Earning the right to stay: a new points test for citizenship

Response from the Immigration Law Practitioners' Association

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 an asylum through training, disseminating information and providing evidence-based research and opinion. ILPA is represented on numerous government and other stakeholder and advisory groups including the UK Border Agency's Earned Citizenship Strategic Advisory Group.

ILPA gave evidence to the Lord Goldsmith's review of citizenship[1] and also responded to the UK Border Agency consultation *The Path to Citizenship*[2] as well as briefing representatives of all parties on the bill that is now the Borders, Citizenship and Immigration Act 2009.[3]

The consultation appears to be based on false premises. Naturalisation is not, and has, as far as we are aware, never been, a matter of entitlement. Failure to obey the law or pay taxes and inability to speak English have been statutory reasons to refuse naturalisation since 1914,[4] while the requirement to demonstrate knowledge of 'life in the UK' dates from 2002.[5]

Naturalisation and citizenship will remain uncomfortable concepts for the UK for as long as it maintains a legal framework that denies many of those who hold British nationality a 'right of abode',[6] a fundamental element of citizenship in international law.[7] The very first of the Lord Goldsmith's recommendations in his review[8] was:

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[1] *Citizenship: Our Common Bond* March 2008. ILPA's December 2008 submission can be found on the Submissions page of www.ilpa.org.uk

[2] UK Border Agency, February 2008. ILPA's response can be found on the Submissions page of www.ilpa.org.uk

[3] These briefings are available on the briefings page of www.ilpa.org.uk

[4] The British Nationality and Status of Aliens Act 1914, s 2.

[5] Nationality, Immigration and Asylum Act 2002, s 1 amending British Nationality Act 1981 s 41 and Sch 1.

[6] Immigration Act 1971, as amended, s1(1)

[7] See, e.g. Article 13(2) of the 1948 Universal Declaration of Human Rights; Article 12 of the International Covenant of Civil and Political Rights and Article 3 of Protocol Four to the European Convention on Human Rights. See Fransman's *British Nationality Law* (1998) at 3.2.3 for a full discussion of the international treaties and caselaw on this right. See also *International Human Rights Instruments: The UK's Position: Report on the outcome of an Inter-Departmental Review conducted by the Department of Constitutional Affairs*, DCA, Human Rights Division, July 2004; discussed in *Review of*

> *"The residual categories of citizenship – with the exception of British Overseas Territories Citizenship and British Nationals (Overseas) status – should be abolished allowing people who would qualify for those categories with access to full British citizenship. Though this change will only affect relatively small numbers of people, it is important to address the history involved in the residual categories as part of renewing our common bond of citizenship; […]"*

The many myriad comments in the consultation paper about 'integration' and 'community cohesion' are poor substitutes for tackling this underlying problem, and also ignore the contradiction between compelling people to become citizens or permanent residents, on pain of delaying access to social entitlements, and the impulse of choosing to be British, as identified in the Nationality Instructions which refer to whether:

> "*…applicants… have genuinely thrown in their lot with this country.*"[9]

We recall the novelist Henry James, who lived as a United States citizen in the UK for 40 years before becoming the very model of an 'active citizen' on the eve of the First World War, at which point he naturalised as British, giving up his United States citizenship to do so. In a letter to his nephew,[10] he described how prior to that time, remaining a United States citizen settled in the UK seemed not only the *'simplest and easiest'* but also the '*friendliest'* thing to do.

The consultation is about policing entry to a further period of temporary leave that will subsequently be a basis for an application for naturalisation and tinkering with the criteria for being granted such leave, and the criteria for naturalisation. ILPA opposes the principle of making migrants remain in insecurity for a lengthy period before they can know if they can stay and put down roots in the UK. Treating migrants as expendable for periods of up to ten years is reminiscent of a *gastarbeiter* policy.

The proposals have the potential to add to the regulatory burden on local authorities and employers. The Impact Assessment[11] published with the consultation paper states that:

> "Based on the information available to date, the proposals in this document will not have any significant impact on small business." [12]

but does not provide details of the information on which this assessment is based. Nor are employers more broadly than small businesses identified as a

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International Human Rights Instruments HC 99/HL 264 (Joint Committee on Human Rights, 31 March 2005) and *Human Rights Brought Home,* Cm 3782 (1997), paragraphs 4.10-4.11.

[8] *Op.cit.*

[9] See paragraphs 18.1.7 and 34.1.6 of Chapters 18 and 34 respectively available at http://www.ind.homeoffice.gov.uk/policyandlaw/guidance/nationalityinstructions/nivol1/

[10] Henry James to Henry James Junior, dictated 24 June 1914 . AET 72, Henry James Junior 495, Text available online at http://www.archive.org/stream/lettersofhenryja02jamerich/lettersofhenryja02jamerich_djvu.txt (III,

[11] *Earning the right to stay: impact assessment*, version 1, 27 July 2009.

[12] *Op. cit.* p 10.

category who may be affected by the proposals although the proposals may have a myriad of effects of them, from making it more difficult to recruit persons from abroad, to having to release staff for orientation days.

No detailed costs estimates are provided on the Impact Assessment, which decreases its usefulness for those responding to the consultation.

No Equality Impact Assessment is provided other than the bald statement in the Impact Assessment:

> *"The proposed reforms do not discriminate on the grounds of race, age, faith and belief, disability, sexual orientation or gender."*[13]

This is wholly inadequate. No attempt has been made to consider how many years of delay in access to social entitlements such as working tax credit or child benefit will affect those (i) who work side by side with settled persons in the same jobs where the latter are considered by the state to require such benefits in order to alleviate poverty, or (ii) who are disabled by a work-related injury or otherwise.

Our response to the questions must inevitably be limited by the paucity of information provided in the impact assessment and the paucity of analysis and information in the consultation paper.

These proposals are bureaucratic and ill-thought out and we suggest that they be withdrawn until thinking has been developed much further and evidence, including evidence of cost, marshalled and presented.

Responses to individual questions:

Q1: Do you agree that we should operate a flexible system that allows us to control the number of migrants progressing to probationary citizenship?

No, the system for progressing to citizenship should not be operated in this way. It should not depend on the number of people who apply each year.

The consultation paper sets out that the system the UK Border Agency proposes would not apply to people who have qualified to live in the UK outside the Points-Based System – mainly those recognised as refugees, and those who come to join family members who are British citizens or who are already settled.[14] If there is a maximum number of people to be given probationary citizenship in any one year, and there is a quota only for people who came under the Points-Based System, this could mean that if larger numbers of refugees and family members applied for probationary citizenship in one year, nobody who had come to the UK to work would be successful.

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[13] *Op cit.* page 10. The Equality Impact Assessment for Pre-Application English language requirement for spouses , undated, is provided with the consultation documents.

[14] *Earning the right to stay: a points-based approach to citizenship,* p 7, para 8.

The consultation document does not explain whether this quota would be openly announced, the criteria on which it would be decided, or how far in advance people would know about it.

A quota which applied only to migrants under the Points-Based System (i.e. the work route) and which did not provide for the numbers of people who had been allowed in five years[15] earlier risks discouraging those whom the UK wishes to attract to work in the UK from coming in the first place. For those who do come, it would leave people in insecurity throughout their time on limited leave/qualifying temporary residence leave.. It also leaves employers uncertain as to whether the foreign national staff they have spent five years' supporting and developing will remain available to work for them.

There is no clarity in the consultation paper about what would happen to people who are refused probationary citizenship because the quota had been exceeded. Would they be required to leave the UK, or be given further periods of limited leave other than in the 'probationary citizenship' category? Would their applications be deferred to another year, keeping them hanging on in limbo? If so, would they be the first to be considered in a subsequent year, before applications made for probationary citizenship in the course of that year? It is not clear whether probationary citizenship is indefinitely extendable or whether or when there would be attempts to remove people.

This indefinite time of probationary citizenship is no more and no less than a further period of limited leave. As the Baroness Hanham asked in the House of Lords during the debates on the Borders, Citizenship and Immigration Bill:

> *"Will the Minister tell us what the differences are, apart from the name? Is there anything in probationary citizenship that is different from interim leave to remain? If there is not, please could we stick to the name that we have*?"[16]

Throughout probationary citizenship people will remain subject to the 'no recourse to public funds' conditions[17], lengthening the period on which they could remain under financial pressure, unable to access any benefit from the years of tax and National Insurance contributions they have paid, unable to apply for child benefit or tax credits, with their adult children unable to continue to higher education as home students.[18] At retirement age, people may qualify for the basic state pension but not for any top-up benefits.

A quota imposed at the gateway to probationary citizenship would come too late in the process of people coming to live in the UK to justify making decisions on whether people would qualify for this status by means of quotas. Indeed, no matter when the decision is made, it is difficult to justify anything done on an arbitrary basis. These people would have lived in the UK for at

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[15] Under the current immigration rules, five years limited leave is required before applicants in Tiers 1 and 2 of the Points-Based System can apply for indefinite leave to remain, see the Immigration Rules, HC 395, as amended, e.g. paras 245E (b), 245N(c), 245U(b), 245ZH(b), 245ZS(b).

[16] *Hansard* HL 2 March 2009, col. 517

[17] See the Immigration Rules, HC 395 as amended, paras 6-6C and *passim.*

[18] See *Hansard* HL 2 March 2009, col. 508 for a debate on the entitlements affected.

least five years; many would have an arguable case under Article Eight of the European Convention on Human Rights that they had established a private life and family life in the UK which it would be disproportionate to disrupt. We foresee many challenges to refusals of probationary citizenship. Knowing that their stay here would be tenuous in the extreme and would depend on factors entirely outside their control (e.g. the number of people who happened to apply for probationary citizenship at the same time) would be a strong disincentive to people to come to the UK to work and to decide that it was worthwhile making the effort to integrate into a local community from which they could arbitrarily and unpredictably be uprooted.

A quota system, with the attendant prospect of not being able to qualify in a subsequent year, may encourage the making of 'protective' applications from people who do not see their long-term future in the UK.

Q2: Do you agree that a points based test should be introduced in the application process for permanent settlement?

No.

See also response to Q1. What is proposed is not a points-based test, since it is proposed that many of the criteria will be compulsory pass or fail, with the number of points ascribed to them thus being arbitrary. If people still qualify under the immigration rules in the category in which they entered the UK, however those rules may have been changed in the intervening years, they can qualify under the proposals for permanent settlement, but many years later than at present. What this would mean is that people would experience a longer period of insecurity on limited leave, with the disadvantages previously explained. It appears to be intended, that the number of points allocated to particular parts of the rules, or the levels of income or qualifications required, could be changed at any time.[19] This would militate strongly against people who had come here for work or to join family members feeling secure, because they could be stopped in their progress towards settlement at any time, not by anything that they had done or not done, but by the imposition of quotas.

ILPA strongly opposes the proposal to make the law less certain and predictable for those it directly affects. People legally in the UK need to know their status and whether they are likely to qualify to continue to live in the country.

Question 3: Do you agree that the test should be applied before entry to the probationary citizenship stage?

No

If no, at which stage should the test be applied?

[19] On this point see the Joint Committee on Human Rights, Twentieth Report of Session 206-2997 *Highly Skilled Migrants: Changes to the Immigration Rules*, HL Paper 173, HC 993 and see *R (HSMP Forum (UK) Ltd v SSHD* [2008] EWHC 664 (Admin) and *R (HSMP Forum (UK) Ltd v SSHD* [2009] EWHC 711[2008] EWHC 664 and *R (BAPIO Action Ltd et ors) v SSHD et ors* [2008] UKHL 27.

Other

The consultation document refers to a desire to challenge 'what has been perceived to be an automatic right to move from temporary residence to settlement'.[20]

Under the current arrangements there is no automatic right to move from temporary residence to settlement. The criteria for indefinite leave to enter or remain in the UK are set out in the immigration rules for each category for which settlement can be attained.[21] Not all temporary residence categories lead to settlement and migrants are able to plan their path to citizenship through obtaining leave to remain (and further leave to remain) in the relevant categories leading to settlement, by establishing a life in the UK over an extended period of years.

Any perception that there is an automatic right to move from temporary residence to settlement could more simply be corrected by increasing the public awareness of the present process, which includes language and knowledge of the life in the UK tests, [22] rather than introducing a further set of criteria for migrants to meet.

For family members and refugees, introducing a points test at any stage would be of no benefit since it is proposed that sufficient points would be awarded on the basis of continuing family relationship or protection needs as the case may be.[23]

Those on the work route (Tier 1, with the exception of post-study workers, and Tier 2) already must meet flexible 'points-based' criteria aimed at enabling the Government to respond to the changing economic needs of the country.[24] The relevant criteria must be met at the point of entry to the applicable tier[25] and then again at the point of one or more extensions,[26] which should give the Government sufficient opportunity to set and then review the criteria to be met for those who wish to proceed to eventual settlement.

Migrants on the work route (or at least the principal migrant) will already have spent at least five years establishing a life in the UK and contributing economically as prescribed under the relevant work categories prior to seeking to qualify for probationary citizenship. Some migrants will have spent substantially longer - for example in categories that do not lead to settlement.

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[20] *Op cit*. Page 18, para 2.3.

[21] See e.g. Immigration Rules, HC 395, as amended, e.g. paras 245E , 245N, 245U, 245ZH, 245ZS.

[22] See Immigration Rules, HC 395, as amended, paras 33B to 33D and e.g. paras 245E(d) , 245N(d), 245U(d), 245ZH(e), 245ZS(c).

[23] *Earning the Right to Stay: a points-based approach to citizenship,* p 7, para 8.

[24] Immigration Rules, HC 395 as amended, part 6A and Apendix A.

[25] Ibid.. e.g. paras 245C;245D; 245J; 245K, etc.

[26] Ibid. e.g. Ibid.. e.g. paras 245C;245D; 245L; 245M, etc.

It is also relevant that the Government has recently accepted[27] the Migration Advisory Committee's recommendation[28] to exclude Tier 2 Intra-Company Transfer[29] from being considered an immigration route leading to settlement, so not all Tier 2 migrants will be able to count all time spent under Tier 2 towards eligibility for probationary citizenship. How this recommendation will be implemented has not been determined as at the time of this consultation.

Introducing a further points-based test at probationary citizenship stage, as proposed by the Government, would create an unacceptable level of uncertainty for migrants wishing to settle permanently in the UK. Where points scoring criteria for probationary citizenship are substantially different from the criteria for the work route (and taking into account that the work route already comprises two separate Tiers) and are subject to change, migrants will not be able have a reasonable assurance of their eligibility in advance. Contrary to the stated desire to take a decision as early as possible in the process, a decision taken at probationary citizenship stage would, properly understood, constitute a late decision.

The three stage earned citizenship system established under the Borders, Citizenship and Immigration Act 2009[30] recognises temporary residence as being the first stage of the path to citizenship.[31] This approach, in which a period of temporary residence is a prerequisite for probationary citizenship and then British citizenship or permanent residence, contrasts starkly with the arrangements in other countries operating points- based immigration schemes, such as Australia[32] and Canada.[33] In these countries, migrants who meet the points- based criteria are granted permanent residence from the outset (in many cases without ever having previously lived in the relevant country), or subject to the requirement to live in a specified geographic area for a prescribed period.

Introducing a points test at probationary citizenship will also undermine the Government's stated aim of encouraging integration, because migrants will come to see their life in the UK as temporary until such time as they are granted permanent residence or citizenship. An approach which requires migrants to gamble on being able to meet flexible points based criteria at the time their existing leave to remain is due to expire is likely to cause undue anxiety to those migrants who wish to settle permanently in the UK, as well as encouraging highly skilled and skilled migrants to choose to settle in

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[27] UK Border Agency Press release 7 September 2009, New controls help protect jobs for British Workforce, available at ww.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2009/september/controls-protect-jobs?area=allNews

[28] Migration Advisory Committee *Analysis of the Points-Based System Tier 2 and Dependants* 19 August 2009, para 6.122, p 114, available at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithus/mac/pbsanalysis-09/

[29] Immigration Rules HC 395 as amended Part 6A, and Appendix A Table 10

[30] Sections 39-41.

[31] See s 39 inserting new para 2A(1)(a) into Sch 1 to the British Nationality Act 1981 and s 40 inserting new para 4A(1)(a) into that Schedule.

[32] See the General Skilled Migration Programme, Independent (Migrant) Visa Subclass 175, Skilled Sponsored (Migrant) Visa Subclass 176

[33] See the Federal Skilled Worker Programme and the Quebec Selected Skilled Worker Programme

countries offering a more certain, less costly and less lengthy immigration process for settlement.

Question 4: Which attributes should attract points?

Other

As per the answer to Question 3 above, points-based criteria should not be further extended. We do not consider that the case has been made in the consultation paper for extending the existing requirements. Nor has the consultation paper provided research or evidence that might demonstrate whether the additional requirements imposed at the naturalisation stage by amendments made to the British Nationality Act 1981 by the provisions of Part 1 of the Nationality, Immigration and Asylum Act 2002 (in respect of the requirements to have sufficient knowledge of a language and life in the UK)[34] should be maintained or dropped.

Earning potential should not be a criterion because if future earnings are taken into account this can only be speculative and would be impossible objectively to assess. If past earnings are considered as an alternative, this may distract migrants from their main occupation as they seek to increase their income. It may also not be an appropriate criterion to apply to Tier 2 migrants, whose capacity to earn additional income is restricted due to employment limitations[35] attached to their limited leave. Those whose work is of a vocational nature but still of social importance may also be unable to meet earnings-related criteria for the award of points.

Special artistic, scientific or literary merit should not be a criterion as it would appear by definition to apply to only a very small group and carries with it a grave risk of including a subjective element. We note that shortage occupations are proposed as an another possible basis for points. There appears to be overlap between that proposal and this one. Already there is provision to allow, for example, ballet dancers, to come to the UK through the mechanism of including them on the shortage occupation list to get around the problem of the Points-Based System not recognising skills or experience. The Home Affairs Committee described this situation

> "*79. Some occupations on the shortage occupation lists reflect areas of long term structural shortages, or exceptional talent at the international level: these shortages are unlikely to change quickly. The long term inclusion of occupations such as skilled ballet dancer, for instance, appears to be to compensate for poor design elsewhere in the system—namely that it cannot recognise the skills of this occupation through the points criteria."*[36]

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[34] Nationality Immigration and Asylum Act 2002 s 1(1) inserting new para 1(1)(ca) into Sch 1 to the British Nationality Act 1981 and s 1(2) inserting new subsections 41(1)(ba) and (bb) into the British Nationality Act 1981.

[35] Immigration Rules HC 395 as amended para 245ZB(b)

[36]See http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithus/mac/first-review-lists1Report of the Home Affairs Committee, *Managing Migration: the Points Based System,* Thirteenth Report of session 2008-2009 HC 217 paragraph 79 /

Qualifications gained in the UK, if made subject to a requirement that they be obtained in the period of qualifying temporary residence leave[37] would appear to exclude qualifications gained e.g. whilst holding limited leave as a student prior to obtaining qualifying temporary residence leave as a worker. The purpose of the route from student to Tier 1 (Post Study Work) migrant is set out in the immigration rules on Tier 1 (Post-Study) Work:

> ***"245V. Purpose***
>
> *The purpose of this route is to encourage international graduates who have studied in the UK to stay on and do skilled or highly skilled work."*

This purpose would be supported by allowing qualifications obtained in the UK during the currency of student leave to count. More generally, those who have qualified in the UK may have specialist knowledge of UK practice in their area as a result of those studies. The requirement that the qualifications be obtained while the person has qualifying temporary residence leave may create a conflict between the economic activities and completion of additional studies outside of normal working hours. Also, courses undertaken part-time (in particular Bachelor degrees) may take longer than a five-year temporary residence period to complete. Migrants also would be unable to move into a full-time student category to complete a qualification without this adversely affecting eligibility for probationary citizenship or British citizenship (as student leave is not likely to be considered leave in a qualifying temporary residence leave category given that it is currently a form of leave that does not lead to settlement).

The consultation paper does not set out how shortage occupation would be defined. The shortage occupation lists are reviewed frequently[38] and change, in some cases frequently, in some cases in response to Government schemes to reduce shortages amongst the resident labour market. Would time spent within a shortage occupation attract points in the event that the relevant occupation were to be removed from the shortage occupation list prior to the migrant coming to apply for probationary citizenship?

It is also not appropriate to include English language at a higher standard as a criterion as this would unfairly favour migrants from English speaking countries. It would seem perverse that those who make the effort to learn English as an additional language may be at a disadvantage to those who happen to speak it as a first language, despite the former having achieved a level of proficiency sufficient to be able to live and work in the UK.

With regards to location, we do not understand how this criterion could work. Those who live in the UK may move freely within the UK. A person may move,

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[37] See Borders, Citizenship and Immigration Act 2009 s 39 inserting new para 2A(1)(a) into Sch 1 to the British Nationality Act 1981 and s 40 inserting new para 4A(1)(a) into that Schedule.

[38] See the reports of the Migration Advisory Committee available at http://www.ind.homeoffice.gov.uk/aboutus/workingwithus/indbodies/mac/reports-publications/

just before or just after taking a probationary citizenship test or applying for naturalisation. Even if, as a matter of free choice, people were to stay put, this criterion introduces a delay between when migration is required for a particular area and the benefit to the migrant of residing there.

It should also be recognised that migrants under Tier 2 are not free to determine the location of their work so could not choose to move to a designated area in order to increase their eligibility for points.

In setting points scoring criteria, careful consideration should be given to what, in practice, migrants are being asked to do in order to qualify for additional points. The personal cost to the migrant both financially and in terms of time commitment should not be such that it conflicts with the limited leave purpose for which the migrant is in the UK.

Question 5: Which of these attributes is most important?

Other

It is not appropriate for the Government to set additional points scoring criteria, particularly where doing so would create an additional financial or time cost for migrants, where the ability to score additional points is outside of the control of the migrant or would have the effect of distracting the migrant from the purpose for which their limited leave was granted.

Question 6: Should points be deducted or penalties applied for failure to meet requirements for integration into British life?

No.

The vague nature of the question and the lack of a definition within the consultation document as to what constitutes the failure to integrate into the British life are themselves illustrative of the difficulty of this approach.

The existing requirements such as residence, intention to make the UK one's main home, maximum permitted absences and being of good character,[39] could all be described as the existing 'requirements for integration'. A person who did not meet these requirements would not obtain points in these areas in the first place. The question of deductions does not appear to arise.

It has been made explicit, repeatedly, that 'active citizenship' will not be mandatory and that it goes to the duration of probationary citizenship leave only.[40] This we understand to be incompatible with the deduction of points for not having been involved in 'active citizenship'. Thus we proceed on the basis that this question relates to criminal or anti-social behaviour or what is described in the consultation paper as 'active disregard for British values'. These we address in our response to question seven below. If we are mistaken in this approach and it is intended to deduct points on the nebulous

[39] British Nationality Act 1981 Sch 1, paras 1 and 3.
[40] See e.g. *Hansard* HL 2 March 2009 col 560 per the Lord Brett; *Hansard* HC 2 May 2009 col 520W

basis of 'failure to integrate' then we consider that this is too subjective to form a meaningful legal criterion.

Question 7: **If yes, for which attributes should points be deducted or penalties applied?**

See response above.

Chapter 18 of Volume 1 of the Nationality Instructions already sets out a very detailed structure as to how good character is normally assessed for the purposes of naturalisation. This was last updated in September 2009.

Migrants ought to be subject to the same standards of behaviour as British citizens. No penalties should be imposed for acts which are not the product of judicial decision. Spent convictions should be treated as spent in accordance with the Rehabilitation of Offenders Act 1974.

We do not consider that it would be appropriate to allow a criminal conviction to be 'traded' for, for example, points for high earnings, special literary or artistic merit, or working in a profession on the shortage occupation list. If a conviction for a particular criminal offence is considered to demonstrate that a person is not of good character we fail to see how this could be offset by such matters.

Under UK law a person is innocent until proven guilty.[41] To use conduct of which a person has not been convicted against them, as is proposed in the current (September 2009) Annexe F to the Chapter 18 (Naturalisation) of the Nationality Instructions, violates that principle.

We are unclear what is meant by the proposal to use 'Anti Social Behaviour' against an application. Is this a reference to Anti-Social Behaviour Orders[42] or to other similar civil penalties, such as employing a person who does not have permission to work in the UK or not paying a congestion charge? Part 8 (Notoriety) of the current Annexe F states:

> *"8.3 However, where there is evidence that applicants have, by the scale and persistence of their behaviour (including, for example, a known and extensive involvement in crime [without having been convicted], drug abuse or anti-social behaviour), made themselves notorious in their local or the wider community, consideration should be given to refusal. In such circumstances, caseworkers may ask for an interview to help substantiate any information received, for example, from members of the public."*

This appears to provide scope for campaigns against individuals by ill-wishers and for racism and other discrimination. If a person has an extensive involvement in crime, or possesses illegal drugs, criminal sanctions are available.[43] If the person has not been accused, charged and convicted, then

[41] *Woolmington v DPP* [1935] AC 462
[42] Crime and Disorder Act 1998, s 1.
[43] See e.g. The Misuse of Drugs Act 1971.

why should staff in the Nationality Directorate be considered to be in a position to second-guess the decisions of police officers, the Crown Prosecution Service, judges and juries?

As to the proposal to use 'active disregard for British values' as a criterion, no definition of British values or of active disregard is provided and, we suggest, none could be. There would seem to be an assumption behind the proposal that all 'British values' are desirable and meritorious. The state of the nation is frequently lamented. Recently the newspapers have been full of accounts questioning why the British indulge more in 'binge-drinking' than people in other countries.[44] Is it suggested that indulgence in binge drinking is not a 'value' because widely regarded as negative? If it is a value, does it imply that being a teetotaller, is to display an active disregard for British values?

The UK has long not required its nationals to hold identity cards, in contradistinction to many other European countries,[45] and many other countries[46] further afield. Much of the opposition to identity cards sought to characterise them as an imported notion.[47] Yet the past decade has seen an enormous growth of databases holding data about individuals.[48] Is opposition or support for this a demonstration of 'British values'?

The provisions in the Borders, Citizenship and Immigration Act 2009 on citizenship can be traced to the July 2007 *Governance of Britain Green* paper.[49] The chapter on citizenship in the *Governance of Britain* Green Paper states:

> *185'…there is common ground between British citizens, and many cultural traits and traditions that we can all recognise as distinctively British. The Government believes that a clearer definition of citizenship would give people a better sense of their British identity in a globalised world. British citizenship – and the rights and responsibilities that accompany it – needs to be valued and meaningful, not only for recent arrivals looking to become British but also for young British people themselves.*
>
> *186.The Government believes that everyone in the UK should be offered an easily understood set of rights and responsibilities when they receive citizenship.'*

We are uncertain what the '*common ground*' is, and what we are supposed to recognise as '*distinctively British'*. That chapter also sets out proposals for a Bill of Rights and Responsibilities, which would cover all persons in the UK.

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[44] See e.g. *Binge-drinking is British as rain*, Daily Telegraph 16 February 2008. See also the *Alcohol Harm Reduction Strategy for England,* Prime Minister's Strategy Unit, March 2004.
[45] E.g. Luxembourg, Greece, Belgium, Germany, etc.
[46] E.g. Japan, Cuba, Kenya, China Egypt, Chile, etc.
[47] See e.g. The Bow Group *Pamphlet on ID cards,* Peter Lilley MP 24 November 2004; *Blair's Values aren't British* A. C. Grayling, the Guardian, 19 May 2006.
[48] E.g the National DNA Database, Identity and Passport Service databases
[49] Cm 7170, Secretary of State for Justice and Lord Chancellor, July 2007.

As set out in the *Governance of Britain* Green Paper, the Prime Minister charged the Lord Goldsmith with a review of citizenship.[50] The terms of reference of the review were:

- *To clarify the legal rights and responsibilities associated with British citizenship, in addition to those enjoyed under the Human Rights Act, as a basis for defining what it means to be a citizen in Britain's open democratic society*
- *To consider the difference between the different categories of British nationality*
- *To examine the relationship between residence, citizenship and British national status and the incentives for long-term residents to become British citizens*
- *To explore the role of citizens and residents in civic society, including voting, jury service and other forms of civic participation*

What now appears to be being attempted is something back to front: to define the criteria for naturalisation in the hope that these will in their turn provide '*a basis for defining what it means to be a citizen in Britain's open, democratic society*'. The Lord Goldsmith's review makes reference to the research by Professor Anthony Heath and Jane Roberts on *British Identity: its sources and possible implications for civic attitudes and behaviour*.[51] The Lord Goldsmith's review summarises their research and the summary includes the following:

> *"The main driver of a feeling of attachment or belonging to Britain is age with younger people being less strongly attached to Britain. It is likely that much of the decline in pride and attachment is generational in character, with younger generations who feel a lower sense of attachment gradually replacing older generations.*
>
> - *Controlling for age, we find no evidence that Muslims or people of Pakistani heritage were in general less attached to Britain than were other religions or ethnic groups. …*
>
> - *Socio-economic marginality (lower social class or low income, or a limiting long-term illness) is associated with slightly weaker feelings of belonging.*
>
> *…*
>
> - *A feeling of 'belonging' or 'attachment' to Britain appears to be associated with social trust and a sense of civic duty (at least as indicated by turnout in elections).*
> - *A sense of belonging is not associated with particularly xenophobic attitudes, nor is it associated with distinctive political positions (other than on European integration and maintenance of the union) or with many other aspects of social participation or values. People with a lower sense of attachment appear to be more critical of the current social and political order.*
> - *…"*

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[50] *Op cit*, Chap 4, para 193.

[51] Page 84 of *Citizenship; our common bond, op.cit.* The full research is *British identity: its sources and implications for civic attitudes and behaviour* Dr Anthony Heath, Jane Roberts. Undated.

This research illustrates the complexity of the questions involved.

Much emphasis is placed, including in the revised pledge introduced by the Nationality Immigration and Asylum Act 2002 [52]in 2002, on '*democratic values*' yet attempts to codify these m are apt to give rise to results which do not appear to be open or democratic.

It does not appear that adequate consideration has been given to the effects of the penalties applied on the migrant (and his or her dependants), given the time-limited nature of probationary citizenship. It is possible for example for the rehabilitation period for certain convictions[53] to be equal to or longer than the proposed maximum five year period allowed for probationary citizenship so the consequence of committing a crime whilst holding probationary citizenship would need to be explored in detail.

Further information regarding the implementation of earned citizenship under the Borders, Citizenship and Immigration Act 2009 must be made available before a meaningful consultation on this question can be conducted.

Q8: Do you think that the current Nationality Checking Service model can be successfully built upon to provide a 'check and send' service for earned citizenship?

No; ILPA has made its opposition to 'active citizenship' clear in responses to previous consultations and in briefing on the Borders, Citizenship and Immigration Act 2009.[54] There are strong reasons why some people may not be able to spend time on formal 'active citizenship' activities: whether there are relevant voluntary organisations in their area, whether there are vacancies for volunteers in the areas of their expertise and interests and whether they have the time to do this, bearing in mind their work and family responsibilities and any physical, or psychological conditions that impose constraints upon their taking up the volunteering opportunities available in their area. There is room for the growth of scams in providing evidence of 'active citizenship' work, as has been shown with the discovery of scams of providing English as a Second or other Language (ESOL) exam certificates[55] and in passing the Life in the UK test.[56] Local authority register office workers are not in any position to verify such documents.

Local authorities are free to charge any fee they determine for the current nationality checking service. This adds anything up to £80 to the cost of a

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[52] Schedule 1, para 2, inserting a new Schedule 5 to the British Nationality Act 1981, see paras 1 and 2 of that Schedule.

[53] See The Rehabilitation of Offenders Act 1974 (c.53) s 5. For example, conviction carrying a sentence of a term of imprisonment for more than six months is not spent for ten years.

[54] See the Briefings page of www.ilpa.org.uk and see ILPA's response to the *Path to Citizenship* consultation, *op. cit.*

[55] See e.g.the expulsions from Newcastle University in November 2008.

[56] See e.g. the convictions of Steve Lee and Rong Yang in November 2008 at Kingston Crown Court, see Metropolitan Police Bulletin Bulletin Two convicted of immigration test scam *0000001066 of 14 November 2008.*

British citizenship application;[57] if the documents that they have to check will be more complicated, it is likely that the fee will go up. ILPA members' experience is that many applicants believe that the Nationality Checking Service gives them a greater chance of success in their applications and feel pressure to use it. This proposal would mean that applicants will have to pay an increased fee for no extra benefit to their application.

Q9: Do you think it appropriate that local authorities perform an additional service around advice and co-ordination?

No. Local authorities should, like the Post Office in its role in British passport applications,[58] just check that the right documents are there and that the right questions on the form have been answered. They should not give any advice and should make it clear to those using their service that they are not advisers and are making no comment on the likelihood of success of the application.

Most local authorities' staff dealing with the Nationality Checking Service are registered with Office of the Immigration Services Commissioner at Level 1; if they were to be required to do more work connected to advice they would need further training and registration at a higher level. This would impose costs on local authorities, of staff training and continued professional development as well as of maintaining the supervisory regime and complying with the Office of the Immigration Services Commissioner standards.[59] The proposal would have serious consequences for staff recruitment and training. Yet without such costs being met and the responsibilities imposed by regulation being taken up and met, there must be concerns about the quality of advice that would be given. The question of adequate funding for immigration and nationality advice is a separate one, but should not be answered by inadequately-qualified groups of people attempting to give this advice.

Again, the question of 'full cost recovery' for the new service raises questions of the justice of imposing another quasi-compulsory fee on migrants making applications for probationary citizenship and British citizenship

Q10. Should we require applicants to meet English and Knowledge of Life requirements at both probationary citizenship and British citizenship stages? If no, why not?

In respect of one discrete group, Tier 1 migrants, they have already passed the highest test for English as a Second or Other Language (ESOL).[60] For them it is not clear what further tests could or should be imposed at either the probationary citizenship or the British citizenship stage.

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[57] Many councils that place their fees on their website charge £0-£55 per adult, but many councils do not display the fees on their websites.

[58] See http://www.nidirect.gov.uk/index/travel-and-transport/travelling-abroad/passports/passport-applications-extra-information/the-post-office-check-and-send-service.htm . The fee for this service is £6.85.

[59] See the Office of the Immigration Services Commissioner *Code of Standards (2nd edition).*

[60] See the Immigration Rules, HC 395, as amended, Appendix B, para 2(2).

For those on work route, probationary citizenship is a further period of limited leave to remain following on from an initial period of leave which itself has had a language requirement as a condition of grant.[61] It is intended to introduce such a requirement for spouses.[62] In these circumstances and where there is a statutory requirement to have sufficient knowledge of a language and life in the UK in order to naturalise as a British citizen,[63] no case has been made for an additional, third language test at the probationary citizenship stage.

In addition, there must be real concern about the further growth of the industry that has grown up around tests and courses. The fees that would be charged for such additional courses, would further add to the burden on persons at the probationary citizenship stage who will not be able to rely on public funds and who will be expected to rely on their own resources.

Q11. Should these two stages of testing be different based on information relevant at each stage? This would involve testing on new topics not currently tested, for example British history. If no, why not?

No.

A new, additional, test at the probationary citizenship stage, followed by a second higher test at the British citizenship stage, the latter considering British history, the Government of the UK, relations with Europe, etc is a proposal fraught with problems. In respect of the proposed higher standard at the second stage, there is no consensus on what history should be taught in the UK. Understanding of history varies widely between and within the countries and regions of the UK (Oliver Cromwell is viewed very differently in England, Scotland and Northern Ireland for example).[64]

It is wholly unclear why this test is proposed for migrants, and not for all British citizens. To take one simple example of a figure whose role in the Second World War is well known: Winston Churchill. He helped introduce unemployment insurance for workers in the Asquith government but later actively laboured to suppress the General Strike of workers in 1926 and actively opposed independence for India in the 1930s. The latter historical fact is usually better known to those of Indian heritage than to UK residents with no such heritage. These are matters than are essentially unknown or forgotten by those who remember the Second World War narrative.

It is the case that pass rate for the existing tests is strongly differentiated by nationality[65] and it must be asked whether this is because of shortcomings in the answers given or in the questions asked.

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[61] *Ibid*., Annexe B.
[62] See *Earning the right to stay* , *op.cit.* p 9 para 25.
[63] British Nationality Act 1981, Sch 1.
[64] See, e.g. *Cromwell against the Scots: the last Anglo-Scottish war*, 1650-1652 Grainger, J. D., 1997 ; *Cromwell in Ireland, A history of Cromwell's Irish campaigns* , Wheeler, J.S., 1883
[65] Bernard Ryan 'Integration Requirements: A New Model in Migration Law' *Journal of Immigration Asylum and Nationality Law IANL* (2008) 22(4) 303-316 at 314.

If migrants need to know them of these matters, why not British citizens too? At the same time, The diversity of historical incident in relation to one man (Winston Churchill), and the different way he is understood in different historical narratives (social welfare, trade union, anti-colonial, and military - all important) serves to illustrate the futility of the enterprise of introducing a multiple choice test to show knowledge of history in the UK. Knowing the date of the beginning of Operation Overlord[66] is meaningless unless you know why it is significant and what it achieved.

The '*Life in the United Kingdom: A Journey to Citizenship*'[67] contained the observation that 'The English like to think that theirs is the "the mother of parliaments".[68] This unsupported assertion is of course itself an inaccurate transposition of the statement of John Bright in 1865 that 'England is the Mother of Parliaments'[69] (i.e. not the Westminster Parliament but the rather the country itself). The difference is subtle but important and migrants are tested upon it (on the basis of inaccuracy) while British citizens, including those writing the *Life in the UK* book, are permitted to remain in ignorance. As to Britain's relationship with Europe, we suggest that the difference between the Council of Europe and the European Union may not be widely known by British citizens. Many people in the UK have only a very vague idea how European Community legislation is made and many do not realise that the European Court of Human Rights and the European Court of Justice are not the same institution. It is legitimate to ask whether limited resources might not be better spent educating the public at large, citizens and aspiring citizens rather than in the limited context of naturalisation tests.

Q12. Should this two-stage test require a higher standard of English for the second stage? If no, why not?

No.

Assuming that the question refers to a higher standard test at the entry point to British citizenship, than that applying at the entry point to probationary citizenship, the case for this has not been made out. If the desire is that all British citizens speak English to a certain standard, why is the test not being imposed on all British citizens, whether they have naturalised as such or been born British? . The test risks discriminating against those from non-English speaking countries of origin.. The migrants in question will (i) have satisfied the requirement of qualifying temporary residence leave for a number of years without recourse to social assistance (including in-work benefits such as housing benefit, child benefit and working tax credit); (ii) have thereafter resided through a further period of probationary citizenship, working, if on the work route and very likely working if on the family route, and paying taxes again without recourse to social assistance, (iii) have passed a language test to qualify for a grant of probationary citizenship, (iv) have (possibly) satisfied

[66] 6 June 1944
[67] Home Office 2004.
[68] *Op.cit.* p 21.
[69] In a speech 18 June 1865. Contrary to what is suggested in the debates in *Hansard* HC 10 June 2009 col 857, the speech was given in Birmingham, not in the Westminster parliament.

the activity condition in order to shorten the qualifying period, and (v) have paid all the costs of earlier applications, courses and tests. They will have spent extended periods in the UK before naturalisation. The test at the British citizenship stage should be the same as that for probationary citizenship. By the time a migrant comes to apply for British citizenship, he or she will have a degree of functional 'integration' that will render otiose any further attempt to manufacture integration and cohesion through the imposition of additional tests.

Q13. Do you think that mentoring schemes should be extended to cater for non-refugees? If no, why not?

No, not if such schemes involve compulsion or attract points. Migrants on the work route will be economically active and have passed demanding tests to qualify for qualifying temporary residence leave and probationary citizenship. They will be paying tax and national insurance, rent or a mortgage, and running households without social assistance. Migrants on the family route will live with family members who are settled or who are British citizens. These groups are not analogous to refugees and those with protection needs, the latter having been forced out of their home countries and driven to seek refuge in the UK then forced into within the UK into an asylum system predicated upon social exclusion, poverty and compulsory unemployment.[70] Presumably resources are not unlimited and we had rather see them directed to providing a dignified level of support to persons seeking international protection.

Any mentoring schemes that are established should be voluntary, focused on needs identified by the client groups themselves and avoid clumsy attempts to manufacture integration or cohesion that risk diverting people's time and energy from activities undertaken of their own volition. A keen cricketer is far more likely to make friends, find out and be involved in what is going on in the local area by joining a local cricket team than by spending that time in one-on- one sessions with a mentor.

Q14. Do you think that orientation days for migrants should be introduced to encourage integration? If no, why not?

No. They would simply add to the bureaucratic and administrative machinery of Government, at real cost, without any clear or measurable benefit. No detail is provided as to what the course would offer on such a day to people who have already lived for five years in the UK. The notion that *'British values, social norms and customs'* are to be part of such days provides none of the requisite detail. There is no consensus on any of these things that can serve as the basis of a quick and readily digestible guide or course to be given to a diverse, established group.

Local authorities are stretched as it is and should focus on providing services to those who have need of them. These days appear to be contemplated as

[70] See the Joint Committee on Human Rights *The Treatment of Asylum-Seekers,,* 10th report of session 2010-2011, HL Paper 81, HC 60 (two volumes).

data-collecting exercises for local authorities. Who is being orientated here: the migrants or the local authorities? What data is to be collected, by whom will it be stored and to what use will it be put? Migrants will already be known to local authorities as council tax-payers and as parents of children in schools. Further data collection risks being intrusive and pointless.

Q15. Do you think that it should be compulsory for migrants to attend an orientation day? If no, why not?

No.

Any orientation days that are introduced should be voluntary. There may be scope for supporting a diverse selection of such days, for example, designed by migrant and other community groups to meet particular identified needs. Compulsion would lead to the days being something to be endured, suffered and survived rather than being attractive and accessible so that migrants choose to attend. Where it is properly accessible, migrants will seek out the orientation, sign-posting and advice they require. By making orientation days compulsory, with an attendant penalty or dis-benefit for non-attendance to ensure that such an element of compulsion is not illusory, a one-size-fits-all day is imposed where formal attendance supplants practical benefit, rather than a tailored, orientation day, designed to meet local needs and available to users who feels they have need to attend. The Sure Start programmes for parents with young children, offer some assistance as an example of how a voluntary and diverse scheme might work (in that case in some boroughs there are playgroups, practical advice sessions, language groups and culturally sensitive programmes tailored to meet the needs of local communities). [71]

Q16. Do you think that migrants should be awarded points towards probationary citizenship for attending an orientation day? If no, why not?

No. Migrants should not have points awarded for attendance, nor should employers have to provide them to gain sponsor licences. Such impositions do not further integration within society but impose costs and regulation on migrants, employers and even local authorities. By awarding the points, the potential, practical nature of any orientation takes second place to the formality of acquiring the points by mere attendance. A lawyer or advisor who has sat through a course merely to acquire continuing professional development (CPD) points to fulfil their annual requirement, has not learned new skills to the same extent as one who has sought out and signed up for a course in which they have genuine interest.

Q17. Who do you think orientation days should be run by? (select all that apply)

- **Local authorities?**

[71] See information on the Department for Children, Schools and Families website, www.dcsf.gov.uk/everychildmatters/earlyyears/surestart/whatsurestartdoes/

- **Employers?**
- **Local authorities and employers?**
- **Other? Please specify**

Other

See answers above.

Q18. How do you think orientation days should be funded? (Please select one)

- **By the migrant?**
- **By employers?**
- **Other? Please specify**

Other.

If there must be orientation days they should be paid for out of central government funds and the case for this becomes all the more compelling if the days are to be compulsory. The burden should not fall on migrants, individual local authorities, or employers. Immigration is a UK wide issue, in respect of which law and policy are set by the Home Office and the UK Border Agency. The proposal is potentially costly and would impose a regulatory burden on employers and local authorities however much the desire may be to make the costs to be yet another burden born solely by those who wish to obtain probationary citizenship or to naturalise.

There are lessons to be learned from the provision of English as a Second or Other Language (ESOL), where lack of access to suitable, affordable courses has meant that supply does not meet demand.[72]

ILPA is aware that for many people the level of fees is a barrier to naturalisation. Fees for naturalisation have risen sharply. Fees for settlement applications increased from £335 per person to £750 per person in April 2007 and now stand at £820, or £1020 for those who apply in person at a Public Enquiry Office to avoid delays.[73]

Migrants should not be made to pay for orientation days. Local authority social services departments and housing departments will not be permitted to offer those on the work and family routes social assistance during the qualifying period. Why then, should migrants be expected to pay for this exercise in data collection? Employers should not be expected to pay. A person may change job or employer during the course of their limited leave and the imposition of a fee on the employer employing the migrant at the time of the application for

[72] See the ILPA response to *Focusing English as a second language on community cohesion,* April 2008, available from the Submissions page of www.ilpa.org.uk

[73] See the the Immigration and Nationality (Fees) Order 2007 SI 2007/801 as amended/supplemented, e by the Immigration and Nationality (Fees) Regulations 2008 (SI 2008/166 and the Immigration and Nationality (Fees) Regulations 2009 SI 2009/ 816. For fees for naturalisation, see the The Immigration and Nationality (Cost Recovery Fees) Regulations 2007 SI 2007/936 as amended by the The Immigration and Nationality (Cost Recovery Fees) Regulations 2009 (SI 2009/421).

probationary citizenship would not be equitable. The prospects of having to pay risk making some employers reluctant to employ migrants who are approaching the time when they can apply for probationary citizenship and could lead discriminatory treatment of migrants.

The Government department(s) sponsoring the introduction of orientation days should meet any costs associated with those days.

Q19. What do you think an orientation day should involve?

This is outside ILPA's area of specialist expertise.

Q20. Do you think that online orientation is a good idea? If no, why not?

It is likely to be a preferred option for some, but not useful for others. Its desirability depends on the level of internet literacy possessed by the migrant in question and by their literacy in the language (English?) in which the online package is presented. A person illiterate in their first language, struggling with English and who has been excluded from education as a child on grounds of gender may find such an on-line course inaccessible for all practical purposes.

Q 21- 23: Do you think that a group should be set up to add value to the development and implementation of integration strategies for migrants? If set up, do you think this group should just include representatives from across government? Do you think the group should also involve independent representatives, for example from the voluntary or community sector?

This is outside ILPA's area of specialist expertise, but in general terms we would urge that if such a group is to be set up it should not be led by the Home Office or the UK Border Agency but by the Department for Communities and Local Government or Ministry of Justice and that it should include representatives from the voluntary and community sector with a real and influential role.

Q24. Do you think we should facilitate circular migration in order to reduce the negative impact of brain drain on developing countries?

Does not admit of a tick-box response

It is important to underline that the 'earned citizenship' agenda itself creates problems for circulation migration and creates the very problem the consultation paper displays an interest in resolving. At the moment indefinite leave to enter/remain is playing the role of facilitating circular migration. The Borders, Citizenship and Immigration Act 2009 does away with indefinite leave to remain and replaces it with probationary citizenship, a far more precarious situation, with restricted entitlements, that is envisaged as a stage on a journey to citizenship rather than a status in its own right.

A person who is settled is now free to leave and to return to the UK without immigration penalty. However, certain difficulties may arise if a person is

absent for more than two years, under the 'returning residents' provisions of the immigration rules which state:

> ***"Returning Residents***
> *18. A person seeking leave to enter the United Kingdom as a returning resident may be admitted for settlement provided the Immigration Officer is satisfied that the person concerned:*
>
> *(i) had indefinite leave to enter or remain in the United Kingdom when he last left; and*
> *(ii) has not been away from the United Kingdom for more than 2 years; and*
> *(iii) did not receive assistance from public funds towards the cost of leaving the United Kingdom; and*
> *(iv) now seeks admission for the purpose of settlement.*
>
> *19. A person who does not benefit from the preceding paragraph by reason only of having been away from the United Kingdom too long may nevertheless be admitted as a returning resident if, for example, he has lived here for most of his life.*
>
> *19A. Where a person who has indefinite leave to enter or remain in the United Kingdom accompanies, on a tour of duty abroad, a spouse, civil partner, unmarried partner or same-sex partner who is a member of HM Forces serving overseas, or a permanent member of HM Diplomatic Service, or a comparable United Kingdom-based staff member of the British Council, or a staff member of the Department for International Development who is a British Citizen or is settled in the United Kingdom, sub-paragraphs (ii) and (iii) of paragraph 18 shall not apply.*
>
> *20. The leave of a person whose stay in the United Kingdom is subject to a time limit lapses on his going to a country or territory outside the common travel area if the leave was given for a period of six months or less or conferred by a visit visa. In other cases, leave lapses on the holder remaining outside the United Kingdom for a continuous period of more than two years. A person whose leave has lapsed and who returns after a temporary absence abroad within the period of this earlier leave has no claim to admission as a returning resident. His application to re-enter the United Kingdom should be considered in the light of all the relevant circumstances. The same time limit and any conditions attached will normally be reimposed if he meets the requirements of these Rules, unless he is seeking admission in a different capacity from the one in which he was last given leave to enter or remain."*

The new earned citizenship proposals will make the situation of persons wishing to live (and possibly work) in both the UK and overseas much more problematic. It is a requirement for naturalisation other than as a spouse or partner, now,[74] as under system envisaged by the amendments to be effected

[74] British Nationality Act 1981, Sch 1, para 1(1)(a)

to the British Nationality Act 1981 by the Borders Citizenship and Immigration Act 2009, that a person proposes to make the UK their main home.[75] This is not a current requirement for indefinite leave to remain. Nor is it a requirement for a returning resident (see rule above). Thus the option of turning to British citizenship to protect re-entry to the UK is not open to those who have not, in the words of the UK Nationality Instructions, *'..thrown in their lot with this country'*.[76] It cannot be discerned from the face of the 2009 Act what the position will be with regard to permanent residence leave.

However, even if permanent residence leave is to function as current indefinite leave to Remain, it is going to be harder to get permanent residence leave than it now is to get Indefinite Leave to Remain. It is going to take longer to achieve permanent residence leave than to achieve citizenship, and during this period ties with the country of origin may be etiolated if not severed.

As to citizenship, those who wish to maintain professional and other ties with their country of origin may well fall foul of the rule which states that absences from the UK cannot exceed 90 days in any given year,[77] unless discretion is exercised in the applicant's favour.[78] Applicants are, in ILPA members' experience, risk adverse and will be unlikely to stake all on the possible exercise of discretion.

The requirement that a person have a qualifying immigration status throughout the qualifying period,[79] is also relevant. It is important that people are able to aggregate periods of leave, for example where they are combining work with periods of study. At the Committee Stage in the House of Commons, Phil Woolas MP, Minister of State, Home Office, confirmed that qualifying periods may be aggregated:

> *"Somebody who spends two periods in the UK with a qualifying immigration status, and who in between is lawfully in the UK with an immigration status that is not a qualifying one, can have the two qualifying periods aggregated … For example, an applicant who entered under the work route, stopped working after three years to commence a two-year period of study and then resumed work, could count both periods spent as a worker towards the qualifying period."*[80]

This is not to say that the current regime contains no elements that may create problems for countries of origin wishing to retain people. A substantial commitment (five years) is required before a person can achieve indefinite leave to remain. A absence from the country of origin from this period may

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[75] Borders, Citizenship and Immigration Act 2009., s 39.
[76] Nationality Instructions, Volume 1 Chapter 18, at 18.1.7
[77] Borders Citizenship and Immigration Act 2009 s 39 and 40 amending Sch 1 and Sch 2 to the British Nationality Act 1981
[78] *Ibid.*
[79] *Ibid.*
[80] Borders Immigration and Citizenship Bill, session 2008-2009, Public Bill Committee BC Deb 4th Sitting 11 June 2009 c108.

have a positive or negative effect on a person's career, but it is also likely that during that period other ties to the UK are formed (for example children become very much part of the UK education system, and parents may be concerned about their prospects of adapting to curriculum, or studying at the same level in the language of the country of origin). Relationships are formed which then loom large in people's lives, and spouses or partners may have ties to the UK or face difficulty in adapting to life in the country of origin (for example through language barriers). Other considerations play a part. There is, for many people, always the fear that if they go they will not find it easy to return. UK rules change. For example, the minimum educational requirement for coming to the UK as a Tier 1 (General) migrant has risen[81]: a person who elected to work in the UK for, say, 18 months as a Tier 1 (General) migrant and then to return to their country of origin, would have found at the time of making a fresh application that a Masters degree was required. For some, this closes this route to them. Visa requirements have been applied to new countries in the past year, for example to South Africa,[82] so that travel, for example, to see friends or have a holiday has become more complicated. Consistency in, and quality of, decision-making is also important. ILPA members and their clients are aware of cases in which a person has travelled repeatedly on the evidence of a particular document or a letter of invitation, only then to find it called into question on a subsequent occasion.

In these circumstances, people are risk adverse. They want to know that they will be able to return. Faced with uncertainty they will look for options that will provide them with an entitlement to return and, as explained, in the course of achieving such an entitlement they may sever links with the country of origin.

Q25. In order to combat brain drain do you think it would be feasible to develop a list, similar to the NHS list, but covering other sectors? Q26. What evidence could be drawn upon to develop such a list? (please specify)

Without coming to a conclusion as to whether this is feasible or not, which is a question both of the available data (which we do not have) and the resources that would be invested in the scheme, we note the following.

Unlike, for example, the work of the Migration Advisory Committee, which considers data from the UK, to devise a sensible list would involve looking at the situation in many countries, not just the UK. A shortage of experienced professionals, for example, may be experienced in one sector in one country, in another sector in another. Countries may have different employment opportunities/needs for skills in different fields. It is not straightforward, and we should anticipate that it is very resource-intensive, to identify the relevant factors for different countries and to come up with (and keep up to date) a list that reflects these. A one-size list, in failing to respond to the different

[81] Statement of Changes in Immigration Rules, HC 395 Appendix A, para 7A

[82] Ibid., Appendix 1, as amended by Statement of Changes in immigration rules HC 413 with effect from 1 July 2009.

situations in different countries of origin, seems to us unlikely to have the desired effect and could even exacerbate the problems in some countries.[83]

The way in which such a list functions is also a complex matter. A particular career may be attractive precisely because it offers the opportunity to work (and earn) abroad and cutting off that opportunity may affect the number of candidates for that career in the country of origin. We agree with the statements in the consultation paper that the evidence is far from conclusive and would underline the importance of working with countries of origin to understand the complex interplay of causes and effects. Such work is likely to cost a lot. It is likely to be of interest to many countries and joint work through international organisations may thus be a way to avoid each country re-inventing the wheel.

Q27. What further views do you have on how we could mitigate against the negative impacts of migration from developing countries?

We assume that this question is concerned with the negative effect upon developing countries. On this assumption we make the remarks below.

See response to q.24 above. It should not be a requirement for a grant of permanent residence leave that a person intend to make the UK their main home. This would be in accordance with current provisions for indefinite leave to remain and would provide an option for those who do not necessarily see their long-term future in the UK.

See response to q.24 above. Those who have permanent residence leave should be allowed to return to the UK when they wish, and should not be subject to an equivalent of the returning residents rule. This is a *quid pro quo* for permanent residence leave being more difficult to obtain than indefinite leave to remain (and, indeed, citizenship).

One attraction of British citizenship for those who intend to pursue international careers or simply those who like to travel is that it offers a freedom to travel that is offered by the citizenship of few non-OECD countries and extensive freedom to travel within the European Union. Not only are there European free movement rights, but there are still a number of countries where British citizens do not require a visa for all purposes, and find it easier that persons from non-OECD countries to get a visa for other purposes. As described in our response to q.24 above, not only does an application for British citizenship entail evincing an intention to make the UK one's main home, it also takes some time to obtain British citizenship and the links one must be maintain within the UK during that period, made stronger by the provisions of the Borders, Citizenship and Immigration Act 2009, will affect the links one is able to maintain with the country of origin. In these circumstances,

[83] See the discussion in, and the bibliography to *Migration and development: A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration* Sriskandarajah, D., undated, Global Commission on International Migration.

proposals such as the European Blue Card[84] have the potential to facilitate circular migration between countries of origin and countries of migration, because of the potential they have to create entitlements in more than one country. We recall Preambles 22 and 24 to 17426/08, which state:

> *(22) In implementing this Directive, Member States should refrain from pursuing active recruitment in developing countries in sectors suffering from a lack of personnel. Ethical recruitment policies and principles applicable to public and private sector employers should be developed in key sectors, for example the health sector, as underlined in the Council and Member States' conclusions of 14 May 2007 on the European Programme for Action to tackle the critical shortage of health workers in developing countries (2007-2013) and the education sector, as appropriate. These should be strengthened by the development and application of mechanisms, guidelines and other tools to facilitate, as appropriate, circular and temporary migration, as well as other measures that would minimise negative and maximise positive impacts of highly skilled immigration on developing countries in order to turn "brain drain" into "brain gain".*
>
> *(24) Specific reporting provisions should be provided for to monitor the implementation of this Directive, with a view to identifying and possibly counteracting its possible impacts in terms of "brain drain" in developing countries and in order to avoid "brain waste". The relevant data should be transmitted annually by the Member States to the Commission in accordance with Regulation (EC) No 862/2007 of the European Parliament and of the Council on Community statistics on migration and international protection.*

The UK should consider whether to opt-in to the 'Blue card' proposals in the light of these elements of those proposals.

The Government should give consideration to amending Part two of the Borders, Citizenship and Immigration Act 2009 before it comes into force (we do not doubt that there will be a legislative opportunity before July 2011) so that applicants are not reliant upon hoping for an exercise of discretion in their favour but instead have better protection is situations of absences in excess of 90 days per year or having held different types of leave, against refusal of their applications for naturalisation. In any event, the provisions of that Act as to naturalisation should not be replicated in the requirements for permanent residence.

ILPA has argued that both fees for immigration applications and the maintenance requirements of the Points-Based system militate against those from non-OECD countries whose currencies do not perform well against sterling. A fee that may be affordable for an applicant from an OECD country may be prohibitive for an application from a non-OECD country. Under the Points-Based System the Home Office has made use of multipliers in

[84] See 17426/08 MIGR 130, SOC 80016952/08 *Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment*, and MIGR 127 SOC 773 + COR 1 (en).

calculating salaries. Why could it not do this for fees? This would be more equitable.

In the case of maintenance requirements, while it is correct, as the Home Affairs Committee, has pointed out,[85] that it costs the same to live in the UK whatever your country of origin, this is not the end of the story. It is not the end of the story because many of those coming in under Tier 1, where an employer is not permitted to underwrite the maintenance requirement, may have a job in the UK to which to come and thus be in no danger of destitution. In any event, the risk is on them because they are not entitled to have recourse to public funds (Immigration Rules, paragraphs 6 and 6A) and if they cannot pay their way in the UK, will have to leave.

The maintenance requirement must be demonstrated for a period prior to making an application. As ILPA has pointed out, in its comments on the equality impact assessments for the Points-Based System[86] and subsequently, the sums that those from non-OECD countries are required to demonstrate are very large. The Home Affairs Committee cited examples from ILPA and others:

> *"98. … ILPA provided an illustrative example:*
>
> *A Tier 1 applicant outside the UK must show £2,800 for themselves and £1,600 for each family member. For a typical family of four this would therefore be £7,600. For an applicant from Ghana for example this would be equivalent in real terms to £83,600 (by the UKBA's own measures of relative income values world-wide, which it uses for calculating the points for the past earnings attribute).*
>
> *99. We heard similar concerns during our visit to India in October 2008. UK Border Agency staff in Delhi told us that, to that date, 65 per cent of refusals under Tier 1 had been based on applicants not meeting the £2,800 per person maintenance requirement. They said that there had typically been two reasons for this—insufficient savings by the applicant, and/or poor documentation, and told the Committee that professional salaries in India tended not to be as high as their UK equivalents, making it hard for even highly skilled migrants to meet this criterion.*
>
> *100. The requirement that an applicant must have held the sum in their bank account for the whole of the previous three months has also come under fire. The Immigration Law Practitioners' Association argued that "a single applicant who ordinarily maintains a balance of £50,000 but on one day in the last three months dropped to £2,799 simply due to the order in which transactions were processed by his bank will fall to be refused". The Joint Council for the Welfare of Immigrants calculated that a Bangladeshi accountant/professor would take 18.7 years to earn*

[85] Home Affairs Committee *Managed Migration: The Points-Based System* , Thirteenth Report of session 2008-2009, HC 217, Vol I para 113.
[86] Available on www.ilpa.org.uk

> *enough to meet the maintenance requirement for himself, a spouse and three children*." [footnotes omitted] [87]

The reasons why people prefer to pursue careers in the UK rather than in their country of origin are not solely related to the exercise of their profession. Factors as various as attitudes to women in the country of origin, the type of education they want for their children, other interests that they wish to pursue outside work, are all relevant. In some cases the country of origin may seem a very desirable place in which to live and pursue one's profession at a given moment, but decisions to leave are based on a perception that the situation, whether economic, political or social, is fragile and people may move with one eye on possible medium or long- term effects.

The suggestions in the consultation paper that:

> *"33. We now want to explore whether there is more we can do, …This mightinclude, for example, allowing migrants to return home for longer than the period defined by their conditions of entry to the UK; or allowing migrants to bolster their application for citizenship through carrying out periods of development-focused activity in their country of origin."*

both seem to us to be worthy of further exploration although, as discussed above, we emphasise that the element of certainty attaching to ability to return is likely to be extremely important to individuals contemplating these options.

The UK is one of a number of possible destinations for those whose absence from their country of origin is felt by those countries as a 'brain drain'. It thus appears to us important that possible solutions are looked at with other countries.

Alasdair Mackenzie
Acting Chair, ILPA
26 October 2009

[87] Op. cit., Vol I