**CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS**

**JANUARY 2021**

**LEVEL 6 - UNIT 8 – IMMIGRATION LAW**

**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 2021 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

There was a broad range of performance across the cohort, with some candidates able to achieve distinction and merit grades and some candidates receiving fail grades.

Where candidates did not perform well it was due to excessively short answers for high mark questions, poor knowledge of relevant law and large areas of omission and mistakes.

The paper covered key areas across a broad range of the unit specification including questions on asylum, deportation, immigration, nationality and human rights law. The paper covered many elements of the unit specification which is available to all candidates and should form the basis of their preparatory work for the exam.

## CANDIDATE PERFORMANCE FOR EACH QUESTION

### Section A

**Question 1**

Marriage visitor visas. This question was answered well. All candidates identified that visitor visas were in question, although some candidates discussed the requirements for general visitors. This approach was capable of achieving some marks.

**Question 2(a)**

Grounds for deportation. This question was answered well with all candidates being able to identify most of the relevant statutory provisions. Better candidates discussed relevant caselaw.

**(b)**

Article 8 family life arguments in respect of deportation. This question was generally answered well with most candidates able to identify relevant arguments and appropriate caselaw.

**Question 3**

Article 8 private life. This question was generally answered well. All candidates identified the relevant provisions for assessment of private life in the immigration rules (specifically paragraph 276ADE) and some candidates were able to discuss relevant caselaw.

**Question 4**

Naturalisation and good character. This question was answered well. All candidates were able to identify the correct statutory provisions and better candidates were able to discuss provisions and caselaw in respect of good character.

### Section B

**Question 1**

Domestic violence application. This question was answered well with almost all candidates identifying that this was a situation where the domestic violence provisions of Appendix FM were relevant. Most candidates were able to discuss the relevant evidential requirements. Some marks were available for accurate discussion of application procedure.

**Question 2(a) and 2(b)**

'Windrush' scenario. No candidates attempted this question and therefore no comments can be made in respect of performance.

**Question 3** – investor visa.

This question was generally answered well. All candidates were able to identify relevant provisions in the immigration rules. Candidates should review the unit specification for caselaw that is relevant to this topic. Most candidates were able to discuss the relevant evidential requirements. Some marks were available for accurate discussion of application procedure.

**Question 4** – asylum.

This question attracted mixed answers. Good candidates approached the scenario methodically and referenced relevant caselaw. Poorer answers were less focused and lacking in detail. Most candidates were able to discuss the relevant evidential requirements. Some marks were available for accurate discussion of application procedure.

## SUGGESTED ANSWERS

## LEVEL 6 - UNIT 8 – IMMIGRATION LAW

### SECTION A

**Question 1**

The rules relating to visitor visa applications can be found in Appendix V to the immigration rules. These include those related to marriage visitors.

Each party to the proposed marriage requiring entry clearance must make an application to enter the UK in order for the marriage to take place. These can be submitted together with a combined covering letter and joint evidence. All applicants, including those from 'non-visa national' countries who would normally be able to visit the UK without applying for entry clearance in advance, will need to apply for entry clearance due to the special nature of the visit.

The applicant must be over the age of 18, free to marry and able to give notice of a marriage within six months of entering the UK. The applicant must show that they are in a genuine relationship, will visit the UK for less than six months and will leave the UK at the end of the visit. The applicant must be able to support themselves without recourse to public funds and be able to meet the cost of travel to and from the UK. They also must not intend to work or earn money in the UK, or study for a period of time that is prohibited (Part V4.2-V4.10 and Part V6, Appendix V).

The applicant must not fail on suitability grounds (Part V3 Appendix V) – these are broadly similar to those under paragraph 320 of the immigration rules and include previous immigration history, past criminal activities etc. Comprehensive instructions must be taken in relation to these considerations.

The applicant will need to provide their national passport in order to establish their nationality and identity as well as their date of birth.

In terms of the genuineness of the relationship, the applicant will need to establish that he or she and the partner will get married. This can be done by providing details of any wedding plans made to date. The couple could include evidence of emails regarding bookings, a receipt for any engagement ring or other bills relating to the wedding. The couple should include photographs of themselves together in order to help establish that they are a genuine couple.

In terms of intention to leave the UK, both the applicant and the partner should provide evidence of their links to the home country. These could include financial documents for employment in their country of origin e.g. payslips and contracts of employment, as these will illustrate ties. If they rent or own property in the home country, they should consider sending evidence of this as well.

*In Sawmynaden (Family visitors – considerations)* [2012] UKUT 00161 (IAC), although concerned with now defunct family visit visas, it was established that regular visits to the UK to visit family members was not enough to state that the applicant was no longer a genuine visitor who intended to leave at the end of their period of leave to remain.

In terms of financial information, the provision of payslips and contracts of employments should also in part satisfy the requirement to show evidence that the applicant will be able to support themselves. However, they should also supply three months continuous current account bank statements and/or savings accounts information that show a positive and consistent balance, to show that there is sufficient money to be used for support in the UK.

In terms of accommodation, the applicant should provide evidence of where the applicant intends to stay for the duration of the visit. For example, a letter from a family member who will host the applicant or details of a hotel booking.

The application is online and can be accessed via the gov.uk website. There is an application fee. The applicant will need to make an appointment with the relevant overseas partner organisation in order to provide the supporting documents.

It would be sensible to include a comprehensive covering letter with the application to explain the specific circumstances of the couple. The covering letter could also state that the right to private and family life rights are engaged if there are family members in the UK and this is the reason for choosing the UK as the location of the wedding.

If refused, it may be possible to argue that the application should accrue an appeal on human rights grounds under s.82(1)(b) Nationality, Immigration and Asylum Act 2002, and in line with Baihinga (r. 22; human rights appeal: requirements) [2018] UKUT 90 (IAC) – where it was stated that if human rights arguments are raised the SSHD should consider the application through the lens of Article 8 and a refusal should give rise to a right of appeal. The Home Office guidance 'Considering human rights claims in visit visa applications', however, takes a significantly narrower view than Baihinga.

In addition, Charles (human rights appeal: scope) [2018] UKUT 89 (IAC) confirms that only arguments related to the human rights of the applicants and other affected parties are arguable in a human rights appeal.

If there are no human rights grounds, then another remedy would be to pursue administrative review and then, if appropriate, judicial review.

**Question 2(a)**

The grounds for deportation are found at s.3(5)(a) Immigration Act 1971 (deportation conducive to the public good) and at s.3(6) IA 197 (person of at least 17 convicted of an offence punishable by imprisonment and recommended for deportation by a Court on conviction). Deportation now primarily involves removal of foreign criminals from the United Kingdom.

With regard to the meaning of "deportation being conducive to the public good", in N (Kenya) v SSHD [2004] EWCA, the court found that there is a balance to be struck between public interest and compassionate factors, including Article 8 considerations. Public policy includes deterrence and showing revulsion at commission of criminal offences. The court must take proper account of first instance public policy decision-making of the Secretary of State, although the court must take into account all relevant factors. The risk of reoffending is a factor but not the most important element. In AS (Pakistan) v SSHD [2008] EWCA Civ 1118, the court stated that when dealing with a serious offender, the primary considerations are protection of the public and deterring offending of others. In AL (Jamaica) v SSHD [2008] EWCA civ 482, the court determined that the Tribunal must broadly respect the judgment of the Secretary of State in respect of policy but must reach its own decision in respect of Article 8(2) ECHR.

It is possible for the Secretary of State for the Home Department to issue automatic deportation orders under s.32 UK Borders Act 2007. A foreign national will automatically be made the subject of a deportation order if convicted of a criminal offence and sentenced to at least 12 months custody. The case of R v Kluxen [2010] EWCA crim 1081 confirmed that it is no longer necessary for a criminal court to recommend deportation where automatic deportation will apply.

In Masih (deportation – public interest – basic principles) Pakistan [2012] UKUT 00046 IAC, it was determined that there is a strong public interest in deporting serious criminals. The starting point for assessing the seriousness of an offence is the view of the sentencing judge. However, very serious violent or other offences are required to justify deportation of a lawful migrant who has spent the majority of their childhood or youth in the UK.

Deportation can also take place on grounds of national security. The leading case is SSHD v Rehman [2001] UKHL 47. There is a high standard of proof related to actual involvement in terrorist activities, although it is for the Secretary of State to determine what is in the interests of national security.

A deportation order gives rise to a right of appeal on asylum or human rights grounds. However, in cases involving national security concerns there is only a limited right of appeal to the Special Immigration Appeals Commission (established by the case of Chahal).

Whilst a deportation order is in force, a person cannot return to the UK for the duration of the order. This is usually 10 years, if the offence committed attracted a sentence of less than four years imprisonment. If the sentence was for 4 years or over, the person cannot return at any time (Immigration rule 391).

**Question 2(b)**

In challenging a deportation decision, the burden of proof is on the person resisting deportation to raise the relevant grounds for challenge and provide evidence.

**Immigration rules**

Paragraphs A398-399C – list the considerations that the Secretary of State will take into account where deportation is sought but evidence exists of family life in the UK.

Paragraph 398 applies where a person has been subject to imprisonment for 1-4 years OR the SSHD believes the person caused serious harm OR that the person was a persistent offender and is therefore conducive to the public good.

Those falling into to the above category may be able to challenge the imposition of a deportation order in the event that they a) have a genuine and subsisting parental relationship with a British or 7-year resident child AND it would be unduly harsh for the child to leave the UK with the person or b) has a genuine and subsisting relationship with a British or settled partner AND the relationship was formed at a time when the person was in the UK lawfully (and not with precarious status) AND there are compelling circumstances exceeding the very significant difficulties referenced in EX2 of Appendix FM. (paragraph 399)

If the above can be established, the person's family life would outweigh the public interest in deportation.

A definition of what may be considered as 'unduly harsh' can be found in MAB (para 399; 'unduly harsh') [2015] UKUT 435 (IAC). Unduly is defined as 'inordinately' or 'excessively' (in light of the circumstances), and harsh is defined as 'severe' or 'bleak'. Challenges would therefore need to address these points.

In circumstances where a person has been imprisoned for longer than 4 years, they will be unable to rely on Article 8 family life arguments and would only be able to argue in relation to breaches of obligations under Refugee Convention/Article 3 (paragraph 397).

It is very difficult to establish that Article 8 family life would outweigh the public interest in deportation of a foreign criminal where children are not involved

**Statute**

Some persons are exempt from deportation under s.7 IA 1971. These include commonwealth and Irish nationals who were 'ordinarily resident' in the UK on 1 January 1973 (the date the Act came into force).

Exceptions to automatic deportation may be found at s.33 UK Borders Act 2007. These include deportation that would be in breach of the European Convention on Human Rights.

S.117C Nationality, Immigration and Asylum Act (NIAA) 2002 (inserted by Immigration Act 2014) provides that where a foreign criminal has been sentenced to less than four years imprisonment the public interest requires deportation of the person UNLESS the person to be deported has a genuine and subsisting relationship with a qualifying partner or a genuine and subsisting parental relationship with a qualifying child AND the effect of deportation would be unduly harsh on the partner or child. S.117D NIAA 2002 defines 'qualifying partner' as one who is British or settled, and 'qualifying child' as a child who is British or has seven years residence in the UK.

Section 94B Nationality, Immigration and Asylum Act 2002 allows the SSHD to require that any deportation appeal brought on Article 8 grounds be advanced from abroad i.e after removal has taken place, if the SSHD provisionally determines that removal would not breach Article 8 and the SSHD further considers that the person would not face a real risk of serious irreversible harm if removed to the destination proposed. In R(Kiarie) v SSHD [2015] EWCA Civ 1020 it was considered that, in general, out of country appeals against deportation provided a person with an appropriate challenge to deportation. However, the specific facts of the case would need to be taken into account. Therefore arguments would need to centre around conditions in the home country e.g availability of suitable facilities to give evidence from, stability of receiving country etc.

Human rights arguments

MF (Nigeria) v SSHD [2013] EWCA Civ 1192 confirmed that the courts are still required to perform a balancing exercise to determine the proportionality of deportation where family life considerations exist. Therefore, the first step will be to assess the case against the criteria set out in the immigration rules. If the case does not meet this criteria, the court must then move on to consider the case more generally in line with Article 8 principles. However, SSHD v AQ (Nigeria) [2015] EWCA Civ 250 indicated that the second set of factors to be considered must be done through the "lens of the Act and rules". In Velasquez Taylor v SSHD [2015] EWCA Civ 845, it was stated that the court must initially consider the case under the criteria set out in the immigration rules in order to give proper weight to the public interest in deportation.

However, ECtHR has provided some additional considerations in, for example, Maslov v Austria, where the length of time spent in the UK (and whether from childhood), the nature and seriousness of the offence, the country to which the person would be returned (including the length of time spent away from there and connections) and the person's conduct since the offence was committed were all considered to be relevant to the balancing act exercise. It may be possible, therefore, for these factors to lend weight to family life arguments in the overall consideration of the court.

**Question 3**

On 9 July 2012, the Secretary of State for the Home Department introduced revamped immigration rules that it was claimed would incorporate human rights cases based on Article 8 ECHR into categories within the immigration rules. The Secretary of State's position is that the rules now present a "complete code" for the consideration of Article 8 applications.

Article 8 private life application categories inside the rules can be found at paragraph 276ADE(1).

These applications include a person who has lived in the UK for a continuous period of 20 years (whether lawfully or unlawfully or a combination) under 276ADE(1)(iii); a person under 18 years of age who has lived in the UK for a continuous period of seven years, and it would not be reasonable to expect them to leave the UK under 276ADE(1)(iv); a person aged 18-25 who has spent at least half their life living continuously in the UK under 276ADE(1)(v); a person who has lived for a continuous period of less than 20 years in the UK, but for whom there would be very significant obstacles to the applicant's integration into the country where they would have to go if required to leave the UK under 276ADE(1)(vi). All of the time periods indicated in these categories are exclusive of time spent in prison.

In terms of 'reasonableness' in relation to 276ADE(1)(iv), MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 88 (IAC) considered that the starting point in a seven year rule case where a couple applied to remain with the child in the UK should be to grant leave. In PD and Others (Article 8: conjoined family claims) Sri Lanka [2016] UKUT 108 (IAC), the Upper Tribunal stated that the reasonableness test involves a balance of all material facts and considerations. Relevant considerations could include length of residence and strength of connections with UK, personal and educational considerations and extent of connections with the home country. In Zoumbas v SSHD [2013] UKSC 74) the Supreme Court stated 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 on a child cannot be influenced by the poor conduct of the parents.

The Immigration Act 2014 (inserted as a new Part 5A NIAA 2002) made further provisions in respect of Article 8 private life applications. Whilst the courts must have regard to these new provisions, the SSHD is not required to. S.117B(2) provides that it is in the public interest for those applying to remain in the UK to be able to speak English. S.117B(3) provides that it is the public interest for those applying to remain in the UK to be financially independent. S.117B(4)(b) provides that little weight should be given to a private life established by a person at a time when they are in the UK unlawfully. S.117B(5) provides that little weight should be given to a private life established by a person at a time when they have precarious immigration status. S.117B(6) provides that, as long as the person in question is not subject to deportation proceedings, the public interest does not require their removal where they have a genuine and subsisting relationship with a qualifying child and it would not be reasonable to expect them to leave the UK. A qualifying child (defined under s.117D(1)(b)) includes a child under paragraph 276ADE(1)(iv).

*Rhuppiah v SSHD* [2018] UKSC 58 provided important guidance in respect of the above considerations. The Supreme Court found, firstly, that financial

independence should be defined as not having recourse to public funds. Secondly, that precarious immigration status is any status falling short of indefinite leave to remain. Thirdly, that the concept of "little weight" provides a degree of flexibility allowing a judge to place some weight on it if appropriate.

However, despite the assertion of the Secretary of State that the new provisions are a "complete code" to Article 8 claims, applications that fall outside these narrow categories set by the Secretary of State can still be made. In MF (Article 8 – new rules) Nigeria [2012] UKUT 00393(IAC) the Upper Tribunal stated that, contrary to the Secretary of State's position, the new rules (paragraph 276ADE immigration rules and provisions in the IA 2014 below) are only the first step in assessing the validity of a claim under Article 8 ECHR. In Hesham Ali (Iraq) v SSHD [2016] UKSC 60, the Supreme Court stated that it was a mistake for the rules and the rules alone to be considered as the only relevant consideration in appellate decision making.

Although applications outside the rules on the basis of Article 8 private life are less common, there are still significant gaps in the types of applications permitted under the immigration rules. For example, there is no application within the rules or Appendix FM that allow a couple (2 parents) to apply to remain in the UK with the qualifying child under 276ADE(1)(iv).
Applications outside of the immigration rules can still be made with reference to previous Article 8 caselaw, specifically in line with the 5 stage test in R v SSHD ex parte Razgar [2004] UKHL 27 i.e 1). This considers whether the proposed removal will be an interference by a public body in the right to private life, 2) will the interference have consequences of such gravity so as to engage Article 8, 3) is the interference in accordance with the law, 4) is the interference necessary in a democratic society, 5) is the interference proportionate to a legitimate aim. The findings in Huang v SSHD and another [2007] UKHL 11 will also be relevant, as this case stated that where the Article 8 right cannot be reasonably be enjoyed in another country (here posed in relation to family life) in a serious enough way to cause a breach of the Article, the refusal to permit leave is unlawful. JN (Uganda) v SSHD [2007] EWCA Civ 802 confirmed that the reasoning of Huang can be expected to apply equally in a private life case.

**Question 4**

The requirements for naturalisation as a British citizen are set out in s.6(1) (persons not married to British nationals, s.6(2) (persons married to British nationals) and Sch. 1 British Nationality Act 1981.

The applicant must have been present in the UK on the date five years preceding the date of the application. The applicant must have been in the UK for a five-year period prior to the application, subject to an allowed period of absence from the UK of 450 days over the five-year period and 90 days in the 12 months preceding the application under s.6(1) (270 days over a three-year period and 90 days in the 12 months preceding the application under s.6(2)). In practice, as the probationary period for spouses is now at least five years before an applicant is eligible for settlement, the requirements for spouses and non-spouses have been harmonised, except for the allowed period of absence.

The applicant must have been free from restrictions on the period they may remain in the UK for a period of 12 months. The applicant must not have been

in the UK in breach of immigration laws for the five years preceding the application. The applicant must intend to make the United Kingdom their main home. Demonstrating knowledge of language and life in the UK (KOLL) is required, unless this has previously been demonstrated in an application, for example, for settlement.

The Applicant must be at least 18 years of age, as only adults can naturalise as British nationals.

The Applicant must be of good character. The BNA 1981 does not define "good character", but the types of conduct that should be assessed are set out in the Home Office guidance – 'Good Character Nationality Policy Guidance' dated September 2019. Consideration is given to positive as well as negative factors. Decision-makers must be satisfied that Applicants are of good character on the balance of probabilities.

In TN (Afghanistan) v SSHD [2015] UKSC 40,[2015] 1 WLR 3083, the Supreme Court determined that Parliament has entrusted the assessment of character to the Secretary of State not the judiciary, and therefore the Courts cannot require the Secretary of State to grant a person British nationality where the Secretary of State has determined they are not of good character. In R (Hiri) v SSHD [2014] EWHC 254 (Admin), it was determined 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 in that instance, the decision letter was not sufficiently detailed to show that the assessment of character had been carried out correctly i.e. taking into account the whole of the Applicant's character.

Further relevant policy guidance if found in 'Naturalisation as a British citizen by discretion – nationality policy guidance' dated September 2019. Naturalisation is at the discretion of the SSHD, but the SSHD is susceptible to judicial review for failure to follow a published policy. The guidance indicates that the SSHD will check that the person is not automatically entitled to British nationality before processing a naturalisation application.

S.50(11) BNA 1981 requires a person applying for naturalisation to be "not of unsound mind." Therefore, a person who lacks capacity may not be able to apply for naturalisation. However, according to the relevant guidance, the SSHD has an ability to waive this requirement where is it in the person's best interests to be naturalised. The SSHD must not discriminate on the grounds of disability in applying this. Where the full capacity requirement has been waived, it is also possible for the "oath and pledge" requirement to be waived. That is the person concerned would not need to attend a citizenship ceremony.

When considering absences from the UK in the qualifying period, the guidance states that the Secretary of State will have regard to passports submitted by the applicant. Therefore all passports covering the qualifying period should be submitted with the application. If passports are not available for the whole of the qualifying period, other evidence may be accepted e.g. HMRC and other employment records, doctors letters in the case of long-term sickness (and regular attendance) or immigration records showing long term reporting conditions have been met.

The day of departure and arrival in the UK are not counted as contributing to days of absence from the UK and the guidance also states that, where an

applicant slightly exceeds the maximum days of absence from the UK, the Secretary of State may use their discretion in deciding whether to grant the application. For longer absences, there must be evidence that the applicant has made their main home in the UK.

Periods of time spend in prison cannot count towards the residence period, and time spent in the UK with temporary admission/immigration bail or whilst in the UK unlawfully will also not usually count. Where an asylum seeker travels to the UK, claims asylum at the airport and is granted temporary admission/immigration bail pending consideration of their claim they are not regarded as being in the UK unlawfully during that time.

Free from immigration time restriction means the person has Indefinite Leave to Remain, is a Permanent Resident under the EEA regs or is a person who has the right of abode. In terms of presence in breach of immigration law, a person who has made an application for further leave "in-time" has their leave extended under s.3C Immigration Act 1971. Therefore, such persons are not in breach of immigration law at that time. Paragraph 39E of the immigration rules states that a period of overstaying before a valid application is made for further leave to remain can be disregarded if it is for no more than 14 days (previously 28 days) and such a person is unlikely to be penalised for being in breach of immigration law.

## SECTION B

### Question 1

As Eileen has leave to remain in the UK as a partner on the 10-year route to settlement, she will be in breach of the conditions of her current leave to remain if she no longer lives with her partner as the relationship must be "subsisting" in order for her to remain in the UK as a partner under Appendix FM. Therefore, the most appropriate course of action would be for Eileen to make a "domestic violence rule application" under the provisions for domestic violence in Appendix FM if Eileen is able to meet the requirements. The standard of proof is the balance of probabilities and the burden of proof rests with Eileen. The application is for a grant of Indefinite Leave to Remain.

The Home Office policy document 'Home Office – Victims of domestic violence and abuse, v.14.0 (5 February 2018)' defines domestic abuse as "any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality." Eileen's experiences can therefore be defined as domestic abuse as she has been subject to a pattern of threatening behaviour by her partner.

Prior to making a substantive domestic violence application, Eileen may be able to apply for a three - month period of leave to remain under the "destitute domestic violence concession". If granted, Eileen would then be able to access welfare benefits and would be able to use the period of additional leave in order to obtain legal advice and collect the appropriate evidence in support of her application.

The requirements for a substantive domestic violence application are found in section DVILR 1.1 (a)-(d) and section E-DVILR 1.1-1.3:

They are:

- That the last grant of leave must have been in the category of spouse/partner;
- The applicant must be in the UK;
- The Applicant must not fall for refusal on the grounds of suitability under Appendix FM (in order to be granted ILR);
- The Applicant must provide evidence that during the most recent period of leave the Applicant's relationship with the partner broke down permanently as a result of domestic violence.

Eileen's last grant of leave was as a partner under Appendix FM. There is no requirement that the leave must be current (although in Eileen's case it is). As long as abuse has taken place during the probationary period and the relationship has broken down as a result of the abuse then overstaying will not necessarily be a bar to being successful in a domestic violence application in line with IN (Domestic violence, IDI, policy) Pakistan [2007] UKAIT 00024.

Eileen is currently in the UK. There is nothing to suggest that Eileen is unsuitable for settlement.

The application should be made on Form SET(DV) and should be completed online. Failure to use the correct form or procedure in an application for indefinite leave on the grounds of domestic violence will invalidate the application (JL (Domestic violence: evidence and procedure) India [2006] UKAIT 00058).

The prospects of success of the application will depend on the evidence that Eileen can provide to the Home Office in relation to the domestic abuse she has suffered. She will need to provide evidence that she is in the UK as a partner, most likely by way of an endorsed passport or a biometric residence permit.

She will need to provide evidence of the abuse. Evidence such as an injunction, a non-molestation order or a protection order, a relevant court conviction or a relevant police caution is considered by the Home Office to be the most persuasive and the provision of one of these will usually cause the application to be successful. It will therefore be important to enquire with Eileen whether any action to prevent her husband from contacting her will be started in the family courts.

If these are not available, then a number of other pieces of evidence, when taken together, may enable Eileen to prove that she has been a victim of domestic abuse to the required standard. These include: a medical report, a police report, a social services report, evidence from a domestic abuse agency that have provided support, evidence of a MARAC (multi-agency risk assessment committee) referral or other documentary evidence.

Eileen may be able to obtain confirmation from the police regarding the behaviour of her husband. She should also be able to obtain supporting evidence from Social Services. Instructions should be taken as to whether a MARAC referral has been made and whether Eileen's mental health has suffered as a result of the abuse as these could be further sources of evidence for the purposes of the application. It will also be helpful to check Eileen's maternity notes and other medical records in case any special measures have been put in place to keep her safe.

If Eileen is able to obtain the necessary evidence then it is likely that she will be successful in her application.

A domestic violence application in these circumstances would be likely to attract a human rights appeal following the case of AT, R (on the application of) v SSHD [2017] EWHC 2589 (Admin). A right of appeal is likely in this case because the couple's child will almost certainly be born by the time a decision on the application is made by the SSHD and following the case of Beoku-Betts (2008) "there is only one family life" and all affected parties will need to have their Article 8 rights considered.

The right of appeal is found at s.82(1)(b) Nationality, Immigration and Asylum Act 2002 and the ground of appeal found at s.84(2) is that the decision is unlawful under s.6 HRA 1998.

Eileen must submit an appeal on form IAFT-5 to the First-tier Tribunal (Immigration and Asylum Chamber) along with grounds of appeal, any relevant evidence and the fee or proof of eligibility to have the fee waived. This must be done within 14 days of being sent the decision by the Secretary of State under r. 19(2) Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

Following a full hearing in First-tier Tribunal, whichever party is unsuccessful may apply for permission to appeal to the Upper Tribunal on error of law grounds. The initial application is to the First-tier Tribunal within 14 days of the determination being sent by the Tribunal under r.33(2) Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

If unsuccessful, then renewed grounds may be sent within 14 days of the refusal of permission being sent by the First-tier Tribunal directly to the Upper Tribunal under r.21(3)(aa)(i)Tribunal Procedure (Upper Tribunal) Rules 2008.

If permission is refused, the only remedy is judicial review of the Tribunal decision to refuse permission following the case of R (Cart) v The Upper Tribunal; R (MR (Pakistan)) v The Upper Tribunal (IAC) [2011] UKSC 28

If permission is granted the case will proceed to one or more hearings in the Upper Tribunal. Following the decision of the Upper Tribunal, onward appeals may be available to higher courts on a point of law.

**Question 2(a)**

It will be necessary first to ascertain the status of Mina's parents.

As Citizens of the United Kingdom and Colonies (CUKCs), Mina's parents were able to freely enter the UK in January 1968, as this was prior to the Immigration Act 1971 coming into force on 1st January 1973. This right to freedom of movement within the Commonwealth was as a result of provisions in the British Nationality Act 1948. As Mina's parents were present and settled in the UK on 1st January 1973, they obtained "patrial" status and the right of abode on that date, under s.2 Immigration Act 1971 as first enacted.

The right of abode is a statutory right that a person either has or does not have. It cannot be conferred by a minister of state merely by the act of issuing

a passport or other confirmatory document as set out in Christodoulido v SSHD [1985] Imm AR 179.

Following the coming into force of s. 11 British Nationality Act 1981 on 1 January 1983, Mina's parents automatically became British citizens, as prior to that they had held CUKC status and had the right of abode.

As Uganda became independent in 1962, Mina was born outside the UK and colonies. However, as her father had CUKC status, Mina acquired citizenship of the UK and colonies by descent at birth. Mina therefore was a citizen of the UK and colonies by descent when she entered the UK. Like her parents, Mina also became a British citizen on 1 January 1983.

In addition, a CUKC who was ordinarily resident in the UK for any continuous period of five years before 31 December 1982 was considered to hold the right of abode under s.2(1)(c) IA 1971. Under this provision, Mina would also have become a British citizen on s.11 BNA 1981 coming into force.

Those with the right of abode are not liable to deportation or administrative removal under provisions set out in Immigration Act 1971 and later statutes, as confirmed in R (Miah) v SSHD [2017] EWHC 2925 (admin). However, under s.3(8) IA 1971, the burden of proof in establishing that a person is a British citizen or has the right of abode rests with the person asserting the claim.

**2(b)**

The facts of Mina's case have similarities to a large number of cases that have come to light in recent years and have been termed "Windrush cases". They generally involve citizens of the Commonwealth who came to the UK as of right during the 1950s, 1960s and early 1970s at a time when the need for immigration and nationality paperwork was far less important than it has become in modern Britain. As s.3(8) IA 1971 states that the burden of proof in establishing that a person is a British citizen or has the right of abode rests with the person asserting the claim, individuals who came to the United Kingdom at this time have recently suffered discrimination and difficulties obtaining services as a result of the "compliant environment" introduced by the Immigration Acts 2014 and 2016. In 2018, the Home Office set up a Windrush cases taskforce and published guidance on how caseworkers at the Home Office should handle such cases.

As Mina is British citizen, the first step she could consider taking would be to apply for a British passport. In doing this, she could provide a covering letter explaining her situation and asking the Home Office to check the records and find out whether her entry or the entry of her parents was noted and kept on file. In advance of doing this, Mina may wish to obtain freedom of information subject access request files for herself and her parents to find out what information is held on file for herself. The risk in simply making an application to HM Passport Office is that it may alert the Home Office to Mina's presence which could lead to attempted enforcement action. The better course of action may be to contact the Home Office Windrush task force for guidance on the best course of action. The task force may recommend making an application for a passport. If applying for a first British passport, a fee will be payable.

It may be more appropriate for Mina to apply for a certificate of entitlement which will confirm her status in the UK. Under the Windrush casework

guidance, this application is free of charge although there is usually a fee. The application should be completed online.

Mina will need to obtain evidence of her life in the UK to date in order to be successful in establishing her right to British citizenship/right of abode. The Windrush task force may be able to assist with checking Home Office records to establish whether a record of entry of Mina or her parents is held.

In addition, Mina should try and obtain records relating to attendance at primary and secondary school, college, employment records, medical records, HMRC records, birth certificates, marriage certificate of her parents, records relating to home ownership, rental agreements or employment of her parents in the UK. Mina should provide as much evidence as possible to support her claim to British citizenship.

In the event that Mina's application is successful she will be issued with a certificate of entitlement that she can then use to show her entitlement to be issued with a British passport.

In the event that Mina's application is refused, caseworker guidance on the Right of Abode published November 2019 indicates that, as Mina has lived in the UK for over 20 years, the case must be referred to a senior caseworker in order to decide whether a referral for enforcement action is required. Where some evidence exists to suggest that Mina may have the right of abode (but insufficient evidence on the balance of probabilities), Mina will be informed of this in the refusal letter.

Currently, there is no right of appeal accrued from the refusal of such applications, but it may be possible to argue that a human rights appeal should be granted on private life grounds. Failing that, the appropriate further action will be to request a review of the decision and, if the decision remains unchanged, to consider challenging the decision by way of a judicial review.

**Question 3**

Katazyna may be eligible to apply for an Investor visa under Tier 1 of the Points based system. The requirements are found at Part 6A and Appendix A of the immigration rules.

As Katazyna is in the UK on a Tier 4 student visa, she is eligible to switch into the Tier 1 Investor category. However, she is also able to return to Russia and apply for entry clearance is she prefers. Applicants must be over the age of 18, which Katazyna is. There are no English language requirements in respect of the Investor visa.

Applicants must show that they have at least £2 million under their control and available to invest. Therefore, the minimum gift that must be made to Katazyna by her father is this amount. Katazyna is confident that this amount is within her father's ability to gift, so this is unlikely to be a problem.

The money must be held in a regulated financial institution (either in the UK or abroad). The money must have been held by the investor for at least three months. Therefore, Katazyna's father must transfer these funds into a regulated bank account in Katazyna's name a minimum of three months before the date on which she wishes to make this application. The money

must be invested within three months of the visa being issued. Failure to do so or to maintain the investment will prevent the visa being extended or indefinite leave to remain being granted. Therefore, Katazyna must identify a suitable organisation to receive her investment and she must maintain the level of investment for the duration of her visa.

Criminality and immigration history checks will be made as well as enquiries into the original source of the money held if this is deemed necessary. There is nothing in the scenario to suggest that Katazyna will fail on criminality or immigration history but full instructions will need to be taken, and all issues, including minor ones, should be disclosed in the application as they are unlikely to result in a refusal but a failure to disclose them could.

If the applicant has invested the minimum of £2 million but below £5 million, they will be eligible to settle after five years. If the applicant has invested £5 million or above but below £10 million, they will be eligible to settled after three years. If the applicant has invested £10 million or above, they will be eligible to settled after two years. Therefore, the amount of the gift Katazyna receives from her father will determine when she can apply for settlement. The initial visa is for three years four months, therefore only those on a 5-year route to settlement need apply for an extension. Extension applications may be made for a further period of two years.

This immigration category is subject to the usual rules relating to absence from the UK, and therefore Katazyna must not be outside of the UK for more than 180 days in any 12-month period for the duration of the period of leave to remain.

The application must be completed online including payment of the relevant fee and the applicable health surcharge. A decision should be received within three weeks. There are additional options for payments to access premium services. The visa is subject to a no recourse to public funds condition.

Documents that will be required include a valid national passport and TB certificate if relevant. Criminal records certificates from any country lived in for 12 months in the last 10 years will be required. Katazyna will need to supply evidence from Russia and any other countries that she has lived in.

Katazyna must provide evidence of the investment funds, that they are "available", and where they were obtained from if held for less than two years. Therefore, she will need to provide evidence of the gift from her father. Katazyna must also provide evidence that a UK bank account has been opened in readiness to receive the investment funds. This requirement is subject to a specific format. The evidence must be on headed paper, dated within three months of the application, issued by an authorised bank official, state name and account number, that account has been opened to receive the specific sum to be invested, that the institution is regulated by the FCA and a money laundering check has taken place. Other documents must be supplied as required.

In Shahzad [2012] UKUT 81 (IAC), the Upper Tribunal found that there was no unfairness in the requirement of the Points Based System that an applicant must submit all required evidence in order to demonstrate that they meet the rules. In Alam v SSHD [2012] EWCA Civ 960, the Court of Appeal determined that the immigration rules, policy guidance and application form make it clear that the submission of specified documents is mandatory and, if not produced,

the application would be refused. It is a feature of the Points Based System that predictability and certainty are more important than the exercise of discretion. In Mudiyanselage v SSHD [2018] EWCA Civ 65, the Court of Appeal confirmed that there is no evidential flexibility in submission of specified documents for applications to the Points Based System. In Harpreet Singh v SSHD [2018] EWCA Civ 2861, the Court of Appeal stated that the Points Based System allows no opportunity to correct administrative mistakes.

The Court of Appeal has repeatedly found, therefore, that the Secretary of State is entitled to have an inflexible system of this kind, where applicants have to take the consequences of their own mistakes. Therefore, Katazyna should be advised of the strict evidential requirements and her application should not be submitted unless it is able to meet them, as the application would be refused and the application fee not refunded.

**QUESTION 4**

Ismael can make an application for asylum to the SSHD. The burden of proof in an asylum claim is on the Applicant but the standard of proof is a lower standard of "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 Rajendrakumar [1996] Imm AR 97, PS Sri Lanka (2008)). 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 and Article 2 (c) Refugee Qualification Directive.

**Well-founded fear**

Ismael fears that he will be targeted by the authorities on return to Kuwait because he has undertaken anti-government activities. He also fears that his poor treatment as a non-citizen of Kuwait will continue and we will continue to be unable to access healthcare and the job market. Ismael has subjective fear.

In Hovarth (2000), it was stated that a claim cannot be assessed without looking at the conditions of the country of origin. The objective information provided in the scenario states that undocumented Kuwaiti Bidoons are subjected to the type of discrimination outlined by Ismael. However, further objective research will be required and potentially an expert report on country conditions.

**Persecution**

In this case the Home Office argue that there has been no past persecution. The Secretary of State may doubt the fact that there is a real risk of persecution in the future here as there is no indication the authorities are looking for them, no past persecution and their fear is based on speculation about what their friends may have told the authorities.

Persecution is not defined in the Refugee Convention. However, in Article 9 Refugee Qualification Directive (RQD) and Regulation 5 Refugee Qualification

Regulations (RQR) persecution is defined as an acts sufficiently serious by their nature or repetition to amount to persecution or an accumulation of acts so substantially prejudicial to human rights to amount to persecution.

It could be argued that the lifelong discrimination of Bidoons in the past, and the denial of their basic economic and social rights, could amount to persecution. This is similar to the denial of the rights of Roma in Gashi (1997).

A complete denial of access to basic civil rights would be construed as an act sufficiently serious by their repetition to amount to persecution.

Further evidence would need to be obtained in relation to prison conditions and treatment of political dissidents in order to determine whether this would also amount to persecution.

In Shah and Islam persecution was defined as serious harm plus failure of state protection. Arguably the accumulation of discrimination in the past, instigated and condoned by the state, fits this definition. The country reports show this ongoing discrimination.

In any event future persecution can be sufficient (Sivakumaran (1987)) and the central question at the appeal is the risk of persecution on return - Karanakaran (2000)

**Protection**

Regulation 4 of the protections regulations state that 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 and the person has access to them.

As Ismael fears persecution from the state itself, the state will not provide protection of the kind outlined in Regulation 4.

As the persecution is by state agents, as the government enforces and condones these provisions, this falls at the high end of the spectrum of state responsibility (Svasas (2002) ) and there is no protection available in Kuwait against this.

**Convention Reason**

Political opinion

Ismael has taken part in an anti-government demonstration and believes that his identity may now be known to the authorities in Kuwait. Ismael has stated that he is angry about the treatment of undocumented Bidoons and this would amount to expression of a political opinion. Political opinion is interpreted broadly (Gomez (2000)) and this would be a clear expression of political opinion.

Membership of a Particular Social Group.

In Shah and Islam [1999] the House of Lords stated that members of a particular social group must have an immutable characteristic that they cannot change or cannot be expected to change.

The definition of a particular social group in Montoya v SSHD [2002] EWCA Civ 620 stated that it concerned discrimination directed at members of a group due to a common, immutable characteristic.

In BA and Others (Bidoon – statelessness – risk of persecution) Kuwait CG [2004] UKIAT 00256, the Tribunal confirmed that the Bidoon do form a particular social group.

**Internal Relocation**

As Ismael fears the authorities in Kuwait, there is no safe place to which Ismael could relocate given that the Kuwaiti authorities control the whole country.

**Credibility**

Ismael has made a genuine effort to substantiate his application with country of origin information and a witness statement from his friend, Yusuf. He therefore complies with Article 4. (5) Refugee Qualification Directive.

The Home Office have not accepted the statement from Yusuf as his claim is not believed either. However, in Ravichandran [1995] EWCA Civ 16, it was determined that credibility issues are central to establishing a well-founded fear. Evidence should be looked at in the round and all the relevant circumstances taken into account. The statement should have been considered as part of the assessment.

In KS (benefit of the doubt) [2014] UKUT 552 IAC, it was determined that every asserted fact where there is doubt 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 Article 4 RQD state that the benefit of the doubt need only be given where the account is generally credible.

Paragraph 339L 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 and 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. The benefit of the doubt should have been given to Ismael on the basis of the evidence produced.

Ismael has been asked to produce a summons for his arrest, but he should not be expected to corroborate his claim in this way (Karakas 1998). He has made a genuine effort to substantiate his application (Article 4 (5) RQD) and has suffered discrimination at the hands of the government all his life which can amount to persecution, in any event.

With regard to s.8 Asylum and Immigration (Treatment of Claimants etc.) Act 2004, section 8 (4) provides that adverse inferences can be made from the failure to claim asylum in a safe country, an issue the Home Office have raised

here. However this is only a starting point for credibility and should not be used to make inroads into the judicial decision making process. A judge on appeal can decide the weight to be given to these factors (SM Iran (2005), JT Cameroon (2008)).

It will be necessary to take instructions about whether and how Ismael has claimed asylum, and whether there were opportunities to do so beforehand in the UK or a European Union country. Ismael presumably travelled through a number of safe countries but was under the control of the agent. He was unlikely to question the authority of an agent who had promised to bring him to a safe country.

Ismael will need to provide a credible version of events, that is consistent, in order to avoid an adverse credibility finding. The credibility of his account will determine whether it is accepted that he is an undocumented Bidoon. The very nature of this type of case is that the applicant is "without" documents or evidence. Ismael should be aware that in considering his case his account of events and the account of his friend who travelled with him will be compared and even minor discrepancies may create credibility problems. As long as the account given by the two friends is broadly credible and consistent throughout the proceedings then the two friends have a reasonable prospect of being regarded as refugees in need of protection.