

**ILPA Submission to the Home Affairs Committee Enquiry into Managed Migration: the Points Based System****INTRODUCTION**

1. ILPA is a professional association with some 1,000 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 including the UK Border Agency Corporate Stakeholder Group, and the UK Border Agency Employers Task Force. An ILPA working group meets regularly with those designing and implementing the Points-Based system and UK Border Agency officials have participated in ILPA training sessions and members' meetings about the new system. ILPA regularly gives written and oral evidence to parliamentary committees.
2. A selection of ILPA's broader work on this topic is found in the previously submitted material annexed to this report. The annexed material is all in the public domain and ILPA consents to this submission being made public.

**EXECUTIVE SUMMARY**

3. In this response we concentrate on the following matters from the terms of reference for the Committee's enquiry:
  - the proposed points based managed migration system;
  - the implementation of Tier 1 (highly-skilled migrants);
  - the impact on certain sectors of phasing out sector-specific schemes, including the Seasonal Agricultural Worker's Scheme and Sectors Based Schemes;
  - the effect of the proposed changes on the education, sports and culture sectors;
  - proposed sponsorship arrangements, including the impact of fees and greater responsibility on small and medium enterprises; and
  - the immigration-related provisions of the Government's draft Citizenship, Immigration and Borders Bill (when available).
4. We deal with these in four specific contexts:
  - implementation, including the consultation process and time-scale
  - objectivity
  - sponsorship
  - maintenance and general grounds of refusal and discrimination

5. We have dealt with a number of matters raised by other terms of reference in previously published submissions (annexed hereto) and the final part of the text explains where to find this information in the Annexes and highlights subsequent developments.

## **ILPA SUBMISSIONS**

### **THE POINTS-BASED MANAGED MIGRATION SYSTEM**

#### ***Terms of reference of the Enquiry: the proposed points based managed migration system***

#### **The consultation process and implementation**

6. ILPA is concerned that the Government ignored the findings of its consultation into the Points-Based System and failed to consult at all on some of the most fundamental aspects of the system.
7. By way of example, in the Command Paper 'A Points-Based System: Making Migration Work for Britain' only 2% of those who responded considered age to be the most important attribute for Tier I Highly Skilled Migrants and only 1% considered previous salary to be most important. 64% considered skills to be most important and 40% work experience<sup>1</sup>. Yet the attributes test for Tier I is based solely on age, previous earnings and qualifications; it does not take into account at all the applicant's skills or previous work experience (experience being one of the key skill generators). ILPA does not believe that Tier I enables the most highly skilled migrants to come to the UK and is focussed more on young graduates.
8. The Government failed to consult on its intentions to introduce the new mandatory grounds of refusal contained in HC321, which it has already had to correct and/or amend several times. For further information on this matter please see ILPA's briefing and general comments appended hereto.
9. ILPA has highlighted that Tier 5 Youth Mobility Scheme is expressly closed to young people from any country that appears on the Government's visa national list<sup>2</sup>. The Government failed to consult on this issue, which is of significant national and international importance.
10. ILPA is concerned that the Government has failed to take account of the responses to its Equality Impact Assessments and that many aspects of the Points Based System are discriminatory and/or will have a disproportionately negative impact on a number of groups and communities. For further details please refer to ILPA's responses to the relevant Equality Impact Assessments and its response to the consultation on Tier I appended hereto.
11. In general the Points-Based System is being rolled out in great haste. In so doing the Government is missing the opportunity to design and implement the very best immigration system in the world. ILPA members report a lack of confidence in the system and in particular those set out in the following paragraphs.
12. UK businesses are not applying to become sponsors under the Points-Based system in the numbers anticipated by the Home Office. ILPA members report that businesses are

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<sup>1</sup> Page 44 'A Points –Based System: Making Migration Work for Britain' March 2006

<sup>2</sup> See ILPA's Response to the Equality Impact Assessment: Points Based System Youth Mobility Scheme (Tier 5) – March 2008 and the Government's Tier 5 'Statement of Intent' - June 2006

confused by the sponsor guidance notes which are incomplete do not understand many of their obligations under the new system and do not wish to take on the burden of controlling the immigration system to the extent required, particularly in the absence of full and accurate guidance.

12. The constant flow of publications, changes, amendments and corrections is unsettling for applicants and those advising them.
13. The new system is being delivered by way of changes to the Immigration Rules, rather than through simple to read guidance notes and this is overly complex, extremely difficult to understand and requires parliamentary intervention to amend errors.
14. The new system was heralded as 'on-line' based yet Tier 1 application form is still hard copy only and the design and usability of the on-line sponsor application form is unsophisticated.
15. The new system is being promoted as providing greater clarity and being easier to understand and use, both for migrants and sponsors. This is not the case. By way of example the new application form for Tier 1 (General) highly skilled migrants is some 66 pages long. The guidance is 41 pages. Similarly we understand that the revised guidance for sponsors under the other Tiers of the PBS is approximately 150 pages (not including the actual criteria for migrants applying under those Tiers). Whilst ILPA of course welcomes comprehensive guidance for applications, the notion that Tier 1 (General) is more straightforward than the Highly Skilled Migrant Programme is replaced is a misnomer.
16. There has been insufficient time for key details of the scheme to be fully considered in the depth required and policy on some issues is being determined in great haste immediately prior to 'go live'. This has impacted upon UK Border Agency's ability to publish information in advance of Tiers/sub-categories being implemented. The actual documentary requirements for the PBS are contained in the guidance and advance publication of guidance notes prior to 'go live' of a category is critical to enable applicants to prepare and to enable any feedback to be given before the guidance becomes operative. Tier 1 (General) went live on 29 February (for applicants within the UK) and the guidance was not released until 29<sup>th</sup> February. Despite ILPA (and others) strenuously raising concerns on this timing issue, Tier 1 Entrepreneur, Investor and Post-study worker guidance was also not published until these sub-categories actually opened, on 30 June 2008. This is unacceptable.

### **Objectivity (general)**

17. ILPA does not consider that an immigration system based purely on objective criteria can deliver the immigrants the UK wishes to attract for economic, cultural and educational reasons.
18. ILPA does not agree that the Points-Based System is fair, transparent and objective. Under the system Entry Clearance Officers decide who can and who cannot come to the UK by reference to the evidence which the individual is able to produce. The Immigration Rules now require an applicant to provide 'specified' documentation. The effect of this is that rather than demonstrating that they meet an attribute criterion, such

as proving that they hold a degree, the applicant must in fact prove that they hold a particular type of document regarding that attribute. For instance, under Tier 1 a highly skilled applicant whose original degree certificate has been misplaced and whose university does not issue duplicates will be refused a Tier 1 visa even if he produced an original transcript of his degree results with an original letter from his university which were accepted as genuine by the ECO.

19. ILPA is concerned that the pursuit of perceived 'objectivity' has become the driver of the Points-Based System, at the expense of other important policy objectives. For example, it would appear that significant skills tests such as work experience and skills were sacrificed in this pursuit. ILPA is further concerned that the pursuit of objectivity has actually generated a 'form over substance' approach to consideration of applications. *In extremis*, 'objectivity' can create a focus on administrative ease rather than merit.

## **TIER 1**

***Term of reference of the enquiry: The implementation of Tier 1 (highly skilled migrants).***

### **Objectivity (highly skilled)**

20. As stated above ILPA does not consider that truly highly skilled individuals can or should be assessed solely in terms of age, past earnings and qualifications.
21. Entry under Tier 1 (General) is not possible without a bachelor's degree. There are many very highly skilled individuals who do not possess a degree. They will not be able to enter the UK at all under Tier 1 (General) and as many of the most high profile examples are self-employed rather than employer Tier 2/work permit schemes are also unsuitable for them (hypothetical examples that have previously been advanced to illustrate this point include Bill Gates and Nicole Kidman). A 22 year-old graduate with a bachelor's degree from a UK institution who has earned £23,000 in his first 12 months of work experience ever would meet the attributes requirements of Tier 1. Whereas a businessperson of 25 years experience, with a global reputation and earnings of hundreds of thousands of pounds, but who lacks a bachelors degree would not qualify as 'highly skilled' under Tier 1. Tier 1 is fundamentally flawed in this regard and cannot cater for the different types of highly skilled applicant. This is in contrast to its forerunner, the highly skilled migrant programme, before November 2006, where points could be awarded for extensive experience (or indeed for an exceptionally high salary) which would compensate for the lack of degree – particularly for older applicants who began their careers at a time when university education was less prevalent.
22. The documentation requirements under Tier 1 are confusing and unduly administrative and make the scheme almost inaccessible for many people. For instance, in order to evidence past earnings the applicant cannot rely solely on his wage slips even if the caseworker accepts without any doubt that the wage slips are genuine. The applicant must provide other evidence such as bank statements or employer's letter evidencing exactly what the wage slips state. ILPA members often report a refusal decision where the caseworker has failed to appreciate that the sum in the wage slip may differ from the sum deposited into the individual's bank account for a whole range of perfectly acceptable reasons. It is also not always possible for an applicant to approach his

employer for a letter to the Home Office that will lead the employer to conclude that the employee wishes to leave the employment.

23. ILPA members are aware of occasions when a Tier I caseworker has telephoned a large multinational organisation to verify the evidence of previous earnings submitted with the application and has simply asked the receptionist if the applicant works at the entity, relying on information informally provided by a receptionist who is unlikely to know the individual concerned when making a decision.
24. There is grave uncertainty for Tier I applicants and indeed applicants under any immigration route into the UK as to how they may secure Indefinite Leave to Remain (ILR) in the UK. For almost three years ILPA has requested clear and unequivocal guidance from the Home Office as to the level of permissible absence from the UK without effecting their entitlement to ILR. ILPA members report that the Home Office is refusing applications for ILR where it deems that the individual has spent too much time outside the UK in the qualifying period and it is wholly inappropriate that such negative life-changing decisions should be taken in the absence of clear guidance.

## **Maintenance**

25. Under Tier I, applicants are required to demonstrate that they not only satisfy the appropriate attributes tests, but that they also have sufficient funds to maintain themselves and their families in the UK. As you may be aware the requirement that an applicant can maintain and accommodate themselves and any dependants is not new. However, historically it has been based on the circumstances of the individual migrant, recognising that what is 'sufficient' depends upon each individual's own expenses, lifestyle, and prospects. The new maintenance test is arbitrary and impractical, creating perverse results. An applicant outside the UK must demonstrate that they have £2,800 for themselves and £1,600 for each family member (for a typical family of four this would therefore be £7,600). Further they must demonstrate that they have held such a sum for at least the last three months. Moreover, they must demonstrate that that sum has been in their account for *every single day* of the last three months.
26. 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. This problem of arbitrary documentary requirements will become even more pronounced at the time of extensions, once applicants have successfully established themselves in the UK for 3 years and have been clearly maintaining their family throughout yet do not have the required form of evidence at the time of application
27. The Government failed to consult on the new maintenance test or give any advance warning, which resulted in the Government having to issue an almost immediate transitional measure for those already in the process of applying from within the UK, to prevent such migrants from being unreasonably affected by the change. It is notable that transitional arrangements were only put in place for applicants within the UK. Many applicants outside the UK are most seriously affected by the introduction of the new maintenance tests; due to administrative delay by UKBA in considerations of HSMP applications (now taking approximately four months rather than the previous typical 4 week processing time); applicants who submitted HSMP application (incurring fees) several months ago on the understanding that they were applying under the terms of the

scheme in place at the time, only to find that having at had their HSMP applications approved their entry clearance applications will fall for refusal as they must now meet additional maintenance requirements.

28. The test discriminates against those highly skilled applicants from the less developed countries. For instance, a highly educated, highly skilled surgeon from Ghana who has reached the very top of his profession and who has maintained and accommodated himself and his wife and two children all his life, would have to show that he has held in his bank account for at least three months, the sum of £7,600, which by the UK Border Agency's own measures is equivalent in real terms to £83,600, regardless of whether or not he has an offer of a post in the UK at the time of applying. It is notable that the skills (attributes' thresholds under Tier 1 (general) are no different to those under the post November 2006 HSMP. ILPA is concerned that highly skilled migrants who would have been admitted previously, and in respect of whom there is, we understand, no evidence or indeed research identifying that there has been any failure to adequately maintain and accommodate themselves, will now be refused entry based on arbitrary financial thresholds and these thresholds, without any sound evidential basis, would appear to operate in a discriminatory manner.
29. ILPA has provided further information to the Government already on this matter and its belief that Tier 1 discriminates on the grounds of race, age and sex<sup>3</sup>. The UK Border Agency may not agree with ILPA but it is of note that their impact assessment does not address these matters. It is also noteworthy that the deadline for comments on the impact assessment came after the relevant Statement of Changes in the Immigration Rules had been published.

## **SECTOR SPECIFIC SCHEMES**

***Term of reference of the enquiry: The impact on certain sectors of phasing out sector-specific schemes, including the Seasonal Agricultural Worker's scheme and Sectors Based Schemes.***

30. ILPA is very concerned that the Government presently has no plans to activate Tier 3 or lift the restrictions currently in place in relation to the Bulgarian and Romanian workforce.
31. ILPA's members are reporting that many of their business clients are facing severe difficulties already in recruiting workers in the agricultural and catering sectors.
32. The principle that highly skilled workers should have a route to settlement while others should not risks replacing 'highly desired skills', those that the UK needs, with 'highly skilled'. More fundamentally, failing to provide a route to settlement may leave these workers more open to exploitation and abuse. The government has agreed to retain the existing domestic worker category, with its route to settlement for two years and then to review it, rather than to abolish it as part of the introduction of the Points-Based system in recognition of the need to provide protection for these very vulnerable workers. The question of the extent to which the more general principle that the highly skilled should have a route to settlement while others will not, creates risks of exploitation is worthy of study by the Committee in this enquiry.

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<sup>3</sup> See ILPA's response to the Equality Impact Assessment on Tier 1 (January 2008), annexed hereto

## **EDUCATION, SPORTS AND CULTURE SECTOR**

***Terms of reference of the enquiry: The impact of the proposed changes on the education, sports and culture sectors***

33. The Points Based System fails to address the UK's desire to attract the very best individuals in the sports and entertainment industry.

34. The system does not cater for writers and artists in any way, who until 30 June 2008 had their own immigration category because of the very exceptional and specific nature of their work. Those whose contributions are measured in terms of creativity and culture have been over-looked in the new system in favour of box-ticking economic assessment criteria. Financial contribution can be more easily measured and therefore appeals to the 'objectivity' focus of the PBS, whereas the arts arguable make a more profound and important contribution to the richness of life in the UK but are more complex administratively and evidentially to measure

35. Tier 5 temporary workers will not enable artists of international repute to enter the UK easily. Such artists who may be entering the UK for promotional reasons must be permitted easy access to the UK in order for the UK to remain a world leader in cultural and artistic matters.

## **SPONSORSHIP**

***Term of reference of the enquiry: proposed sponsorship arrangements, including the impact of fees and greater responsibility on small and medium enterprises.***

36. Many ILPA members report that the Sponsor Registration process is inadequate and unclear.

37. The sponsorship licence application process requires the potential sponsor to demonstrate their immigration compliance record. Given the parallel introduction of civil penalties, potential sponsors are required to carry out internal audits of their employees and systems to ensure that risk of financial penalty is minimised.

38. There is insufficient published information relating to the documentation required to support the sponsorship licence application process, the application process in itself and the obligations and criteria that the potential sponsor is required to meet once Tier 2 goes live.

39. Potential sponsors are reporting difficulties in assigning the central positions of Authorised Officer, Key Contact and Level 1 User because there is no detail as to how the scheme will work in practice. Although the duties and responsibilities of each of these positions have been detailed, the penalties for failing in these responsibilities has yet to be clarified. Without such clarification, potential sponsors cannot allocate the positions internally.

40. As part of the sponsorship licence application process, potential sponsors are required to demonstrate how they will meet new obligations of Tier 2 sponsorship. The UK



Border Agency has failed to take into account commercial reality when setting out timelines for the new system. In particular, the requirement to report on personal and work changes of sponsored employees require significant amendments, purchase and development of Human Resources Information Systems. This, in turn, requires internal budget allocation which, in most cases, requires the potential sponsor to seek additional internal financial resources. This, and the development work required, takes time which is reflected in the current low take up of sponsorship licences. There is real fear that the UK Border Agency does not have the resources to meet need and issue sponsorship licences before the Tier 2 go live date once potential sponsors have completed the internal work required before the sponsorship licence application can be submitted.

41. The industry Codes of Practice that are detailed in UK Border Agency guidance on the new system have yet to be published and, therefore, sponsors are unclear as to the criteria of the new system.
42. Through its working party on the Points-Based System have consistently lobbied UKBA to review all aspects of the sponsor system. Sponsors were not warned that the system would be so onerous and time-consuming in terms of their involvement. Sponsors were not warned that they would have to report on their migrant workers and ILPA members report that they sense considerable distaste from the business community that 'good behaviour' in terms of reporting illegal migrant activity, or perceived illegal migrant activity will mean a reduction in civil penalties.<sup>4</sup>
43. ILPA is opposed to the introduction of any maintenance test for Tier 2. Our understanding is that the rationale of the Tier 2 maintenance test is to ensure that foreign nationals have sufficient personal financial resources to live in the UK in the first month after their arrival and prior to receiving their first salary from the UK sponsoring employer.
44. The employer needs to undertake a rigorous application process to gain a licence to sponsor under Tier 2 and will, thereafter, be subject to audit at any time. In issuing the licence, the UK Border Agency will be confirming the trustworthiness of the employer and its suitability to issue certificates of sponsorship. As such, the maintenance test of Tier 2 suggests that the UK Border Agency will be approving sponsorship licence applications for employers that they believe will not financially support their foreign national workforce in the first month of arrival in the UK. The maintenance test, therefore, significantly undermines the sponsorship licence application process and rationale. It also serves no social purpose as foreign nationals who have entered the UK under Tier 2 will not be permitted to claim public benefits in any event.
45. Many UK employers currently financially support their foreign national workforce on first arrival in the UK in many ways: provision of accommodation; payment of immediate allowances; golden handshake on arrival etc. Requiring the individual to have a minimum credit amount in their personal bank account prior to a successful entry clearance application will, in many cases, require the UK employer to transfer funds to the individual prior to the UK employment commencing. This in itself represents a significant risk to the UK employer but, most importantly, encourages non-compliant activity because the employer loses the valuable link between salary/allowances and

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<sup>4</sup> See 'Comprehensive Guide for Employers' February 2008

immigration status (ie that UK salary/allowances will only be made on satisfactory production on valid work authorisation). As such, the maintenance test of Tier 2 undermines the immigration system as a whole. Finally, the maintenance test is flawed in any event as there is no guarantee that the foreign national will be in a position to access the evidenced funds within the first month of arrival in the UK if, for example, there are currency exchange controls applicable in the country of origin. For these reasons, the Tier 2 maintenance test is both wholly inappropriate, undermines the new system and represents a significantly onerous obligation on the employer who will have already undertaken a significant assessment with regard to sponsorship suitability by the UK Border Agency.

## **Citizenship Immigration and Borders Bill**

***Term of reference of the enquiry: the immigration-related provisions of the Government's draft Citizenship, Immigration and Borders Bill (when available).***

46. ILPA is unable to comment on this at this time because we have not seen the draft Citizenship, Immigration and Borders Bill. ILPA would refer the Committee to our response to the UK Border Agency consultation on Simplification, our submissions to Lord Goldsmith's Citizenship Review and our response to the UK Border Agency's A Path to Citizenship consultation, all of which are appended hereto.

## **Material relevant to other terms of reference in previously published work**

47. ILPA would like to take this opportunity to bring to the attention of the Committee our existing material relating to the points based system, which are annexed hereto.
- Migration Advisory Committee Call for Evidence – Response of the Immigration Law Practitioners' Association April 2008
  - Equality Impact Assessment: Points Based System Youth Mobility Scheme (Tier 5) ILPA Response March 2008
  - ILPA response to consultation on *Path to Citizenship* Green Paper May 2008
  - ILPA's response to the Equality Impact Assessment: Points-Based System Highly Skilled Tier January 2008
  - ILPA Briefing for the Joint Committee on Human Rights Changes to the General Grounds for Refusal in the Immigration Rules to be introduced by Statement of Changes in the Immigration Rules HC 321 February 2008
  - Points Based System fees – ILPA response to consultation 9 November 2007
  - Lord Goldsmith's Citizenship Review: The Different Categories of British Nationality ILPA submission December 2007
  - Consultation on Simplifying Immigration Law ILPA Response August 2007

- ILPA Briefing on a Points-Based System: Making Migration Work for Britain March 2006

We should be pleased to make any of the ILPA reports and responses to which reference is made in this submission available to the Committee.

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