ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

ILPA response to the Migration Advisory Committee's *Consultation on the level of an annual limit on economic migration to the UK*

INTRODUCTION AND GENERAL

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. A copy of ILPA's written evidence to the Home Affairs Committee is annexed hereto and a copy of ILPA's response to the UK Border Agency will be forwarded to the Migration Advisory Committee when it is available.

Question 1: What factors should the MAC take into account, in order to inform its recommendations for Tiers 1 and 2 in 2011/12, when assessing the impacts of migration on:

- **the economy;**
- **provision and use of public services; and**
- **wider society.**

1.1 THE MIGRATION ADVISORY COMMITTEE'S EXPERTISE AND PREVIOUS WORK

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. [1] It is ILPA's understanding that there has been no fundamental change to the composition of the Committee since the Committee made these observations. The Committee's consultation paper states without further comment that it has been asked to take into account not only economic effects but '*social and public service impacts*'.[2] It would **seem appropriate that the Committee identify such factors as are within its own specialist expertise and take these into**

[1] Migration Advisory Committee *Tier 2 and dependants*, August 2009 (subsequently MAC 2009a) at 7.93.

[2] Migration Advisory Committee consultation paper at 3.3.

ILPA Lindsey House, 40/42 Charterhouse Street London EC1M 6JN Tel: 020 7251 8383 Fax: 020 7251 8384
email: info@ilpa.org.uk website: www.ilpa.org.uk

THE IMMIGRATION LAW PRACTITIONERS' ASSOCIATION LTD IS A COMPANY LIMITED BY GUARANTEE, REGISTERED IN ENGLAND AND WALES
REG NO. 2350422 REG OFFICE ACRE HOUSE, 11/15 WILLIAM ROAD, LONDON NW1 3ER

account and identify other independent experts in a position to comment on matters where the Committee is not best placed to do so.

ILPA observes that the Migration Advisory Committee has not been asked to analyse whether caps on Tiers 1 and 2 would be economically advantageous or damaging. While the caps themselves may be matters of Government policy, this policy should be informed by an understanding of the economic consequences **and ILPA trusts that the Migration Advisory Committee will ensure that the Committee's report gives the Government the benefits of its expertise on these matters.** ILPA recalls the Committee's recent observations which are worth citing *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."*[3]
>
> *"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."* [4]
>
> *"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."*[5]
>
> *" 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."*[6] (p 70)
>
> *"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)."* [7]
>
> *"Dustmann et al. (2008) examine the effect of immigration along the wage distribution. They find the overall effect to be small and positive."* [8]
>
> *"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 acquisition of country-specific knowledge enable UK firms to operate better in foreign markets."* [9]

[3] The Migration Advisory Committee – Analysis of the Points-Based System Tier 1,December 2009, (subsequently MAC 2009b), page 7.
[4] *Ibid.,* page 65.
[5] MAC 2009a page 70 (also cited in MAC 2009b).
[6] *Ibid.,* page 70.
[7] MAC 2009b, page 51.
[8] *Ibid.*, page 51.
[9] *Ibid.*, page 60.

"…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."[10]

"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*." [11]

"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."[12]

"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."[13] (p 103)

"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." [14]

A summary of relevant findings from previous reports could usefully be included in the Committee's report to Government.

The current interim cap, is, to use the Committee's term above, 'arbitrary'. The way in which it has been implemented cannot be justified in terms of fairness, nor does it provide a mechanism for assessing which migrants will be of most benefit to the economy. **The interim cap should be used as a case study to study the effects of the imposition of a cap.**

At his lecture, and subsequent panel discussion, in October 2008 at the London School of Economics Professor David Metcalf explained the complexity of the research that had gone into developing the Committee's twelve indicators to identity

[10] *Ibid.,* page 61.
[11] MAC 2009a, page 103.
[12] *Ibid.*
[13] *Ibid.*
[14] *Ibid., p 105*

skills shortage in the UK economy[15] and that this research then was subsequently used by the Committee to construct the skills shortage occupation list of the UK as a whole as well as the separate Scottish shortage occupation list for Tier 2 (General) of the new system.[16] These lists were intended to be reviewed regularly over a two-year period to assess whether the responses in the economy were favourable and whether the shortages continued to exist.[17]

The work that the Committee has done on shortage occupations is highly relevant to the question of whether any cap or caps should be an overall total or an overall total per tier, or whether specific caps or quotas should apply, at different levels of specificity, right down to the level of particular 'SOC' codes. If a health authority requires a doctor, this need is in no way met by the entry of twenty engineers. If a paediatric oncologist is required, this need is in no way met by the entry of a neurologist. The extent to which different sectors are required to compete against each other for migrant workers may have significant consequences, especially where, rather than there being no-one in the resident labour market willing to do the job, there is no one in the resident labour market able to do the job.

Migration is an aspect of life in the UK and will continue to be so, with any attendant effects upon the economy, provision and use of public services and 'wider society' whether Tiers 1 and 2 are capped or not. There is migration to join family members, to seek international protection and through the other Tiers of the Points-Based system. European law encompasses rights of free movement of EU nationals and their family members, be they European Union member State or third country nationals, rights of 'posted' workers[18] to move and rights of workers to move under the *Van der Elst*[19] provisions. Thus **the Migration Advisory Committee and others, for the purposes of this enquiry, will need to identify and isolate those factors affected by migration that it is proposed to cap, taking account of displacement into other routes.**

The Committee's consultation paper proposes that the Committee include Intra-Company Transfers in its analysis of the caps,[20] while acknowledging that their

[15] A copy of the lecture notes is held in the ILPA archive. A good explanation of the twelve indicators used by the Migration Advisory Committee can be found in the Executive Summary of the report, *Refining the top-down methodology to identify shortages in skilled occupations (SRG/08/041),* prepared by Frontier Economics for the Migration Advisory Committee in November 2009. For the initial remit of the MAC in their analysis and regular review of the stock of labour in the UK economy see the Migration Advisory Committee report: *Identifying occupations where migration can sensibly help to fill skilled labour shortages* (2008); for a discussion of the 'stock' and 'flows' of migrant labour see the Migration Advisory Committee report: *First recommended shortage occupation lists for the United Kingdom and Scotland* (2008) and for the regular review of the shortage occupation lists see the *Migration Advisory Committee report: first review of recommended shortage occupation lists for the UK and Scotland* (2009).

[16] October 2008 lecture, *op. cit.*

[17] *Ibid.*

[18] See the Posting of Workers Directive (Directive 96/71/EC). For a general overview see the archived BERR website *Posting of Workers Directive* http://webarchive.nationalarchives.gov.uk/+/http://www.berr.gov.uk/employment/employment-legislation/employment-guidance/page19313.html

[19] For a general overview see the UK Border Agency Entry Clearance Guidance and Instructions EUN 4 *Non-EEA and Swiss Nationals working in the EU (Van der Elst and Swiss Posted Workers.)*

[20] Migration Advisory Committee consultation paper at 1.6.

inclusion/exclusion from the cap is a matter on which the Government is consulting.[21] The Committee's consultation paper proposes to include dependants in its analysis of the caps,[22] without reference to the fact that the inclusion of dependants is also something on which the Government is consulting. **The Committee should ensure that its report does not pre-empt the outcomes of the Government consultation.**

The Committee's consultation paper states that any cap will cover both grants of entry-clearance and in-country applications for extension/variation of leave in the relevant categories of Tiers 1 and 2.[23] **The Committee should separate its recommendations pertaining to applications for entry clearance and those pertaining to 'in-country' applications for the extension and variation of leave.**

1.2 INCOMPLETE DATA AND EVIDENCE

The Committee should take into account that, as it highlights in its consultation paper,[24] the data and evidence, statistical and qualitative, on which policy-making is based is incomplete.

The Committee itself has highlighted the lack of empirical research in a number of areas relevant to this enquiry. Again, 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..."*[25]
>
> *"…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."*[26]
>
> *"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*

[21] *Limits on Non-EU Economic Migration – A Consultation* UK Border Agency, June 2010.
[22] Migration Advisory Committee consultation paper at 1.5.
[23] Migration Advisory Committee consultation paper at 1.5 and 1.6.
[24] Consultation paper, para 3.17.
[25] 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.
[26] MAC 2009a, page 145.

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."[27]

"Throughout this report, we have identified the areas where further research and analysis may be justified. Some potential topics are as follows…

- *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."[28] (p 154)*

Similar calls for further research and data collection were made by The House of Lords Committee on Economic Affairs[29]:

"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)."

Research, both statistical and qualitative, into the effects and likely consequences, intended and perverse, of interim and longer term quotas could 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.

[27] *Ibid.*, page 143.
[28] *Ibid* page 145
[29] 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).

Without reliable statistical and qualitative data, the risks of unforseen, unintended or perverse consequences of a cap are high. **A summary of those areas where the Committee and others have identified needs for further research could usefully be included in the Committee's report to Government, together with any additional recommendations for research.**

1.3 THE LAW

The Committee must take into account the legal framework. This includes immigration law, public law, human rights law, European Union law on free movement, discrimination and employment law.
The law must be taken into account because it forms the framework within which a cap will operate and because a system that is vulnerable to legal challenges is not sustainable. Successful challenges could overthrow or modify the system, in the latter case in particular producing unintended consequences. The behaviour of migrants and employers will also be informed by their understanding of their options under the current law.

1.3.a Public law constraints on the making of immigration law and policy

The Immigration Act 1971 (the Act)[30] 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[31], 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,[32] failing to respect the parliamentary convention of 21 days.[33] This is very difficult for prospective migrants and their proposed employers attempting to plan for the future, in particular where they have prepared applications. ILPA members are well aware of the strength of feeling among their clients that the proposed cap is irrational and anticipate legal challenges as to its

[30] Section 1(4) Immigration Act, 1971.
[31] HL paper 173, HC 993 published 9th August 2007.
[32] Recent examples of statements of changes in Immigration Rules that have come into force the day after they were made include 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.
[33] Recent examples of statements of changes in immigration rules that have come into force the day after they were made include 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.

lawfulness, including on the grounds of irrationality, or to use the Migration Advisory Committee's term, arbitrariness.[34]

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.[35] 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*,[36] *BAPIO*,[37] *Pankina*[38] and *English UK*[39] amongst others.[40] ILPA foresees similar 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[41], 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,[42] 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.[43] The

[34] See part 1.1 of this response, *supra*.
[35] See the leading case of *CCSU* [1985] AC 374.
[36] *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.
[37] *R (BAPIO Action Ltd) v SSHD* [2008] UKHL 27.
[38] *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).
[39] R *(English UK) v SSHD* [2010] EWHC 1726.
[40] 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).
[41] Minutes of meeting with the then Immigration Minister, 26 March 2007.
[42] *Ibid.*
[43] *Ibid.*

consequence of this sudden change was so severe to one family that the dependant of Bangladeshi HSMP migrant committed suicide.[44] 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"* [45]

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).*" [46]

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 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 …*" [47]

The HSMP Forum succeeded in their challenge.[48] 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 following:

> *"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*

[44] *Ibid.*
[45] *Ibid.*
[46] HL paper 173, HC 993 published 9th August 2007.
[47] *Ibid.*
[48] *R (on the application of HSMP Forum Ltd) v Secretary of State for the Home Department* (2008) EWHC 664 (Admin).

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.

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.

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:

'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 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." [49]

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

"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

[49] *Hansard*, 20 June 2006, Second Standing Committee on Delegated Legislation

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." [50]

Again the HSMP Migrants successfully challenged this decision.[51] 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. [52]

More recently, in the cases of *Pankina* in the Court of Appeal [53] and *English UK* in the High Court,[54] 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 mandatory requirement and could lead to rejection of an application but had not been subject to parliamentary scrutiny.

While the UK Border Agency has moved the requirement to demonstrate that the requisite sum is held for three months into the immigration rules,[55] it has failed to

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[50] *Ibid.*

[51] *R(on the application of HSMP Forum (UK) Ltd) v Secretary of State for the Home Department* (2009) EWHC 711 (Admin).

[52] *R (on the application of BAPIO Action Ltd) v Secretary of State for the Home Department* (2008) UKHL 27.

[53] *Secretary of State for the Home Department v Pankina* 2010 ECWA Civ 719.

[54] *R.(on the application of English UK) v Secretary of State for the Home Department* (2010) EWHC 1726.

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

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

Foreign 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[56] 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.

1.3.b Immigration law and European free movement law

The effect of other requirements of immigration law may influence the behaviour of migrants. For example, the maintenance requirement for Points-Based System applications is payable for the principal applicant and each dependant. If, for example, the migrant is coming from a country with a weak currency in comparison to the UK, s/he may not be able to afford to bring all dependants at the outset and may call for dependants to join him/her once earnings have been accumulated in the UK.

Immigration law and European free movement law are also relevant insofar as they offer persons who might otherwise come to the UK under Tiers 1 and 2 alternative routes of entry. Thus, for example, as described above, a person might be eligible to come to the UK both in Tier 1 General and as a Tier 1 (Entrepreneur) and as a Tier 1 (Investor). Such a person might also be eligible to take advantage of Van der Elst provisions or to come to the UK as a posted worker. In such cases, the effect of a cap may be to change the basis on which the certain workers come to the UK.

1.3.c The law on entitlements to social welfare assistance and housing

[56] HC 382.

As the Committee has highlighted in its consultation paper,[57] 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.[58] 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.

The Committee observes in its consultation paper that those who settle in the UK acquire entitlements to social welfare assistance and housing.[59] 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.[60] There are provisions on the statute book,[61] although not yet in force, and related policy proposals from the previous Government,[62] to replace indefinite leave to remain with 'probationary citizenship' and fundamentally to alter the rights and entitlements of those who do not acquire citizenship or ' the new status of permanent residence'.

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

We are not aware of any evidence (or of UKBA 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.

1.3.d The law on taxation

Those migrating for two years or more are likely to be paying taxes in the UK and that those migrating for shorter periods may be doing so.[63]

1.3.e Employment and discrimination law

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 risk of an increase of race discrimination claims brought against employers. There is currently a tension between the UK immigration law and

[57] At 2.18.
[58] HC 395 as amended.
[59] At 2.20.
[60] See, for example, for Tier 1 (General) Migrants, Immigration Rules rule 245Eff.
[61] Borders, Citizenship and Immigration Act 2009, Citizenship.
[62] See for example, *Earning the right to stay, a news points test for citizenship,* August 2009.
[63] See HMRC IR 20 *Residents and Non-residents: liability for tax in the United Kingdom.*

practice and discrimination legislation. The latter confers a right not to be discriminated against on the grounds of a protected characteristic. Whilst any indirect race discrimination claim is, in theory, capable of being justified, direct discrimination claims are not. There is likely to be an increase in such claims particularly if employers are being forced to take difficult decisions about allocating a limited number of certificates and whether these should be reserved for new recruits, lateral hires or existing sponsored migrants.

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.* [64]

Osborne Clarke

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

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

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, Osbourne 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." [65]

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. Extension applications should be excluded from the cap.

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.

1.4 PERCEPTIONS AND DECISON-MAKING, MIGRANTS AND EMPLOYERS

Due to their extensive experience in advising businesses and skilled migrants regarding UK immigration law, ILPA's members are well-placed to comment on the potentially grave consequences of the immigration limits on Tiers 1 and 2 and the issues associated with the proposed methods of implementation. Members advise migrants deciding whether to chose the UK over other destinations; employers who, having failed to find a person in the resident labour market to do a job are seeking to attract a third country national; and migrants and employers making decisions about the specific route of entry and the migrant's life in the UK.

See also responses to questions 8 and 9 below.

1.4.i Uncertainty

Throughout this response, we highlight the effects of uncertainty on migrants and on employers. This affects whether a migrant elects to come to the UK in the first place and their behaviour, and that of employers, when they are in the UK. The consequences of uncertainty cannot be overstated.

[65] *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.

Migrants face a constantly changing and increasingly complex requirement structure within their relevant category.[66] 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 objective of integrating a desirable migrant seamlessly into the settled population and doing so on as fast a route as possible. Commitment is not fostered in an unstable and uncertain 'transparent' regulatory environment subject to extremely regular short-term revisions.

The result has been increased uncertainty for migrants who wish to contribute to the country, by way of court wrangles over technical legal issues and increasingly detailed and restrictive policy guidance which is revised often in a knee-jerk reaction to developments in the system.[67] 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 (through legal fees and delayed business deals) of the new system.

When arbitrary quotas and unpublished assessment criteria are introduced on top of other changes, this has the potential to undermine the credibility of the reasoned and researched structure of the system as the migrants and their employers do not know whether or when they will be allowed to commence their economic activity even if they are found to be fully compliant with what are regarded as desirable attributes.

There has been no indication in the implementation of interim limits, or the consultation on the proposed final limits on these groups, as to what the government's plans are to attract and retain eligible candidates in light of the broader earned citizenship policies and legislative changes. Without a considered approach to "the work category" as a whole, the government and its quotas on highly skilled and skilled migrants run the risk of unintended, unanticipated and negative consequences for migrants, UK businesses and employers, the UK government and the UK public in the longer term.

Proposals in the UK Border Agency's consultation paper do give rise to concerns that methods of selection will generate additional uncertainty. For example, as to proposals for a pool system, a high points threshold would lead to a smaller pool thus resulting in a lower wait time to be chosen. Whereas a lower points threshold would lead to the highest scoring of those applications being chosen every month, thus potentially resulting in individuals remaining in the pool for up to six months. Individuals may not be chosen, not because they are not highly skilled but due

[66] 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.

[67] *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.

circumstances beyond their control such as the points score of other candidates. The uncertainty of any pool system is likely to lead to individuals looking to other countries, particularly those who offer settlement at the outset (Canada, Australia, New Zealand). As to proposals for a 'first come, first served' system, the Agency does not indicate whether, if applied to Tier 2, such an approach would apply to certificates of sponsorship or allocation of entry clearances. Both approaches would lead to uncertainty for business and individuals, given that there is no way of knowing whether a certificate of sponsorship/entry clearance would be available. If a system were to operate on a first come first served at entry clearance level, this would cause considerable delays for businesses in filling vital vacancies if the monthly/quarterly limit has been reached. In some cases, posts would remain unfilled for a significant period of time. In some cases, business would lose contracts, others might decide to "offshore" projects or to relocate to other immigration friendlier countries. If there were a 'roll-over' of unsuccessful candidates, then the longer the period before the application was considered again, the greater the uncertainty for migrant and employer.

1.4.ii Healthcare

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).

1.4.iii Private sector housing

Uncertainty as to long-term prospects in the UK may make migrants less inclined to invest in property, or more inclined to divest themselves of property earlier than they would otherwise have done and thus encourage them to use the private rented sector.

1.4.iii Education

In members' experience significant numbers of Tier 1 and Tier 2 migrants opt for private schools in the UK for their children. Recent press reports have highlighted the difficulties private schools face in the current economy and the importance to them of pupils from overseas.[68]

The proposed periodically allocated quotas will cause delay to the visa application process. It will be difficult for migrants to put their children into schools, if they are unable to plan in advance because they are waiting for a decision on their visa. This may discourage migrants from applying to the UK; in members' experience prospects for children's education can be an important factor in decision-making as to whether, and where, to migrate.

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[68] See for example *Recession hit private schools cushioned by overseas pupils*, Independent , 29 April 2010, http://www.independent.co.uk/news/education/education-news/recessionhit-private-schools-rescued-by-overseas-pupils-1957288.html

Given the multicultural nature of UK society, with or without caps on Tiers 1 and 2, and the easy access to all areas of the globe that exists today, ILPA considers that one of the benefits the UK derives from migration is that children in UK schools meet children from other countries at school and to be introduced to diversity at an early age. This may have social benefits, pitting individual experience against racist narratives and thereby contributing to combating discrimination on the grounds of race, nationality or ethnicity. These benefits are not confined to the children of Tier 1 and Tier 2 migrants but they are a part of the wider picture.

1.5 OTHER ECONOMIC EFFECTS

Tier 2 is predicated upon there being a vacancy and there being no worker in the resident labour market able to fill that particular vacancy, or in the case of shortage occupations a general high level of vacancies in a particular area of the labour market and insufficient workers to affect the general high level of vacancies in a particular area. This is either because there is no one in the resident labour market with the skills to do a job, or because no one with those skills wants the job. If the vacancy cannot be filled from within or outside the resident labour market it will continue to be a vacancy and the work that that worker would have done, as well as work that depends upon it, will not get done. We have set out at 1.1 a selection of comments from previous Migration Advisory Committee and other reports on the effect of migrant labour on jobs for those in resident labour market and on wages.

Those who stand to be affected by the cap include high net worth individuals. 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. Similar consideration should be given to the amount of money that a Tier 1 or Tier 2 worker can invest during their time in the UK, not to mention revenue derived from taxation, economic contribution through consumer activity during their stay and the contribution such workers may make to facilitate investment in the UK by the businesses they work for or with.

In terms of existing migrants, the uncertainty caused by, firstly, the temporary cap itself and, secondly, the risk of the Government changing policy has made migrants acutely aware that they may be asked to leave the UK at short notice. This affects their attitude to the risk of making long term investments.

There is a strong possibility that migrants currently in the UK will halt any significant investment plans that they have and consider moving their existing investments abroad. As discussed above, they may be reluctant to invest in property and may even chose to keep their bank accounts abroad.

There may be knock-on effects of encouraging migrants to seek other ways to enter the UK. Migrants may use the business visitor's route, either intentionally or not, and/or the Tier 2 Intra-company transfer route for purposes for which they were not intended. If that was the case the Government would not benefit from any investment that those individuals may have otherwise put into the economy as their investments and employment would remain abroad. It would also have no real effect on the net number of migrants in the UK (though it may bring some below the line of statistical visibility if net migration statistics continue to be based of migrants coming to the UK for 12 months or more).

Some UK businesses exist purely to offer services to people migrating, such as relocation companies, property searches and advisory services (to name a few) and a drop in migration could affect such businesses.

Finally, particular regard should be given to small business, which are less well equipped to 'juggle' immigration options to secure a solution or to spread the burden of not being able to engage a key worker across the wider business, as well as to particular sectors.

1.6 NATIONAL HEALTH SERVICE

Members represent many specialised clinicians working in the National Health Service who are here under Tier 1 or Tier 2. If those people were not able to come and practice in the UK this would affect public service levels and potentially patient safety.

The services provided by the National Health Service are designed, *inter alia*, to protect and promote public health. The provision of those services, and their receipt by the population as a whole is designed to promote the health of the population as a whole, not just the direct recipients of the services and cutting a section of the population out of these services may interfere with these aims of protecting public health.

See also the response to question 9.

1.7 WIDER IMPACTS

1.7.1 Perceptions of the Government as in control of migration

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.'[69] 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. The Migration Advisory Committee has provided Government with considerable research on these matters;[70] we see no evidence in the UK Border Agency consultation paper that this has informed thinking on the cap. Migrants and their employers have a significant contribution to make to such understanding and their voices have been raised[71] against the UK Border Agency's current proposals. An ill-thought-out cap is likely to have the opposite of the intended effect.

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, and thus risks being seen as failing to deliver and as disappointing.

[69] Speech by Damian Green, then shadow immigration minister, at the International Bar Association 4th Biennial Global *Immigration* Law *Conference* 19 - 20 November 2009, London.
[70] See references in part 1.1 of this response, *supra.*
[71] See responses to this consultation and media coverage, e.g. *Fears force immigration cap rethink,* George Parker & James Boxell, Financial Times, 24 June 2010.

An effect of the cap is to condone the negative image of migrants portrayed by some elements of the press. Organisations such as the British National Party are enjoying increased popularity. [72] It would appear the negative media portrayal of migrants is perpetuating racial tensions and that public opinion against migrants is gaining momentum. Divided communities led to, amongst others, the Oldham race riots in 2001, prompting the introduction of policies to improve integration. [73] There is a risk that a likely effect of the cap will be to reverse the progress made.

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.'* [74]

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. [75]

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 wishing 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.

Individuals will form opinions of the UK based on their treatment here (or their inability to enter). Governments will also consider the UK Government's policies which could cause tension on a political front. Businesses that cannot operate easily in the UK will consider leaving the UK or setting up their headquarters in more accessible areas of the world with the most desired workers, resident or migrant, following them there.

Further, other jurisdiction may respond by implementing reciprocal restriction on British citizens engaging in work or business abroad which may impede UK companies' position in the global marketplace.

Question 2: How should the MAC measure or assess these impacts?

2.1 REVIEW OF RECOMMENDATIONS ABOVE

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

73 BBC "Race segregation Caused Riots", http://news.bbc.co.uk/1/hi/england/1702799.stm , 11 Dec 2001.

74 "*What does MIPEX measure*?" http://www.integrationindex.eu/topics/2650.html

[75] 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.

See 1.1 above. **The Committee should not dilute its expertise nor jeopardise its reputation by straying beyond its area of expertise**.

See 1.1. above. **The Committee should draw on its previous work and reports.**

The Committee should use the interim cap as a case-study of the effects of an 'arbitrary' cap.

See 1.1. above. **The Committee should not pre-empt the outcomes of the UK Border Agency consultations.** The UK Border Agency is consulting on the inclusion/exclusion of dependants and/or Intra-Company Transfers in a cap. Respondents to the consultations about the cap (the UK Border Agency's, the Committee's own and that of the Home Affairs Committee) are questioning the case for a cap. They are raising the need to consider the implications of any cap or caps being an overall total or an overall total per tier, or whether specific caps or quotas should apply, at different levels of specificity, right down to the level of particular 'SOC' codes. They are also highlighting the question of whether applications for entry clearance and 'in-country' applications for extension/variation of leave should be treated differently in the consideration of any caps. **The Committee should identify what data it can amass and interrogate that is of relevance to any/all of these questions.**

See 1.1 above. **The Committee should endeavour to isolate the specific effects of migration under the parts of Tiers 1 and 2 under examination, taking into account that some of those who use these routes may use alternative routes in future.**

See 1.2 above. **The Committee should summarise those areas where the Committee and others have identified needs for further research, make additional recommendations for research, by the Committee or by others, and request permissin to undertake such necessary research as is within its remit.**

See 1.3 above. **The Committee should take into account the legal framework and the prospect of future challenges, whether against the UK Border Agency or employers and the interaction of the law, expectations and behaviour.**

As ILPA has previously indicated, we do not consider that qualifications are any proxy for being 'highly skilled' and this must be considered in considering relevant factors to be taken into account. Similarly, whether salary is a proxy for being highly skilled cannot be judged without taking into consideration the sector in which a person is working.

The UK Border Agency has identified in its consultation paper certain factors it could take into account in a capped points based system. We comment briefly on these:

- ILPA considers that awarding extra points for a higher level English Language ability would lead to discrimination against certain nationalities and may

potentially lead to indirect race discrimination. New Zealand for example, awards points for the purchase of English Language study to ensure that migrants are able to adapt and integrate effectively.

- Consideration being given to the skills of dependants creates risk of discriminating against those with no dependants.
- ILPA considers that points should be awarded for general work experience as opposed to UK experience alone.
- ILPA has no objection to the award of points for skills for which there is a shortage; the question is rather whether the shortage occupation lists are a more efficient way of dealing with such shortages.
- Provisions as to mandatory health insurance could lead to a perverse situation where migrant workers are treated more favourably than resident workers and where, to prevent discrimination, employers (including the NHS) may be forced to offer private health care to its entire workforce. It is also necessary to take into account the bilateral health agreements that the UK has with a number of countries, which allows citizens and in some cases residents (irrespective of nationality) of those countries. access to the NHS. Small businesses, voluntary organisations and those will lower profit margins would be adversely affected by a requirement for mandatory health insurance.

ILPA considers that proposals to merge the Resident Labour Market Test and the Shortage Occupation lists are illogical. Such an approach would result in vacancies in non-shortage occupations going unfilled. 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 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.

2.3 INTERNATIONAL COMPARISONS

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,[76] 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 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.[77]
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

[76] *Limits on Non-EU Economic Migration – A Consultation,* UK Border Agency, June 2010, page 12.
[77] For processing priorities and times see http://www.immi.gov.au/about/charters/client-services-charter/visas/8.0.htm

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.

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 art. 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.[78]

United States of America

As to the change to Tier 1 (General) under the interim cap of increasing the point threshold for attributes, there is no similar system in US immigration to obtain a visa. However, specific attributes may be used to acquire a United States visa such as a degree for a position requiring specialised knowledge for an H-1B visa, and previous earnings when determining extraordinary ability for an O-1 visa.

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

The H-1B visa for workers in a Specialty Occupation 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. Non-immigrant visas which are subject to caps include H-1Bs and E-3s among others. 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 annual cap is usually exceeding on the first day it opens, resulting in a lottery as to which applications are selected for consideration. Consequently many large organisations submit large numbers 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 inevitable means that some of the workers for whom a visa was secured may not ultimately be needed or may otherwise be unable/unwilling to undertake the assignment that may arise, whilst blocking other organisations from obtaining visas for much needed personnel.

[78] See http://www.immigration.govt.nz/NR/rdonlyres/7551739C-0FE9-4949-8D8A-BF0C548086E7/0/AmendmentCircular201007.pdf

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.

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 I (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 and thus implementing similar immigration procedures alike Canada would produce various conflicts.

Question 3: How should the MAC trade off, prioritise, and balance the economic, public service and social impacts of migration?

As observed above, 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. [79] ILPA does not consider that the Committee is in a position to 'trade' as described in terms of its expertise. 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 and for politicians.

The Committee has an important specialist contribution to make. It also has a reputation for independence and expertise to protect. ILPA urges caution.

ILPA members emphasise the importance of migrant workers to the British and multinational businesses they act for in building economic recovery in the UK and the ability for the UK to compete in the international market following the recession; great care must be taken not to stifle economic recovery; succeeding in reducing net migration at the expense of economic recover would be a pyrrhic victory.

Question 4: To what extent and how quickly can alternatives to employing Tier I and Tier 2 migrants, including training and up-skilling of UK resident workers, reduce reliance on such migration? What can Government and other bodies do to facilitate this?

This question is beyond ILPA's expertise. We note that, given that the responsibilities on sponsors are onerous, there is every incentive to hire a worker from the resident labour market if one has the skills or can acquire them with sufficient speed.

Question 5: What trends do you expect to see over the lifetime of the Parliament in non-PBS migration, including of British and European

[79] *MAC 2009a at 7.93*

Economic Area (EEA) citizens? Will limits on non-EEA migration affect this? Please provide reasons.

ILPA can comment on the likely effect of underlying trends on behaviour, based on members' past experience of advising migrants (to the UK and to other countries) but cannot predict what those underlying trends will be.

UK workers unable to find work in the UK are likely to look at options for migration. Interest may increase if sterling is weak compared to other currencies. There are often limits to the extent to which skilled UK workers can take advantage of EU free movement rights to do skilled work in other European countries because they lack sufficient relevant language skills.

Similarly EEA national workers may look to other European countries if unable to find work at home and again the relative values of sterling and the euro will have an effect. Language skills and the desire to improve English language skills (including with a view to migrating to North America/Canada subsequently) can contribute to making the UK a destination of choice.

Many highly-skilled workers have a choice of destination. Considerations of career and lifestyle, for self and dependants, play their part in decision-making, and knowledge of the language is relevant to both of these. We cannot overstate the importance of certainty and predictability at all stages of the process. Longer-term prospects and the certainty surrounding these are factors. Complexity and cost of different application processes is also a factor. At the time of writing, it is uncertain what will come of the provisions, not yet in force, in the Borders, Citizenship and Immigration Act 2009 to change the 'path to citizenship.' If implemented these would greatly reduce certainty.

Having a more skilled resident labour market work force will not necessarily 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. 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." [80]

Movement to seek international protection is affected by the level and extent of conflict in other countries, as is borne out by the asylum statistics, and also by people's ability to leave those countries.

ILPA identifies no reason why movement to join family members should decrease. A whole range of reasons may determine whether the UK may be the preferred destination for a couple, one of whom is British: language skills (the prevalence of English and the extent to which the British partner in the couple has skills in other languages); cost of living and the value of sterling relative to other currencies; tolerance and intolerance: for example the UK's recognition of civil partnership in all areas of the law is an incentive for civil partners to make their home in the UK rather than in countries where there are higher levels of discrimination. Article 8 of the European Convention on Human Rights is likely to determine whether applications will be successful.

Short term migration may be affected by lack of opportunity in the country of origin, but also by levels of affluence, giving the opportunity to spend time abroad.

Human trafficking is a factor in determining the movement of migrants. Where barriers to movement exist, the potential for profits in trafficking and smuggling increases.

Question 6: The stock of main (non-dependant) migrant workers under Tiers 1 and 2 is determined by

- **(i) new migration from outside the UK and**
- **(ii) extensions and switching between routes by migrants within the UK.**

If migration is to be reduced, do you most favour achieving this via cuts in (i) or (ii)?

ILPA is opposed to a cap whether on new migration from outside the UK or on extensions and switching between capped routes by migrants within the UK. It considers that the latter may well have even more disastrous consequences than the former.

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.

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

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 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 imprative: 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 within 28 days of a final decision, or face a lengthy 're-entry ban.'[81] 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 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

[81] See HC 395 part 9, and in particular paragraph 320.

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[82] 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).

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. [83]

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.[84] This will make the imposition of any cap on in-country applications 'arbitrary'.

We recall that at his lecture, and subsequent panel discussion, in October 2008 at the London School of Economics Professor David Metcalf[85] 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.[86] 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

[82] *Op.cit.*
[83] *Shall We Stay Or Shall We Go?* Institute of Public Policy Research, 2009, page 103.
[84] UK Border Agency meeting with ILPA 12 August 2010.
[85] A copy of the lecture notes is held in the ILPA archive
[86] *Ibid.*

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.[87] 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.

Accordingly ILPA urges the **Committee to separate its recommendations pertaining to applications for entry clearance and those pertaining to 'in-country' applications for the extension and variation of leave.**

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[88]

Question 7: To what extent should reductions in flows through Tiers 1 and 2 be met through reduced migration of dependants? Should dependant numbers be reduced by proportionately more than those of main migrants?

As indicated at 1.1 above the UK Border Agency is consulting on whether dependants should be included in the cap and **the Committee should not pre-empt the results of this consultation.**

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.[89] 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,[90] following male primary applicants. When the Migration

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[87] *Ibid.*

[88] *Beoku-Betts v SSHD* [2008'] UKHL 39.

[89] 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).

[90] See MAC 2009a, *op.cit.,* Section 7, especially 7.6 *Equality Issues* and the evidence cited therein.

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"*[91]

The Home Secretary (and Minister for Equalities) has indicated that, where the cap is concerned, this indeed the Government's intention:

> *"We want to ensure that we can properly weigh the economic considerations against the wider social and public service implications"*[92]

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.

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.

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[91] *Ibid*. at 7.93.

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

We pause to observe that 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;[93] 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 the country of origin but not to the UK.[94]

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'.[95] The announcement of the consultation on the UKBA's website states,

> *"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 migration is currently 'uncontrolled'. It also gives the impression that all migrants are entitled to other benefits, when again, many are not, or not until they have lived and worked in the UK for many years. The cap cannot be applied to EEA nationals coming to work (unless the UK decides to leave the EU) and it is not proposed yet that it should apply to people who qualify to live in the UK in other ways (Commonwealth-country citizens with a grandparent born here, family members of people already allowed to live here permanently or of British citizens, for example). The arguments against family separation above are even stronger for those who already have the right to stay permanently.

Damian Green stated in evidence to the Home Affairs Select Committee on 27 July 2010:

> *Q51 Mr Burley: Do you intend to cap family reunification?*

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

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

[95] *Hansard*, HC Report, 28 June 2010, col. 585. See also 28 June 2010UK Border Agency press release, *Coalition commits to impose immigration limit.*

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.[96]

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.

Question 8: What would be the likely impact on your organisation, sector or local area of reducing (from 2010) the number of main migrants through the Tier 1 general route in 2011/12?

ILPA is an organisation representing practitioners in immigration law. Effects are therefore:

i) Direct – on immigration law firms (or law firms with immigration departments) who would otherwise have hired Tier 1 general workers
ii) Indirect – affecting immigration law firms because client numbers reduce

However, ILPA's members represent employers and migrants drawn from all sectors and are acutely aware of the concerns clients express on the impact the limits may have on their businesses, careers and lives.

As to i), firms most likely to be affected are those that specialise in a particular area of the world and require expertise on that area or particular language skills. These may be firms with offices overseas, but may also be smaller firms. 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. [97] 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).[98]

As to ii) the likely effects are difficult to calibrate; people may engage a legal representative to ensure that they give themselves the best possible chance in an increasingly competitive environment and fewer places does not automatically mean fewer people instructing legal representatives.

ILPA members advise migrants and businesses operating across all industry sectors, including those operating within international markets and the overwhelming view expressed by these clients is that the imposition of an immigration cap will stifle economic growth.

[96]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
[97] *Immigration cap will strangle city law firms, Chancery Lane warns*, Law Society Gazette, 23 August 2010.
[98] See also the response of The Law Society to this consultation.

Questions 8 to 10 relate to the Committee's consideration of the 'trajectory' for the implementation of caps to achieve the Governments objective of reducing net migration by the next parliament, in 2015. Any changes must be introduced gradually and with sufficient advance warning to allow migrants and businesses to plan accordingly: training of resident labour market workers (or indeed relocation of businesses where necessary) takes time as does the planning of personal affairs, careers, investments and family commitments. To jeopardise economic recovery at this juncture in the economic cycle may be extremely damaging for the UK in the long-term.

The Government's stated aim is to "*reduce net migration to tens rather than hundreds of thousands*" [99] 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 best to ensure economic growth."*[100] 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 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.[101] 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 for global talent.

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.

The view that has been expressed to members 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.

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[99] *Immigration to be reduced,* Home Office press release 24 June 2010 citing Damien Green, Minister for Immigration.

[100] 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).

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

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.

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 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. 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 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.

ILPA's recommends that the Committee **examine the question of whether any cap or caps should be an overall total or an overall total per tier, or whether specific caps or quotas should apply, at different levels of specificity, right down to the level of particular 'SOC' codes.**

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 encouraging speculative application whereby prospective migrants apply to come to the UK as well as other destination countries.

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.

The Government's stated intention is that of attracting and welcoming to the UK those who have the most to offer,[102] therefore 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. [103] It also contrasts with the Diversity Visa (Green Card) lottery programme run in the United States, in which applicants are selected at random to make an application for permanent migration to the USA irrespective of skill set. [104]

Under the current UK arrangements, highly skilled migrants must defer the possibility of permanent residence, however are able to make their initial entry to

[102] *Limits on Non-EU Economic Migration – A Consultation* UK Border Agency, June 2010, page 3.
[103] Examples include Australia's General Skilled Migration categories, New Zealand's Skilled Migrant category and Canada's Federal Skilled Worker program. See further below.
[104] For further information on this program see: http://www.usagcls.com/index.asp

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 could give consideration to restructuring Tier 1 General to grant indefinite leave to enter or remain at the outset or, as described, exempt any extension phase from the cap.

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.

Question 9: What would be the impact on your organisation, sector or local area of reducing the number of main migrants through the Tier 2 shortage, Resident Labour Market Test, and intra-company transfer routes?

As the Committee acknowledges in its consultation paper,[105] the UK Border Agency is consulting on whether intra-company transfers should be included in any cap. As indicated at 1.1 of ILPA's response, the Migration Advisory Committee's research to date is very relevant to its examination of this field.

See response to question 8 above. If firms and organisations are desperate to fill a vacancy and this is not straightforward, for example because of the immigration cap, then they are likely to employ legal representatives to help them to explore their options. For example under the interim cap it is possible to make representations for an exceptional Certificate of Sponsorship additional allocation and legal representatives may be engaged to present cases to the exceptional cases panel. The cost-benefit analyses of the effects of a decision to litigate a refusal may be affected by the cap. If there is no other way of achieving the desired outcome and the consequences of not doing so are disastrous for the firm, particularly when the problem is going to be recur, there may be an increased preparedness to litigate, which involves instructing legal representatives and counsel. It is thus ILPA's expectation that those firms and organisations who are in a position to challenge adverse decisions in the courts and tribunals are likely to be particularly in demand.

Turning, for the same reasons as in our response to question 8, to general, wider effects:

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 issued for the period of 19 July 2009-31 March 2010 to help them set the limit. The problem with this is that many businesses did not recruit employees during the period 19 July 2009-31 March 2010 due to the recession and indeed many businesses were making staff redundant.

[105] At 1.6.

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 these organisations is that because they did not use their licence for Tier 2 General 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.

Even large organisations that did use their licence for Tier 2 General are not unaffected by the Interim Limit, as they need to hire a larger number of migrant workers than they did before. 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 pool. The Panel has prioritised applications so that 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 e given priority over a worker required for a post fro which the resident labour market test applies. 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? Whether the UK Border Agency applies the cap at the point of allocation (as in the interim limit) or assigning certificates of sponsorship, or at the point of applying for leave to remain, the same dilemma will apply. Certain categories of application (in particular extensions) should remain outside the cap and some mechanism to address exceptional circumstances is required.

ILPA is aware that a very considerable number of requests for exceptional allocation have already been submitted to the panel, which indicates that the interim cap is already having a substantial effect on business. The workload of the panel, its size and unpredictability, risk giving rise to further delays and uncertainties.

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 that 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 they cannot afford to train up a resident worker. Also 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 workers jobs.

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 for applications made outside the UK is capped.

A situation could easily arise where 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.

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 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.

As to the Intra-company transfer route, we recall the Committee's previous discussions of this matter, cited at 1.1. If it is included in any permanent cap then the result of a loss of business to the UK is all the more likely. The Tier 2 (General) cap is already negatively affecting the businesses ILPA members advise and a Tier 2 Intra-Company Transfer cap would only make their position worse.

The UK Border Agency has implemented a series of measures with regard to intra-company transfers which risk reducing business growth and opportunities. The prior experience with the overseas company for required for Tier 2 Intra-Company Transfers was increased from six to12 months. Although other Intra-Company Transfer sub-categories were introduced these are for graduate roles only and for a minimum of six months for skills transfer and 12 months for graduate training. Both these sub- categories are designed for more junior members of staff and not for an employee coming from overseas to head up a sector of business.

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[106]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 which facilitates the operation and growth of international organisations seeking to be based in the UK. Restricting

[106] See also appendix C to the UK Border Agency consultation paper on the cap, *op.cit.*

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.

Question 10: The Government's objective is to lower net migration overall. If you are proposing small or zero reductions in migration through a particular tier or route, through which Tier 1 and 2 routes do you think migration should be reduced instead?

For the reasons set out above, which ILPA considers to be supported by the Migration Advisory Committee's previous reports cited at 1.1. above, ILPA considers that the Government's objective is flawed. If there is no one in the resident labour market to fill a vacancy then either a third country national must be recruited or the vacancy go unfilled. We are unclear as to the policy reasons that would lead the Government to desire that a vacancy go unfilled. 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 Committee's comments, cited already at 1.1:

> *"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."*.[107]

Sophie Barrett-Brown
Chair
ILPA
7 September 2009

[107] MAC 2009b, page 7.