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

On 7 March 2006 the Government published its proposals for a new points-based system for managing migration *A Points-Based System: Making Migration work for Britain* (CM 6741), following its consultation *Selective Admission: Making Migration work for Britain.* The ILPA response to the original consultation can be found on our website. This note provides a summary of our initial views on the published scheme, using the headings set out in the document.

**Architecture of the new system**

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- The document is the expression of an aspiration for a points-based scheme rather than a description of such a scheme, with, for example, the criteria for an application and for the award of points as well as the duties on sponsors, as yet undetermined.

- Where there is detail this serves to confirm that, as we anticipated, the scheme will still involve substantial exercise of judgement by those determining applications. We are not in a brave new world of merely ticking boxes. We reject the assertion that performance under the current system is no indicator of the success of the proposed system: UKVisas' ability to deliver sustainable decisions and to try to ensure consistency of quality across posts are at issue in both. Difficulties posts have in dealing with their existing workload, the problems of management at a distance, and the difficulties of communicating with posts abroad, which are both technical and due to a culture not always receptive to such communications, all reduce confidence in the proposed system.

- The proposed "administrative review": an internal reconsideration by a senior manager, is a manifestly inadequate substitute for a right of appeal against a wrong decision. We have been unable to identify ways in which such a review would differ from the internal reviews that are supposed to happen now, according to the guidance for Entry Clearance Officers, the Diplomatic Service Procedures and which, with applicant success rates on appeal running at 53% last year (and much higher for certain posts and categories), have failed to improve quality and consistency.

- A glimmer of hope was offered during parliamentary debates on the Immigration, Asylum and Nationality Bill on 14 March 2005 when the government Minister acknowledged that *"there may well be good reason for a person outside the management chain to be involved, whether at regional or national level"1[1]* Review external to the decision-making post is a minimum requirement for consistency, fairness and the appearance of fairness.

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1[1] *Hansard,* HL Report, 14 March 2006, col. 1167, Baroness Ashton of Upholland

- The proposals for administrative review run counter to general government policy. The DCA (Department for Constitutional Affairs) White Paper *Transforming Public Services: Complaints, Redress and Tribunals* ((Cm 6243, July 2004) states:

  ***"Complaints to departments and agencies***

  *3.12 What can an individual do? The first and most direct remedy is to dispute decisions directly with departments and agencies.*

  *3.13 But in a democracy ruled by law, and under a government committed to high quality and responsive public services, simply appealing to a department's sense of fairness is not, and never has been, enough. There has to be redress beyond the department"*

- During the debates in parliament on 14 March 2006 the Minister indicated that the review would not, as the Command Paper suggests, be confined to factual matters. However, she confirmed that current thinking was, as suggested in the Command Paper, that there would be a decision on whether a person was entitled to a review, prior to that review being undertaken2[2]. This would be inefficient and likely to lead to delays and injustice. If a person's grounds for challenging a decision are weak or non-existent, the review should be a straightforward matter. Given this, why waste resources on a triage system seeking to block their right to the review, especially when this decision is to be taken by the very department, perhaps the very individuals, whose decision it is sought to challenge? In these circumstances, justice is neither done nor seen to be done.

- Architecture is one thing: constructing a building is another. The document says that the government does not underestimate the IT requirements needed (para. 162). Demands on infrastructure can be identified across the board. The National Audit Office's report *Consular Services to British nationals3[3]*, while not directly addressing the visa system, provides a useful insight into the pressures on the infrastructure of posts.

- Reference to the scheme's being self-financing (para 157) raises the spectre of those companies and institutions wishing to bring migrants to the UK funding a costly bureaucracy

**Sponsorship**

- We are told that universities will make decisions about whether a course is suitable for a particular applicant, employers about whether an applicant is able to do a particular job (paragraph 58). All well and good. However, the document then describes how decisions on, for example, the standard of English of the employee, will be taken by employers or operators, "*overseen*

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2[2] *Hansard* HL Report, 14 March 2006 col 1167, the Baroness Ashton of Upholland

3[3] HC 594

*by compliance arrangements for sponsorship"* (paragraph 123). It is impossible to determine from the document the nature and range of obligations on sponsors.

- It is impossible to determine the extent to which *"compliance arrangements for sponsorship"* will involve second-guessing sponsors' decisions, including the possibility of retrospective assessment that their procedures were not adequate and punishment on that basis. If this is so, all questions of subjectivity re-enter the scheme, they are simply displaced into the compliance arrangements for sponsorship. For example, if an employer says that s/he has advertised a job, will this be cross-checked, if so how, or evidence required, as in the present work permit system. What will happen if it is considered that the job was advertised in an inappropriate place. What penalties apply if the sponsor is found to have been negligent or acted in bad faith, or if the government otherwise disagrees with their assessments?

- Prior to removal from the list of approved sponsors there is an opportunity to make representations, but no indication is given of any form of review or redress available to a sponsor whose decisions are questioned in other circumstances. What redress will there be for a sponsor wishing to challenge his/her grading, with all the commercial disadvantages, from reputational risk to inability to recruit desired staff, that the grading entails?

- The paper describes a sponsor's rating as "an expression of their track record in sponsoring migrants" (before para 55). Although not stated in the paper, we understand from meetings on the points-system4[4] that new sponsors will enter the system as a probationary grade A (top rating). This would appear to us essential given that there is no centralised record of compliance of sponsors to date. However, the document fails to explain how the system will avoid favouring those who bring in large numbers of people given the references to track record (para. 66). It will be vital that the sponsor is not punished for matters outside their control.

- The suggestion that sponsors might want to offer advances of salary so that an employee can demonstrate available funds, or that employers and educational institutions might pay an application fee, in addition to taking insufficient account of financial realities, could give rise to complex contractual problems as to the employer/employee relationship prior to the commencement of work.

- A person coming under the points based scheme will not be allowed to extend his or her stay in the UK as a visitor (paragraph 39). We see no scope for workers to take a holiday in the UK, or simply stay to tidy up their affairs, at the end of their contract. Why should an employee not be able to stay for a few months at this time? But equally, why should the employer be liable for them when they have left the company or organisation?

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4[4] A meeting between the Minister of State and representatives of the Chinese community on 14 March 2006, note from Christine Lee Solicitors, and a presentation by Ministers at a stakeholder event on 20 March 2006.

**The five tiers**

- The document describes five different tiers within the system, each providing a route of entry. It is unclear how the system will cope with highly skilled individuals who do not earn high salaries nor have academic qualifications.

**Tier 1 Highly skilled migrants**

- This deals with highly skilled migrants who will be allowed to change employer and also contains special streams: a post-study route for those who have studied at UK institutions and an enterprise category for those intending to establish themselves in business, innovators or those with substantial funds to invest.

- It is unclear how the system will cope with highly skilled individuals who do not earn high salaries nor have academic qualifications. There does not appear to be equivalent under the scheme of the "significant achievement" criterion used for the existing Highly Skilled Migrants Programme. Among those we find difficult to place in the new system (whether in Tier 1 or Tier 2) are chefs specialised in different ethnic cuisine and artist, writers or actors (other than those commanding substantial sums

- This is the only tier for which one does not need a sponsor, and therefore would appear to be the only tier accessible to sole traders or companies starting up or wishing to expand into the UK. We are concerned that there will be companies or sole traders in this position who do not meet the Tier 1 criteria, but who wish to work or build a business in an area identified as a shortage occupation under Tier 2. These could include individuals and companies from a wide range of trades and professions. The UK needs their skills, but it is unclear how they get in. It is unclear how the system will deal with sole traders or companies starting up or wishing to expand into the UK, because of the centrality of the sponsor to the system.

- Experience of the highly skilled migrants programme to date suggests that self-assessment is no simple task, with self-assessment, assessment by the Entry Clearance Officer and assessment on appeal rarely matching up. The Command Paper expresses an aspiration to tackle this, but offers no reassurance that it is achievable:

  > *"To achieve this we intend to write descriptors for each of the criteria…the descriptor needs to be clear and transparent while providing a framework to allow decision-makers to exercise judgment in the individual case. Drafting these descriptors is a challenge, and will take time to get it right"* (paragrapghs 50-51)"

  This does not make clear how the new system will deal with *varying assessments of documents submitted by applicants nor the way in which they assess whether a document is a forgery, and evidence that assessment, both problems under the current system.*

**Tier 2 Skilled workers with a job offer**

- Tier 2 deals with high or medium skilled workers with a job offer, where advertisement has failed to identify a person from the resident labour market to do the job or where a general shortage of people to do the job has been identified. The worker must have a job offer from a UK sponsor. Inter-company transfers are also dealt with under this tier.

- See our comments on sponsorship above.

- See our comments on Tier 1: again, the focus on academic qualifications and salary would appear to replicate the risks identified above. We are encouraged by the note that skill and salary attributes will be adjusted to ensure that specialist categories such as Ministers of Religion will qualify (para. 95) and suspect that there will be considerable adjustment to be done to ensure that the system does not exclude a range of skilled workers whom the UK needs. We are pleased that the document recognises the importance of identifying shortages in particular regions of the UK, as well as at national level. Such adjustment however does imply a more complex system, strengthening our concerns about quality, consistency and oversight of decision-makers

**Tier 3 Low-skilled migration**

- This Tier is concerned with low-skilled workers in shortage occupations coming to the UK on quota based schemes run by "operators". Such workers will not be able to qualify for settlement.

- The notion that an individual should be prevented from coming to the UK because the UK does not have effective returns arrangement with his/her country, when there is no evidence to suggest that the individual in question is not going to comply with conditions of leave, raises a real prospect of discrimination on the grounds of nationality.

- We find it impossible to square plans for this tier with the Home Office's work on human trafficking, which is the subject of an ongoing consultation – as set out in *Tackling Human Trafficking*. Cutting off all legal routes of migration from a particular country increases the risk of drawing people into the illegal, underground sector, and of their exploitation through forced labour. Morecambe Bay provided ample illustration, if such were needed, of what can and does happen across a range of industries.

- The consultation asked questions on "operators" bringing in low-skilled migrants and about the division of responsibilities between operator and employer, yet the Command Paper is wholly silent on operators. Who will they be? If they are companies based abroad, how will any responsibilities placed upon them be enforced against them? In an effort to combat labour exploitation, the government passed the Gangmasters Licencsing Act. It would be helpful to understand how the proposals for operators link with the way in which gangmasters are to be regulated. In particular, how will the government guard against corruption and exploitation by operators, and how will it negotiate the complexities of sub-contracting in determining responsibility?

**Tier 4 Students**

- This tier addresses students.

**Tier 5 Youth mobility and temporary workers Students**

- This Tier is primarily concerned with those coming for short periods and/or whose presence contributes to cultural, charitable, religious or international objectives. There is no route to settlement for those who come. Little detail is provided.

- We are concerned that some groups have been assigned to this tier when only some of their members fit within it. For example entertainers or other creative artists. Some may be coming for a maximum of 12 months, but others may wish to make the UK their base. It is unclear where such people fit if they do not have the academic qualifications or earnings to qualify under tier 1. Similarly with religious workers other than ministers of religion.

- For youth mobility the same concerns arise as under Tier 3. An individual may be penalised for the attitude of his/her government and immigration risk (presumably determined on the basis of the behaviour of some of his/her fellow nationals) (see para. 139). This risks discriminating on the grounds of nationality.

- Concern has long been expressed about discrimination against certain nationalities in the current Commonwealth working holidaymaker scheme. The reference to a cap on total numbers, 'based roughly on the number of people entering through existing schemes' (para. 145) gives rise to fears of a risk of further institutionalising that discrimination. Outsourcing the vetting of such young people to the government of their country (para.144), could also lead to further unfairness, as governments may use different criteria for allowing their citizens to leave, or gaining assurances or commitments from them about their future intentions.

**Omissions and other groups**

- No mention in the Command paper of a range of significant categories of migrant: retired persons of independent means, and sole representatives.

*Domestic workers*

- No mention is made of domestic workers in the Command Paper save a reference to *"servants in diplomatic households*"(para. 155) who are covered by international agreements.

- NGOs working to protect the safety and rights of those exploited through domestic slavery have now been told by officials working on the points system that domestic workers who accompany their employers to the UK must either qualify as part of Tier 2 (which few will do, since this requires that you have an National Vocational Qualification (NVQ) at Level 3 or equivalent) or will be given a maximum of 6 months leave, which cannot be

extended. The idea is that the employer will then recruit a replacement domestic worker from the resident labour marker, and the original worker will go home.

- In practice, the proposal will mean that domestic workers go underground. Overseas domestic workers are very vulnerable to exploitation in their employment. They have often borrowed large sums to migrate to take up employment and have to work for years to pay back the initial investment and interest on it.

- Domestic slavery is an abuse that takes place behind closed doors: victims are hidden, isolated and exploited. Without rights to change employer, or even to extend their stay with an existing employer, and with no route to settlement, the government proposals will put domestic workers at even greater risk of such exploitation. What incentive will there be for an employer to pay an employee properly, or treat them properly under the proposals?

- The approach runs wholly counter to the Home Office position in *Tackling Human Trafficking - Consultation on Proposals for a UK Action Plan* and to past Home Office provisions to offer protection to domestic workers, culminating in the introduction of a category in the Immigration Rules in 2002. The important point of those reforms was to break cycles of abuse by allowing overseas domestic workers to change employers.

- As a footnote, we observe that members know of instances of highly skilled individuals changing their decision as to whether to come to the UK when their domestic worker was refused entry clearance. Many of these individuals are highly sought after, they can take their pick of countries in which to work. Not to be allowed to bring the nanny who has been with children all their life, or a domestic worker who has been part of the household for many years, has proved for some to be a decisive factor in rejecting the UK as a destination.

For further information on ILPA's work on the points system please contact Alison Harvey, Legal Officer, alison.Harvey@ilpa.org.uk on 0207 490 1553