



IMMIGRATION, ASYLUM AND NATIONALITY BILL – BILL 13
HOUSE OF COMMONS STANDING COMMITTEE
COMMITTEE SESSION 2, 19 OCTOBER 2005

**BRIEFING NOTE ON APPEALS AND MANAGED MIGRATION FOLLOWING
FIRST COMMITTEE SESSION**

ILPA is a professional association with some 1200 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 teaching, provision of high quality resources and information. ILPA is represented on numerous government and appellate authority stakeholder and advisory groups.

How relevant is managed migration and the five year strategy on immigration and asylum to the questions the Committee is asking on variation appeals (Clause 1)?

1. In responding to the first group of amendments to the proposed Clause 1 (amendments 13, 14, 77) on 18 October 2005, the Minister emphasised that these needed to be seen in the context of proposals for managed migration and the five year strategy for immigration and asylum. A brief note on the managed migration proposals appears below. However, we suggest that managed migration proposals are of limited relevance to the key concerns being voiced about Clause 1.
2. The parts of the managed migration proposals highlighted by the Minister were those intended to determine who can come to the UK and to establish a “points system” for deciding applications.
3. The people who will be affected by Clause 1 will be those who got entry clearance and came to the UK with leave, under whatever points or other system is then in force, who have applied for an extension of leave and been refused. The Managed Migration system is not going to lead to a system in which no one is ever refused an extension of leave. The clause is predicated upon there being such refusals.
4. The Committee is debating what should happen to those people. Should they be allowed to appeal, or not? Should that appeal be in, or outside the UK? Should their leave continue on the same terms (rights to work, study etc) while they appeal or should they be made illegal overstayers? The Minister has yet to explain why it is necessary to make perfectly legal migrants, whose only misdemeanour is to have applied for an extension of leave, illegal overstayers nor why it will not be a deterrent to professionals and others to know that by applying to extend their leave they risk blotting their immigration history copybook for the UK and for other destinations to which they may wish to travel in future.
5. There is indeed an argument to say that the better the system of deciding who should come to the UK in the first place, the more reason to think that those people’s appeals against refusal to extend the leave we chose to grant them may have merit. And new, untried, systems require more scrutiny not less. There may be applicants under the managed migration scheme whose applications for variation fail not because they do not satisfy a rule

but because sufficient numbers of better-qualified applicants have applied already. Do those people deserve to be criminalised as is the effect of **Clauses 1 and 9**?

6. We remind the Committee that there are already ample powers to deal with applications with no prospect of success. A variation appeal may not be brought against an immigration decision taken on the ground that the person does not satisfy a mandatory requirement of the immigration rules¹ (e.g. as to age, nationality, citizenship, possession of the appropriate documentation) or is making an impossible application (e.g. to stay in the for a period greater than permitted by the immigration rules or for a purpose not permitted therein²).

7. No points system in the world will obviate the need for making judgements when granting an application, for weighing the evidence and deciding whether the criteria have been met to the required standard. Moreover, whatever improvements are made there is always scope for human or other error: documents being delayed or lost in the post, or becoming separated from the file, which can lead to a wrongful refusal. This can be seen by examining the current consultation documents out on the proposals.

8. The key documents are *Controlling our borders: making migration work for Britain: Five year strategy for asylum and immigration* Home Office Cmnd 6472; the Consultation document *Selective Admission: making migration work for Britain*, and the accompanying questionnaire for response³. The consultation closes on 7 November 2005. The Five Year Strategy makes clear that the government wishes to encourage migration 'from those who work hard and add to our prosperity'. As a perusal of the documents will demonstrate, and as the Minister emphasised in his speech, the scheme is still very much at the design stage. There are a considerable number of gaps. The Annexe to this briefing provides basic information from scheme in the form of extracts from official Immigration and Nationality Department documents as well as information from the Australian Joint Standing Committee on Migration *Review of skilled migration*⁴.

9. In the Annexe below we have reproduced extracts from the *migration* part of the Immigration and Nationality Directorate Press release on the five-year strategy⁵ and from *Controlling our borders* on the points system.

10. The consultation questionnaire asks questions such as

“9. How would you rank the proposed tests for the system in order of priority? Please number them below from 1 to 8. (*The tests to be ranked are:* Operability; Robustness; Objectivity; Flexibility; Cost Effectiveness; Transparency; Usability; Compatibility)

¹ Nationality, Immigration and Asylum Act 2002, s. 82(4)

² Nationality, Immigration and Asylum Act 2002, s. 88

³ These can be found at:

http://www.workingintheuk.gov.uk/ind/en/home/laws_policy/consultation_documents/current_consultations.html which also contains a link to a one page chart of the points system.

⁴ 40th Parliament (February 2002 - August 2004) Joint Standing Committee on Migration, *Review of Skilled Migration* see <http://www.aph.gov.au/house/committee/mig/reports.htm>

⁵ *Controlling our borders: Making migration work for Britain. Charles Clarke sets out five year Strategy for Immigration and Asylum* IND Press Release, 07 February 2005

10. What can we do to make the system robust against abuse, whilst still benefiting from migrants working and studying in the UK?

11. Which of the following attributes do you think are the most important for Tiers 1 and 2? (*The attributes are* Age; English Language Proficiency; Job Offer; Previous Salary; Work Experience; Skills/Qualifications. *The options for ranking are* Least Important; Less Important; Neutral Importance; More Important; Most Important). Are there any others? Please give reasons for your choices.”

11. The example of question 9 demonstrates that early stage of design of the scheme. As to question 11, ranking will always be weighted rather than linear; and different attributes will be relevant for different types of applications; while understanding the significance of a salary may depend on considerable knowledge of the country from which the applicant comes and the sector. No points system will reduce migration decisions to a tick-box scheme.

12. ILPA’s advice to the Committee is: by all means study the 5 year plan. But do not be distracted from pressing the Minister on the specificity of loss of appeal rights in the Bill. What is at stake in **Clause 1** of the Bill is what should happen to people who have satisfied all the requirements in force at the time for entry to the UK in their particular category, complied with immigration control for the duration of their stage, applied for a variation (including an extension) and been refused. No more. No less.

ANNEXE – EXTRACTS FROM GOVERNMENT DOCUMENTS ON THE 5 YEAR STRATEGY AND FROM DOCUMENTS OF THE AUSTRALIAN PARLIAMENT

I. Press release

Immigration and Nationality Directorate Press Release 07 February 2005

Controlling our borders: Making migration work for Britain. Charles Clarke sets out five year Strategy for Immigration and Asylum
[Extract]

Migration

- **A new points system** for people applying to work or study in the UK. The simple scheme will consist of four new tiers: highly skilled, skilled, low skilled and student/specialist (such as football players) and will sweep away the complexity of the current system. Points will be adjusted to respond to changes in the labour market giving the system flexibility and control. An **independent labour market advisory group** will 'take the politics' out of identifying the skills gaps.
- **Financial Bonds** where necessary for specific categories where there has been evidence of abuse. This will be refundable only on return to country of origin.
- **Ending chain migration** by limiting family migration. There will be an end to the practice whereby those who have settled in the UK can bring in dependents who can then bring in further family members in their own right.
- **Ending appeals.** The Government has already reduced the number of times an asylum seeker can appeal against a decision, and will now extend this to migration routes by abolishing appeals for those seeking to enter the UK to work or study.
- There will be **no automatic right to stay** in the UK for lower skilled workers and students. They will have to leave when their visas expire. Only skilled workers who support themselves financially can apply to stay permanently after five years - an increase on the current four - and they will be **required to speak and write English.**
- **Employers' responsibilities** will ensure that those who benefit from migration will share the responsibility for making the system robust. Below the most highly skilled, each migrant will need a sponsor (normally their employer) who must work with the Government to ensure a migrant worker complies with the rules of their entry to the UK and returns home at the end of

their stay. As part of the continued drive against illegal working the Government will also introduce **£2,000 fixed penalty fines for employers** for each illegal worker.

II. Controlling our borders... Cmnd 6472

Controlling our borders: making migration work for Britain: Five year strategy for asylum and immigration Home Office CM 6472

[Extracts]

“Students

17. We will continue to encourage students to come here, while tightening our approval processes to ensure applications are genuine. Students need an offer on a course at a recognised educational institution; and evidence that they are capable of funding themselves throughout and completing the course. Our checks will be supported by the new register of educational establishments, by co-operation between the British Council and visa-issuing posts in certain countries to encourage higher quality applications, and by careful scrutiny at posts to check that supporting documents are not forged.

A new points system

18. We will bring all the current work schemes and students into a single points-based system, so that there will no longer be a range of routes with specific criteria for each. Points will be allocated according to qualifications, work experience, income, and other relevant factors. It will be easy for individuals, employers and the public to see what is needed to qualify. It will also be straightforward to adjust the points levels to respond to changes, for example in the labour market.

19. The scheme will have four tiers:...Tier 1 (Highly Skilled)...: Tier 2 (Skilled)...: Tier 3 (Low Skilled)...: Tier 4 (Students and Specialists)...

20. The scheme will introduce a number of **obligations** on the various parties who benefit: n Below Tier 1, each migrant will need a **sponsor**. This would normally be the employer or educational institution, but could, for example, be a representative of a faith community for Ministers of Religion, or the devolved administrations or local authorities, who may wish to sponsor migrant workers to address their particular needs. Sponsors will share the responsibility of ensuring that migrants comply with the requirements attached to their leave. They will be expected to including report if the migrant has left employment or is failing to attend studies. The detail of the obligations and expectations of sponsors will be worked up in consultation. Tier 3 schemes and some schemes under Tier 4... will only be available to nationals of countries with a satisfactory **returns** arrangement with the UK. Where there is evidence of previous abuse and where necessary, we will require migrants (or their sponsors) from higher risk countries or visa categories to deposit a financial **bond**, which would be forfeited if they did not leave at the end of their stay...
...

22. We will merge the current immigration and employer checks into a **single, pre-entry check**. This will be simpler and more robust against abuse than the current system...

III Extract from the Australian Joint Standing Committee on Migration *Review of skilled migration*⁶

On Monday 29 March 2004, the Joint Standing Committee on Migration of the Australian Parliament tabled its report on the review of skilled migration.

⁶ 40th Parliament (February 2002 - August 2004) Joint Standing Committee on Migration, *Review of Skilled Migration* see <http://www.aph.gov.au/house/committee/mig/reports.htm>

The following tables, from that report, were compiled from ILO and other information collected by the Committee

Table 1.2 Temporary skilled migration: selected countries 2000-2003⁷

COUNTRY	Workforce	Program	2000	2001	2002
Canada	15.1m	Temporary foreign workers	45,573	47,691	47,061
Ireland	1.7m	Work Permits:	18,000	36,000	40,000
Japan	64.1m	Skilled Status of Residence	248,152 ₉	254,543 ₉	272,797 ₁₀
UK	28.2m	Work Permits Entered	92,000	109,000	120,000
		Work Permits Issued	85,638	No data	No data
USA	135.1m	H1B applications: Initial total	164,814 299,046	201,543 342,035	109,576 215,190
		H1B approved: Initial total	136,787 257,640	201,079 331,206	103,584 197,537
		H1B admissions ¹¹	355,605	384,191	370,490
			Financial years		
			2000/1	2001/2	2002/3
Australia	9.1m	Skilled visa classes	45,669	43,303	48,779
Germany	3.7m	IT specialists	8,500	4,000	2,000
NZ	1.8m	Work visas & work permits	57,087	71,494	82,283

Table 1.3 Permanent skilled migration: selected countries: 2000-2003¹⁴

Country	Workforce	Program	2000	2001	2002
Canada	15.1m	Skilled Worker	118,307	137,112	123,357
USA	135.1m	Permanent Labor Certification	107,024	179,195	174,968
			Financial years		
			2000/1	2001/2	2002/3
Australia	9.1m	General Skilled Migration	44,730	53,520	66,050
NZ	1.8m	General Skills Category	23,264	31,340	26,662