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ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
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ILPA training

UNMARRIED PARTNERS: including how to advise those who do not meet the time requirements

London, Tuesday 9 July, 2002, 4.00-7.15pm

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Course code: DT 604
Continuing professional development – 3 hours

UNMARRIED PARTNERS COURSE

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1. Historical Background

1. Common-law spouses (where the applicant was female), but not same sex relationships, were recognised in the Immigration Rules until 1985 (HC169 Para 49).

2. High Court challenge to the failure to recognise same-sex relationships was unsuccessful (**Wirdestedt v SSHD [1982] ImmAR186**).

3. Common-law spouse provision in the Rules abolished by HC503 in 1985, but replaced with a concession outside of the Rules (published in *Immigration & Nationality Law and Practice*, October 1986).

4. High Court defines common-law spouse relationships (in the context of DP2/93) as ones where there is a legal possibility of marriage thus excluding same-sex relationships (**R v SSHD ex parte Ozminos [1994] ImmAR 287**).

5. 4th May 1994 – *"Compelling Circumstances"* policy for same sex partners introduced.

6. Tribunal Determinations in **Lizarzaburu [10848]** and **Livingstone [10964]** urge Home Office to apply common-law spouse concession to same sex relationships.

7. 22nd February 1996 – Common-law spouse concession withdrawn (justified on grounds of alleged abuse).

8. DP2/93 cancelled and replaced by DP3/96 – common-law spouses no longer included.

9. Tribunal considers inconsistent application of *"Compelling Circumstances"* policy in **Camara [14591]**.

10. 10th October 1997 – *"Unmarried Partners Concession"* introduced covering same sex and heterosexual couples where there is a legal impediment to marriage. Four years relationship required. Immigration Minister, Mike O'Brien states that the previous practice was considered *"unsustainable"* and *"may have breached Human Rights law"*, the new concession keeps the *"special position of marriage"*.

11. 16th June 1999 – Four years requirement reduced to two years, probationary period increased from one year to two years. Concession to be taken into account when deciding whether or not to initiate enforcement action [*Hansard written answer number 16, 16/6/99*].

12. 2nd October 2000 – Unmarried Partners Concession incorporated into the Immigration Rules (**Paragraphs 295A – 295O of HC395**, inserted by **CM4851**).

2. The Unmarried Partners Rule (and its Interpretation)

I The applicable law

1. **HC395** Paragraphs 295A – 295O. **[1-4]**

2. **Immigration Directorates Instructions** (IDI) Chapter 8, Section 7 and Annex AA, and Annex Z. **[5-19]**

II Who Benefits

The Unmarried Partners of:

1. Persons *present* and *settled* in the UK or persons being admitted for settlement (295A-295I) **[1-3]**

2. Persons with limited Leave to Enter or Remain with a view to settlement (e.g. work permit holders, persons with UK ancestry etc) (295J-295L) **[3-4]**

3. EEA nationals exercising Treaty Rights [see Paragraph 1, Chapter 8, Section 7 of IDI) **[5]**

The Rule does not extend to the unmarried partners of:

Students, student nurses, post-graduate doctors and dentists, teachers and language assistants or those on Department of Employment Training or work experience schemes [*cf* position of spouses]

[note other references to unmarried partners in immigration legislation;

- **Immigration Appeals (Family Visitor) Regulations SI 2000/2446**: Family member defined to include *"a person with whom he lived as a member of an unmarried couple for at least two of the three years before the day on which his application for entry clearance was made"*

- Family member in S74,75 & 76 of the 1999 Act defined similarly by the **One-Stop Procedure Regulations SI 2000/2244**

- Article 4 of the **Immigration (Exemption from Control) Order 1972** makes certain persons and "members of their households" exempt from immigration control. Chapter 14, Section 1 of IDI at paragraph 6 defines "members of household" to include *"unmarried partners (common law or same sex relationships) where the relationship is recognised as durable by the sending State and is one that is akin to marriage.."*

III Core Requirements

There are **Seven** core requirements applicable to in-country and on entry applications.

1. **Any previous marriage or similar relationship has permanently broken down.**

   See Paragraph 1, Annex AA, Chapter 8, Section 7 (IDI) **[13]**

2. **The parties are legally unable to marry under United Kingdom law (other than by reason of *consanguineous [blood]* relationships or age [under 16]).**

   See Paragraph 2, Annex AA, Chapter 8, Section 7 of IDI **[13]**

   Legal impediment exists for same sex and transsexual couples (Section 11 of the Matrimonial Courses Act 1973); heterosexual couples "free to marry" will not qualify [breach of Article 14 with Article 8?]

3. **The parties have been living together in a relationship akin to marriage which *has subsisted for two years or more.***

   See Paragraph 3, Annex AA, Chapter 8, Section 7 (IDI) **[14].**

   Two year relationship required, but not necessary to show two years of continuous co-habitation

   Periods of separation for good reasons for up to six months (at a time) allowed if couple otherwise *"living together"*. Evidence of co-habitation when together and contact when separated essential.

   But note practice of some overseas posts – requiring 2 years cohabitation **[20]**

   Visits / studies permissible to build up 2 years **[21-23]**

   See approach of Adjudicators in **Shonubi [TH/40029/96], Bloch [TH/6006/98],** and **Netweera [TH/6369/98]** **[24-41]**

   See also Tribunal Determination of **Richards [20616]** re *"Akin to Marriage" – "that phrase denotes a relationship intended to have a permanency"*. **[42-47]**

4. **The parties will be able to maintain and accommodate themselves and any dependants without recourse to public funds.**

   Policy is no "*additional* recourse"; same-sex partners are not treated as a couple (yet) for purpose of benefits legislation

5. **The parties intend to live together permanently.**

   Evidence of relationship to date and Declaration to that effect suffices – declaration on FLR(M)

6. **In-country applicants must have limited Leave to Remain in the United Kingdom and the relationship must pre-date any decision or recommendation to deport / remove.**

H/w relationship to be *"taken into account"* when deciding whether or not to initiate enforcement action (Hansard, 16th June 1999) **[48]**

See also paragraph 4, Annex G, Chapter 8, Section 7 (IDI) on use of discretion in illegal entrant cases **[8 & 49-51]** .

Enforcement policies applicable to marriage apply e.g. DP3/96 (see Para 3.1, Chapter 8, Section 7 , IDI) **[7 & example at 52-53]**

7. **Port applicants must have prior entry clearance.**

However, see Para 2.2, Chapter 8, Section 7, (IDI) – *"Where a passenger does arrive without a valid entry clearance...it will be necessary to establish whether there are any compelling and compassionate circumstances, which would prevent refusal and removal"*. **[6]**

See ex parte **Hashim CO/2052/1999** (exceptional on its facts) **[54-61]**

See also ex parte **McCollum [2001] EWHC Admin 40** **[62-72]**

IV The Probationary Period

Two years if applicant's partner is settled (295B & E). **[1]**

Leave in line, if applicant's partner has limited Leave (295K). **[4]**

Partners of EEA nationals; two years followed by 3 years (but can apply for ILR once resident in UK for 4 years or if EEA partner has settled status) **[73]**

Bereavement (295M). **[4]**

Domestic violence policy applies

V Possible Future change

1. Domestic law; White Paper proposal to allow applicants in 5 year relationships to apply for settlement entry clearance (i.e. no probationary period).

2. European Union law; two draft Council Directives pending

   (i) **COM (2001) 257** on free movement. "Family member" defined to include (some) unmarried partners. *cf* current **Reg. 1612/68** . **[74-79]**

   (ii) **COM (2002) 225** on family reunification; optional provision only **[82-83]**.

3. Making an application under the Unmarried Partners Rules

I Where should the application be made?

An application for leave to remain can be made to the Home Office in the United Kingdom or an application for leave to enter can be made to the British Embassy, Consulate or High Commission in the country where the applicant is living. The following questions should be asked:-

1. Does the applicant have a choice? *(e.g., is it an application for leave on the basis of a relationship with a person with limited leave?)*
2. Are there advantages to an application outside of the United Kingdom for leave to enter? *(e.g., or problems with current leave for an applicant who is in the United Kingdom)*
3. Are there disadvantages to an application outside of the United Kingdom for leave to enter? *(e.g., a risk of refusal and the applicant will be forced to remain outside the United Kingdom and therefore away from his or her partner during the appeal process.)*
4. If an application is to be made within the United Kingdom, is there a potential problem of "illegal entry"? *(consider the applicant's last entry and the basis on which that entry was made or, if the applicant is outside the United Kingdom, on what basis the applicant will enter the United Kingdom, whether the applicant is able to travel once they have decided upon an application under the unmarried partners rules.)*

II The application form

Applications within the United Kingdom should be made on Form FLR(M) **[84-95]** if the applicant meets the immigration rules. If the applicant does not meet the rules, consideration should be given as to whether Form FLR(O) **[96-106]** should also be completed. If both are to be completed, close consideration should be given to the declarations at page 11 of form FLR(M).

For applications outside of the United Kingdom, Forms IM2A and IM2B **[107-112]** must be completed - these now include a box for 'partner'. Please also note that for applications outside of the United Kingdom, a fee is payable in local currency (currently around £250).

III Documentation required

All applications must include the following:-

1. A passport size photograph of both the applicant and the partner (and any dependants). These should be stapled to the front of the form and the names clearly displayed and written on the back of the photographs. For applications made outside of the United Kingdom, two passport photographs are required instead of one.

2. A valid passport for the applicant.
3. Police registration certificate if registration was required.
4. Passport of the British/European or settled partner. See page 6 of Form FLR(M), note 3 for guidance on the situation where the applicant's partner does not have a current passport or travel document.
5. Evidence of the couple's ability to accommodate and maintain themselves without recourse to public funds. This should take the form of the original bank statements of any sole or joint account held by the applicant and the partner. At least the last three months' bank statements must be submitted and the last three months' worth of pay slips for the applicant and/or the partner if they are employed. For applications outside of the United Kingdom, six months' evidence will be required. See chapter 8, section 7, paragraph 3.3 of Immigration Directorate's Instructions for comment on maintenance and accommodation **[8].** (It should be noted here the UK-based partner can rely on public funds but these must not be increased for the benefit of the applicant. See the standard letter of grant **[113-114]** which states ' there is no objection to your partner receiving assistance to which he or she is entitled to in his or her own right').
6. Evidence to prove relationship. See section below.
7. Evidence of breakdown of any previous relationship. See section below.

IV Evidence to prove relationship

There are no mandatory documents that must be submitted for a successful application. Note 5 at page 9 of Form FLR(M) **[92]** and paragraph 3 of annexe AA of section 7, chapter 8 of the Immigration Directorate's Instructions **[14]** both provide guidance as to what evidence can be used to prove a relationship. It must be stressed that this is *just* guidance. It is preferable to use the 'official' documents suggested but other documents can be used in the absence of the suggested documentation. Furthermore, the guidance gives the bare minimum number of documents required and it is not advisable to rely on this.

There is no one set of documents that has to be produced but below is a suggested application. It must be noted that the documentary evidence of *cohabitation* is essential. An application will rarely be granted if the Home Office are not convinced that the couple have been cohabiting for the required period of time.

Suggested documentation:

1. **Testimony of the applicant and the partner** – a joint letter or two separate letters signed by each of them providing a chronological history of their relationship, where they have lived together and explanations for any recent periods of separation, an idea of the life the applicant and the partner and their love for each other, confirmation that they are living together and intend to do so permanently. Do not let your clients give evidence of illegal entry.
2. **Testimonies from friends and family** – stating who they are, their relationship to the applicant and partner, how long they have know them and confirmation of the applicant and partner's relationship and cohabitation. The

number needed and Home Office attitude towards these testimonies should be considered. Do not let the testimonies give evidence of illegal entry.

3. **Chronology of the relationship** – showing clearly periods of cohabitation and periods of separation.
4. **Evidence of cohabitation** – this is the crucial part of the documentation. Ideally, the applicant should be able to provide evidence for the last 24 months from utility companies, banks, or other bodies listed in note 5 page 9 of Form FLR(M) **[92]**. Joint correspondence is ideal but if there is no joint correspondence then correspondence for both the applicant and the UK-based partner must be included. (NB – you must show that both members of the couple are at the same address and not neglect to give evidence that the UK-based partner is living there.) Form FLR(M) gives guidance as to how many pieces of post are required but this is the bare minimum and it is advisable to provide more, and if possible a piece of post for each of the last 24 months. If "official" correspondence is not available, then submit postmarked envelopes/postcards addressed to the applicant, the partner or to both of them. Other acceptable evidence of cohabitation are joint leases, letters from landlady/landlord stating that the applicant and partner live at the same address, official documents which show the address of the applicant and partner. However, do not rely on just leases or letters from landlords, always include correspondence. It must be remembered that the cohabitation section is crucial.
5. **Evidence of commitment to relationship** – this may include wills, life assurance policies of a member of the couple showing the other as a beneficiary, any joint financial arrangements, joint credit cards.
6. **Non-documentary evidence of the relationship** – e.g. Valentine's cards, personal letters.
7. **Documentary evidence of continued contact during enforced separation** – e.g. phone bills.
8. **Photographic record of the relationship**.
9. **Any "human interest" or compassionate aspects of the relationship**.

It is a question of judgement as to how much of each type of evidence should be included. If the applicant and partner have very strong evidence of cohabitation, then it would not be necessary to submit large amounts of mementoes, photographs or letters of support. However, in an application where the evidence of cohabitation is weak, it is essential to include as much other information as possible to convince the Home Office that the application meets the rules.

An interesting point to note here is that in Chapter 14, Section 1of IDIs at paragraphs 6 and 9**[169 – 175]** relating to the unmarried partners of diplomatic staff. The requirements for these applicants differ and there is no set period of cohabitation and the evidence may therefore differ.

V Evidence of the permanent breakdown of a previous relationship.

The applicant and partner must be asked about any previous relationships in all instances, for heterosexual partners as well as same sex partners - there are many gay men and women who have previously been in a heterosexual marriage.

From the rules and from Form FLR(M), it is clear that a divorce is not required. Indeed, in cases involving heterosexual partners, it may be the inability to obtain a divorce which has led to an application under the unmarried partners' rules.

However, if there has been a previous marriage, the divorce certificate should be included wherever possible. See correspondence with Home Office on this issue **[115 – 120]**. Guidance is given in paragraph 1 of Chapter 8 Section 7 Annex AA.**[13 – 14]**

VI Presenting the application

Make it easy for the Home Office to read!

VII How should an in-country application be made?

1. By post?
2. In person?
3. By Home Office priority system?

It must be considered whether it will be to the applicant's advantage for the application to be sent by post and potentially take some time. However, it may be that with a straightforward application, the applicant may wish to attend the Home Office in person., this very much depends on how quickly the Home Office is dealing with applications at any one time. It may be appropriate to use one of the priority schemes.

VIII Covering letter

The nature of the solicitor's covering letter depends on the strength of the application. There is no one correct letter to accompany the application but it may be advisable in a straightforward application to write a shorter letter simply confirming that it is a straightforward application which meets the rules and then pointing out the length and places of cohabitation, the ability to support and accommodate and detailing the documents that are included. However, when an application is not straightforward, a much fuller letter should be provided to explain why the application does meet the rules.

4. Strategies for those who do not fall squarely within the Unmarried Partners Rules

I A cardinal principle – do not automatically concede that an application falls outside the rules if it arguably does

While the Home Office, in its instructions, tries to define a 'relationship akin to marriage' according to the amount of cohabitation which has taken place during the two-year qualifying period, this is not specifically set out in the rules. In cases, therefore, where a serious relationship has been subsisting for two years, but the cohabitation requirements have not been met, nonetheless it should be asserted that the application falls within the rules. The decision then needs to be taken whether, strategically, the applicant should spell out that the cohabitation has been less than the eighteen months required but argue that, nonetheless, the relationship is one 'akin to marriage' and has 'subsisted for two years' or, in the alternative, should remain silent on this point. Obviously, however, where the relationship itself has been subsisting for less than two years, it will be impossible to bring the application within the ambit of the rules. (Decision needs to be taken whether to submit a form FLR(O) as well as a form FLR (M).)

II Some special considerations

Obviously, the immigration adviser's responsibilities in such situations are not that much different than in many other similar situations where an individual is seeking leave to enter or remain in the United Kingdom. There are, however, some factors arising in cases relating to the unmarried partners rules which can distinguish them from other situations.

1. To a certain extent, the individuals concerned may be more knowledgeable and 'clued up' than the ordinary client. (See excerpt from the Stonewall Immigration Group website at pp 123-127 in the Appendices.)
2. It may also occasionally be the case that they are more 'politicised' and feel that they are victims of an injustice and a violation of their human rights not to have their relationship recognised under the unmarried partners rules whereas, if they were free to marry, their marriage would be immediately recognised. This is an understandable reaction but, at the same time, may cloud their judgement as to the best strategy to follow. Such a reaction may lead to the individuals concerned feeling that they want to make an application based upon their relationship notwithstanding the fact that it does not fall within the unmarried partners rules.
    a. In fact, this was a strategy followed successfully by literally hundreds of couples in the early- and mid-1990s before the promulgation of the unmarried partners concession in 1997 and, eventually, the unmarried partners rules in 1999.
    b. Furthermore, to the best of our knowledge, there has never yet been a case where an individual legally within the United Kingdom made an application based upon his or her relationship, either before or after the implementation of the concession and rules, where that individual was

ultimately compelled to leave the United Kingdom. It is, therefore, a strategy which has a good rate of success.

c. It is, nonetheless, a strategy which exacts a substantial cost from those who are pursuing it which, clearly, it is the responsibility of the adviser to explain to the client.

(i) Legal costs occasioned by the initial application, subsequent appeal(s), possible judicial review, etc.

(ii) The inability of the foreign partner to travel.

(iii) The non-existent or limited right of the applicant to work. (But note that section 3(c) of 1971 Act, inserted by Immigration and Asylum Act 1999, section 3, provides that if a person who has limited leave applies to the Secretary of State for variation of leave before his present leave expires, the existing leave is treated as continuing so long as no decision has been taken and, if a negative decision is taken, until the end of the period provided under procedural rules for appealing.)

(iv) Continuing long-term uncertainty as to when or whether a positive resolution of the case will be achieved. Notwithstanding the prospects of long-term success, the initial appeal against refusal may not be scheduled for a long period of time, given the priority being given to asylum appeals. While, in the meantime, representations made by an MP or another strategy may prove effective in bringing about a positive resolution, there can be no guarantee.

(v) All of these factors can combine to put enormous pressure on a relationship, the extent of which cannot easily be understood by someone who has not lived through it. Inequality within the relationship as to freedom to travel, right to earn a living, etc. Fewer support structures in place than before.

3. The adviser, therefore, has to take some responsibility for 'reining in' the enthusiasm of a client to 'fight for what is right' and to consider other viable alternatives.

III Considering the alternatives

The purpose of this course is not to describe in detail relevant factors for every possible application which could be lodged under the immigration rules by an individual seeking to 'build up' two years of cohabitation. The excerpt in the Appendix from the Stonewall Immigration Group website provides an overview of the spectrum of possibilities which most often might be relevant. There are, however, particular factors which need to be taken into account with respect to certain alternative categories which may be pursued.

IV Statuses not leading to settlement

1. A fundamental problem – the intention to leave.

a. What is the applicant's intention at the time of the application? (*e.g. is it possible to make application for leave to enter or remain for some*

temporary status in the early stages of a relationship without having taken a decision that, once the two year mark has been reached, an application for further leave to remain based upon the relationship will made? Arguably, yes. Not so different from a couple contemplating the possibility of marriage with one member of the couple deciding to come here to visit or study 'to see how it goes'.)

b. Avoiding being declared an 'illegal entrant' at the time of eventually lodging an application under the unmarried partners rules. (*The importance of not having recently re-entered the United Kingdom. The importance of making clear in the context of an application when a decision was taken that the couple wished to remain together permanently. Hopefully, this final decision will have been taken only after the applicant's most recent entry to the United Kingdom.*)

2. Visitor's status.

a. Note that the Immigration Directorate's instructions specifically contemplate the possibility of building up a two-year period of cohabitation by members of the couple visiting one another in their respective countries. (See chapter 8 section 7 annexe AA paragraph 3 at page 14 of the Appendices. This provision was specifically negotiated by the Stonewall Immigration Group with the then immigration minister, Mike O'Brien.)

b. Application for entry clearance as a 'visitor' by a visa national. There may be occasions where it is sensible, in the context of visitor visa applications by visa nationals and in other similar contexts, for the individuals concerned to admit the existence of their relationship and the fact that they are using visitor's status to 'build up time' but stressing that they realise that they must not 'set a foot wrong'. (See model letter in Appendices at pp 128-129 which includes formula which has been used successfully in such contexts.)

3. Student applications.

a. Similar types of concerns can arise in the context of student applications.

b. Often, however, it may make more sense not to volunteer information while, at all times, ensuring that there is no material representation.

c. Tricky situations can arise in cases where the British-based partner is sponsoring the foreign partner and providing accommodation as well as, perhaps, paying tuition expenses and living expenses. It can be a double-edged sword. In the future, may want to draw attention to this sponsorship to prove the seriousness of the relationship at the point of student application At the same time, however, not necessarily advantageous to draw the Home Office's attention to the fact that the individuals concerned are pursuing a relationship lest this be used by Home Office to draw conclusion that individual concerned will not leave at the end of studies.

d. More complicated in entry clearance cases. Sometimes approach set out above in paragraph III.2.c may be appropriate.

V Applying for statuses leading to settlement

Obviously, such applications are far less problematic because the intention of the individual to remain in the United Kingdom with his or her partner is parallel to the inherent intention of any application for a status leading to settlement. Such applications, instead, only raise questions of strategy for the individuals concerned about whether they will, at some point, find it useful to 'switch' from their one status leading to settlement to that of an 'unmarried partner'. Quite often, this will be simply a question of arithmetic. (i.e. which status will lead to settlement sooner.) There also may be questions, however, arising out of whether the individual concerned wishes to be tied more securely to a job or an individual!

VI Special cases

1. Building up time by living in another country.
   a. The UK's policy relating to the recognition of same-sex relationships for immigration purposes is more onerous than that prevailing in many other countries. It may be that a couple may have the right to live together in another country, thereby building up the two years' cohabitation required to make a successful application in the United Kingdom. e.g. Australia, Canada, Netherlands, the Scandinavian countries, South Africa, etc.
   b. This situation may arise either because the foreign national in the couple comes from a country recognising such immigration rights for unmarried partners or, in the alternative, the British-based partner may have the right to go and live in one of these countries and to bring his or her partner because of status as an European Union citizen.
   c. There may be another basis in the immigration law of the foreign partner's country which permits the British-based partner to go and live there for a time. (e.g. reciprocal and Commonwealth working holidaymaker arrangements.)
2. The possibility of the foreign partner acquiring another nationality. (e.g. entitlement to the nationality of an EU country or to a country party to an Association Agreement through parents or grandparents.)
3. Cases where HIV and AIDS are a factor.
   a. Traditionally some willingness on the part of the Home Office to exercise discretion favourably in those cases where HIV and AIDS are a factor.
      (i) Need for good documentation from doctor(s), social worker or others both about the details of the directly affected partner's illness and the important role which the other partner plays in supporting him/her (with mutual support provided where both parties are affected).
      (ii) Questions around life expectancy.
      (iii) Questions of availability of new treatments in a foreign partner's home country where s/he is the affected partner.
      (iv) What about "reliance on public funds"?

b. Need to take into account factors cited in the current Immigration Directorate's instructions. See pp 130-137 of the Appendices. These purport to bring the United Kingdom into compliance with the European Court of Human Rights decision in the case of *D v UK* (1997) 24 EHRR 423.

c. The carer's concession. See pp 138-141 of the Appendices.

5. Human rights strategies

I Relevant rights

The incorporation by the Human Rights Act of the European Convention on Human Rights into British law has opened rich new possibilities for pursuing applications for unmarried partners rules who do not fall squarely within the unmarried partners rules. The decision last Friday by the Court of Appeal in the case of *SSHD v Z* demonstrates that this is an area which remains ripe for further litigation. (See pp 142-156 of the Appendices.)

1. Article 8.

   The provision of the European Convention on Human Rights which is likely to be most relevant in this context is Article 8 which states:-

   "Article 8 - Right to respect for private and family life

   1. Everyone has the right to respect for his private and family life, his home and his correspondence.
   2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

2. Other relevant rights as set out in Articles 3 and 14.

   "Article 3 – Prohibition of torture

   Noone shall be subjected to torture or to inhuman or degrading treatment or punishment."

   "Article 14 – Prohibition of discrimination

   The enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

II Establishing a violation of Article 8

1. The key questions.

   In order to establish a violation of Article 8, two key questions need to be addressed:-

   a. Has 'family life' or 'private life' been established?

   b. Has there been an interference with such a right constituting a violation of Article 8? In answering this question, a series of additional questions need to be addressed:-

      (i) Is there an interference with that 'family life' or 'private life'.

(ii) Is the interference in accordance with the law?

(iii) Does it have a legitimate aim?

(iv) Is the interference necessary in a democratic society?

(v) Is it proportionate to the aim pursued?

2. Has 'family life' or 'private life' been established?

a. The European Court has held that marriage, almost inevitably, gives rise to 'family life' (*Abdulaziz, Cabales and Balkandali v UK* (1985) 7 EHRR 471). 'Family life' has also been held to include many other common law and 'de facto' heterosexual relationships. The Commission has indicated that, in examining such relationships to see whether they comprise 'family life', the kinds of issues to be considered are:-

(i) Whether a couple live together,

(ii) The length of their relationship, and

(iii) Whether they have demonstrated their commitment to one another by having children together or by any other means. (*Kroon v Netherlands* (1995) 19 EHRR 263.)

b. The European Court has gone on to accept that 'family life' can exist between a couple where one of the members is a transsexual. (*X, Y and Z v UK* (1997) 24 EHRR 143.) The case involved X, a transsexual, Y his female partner and Z, Y's child by artificial insemination.)

c. The Strasbourg institutions, however, have thus far failed to recognise that a stable gay/lesbian relationship constitutes 'family life'. In *X and Y v UK* (1983) 32 DR 220, the Commission held, in the context of a deportation decision affecting a gay couple that:-

"Despite the modern evolution of attitudes towards homosexuality, the Commission finds that the applicants' relationship does not fall within the scope of respect for family life ensured by Article 8."

d. In that case, however, and in other earlier cases (notably *Dudgeon v UK* (1981) 4 EHRR 149), such relationships were said to be protected as an aspect of the individual's 'private life'.

e. The Convention is, however, a 'living instrument' and, in the light of evolving social values, it is to be hoped that the decision to exclude gay and lesbian relationships from the definition of 'family life' would be overturned in the near future. In this regard, the decision of the House of Lords in the case of *Fitzpatrick v Stirling Housing Association* (1999) 3 WLR 1113 is relevant. In that case, the House of Lords found a same-sex couple to constitute a 'family' for the purposes of the Rent Act (1977). Lord Slynn commented that:

"Leaving aside the fact that those cases were still in an early of stage of the development of the law and that attitudes may change as to what is acceptable throughout Europe, I do not consider that these decisions impinge on a decision which your Lordships have to take on a specific statutory provision."

f. In *X and Y v UK*, the Commission specifically extended the principle of the protection of the private life of gay and lesbian couples to the immigration context:-

"The Commission finds that the applicant's relationship is a matter of private life and the question arises whether the deportation order requiring the first applicant to leave the United Kingdom constitutes an interference with the applicant's rights under Article 8."

3. Has there been an interference with the right to respect for 'private and family life' constituting a violation of Article 8?

a. The Strasbourg institutions have consistently accepted that a violation of Article 8 can occur as the result of state activity in the field of immigration. See, e.g., *East African Asians v UK* (1973) 3 EHRR 76; *X and Y v Germany* (1977) 9 DR 219; *Lukka v UK* (1987) 9 EHRR 552; and *Abdulaziz, Cabales and Balkandali v UK* (1985) 7 EHRR 471.

b. This is not withstanding the provision in Article 8(2) allowing a public authority to interfere with 'private and family life' if such interference is "in accordance with the law" and is necessary in a democratic society "in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

c. In many contexts, the need to maintain immigration control has been accepted as consistent with taking steps to protect "the economic well-being of the country", and steps "for the prevention of disorder" and "for the protection of the rights and freedoms of others."

d. This leads necessarily to the need, in individual cases, to apply the **principle of proportionality**, whereby, in deciding whether a public authority's interference with the right to 'private and family life' is justified, there is the need to find a 'fair balance' between the individual's right and the community's interests.

e. This fair balance can, according to the jurisprudence of the Strasbourg institutions, be achieved if the limitation of the individual's rights is strictly proportionate for the policy aim to be achieved. The principle of 'proportionality' involves the weighing up of whether the interference is supported by sufficiently persuasive means and, further, whether there are alternative means available which might prove equally effective without undermining the individual's rights to the same degree.

f. Questions such as these can arise in the context of cases relating to the unmarried partners rules in a number of contexts.

(i) If the couple concerned would have the right to live together in another country, it is unlikely that a decision to refuse to allow them to remain in the United Kingdom taken under the terms of the unmarried partners rules would be seen as a violation of Article 8, all the more so since, presumably, while living in that other country, they will have the right to 'clock up' the necessary time which would allow the foreign partner to

reapply to enter the United Kingdom to live with his or her partner here.

(ii) The situation is a very different one, however, in cases where a refusal to allow the couple to remain together in the United Kingdom means that, effectively, they are barred from living together anywhere in the world, thereby precluding them from ever reaching the point where they would qualify under the unmarried partners rules. (This situation could arise simply because the British-based partner would not have the right to live with the foreign partner in that other country. The situation could be exacerbated in situations where it is against the law for the couple concerned to live openly in a gay or lesbian relationship in the foreign partner's home country. Consider also the situation where, for example, the British-based partner is HIV positive and the foreign partner comes from a country such as the US where, under the benighted laws applying there, an HIV positive person is not even allowed to visit that country. Consider also cases where requiring the foreign partner to go abroad to apply for entry clearance might interrupt cohabitation by more than six months if, for example, partner faces conscription or other restriction on leaving the country, thereby taking the couple outside the immigration rules.)

g. The Court of Appeal's first (tentative) attempts to deal with such issues – *SSHD v Z* determination issued on Friday 5 July 2002. See pp 142-156 of the Appendices.

h. Article 8 issues many also arise in the context of individuals seeking leave to enter the United Kingdom on the basis of the unmarried partners rules after having been in this country for a period of time on temporary admission and forming a relationship while here. (See e.g. adjudicator's determination in *Kazlauskas* at pp 157-164 of the Appendices, relating to such an application by a failed asylum seeker.)

III Article 3 Inhuman and degrading treatment

Practitioners have previously sought to argue that it might constitute 'inhuman or degrading treatment' to refuse to allow unmarried partners to remain together in this country. The brief consideration of Article 3 arguments in *Z* by the Court of Appeal would not seem positive in this regard. Consider, however, a case with extreme facts whereby, if the couple are not allowed to remain together in the United Kingdom, they will effectively be barred from *ever* living together.

IV Article 14 Prohibition of discrimination

Arguably, the case can be made that, with respect to both heterosexual and gay/lesbian relationships, unmarried partners are being discriminated against on the grounds of their 'other status', i.e. failure to be in a marriage. Arguably also sex-related in gay/lesbian cases since *could* marry if of opposite sexes.

6. Asylum

1. The Refugee Convention and **Islam (A.P.) v Secretary of State for the Home Department, Regina v Immigration Appeal Tribunal and Another Ex Parte Shah.**

2. Asylum applications and applications under the European Convention on Human Rights and the Human Rights Act 1998.

3. Possible sources of information (selected, by no means an exhaustive list!):-
   a. International Gay and Lesbian Human Rights Commission **[165 – 168]** (www.iglhrc.org). (request for documentation form attached.)
   b. International Lesbian and Gay Association (www.ilga.org)
   c. '*Crimes of Hate, Conspiracy of Silence*: Torture and Ill-Treatment based on Sexual Identity' Amnesty International 2001.
   d. Behind The Mask (www.mask.org)
   e. Planetout (www.planetout.com)
   f. Sodomy laws (www.geocities.com/privacylaws/world)

4. Suggested approach to an asylum statement of an LGBT client.