

ILPA BRIEFING FOR OPPOSITION DAY DEBATE ON IMMIGRATION TUESDAY 21 OCTOBER 2008:

WILL SPONSOR LICENSING UNDER THE POINTS-BASED SYSTEM HAPPEN – OR WILL PARLIAMENT SAY NO?

ILPA is a professional association with some 1000 members (individuals and organisations), 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 aims to promote and improve the giving of advice on immigration and asylum, through teaching, provision of high quality resources and information. ILPA is represented on numerous government and appellate authority stakeholder and advisory groups. ILPA representatives and members have met regularly with the UK Border Agency throughout the development of the sponsor-licensing scheme and many detailed briefings about the scheme can be found on ILPA's website www.ilpa.org.uk, including ILPA's July 2008 written evidence to the Home Affairs' Committee enquiry into the points-based.

To date, the whole question of the licensing of sponsors under the Points-Based System has been a matter developed through UK Border Agency policy and guidance. It has all been below the waterline of formal recognition in law. The first time that it will emerge above that waterline is when the Statement of Changes in the Immigration Rules are laid before parliament, replacing the current rules for work permit holders with requirements that workers coming to the UK hold a certificate of sponsorship from a licensed sponsor. The new rules are expected to be laid before parliament in November and are subject to the negative resolution procedure. Were parliament to pray against those rules and reject them, the requirement to have a licensed sponsor would not become law, thus stopping, or, if the government presents new rules that are accepted by parliament, slowing down, the sponsor licensing scheme and the introduction of Tiers 2 (skilled workers) Tier 5 (youth mobility and temporary workers) and potentially Tier 4 (students) of the Points-Based System.

ILPA's concerns about the sponsor-licensing scheme are many. In brief

- Only 745 employers¹ listed on the UK Border Agency Register of sponsors² which is open for registration for Tier 2 (employers) Tier 4 (students) and Tier 5 (Temporary Workers and Youth mobility). The number of employers on the list is tiny compared to the many thousands of employers who currently employ people under work permits. Employers are not keen to take on the role of unpaid immigration officers. In addition the 130 pages of guidance³ and the 35 page, 58 question application form are a further disincentive. The bureaucracy with which

¹ As of 16 October 2008

² www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/pointsbasedsystem/pbsregisterofsponsors

³ www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/pbsguidance/sponsorapplicationsguidance.pdf?view=Binary

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an employer has to grapple, for the convenience of the UK Border Agency, is enormous.

- In the rush to get the system up and running, UK Border Agency staff have stopped carrying out audits on employers before registering them as sponsors. Given that sponsors will be able to issue Certificates of Sponsorship that will stand in the place of the current work permits, the potential for fraud is large. Some years ago the Home Office piloted a scheme whereby select employers could issue their own work permits. It was closed down very soon because of concerns about fraud.
- There is no indication that the current immense bureaucracy will target those employers who do not play by the rules. The most extreme examples of such employers are those involved in human trafficking and the exploitation of migrant workers, including the use of bonded labour, thus undercutting employers who respect their obligations under health and safety law, company law and employment law, whether they employ migrant workers or those from the resident labour market⁴. The UK Points-Based System is often described as 'Australian-Style'. If one looks at Australia's Employer Nomination Scheme, which concerns the sponsorship of those coming to reside permanently in Australia, to gain approval to sponsor a skilled worker from overseas, the employer must demonstrate (among other things) that it is an "employer of good standing", which includes record of compliance with both immigration and workplace relations. Under the Australian Regional Sponsored Migration Scheme (which allows employers in regional areas to sponsor skilled workers where no labour is available locally), the employer must demonstrate (among other things) a record of compliance with workplace relations laws. By contrast, the UK Border Agency scheme is more of a 'speeding fines' approach that raises revenue from employers who take all these obligations seriously but sometimes make an innocent mistake in understanding their obligations or in collating or retaining the evidence of compliance.
- The detail of the scheme has been drawn up in haste. Many elements remain unclear. Employers, including those who have registered as sponsors, lack clarity about the full extent of their obligations under the scheme and about the mechanics of operating it in practice.
- Many problems remain unresolved, such as how the new scheme will handle Intra-Company Transfers, or the bringing of a contractors staff to do very specific work (e.g. on IT systems or high-technology equipment) in the UK, as well as how training and work experience schemes and internships will be handled. We have systems that work under the current schemes but there is no indication that there is yet anything to adequately replace them under the new schemes. Teething problems are one thing, gaping holes in the framework are another, and the latter is the current situation.
- Experience of the Points-Based Scheme to date (i.e. of Highly Skilled migrants under Tier 1) reveals an extremely bureaucratic scheme with very prescriptive methods of evidencing that one meets the requirements, so that people can be tripped up because, for example, they have online bank accounts and only print-outs of bank statements. Maintenance requirements have put barriers in the way of migrants,

⁴ See *Hard Work Hidden Lives* The Report of the TUC Commission on Vulnerable Commission, TUC 2008. On human trafficking see the Joint Committee on Human Rights Twenty-Sixth report of session 2005-1006, *Human Trafficking*, HL 245/HC 1127, 9 October 2006 and the Committee's *Human Trafficking; Update* HL 179/HC 1056, 21st report of session 2006-2007, 18 October 2007

especially those from non-OECD countries, because it must be demonstrated that a fixed sum is held in the migrant's bank account for three months prior to application, without ever dropping a penny below that sum. Where a country's currency is weak in comparison to the pound, the sum may be huge and may be a barrier to a migrant entering, whatever skills that person has and whatever salary the person would command in the UK. A family of four from Ghana coming to the UK under Tier I would be required to have the equivalent of some £86,000 in their bank account for the three months prior to the application.

Possible points to raise in the debate:

- **How many employers currently employ people who hold work permits?** (this figure, to be contrasted with the number of employers registered as sponsors, is not available at the moment, perhaps because comparisons are odious).
- **Will the government slow down the implementation of the Sponsor-licensing scheme?** Employers should not be asked to sign up to open-ended obligations without knowing what these are. There are too many holes in the current scheme, it is being cobbled together and the gaps will disadvantage migrant workers and those employing them.
- **Will the government review its proposed sponsor-licensing scheme and focus its regulatory efforts on those employers who breach health and safety and labour law and exploit their workforce, including their migrant workforce?**
- **Will the government review the maintenance requirement to ensure that it does not prevent the recruitment of people from non-OECD countries and thus discriminate against them?** Those who enter under Tier 2 will be coming to a job with a known salary. Their leave is subject to a 'no recourse to public funds' condition. The maintenance requirement adds nothing to these safeguards, but skews the group from whom UK employers toward particular nationalities based on the economy of the home country.
- **Will the government accept that the present level of bureaucracy associated with the scheme is unworkable?**

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