ILPA response to the UK Border Agency Consultation on Limits on Non-EU Economic Migration

INTRODUCTION

The Immigration Law Practitioners' Association (ILPA) is a professional association with over 900 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 exists to promote and improve the giving of advice on immigration and asylum through training, disseminating information and providing evidence-based research and opinion. ILPA is represented on numerous government and other stakeholder and advisory groups and has given both written and oral evidence to many Parliamentary Committees. ILPA has provided written evidence and has been asked to give oral evidence to the Home Affairs Committee enquiry into the cap. Copies of ILPA's written evidence to the Home Affairs Committee and ILPA's response to the Migration Advisory Committee consultation are annexed hereto.

ILPA members have extensive experience in advising migrants and their dependants, including those entering in Tiers 1 and 2, and the businesses that employ or seek to employ such migrants. As a result of this experience, ILPA foresees potentially grave consequences of any cap on Tiers 1 and 2 and of proposed methods of implementation. The very premise for imposing the cap appears to ILPA to be flawed. The merits and drawbacks of the Government's policy to limit net migration in this way therefore form part of ILPA's response to this consultation and we are only sorry that the consultation paper has not been framed to invite other respondents to address these broader questions.

As ILPA understands it, one reason why the UK Government wants a cap is so that it can demonstrate to a (frequently hostile) public that migration is 'under control.'[1] ILPA suggests that no Government can lay claim to exercising control over migration for work without demonstrating that it understands such migration and the wider effects of its interventions. Migrants and their employers have a significant contribution to make to such understanding and their voices have been raised[2] against the UK Border Agency's current proposals. The Migration Advisory Committee has provided Government with considerable research on these matters previously;[3] we see no evidence in the consultation paper that this has informed thinking on the cap. An ill-thought-out cap is likely to have the opposite of the intended effect.

The Home Secretary's announcement of the cap stated it was designed to tackle 'unlimited migration', which 'places unacceptable pressure on public services, school places, and the provision of housing'.[4] The announcement of the consultation on the UK Border Agency's website states:

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[1] Speech by Damian Green, then shadow immigration minister, at the International Bar Association 4th Biennial Global *Immigration* Law *Conference* 19 - 20 November 2009, London.

[2] See responses to this consultation and media coverage, e.g. *Fears force immigration cap rethink,* George Parker & James Boxell, Financial Times, 24 June 2010.

[3] See below.

[4] UK Border Agency press release, 28 June 2010, at http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2010/268071/43-impose-migration-limit1 also in the Ministerial statement to the House of Commons, *Hansard*, col 585, 28 June 2010.

> *"The government believes that Britain can benefit from migration, but not uncontrolled migration. It wants to continue to attract the brightest and the best people to the UK, but with control on the numbers coming here. Unlimited migration places unacceptable pressure on public services, school places, and the provision of housing, causing problems for certain local communities."*

The impression thereby given is that there are no limits on migration, which is far from the truth. An impression is also given that migrants in Tiers 1 and 2 have access to public housing, which is not the case, while the extent to which they make use of private education and private healthcare is not acknowledged.

The cap risks being seen as a solution to a range of concerns that it will not affect. If concern, directly or indirectly, is with European free movement, movement for international protection, family migration, or unlawful migration, the cap will not address these,[5] and thus risks being seen by those the Government wishes to appease as failing to deliver and as disappointing. The approaches outlined in the consultation paper appear to ILPA to be setting the Government up to fail.

Tier 1 Options

Q1. DO YOU AGREE THAT OPERATING A POOL FOR HIGHLY SKILLED MIGRANTS ON THE BASIS DESCRIBED ABOVE WILL BE THE FAIREST AND MOST EFFECTIVE APPROACH? PLEASE SELECT ONE ANSWER ONLY.

This question does not admit of a tick-box answer.

Q2. IF YOU ANSWERED YES OR NO TO THE PREVIOUS QUESTION, PLEASE GIVE YOUR REASON(S) IN THE BOX BELOW.

It is not possible to answer this question with a yes, no or 'don't know' answer. Firstly because insufficient detail is provided on the proposals and secondly because it can be read as implying that the proposals in the consultation paper are for fair and effective systems, albeit that some may be fairer and more effective than others. We deal first with factors relevant to fairness and efficiency overall then with the different proposals.

The wider question of the fairness and efficiency of a cap can be addressed under three headings, dealt with below:

- Potential for legal challenges
- Empirical evidence
- The stated policy objective of attracting and retaining 'the brightest and best – be they Tier 1 or Tier 2 migrants, resident labour market workers, or businesses.

Potential for legal challenges against the Government

[5] A point that has not gone unnoticed in the media. See Christopher Hope, "Record four out of five jobs going to foreigners between May and June", http://www.telegraph.co.uk/journalists/christopher-hope/7939138/Record-four-out-of-five-jobs-going-to-foreigners-between-May-and-June.html , 12 August 2010; James Boxell, "*Business attacks cap on skilled immigrants*", http://www.ft.com/cms/s/0/20bb8e8c-9b37-11df-baaf-00144feab49a.html?ftcamp=rss;, *Numbers cap does not fit anxious UK groups* http://www.ft.com/cms/s/0/4fa1bcfc-9b6a-11df-8239-00144feab49a.html , 29 July 2010 and 30 July 2010; The Guardian, Alan Travis, 28 July 2010.

A cap that may be unlawful for the reasons below cannot be either fair or effective. Its effect will be determined by the outcome of litigation. We consider that the systems proposed in the consultation paper would be vulnerable to such challenges.

On an international level, the UK is bound by World Trade Organisation agreements and Government must have regard to these obligations.

The Immigration Act 1971 (the Act)[6] underpins all immigration law in the UK. Section 1 (4) of the Act provides the Secretary of State with the power to decide and lay rules before Parliament, which can be changed whenever the Secretary of State thinks necessary. However, there are a range of circumstances under which changes to the structures put in place to maintain immigration control may be held to be unlawful. The UK Border Agency's practice of failing to address the concerns of specific sectors, and advice received from external sources on the impact and legality of proposed changes, including the advice of the Parliamentary Joint Committee on Human Rights[7], has led to various applications to the courts, which could have been avoided if serious consideration had been given to the comments received.

The current tendency is to change the Points-Based System requirements with almost immediate effect, failing to respect the parliamentary convention of 21 days.[8] This is very difficult for prospective migrants and their proposed employers attempting to plan for the future, in particular where they have prepared applications. Mr Keith Best, then Immigration Advisory Service Chief Executive, speaking on 11 February 2009 at the Ethnic Minorities Law Centre's conference on Understanding the New Points Based System summarised the risks:

> *"It could lead to large numbers of employees necessary to British business being denied a legitimate expectation to come to the UK. It could lead to many students being denied entry to British education establishments and forced to go to other countries to the great loss for the UK. International students contribute more than £8.5 billion to the UK economy according to the UK Border Agency. It will be bad for British business and could cause some establishments to go under with the loss of employment in the UK of the teachers and staff if these students are refused entry."*[9]

Where insufficient regard has been given to the interests of migrants, litigation has followed. There are a number of instances in which migrants have challenged the Secretary of State where changes in the Immigration Rules were applied with immediate effect and no transitional arrangements, thus making it difficult for them to extend their stay in the UK.
One of the successful arguments advanced on behalf of migrants is legitimate expectation.[10] The principle of legitimate expectation arises where a public body has made a promise or adopted a practice that represents how it proposes to act in a given area.

Successful legal challenges to changes in the immigration rules include the cases of *HSMP Forum*,[11] *BAPIO*,[12] *Pankina*[13] and *English UK*[14] amongst others.[15] ILPA foresees similar

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[6] Section 1(4) Immigration Act, 1971.
[7] HL paper 173, HC 993 published 9th August 2007.
[8] Recent examples of statements of changes in immigration rules that have come into force the day after they were made include Cm 7929 and Cm 382 (parts taking effect 23 July 2010), HC 96 was ordered to be printed on 15 July 2010 and took effect five days later; HC 439 was ordered to be printed on 18 March 2010 and parts took effect on 6 April 2010.
[9] http://www.iasuk.org/news--media-releases/ias-warns-uk-border-agency.aspx
[10] See the leading case of *CCSU* [1985] AC 374.
[11] *R (HSMP Forum Ltd) v SSHD* [2008] EWHC 664 (Admin); *R (HSMP Forum (UK) Ltd) v SSHD* [2009] EWHC 711 (Admin). See Joint Committee on Human Rights, 20th Report of Session 2006-2007, *Highly Skilled Migrants: changes to the immigration* rules, HL paper 173, HC 993, 9 August 2007.
[12] *R (BAPIO Action Ltd) v SSHD* [2008] UKHL 27.

successful challenges to the proposed cap, the methods of implementation and the consultation process.

HSMP Forum Limited (first application)

The UK Government introduced the Highly Skilled Migrant Programme (HSMP) to attract exceptionally well-qualified migrants to the UK. All of these applicants were required to make a long term commitment to the UK as part of the application. As such these individuals made many sacrifices[16], such as leaving well-paid jobs in their countries of origin or of previous residence, selling their properties and uprooting their family to settle in the UK, only to find that the rules of the programme were suddenly changed making it harder, or in some cases impossible, for them to extend their stay in the UK despite the commitment that had been required of them in the application.

During a meeting that was held at the House of Commons on 26 March 2007 between the then Immigration Minister, Mr Liam Byrne, and HSMP visa holders,[17] the Minister was told of the personal consequences that they faced because of the proposals to change the HSMP with immediate effect. Many of the HSMP visa holders present explained that they were forced to wind up their establishments, leave careers, interrupt the schooling of their children, and move investments because of the proposals to change the HSMP with immediate effect.[18] The consequence of this sudden change was so severe to one family that the dependant of Bangladeshi HSMP migrant committed suicide.[19] Another migrant, Mr Debansu Das had the following to say during the meeting:

> *"I studied where people are selected after undergoing a stiff competition among millions of participants and UK companies make campus recruitments but due to the unfair points based system for further extension I and my family are now struggling for our further visa extension"* [20]

The Parliamentary Joint Committee on Human Rights conducted an inquiry into the changes in the Immigration Rules to which the new scheme and found:

> "*… individuals with leave to enter or remain under the HSMP have taken a number of important and long-term steps to establish their main home in the UK: they have left permanent jobs in their home countries, sold their homes, relocated their families (spouses and children) to be in the UK also, entered into financial commitments such as mortgages, transferred businesses, entered into long-term financial arrangements, made long-term economic and contractual plans, and the lives of their families have been transferred (for example, spouses have new jobs, children new schools).*" [21]

The Committee went on to find:

> "*The immediate effect of the tightening of the requirements for extending leave is to make it likely that a considerable number of those highly skilled migrants who have moved to this*

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[13] *SSHD v Pankina et ors* [2010] ECWA Civ 719. See also *FA and AA (PBS: effect of Pankina) Nigeria* [2010] UKUT 00304 (IAC); *CDS (PBS: "available": Article 8) Brazil* [2010] UKUT 00305 (IAC).
[14] R *(English UK) v SSHD* [2010] EWHC 1726.
[15] See, for example *R (Chong Meui Ooi) v SSHD* [2007] EWHC 3221 (Admin), *Odelola v SSHD* [2009] UKHL 25, *R (Limbu) v SSHD* [2008] EWHC 2261 (Admin).
[16] Minutes of meeting with the then Immigration Minister, 26 March 2007.
[17] *Ibid.*
[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid.*
[21] HL paper 173, HC 993 published 9th August 2007.

country and made it their main home under the HSMP will not now be eligible for further leave when their current period of leave expires …" [22]

The HSMP Forum succeeded in its challenge.[23] In his judgment, Sir George Newman found that people admitted to the UK under the HSMP had been given the assurance that the terms under which they would be eligible to apply for settlement would not change.

HSMP Forum Limited (second application)

The same migrants were again prejudiced by the Secretary of State's decision to increase the settlement threshold from four to five years. The consequence of this second change was discussed in Parliament where the Right Honourable Nick Clegg MP stated:

> *"The legislation has been sprung on us without any meaningful consultation. In the Government's February consultation document, there was no mention of the new five-year qualifying period. There is a suddenness - a brutality - about the way in which the measure has been announced. There was no preceding consultation whatever, and that strikes us as bad practice, which will lead to several unintended - or perhaps intended - consequences that merit further examination. I am sure that we have all received correspondence from constituents whom we know to have been directly affected by the change. In my constituency, I have come across a large number of families who, if the measure proceeds, will need to change their plans, leave their work or studies, sell their homes and take their children out of school or university, because they have received no warning that the rules have changed, or that the understanding on which they entered this country has summarily changed. 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.*
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> *There has been no proper analysis of the measure's impact and there is no regulatory impact assessment attached to it, yet estimates suggest that the overall cost to UK employers of renewing their employees' work permits could be as high as £15 million. In other words, the change is not cost-free. In addition to its sudden introduction and its retrospective application to those who were perfectly entitled to expect that the rules would not change from one day to the next, it will be costly to UK business.*
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> *The impact of the measure on overseas students and trainee doctors, specialists and others working in the national health service has attracted a great deal of attention. I shall quote an e-mail that I received from a constituent who is a consultant and the head of the assisted conception unit at the Jessop wing in Sheffield:*
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> > *'The changes regarding the need for work permits will almost certainly affect our ability to recruit appropriately trained doctors to work in our department. It is increasingly difficult to attract UK graduates into our speciality as a whole, and the field of reproductive medicine is even more specialised. In order to get the best people for the job, we need to recruit from all over the world, and indeed to date we have been very successful in attracting a very high calibre of applicant to these jobs. I am concerned that, with the introduction of these new rules, we will no longer be able to attract these high-quality trainees to work with us, as the UK will be perceived to be hostile to overseas doctors. This may mean that we will be forced to employ someone who is less suitable, which would be a disadvantage to our service, the women of Sheffield and the scientific community as a whole.' Similar observations have been made by the British Medical Association, which*

[22] *Ibid*.

[23] *R (on the application of HSMP Forum Ltd) v Secretary of State for the Home Department* (2008) EWHC 664 (Admin).

> *claims that the change is unfair on the doctors who already work here, and by many other professional bodies, which fear that they will have a detrimental effect on the quality of work undertaken in a number of specialism's in the NHS."* [24]

Mr Damian Green MP, Shadow Immigration Minister at the time, concurred with Mr Clegg's comments, stating:

> *"In particular, 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."* [25]

Again the HSMP Migrants successfully challenged this decision.[26] The legal challenge could have been avoided had the UK Government of the day listened to the advice of the Parliamentary Joint Committee on Human Rights, the migrants themselves and other commentators.

BAPIO

Migrants in the medical profession were affected by the Secretary of State's decision to introduce guidance restricting National Health Service employers looking for junior doctors to fill postgraduate training positions). Applicants who were not nationals of the United Kingdom or any other European Economic Area Member State, and whose leave to remain in the UK would not extend beyond the duration of the position on offer, were not to be offered the position unless there were no suitable candidates who were UK or EEA nationals. This decision was made without taking into consideration that these migrants had made the UK their main home and had a legitimate expectation that they would be able to seek employment and obtain employment in the fields of their skill. The House of Lords found that the guidance issued by the Secretary of State for Health limiting the recruitment of doctors from outside of the EEA was unlawful. [27]

More recently, in the cases of *Pankina* in the Court of Appeal [28] and *English UK* in the High Court,[29] the relevant courts held that it is unlawful for criteria determining individuals' status and entitlements to be incorporated in a source outside the Immigration Rules, if that source is impermanent or undetermined and not subject to parliamentary scrutiny each time it is changed.

Pankina

Pankina was a Court of Appeal decision in which it was held that an applicant under the Points-Based Scheme would only need to demonstrate that they had £800 (or £2,800 if applying from abroad) at the time of their application for the purposes of proving adequate maintenance. The ratio of the decision was that while the requirement to show that a person held this sum was contained within the immigration rules, the requirement that the sum be held for three months was contained in Policy Guidance. It purported to be a

[24] *Hansard*, 20 June 2006, Second Standing Committee on Delegated Legislation.
[25] *Ibid.*
[26] *R (on the application of HSMP Forum (UK) Ltd) v Secretary of State for the Home Department* (2009) EWHC 711 (Admin).
[27] *R (on the application of BAPIO Action Ltd) v Secretary of State for the Home Department* (2008) UKHL 27.
[28] *Secretary of State for the Home Department v Pankina* 2010 ECWA Civ 719.
[29] *R (on the application of English UK) v Secretary of State for the Home Department* (2010) EWHC 1726.

mandatory requirement and could lead to rejection of an application but had not been subject to parliamentary scrutiny.

The maintenance requirement under the Points-Based System introduced in the form of guidance affected all Points-Based System migrants. On 5 November 2009 "Kevin" (surname not given) stated on the Free Movement website:

> *"I too am stuck with the same problem regarding the maintenance requirement of extending a visa under the PBS, had my application denied in August and the Appeal was heard in October; I am currently waiting for the determination. I can't describe how incredibly frustrating it is to sit in front of a judge that agrees that the system is essentially flawed but states he is unable to rule against the HO. I am sorry to say but anybody relying on the AIT for redress to a visa appeal for this requirement is facing some very bleak prospects and a very long fight."* [30]

While the UK Border Agency has moved the requirement to demonstrate that the requisite sum is held for three months into the immigration rules,[31] it has failed to engage with the wider implications of the *Pankina* judgment for other mandatory requirements that are contained only in guidance. At the time of writing, further challenges appear inevitable.

English UK

Overseas students seeking to study English in the UK were affected by the increase in the required minimum level of proficiency in English from basic to intermediate, which was introduced in the form of amended UK Border Agency guidance instead of included in the immigration rules and thus laid before Parliament under the negative resolution procedure. Their application for judicial review was successful.

While the UK Border Agency has, in response to the judgment, amended the immigration rules[32] to include the requirement to demonstrate an intermediate level of English, as with the *Pankina* case it has failed to address the wider implications of the judgment for other requirements contained in guidance and again, at the time of writing, further challenges appear inevitable. Moreover, although the case was brought as part of efforts to highlight the effect of the change on UK language schools members of English UK, who had previously offered courses to students with only a basic level of English on arrival, the underlying policy was not revisited despite the successful legal challenge.

We foresee, in particular, legal challenges from those already in the UK as Tier 1 or Tier 2 migrants who are prevented from extending their leave to remain in the UK due to the operation of an arbitrary cap, be it the interim cap or the cap which is the subject of this consultation. Account must be taken of these decisions of the courts in designing any future policies, including any cap. In particular the Agency should ensure that:

- Mandatory requirements are placed in the immigration rules and subjected to parliamentary scrutiny, not inserted into guidance;
- Guidance makes provision for the exercise of judgment and discretion in accordance with the published guidance;
- Policies are published in full;
- There is no retrospective application or effect of rules, or failure to honour previous legitimate expectations, in any new system.

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[30] Comment to Article '*Points Based System in Trouble,* November 2009, at http://freemovement.wordpress.com/2009/05/26/points-based-system-in-trouble/

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

[32] HC 382.

Empirical analysis

ILPA is concerned that it is proposed to implement a cap, and indeed that an interim cap has been implemented, without the Government's having asked the Migration Advisory Committee to comment on the likely economic effects of a cap, and on the consequences of introducing a cap, and without seeking the views of expert interlocutors on this broad point.

The Migration Advisory Committee and others, including the House of Lords Committee on Economic Affairs have highlighted the lacunae in the existing evidence. We cite *in extenso,* from the Committee's reports:

> *"Since economic theory alone cannot provide a definite answer to the expected impact of immigration on the labour market, there is a clear need for more empirical research, especially in areas that have so far received relatively little attention. Little is known, for example, about how immigration impacts on activity rates of the resident population..."*[33]
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> "*…if the Government wishes to make evidence-based policy decisions in this area, consideration should be given to whether existing sources such as the LFS and PBS management information could be better designed than at present to gather such information.*"[34]
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> "*We have not been asked to make policy recommendations on the economic contribution of dependants. But, on the basis of the limited information we have, there is not sufficient reason to conclude that greater restrictions on working rights for dependants would lead to improved outcomes – either for UK workers or for the UK economy. However, we emphasise that these are extremely tentative conclusions, due to the very limited data on dependants of PBS immigrants, their labour market outcomes, and their impacts on the labour market outcomes of the resident workers. This is an area that is ripe for further data, collection and research*."[35]
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> "*Throughout this report, we have identified the areas where further research and analysis may be justified. Some potential topics are as follows…*
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> - *A review of the UK and international literature examining how labour markets and immigration policies can be designed to create employee and employer incentives to aid their practical enforcement.*
> - *An analysis of the importance of the right for spouses to work full time and access public services in the UK as a 'pull factor' for students and highly skilled workers.*
> - *An analysis of the options for developing and more comprehensive framework for considering the economic impact of immigrants and their dependants, including an assessment of how to address a serious lack of data currently available on the issue.*"[36] *(p 154)*

Similar calls for further research and data collection were made by The House of Lords Committee on Economic Affairs[37]:

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[33] Migration Advisory Committee report: *First recommended shortage occupation lists for the United Kingdom and Scotland* (2008). http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithus/mac/first-lists/ at 1.54.
[34] MAC 2009a, page 145.
[35] *Ibid*., page 143.
[36] *Ibid* page 145
[37] House of Lords Committee on Economic Affairs First Report of Session 2007-2008 *The Economic Impact of Migration,* HL 82 of Session 2007-2008 vol I and vol 2 (Evidence).

"209. There is a clear and urgent need to improve the data and information about gross and net migration flows to and from the UK, and about the size, geographical distribution and characteristics of the immigrant stock (para 39).

210. It is unrealistic to expect that the Government can have complete data on migration. The key questions are how, by how much, and at what cost, the current gaps in the available data can be reduced. But clearly there is ample room for improvement in UK migration statistics. The Government should make a clear commitment to improving migration statistics and facilitating more comprehensive assessments of the scale, characteristics and impacts of immigration (para 43).

...

222 Much more empirical work might usefully be done on the labour market and macroeconomic impacts of immigration in the UK (para 98)."

Moreover, we see no indications in the current consultation paper that it has taken the recent observations of the Migration Advisory Committee into account. Again, we cite from the Committee's recent reports *in extenso*:

"We believe that 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."[38]

"We consider highly skilled immigrants to be of great value to the UK economy. This has been heavily underlined by the stakeholder evidence we received." [39]

"We remained mindful of the 'lump of labour' fallacy. Applied to immigration, this fallacy is the assumption that there exists a fixed number of jobs and, therefore, more immigrants will cause one-to-one displacement of the resident workforce. This is not the case, partly because immigrants will themselves create demands for goods and services, and therefore create jobs."[40]

" The Tier 2 route is demand driven and employer led: immigrants coming through this route must have a sponsor and a valid certificate of sponsorship. As such, it should work in such a way that flows are responsive to the UK's economic circumstances."[41]

"The balance of empirical evidence suggests that the impacts of immigration on wages and employment of UK-born workers tends to be small (Reed and Lattore, 2009: Lemos and Portes, 2008)." [42]

"Dustmann et al. (2008) examine the effect of immigration along the wage distribution. They find the overall effect to be small and positive." [43]

"It is thought that skilled immigrants can contribute to greater economic growth by improving long-term allocative efficiency and promoting innovation, both of which can boost total factor productivity. Economic theory suggests that the positive impacts of the increased innovation resulting from technical knowledge transfer, increased trade and the

[38] The Migration Advisory Committee – Analysis of the Points-Based System Tier 1, December 2009, (subsequently MAC 2009b), page 7.
[39] *Ibid.,* page 65.
[40] MAC 2009a page 70 (also cited in MAC 2009b).
[41] *Ibid.,* page 70.
[42] MAC 2009b, page 51.
[43] *Ibid.*, page 51.

acquisition of country-specific knowledge enable UK firms to operate better in foreign markets." [44]

"…as well as increasing the absolute number of workers and the associated human capital, highly skilled immigration can also enhance the rate of creation of jobs."[45]

ILPA urges caution in the use of international comparisons. It is not appropriate just to take methods used in other immigration systems and apply them to the UK system. Capping methods used in other countries fall to be understood in the context of those countries' overall immigration systems and economies.

The capping proposals for Tiers 1 and 2 will leave little non-EEA economic migration outside of the capped categories. This contrasts with the systems in Australia, New Zealand and the United States of America, all of which have additional uncapped immigration routes for highly skilled and skilled migrants.

Systems used in countries outside the EEA also differ from the UK in that they do not have an equivalent of taking into account the availability of EEA labour in formulating policies, including mechanisms for regulating market access to non-EEA workers who are highly skilled or skilled.

In the summaries below we draw on the experience of ILPA members who also work on immigration to other countries.

Australia

As mentioned in Appendix A of the UK Border Agency's consultation document,[46] Australia operates a targeted migration programme with priority processing of some visa categories. Australia does not apply a hard cap to its General Skilled Migration Programme or Employer Sponsored (Permanent) Migration Programme (the closest equivalents to Tier 1 (General)), nor to the Business Long Stay Subclass 457 visa (the closest equivalent to Tier 2).

Importantly, it is incorrect to state that Australia operates a 'cap and pool' arrangement as described in the UK Border Agency's Appendix A.

The arrangement is more correctly described as that of a 'pass and pool'. The eligibility of migrants is managed through adjustments to the pass mark and pool mark, amendments to the lists of eligible and shortage occupations (via the skilled occupation list and migration occupations in demand list) and to the points available for each points scoring factor, not by a cap.

Successful applicants under the General Skilled Migration Programme and Employer Sponsored (Permanent) Migration Programme are (with limited exceptions) granted permanent residence from the outset. This contrasts with the time-based indefinite leave to remain concept applied to Tier 1 (General) migrants, who must make (and pay for) a series of applications (normally an initial application, points based extension and indefinite leave application) prior to gaining permanent residence.

Adding a cap in the context of the UK's time-based approach introduces a host of potential technical problems for resolution that do not arise in the case of immigration categories that lead directly to permanent residence. For example the UK Government must devise a fair

[44] *Ibid.*, page 60.
[45] *Ibid.,* page 61.
[46] *Limits on Non-EU Economic Migration – A Consultation,* UK Border Agency, June 2010, page 12.

system for determining extension eligibility, the addition of dependants and dealing with potential breaks in continuity of leave.

Processing times for General Skilled Migration and Employer Sponsored (Permanent) Migration visas can be lengthy, in some cases up to 24 months. In response, Australia has a number of visa Subclasses aimed at meeting particular economic needs, for example where a worker is nominated by an employer, state or territory government or will be based in a regional area. Applications in categories considered to be high priority are processed more quickly, as are applications from in-country applicants.[47]

The UK Government has not included within its proposals any means of identifying and prioritising individuals from within Tier 1 (General) who are urgently required in the UK, for example by a prospective employer, or in order to proceed with a business opportunity. This matter ought to be addressed as part of the Government's strategy for maximising economic benefit from this category.

Another important point to consider is that Australia operates a system of bridging visas, enabling in-country applicants to apply for a travel facility (bridging visa B) to allow them to travel abroad without withdrawing a pending application. The absence of such a facility in the UK is of concern, particularly as one of the consequences of capping is likely to be a substantial increase in processing times for applicants, along with increased uncertainty regarding the outcome. Also of concern is the absence in the UK of the concept of concurrent applications which exists in Australia, such that an individual may hold (and extend) a temporary visa whilst a permanent migration application is pending.

The Business (Long Stay) Subclass 457 visa is the closest equivalent visa category to Tier 2, however this category is not mentioned in Appendix A. This omission is unfortunate since the Subclass 457 visa plays a crucial role in the Australian economy by ensuring that human capital from abroad can be provided quickly and in accordance with employer demand. This is a temporary migration category for workers who are sponsored by an employer to work in Australia for up to 4 years at a time.

There is no limit on the number of times a Subclass 457 visa can be renewed, however migrants who wish to settle in Australia permanently must do so by making a successful application under a permanent residence visa category. This allows employers to access the skilled workers they require to run and grow their businesses, and for the workers to understand that their stay under the Subclass 457 visa is for a finite period.

There are certain elements of Tier 2 (in its current form) that are similar to the requirements of the Subclass 457 visa, including the requirement to have a sponsor, a limit on the number of nominations/certificates of sponsorship the sponsor may issue, the use of a list of eligible skilled occupation codes and minimum salary thresholds. Overall migrant numbers are limited to the number of nominations/certificates of sponsorship granted to the sponsors based on the business case each sponsor provides.

Superimposing a cap on Tier 2, using any of the methods under consideration in the UK Border Agency's consultation, will provide a much less refined means of selection than the current methods used to determine the number of migrants admitted to Australia under the Subclass 457 category and to the UK under Tier 2. This is because none of the methods under consideration will allow sponsors to articulate the business case that justifies the sponsor's demand for skilled migrant labour, nor to fairly rank one sponsor's business case against another's.

[47] For processing priorities and times see http://www.immi.gov.au/about/charters/client-services-charter/visas/8.0.htm

New Zealand

The New Zealand immigration system is comprised of two distinct routes which facilitate temporary and permanent migration. Only the permanent route is points based.

The objective of New Zealand's temporary work permit policy is to protect employment opportunities to New Zealand Citizen's and residents whilst allowing employers to recruit temporary workers from overseas in order to meet particular skills or seasonal needs, or to fill skilled labour shortages in New Zealand.

A resident labour market test is required, except where it is recognised that there is a skill shortage in a particular region of New Zealand or where an application is considered under one of the Work to Residence policies.

Work to Residence policies have been introduced to facilitate permanent residence for individuals qualified in occupations that are in demand in New Zealand, or may have exceptional talent in sports or the arts. Permanent residency may be applied for after two years.

The permanent route, or Skilled Migration category is based on a points system which enables individuals with the skills New Zealand require and/or wish to settle permanently in New Zealand to apply to settle in New Zealand.

Each year the New Zealand Government agrees a quota for the New Zealand Residence Programme (NZRP) in order to meet New Zealand's ongoing skills objectives and humanitarian commitments. For 2010/11, approximately 26,900 - 29,975 places were available under the Skilled/Business stream.[48]

United States of America

The US does not operate a points-based system and makes limited use of caps. Perhaps the closest comparison to the Tier 1 (General) category is the O-1 visa for persons of extraordinary ability (which also has regard to attributes such as previous earnings and targets the most highly skilled of migrants). There is no cap on the number of visas which may be issued in this category.

Whilst there is not a 'sponsor licence' system in the US as in the UK, a comparison can nonetheless be made to the Tier 2 General and ICT sub-categories insofar as the US has two distinct categories for employment with a US company with some similarities to Tier 2: the H-1B visa for employment in a Specialty Occupation and the L visa for Intra-Company Transferees.

The H-1B visa is a non-immigrant visa for workers in a Specialty Occupation and requires a 'Labor Condition Application' to ensure that United States workers are not negatively affected by hiring foreign workers, and that foreign workers will not be exploited (similar in purpose to the resident labour market test in the UK). H-1Bs are subject to a cap of 65,000 per annum, a level far below market demand and unchanged since its inception in 1990 (with the exception of a short-lived adjustment to accommodate additional workers in the high technology sector in the lead up to the millennium).

[48] See http://www.immigration.govt.nz/NR/rdonlyres/7551739C-0FE9-4949-8D8AF0C548086E7/0/AmendmentCircular201007.pdf

The annual cap is usually exceeded (by at least 100%) on the first day it opens, resulting in a lottery as to which applications are selected for consideration. Consequently many large organisations submit a significant number of speculative applications in order to secure a proportion of approvals under the cap for their anticipated need through the coming year. However this approach inevitably means that some of the workers for whom a visa is secured may not ultimately be needed or may otherwise be unable/unwilling to undertake the assignment that may arise, thereby blocking other organisations from obtaining visas for much needed personnel.

Lengthy visa backlogs result from the cap on H-1Bs once the numerical limit is reached. These backlogs prevent United States companies from hiring professionals whom they regard as playing an essential role in their businesses, and are perceived by businesses to hinder the United States' ability to remain competitive with foreign markets. The H-1B system fails US business and the US economy, reducing the ability to secure specialist personnel to nothing better than a lottery – and one with substantial delay. A notable example of the negative effect of the H-1B cap is that of Microsoft which, frustrated with the system and unable to continue to wait with uncertainty to secure the highly educated and skilled workers it required, decided to open a major software development facility in Vancouver, Canada generating 1,000 jobs there rather than in the US. [49] Microsoft stated in its press release that opening the processing facility in Canada *"allows the company to recruit and retain highly skilled people affected by immigration issues in the US"*[50]

The L-1 visa is for employees of international companies who wish to work in the United States for an affiliate company in an executive, managerial or specialised capacity and have been employed for at least one year at the overseas affiliate within the three years prior to application. These visas are not subject to a cap.

The Immigration and Nationality Acts sets the number of immigrant visas that may be issued per year. There are an unlimited number of immigrant visas available for immediate family members of United States citizens; however, United States immigrant visas issued for family sponsored and employment based preference categories are limited to a specific number per year. Often, the demand for immigrant visas in preference categories exceeds supply, and a waiting list is formed using applicants' priority dates. The visa bulletin, issued by the United States Department of State, serves as a guide for issuing immigrant visas at United States consulates and embassies, and allows individuals to check their place in the immigrant visa queue. The backlog resulting from the immigrant visa queue, like the H-1B cap, can be detrimental to the US because it deprives the US of essential high-skilled workers it needs to remain competitive in the global marketplace.

Implementing a similar system of limits/caps as well as enforcing a priority date scheme will in turn deter highly skilled workers from seeking employment in the UK and prohibit the UK economy from prospering.

Canada

The UK and Canadian employment visa systems are both points-based.

The two major categories of employment visas for Canada are Skilled Worker visas, for which the applicant must score a minimum of 67 points, and Business visas, for which the applicant must score a minimum of 35 points.

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[49] See for example article in the Los Angeles Times, 10 July 2007
http://articles.latimes.com/2007/jul/10/opinion/ed-microsoft10

[50] Microsoft press release 5 July 2007
http://www.microsoft.com/presspass/press/2007/jul07/07-05msexpandvancouverpr.mspx

Skilled worker visa applicants can claim points for education (25 points for a Masters degree or a PhD), language (24 points for a high proficiency in English and French), work experience (21 points for 4 years' work experience), age (10 points for 21 to 49 years of age), arranged employment (10 points if the applicant has a job offer that has been confirmed by Human Resources and Skills Development Canada) and adaptability (5 points).

Business visa applicants (which include Investor, Entrepreneur and self-employed visas) can claim points for education, language, business experience (35 points for 5 years of business experience) and adaptability.

Skilled worker visas and Tier 2 are both sponsorship categories. In fact, a skilled worker applicant for Canada must have an offer of employment validated by the Human Resources and Skills Development Canada (HRSDC) unless the occupation appears on the Canadian Priority Occupation list. In that case, an offer of employment is not required.

Regarding Business visas in Canada, the equivalent in the UK would be Tier 1 (Investor) and Tier 1 (Entrepreneur), which are unaffected by any changes in the UK at the moment. However, in Canada there is no limit as in the UK Tier 1 (General) and Tier 2 categories.

Additionally, in Canada permanent residency can be obtained from being granted a non-immigrant visa upon entry to the country. Indeed, with the low unemployment and an ageing population in Canada, the result is that a number of occupational categories are reporting a desperate need for skilled workers so there is a stronger desire to not only attract workers but also to keep them residing in the country. Therefore the Canadian immigration system offers more incentives to foreign workers to take up employment in the country as well as reside there permanently such as making the process of obtaining permanent residency feasible upon entry for certain visa categories. This contrasts with the current economical and political situation in the UK .

Research, both statistical and qualitative, into the effects and likely consequences, intended and perverse, of interim and longer term quotas could, in addition to that research already undertaken by the Migration Advisory Committee and now by the Home Office,[51] also usefully focus on:

- **What the factors are behind economic migrants' demand for UK visas. Research could then go on to examine how to weight and rank them within a realistic equation to establish the true placement of this demand within an economic model for the UK. The elasticity of this demand should also be established and tested appropriately to see how changes within the domestic and international economy affect it.**
- **The interrelationship between movement for economic reasons from within the European Economic Area and economic migration from outside Europe.**

The stated policy objective of attracting the brightest and the best

The Government's stated aim is to "*reduce net migration to the level to the 1990s - tens of thousands, not hundreds of thousands*[52] by introducing a limit on immigration from outside of the EU. It has also stated its intention to "*continue to attract to the UK the brightest and the*

[51] *The Migrant Journey* Home Office, 7 September 2010.
[52] *Immigration to be reduced,* Home Office press release 24 June 2010 citing Damien Green, Minister for Immigration.

best to ensure economic growth."[53] These two aims are incompatible. The business community is concerned that the Government's proposals will adversely affect the UK's prospect 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 question of attracting the 'brightest and best' is not, and cannot become, a mere matter of rhetoric. It is a way of Government seeking to indicate that it is not hostile to migrants, but it is also much more than that. It expresses a truth, which is that those whose skills are most desired have a choice as to whether they come to the UK and that the UK will lose out if it is not their chosen country of destination. This the current Minister for Immigration, Damian Green, described during debates on the Borders, Citizenship and Immigation Bill in 2009[54]:

> *"If the highly skilled people around the world believe that this is not a country that welcomes them, they will stop coming here. The more highly skilled one is, the more marketable one is in an international context, and the more choice one has about where to live for large parts of one's working life."*
>
> *"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."*

An example will illustrate the concerns. If X is the world's leading open heart surgeon, presumably it would be considered desirable to attract that surgeon to practice in the UK. First, for their own skiills. Secondly, to attract those who will gather around him/her. This second group will include the 'brightest and best' open heart surgeons from within the resident labour market, who might otherwise decide to leave the UK to work with the world expert. The surgeon is likely to have a choice of country of practice, as are those good enough to work with him/her. There is never any guarantee that the brightest and best in a particular field will be a Britisih citizen or a person settled in the UK. And the UK is not immune from a brain drain.

In more general terms, traditionally economic quotas limit the supply of a good, whether it be a commodity or service, and thereby set an artificial price for the good above what the domestic price would be at a true market equilibrium if the demand for the good and the available supply of the good were allowed to prevail at a point of intersection where willing and able buyers and sellers are permitted to negotiate their contracts freely and come to mutual agreement regarding the price for the quantity supplied of the good.[55] Economic literature based on international trade has found that for small open economies, quotas reduce the welfare of the population by limiting a good.[56] In the immigration context migrants who can contribute positively to an economy and grow wealth and opportunity for both resident labour market workers and others could be said to be the good involved that the UK now wishes to limit. Economic migrants however are not passive commodities but are rational, self-interested agents who are looking for the best possible opportunities for themselves i.e. the highest return for their investment in the small open economy that they

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[53] 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).

[54] Damian Green MP, Shadow Immigration Minister, *Hansard*, HC Committee, Third Sitting 11 Jun 2009

[55] Steven M. Suranovic (Associate Professor of Economics and International Affairs at The George Washington University *International Trade Theory & Policy* (2009) Ch7 Section 13. http://www.flatworldknowledge.com/pub/international-trade-theory-and/199658#web-199739 & http://internationalecon.com/Trade/Tch110/T110-4.php

[56] *Ibid at Ch7 Section 14;* see also Yip, Chong K., Southern Economic Journal, 1997 http://www.allbusiness.com/specialty-businesses/608475-1.html)

join. As are the resident labour market workers who might chose to migrate to the UK. As are the companies who, while many factors weigh in their decision as to where to be based, may become so vexed with their inability to hire the staff they need, or with delay and uncertainty, that they chose to leave the UK.

The more onerous it is for a person to join and contribute to the UK economy, the higher the cost will be in the economic and non-economic returns the UK will have to offer to them to attract them (nationality at the end of the day may not be a sufficient reward in and of itself). Fewer economic migrants may equate to lower economic growth and prosperity overall for the UK population.

When an economic migrant makes an assessment about the cost and benefit of obtaining a UK visa, s/he considers a range of direct and indirect costs, from the Home Office application fee,[57] the funds necessary to satisfy the maintenance requirement,[58] legal fees for those who choose legal representation in their UK immigration matters as well as the costs of relocating their personal and financial possessions to the UK. Every additional cost that contributes to the true cost for a migrant to choose and relocate to the UK would need to be offset by an economic or other benefit and the reasonable predictability of obtaining an extension (and indeed settlement and citizenship) to ensure that their investment of funds, time and family disruption are worthwhile. They will also factor into their assessment the opportunity cost to them of not choosing to relocate to other destinations including Australia, New Zealand, Canada, Brazil, Russia, China and India among other desirable economic migration destinations. These costs will affect the economic migrants' demand for UK visas and will need to be quantified as accurately as possible for both interim policy measures and final policy measures.

The Government is currently seeking to drive economic growth by encouraging inward investment from overseas companies, particularly those operating in emerging markets such as China, India, Russia and Brazil.[59] The decision to exclude Investors and Entrepreneurs from the cap is a clear indication of the intention to ensure that investment in the UK is protected. Yet the operation of caps in Tier 1 (General) and Tier 2 may fundamentally undermine investment and entrepreneurial activity in the UK.

UK businesses are, increasingly, seeking key strategic appointments from the overseas labour markets, or recruiting graduates directly from universities within countries that represent emerging markets as a business strategy. However, many of the businesses ILPA's members advise have expressed to members their grave concerns that the imposition of the cap may deter new investors from the UK and make it more difficult for existing collaborations between UK and overseas companies to work effectively; and, in so doing, make the UK a less attractive destination.[60]

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[57] A valid application according to paragraph 34A of the current UK immigration rules requires the specified fee to be submitted at the time of making the application: http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part1/.

[58] Appendix C of the current UK immigration rules set out the maintenance requirements for Points-Based System migrants: http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/appendixc/.

[59] UK Trade and Industry *Survive and prosper: emerging markets in the global recession*, September 2009.

[60] The media has reported diplomatic friction caused by the announcement of a cap. The issue was highlighted in press coverage of the Prime Minister's visit to India. See, for example The Guardian, Alan Travis, *Immigration cap is to the fore as David Cameron visits Bangalore* ; The Daily Mail, Tim Shipman, *Nick Clegg reopens migrants row as he dismisses coalition plans to introduce cap on immigration* http://www.dailymail.co.uk/news/article-1303679/Nick-Clegg-reopens-migrants-row-dismisses-coalition-plans-introduce-cap-immigration.html#ixzz0xcbvQPaD , 17 August 2010; The Economic Times ' Non-EU Migration into Britain to be controlled' 20 July 2010 http://economictimes.indiatimes.com/News/News-By-Industry/Services/Travel/Non-EU-immigration-into-Britain-to-be-controlled/articleshow/6192059.cms ; The Daily Express, *Cabinet 'debate' on*

A view widely expressed by clients is that for UK businesses to access opportunities in these new markets it is imperative that they find partners, agents and employees from within the local communities of the target markets. UK businesses are, increasingly, seeking key strategic appointments from the overseas labour markets, or recruiting graduates directly from universities within these emerging countries to enable them to select the best talent for training in the UK. This is with the view to these talented individuals ultimately advancing key business strategies from bases in the UK and/or within the emerging market or elsewhere.

In August the legal press reported the difficulties international law firms are experiencing as a result of the crude reduction in the allocation of certificates of sponsorship under the interim limits. [61] International law firms, like other international businesses, are being forced to move non-EU graduates to other locations within Europe to honour their contractual commitments to them. Restrictions on being able to engage international lawyers in the UK will significantly impede UK firms international offering and damage those firm's position in the international marketplace (and in turn the UK's position as a legal hub for cross-jurisdictional transaction work).[62]

The view that has been expressed to members by their clients is that if the UK is to be truly competitive on the global economic stage, the immigration system must be able to have the flexibility to allow and support entrepreneurs and multinational companies to transfer existing managerial and qualified, trusted employees from branches and subsidiaries of multinational companies to work in the UK and that the current proposals would not permit this to happen.

There is a very real risk that the immigration cap will adversely impact on the UK's businesses by limiting opportunities with potential trading partners within target markets, reducing the level of investment in the UK and damaging competitiveness within the global market. This is an issue of real concern for UK businesses given that we are emerging from a deep recession and, with the threat of a double dip around the corner, the resounding message from employers is that this is not the time for the Government to restrict any opportunities for growth within the economy in order to achieve its political ends.

Contrary to the Government's stated aim, the immigration cap will be likely to act as a deterrent to the highly skilled, intelligent and talented migrants coming to the UK. A reduction in inward investment, the potential withdrawal of multinationals from the UK and a shrinking economy, and also the withdrawal of multi-nationals from the UK economy, will limit the opportunities here. This will inevitably mean that the UK is less attractive as a destination. It is likely that some talented individuals will not be able to gain entry to the UK because of the restrictions, or instead opt to go to other countries that offer greater opportunities for migrant workers.

Turning to the specific proposals, as to a pool, insufficient information is provided in the consultation paper as to the criteria that would be applied to select from any pool. A high points threshold would lead to a smaller pool, resulting in a lower waiting time for those in the pool. A lower points threshold would lead to those with the highest number of points being chosen at each selection from the pool thus potentially resulting in individuals remaining in the pool for six months. It would skim off the highest scoring applicants in a

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immigration cap, http://www.dailyexpress.co.uk/posts/view/189724/Cabinet-debate-on-immigration-cap 28 July 2010.

[61] *Immigration cap will strangle city law firms, Chancery Lane warns*, Law Society Gazette, 23 August 2010; see also http://www.thelawyer.com/bordering-on-the-problematic/1005319.article

[62] See also the response of The Law Society to the Migration Advisory Committee consultation.

certain period so that the points required to qualify are unknown at the time of application and leaving applicants for up to six months (by which time the employment or business opportunity that attracted them to the UK is likely to have passed), thereby deterring those who have other options. Individuals might never be chosen from the pool, not because they are not highly skilled or there is no need for their skills but because of circumstances beyond their control; the points score of other candidates.

Further (depending on the points criteria applied) the inevitable result of 'creaming off' the highest point-scoring applications will be that the highest earning applicants will always be favoured. This will disadvantage certain sectors and will not meet the UK Border Agency's objective of attracting the brightest and the best, only the wealthiest. For example, a reasonably low ranking investment banker with limited experience and qualification may still earn bonuses of several hundred thousands (which may often be paid offshore to minimise tax liability, limiting the economic benefit to the UK of these high earnings in any event). In contrast an academic recognised as a world leader in his field or a distinguished pioneering neurosurgeon or an award winning architect (to give but a few examples), will receive relatively modest remuneration but their ability to contribute to the UK, not only directly economically but in broader public service, resident worker training and long-term economic development and international reputation terms, is manifest. The UK must operate a system that continues to attract the world's finest minds in <u>all</u> sectors to ensure that the UK can truly compete in the global arena and generate effective, diversified, end ring economic prosperity.

It appears to ILPA members unlikely that a pool system will be capable of linear ranking of all candidates. Some elements for which points are awarded, such as satisfying maintenance requirements, are simply mandatory criteria to which an arbitrary number is attached. Others, such as degree equivalences, divide into broad bands. Salaries are ranked in bands, and to do otherwise and let minor differences play a part does not appear equitable and is open to manipulation. There are additional disadvantages if extra points are awarded according to level of English over and above the skilled level required for Tier 1 as this appears to create a bias toward candidates from countries where English is the main language. The need for adequate equality impact assessment is apparent.

Operating a pool would lead to delay and uncertainty, for migrants and for those wishing to employ them. Contrary to what may be assumed from the consultation paper,[63] there is not a neat separation between Tiers 1 and 2. The consultation paper is misleading insofar as it suggests that Tier 1 migrants have no job offer; Tier 1 does not *require* the applicant to have a job offer, however it is commonly the case that applicants' employment or business commitments/opportunities are the very reason for their application. Many migrants who have a job offer nonetheless enter via Tier 1. This may be because a migrant much in demand can negotiate not to be tied to a particular company or because a company has decided not to go down the route of being a UK Border Agency licensed sponsor (in the case of small businesses, and some larger ones, this may be because hires from outside the Resident Labour Market are very infrequent).

There is a suggestion that it would be reasonable to require a fee to be paid to enter the pool. Yet candidates within the pool are not, by inclusion in the pool alone, permitted to enter the UK and may find their application rejected after six months due to circumstances wholly beyond their control: the points that other candidates applying at the same time have scored. The proclaimed efficiency of the system would appear to lie in creating revenue for the UK Border Agency and little else; effort is devoted to providing immigration employment documents to persons who may never be permitted to enter the UK and use their skills. For migrants, the prospect of paying a fee for no return and six months

[63] *Limits on Non-EU economic migration,* 28 June 2010.

uncertainty is likely to be an invitation to look to other countries, in particular those where a successful application would lead at once to settlement.[64]

As to a 'first come, first served system, as described above, Tier 1 (General) migrants may have been identified for a particular position in the UK before making their application. The disadvantages of the 'first come, first served' system, described in response to question 2 below, therefore apply *mutatis mutandis* to such Tier 1 applications.

As to an auctions system, we consider the prospect of this being applied fairly very low indeed. The ability to tender higher fees has no necessary correlation with the need of the business for the worker, indeed it raises the question of whether, had the funds been invested in efforts to make the job more attractive to persons in the resident labour market, it could have been filled. Businesses with lower profit margins, not for profits and voluntary organisations, as well as smaller businesses just starting up, risk being the most adversely affected. Where companies are prepared to pay a premium to bring in a particular worker, we can envisage scenarios such as two or more rival companies bidding for the same candidate.

Neither the efficiency nor the effectiveness of the first come first served, pool or auction systems have been demonstrated and all run counter to the analyses of the Migration Advisory Committee as to the net economic benefits of migration[65], at a time when the UK can ill afford to place its economy in jeopardy.

At present, Tier 1 (General) presents a viable option for some individuals who would also qualify to apply under the Tier 1 (Investor) and Tier 1 (Entrepreneur). Such individuals are currently likely to opt to apply under Tier 1 (General) as this category provides greater flexibility in terms of business and investment activities.

If, as proposed, Tier 1 (General) is capped and the Investor and Entrepreneur sub-categories remain uncapped, it is foreseeable that some individuals may choose to use the investor or entrepreneur routes if they closely match his/her intended activities in the UK. However, where the investor or entrepreneur sub-categories are considered too restrictive and the revised Tier 1 (General) route is considered too risky a route for the commitment of a large personal investment (particularly where the extension process is capped or otherwise uncertain), individuals may choose not to start a business or invest in the UK.

See also ILPA's response to question 4 below.

Tier 2 Options

Q3. DO YOU AGREE THAT OPERATING A FIRST COME FIRST SERVED SYSTEM FOR SKILLED MIGRANTS AVAILABLE TO INDIVIDUAL SPONSOR EMPLOYERS WILL BE THE FAIREST AND MOST EFFECTIVE APPROACH? PLEASE SELECT ONE ANSWER ONLY.

This question does not admit of a tick box answer.

Q4. IF YOU ANSWERED YES OR NO TO THE PREVIOUS QUESTION, PLEASE GIVE YOUR REASON(S) IN THE BOX BELOW.

[64] As is the case for certain categories in, e.g., Australia, Canada, New Zealand and the United States of America see discussion below.

[65] See the reports at www.ukba.homeoffice.gov.uk/aboutus/workingwithus/indbodies/mac/reports-publications/ and discussion above.

As with question 2 above, it is not possible to answer this question with a 'yes', 'no' or 'don't know' answer. Firstly, because insufficient detail is provided on the proposals. Secondly, because it can be read as implying that the proposals in the consultation paper are for fair and effective systems, albeit that some may be fairer and more effective than others. We have addressed the factors relating to fairness and effectiveness in our response to question 2 and the comments made there apply equally to this question. We supplement this here with comments on the different proposals for dealing with Tier 2.

Many businesses have been given a zero Tier 2 General Certificates of Sponsorship allocation for the period 19 July 2010 - 31 March 2011 as part of the interim limit.

The UK Border Agency used the number of Certificates of Sponsorship used during the period of 19 July 2009 - 31 March 2010 to set the limit. The problem with this is that many businesses did not recruit as many employees during the period 19 July 2009 - 31 March 2010 as they usually would have due to the recession and indeed many businesses were making staff redundant.

The economy has started to improve and recruitment is on the increase, particularly in the financial sector. Organisations that did not use their sponsor licence are now in a position where they need to hire migrant workers who need sponsorship. The problem facing many of these organisations is that because they did not happen to use their licence for Tier 2 General during that particular 7.5 month period they are not able to sponsor new migrant workers as they have a zero Certificate of Sponsorship allocation. The proposals for the permanent cap will not alleviate this. The effect of a "first come first served" system will not take into account business needs or where a particular employee is critical.

Even large organisations that did use their licence for Tier 2 General are not unaffected by the Interim Limit, as many need to hire a larger number of migrant workers than they did during the comparison period at the height of the recession. For example some large City firms may have 50 Certificate of Sponsorship allocations for Tier 2 General but require 100. They too will be affected by the permanent cap and they will not be able to employ all the staff they require in the UK. If they did, this would then mean that smaller organisations would not be able to sponsor migrant workers. The current system means that small sponsors and larger sponsors will be faced with the reality that they cannot hire the workers with the right skills.

The Exceptional Cases Panel has been set up by the UK Border Agency where additional Certificates of Sponsorship are required, but they only have a finite (and undisclosed) pool. The Panel has prioritised applications using 6 rankings: a work permit holder or Tier 2 General migrant requiring a Certificate of Sponsorship to extend their stay will be given priority for an additional Certificate of Sponsorship over a worker required for a shortage occupation post who in turn will be given priority over a worker required for a post for which the resident labour market test applies and in each of the three scenarios an existing sponsor (registered prior to 19 July 2010) will be given priority over a new sponsor. There is no guidance on how a decision will be made if more requests are received in a single preference category than there are Certificates of Sponsorship available - which of the work permit holders/Tier 2 migrants applying at the same time will be refused a certificate, thereby preventing them from extending their leave in the UK? The form to be used for the submission of cases to the panel misleads employers as to the criteria by asking for information on advertising and for the business case. In fact no consideration is given to the individual merit and business need of each request, only to the category of application.

ILPA is aware that a very considerable number of requests for exceptional allocation have already been submitted to the panel, and the first meeting of the panel resulted in all applications being refused except for those relating to a work permit/Tier 2 extension. This

clearly indicates that the interim cap is already having a substantial effect on business. The workload of the panel, in terms of size and of unpredictability, risks giving rise to further delays and uncertainties.

Speaking to the Financial Times on 16 September 2010 the Business Secretary, Vince Cable, has himself stated that the Government's cap on immigration has been "very damaging". The Guardian[66] reported his comments that

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

The consultation paper envisages that the 'first come, first served cap relates to the allocation of entry clearances. However, we understand from subsequent discussions with the UK Border Agency[67] that the cap may be applied at the point of the sponsor attempting to assign the Certificate of Sponsorship. Whether the UK Border Agency applies the cap at the point of allocating certificates to sponsors (as in the interim limit) or at the point of sponsors assigning certificates of sponsorship to migrants, or at the point of applying for leave to enter or remain, the same dilemma will apply.

The UK Border Agency has confirmed that it has no way of knowing how many work permit holders there are in the UK who will require sponsorship.[68] This will make the imposition of any cap on in-country applications 'arbitrary' to use the words of the Migration Advisory Committee, cited above.

A "first come first served" approach could mean that work permit holders and those on Tier 2 who require an extension are not able to be sponsored as the allocation of Certificates of Sponsorship/leave to remain approvals has been used. This could result in economic loss to the employer as they have invested in the migrant worker and the migrant could be critical to the employer's business.

Migrants make a considerable investment when they move internationally. Living in a new country requires arrangements to be made for accommodation, transportation and schooling for children. Capital assets may be sold in the country of origin and bought in the destination country. A range of contractual commitments must also be made in order to facilitate employment or self-employment and private activities in the destination country.

Due to the substantial financial and personal commitments many Tier 1 and Tier 2 migrants make when moving to the UK, fairness dictates that limits on Tier 1 (General) and Tier 2 should not operate in a manner that would result in migrants being unable to extend leave to remain in the UK simply because a cap has been reached. Uncertainty regarding extension entitlements distracts migrants from their work and creates substantial anxiety for migrants and their family members.

There is also likely to be a range of responses within the UK market to the creation of a class of migrants with more uncertain residence rights, for example restrictions/ineligibility to obtain finance for capital items such as cars, residential or commercial property and other business plant and equipment. The cost to a business of engaging migrant workers with skills not otherwise available in the resident labour market may also increase as migrants demand

[66] The Guardian, 17 September 2010.
[67] UK Border Agency meeting with ILPA of 18 August 2010 and UK Border Agency meeting with Law Society of 5 August 2010.
[68] UK Border Agency meeting with ILPA 12 August 2010.

higher remuneration as compensation for the greater risk and personal expense associated with a less secure immigration status.

Making arrangements for an international move (both to and from the UK) requires planning and creates stress, even where timelines for the move are known well in advance. Being forced to leave a country with little or no notice can be financially and personally devastating for migrants and dependants as contracts are broken, assets are sold in a rush, and educational arrangements and personal relationships are disrupted.

Particular uncertainty may be created at the time when a migrant must apply for an extension. The UK Border Agency has canvassed different methods of implementing the cap: 'first come, first served', a 'pool' or 'auctions' with attendant measures such as the 'rolling over' of applications from one selection round to the next. It is entirely unclear how any such proposals could viably operate for applicants in the UK who will have a particular time imperative: that of their current leave expiring. Provided that an application is validly submitted on or before the date a migrant's existing leave to remain is due to expire, the applicant will continue to have permission to remain in the UK until that application has been determined (and any right of appeal exhauted) by operation of section 3C of the Immigration Act 1971 (as amended) (3C). For example, a migrant seeking to extend his/her leave could find his/her application 'rolled over', including to a date after the initial leave would have expired, so that extensions of leave under 3C are relied upon. If the application is ultimately not successful, the migrant will be required to leave the UK, and to do so within 28 days of a final decision or face a lengthy 're-entry ban.'[69] This creates considerable uncertainty, making it impossible for employers to plan, for the self-employed (in Tier 1 General) to plan for their businesses and for Tier 1 and Tier 2 migrants to plan their lives.

The prospect of such uncertainty may make it more difficult for the UK to attract those migrants who have a choice of destination in the first place; the reality of such uncertainty will place considerable strain on individuals and businesses.

Where the application is unsuccessful the employer may lose a worker in whom they have invested and who is critical to the employer's business at the time where, for reasons outside the control of the migrant or employer, for example the place of their envelope in a queue, or the points score of others in the 'pool' at a particular time, the migrant is unable to extend his/her leave.

When in 2006, under the precursor to Tier 1 (General), the Highly Skilled Migrant Programme, initial grants of leave were for one year and a 'points-based' extension was introduced, many migrants in this category had problems getting jobs as employers didn't want to take the risk they wouldn't get an extension. See the *BAPIO* case[70] in particular. Uncertainty results in worse personal outcomes for migrants.

For the reasons outlined above, careful consideration should be given to prioritising skilled and highly skilled migrants who already live in the UK, with a view to maximising their economic contribution, minimising disruption to their personal lives and protecting their rights. This may be achieved by such measures as relaxing in-country switching criteria (for example where a dependant wishes to become the main applicant due to changed circumstances), exempting individuals who currently live (or have recently lived) in the UK from having to meet higher English language criteria, making a clearer delineation between temporary and permanent migration categories and allowing migrants to have more than one application under consideration at the same time (for example an application for Tier 1 (General) and an extension under Tier 2).

[69] See HC 395 part 9, and in particular paragraph 320.
[70] *Op.cit.*

Furthermore, a strategy to implement any cap must seek to avoid the creation of a group of migrants who choose to remain in the UK unlawfully as a consequence of being unable to extend their stay. The Institute of Public Policy Research and others have argued that limited options for regularisation and future legal re-admission to the UK, whilst designed to deter illegal immigration and increase return, is 'artificially damming irregular migrants in', and that migrants who have legal status are more likely to ultimately return to their country of origin or migrate onwards than those
who do not. [71]

We recall that at his lecture, and subsequent panel discussion, in October 2008 at the London School of Economics Professor David Metcalf[72] expressed his then view that the duration of the leave granted, rather than the operation of a quota system for initial applications, was a more effective way of controlling 'stocks' of human capital because if the job for which the migrant had been taken on for a three year period (or less) and was granted an entry clearance visa for ceased to exist, then their leave would expire and they would have to find alternative employment/grounds to stay in the UK or they would have to leave the country.[73] In this way economic changes and changing company requirements would be addressed sufficiently if labour from outside the resident labour market were required to fill a gap in the pool of economically active candidates. He indicated that people should not focus so much on 'flows' of human capital in terms of the movement of people in and out of the country. The issue in his view was who was in the UK and why and who was engaged in economically beneficial activity.[74] This view is difficult to square with an approach that would require whether a person obtained an extension to be determined by the number of other applications for an extension/an initial grant of leave.

If the immigration cap is to include extension applications for existing staff then sponsors will need to manage this internally. Apart from the impact on businesses forced to release valued staff, a decision not to allocate a certificate of sponsorship to an existing employee could lead to their employment being terminated (and that of any dependant), and could potentially result in unfair dismissal and/or breach of contract cases. A decision by an employer not to pursue an exceptional request application could also lead to such cases.

Accordingly **ILPA urges the Government not to impose a cap on in-country applications, whether in Tier 2 or in Tier 1.** In addition, some mechanism to address exceptional circumstances is required.

It is pointless to prevent people switching in-country when, if they returned to their country of origin, an application for entry clearance in the new category would at once succeed. An example is switching to leave as a spouse or civil partner of a British citizen or settled person only to return a short time later. It is also apt to lead to successful challenges in the courts under human rights law[75]
The interim cap on Tier 2 General means, and a subsequent cap will mean that many organisations are/will not be able to hire migrant workers who require sponsorship. This could detrimentally affect start-up companies relying on a key worker from abroad and small companies that may need a migrant worker with a particular skill set not available in the UK and cannot afford to train up a resident labour market worker with the time-frame required and/or at this stage of the company's development. International organisations may be affected by the inability to have staff with international skills in the UK. This could result in businesses being set up abroad, thereby costing resident labour market workers jobs.

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[71] *Shall We Stay Or Shall We Go?* Institute of Public Policy Research, 2009, page 103.
[72] A copy of the lecture notes is held in the ILPA archive.
[73] *Ibid.*
[74] *Ibid.*
[75] *Beoku-Betts v SSHD* [2008'] UKHL 39.

This means businesses are and will be restricted in terms of who they can hire. They cannot use Tier 2 Intra-Company Transfers unless the migrant has worked in a linked company overseas for 12 months. Tier 1 (General) is capped for applications made outside the UK.

A situation could easily arise where, for example, a Chief Executive or Managing Director is caught out by the cap on Tier 2 General. They have not obtained 12 months experience with the overseas company and cannot come as an Intra-Company Transferee. They make a Tier 1 General application but are caught out by the cap and, under the proposals in the consultation paper, their application is rolled over to the next month.

The company cannot bring their key employee to the UK except as a business visitor. This means that businesses will have the choice of being without their Managing Director/Chief Executive Officer which would seriously affect their business, or break immigration law and bring them in as a business visitor despite the fact they are really working in the UK.

The 'first come, first served' system is random in its operation. Its perceived 'fairness' is that it is equally unfair to all migrants. But this is not the case. It will affect persons of different nationalities differently. Processing times vary in different posts around the world,[76] creating a disadvantage for applicants in countries with slower processing times. In some countries, such as the United States of America, UK consular posts offer premium and priority service applications (Tier 4 same day service and 48 hour premium service,[77] services which now incur a fee –the legal basis for which is questionable[78]). In other countries applications take several weeks. Some posts are not connected to the Agency's central IT system, causing further delays. In addition, problems with the Agency's information technology system are far from unknown.[79] The point at which the cap is reached is determined by the number of allowed applications. If consular posts in, for example, Australia, have more staff and work fastest, they may have allowed sufficient applications to reach the cap before applications from, for example, India, have ever been considered. The potential for inequitable treatment is high. Similarly if each post is given a quota, where the size of the quota will affect the chances of nationals from that country. ILPA members are also aware that those companies

[76] See www.ukvisas.gov.uk/en/howtoapply/processingtimes

[77] See https://www.visainfoservices.com/Pages/Content.aspx?Tag=Services_PAGE, USA, link Additional Services,

[78] Extract from ILPA note of the UK Border Agency International Group User Panel meeting on 22 July 2010:

> *Priority and premium service fees:*
> I [Alison Harvey] asked what was the legal basis for charging for this given that it is contained neither within the Consular Fees Order 2010 [SI 2010/238] nor the Immigration and Nationality (Cost Recovery Fees) Regulations 2010 [SI 2010/228]. The Acting Chair said that it is an extra service offered by commercial partners not the Agency – so like photocopying, no need for it to be in fees regulations. She said that the fee was not mandatory. It was for a priority service. It has no bearing on the outcome of the application. Where service falls below published standards it is not offered as people should not have to pay to get a service within published standards. She said that they had looked at including it in fees regulations but it could not be a local fee and it was too complicated to set out different fees for different countries in a schedule. So it is done by commercial partners and therefore Agency says they do not need to put it in regulations.[...]I protested that it was all very well talking about administrative convenience and complicated regulations but that sidestepped the main issue in making it something the partners charged for rather than putting it in the fees regulations meant that it was not subject to parliamentary scrutiny. I suggested that this was unacceptable and also asked that the UK Border Agency revisit the question of legality in the light of the judgment in *Pankina*. The Acting Chair emphasised that it is not a mandatory fee, but agreed to seek advice on legality post *Pankina*.

[79] See e.g. Chief Inspector of the UK Border Agency, *An inspection of the UK Visa Section Pakistan settlement applications*, Jan-April 2010, paras 8.24-8.28 and *Croydon Public Enquiry Office: Unannounced Inspection*, 04 February 2010, paras 5.22 and 5.24.

with a larger migrant workforce are likely to develop the most intricate knowledge of the workings of the system, combined with the manpower to utilise the system (eg. by having multiple staff positioned to assign COS/submit on-line entry clearance forms the second the cap allocation period opens) to the advantage of their prospective employees, of whatever Tier. A global 'first come first served' system is logistically complex and open to charges of operating in a discriminatory manner just as is a system that allocates quotas of visas to posts. An equality impact assessment is required.

The first come first served system, besides being discriminatory, is not easy to operate, including if applications exceed the limit at which the cap is set on the first day of its operation, creating a situation akin to the operation of the H1B visa in the United States of America. There is, ILPA suggests, a limit to the fee that can be charged to a migrant who does not even have any certainty that his/her application will be studied.

Since the Government's policy is aimed at cutting net migration down to levels below natural demand, it is highly likely that waiting times for entry into Tier 1 (General) and Tier 2 will increase as supply of places in these categories is reduced. Any substantial increase in waiting times will damage business operations, make the UK a less attractive destination relative to alternative destinations and encourage speculative applications whereby prospective migrants apply to come to the UK as well as other destination countries and employers apply for multiple staff (and potentially multiple jurisdictions): the lottery effect - you only need one winning ticket but the more tickets you buy the greater the chance that one of these tickets will be a winner. A system based on statistical chance, rather than specific need and merit creates perverse outcomes.

The recruitment process risks becoming unnecessarily drawn out, affecting the ability of employers to meet immediate highly skilled and skilled labour needs. Even with up-skilling within the UK concerns have been expressed to members that in areas of particular deep shortage that employers will not be able to secure skilled staff from the resident labour market. The concern around this issue is that businesses could find that they lose good candidates, or otherwise be put at significant cost (e.g. having to offer incentives) to keep potential recruits interested and incentivised during lengthy recruitment process. The delay in bringing non-EU nationals on board would affect service delivery, contracts, and key business strategies.

Proper consideration does not appear to have been given to how the immigration cap might affect recruitment to those posts which are usually recruited for well in advance, for example trainee solicitors, post graduate medical and dental trainees, and graduate recruits.

There is a real risk that the manner in which a cap on Tier 2 is implemented will encourage speculative applications for certificates of sponsorship or leave to enter/remain (depending upon the stage at which the cap is applied – the interim cap is applied to the allocation of certificates of sponsorship to each licensed sponsor, whereas the consultation envisages that the cap may be applied later, at the leave to enter/remain stage).

Indirect race discrimination is an important consideration for those recruiting, who must answer to both the Employment Tribunals and the UK Border Agency. The Commission for Racial Equality Code of Practice on racial equality in employment makes clear that as far as possible, employers should make an application, leaving it up to the immigration authorities to determine the outcome. This was confirmed in the case of *Osborne Clarke.* [80]

Osborne Clarke

[80] *Osborne Clarke Services v Purohit* [2009] I.R.L.R. 341 (EAT).

Law firm Osborne Clark Services had a policy of not considering any application for solicitor training contracts from individuals requiring permission from the UK Border Agency to work in the UK. Last year, an Employment Tribunal held that one such applicant had been indirectly discriminated against by Osborne Clark Services because the proportion of non-EEA nationals who could comply with its requirement of not requiring a work permit was smaller than those who could comply with it - and that Osborne Clark Services could not justify the requirement. Osborne Clarke Services' policy therefore adversely affected non-EEA nationals who, by virtue of their immigration status, were not permitted to work in the UK.

At the Employment Tribunal, Osborne Clark Services had sought to justify its policy on the basis that UK Border Agency *Guidance for Employers* provides that when applying for a work permit, employers must show why they cannot not fill the post with an EEA national, including a less qualified or experienced one who, with extra training, could do the job. As a result, Osborne Clark Services considered that it could not sign the declaration at the end of the work permit application verifying that all of the facts in the form were true as, even if a non-EEA candidate was superior to the other EEA candidates, since the nature of the job involved training, those less successful EEA candidates could, with extra training, always do the job.

Furthermore, as the UK Border Agency could refuse the application, Osborne Clark Services argued that even if they submitted a form for a work permit for a non-EEA national, there was little prospect of success. It also argued that submitting an application would in turn unnecessarily raise the candidates' expectations and that it would incur additional costs in taking such candidates through the recruitment process and having to make an application to the UK Border Agency. None of the above arguments found favour with the Employment Tribunal - in particular, it found the costs argument "an unattractive way of justifying indirect discrimination".

Employment and discrimination law require that the best candidate is offered the position (regardless of their nationality or immigration status), whereas Tier 2 (General), where the resident labour market test applies, requires that no resident worker who is suitable is rejected in favour of the sponsored migrant worker even if the resident worker is inferior; it is not enough for the migrant worker to be the best candidate.

The Tribunal also referred to the 'Code of Practice on Race Equality and Employment' which makes it clear that as far as possible selection should be based purely on merit and that immigration issues should only come into consideration at the later stage of selection. The Code also states that "Employers can apply for work permits and should not exclude potentially suitable candidates from the selection process".

The Tribunal's key findings were that in the absence of any dialogue between Osborne Clark Services and the UK Border Agency, Osborne Clark Services was wrong to assume that there was no point in applying to the Agency and that the Tribunal did not accept that it was for the UK Border Agency to tell Osborne Clark Services - a leading international law firm - who is suitable for them to employ in a qualitative sense. In the Tribunal's opinion, it was up to Osbourne Clark Services to identify the person it considered to be most the suitable for the job employ and then make the case to the UK Border Agency if it considered that there was a case to be made. Osborne Clark Services appealed against the decision to the Employment Appeals Tribunal - which agreed with the Employment Tribunal's findings and rejected the appeal.

Whilst this case concerns the "old" work permit system, it has significant implications for employers who have blanket polices of not accepting applications from non-EEA nationals requiring sponsorship under the successor Points-Based system. It is clear that it will be

difficult for employers to justify such policies, on the basis (for example) of the costs and/or administrative burden of obtaining a sponsorship licence.

The UK Border Agency's own policy document regarding the avoidance of discrimination whilst seeking to prevent illegal working states:

> *"3.5 Employers must not discriminate on racial grounds or subject a person to harassment in:*
>
> *a) the arrangements they make to decide who should be offered employment; or*
> *b) the terms on which they offer to employ a person; or*
> *c) by refusing or deliberately failing to offer employment.*
>
> *3.6 It is also unlawful for employers to discriminate on racial grounds against a worker, or to subject him or her to harassment:*
>
> *a) in the terms of employment provided; or*
> *b) in the way they make opportunities for training, promotion, transfer, facilities, services or other benefits available; or*
> *c) by refusing access to such opportunities, benefits, facilities or services; or*
> *d) by dismissing the worker, or subjecting him to some other detriment.*
>
> *Failure to observe this code may be taken into account by an Employment Tribunal."* [81]

Post *Osborne Clarke*, the Employment Tribunal ruled that applying a blanket policy to reject candidates requiring sponsorship is unlikely to be objectively justifiable and cost is 'an unattractive way of justifying indirect discrimination, employers are likely to find themselves in the position of having to complete recruitment processes, request a Certificate of Sponsorship and apply for leave to enter/remain for the prospective worker even where they know it will not be, or is statistically unlikely to be, granted due to the cap – all at substantial expense and time cost.

Again, it is particularly important to consider the position of workers who already hold leave under Tier 2 (or under the predecessor work permit scheme). An employer who is unable to continue the migrant's employment due to the cap being reached, if it were to apply to extensions as well as new entrant applications, may be vulnerable to discrimination claims in terminating that employment. This is an additional reason why **extension applications should be excluded from the cap.**

Members have heard from some sponsors who are extremely concerned that to comply with Osborne Clarke they will be compelled to assign COS for overseas national candidates who are not business critical in order to avoid discrimination claims, leaving them without the COS they need for crucial specialist or senior migrant workers in business critical positions. A merit based assessment by UK Border Agency, rather than a purely numerical cap, would avoid such difficulties.

There is also the converse risk that some employers, contrary to discrimination law, will introduce a process of sifting out applications from candidates on the basis of their actual or perceived nationality or immigration status.

Questions of discrimination also arise where a sponsor is obliged to hold health insurance for sponsored workers and does not extend this benefit to all employees.

We are at a loss to see how a wholly random system provides certainty for businesses, or enables them to recruit the migrants most needed. There may be certainty within a short period for those whose envelope happens to be at the top of the pile; for the others there is only the uncertainty and difficulties that come with having a key post unfilled, and no means

[81] *Guidance for employers on the avoidance of unlawful discrimination in employment practice while seeking to prevent illegal working: Code of Practice*, Border & Immigration Agency, February 2008, page 5.

to fill it. See also our response to question 21 where we address the question of how a first come first served system would lead to competition between wholly disparate areas of work.

Q5. DO YOU BELIEVE WHERE A QUARTERLY QUOTA IS FILLED, APPLICATIONS THAT HAVE NOT YET BEEN CONSIDERED SHOULD BE ROLLED OVER TO THE FOLLOWING RELEASE?

Yes

Q6. IF YOU ANSWERED YES OR NO TO THE PREVIOUS QUESTION, PLEASE GIVE YOUR REASON(S) IN THE BOX BELOW.

ILPA reiterates that it does not agree with a quota system. However, if there is to be such a system, then 'rolling over' would appear to be less unfair than the other options. A short roll-over period would be favoured, given that it provides fewer lengthy periods of uncertainty.

POINTS FOR HIGHLY-SKILLED MIGRANTS

Q7. DO YOU THINK THE GOVERNMENT SHOULD CONSIDER RAISING THE MINIMUM CRITERIA FOR QUALIFICATION UNDER TIER 1 OF THE POINTS BASED SYSTEM? PLEASE SELECT ONE ANSWER ONLY.

No.

Q8. IF YOU ANSWERED YES OR NO TO THE PREVIOUS QUESTION, PLEASE GIVE YOUR REASON(S) IN THE BOX BELOW.

This would lead to a significant number of individuals whose skills are needed being excluded from the new system.

ILPA, for reasons that have been advanced to the Agency many times, does not consider that qualifications or salary are an adequate proxy for skills.

Any mechanisms adopted must allow migrants and their families to plan for the future with a high degree of certainty regarding when and for how long they will be able to come to the UK.
If the Government is serious about its stated intention of attracting and welcoming to the UK those who have the most to offer,[82] then consideration should also be given to the factors encouraging such migrants to choose to apply to come to the UK in preference to other countries.

At present new Tier 1 (General) migrants must remain in the UK for at least five years prior to qualifying for indefinite leave to remain, including successfully completing a points based extension process during the qualifying period. This contrasts with the process for capped points based categories aimed at attracting highly skilled migrants to other countries, which in most cases offers successful applicants permanent residence prior to entry. [83] It also contrasts with the Diversity Visa (Green Card) lottery programme run in the United States

[82] *Limits on Non-EU Economic Migration – A Consultation* UK Border Agency, June 2010, page 3
[83] Examples include Australia's General Skilled Migration categories, New Zealand's Skilled Migrant category and Canada's Federal Skilled Worker program.

of America, in which applicants are selected at random to make an application for permanent migration to the United States of America irrespective of skill set. [84]

Under the current UK arrangements, highly skilled migrants must defer the possibility of permanent residence, however are able to make their initial entry to the UK much faster than for alternative countries. Broadly speaking, the criteria for extension and settlement are known in advance and therefore migrants are able to plan their activities with a view to ensuring they are able to meet the criteria for settlement.

The Government must take steps to ensure that the Tier 1 (General) cap is administered in a way that will not dissuade the 'brightest and best' from applying.

As the Government's policy aims to reduce net migration to levels below natural demand, it is highly likely that waiting times for entry into Tier 1 (General) and Tier 2 will increase as supply of places in these categories is reduced. Any substantial increase in waiting times will make the UK a less attractive destination, relative to alternative destinations.

The models adopted by the Government must include mechanisms to ensure that waiting times for eligible applicants do not significantly increase (for example by adjusting the Tier 1 (General) points threshold for eligibility where demand outstrips supply and by having a fortnightly or monthly quota for Tier 2 rather than a quarterly one and revising the Tier 2 points table for new migrants where demand outstrips supply).

Another option the Government ought to consider as a means of better competing with other countries is to restructure Tier 1 (General) to grant indefinite leave to enter or remain at the outset, or at the very least to exempt the extension phase from the cap as described.

To ensure fair treatment for individual migrants, it should be recognised that while migrants in Tier 1 (General) and Tier 2 primarily come to the UK for economic purposes, their value to the UK is much more than as units of labour. Migrants' experience of living in the UK and dealing with its institutions can bolster or detract from the country's international reputation. [85]

Often migrants choose to come to the UK taking into account non-economic factors, such as having siblings or other family members living in the UK, having previously lived here (for example for work, study or as the dependant of another person) or who would like their children to be educated here. Critically, these are also individuals who are highly skilled or skilled and have a desire to live in the UK, either on a short term or permanent basis.

Whilst the UK should certainly seek to maximise the potential of British workers through upskilling initiatives, it does not necessarily follow that having a more skilled British work force will reduce demand for migrant labour. This is because the Government cannot control market outcomes – those with skills may choose not to use them or use them in a sector other than the targeted one. They may also opt to use their skills abroad, which would reduce the net migration figure but would not achieve the objective of benefitting the UK economy. Unless there is a perfect match between the skills of the resident workforce and the labour needs of the economy, there will always be demand for migrant labour.

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[84] For further information on this program see: http://www.usagcls.com/index.asp

[85] The Institute for Public Policy Research has observed that 'Re-migrants are, potentially, an asset to the UK, even though they have left the country. They can help in all sorts of ways to promote the country, and are probably under-utilised in this way.' *Shall We Stay Or Shall We Go?* Institute of Public Policy Research, 2009, page 78.

In addition, there will also always be demand for highly skilled and skilled workers with international experience in the context of a globalised economy. A 2004 working paper commissioned by the Canadian Government supports this view, making the following observations:

> *"Our analysis suggests that mobility of skilled workers has increased in parallel to an increasing importance of technological change, globalization of production and integration of markets through international trade and foreign direct investment, location of multinational enterprises, strategic alliances and networks with high-technology global firms and clusters of research and innovation, opportunities for high-technology entrepreneurship and the internationalization of R&D activities of national firms. Our findings also seem to suggest that increased income and employment opportunities, and career prospects and attractiveness of the education and research system coupled with the changing preferences of highly qualified personnel towards working abroad are also key drivers of international mobility of skilled workers in the new global economy."* [86]

Q9. DO YOU THINK THE GOVERNMENT SHOULD PROVIDE FOR ADDITIONAL POINTS TO BE SCORED FOR THE FOLLOWING FACTORS? PLEASE SELECT ONE ANSWER FOR EACH FACTOR.

Higher level English Language ability	No
Skilled Dependants	No
UK Experience	No
Shortage Skills	Yes
Health Insurance	No

Q10. DO YOU THINK THERE ARE ANY OTHER FACTORS THAT SHOULD BE RECOGNISED THROUGH THE POINTS SYSTEM? IF YES, PLEASE GIVE DETAILS BELOW.

We use this question first to elaborate on our responses to question 9.

English language: If extra points are awarded according to level of English over and above the skilled level required for Tier 1 then this appears to create a bias toward candidates from countries where English is the main language. The need for adequate equality impact assessment is apparent. It is also worth looking at the approach in New Zealand which awards points for the purchase of English Language study to ensure that migrants are able to adapt and integrate effectively.

We would also observe that the required standard of English for Tier 1 is already exceptionally high (equivalent to Grade A-C GCSE) – a standard not achieved by a large proportion of the resident population.

Skilled dependants: It is unclear to ILPA how points could be awarded for this without discriminating in favour of those with dependants over those with no dependants at all.

UK Experience: Points should be awarded for work experience (indeed ILPA has long advocated this) as opposed to UK experience alone. Points for work experience were previously awarded under the HSMP and other jurisdictions operating points based systems award points for experience (such as New Zealand).

Shortage skills: ILPA has no objection to this.

[86] *International Mobility of Skilled Labour: Analytical and Empirical Issues, and Research Priorities*, Skills Research Initiative Working Paper, 2004.

Health insurance: There are many difficulties with this. Small businesses, voluntary organisations and those with lower profit margins will be adversely affected by the additional expense. Such a requirement might lead to a perverse situation where, to avoid treating migrant workers more favourably than resident labour force workers and to prevent discrimination employers, including the National Health Service, are obliged to offer private health care to the entire work force, at considerable cost. There is also the question of the bilateral health agreements that the UK has with a number of countries which allow citizens, and in some cases residents (irrespective of nationality) access to the National Health Service. Nothing in the consultation paper suggests that these complexities have been considered.

We refer to our introduction, our answers to questions 2, 4 and 8 there is first and foremost, a need to take into account the law, be it public law, discrimination law, employment law, or immigration law.

As to immigration law, when referring to the criteria for entry under the Points-Based System it is incumbent upon Government and the UK Border Agency to make reference to all the criteria, including general requirements of the immigration rules. These are given so little attention that we set out some of the considerations here.

As the Migration Advisory Committee has highlighted in its consultation paper,[87] no worker or dependant entering through Tiers 1 and 2 is permitted any recourse to 'public funds' as defined in rules 6 to 6C of the Immigration Rules.[88] To have recourse to public funds as defined in the immigration rules is to be in breach of terms and conditions of leave, with the attendant risk that leave is curtailed and the worker and dependants must leave the UK. No worker or dependant entering through Tiers 1 and 2 is entitled to public housing. Workers and their dependants will thus purchase property or be housed in the private rented sector.

We are not aware of any evidence (or of the UK Border Agency undertaking any research) of Tier 1 or Tier 2 migrants or their dependants claiming public funds in breach of conditions, or following the grant of settlement, so as to warrant any reasonably founded concern of any adverse economic/social impact in this regard.

The children of migrants are entitled to go to state school. Tier 1 and Tier 2 migrants, and their dependants are entitled to use the national health service. Those who settle in the UK acquire entitlements to social welfare assistance and housing.[89] But these are not 'free gifts'. Those migrating for two years or more are likely to be paying taxes in the UK; those migrating for shorter periods may be doing so.[90]

There is however no automatic progression from limited leave in Tiers 1 and 2 to settlement. A separate application for indefinite leave to remain must be made and the relevant criteria fulfilled.[91]

It is not necessarily the case that a migrant applying for indefinite leave to remain in the UK intends to stay in the UK in the medium to long term. Settled status may be attractive because it permits the migrant to leave and return, whether to work or for a visit. It may become all the

[87] At 2.18.
[88] HC 395 as amended.
[89] At 2.20.
[90] See HMRC IR 20 *Residents and Non-residents: liability for tax in the United Kingdom.*
[91] See, for example, for Tier 1 (General) Migrants, Immigration Rules rule 245Eff.

more attractive the more 'arbitrary' and changing the criteria for any subsequent entry are perceived to be.

There is also a need to take into account the way in which Tier 1 and Tier 2 migrants make use, or do not make use, of the public services to which they are entitled.

In members experience, many Tier 1 and Tier 2 migrants have private healthcare for themselves and their dependants, often as part of a benefits package offered to the migrant along with their job (in particular in specialised positions where this is part of a recruitment package designed to attract candidates).

In members' experience significant numbers of Tier 1 and Tier 2 migrants opt for private schools in the UK for their children.

In addition we make the following points:

There is a need to take into account hostility toward migrants and other racism. Organisations such as the British National Party are enjoying increased popularity.[92] An effect of the cap is to condone the negative image of migrants portrayed by some elements of the press. An example is a piece in The Sun [93] where the representative can confirm that the individual acted within the law and sought an entry clearance due to the inability of the UK Border Agency to offer a Points-Based System 'fast track' appointment on a date which would have allowed the applicant to complete his contract before changing employer/ status. However, the article used language such as 'deported' and implied that the applicant had been working illegally (he had not and this was not in issue). The Migrant Integration Policy Index (MIPEX) reminds us of the European move towards a common system of monitoring migration and integration policy. MIPEX hold the view that

> *'When migrants feel secure, confident and welcome, they are able to invest in their new country of residence and make valued contributions to society.'* [94]

There is a need to take into account the human cost to migrants, their dependants, and their colleagues and employers who depend upon them of the stress and uncertainty of ever-changing unworkable policies. Migrants face a constantly changing and increasingly complex requirement structure within their relevant category.[95] This constant policy guidance and rule revision process affects the migrant's knowledge and expectations regarding the benefit to them of the duties they will be required to undertake in their agreement to become part of the economically active population in the UK. Without a reasonably stable platform of understanding and measurable expectations it is very difficult to plan personal investment and life strategies that complement a longer term route to relocate to another country. This uncertainty and instability undermines the stated[96] objective of integrating a 'desirable' migrant seamlessly into the settled population. Commitment is not fostered in an unstable and uncertain environment subject to extremely regular short-term revisions and to legal challenges.[97]

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[92] BBC Election 2010 results, http://news.bbc.co.uk/1/shared/election2010/results/

93 The Sun 'Strictly Star Hoofed Outa UK', 05 August 2010. http://www.thesun.co.uk/sol/homepage/showbiz/tv/strictly_come_dancing/3082216/Strictly-Come-Dancings-Artem-Chigvintsev-returns-to-the-USA-to-avoid-being-deported.htmln

[94] "What does MIPEX measure?" http://www.integrationindex.eu/topics/2650.html

[95] For examples of such recent changes see Cm 7929 (parts taking effect 20 August 2010); Cm 382 (parts taking effect 23 July 2010), HC 96 was ordered to be printed on 15 July 2010 and took effect five days later; HC 439 was ordered to be printed on 18 March 2010 and parts took effect on 6 April 2010.

[96] Including in the Conservative Party Manifesto.

[97] *R (HSMP Forum Ltd) v SSHD* [2008] EWHC 664 (Admin); *R (HSMP Forum (UK) Ltd) v SSHD* [2009] EWHC 711 (Admin); *R (BAPIO Action Ltd) v SSHD* [2008] UKHL 27; *SSHD v Pankina et ors* [2010] ECWA Civ 719; R *(English UK) v SSHD* [2010] EWHC 1726.

Changes to the rules and the proposed cap have caused migrants who are currently in the UK but who have not been granted settlement to be concerned about whether they will be permitted to remain. They may be uncertain as to whether to settle their children in UK schools, invest in property, buy a right-hand drive car or invest their money in the UK rather than keeping it overseas. It will be difficult for migrants to put their children into schools, private or otherwise, if they are unable to plan in advance because they are waiting for a decision on their visa. What may have started out as a strong desire to participate in UK society and perceived common economic goals and values often wanes in dismay and disgust at the perceived chaos and the real hidden costs of the new system.

There is a need to take into account the interaction with other areas of Government policy. An approach that permits discrimination on the grounds of gender, age or marital status may be unlawful, and may run counter to policies designed to promote equality of opportunity, whether among the working population as a whole, in the resident labour market, or at large.

There is a need to take into account the effect of the system and its operation on small business. Often they will have only obtained a sponsorship licence to appoint one or two key strategic roles and there is a risk of a disproportionate effect on those businesses.

There is a need to take into account additional costs for businesses and the regulatory burdens and constraints that will be placed upon them as well as the effect on relationships between businesses and the Government.[98]

There is a need to take into account the effect on public services of losing skilled migrant workers in the public sector, as the Government has indicated in the questions it put to the Migration Advisory Committee. [99]

There is a need to take into account the effect of the system on international relations. Media coverage of the Prime Minister's visit to India, mentioned above, highlighted the risks.[100]

There is a need to take into account that, in ILPA members' experience, many skilled migrants who may be eligible for asylum, human rights or discretionary leave often prefer to apply for leave within the immigration rules if they are eligible. By limiting the possibilities to apply within the rules, applications on discretionary grounds and those on grounds of human rights and asylum are likely to increase.

No doubt consideration is being given to the effects of the operation of the system on the stability of the coalition Government.[101]

INVESTORS AND ENTREPRENEURS

[98] See responses to this consultation and that of the Migration Advisory Committee and, for example, *Fears force immigration cap rethink,* George Parker & James Boxell, Financial Times, 24 June 2010.
[99] And see, for example, Sam Marsden, "Migrant limits hit child protection department", http://www.independent.co.uk/news/uk/home-news/migrant-limits-hit-child-protection-department-2053208.html , 15 August 2010.
[100] Alan Travis, "Immigration cap is to the fore as David Cameron visits Bangalore", http://www.guardian.co.uk/world/2010/jul/28/alan-travis-analysis-immigration-cap , 28 July 2010
[101] "Cabinet 'debate' on immigration cap", http://www.dailyexpress.co.uk/posts/view/189724/Cabinet-debate-on-immigration-cap , 28 July 2010; Tim Shipman, Nick Clegg reopens migrants row as he dismisses coalition plans to introduce cap on immigration at http://www.dailymail.co.uk/news/article-1303679/Nick-Clegg-reopens-migrants-row-dismisses-coalition-plans-introduce-cap-immigration.html#ixzz0xcbvQPaD , 17 August 2010; James Boxell, "*Business attacks cap on skilled immigrants*", http://www.ft.com/cms/s/0/20bb8e8c-9b37-11df-baaf-00144feab49a.html?ftcamp=rss; *Numbers cap does not fit anxious UK groups* http://www.ft.com/cms/s/0/4fa1bcfc-9b6a-11df-8239-00144feab49a.html, 29 July 2010 and 30 July 2010.

Q11. DO YOU AGREE THAT TIER 1 INVESTORS SHOULD BE EXCLUDED FROM THE ANNUAL LIMIT? PLEASE SELECT ONE ANSWER ONLY.

YES.

Q12. IF YOU ANSWERED YES OR NO TO THE PREVIOUS QUESTION, PLEASE GIVE YOUR REASONS BELOW.

The UK Government needs to attract more investment. The Government has made it clear in the consultation document that it is keen to encourage to the UK investors, entrepreneurs and other high net worth individuals who can drive the economic growth in the UK. It is stated that it is for this reason that it has taken the decision to exclude these categories of migrants from the Tier 1 cap and this reason would appear sound. If these categories are included in the cap then we anticipate that those who would have entered through these routes will be prevented and/or deterred from entering the UK.

Q13. DO YOU AGREE THAT TIER 1 ENTREPRENEURS SHOULD BE EXCLUDED FROM THE ANNUAL LIMIT?

YES

Q14. IF YOU ANSWERED YES OR NO TO THE PREVIOUS QUESTION, PLEASE GIVE YOUR REASON(S) BELOW.

See response to question 12 above. Entrepreneurs are required by the terms of their admission to create jobs for the workers in the resident labour market. In addition they generate business income and tax revenues. The Government should be giving consideration to expanding this category.

Q15. HOW CAN THE UK MAKE ITSELF MORE ATTRACTIVE TO INVESTORS AND ENTREPRENEURS WHO HAVE THE MOST TO OFFER IN TERMS OF DRIVING ECONOMIC GROWTH? PLEASE GIVE YOUR IDEAS BELOW.

It will be necessary for the government to provide substantial additional incentives to intending entrepreneurs and investors in order for the UK's offering to compete with the offerings of other countries.

In members' experience, two factors weigh particularly heavily with those coming under this route; both relate to certainty and long-term security of status. One is decreasing the period of time it takes an investor or entrepreneur to qualify to settle (and indeed to obtain British citizenship) in the UK. The second is assisting people entering under these categories to qualify for settlement by increasing the number of days absence permitted from the UK. The very nature of investors and entrepreneurs is that they will typically be international business people with multi-jurisdictional business commitments requiring them to travel and/or have substantial global wealth including homes in several countries and the attendant lifestyle. The present policy on absences is insufficiently clear and unduly onerous for this group and creates uncertainty of outcome that deters applicants – particularly when they will receive permanent status from the outset in other jurisdictions.

For these categories as for other categories, uncertainty is an enormous concern. Migrants are faced with a constantly changing and increasingly complex requirement structure within

their relevant category.[102] In debates on the naturalisation provisions of the Borders, Citizenship and Immigration Act in parliament, the Baroness Hanham, speaking for the Conservative party in opposition, envisaged the predicament of migrants as a game of snakes and ladders':

> *'Many migrants currently will be progressing their way along 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'*[103]

The provisions of the Borders, Citizenship and Immigration Act 2009 pertaining to 'earned citizenship', not yet in force, would increase the period taken to achieve settlement and would also reduce the permitted absences from the UK and remove flexibility. [104] The question of 'earned citizenship is currently under review. ILPA is pleased that the current Government has rejected the proposals for 'active citizenship' as set out in the Bill and urges the Government not to implement, but to repeal, the provisions on the new path to citizenship contained within the Bill. Their passage through parliament resulted in provisions of incredible complexity, requiring wholesale revision from that point of view alone. The provisions, for reasons set out extensively in ILPA's briefings on the Bill,[105] are ill-thought out and inoperable. We recall just some of the concerns expressed by representatives of the current Government, including the Minister for Immigration, about these provisions.

Damien Green MP, now Minister for Immigration, highlighted that the 'path to citizenship' should not be allowed to deter those whom the UK wishes to attract:

> *'We would all agree that this country benefits from highly skilled migrants...The root of our objections to the Government's original proposal—objections that were carried through the Lords by my noble Friend Baroness Hanham - was that highly skilled people who had been here a number of years and wanted to stay, and who were working towards citizenship, found the rules changed from under them, retrospectively, in their view. The rules were changed halfway through the game, which they thought unfair, and I agree with them.'*[106]

> *'It is worth while setting out the Conservatives' attitude to citizenship in principle. We believe that UK citizenship is a privilege, not a right. Anyone who is here on temporary leave to remain should not assume that that gives them the right to remain here permanently or to become a British citizen. However, we need to be fair and reasonable. We also need to recognise that our country is competing with others around the world for highly skilled migrants who will benefit our economy - we all agree that Britain benefits from highly skilled migrants.*'[107]

> *'We should also pay tribute to him [Mr Woolas] for retreating on the retrospection clauses on high-skill migrants, and others, and their moves towards citizenship. That is a welcome improvement.'*[108]

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[102] For examples of such recent changes see Cm 7929 (parts taking effect 20 August 2010); Cm 382 (parts taking effect 23 July 2010), HC 96 was ordered to be printed on 15 July 2010 and took effect five days later; HC 439 was ordered to be printed on 18 March 2010 and parts took effect on 6 April 2010.

[103] Baroness Hanham, Shadow Minister, Home Affairs. *Hansard*, HL 11 February 2009, col 1135.

[104] ss39-41 Part 2 Citizenship *Acquisition of British citizenship by naturalisation* Borders, Citizenship and Immigration Act 2009.

[105] See www.ilpa.org.uk, Briefings.

[106] Damian Green MP, Shadow Immigration Minister *Hansard*, HC, Standing Committe Third Sitting 11 June 2009, col 79.

[107] Damian Green MP, Shadow Immigration Minister *Hansard*, HC 14 July 2009, col 223.

[108] Damian Green MP, Shadow Immigration Minister *Hansard*, HC, 14 July 2009, col 245.

Damien Green MP also questioned the rules on permitted absences

> *'[Section 39] seeks to impose stricter rules on absence 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 the result of a genuine family emergency or work commitment, would thereby jeopardise their application for citizenship. The change imposes a much heavier restriction on freedom of movement and might unfairly discriminate, particularly against those who have a family emergency.'*[109]

INTRA-COMPANY TRANSFERS

Q16. DO YOU AGREE THAT THE INTRA-COMPANY TRANSFER ROUTE SHOULD BE INCLUDED WITHIN THE ANNUAL LIMITS?

No

Q17. IF YOU ANSWERED YES OR NO TO THE PREVIOUS QUESTION, PLEASE GIVE YOUR REASON(S) BELOW.

We recall the Migration Advisory Committee's previous examinations of this question:

> *"We have received more evidence from stakeholders on this route of Tier 2* [intra-company transfers] *than any other. The overwhelming majority told us that the abolition of this route would have a negative impact on their business. There was a general consensus that the intra company transfer route is an essential part of global mobility policies designed to support international business, trade and investment. We were told that this route* facilitates *the operation and growth of multi-national organisations, which in turn leads to the creation of UK jobs*." [110]
>
> *"A leading management consultancy surveyed its clients on our behalf, approximately two-thirds of whom reported that closure of the intra company transfer route would cause major disruption in terms of reorganisation of business and transfer of training to outside the UK."*[111]
>
> *"The ability to bring in relevant knowledge and experience from overseas, despite the downturn, is vital, according to the CBI. Company-specific knowledge and knowledge transfers, both into and out of the UK, were cited as an important reason for employing non-EEA staff. UK Trade and Investment (UKTI) told us that, among other purposes, "the [intra company transfer] route also provides entry to the UK for what are 'global jobs', which a company may decide to locate in the UK in support of a specific project. These are not UK jobs taken by migrant workers."*[112]
>
> *"...there is no economic case in restricting Tier 2 [Intra-Company Transfer'* [113]

[109] Damian Green MP, Shadow Immigration Minister *Hansard*, HC, Standing Committee, Fourth Sitting 11 June 2009, col 104.
[110] MAC 2009a, page 103.
[111] *Ibid.*
[112] *Ibid.*
[113] 2009a, para 6.1.

> *"In its evidence to us, the Japanese Embassy quoted a January 2008 survey of ten Japanese companies conducted by the then Department for Business, Enterprise and Regulatory Reform. This found that, for every Japanese national employed by these firms, an average of 73 non - Japanese nationals were employed by these companies in the UK."* [114]

We are not aware of any data demonstrating that there have been relevant economic changes since those reports that would lead to a case for including intra-company transfers in any limit.

The effects of a cap on the ability to fill essential roles may be enormous.[115] Caps are untried and untested. The exclusion of intra-company transfers provides, at the very least, a necessary buffer in this climate of uncertainty during the period in which the effects of the cap can, if the will and resources are there, be understood.

ILPA's members have canvassed views from businesses about the proposals to include Tier 2 Intra Company Transferees in the proposed Tier 2 cap. Businesses are extremely concerned that if they are applied without any exemptions, the likely impact of this on the UK economy would be significant. The clearest message put forward to members is that multinationals will give serious consideration to leaving the UK to set up their European headquarters elsewhere, pulling out existing investment in the UK, taking some of their employees abroad and making others redundant.

The resounding message from employers is that this is not the time for the Government to restrict any opportunities for growth within the economy.

In recent years and months the intra-company transfer system has been substantially changed and calibrated so that migrants who have spent different periods with the company overseas can come to the UK for different periods.[116] The prior experience with the overseas company required for Tier 2 Intra-Company Transfers was increased from six to 12 months. Indefinite leave to remain is no longer available for intra-company transfers (previously available after five years). Although other Intra-Company Transfer sub-categories were introduced these are for graduate roles only and for a maximum of six months for skills transfer and 12 months for graduate training. Both these sub-categories are designed for more junior members of staff or supernumerary roles, not for an employee coming from overseas to head up a sector of business. The current measures risk reducing business growth and opportunities.

Intra-company transfers of less than 12 months do not count toward net migration, because net migration is measured in terms of those who remain in the UK for 12 months or more. But any attempts to manage the figures by limiting intra-company transferees to short stays in the UK would come at a price: intra-company transferees who come to the UK only for a period of two years or less are often not subject to UK tax.[117] It is unclear why the UK would wish to deprive itself of revenue from taxation at this time.

Furthermore, in the Home Office's latest Control of Immigration Statistics quarterly report of 26 August 2010, it showed a marked decrease in the issuance of visas under the Intra-Company transfer category[118] is category. Appendix C of the Consultation document shows that visas issued under this category is not significant. Thus any restriction would not result in any significant reduction in economic migration and would negatively affect global mobility

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[114] *Ibid., p 105*
[115] See Migration Advisory Committee, *op.cit.* August 2009, esp. pages 103 – 105.
[116] See Statement of Changes in Immigration Rules HC 439 and www.ukba.homeoffice.gov.uk/workingintheuk/tier2/ict/, accessed 26 August 2010.
[117] See Migration Advisory Committee, August 2009, *op. cit.* para 6.143.
[118] See also Appendix C to the UK Border Agency consultation paper on the cap, *op.cit.*

which facilitates the operation and growth of international organisations seeking to be based in the UK. Restricting this category would impact on the various international obligations (World Trade Organisation) the UK has with its trading partners. This may result in global businesses relocating to other English-speaking jurisdictions or relocating within the European Union.

There is no clarity as to what transitional arrangements will be made for extensions of leave if a decision is made to include intra-company transfers in the cap. Nor what will happen subsequent to any such inclusion. Businesses need stability to service projects, which can and do over-run.

The UK Border Agency changed the Tier 1 General criteria to enable an applicant who could show earnings of £150,000 to score 75 (now 80) for 'attributes'. But since this change, a cap has been introduced for Tier 1 General applications made abroad. These measures together with the proposed permanent cap on Tier 2 (General) and any cap o n Tier 2 (Intra-Company Transfer mean that businesses may not be able to bring high profile or key employees to the UK, or at best can expect significant delays and periods of uncertainty, which are undesirable for all the reasons given above.

DEPENDANTS

Q18. DO YOU AGREE THAT DEPENDANTS SHOULD BE INCLUDED TOWARDS THE LIMIT? PLEASE SELECT ONE ANSWER ONLY.

No.

Q19. IF YOU ANSWERED YES OR NO TO THE PREVIOUS QUESTION, PLEASE GIVE YOUR REASON(S) IN THE BOX BELOW.

As discussed above, the policy intention behind Tiers 1 and 2 is to provide routes for skilled workers the UK needs to be able to come to the UK. ILPA struggles to see how this intention can be fulfilled if some included within a cap are skilled workers and others babies.

If a cap that includes dependants places additional pressures on businesses, this could give rise to incentives to recruit single people without caring responsibilities. In ILPA members' experience, whether family members can accompany a migrant is an important factor in choice of destination for those with partners and children. It may also be a factor in length of stay, which in its turn could put pressure on the cap, with the need to recruit arising more frequently if people stay for a shorter time. Younger people are less likely to have formed families than older ones. Studies show that more women than men have caring responsibilities.[119] Questions of discrimination on the grounds of age and gender thus arise.

The evidence available already suggests that more dependent spouses and partners are women than men,[120] following male primary applicants. When the Migration Advisory Committee examined the question of dependants (in the context of examination of their entitlement to work) it noted that

> *"...we think the Government will want to take account of other factors (such as wider social impact)"*[121]

[119] See MAC 2009a, *op. cit.*, section 7, especially 7.6; Department of Health *Carers at the heart of 21st century families and communities,* 10 June 2008 and see International Labour Organisation *Workers with Family Responsibilities* Convention 1981 (No. 156) and *Recommendation* (No 156).
[120] See MAC 2009a, *op.cit.,* Section 7, especially 7.6 *Equality Issues* and the evidence cited therein.
[121] *Ibid*. at 7.93.

This is reflected in the questions put to the Migration Advisory Committee, although as we have indicated above, the Committee is not necessarily in the best position to answer them.

The Government should avoid any capping measures that would lead to children being left behind or a child dependant born abroad being unable to come to the UK or else the parents having to leave. The policy cannot create incentives to split families. In addition to human rights considerations, the UK Border Agency has a duty to safeguard and promote the welfare of children under section 55 of the Borders, Citizenship and Immigration Act 2009. There is already concern that the maintenance requirement under the Points-Based System may encourage families to come to the UK in stages, and that this may have a disproportionate effect on those from non-OECD countries, whose currencies are week in comparison to those in the UK.

It is thus essential that the Government prepare an equality impact assessment, covering, *inter alia*, age and gender.

Current immigration statistics count family members of migrants separately and this should continue. Having a separate capped number for family members of workers would be problematic. Even if real-time statistics were available, to know how many places for dependants were still available at the same time as a worker was approved, it would be impossible to know how many people were applying in Tier 1 or how many other employers were applying for certificates of sponsorship for workers who also had dependent family members. If a worker or the partner of a worker was pregnant at the time of consideration, how would this possible extra dependant be counted? In all the different ways proposed about implementing the cap, including dependent family members within it would add a further level of uncertainty to the process and thus discourage migrants from wanting to come to the UK.

Including dependent family members would also increase the inefficiency of the process, as migrants selected to come and, in Tier 2, whose employers had obtained certificates of sponsorship, might well decide not to take up the offer if they found after acceptance that their family would not be able to come with them, or would be delayed for an unknown period until there was space for them in another quota. This would lead to wasted Certificates of Sponsorship and to increased work for employers and the UK Border Agency in processing new applications when the preferred candidate went elsewhere.

Articles 8 and 12, read with Article 14, of the European Convention of Human Rights, incorporated into UK law through the Human Rights Act 1998, protect the rights to respect for family and private life, and to marry and found a family, without discrimination. If the UK were to propose to treat migrants differently, as to initial grant of leave or extensions, on the basis of marital/partnership status or their having children, for example by rewarding the migrant with no dependants with extra points, this could engage the Convention.

The Migration Advisory Committee's previous investigations found that there is insufficient data to show the proportions of dependants in different kinds of work;[122] thus there is no data to show any benefit there would be to UK society by creating a group of workers who could not be joined by their families, or who experienced delay in coming to join them. If workers' families are not able to come, or not able to come with them because they are considered in a different 'roll-over' of the cap, this will not enhance any attempt by the worker to be an active part of British society when they retain such close ties with the country of origin. It will also mean that the UK gains less economic benefit from the worker, as workers with close family abroad are likely to remit more money to them, of benefit to

[122] MAC 2009a, *op. cit.*

the country of origin but not to the UK.[123] Because of workers' contributions, including financial contributions in the form of tax and national insurance payments, their families are entitled to use the NHS and their children under 16 are entitled to go to state schools. In practice, some workers send their children to private schools, and take out health insurance, for themselves and their families, or possibly have both as perks of the job, so it is likely they will be contributing to the UK economy in that way as well.

The Minister for Immigration stated in evidence to the Home Affairs Select Committee on 27 July 2010:

> *"Q51 Mr Burley: Do you intend to cap family reunification?*
>
> *Damian Green: I anticipated that kind of perfectly reasonable question. We have not come to decisions yet on the other routes, so there will be a rolling programme of announcements. We wanted to start with the economic routes because they are in the coalition agreement."*[124]

ILPA urges the Government to make it clear now for all the reasons we have stated that it does not plan further changes to the immigration rules on family unity for settled and British people. To do so would be unjust and would be even more likely to result in legal challenges.

THE SHORTAGE OCCUPATION AND RESIDENT LABOUR MARKET TEST ROUTES

Q20. DO YOU BELIEVE THE SHORTAGE OCCUPATION AND RESIDENT LABOUR MARKET TEST ROUTES SHOULD BE MERGED IN THIS WAY (AS DESCRIBED IN THE CONSULTATION DOCUMENT).

No.

Q21. WHAT, IF ANY, DO YOU THINK WOULD BE THE ADVANTAGES OF MERGING THE SHORTAGE OCCUPATION AND RESIDENT LABOUT MARKET TEST ROUTES? PLEASE GIVE DETAILS BELOW.

ILPA does not identify any advantages.

Q22. WHAT, IF ANY, DO YOU THINK WOULD BE THE DISADVANTAGES OF MERGING THE SHORTAGE OCCUPATION AND RESIDENT LABOUR MARKET TEST ROUTES? PLEASE GIVE DETAILS BELOW.

ILPA strongly disagrees with the proposals to merge the Resident Labour Market Test and the Shortage Occupation lists and considers these are illogical. The consultation paper envisages that one could have a post that it has been impossible to find a resident labour market worker to fill, that is in an occupation where there is a shortage and yet be unable to recruit to the post because of the time of submission relative to other applicants, a matter largely beyond the applicant's, or their sponsors' control.

In shortage occupations the merger would place an additional obligation on an employer in fulfilling a Resident Labour Market Test, when it has been established that the occupation is

[123] *Development on the move: measuring and optimising migration's economic and social impacts*, IPPR, May 2010.

[124] Uncorrected evidence to Home Affairs Select Committee, 20 July 2010, on the Immigration Cap, to be published as HC 321-I, now at http://www.publications.parliament.uk/pa/cm201011/cmselect/cmhaff/uc361-i/uc36101.htm

in shortage and not all vacancies can be filled in this way. When that is no longer the case, the occupation would no longer qualify for inclusion on the Shortage Occupation List.

In non-shortage occupations, the merger would result in posts going unfilled. We are unclear as to the policy reasons that would lead the Government to desire that a vacancy go unfilled. We have set out above a selection of comments from Migration Advisory Committee and other reports on the effect of migrant labour on jobs for those in resident labour market and on wages.

There are two reasons why a post may go unfilled from within the resident labour market. One is that no one can do the job; the other is that no one who can do the job wants it. If no one in the resident labour market can do the job, then, if a migrant worker cannot be recruited, the post will go unfilled. If no one in the resident labour market wants the job, then if a migrant worker cannot be recruited the employer has the option of leaving the job unfilled or endeavouring to make it more attractive to those in the resident labour market, for example by increasing salaries and job-related benefits. If the employer cannot afford to do these things, the job will go unfilled. The greater the shortage in the resident labour market, the more difficult it is likely to be to persuade the reluctant to apply. The effect of the proposals appears to be to put the greatest pressure on areas of the labour market where shortages are already most acute.

Denying the vacancy to a third country national worker will neither result in a resident labour market worker who does not have the relevant skills acquiring those skills, nor in a resident labour market worker who does not want a particular job starting to desire that job. If the Government is not satisfied with the ways in which the shortage occupation lists and the resident labour market tests are working then it should examine those tests. We recall the Migration Advisory Committee's comments, cited already:
"We believe that 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."[125]

If, contrary to all ILPA's recommendations there is to be a cap, then rather than seek to merge the shortage occupation and resident labour market tests, **the Government should consider the question of whether any caps should apply to specific skill-sets, right down to the level of particular 'SOC' codes, whether in shortage occupations or otherwise.**

The proposal to introduce the immigration cap and the mechanisms for operating this will adversely impact upon businesses, potentially preventing them from making lateral hires, extending existing sponsored migrants or, in the case of multinationals, from transferring staff from branches and subsidiaries overseas.

Within the health sector, there is a particular concern that the public services and particularly patient care will be affected either because of an inability to offer non-EU clinical specialists employment, or as a result of the inevitable delays that will result from whichever mechanism (whether first come first served, or the pool arrangement) the Government chooses to adopt.

Anecdotally, a world class leading hospital in paediatric care stated that it is not uncommon for the hospital to need to appoint a clinician who is one of only two specialists within the world and who happens to be a non-EU national. Until now they have had a reputation of attracting world class talent but the imposition of a restriction on tier 1 and tier 2 visas

[125] MAC 2009b, page 7.

could potentially undermine their status and eventually their ability to attract and retain the best.

Those within the public sector are charged with delivering high quality services within tight budgetary constraints. The flagship hospitals within the health sector must be given special consideration; they have specific needs and they have very persuasive arguments to remain outside of the restrictions. They will simply not be able to do what they do (i.e. to offer the last chance for care for some patients) without the flexibility to appoint and retain non-EU nationals some of whom will be the best in the world. One healthcare provider estimated that around 80% of its clinical staff are non-EU nationals.[126] To date, there is no clarity around what, if any, flexibility there will be for employers to submit exceptional requests where there is an urgent need to make a critical appointment.

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[127] 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. Take for example a situation where there are only a limited number of certificates/visas available for approval and requests are made from employers within the health sector, financial services sector, and the creative industries to sponsor key staff. How would the UK Border Agency approach this where there is an arbitrary cap that cuts across different various sectors? Luck of the draw (in a race to assign a certificate of sponsorship or lodge an entry clearance/leave to remain application faster than another organisation) is not a satisfactory approach to vital public services or critical business positions.

There is the unquantifiable cost of the impact that the loss of established, valued, migrant workers will have on the business.

The recruitment process will become unnecessarily drawn out; it will affect the ability of employers to meet immediate highly skilled and skilled labour needs. Even with the up-skilling within the UK there are concerns that in areas of particular deep shortage that employers will not be able to secure skilled staff from the resident labour market. The concern around this issue is that businesses could find that they lose good candidates, or otherwise be put at significant cost (eg having to offer "golden handshakes") to keep potential recruits interested and incentivised during lengthy recruitment process. The delay in bringing non-EU nationals on board would obviously impact on service delivery, contracts, and key business strategies.

Q23. WHEN DO YOU THINK THIS CHANGE SHOULD BE IMPLEMENTED?

N/A

Q24. WHAT CONSIDERATIONS SHOULD BE GIVEN TO ADVERTISING REQUIREMENTS?

ILPA does not agree that the shortage occupation and resident labour market tests should be merged.

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[126] For another example within the public sector, see Sam Marsden, "Migrant limits hit child protection department", http://www.independent.co.uk/news/uk/home-news/migrant-limits-hit-child-protection-department-2053208.html, 15 August 2010.

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

As to advertising requirements more generally:

- That they are lawful – see notes on the *Osborne Clarke* case above. They must respect all the tenets of employment law.

- That they are advertising requirements that lead to a real possibility of a resident labour market worker being found, if one has the skills and the ability to do the job. ILPA has on many occasions apprised the UK Border Agency of its view that it does not consider that advertising in jobcentre plus, whether for two weeks, or four, or more, fulfils that criterion. If jobcentre plus is to be used in this way then it would need to be changed radically.

SPONSOR RESPONSIBILITY

Q25. DO YOU BELIEVE THAT THE GOVERNMENT SHOULD EXTEND SPONSOR RESPONSIBILIITIES IN THESE WAYS (AS DESCRIBED IN THE CONSULATION DOCUMENT)?

No response.

Q26. IF YOU ANSWERED YES OR NO TO THE PREVIOUS QUESTION, PLEASE GIVE YOUR REASONS BELOW.

This question is outside ILPA's expertise insofar as it pertains to how to ensure that employers transfer skills to the resident labour market.

One reason it is outside ILPA's expertise is that the question of the transfer of skills goes far beyond that of companies who are registered as sponsors with the UK Border Agency. It involves the work of a whole range of Government departments who are more likely to have relevant powers, and expertise, than the UK Border Agency. The case has not been made for limiting the question of the transfer of skills to a narrow initiative involving work by the UK Border Agency with Tier 2 sponsors. There are already heavy obligations placed on Tier 2 sponsors. As the obligations increase the cost-benefit analysis of whether or not to be a Tier 2 sponsor may yield a different result. As, at some point, may the cost-benefit analysis of whether to continue to make the UK one's centre of worldwide operations or European base.

ENGLISH LANGUAGE RESPONSIBILITY

Q27. DO YOU THINK THAT THE GOVERNMENT SHOULD RAISE THE ENGLISH LANGUAGE REQUIREMENT FOR TIER 2?

No

Q28. IF YOU THINK THAT THE GOVERNMENT SHOULD RAISE THE ENGLISH LANGUAGE REQUIRMENT FOR TIER 2, TO WHAT LEVEL DO YOU THINK IT SHOULD BE RAISED?

ILPA does not consider that the language requirement should be raised. As described, to impose language requirements over and above those required to do the job in question risks discriminating against those for whom English is not their mother tongue, and regardless of their aptitude for learning the language.

The language requirement for Tier 2 (Ministers of Religion) is higher than that for Tier 2 (General). Just as we see no reason to raise the requirement for Tier 2 (General) we suggest that it would be appropriate to reduce the language requirement for Tier 2 (Ministers of Religion) to the same level as other Tier 2 workers.

REDUCING DEMAND FOR SKILLED MIGRANTS

Q29. IF A SUPPLY OF MIGRANT WORKERS IS NO LONGER READILY AVAILABLE, WHAT ACTION WILL YOU TAKE TO TRAIN AND SOURCE LABOUR FROM THE DOMESTIC MARKET? Please give details.

The legal profession already has a system of training that starts with a university degree (as a first degree or it is possible to transfer post a first degree), continues with a vocational postgraduate qualification, followed by pupillage for the Bar (minimum 12 months) and training contracts for solicitors (minimum two years): an 'apprenticeship' model where people are trained 'on the job'.

Running a legal case may involve drawing on expertise, in some cases expertise that it takes a lifetime to acquire. The world expert in, for example, Argentinean nationality law, is likely to have practised for many years in that country. Where a case has an international aspect, it will often involve drawing on expertise of the legal systems of many countries. If lawyers with such expertise are not available in the UK, it will be necessary to look to lawyers based overseas, on an *ad hoc* basis or by forming partnerships with firms overseas. Larger firms, or firms with expertise in a particular country, may set up branches overseas. In other words, the work will disappear from the UK. If UK lawyers are to learn from these experts, they will have to migrate. They may choose to remain overseas where expertise is concentrated.

ILPA members seeking expert reports do in some cases commission these from people based overseas. Where experts in an aspect of another country are based in the UK they are likely to make frequent visits to their country of specialism and to be regarded less highly by tribunals and courts if they do not. Once again, where there is no resident expert, because of the nature of the expertise, the need is unlikely to be met by skilling up a member of the resident labour market.

Many ILPA members make use of translators and interpreters to assist in work with their clients. It is possible to use translators of written texts who are based overseas if no one is available in the UK. Face to face interpretation is preferred to telephone interpretation but it will depend on the particular case whether having the interpreter in room matters more than having the best language skills.

Interpreters and experts illustrate a not uncommon problem. In many cases, they are freelancers, commissioned to do particular piece of work. They may have every incentive to build their own skills but, where they are doing small amounts of work for a range of firms it may be difficult to identify one firm that can afford or justify the costs of developing the skills of the expert or interpreter.

The Government has indicated that it wishes to consider the economic, public service and social impacts of migration. The Home Secretary (and Minister for Equalities) stated:

> *"We want to ensure that we can properly weigh the economic considerations against the wider social and public service implications"*[128]

[128] *Hansard* HC Report: 28 June 2010, Col 585.

The Government has asked the Migration Advisory Committee to examine these different factors. The Migration Advisory Committee is specialist in economics and has made the point in earlier papers that wider social effects lie beyond the Committee's specialist expertise[129]. In addition, to 'trade off, balance and prioritise' unlike goods is a matter of ascribing values to those goods and hence of a matter of politics.

Sophie Barrett-Brown
Chair
ILPA
17 September 2010

[129] MAC 2009a at 7.93