ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

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ESOL Consultation
Skills for Employability
Department for Innovation, Universities and Skills
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Dear Consultation Team

FOCUSING ENGLISH FOR SPEAKERS OF OTHER LANGUAGES ON COMMUNITY COHESION

ILPA is a professional association with around 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 and representatives of the Association have met with the Minister of State, John Hutton MP, to discuss English for Speakers of Other Languages (ESOL) provision.

ILPA responded to the Border and Immigration Agency's consultation document, *Marriage visas: pre-entry English requirement for spouses* and in that response confirmed our support for increased ESOL provision in the UK, in particular for new arrivals. I attach a copy of that response, parts of which are also relevant to this DIUS consultation.

ILPA's expertise is in immigration law, not in language teaching. In this response we confine ourselves to our particular areas of expertise. It is members' experience that clients who have migrated for all sorts of different reasons are rarely if ever unwilling to learn English. Some may doubt their ability to do so, some may find it difficult to make the time to devote to study, many more find it difficult to access opportunities to learn, but unwillingness is rarely if ever the issue.

Question 1 a) We have proposed an indicative list of national priorities. Are there any other groups we should consider for inclusion in this list and, if so, how high a priority do you consider them to be?

We suggest that a further group which should be given priority, and high priority, is that of recently-arrived spouses and partners of people already settled here, who have come to join them for settlement but who are given leave to enter for a two- year period initially. Currently they will not qualify for ESOL as home students until they are settled. If it is not possible financially for people to learn English for a couple of years or more, people may

have become accustomed to just making do, and may have lowered their aspirations as to what they can expect from life in the new country. It may be more difficult to gain the enthusiasm to learn after that period. Immediate access to ESOL teaching and learning has the potential to pay dividends.

ILPA therefore urges again that the requirement of settlement before qualifying as a home student for ESOL courses should be removed for those who have come to the UK with a view to settlement, in particular spouses. This view is supported by NIACE[1] and the Advisory Board on Integration and Naturalisation.[2]

Learning the English language and about life in the UK should be seen as another benefit of migration, not as a hurdle which must be overcome before migration is possible.

Learning even a basic level of English can make people less vulnerable to being misinformed or misled and also means that simple transactions can be performed without the need to engage interpreters. For example, a person seeking asylum may continue to require an interpreter for a substantive interview, but may be able to set up that interview, or understand an appointment letter, without the assistance of an interpreter. Beyond the asylum process, people seeking asylum need to engage with a variety of people and organisations including health services, social services, public transport, accommodation providers, retailers and the general public. Improving their ability to communicate in English with these people and organisations would have advantages for all concerned, with savings on interpreting, the time spent on basic transactions and avoiding mistakes or misunderstandings. We therefore suggest that consideration should be given to making people seeking asylum a priority group from the moment of their arrival, rather than after six months and that in any event, whether or not they have received an initial decision on their application within a fixed period should not be the deciding factor: even where an initial decision comes quickly, appeals may add to the time that a person will be in the UK. Such an approach is based on the same principles and reasoning as the recommendation by the Lord Goldsmith QC in his report on Citizenship, that people seeking asylum be permitted to in the UK[3]. He argues forcefully that permitting people seeking asylum to work would aid integration of those whose long-term future is ultimately in the UK; and would generally lessen the public expense in relation to all those seeking asylum.

ILPA would also wish to draw special attention to the difficulties of older children, whether unaccompanied (usually as asylum seekers) or with their families, including but not limited to those over 16. Children arriving at this age may find it very difficult to access full-time education, because they are approaching or have passed the statutory school leaving age, or because of the all too frequent practice of disputing the age of an unaccompanied child. Some of the long-term consequences for education of age disputes are documented in ILPA's 2007 report *When is a child not a child?* We consider that children not in full-time education should be a priority group for English language teaching.

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[1] Most recently in NIACE's draft response to this consultation, paras 6 and 20, on their website at www.niace.org.uk/Organisation/advocacy/DIUS/ESOL-community-cohesion.pdf

[2] ABNI first Annual Report, p.20, on their website at www.abni.org.uk/docs/abni_ann_rep_nov_06.pdf

[3] See paragraphs 46-51 of Chapter 7 'Involving Newcomers' of the report of Lord Goldsmith QC Citizenship Review, *Citizenship: Our Common Bond*, available at http://www.justice.gov.uk/docs/citizenship-report-full.pdf

It is important that the criteria for eligibility are not drawn in such a way as to impose bureaucratic hurdles to providing proof of inclusion in a priority group, particularly among those seeking asylum who may have little documentation. It is also important that criteria should not be drawn so as to be too restrictive; or open to restrictive interpretation. We have explained above why we suggest that the six month time period is either not adopted as a criterion or, at the most, merely focuses on whether the asylum-seeker remains in the UK. The reference to 'cannot return home' in the consultation paper is particularly problematic. There may be various reasons why a person seeking asylum cannot return home following a refusal of his or her claim. This can arise where, for example, someone is too ill to travel, there is no safe route of return, or the country of origin will not assist with documentation for return. These circumstances are currently relevant to whether a refused asylum-seeker can access financial and accommodation support under section 4 of the Immigration and Asylum Act 1999; and our experience of that regime is that the approach in practice is very restrictive. We note that, when introducing new asylum processes (often referred to as the New Asylum Model), the Home Office has made commitments to resolving asylum cases within 6 months. Resolution for these purposes means that either the asylum-seeker is granted leave to enter/remain in the UK or removed from the UK within the 6 months' time period. This means that it is within both the power and the current policy aim of the Home Office to control the size of this group. On the other hand, the reasons we have given above as to why we suggest all asylum-seekers be treated as a priority will continue to apply to those asylum-seekers who remain in the UK beyond 6 months.

English language skills can be of considerable value when people return to their countries of origin – for many people, from those with considerable education and responsible jobs to young people travelling and gaining work experience, the chance to improve one's level of English, including in the light of the benefits this will bring on return home, is one reason to come to the UK in the first place. These same benefits may be of relevance to those whose applications for asylum or for permission to stay in another category have been refused and who do not have protection needs: those who 'can return home'. The government has stated that it wishes to encourage voluntary return by such people, as this is always to be preferred to their forcible removal (see e.g. HC (2002-03) 654-I, Ev 86, para 13). Possession of English language skills may make the prospect of return less daunting to people in this position.

Lord Goldsmith's review of British citizenship suggests both that ESOL classes should be affordable and charged at the same rate throughout the country, and that there should be specific 'language loans' to help newcomers to pay for courses. All these ideas should be considered, but ensuring that classes are low-priced and there is no continuing discrimination against people who have recently arrived to join their families should be given a very high priority.

Question six: What would incentivise employers to support their employees who have ESOL needs?'

ILPA has held extensive discussions with those designing the new Points-Based System and meets with them on a regular basis. These discussions have, among other matters, addressed the question of the language requirements for those entering under the Points-Based System. The intention is that this test be imposed prior to arrival. ILPA wrote in its

response to the consultation on the Equalities Impact Assessment for Tier 1 of the Points Based system (January 2008):

'The requirement to have to take a test to demonstrate English language ability discriminates against those nationals who are not from the listed majority English speaking countries and who do not have a bachelor's degree from an English speaking university.

There are two difficulties here. The first is that historical accidents of birth (race and nationality) are privileged over the contribution an individual may be able to make. A university degree is no proof that a person has contributed successfully to an economy – our understanding is that the Border and Immigration Agency has selected this criterion (as it has selected previous earnings) on the basis that it is an indicator of likely future success in the labour market (see *A Points-based system: making migration work for Britain* CM 6741, paragraph 43: 'points will be awarded for attributes which measure the applicant's potential value to the UK labour market' and *passim*.).

Linguistic competence may be relevant to whether a person will learn English, but the proposed system has no way of allowing for the linguistic competence of a person who does not have English as a first language but will acquire it with ease. Such a person may have highly specialised skills that do not require high level of competence in English to start work in the UK and perform well in the labour market. Were ability to speak English tested at the point of applying to extend limited leave in Tier 1, it would be easier to understand. When it is made an entry requirement, it has every appearance of being discriminatory.

The second question, and one that gives rise to a clear possibility of direct discrimination, is the question of which countries are on the list of being 'majority English speaking countries'. The BIA's list in the Statement of Intent on Tier 1 of majority English speaking countries *Highly Skilled Migrants Under the Points Based System Statement of Intent* Annexe B note 6) is as follows: Antigua and Barbuda, Australia, the Bahamas, Barbados, Belize, Canada, Dominica, Grenada, Guyana, Jamaica, New Zealand, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Trinidad and Tobago, the USA. Canada, for example, is a dual language country and in the Francophone province of Quebec an individual need speak no English to earn a degree and a high level of earnings. States of the United States of America such as California recognise both English and Spanish as official languages. Why is Canada on the list, while Nigeria is not? If one takes the class of Canadians holding university degrees and the class of Nigerians holding those degrees, which has the greater proportion of English speakers in it? Do more or fewer Canadians than Nigerians holding Bachelor's degrees meet the requisite level of English language? In certain West African countries, for example, the majority of the educated elite (those who achieve university degrees and thus make up the subset from which those who can qualify under Tier 1 is comprised) will speak English. The list of countries offers the greatest scope that we can see within the scheme for direct discrimination.

The language requirement will especially impact those who are on the cusp of an age category and who will therefore not receive (enough) points for age because of the delay in the timing of their application caused by the need to sit a test before the application may be submitted. This therefore raises issues of indirect race discrimination.'

In the case, for example, of Intra-Company Transfers it may be necessary to bring in a staff member, such an IT expert, very rapidly when something goes wrong or where someone

falls ill or needs to be replaced. In some cases experts will be coming for a very short period, and will spend all of that working: their opportunities to be involved in the community in the UK will be very limited and they will have no intention of staying for longer than the short period that it takes to carry out the task in hand. In other cases, we suggest, that the employee's potential and incentive to learn English is far more important than the skills the employee has developed prior to arrival. If the Points-Based System is to deliver the skills most needed in the UK, then it is important that companies are able to recruit the people best able to do the job.

If tests currently planned for the pre-entry stage were moved to the stage at which an employee applies to extend his or her leave, this would not only address some of these concerns, but there would be a clear incentive for the company to support the employee in learning English. Not to do so would mean that the company risked losing a valued employee in whom they had invested time and money. Companies' desire to ensure that their employees have access to ESOL teaching within the UK also has the potential to provide support to the ESOL sector as a whole. For example, those who have set up schemes may wish to open them to all employees (and not just those who will be tested for English during an extension application), family members and, where the company has community projects, to other members of the community. Or the income from companies paying for ESOL training for their staff may support projects that provide ESOL to other members of the community at low cost or free of charge. None of these benefits will result if companies are obtaining and paying for language tuition for their employees prior to arrival, which is the currently envisaged outcome if the criteria of Tier 2 of the Points-Based System remain as that already published.

Other incentives might include information packs and other resource materials, small business loans to fund course set up costs, a voucher scheme (similar to childcare vouchers).

Question 8: Any other comments or suggestions not previously covered?

We should like to take this opportunity to reiterate ILPA's grave concerns at the imposition of compulsory language tests at the settlement (Indefinite Leave to Remain) stage and in the proposals for probationary citizenship currently the subject of the government's 'Path To Citizenship' consultation at the stage of passing from temporary residence to probationary citizenship (see paragraph 142 of the Path To Citizenship consultation). In these cases, the sanction for failing to speak English is potentially removal from the UK. It is perhaps not exaggerated to talk of the 'punishment' not fitting the 'crime' given the increased frequency with which Ministers have coupled statements about the need for migrants to obey the law and pay taxes with statements about the need for migrants to speak English (see for example the introduction to the Path to Citizenship consultation and Chapter 2.2 therein).

One can envisage, for example, a work permit holder obtaining indefinite leave to remain after five years of work, but his/her spouse failing to do so because s/he has not learned English and instead continuing to obtain extensions of temporary leave. Several years later, the relationship may break down. Is it then proposed to remove a person who may have lived in the UK for 8 or 9 years, and have other family here? It is already the case that human rights cases have succeeded where people have unsuccessfully sought asylum and, because of delays in the system, had been in the UK on temporary admission for a lengthy period and formed ties here, at a time when their claim was finally determined. These examples strongly suggest that those with many years of lawful leave behind them will be in a

position to raise compelling human rights against removal. It is unclear to us that, whatever the prospects of succeeding in an appeal on human rights grounds, government would indeed wish to see such people forced to leave the UK. Yet that is the potential consequence of current and proposed policies.

Yours sincerely

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