ILPA response to *Marriage visas: pre-entry English requirement for spouses*
February 2008

ILPA is a professional association with some1000 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 teaching, provision of resources and information and to work towards just and non-racist immigration laws.

ILPA strongly opposes the proposed requirement that spouses from abroad should have to pass a test of knowledge of the English language before being granted entry clearance to come to the UK. The requirement would be discriminatory on grounds of race and sex and cannot be objectively justified, thus giving rise to risks of a breach of Articles 8 (private and family life) and, in certain circumstances, 12 (right to marry) of the European Convention on Human Rights (ECHR), on their own and read with Article 14 (prohibition of discrimination in respect for rights under the ECHR). ILPA agrees that knowledge of English is valuable for those living in the UK but believes that making this a requirement and, in particular, a pre-entry requirement, cannot be justified.

The Prime Minister stated on 21 February 2008 in his speech to the Institute of Public Policy Research (IPPR):

> "*Included in the responsibilities will be the expectation that newcomers - whether workers here under the points-based system or those applying to stay permanently - will normally be able to speak English*."

and

> *"….we will generally expect adults entering Britain to speak English …."*

This suggests that a decision has already been taken to implement this policy and casts doubt upon whether this consultation could have any influence on the development of the law.

This impression is reinforced because since this consultation was issued it has been overtaken by the publication of the *Path To Citizenship* consultation which proposes a different route from limited leave as a spouse to citizenship or permanent residence. The impression is not one of joined up or clear, thought-out, policy-making.

The new Points-Based system requires skilled applicants to demonstrate, prior to arrival, a higher level of English than was previously the case; it is not clear how necessary this is or how many people it might exclude. The Border and Immigration Agency should first see how this works and learn from any problems before extending any such requirement to any other groups of people. ILPA notes that it is not proposed that there should be a pre-entry language requirement for the spouses of those coming through the points-based scheme. We agree that this would be unjustified.

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ILPA has already expressed its concerns at knowledge of life and language in the UK being made mandatory in applications for Indefinite Leave to Remain. The 'punishment', which could include removal from the UK does not appear to fit the 'crime' (not speaking a certain level of English). People who are unable to meet the requirements of the test may spend many years in the UK with limited leave. If they cease to fulfil the conditions of their limited leave (for example the spouse of a work permit holder whose relationship breaks down) then they face removal. It seems doubtful that the policy was indeed intended to have this effect; it seems not to have been thought through to its inevitable conclusion.

It is already the case, as seen in the work of the Home Office's Case Resolution Directorate, that where a person has had temporary admission (for example as a person seeking asylum) for a considerable period, or even where the person has been in the UK for a lengthy period with no leave at all, for example as an overstayer, Article 8 of the European Convention on Human Rights will be a factor to be considered in deciding whether or not to remove. Given that Article 8 is relevant in such cases, how much more so when the person has had leave within the immigration rules for many years and the only reason that they face removal rather than being allowed to settle is that they have been unable to pass the knowledge of life or language in the UK test? As ILPA has previously stated, the provisions will increase the numbers of Article 8 challenges. The government is also consulting on provision of teaching of English as a second language (ESOL); current provision is inadequate. ILPA urges that the requirements for settlement be relaxed.

Responses to questions.

Chapter 1

1. **Do you think there should be a requirement for spouses to demonstrate knowledge of English before they enter the UK?**

No. These proposals would place additional restrictions upon the capacity for non-EEA foreign spouses to enter the UK in order to join their British partner. While the consultation paper seems to envisage applications only from newly-married couples, that is not always the case; it could equally affect a couple who have been married for years. The proposals would constitute an interference with the Article 8 right to respect for private and family life and in certain circumstances Article 12 (right to marry and found a family) of the European Convention on Human Rights.

The stated reasons for the proposed interference are to further the objectives of assisting integration, improving employment opportunities and highlighting the importance of English language ability in both cases. It is necessary to show that the measures will indeed promote these objectives. Precluding the entry to the UK of a spouse from a country or situation where English is not spoken does not assist the spouse to integrate or to access employment opportunities in the UK. Indeed, it does not assist that spouse to learn English.

Even if the objectives are held to be legitimate and the measures held to promote those objectives, the question of proportionality will arise. An assessment of proportionality involves considering whether:

> "*(i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.*"[1]

ILPA agrees that knowledge of English is valuable for those living in the UK but does not consider the proposed response to be proportionate. If spouses are not permitted to come to the UK because they have not passed an English language test, this could be considered unjustifiable discrimination and interference with enjoyment of the right to private or family life, under Article 8 ECHR as the lack of English could not be considered a proportionate reason for keeping a family apart (thus risking a breach to the right to family life) or requiring the UK based partner to leave the UK so that the family could be together (thus risking a breach of the right to private life for that individual and of family life where that individual has established family life with family members in the UK).

Restrictions on the right to marry were found to be unlawful in the case of *R(Baiaiv SSHD)*[2] and ILPA is concerned that a further set of restrictions is being proposed while that case, which looks at the extent to which interference can be justified and how the need for interference should be evidenced, is pending before the House of Lords.

Under the current law, spouses who wish to settle permanently in the UK must satisfy a language test. This constitutes an interference with their Article 8 rights in precluding permanent settlement or naturalisation until the language test is satisfied, as discussed above. The principle that the interference should be no more than is necessary to accomplish the objective would require it to be demonstrated that the tests achieve anything over and above the existing tests, applied when a person is the UK and can thus benefit from any measures taken by the UK government to promote the learning of English. The UK government has accepted obligations under European Union law that mean that EEA nationals are not obliged to meet any language requirement. The objectives of integration and employment access are no less significant for EEA nationals, and some of these nationals may well have little or no English. That the government is prepared to live with obligations that preclude imposing the test on them militates against arguments that the measures are necessary for non-EEA nationals.

The requirement to pass a test before being allowed to come to the UK would be discriminatory and cannot be objectively justified, thus engaging Articles 8 and, in certain circumstances, 12, of the ECHR read with Article 14 (prohibition of discrimination in respect for rights under the ECHR). The proposal will give risk to a risk of discrimination between nationalities, genders and races, as some would be able to meet the requirement very much more easily than others. The interference with private and family life caused by these proposals is likely to be caused to spouses of particular national origins. It may also be that women will be disproportionately affected as compared to men in that the lack of educational or other socio-economic opportunities for girls and women globally means that there would be less prospect of their having had access to English language teaching or usage and age may also be relevant to access to education, giving rise to questions of age discrimination.

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[1] *per* Lord Steyn in *R(Daly) v SSHD* [2001] 2 AC 532, paragraph 27
[2] Baiai and others v SSHD [2007] EWCA Civ 478

Spouses from a country where English is a national language will have an inherent advantage in meeting the English language requirement. Others, including those from countries from which the largest number of spouses currently come, Pakistan, India and Bangladesh, will have an inbuilt disadvantage. While those who have had higher education in one of those three countries are likely to have had some of their education in English, those who have not, or who have lived in rural areas, are unlikely to have learned English. They are also likely to have the greatest difficulties in accessing English language teaching and to be able to follow any distance-learning courses. Fewer women than men have access to education and the chance to learn English. The proposal will be racist in effect even if not in intention, will impact disproportionately on people from different communities and could lead to legal challenge, under the principles of the *Prague Airport* case.[3]

ILPA asks for clarification of paragraph 1.12 in relation to the dependants of recognised refugees. We ask for confirmation that the requirement would not be imposed on those accepted on resettlement programmes and for family members applying for entry clearance to join someone who has been recognised as a refugee or granted humanitarian protection. It would be contrary to the UK's obligations under the 1951 UN Convention Relating to the Status of Refugees to keep a person recognised as a refugee and unable to return to the country of origin apart from family members. It would be contrary to the UK's policy on those granted humanitarian protection to keep a family apart on this basis. Family members of refugees and those granted humanitarian protection may also themselves be at risk. Moreover, where there is no possibility of the family being reunited abroad it would be a disproportionate interference with the right to family life to require members abroad to learn English before they can be reunited. Family members in a refugee camp abroad, or facing persecution and conflict, will have little opportunity to learn English. ILPA awaits confirmation from the Home Office that the omission of a specific reference to refugees' dependants was an oversight and that no language requirement will be imposed on them.

The UK has already increased the requirements for people travelling to the UK to settle on grounds of marriage, by raising the entry clearance fee to £500 in April 2007 and again to £515 in April 2008, by raising the age to 18 and proposing to raise it to 21[4], all making it more difficult for people to come to the UK.

The document is premised upon increased knowledge of English benefiting UK society. This is a reason for the UK to put resources into the teaching of English and the subsidising of learning the language.

In summary, while ILPA does not oppose the overall objectives of encouraging people settling in the UK to learn English ILPA is opposed to proof of competence in English being made a mandatory requirement. A spouse or fiancé(e) should not be barred from joining a partner in the UK for language reasons. This is neither proportionate nor necessary in a democratic society and is instead an unjustified interference with rights to private and family life. The objectives are couched as aimed at improving the circumstances of the spouse and family, as well as wider UK society, yet by making the requirement mandatory the spouse and family are unable to make their own decision as to what will improve their circumstances.

[3] *R (on the application of European Roma Rights Centre and others) v Immigration Officer at Prague Airport* [2004] UKHL 55

[4] ILPA responded to these consultations and our responses, ??? are available on request

2. **Do you think the three objectives behind the introduction of a pre-entry English language requirement are well-founded?**

ILPA considers that all these objectives will be met more fairly and effectively by providing more teaching and support within the UK after people arrive, and ensuring that the communities where many people manage without much English are targeted for further language training.

The UK is in a position to support provision of English as a Second Language (ESOL) teaching in the UK and to identify groups who should benefit from a waiver of fees for such teaching, as discussed in the current Department for Innovation, Universities and Skills consultation *Focusing English for Speakers of Other Language (ESOL*) on Community Cohesion. Changes in the funding for ESOL courses in an attempt to press employers to do more for their employees evidence the government's premise that this is beneficial to work. It is also of course easier to learn a language when it is being heard and used in society around one. It is therefore more sensible to increase language teaching and learning provision in the UK and than to impose mandatory requirements including pre-entry requirements.

One way of increasing the likelihood of people learning a language is to make it easier to do so immediately on arrival. 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. If it is not possible financially to learn 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.

Chapter 2

ILPA's expertise is in immigration, refugee and nationality law rather than language teaching. We have therefore not responded in detail to questions about the practicalities of taking a test abroad, which we oppose. We are most concerned about the unfairness of the test, on race and gender grounds, and we can see no adequate justification for this. 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.

The concept of a *Living and working in Britain* booklet has been mooted for a long time by UKvisas and the Border and Immigration Agency but has not been produced. ILPA urges that if the idea for such a booklet is to be resurrected and a booklet written, the Advisory Board on Naturalisation and Integration should be involved in its production from the beginning. Its improvements to the *Life in the UK* book for those taking this test for naturalisation and now for settlement were very welcome, making the book more accessible and easier to read and understand at the level of language required. Having people who are specialists in language teaching and learning involved is vital, so that the concepts of immigration law familiar to those writing it, and other useful information, are put in a way that is simple and comprehensible at the level of language mentioned. Comments from other organisations involved in language teaching and in helping integration should also be actively sought before considering implementation, such as NATESLA, the Equalities and Human Rights Commission, and relevant community groups.

If contrary to our arguments, the Home Office decides to go ahead and to impose a test, the test should be set at the simplest level. We do not support a mandatory test for anyone, but, if a mandatory test is imposed, there must be exceptions including for those with mental health problems, physical impairment or disabilities making it harder to succeed. Even in the UK it can be very hard for people with a particular physical disability e.g. partially sighted, blind, deaf - to access language training which meets their needs and if there is no such specialist training available the person would be still more profoundly disadvantaged.

As set out above, ILPA considers that the current mandatory life and language in the UK tests prior to settlement impose too high a penalty on those who cannot speak English, especially given that there are difficulties in accessing language training, in particular in accessing free of charge. For the same reasons as ILPA opposes a test at the ILR stage, it opposes a test after a short time in the country, albeit that both are less of an interference with private and family life than a test prior to entry.

Chapter 3

ILPA does not have expertise in the area of language teaching and learning and so is not responding in detail. No detail is given in the consultation paper as to whether that the BIA/UKvisas are in discussion with overseas governments and others and with the British Council to assess the feasibility of providing teaching to support a test abroad.. ILPA reiterates our view that the costs should be met by the UK, not by the individuals concerned, who already have to pay a substantial fee fo their application. Similarly, sponsors in the UK or their families, who already have to show that they are able to support and accommodate the person coming, should not be required to pay language schools abroad, or to buy materials to post abroad. The flourishing of new language schools in the UK, guaranteeing passes to another ESOL level in connection with the expansion of the Life in the UK test to settlement as well as for naturalisation, is a cautionary tale about the difficulties of regulation and about how people may be charged huge sums for inadequate teaching.[5] Even if this were the best way forward, ILPA cannot see a way in which having to pass a language test abroad could ever be done from a level playing field, and therefore not raise questions of unlawful discrimination.

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[5] There are reports of £1800 paid for a 'guaranteed pass' in Birmingham, and sums of £250 sent by post to a 'college' which promised a certificate but turned out not to exist.