ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

BOL/nc

The Commons Clerk of the Joint Committee
on Human Rights
Committee Office
House of Commons
7 Millbank
LONDON
SW1P 3JA

6 October 2010

Also by e-mail to: jchr@parliament.uk

Dear Sir/Madam

Response to call for evidence in relation to Remedial Order repealing Certificate of Approval scheme

I am writing to you on behalf of the Immigration Law Practitioners' Association (ILPA) in response to your call for evidence on The Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010.

ILPA wholeheartedly welcomes this Order and the repeal of the Certificate of Approval Scheme. The introduction of Certificates of Approval was clearly incompatible with Convention rights.

We answer below the specific questions posed in your call for evidence of 9 September 2010. We also take this opportunity to make brief comments on the lessons that can be learned for the wider issues of compatibility with the Convention.

References to marriage below should be read to include civil partnership as the Certificate of Approval scheme in relation to civil partnership must also be abolished (and the Remedial Order does this).

1. *Will the Remedial Order remove the incompatibility with Convention rights identified by the courts?*

   Yes, the incompatibility will be removed by the Remedial Order

2. *What was the impact in practice of the decision of the House of Lords in R (oao Baiai and others) v Secretary of State for the Home Department on the scope of the scheme?*

Following the decision of the House of Lords (and the Court of Appeal before that), it has been possible for an individual to obtain a Certificate of Approval whatever their

immigration status in the United Kingdom so long as the Secretary of State was satisfied the relationship is genuine. However, from our members, we are aware that this position was not widely understood by the migrant population and that some of the deterrent effect of the Certificate of Approval scheme remained.

Individuals with sound legal advice would know that they could make a Certificate of Approval application and be successful but for many others the belief remained that they would be denied permission to marry. They would also remain concerned about applying if they do not have status in the United Kingdom as the Home Office guidance still states "*where a person without leave to remain applies for a Certificate of Approval, the Home Office will (as in all cases where it is discovered a person is present illegally) consider whether or not enforcement action should be initiated, in addition to considering the application for the Certificate of Approval*."

ILPA members also found that applications for Certificates of Approval made by their clients without immigration status took a very long time to consider, adding to the deterrent effect. Delays increased after April 2009, when the UKBA stopped charging fees.

The decision of the House of Lords has, therefore, assisted those who understood its ramifications but it did not remove the whole deterrent effect and many remain uncertain of their position.

3. *Information requested on the operation of the ex-gratia refund scheme operated by the Government, designed to refund applicants who had suffered past hardship in connection with the fees paid for a Certificate of Approval.*

We have had little feedback from our members in connection with this. The UK Border Agency stated that those applying for the fee to be repaid "*must show that paying the fee caused them real financial hardship at the time of the payments*". We would comment that it would be difficult to provide evidence of this, particularly several years later.

4. *Information requested on process for removing Certificate of Approval Scheme*

We note that the Court of Appeal decision in this matter was in 2006 and the House of Lords decision in July 2008. Over two years passed before the Remedial Order was brought before Parliament. We ask that the quickest possible process be used now in order to remove the discriminatory scheme. The draft order will serve the purpose of removing the Scheme.

5. *General Comments*

While welcoming the end of the Certificate of Approval scheme, we believe this is an opportune time to raise our general concerns about incompatible provisions within immigration law in the United Kingdom.

When the scheme was first proposed, it was clear to those who had experience of immigration law and the European Convention on Human Rights that the scheme was discriminatory. Sadly, the discriminatory scheme has remained in place for over five years and has not yet been abolished. This, in ILPA's view, is indicative of the tendency of the Secretary of State for the Home Department to make immigration law without adequate regard to compatibility with the Convention.

There are numerous examples we could provide of this, but for the purpose of this response, we will concentrate on two changes in immigration law to be introduced within two months.

From 29 November 2010, the Secretary of State will introduce compulsory English language requirements for individuals applying for visas to the United Kingdom to be with their settled partners.[1] There are clear implications for human rights and race relations. Clearly, English language tests will have a far greater impact on spouses from non-English speaking countries than those from the majority-English speaking countries which are exempted from this requirement. We attach as an Appendix to this submission ILPA and JCWI's letter to Damian Green MP about this proposal. We can predict at this point that if these English language requirements are introduced without further consultation and without further consideration of the human rights and race relations points, they will be subject to a challenge in the near future. We understand that Liberty have already obtained a legal opinion from Matrix Chambers that there is discrimination within the tests.[2]

All bodies, including this Committee, should urge the Secretary of State to postpone such tests until full consideration has been given. It is far better to deal with such issues upfront than wait for a declaration of incompatibility from the Courts.

The Secretary of State has also published proposals to increase the fees charged for many immigration applications,[3] raising the fees for marriage applications in the UK to £500 and to £750 for those applying for entry clearance abroad, and to £900 for settlement applications after the two year probationary period. These fees are excessive and will place a further barrier on family reunion.

The failure of the Certificate of Approval scheme is a lesson in how such matters should be considered carefully before they are brought into practice. If not, the same mistakes will be repeated with a large cost to family life and the tax payer.

Yours faithfully

Sophie Barrett-Brown
Chair, ILPA

[1] Statement of changes in Immigration Rules, Cm 7944, 1 October 2010
[2] As reported in *The Guardian* of 28 September 2010
[3] Written Ministerial Statement, 9 September 2010, Charging for Immigration and Nationality Services 2010-11, col. 23-24WS