ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

ILPA Briefing for the 19 June 2013 Westminster Hall debate: Effects of the new family migration rules Mr Virendra Sharma

Those affected by the changes to the rules on family immigration brought in on 9 July 2012 and subsequently are a diverse group, whose members are unknown to each other. For this reason, it has taken time for them to become visible, with immigration lawyers and MPs among the first to recognise that in every area there are people affected by the rules. Soon everyone is likely to know a family member, friend or colleague, who is a British citizen or has indefinite leave to remain in the UK, who is unable to have their partner, child or parent join them or remain with them because of these rules[1].

ILPA's first training course on the new rules was entitled "Don't fall in love," that being the best advice for those faced with the new rules. Rights of migrants and refugees not to be subject to torture or enslavement, the right to a fair trial, strike a chord with very many people, but interference with the right to private, and particularly family, life of a friend, family member or colleague touches many people more nearly. We see at first hand the pain that not being able to care for a dying relative or being separated from a partner or child is causing. These feelings are familiar and comprehensible: we can empathise and imagine ourselves in the shoes of those affected.

ILPA responded to the Government consultation on family migration that led to the July 2012 rule changes and provided written and oral evidence to the All Party Parliamentary Group on Migration's investigation of family immigration, which has culminated in its report. ILPA has met with officials and corresponded with them at great length about the rules, pointing out errors and infelicities in the drafting and problems in their application. Over 30 of the changes to individual family immigration rules since July 2012[2] reflect matters ILPA raised in this correspondence[3]. Problems go beyond drafting. The purpose for which many requirements are imposed is wholly unclear and there are what appear to be perverse and unintended consequences of overly prescriptive, rigid requirements.

In summary, the effects of the rules are:

Adult dependent relatives:

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

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 groups with characteristics protected under the Equality Act 2010;

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[1] Individuals have posted their stories on the website http://familyimmigrationalliance.wordpress.com/ . See also the http://britcits.blogspot.co.uk/

[2] Changes to the family rules since 9 July 2012 include Statement of Changes CM 8423 (July 2012) – which is 288 pages long; Statement of Changes HC 565 (September 2012); Statement of Changes HC 760 (December 2012); Statement of Changes HC 820 (December 2012) and Statement of Changes HC 1039 (April 2013); Statement of Changes HC 244 (June 2013).

[3] The Home Office and others may well have spotted the errors also.

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- The rules are separating families with lower incomes;
- Arbitrary, prescriptive requirements at odds with stated policy intentions;
- Complexity for applicants, Home Office staff and legal representatives.

Adult dependant relatives

The "Retired persons of independent means" category[4] in the rules was closed in 2008[5] so that there is no route for elderly relatives to come to the UK under their own steam unless they have the million pounds required under the investor route[6].

Under the rules in force before July 2013, parents or grandparents aged 65 or over could apply to come to the UK as adult dependent relatives if they were wholly or mainly financially dependent on the UK-based family member, did not have other close relatives in their country who could support them, and could be adequately maintained in the UK without recourse to public funds and housed in accommodation owned or occupied by the UK-based sponsor. Other adult relatives (parents and grandparents under 65, and children, siblings and uncles and aunts) could apply but in addition to meeting the criteria applying to parents they had to demonstrate "exceptional compassionate circumstances'.

Since July 2012, all relatives including parents must show a need for "*… long-term personal care to perform everyday tasks"* and that even with the sponsor's practical and financial help they cannot get it where they now live "*because either it is not available and there is no person in that country who can reasonably provide it or it is not affordable*"[7]. The current application of the rules requires such a state of dependency that many elderly relatives will be unable to travel by the time they meet them.

There must be no reliance on public funds in providing adequate support for the relative in the UK for at least five years. It will be recognised that it is very likely that those who meet the requirements of the rule will be dead within that period.

In the UK Border Agency's own guidance[8], 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.*

The 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 means that the better able someone is to pay for such care, the less able they are to satisfy the rule. Government has to date failed to explain the policy intention behind this.

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[4] Previously Immigration Rules HC 395 paragraph 317.
[5] Statement of Changes in Immigration Rules HC 1113.
[6] Immigration Rules HC 395, Annexe A Table 7.
[7] *Immigration Directorate Instructions, Appendix FM Annex 6.0, Adult Dependent Relatives (December 2012).* Available at: http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/chp8-annex/section-FM-6.0.pdf?view=Binary (accessed 16 June 2013)
[8] *Ibid*.

The rules are acting as a bar. The Lord Taylor of Holbeach responded to a parliamentary question by the Lord Avebury[9] by a letter of 18 December 2012 stating that in the period from 9 July to 31 October 2012 only one visa was issued to an adult dependent relative. It is not recorded whether that person was well enough to travel.

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*[10], 2,700 adult dependent relatives were granted entry clearance in 2010. The overall family migration statistics[11] have shown a decrease in family migration in 2011 and 2012, although the actual statistics for adult dependant relatives are not disaggregated[12].

In its evidence to the All Party Parliamentary Group on Migration the British Medical Association provided first-hand accounts from skilled British citizens who are medical professionals who had taken the decision to leave the UK because they wanted to care for their elderly dependent relatives[13]. For example:

BMA member
British citizen, now living in Singapore

I am a British citizen, and work as consultant forensic psychiatrist (on an employment pass/work permit) in Singapore I am 44 years old, and at the peak of my career… I also have one younger sister living in UK, who is also a British citizen. She is a consultant psychiatrist in learning disabilities, and also an associate medical director in an NHS Trust … Her husband, also a British citizen, is an eminent trauma and orthopaedic surgeon… I relocated to Singapore because it allowed my parents to stay with me, uninterrupted, as long as my employment pass was valid. Now my sister and her family are also considering relocating here so that the family could be together. However, we do not wish to make Singapore our home; our home is the UK. At the same time we cannot neglect our parents who left no stone unturned to provide us with the best of education and support…

The European route

EEA nationals and their family members are not subject to the rules, but to European Union law on rights of free movement. A British citizen returning to the UK from another EEA State can enjoy those same free movement rights[14]. Thus an option for some is to reside with their family member in accordance with European law (i.e. normally working or studying) and then return with them to the UK. The All Party Parliamentary

[9] HL Report 23 Oct 2012 : Column 189
[10] Paragraph 5.5.
[11] See *Immigration Statistics, April to June 2012 at* http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/immigration-asylum-research/immigration-q2-2012/family-q2-2012 (accessed 16 June 2013).
[12] Migration Advisory Committee report, op cit., figure 3.4 page 31.
[13] BMA Memorandum of Evidence 23 January 2013. See also the case of "Alex" on http://britcits.blogspot.co.uk/ , earning over £100,000 a year but seeking an international posting.
[14] As established in the European Court of Justice case C380/90 of *Surinder Singh*.

Group heard evidence of this route being used in a small number of family immigration cases[15].

Spouses, partners and children: the income requirement

The minimum income requirements to sponsor a family member were changed in July 2012 from having means equivalent to income support, along with adequate housing, to a minimum income threshold starting at £18,600. There is a considerable difference between what people on benefits are expected to live on and what the rules require. Non-EEA national family members were never permitted recourse to public funds as defined, [16] or the British or settled family member additional public funds on account of the presence of the non-EEA national. 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[17]. Any financial requirement set higher than "no recourse to public funds" discriminates 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.

We urge MPs to probe the policy behind the approach. Is it an attempt to discourage people from forming relationships with non-EEA nationals? If so, why? Are they expected to form relationships with EEA nationals instead or is this also undesirable? Family income is tested on entry, when leave is extended, and when applying for settlement.

In entry clearance cases, the exchange rate may determine whether the threshold can be met. The All-Party Parliamentary Group records a submission from South Africa: "*As barristers, we are top earners here, but when converted into pounds we fall short."*[18] Exchange rates and levels of earning in different countries also affect whether savings requirements can be met.

The Royal College of Nursing stated in evidence to the All Party Parliamentary Group that the majority of NHS health care support workers earn between £14,153 and £17,253 per annum.[19] The Group records submissions from shop attendants, security guards, office administrators, those studying to be vets or teachers and persons in religious communities unable to meet the threshold[20]. The All Party Group reports that the Migration Observatory estimated that 47% of British citizens in employment in 2012 would not qualify to sponsor a non-EEA partner on the basis of earnings[21].

In certain circumstances those who fall short of this figure can make good the shortfall by demonstrating savings held in a personal bank account in cash for six months. Only

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[15] See All-Party Parliamentary Group on Migration *Report of the inquiry into the new family migration rules*, June 2013, page 24.
[16] See Statement of Changes in Immigration Rules HC 395, paragraph 6.
[17] 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.
[18] *Ibid*., page 26.
[19] Cited in the report at page 22.
[20] *Ibid.*
[21] *Ibid*.

savings above £16,000 count and these are subject to a multiplier so that an applicant relying solely on savings for an entry clearance application or an application for leave to remain needs to have £62,500 untouched in a bank account for six months.

The changes do not make a difference to the ability of the family to call on the public purse. Nor can it be assumed that the family will be poorer if reunited in the UK. Remittances may be being sent overseas, the presence of the non-EEA national family member may make it possible for their partner to go out to work, or to work more, and they may themselves work.

The separation of families where income is higher than this minimum results from the detail. 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.

The following types of income are not taken into account:

- Financial support from family members;
- The applicant's current and future income from employment or self-employment where an entry clearance application is being made (only that of the British spouse or partner is relevant)[22];
- Earnings from self-employment in the individual's current financial year[23]; and
- 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 an employer for six months or more, gross annual income will be his/her gross annual salary at its lowest point in the last six months, rather than his/her actual annual salary.

A person who can meet the financial requirements 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.

Third party support now cannot be counted towards meeting the income requirement whatever the means and willingness to assist. Guidance on transitional arrangements says for cases where such support is still permitted:

> The caseworker will need to verify and assess an offer of third party support in order to determine whether an applicant satisfies the requirement that he/ she can be adequately maintained in the UK without recourse to public funds. The caseworker may request evidence (e.g. original bank statements over at least three months) of the third party's assets.
>
> It is open to the caseworker to ask a third party offering long-term support to become a joint sponsor and to give an undertaking … to underwrite his commitment. [24]

[22] See for example the case of Ms Bailey cited by the BBC in the BBC on 10 June 2013 *UK's new visa rules causing "anguish" for families*: http://www.bbc.co.uk/news/uk-22833136 (accessed 17 June 2013).
[23] *Ibid*., for the case of Mr Shillingstone.
[24] Immigration Directorate Instructions, Chapter 8, Annexe F.

Thus, the change is an example of outlawing the ability to use judgement in favour of prescriptive requirement the purpose of which appears to be ease of application rather than fulfilment of any policy intention.

Delay is a problem. Return to the UK may be triggered by finding that a British partner is pregnant, or because of illness or other difficulties of family members in Britain. In such cases, there is no time for waiting six months to be able to evidence having held savings for six months. We have seen very wealthy people, who do not keep their assets in cash, who have been unable to meet the rules.

We are aware of British citizens and settled persons who have decided not to remain in, or have decided to leave the UK because they cannot have their family members join them[25]. These are persons who have somewhere else that they can go, for example because their skills are in demand or they are of independent means.

It is no answer to suggest that the non-EEA partner could use another migration route since these may not be open to him/her. Only 1000 persons are permitted to enter under the Tier 1 "Exceptional talent" category and there are no other routes under which self-employment is permitted, save for those making investments and coming as investors (investing at least one million) or entrepreneurs. Tier 2 of the Points-Based System is for skilled workers with a job offer. It will not cover those with the potential to earn a lot but without qualifications. It will not avail a couple where it is the British or settled partner who is the worker, or the skilled worker, or the high earner. Moreover, only those who hold a sponsor licence can employ a worker under Tier 2 and not all companies hold such licences.

The effect of the requirements is much greater where earnings are low relative to the UK and /or the currency weak. This is about earnings, not expenditure or how much one has to live on, and thus those outside London and the South-East are disadvantaged and the All Party Group also heard evidence that women and those of pensionable age would suffer particular disadvantage[26].

The rules give rise to discrimination. Since average earnings of women in the UK are lower than those of men[27], the rules indirectly discriminate on grounds of gender. More women than men work part-time[28]. The indirect discrimination against female sponsors and male applicants is exacerbated in entry clearance cases where only the earnings of the sponsor are taken into account.

Maternity leave and maternity pay affect women's earnings and there is a risk that the income thresholds, the details of these and of the ways in which one must evidence

[25] And see, for example, the case of the Prodgers reported in The Independent on Monday 10 June: "*Family immigration rules that put a £18600 a year price tag on love are heartbreaking*" http://www.independent.co.uk/news/uk/home-news/family-immigration-rules-that-put-a-18600ayear-price-tag-on-love-are-heartbreaking-8651456.html?origin=internalSearch and that of Sarah and Eduardo in the BBC article *British mother had abortion because of visa rules*, of 10 June 2013 http://www.bbc.co.uk/news/uk-22868332 (accessed 17 June 2013).

[26] *Ibid*, page 23.

[27] European Commission, Gender Pay Gap statistics, United Kingdom, available at http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Gender_pay_gap_statistics (accessed 17 June 2013).

[28] *Op.cit*. The Gender Pay Gap statistics document 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.

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[29], the rules indirectly discriminate on grounds of race.

Under section 55 of the Borders, Citizenship and Immigration Act 2009, the Home Office is supposed to have due regard to the need to safeguard and promote the welfare of children (who may be British or from overseas) in the discharge of its immigration and nationality functions. The All Party Parliamentary Group records breast-feeding mothers separated from their children and fathers who have never met their children and whose partners are struggling alone.[30] The risks of breach of the legal duty are very high.

The All Party Parliamentary Group on Migration has called for an enquiry into the effect of the income threshold. We suggest that what matters is to change it. There is every reason for the Government to acknowledge at once that it has got the following matters which the Group would like to be part of any review wrong and should change the rules with immediate effect to:

- Allow those who can demonstrate their ability to provide full financial support to an adult dependent relative in the UK, or where the relative themselves has the means to financially support themselves, to bring their elderly relatives to the UK;
- Make clear that an adult dependent relative need not be physically helpless to meet the requirements of the rules;
- Take into account the prospective earnings of both partners including in circumstances where the non-EEA partner has a firm offer of employment or self-employment in the UK;
- Treat income from self-employment in the same way as income from employment;
- Permit third party support;
- Not require shares etc. to be converted into cash before taking them into account;
- Strip out prescriptive evidential requirements that create a rigid system and focus on what needs to be proven, rather than restricting the means by which proof can be offered. Statement of Changes HC 1039, which gave a small amount of discretion as to evidence and allowed further evidence to be requested, showed that nothing prevents a pragmatic purposive approach to evidence.

Article 8

We are promised new primary legislation in the autumn to address Article 8 of the European Convention on Human Rights, the right to private and family life. It did not need the insight of a Cassandra to predict the effects of the rule changes made in July 2012 where Article 8 was concerned. That the Home Secretary recognises only a part of the rights protected by Article 8 within the rules makes no difference to the UK's obligations

[29] Migration Advisory Committee, 2011, *Review of the minimum income requirement for sponsorship under the family migration route*. Available at: http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithus/mac/family-migration-route/family-migration-route.pdf?view=Binary .

[30] Report, *op. cit.* at page 27. See also the BBC 10 June 2013 *UK's new visa rules 'causing anguish' for families* at http://www.bbc.co.uk/news/uk-22833136 (accessed 17 June 2013). See also the cases of Shona and Elie Bakarat and Gillian and Tsuyoshi in the BBC article *British mother had abortion because of visa rules*, of 10 June 2013 http://www.bbc.co.uk/news/uk-22868332 (accessed 17 June 2013).

under the Convention and it is these that are given effect by the courts. That is their job. It is as much a part of our democracy that judges uphold the law as that politicians make it, whether by signing an international treaty or enacting a set of rules.

The extent to which putting a preferred definition of Article 8 into primary legislation will change the way in which the right is enforced is difficult to predict without sight of the Bill. It can be identified that it will be open to anyone refused protection of their rights under Article 8 in the UK to take their case to the European Court of Human Rights in Strasbourg once they have exhausted all remedies within the UK.

Perhaps at this stage what is most important is to stand back and consider the broad policy position. Is the message to those whose elderly parents are not British, and to those who have a spouse civil or unmarried partner, who is not an EEA national that they should not expect to make a future in the UK with their children? Is the message to those who will see family members friends and colleagues go abroad to be with parents, spouses and partners that this separation is public policy? If it is, then why?

About ILPA

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

Statement of Changes in immigration rules HC 194 introduced for family immigration the sorts of complex, rigid and prescriptive rules that had previously been seen only in the Points-Based System. Just as businesses have needed to rely heavily, more heavily than they had done in the past, on lawyers to navigate these requirements, so individuals have needed to be more reliant on legal advice. This can be costly for those who can pay. For those who cannot, the situation has changed since the rules were brought into force.

Since 1 April 2013, there is no legal aid for family immigration cases, save in the most limited circumstances. That which remains, such as legal aid for some but not all immigration and nationality judicial reviews, for certain groups of applicant such as survivors of domestic violence, will almost all go if the proposals set out in the latest *Transforming Legal Aid* consultation come into effect. ILPA has written in detail about both sets of changes[31]. It is a crime to give advice on immigration in the course of a business, whether or not profit, unless regulated as a barrister, solicitor, legal executive or by the Office of the Immigration Services Commissioner[32]. Those of limited means affected by the immigration rule changes will in many cases turn to their MPs, who are one of the few sources of advice and assistance open to them.

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17 June 2013
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[31] See ILPA's response to the Transforming Legal Aid consultation of June 2013 at and our summary of the proposals at http://www.ilpa.org.uk/resource/17778/transforming-legal-aid-ilpa-short-note-on-the-proposals-26-april-2013

[32] Immigration and Asylum Act 1999, section 84.