ILPA response to the All Party Parliamentary Group on Migration Inquiry into Family Migration

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 and non-governmental organisations are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous government and other advisory groups and has given both written and oral evidence to many parliamentary committees.

This inquiry is limited to the impact of the new minimum income requirement of £18,600 for British nationals and permanent residents who want to bring non-EEA spouses or partners to the UK and also to the impact of the new rules on sponsorship of non-EEA adult/elderly dependents applying to come to the UK. ILPA has therefore restricted the comments to these points. A summary of the relevant immigration rules is set out in the appendices.

In the Statement of Intent of June 2012, the intention behind the rule changes was described, in summary, as[1]

1. To define the circumstances in which a person's right to respect for private and family life can constitute a basis for entry or stay in the United Kingdom;

2. To "*…ensure that there is a clear focus on whether the relationship between applicant and sponsor is genuine, that the sponsor can properly support their partner and any dependants financially, and that the partner is able to integrate into British society.*"

As explained further below, the new rules relating both to the minimum income threshold and adult dependent relatives are highly prescriptive. They sit ill with the fact that an assessment of family life under Article 8 of the European Convention on Human Rights must be cumulative[2] and must be made on a case by case basis[3]. In 2008, in *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41, the House of Lords made clear that:

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

The new rules are also at odds with the Prime Minister's speech on 15 August 2011[4] , in which he expressed a desire to prioritise family life:

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[1] *Statement of Intent*: *Family Migration*, UK Border Agency, June 2012, paragraphs 7, 16.
[2] The European Court of Human Rights re-emphasised this in *Balogun v UK* (60286/09: 10/04/2012, see "*…the totality of social ties*", paragraph 43.
[3] *Maslov v Austria* (1638/03: 25/06/2008) at 73; *Maslov* at 70: "*[T]he weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case.*"
[4] Available at http://www.number10.gov.uk/news/pms-speech-on-the-fightback-after-the-riots

"...if we want to have any hope of mending our broken society, family and parenting is where we've got to start.

…

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."

In summary, the effects of the new rules are:

Minimum income

- Families are being separated in circumstances where the sponsor is required to work in the UK for at least six months before the application can be made;
- The rules discriminate against particular groups as detailed below;
- The rules are preventing families with lower incomes from enjoying family life,;
- Arbitrary and prescriptive requirements do not appear to reflect stated policy intentions.
- The rules are very complicated, for applicants, UK Border Agency staff and legal representatives.

Adult dependent relatives:

- Families are being prevented from caring for their elderly, ill or infirm relatives;
- There is interference with family and private life.

1. **<u>What does the available evidence suggest have been the impacts of the new minimum income requirement and new rules affecting adult/elderly dependents on potential sponsors and/or applicants since July 2012?</u>**

As a result of the changes, ILPA members are seeing people from all parts of the country and all backgrounds who will be unable to live with their spouses or partners or care for their elderly parents in the UK, or who face a period of separation before they can meet the rules.

Minimum Income Threshold

Enforced Separation of Families

The minimum income threshold for spouses and partners is keeping families apart for prolonged periods or even permanently in some circumstances. This is for two main reasons.

First, not only do the immigration rules set out a minimum income threshold, but they also define what income will be taken into account, how income will be calculated and time periods during which such income must have been received. For example, the following types of income are not taken into account:

(a) Financial support from family members;
(b) The applicant's current and future income from employment or self-employment where an entry clearance application is being made;
(c) Earnings from self-employment in the individual's current financial year; and
(d) Savings, unless they have been held for a full six months.

Furthermore, the rules specify how "gross annual income" is to be calculated. For example, where an individual is in the United Kingdom and has worked for his employer for six months or more, gross annual income will be his gross annual salary at its lowest point in the last six months, rather than his actual annual salary.

In most other cases the Immigration Rules impose two tests for those in salaried employment. First, the rules look at the income at the date of the application or, where the individual is returning to a job in the United Kingdom, the annual salary from the future employment that has been secured in the United

Kingdom. Secondly, the rules look at the gross income actually received from work in the last 12 months or, where the individual has been employed for six months or more, the salary at its lowest level in the last six months. The income threshold must be met for both tests for an application to succeed.

This means that families who do and will have an income of or above the relevant threshold find themselves having to postpone submission of an application for their income to be taken into account. For example, ILPA members have seen many British or settled partners having to return to the United Kingdom to find employment, as they are unable to obtain a job offer from overseas. The British or settled partner then obtains employment and starts work at a salary well in excess of £18,600, but has to work for six months before his/her partner can submit the entry clearance application as the British or settled partner's earnings outside the United Kingdom did not meet the second financial test. Families may also be separated where a partner is self-employed, as an applicant can only rely on income in the last financial year. There is no provision for those who have only recently started working on a self-employed basis.

Secondly, the immigration rules set out an income threshold that some families simply cannot meet. Prior to 9 July 2012 the financial requirement for family cases was that the applicant (and any children) could be financially supported and accommodated without recourse to public funds. This was held to mean being able to show income at least equivalent to that of a couple/family on income support[5]. At present, this is, for a couple over the age of 18, £111. 45[6], significantly lower than the £18,600 threshold.

Enforced exclusion of British or settled partners and children from the United Kingdom

The new rules are not only separating families but they are preventing British or settled partners and British or settled, children from returning to live in the United Kingdom.

First, as explained above, the rules do not take the current or future income of the applicant into account where the applicant is outside the United Kingdom applying for entry clearance. This is causing problems for many families, particularly those where a British spouse has taken not only maternity leave, but a career break, to care for children and applicant is the breadwinner. Such families find themselves unable to return to the United Kingdom even though they can support themselves. For example, the financial requirement would not be met if the applicant had earned £75,000 overseas in the last year and had been offered employment in the United Kingdom for a salary of £100,000.

Secondly, while the exceptions set out in paragraph EX.1. provide for leave to remain to be granted where the financial requirements are not met, paragraph EX.1. does not apply to those applying for entry clearance.

For the sake of completeness, there is also an exception where the sponsor is in receipt of certain benefits such as carer's allowance or certain disability-related benefits. This applies both to entry clearance and in-country applications. However, the government has said that it will review these exemptions in April 2013[7].

Confusion due to complexity

The rules are extremely complicated. This is causing confusion amongst applicants, practitioners and within the UK Border Agency. For example, to meet the financial requirement for an entry clearance application on the basis of a British or settled partner's self-employment in the UK as a sole trader, an applicant and his/her partner must read:

Paragraph E-ECP.3.1. of Appendix FM, which sets the gross annual income threshold.

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[5] *KA and Others (Adequacy of maintenance) Pakistan* [2006] UKAIT 00065.
[6] https://www.gov.uk/income-support/what-youll-get as of 10 January 2013.
[7] House of Commons Library Note SN/HA6353, 22 August 2012, Melanie Gower, Home Affairs Section.

Paragraph E-ECP.3.2 of Appendix FM, which explains that income from the British partner's self-employment can be taken into account but not the employment or self-employment income of the applicant.

Paragraphs 13(e) of Appendix FM-SE, which says that the gross annual income test must be met from earnings in the last full financial year.

Paragraph 19 of Appendix FM-SE which says that for the purposes of the test the self-employed sole trader's gross annual income is the gross taxable profits from their share of the business.

Paragraph 13(f) of Appendix FM-SE which says that savings cannot be combined with income from self-employment.

Paragraphs 7(a) to (h) of Appendix FM-SE, which specify the documents that must be provided as evidence of self-employment.

Paragraphs 1(a) to (l) of Appendix FM-SE, which set out general rules, including the required format for bank statements.

There are circumstances in which an applicant may be exempt from the financial requirements, for example where the sponsor is in receipt of certain benefits such as carer's allowance or certain disability-related benefits. The government has said that it will review these exemptions in April 2013[8].

ILPA members are seeing clients who are seeking advice because they do not understand the financial requirements. In many cases advice is now being sought before an application is submitted, as couples cannot understand that requirements, although in others, clients are seeking advice after a refusal having misunderstood what was expected of them. Prior to the rules change, ILPA members' experience was that more people were attempting the application themselves to save money on legal costs.

In addition to causing confusion, the changes are leading to higher costs for applicants. From April 2013, under the provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, most family immigration matters will not be within the scope of legal aid. If a lawyer is necessary to present a case then those unable to afford a lawyer will be unable to present their cases. ILPA members have seen many entry clearance refusals where the applicant has had to make a fresh application, as an initial application was submitted and refused because the applicant did not fully comprehend the requirements.

Complexity has been increased by the rules constantly being changed. The financial requirements are difficult for applicants to find as they are in a separate appendix. Since Statement of Changes in Immigration Rules (HC194) came into force on 9 July 2012 and introduced the minimum income threshold, the immigration rules have been further amended five times, by HC514, CM8423, HC565, HC760 and HC820. One of these statements of changes (Cm 8423) is 288 pages long. It came into force on 20 July 2012, adding Appendix FM-SE, which, amongst other things, sets out how gross annual income will be calculated and the documents that must be provided. (The statement of changes was a response to the Supreme Court judgment in *Alvi*[9] in which the Court held that the duty of the Secretary of State to lay all immigration rules before parliament meant laying all requirements that had the nature of a rule before parliament. A requirement had the nature of a rule if it were determinative of the success or failure of the application.

On 22 November, Statement of Changes in Immigration Rules HC 760 was published, to take effect on 13 December 2012 for all applications submitted after that date. [10] On 12 December 2012 Statement of Changes in Immigration Rules HC 820 was published. It principally operated so that the changes set out

[9] *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33.
[10] See ILPA's submission to the House of Lords Secondary Legislation Scrutiny Committee on consultation practice 4 December 2012.

in HC 760, would also govern applications submitted before 13 December but not decided by that date, i.e. changing the position announced in HC 760 on 22 November 2012.

When the application is decided is outside the control of the applicant; it is within the control of the UK Border Agency. The Agency can determine whether an application succeeds or fails by controlling the date on which it is decided. This means that persons will have paid application fees to the UK Border Agency for applications that cannot succeed under the new rules, as well in many cases as paying legal representatives to prepare applications that they would not have made had they known that these would fall to be decided under the new rules. Such persons have also lost the opportunity to endeavour to ensure that their applications were decided under the old rules, for example by paying a fee and making a premium, same day application. ILPA opposes the new rules on the minimum income threshold and adult dependent relatives.

ILPA has written to and met with the Home Office and UK Border Agency since the Statement of Intent on family migration[11] was first announced in June 2012 to highlight problems and mistakes in HC 194 and subsequent statements of changes. The letters and responses are appended and serve to highlight the complexities and practical problems in the rules and have led to amendments being made to the rules. We echo the comments of the Lord Taylor of Holbeach:

> *"I agree with my noble friend that no area is more complex than the whole business of the Immigration Rules and the procedures surrounding them."*[12]

Form over substance

Under the new rules form is valued over substance. A person who can meet the financial requirements set out in Appendix FM SE , but cannot or does not supply all of the required evidence (even where the evidence s/he relies upon does show that s/he or his/her partner has the required sum of money), will not meet the requirements of the rules.

The inflexible evidential requirements exclude many who are able to support themselves without recourse to public funds, including many persons in higher income brackets.

If the sponsor is returning to the United Kingdom with the applicant the sponsor must be in employment at the date of application and must have been in employment with the same employer for six months and must have a confirmed job offer in the United Kingdom to start within three months of entry. The job must meet the required salary threshold[13].

If the sponsor has been in the same employment less than six months s/he must show that his/her gross annual salary meets the threshold[14] and that in the previous 12 months s/he has met the threshold.

If the sponsor has been in the same employment less than six months and is returning to the UK with the applicant, the sponsor does not need to be in employment at the date of the application but must be able to evidence meeting the threshold by a confirmed job offer in the UK and must have met the threshold in the past 12 months.

For example a self-employed sponsor must provide more than 10 specific documents evidencing income[15]. UK Border Agency staff are only permitted to use discretion as to evidence in limited

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[11] *Statement of Intent*: *Family Migration*, UK Border Agency, June 2012.

[12] Lord Taylor of Holbeach in response to Lord Lester of Herne Hill, Hansard, HL Report, 12 December 2012: Column 1087.

[13] Alone or in combination with savings/certain non- employment income set out in the UK Border Agency

[14] Appendix FM—SE paragraph 13 (b)

[15] Appendix FM-SE paragraph 7.

circumstances[16], such as where one document from a series is missing, or the document is not the original or is in the wrong format.

Restrictive exceptions

Appendix FM contains category EX1, exceptions. Persons who meet the suitability requirements for their category as set out in Appendix FM, but do not meet the eligibility requirements, may nonetheless qualify under Appendix FM if they can show that they:

- have a genuine and subsisting parental relationship with a child who is British, and it would not be reasonable to expect the child to leave the UK; or
- have a genuine and subsisting parental relationship with a child who has lived in the UK for at least the last seven years, and it would not be reasonable to expect the child to leave the UK; or
- have a genuine and subsisting relationship with a partner who is British, settled in the UK (or has refugee leave or humanitarian protection) and there are insurmountable obstacles to continuing family life with that partner outside the UK.

In this category the applicant will then only be able to apply to settle in the United Kingdom after 120 months (10 years) of continuous lawful leave[17].

The benefits to applicants of an exemption from the financial requirement are offset by the high threshold to satisfy and that the applicant will then be unable to achieve certainty in his/her status for a period of 10 years.

Client D

D came to the UK from Zimbabwe. In spring 2012, after he was granted indefinite leave to remain, his wife, a teacher, made inquiries about the requirements she and their two children needed to meet if they were to apply to join him. She found that, among other things, she needed to pass an English test. It took some time for this to be done and in the meantime the children applied without their mother, only to be refused on the basis that their father did not have sole responsibility for their upbringing. D sought legal advice after his wife had passed her English test in October 2012, only to learn that the new rules now applied. He is earning £12,000 from a part-time job, as he has been unable to find full-time work, and has no savings. To bring in the family now, he would need to earn £24,800; his wife's higher overseas earnings as a teacher, and her potential future earnings in the UK, cannot be counted. Their eldest son will be 18 in May 2013.

Client M

M has lived lawfully in the United Kingdom for seven years and naturalised as a British Citizen in 2011. M married a family friend in Iraq in July 2012. As he earns £15,000, to bring his wife to the United Kingdom he is required to show that has held £25,000 in savings for six months (£16,000 + (2.5 x {£18,600 - £15,000 })= £25,000) in addition to his salary of £15,000. M lives very close to his uncle and family who have helped support him emotionally and financially throughout his time in the United Kingdom. M's uncle is also related distantly to M's wife. While the family are able and willing to provide financial support to M and his wife in the form of weekly payments, this does not assist rules because the new rules do not accept third party support (save in very limited circumstances). Furthermore, M does

[16] Appendix FM-SE paragraph D (a)-(e).
[17] Appendix FM D-LTRP.1.2.

not have the requisite savings and his wife's salary in Iraq and future income does not count towards the income threshold.

Adult Dependent Relatives

The new rules in respect of adult dependent relatives do not reflect what family life means to individuals who are being refused the right to care for their elderly parents or relatives, many of whom will, by the nature of the application, be near to the end of their lives. The rules interfere with relationships in ways not proportionate to the aims. To satisfy the rules it is necessary to demonstrate that the applicant, or the applicant and their partner are unable, even with the practical and financial help of the sponsor, to obtain the required level of care in the country where they are living because it is not available and there is no person in that country who could reasonably provide it or because it is not affordable.[18] This can be contrasted with the previous rules[19] which required that the applicant had no other close relatives in his/her country to whom s/he could turn for financial support.

The new rule implies that paying a person who may be a stranger to look after a dying relative far away can be equated with caring for that relative oneself. It also means that the better able someone is to pay for such care, the less able they are to satisfy the rule and care for the relative themselves. The justification is stated to be saving public funds through ensuring that elderly relatives do not use the National Health Service.

Given the numbers involved, the costs of any access to the National Health Service are tiny and it is not a proportionate response to deny British citizens and those settled in the United Kingdom the right to care for their elderly relatives. According to the UK Border Agency's 2011 *Family Migration: a consultation*[20] 2,700 adult dependent relatives were granted entry clearance in 2010. The overall family migration statistics[21] have shown a decrease in family migration over 2011 and 2012, although the actual statistics for adult dependant relatives are not disaggregated[22]. In a recent letter from Lord Taylor of Holbeach to Lord Avebury dated 18 December 2012 it is confirmed that in the period from 9 July to 31 October only one visa was issued to an adult dependent relative. The letter is in response to Lord Avebury's question about this:[23]

> *"I believe that the rule has been designed to prevent any elderly parents being able to join their children here, although every other country in Europe allows it, and I ask* [the Minister Lord Taylor of Holbeach] *to say how many have actually managed to get past this rule-or how many he thinks will get past it".*

Under the previous rules[24] successful applicants in this category were subject to a 'no recourse to public funds' restriction in any event.

The new rules do not reflect a proportionate balance between a person's right to respect for family and private life and the government's stated intention of saving public funds. The rules mean that the overwhelming majority of applications will not succeed and, as mentioned , in the period from 9 July to 31 October only one visa was issued to an adult dependent relative. The rules do not reflect the UK's

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[18] Appendix FM E-ECDR.2.5.
[19] Rule 317(f)(iv).
[20] Paragraph 5.5.
[21] See http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/immigration-asylum-research/immigration-q2-2012/family-q2-2012
[22] Migration Advisory Committee family Migration figure 3.4 page 31.
[23] Official Report 23 Oct 2012 : Column 189.
[24] Immigration Rules, paragraph 317ff.

obligations under the European Convention on Human Rights. In the UK Border Agency's own guidance[25] the following example is given, which highlights how restrictive these rules are:

> *(e) A person (aged 85) lives alone in Afghanistan. With the onset of age he has developed very poor eyesight, which means that he has had a series of falls, one of which resulted in a hip replacement. His only son lives in the UK and sends money to enable his father to pay for a carer to visit each day to help him wash and dress, and to cook meals for him. This would not meet the criteria because the sponsor is able to arrange the required level of care in Afghanistan.*

Until 27 November 2008[26] there was a category within the rules for Retired Persons of Independent Means[27]. Such persons, defined as those with £25,000 per annum at their disposal, could come to the UK if they could accommodate themselves[28] and show that they had a close connection to the UK and an intention to make the UK their home. Elderly dependent relatives could thus apply under their own steam in this category. When the category for Retired Persons of Independent Means was closed, wealthier elderly parents no longer of working age found themselves without the option of the Retired Persons category and unless they were in a position to invest £1 million in the UK and thus to enter in the investor category, they were restricted to trying to satisfy the requirements of elderly dependent relatives. These categories of people have been further restricted by the new, post 9 July, rules for adult dependent relatives.

The pre-9 July immigration rules made provision for parents or grandparents aged 65 or over and/or for other adult dependant relatives to come to the UK where there were compelling compassionate circumstances and where they could be supported in the UK without resource to public funds[29]. These previous rules were already restrictive for this category of applicants, resulting in low numbers of entries into the United Kingdom in this capacity[30]. The case for further restrictions has not been made out.

2. <u>Does available evidence suggest that the new minimum income requirement for sponsoring non-EEA spouses and partners to come to the UK has been set at the right level? Please provide support for your view.</u>

In ILPA's view the income requirement was not set at the right level.

The Migration Advisory Committee was asked

"What should the minimum income threshold be for sponsoring spouses/partners and dependants in order to ensure that the sponsor can support his/her spouse or civil or other partner and any dependants independently without them becoming a burden on the State?[31]"

The Migration Advisory Committee was not asked whether there should be a minimum income threshold. It was not asked or told, how many, if any, of those admitted on condition that they did not have recourse to public funds did end up having such recourse. The Migration Advisory Committee did not look at what spouses and partners were earning several years after entry.[32] The Migration Advisory Committee did not take anything other than economic factors into account when conducting their research[33]:

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[25] Immigration Directorate Instructions Annex FM 6.0 Adult dependent relatives.
[26] Statement of Changes in Immigration Rules HC 1113.
[27] Immigration Rules HC 395 as amended, paragraphs 263-270.
[28] And any dependants without recourse to public funds and without taking employment.
[29] Immigration Rules, paragraph 317.
[30] UK Border Agency's 2011 *Family Migration: a consultation* paragraph 5.5.
[31] Migration Advisory Committee, *Review of minimum income requirement for sponsorship under the family migration route*, November 2011.
[32] See Migration Advisory Committee, *Review of the Minimum Income Requirement for sponsorship under the family migration route*, November 2011.
[33] See Migration Advisory Committee, *Review of the Minimum Income Requirement for sponsorship under the family migration route*, November 2011 paragraph 2.35.

"We did not try to prejudge what might be considered necessary or proportionate in the light of Article 8(2). We instead set out a range of potential options for establishing the maintenance requirement and the pros and cons of those options from an economic perspective."

The previous version of the rules included a condition that successful applicant have no recourse to public funds[34].

The Committee found that a 25% of applicants in the 'spouse or partner' category would fall below a maintenance threshold of £14,200, 50%would fall below a threshold of £20,100 and 75%would fall below a threshold of £30,500[35].

We are not aware that there is any evidence or indeed suggestion that successful applicants, who are bound by an obligation not to have recourse to public funds, have been found to have claimed any public funds, or to be a burden upon the State and we understand from correspondence that at the time of the consultation on family migration in October 2011 the UK Border Agency had no evidence of this.[36] To assert that the threshold needed to be increased to prevent migrants becoming a burden on the State, it would appear necessary to hold such evidence. This is important in light of the need to satisfy the requirement that an interference with family life be proportionate to the end to be achieved. Moreover, it does not follow that because £18,600 would provide a general guarantee that a person would not have recourse to public funds, as was the opinion of the Migration Advisory Committee[37], that this sum would be required to achieve the policy aim in any individual case.

The failure to take into account regional variations or, in many cases, the earnings of the migrant applicant and the general prohibition on third party support[38] are all reasons why the interference with private and family life caused by the new rules is not proportionate.

The requirement of £18,600 gross annual income cannot be regarded as a proportionate balance between the economic interests of the United Kingdom and a person's right to respect for family and private life. Income that does not meet the threshold must be made up from savings, at two and a half times the deficit, as set out above. The savings of both the sponsor and applicant seeking to come to the United Kingdom may be taken into account. This adds rather than reduces concerns, e.g. as to indirect discrimination because it is to be expected that migrants from certain countries are far less likely to have savings of such significant levels. This is particularly true given the levels of earnings in different countries and the effect of exchange rates.

3. **Please provide details of any other economic, social or practical considerations relating to the new minimum income requirement and the new rules affecting elderly dependents which could usefully inform this inquiry.**

Social

Certain groups of people are disproportionately affected by the income threshold due to their gender, race, age and religion.

Since average earnings of women in the UK are lower than those of men,[39] the new Immigration Rules indirectly discriminate on grounds of gender. The indirect discrimination against female sponsors thereby and male applicants, is exacerbated in entry clearance cases where only the earnings of the sponsor (i.e.

[34] Immigration Rules, paragraph 281 (iv).
[35] Migration Advisory Committee *Review of minimum income requirement for sponsorship under the family migration route*, November 2011, page 43, paragraph 3.37.
[36] Correspondence between Wesley Gryk solicitors for ILPA and Ms Helen Sayeed of the Immigration and Border Policy Directorate, Home Office, September and October appended hereto.
[37] Migration Advisory Committee, *Review of minimum income requirement for sponsorship under the family migration route*, November 2011, page 72, paragraph 5.5.
[38] Appendix FM-SE AI (1)(b).
[39] European Commission, Gender Pay Gap statistics, United Kingdom, available at http://ec.europa.eu/justice/gender-equality/gender-pay-gap/files/gpg-fiches_uk_en.pdf

the British or settled partner) may be considered. Furthermore, more women work part-time[40] and often have lower incomes.

Maternity leave and maternity pay affect women's earnings and there is a risk that the new income thresholds, the details of these and of the ways in which one must evidence meeting them will give rise to discrimination on the grounds of pregnancy and maternity, both protected characteristics under the Equality Act 2010, for example in cases where British or settled women wish to return to the UK to be near to family and friends when they have a baby.

Since average earnings are lower for persons of certain ethnicities,[41] the new immigration rules indirectly discriminate on grounds of race. According to Migration Advisory Committee 45% of applicants would not meet the new income threshold[42] and two-thirds would not meet the higher recommended threshold of £25,700[43]. ILPA members' experience is that some communities where there are generally on lower incomes people often rely on third party support from families and/or friends. Since average earnings are lower for younger adults, the new immigration rules indirectly discriminate on grounds of age[44]. The Migration Observatory conducted an analysis of figures based on the income threshold and their press release highlights those most affected by the threshold are 'women, young people and on Londoners'[45].

Since average earnings are lower for persons in certain religious posts, the new immigration rules also indirectly discriminate on grounds of religion. One example from an ILPA member is of members of a religious order who have taken vows of poverty. They do not get paid money for the work they do, but rather are provided with accommodation, food, clothing etc. Some religious communities are made up of people with families. Applicants in these circumstances are unable to meet the financial requirements imposed by the new rules. Further, ministers of religion, are frequently paid low salaries but provided with accommodation. The accommodation is not taken into account in calculating whether they meet the financial requirements of the rules.

Client A

A and his family are currently resident in the United States of America. A's wife is British. She has been out of work for one year due to an accident at work but prior to that she had been working full time for several years, earning in excess of the £18,600 requirement. During this year, she has been in receipt of compensation from the State of New York for injuries at work and has also just settled a compensation claim.

The family wish to return to the United Kingdom and A's wife has a confirmed offer of employment. Were A's wife making an in-country application, she would almost certainly qualify under E-ECP3.3 of Appendix FM because she would likely been receiving one of the disability allowances listed there. However, since she is in the United States her case is not covered by the rules.

There are no provisions in the new rules which allow for equivalent benefits from abroad to enable exemption from the minimum threshold requirement or for period of disability in such circumstances to be taken into account.

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[40] *Op.cit*. The Gender Pay Gap statistics looks at which gender is in part time work, and compares the number of women with children who work with the number of women with no children who work.
[41] "Understanding the Ethnic Pay Gap in Britain," Bryin, M. and A Güveli, *Work Employment and Society* [2013] 26(40 574-587.
[42] Migration Advisory Committee family Migration 5.8
[43] *Op.cit.,* page 1, introduction.
[44] http://www.migrationobservatory.ox.ac.uk/press-releases/women-young-people-and-non-londoners-are-most-affected-changes-family-migration-polic
[45] *Op.cit.*

Client B

Client B, a British national, studied medicine at university and graduated as a doctor. In summer 2012, he began working as a junior doctor in August 2012. He had met his wife, a Costa Rican national, through family friends in Costa Rica where they were married. Client B lives in his parents' spacious home and would live there with his wife. However, she cannot apply to come to the UK as his wife until February 2013 as he has not been in his current employment for more than six months and cannot show 12 months earnings prior to that as he was a student.

Where the sponsoring partner is a student who has recently graduated, there should be provision to waive the second test, requiring that the sponsor show that they have earned the threshold in the previous 12 months, where their current employment has been on-going for less than six months to avoid lengthy separations between partners. In this example, as a junior doctor, the British national is both earning a good salary and doing essential work. Further, he has no accommodation costs.

Practical

In practice, making an application can be problematic. The application forms contain requests for irrelevant information and are contradictory. Paper appendices to the standard online forms have been introduced for entry clearance applications, but it is not necessarily clear to applicants which appendix they should use. With respect to in-country applications, new versions of forms are produced frequently, creating the risk of an application being invalid if made on an 'old' form and the applicant inadvertently becoming an overstayer.

Under the new immigration rules there are substantial additional uncertainties for families, including partners and children.[46]. An initial grant of entry clearance as partner will normally result in 33 months leave[47], before the expiration of which, it is necessary to apply for further leave. If granted, an application for further leave will usually result in 30 months leave[48]. After five years (or 10 in some cases[49]) an applicant may apply for indefinite leave to remain[50]. The previous route to settlement took two years; the new route takes five years and requires three applications rather than two. This extended probationary period, during which a migrant must remain on limited leave without recourse to public funds during, for example, periods of absence from work because of illness, have the potential to place considerable stress on families. The balance of power in a relationship is affected and the relationship placed under strain when even after many years, one partner depends wholly upon the other for permission to be in the UK. The normal ups and downs of a relationship can take on a much greater significance and this may contribute to the breakdown of a relationship that would otherwise have survived; a trial by ordeal. Family decisions such as having children/more children, further education or starting one's own business will all be affected by the continuing requirement to meet the income threshold for future applications. Redundancy or ill health may also mean that a person no longer meets the requirements.

Current fees for a leave to remain postal application for a partner are £561. The current fees for an indefinite leave to remain postal application for a partner are £991. Once in the United Kingdom, subsequent applications may have regard to the migrant family member's earnings but temporary financial/employment problems for either partner may result in the applicant being switched to the 10 year route to settlement, requiring even more applications, with fees. An applicant applying to come to the UK

[46] See Appendix FM, Exception EX1.
[47] Appendix FM D-LTRP 1.1
[48] Appendix FM D-LTRP 1.1.
[49] Those applying under Appendix FM, category EX1 or other exceptions.
[50] Appendix FM D-LTRP 1.2.

as a fiancé will need to make the initial entry clearance application (£826), plus two further leave applications (£561x2) plus an indefinite leave to remain application (£991), resulting in a total of £2939 for application fees alone, excluding and legal representation and potential appeals.

4. <u>The Coalition Government stated that its objectives in introducing new family migration rules were to tackle abuse, promote integration and relieve any burden on the taxpayer caused by family migration to the UK. Are the new family migration rules meeting these objectives? What contribution to the reduction of net migration can the new family migration rules be expected to make?</u>

No, the rules are not meeting the stated objectives. We also consider that the stated objectives are based on misconceived public perception of immigration and therefore are flawed.

It is not enough to take a purely economic view of immigration. Migration provides many benefits to the United Kingdom[51] and has provided the foundations of many nations such as the United States of America, Canada and Australia. At a recent All-Party Parliamentary Group debate held on 23 January 2013, public perception of immigration was highlighted as being disproportionately negative[52]. The widely held misconceived idea, is that migrants rely disproportionately on housing and benefits and take jobs away from British Citizens. The positive contributions to the United Kingdom from immigration are rarely promoted.

Further, the measures do not meet the stated objectives. According to the last annual immigration statistics[53], the number of spouses admitted in the year ending June 2012 was 45,290. According to the same statistics, the figure for 2011 was 50,150, thus 2012 saw a 10% decrease. The provisional long-term international migration statistics set out in the Migration Advisory Committee report that preceded the rule change[54] estimate that for 2010 net migration was 239,000. The overall figures for migration in the family categories show that the numbers are small in comparison to overall net migration. The government target to reduce net migration by 'tens of thousands' cannot be reached through increased restriction in the family categories because there are not enough applicants. Dr Scott Blinder, Oxford University states[55]:

> *"The announced income threshold might make for a fairly sharp reduction to family migration, but this is still only a small fraction of the cuts needed to approach the government's target."*

In the judgment in *Quila*[56], handed down by the Supreme Court on 12 October 2011, Lord Wilson, concluded of the introduction of a minimum age of 21 in applications on the basis of marriage or partnership: "*On any view, the measure was a sledgehammer but the Secretary of State has not attempted to identify the size of the nut*"[57]

The same criticism can be made of the income threshold and adult dependent relative requirements in the new rules.

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[51] *Fiscal Sustainability Report 2012*, Executive summary at paragraph 44: *Higher net inward migration than in our central projection – closer to the levels we have seen in recent years, for example – would put downward pressure on borrowing and PSND, as net immigrants are more likely to be of working age than the population in general. This effect would reverse over a longer time horizon, when those immigrants who remain in the UK reach old age.*

[52] http://yougov.co.uk/news/2012/12/17/perilous-politics-immigration/

[53] http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/immigration-asylum-research/immigration-q2-2012/family-q2-2012

[54] Paragraph 3.6, page 27.

[55] Migration Observatory press release: http://www.migrationobservatory.ox.ac.uk/press-releases/women-young-people-and-non-londoners-are-most-affected-changes-family-migration-polic

[56] [2011] UKSC 45.

[57] Paragraph 58.

5. <u>What role does family life play in the integration process in the UK? How should the immigration system recognise and support the value of family life?</u>

The question does not define "Integration process". Immigration lawyers are in touch with clients during the initial and subsequent applications and appeals and therefore normally see people settling and making a life in the UK only at intervals. In members' experience, having family members in the UK makes it easier for people to make friends, find out information about the UK and become involved in activities. Having family members is not the only relevant factor, for example work or study are others. Integration is a two-way process, British or settled persons get to know a migrant who becomes part of their own family. Again, work or study may play a similar role to family membership.

With respect to supporting family life, the UK is a signatory to the European Convention on Human Rights, Articles 8 and 12 of which reflect the value that parties place on family and private life, on marriage and on the founding of a family. While Article 12 describes a right that is unqualified, Article 8 describes a qualified right and there is caselaw, from both the regional and UK courts that weighs the value of family life against other values and laws. The provisions and the caselaw provide a starting point for thinking about how the immigration system should recognise and support the value of family life. Among the key principles is that of proportionality. Any interference with the right to family life must be necessary, in a democratic society to achieve a legitimate aim. The use of sledgehammers to crack nuts is thus forbidden.

HC 194 introduced rules that do not reflect settled caselaw on what is proportionate. Persons who are already in the United Kingdom and meet the suitability requirements for their category as set out in Appendix FM, e.g. the criminality requirement, but do not meet the eligibility requirements, such as the financial requirements, may nonetheless qualify under Appendix FM if they can show that they:

a. have a genuine and subsisting parental relationship with a child who is British, and it would not be reasonable to expect the child to leave the UK; or
b. have a genuine and subsisting parental relationship with a child who has lived in the UK for at least the last seven years, and it would not be reasonable to expect the child to leave the UK; or
c. have a genuine and subsisting relationship with a partner who is British, settled in the UK (or has refugee leave or humanitarian protection) and there are insurmountable obstacles to continuing family life with that partner outside the UK.

In this category the applicant will then only be able to apply to settle in the United Kingdom after 120 months (10 years) of continuous lawful leave[58].

Previously, the courts have explicitly stated[59] that 'insurmountable obstacles' is not to be regarded as a legal test. Furthermore, the tests where the applicant has a relationship with a child do not match the test under Article 8 and indeed sits ill with section 55 of the Borders, Citizenship and Immigration Act 2009. (Section 55 requires the UK Border Agency to have regard to the need to safeguard and promote the welfare of the child and it is likely that the requirements in the family courts will also be relevant in particular cases.) It therefore remains necessary, as the Immigration and Asylum Chamber of the Upper Tribunal has set out in *MF (Article 8 – new rules) Nigeria* [2012] UKUT 00393(IAC), having first addressed the question of leave under the rules to consider whether those who do not so qualify will nonetheless qualify under "the real" Article 8. The changes introduced by HC 194 mean that there will be

[58] Appendix FM D-LTRP.1.2.

[59] *EB Kosovo v SSHD* [2008] UKHL 41; VW (Uganda) [2009] EWCA Civ 5.

more cases where applicants cannot bring themselves within the rules and are forced to rely on the "real" article 8. Thus for example, the Immigration Directorate Instructions caseworker guidance on Appendix FM, paragraph EX1, the exceptions, states

> *'In determining whether there are "insurmountable obstacles", the decision maker should consider the seriousness of the difficulties which the applicant and their partner would face in continuing their family life outside the UK, and whether they entail something that could not (or could not reasonably be expected to) be overcome, even with a degree of hardship for one or more of the individuals concerned.'*[60]

The courts have explicitly stated that 'insurmountable obstacles' is not the test under (the real) article 8 and is confirmed in *MF (Nigeria)*[61].

One of the requirements of Article 8 is that any interference with the right to private and family life must be "prescribed by law." The European Court of Human Rights has held that this includes a requirement that the law be sufficiently clear and that it can be known.[62] It is arguably very difficult for a person who is not represented to understand that while there are exceptions contained within the rules, there is nonetheless an entitlement to have the case considered under the "real" article 8, which goes wider than these exceptions.

The difference between obtaining leave under the rules or leave on the basis of the exception in paragraph EX.1 or the real article 8 is significant. A person who meets all the eligibility requirements and is granted leave under the Appendix FM, is granted 30 months leave and is on a five year route to settlement. A person who is granted leave under the EX1 or the 'real' Article 8 will also be given 30 months leave but must accumulate 10 years such limited leave before being able to apply for settlement[63]. A person whose future lies in the UK should not have to wait 10 years for settlement. The prolonged probationary period gives rise to real tensions within a family and a very real potential for a relationship breakdown because of these tensions.

The immigration system should recognise and support the value of family life by giving full effect to Articles 8 and 12 of the European Convention on Human Rights. As far as possible the immigration rules should be used to give effect to these articles. Evidential requirements should not be such as to undermine the substance of the rights. They should not be prescriptive. The purpose of demonstrating that a person meets each requirement should be clearly defined so that it is possible to judge whether alternative forms of evidence satisfy the requirement. Such alternative forms of evidence should be permitted.

Rights to family life under Article 8 will not be breached in cases where there is a country other than UK, in which a family could be together without difficulties which reach a level of seriousness that is required for a breach of Article 8.[64] In such cases there will nonetheless be an interference with the *private* life of the British or settled partner, and in many cases both partners, if they are forced to leave the UK. Where the interference reaches the level of seriousness required for a breach of Article 8, the couple are entitled to remain in the UK. Where it does not, it is a question of policy whether the UK wishes to make provision for those of its citizens and settled population who have formed relationships with foreign nationals to be able to stay in the UK. Those affected may have wider family in the UK and play a significant role in their community or workplace, or in the lives of particular individuals. A just and

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[60] Immigration Directorate Instructions, Chapter 8, Annexe FM 1.0 Partners 3.2.7.c.
[61] *MF (Article 8 – new rules) Nigeria* [2012] UKUT 00393(IAC),
[62] *The Sunday Times v UK, European Court of Human Rights (plenary), App* . No. 6538/74.
[63] Appendix FM D-LTRP.1.2.
[64] *Boultif v Switzerland* (2001) ECHR 50.

equitable immigration law should give such persons an opportunity to remain in the UK that is not merely illusory.

No financial requirements should be set higher than the requirement to have no recourse to public funds. To do so is to discriminate against persons on the grounds of wealth, for cost to the State is the same whether one meets this threshold by a narrow margin or a large one. The public funds requirement itself must permit of exceptions and be applied with sensitivity, for example in cases where the severity of a person's disability is the reason for reliance on public funds.

There are couples and families whose ability to meet the financial thresholds and to demonstrate an ability to support themselves is affected by having to pay the fees for applications and appeal fees. Fees for applications should not be set higher than the cost of providing the service. Appeal fees should not be charged in family immigration cases because these are concerned with rights to private and family life.

ILPA

4 February 2013

Appendix:

Note on the financial requirements

HC 194 introduces demanding financial requirements affecting those who apply to come to or stay in the UK as:

• the partner (spouse, civil partner, unmarried partner, fiancé or proposed civil partner) of a British citizen or a person settled in the UK; or

• the partner (spouse, civil partner, unmarried partner, fiancé or proposed civil partner) of a person with limited leave to remain as a refugee leave or with humanitarian protection (where the relationship was formed after the refugee or person with humanitarian protection fled his or her home country).

Entry clearance

Where the applicant is outside the UK and applying to join his or her partner in the UK, the financial requirements must be met either from income or savings or a combination of the two, save certain forms of income cannot be combined with savings.

If just relying on income, a gross annual income of £18,600 is required. If the applicant has and wishes to bring any children, an additional £3,800 gross annual income is required for the first non- British child and a further £2,400 for each additional non-British child. For example, where an applicant wishes to come to the UK with his or her three non-British children, the gross annual income required will be £18,600 + (£3,800 + £2,400 + £2,400) = £27,200. No earnings from work of the applicant can be taken into account, though some of his or her other income may be taken into account, e.g. any income from savings or a pension.

If relying on savings, a formula is applied. It can be expressed as

$$\text{Savings required} = £16{,}000 + \frac{5(£18{,}600 - \text{Gross annual income})}{2}$$

For example, if the couple have no income, therefore, they must show savings of £16,000 + (2.5 x [£18,600 – 0]) = £62,500. Where an applicant has no income (save for earnings from work) and no non-British children, and his or her partner is in the UK and has a gross annual income of £14,000, the required savings will be £16,000 + (2½ x [£18,600 - £14,000]) = £27,500. If the applicant in this example has one non-British child, the required savings will be £16,000 + (2½ x [£18,600 + £3,800 - £14,000]) = £37,000.

In-country

Where the applicant is in the UK and is applying to stay with his/her partner in the UK, the only difference from an entry clearance application is that the applicant's earnings from work may be included along with those of the partner to meet the requirements in either of the ways set out above. Where an applicant is applying to come to or stay in the UK on the basis that he or she is the child of a parent who either is applying to come to or stay in the UK or has limited leave to enter or stay in the UK, the new financial requirements are very similar to those described above.

Appendix FM-SE to the Immigration Rules sets out how gross annual income will be calculated and the documents that must be submitted as evidence of such income (or savings where applicable), as follows:

> *13. Based on evidence that meets the requirements of this Appendix, and can be taken into account with reference to the applicable provisions of Appendix FM, gross annual income ... will be calculated in the following ways:*
>
> *(a) Where the person is in salaried employment in the UK at the date of application and has been employed by their current employer for at least 6 months, their gross annual income will be (where paragraph 13(b) does not apply) the total of:*
>
> > *(i) The gross annual salary from their employment as it was at its lowest level in the 6 months prior to the date of application;*
> >
> > *(ii) The gross amount of any specified non-employment income (other than pension income) received by them or their partner in the 12 months prior to the date of application; and*
> >
> > *(iii) The gross annual income from a UK or foreign State pension or a private pension received by them or their partner.*

(b) Where the person is in salaried employment in the UK at the date of application and has been employed by their current employer for less than 6 months (or at least 6 months but the person does not rely on paragraph 13(a)), their gross annual income will be the total of:

(i) The gross annual salary from employment as it was at the date of application;

(ii) The gross amount of any specified non-employment income (other than pension income) received by them or their partner in the 12 months prior to the date of application; and

(iii) The gross annual income from a UK or foreign State pension or a private pension received by them or their partner.

In addition, the requirements of paragraph 15 must be met.

(c) Where the person is the applicant's partner, is in salaried employment outside of the UK at the date of application, has been employed by their current employer for at least 6 months, and is returning to the UK to take up salaried employment in the UK starting within 3 months of their return, the person's gross annual income will be calculated:

(i) On the basis set out in paragraph 13(a); and also

(ii) On that basis but substituting for the gross annual salary at paragraph 13(a)(i) the gross annual salary in the salaried employment in the UK to which they are returning.

(d) Where the person is the applicant's partner, has been in salaried employment outside of the UK within 12 months of the date of application, and is returning to the UK to take up salaried employment in the UK starting within 3 months of their return, the person's gross annual income will be calculated:

(i) On the basis set out in paragraph 13(a) but substituting for the gross annual salary at paragraph 13(a)(i) the gross annual salary in the salaried employment in the UK to which they are returning; and also

(ii) On the basis set out in paragraph 15(b).

(e) Where the person is self-employed, their gross annual income will be the total of their gross income from their self-employment, from any salaried employment they have had, from specified non-employment income received by them or their partner, and from income from a UK or foreign State pension or a private pension received by them or their partner, in the last full financial year or as an average of the last two full financial years. The requirements of this Appendix for specified evidence relating to these forms of income shall apply as if references to the date of application were references to the end of the relevant financial year(s).

(f) Where the person is self-employed, they cannot combine their gross annual income at paragraph 13(e) with specified savings in order to meet the level of income required under Appendix FM.

(g) Where the person is not relying on income from salaried employment or self-employment, their gross annual income will be the total of:

(i) The gross amount of any specified non-employment income (other than pension income) received by them or their partner in the 12 months prior to the date of application; and

(ii) The gross annual income from a UK or foreign State pension or a private pension received by them or their partner.

Appended as separate documents:

1. Wesley Gryk solicitors' letter to the Immigration and Border Policy Directorate of the Home Office of 7 September 2011 and reply from Ms Helen Sayeed of the Immigration and Border Policy Directorate of 3 October 2011.
2. ILPA to Sally Weston, Immigration and Border Directorate, Home Office of 4 July 2012
3. Sally Weston, Immigration and Border Policy Directorate, note on changes to the immigration rules, 6 September 2012.
4. ILPA to Jeremy Oppenheim Director of Immigration and Settlement UK Border Agency, 7 September 2012
5. Philip Duffy, Director of Immigration and Border Policy, Home Office to ILPA of 4 October 2012
6. 18 December 2012 Letter from Lord Taylor of Holbeach to Lord Avebury.