POINTS-BASED SYSTEM: TIER 4 REVIEW

ILPA COMMENTS

The Immigration Law Practitioners' Association (ILPA) is a professional association with over 900 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum through training, disseminating information, research and analysis. ILPA is represented on numerous government and other stakeholder and advisory groups

ILPA received notification of this consultation at the Employers Task Force meeting on 25 November and only received the details and the question on 30 November, after the closing date. Thus our timescale for response has been even more limited than that of other organisations.

We have had sight of the responses of Universities UK, UKCISA and English UK. We note the concerns that they have raised about the truncated consultation period and the lack of information provided. As detailed by English UK, the consultation does not comply with the Government Code of Practice on Consultation, published by the Better Regulation Executive (part of BERR, now BIS) in July 2008. Detailed information would have been useful in seeking to understand why the UK Border Agency and UK Trade and Industry are entertaining the proposals described in the letter, and why they are considered to be a helpful response. Universities UK stated:

> *"From initial discussions that Universities UK has had with the UKBA/BIS review team it appears that the reasons for this review stem from the provision of visa letters by a certain type of private provider to prospective students from certain countries seeking to undertake low level qualifications who lack apparent suitability for study in the UK.*
>
> *However, no evidence is publicly available to support this and it would be very useful if one of the outcomes of the review was the provision of an analysis of the information UKBA/BIS has gathered that prompted the review and which indicates what type of institutions are involved and what qualifications are being offered."*

UKCISA wrote:

> *"…it has been extremely difficult to develop any considered responses to areas which might be tightened without seeing any assessment or evidence of where perceived abuse might lie – such as specific countries or courses or colleges. You gave a few examples when we met but we would still wish to see a breakdown of*

those applications which are causing concern, by type of course (both subject area and awarding body).

Without that it is difficult to know what specific problem areas are to be addressed. The only information in the public domain appears to be a number of anecdotes *from several anonymous immigration officers broadcast on Five Live. This does not appear to be a firm or reliable basis for an enquiry of this importance."*

We concur.

The limited information we have suggests that there is a mismatch between the concerns to be addressed and the proposals by which it is proposed to address them. The concerns appear to be all about enforcement and compliance. But the proposals are all to do with the points awarded in Tier 4. Points do not go to questions of enforcement and compliance, but to the question of eligibility. Changing the points will affect who is eligible to come to the UK under Tier 4; it will not affect whether they, or their sponsors comply with the obligations placed upon them by the UK Border Agency.

As to eligibility, in Tiers 1 and 2 the Government's approach is fairly clearly spelled out: the intention is to attract workers to fill posts that cannot be filled from within the resident labour market (UK and EEA nationals). In Tier 4 the thinking behind eligibility has been less clearly spelled out by Government. The UK wishes to attract overseas students to study in its universities and colleges, both public and private, for the economic, cultural and social benefits that they bring.[1] Nothing suggests that Government policy distinguishes between students. For example, one recognised institution is not preferred over another, one subject is not preferred over another.[2]

The current arrangements for Tier 4 are already extremely complicated and the effective removal of any discretion at the point of decision-making creates difficulties which affect the UK's position in the student market, as well as creating additional litigation.

As to enforcement, the review makes no mention of the question of sponsorship and sponsor-licensing in Tier 4. Universities UK state in their response

"The concerns that appear to have prompted this review appear to relate to a clearly identifiable sub-set of Tier 4 sponsors rather than a particular qualification level."

We concur with UKCISA that "

"…if the concern, therefore, is that students are not registering to study as required, all the ingredients are now therefore in place to ensure this happens or to sanction sponsor institutions if this does not take place."

The combination of the licensing of the sponsor and the requirements to be imposed upon the individual student were designed, as we understand it, to provide the

[1] Students under the Points-Based System, Tier 4, Statement of Intent, UK Border Agency

[2] For further information on the Points-Based system, see the evidence of the Minister for Borders and Immigration, Phil Woolas MP, to the Home Affairs (HC 1199) published 20 November 2008 and *Managed Migration: the Points-Based System, published* 1 July 2009, HC 217.

necessary controls. It would be helpful to understand why the UK Border Agency considers the systems it has put in place to be ineffective and whether this has implications for other parts of the Points-Based System. Audits of licence holders are, as we understand it, intended to be a key part of enforcement. Is it envisaged that a person could use the Tier 4 route improperly without the connivance of the sponsor or without the sponsor failing to comply with the requirements imposed upon it by the UK Border Agency?
We are aware UK Trade and Industry will be particularly concerned with the potential effect of any changes upon the revenue generated by overseas students. Universities UK, UKCISA and English UK have made relevant points about this. We concur with English UK that there have been misunderstandings on audit visits due to lack of understanding of the rules which have given rise to misjudgements

By no means all overseas students consult a legal advisor. Some do; others are more likely to go a legal advisor when they identify a complication in the application, or when something goes wrong. In other instances, ILPA members may be advising colleges and universities. The introduction of Tier 4 has seen many changes in the area, and increased responsibilities and liabilities for universities and colleges and change normally leads to an increase in those seeking the assistance of lawyers.

ILPA members see students who are deliberating whether to come to the UK or to go to study in another country. They are choosing where to study. The excellence of the courses on offer will be a factor; what they will take from these courses that will assist them, usually in future work or study, will be a factor, fees will be a factor, so, for some, will whether they can bring their families with them and so, for some, will be the question of being able to work while in the UK. There will then be the question of whether they can comply with the requirements of the UK immigration rules, of processing times, and of opportunities for further study and/or work at the end of the course. These students do not have to come to the UK; there are many other countries seeking to attract them. Some who are seeking advice are trying to make a final decision; some have spent considerable time deliberating on their country of choice and have reached a firm decision.

ILPA submitted comments on the Equality Impact Assessment for Tier 4 in July 2008.[3] We draw on these in this response but also refer those conducting the review to that response itself.

Specific questions to be addressed

The review will use all available data and evidence, including evidence from UKBA staff operating the current system and views expressed by stakeholders and the sector, to address the following specific questions.

1) **Should the minimum level of qualification that can be studied through the PBS be raised from the current National Qualifications Framework (NQF) level 3?**

[3] Available on the submissions page of www.ilpa.org.uk

We note the responses of UKCISA, English UK and Universities UK which suggest that there is an error in this question and await clarification of the question.

2) **Should the minimum level of English language qualification that can be studied in the United Kingdom through the PBS be raised from the current Common European Framework of Reference A2?**

As to enforcement, it is wholly unclear to us is why demanding a minimum level of English should be thought to address any concerns about students not studying in accordance with their visa.

As to eligibility, one reason to come to the UK is to study English. Those who have very basic English may wish to improve it in an English language environment. Student visitor visas are only suitable for those wishing to study for six months or less and will not therefore meet the needs of all.

3) **Should English language testing be introduced for all courses of NQF level 5 and below, including English language courses and, if so, through what mechanism?**

As to enforcement, once again, it is wholly unclear to us why demanding a minimum level of English should be thought to address any concerns about students not studying in accordance with their visa.

It should be for the educational institution to assess whether the student has the linguistic competence/aptitude necessary to study for the course in question. To introduce further tests not based on this criterion, and assessed by experts, risks introducing discrimination on the grounds of national or ethnic origin into the system.

At the time (July 2008) when ILPA produced its comments on the Equality Impact Assessment for Tier 4 there were approximately 1.5 million students in full time higher education in the United Kingdom of which approximately 240,000 were from non-EU countries[4]. Of the top 10 countries highlighted by HESA in their 2006/7 eight were countries where the principal language is not English. Requirements that students should be able to demonstrate proficiency in English over and above that required for their course amounts to direct discrimination against students from non-English speaking countries.

At that time we wrote

> *"There are 193 member nations of the United Nations. The British Council currently provides English teaching facilities to only 47 of them[5]. There are many students from countries where there is little or no facility for them to learn English before they come to the United Kingdom. This is why the British Council actively promotes English language courses offered by UK educational establishments."*

We drew attention to the judgment in *GOO & Ors [*2008] EWCA Civ 747 (per Sedley LJ):

[4] HESA Press release 120. HESA Students in Higher Education Institutions 2006/07
[5] British Council website at: www.britishcouncil.org

> *"…Before we turn in detail to our reasons, it is relevant to recall that the admission of foreign nationals to study here is not an act of grace…Not only does it help to maintain English as the world's principal language of commerce, law and science; it furnishes a source of revenue… We therefore find it unsurprising that the legislation and rules, correctly construed, do not place arbitrary or unnecessary restrictions on what foreign students can study here."*[6]

4) Should access to vocational courses be restricted?

As to enforcement, once again, it is wholly unclear to us why restricting access to vocational courses should be thought to address any concerns about students not studying in accordance with their visa.

No definition of 'vocational' training is provided. Is training as a solicitor or barrister, or a doctor, regarded as 'vocational' training? What of courses such as a Master of Business Administration course? What of courses where the applicant is taught technical skills (for example in restoration of works of art)? As these examples illustrate, there is a huge diversity in what might be described as vocational.

If the UK is providing courses that are the best in the world, be they academic or vocational for the professions, for business or in skilled trades, we see no reason why people should not be able to apply to study on them.

We see no reason why the UK should not take pride in having courses that are considered so good that students from all over the world wish to study on them, be they academic or vocational.

To quote from the judgment in *GOO et ors (op. cit.)* to limit access to vocational courses smacks of ' *arbitrary or unnecessary restrictions*'

5) Should we introduce a differential approach for countries which have historically been sources of illegal migration, raising the minimum level of qualification and introducing stricter tests for individuals from those high risk countries?

No. This is stereotyping and creates a risk of discrimination. It would necessitate Ministerial Authorisation under s.19D of the Race Relations Act 1976 as amended and an authorisation that demanded a different level of qualification depending on the country of origin, for example, could not be justified under the law. That there has been illegal immigration from a country gives no indication as to whether those coming to study from that country have broken the rules. That one student has broken the rules is not an indicator of whether another student will do so. Guilt by association can be no part of an equitable system.

6) Should we restrict the work rights attached to student visas?

[6] Para 4, *GOO & Ors* [2008] EWCA Civ 747

No. Maintenance and accommodation are already required for students so a student will have satisfied the UK authorities of their ability to maintain themselves as a condition of obtaining permission to come to the UK to study. The ability to participate while living in the UK does affect choice of destination as does the ability of a spouse or partner to work. We make reference to the Migration Advisory Committee reports on access to work for dependants of work permit holders (which cite ILPA comments)[7] as highlighting the wider policy concerns around the placing of restrictions on spouses and partners.

7) **Should we place limits on the progression of individual students on courses up the qualification scale without their returning to their home countries?**

No. Why? There can be no reason for this. It will add to the administrative work for UK posts abroad and to the costs for students. Different posts take different times to process applications and there is a risk of different treatment depending on the country of origin, in some cases resulting in being unable to commence a course on time. ILPA members' experience suggests that it would make the UK a significantly less attractive destination to those of their clients who are international students.

It would be a most onerous requirement, especially for those students with dependent family members. The UK Border Agency might also want to consider its effect upon applicants' carbon footprint.

The response of English UK to this consultation suggests that it has been indicated to them that the UK Border Agency concern is students who study for long periods and then come to qualify for indefinite leave to remain under the long residence rule. As English UK note, rare will be the student who can remain in the UK for ten years, qualifying to study, paying fees and supporting and maintaining him/herself. To impose massive inconvenience on the vast majority of students for this reason is wholly disproportionate. The majority of students who settle will eventually will do so because they have entered the UK labour market (via the intermediary of the Post-Study Work route) or formed a marriage/civil partnership or relationship, which gives them a route to settlement in any event. Human rights applications will also often come into play after such a lengthy period of residence. The citizenship provisions of the Borders, Citizenship and Immigration Act 2009 also introduce probationary citizenship to replace indefinite leave to remain, thus changing the position beyond recognition.

Timescale

To report back to the Prime Minister, First Secretary of State and Home Secretary by 11 December 2009.

Given the tight timescale, we will need you to submit your views by Friday 27 November at the latest. Please could these be sent via e-mail

[7] *Analysis of the Points-Based System: Tier 2 and Dependants*, Migration Advisory Committee, Agusut 2009.

to to the review team at the following address:
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