LEVEL 6 - UNIT 8 – IMMIGRATION LAW
SUGGESTED ANSWERS – JANUARY 2018

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide candidates and tutors with guidance as to the key points candidates should have included in their answers to the January 2018 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 tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' reports which provide feedback on candidate's performance in the examination.

SECTION A

Question 1

Section 3C of the Immigration Act 1971 ("section 3C leave) is the statutory provision which exists in UK immigration law to prevent a person, who makes an in-time application to extend their leave, from becoming an overstayer. An in-time application is an application made when the applicant still has leave to remain in the UK. Where an applicant's leave has expired before an application is made, section 3C will not extend the leave.

The March 2017 Home Office Guidance, version 8.0, provides that a section 3C leave will apply if a decision on an application is pending when:

(a) An applicant has limited leave to enter or remain in the UK;
(b) an applicant applies to vary their leave;
(c) an application for variation is made before leave expires;
(d) leave expires without the application for variation has been decided;
(e) an application for variation is neither decided nor withdrawn.

The guidance also stipulates that a section 3C leave will also apply in cases where an appeal is pending and it is an in-country appeal. An appeal is pending until it is finally determined, is withdrawn or is abandoned.

A section 3C leave will continue to apply in cases where administrative review is pending, during the period when an administrative review can be sought and when no new application for leave to remain has been made.

Where an applicant leaves the UK, the leave granted by section 3C will end.

Section 3C does not apply to EEA applications made under the EEA Regulations. Applications made under EEA Regulations such as an application for residence

card seek to confirm the rights of a person are being exercised. EU nationals do not require leave to enter or remain.

A section 3C leave will come to an end if a person does not lodge an appeal or seek permission to appeal within the relevant time limit. A section 3C leave will not apply even if the tribunal accepts an appeal or an application for permission to appeal out of time. A section 3C leave can only exist where there is a seamless continuation of leave. Where there is a break in a section 3C leave it cannot be resurrected.

Where a person has made an in-time application but that application is deemed to be invalid, section 3C would not apply.

The Home Office guidance also provides that an applicant will not be disadvantaged where a section 3C leave applied at the time a decision was made and that decision is subsequently withdrawn after the section 3C leave has ended. A subsequent application would be considered as if the applicant still had a section 3C leave. A break between a section 3C leave coming to an end and the grant of new leave should not be held against an applicant in any subsequent application.

There are new powers under section 62 of the Immigration Act 2016 to cancel leave that is extended by section 3C of the Immigration Act 1971. Section 3C leave may be cancelled where a person has failed to comply with a condition attached to their leave or where deception was used to seek leave to remain. The power to cancel section 3C leave is discretionary and cannot be cancelled for any other reason.

A valid application is defined in paragraph 6 of the Immigration Rules as an application made in accordance with the requirements of Part 1 of the rules. For an application to be valid, photos which comply with the photo guidance must be submitted, the applicant must provide their biometrics, the applicant must submit their valid passport, the correct fees must be paid, the correct form, which is fully completed and signed must be submitted.

Question 2

In the UK an asylum seeker is a person who makes an application to the Home Office to be recognised as a refugee. If their application is successful, they will be granted a refugee status but until that time they are referred to as an asylum seeker. The definition of a refugee is given in Article 1A of the 1951 UN Convention relating to the Status of Refugees also known as the 1951 Convention, the Geneva Convention and the Refugee Convention. A person can be recognised as a refugee where he or she has a well founded fear of persecution for one of the Refugee Convention reasons, is outside his or her country of nationality and, owing to such fear, is unable or unwilling to return to that country. This definition is also set out in Article 2 (c) Council Directive 2004/83/EC (The Refugee Qualification Directive). This is implemented in Regulation 2 of The Refugee or Person in need of International Protection Regulations 2006.

The UK must abide by its international obligations under Article 33 of the Refugee Convention and not return someone on UK soil to persecution (the non-refoulement obligation) where that person fits the definition of a refugee under Article 1A Refugee Convention. So when a person makes an application to be recognised as a refugee, it is made on the basis that it would be contrary to this obligation to remove him or her from the UK. The obligation under the

convention gives every person the right to make an application and all applications will be determined by the Secretary of State.

Article 1 (A)(2) of the 1951 UN Convention defines a refugee as a person who "owning to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable , or owing to such fear is unwilling, to avail himself of the protection of that country."

In order to understand the legal basis in which a person may be assessed to be a refugee in the UK, it is necessary to understand the individual parts of the definition of a refugee.

Well Founded Fear

It is generally accepted that a well-founded fear of persecution will be shown if there is a serious possibility or reasonable degree of likelihood on the authority of the House of Lord in Sivakumaran (1988). It may also be referred to as real risk (PS Sri Lanka (2008)). The test of well-founded fear is both subjective and objective.

The subjective fear looks at the genuineness of the applicant's fear. The applicant's testimony and frame of mind, which are subjective, will need to be assessed. This will show the applicant's subjective fear on return to his or her home country, which is nothing more or less than the belief which the appellant states is likely to happen. This fear must be objectively justified. (Horvath (2000) states that a claim cannot be assessed without placing it in the objective context of the country of origin. Therefore the asylum seeker must show, with reference to country reports, that what he or she believes will happen is likely to materialise. Conversely, the Home office may rely on the evidence of conditions in the country from which the appellant is fleeing to show insufficient basis for the fear.

Credibility issues are often central to determining whether there is a well-founded fear. It has been held that all the evidence should be looked in the round and the relevant circumstances taken into account (Ravichandran (1996)). An applicant must make a genuine effort to substantiate their application (Article 4 RQD) but should not be penalised for not having corroborative evidence where missing elements have been explained. (Karakas (1998), Article 4 RQD).

Timing of fear

The timing of fear is important as a current well-founded fear is necessary (Adan) (1998). It is not sufficient that the applicant was in fear when he or she left. The fear must be existing at the time the applicant makes a claim for refugee status i.e. there is a real risk of persecution if the applicant is sent back to his or her home country.

Persecution

There is no universally accepted definition of persecution. Article 33 of the Convention states that threat to life and freedom is always persecution. The opinions of leading academics suggest that a sustained or systematic violation of basic human rights demonstrates a failure of state protection and it has been held that persecution is serious harm combined with failure of state protection (Shah and Islam (1999)).

Article 9 Refugee Qualification Directive (RQD) and Regulation 5 of the Refugee Qualification Regulations set out a minimum definition of what constitutes acts of persecution. Acts must be sufficiently severe by their nature or repetition or be an accumulation of various measures sufficiently severe to inhibit human rights. One act of torture is sufficient to amount to persecution – Demirkaya (1999). For example, rape would be sufficiently serious alone to be persecution and is seen as a grave and abhorrent act amounting to torture.

The Refugee Convention Reasons

(a) **Race** includes all ethnic groups referred to as races including consideration of colour, decent or membership of a particular ethnic group Article 10(1)(a) of the Qualification Directive.

(b) **Religion** incorporates all forms of religious practises including the holding of theistic, non-theistic and atheistic beliefs, the participation in or abstention from, formal worship in private or public view, other religious acts or expressions of view Article 10(1)(b) of the Qualification Directive

(c) **Nationality** is not confined to citizenship or lack of it. This includes membership of a group determined by culture, ethnic or linguistic identity, common geographical or political origins etc. as stipulated in Article 10(1)(c) of the Qualification Directive

(d) **Membership of a particular social group** includes persons of similar background, habits or social status who hold an innate or immutable characteristic that they cannot change or should not be expected to change (Shah and Islam (1999)) and Article 10(1)(d) of the Qualification Directive. Particular social groups have been held to exist in cases of women in societies which discriminate against women (Shah and Islam (1999)). This has been extended to cases of women at risk of Female Genital Mutilation in P and M (2004) and Fornah (2006). Other particular social groups include same sex couples in societies where homosexuality is discriminated against as in the Supreme Court case of HJ (Iran) and HT (Cameroon). Further particular social groups include families targeted because of their membership of such as in the case of K and Others (2006).

(e) **Political opinion** includes the holding of directly or imputed/attributed opinion, thought or belief on a matter related to the potential actors of persecution, their policies or methods. The applicant must fear persecution for holding such opinion. Regulation 6(1)(f) of the Qualification Regulations 2006

Question 3(a)

The right to liberty is a fundamental right enjoyed by all people in the UK, whether British citizens or those subject to immigration control. In a bail application there is a presumption in favour of bail and therefore the burden of proof in justifying detention rests on the Secretary of State. The burden of proof is based upon the balance of probabilities.

There are a number of options available to seek release of a person detained for immigration purposes. The lawfulness of the detention must be based on the statutory powers as set out in Schedule 2 and 3 of the Immigration Act 1971 (as

amended by section 10 of the 1999 Act because of the amendments introduced by the Immigration Act 2014), but there are limitations on the use of such powers. These powers allow the Home Office to detain a person in order to examine their suitability for entry into the UK, if a person is pending being removed from the UK, if a person is pending being deported or if a person is a crew member.

Written representations should always be made by way of a request for Temporary Release to the Immigration Compliance and Enforcement (ICE) team.

The concept of temporary release is being abolished with the coming into force of section 61 and Schedule 10 of the Immigration Act 2016. All those who would have been on temporary release under existing provisions will now be on immigration bail.

Where there is a failure to secure bail from ICE, representations can be made to a Chief Immigration Officer (CIO) for CIO bail. An application for CIO bail is usually likely to fail where ICE has refused release. However where a CIO bail is granted, the grant will usually include conditions such as place of address, reporting duties, sureties, curfews and working conditions.

Where the ICE and the CIO have refused bail, an application for bail can be made to the First-tier Tribunal.

At all stages of the immigration process there is a right to seek bail. This right is contained in Schedule 2 of the Immigration Act 1971. There are conditions attached to this right such as no bail can be granted for the first 7 days after a person arrives into the UK and a person cannot be released on bail without the permission of the Secretary of State where removal directions have been set and require the person to leave the UK within 14 days of the date of the bail decision.

Unless there is a material change to the circumstances of a person applying for bail, a repeat bail application made within 28 days of a previous bail refusal from the tribunal cannot be made.

A tribunal bail application must be made on the prescribed form, B1. Where bail is granted by an immigration judge, it is normal to have conditions imposed which are similar to conditions imposed by the Secretary of State.

Question 3(b)

Where criminality was punished by imprisonment, the factors likely to outweigh public interests when a deportation decision has been made against a person subject to immigration control should include:

(a) Whether there is a genuine and subsisting family life (adult relationship) that has been established with a British citizen or a person settled in the UK. Consideration is given to when the family life was established for example a family life would not be considered genuine if it was established when a person was in the UK illegally. It would be regarded as unduly harsh if as a result of being deported, a British child of the deportee would be forced to leave the UK and live abroad with the deportee or remain in the UK without the deportee.

(b) Whether there is evidence of an established private life in the UK, which would include in the most part where the deportee has remained in the UK legally and have formed strong ties in the community - socially and

culturally. There must be evidence of significant obstacle which will prevent the deportee integrating into the country of return.

(c) Whether there is a genuine and subsisting family life (parental relationship) that has been established with a UK child or a child who has remained in the UK from birth for seven year such that it would be unduly harsh for the child to live with the deportee abroad or without them in the UK.

Question 4

The case of R (Secretary of State for the Home Department) v Immigration Appeal Tribunal and Surinder Singh (1992) 3 CMLR 358 was in the context of an Indian national married to a British national, who worked with his British wife in Germany for two years and then returned to the UK and she opened a business in the UK. This had the effect of his wife having activated her Community status by working in Germany under Article 48 EEC and continuing to exercise her Treaty Rights when she returned to the UK. Therefore, while the marriage was still subsisting, her Indian husband was entitled to reside and work in the UK so long as his wife also resided and worked in the UK.

In the context of this case a foreign spouse must benefit from the same rights as would be required under Community law on entering and residing in another member state. In accordance with Article 52 EEC and Directive 73/148, a member state must grant leave to enter and reside in its territory to the spouse (of whatever nationality) of one of its nationals who has gone with his or her spouse to work in another member state under Article 48 EEC and then returned home to establish himself in his home state in the circumstances covered by Article 52 EEC.

In general, to satisfy the Surinder Singh principle an EEA national and their non-EEA spouse must meet the following requirements:

- That on returning to the UK, the EEA spouse had resided in an EEA member state;
- That on returning to the UK, the EEA spouse would be defined as a qualified person exercising Treaty Rights. The Immigration (EEA) Regulations 2016 sets out a list of qualified persons;
- That on returning to the UK, the EEA national and their non-EEA spouse are in a genuine and subsisting relationship.

The key issue in this case is whether, subject to any issue of evasion of national law, Community law grants a right of residence to a national of a non-member country who is the spouse of a Community national when the Community national returns for the purpose of running a business in accordance with Article 52 EEC in his or her home country after having worked in another member state.

Article 52 EEC provides for the abolishment of the restrictions on the freedom of movement of nationals of a member state in the territory of another member state and that the freedom of establishment includes the right to take up and pursue activities as a self-employed person under the conditions laid down for its own nationals by law of the relevant country.

Article 48 EEC provides for:

- The guarantee of freedom of movement within the Community

- The protection against discrimination based on nationality with regard to employment and workers' rights
- The protection of the rights of EU nationals subject to the limitations based on grounds of public policy, public security or public health
- The exclusion of Article 48 EEC for those employed in public service

It must be noted that the expression 'employment in the public service' within the meaning of Article 48 EEC section 4, which is excluded from the ambit of Article 48 EEC sections (1), (2) and (3), must be understood as meaning those posts which involve direct or indirect participation in the exercise of powers conferred by public law and in the discharge of functions whose purpose is to safeguard the general interests of the State or of other public authorities. Such posts in fact presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality. Examples of posts which may apply under Article 48 EEC section 4 are those which are reserved for nationals. These may include:

- posts in the judiciary, public prosecutors, prison staff;
- posts in the police and border control services, firemen, security guards;
- military and civil posts in the army;
- posts in the intelligence service;
- posts in the diplomatic service.

In the cases of Knoors v Secretary of State for Economic Affairs (1979) E.C.R. 399, (1979) 2 C.M.L.R 357 and Bouchoucha (1990) I E.C.R. 3551, (1992) 1 C.M.L.R 1033, the courts has consistently held that facilities created by the Treaty cannot have the effect of allowing the persons who benefit from them to evade the application of national legislation and prohibiting member state from taking the measures necessary to prevent such abuse.

The decision held by the court is therefore that Article 52 EEC and the Directive 73/148 require a member state to grant leave to enter and reside in its territory to the spouse as envisaged by Article 48 EEC and Article 53 EEC and that the spouse must enjoy at least the same rights as would be granted to him or her under Community law.

Once in the UK, the non-EEA spouse may apply for a residence card issued to a non-EEA national family member. This card confirms the non-EEA spouse's right to reside and work in the UK under EEA law. If an EEA national remains in the UK as a qualified person for a continuous period of 5 years, the EEA national would be eligible to apply for a document certifying permanent residence. If the non-EEA spouse remains a family member for the same period of time, the non-EEA spouse would be entitled to apply for permanent residence.

SECTION B

Question 1(a)

Hector is liable to be removed from the UK under s10 IA 1999 as he is overstaying his leave to remain in the UK. Both his original visit visa and his temporary admission as an asylum seeker have expired so he now requires leave to remain in the UK and does not have it.

Hector does, however, have a genuine and subsisting parental relationship with Lillie and it is arguable that EX 1 Appendix FM would apply here and permit him to stay in the UK. Lillie is under 18, in the UK and is a British citizen as she was born in the UK after 1/1/1983 to a British mother.

In this situation it would not be reasonable for Lillie to be expected to leave the UK. Hector is no longer in a relationship with Lillie's mother, Rachel, so the family would not be able to relocate as Rachel and Lillie would remain in the UK.

In accordance with s117B Nationality Immigration and Asylum Act (NIAA) 2002, as amended by the Immigration Act 2014, where a person is not liable to deportation, the public interest does not require that person's removal where there is a genuine and subsisting relationship with a child and it would be reasonable to expect child to leave the UK. A qualifying child is defined in the same way to EX1 as 7 years residence in the UK or a British citizen. As Lillie is a British citizen this statutory provision would also be satisfied.

Article 8 ECHR will clearly be engaged in this scenario as there is a genuine parental and child relationship involving frequent and regular contact. Applying the further stages of the five stage test in Razgar (2005), to remove Hector from the UK would interfere with this family life and sever this relationship. Removal is in accordance with the law under section 10 Immigration and Asylum Act 1999 as Hector requires leave to remain and does not have it. However, there are further legal provisions (s117C NIAA 2002 and EX1 Appendix FM) that permit him to stay.

In considering whether a legitimate aim permits removal, it is clearly in the interests of the economic well-being of the country to control immigration. In looking at the proportionality of the removal, in line with the final stage of the Razgar test, the test in Huang (2007) will be applied, namely whether the family life reasonably be enjoyed elsewhere. It would not be reasonable to expect Lillie to relocate to Zimbabwe with Hector as he is no longer in a relationship with her mother and therefore she will remain in the UK with Rachel. Lillie is settled into her local school and should not be uprooted, even if this was an option.

The courts will determine whether it is reasonable to expect Lillie to leave the UK and it is clear that the Article 8 jurisprudence in these cases places great importance on the best interests of children, seeing them as a primary consideration - ZH Tanzania (2012), Zoumbas (2013). In Maslov v Austria (2008) the European Court of Human Rights emphasised the best interests of the children and family ties as important considerations.

The House of Lords in EB Kosovo (2008) held that it would rarely be proportionate to separate a parent and child, which is the case here. If Hector was removed it would sever this relationship. Further in Ogundimu *(*2013), the Upper Tribunal doubted it would ever be in a child's best interests to lose contact with parent.

It is there submitted that removal would be likely to be a disproportionate interference with Article 8 ECHR.

Question 1(b)

If Victor had been in prison for two years having been convicted of a criminal offence he would be liable for automatic deportation under section 32 UK Borders Act 2007 as he is not a British citizen and would have been sentenced to a minimum period of 12 month's imprisonment. However, as his deportation is a potential breach of Article 8, this falls under an exception to automatic deportation.

Furthermore, as there are human rights considerations here, immigration rules 397-399 also apply. Although the rules seen as a 'complete code' for dealing with the Article 8 issues as proportionality, in accordance with MF (Nigeria) (2013), Article 8 considerations can be dealt with under the 'exceptional circumstances' provision in rule 398, now replaced by the phrase 'very compelling circumstances'.

Given the fact that the term of imprisonment is two years, rule 399 can be considered. Rule 399 applies to deportations of foreign criminals where they have been sentenced to less than 4 years imprisonment (see rule 398) and they have a genuine and subsisting parental relationship with a child under the age of 18 who is a British citizen or has lived in the UK for 7 years continuously, if it would be unduly harsh for the child to remain in the UK without the person who is to be deported or to live in the country to which he is being deported. As Lillie's mother, Rachel, will remain in the UK it clearly would be unduly harsh to expect Lillie to go to Nigeria. Arguably it would also be unduly harsh for Lillie to remain without her father, who is being deported.

Section 117C NIAA considers the relevant public interest considerations in these cases. Deportation is usually in the public interest (s117 (1)) and the more serious the offence committed, the greater the public interest in deportation (s117 (2)). However an exception applies where the sentence of imprisonment is less than 4 years, as in this case and the relevant exception is similar to rule 399. As Vincent has a genuine and subsisting relationship with a 'qualifying child' (in the UK for 7 years or a British citizen), if the effect of his deportation on the child would be unduly harsh, it would be disproportionate to deport him. It is submitted that in this case it would be unduly harsh as it would sever Vincent's relationship with Charlotte as she and her mother would remain in the UK.

The more serious the offence, the greater likelihood of deportation and when it comes to serious foreign criminals there is a markedly higher weight in the balancing act in favour of deportation in the public interest, in accordance with SS (Nigeria) (2013). However, Hector's two year sentence indicates a less serious offence than in SS Nigeria (2013) so this case could be distinguished on the facts.

The Secretary of State does have the power to certify this case under section 94B NIAA 2002 if no serious irreversible harm would be caused to the person or their family if they were removed from the UK and remained outside the UK until the outcome of the appeal – s94B (3).

Question 2

Obinna should be advised that his father, Gregory, should be making an application for entry clearance as an adult dependent parent of a person present and settled in the UK under Appendix FM of the Immigration Rules.

Applications under this category are very difficult to succeed without a cogent argument supported by evidence. The relationship requirements must be met under E-ECDR.2.1. The applicant must be either the:

a) Parent aged at least 18 years of the sponsor;
b) Grandparent of the sponsor; or
c) Brother, sister, son, daughter (aged at least 18 years) of the sponsor.

The sponsor is the person who is present and settled in the UK. The sponsor's parents or grandparents must not be in a subsisting relationship, unless the

other partner is also the parent or grandparent of the sponsor. A parent can also include a step parent.

The sponsor must be over 18 years of age, British or present and settled in the UK, or a Refugee with leave to remain as a refugee or with humanitarian protection.

There is no longer a requirement that the applicant lives alone. The threshold requirement under E-ECDR2.2 is that the applicant requires long-term personal care due to age, illness or disability which is unavailable and that there is no person in their home country who can reasonably provide such care or that such care is unaffordable.

The evidence required to support an application must be independent. The type of evidence required includes:

a) A birth certificate, adoption certificate, or other documentation which will show the family relationship between the applicant and the sponsor.
b) Evidence from medical, health professional or social workers that as a result of the applicant's age, illness or disability, the applicant will require long–term independent care and support.
c) Evidence of lack of financial means to provide the required level of care in the country where the applicant resides.
d) Where there has been pre-existing care arrangement, evidence to show why the previous care arrangement is no longer viable and why.
e) Any records of a previously paid care arrangement and why it cannot continue.
f) An undertaking given by the sponsor to be responsible for the maintenance and accommodation of the applicant, usually for 5 years.
g) A care plan.
h) Bank statements from the sponsor covering a period of at least 6 months, to show availability of funds to care for the applicant.
i) Evidence of adequate accommodation to support the applicant in the UK.
j) Details of income, an employment letter, payslips savings covering a period of at least 6 months.
k) Evidence to show that the applicant will not rely on public funds.

Applications of this type are usually made on form VAF4A. Applications under this category must be made from outside of the UK.

An applicant who successfully applies under this category will be granted Indefinite Leave to Remain (ILR). However, the undertaking given by the sponsor that the applicant will not have recourse to public funds remains for 5 years from the date of entry.

Applicants who rely on sponsors who themselves have limited leave to remain as a Refugee or under the Humanitarian Protection route, will be given leave in line with their sponsor. They will only be eligible to apply for ILR at the same time as their sponsor. The undertaking signed by the sponsor will only have to be signed at the applicant's ILR stage for 5 years.

Question 3

Since 9 July 2012, a financial requirement was introduced for those applying for entry clearance, leave to remain or Indefinite Leave to Remain (ILR) in the UK as a non-EEA national partner or dependent child of a person who is:

- British, or
- Present and settled in the UK, or
- In the UK with refugee leave or humanitarian protection.

Under Appendix FM any application for entry clearance as a partner will need to meet the gross annual income set out in E-ECP 3.1, which requires that the applicant's partner must earn an income of £18,600 with no dependent children. There is an additional income where there are dependent children. For the first dependent child, there is an additional income of £3,800 and a further additional income for each additional child of £2,400, alone or in combination with specified savings.

Under Appendix FM, a child is a person who is a dependent of the applicant and under the age of 18, or who was under the age of 18 when they were first granted entry and is applying for entry clearance as a dependent of the applicant or has limited leave to enter or remain in the UK.

The financial requirement does not apply to a child who is:

- A British citizen including an adopted child who acquires British citizenship;
- settled in the UK or qualifies for indefinite leave to remain; or
- an EEA national with a right to be admitted under EEA Regulations 2006.

The fact that Tom has a 5 year-old son, David, from a previous relationship is irrelevant to Kelly's application because he is a British citizen and not a dependent of Kelly.

Employment can be full-time or part-time, permanent, fixed-term or with an agency.

In order for Kelly to join Tom in the UK, he would need to earn a gross annual income of at least £18,600.

Tom currently works at Marks & John's in Hull with a gross annual income of about £11,615.64. This figure does not meet the financial requirement under Appendix FM. However, Tom can combine his gross annual income with other acceptable income source such as overtime payments, commission-based payments and bonuses to meet the financial requirement. These extra income sources must have been received in the 6 or 12 months period prior to the date of Kelly's application.

Where income is from overtime payments, commission-based payments and bonuses vary from month to month, all income will be calculated based on the approach to income from a non-salaried employment, which is based on an annualised 6-month average. This is then added to the level of the gross annual salary.

Tom's annualised average for the bonuses and overtime payments which he has received, is calculated as follows:

In the last 6 months Tom has received bonuses for working on Sundays as follows: £111.15, £111.15, £55.58, £55.58, £111.15 and £55.58. This gives a total of **£504.19**.

Also in the last 6 months Tom has received bonuses for working unsociable hours as follows: £74.00, £75.48, £35.52, £290.08, £66.60 and £74.00. This is gives a total of **£615.68**.

The combined total of Tom's bonus and overtime income is **£1115.87**. The annualised figure of Tom's combined bonus and overtime payment is: **£2231.74** (1115.87 divided by 6 multiplied by 12).

The amount £2231.74 is to be added to Tom's income of **£11,615.64** to give a total gross annual income of **£13,847.38**.

At the entry clearance/initial leave to remain stage and the further leave to remain stage, the amount to be combined is savings above £16,000 divided by 2.5 years. The figure 2.5 reflects the initial leave period of 2.5 years being granted.

Tom's total gross annual income falls below the threshold of £18,600. The level of savings Tom would require to meet the financial requirement is determined as follows: ((Savings – £16,000) / 2.5) + **£13,847.38** = £18,600

Savings / 2.5 – (£16,000 / 2.5) + **£13,847.38 =** £18,600

Savings / 2.5 - £6,400 + **£13,847.38 =** £18,600

Savings / 2.5 = £18,600 - **£13,847.38** + £6,400

Savings / 2.5 = £11,152.62

Savings = £11,152.62 X 2.5

Savings = **£27,881.55**

Question 4

The category Tier 1 (Entrepreneur) is designed to allow a migrant to come to or remain in the UK to invest in or set up a business with a substantial investment of his or her own money. This category is set out at paragraph 245D of the Immigration Rules.

Paragraph 245D (b) defines a business as an enterprise such as:

1. a sole trader,
2. a partnership, or
3. a company registered in the UK.

The general requirements that Paul will need to meet as he would be applying for the first time are divided into 4 parts subject to not being refused under the general grounds for refusal.

Part (a) - He must score 75 points for investment and business activity referred to as attributes.

Part (b) - He must score 10 points for English language. He must show competence in the English language by passing a specified test in English equivalent to level B1 of the CEFR except where he can show that he is a national of a majority English speaking country or has taken a degree taught in English.

Part (c) - He must score 10 points for maintenance. He must show access to at least £3,310 of personal savings which he has held for at least 3 months prior to the date of application.

Part (d) - He must show genuine intention to set up, take over, become a director of a business in the UK and he is able to do so within 6 months of grant of the visa. He must show genuine intention to invest the money required under the investment and business activity. He must also show that the money is genuinely available to him to conduct the relevant business activity in the UK. Finally he must show he does not intent to take up any other employment in the UK other than under the terms of Tier 1 (Entrepreneur) visa.

Where the Home Office has raised genuineness concerns, the deadline for responding is 10 working days for applications made from 24 November 2016. Otherwise a 28 day deadline applies.

No employment is required other than working for the business established.

Part (a) - Attributes

He must have access to at least £200,000 to be awarded the initial 25 points towards investment and business activity. Paul only has £50,000, which he inherited from his grandfather's estate. Therefore, Paul will need to rely on obtaining financial support of at least £50,000 from any one for the following to be awarded the initial 25 point:

- one or more registered venture capital firms regulated by the Financial Conduct Authority (FCA)
- one or more UK Entrepreneurial seed funding competitions which is listed as endorsed on the Department for International Trade pages of the GOV.UK website
- one or more UK Government Departments, or Devolved Government Departments in Scotland, Wales or Northern Ireland, and made available by the Department(s) for the specific purpose of establishing or expanding a UK business UK.

Paul will be awarded a further 25 points if he can provide evidence that the money he receives to support his business idea is held in one or more regulated financial institutions.

Paul will also be awarded a further 25 points if he can provide evidence that the money he receives is disposable in the UK.

Paul completed a degree in Computer Science from the University of Cranbrook in Sheffield UK. There is nothing in the facts to suggest that he has, or was last granted leave as a Tier 1 (Post-Study Work) visa. Paul also does not live in the UK and therefore his application is not for leave to remain in the UK. No points can be claimed on this basis.

Paul will be expected to support his application with the following documents:

- A full CV to support, relevant qualifications, training, previous and current experience in the area of the business he intends to set up, take over or become a director of.
- A viable business plan and any feasibility studies or market research carried out to support the sustainability of the business.

- Evidence of meeting relevant legal requirements such as insurance, company registration, registration with HMRC if setting up as a sole trader and accreditation where required.
- Evidence of business and financial information.
- Evidence of business trading premises and previous businesses owned by the applicant.
- References and recommendation from established business owners in the relevant industry.

To increase his chances of success Paul may wish to initially apply for a standard visit visa under Appendix V for prospective entrepreneurs who need to come to the UK to secure funding from a relevant funding body in the UK and perhaps to carry out feasibility and market research.

If an application is successful Paul will be granted leave for 3 years and 4 months with a prohibition on recourse to public funds. He may be required to register with the Police under paragraph 326.