ILPA BRIEFING FOR THE MOTION TO REGRET IN THE NAME OF THE BARONESS SMITH OF BASILDON

TO BE DEBATED 23 OCTOBER 2012

…to move that this House regrets that notwithstanding welcome but limited measures to ensure the deportation of foreign criminals and tackle sham marriages, and notwithstanding the importance of greater protection for the taxpayer, the Government have not demonstrated that the specific minimum annual income requirement which has been introduced through the Statement of Changes in Immigration Rules (HC 194) is the most effective way to protect taxpayers and deliver fairness for UK citizens who wish their spouse or partner to settle in the United Kingdom. 6th Report from the Secondary Legislation Scrutiny Committee.

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. Founded in 1984 by leading practitioners in the field, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing research and opinion that draw on the experiences of members. ILPA is represented on numerous Government, official and non-Governmental advisory groups and regularly provides evidence to parliamentary and official enquiries and responses to consultations.

About the motion

In ILPA's view, the motion is trying too hard. We do not consider the measures in HC 194 as to deportation to be "welcome." Rather, we consider that they fail to give effect to the UK's obligations under the European Convention on Human Rights. We draw from the text of the motion that, whatever one's attitude toward the purported justifications for it, HC 194 is not considered to be an acceptable instrument. ILPA regrets both HC 194 and the terms of the motion to regret it. Both would benefit from amendment; the latter to cut straight to the chase.

As to the former, below we deal first with the financial requirements highlighted in the motion and then make some more general comments on HC 194 following the 6th report of the Secondary Legislation Scrutiny Committee.[1] The Committee has questioned the parliamentary procedures that have surrounded the introduction of

[1] http://www.publications.parliament.uk/pa/ld201213/ldselect/ldsecleg/26/2603.htm

these measures. ILPA shares the Committee's concerns and provided a briefing for the House of Commons debate on HC 194.[2]

About the financial requirements

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

- they are the partner (spouse, civil partner, unmarried partner, fiancé or proposed civil partner) of a British citizen or a person settled in the UK; or
- they are the partner (spouse, civil partner, unmarried partner, fiancé or proposed civil partner) of a person with refugee leave or humanitarian protection (where the relationship was formed after the refugee or person with humanitarian protection fled his or her home country).

In these cases, the new financial requirements may be met from either income or savings. Where the applicant is outside the UK and applying to join his or her partner in the UK, the financial requirements must be met in one of the two ways.

- 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, the savings of both partners may be considered.

There must be total savings of £16,000 plus an amount no smaller than 2½ times the difference between the required income and the gross annual income the couple have, again discounting any earnings from work of the applicant. If the couple have no income, therefore, they must show savings of £16,000 + 5 x ([£18,600 – 0]/2) = **£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**.

Where the applicant is in the UK and is applying to stay with his/her partner in the UK, the only difference 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

[2] *ILPA briefing for debate on HC 194 statement of changes in immigration rules: to amend the motion* http://www.ilpa.org.uk/data/resources/14855/12.06.13-ILPA-briefing-for-debate-on-family-immigration.pdf

has limited leave to enter or stay in the UK), the new financial requirements are very similar to those described above.

Confused? So are unrepresented appellants and any lawyers who have not spent hours studying this. Although this may come as a surprise, the above is a very simplified version of the rules. For example, whether the British spouse or partner has been working overseas for the same company for more than six months or less than six months is relevant to the question of whether he or she meets the financial requirements. ILPA is running advanced courses for solicitors and barristers on the financial requirements – we append a short extract from our training notes to this briefing just to give you a glimpse of the complexity.

Previously, the Immigration Rules had included much less demanding financial requirements in these types of cases. Those requirements had been that the applicant (and any children) could be financially supported and accommodated without reliance on public funds.

The immigration rules have been twice further amended since the coming into force of HC 194. On 20 July 2012, Appendix FM-SE was added. This contains additional requirements relating to the financial requirements. For example, it sets out what and whose income and savings may be relied upon and what specific evidence is required to meet the financial requirements. 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 sums are substantial. The Migration Advisory Committee, in recommending such sums as a means to guaranteeing that a family migrant does not become "*a burden on the State*",[3] had expressly acknowledged that a large proportion of current applicants would be unable to meet such a requirement. Leaving aside the sums in respect of children, it was considered that a requirement of £18,600 would exclude some 45% of currently successful applicants.[4] We are not aware that there is any evidence or indeed suggestion that some 45% of successful applicants, who are bound by an obligation not to have recourse to public funds, currently have been found to claim any public funds, or to be a burden upon the State, still less a disproportionate burden.

It does not follow that because £18,600 would provide a general guarantee as indicated by the Migration Advisory Committee that this sum would be required to meet the policy aim in any individual case. Living costs vary in different regions of the United Kingdom, some families have additional sources of financial support from extended family members and some migrant family members will have prospects of good earnings. These factors are discounted from consideration under the new Immigration Rules.

Since average earnings of women in the UK are lower than men, the new Immigration Rules indirectly discriminate on grounds of gender. The indirect

[3] *Review of minimum income requirement for sponsorship under the family migration route*, November 2011.
[4] *Op cit.* paragraph 5.18; and see paragraphs 3.28 *et seq.* concerning the sample on which this assessment is based (which identifies that the same was of successful applicants).

discrimination against women is significantly exacerbated in entry clearance cases where only the earnings of the sponsor (i.e. the British or settled partner) may be considered and not those of the applicant, because women disproportionately take on childcare responsibilities.

Since average earnings are lower for persons of certain ethnicities, the new Immigration Rules indirectly discriminate on grounds of race.

The requirement of £18,600 gross annual income cannot be regarded as setting where a proportionate balance lies in the generality of cases
The somewhat complex alternative whereby savings, of both the sponsor and sponsored family member seeking to come to the United Kingdom, may be taken into account adds rather than reduces concerns, e.g. as to indirect discrimination since it is to be expected that migrants from certain national origins are far less likely to have savings of such significant levels given levels of earnings in different countries the effect of exchange rates.

Under the new Immigration Rules there is substantial additional uncertainty for families, including partners and children. There are extended probationary periods, during which a migrant must remain on limited leave without recourse to public funds. Additional applications must be made. The previous route to settlement took two years; the new route will take five years and require three applications rather than two. The full impact of the new rules lies in the combination of these factors with the new, significantly more onerous requirements, which must be met throughout the relevant probationary period, in particular at each application stag. It is the financial requirements that are likely to be especially onerous in many cases. Whereas, once in the United Kingdom, subsequent applications may have regard to the migrant parent's earnings, any temporary financial/employment misfortune may have fatal consequences for continued satisfaction of the new Immigration Rules.

About HC 194 more generally

The Explanatory Memorandum to HC 194 states:

> "*The new Immigration Rules provide a clear basis for considering family and private life cases in compliance with Article 8... The new Immigration Rules will reform the approach taken as a matter of public policy towards* [Article 8] *– the right to respect for family and private life – in immigration cases. The Immigration Rules will fully reflect the factors which can weigh for or against an Article 8 claim. The rules will set proportionate requirements that reflect the Government's and Parliament's view of how individuals' Article 8 rights should be qualified in the public interest to safeguard the economic well-being of the UK in controlling immigration and to protect the public from foreign criminals. This will mean that failure to meet the requirements of the rules will normally mean failure to establish an Article 8 claim to enter or remain in the UK...*" (paragraphs 6.1 & 7.1)

The Government has made clear its intention that, other than in exceptional cases, Article 8 will no longer provide a basis for a person to be permitted to come to or stay in the UK if the requirements of the new Immigration Rules are not met. On 19 June 2012, Damian Green MP, then Minister for Immigration, said about the new Immigration Rules:

"*Applicants will have to meet clear requirements in the rules which reflect an assessment of the public interest. Those requirements are a proportionate interference with article 8 because they draw on the relevant case law, because there is a strong rationale and evidence for the fact that they will serve the public interest, and because, if Parliament agrees to the motion... they will reflect the correct balance between individual rights and the public interest.*

No set of rules can deal with 100% of cases, and there will be genuinely exceptional circumstances in which discretion is exercised outside the rules. However, it is in the interests of both the public and applicants for there to be a clear system to ensure fairness, consistency and transparency. The public, applicants and caseworkers need to know who is entitled to come or stay, and on what basis, and who is not. If there is to be a system of that kind, there must be rules: rules that deliver sustainable family migration to the UK that is right for the migrants, for communities and for the country as a whole, rules that properly reflect individual rights and the wider public interest, and, above all, rules that are set in Parliament, and not by individual legal cases..."[5]

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 Government is correct, therefore, to recognised that no set of rules can deal with 100% of cases. The Government is incorrect, however, to suggest that the rules will deal with the generality of cases, and it is unsafe for the Government to predict that only in exceptional circumstances will a case, which does not meet the requirements in the Rules, succeed under Article 8.

The Supreme Court, and the House of Lords before it, has repeated on several occasions similar statements that there is no 'exceptionality' test. There are other problems with the Government's position such as:

- There are several factors, which are generally relevant in considering Article 8 cases, which are not reflected in the new Rules. For example, there is no specific requirement in the Rules to consider the best interests of children, there is nothing in the Rules concerning delay on the part of the UK Border Agency and the Rules do not make any reference to the age, health or vulnerability of any individual.
- The public interest in immigration cases is not and cannot be fixed in the way that has been attempted. For example, where children are involved, there is a public interest in ensuring they are properly brought up, and in a case where a child in the UK faces being separated from his or her parent that public interest may point strongly against the removal of the child's parent. Where there has been significant delay on the part of the UK Border Agency, the weight to be given to the public interest in favour of a person's removal may be reduced by that delay.

[5] *Hansard* HC, 19 June 2012 : Column 823 The motion to which the Minister referred and the debate in the House of Commons, can be found at: http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120619/debtext/120619-0001.htm#12061972000001

The uncertainty created by these new Immigration Rules is unlikely sufficiently to respect private and family life as to be compatible with Article 8 of the European Convention on Human Rights, whether generally or in very many cases. Nor do these Rules show any respect for the best interests and welfare of children, whose personal development requires a degree of certainty as to their and their family's (in particular, parents and siblings) futures.

The new Immigration Rules do not reflect all the relevant factors for considerations of proportionality in relation to Article 8 of the 1950 European Convention on Human Rights or the best interests of children in relation to Article 3 of the 1989 UN Convention on the Rights of the Child and do not establish where the balance lies in assessing the proportionality of any immigration decision where proportionality and/or a child's best interests are relevant.

This is not fatal for the new Immigration Rules, since previous iterations of these rules have not achieved this. It is, however, dangerous for the Home Office to so misunderstand its obligations under Article 8, and in respect of best interests. The Home Office *Statement on Compatibility* claims, at paragraph 11, that the approaches of the courts, coupled with inadequacy in the Immigration Rules prior to Statement of Changes in Immigration Rules HC 194, has "*...led to unpredictability and inconsistency which are anathema to good administration.*"

However, what has led to unpredictability and inconsistency is the longstanding failure on the part of the Home Office to accept and implement the judgments of the courts, domestic and European, and to issue guidance to its decision-makers and presenting officers to desist from returning to long-rejected arguments about the application of Article 8 (and more latterly the best interests of children). As ILPA raised with the Joint Committee on Human rights in October 2010[6], the guidance that has been available for Home Office decision-makers, and in particular entry clearance officers, over many years is inadequate.

We do not consider that these new Immigration Rules can have the effect claimed for them including by Ministers during the debate in the House of Commons on 19 June 2012.[7] The United Kingdom remains bound by the European Convention on Human Rights, and the Home Office, tribunals and courts remain bound to apply the law as established by the Human Rights Act 1998 requiring public authorities, including tribunals and courts, to act in accordance with the European Convention on Human Rights as there incorporated.[8] The Home Office has additional duties in respect of children's safety and welfare by virtue of section 55 of the Borders, Citizenship and Immigration Act 2009 and best interests by virtue of Article 3 of the 1989 UN Convention on the Rights of the Child, duties which the tribunals and courts are required to enforce.

For further information please get in touch with Alison Harvey, General Secretary alison.harvey@ilpa.org.uk on 0207 251 8383.

[6] Submission from ILPA to the Joint Committee on Human Rights Review of the Government's response to judgments identifying breaches of human rights in the UK, 22 October 2010,available at http://www.ilpa.org.uk/data/resources/13011/10.10.679.pdf

[7] *Hansard* HC, 19 Jun 2012: Column 760 *et seq*.

[8] Section 6(1) of the Human Rights Act 1998.

ANNEXE – EXTRACTS FROM ILPA TRAINING NOTES ON THE FINANCIAL REQUIREMENTS © ILPA

We reproduce a brief extract from our training notes to give you a taste of the complexity of the new measures.

Materials

- Immigration Rules: Appendix FM
  - Partners – E-ECP. 3.1-3.4 & E-LTRP. 3.1-3.4
  - Exception – EX.1
  - Child of a parent with limited leave as a partner - E-ECC. 2.1-2.4 & E-LTRC. 2.1-2.4
  - Parent of a child in the United Kingdom – E-ECPT. 3.1-3.2 & E.LTRPT. 4.1-4.2
  - Adult dependent relatives – E-ECDR. 3.1-3.2 (& E-ILRDR. 1.4-1.5)
- IDIs, Annex FM Section FM 1.7 (Financial Requirement)
- IDIs, Annex FM Section 1.7A (Maintenance)

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TEST 1: MINIMUM GROSS ANNUAL INCOME

The general rule is that those applying for leave as a partner or as the child of partner must meet the new minimum gross annual income requirement.

Paragraph 1A of Appendix FM-SE provides:

"*To meet the financial requirement under paragraphs E-ECP.3.1., E-LTRP.3.1., E-ECC.2.1. and E-LTRC.2.1. of Appendix FM, the applicant must meet:*
(a) The level of financial requirement applicable to the application under Appendix FM; and
(b) The requirements specified in Appendix FM and this Appendix as to:
(i) The permitted sources of income and savings;
(ii) The time periods and permitted combinations of sources applicable to each permitted source relied upon; and
(iii) The evidence required for each permitted source relied upon."

Appendix FM provides that the requirements for partners are as follows:

Entry clearance application	**Leave to remain**
E-ECP.3.1. The applicant must provide specified evidence, from the sources listed in paragraph E-ECP.3.2., of-	E-LTRP.3.1. The applicant must provide specified evidence, from the sources listed in paragraph E-LTRP.3.2., of-
(a) a specified gross annual income of at least-	(a) a specified gross annual income of at least-
(i) £18,600;	(i) £18,600;
(ii) an additional £3,800 for the first child; and	(ii) an additional £3,800 for the first child; and
(iii) an additional £2,400 for each additional child; alone or in combination with	(iii) an additional £2,400 for each additional child; alone or in combination with
(b) specified savings of-	(b) specified savings of-
(i) £16,000; and	(i) £16,000; and

Entry clearance application	Leave to remain
(ii) additional savings of an amount equivalent to 2.5 times the amount which is the difference between the gross annual income from the sources listed in paragraph **E-ECP.3.2.(a)-(d)** and the total amount required under paragraph E-ECP.3.1.(a);	(ii) additional savings of an amount equivalent to 2.5 times the amount which is the difference between the gross annual income from the sources listed in paragraph **E-LTRP.3.2.(a)-(f)** and the total amount required under paragraph E-LTRP.3.1.(a);
E-ECP.3.2. When determining whether the financial requirement in paragraph EECP.3.1. is met only the following sources will be taken into account- (a) income of the partner from specified employment or self-employment, which, in respect of a partner returning to the UK with the applicant, **can include specified employment or self-employment overseas and in the UK**; (b) specified pension income of the applicant and partner; (c) any specified maternity allowance or bereavement benefit received by the partner in the UK; (d) other specified income of the applicant and partner; and (e) specified savings of the applicant and partner.	E-LTRP.3.2. When determining whether the financial requirement in paragraph ELTRP.3.1. is met only the following sources may be taken into account- (a) income of the partner from specified employment or self-employment; **(b) income of the applicant from specified employment or self-employment unless they are working illegally;** (c) specified pension income of the applicant and partner; (d) any specified maternity allowance or bereavement benefit received **by the applicant** and partner in the UK; (e) other specified income of the applicant and partner; **(f) income from the sources at (b), (d) or (e) of a dependent child of the applicant under paragraph E-LTRP.3.1. who is aged 18 years or over**; and (g) specified savings of the applicant, partner and a **dependent child of the applicant under paragraph E-LTRP.3.1. who is aged 18 years or over**.