Response from the Immigration Law Practitioners' Association to *Consultation on charging for immigration and visa applications*, September 2009

Introduction and summary

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 and providing evidence-based research and opinion. ILPA is represented on numerous government and other stakeholder and advisory groups and offers its views in these forums in the hope that they will be considered and may make a difference to government policies.

ILPA has responded to the previous Home Office decisions and consultations on fees, from their imposition in August 2003 onwards.[1] We have consistently opposed the policies on charging more than the administrative costs of dealing with an application[2] and the principle of making migrants, rather than the whole population through taxes, pay for the benefits of migration. We have stressed that fees should not be raised for those who can least afford it and that migrants should not have to pay extra towards the cost of immigration appeals and enforcement, and, most recently, towards meeting the short-term local costs of migration where these may have nothing to do with the particular application.

ILPA recalls the presentation at the UK Border Agency Corporate Stakeholder Group on 22 October 2009 on e-borders by Brodie Clark, Director of Enforcement, where we were presented with statistics that since 2005 there have been 125 million passenger and crew movements captured and analysed. During this period 153 passports had been impounded; 950 people refused entry because of previous adverse immigration history and 90 fraudulently obtained documents/visas identified. Those present questioned the cost/benefit analysis of this work. While it was indicated that other benefits

[1] See, for example ILPA response to the fee scheme consultation, March 2009; ILPA letter to Lin Homer, 9 November 2007 in response to hers of 24 October 2007 on fees for the PBS, ILPA response to the Points-Based System Fees consultation, May 2007; ILPA briefing on the Immigration (Application Fees) Order 2005 ILPA response to Consultation on Review of Charges for Immigration Applications, December 2004, ILPA letter to Beverley Hughes MP, 28 July 2003, objecting to the imposition of fees for immigration applications in the UK, most available from the Submissions page of www.ilpa.org.uk. See also ILPA briefings on legislation affecting fees, for example on the Asylum and Immigration (Treatment of Claimants etc.) Bill.

[2] See the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, s 42.

had been identified (such as the seizure of tobacco), it is far from clear that applicants for visas should be contributing to the costs of the e-borders project.

Our views have not been accepted by the UK Border Agency (UKBA), fees have been raised after each consultation process[3], and we have little confidence that any views we express will be acted on now. We are aware, as set out in the Impact Assessment published with the consultation paper,[4] that the UK Border Agency is under a statutory obligation to consult if it wishes to charge fees above the costs of administrative processes. We do not consider that obligation has been fully met.

Whatever may result from this consultation, we note the meteoric rise in fees over recent years[5] which reflects the fact that since the coming into force of s 42 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004[6] fees can exceed the administrative cost of handling applications. In many areas the service that is provided to applicants remains poor, and the quality controls on service remain patchy. Timeframes for processing applications must be reasonable and there must be a degree of certainty for applicants, who are surrendering documents such as passports that they can ill afford to be without. Targets relating to these timeframes should apply to 100% of applications. ILPA was pleased that the Visa Services Directorate responded to ILPA suggestions of having customer services standards for 100% of applications.[7] Other parts of the UK Border Agency should follow suit. Provision should be made for repayment of fees in cases where the timeframes are not met. Such requirements are all the more appropriate where applicants, as now, are required to pay such high fees.

Fees should be set flexibly in a way that is just to the individuals concerned and which relates to their ability to pay them. Migration benefits the whole of society and therefore it should be a cost for the whole of society, rather than an extra cost on top of all the other costs for those who migrate. The statement in the Impact Assessment that migrants 'benefit most from the system' is an assumption for which evidence is not provided. There could be an argument for differential fees to be set in different countries on the basis of that country's GDP/average earnings/average income but not, as the paper proposes in relation to elderly dependent relatives, on the basis that those who are often least able to pay should pay more. The UK Border Agency uses multipliers to calculate the relative earnings of workers in different countries for applications under the Points-Based System;[8] it should also consider doing so in relation to the fees that people pay in those countries. Use of multipliers would also help address the cost identified in the Impact Assessment (in connection with Differential Pricing and Premium Services) that:

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[3] For example, the fee for an in-country settlement application started at £155 in August 2003, rose to £335 in April 2005, £750 in April 2007 and £820 in April 2009.
[4] *Consultation on charging for immigration and visa applications*, 17 June 2009, part 2 page 6.
[5] See footnote 3.
[6] On 1 October 2004, SI 2004/2523.
[7] See www.ukvisas.gov.uk/en/customerservices/customerservicestandards/
[8] Immigration Rules, HC 395, Appendix A Table 2A.

> "Differing local economies across the world may create barriers of affordability and disparity of choice for some applicants…"

We are aware that the Migration Advisory Committee is interested in the multipliers used and their work on this could usefully inform consideration of multipliers for fees.

More could be done to ensure that fees are set to reflect the speed of service provided. In particular, to reduce the pressure on the Public Enquiry Office, ILPA and others have suggested to the UK Border Agency that it should offer differing levels of premium postal processing. Therefore in addition to the one day service offered by the UK Border Agency Public Enquiry Offices (PEO), the postal teams could offer for example a 48-hour and a five-day premium postal service, where applicants who required their applications to be considered within short guaranteed timeframes could opt to pay for the certainty that their applications will be processed within a specified window, failure to do so leading to repaying the fee. This would not, of course, obviate the need to ensure faster processing times and greater certainty about processing times for all applicants. At the moment, many people who can ill afford to do so use the Public Enquiry Office service because the alternative is to give up their documents for an unknown period of time, with all the constraints that result from this.

Finally, a number of the consultation questions (as explained below) do not provide enough information to give a useful response. We note two general concerns here regarding significant parts of this consultation. Firstly, we remind the UK Border Agency that consultation on impacts cannot absolve the Agency from its obligations to carry out comprehensive impact assessments. Secondly, the consultation paper is lacking in detail and analysis and provides no or inadequate information to enable respondents properly to assess the questions asked. It is thus difficult to assess consequences of any particular yes/no response, and evaluation of consultation responses must have regard to this. We understand that the UK Border Agency wishes to consult on principles rather than on proposed precise fees, but a great deal more information is required if people are to be able to provide informed answers about these questions of principle. The Impact Assessment has only quantified the costs for fees relating to the earned citizenship proposals.

Responses to specific questions

Q1: Do you agree that we should continue to set fees flexibly by taking into account wider policy objectives such as attracting specific groups of migrants that are beneficial to the UK?

This question does not admit of a yes or no answer. There is no definition of which 'wider policy objectives' have been decided to be paramount, or even which have been considered, nor of 'beneficial to the UK'. The Impact Assessment specifically indicates that it is an initial assessment of the fees for earned citizenship 'products' and that the benefits of the policy of earned

citizenship will be considered in a separate impact assessment. If 'beneficial to the UK' means people coming to work under the points-based system, they will generally be coming to highly-paid jobs and will have been highly-paid in the past, so they may be able to afford higher fees. But the level of fee may be a consideration for highly mobile professional people who may decide to go elsewhere where the immigration processes are more welcoming. Also, as the economic situation in the UK changes, those who are 'beneficial' in one year might be considered not to be so any longer two years later – would their fees for an extension of stay at that time then be raised?

In the case of family settlement, applicants and their family members in the UK do not have a choice of country in the way an economic migrant may have. Accordingly, setting high fees for such applications, bearing no relation to the economic situation of the applicant, is unfair as the migrant will not always have any choice other than to pay the fee in order to join their family. We understand from the presentation on the charging consultation at the Visa Services Directorate User Panel on 9 November 2009 by Chris Nickson that the UK fees appear on the UK Border Agency's own calculations and using the Agency's own comparators, to be some 23% above the identified average. This should be a matter for concern.

See also our answers to questions 13, 20 and 21.

Q2: Do you agree that fees for the different stages of the journey to citizenship should be set at different levels to reflect the different benefits provided at each stage?

This question does not admit of a yes or no answer. ILPA does not see any benefits which accrue from 'probationary citizenship' and therefore finds it hard to answer this question. We made our views on 'earned citizenship' clear in our response to the UK Border Agency consultation on this earlier in the year.[9] Certainly if the 'reflection of benefits' principle is followed, the fee for probationary citizenship should be lower than the current fee for indefinite leave to remain in the UK (ILR). The preferred option set out in the Impact Assessment of maintaining the same income for Settlement/Nationality as for Earned Citizenship fails to recognise the differences between the old and new routes. Probationary citizenship provides fewer benefits than ILR and people with this status will be barred from recourse to many public funds, even those which they have paid towards in their general taxes and NI contributions, such as being treated as home students for financial support purposes. They may be eligible for contributions-based benefits such as contributions-based job seeker's allowance or the state retirement pension.

The rise in fees in recent years is concerning. It would appear that applicants are being forced to contribute to the long-term cost of the immigration system irrespective of the proposed length of their stay in the UK.

[9] Earning the right to stay: a new Points-Based test for citizenship, ILPA submission 26 October 2009. Available from the submissions page of www.ilpa.org.uk

High fees for initial applicants, especially those from poorer countries, create barriers to their entry, restricting access to the rich and excluding the highly skilled from countries with a currency that is weak in contrast to the British pound.

Not all migrants intend or desire to enter the path to citizenship and some of those entering by a route that leads to settlement have no desire to settle in the UK. For example, under the work permit system, in 2004 42,235 people were issued with long-term work permits but four years later, in 2008, only 16,205 people were granted settlement on this basis.[10] All such people in the UK for shorter periods will have contributed by working and paying taxes; it is unfair that they should also pay extra immigration fees to go towards a status which they do not require. The percentage leaving might well increase if the flexibility in the Points-Based System is widely used to refuse further extensions of stay to workers if the conditions of the economy change

On the other hand, the journey to citizenship as intended removes choice for the migrant. If a migrant is unable to extend their leave beyond five years they may have no alternative but to apply for probationary citizenship. Because of the limits on entitlements if one remains a probationary citizen, a probationary citizen may have no option but to apply for British citizenship or permanent residence. It is particularly important that fees must not be set at a level which creates severe hardship for those with strong grounds to remain, such as family members of low-paid, long-settled workers.

It is not clear whether the alternative to British citizenship, permanent residence, would always be available or only in circumstances where it would be unreasonable to require a person to apply for British citizenship, for example when the country of origin does not permit dual nationality.

Q3: Do you agree that when setting the fees for the different stages of the journey to citizenship, the UK Border Agency should take into account wider factors?

Yes, including the means of the person applying, in providing for the waiving of fees in more circumstances than the present restriction to those applying under the domestic violence rule. The judgement of the House of Lords in *R (Baiai) v Secretary of State for the Home Department* [2008] UKHL 53 makes it clear that a fixed fee, set without consideration of the means of the applicant can lead to an unjustified and unlawful interference with human rights.

Q4: There are a number of factors that could be used to inform how much the fee for citizenship would cost. What factors, if any, do you think should be used to set the fee?

The actual cost of processing citizenship applications should be the major consideration. If the government wants those settling in the UK to become

[10] Control of immigration: statistics UK, 2008, Home Office Statistical Bulletin 14/09, August 2009

British citizens, and given that the design of probationary citizenship means that they will have little option but do so, the present major barrier to people gaining citizenship, the fee, which is very much more than the cost of dealing with the application, should be reduced. This is particularly important for family settlement applications where, as previously stated, the applicants do not always have a choice about paying if the family wants to remain together or to remain together without significant disruption to the private and family life of some members.

Q5: Do you agree that the UK Border Agency should set different fees for the same type of application?

Yes, this should be a consideration. We have suggested that a multiplier could be used to ensure that the fee paid by applicants in different parts of the world equates to the same level. For instance an applicant in India should be able to afford the fee in the same way as an applicant in Canada. Therefore if the fee constitutes say a day's salary in Canada the fee for applicants in India should also be a day's salary but based on the earning power of an Indian worker. A multiplier similar to that used in Tier 1 (General) applications to determine an applicant's level of previous earnings could be used to ensure that the same level of fees are paid worldwide relative to the applicant's earning power and the GDP of their country of residence.

But higher fees should not be set in relation to matters completely beyond the applicant's control. 'High local security requirements' are not the responsibility of the applicant. At present, applications made in Pakistan are not generally dealt with there, for security reasons, but in Abu Dhabi or the UK. This has resulted in significant extra delays and in refusals which show a lack of experience in the decision-maker, a significantly worse service. It would be unreasonable to expect applicants to pay extra for this.

On-line applications have been trialled in various posts abroad. ILPA is not clear that they have been successful, and they also mean that the applicant must have a degree of computer literacy and access to the internet, which is not available for all. ILPA would not wish those who have access to technology and who may therefore be more able to pay to be subsidised by those who do not.

Similarly, in countries where there is a reliable postal system it might be justifiable to charge when an appointment is missed without reasonable cause. But, again using Pakistan as an example, when the postal system is so unreliable as to mean that it is not uncommon for letters to go astray, between applicants and the commercial partner and for the British High Commission to respond to representations about delays in cases by stating that an appointment letter was sent out months ago, and much business is conducted by mobile phone, it would be unfair to penalise applicants by charging them for appointments they could not know about.

There is some support for a higher fee for a guaranteed turn-around time to deal with the application (building on the existing premium service offered by

the Public Enquiry Office), provided that the normal way of dealing with it is known, transparent and acceptable and does not become longer if extra priority is given to a premium or semi-premium postal service. The fee should be repaid if the UK Border Agency does not make a decision within the target time.

Before implementing any change, the UK Border Agency needs to carry out a full equality impact assessment to determine the effects of the changes on particular groups.

Q6: For which of the following methods, if any, do you think we should offer different fee levels?

See responses to questions above; the situation is too varied to admit of a fair differential fee level.

Applicants with the financial resources are currently able to utilise a premium service at the UK Border Agency's Public Enquiry Office. However for a migrant on a more modest wage or with a large family the higher fee may be prohibitive in utilising the one day service on offer. If a structure of, for example, 48-hour and five-day premium services as detailed in the introduction to this response were made available and a guarantee that applications would be processed in the specified time frame (failure of which would lead to a repaying of the fee) the UK Border Agency could offer different fees levels to reflect the expedited service.

The location of the application may be relevant, as described above. Methods of payment are only likely to make the marginal difference of compensating for e.g. charges imposed by credit card companies.

Q7: Do you agree that we should set fees flexibly, setting fees for optional premium services at a higher level than equivalent standard applications, depending on the speed/tailoring/convenience of service received?

Possibly. Some clients have benefited from the Public Enquiry Office's premium same day service. But this does not apply to all applications and nor can all clients afford to use it. Furthermore, at the moment demand exceeds supply so that not all those who wish to use it can do so. ILPA has commended, and places on record again its commendation, the work that the staff of the Public Enquiry Office do within the limited resources available to them, and its view that those resources are manifestly insufficient. The remit and capacity of the Public Enquiry Office should be extended in order to ensure that there can be a fair take-up of this service. As described above, there is a role for premium postal services for those who do not need, and can ill-afford a same day service but do require very rapid processing of their applications.

Q8: Do you agree that we should charge for consultancy services provided to customers and third parties?

No, the UK Border Agency should not be providing consultancy services. Its function is to operate the UK's immigration, asylum and nationality laws, it is not an advice agency and should not put itself out as such.

In particular, ILPA is aware from its members that the UK Border Agency's commercial partners, Worldbridge and VFS, charge significant fees for what is represented as an advice line but which in practice simply reads out the guidance to an applicant and in certain instances actually misadvises applicants. This is unacceptable. Commercial partners' service agreements with the UK Border Agency or particular posts must make it clear that they are a post-box service, not an advice service, and that they should not be able to charge applicants for any kind of advice. It is crucial that a clear distinction is made between advice and information provided by Entry Clearance Officers/Managers who should have received appropriate training and the staff of visa application centres who must not advise applicants on immigration applications.

ILPA members have varying experiences of the UK Border Agency employers' advice line but in general they do not think the service is good enough to be chargeable, as too often the advice line cannot trace the information required about a potential worker, or does not give the correct response, either as to individuals or to entitlements.

ILPA agrees with the comment in the Impact Assessment that charging for these services

> 'Could have a disproportionate impact on the uptake of training and advice by smaller businesses/third sector; which could have long-run implications for compliance and understanding UK Border Agency policy'

Consultancy can go beyond advice to individuals to advice on systems and processes. ILPA is concerned that to charge for such services may place the UK Border Agency in a position where it faces conflicts of interest.

For example, in the case of services to employers, we are aware that many employers who have requested pre-application audits have been unable to obtain these. If the Agency were to charge for such audits, it would have to be in a position where it could meet the demands of all those applying and also to have a pricing structure whereby, for example, small businesses with limited means were in as good a position to obtain these services as large ones with large budgets. We consider that very rapidly the Agency could end up in a position where questions were raised about equitable access to its services, and the effect on small businesses.

Unless services are provided on a cost recovery basis they will compete with other work to be done by the Agency. Questions will arise if the Agency is

prioritising such activities over other activities where its performance requires improvement.

The consultation paper moots the idea of the UK Border Agency asking for payment to speak at annual conferences and ILPA can see no objection to this. However, the UK Border Agency should use its ability to charge selectively, for there are events at which it would wish to be present and to make its views known and it would not wish to be in a position where the events it attends are dictated by potential revenue.

ILPA provides the UK Border Agency with many hours of unpaid consultancy services, worth many thousands of pounds, in the form of attendance at regular and *ad hoc* meetings and written responses to consultations such as these. We are far from being the only organisation to provide such services. We do not charge the Agency for these; we value the opportunity to share our knowledge and experience to inform the Agency's thinking. We consider that the same applies to the Agency in considering charging for events.

Q9: What types of consultancy and document verification services, if any, do you think the UK Border Agency should charge for?

No consultancy services. There could be a useful role for the UK Border Agency or for the Foreign and Commonwealth Office to provide a specialist document verification service for sponsors in the UK to bring original documents to an office in the UK to be photocopied and certified and then sent by quick and secure post, or by email, to a British post abroad in support of an application for entry clearance, or for the issuing of a British passport to a child who is British by descent. Currently, documents often have to be prepared in the UK and then originals sent abroad, or people travel with them at a time inconvenient to them in order to ensure that they are available for the British post. If such a service were to be set up, it should be widely publicised and available and any fee charged should not be more than the costs of the administration of the service, e.g. photocopying, postage and the staff time involved.

When UK Border Agency staff are invited to speak at conferences, seminars etc they are of course entitled to charge a speaker's fee, as discussed above.

Q10: Do you agree that the UK Border Agency should charge third parties to access the information we hold, within the confines of the Data Protection Act?

The document does not give enough information on which to make an informed response. However, individuals making subject access requests under data protection legislation have been able to obtain information about their cases which could not be found any other way. This service, with the current fee of £10, should be retained. Increasing this fee would deny access to justice and hinder the resolution of cases.

The UK Border Agency is obliged to provide information in response to freedom of information requests. Like other government departments it is permitted to refuse requests which would cost too much. It is open to a person to offer to pay if they require information that would exceed the costs threshold. It will always be open to those undertaking research etc. to use the Freedom of Information Act to obtain information. Members of Parliament are also able to request information from Departments through Parliamentary Questions.

We consider that the existing procedures for dealing with freedom of information requests provide for reasonable cost charges. To move to other fees would risk giving unequal access to information. For example the UK Border Agency could find itself in a position where information has been purchased and used in a very poor quality piece of research but someone doing a piece of high quality research on the same topic cannot afford information that could be used to refute/call into question the poor research. This would be undesirable. We agree with the statement in the Impact Assessment that

> "Charging a fee to access information could have a disproportionate impact on smaller institutions; in particular the third sector (voluntary/charitable organisations)"

The Impact Assessment also states that

> "Potential users could see this as a barrier to transparency in access to information."

We consider that the problem goes beyond this; it would in fact be a barrier to transparency in access to information. It is also likely to place burdens on the Parliamentary Questions system as MPs make efforts to obtain the information through that system to save their constituents costs, or to obtain information that they need for debates and that those briefing them are unable to provide.

Q11: What type of fee, if any, do you think third parties should pay to access the information held by the UK Border Agency?

See response to Q10. An explanation as to who is considered a third party would be required in order to answer this question. It is not ILPA's opinion that the UK Border Agency should charge other government departments or external agencies for access to its information. Moreover, there are already substantial concerns over the amount of information collected and retained by the UK Border Agency and its powers for sharing this information.[11] Information sharing must not become a profit-making exercise.

[11] For instance, this is something on which the Opposition expressed grave concerns during the passage of the Borders, Citizenship and Immigration Act 2009 – see e.g. *Hansard* HC Public Bill Committee, First Sitting, 9 June 2009: Column 31 *per* Damian Green MP.

Q12: Do you agree that each dependant applying for leave to remain in the UK should pay an additional, separate fee for their application, in line with the practice overseas?

No. The application for another child made together with the rest of the family does not lead to significant extra work for the UK Border Agency and a substantial extra fee could cause serious hardship to the applicants, especially if there are several children in the family. When the fees are so high, the aggregate fee for a family is even less justifiable. ILPA does not understand why the option, which we prefer, of changing the practice abroad at the British Diplomatic Posts, so that a family applying together pays only one fee, or a much-reduced fee for the children, has not also been proposed for consultation and suggests that it be considered.

Q13: Do you agree that migrants who come under the dependant relative route, and who are over the standard age of retirement, should pay more at the point of application?

No. ILPA questions the question being asked, we should need information as to why the UK Border Agency feels that it should charge more at this point of application before an answer could be reached. When families want to reunite in the UK they should be able to do so without the barrier of huge fees. We see no reason why the fee for a 66-year-old should be greater than that for a 63-year-old.

Q14: Do you agree that we should charge overstayers more than the cost of consideration of such applications?

No; again, the work which the UK Border Agency has to do in dealing with such applications is not significantly more than that for an in-time application. The document gives no evidence to support its assertion that 'processing these types of applications is more costly and complex' and ILPA does not accept that this is generally the case. The application of a person who has overstayed only a short time will not be much more complex than one made in time. Applications made on the basis of long residence may also raise points under Article 8 of the European Convention on Human Rights and a fee which made such applications impossible for destitute applicants could be discriminatory or unlawful, as the fee for certificates of approval for marriage was found to be in the *Baiai* case cited above

In particular, an overstayer cannot legally work and therefore will struggle to pay any fee let alone a higher fee. It would appear from the question that the UK Border Agency wishes to introduce a punishment by charging increased fees to overstayers rather than encouraging them to attempt to regularise their status and determine whether they have grounds to be allowed to remain in the UK. Such an approach would be likely to discourage overstayers from seeking to regularise their status and thereby prolong the duration of their time as overstayers or increase the number of irregular migrants in the UK.

Further, members report an increase in the number of clients inadvertently becoming overstayers due to in-time applications being rejected as invalid or refused due to minor technicalities (such as difficulties with processing the fee or the format of photographs in the case of rejections, or the format of degree certificates or bank statements in the case of refusals) and consequently having to resubmit their applications on an out of time basis with a further fee. The approach taken under the points-based system, to require specific format documentation yet refuse to engage with the applicant even where a minor defect in documentation can be easily corrected and the application is clearly meritorious, mean that applicants pay a higher fee for reduced service levels that results in a greater number of applicant's unintentionally becoming overstayers. The suggestion that such applicants would not only end up paying two fees but that the second application should incur a higher fee is unsupportable.

Q15: Do you agree that we should charge sponsors of migrants in accordance with how well they comply with sponsorship requirements?

No, this question suggests that the UK Border Agency wishes to reward sponsors that are compliant with duties that are mandatory in nature and charging on this basis would therefore undermine the seriousness with which sponsors should take their duties. It also suggests that the Agency may wish to punish with higher fees those who may not have been able fully to comply for a variety of reasons, some of which may attract a civil penalty in any event. Compliance with the sponsorship requirements is not sufficiently monitored to permit the UK Border Agency making decisions on charging fees on this basis. In addition, many instances of partial non-compliance are the result of unclear policy guidance from the UK Border Agency on sponsors' duties. Non-compliance can be for reasons other than a sponsor not trying its best to comply, given that new guidance is issued almost every quarter and the goal posts are ever-changing. It is not workable to assess compliance and charge on this basis.

Furthermore, the concept of issuing civil penalties exists to deal with sponsors who have not taken the appropriate steps to prevent illegal working in their organisations. Fees should not be used in a punitive way, by charging more or less depending on how well a sponsor complies with its sponsorship requirements. In the case of sponsorship, the civil penalty regime established under the Immigration, Asylum and Nationality Act 2006 already exists to provide a financial means of punishment.

Q16: Do you agree that the certificate of sponsorship should be priced more flexibly?

Neither agree nor disagree. Any answer is dependent on what factors will be taken into consideration when deciding the fees to charge for certificates of sponsorship within a sub-category of a Tier. As the consultation paper gives no indication of the factors involved, the question cannot be answered sensibly. This is another example of the consultation paper asking for ideas

on how the issue of fees should be addressed, without providing the necessary information to respondents to allow it to make use of their answers. There is no information on what factors affect the level of fees in the first instance nor on the data as to the costs to the UK Border Agency and to businesses, including small businesses, for administering the different types and methods of application. We are also mindful that a sponsor issues a certificate, and is at risk of penalty if the certificate is wrongly issued. If it is suggested that one sponsor should be issuing certificates that cost different amounts, at risk of penalty if it gets it wrong, then this would appear to add further complexity to an already very complex system.

Q17: Do you agree that a fee should be charged to applicants who request an administrative review of an application that has been refused?

No. Applications that fall for refusal may be refused due to errors made by the UK Border Agency staff or the staff of the British Diplomatic Posts abroad in dealing with an application. Applicants should not have to pay additional fees for rectifying the mistakes of UK Border Agency staff.

It is important to note that an administrative review is limited in value as no new documentation can be submitted in support of the refused application and therefore is a reconsideration of the documentation already before the Entry Clearance Officer when they first considered the application. It would be a more useful review process if an applicant could submit new documentation that would clarify any issue that led to the initial refusal.

If an additional fee were levied for an administrative review and if that review were successful, the fee should be repaid to the applicant. The additional cost incurred by the UK Border Agency would in that instance have been the result of its own staff's failure to assess the application adequately in the first instance. Without repayment, the applicant would have paid an extra fee and suffered extra delay, by reason of the UK Border Agency's failings, before the application was resolved. The process is vital to the Agency itself for its own systems of quality control.

The Impact Assessment states

> 'Could have a disproportionate impact on specific groups. The fee could be seen as creating barriers of affordability and disparity in discouraging genuine applicants from some groups from exercising their right of appeal."

ILPA considers that a fee would create barriers, in a disproportionate fashion, and prevent exercise of a right of appeal.

See also the response to Q19 below.

Q18: Do you agree that a fee should be charged to applicants who request a reconsideration of an application that has been refused?

No. Similar arguments to those in the answer to Q17 apply. If UK Border Agency staff make a mistake in dealing with an application, a person asking for that decision to be corrected should not have to pay for them getting it right. The process of reconsideration should be used by the UK Border Agency as an indication of the quality of decisions and lessons learned from reconsideration should be widely circulated to decision-makers to avoid similar mistakes in future. The process is of use to the Agency itself for its own systems of quality control.

Q19: Do you agree that users of the immigration system should contribute to the costs of the appeal system and, if so, should the costs be paid for by:

A> All visa and immigration applicants by ensuring that visa fees contribute towards the cost of the whole system by a small increase
B> Those visa and immigration applicants who have a right to appeal against their decisions by increasing the relevant visa fees
C> Only those who wish to make an appeal against their original decision by charging a larger fee on appeal

The UK Border Agency has consulted on this before and got an answer. In 2004, 82% of respondents to its consultation on fees[12] thought appeals should not be included in the application fee, and 92% that enforcement costs should not be included.[13] The fees then set in 2005[14] included the UK Border Agency's appeal costs. When fees were raised in 2007 the UK Border Agency made it clear that the increase, expected to raise an extra £100 million, would fund extra investment in enforcement action against illegal immigration.[15] It is incorrect to suggest that fees do not contain this element of costs of the appeal system now. The suggestion therefore that visa fees should also pay for the independent Asylum and Immigration Tribunal and its successor Tribunals cannot be justified. The cost of immigration appeals is at least in part a product of the relative quality in the decision-making at the UK Border Agency, a matter over which applicants and appellants have no control. In the same way as the courts system is paid for through general taxation, so should this be.

When the Government restored a right of appeal to some visitors refused entry clearance, in the 1999 Immigration and Asylum Bill, it initially charged them a fee for lodging an appeal. This was deeply unpopular and resulted in

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[12] Consultation on Review of Charges for Immigration Applications, September 2004
[13] Home Office, *Consultation analysis – Review of Charges for Immigration Applications*, n.d. but must be early 2005, p.7.
[14] Home Office Immigration and Nationality Directorate, *A response to the consultation on a new charging regime for immigration & nationality fees,* March 2007, p.7.
[15] Home Office, *Enforcing the rules,* March 2007, p.29

injustice as many people did not appeal because of the cost, even though they had a strong case. Fees were quickly reduced, and then abolished altogether.[16] Family visit visa appeals often succeed, showing that the original decisions were flawed; in 2008, for example, the success rate in such appeals from India was 53%, from Bangladesh, 52% and from Pakistan, 49%.[17] Charging for appeals is a recipe for injustice continuing.

From April 2009[18] visa fees also include a £70 extra charge intended to meet some of the extra short-term local costs of migration through a Migration Impacts Fund. Fees are already higher than necessary to cover the costs of applications and also cover part of the costs of appeals and enforcement and very much more; they should not be increased to cover even more of the appeals costs.

Moreover, as we have expressed previously[19], decisions and consultation in respect of the appeals system ought to be independent of the UK Border Agency, which is the Government agency over whose decisions that system is intended to provide independent scrutiny and remedy.

Q20: Do you think that any proposal outlined above could have an impact on community relations?

The consultation paper has not provided any information that would enable respondents to answer this question. As described above, there are a number of proposals in the paper that could increase dissatisfaction with the UK Border Agency and a number that could place burdens on those, be they migrants, British citizens, the settled employers or universities, who are affected by the actions of the Agency. But it is a big leap to identifying such sources of dissatisfaction and mooting an effect on 'community cohesion'.

Equitable conduct by Government departments is vital for people to have confidence in those Government departments and we have identified that some of the charging proposals could result in inequity or place the UK Border Agency in positions of conflict of interest. We also recall our comments above that were it to charge for its public presentations the Agency might find that it has priced itself out of some fora where it would wish to put forward its perspective.

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[16] A useful summary of this history is at http://www.citizensadvice.org.uk/index/campaigns/campaign_success/family-visa-appeal-fees.htm

[17] House of Commons *Hansard,* 15 July 2009, col. 402W

[18] *Managing the impacts of migration; improvements and innovations,* available on www.communities.gov.uk/documents/communities/pdf/1179350.pdf, Explanatory memorandum to the Immigration and Nationality (Fees) Regulations 2009, (2009) No 816

[19] See our October 2008 response to the August 2008 *Immigration Appeals: fair decisions fast justice* consultation, available from the submissions page of www.ilpa.org.uk .

Q21: Do you think that any proposals outlined would impact adversely upon small/medium-sized businesses? Please provide comments on how this impact might be minimised.

A regulatory impact assessment is mandatory and the UK Border Agency cannot circumvent its obligations through questions such as this in the consultation. The consultation paper has provided insufficient background information to allow a detailed answer to be given. As indicated above, we are concerned that if the UK Border Agency were to charge for its 'consultancy' services these services might be more affordable for large multi-nationals than for small businesses

Q22: Do you think any proposals outlined above would have a disproportionate effect upon any particular group according to:
***race**
***gender**
***age**
***disability**
***religion**
***belief**
***sexual orientation**

ILPA has responded to previous consultations on how more restrictive regulations impact on particular groups; and how people from many countries in Asia, Africa and the Caribbean are less likely to be able to afford increased fees and how they are a higher proportion of their income than for people from north America or Australasia.[20]

The proposal to charge extra for elderly dependent relatives would have a disproportionate and wholly unjustified effect on elderly people. There are copious statistics to show that people with disabilities are less likely to be working, and more likely to be living in poverty, than the majority of the population, so any increase in fees would have a disproportionate effect on them. Again, ILPA stresses that comprehensive impact assessments are required, rather than perfunctory questions in a consultation with insufficient information provided to make an assessment. We draw attention to page 13 of the consultation paper which makes clear that for all heads of impact assessments there are no results in the evidence base, let alone results annexed.

[20] See ILPA's comments on the Points-Based System Highly Skilled Tier Impact Assessment, January 2008 Youth Mobility Scheme (Tier 5) Impact Assessment, March 2008 and the Tier 4 Equality Impact Assessment, July 2008, all available from the Submissions page of www.ilpa.org.uk

Q23: Are there any other products or services that we should charge for?

No. The UK Border Agency should however have a policy concerning the circumstances in which fees should be repaid, including the possibility of repaying the fees for unsuccessful applications, or applications which are unreasonably delayed by the UK Border Agency.

ILPA
30 November 2009