refused on the basis of requirements that would not be clear to them at the time of making an application. This lack of clarity in regards to evidential requirements has been a key feature of other recent overseas inspections****, most significantly in Amman, and raises issues of procedural fairness. The UK Border Agency must improve the efficiency, effectiveness and fairness of its visa operations to address these issues."*

This report makes it clear that the UK Border Agency is failing to indicate clearly what evidence is required for a successful application and is frequently overlooking relevant evidence submitted with the applications. The problems are not just restricted to Pakistan but can be found at other entry clearance posts.

In stating that there is 'misuse' of the appeal system by the applicants and therefore a revision to the law is required to diminish or do away with the right of appeal against immigration decisions the consultation paper fails to acknowledge the very serious problems highlighted by the Chief Inspector.

More requests being made by Entry Clearance Officers if further information is required.

It is ILPA members' experience that Entry Clearance Officers do not get in touch with family visit visa applicants to request information they deem necessary and outstanding to make a proper decision on a family visit visa application; they simply refuse the application. ILPA suggests that they could get in touch with applicants and appeals could be avoided as discussed.

Question 33: Should we prevent family visitors switching into the family route as a dependent relative while in the UK?

Please select 1 answer only
☐ YES

☐ **x NO**

☐ NO OPINION

No, there are often good reasons why people need to change their status in the United Kingdom post entry. There should be no limitation on the ability to switch into the dependent relative route in the United Kingdom where the applicant satisfies the requirements in the rules. While the applications are being decided the applicants are not able to access public funds or National Health Service treatment and there are therefore no costs associated with allowing such applications to be submitted in country.

Note on refugee family reunion

There is reference to refugee family reunion in the consultation paper but no changes are proposed by the UK Border Agency in the paper. Any changes would therefore require a further consultation.

ECHR ARTICLE 8

Chapter 8: Article 8

Before answering the questions posed in this section of the consultation, ILPA wishes to comment on the way in which the present state of the law on Article 8 is presented. As the consultation paper does not set out the position in the United Kingdom with regard to Article 8, we do so here.

R (Razgar) v Secretary of State for the Home Department [2004] UKHL 27, [2004] 2 AC 368, para 17, sets out the process to follow in assessing whether a person's exclusion or expulsion from the UK will give rise to a breach of Article 8. It states:

> *In a case where removal is resisted in reliance on article 8, these questions are likely to be:*
> *(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?*
> *(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?*
> *(3) If so, is such interference in accordance with the law?*
> *(4) If so, is such interference 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) If so, is such interference proportionate to the legitimate public end sought to be achieved?*

In cases of the types discussed in the consultation paper, it is usually the question of proportionality which is in dispute. The question is whether expulsion or exclusion will amount to a disproportionate interference with a person's right to respect for family and private life (and the rights of any other family members upon whom the decision would impact).

In *Huang and Kashmiri v Secretary of State for the Home Department* [2007] UKHL 11, [2007], the House of Lords, reviewed all of the relevant authorities from the UK and from Strasbourg. It set out, on the one hand, factors which would weigh in favour of exclusion or removal:

> *[16] The [Tribunal] will wish to consider and weigh all that tells in favour of the refusal of leave which is challenged, with particular reference to justification under article 8(2). There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly*

> *porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain; the need to discourage fraud, deception and deliberate breaches of the law; and so on.*

It then set out, again on the basis of a reading of UK and Strasbourg authority, the factors which weigh against removal:

> *[18] Human beings are social animals. They depend on others.* ***Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives.*** *Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant.*

The House of Lords went on to reject the suggestion that a person who claimed a right to remain in the United Kingdom because of his/her private or family life would have to pass an 'exceptionality' test. Instead, it was essential to conduct a proper factual analysis:

> *[20] In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality.*

Reflecting on paragraph 20 of *Huang*, the House of Lords in *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41stated at paragraph 12:

> *[12] Thus the appellate immigration authority must make its own judgment and that judgment will be strongly influenced by the particular facts and circumstances of the particular case. The authority will, of course, take note of factors which have, or have not, weighed with the Strasbourg court. It will, for example, recognise that* ***it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child. But cases will not ordinarily raise such stark choices, and there is in general no alternative to making a careful and informed evaluation of the facts of the particular case.*** *The search for a hard-edged or bright-line rule to be applied*

> *to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires.* [Emphasis added].

We should have expected passages such as these, which represent the thinking of the highest courts about the nature of the right to family and private life, to be cited or at least summarised in a consultation paper which intends to elicit and informed response from members of the public who may not be familiar with the details of the law. It is extremely disappointing that the consultation paper makes no attempt to provide such information.

Specific errors in Chapter 8

'insurmountable obstacles'

At paragraph 8.5 of the consultation, the authors assert that

> "*the European Court of Human Rights at Strasbourg has said that there is no interference with the right to respect for private and family life if there are no 'insurmountable obstacles' in the way of the family living in another country*".

The reference given in footnote 116 is *Abdulaziz v UK* (1985) 7 EHRR 471.

In *Abdulaziz*, however, the European Court of Human Rights 'says' no such thing. What the court finds in that case (para. 68) is that there were no '*obstacles*' at all to the families concerned living in another country. Nothing in *Abdulaziz* suggests that a person must show 'insurmountable' obstacles before an interference is shown and therefore before Article 8 is engaged. [152]

There is no extant legal authority in support of the extreme position which is advanced as a norm, or as a starting point, by the authors of the consultation document at paragraph 8.5. This is a fundamental legal error; it gives false legitimacy to a point which has been never been upheld in the international or national courts, and it is bound to mislead anyone who is not familiar with the original case reports and who goes on to read the remainder of section 8 of the consultation.

That error is compounded by paragraph 8.6 of the consultation document, which appears to suggest that the judgment of the Court of Appeal in *R (Mahmood) v SSHD* [2001] 1 WLR 840 is consistent with the spin the consultation has already attempted to place upon the European Court of Human Rights' judgment in *Abdulaziz*.

As is clear even from a reading of the passage quoted in footnote 117 to the consultation, the Court in *Mahmood* said no such thing. The authors of the consultation then move on (still at para. 8.6) to suggest that the judgments of the House of Lords in *EB (Kosovo) v SSHD* [2008] UKHL 41 and of the Court of Appeal in *VW (Uganda) v SSHD* [2009] EWCA Civ 5 were, somehow, reversing the decisions in these earlier cases. This is another mistake. The courts in these later decisions were building precisely upon the earlier ones. As the authors of this consultation paper are, or should be, aware, the reliance upon an '*insurmountable obstacles*' test as

[152] See also the comments on *Abdulaziz* in *Quila, op. cit.* paragraphs 43 and 72 per Lord Wilson and Lady Hale.

a necessary precondition for an Article 8 breach has been authoritatively described as a '*misreading*' of *Mahmood* (see *VW (Uganda)* at 28; and see *JO (Uganda) and JT (Ivory Coast) v SSHD* [2010] EWCA Civ 10).

Paragraph 8.7, which backs off from this extreme and incorrect position, is in itself unobjectionable, but to any reader who is unfamiliar with the cases, and who simply trusts that the Secretary of State will have accurately summarised them in a consultation paper, the damage is already done. The authors of the report have sought to portray a conflict between different authorities, or between Strasbourg and the UK courts, and given the reader the impression that there is a choice to be made between them. That conflict does not exist, and the Secretary of State is, or should be, aware of this.

Automatic deportation

Paragraph 8.11 is, again, misleading. It refers to the automatic deportation provisions as follows: "*Parliament has imposed a duty on the Secretary of State to make a deportation order*" and then suggests, that, where such duty applies, it will be "*only in exceptional circumstances*" that Article 8 will be breached by removal of an applicant from the UK. It then goes on to suggest that the Court of Appeal in *AP (Trinidad and Tobago)* [2011] EWCA Civ 551 "*indicated that this is the right approach*". This is not only wrong (there is no such reference to 'exceptional circumstances' in the Court's Judgment). It is also misleading in a more fundamental way. In *AP (Trinidad and Tobago)*, the Secretary of State expressly declined to advance this argument, with the result that the court did not hear argument on it, and did not reach any settled conclusion on it at all. The Secretary of State may now wish to change her mind, but it is misleading to suggest that this argument was advanced before the Court.

Precariousness

At paragraph 8.14, the authors of the consultation paper introduce the next error of law. The question here is the weight to be attached to private or family life which is established while a person is unlawfully present in the UK. The authors suggest that "*judgments from the Strasbourg Court make [*it*] clear*" that such person "*should [*not*] benefit from their lack of status*". The authors cite the Strasbourg case of *Rodrigues da Silva v Netherlands* (2007) 44 EHRR 729 in support of that proposition. Any reader of the consultation document who is unfamiliar with that case, or who trusts the Secretary of State to present it accurately, would reach the conclusion that the Strasbourg Court had dismissed a claim on the basis that a person was unlawfully present. In fact, as the authors of the report must be aware, the applicants in *da Silva* were successful, despite Mrs da Silva's having remained unlawfully in the UK and established her private life and family life as an unlawful migrant.

As the authors of the consultation document are, or should be, further aware, the Supreme Court recently expressed its own views about *da Silva*, describing it (in *ZH (Tanzania)* [2011] UKSC 4 at 20) as

> "*.. a relatively recent case in which the reiteration of the court's earlier approach to immigration cases is tempered by a much clearer acknowledgement of the importance of the best interests of a child caught up in a dilemma which is of her parents' and not of her own making*".

The authors of this consultation document overlook this recent and authoritative commentary on *da Silva*.

General Comments on Chapter 8

In addition to these specific and fundamental errors, there are three overriding problems with Chapter 8 of the consultation paper.

First, we have set out above the courts' observations about the fundamental importance of the rights to family and private life. It is extremely disappointing that, in a document which is presumably intended to trigger an informed discussion, there is no attempt at all to explain why Article 8 rights are important. The UK government has, as described elsewhere in response, claimed to be committed to the preservation of family life, and the provision of a stable environment for family members. It is astonishing that there is no reference to the link between this aim and the rights protected by Article 8; it is very disappointing indeed that the Courts' descriptions of the importance of Article 8 rights are entirely omitted from this consultation paper.

Secondly, the consultation paper simply fails to recognise that the Article 8 exercise, both the fact-finding element and the final assessment of the proportionality or otherwise of a decision to exclude or expel, is clearly established to be a matter (i) for the Secretary of State (or ECO) at the initial stage; and then (ii) for the Tribunal and/or courts on appeal or review.

There is a clear and principled division between the legislature, which has decided that Article 8 is directly enforceable in the UK; the executive, which are required to apply Article 8 when taking decisions; and the judiciary, which is required to interpret the requirements of Article 8 and apply them in the context of individual decision.

The consultation document appears to suggest that the role of the judiciary in interpreting and applying Article 8 can be ousted or its judgment fettered by the Immigration Rules. It therefore appears to invite respondents to give opinions which would be contrary to the Article 8 jurisprudence as it presently stands. This is both a misleading and pointless exercise. It is misleading, because it gives the impression that the Government has the power to do something which it cannot do (amend the meaning of Article 8 by Immigration Rules or published policies). It is pointless, because it gives respondents to this consultation document the impression that their views are capable of changing the nature of Article 8 by way of changes in policy or rules.

The underlying proposals advanced in this chapter of the consultation exercise seek, in our view, to amend the nature and application of Article 8 itself. Such amendments do not fall within the proper scope of this consultation exercise; they require to be addressed to the Council of Europe and to the European Union. To give respondents to the consultation the impression that the United Kingdom's international obligations can be short-circuited in this way is to set up a futile and illegitimate set of expectations.

Finally, it seems that the whole basis of the consultation exercise is an attempt to introduce criteria of exceptionality: if a person has established his or her private/family life while overstaying; or is subject to 'automatic' deportation; or faces no insurmountable obstacles in relocating, he/she should only exceptionally be entitled to succeed on Article 8 grounds. Against that background, it is astonishing that the authors have not chosen to refer at all to the seminal judgment of the House of Lords in *Huang*, where any recourse to 'exceptionality' tests was firmly rejected.

To put it another way, the consultation exercise seeks to draw "*hard-edged or bright line rule[s]*", to determine who should and who should not succeed on Article 8 grounds (see e.g. paras 8.11; 8.13; 8.14; 8.16; 8.19; 8.20). Such rules are, however, expressly rejected by the House of Lords in *EB (Kosovo)*[153] at para. 12:

> "*The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires*".

Again, this passage, which is recent and binding, is ignored by the authors of the consultation paper. Any rules which seek to impose a "*hard-edged or bright-line rule*" are and will remain incompatible with Article 8 for as long as *EB (Kosovo)* remains binding law in the UK. It is, therefore, unclear why the consultation exercise purports to give respondents a choice which can have no legal purchase whatsoever. It is further unclear why a consultation exercise which does footnote a number of legal authorities and hold itself out as legally informed should simply fail to refer to the passages most relevant to the propositions it seeks to advance.

The government has a duty, when presenting a consultation document, to take reasonable care that it gives an accurate portrayal of the law. Selected chunks of favourite bits of jurisprudence, cited out of context and (in the case of *Abdulaziz*[154]) entirely incorrectly, do not satisfy that duty. Most regrettably, this section of the consultation exercise falls far enough short of presenting an accurate or competent picture of the law as it presently stands that little if any weight can be attached to any answers to it.

Response to the specific questions

Despite our objections to the way in which this whole section of the Consultation Paper, we seek to answer the questions put.

Question 34: Should the requirements we put in place for family migrants reflect a balance between Article 8 rights and the wider public interest in controlling immigration?

That balance is already enshrined in the decision making of the UK Border Agency and in the reviewing powers of the courts. It is clearly set out in the text of Article 8 itself and in its interpretation by the UK Courts, the European Court of Human Rights, and the European Court of Justice. The question must be answered 'yes'. No

[153] *Op. cit.*
[154] *Op. cit.*

other answer would be lawful, and to give the impression that there is a choice to be made is simply misleading.

Question 35: If a foreign national with family here has shown a serious disregard for UK laws, should we able to remove them from the UK?

Again, the courts have clearly established that the UK has the power to remove such people, subject always to a fact-sensitive analysis of their and their families' individual circumstances and histories including such factors as length of residence, nationality of the affected parties, best interests of the children, seriousness of the breach of the UK laws, risk of reoffending, difficulties which will face the affected parties upon expulsion, and so on.

The only lawful answer to this question is 'yes'.

Insofar as the consultation exercise suggests that the fact-sensitive analysis can be restricted by hard-edged or bright-line rules, that suggestion is unlawful and we should reject it. Any attempt to introduce 'exceptionality' criteria will only lead to costly litigation in the higher courts and delays in decision-making, as happened in the last decade, and must be avoided.

Question 36: If a foreign national has established a family life in the UK without an entitlement to be here, it is appropriate to expect them to choose between separation from their UK-based spouse or partner or continuing their family life together overseas?

This is, again, to seek to introduce a hard-edged or bright-line rule. It is unlawful and we should reject it.

The courts have clearly established that the fact that family life has been established during a period of unlawful residence is a relevant factor in the Article 8 balancing exercise, no more and no less.

The weight to be attached to such precariousness will be affected by other factors such as length of *de facto* residence, the culpability of the parties and their knowledge of precariousness, the best interests of any children involved, the nationality of the parties, the nature of the obstacles to relocation elsewhere, and the conduct of the Secretary of State, including any delay in resolving immigration issues. We should reject any attempt to short-circuit this fact-finding exercise. The courts have clearly shown that they are able to conduct the exercise (see for example the figures cited at footnote 121 of the consultation paper). Any attempt to limit the fact-finding of the courts, or to restrict their exercise of judgment, will be unlawful and will lead to unnecessary and costly litigation.

Our overriding response to the consultation questions on Article 8 is that the courts have shown themselves fully able to regulate the operation of Article 8 in an immigration context. While this will inevitably lead to some decisions with which the Secretary of State disagrees and also to decisions with which migrants and their representatives disagree such is the nature of judicial overview of the decision-making system.

IN GENERAL

Question 37: What more can be done to prevent and tackle abuse of the family route, particularly sham marriage and forced marriage?

See detailed ILPA responses above especially in light of the Chief Inspector's recommendations for better implementation of the current immigration rules and guidance which already address the stated aims of the consultation paper.

Question 38: What more can be done to promote the integration of family migrants?

See detailed ILPA responses above especially in light of the Chief Inspector's recommendations for better implementation of the current immigration rules and guidance which already address the stated aims of the consultation paper.

Question 39: What more can be done to reduce burdens on the taxpayer from family migration?

See detailed ILPA responses above especially in light of the Chief Inspector's recommendations for better implementation of the current immigration rules and guidance which already address the stated aims of the consultation paper.

Question 40: How should we strike a balance between the individual's right under ECHR Article 8 to respect for private and family life and the wider public interest in protecting the public and controlling immigration?

See detailed ILPA responses above especially in light of the settled and established human rights case law.

Sophie Barrett-Brown
Chair
ILPA
13 October 2011