LEVEL 6 - UNIT 8 – IMMIGRATION LAW

CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2020

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested answers is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the January 2020 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 candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed by the suggested answers.

Candidates and learning centre tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' **comments contained within this report** which provide feedback on candidate performance in the examination.

CHIEF EXAMINER COMMENTS

The reasons for candidates' good performance of this paper included:

- Use of relevant caselaw and other references to support answers
- Application of relevant law to the facts
- Very good question comprehension and analysis of scenarios
- Clear evidence of relevant knowledge and wider reading/research
- Understanding of practical development of the law in this area
- Evidence of revision based on knowledge of the content of the unit specification

Failures were due to:

- Inadequate reference to relevant legal provisions, particularly caselaw.
- Insufficient revision of key areas leading to superficial, inadequate answers
- Reliance on out-of-date law resulting in answers founded on the wrong legal basis.
- Poor command of written English

- Time wasted on drafting long summaries restating the facts of the scenarios. This is unnecessary.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

Nationality (registration) – all the candidates who answered this question understood the remit of the question and there was obvious evidence of revision in relation to the topic. The good character requirements were addressed. Candidates could have improved their marks by making specific reference to relevant parts of the British Nationality Act 1981 and by referring to relevant caselaw.

Question 2

Bail – most candidates answered this question well and most candidates were aware of the change to the bail/detention/temporary admission regime brought in by the Immigration Act 2016. Those candidates who performed weakly generally did so because they based their answers on law that is no longer applicable. Given that this change took effect in January 2018, it is to be expected that candidates would be aware of this. Candidates could have improved their performance by discussing caselaw related to, for example, lawfulness of detention.

Question 3

Visitor visas and remedies – this question was very popular and generally was answered well. Candidates who provided strong answers discussed remedies comprehensively in part b. Weaker answers relied on old provisions for visitors in the immigration rules or were not aware that specific family visit visas are no longer available. As in relation to other questions, candidates could have improved their answers by referring to relevant caselaw.

Question 4

Exclusion from protection – performance in answering this question was satisfactory. Most candidates were able to provide discussion of Article 1F, but all candidates failed to note that Articles 1D and 1E are also relevant to exclusion and so needed to be explored. Most candidates identified that exclusion from Humanitarian Protection is also possible and provided details in respect of the Home Office policy on restricted leave. Some candidates were able to discuss relevant caselaw, which strengthened their answers.

Section B

Question 1

Asylum – this question was very popular and overall candidate responses were excellent. All candidates were able to determine the criteria for determining whether a person is a refugee and almost all answers contained sustained

critical analysis of the facts of the scenario against that criteria. Almost all candidates understood that Miriam must make an asylum claim as soon as possible and should not continue to make applications under the points-based system. All candidates were familiar with relevant caselaw, and this had a positive impact on their answers and awarded marks.

Question 2

Family life under Appendix FM/Zambrano – this was another very popular question, although the quality of answers was varied. Most candidates recognised that Cecil could apply to remain in the UK as Delilah's father under Appendix FM as EX.1 applied. Candidate understanding of which requirements Cecil would still need to meet was uneven at times. Some candidates wasted time discussing removal, which was not relevant, or discussed indefinite leave to enter under the immigration rules which was again not relevant. Some candidates also discussed private life applications under paragraph 276ADE(vi) immigration rules, which was not relevant to the facts. For part b, most candidates understood that a derivative right of residence application relying on Zambrano could be made. The strongest candidates identified that an application under Appendix FM would need to be made and refused before a Zambrano application could be submitted, and that the new regime under Appendix EU allows holders of derivative right of residence cards the opportunity to settle.

Question 3

Tier 2 ILR – this was the least popular question and also the most poorly answered. One candidate provided a very good answer that comprehensively responded to the question posed. However, even those who answered poorly were able to grasp the remit of the question and attain some marks.

Question 4

Article 3/8 ECHR medical cases – five candidates answered this question. Two candidates provided excellent answers and achieved high marks. There was clear evidence of revision and good understanding of the topic. Weaker candidates had grasped the remit of the question, but their answers lacked detail and analysis and did not demonstrate knowledge of related caselaw.

LEVEL 6 - UNIT 8 – IMMIGRATION LAW

SUGGESTED ANSWERS

SECTION A

Question 1

There are two situations, not very common, where children born in the UK, but not British, can become British without being registered. Babies found abandoned in the UK are deemed to be British (s.1(2) BNA 1981), while children born here, who are not British, become British automatically if they are adopted in the UK by British parents (s.1(5) BNA 1981). But most non-British children have to be registered. Nationality applications for children are on the basis of registration rather than naturalisation under British Nationality Act 1981.

1 – application for registration under s.1(4) BNA 1981.

Section 1(4) entitles children born in the UK and who have lived in the UK for the first 10 years of their life to register as British citizens.

This entitlement is available to all children born in the UK after 1 January 1983 who have lived in the UK for the first 10 years of their life. The Applicant may apply for registration as a British national at a later date, including once they are over 18.

Under s.1(4) there are requirements in respect of time spent outside the UK. Applicants must not have been absent for more than 90 days in any of the first 10 years of life. The SSHD is able to exercise her discretion with regard to absences that extend beyond this.

In terms of documentary evidence, applicants will need to provide their full birth certificate confirming birth in the UK. The applicant will also need to provide evidence of continuous residence e.g. a child's early years baby book (this would cover the first five years of life), school enrolment information, GP and dentist registrations, social services papers, court documents in respect of the child and club or group memberships. The Applicant is likely to require several sources that cumulatively will provide evidence of continuous residence for the required years.
It is advisable to submit this type of application using Form T, which is available as an online application.

An application fee must be paid, and the fee is slightly higher for adult applicants than child applicants.

2 – application for registration under s.1(3) BNA 1981.

Section.1(3) entitles a child to be registered as a British citizen if, whilst under the age of 18, the child's parent becomes settled or British. There are no requirements as regards time spent abroad or length of residence.

The Applicant will need to provide their full birth certificate (as evidence of parentage and birth event) and evidence of his or her parent's Indefinite Leave to Remain (ILR) or British nationality in order to qualify.

The definition of a mother is set out at s.50(9) BNA 1981 and provides that the mother is the woman who gives birth to the child. The definition of a father was revised by s.65 IA 2014 and provides that men who were not married to the mother of their child are able to pass on their British nationality to their child as long as paternity can be established.

Where this is in doubt, evidence of paternity should be provided in line with the British Nationality (Proof of Paternity) Regulations 2006 (SI/1496/2006) and the British Nationality (Proof of Paternity) (Amendment) Regulations 2015 (SI/1615/2015). These provide different criteria depending on when the birth took place.

Applications would most appropriately be made on Form MN1, which is available as an online application. The required fee must be paid.

Unlike applications under s.1(4), this application is only available to minors.

3 – application for registration under s.3(1A) BNA 1981

A further route to registration arises where a child was born in the UK on or after 13 January 2010 who is not British nor born to a parent who is British, settled or in the armed forces. If at any time before the child reaches the age of 18 one of their parents becomes a member of the armed forces, they can apply to register as British. They must be under the age of 18 at the date of the application.

The child must provide evidence from the Ministry of Defence that the parent has or is serving in the British Armed Forces. Applications would most appropriately be made on Form MN1. The required fee must be paid.

4 – application for registration under para 3, Sch 2, BNA 1981

A child born stateless in the UK, and still stateless after five years, is entitled to be registered as a British citizen, provided the child has not been absent from the UK for more than 450 days.

Good character requirements

Good character requirements apply to all registration applications where the applicant is over the age of 10. Factors which Home Office caseworkers will take into account are set out in the Nationality Instructions, and include previous infractions of the immigration laws, such as overstaying one's visa. Ten years must elapse since the last period of unlawful residence, before an application to register (or naturalise) will be entertained. Incorrect answers to questions on the application form, for example, saying that one does not have any criminal convictions when one does, may lead to the application being refused, and a ten-year moratorium on further applications.

In TN (Afghanistan) v SSHD [2015] UKSC 40, the Supreme Court confirmed that Parliament has entrusted the assessment of character to the SSHD, not the judiciary, and therefore the Courts cannot require the SSHD to grant a person British nationality.

In R (Hiri) v SSHD [2014] EWHC 254 (Admin) it was established that the assessment of character must take into account the whole of an Applicant's character and not just ask whether or not the Applicant has a criminal record.

In R (DC) v SSHD [2018] EWHC 399 (Admin) it was found that the decision letter had not sufficiently shown that the assessment of character had been carried out correctly i.e. taking into account the whole of the Applicant's character.

Fee waivers are not available in nationality matters, even for destitute children in social services care. The Court of Appeal has determined that this is not unlawful -(R (Williams) v SSHD [2017] EWCA Civ98).

Question 2

Schedule 10 Immigration Act 2016, that came into force on 15 January 2018, governs the operation of immigration bail. Schedule 10 replaced the concepts of temporary admission and temporary release. Any immigrant without leave to remain but not detained, is now regarded as being on immigration bail.

Under paragraphs 1(1) and 1(2), any individual pending examination, removal or deportation can be granted bail by the Secretary of State (SSHD) whether or not they are (or can be) detained. Also, under paragraph 1, bail ends when a person is granted leave to enter or remain, when they are detained, when they are removed or when they otherwise leave the UK.

Under paragraph 2(1) anyone who is granted immigration bail **must** be subject to at least one of the following conditions: to appear before the Secretary of State or First-tier Tribunal at a specified time and place; restrictions on work, occupation or studies; a condition about the person's residence; a condition requiring the person to report to the Home Office; an electronic monitoring condition; and such other conditions as the person granting bail thinks fit. Mandatory electronic monitoring under paragraph 3(3) for people who have served criminal sentences is not yet in force.

An additional financial condition can be applied to ensure compliance with one or more of these conditions (2(4)).

When considering whether or not to grant bail the SSHD **must** have regard under paragraph 3(2) to the likelihood of failure to comply with a bail condition; whether the person has been convicted of an offence; the likelihood of an offence being committed whilst on bail; the likelihood of the person's presence in the UK, whilst on bail, causing a danger to public health or a threat to public order; whether detention is necessary in that person's interests or for the protection of any other person; and such other matters as the SSHD or the Tribunal thinks relevant.

Under Paragraph 4, an electronic monitoring condition means a condition to cooperate with arrangements for detecting and recording a person's location at specified times; absence from a location at specified times; and to wear a device, make specified use of a device and communicate in a specified manner and at specified times or periods.

In paragraph 5, the term "financial condition" replaces "surety" under the previous bail system. A financial condition is a condition that would be appropriate to impose with a view to ensuring compliance with another

condition. It must specify the sum of money, when it is to be paid and the form and manner of payment.

Bail conditions can be varied by the SSHD under para 6(2)). Under para 6(1), the SSHD may also amend or remove conditions or impose one or more new conditions. The person on bail must be given notice of the decision, under para 6(6). Only the SSHD can amend an electronic monitoring condition (para 6(5)).

Paragraph 7 sets out when an electronic monitoring condition can be removed.

Paragraph 9 states that the SSHD may provide or arrange accommodation for a person on immigration bail where residence at a specific address is required and the Applicant is otherwise unable to obtain it. Those who have claimed asylum can apply for NASS accommodation as normal on Form ASF1. Those who have never claimed asylum (and do not wish to), and have not committed criminal offences, can apply for Schedule 10 accommodation using Form 409. Those who have committed criminal offences will need to apply when they apply for bail (see below).

Under paragraph 10(1), a person may be arrested and detained if there are 'reasonable grounds for believing' that a person is likely to fail to comply with a bail condition or is failing or has failed to comply with a bail condition. Where bail is granted by the SSHD, the SSHD must decide whether the arrested person has broken or is likely to break any of the bail conditions, under para 10(11). Breach of bail conditions without a reasonable excuse is also a criminal offence under section 24(1)(h) of the Immigration Act 1971, with a maximum penalty of six months' imprisonment and/or an unlimited fine.

Applications for SSHD bail from detention must be made on Form 401. This form should be used if a client has been detained under immigration powers and wants to make an application to the Secretary of State to be released on bail. Completed application forms should be returned to an immigration official within the place of detention. The SSHD should respond within 10 working days.

An applicant's bail grounds should address the mandatory considerations listed at para 3(2) as well as referencing any other case specific reasons why bail is needed.

If relevant, reference should also be made to the SSHD "adults at risk in immigration detention" policy guidance. Consideration of the policy will be relevant where a client discloses a serious physical disability, serious physical health conditions or illnesses, mental health conditions, having been a victim of torture, having been a victim of trafficking or modern slavery, being vulnerable as a result of age, pregnancy in the case of a woman or being transsexual or intersex.

Also, it is important to consider the possibility of Rule 35 (Detention Centre Rules 2001) reports being made by relevant medical professionals in the case of a person whose health will seriously deteriorate as a result of continued detention, a person having suicidal thoughts or a victim of torture. These can provide useful evidence for bail grounds and, as was the case in Aboro, more weight may be placed on evidence from a treating medical professional in the detention centre.

Question 3(a)

The standard visit visa requirements outlined in Appendix V of the immigration rules apply to family visitors. There are no special arrangements that apply to family visitors. Entry is usually granted for a period of six months.

Suitability requirements apply under v3.2 -v3.16 and are similar to the general grounds for refusal under Part 9 of the immigration rules.

Paragraph v4.2 requires a visitor to be "genuine". This means they will leave the UK at the end of their visit; they will not live in the UK by remaining for lengthy periods on successive occasions; they are seeking entry for the reasons they have declared; and they do not intend to undertake activities that are not permitted in this category.

These prohibited activities include working and being paid for undertaking activities. Factors that will be taken account in assessing the genuineness of the Applicant include previous immigration history, ties to the home country and financial circumstances.

Under v4.2 – Applicants must have sufficient funds to cover reasonable costs whilst in the UK. A set level of funds is not specified. The Applicant must also be able to show that they have accommodation available to them throughout the course of their stay. Third party assistance is permitted in meeting the maintenance and accommodation requirements.

A non-visa national will be permitted to make an application informally on arrival. However, they are still required to establish that they meet the suitability requirements, are a genuine visitor and will be able to maintain and accommodate themselves in the UK for the duration of their stay. Visa nationals will be required to make an application for entry clearance online.

The genuineness and intention to leave requirements are contentious and have been interpreted restrictively in some cases.

In SSHD v Ahmed Ashfaq, Parveen Ashfaq (13951) the genuineness of the visit was interpreted in line with the context of the prevailing economic, social and cultural circumstances in the country of origin. The tribunal found that where economic circumstances were poor, the applicant may be trying to disguise a real intention of permanent migration to the UK where the future is brighter. However, countervailing factors may be strong family or other ties in the country of origin.

In Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC) a claimant's strong ties to Egypt, in the form of his work and children living there, were good reasons for finding that a short visit was intended. However, other decisions have been more restrictive. In Adjei (visit visas – Article 8) [2015] UKUT 0261 (IAC) a claimant, who was over 18, wanted to visit her father, stepmother and stepsiblings in the UK. Despite the fact that she had a partner and a two-year old child in Ghana (her mother would look after child while she visited) the ECO refused the application, not being satisfied that she was a genuine visitor or did not want to take up employment.

Further in Kaur (visit appeals; Article 8) [2015] UKUT 00487 (IAC) an 83 year old army widow was prevented from visiting one of her three sons (the others were still living in India) and his family, including her two grandchildren aged

19 and 13. Despite finding family life as being established in this case, it was not accepted that the visit was genuine, nor that there were any compelling circumstances permitting a departure from the rules. Intention to leave at end of visit was not shown.

The need for genuineness and intention to leave at the end of the visit have thus been interpreted very harshly in some cases, leaving elderly relatives and young adults unable to visit family even where there seem to be significant ties to the country of origin.

3(b)

1 – reconsideration
The first step may be to simply request the ECO to reconsider the decision, particularly if a piece of evidence has been overlooked or a mistake made.

2 – reapply
In the event that some evidence was submitted but rejected and better evidence is now available, it may be simplest to reapply with stronger evidence. The fee for a visit visa is not high, compared to most other applications.

3 – human rights appeal
Under the new s.84 NIAA 2002 (amended by s.15 IA 2014) the only ground of appeal on which an entry clearance visit visa can be challenged is that the decision breaches the Applicant's rights under Article 8 ECHR. In order to succeed, the Applicant will need to establish that Article 8 is engaged and that failure to allow entry will breach the Appellant's right to family life.

The five-step test set out in Razgar [2004] UKHL 27 must be followed by the Tribunal when assessing human rights arguments under Article 8 ECHR. This involves a decision as to whether Article 8 is engaged and whether the interference of the right is proportionate to the legitimate aims relevant to effective immigration control. The relevant legitimate aims are usually the economic well-being of the country and the rights of others (Article 8(2)).

In AG (Eritrea) v SSHD [2007] EWCA Civ 80, the Court of Appeal considered that an interference with a private or family life must be real, but the threshold of engagement under Article 8(1) was not a particularly high one. Once engaged, the focus must move to the justification for the interference under Article 8(2), i.e. the proportionality assessment.

The Upper Tribunal in the case of Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) considered when Article 8 would be engaged in a visit visa appeal. The Court was satisfied that where a couple were married, Article 8 would be engaged.

The Upper Tribunal in Baihinga (r. 22; human rights appeal: requirements) [2018] UKUT 90 (IAC) considered what is meant by a human rights claim and concluded that a human rights claim arises where the SSHD is required to make a decision in respect of private or family life issues.

The Home Office policy guidance on "Considering human rights claims in visit applications" confirms that the Home Office view is that a human rights claim will rarely arise in the context of a visit visa and only between spouses/life partners or parent-minor children relationships.

However, caselaw indicates that other relationships may give rise to Article 8 becoming engaged. For example, in ZB (Pakistan) v SSHD [2009] EWCA Civ 834, the Court of Appeal found that Article 8 could be engaged where a parent relied on adult children for care due to ill-health and was also financially dependent on them. Also, in PT (Sri Lanka) [2016] EWCA Civ 612. Article 8 could be engaged by the relationship between a young adult and their parents or siblings where they formed a family unit. By contrast, in Advic v UK (Application no: 25525/94), the ECtHR found that Article 8 was not engaged between a parent and an adult child, where there was no dependency beyond the normal emotional ties.

Certain applications will almost certainly engage Article 8, for example the relationship between a parent and a minor child (Soderbeck v Sweden [1998]) or partners living separately. Other applications may also engage Article 8, for example, older/elderly relatives, young adults not living an independent life or de facto adopted children. It will be necessary to assess the strength, depth and quality of a relationship to advise whether a human rights appeal may succeed.

A right of appeal on human rights grounds is limited by the fact that the Court can only consider the facts of the case through the lens of Article 8, as was confirmed in Charles (human rights appeal: scope) [2018] UKUT 89 (IAC). Thus, if the circumstances of the parties do not engage Article 8, a decision that is contrary to the immigration rules is unlikely to be overturned, such as in Adeji [2015].

The appeal form, supporting evidence and grounds will need to be submitted to the Tribunal within 28 days of the decision being sent by the Entry Clearance Officer. The correct application form is IAFT-6 and the application can be made online. A fee is payable. If the ECO does not indicate that a right of appeal on human rights grounds has been given, an appeal can still be submitted to the Tribunal asserting that the application was a human rights claim and therefore attracts a right of appeal. A 'duty judge' at the FTT will determine whether the decision being challenged does engage Art 8, and if not, the appeal will not go ahead.

4 – Judicial Review

If it is unlikely that any of the aforementioned options will succeed, then there may be a remedy available to a client by way of Judicial Review. However, Judicial Review is a remedy of last resort. Therefore, if wishing to rely on human rights grounds in the Judicial Review, it will probably be necessary to submit a human rights appeal to the Tribunal and wait for it to be rejected first.

If on the facts it does not seem that human rights grounds can be relied upon, it may be possible to apply for permission for Judicial Review on the grounds that the decision is unlawful. This is because, although the Tribunal will only look at the human rights issues in the case, the administrative court is able to assess the lawfulness of the decision to refuse entry under the immigration rules.

A strict 3-month time limit from the date of the decision applies to issuing proceedings for Judicial Review, including complying with the relevant pre-action protocol.

Question 4

Exclusion provisions apply to both applicants who may otherwise be granted asylum under the Refugee Convention and applicants who may otherwise be granted Humanitarian Protection under the immigration rules and Refugee Qualification Directive.

1 - Exclusion clauses are contained within the UN Convention relating to the Status of Refugees 1951 ("the Refugee Convention") at Articles 1D-F and are also set out in Article 12 of the RQD.

Article 1D of the Refugee Convention relates to Palestinian refugees receiving assistance from the United Nations Relief and Works Agency (UNRWA). Such persons are excluded from the Refugee Convention as they are already under the protection of the United Nations. However, if a person can show that they are no longer able to access the protection of the UN, they may be able to receive Refugee Status in another signatory country.

Under Article 1E, a person will be excluded from protection under the Refugee Convention if there is a third country where the person is able to access rights "akin to nationality".

Article 1F of the Refugee Convention excludes those found to have committed crimes against international law and serious criminal activity of a non-political nature. This includes crimes against international law, war crimes, crimes against humanity, acts contrary to the purpose and principles of the UN and crimes listed in the Rome Statute (International Criminal Court).

In KJ (Sri Lanka) v SSHD [2009] EWCA Civ292, it was found that an armed campaign against a government will not necessarily be an act contrary to the purposes and principles of the UN. Rank within the organisation will also be a factor. In Al-Sirri v SSHD [2012] UKSC 54, it was found that any acts committed must be of real severity in order to be considered contrary to the purposes and principles of the UN (as was the case here, where the Appellant had undertaken military activities against UN-mandated forces in Afghanistan).

In R (on the application of JS) (Sri Lanka) v SSHD [2010] UKSC 15, the Supreme Court provided a list of factors that should be taken into account, with regard to exclusion under 1F, that included a deliberate and voluntary contribution in a significant way to an organisation's ability to commit war crimes.

In B and D (C-57/09 and C-101/09 (joined)) it was confirmed that commission of terrorist attacks can result in exclusion under Article 1F. In Lounani (C-573/14), it was held that persons who provide assistance to terrorists who commit attacks may also be excluded under Article 1F. In *Youssef v SSHD* [2018] EWCA Civ 933, the Appellant was excluded from Refugee Status under 1F because his behaviour had generally aimed to incite terrorism. It was found that there was no need for any specific act of terrorism to have resulted from this behaviour.

2 – exclusion from Humanitarian Protection under Article 17 Refugee Qualification Directive/paragraph 339D immigration rules

Under these provisions, a person may be excluded on virtually identical grounds to those identified in the Refugee Convention. These include where there are serious reasons for considering that a person has committed a crime against the peace or a war crime or a crime against humanity. Further grounds include serious reasons for considering that a person has committed a serious crime; has been guilty of acts contrary to the principles of the United Nations or constitutes a danger to the community of the security of the UK. If, prior to being admitted to the UK, a person has committed one or more crimes that would be punishable by imprisonment if they had been committed in the UK, and the sole reason for travelling is to avoid sanctions for these crimes, the person can also be excluded from protection.

In AH (Algeria) v SSHD [2012] EWCA Civ395, it was found that exclusion from Humanitarian Protection was fact-sensitive and the particular length of a criminal sentence was not sufficient grounds alone to exclude or revoke Humanitarian Protection. In Ahmed C-369/17, the CJEU found that a member state must take account of all the circumstances of a crime committed by an Applicant before declaring it a "serious crime" resulting in exclusion from Humanitarian Protection.

SECTION B

Question 1

One option for Miriam would be to remain on the Tier 2 route which, for a nurse in a 'shortage occupation', may well enable her to apply for indefinite leave in 2022. On the other hand, Miriam may prefer to make an application now for asylum to the SSHD.

The burden of proof is on the Applicant and the standard of proof is "a reasonable degree of likelihood" (R (on the application of Sivakumaran) v SSHD [1987] UKHL 1) "substantial grounds for believing" or a "real risk" (R v Immigration Appeal Tribunal and another ex parte Ravichandran [1996] Imm AR 97). This is lower than the civil standard of "the balance of probabilities".

The definition of a refugee is found under Article 1A of the UN Convention relating to the Status of Refugees 1951.

Well-founded fear

Miriam fears that her daughter will be subjected to Female Genital Mutilation. She also fears that she herself may be physical harmed or killed by her family or the wider community if she were to return with Gloria and try to prevent this from happening. Miriam has received threatening text messages. Miriam has subjective fear of persecution on return in relation to Gloria and herself.

In Horvath (2000) the House of Lords held that a claim cannot be assessed without looking at the conditions of the country of origin. The objective information provided states that FGM is practised to a very high level in the tribe to which Miriam and Gloria belong. The objective information also

indicates that FGM is not against the law in SL and that it has widespread cultural support. On the information provided, Miriam's fear is well-founded. However, further objective research will be required and most likely an expert report on the country conditions.

Persecution

Although not explicitly defined in the Refugee Convention, under Article 9 Refugee Qualification Directive (RQD) and Regulation 5 Refugee Qualification Regulations (RQR) "persecution" is defined as acts sufficiently serious by their nature or repetition to be persecution. In Demirkaya (1999), the Court found that one act of torture is sufficient to amount to persecution.

The irreversible mutilation of a child's genitals clearly amounts to torture (P and M (2004). Therefore, this single act would be sufficient to amount to persecution.

Convention Reason

The convention reason on which Miriam will be able to rely is Membership of a Particular Social Group (PSG). In Shah and Islam [1999] it was found that members of a particular social group must have an immutable characteristic that they cannot change or cannot be expected to change, such as gender. Further, in Montoya v SSHD [2002] EWCA Civ 620 members of a PSG were found to have discrimination directed at the group because of a common immutable characteristic. In K and Fornah [2006] UKHL 46, it was held that women and girls at risk of FGM can form a PSG. The appellant in Fornah was from Sierra Leone and the particular social group in that case was described as "Uninitiated indigenous females in Sierra Leone" (para 56 – Lord Hope of Craighead) or "Uninitiated intact women who face persecution by enforced mutilation." (para 80 – Lord Roger of Earlsferry). Therefore, if Gloria is found to be at risk of FGM she will be a member of a PSG.

Protection

In accordance with Regulation 4 of the Refugee Protections Regulations (RQR) protection will be regarded as provided when the authorities take reasonable steps to prevent persecution and the suffering of serious harm by operating an effective legal system for the "detection, prosecution and punishment" of acts constituting persecution or serious harm. The person at risk must have access to the relevant means of redress.

As FGM is not illegal in Sierra Leone, it is unlikely that there will be state protection available, as there will not be an effective system for the detection, prosecution and punishment of FGM. This test is in line with Horvath and the perpetrators of the harm will be non-state agents but with no state protection from their actions.

Internal Relocation

Internal Relocation is set out in the RQD and written into the immigration rules at 339O. Essentially asylum or HP will not be given where a safe part of the country exists in which the applicant could live, taking account of the personal circumstances of the Applicant.

In Januzi v SSHD and others [2006] UKHL 5, it was held that the test for internal relocation is whether it would be "unduly harsh" for the Applicant to reside in the proposed area of relocation. It is further necessary that a person "could live a relatively normal life without undue hardship."

The assessment will therefore be fact-sensitive. As Miriam is from the capital city, if she and Gloria would be at risk on return to Sierra Leone then they could not return there. Objective evidence would be required. Depending on whether her tribe is spread throughout the whole of Sierra Leone, internal relocation may not be available as, should members of her tribe discover that Gloria has not undergone FGM, she may be at risk. Miriam's past activities as a vocal opponent of FGM may further prevent her from "blending in". Furthermore, if she is returned to a part of the country where she does not have any support, and is unlikely to get employment, these are factors that could be relevant to the assessment of whether internal relocation is unduly harsh. As Sierra Leone is a country that discriminates against women, given the lack of protection against FGM, she is unlikely to be able to reasonably relocate within the country.

Credibility

In Ravichandran [1995] EWCA Civ 16, it was found that credibility issues are central to establishing a well-founded fear. All evidence should be looked at in the round and the relevant circumstances taken into account. In KS (benefit of the doubt) [2014] UKUT 552 IAC, it was found that where there is doubt, every asserted fact should be kept in mind and not rejected until the end when the overall question of risk is posed and all evidence can be considered together in the round. The UNHCR handbook and Art. 4 RQD state that the benefit of the doubt need only be given where the account is generally credible. Paragraph 339L of the immigration rules provides that the burden of proof is on the asylum-seeker in general. However, where every effort has been made to substantiate an account the story provided is both coherent and plausible in light of country evidence, and any lack of corroboration has been explained, the asylum seeker should be given the benefit of the doubt. s.8 Asylum and Immigration (Treatment of Claimants etc.) Act 2004 must be considered, although none of the statutory consideration appear to apply here.

Miriam herself has been subjected to FGM. This provides credible evidence that she belongs to a tribe that practices FGM. It would be beneficial to obtain medical evidence to establish that Miriam has been a victim of this. Equally, it will also be helpful to obtain medical evidence that confirms that Gloria has not undergone FGM.

It would be useful to obtain copies of the messages from the family, although this alone will be unlikely to establish a well-founded fear of persecution as they could be seen as self-serving. However, a reason must be given for finding evidence to be self-serving as this could be interpreted as applying to all evidence, as upheld in Moyo v SSHD [2002] UKIAT 01104 and R (SS) v SSHD ("self-serving" statements) [2017] UKUT 00164 (IAC),

Miriam has current leave to remain and has complied with all the conditions of her visa as far as we are aware. She has a good immigration history. Her claim is "sur place" and would be being made at the earliest opportunity.

It is likely that Miriam can establish her general credibility and therefore should be given the benefit of the doubt. It would be possible to use this to argue that the messages should be regarded as genuine on the lower standard of proof. However, further objective evidence and an expert report will be helpful in order to establish the credibility and veracity of her claim.

Question 2(a)

Cecil should make an application for leave to remain in the UK as a parent under Appendix FM. He cannot meet the maintenance and accommodation requirements, nor the immigration status requirements, therefore he is not eligible to apply on the five-year route to settlement. Cecil will need to apply on the 10-year route to settlement and rely on Section EX, specifically EX.1(a).

EX.1(a) provides that a parent seeking LTR on the 10-year route to settlement must have a genuine and subsisting relationship with a minor child who is present in the UK and who is British, settled or has been resident for seven years in the UK. It must also be unreasonable to expect the child to leave the UK, taking their best interests into account as a primary consideration.

Delilah is a British citizen, having been born in the UK to a British mother. Delilah is under the age of 18. Therefore, Delilah can be regarded as a relevant child.

Cecil will need to prove that he has a genuine and subsisting relationship with Delilah. As he has been her primary carer for the majority of her life, he should provide evidence of this. This should include a letter or witness statement from Olivia confirming that this is the case. He could provide evidence from the school, health visiting service and GP/dentist confirming his involvement in her life. He could also provide evidence of Olivia's illness to confirm that he has primary responsibility of Delilah as Olivia is unable to look after her.

Strong arguments can be made that it is not reasonable to expect Delilah to leave the UK. In ZH (Tanzania) v SSHD [2011] UKSC, it was held that, where a British citizen child is involved, the best interests of that child are of higher importance than any other consideration. Significant weight must be given to the right of the child to grow up in their country of nationality, even where the conduct of the parent has been poor. Therefore, Delilah's best interests are the single most important factor. It is highly likely that it is in Delilah's best interests to remain in a situation where she continues to be able to have contact with her seriously ill parent, which Cecil is facilitating. In Zoumbas v SSHD [2013] UKSC 74), it was found that a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent. Therefore, the consideration of the impact of removal of Cecil on Delilah cannot be influenced by Cecil's poor immigration history.

Home Office policy on reasonableness in this context has been approved by KO (Nigeria) & Ors v SSHD [2018] UKSC 53. The policy guidance suggests that it may be reasonable for the child to leave the UK if they will do so with both parents. Clearly, this will not be the case here as Olivia is suffering from a serious illness and accessing the care of the NHS. She has also separated from Cecil and could not be expected to leave the UK with Cecil, particularly in these circumstances.

Under s.117B(6), Parliament has confirmed that the public interest does not require the removal of a parent who has a genuine and subsisting relationship with a qualifying child. This section must be applied by the Courts but not the Home Office. Under s.117D, a qualifying child includes a British citizen child. The case of MA (Pakistan) v Upper Tribunal (Immigration and Asylum Chamber) [2016] EWCA Civ 705 confirmed that there is no public interest in removing a qualifying child where s.117B(6) is satisfied

Applications on this route must be made on Form FLR FP. An application fee is payable (plus the health surcharge). Cecil must meet the suitability and relationship requirements but is exempt from the immigration status, English language and maintenance and accommodation requirements. The initial period of leave will usually be for 2.5 years with further applications required.

Cecil can apply for a fee waiver from the SSHD, as his application is based on human rights and he has no income. He must complete an online application and await a decision. However, once granted he will have 10 days to submit his substantive application. Therefore, he must take steps to prepare his application so that, if the fee waiver is granted, the application can be sent off straight away. The application can be completed online.

Question 2(b)

Cecil may be able to make an application to remain with Delilah in the UK as a Zambrano carer with a derivative right of residence under the Immigration (European Economic Area) Regulations 2016.

Home Office policy guidance on Zambrano carers, dated May 2019, states that Zambrano applications will only be considered if a human rights application has first been submitted and rejected. Therefore, Cecil will need to follow the option in part (a) first.

The EEA regs 2016, at Reg. 16(4) state that an application may be made by a person who is the primary carer of a British national who lives in the UK and that British national would be unable to continue to live in the UK or another member state if the person left the UK for an indefinite period. This provision emanates from the case of Zambrano (C-34/09). The case states that an EU member state must provide a right of residence to a third country national with minor children, who hold European citizenship, where the children are dependent on the third country national and where removal from the member state would deprive those children of the genuine enjoyment of their rights as EU citizens, i.e they would no longer be able to live in their country of nationality.

In Chavez-Vilchez and Others v Netherlands C-133/15, it was found that, where there is another parent who is able and willing to take care of the child (possibly not the case here due to Olivia's illness) but a relationship of dependency exists between the child and the third country national parent, the decision to remove may result in the child being compelled to leave the Union. Thus, the decision must take into account the best interests of the child and the specific circumstances involved.

In Omotunde (best interests – Zambrano applied – Razgar) Nigeria [2011] UKUT 00247 (IAC), it was held not to be reasonable to deprive the British child of the father who was the primary carer, despite the fact that the child's mother was in the UK and had some involvement in the child's life.

In MA and SM (Zambrano: EU children outside EU) Iran [2013] UKUT 00380 (IAC), it was found that, where the EU national was unable to look after the child due to illness, the non-EU national parent could enter the UK as, realistically, the child would have to otherwise leave the UK.

In Patel v SSHD [2017] EWCA Civ 2028 it was found that compulsion, not choice, is always the test. Zambrano should not provide a "back-door" for non-EU nationals to remain in the UK (this inspired the May 2019 policy change).

It is highly likely that Delilah would be compelled to leave the UK with Cecil as he is her primary carer and Olivia is incapacitated through illness. It can be shown that a relationship of dependency exists between Delilah and Cecil. Forcing Delilah to leave the EU would result in her being unable to genuinely enjoy the rights attached to her EU citizenship. Cecil will need to provide the same type of evidence as suggested in part(a) in order to prove the relationship.

An application should be submitted on Form DRF1, which is a paper application form. An application fee must be paid but there is no requirement to pay a health surcharge. A derivative right of residence card is usually valid for a period of 5 years. The residence card evidences the right of residence under EU law.

Question 3

There are two routes that Sasha could follow in order to qualify for ILR:

1 – ILR (Long residence) under paragraph 276B of the immigration rules.
2 – ILR (Tier 2 migrant) under paragraph 245HF of the immigration rules.

Sasha should try to meet the rules under 245HF as they are less onerous than the requirements under 276B. If she is unable to meet those requirements, then paragraph 276B should be considered.

Requirements for ILR as Tier 2 migrant under paragraph 245HF

The Applicant must not fall for refusal under the general grounds for refusal. For example, she must not have made any false representations in relation to the claim and her character, conduct or associations must not make it undesirable to admit her.

The Applicant must have spent the last 5 years lawfully in the UK under a specified category (that includes Tier 2 (general) migrant).
The Applicant's sponsor, who issued the previous certificate of sponsorship, must still hold a Tier 2 licence. There is no evidence in this case to suggest that this has happened.

The sponsor must certify in writing:

- that the applicant is needed in the sponsored employment for the foreseeable future;
- that the gross annual salary has been paid and she can confirm that this will continue to be paid for the foreseeable future;

The pay confirmed must be the basic pay that is received and not include overtime or other payments. The pay must also be at least equal to the appropriate rate for the job listed in Appendix J. Further, the sponsor must comply with specific minimum rates of pay unless the job has a PHD occupation code or is on the shortage occupation list. There are also knowledge of language and life in the UK requirements.

Therefore, some requirements must be met by Sasha and some must be met by the sponsor.

In terms of the lawful residence requirements, Sasha has had a Tier 2 visa for the past 6 years and therefore she should meet this requirement as long as her last Tier 2 extension application was made in time.

Under General Requirements for Indefinite Leave to Remain at paragraph 245AAA(a)(i), lawful residence is defined as a period of time in which absences of no more than 180 days in any of the 5 consecutive years leading up to the application have been recorded. The case of R (Nesiama & Ors) v SSHD [2018] EWCA Civ 1369 confirmed that this refers to physical presence.

As Sasha has only left the UK for a maximum period of two months during the course, of any of the five years leading up to the application for ILR, she should be regarded as having been lawfully resident for that time.

Sasha must not fall for refusal under the general grounds for refusal. Sasha was required to keep her police registration certificate updated with her personal details, including her marital status as a condition of her Tier 2 leave. Under paragraph 322(3) of the immigration rules, a general ground for refusal is a failure to comply with any of the conditions attached to the current or a previous grant of leave – this is discretionary, not mandatory. Iqbal (Para 322 Immigration Rules) [2015] UKUT 434 (IAC) confirmed that the grounds of refusal, noted as normally being a reason for refusal, allow the SSHD to exercise discretion.

As long as Sasha provides full details in a covering letter with the application, as to why she was unable to update her police registration certificate, then it is unlikely that she will be refused on this basis.

Sasha must obtain a supporting letter from her sponsor. The letter must confirm that she will be required for her job for the foreseeable future. The letter must contain details of her salary and confirm that this will be paid for the foreseeable future.

As Sasha's application is likely to be submitted after 1 April 2019, but before 1 April 2020, her salary according to paragraph 245HF(d)(vi) should be at least £35,800. This means that, under this paragraph, Sasha does not earn enough to be successful. However, paragraph 245HF(f)(i) states that this minimum salary does not apply in the case of a person who is employed in a job which is listed under the PhD codes in Appendix J. Appendix J lists "higher education teaching professional" at code 2311. Therefore, the applicable range for Sasha's job is listed in Appendix J as between £31,400 and £40.000. Sasha's salary can therefore qualify, but her sponsor will need to include the code and job title in their letter.

Sasha will be able to meet the general English language requirements for ILR as she has studied a PhD in the UK, which is a qualification at Bachelor level

or above. However, she must pass the Life in the UK test in order to satisfy both parts of the Knowledge of Language and Life requirements.

Sasha must apply online using form SET O. An application fee is payable, which can be paid using a debit or credit card. If successful, she will be granted indefinite leave to remain.

Question 4

Lucky should make a human rights application outside the immigration rules based on submissions focusing on Article 3 and Article 8 medical grounds.

A high threshold exists in the case of Article 3 submissions on this basis. In D v UK (application no. 30240/96), the threshold was found to be that only "very exceptional circumstances" would engage Article 3 in a medical case. In N v SSHD [2005] UKHL 31, it was found that an early death after a period of acute physical and mental suffering was not sufficient to breach Article 3. Only so-called death bed cases were serious enough. In N v UK (application no. 26565/05) the ECtHR found that removal would only breach Article 3 in a very exceptional case.

In Paposhvili v Belgium (application no. 41738/10), the ECtHR sought to give guidance on which circumstances may be regarded as an "exceptional case" in the terms of N. The Court of Appeal in AM (Zimbabwe) and another v SSHD [2018] EWCA Civ 64 sought to provide "authoritative guidance" in relation to Paposhvili. The Court of Appeal found that the boundary in relation to Article 3 protection had shifted from the imminence of death in the removing state to the imminence of intense suffering or death in the receiving state. This must be due to the non-availability of treatment in the removing state.

Lucky will need to provide strong medical evidence confirming the level of treatment she is receiving in the UK and also an expert report on the level of treatment that may be available on return to India. Objective information indicates that suitable treatment will not be available but further objective research and an expert report will be essential.

Lucky should also include submissions that assert that removal will breach her right to a private life under Article 8 ECHR.

In SL (St Lucia) v SSHD [2018] EWCA Civ 1894, the Court of Appeal confirmed that the decision in Paposhvili does not affect the assessment of proportionality in an Article 8 medical case. The appropriate assessment is still the 5 steps to be undertaken in assessing Article 8 identified in Razgar. These 5 steps provide that any decision to refuse leave on the grounds of Article 8 must be proportionate taking into account the balance between the legitimate aims of immigration control and the applicant's personal circumstances. In Bensaid v UK (Application no: 44599/98), it was held that treatment that does not breach Article 3 in terms of severity may breach Article 8 where there are sufficiently adverse effects on physical and moral integrity. In GS and EO (Article 3 – health cases) India [2012] UKUT 00397 (IAC), it was found that factors relevant to the proportionality assessment can include where the Applicant had lawful permission to reside in the host state before the disease was diagnosed.

Lucky may have a better chance of succeeding under Article 8. She was in the UK lawfully when she fell ill, which is a factor in her favour. Again, it will be

necessary to provide strong medical evidence and strong country information in support of her case, in the form of objective research and an expert report. It will be necessary to argue that on return to India there would be a serious adverse effect on Lucky's physical and moral integrity that is sufficiently serious to breach her right to private life under Article 8.

Lucky should therefore make submissions under both Article 3 and Article 8.

Applications should be submitted on a Form FLR HRO. A fee waiver can be obtained for such applications, otherwise the relevant fee must be paid. If successful she will usually be granted a period of discretionary leave for 2.5 years with further applications necessary if required.