ILPA response to National Audit Office study on the Points-Based System

Introduction

The Immigration Law Practitioners' Association (ILPA) is a professional association with some 900 members (individuals and organisations), the majority of whom are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous Government, including UK Border Agency and other 'stakeholder' and advisory groups.

The terms of reference of the National Audit Office study are that it will focus on the employment routes and aims to address three key areas:

- **whether the points-based system is designed and functioning well to meet the UK's needs for non-EU migrant workers;**

- **whether the processes and procedures are efficient and good value for money for all stakeholders (taxpayers, applicants and employers); and**

- **whether UKBA, through the points-based system, operates sufficient control over work-based immigration routes to protect resident workers and prevent abuse.**

The NAO has invited our views as an organisation representing or working with people wanting to work in the UK to get an understanding of the system from the applicants' perspective and would value your opinion on the following areas (addressed in turn below):

The design of the System:

- **Is there generally a good match between the skills employers want, the skills that applicants have and the points awarded? If not, why not?**

As to the match between the skills employers want and the skills that applicants have – this very much depends on the post, and the applicant. Legal representatives are unlikely to see other than the successful applicant (whether they represent the individual or the employer), where the employer

has determined that there is a good match and wants to bring the person to the UK, so we are not best placed to comment on this.

As to the match between the skills that applicants have and the points awarded, the big difficulty is that there are no points for experience and skills, only for qualifications and earnings. The Command Paper *A Points-Based System: Making Migration Work for Britain* set out that only 2% of those who responded to the UK Border Agency consultation considered age to be the most important attribute for Tier 1 Highly Skilled Migrants and only 1% considered previous salary to be most important. 64% considered skills to be most important and 40% work experience[1]. These results are consistent with ILPA members' experience of what employers say to them. The Migration Advisory Committee has indicated that salaries are a good proxy for skills,[2] however, this is not effective across all sectors. In the voluntary, education and health sectors for example, salaries tend to be lower. The Home Affairs Committee in Managing Migration: The Points Based System[3] its report stated:

> "92. We heard compelling evidence that the emphasis placed on formal qualifications by the Points Based System failed to take into account jobs where skill cannot be gauged primarily on qualifications. ... Under Tier 2, applicants must hold at least NVQ level 3 qualification. There are no points allocated under either Tier for training or on-the-job experience.
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> 93. During our visit to Bangladesh in October 2008 the argument was put to us that points should be more directly linked to the skills required for specific jobs, and that the requirement for skilled workers under Tier 2 to have an official qualification at NVQ level 3 should be relaxed for experienced workers. We were told, for example, that chefs often had 'on-the-job' experience rather than formal training or qualifications.[This was emphasised also in formal evidence. The Chinese Immigration Concern Committee argued that the Government's designation of NVQ level 3 as a benchmark qualification to earn points was inappropriate and did not reflect the skills required by the job. Its research into the NVQ Level 3 Professional Cookery or the NVQ Level 3 Food Preparation and Cooking "found that none of the courses contain any unit or content on Chinese cooking".
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> 94. Similar concerns were reflected in the arts sector. Louise De Winter of the National Campaign for the Arts (NCA) told us "the big area of contention and a problem for our artists is around qualifications. Obviously, you do not need academic qualifications to be good at acting or dancing or playing the violin". The NCA suggested that "there

[1] Page 44 *A Points–Based System: Making Migration Work for Britain* March 2006, Home Office

[2] See, for example, Migration Advisory Committee *Identifying skilled occupations where migration can sensibly*
help to fill labour shortages Methods of investigation and next steps for the Committee's first Shortage Occupation List, February 2008 at 2.2.

[3] Thirteenth Report of Session 2008-2009, HC 217, vol 1.

should be an alternative means of accruing points, perhaps through training and experience". ...

This is because of the nature of qualifications and earnings in various areas of the arts sector and not a reflection of the talent of the artist in question: for example, a dancer might be professionally trained, but not have any professional qualifications."

The interim cap has created real difficulties for employers who have been unable to obtain certificates of sponsorship, despite having been unable to recruit from the resident labour market. The cap affects not only recruiting new staff, but also extending the contracts of workers already employed. In such cases the relevant skills are not only the skills the person brings to the job but those acquired in the course of doing the job, through experience, the building of relationships and on the job training.

- **What are the common factors that make applicants more likely to apply to the UK rather than to another country?**

In ILPA members' experience of advising applicants, some applicants have no general desire to migrate but simply a desire/commitment to do a particular job, or a work for a particular company, which makes migration a necessity. Others are looking for opportunities to migrate – they may be looking for international experience that they will then take back to their country or to make a permanent home in a new country. Thus factors will not be common to all applicants. Factors that may be relevant for individuals are:

- Nature and type of job/employer and work opportunities. This may take many forms. A person may be working for a company in one capacity and seek promotion. Or they may wish to work on a particular project/type of work and the UK may be the country where those doing this work are based. The UK work experience may be seen as advantageous for their future career in a number of countries. In some cases, for example that of health professionals, limited resources in their country of origin may restrict opportunities for career and skills development.

- Language – because of the widespread use of English applicants may be more likely to have the skills to work in an Anglophone country and this may also be useful for their future career, even if this is likely to be outside the UK. Language may also be a consideration in thinking about where dependants will fare best.

- Dependants can work.

- Prospects for dependants more generally: whether the children can be educated in a way that will equip them for their future (considerations of language, or gaining qualifications that will be relevant in the country in which they will make applications for university admission), the sort of society in which they will grow up.

- Long term prospects – these routes currently leading to settlement and ultimately citizenship, the latter bringing with it the prospect of free movement within the European Union.

- Links with the UK/existing knowledge of the UK – family and friends already here are one example, but another would be having done work with UK companies in the past. In addition, aspects of the UK system will be familiar to those in Commonwealth countries whose legal systems were modelled on the UK.

- **Are there any perverse incentives in the system which makes it advantageous for employers to hire someone from overseas compared to an equivalent settled worker?**

An employer cannot prefer a person who is a British citizen or settled in the UK over other EU workers.

The obligations on sponsors are onerous and can be costly to fulfil and frequent changes to the Points-Based System create a high level of uncertainty for employers who cannot be confident that the person they recruit from overseas and in whom they invest money and time will continue to qualify under the Points-Based System in the medium to long term. The uncertainty for the worker may a matter against which they require to be protected by their employer so that those most in demand will be looking for higher pay or other benefits to offset the risks they are taking.

In addition the system exposes the employer to risk. Under the old work permit system a failure to fulfil the requisite steps (for example satisfactory advertising) would result in a refusal of the work permit; the error would be detected at the outset. Now, employers issue certificates of sponsorship but may be told in an audit, months or even years down the line, that they have made a serious error. This may put at risk their ability to continue to employ their other existing migrant workers, or to hire a person from outside the resident labour market in future. It may also carry a risk to the reputation of the country.

Thus in the case of scrupulous employers minded to fulfil their obligations under employment, company and immigration law, the perverse incentives would appear to be minimal.

Matters such as guideline salaries for posts reduce the scope for employers to seek to recruit from overseas as a means of finding an employee who would be paid less than a British worker would be paid. However, such protection is only a deterrent in so far as it is enforced.

Insofar as the employment of those without permission to work is concerned, in its 28 June 2008 Special Bulletin, the Migrant rights Network identified that ethnic minority businesses appeared to be over-represented on the UK Border Agency list published 19 June 2008 of employers against whom the UK Border Agency had taken enforcement action. The lists continue to be

published[4] and the same concerns continue to be voiced. It would be useful for the National Audit Office to investigate whether 'compliance visits' for sponsors show any similar bias and if so to look at the extent to which it is possible to distinguish 'risk-profiling' from stereotyping and discrimination. Those less exposed to scrutiny may have greater scope to exploit workers from overseas.

A person whose ability to remain in the UK depends upon their remaining in their job is vulnerable to exploitation from their employer. Tier 2 migrants who lose their job have sixty days to find a new one or they must leave. The structure of the Points-Based System places responsibilities for the enforcement of immigration control on the employer. As a condition of obtaining the sponsor licence the employer is supposed to inform the UK Border Agency of non-compliance with immigration law. More than this, the civil penalty regime imposed upon employers who hire persons in circumstances where those persons do not have permission to do the work as a matter of immigration law, encourages employers (by holding out the promise of reduced penalties) to report suspicions to the Agency, even where these have not been explored, including as required by employment law and the policies and practice of the workplace. This places the worker in an extremely vulnerable position vis a vis his or her employer, whether in matters of pay, hours, or conditions in the workplace.

Thus it can be identified that while the points-based system does not create perverse incentives for companies who take their responsibilities and the rights of their workers seriously to hire from overseas, it does create such incentives for employers who are minded to exploit their workers and evade their legal obligations.

The uncertainties attendant upon recruiting migrant workers and in particular the imposition of the cap on migration mean that when recruiting from outside the resident labour market it is more attractive to consider using an Intra-Company Transfer (excluded from the interim cap) than recruiting a worker not previously employed by the company from outside the resident labour market. There are also incentives to bring workers in under other migration routes, such as having them come as investors or entrepreneurs or to 'post' them from other parts of the European Union,[5] rather than take a risk on the vagaries of the Tier 1 and Tier 2 criteria.

The requirement to advertise in jobcentre plus, while it does not create an incentive to hire someone from overseas, does not, in ILPA members' experience serve to open up the job to resident labour market workers. Job-centre plus has not traditionally been used for jobs at the skills levels required to hire a migrant worker. It could be so used, but it would require a big overhaul of job-centre plus. As it is, it is unlikely that an advertisement on job centre plus for the types of jobs done by tier 1 and tier 2 migrants would be spotted by resident labour market workers if advertised on jobcentre plus. ILPA's membership between them we can count on the fingers of one hand between them cases where employers who have advertised on Job Centre

[4] www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/listemployerspenalties/
[5] See the Posting of **Workers Directive** (EU **Directive** 96/71/EC)

Plus as a necessary preliminary to moving to recruit from overseas and have filled the vacancy as a result of the advertisement.

Quality of service UKBA provides to applicants:

- **Are there any significant failings in the customer service provided by UKBA?**

Yes.

There are many. In general the experience of members is that the service afforded under the Points-Based System is much less suited to the realities of migration for work than the old Work Permits system and experience of the system, by migrants, employers and their legal representatives is much less positive.

One problem is simply the Points-Based System itself, with its rigid and inflexible requirements, and rigid, inflexible and bureaucratic requirements as to the ways in which a migrant can evidence that s/he meets those requirements. The placing of mandatory criteria in the guidance (rather than immigration rules) was successfully challenged in the case of *Pankina v SSHD*[6] in the Court of Appeal. The Secretary of State did not appeal the case and responded to the judgment by laying a statement of changes in immigration rules to move the mandatory requirement challenged in *Pankina* into the immigration rules.[7] However, there has as yet been no auditing of the guidance subsequent to the judgment to identify other mandatory criteria impugned by the judgment.

The application forms, both for individuals and for those wishing to be licensed as sponsors, are enormous, the guidance notes voluminous and changes frequent. The hard copy version of the sponsor application form is 35 pages long and the guidance for a Tier 2 sponsor effective from 1 October 2010 runs to 84 pages plus 5 appendices, which add another 81 pages. The application form for a Tier 1 (General) is 75 pages long and is supported by 46 pages of guidance. Woe betide the worker or employer who starts to complete the form only to find the rules, form and/or guidance change when s/he is halfway through the application. Seven statements of changes in immigration rules pertaining to the Points-Based System have been laid so far this calendar year, each necessitating changes to forms and guidance.[8] Guidance is very often unclear and ILPA members frequently share with the ILPA and with each other clarifications on points of confusion that they have obtained from

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[6] *SSHD v Pankina et ors* [2010] ECWA Civ 719. See also R *(English UK) v SSHD* [2010] EWHC 1726, *FA and AA (PBS: effect of Pankina) Nigeria* [2010] UKUT 00304 (IAC); *CDS (PBS: "available": Article 8) Brazil* [2010] UKUT 00305 (IAC).

[7] Statement of Changes in immigration rules HC 382, July 2010.

[8] Statement of changes in Immigration Rules Cm 7944 - October 2010, Cm 7929 - August 2010, HC 382 - July 2010, HC 96 - July 2010, HC 59 - June 2010, HC 439 - March 2010, HC 367 - February 2010.

the Agency, that are (sometimes) incorporated into future editions of the guidance.

To give examples of recent concerns members have brought to ILPA's attention:

- UK Border Agency going direct to clients (whether migrants or employers) rather than communicating through their nominated legal representative, including in circumstances where the migrant or employer has already drawn this to the attention of the Agency and asked it to desist from doing so. ILPA has also raised this matter with the UK Border Agency across all its operations.
- Delays in sponsors being given identification and log-in details for their 'Level 1' and Level 2' users of the sponsor management system (including legal representatives)
- There are delays in the system at every stage, up to and including the implementation of appeals where the applicant has rights of appeal.
- There is little redress for those whose applications have been wrongly decided. In many cases it is difficult to get in touch with posts overseas, particularly where the contact must go through a commercial partner.

- **What are the most common problems faced by applicants in achieving a successful and timely outcome?**

The most common are:

- Problems with the criteria themselves and the prescriptive approach to evidence with the lack of discretion.
- Frequently changing rules and qualifying criteria
- Delays at every stage of the system and

Level of fees:

- **Are the fees charged by UKBA reasonable?**

No. The fees charged by the UK Border Agency are substantive and in many instances above the costs of processing the application but there are many difficulties with the level of service received by applicants and sponsors, as described. There are delays , errors and there are difficulties in checking the progress of an application. The fees should reflect the standards of service an applicant is getting.

It is not reasonable to charge an employer for a sponsor licence and then tell the newly licensed sponsor that they have an allocation of zero certificates of sponsorship.

It is not reasonable to charge for an improvement plan where this is mandatory.

- **Do fee levels attract or deter particular types of applicant?**

Yes. Some people's fees are paid by their employer (more likely in Tier 2), others by the applicant him/herself. Where the fees are paid by the applicant they produce a particular hurdle for those whose economy is weak in comparison to the UK. Although a person may be well-placed to find a job in the UK and attract a good salary, if at the time of applying they are earning in a country whose currency is very weak by comparison to the UK then the fee, especially when combined with the maintenance requirement, may be prohibitive for them.

Impact of the limits:

- **What do you see as the likely consequences for applicants of the proposed limit on numbers?**

One consequence is uncertainty – not only for those wishing to come to the UK and those endeavouring to recruit them, but for those already in the UK and their employers. Another is workers in the UK who are unable to continue in their post.

A consequence of uncertainty is that the UK becomes a less attractive destination for applicants than other countries to which they might apply.

We are aware from communications to members from client employers of high levels of frustration with the current system, particularly from those who have been allocated no certificates of sponsorship whatsoever, including those who are new to being licensed sponsors and, despite having paid the requisite fees and upgraded their systems when required, have never been allocated any certificates of sponsorship. Employers who have required or anticipate requiring significant numbers of, or key, staff from outside the resident labour market are already mooting the possibility of moving their headquarters, European headquarters or office out of the UK.

There is some displacement onto other routes to the UK, for example Tier 1 investors/entrepreneurs and posted workers, posted under European law.

ILPA has provided extensive evidence to the Home Affairs Committee, the Migration Advisory Committee and the UK Border Agency on the effects of the cap and these are appended hereto. They provide further information on the points above and related matters. The latter two are on our website, the first will be published by the Committee but, pending such publication, should not be cited without their permission.

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Chair
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