Note to Candidates and Tutors:

The purpose of the suggested answers is to provide students and tutors with guidance as to the key points students should have included in their answers to the January 2014 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

Students and tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners’ reports which provide feedback on student performance in the examination.

SECTION A

Question 1

Introduction

Article 8 ECHR (a qualified right) is an area where human rights arguments have been significantly used in cases involving asylum seekers and family entry clearance cases. A breach of Article 8 may arise in asylum cases where a claim has taken years to determine and family life has been established in the UK. It could also arise in entry clearance cases or cases concerning deportation and removal where separation will interfere with private and/or family life.

As Article 8 is a qualified right, the individual’s right to private or family life must be balanced against the public interest and the need to maintain effective immigration control. A five stage test for determining decisions involving Article 8 issues has developed and was propounded in the case of Razgar (2004) in the following way:

1. Is there a family life?

This aspect of the test involves establishing family life in accordance with Article 8 (1). This may be obvious on the facts, such as the close family ties in Marckx v Belgium (1979). It may also be established where it is less obvious and has been interpreted broadly. In Singh v ECO New Delhi (2004) the Court of Appeal acknowledged that a wide range of relationships could constitute family life, not just those based on marriage and blood. Homosexual and transsexual relationships, cohabitees, partnerships without cohabitation, foster parents and foster children were amongst the relationships discussed. In ZB (Pakistan) v SSHD (2009) a generous interpretation of ‘dependency’ was given by the Court of Appeal when looking at the reliance of a 59-year-old woman dependent on her children in the UK. The House of Lords in EM (Lebanon v SSHD (2008) noted that families differ widely in their composition.
2. **Has there been an interference with the right to family life?**

There is no obligation to respect the choice of residence of a family and the UK does have the right to control entry and immigration - Mahmood (2000). It therefore has to be established that there are special reasons why the family could not live elsewhere. For example in the case of Berrehab v Netherlands (1988), to expel the Moroccan applicant would have prevented him from exercising his rights of access to his four-year-old child as he was separated from the child’s mother.

Where the removal of someone with serious criminal convictions is being proposed and there are Article 8 considerations, the criteria to be used are set out by the ECtHR in Boultif v Switzerland (2001) and include the nature and seriousness of the offence, the length of residence in the host state, children of the marriage, the length of the marriage and difficulties which might be experienced by a spouse or partner in the country of proposed removal.

3. **Is such interference in accordance with the law?**

As domestic legislation allows for the control of leave to enter and remain in the UK most decisions in immigration will be lawful. The law must be precise, foreseeable, accessible and certain – Sunday Times v UK (1979).

4. **Is such interference in pursuit of a legitimate aim?**

**Article 8 (2)** sets out the justifications for the interference with the right to respect for private and family life. It is well established that the aims such as the economic wellbeing of the country and national security are valid reasons to impose controls on immigration.

5. **Is the interference necessary in a democratic society or proportionate?**

This part of the test involves balancing the considerations in favour of respect for private and family life against those in favour of removal or deportation in the interests of controlling immigration or national security.

There are two major issues considered at this point, namely whether the family could reasonably be expected to live elsewhere Huang (2007) and whether the removal would be short term only as the person could return after a successful entry clearance application.

**Issue 1: Can the family reasonably be expected to live elsewhere?**

In relation to the first issue, the Court of Appeal in VW and AB v SSHD (2009) addressed the long held view that there must be insurmountable obstacles preventing the family living elsewhere. The Court stated categorically that this was not the test and upheld the test in Huang (2007). The only consideration was whether the family life could reasonably continue elsewhere. It is worthy of note, however, that the changes made to the immigration rules by HC 194, refer once again to the insurmountable obstacles test, despite this being at odds with the more recent case law of the higher courts in the UK.

There have been some recent positive decisions involving Article 8 matters, particularly in cases involving children. For example in the case of FB Kosovo (2008) the House of Lords held that it would rarely be proportionate to remove a spouse where there is a close and genuine bond and where either the other
spouse “cannot reasonably be expected” to go abroad or the effect would be to
ever the relationship between parent and child (Lord Bingham at paragraph 12). In Beoku-Betts v SSHD (2008) the court made it clear that the impact on and
the interests of other family members had to be taken into account when considering whether removal was proportionate or not. Considerations such as
the welfare of a child, for example where one parent would be removed while the
other remains in the UK, are important in considering proportionality.

**Issue 2: Could the applicant return on a successful entry clearance?**

When considering the issue of whether the migrant could return on a successful entry clearance application, factors taken into account include entitlement to return (i.e. not in most deportation cases), and the prospects of a successful entry clearance application.

Regarding this issue, there have also been positive developments where children are involved. In the case of Chikwamba (2008) it was held that there would rarely be justification to separate a family to obtain entry clearance where children are involved. In the recent case of ZH (Tanzania) (2011) the Supreme Court placed new emphasis on the rights of children and the need to protect their best interests, especially where British children are involved. The best interests of the child were held to be a primary consideration and the fact that the children of the appellant had lived their lives in the UK, and were aged 9 and 12, prevented the removal of their mother, despite her appalling immigration history. Section 55 Borders Citizenship and Immigration Act 2009 was referred to in this case as it emphasises the need to safeguard and promote the welfare of children who are in the UK.

**The family immigration rules**

These developments are somewhat tempered, however, by the introduction of section EX1 to Appendix FM (and rule 399 for deportation cases). Where a British citizen child in a genuine and subsisting parental relationship would not be removed under this provision if it was not reasonable to expect the child to leave the UK, a non-British citizen child is not guaranteed the same degree of protection, needing 7 years residence in the UK for his/her rights to be considered. Consequently a 6-year-old non British child could have lived all his/her life in the UK but then have to leave their friends and school and move to a country unknown to them. This seems very far removed from the test in ZH Tanzania (2011) where the Supreme Court held that the best interests of the children were a primary consideration.

Although these immigration rules do propose to set out the approach to Article 8 to be taken by the courts, the Article 8 claim in itself still stands alone as a separate argument and the courts may well continue to follow their own approach to cases involving children. The Upper Tribunal in MF (Article 8 – new rules) Nigeria (2012), a deportation case, held that even if a decision to refuse Article 8 was found to be correct under the new rules, judges still had to consider whether the decision complied with s6 HRA 1998. Therefore a 2-stage approach had to be taken. It may well be that a similar approach would be taken in other areas involving Article 8, and the best interests of the child in each case retained as an important consideration.

**Conclusion**

The development of the law in Article 8 ECHR cases has been significant and, despite a fairly restrictive approach being initially taken by the courts, there have
been some very positive developments relating to children. The new family immigration rules at EX1 Appendix FM and rule 399 are helpful for British children, although not as useful where the child is a non UK national, requiring 7 years residence. However, Article 8 itself is more flexible and the best interests of children are becoming increasingly important in the cases reaching the higher courts.

**Question 2(a)**

The family members of an EU national exercising treaty rights in the UK derive from their relationship with the EU national. So, for example, if an EU national is exercising the general right of residence for three months under **Article 6 Directive 2004/38/EC**, this right of residence will be the same for the EU or non-EU national family member. In the case of **OA (2007)** the tribunal held that a person lost his status when in prison and this was a matter that removed him from his freedoms under the Directive. As a result his wife was no longer able to reside in the UK.

**Article 6 Directive 2004/38/EC** extends the general right of residence for three months to family members, whether or not they are themselves EU nationals.

Workers’ rights to long term residency under **Article 7 Directive 2004/38/EC** are also extended to family members (**Lawrie-Blum (1987)**). **Article 2** stipulates that family members are:

- The spouse or registered partner of an EU citizen;
- Direct descendants of an EU citizen or his/her partner who are either under 21 or dependent on the EU citizen or his/her partner; and
- Dependent relatives in the ascending line.

The relatives for EU citizens who are here to study are slightly more restrictive and usually extend only to a spouse or registered partner and dependent children.

**Regulation 7 I (EEA) R 2006** also defines family member in a similar way. **Regulation 11 I (EEA) R 2006** provides that a family member of an EEA national can be admitted if they produce a passport and an EEA family permit, or other means of proving that they are the family member of an EEA national with the right to accompany or join the EEA national.

**Article 3** also allows for entry and residence to be facilitated for other family members who are:

- dependent or members of the household of the EU citizen in their country of origin; or
- have serious health issues requiring personal care by the EU citizen; or
- a partner with whom the EU citizen has a durable relationship which has been duly attested.

**Article 3** is transposed into national legislation by **Regulation 8 I (EEA) R 2006**, which details “extended family members” who may be eligible to join a worker in the UK. There is no definition of this phrase, and so it can include brothers, sisters, aunts, uncles and cousins. Their entry may be facilitated on the same grounds as article 3 above. However, **Regulation 8** is slightly more specific than **Article 3** in stipulating that, as well as requiring dependency or membership of the household, the family member should be either accompanying the EEA national to the UK or wishing to join him there or
Dependency can include, for example, providing rent-free accommodation and money for living expenses to an adult child as in *Bigia v ECO* (2009).

The ECJ in *Rahman* held that facilitating entry does not mean that entry has to be granted in every case where Article 2 does not apply. Personal circumstances must be extensively examined, the criteria must be consistent with the term “facilitate” and those words relating to dependence in Article 3 (2). Member states have a wide discretion to select entry criteria but legislation must not deprive Article 3 of its effectiveness or it could be challenged by judicial review.

There are provisions in the Directive (Articles 12 and 13) and the Regulations (Regulation 10) for EEA nationals to retain rights of residence where a qualified person has died or a relationship has ended. There are also certain circumstances in which they can retain their rights where the qualified person ceases to be qualified.

In the case of termination of marriage or death of an EU citizen, his/her family members’ rights will not be affected if the Union citizen was exercising treaty rights at the date of death or termination and, in the case of a Union citizen and a non-EU citizen spouse, if they had been married for at least three years and had been residing in the host member state for at least one year. The same provisions for acquiring permanent residence will continue as if the Union citizen were still alive, provided the family member exercises the equivalent of ‘Treaty rights’ as a worker, self-employed or self-sufficient.

A partner of an EU citizen and his or her children will retain ‘derivative’ residence rights where the partner has custody of the children and the children are studying at an educational establishment, provided the children were in the host state at a time when the Union citizen was working there.

In the case of divorce residence rights will remain if either:

- The marriage has lasted three years prior to the divorce of which one year was in the member state;
- by agreement or court order custody of a child has been conferred on the non-EU spouse;
- difficult circumstances such as domestic violence have occurred during the marriage; or
- the non-EU partner has rights of access to the child by agreement or court order.

As with the bereavement provisions, permanent residence can be acquired after five years’ residence in accordance with the Regulations, in the same way as if the couple were still in a lasting relationship.

**Question 2(b)**

The rights of a family member of a UK citizen who is exercising free movement are significantly greater than the rights of a family member of a UK citizen who simply resides in the UK. The former will have free movement rights while the latter will be subject to the increasingly restrictive immigration rules relating to family members. As these situations are very different, the ECJ has not found them to be discriminatory.

This trend has led to the development of case law where a British citizen is also a national of another Member State and uses that nationality to gain residence in
the UK for a third country national spouse, rather than applying as a British sponsor under the immigration rules.

If a UK citizen with a non-EU partner were to exercise treaty rights in an EU state, and then enter the UK in order to exercise a treaty right such as employment, then the UK citizen’s partner or spouse’s residence rights will be governed by EU law rather than domestic law on the authority of IAT and Surinder Singh ex parte SSHD (1992). The principle in this case is incorporated into I (EAA) R 2006 which stipulates that, if the UK national has been in another EEA state as a worker or self-employed person, and has been living together with his or her spouse or partner in that state before returning to the UK, the UK national will be treated as an EEA national. If the couple were then to divorce, EU law would apply.

In Akrich (2004) the ECJ made it clear that as long as the marriage was genuine the fact that a couple established themselves in a Member State, specifically to return later on without having to satisfy the immigration rules, did not prevent them from benefitting from EU law.

In Carpenter (2002) a British national who ran a business providing services to Member States was exercising rights under Article 49 (now 56) EC treaty. His wife, a Filipina woman who had overstayed her leave to remain in the UK, provided essential childcare, looking after their children, so removal was found to be a disproportionate interference with Article 8 ECHR.

In the case of Zambrano (2011) the Court of Justice held that, even where there is no actual free movement, European law can be relied on. The unusual circumstances of the case involved a husband and wife from Colombia living in Belgium without any status, but whose two children had been registered as Belgian citizens. The ECJ ruled that the parents would have to be given the right to live and work in Belgium otherwise the children would have to accompany their parents to Colombia, thus depriving the Belgian and EU citizen children of the right to be brought up in the territory of the EU.

However, adults who are citizens of a member state would not have to leave in this way if a non-EU national family member has to leave. The Zambrano principle does not apply unless the situation is one where the children are Union citizens and the parents are not.

In the Court of Appeal case of McCarthy (2011) a British citizen tried to rely on her Irish nationality to achieve residence for a third country national spouse. The woman lived in Northern Ireland and was both a British and an Irish national. Her husband was from Jamaica and did not meet the requirements of the immigration rules relating to partners.

The issue for the Court of Appeal, however, was the fact that Ms McCarthy had never worked in the UK and had always been in receipt of benefits. She was therefore not exercising treaty rights as an EU citizen in the UK and thus not a qualified person for the purposes of Article 7 Directive 2004/38/EC and regulation 6 I (EEA) R 2006.

When the matter reached the ECJ they went even further in finding that Ms McCarthy had lived all her life in Northern Ireland so, not only was she not exercising free movement rights to work, she had not actually exercised any free movement rights at all and thus EU law was not even engaged.
This principle was upheld in the case of Dereci and Others v Bundesministerium fur Inneres (2011) when it was held by the ECJ that adult citizens of the EU have no right to be joined by third country national family members if they have never exercised free movement rights in another member state.

As a result, the positive decision in Zambrano (2011) is confined to cases of very similar facts and the principle that free movement rights must have been exercised in another member state to gain the benefit of EU law provisions is clear. However, if these rights are exercised it is becoming increasingly easier for partners to settle in the UK as a partner of someone exercising treaty rights than under the immigration rules relating to partners.

Question 3(a)

Before the British Nationality Act 1981 (BNA) a person born in Britain would automatically become a citizen of the United Kingdom and Colonies. However a person born outside the UK would only automatically become British if the father was British. S1 BNA abolished this jus soli principle and replaced it with jus sanguinis.

S1 BNA now establishes citizenship through parentage. S1(1) BNA entitles a person to British citizenship if, at the time s/he is born in the UK, one of his/her parents is settled in the UK. This prevents children becoming British citizens when their parents are here on a temporary basis, such as asylum seekers who are not recognised as refugees, visitors or students.

There are, however, provisions for acquiring British citizenship if a person’s parents later become settled in the UK. For example if someone has been working here under the Points Based System and then obtains settlement after five years. In such circumstances a child can register as a British citizen under S1(3) BNA 1981.

A citizen of the UK and Colonies who was born in the UK had been given the right of abode under S2 (1) of the Immigration Act 1971 (IA 1971) and was a patrial. All patrials became British citizens on the passage of BNA 1981.

A person who was born in the UK after 01/01/83 and, at the time of his/her birth, either of whose parents was settled in the UK, would be a British citizen, provided that, if only his father was British, his father and mother were married. An illegitimate child, whose mother was neither British nor settled, did not qualify for citizenship under the BNA 1981, as originally enacted.

Where a person is born outside the UK, and acquires British citizenship only through having a parent who is a British citizen, he or she will be a British citizen by descent. This means that if he/she were then to have a child abroad he/she would not automatically be able to pass on British citizenship to that child. By contrast a British citizen otherwise than by descent is a British citizen who has acquired citizenship through birth in the UK and as such could pass that citizenship on to a child.

Before the British Nationality Act 1981 (BNA 1981) came into force on 01/01/1983, a person who was born outside the UK would only be a British citizen if his father was born in the UK or his father was registered or naturalised as a British citizen in the UK before the child’s birth and his parents were married or subsequently married. This was the main way to acquire British Nationality by descent.
Under **Section 1 BNA 1981** a child born outside of the UK who has a British father or mother will acquire British citizenship by descent. However if a person was born outside the UK to a British mother before **01/01/83**, when citizenship only passed automatically through the father, they can now register as a British citizen. This goes someway to rectifying the injustice caused by the previous legislation.

Until 1 July 2006, a father could only pass on his nationality in this way if he was married to the child’s mother. **S9 NIAA 2002** rectified this previous injustice in the law and amends **BNA 1981** to include the father of an illegitimate child, provided proof of paternity is produced.

Under **s2 (1) BNA 1981** in order to pass on British nationality and allow a child to become a British citizen by descent, either the mother or the father must be a British citizen otherwise than by descent. This restricts the passing on of British citizenship to one generation only.

**BNA s 3 (3)** does mitigate this to some extent as a child born overseas has the right to be registered as a British citizen by descent at a British consulate if:

- one of the parents is a British citizen by descent;
- the British citizen by descent parent has a parent who is or was a British citizen otherwise than by descent; and
- the child’s parent had at some time before the child’s birth lived in the UK for a continuous period of three years, not being absent for more than 270 days in that period.

**S 3 (5) BNA 1981** allows a child born overseas to a British citizen by descent parent to be registered in the UK as a British citizen if they have lived with their parents in the UK for three years before the application.

**Question 3(b)**

Certain Commonwealth citizens retained the right of abode on the passage of **BNA 1981** but are not British citizens. They therefore have the right to enter, remain and work in the UK without any immigration restrictions.

**Section 2 (1) (d) IA 1971** conferred the right of abode on Commonwealth citizens “born to or legally adopted by a parent who at the time or the birth or adoption had citizenship of the United Kingdom and colonies by his birth in the United Kingdom or in any of the Islands.”

As someone born abroad with a father born in the UK would be a Citizen of The UK and Colonies (CUKCs) by descent, this provision gave the right of abode to Commonwealth citizens born abroad to mothers who were born in the UK. These rights were retained with the passage of **BNA 1981**.

The other way in which a Commonwealth citizen could have acquired the right of abode, but without become a British citizen, was through marriage. **S 2 (2) IA 1971**, before being amended by **BNA 1981**, gave the right of abode to Commonwealth citizen women who were married to men who had the right of abode in the UK. Once a woman had acquired the right in this way she would not lose it if she divorced her husband or if he died.

In both these examples the person acquiring the right of abode in one of these ways must have been a Commonwealth citizen on 1 January 1983, when **BNA 1981** came into force. Where the right of abode was acquired through marriage,
the marriage must have taken place before 1 January 1983 and the Commonwealth citizen woman must not have ceased to be a Commonwealth citizen in the meantime.

Now BNA 1981 is in force, marrying a person with the right of abode does not automatically confer a right of abode, and the rules relating to entry for marriage, residence in the UK and naturalisation will apply instead.

**Question 4**

**Deportation**

Deportation is a decision made by the Secretary of State under S5 Immigration Act 1971 (IA 1971) or an order which must be made under S32 UK Borders Act 2007. The decision is made by the Home Office under the Carltona principle, not the immigration service. Caseworkers acting on behalf of the Secretary of State make such decisions.

Once a deportation order is in force it is effective until it is revoked, although an appeal may be brought against a refusal to revoke the order. In other words a person cannot return during the currency of the deportation order. The duration of the order is 10 years, unless the deportee has been sentenced to four years or more in prison, in which case it will be permanent unless there are strong human rights reasons to revoke the order.

People with the right of abode, such as British citizens or certain Commonwealth citizens, will not be liable to deportation. However there are now some powers to deprive persons of their citizenship under Nationality Immigration and Asylum Act 2002 (NIAA 2002). Diplomats are also not liable to deportation and EAA nationals can only be deported if they are a risk to public health, public policy or public security. Under S7 IA 1971 a Commonwealth or Irish citizen will be immune from deportation if, on the coming into force of the Act, he or she had been ordinarily resident for five years. All other residents whether they have limited leave, no leave or indefinite leave, can be deported.

Administrative removal differs from deportation as it results from breaches of immigration law, whereas deportation usually results from conviction of a more serious criminal offence. It used to be the case that a person could return legally after being administratively removed but the revised immigration rule 320(7B) effectively bars a person from re-entering the UK for various periods, which may be as long as ten years, where they have previously breached immigration law.

The one ground for deportation is that it is conducive to the public good – s3 (5) (a) IA 1971. Under s32(4) UK Borders Act 2007 (BA 2007) the Secretary of State must deem deportation of a “foreign criminal” conducive to the public good. A criminal court can also recommend deportation, and conducive to the public good includes conviction of a criminal offence. However, after Kluxen (2010) the Court of Appeal advised judges not to make recommendations any more as the automatic deportation provisions of the BA 2007 have largely superseded this power.

Under Ss.32-39 BA 2007 deportation is now automatic if a “foreign criminal,” namely someone who is not a British citizen, is convicted of an offence in the UK and is either sentenced to at least 12 months’ imprisonment (s.32(2)), or the offence is specified by order of SSHD under s.72(4)(a) NIAA 2002 and the person is sentenced to a period of imprisonment following a conviction for that specified offence (s.32(3)). The Nationality Immigration and Asylum Act
2002 (Specification of Particularly Serious Crimes) Order 2004 SI 2004/1910 lists these specified offences but is not currently in force, having been successfully challenged in court.

For the purpose of s.3(5) (a) IA 1971 deportation of such a person is conducive to public good under s.32 (4) BA 2007 and therefore it is presumed in these cases that deportation is in the public interest. As such under s.32(5)BA 2007 the SSHD MUST make a deportation order in these circumstances unless an exception under s.33 BA 2007 applies, such as a breach of the Refugee Convention or the ECHR.

Where one of these exceptions applies, case law on deportation which predates the automatic deportation provisions will still apply. In such cases, in line with Court of Appeal guidance in N (Kenya) (2004), the judge on appeal must attach weight to the SSHD’s view of the public interest.

Family members of someone liable to deportation can also be deported themselves under S3 (5) (b) IA 1971. Paragraphs 365, 366 and-368 HC 395 guide caseworkers about that.

**Administrative Removal**

Administrative removal involves the issue of removal directions (e.g. as in asylum cases) that require a person to leave the country. These are issued by immigration officers as an administrative decision.

Those liable to administrative removal are firstly illegal entrants under paras 8 to 10 schedule 2 IA 1971. An illegal entrant is defined under s33 (1) IA 1971 as “a person who is unlawfully entering or seeking to enter in breach of a deportation order or of the immigration laws” or someone who is “entering or seeking to enter by means which include deception by another person” or as “a person who has entered” in either of those ways. In these cases the burden of proving that a person is an illegal entrant is to a high standard.

Under Section 10 (1)(a) Immigration and Asylum Act 1999 (IAA 1999) people who have overstayed the limit of their leave or breached a condition of their leave can be removed from the UK. Further, people who have gained leave to remain by deception can be removed under s10 (1)(b) IAA 1999 and people whose indefinite leave to remain has been revoked can be removed under s 10 (1) (BA) (inserted by NIAA 2002).

Families of these people can also be removed under Section 10 (1)(c). Paragraphs 365, 366 and-368 HC 395 do not apply to removal, but only to deportation. The main considerations in family cases are whether a person has qualified for settlement in his own right, he and his mother or father have been living apart from the deportee, he is a child who has left home and established himself independently, or he is a child who married before the deportation came into effect.

**Appeal Rights and Procedure**

In order to oppose deportation or removal, deportation attracts a full in-country right of appeal on the merits. It is the notice of deportation that is appealable to the First-tier Tribunal (Immigration and Asylum Chamber) (FTIAC) under S82(2)(j) NIAA 2002, while an appeal against “automatic” deportation under the BA 2007 is brought under s82(3A) NIAA 2002. The procedure to be followed in the appeal process is found in the Asylum and Immigration
Tribunal (Procedure) Rules 2005 (AIT (P) R 2005) and the appeal would be made on an in country IAFT 1 appeal form. The time limits for appealing decisions are 10 working days or 5 working days if the appellant is in detention. Any onward appeal would be to the Upper Tribunal (UTIAC), with either leave from the First Tier Tribunal itself or, failing that, the Upper Tribunal. This would only be given on a point of law.

In limited circumstances the UTIAC can review and correct its own decision. In most cases further appeal would be to the Court of Appeal, with leave, on a point of law where an important point of principle or practice or some other compelling argument is raised. Further appeal can be made to the Supreme Court and then, if a human rights point was in issue, there would then be the possibility of an appeal to the European Court of Human Rights.

Administrative removal attracts only a right of appeal from abroad under S82(1)(g) on grounds under section 84 (1) NIAA 2002, unless a human rights or asylum claim is made, in which case the appeal will be heard in this country. Judicial review of a removal decision is possible in the UK, if there is no in-country right of appeal. The time limit for an out of country appeal would be 28 calendar days after the applicant’s departure from the UK. The appeal would be made on an IAFT 3 form. The appeal is heard by the FTIAC and onward appeal rights would be as above. If the appeal was in country, on human rights grounds, it would have to be made on an IAFT 2 within 10 working days.

In cases that involve national security issues rather than criminal convictions there is only a limited right of appeal under s97 NIAA 2002. This will be heard by the Special Immigration Appeals Commission. In Rehman (2001), which involved evidence of association with Islamist terrorist groups, the House of Lords held that the court will in most cases defer to the Secretary of State on matters of national security and gave a broad definition of national security.

Other ways to oppose removal

The immigration rules now provide very limited considerations that can be taken into account in removal cases. These are found in rule 353B. These apply where further submissions have been made amounting to a fresh claim, or appeal rights have been exhausted and the case is subject to review. In such cases the Home Office can consider any offence that the migrant has been convicted of, compliance with any conditions attached to previous grant of leave to enter or remain and compliance with any conditions of temporary admission or immigration bail. Where applicable the length of time spent in the United Kingdom for reasons beyond the migrant’s control after the human rights or asylum claim has been submitted or refused is also considered in deciding whether there are exceptional circumstances making removal from the United Kingdom no longer appropriate.

Human Rights

Human rights arguments are relevant in both deportation and removal cases. Accordingly, arguments such as return to torture or inhuman or degrading treatment contrary to Article 3 ECHR (e.g. Chahal) or a disproportionate interference with established family life contrary to Article 8 are common grounds to oppose deportation or removal (e.g. Abdulaziz, Mahmood, Huang etc.). The offender is more likely to be expelled in deportation cases involving serious crime than in administrative removal cases. Rules 396-399A now must be considered when deportation involves an interference with family life. Rule EX1 is a similar provision relevant in removal cases. In each case the length of
the relationship (with a spouse or child) and the reasonableness of removal or deportation forms part of the assessment, alongside the public interest in deportation or removal.

SECTION B

Question 1

Introduction

Entry is after July 2012 and therefore will be governed by Appendix FM HC 395. Rose will need to satisfy the relationship requirements and the financial requirements. She will also need to pass an English language test. The leave granted will depend on whether she enters as a spouse or fiancée of John.

Entry as a Partner

• **Whether to enter as a spouse of fiancée**

Appendix GEN.1.2 defines a partner as including both a spouse at GEN 1.2 (i) and a fiancée at GEN 1.2 (i) (iii).

If Rose enters as a fiancée she will be granted six months leave initially and must not work during that time. If she comes as a spouse she will be granted 33 months leave initially, will then be able to extend the leave for a further 30 months if all the requirements are still met and after that will be able to apply for indefinite leave to remain. As a spouse she will be able to work but must not have recourse to public funds. In the circumstances if Rose wishes to take up a post as a nurse she would be best advised to get married before entry and come as a spouse. However, her income cannot be taken into account and they will have enough to maintain themselves adequately on John’s wage to meet the requirements of the rules. They therefore do not need Rose to work to meet the requirements but if she wishes to, entry as a spouse is the best course of action.

• **Relationship Requirements and determining genuineness**

As John is a British citizen he will satisfy E-ECP 2.1 and be an appropriate sponsor. He is living and working in the UK so it is clear that Britain is his place of ordinary residence in line with the test laid down by the House of Lords in Shah v London Borough of Barnet (1983). He needs to be present in the UK when Rose arrives or else travelling to the UK with her.

In order to comply with E-ECP 2.2 and 2.3 both the applicant and the partner must be over 18. In this case they are 21 and 22 so meet the requirements.

There is nothing in the facts to indicate that the applicant and partner are within the prohibited degree of relationship, contrary to E-ECP 2.4.

In order to comply with E-ECP 2.5 the couple must have met in person. They have spent several months together over long visits so clearly satisfy this requirement. In accordance with the test in Meharban (1989) the parties only require some knowledge of each other in the sense of appearance or personality so this is easily shown.

E-ECP 2.6 stipulates that the relationship must be genuine and subsisting. Annex 2.0 of the Immigration Directorate Instructions (IDIs) lists factors which will serve to indicate genuineness. The length of their relationship will positively affect their application as they have been together for three years. The long visits they have made to each other’s home countries will again help to show the
relationship is genuine and subsisting. Submission of documentation proving their visits such as travel tickets, photographs and so on would assist. The fact that they plan to cohabit in John’s flat will again be a factor indicating genuineness according to Annex 2.0. If they intend to share financial responsibility for the flat and bills this would also assist to prove this requirement. This would be another reason to suggest entering when already married to allow Rose to work as soon as she arrives.

If Rose and John decide to marry before coming to the UK they must prove the marriage is valid in accordance with E-ECP 2.7. They will need their marriage certificate as proof that the marriage is valid. If they have a valid marriage certificate the onus would then be on the Home Office if it was asserted that the marriage was invalid – Babul (1998).

If they decide they wish to marry once Rose is here, and therefore apply for entry clearance as a fiancée, she will need to show that she is entering for marriage in compliance with E-ECP 2.8. Correspondence with the wedding venue will serve to show this.

Any previous relationship must have broken down to comply with E-ECP 2.9 but on the facts they have been together three years and there does not seem to be an issue here.

In order to comply with E-ECP 2.10 Rose and John must intend to live together permanently in the UK. Evidence of contact during their time apart would establish this, alongside evidence of their cohabitation and visits. The older immigration rules did not require an intention to live permanently “in the UK”, but there is no suggestion here that the couple wish to live elsewhere.

- **Financial Requirements**

**Sufficient Income**

In order to meet the maintenance requirement John must prove from specified sources that he has a gross annual income of at least £18,600 (E-ECP 3.1 (a) (i)). As he is earning £22,000 per year this should not be a problem.

The onus is now on the UK partner alone to show this income when the applicant is abroad (E-ECP 3.2). Therefore any potential income of Rose will not be taken into account at this stage. Whether she works or not will not therefore be decisive of the application. However, if they do want her to work straight away, so as not to lose the position available, she should come as a spouse.

**Adequate accommodation**

In order to show that his accommodation is adequate John must show that it is not overcrowded and does not contravene public health regulations to comply with E-ECP 3.4. He also must show that there will be a bedroom for the couple’s exclusive use. As John owns the flat this should not be a problem. The fact that it is one bedrooomed does not mean it is overcrowded, as they are a couple. The rooms must comply with the Housing Act 1985 regulations. One reasonably sized bedroom in a house is sufficient for a couple, KJ Jamaica (2008). John owns the flat and there is sufficient space. He will need to show documentation from the building society or a surveyors report to show it is adequate.

- **English Language Requirement.**
Rose will need to pass an English language test at level A1 of the Common European Framework (E-ECP 4.1) as Kenya is not a recognised English speaking country.

- **The Leave Granted**

If Rose comes as a fiancée she will get 6 months initially, during which the marriage should take place. She cannot work during this time. Once married she can apply for leave to remain under the spouse rules.

If she does not start work straight away this will be fine as the maintenance is adequate without this. If she does want to take up the job offer she may be better to come as a spouse.

If Rose is successful at meeting the spouse rules she will be granted 33 months leave to enter under D-ECP 1.1. She will be able to work but she should not have recourse to public funds. After 30 months she can apply for a further 30 months limited leave then after 5 years she can apply for ILR if she meets the requirements of R-ILRP 1.1.

**Question 2**

**Introduction**

The Home Office have refused the claim on the basis that Claude could live discreetly and also that homosexuality is largely tolerated by the police. They also maintain that the internal flight option is available to Claude. It is submitted that the Home Office refusal is not legally sound and each aspect of Claude’s claim to refugee status will now be examined in turn.

**Well Founded Fear**

Subjective fear is what the appellant believes is likely to happen if he returns to his country of origin. Claude has stated that if returned he fears that he will be imprisoned and possibly killed.

On the authority of Horvath (2000) a claim cannot be assessed without looking at the conditions in the country of origin. This shows whether the appellant’s fear is well founded. The Amnesty International and Department of State Reports show clearly that there is a risk to homosexuals of imprisonment. The Department of State report shows that occasionally police make raids and arrest known homosexuals to demonstrate that they are not turning a blind eye entirely. People arrested are tried and usually convicted. The Home Office report states that public displays of homosexuality could result in the death penalty.

As Claude has been arrested in the past and escaped, the risk would be higher for him on return. The fact that some homosexual activity is tolerated does not obviate the risk, as maintained by the Home Office, as homosexuality can lead to trials, convictions and, in some cases, the death penalty.

On the basis of this objective information and what has happened to Claude in the past, it is submitted that there is a real risk (the standard of proof laid down in PS Sri Lanka (2008)), that he would be persecuted on return.
Persecution

Claude has suffered serious harm plus failure of state protection (Shah and Islam (1999)). There is medical evidence of the past persecution in the form of a medical report which is consistent with the injury to his foot.

One act of torture is sufficient to amount to persecution– Doymus (2000). It is an act sufficiently serious by its nature in accordance with Article 9 RQD. Claude has been tortured in the form of having his foot crushed and this is supported by medical evidence.

Claude has been persecuted by state officials. He has also suffered persistent mistreatment in the form of beatings, detention and torture for 2 weeks. These acts are sufficiently serious by their repetition and therefore also amount to persecution under Article 9 RQD.

Past persecution increases the likelihood of future persecution on the authority of Adan (1998) and Article 4 RQD. As Claude has been arrested, beaten and tortured in the past and escaped detention, there is a real risk he would be persecuted on return.

Protection

Claude has been persecuted by state agents. Government officials such as the police carrying out state condoned actions are at the high end of the Svazas (2002) spectrum of state responsibility. Homosexuality is illegal and there is therefore no state protection.

Convention Reason

Claude was persecuted and risks future persecution on account of his membership of a particular social group. Homosexuality is an innate and unchangeable characteristic, or immutable characteristic, and thus fits the criteria in Shah and Islam (1999)/RQD Article 10.

In the case of Supreme Court case of HJ (Iran) and HT (Cameroon) (2010) the appellants were practising homosexuals from Iran and Cameroon. This is clear authority of the position of homosexuals in Cameroon and their recognition as a particular social group for the purposes of the Convention.

The Supreme Court held that the first part of the test was to look at whether the asylum seeker is a homosexual and whether homosexuals are targeted in that country. In this case it is clear that the appellant is a homosexual and indeed this has not been disputed by the Home Office, it has simply been argued that he could live discreetly.

In relation to the objective evidence it is clear that homosexuals are targeted in Cameroon. The criminalisation of homosexuality and the fact it can be punished with a five year sentence or, for a public display of homosexuality, a longer sentence or the death penalty, is evidence that homosexuals are at risk. The fact that it is tolerated to a degree does not mean that homosexuals are not at real risk of persecution given these other factual findings.

The next stage of the test is to look at how the appellant would act on return, if an open homosexual he would be at risk, but if discreet it would depend on why. If it was due to social pressure and embarrassment the applicant would not be
entitled to asylum, but if it was due to fear of persecution he would be entitled to asylum.

Although the objective evidence indicates some homosexuals are discreet due to social stigma, which would not give rise to an asylum claim, this is not the case for Claude. Claude is a known homosexual, targeted in the past by the police and wanted by the government. He does not therefore have the choice of being discreet. The objective evidence shows homosexuals are persecuted. If his homosexuality is accepted he should therefore be granted asylum.

**Internal Flight**

The Home Office have submitted that there is an area where the laws are not enforced on homosexuality. In principle this may then seem like a viable option, but Claude is known to the authorities for being homosexual and homosexuality is illegal. He therefore may be in danger at the airport on return before he could relocate.

**Article 8 RQD** requires decision makers to consider whether an applicant could reasonably be expected to relocate to another area – para 339O HC 395 implements this.

It is submitted that it would be unreasonable or unduly harsh for Claude to be relocated (Robinson (1997)). The fact that there are no employment opportunities may be a cumulative factor with the other circumstances – Jasim (2006). There are risks in the site of internal protection as there are food shortages in that region. This should be taken into account on the authority of Canaj and Vallaj (2001). Furthermore they are specific to that region and therefore not a part of the general way of life in that country (AH Sudan (2007)).

It is submitted that there may also be relocation difficulties as he does not know anyone in the south and will have no employment or support, relevant factors on the authority of Jasim (2006).

Past persecution is material on the authority of Sellasamy (2000) and this has occurred in this case. The closer the persecution is linked to the state and the greater control the state has of those acting on its behalf, the more significant the past persecution will be in determining whether it is unreasonable for Claude to be returned (Januzi (2007), Lord Bingham para 21.).

It is therefore submitted that, taking all the relevant factors into account, the standard of proof in Karanakaran (2000), it would be unduly harsh to return him to the south of Cameroon.

**Human Rights – Article 3**

Persecution in the past is similar to treatment contrary to Article 3 ECHR therefore there is a real risk (Kacaj (2001)) that he would suffer inhuman and degrading treatment or torture on return.

The crushing of his foot was deliberate inhuman treatment causing very serious and cruel suffering and therefore torture (Ireland v UK (1979)). The treatment he suffered in detention was intense physical and mental suffering and at least capable of humiliating and debasing him and therefore inhuman or degrading treatment (Ireland v UK (1979)). The conditions he was detained in could amount to inhuman or degrading treatment as in the ECJ cases of Peers v Greece

**Conclusion**

It is therefore submitted that the appeal should be allowed as he has a well-founded fear of persecution for a Convention reason, he has suffered and will suffer treatment contrary to **Article 3 ECHR** on return, and it would be unduly harsh to expect him to live in the South of Cameroon.

**Question 3(a)**

**Relevant Categories**

Andrew will be sponsoring both the staff to be transferred and the interpreters under Tier 2 of the Points Based System (PBS). The established staff will be sponsored under the Tier 2 (**Intra-Company Transfer**) route and the interpreters under the Tier 2 (**General**) route.

**Formalities**

In order to sponsor workers to come to the UK the company must have a licence. Once they acquire a licence they will be added to the UKBA register of sponsors. They will then be able to issue a certificate of sponsorship to each applicant.

**The transfer of established employees**

For Scratch Cards and Co to transfer existing employees they will use the **Tier 2 (Intra Company Transfer)** route. This route enables people working for multinational companies to transfer to the UK branch of the same company. Depending on the type of staff that the company wish to transfer, the applicants could come under one of four categories: long-term staff, short-term staff, graduate trainees or skills transfers. The facts indicate that the relevant transfers are likely to be of either long term established staff, to fill a post that cannot be filled by a new recruit from the resident workforce, or a skills transfer imparting specialist skills or knowledge to the UK workforce.

In order to meet the requirements of this category 60 points must be obtained, 50 for attributes and 10 for maintenance. For intra company transfer 30 points are allocated for the certificate of sponsorship. 20 points are then allocated for the appropriate salary – slightly more than £40,000 if long term established staff, slightly more than £24,000 if short term, skills transfer or graduate trainee category.

Each applicant will need to acquire 10 points for maintenance by showing a minimum of £900 in personal savings for at least a 90-day period ending no earlier than 1 month before application. There is no need to satisfy the language requirement in this category if coming for 3 years or less.

The leave granted for **Tier 2 (Intra Company Transfer)** migrants will be for either the period of engagement plus a month or, for short-term staff, up to a maximum of one year and, for the skills transfer category, a maximum of 6 months.

If in the long-term staff sub category, leave will be granted for either the period of engagement plus a month or a period of 3 years and one month, whichever is
shorter. Applicants can no longer be granted indefinite leave to remain under this route.

The Recruitment of Interpreters

The employment of interpreters will come under the **Tier 2 (General) route**. **Tier 2 (General)** migrants need to demonstrate skills that will fill gaps in the resident labour workforce. As Scratch Cards and Co are having difficulties finding Mongolian interpreters this is a clear gap that needs to be filled.

**Tier 2 (General)** Migrants need to obtain 50 points for attributes. 30 points are awarded if the job is either on the shortage occupation list or passes the resident labour market test. The shortage occupation list is maintained on the UKBA website and the resident labour market test requires an employer to show, through advertising for 28 days in Jobcentre Plus and the appropriate journal or newspaper for that position, that there is no UK or EEA national suitable for the post. 20 points are also awarded for the appropriate salary.

Unlike with intra-company transfers 10 points need to be achieved for language by being from a UKBA recognised English speaking country (not in this case) or passing the UKBA approved English language test. A further 10 points must be obtained for maintenance in the same way as discussed above.

**Rule 245HC** states that for **Tier 2 (General)** applicants a successful applicant will be granted a period equal to the length of the period of engagement plus 1 month or a period of 3 years and 1 month whichever is the shorter.

Leave to remain can then be granted to make the period in the UK up to five years under **245 HE**. Following this the applicant can apply for indefinite leave to remain under **245 HF** if he is being paid at the rate specified in Appendix I (a minimum of £35,600 per annum).

**Question 3(b)**

Betty should apply to enter the UK under the Points Based System as a Tier 1 (Investor). She will need to show that she has 1 million pounds in a regulated financial institution and she has 1.5 million. She will score 75 points for attributes under Appendix A as she has the money available to invest. She does not need to score any points for language or maintenance in this category.

In order to support her application Betty requires three months’ bank statements immediately preceding the application. She will need a letter from the lottery that issued the funds and the funds must be freely transferable. She will need to invest within three months of entry to the UK otherwise her leave can be curtailed.

Betty also needs a portfolio report or breakdown of investments in a letter produced by a financial institution covering the three months before the application. The extent of this may be limited as she has only recently won the lottery. If she manages any of her own investments documentary evidence of her holdings will be needed.

The initial leave period granted to a successful applicant is three years. After three years she can apply for a further two years leave to remain. She will be entitled to indefinite leave to remain after five years under Tier 1.
Question 4(a)

To enter the UK as a student Gurpreet must meet the requirements Tier 4 of the Points Based System (PBS). He will enter as a Tier 4 (General) Student and the requirements for entry are governed by rule 245ZT HC 395.

Gurpreet must have 30 points under Appendix A for sponsorship and 10 points for maintenance under Appendix C. There is no points requirement for English language for a degree level course of study but an Entry Clearance Officer (ECO), on examination or interview, may require the applicant to demonstrate English language proficiency to B2 level without the assistance of an interpreter. The facts indicate that he speaks good English and his language ability can be confirmed by the University rather than him having to sit a test.

Gurpreet will need to obtain a place on the law course at Kempston University to proceed with the application. If he does so, he will need them to issue him with a Confirmation of Acceptance for Studies (CAS) to obtain his 30 points for attributes. This is a virtual document in the UKBA’s IT sponsorship management system that must contain the sponsor’s licence number. It must also include Gurpreet’s nationality, passport number, list the evidence provided in his application and give full details of the course. As he has not obtained a place on the course yet he must do this before the application can proceed.

There should be no more than six months in between the issuing of the CAS and the application for entry clearance or leave to remain. The course itself has to meet minimum academic requirements that are listed in Appendix A to the immigration rules and he must undertake his studies at the University.

In order to obtain the 10 points for maintenance Gurpreet needs the course fees plus £800 per month for the first nine months of the course, i.e. £7,200. This money must be in his bank account for a 28-day period ending no more than 31 days before the application – Appendix C. This may be a problem in this case as the facts only indicate that Gurpreet’s parents are able to pay his tuition fees. He clearly needs a lot more money in savings than he has. It may be that his parents are able to lend him some money so he can show extra funds, or that he can obtain the money by another means. Otherwise the application is likely to fail, whether or not he intends to work in the UK.

Finally, in relation to the fact that he wishes to take up employment in the UK he will be able to work for 20 hours a week during term time or for any period during the holidays. He therefore may be able to work extra in the holidays in order to pay back any money he has borrowed, but he will need to ensure he has sufficient maintenance money in his account initially if his application is going to succeed.

If his application is successful he will be granted leave to enter for the period of his course plus an extra five months as it is a three year degree, one month before the course and four months at the end of the course.

The University is an approved education provider and on the list of Tier 4 registered sponsors on the UKBA website. The University must keep a copy of Gurpreet’s passport, ID card or immigration status document and up to date contact details.

If Gurpreet fails to enrol at the University or misses 10 contacts there (lectures/tutorials etc.) the Home Office must be informed. The University must also inform the Home Office if he changes to another immigration status so the
academic institution is no longer the sponsor, if there are any significant changes such as the length of his course, or if it is suspected that Gurpreet is breaching the conditions of his stay.

**Question 4(b)**

Eva would not be able to enter as a general visitor under **para 41** as she wishes to take up employment and this is not permitted – **41 (iii)**.

The other option available is that she comes as an entertainer visitor. There is a specific production that she is to take part in. **Para 46S** sets out the requirements to be met by a person seeking entry as an entertainer visitor and they are an intention to do one or more of the following:

- Take part as a professional entertainer in one or more music competitions.
- Fulfil one or more specific engagements as an individual amateur entertainer or an amateur group;
- Take part as an amateur or professional entertainer in a cultural event listed in **Appendix R**; or
- Serve as a member of the technical or personal staff or of the production team of an entertainer coming for one or more of the above purposes.

She is fulfilling specific engagements as part of an amateur group so would fulfil these criteria.

Her leave would be up to a maximum of 6 months and she would not be able to switch to another category. She should specify on her application the date she wishes to leave, up to 6 months.

She would also need to satisfy the other requirements of the general visitor rules namely;

- She is genuinely entering as a visitor **(41 (i))**.
- She intends to leave the UK **(41 (ii))**.
- She has no intention of taking up employment **(41 (iii)) apart, in this case from the entertainer employment specified)**.
- She has no intention to produce goods or services in the UK **(41 (iv))**.
- She does not intend to study **(41 (v))**.
- She can maintain and accommodate herself without recourse to public funds **(41 (vi))**.
- She can meet the cost of the return journey **(41 (vii))**.

She should be able to satisfy these conditions as she does intend to leave, is a genuine visitor and will not be taking up employment or study, or producing goods or services. She could not simply come as a general visitor as paragraph 41 (ix) prevents entry for an applicant who will be taking part in any of the activities covered by the other visitor categories. As she is fulfilling an engagement as an entertainer visitor she cannot enter as a general visitor.

On the facts she will be accommodated by her cousin, although she will be helping out with the bills and living expenses. As she has a significant amount of money in savings she would be able to do this.

Her £3500 in savings will be sufficient maintenance for her stay in the UK and she should be able to satisfy the immigration officer that she will be able to maintain herself without recourse to public funds.
She also needs to show that she can meet the cost of the return journey which is not obvious on the facts. Evidence of her earnings from her future employment and if these will cover the flight costs, alongside her savings, would assist her application.

The facts could possibly indicate that Eva may enter under Tier 5 of the Points Based System as a temporary worker. This would apply if she was being paid for her employment and if she had relevant sponsorship. She would enter as an entertainer under para 245ZM and would need 30 points for attributes under Appendix A (attributes). This could be attained for relevant sponsorship and the certificate of sponsorship (CoS) satisfies this.

Eva would also need to acquire 10 points needed under Appendix C for maintenance. She could attain these points by having £900 available and, as she has £3500 in savings, she has much more than this. Alternatively an A rated sponsor could verify that she will not claim benefits.

There may be a difficulty here with sponsorship as she part of an amateur touring theatre company. In the guidance in Table 5 of Appendix J “codes of practice for the creative sector” she would need to show international status or that she is required for continuity, which is not really the case here. She is not being sponsored by a UK company to come to the UK but visiting as part of a touring theatre company. Therefore entertainer visitor is probably her best option.