ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

Managed Migration
Customer Services Team
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Dear Sirs,

RE: SELECTIVE ADMISSION: MAKING MIGRATION WORK FOR BRITAIN

Please accept this letter as ILPA's response to this consultation.

ILPA is a professional association with some 1200 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 high quality resources and information. ILPA is represented on numerous government and appellate authority stakeholder and advisory groups.

ILPA members see a wide spectrum of work on immigration and employment. Members practising in business immigration represent employers seeking to bring workers to the UK/employ those under immigration control and people wanting to migrate here and start businesses. Other ILPA members also work with employees/would-be employees abroad or in the UK and subject to immigration control.

Our response is set out below, (using the same paragraph numbers as appear in the original document). We ask that the following be taken into account as part of our response to all questions:

Many of the questions appear to us to be predicated upon respondents having more information about the proposed design of the new Managed Migration System than has yet been made available. Without detailed information regarding the qualifying criteria for the five tiers of the new system it is impossible to respond to questions asking us to evaluate the likely success of the new system or its likely impact on both UK business or migrant groups.

The UK is privileged that businesses invest in this country, attracting exceptionally skilled workers and bringing financial benefits to our economy. The UK has also benefited enormously

from its ability to attract overseas students to study in its universities and colleges. The proposals set out in the consultation need to be seen in this wider context. The proposals in the Immigration, Asylum and Nationality Bill 2005 to remove appeal rights against refusals of entry clearance and to deny in country appeals to those who seek to vary their leave will, in our view, undermine the goals of the Five Year Plan to produce "migration for work through a flexible system that is employer-led and responsive to market needs". The proposals in the "Employment" section of the Bill will also affect employer's attitudes to employing people who are not British Citizens. The final shape of the Bill will affect the government's ability to deliver on the Five Year Plan and also responses to the questions below.

General

1. ***Do you agree that the benefits of migration outweigh the costs***

   Yes.

2. ***Can a Managed Migration System be used to deliver the UK the workers it needs?***

   Yes – unless a Managed Migration System can effectively meet this objective it is failing the UK economy and one of the primary functions of any Managed Migration System. a managed migration system must consider the rights of migrants as well as the need the UK has for workers. Migrant workers have families and are community members too.

3. ***Is the current system too complex and bureaucratic?***

   Overall, no – from a representative's point of view the current immigration system for those coming to work is as complex as it needs to be to meet the diverse and changing needs of the UK economy and to make use of the skills and experience of overseas nationals. We should welcome knowing what research has taken place to ascertain the views of applicants and other users of the system.

   An employer or applicant will have ideas about what s/he wants to do and where there is a category that provides the best fit this will be seen as the most simple, even if has taken some time to locate it. Complexity from the point of view of the individual often arises where it is necessary to rethink aspirations to fit into one of the existing categories.

   This is not to deny that there is scope for improvement. Overall the system of immigration law is complex: it is, for example, not straightforward for an employer to establish who already within the UK has the right to work, or to see the system whole. We welcome the Minister's comments during debates on the Immigration, Asylum and Nationality Bill 2005 on the need for consolidating legislation. There are individual requirements that do appear to us to be unnecessarily bureaucratic, for example the requirement that those with work permits who change their jobs also have to obtain fresh leave to remain after their employers obtain new work permits. There is no doubt that the presentation of the system could be made less complex by strenuous efforts to consolidate, and there are always details to refine, but this should not be confused with the complexity or otherwise of the system for bringing people to the UK to work.

   For example, the present Work Permit scheme, implemented in 1973 and subsequently refined, enables UK businesses to employ key foreign employees and is probably the most efficient and effective employment-related immigration scheme in the world. It is employer-led, and accessible. Work Permit applications are processed by teams of highly trained caseworkers based at Work Permits (UK) in Sheffield. The scheme is

continuously monitored and updated, and operates a range of employment streams based on labour market analysis and sophisticated expertise. The average turnaround time per application is 4 to 6 days and urgent applications can be dealt with in 24 hours. By comparison, the average turnaround for employment approval in the USA is 25 days. Essential to the scheme is the employer's ability to liase with decision-makers throughout the process and to request a review of refusal decisions.

Based upon the information available, the proposed system is based upon an oversimplification of the diverse and continuously changing needs of the UK economy and an oversimplification of the factors involved in the decision-making process.

The appeals provisions of the Immigration, Asylum and Nationality Bill 2005 are examples of purported simplification threatening to introduce complexity. It is much simpler to have an in-country right of appeal against a refusal to vary leave, with studies, employment or business continuing, as now, until that appeal is determined, than to have people forced to leave the country, with the ensuing disruption, before they can appeal. It is simpler to make provision for an in-country right of appeal than to have variation applications presented as human rights cases, including subsequent challenges in the high court to human rights cases certified as clearly unfounded, or to see interventions by MPs and other such routes used to challenge decisions.

4. Should the users of the system or the taxpayer or both bear the costs of the migration system?

We consider that both the user and taxpayer should meet the costs of a managed migration system. The migration system benefits the country as a whole; we have an interest in people coming here. We emphasise that users of a managed migration system, including employees and employers, are also taxpayers. See our responses to questions 1 and 2 above. Society benefits from the skills and experience of overseas nationals both in terms of diversity and of the economic benefit and there should, therefore, be a sharing of costs between both groups. Any fees payable by individuals must be reasonable and should not be greater than the costs of dealing with their application.

5. Do you think we should introduce these changes in a phased manner? If so, which bits do you think should be implemented first?

This question asks when the changes should be implemented, before asking respondents to comment on these particular changes. As noted above, there is insufficient detail available on the changes under discussion.

ILPA has substantial concerns regarding the root and branch nature of the changes proposed as well as the planned new procedures for assessment of applications.

Some matters must be addressed prior to any implementation. It is vital that resources, human and financial, are identified prior to implementation and that training needs are addressed.

We note the Minister's comments in the Standing Committee on the Immigration, Asylum and Nationality Bill 2005 on the need for consolidation. Consolidation of statutes, regulations and rules prior to any implementation would greatly assist in ensuring that those involved in the system were able to see it whole.

We would advocate that any changes to the Immigration Rules be pilot- tested. We suggest a pilot that looks at all applications going through the current system and being decided under the Immigration Rules. Thus while cases would continue to be decided under the existing system, it would be possible to make shadow decisions applying the new system to see how the new proposals worked.

We would also strongly advocate that the new system be tested through the existing Home Office facilities and Work Permits (UK) in Sheffield. The team in Sheffield is already skilled and experienced in assessing qualifications, experience and UK labour market conditions. Entry clearance officers overseas have no such knowledge or experience. They are also working in relative isolation, rather than alongside others grappling with the same new provisions. To roll out a new system to entry clearance officers without having tested the system in advance is likely to lead to substantial disadvantages and to inappropriate refusals of applications.

If ECOs are to be involved, there will need to be demonstrable improvement in the quality of ECO decision-making prior to any pilot. One way of testing this is to examine success rates at appeal in those cases where there is a right of appeal and we should recommend that there should be no question of further removal of appeal rights (i.e. no implementation of provisions proposed in the Immigration, Asylum and Nationality Bill) during the period prior to roll out, as success rate at appeal will be one objective test of whether quality and consistency of ECO decision-making has improved.

We strongly recommend that all overseas nationals making an application for leave to enter the UK under the new managed migration scheme be given appeal rights. Without effective appeal rights it is feared that the quality of decision-making will be both inferior and unmonitored. An appeal system provides effective checks and control against incorrect refusals and ensures the effective operation of the managed migration scheme as a whole. People who apply for entry clearance sponsored by employers who were, unbeknownst to them, cause for concern, risk being unjustly prejudiced in the future, without their knowledge, and appeals are one safeguard against this.

We have considered carefully the Annexe A *Work Underway to improve quality of decision-making* to the Minister of State's letter of 18 October 2005 to Dr Evan Harris, MP (Immigration, Asylum and Nationality Bill: Commons Committee) and make the following points.

- The reports of the Independent Monitor for entry clearance applications have identified a range of substantial concerns, including the wrongful denial of rights of appeal. We are concerned at proposals to impose new decision-making duties on posts while substantive work is ongoing to improve the quality of decision-making. Doing everything at once risks doing nothing well.

- ECOS are likely to require substantial training on the new system prior to any roll-out. There should be training prior to a pilot, and then further training developed in the light of the pilot. The five-day Immigration Officer ECO Conversion course and the three-week ECO course are described in the paper. These will need to be supplemented prior to any roll-out of the new system. The ECO course at the moment is more focused on process than substantive content and will thus not serve as an induction course for the new system.

- The full network of Regional Managers should be in place and their work having been subject to appraisal prior to implementation. The results of the appraisal of the network should be made publicly available prior to any implementation.

- Results of the trialling of pre-decision review by ECMs in Mumbai should be published prior to any implementation.

- The Annexe states that a temporary staff member is collating and analysing success/failure rate at appeal. We would suggest the need for a permanent mechanism to strengthen and maintain the "dialogue with immigration judges" over the quality of refusal decision in cases that attract a right of appeal. The results of this and of the mechanism to provide regular feedback from Presenting Officers on the quality of appeal preparation should be publicly available prior to any implementation.

- The results of the DCA study of quality of end-to-end decision-making should have been made available and reviewed prior to any roll-out.

- We should appreciate more information on the new ECO support helpline and the resources being channelled to this.

- Information and evaluation of Risk Assessment Units and Best Practice Reviews should be made publicly available prior to any implementation of new schemes.

While confidence in the quality of ECO decision-making on their current and long-established caseload is so low, it is difficult to envisage any confidence from employers, would be employees and business people, students, practitioners and others in giving them an enhanced role.

6. **Could the proposals to develop a new points based system affect some groups of migrants more than others? If so, which groups and why?**

Yes. As mentioned above, until more detailed information with regard to the criteria of the new five tiers is available it is difficult to comment in relation to groups of migrants likely to be affected as we are unable to identify which particular migrants who qualify under the current Immigration Rules would not qualify to come to the UK under the new scheme.

Any proposal to exclude from the new scheme categories such as domestic workers, low skilled migrants or people of UK Ancestry would clearly result in these groups being more affected than others.

There are existing inequities in the system. See for example Qayum and Chatwin *Working Holidays for All?* Legal Action, August 2002, page 9, examining different success rates by race in applications for working holiday-maker visas. None of the details presented indicate how the new system will address these inequities.

We have expressed concern at the potential oversimplification of the system. There is a real risk that people who do not fit into nice, neat categories, despite the overall strengths they could bring to the country, will be disadvantaged.

Not only migrants will be affected by the changes. It is likely to be employers who suffer greatly from the proposed new system, as the lack of certainty and the lack of direct

contacts with a UK based processing facility (currently Work Permits (UK)) is likely to mean both delays and greater difficulty in processing of applications.

ILPA would urge consultation on any specific category or concession which is likely to be lost or severely restricted as a result of the new system.

Confidence in the scheme, which is essential for its success, will only be obtained if appeal rights are maintained, and if monitoring of appeals, reviews of decisions and other efforts to improve quality take place.

7. Do you agree that the objectives of the Managed Migration System should be focused primarily on economic benefit to the UK?

ILPA would agree that the objectives of any Managed Migration System for work should include economic benefit. Securing economic benefit is a complex matter. Any Managed Migration System should include in its objectives social inclusion, right to family life and culture and skills exchange. These are likely to be important elements in ensuring economic benefit. They should also be recognised as primary objectives because they benefit not only the economy but also society in the contribution they make to integration, which has implications for matters ranging from competitiveness, to respect for human rights, to safety and security.

Many expatriate assignments collapse because of the lack of family settlement. Protection of rights of family members to come to the United Kingdom, with corresponding access to the labour market), is essential to ensure the success of expatriate assignments and minimise cost to UK employers and business. In addition the ability to maintain contact with family members abroad may be integral to a successful placement, for workers, students and others.

High net worth individuals may be reluctant to come to the UK if they cannot ensure continuity of care for their children, by bringing an existing nanny with them. There may be similar concerns about leaving behind other domestic staff.

Proposals in the new Immigration, Asylum and Nationality Bill that could limit rights of appeal against refusal of family visits to cases where the person to be visited was settled in the UK risk compounding these difficulties.

Employers who cannot be certain of ready access to workers and of the successful duration of expatriate assignments may consider relocation overseas. ILPA members have direct experience of clients who have relocated to other countries in Europe because of specific problems in relation to this issue.

Benefits, both economic and social may be seen in the short term or the long-term. Students bring some short-term economic benefit: they pay fees and for accommodation and live in the UK, spending here. However their greater economic contribution may be in the long term as they move into their working lives whether in the UK or outside, working in partnership with UK companies.

8. If managed migration were intended to meet non-economic objectives what would they be, and how would you measure them?

ILPA advocates for managed migration taking into consideration the promotion of social diversity, social cohesion and inclusion as well as rights to family unification and

reunification. See our answer to the question above – these factors are germane to sustainable economic success as well as important ends in and of themselves.

In addition the exchange of skills and innovation and a balancing of skills drains should be identified as objectives.

9. How would you rank the proposed tests for the system in order of priority? Please number them below from 1-8?

This question suggests that the criteria may be listed in order of priority. However, all of the criteria listed should have a weighted ranking not a linear ranking. Weighting will differ from category to category. Whatever system is proposed it must meet all of the criteria suggested. For example, there is no point in having a system that is robust if it is not useable. Similarly, a system that is cost effective but is incompatible with the European Community Law would be rejected.

See our comments above on the complexity or otherwise of the system. The assessment of an application involves an exercise of judgement, which in turn requires training, and which needs to be subject to supervision and review. Transparency and objectivity are important goals but the system of assessing applications is not going to reduce to a neat series of tick-boxes.

10. What can we do to make the system robust against abuse, while still benefiting from migrants working and studying in the UK?

This question appears somewhat belated given that proposals to protect against abuse have already been laid before parliament in the Employment section of the Immigration. Asylum and Nationality Bill 2005. In the context of those proposals ILPA has made the following observations, which we repeat here:

- We find it difficult to understand the low level of successful prosecutions under the existing offence (under Section 8 of the Asylum and Immigration Act 1996), and even the level of prosecutions and investigations. While appreciating that it is difficult to secure a criminal conviction, we should still have expected to see more investigations, more prosecutions and more successes. Are sufficient political will and resources being devoted to this area? How many enforcement officers are working on it?

- Attention has been given during debates on this bill to the need for a consolidating act, and we welcome the Minister's enthusiasm for this. It is not merely a matter of employers being clear on their own responsibilities. They also need to feel confident in dealing with people under immigration control. If it were less difficult for employers to understand all the ramifications of current immigration law, it would be easier for them to establish who has a right to work and to have confidence in employing people under immigration control, or recruiting employees from abroad. We fear that the Bill only increases the complexity of the provisions.

- Despite the useful information on the Home Office website, and the employer's helpline, it is very difficult for employers to understand who is entitled to work and who is not. Even where their understanding, based on publicly available information, is correct, they are unlikely to feel confident that it is correct. Employers who take their obligations seriously rely heavily on specialist legal advice (for which they pay). The difficulties are acute for those who are but infrequently faced with employing people from abroad, or

who have small workforces and only occasionally face the question of whether they can employ a person under immigration control.

- The discrimination in employment faced by those who are subject to immigration control or whose name, or looks, makes people think they might be subject to immigration control, should not be under-estimated. Much of the problem is not a question of racism, but a result of having been exposed to the general impression that migrant workers are illegal workers, fear of getting it wrong, and mistaken beliefs about what is and is not permitted. Existing codes of practice have not solved the problem

  - The new provisions attempt to pass the burden of policing immigration control onto employers.

  - The worst employers will not check documents. They will not keep copies. They will not keep any records of employing a person, nor pay tax, national insurance, or the minimum wage. This part of the field is the underground economy pure and simple. The success rate in prosecution to date has been nugatory, even with strict liability. What prospects can the government give us of a better rate of prosecution under the new offence? What evidence can they offer that they will achieve this?

  - Employees who do not have the right to work, who perhaps do not even have leave to be in the UK, are very vulnerable. They fear, correctly, for the most part, that if they approach the authorities they will be made to leave the UK/or be detained and this results in their uneasy collusion with the exploitative employer who can deny their rights and damage the labour market with relative impunity. People who, although entitled to work, cannot find legitimate employment, because no one will employ them, are similarly poorly placed to report exploitative employers to the authorities. The risks associated with discrimination affect not merely the individuals concerned, but also the labour market as a whole.

  - We are wary of civil penalties, which provide less protection for individuals subject to them than the criminal law. We have sympathy with the view expressed in the CBI briefing that they are likely to be directed at the "low-hanging fruit" and support the view expressed in the CBI briefing, that there are risks of discrimination where employers who wish to comply with the law perceive the risks associated with people under immigration control to outweigh the benefits.

    Work Permits (UK) have experience in conducting spot checks to ensure that employers are complying with their obligations and that workers' rights are respected. Such work is important. A key factor in minimising abuse of the system is to ensure the protection of the rights of migrant workers, without whose cooperation employer abuses will be difficult to detect or rout out.

11. Which of the following attributes do you think are most important for Tiers 1 and 2?

ILPA is strongly of the opinion that the attributes described cannot be ranked in the simple way suggested by the question but must form part of a sophisticated matrix for assessing the ability, skills and expertise of applicants. The aim of minimising subjectivity in decision-making is a laudable one, but it will require a greater level of training and exercise of skill and judgment, not a lesser one. To suggest a linear ranking of the attributes would oversimplify the purpose and intent of the immigration rules and subvert their application.

For example, previous salary is an important factor in some categories but professionals such as commercial lawyers or bankers are paid at higher rates than doctors or teachers, and it cannot be intended as an indication that lawyers and bankers should be given preference above doctors or teachers. Salary may also be affected by national factors in the applicant's home country or country of previous employment.

Equally, salary will be very much dependent on the field in which an applicant has been working: - those working in the commercial sector are paid more than those in the charitable or not for profit sectors. This should not be taken as an indication that the UK only wishes to attract applicants who have been working in the commercial sector nor is it an accurate reflection of the fact that skills are very often easily transferable between the two sectors.

There may also be a conflict between certain attributes. In the consultation document it is stated that age is an important factor when assessing the benefit to the UK economy – but experience may be the reason for recruiting older candidates.

ILPA would urge the Home Office to make its modelling tools publicly available for more detailed consultation.

12. Would the proposed outline design for Tiers 1 and 2 exclude any migrants who enter the UK under current Work Permit and Highly Skilled Migrant Programme arrangements? Should these people be allowed to work under the new system? If yes, please state why you think they should be allowed to work under the new system and how this relates to the objectives set out in Section 5.

Insufficient detail has been given about the qualifying criteria for Tiers 1 and 2 to allow this question properly to be addressed.

In ILPA's view, any such people should be allowed to work under the new system. Continuity and acquired experience and skills must be taken into account, not only in the final design of the system but in designing transitional arrangements. Employers should be enable to preserve existing strengths in their workforce obtained through migration.

13. Do you agree with the proposal for the Skills Advisory Body set out in section 6?

The Skills Advisory Body is not, as far as we can discern from the documents, a new proposal but rather a repackaging of existing arrangements. We should apreciate further information upon the extent to which the proposals envisage the development of a more generalist board, to be able to evaluate concerns that specialist knowledge of particular sectors could be lost.

ILPA would agree that a body to monitor the labour market and report on skills shortages is essential but it is right that it is not the only route to permit workers to come to the UK.

There will be an inevitable timelag between the identification of shortages by a board meeting, for example, quarterly, and the classification of a role as a shortage occupation, and steps should be taken to enhance capacity to predict future shortages in an accurate and timely manner.

There will be niche or innovative areas where the role is so small or so new that the Skills Advisory Body is unlikely to be able to make any assessment.

An important part of the Board's work will be to take into account geographical differences. Shortages of experienced and qualified workers are often experienced in some parts of the UK – especially remote areas – which are not felt elsewhere in the economy.

14. Should employers be able to access migrant labour for non-shortage occupations (i.e. those not identified by the Skills Advisory Body) and what would be the most effective mechanism for doing so?

Yes, for the reasons set out in paragraph 6.12 of *Selective Admission*.

ILPA has already made strenuous representations regarding the need to separate the resident labour market test from the visa application under the existing system. An overseas national applying from outside the UK is in no position to assess the UK labour market in relation to the role in which he wishes to work. However, a refusal of a visa on the grounds of failure to satisfy the resident labour market test would have serious and long term consequences for an applicant (please see our response to question 27 below).

Given the limitations on the identification of shortages through the Skills Advisory Body as noted above,.it is essential that UK employers are able to employ overseas nationals in non-shortage occupation roles.

Whilst not perfect, the current work permit procedure for advertising jobs is largely effective and should be retained.

The ability to obtain a waiver to the usual requirement to advertise as is currently incorporated into the work permit scheme should also be retained. It is inappropriate to require a multi-national company to advertise a specialist role which requires unique proprietary knowledge only available to existing employees of the group before it were able to make an intra-company transfer. Similarly, board level positions are not generally suitable for public advertising. Where technology or innovation new to the UK is concerned an advertising criterion would not be of value and could only delay UK technological advances.

Specific arrangements would also be needed for workers in the fields of sport and entertainment in line with current work permit arrangements.

ILPA is very concerned about proposals for auctions or higher fees. Higher fees would penalise employers in innovative technological areas and also those in the charitable and not for profit sectors. Auctions are wholly inappropriate and whilst penalising the same group would also give rise to an expectation that it is possible to buy one's way into the UK regardless or merits, qualifications and experience. There is also the concern that unscrupulous employers would bid and then sell on employment places.

15. Which bodies or organisations should be involved in identifying labour shortages involving low or basic levels of skills?

As at present but drawing on skills to ensure stronger safeguards against exploitation of workers can be developed.

16. ***There will be a number of responsibilities associated with proposed Tier 3 schemes. Which of these should be placed on operators and employers of low skilled migrants?***

We are opposed to the use of compulsory remittances which create a risk of exploitation and the correct use of which is difficult to oversee. Such systems could be corrupted to undermine adherence to payment of the minimum wage which should of course apply to all those working in the UK, whehter migrants or not.

Responsibility for ensuring that migrants are not working illegally and that they return home at the end of their leave lies primarily with government. Insofar as responsibiltiies are placed on employers in the case of other categories, coherence should be maintained; employers rather than operators should have the same responsibiltiies for workers in this tier.

17. ***Should employers seeking to fill particular vacancies with participants on Tier 3 schemes be required to demonstrate that they have attempted to fill that vacancy with a resident worker?***

No. As we understand it this tier will involve identified shortages in any event. Given that people are coming for only a year and that these are low skilled occupations, it is difficult to envisage that employers would use migrant workers if sufficient labour were available locally. However, one reason for doing so would be on the basis that the migrant workers were easier to exploit, therefore there is a need, if advertising is not required, to ensure that the the pay offered is competitive, and not the main reason for being unable to fill the job.

18. ***Should there be an English language requirement for Tier 3 workers?***

Language will not always be essential to do the job, but ability to speak English can reduce the risk of exploitation. If English is not made a requirement then there should be a requirement on employers to ensure that adequate interpretation and translation facilities are available to enable workers to understand what they are doing,, health & safety, and entitlements such as the minimum wage and with respect to hours of work etc.

19. ***What are your views about what a points system for students might mean in practice?***

Without further details of how the points system is to be implemented in relation to students it is difficult to comment.

A student's ability to follow a particular course should be left to the educational establishment when considering to offer a place. The government has put in place schemes to establish the *bona fides* of educational estalishments. This would appear to be the most effective use of government resources, rather than second-guessing the judgements of tutors working with specialised admissions officers, knowledgeable in the field of study and the establishments from which students come. Any attempt to fetter the abiility of educational establishments to make decisions concerning the selection of students on grounds of ability should be rejected.

20. ***Should leave to enter or remain in the UK for students be linked to a specific course or institution?***

No – provided a student is following a course of study and is able to support and maintain himself in the UK the particular course of study should not be restricted. If a student commences a BA course in archaeology but switches to a BA in history after one term or even follows the same course at a different university it is difficult to see how this affects either his qualification as a student or his financial ability. If the educational establishment has formed a view that the individual is able to do the new course they should be permitted to do so. Students should not be required to obtain fresh leave to remain if they change course within the period of leave granted.

Nor should educational establishments be burdened with a need to report on students throughout the term. Many establishments are not well placed to monitor performance or attendance on a day to day level and even those that do so are usually not able to determine if lack or attendance is due to serious illness or intentional absence

21. Should educational institutions be required to help maintain integrity of the immigration control in order to be able to issue certificates of sponsorship?

Please refer to our reply at question 26 below which substantially repeats this question.

Any attempt to pass on the burden of enforcing immigration control to root out a few bad apples would incur disproportionate costs for educational establishments at a time when the UK has stated its intention to attract greater numbers of overseas students.

It is a common practice among prospective students both in the UK and overseas to apply to more than one educational institution and then decide which offer to accept on the basis of their results or scholarship offers. A student's decision not to accept a particular sponsorship certificate, or even to hold a number of certificates at one time, should not have any negative implication either for the student or the educational institution. Any reporting scheme should build on the means currently used by the educational establishment to assess performance for its own purposes.

22. What are the benefits to the UK of these kinds of temporary/exchange workers in Tier 5?

ILPA is particularly concerned about the existing temporary categories bundled together under this tier.

Business visitors are not allowed to work in the UK but may transact business. This is neither a working nor an exchange category.

The consultation refers to Vander Elst provisions. The Vander Elst arrangements arise from European Union law and not UK immigration law and cannot be revoked or amended by introduction of a points based tier system.

The remaining list of current "temporary/exchange" workers is broad enough to cover a range of schemes from trainee general practitioners to BUNAC students which have very different benefits to the UK society and economy.

The UK benefits hugely from these groups of people. Not only does society benefit from the cultural and language exchange there is an immense resourse of skills and experience that can be accessed through other schemes. In addition the UK benefits

from improved international standing and reciprocity for many of the exchange schemes and the UK economy would doubtless lose out if this reciprocity should be jeopardised.

23. Is it right that the system should provide for them?

See our response to the question above. In the light of the benefits of these workers coming to the UK, any managed migration system should make provision for them. must reflect the benefits referred to above.

24. Should there be provision for tier 5 workers to switch into tiers 1 and 2?

Switching should be permitted subject to satisfying the appropriate criteria. It follows, therefore, that it should not be a requirement of any approval under tier 5 that the applicant should intend to leave the UK at the end of his period of leave to remain.

25. Should additional conditions be attached?

In order to qualify for any switch from within the UK it should be mandatory that the applicant is able to meet the criteria of the category to which the switch is made. Above and beyond these there should be no additional criteria imposed on applicants seeking the new status from within the UK as opposed to those who apply overseas. ILPA would not recommend additional conditions for tier 5 and would in particular oppose the introduction of any bond scheme.

26. Do you think employers, educational institutions and other sponsors have a responsibility in maintaining the integrity of immigration control?

Both employers and educational institutions already play a major role in upholding immigration integrity. Educational instititions already participate in the accreditation scheme and employers ensure that checks are made on the immigration status of prospective employees to ensure compliance with Section 8 of the Asylum and Immigration Act 1996 and its successors

In addition, employers currently wishing to obtain a work permit for a prospecive employee must sign a declaration of truth and bona fides.

We would oppose any additional burden on either employers or educational institutions. To place the citizen or the corporation in the role of police officer is wholly inappropriate to this complex area of law. The criminal law system does not impose criminal sanctions on employers for failure to maintain criminal control and it is inappropriate that immigration law should do so.

27. What should employers, educational institutions and other sponsors be expected to do to carry out that responsibility?

ILPA agrees that there should be sanctions against employers or educational establishments that deliberately abuse the system, but it is the responsibility of the Home Office to take appropriate monitoring and enforcement action in relation to the immigration system. Requiring employers and educational institutions to take on this role will create additional expense for those who wish to comply with the system but do nothing to deter or control those who wish to deliberately evade or disregard immigration control.

In addition it will be necessary for employers to understand the law relating to pending applications for these proposals to work, as a knowledge of stamps alone will not be sufficient.

The potential impact upon a workplace and industrial relations of the implementation of such a policy, let alone of a mistake by an employer about the immigration status of an employee would be huge - and far outweighs any potential gains.

28. What should be the criteria for being on a list of recognised sponsors?

As the concept of sponsorship is intended to be implemented across a number of tiers in a variety of ways the criteria for sponsorship should be flexible and vaired.

Eligibility should not be linked in any way to the number of applications that are likely to be made, as this would penalise small businesses (perhaps in new and innovative areas). Similarly any attempt to restrict the number of applications a sponsor may support will penalise large multinational corporations and large educational institutions.

ILPA would stress the need to avoid insisting on rigid requirements for audited business accounts as this would penalise new companies as well as, for example, partnerships. However, an expeditious system for recognising a sponsor is essential so that first time sponsors are not unduly penalised for their lack of a previous track record.

Whilst we note that views are not sought in relation to when sponsors are assessed, ILPA would strongly advocate that this should be separate to the consideration ot the visa application of an individual applicant. If a visa is refused solely on the grounds that the sponsor is not deemed to be acceptable then it is the individual visa applicant and not the sponsor who will suffer. A refusal of a visa application must be disclosed when applying for a subsequent visa to come to the UK but also to many other countries. A refusal would reflect badly on the character of the applicant notwithstanding the fact that the refusal was entirely unrelated to his personal merits or qualifications. At best applicants with previous visa refusals can expect delays in considering subsequent applications at worst it could result in further refusals. On the other hand the sponsor will have suffered no such loss of reputation and is free, presumably, to continue to try to support other visa applications.

29. To which type of cases would it be sensible for bonds to be applied? For example, should a bond be required of applicants from countries defined as "high risk" according to accepted criteria (number of breaches, returns etc.)? What about applicants from categories of entry regarded as "high risk"?

ILPA is opposed to the introduction of any bond scheme. An individual applicant should not be required to pay because of historic breaches, whether by his fellow countrymen or women, or by applicants in the same category, who are unrelated to him/her.

Immigration control has been predicated for decades on the basis that economic reasons are the main factor influencing why overseas nationals wish to come to the UK, why those present wish to remain and do not return. Any bond system would therefore presumably target poorer countries, the unpaid or the modestly paid, reinforcing an immigration class system and causing greater hardship., Furthermore, any bond system, to be fair and effective, would also need to take account of wealth disparities within those poorer countries, or between relatives here. There would be an inherent contadiction, as applicants have to show both that they are as wealthy as possible, to

satisfy the maintenance and accomodation requirements, and as poor as possible, to minimise the level of bond payments.

In any event ILPA do not consider that a bond system would deter those determined to work illegally or remain in the UK after the expiry of leave to remain – it will simply become the price to be paid in such circumstances, or be a strong incentive to enter the UK in a category or from a country which does not attract a bond.

It is, however, likely to be a significant deterrent to those in poorly paid employment or those who are unwaged (e.g. students) who intend to stay entirely within the immigration rules but would feel a financial hardship imposed by a bond.

ILPA is also concerned that the cost of collection, enforcement and administration of an appeals procedure in relation to refusals to return a bond would be prohibitively expensive, diverting funds needed elsewhere in the immigration system and that the costs would significantly outweigh any benefit.

30. How should a bonds scheme be operated?

ILPA is opposed to the introduction of any bonds scheme.

If a bond scheme is introduced, we think it would have immense practicial difficulties, as set out above. It would be important to introduce safeguards to ensure that a bond did not become an additional requirement in cases that should have been accepted without it, but was limited to use in those cases where an application would otherwise have failed.

We would be opposed to the delay in paying back bonds until the person is back in employment in the country of origin. There may be many legitimate reasons whey a person does not return to his own country or does not take up new employment on his or her return.

31. Is contracting out a better option than trying to combine it with existing migration work?

As we are opposed to the introduction of any form of bond it follows that we oppose contracting out. In addition we note that there are problems with oversight and quality control where this type of work is contracted out, with supervision all the more difficult to ensure when contractors are overseas. Therefore we oppose contracting out, and would advocate that at the very least the system is up and running and has been subject to monitoring and evaluation before the question of contracting out is visited.

32. What improvements (e.g. different documentation) would help employers understand whether foreign nationals are entitled to work?

In the first instance ILPA would advocate that the use of clear, legible immigration stamps which confirm simply and in plain English the employment rights and restrictions of the worker.

It is the experience of our members that present practices are confusing to many employers. In particular many employers are of the mistaken impression that unless a passport endorsement specifically states that a worker is entitled to work that he is

prevented from doing so. This is the reverse of the real practice that in the absence of wording to the contrary that the worker can in fact undertake any work.

In relation to this question and question 33 below, ILPA would welcome the availability of a fast, readily accessible website with examples of all immigration stamps in current use (as well as examples of all historic stamps which may have continued applicability) confirming the appearance, application and meaning of the endorsement. It must also be made clear that when people are applying to the Home Office, this can take an inordinate length of time and must be recognised.

ILPA has concerns that the present documentation specified by Statutory Instrument as acceptable to establish a defence in relation to Section 8 of the Asylum and Immigration Act 1996 does not accurately reflect those categories of overseas nationals able to work in the UK legally. We are aware of efforts to address this in proposals for the successor to section 8 contained in the Immigration Asylum and Nationality Bill and think that these are very important. As many employers have incorporated obtaining Section 8 documentation into their recruitment practice this leaves the invidious position that applicants who may be allowed to work legally in the UK will not be offered employment as they are not able to provide documentation to satisfy the employer that it has a defence in relation to any proceedings under Section 8. The rectification of this oversight is of urgent importance.

ILPA are disappointed to note that the proposal to require employers to carry out "follow-up checks on some categories of worker periodically after recruitment" has not been put out to consultation, before its inclusion in the bill currently before parliament. It is a radical and for the reasons set out above an unwise move to 'devolve' responsibility for immigration enforcement away from the Home Office and onto employers. Such checks would be prohibitively expensive and could give rise to poor labour relations and potential claims of racial discrimination.

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33. What additional services would help employers in ensuring that they are not employing illegal migrant workers?

ILPA members are frequently called upon to advise employers in relation to the existing immigration status of a prospective worker and his ability to accept a new offer of employment. Of particular concern are those prospective employees who have submitted an application to the Home Office and are waiting for a decision.

At present, the Home Office issues a letter acknowledging applications, and stating that if the application was made prior to the expiry of existing leave to remain then the conditions relating to the leave to remain will continue until a decision has been made on the application. It is impossible for an employer in these circumstances to know whether an application was made in time and whether the conditions of the existing leave to remain allow the prospective employee to work.

Some applications may take many weeks if not months to process leaving a prospective employee in limbo. ILPA feels that the timely consideration of applications would be the best possible solution and would be of an immense value to employers.

However, we would urge the Home Office to consider amending this letter specifically to confirm whether a particular application was made in time and what conditions apply to the applicant until such time as a decision is made. The letter should be issued within a reasonable time scale of just a matter of days rather than weeks and should be an

acceptable document to establish a defence in relation to Section 8 of the Asylum and Immigration Act 1996 and its successors under the Immigration, Asylum and Nationality Bill currently before parliament. .

In addition, ILPA would welcome a facility for the Home Office to provide, on request, a similar letter confirming the working status of an individual (regardless of whether there is a current application awaiting decision). This should be subject to receiving the written consent of the individual concerned and should be provided within a reasonable timescale of days rather than weeks. Again, this document should then be regarded as an acceptable document to establish a defence in relation to Section 8 of the Asylum and Immigration Act 1996 or its successor.

ILPA has considerable concerns regarding the suggestion in the consultation document regarding an "enhanced employer helpline" to provide information regarding "specific migrants in the system". We would wish to know what steps the Home Office propose to take to protect confidentiality and data protection. In addition, is it proposed that telephone advice would be a sufficient defence in relation to Section 8 and its successor? Unless this is the case many employers would feel that the risk of relying on such telephone advice is too great to take.

ILPA repeats its concerns about the practicalities of introducing an ongoing responsibility upon employers to look at the status of existing employees

Furthermore, ILPA would ask that the Home Office makes available details of what, if any, impact assessment has been made in relation to the trial of the joint workplace enforcement team due to run from September 2005 for 3 years.

Conclusion

ILPA wishes to thank the Home Office for the opportunity to take part in this consultation process. As stated, we consider that the very limited information made available regarding the new Managed Migration scheme means that the consultation process has been substantially devalued. Further consultation on specific proposed changes is critical and we should wish to participate in them.

Yours faithfully,