House of Lords Motion:

That this House regrets Her Majesty's Government have laid before the House Statements of Changes in Immigration Rules (HC 59, laid on 28 June; and HC 96, laid on 15 July) in a way that limits direct Parliamentary scrutiny of the level of the immigration cap; and further regrets that the Government's cap policy in relation to highly skilled migrants will negatively impact the UK economy.

25 October 2010

ILPA BRIEFING

Introduction

The Immigration Law Practitioners' Association (ILPA) is a professional association with some 900 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum through training, disseminating information, research and analysis. ILPA is represented on numerous government and other stakeholder and advisory groups. ILPA members include those advising businesses and those, particularly international law firms, who employ skilled and highly skilled migrant workers. ILPA has provided evidence to the Merits of Statutory Instruments Committee on Statement of Changes in Immigration Rules HC 59 (see the Committee's Fourth Report of Session 2010-11, HL Paper 17, July 2010, p19 *et seq*). ILPA has also made responses to the consultations of the Migration Advisory Committee and the UK Border Agency concerning the Government's policy to introduce an economic migration cap in April 2011.[1]

Statement of Changes in Immigration Rules 59 introduces interim measures affecting Tier 1 (highly skilled migrants) of the Points-Based System. The Explanatory Memorandum to HC 59 explains: "*These changes place an interim limit on the number of applications for the Tier 1 (General) category which may be granted during a specific period of time. The limit will only apply to applications for entry clearance submitted from outside the United Kingdom… The limit to be applied… will be published separately by the UK Border Agency…*" (paragraph 7.5); and "*The UK Border Agency… concluded that there should be an increase in the level of points required which, combined with an overall limit on the number of applications to be granted, will ensure that only the brightest and most able migrants are granted entry to the United Kingdom… These changes increase the threshold for qualifications, previous earnings, UK experience and age… thereby ensuring that the application process leads to the most meritorious applications being granted…*" (paragraph 7.14)

Statement of Changes in Immigration Rules 96 introduces interim measures affecting Tier 2 (skilled workers) of the Points-Based System. The Explanatory Memorandum to HC 96 explains: "*These changes place an interim limit on the number of Certificates of Sponsorship that licensed sponsors may assign under Tier 2… The*

[1] Each of these submissions is available in the 'Submissions' section of our website at www.ilpa.org.uk

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size of the limit will be published separately by the UK Border Agency…" (paragraph 7.5)

Both Explanatory Memoranda include the following statement:

> "*The Government has commenced a consultation on how, in the longer term, these limits should be determined and implemented. It is, in the meantime, applying limits on Tier 1 and Tier 2 migrants as an interim measure while the outcome of that consultation is considered. This approach is consistent with the Government view that while the United Kingdom can benefit from migration, uncontrolled and unlimited migration places unacceptable pressure on public services, school places, and the provision of housing, all of which causes problems for certain local communities. The Government is not only concerned to act to limit migration at an early opportunity but is also concerned that the expectation that full limits on migration will be introduced in due course could prompt a surge in applications. The consequences of such a surge would be an immediate increase in net migration. That would be contrary to the Government's policy of reducing net migration and may lead to a more severe correction being required in terms of a future limit than would otherwise be the case. Furthermore it is in the interests of the economic well-being of the UK to act to prevent a spike in the number of foreign nationals entering the labour market having regard to the current financial situation and just as the Government introduces a policy aimed at reducing dependence on overseas labour.*" (paragraph 7.4)

ILPA welcomes the opportunity for further parliamentary scrutiny of these provisions and the underlying policy intention, particularly in view of the following considerations (addressed more fully under discrete headings below):

- HC 59 and HC 96 give power to the Secretary of State to set limits outside of the Immigration Rules and thereby without proper Parliamentary scrutiny
- The policy aims stated to lie behind these measures are in conflict
- The effect of these measures will be damaging to the UK, in economic and in wider terms
- The measures introduce further unlawful discrimination in the Points-Based System

Improper limiting of Parliamentary scrutiny:

HC 59 and HC 96 raise this concern because each provides for the introduction of a cap (on Tier 1 and Tier 2 applications respectively), but leaves it to the executive to set and vary that cap as and when it sees fit. While the introduction of a cap in principle was laid before Parliament, with the opportunity for a negative resolution, the level of the cap at any particular time will not be.

This raises legal and constitutional questions, in addition to more mundane questions of politics and practice. The Court of Appeal has recently considered the legal and constitutional status of the Immigration Rules[2], ruling that:

> "*…there was a potent constitutional reason, whether it was overtly acknowledged or not, for Parliament's insisting in 1969 and again in 1971 that the Home Secretary's rules of practice must be open to a negative resolution: the rules were being elevated to a status akin to that of law and made the source of justiciable rights - something which, in the domestic sphere (as distinct from the administration of its overseas possessions), the Crown as*

[2] *Secretary of State for the Home Department v Pankina & Ors* [2010] EWCA Civ 719

> *executive has no power to do. It can make law only with the authority of Parliament. It follows that only that which enjoys or secures Parliament's authority, in the present instance by the absence of a negative resolution within 40 days after laying, is entitled to the quasi-legal status of immigration rules.*"

In that case, the executive had failed to respect this constitutional settlement by imposing additional requirements for the determination of individual's applications outside of the Immigration Rules, and therefore beyond Parliament's scrutiny or approval, in guidance set by the UK Border Agency. This was ruled to be unlawful. The caps imposed by HC 59 and HC 96 effect a similar illegality in leaving to the executive the setting of what may be the critical and arbitrary determinate of the individual's application – being the level at which the cap is set. Moreover, these suggest an intention on the part of the executive to extend this bypassing of Parliament scrutiny to the setting of the cap at and following April 2011 when the Government intends to introduce its ultimate policy of an economic migration cap.

Conflicting policy aims

The stated lead policy aims, reflected in the Explanatory Memoranda to HC 59 and HC 96, are to "*reduce net migration to tens rather than hundreds of thousands*"[3] and to "*continue to attract to the UK the brightest and the best to ensure economic growth*"[4]. These two aims are not compatible. The one is an arbitrary and blanket target, which bears no necessary relation to the UK's needs or obligations. The business community is concerned that the Government's proposals will adversely affect the UK's prospects of attracting new (or expanding existing) investment into the UK, diminish the country's competitive edge within global markets, result in greater burdens on employers and affect the delivery of key public services. The Migration Advisory Committee has observed:

> "*We believe there is a clear economic case for selective highly skilled immigration into the UK. Any arbitrary restrictions could prove detrimental to ensuring that the UK is best placed to emerge successfully from recession.*"[5]

The Immigration Minister, Damian Green MP, has said much the same thing:

> "*It is hugely important for the future prosperity of the country that we continue to attract, as I said, not just our fair share, but more than our fair share, of highly skilled migrants.*"[6]

The Business Secretary, Vince Cable MP, has himself described the cap as "*very damaging*". *The Guardian* reported[7] his comments:

> "*The brutal fact is that the way the system is currently being applied is very damaging.*"

> "*We have now lots of case studies of companies which are either not investing or relocating or in many cases just not able to function effectively*

[3] *Immigration to be reduced*, Home Office press release 24 June 2010 citing Damian Green, Minister for Immigration

[4] see e.g. *Limits on Non-EU Economic Migration – A Consultation*, UK Border Agency, June 2010 (the UK Border Agency consultation paper on the cap)

[5] Migration Advisory Committee – Analysis of the Points-Based System Tier 1, December 2009, p7

[6] *Hansard*, HC Committee, Third Sitting 11 June 2009 **COLUMN**

[7] *The Guardian – Vince Cable: Migrant cap is hurting the economy*, 7 September 2010

because they cannot get key staff – management, specialist engineers and so on – from outside the European Union."

These views reflect concerns which the Immigration Minster has previously expressed:

"*If the highly skilled people around the world believe that this is not a country that welcomes them, they will stop coming here.*"[8]

Critical to whether the UK is regarded as welcoming is the degree of certainty which the immigration system offers. This affects both the decision whether to apply to come to the UK and the behaviour of migrants and employers after arrival, including whether the migrant chooses to invest here – financially, but also socially and culturally; and the commitments businesses can make, affecting not merely the migrant, on the basis of expectations as to the availability (and continued availability) of a particular employee. In recent years, uncertainty has become an increasing feature of the UK's immigration system. An early statement from the Government that a cap will not be applied in respect of extension applications by migrants who have already lawfully entered the UK would help reverse this, as would an early statement that the Government will not implement, but rather repeal, the provisions on 'earned citizenship' in the Borders, Citizenship and Immigration Act 2009 introduced by the previous Government. This would be consistent with the views of the Deputy Prime Minister and the Immigration Minister when commenting on the previous Government's decision to change the Rules applying to highly skilled migrants applying to extend their stay in the UK, and concerns expressed by the Baroness Hanham and the Immigration Minister during the passage of the 2009 Bill:

"*The measure seems to fly in the face of the basic fairness, transparency and predictability that anybody who is resident and working in this country expects and deserves.*"[9]

"*…I do not agree with the Government's plan to change retrospectively the rules on settlement. Whatever the merits of changing the qualifying period from four years to five, it is unfair and wrong to apply the new rules to people who have been living and working in this country for some time, many of whom had planned their lives around the date on which they expected to gain full settlement rights.*"[10]

"*Many migrants currently will be progressing their way along* [the path to citizenship] *and will be concerned as to whether they will end up in a game of snakes and ladders, by which they may fall down and have to start the process again.*"[11]

"[The Bill] *seeks to impose stricter rules on absences by requiring that a person must not be absent from the UK for longer than 90 days in each qualifying year. In practice, that might mean that a person who consistently remained in the UK for the first two years of their qualifying period but was absent for more than 90 days in their third year, perhaps as a result of a*

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[8] *Hansard*, HC Committee, Third Sitting 11 June 2009 **COLUMN**

[9] *Hansard*, HC Second Standing Committee on Delegated Legislation, 20 June 2006 **COLUMN** *per* Nick Clegg MP

[10] *ibid* **COLUMN** *per* Damian Green MP

[11] *Hansard*, HL 11 February 2009 : Column 1135 *per* the Baroness Hanham (then Shadow Home Affairs Minister)

genuine family emergency or work commitments, would thereby jeopardise their application for citizenship."[12]

Nonetheless, the proposals so far advanced by the UK Border Agency for introducing a cap for applications, even if only applied to leave to enter applications, give rise to profound concerns that each of the methods under consideration would generate significant additional uncertainty for migrants and employers.

Underlying the policy aim of reducing net migration, as reflected in the Explanatory Memoranda is a concern about the impact upon "*public services, school places, and the provision of housing*". However, these concerns are not thought through. The highly skilled and skilled migrants, under Tier 1 and Tier 2, are excluded from having recourse to "*public funds*" as defined in the Immigration Rules, as are their dependants. This includes exclusion from public housing. While their children are entitled to attend state school and to use the National Health Service (NHS), these are not 'free gifts' since those migrating for periods of two years or more are likely to be paying taxes in the UK (those migrating for shorter periods may also do so). Moreover, it is ILPA's experience that many of these migrants have private healthcare for themselves and their dependants and send their children to private schools. We are not aware of any evidence (or the UK Border Agency undertaking any research) to understand the degree to which Tier 1 and Tier 2 migrants, and their dependants rely upon or support (many of these migrants work in public services, including the NHS) public services whether directly or by taxation or by supporting private provision that may relieve some of wider the burden upon public services.

Damaging effects

As indicated in the previous subsection, there is a real danger that the Government's cap policy may have damaging effects upon the UK economy. It is significant that the interim caps provide no sensitivity to the needs of discrete sectors and individual businesses.

The Government's has not canvassed, nor introduced in the interim cap, a sector by sector approach to minimise the disproportionate impact in some sectors. This is all the more surprising given the Government's admission that some sectors, including financial services and health, are likely to be more affected by the cap[13]. This is likely to create a problem in that employers could find themselves in a competitive situation whereby the need or value of one non-EU migrant will be assessed against another in an entirely different sector.

The interim cap on Tier 2 has been implemented in an arbitrary manner, being based on each sponsor's usage of Certificates of Sponsorship in a seven month period (19 July 2009 to 31 March 2010). For example hundreds of sponsors (who had put in place systems to meet all the duties of a sponsor, applied for and been granted an A-rated sponsor licence, at significant cost) were awarded zero Certificates of Sponsorship or had their existing allocation withdrawn, with immediate effect. Consequently employers who had already recruited skilled migrant workers (through recruitment processes that may have taken many months and substantial cost to complete) suddenly found they could not proceed with key engagements.

The proposed approach of attempting to 'cream-off' the highest points-scoring applicants under Tier 1 emphasises the importance of previous earnings. Yet, this

[12] *Hansard*, HC Public Bill Committee, Fourth Sitting, 11 June 2009 : Column 104

[13] *Consultation on the Points Based System Immigration Limits Impact Assessment*, 15 June 2010

explicitly disadvantages certain sectors since, for example, a reasonably low ranking investment banker, with limited experience or qualifications, may still earn substantial bonuses (often paid offshore, limiting any economic benefit to the UK in terms of tax revenue) whereas a world-leading academic, distinguished surgeon or award-winning architect (to give only a few examples) may receive by comparison modest remuneration (while having the capacity to contribute to the UK in terms of broader public service, resident worker training and long-term economic development and international reputation). Particular regard needs to be had to small business. A small business, which misses out by reason of a cap on the one migrant worker it needs, is less likely to have the flexibility to address this – whether by relocating business overseas or relying upon skills and expertise that may be available within a larger workforce.

Unlawful discrimination

The introduction of caps, and the raising of the points threshold for Tier 1, increases the prospect of unlawful discrimination already inherent in the Points-Based System. There is clear potential for discrimination on grounds of age, gender and race.

If dependants are to be included within the cap to be introduced next year, this will discriminate on grounds of age and gender. Young people are less likely to have formed families than older people. Women are more likely to have caring responsibilities than men.

The emphasis on earnings (rather than experience, and not merely UK-based experience) also discriminates on grounds of gender. Women continue to earn significantly less pay than men.

If, as has been proposed, additional weighting is to be given in respect of higher levels of English language ability (regardless of the necessity of such ability for any particular job in question), this will discriminate on grounds of race against nationals of countries, or those with ethnic backgrounds, where English is not the first or a primary language.

The method of operating a cap (e.g. the 'first come, first served' suggestion) may also discriminate against nationals from countries where the processing time of applications is significantly slower than others.

Concluding remarks

The Government's current policy aim of reducing net migration by the imposition of a cap for migrant workers, from beyond the EU, risks substantial long-term damage to the UK economy. It, and indeed other policies with the same aim, may risk reciprocal restrictions being imposed by other countries against British citizens. If applied to extension applications, the uncertainty created will deter the most skilled (since they will have the greatest options for migration) while risking that large numbers of lawful and law-abiding migrants, who have, with their families, invested (economically, socially and culturally) in the UK, become overstayers and contribute to the already large problem of undocumented migrants excluded from regularisation options in the UK. Such uncertainty, moreover, bears no conscionable relation to the ever increasing level of immigration fees. These are all matters that are likely to increase litigation in this area, and the attendant costs upon the courts, UK Border Agency and Legal Aid system, at the very time where these are under considerable pressure to become more efficient and reduce expenditure.

It should be recalled that skilled worker migration is already regulated by means of the shortage occupation list, or the residential labour market test which requires employers to first seek to fill a job with someone from the resident labour market.

Finally, we give warning that the Government's appreciation of the immigration systems in other countries, as revealed by the recent consultation on the introduction of an economic migration cap in April 2011, is seriously flawed. Further information is given of competitor countries, of which ILPA members have experience, in the appendix.

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