IMMIGRATION BILL
ILPA BRIEFINGS TO AMENDMENTS FOR HOUSE OF COMMONS COMMITTEE STAGE

PART 11 CLAUSE 14

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Clause 14 of the ECHR: public interest considerations

AMENDMENT 35

Dr Julian Huppert

Clause 14, page 14, line 3, at end insert 'or

(a) was born in the United Kingdom and has always lived in the United Kingdom;'.

Presumed purpose

Amends the definition of a qualifying child to include a child who was born in the UK and has always lived in the UK. ILPA regards this as a probing amendment that will allow the multiple deficiencies of the clause as regards children to be explored.

Briefing

Subsection 117C of the Nationality Immigration and Asylum Act 2002, proposed for insertion by Clause 14 provides that the public interest requires the deportation of a person sentenced to more than four years in prison unless one of two exceptions applies. The second exception is that the person has a genuine and subsisting relationship with a "qualifying" partner or a "qualifying" child, as defined and that the effect of the deportation on that qualifying person could be unduly harsh. That could be because the qualifying person is left behind, or because the qualifying person will leave with the person to be deported for a harsh future.

A qualifying child is defined as a child who is British or has lived in the UK for a continuous period of seven years. This leaves out a number of children, including settled children and the under sevens. This amendment would expand the definition of a qualifying child to include the under sevens born in the UK and who have never left of whatever age.

Since 1 January 1983, birth in the UK does not make you a British citizen (before that date, it did). If you are born in the UK then to be born British your mother, the husband or civil partner of your mother or (since 1 July 2006) your father where he is not married to your mother must be British or settled (i.e. with indefinite leave to remain). Thus the children this clause contemplates did not have a British or settled

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parent at the time of their birth. A parent may have become British or settled subsequently. If a parent becomes British or settled, the child contemplated by this clause is entitled (there is no good character test for the under tens) to be registered as a British citizen under section 1 of the British Nationality Act 1981[1]. In any event, once a child born in the UK has lived in the UK continuously for ten years, the child, provided that s/he is a person of good character, may register as a British citizen[2].

In the course of a debate on the situation of the under-sevens, ILPA would wish to highlight also the situation of children who are settled, i.e. children with indefinite leave to remain but have not yet become British citizens. Such a child is entitled to remain the UK for the rest of his/her life. Whereas a British citizen can return to the UK after an absence of any length, a settled person can lose that status if they stay out of the country for more than two years[3]. Thus the effect on settled children is potentially more severe than on children who are British citizens, although they share many of the characteristics of such children as described by the Supreme Court in *ZH (Tanzania) v SSHD* [2011] UKSC 4:

> *"…they have lived here all their lives; they are being educated here; they have other social links with the community here; they have a good relationship with their father here. It is not enough to say that a young child may readily adapt to life in another country. That may well be so, particularly if she moves with both her parents to a country which they know well and where they can easily re-integrate in their own community (as might have been the case, for example, in Poku, para 20, above). But it is very different in the case of children who have lived here all their lives and are being expected to move to a country which they do not know and will be separated from a parent whom they also know well."*

The amendment would bring the under sevens within the terms of the exception but it would still be necessary to prove that the effect of the deportation on the child was "unduly harsh". This is the wrong test. The correct test is whether the deportation is in the best interests of the child

As a matter of law the test is not whether it would be "unduly harsh" to expect a child to leave the UK, it is whether it would be in the best interests of the child to do. If the best interests of the child are to be a primary consideration in any decisions concerning children, as the UN Convention on the Rights of Child says that they are and as the UK courts have said in *ZH (Tanzania) v SSHD* [2011] UKSC 4 that they are, then a relationship with any child whose best interests dictate that his/her future lies in the UK is relevant to the question of whether the adult should be removed. The Secretary of State in trying to set out her view of tests for the operation of Article 8 is at best attempting to reify the current interpretation as her view and failing to leave room for her view to develop. But here she is even managing that, she is putting forward an interpretation that is at odds with international consensus and can only cause confusion.

[1] British Nationality Act 1981, s 1(3).
[2] British Nationality Act 1981, s 1(4).
[3] Immigration Rules HC 395, paragraphs 18-20 Returning Residents

The UN Convention on the Rights of the Child says

> *Article 3*
>
> *1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. …]*

The Supreme Court said in *ZH (Tanzania)*

> *44. There is an obvious tension between the need to maintain a proper and efficient system of immigration control and the principle that, where children are involved, the best interests of the children must be a primary consideration. The proper approach, as was explained in Wan v Minister for Immigration and Multicultural Affairs [2001] FCA 568, para 32, is, having taken this as the starting point, to assess whether their best interests are outweighed by the strength of any other considerations.*

Lord Kerr in his concurring opinion stated

> *46. It is a universal theme of the various international and domestic instruments to which Lady Hale has referred that, in reaching decisions that will affect a child, a primacy of importance must be accorded to his or her best interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result.*

Other examples include the European Court of Human Rights in *Neulinger v Switzerland* (2010) 28 BHRC 706, para 131,

> *"the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken . . . of 'any relevant rules of international law applicable in the relations between the parties' and in particular the rules concerning the international protection of human rights". The Court went on to note, at para 135, that "there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount*".

Adrian Berry, Chair of ILPA said in his oral evidence to the Committee (29 October, 2nd session, pm, col 78)

> *Clause 14, which deals with article 8 of the European convention on human rights, seeks to put down a legislative marker as to what factors should be considered in the public interest. In so far as it does that, Parliament has the right to specify what it considers to be in the public interest. Whether it should specify the measures that are specified in clause 14 is a different question. We have concerns about the way in which it has gone about that task. So long as power is reserved to the judges to*

decide substantively whether there has been a violation of article 8, which is a task granted to them under the Human Rights Act 1998, there may be a sufficient safeguard. In its operation, however, clause 14 directs attention to some measures at the expense of others.

To give you the most obvious example, the best interests of the child must be considered as a priority and must be considered first. The question is not whether the impact on the child is unduly harsh. The question is: what are the best interests of the child, and is there a sufficient public policy interest to swing against that? Clause 14, as currently drafted, is not compatible with that formulation, which is prescribed by the Supreme Court in the case of ZH (Tanzania).

Briefing

CLAUSE 14 STAND PART

ILPA considers that Clause 14 should not stand part of this Bill.

Article 8 of the European Convention on Human Rights reads:

> *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 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.*

The language of public interest is found nowhere in Article 2. It is necessary in a case where she is interfering with individual rights for the Secretary of State to identify the particular interest(s), one or more 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, that she seeks to protect by her action.

Parliament can set down what it considers to be in the public interest, although in making reference to this in the course of proceedings under Article 8 it will be necessary to link it with one or more 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 so that it sits within Article 8(2).

Parliament should not, we suggest, try to set down its view of what constitute private rights (to family and private life as per Article 8(1)) in the broad and general terms found in this clause. Human rights judgments require an analysis that looks at the facts of the particular case. The Human Rights Act 1998 assigns that task to the judiciary. That task cannot be carried out in advance of the specific facts of a particular case being known. What will be the effect on this child of the deportation of this parent? Rules applied to people in different circumstances than the mischief

aimed at can have disproportionate outcomes, as illustrated by, for example by *R (Quila & Anor) v SSHD* [2011] UKSC ([2010] EWCA Civ 1482), in, the case on raising the age for marriage with a non-EEA national to 21, which was found to be unlawful.

As to weighing private rights against public interest, that is the job of judges. It is assigned to them by the Human Rights Act 1998. There is a clear and principled division between the legislature, which has decided that Article 8 is directly enforceable in the UK; the Executive, which is required to apply Article 8 when taking decisions; and the judiciary, which is required to interpret the requirements of Article 8 and apply them in the context of individual decisions.

Lord Bingham for the House explained this very carefully in *Huang v SSHD; Kashmiri v SSHD* [2007] UKHL 11; [2007] 2 AC 167:

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

Exceptionality might be a prediction, it was not, held Lord Bingham, a legal test. Lord Bingham in *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41stated As to the House of Lords cases relied upon to reach these conclusions, Lord Bingham s in *EB Kosovo* [2008] UKHL 41 quoted the passage above and then said:

> *…the appellate immigration authority must make its own judgment and that judgment will be strongly influenced by the particular facts and circumstances of the particular case. The authority will, of course, take note of factors which have, or have not, weighed with the Strasbourg court. It will, for example, recognise that it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child. But cases will not ordinarily raise such stark choices, and there is in general no alternative to making a careful and informed evaluation of the facts of the particular case. The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires.*

See the European Court of Human Rights in *AA v UK* (App No, 8000/08, 20 September 2011, Fourth Chamber),

> *…the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case. Further, not all the criteria will be relevant in a particular case…*

R (Razgar) v Secretary of State for the Home Department [2004] UKHL 27, [2004], sets out the process to follow in assessing whether a person's exclusion or expulsion from the UK will give rise to a breach of Article 8. It is there held that in a case where removal is resisted in reliance on article 8, the questions are likely to be:

> (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
> (3) If so, is such interference in accordance with the law?
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

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

> *[16] The [Tribunal] will wish to consider and weigh all that tells in favour of the refusal of leave which is challenged, with particular reference to justification under article 8(2). There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain; the need to discourage fraud, deception and deliberate breaches of the law; and so on.*

It then set out, again on the basis of a reading of caselaw, the factors which weigh against removal:

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

Adrian Berry, chair of ILPA summarised the position in his oral evidence to the Committee (29 October, second session, pm Column number: 79):

Adrian Berry: … the question is not whether Parliament can give a view of the public interest; the question is whether it should formulate it in the terms that are currently drafted in clause 14.

... There is nothing wrong, in a society based on self-rule, with specifying the public interest. The question is whether you should do it in such a way as to cause variance with the convention rights as they are understood and applied under the Human Rights Act.

If I can return to the example of the best interests of the child, it should not be about whether the impact on the child is unduly harsh. It should be: what are the best interests of the child, and is there a sufficient public policy interest to override them? Introducing alternative formulations, variable geometry in legal tests and a series of terms that are being loaded with meaning creates circumstances in which lawyers will pick over those meanings rather than simply applying article 8 in order to understand the first question—has the statutory meaning been satisfied?—before coming on to the second question: what does article 8 require?

The Secretary of State has taken a variety of positions before the courts.
See the case of *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192 (08 October 2013) Available at (http://www.bailii.org/ew/cases/EWCA/Civ/2013/1192.html).

The U[pper] T[ribunal] *in Izuazu recorded the Secretary of State's submission in response to the question what difference the new rules had made on the case law on article 8 in these terms:*

> *"….the Rules make a substantial difference to the case law and essentially restore the exceptional circumstances test disapproved of by the House of Lords in Huang v SSHD [2007] UKHL 11, [2007] 2 AC 167 because their Lordships were considering a set of immigration rules that did not spell out the UK's response to Article 8 issues whereas the present rules before us do so."*

That was a surprising submission to make in view of the round terms in which an exceptionality test was rejected by the House of Lords in Huang at para 20: see also EB (Kosovo) v Secretary of State for the Home Department ***[****2008] UKHL 41, [2009] 1 AC 1159 at paras 8, 12, 18, 20 and 21.*

But the thrust of the case advanced on behalf of the Secretary of State in the grounds of appeal in the present case was different. ..

..It is true that, as the UT pointed out at para 38 of their determination, the new rules are not a perfect mirror of the Strasbourg jurisprudence. But Ms Giovannetti [for the Secretary of State] *concedes that they should be interpreted consistently with it.*
…In view of the strictures contained at para 20 of Huang, it would have been surprising if the Secretary of State had intended to reintroduce an exceptionality test, thereby flouting the Strasbourg jurisprudence. At first sight, the choice of the phrase "in exceptional circumstances" might suggest that this is what she purported to do. But the phrase has been used in a way which was not intended to have this effect

We do not attempt herein a detailed commentary on the Human Rights Memorandum issued with the Bill, although we are happy to provide commentary on particular parts of it if this would be helpful. We do give a couple examples of problems. For example the case of *Rodrigues da Silva and Hoogkamer v Netherlands* (2007) 44 EHRR 34. ILPA highlighted in our 2011 response to the consultation on family migration which preceded the writing of immigration rules addressing Article 8 that the presentation of the case in the consultation was misleading. It is also misleading in the Human Rights Memorandum. It is cited in the context of a discussion on precariousness without explaining that the applicants in da Silva were successful, despite Ms da Silva's having remained unlawfully in the Netherlands and having established her private life and family life when her status was precarious. The Supreme Court describing the case in *ZH (Tanzania)* [2011] UKSC 4 at 20 as

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

In precariousness cases, as in other cases, there is no one size fits all rule. What if a person does not know their situation is precarious- for example someone brought to the UK as a domestic worker who was not told her employer had not kept her paperwork up to date? Or someone who has lived most of their life in the UK not realising that their country of origin's becoming independent of the British Empire while they were in the UK has meant that they are no longer entitled to a British passport – a far from uncommon scenario amongst, for example, London-based communities originating from the Caribbean. What if the British partner is too ill to travel, or is caring for an elderly parent?

Definition of precarious

It is ILPA's understanding, although this could usefully be clarified, that it is intended that "precarious" should mean not only persons with no leave or with temporary admission but also persons with limited leave, including those who, if they chose to extend their leave, could eventually settle in the UK. Many such people will qualify for leave as a spouse or partner under the rules but not all – for example where the requirements of the rules as to English language competence, or cannot be met.

In what follows we highlight concerns about particular aspects of the formulation of the clause

English language

A person coming to the UK under the Tier 1 Investor Category is not required to speak English. A person coming to the UK under as a Tier 2 Intra-company transferee is not required to speak English. Clearly the public interest is not as clear-cut as this clause assumes. Why then is it assumed to be in public interest in every case that those relying on Article 8 should be able to speak English before they come to the UK? English language tests may be expensive and inaccessible overseas. Persons may learn much more quickly in an English speaking country, surrounded by

English speakers. There may be another language in which they communicate perfectly well with family members who can assist in teaching them English.

Financial independence

It is not always those who are financially independent who save the UK most money. Statement of Changes in immigration rules HC 194, which changed the family immigration rules in July 2012, prohibited relying on a third party to support and maintain the applicant. Those relying on third party support might not be financially independent, but neither would they rely on the State. If a person wishes to sponsor their spouse and child to come to the UK and the grandparents of that child are prepared, as third parties, to contribute to support and maintenance, there does not appear to be any mischief in that arrangement. A person who comes to the UK to care for a spouse or partner or for a child with disabilities may not be financially independent but may free up another person to work and may obviate the need for paid carers, thus saving the State money.

Prior to July 2012 the test for those joining family members in the UK was whether they could support and maintain themselves without resource to public funds as defined in the immigration rules. Subsequent to July 2012 the rules were changed to a minimum income threshold starting at £18,600. A modification of these rules will shortly be extended to cover members of the armed forces wishing to sponsor family members.

The court in *MM v SSHD* [2013] EWHC 1900 found the income threshold to be unlawful in the particular cases before it, those of British citizen and refugee spouses and partners. Since then the Home Office has "paused" decision-making in cases that turn only on the income threshold and involve British citizen and refugee spouses and partners. Those people are waiting and have been waiting since mid-July. There is a risk of another backlog and it would be useful to hear about how that is to be avoided and when decision-making will start again.

Non-EEA national family members were never permitted recourse to public funds as defined, [4] 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 then UK Border Agency had no evidence of this[5]. The Minister was asked for it in the 19 June 2013 debate[6] 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.

[4] See Statement of Changes in Immigration Rules HC 395, paragraph 6.
[5] 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.
[6] 19 June 2013 Col 277WH, question by Mr Roger Godsiff (Birmingham, Hall Green)

In entry clearance cases, the exchange rate may determine whether a threshold can be met. The All-Party Parliamentary Group on Migration's report records a submission from South Africa: "*As barristers, we are top earners here, but when converted into pounds we fall short.*"[7] 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.[8] 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[9]. 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[10].

In certain circumstances those who fall short of this figure could make good the shortfall by demonstrating savings held in a personal bank account in cash for six months. Only 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 as detailed above;
- 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)[11];
- Earnings from self-employment in the individual's current financial year[12]; 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

[7] *Ibid*., page 26.
[8] Cited in the report at page 22.
[9] *Ibid.*
[10] *Ibid*.
[11] 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).
[12] *Ibid*., for the case of Mr Shillingstone.

salary at its lowest point in the last six months, rather than his/her actual annual salary. 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.

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.

The effect of the requirements is much greater where earnings are low relative to the UK and /or the currency weak. Since average earnings of women in the UK are lower than those of men[13], the rules indirectly discriminate on grounds of gender. More women than men work part-time[14]. 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 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[15], 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.[16] The risks of breach of the legal duty are very high.

The new rules on adult dependent relatives have received relatively little attention despite having some of the most difficult effects of any of the changes. 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

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[13] 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).

[14] *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.

[15] 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 .

[16] 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).

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*"[17]. 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. In the Home Office's own guidance[18], 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 Lord Taylor of Holbeach responded to a parliamentary question by the Lord Avebury[19] 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*[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 in 2011 and 2012, although the actual statistics for adult dependant relatives are not disaggregated[22].

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[23]. 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

[17] *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)
[18] *Ibid.*
[19] HL Report 23 Oct 2012 : Column 189
[20] Paragraph 5.5.
[21] 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
[22] Migration Advisory Committee report, op cit., figure 3.4 page 31.
[23] 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.

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…

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?

Legal aid

Finally, we point out that those seeking to argue the points of fact and law in these cases will have to do so without the assistance of a lawyer if they stand in need of legal aid because legal aid is no longer available for immigration cases.

> *Although narrowing the scope of legal aid, we intend to provide a safety net. The exceptional funding scheme established in the Bill will provide funding for an excluded case where failure to do so would amount to a breach of a person's right to legal aid under the Human Rights Act or European Union law.* Lord McNally[24]

Heavy reliance was placed during the passage of the bill that became the Legal Aid, Sentencing and Punishment of Offenders Act 2012 on exceptional funding as the means by which access to justice would be preserved. Exceptional funding under section 10 of the Act has proven no answer at all. As of 1 July 2013, a mere six grants of exceptional funding had been made of which one was in immigration. None had been made to persons who were unrepresented. As of 6 September 2013, that figure was 11 grants, with no details of how many were in immigration. Also of concern, only 270 applications for exceptional funding had been made as of 1 July 2013. That would extrapolate to 1080 in the course of a year, far below the original estimate of 70,000. By 6 September, the number of applications had increased only to 624, which extrapolates to some 1497.

An application for exceptional funding involves completing three forms[25]: the usual "means" and "merits" forums and the exceptional cases form[26] which runs to 14 pages plus an 11-page *Exceptional Cases Funding – Provider Information Pack*[27].

Whether excluded cases receive exceptional funding under section 10 of the Act is related to the question of Article 6's having been held not to cover immigration

[24] HL Report, 21 Nov 2011: Column 821. See also HL Report 5 Mar 2012: Column 1570.
[25] Form CIV ECF 1.See http://www.justice.gov.uk/legal-aid/funding/exceptional-cases-funding
[26] Available at http://www.justice.gov.uk/downloads/forms/legal-aid/civil-forms/ecf1.pdf
[27] Available at http://www.justice.gov.uk/downloads/legal-aid/funding-code/ecf-provider-pack.pdf

proceedings[28]. The Lord Chancellor's Exceptional Funding guidance does contemplate exceptional funding where not to fund would be a breach of Articles 8 (and by extrapolation other articles) or 13 but says of immigration:

> *59. Proceedings relating to the immigration status of immigrants and decisions relating to the entry, stay and deportation of immigrants do not involve the determination of civil rights and obligations [footnote: Maaouia v France (2001) 33 EHRR 42; Eskelinen v Finland (2007) 45 EHRR 43 13.]*
>
> *60. The Lord Chancellor does not consider that there is anything in the current case law that would put the State under a legal obligation to provide legal aid in immigration proceedings… to meet the procedural requirements of Article 8 ECHR.*

Therefore, for the Lord Chancellor, not only is no obligation to fund immigration cases derived from Article 6, no obligation derives from the procedural requirements either.

While *Airey v Ireland*[29] and *P, C and S v United Kingdom*[30] were both family law cases, there is nothing in the case law that suggests that a different approach to rights other than rights under Article 6 should be taken in immigration cases. Rights must be rendered not "theoretical and illusory", but "practical and effective"[31]. In *P, C and S v United Kingdom*_(App.No.56547/00) (2002) 35 EHRR 31 the European Court of Human Rights recalled that:

> *Whilst Article 8 contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8*[32].

The residence test proposed in *Transforming Legal Aid* would mean many people are not eligible for judicial review, the only aspect of Article 8 cases that remains within the scope of legal aid. The proposed protections for trafficked persons and for survivors of domestic violence do not extend to judicial review. They are very limited. Children are not protected from the residence test.

The residence test purports to limit legal aid to those lawfully resident and can show 12 months continuous[33] lawful residence at some stage in the past. Entitlement to legal aid and access to justice is made dependent upon where a person is in the world and on their personal status, regardless of their means and of the strength of their case.

Victims of domestic violence and forced marriage

Victims of domestic violence and forced marriage will be entitled to legal aid in some situations and not others. The difference the proposals in *Transforming legal aid* will make to them is that they will no longer be able to obtain legal aid for judicial review if they fail the residence test. The exception for them does not extend that far.

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[28] *Maouiaa v France* Application 39652/98 [2000] ECHR 455 (5 October 2000).
[29] (1979-80) 2 EHRR 305.
[30] (2002) 35 EHRR 31.
[31] See for example, *Airey v Ireland* Series A, No.32, (1979-80) (1979) 2 EHRR 305.
[32] Paragraph 119 of the judgment.
[33] See *Transforming Legal Aid: next steps,* Ministry of Justice, 5 September 2013, paragraph 2.16, *breaks* of up to 30 days, at a time or in aggregate, will be permitted.

As debated during the passage of the Legal Aid, Sentencing and Punishment of Offenders Act 2012[34], not all survivors of violence fall within the scope of legal aid. The required evidence of domestic violence to obtain legal aid is proving a barrier in practice. Many GPs were not providing letters in support, partly because, it has been suggested[35] the Legal Aid Agency is asking them to warrant more than they feel able to say as to the cause of injuries. Other GPs were imposing charges: plans to ensure adequate communications and agreement prior to the coming into force of the Legal Aid, Sentencing and Punishment of Offenders Act 2013 not having resulted in these problems being averted[36]. The Government has just amended its guidance on evidence in the hope of addressing some of these problems.

Persons under immigration control who are not applying under the domestic violence rule, such as wives of refugees whose relationships break down because of domestic violence, are not entitled to legal aid.

Trafficked persons are in a similar position. The difference the proposals in *Transforming legal aid* will make to them is that they will no longer be able to obtain legal aid for judicial review if they fail the residence test. The exception for them does not extend that far.

See further ILPA's evidence to the Joint Committee on Human Rights at http://www.ilpa.org.uk/resources.php/21039/ilpa-evidence-to-the-joint-committee-on-human-rights-enquiry-br-into-the-implications-for-access-to-

[34] See e.g. HC Report 17 Apr 2012: Column 218-252.
[35] Law Society Legal Aid Agency Civil Contracts Consultative Group 9 September 2013.
[36] *Ibid.*