17 August 2005

Tony McNulty MP

Minister of State
Home Office
2 Marsham Street
London SW1

Dear Minister,

Meaning of 'continuous residence': level of permitted absences during the four year qualifying period for ILR

The Immigration Law Practitioners' Association (ILPA) was established in 1984 and is committed, inter alia, to securing a non-racist, non-sexist, just and equitable system of immigration, refugee and nationality law. ILPA has more than 1,200 members including lawyers, advice workers, academics, immigration judges and law students. ILPA is regularly consulted by the IND and has made substantial policy representations over the years. ILPA has also been very active in informing parliamentary debate on nationality, immigration and asylum issues and we have, as a concerned NGO, instituted judicial review proceedings.

Purpose of this letter

We write in response to the article on the front page of the *Financial Times* on 1 August 2005, regarding the Secretary of State's decision to concede the issue in the pending *Ghandehari* judicial review, namely that a policy to restrict an investor's absence from the UK to a total of six months out of the four years leading to ILR should be discontinued in favour of a policy permitting a total absence of 12 months. The Home Office stated to the *FT* that:

> "All categories are being considered as part of the revised guidelines, which will be published as soon as possible".

Whilst no formal consultation process has been called in respect of such a revision, we write with brief representations on what the law should be in this area. We ask the Secretary of State to take our views into account when making his revision.

The affected Immigration Rule categories

We take it that the phrase "all categories" in the *FT* article refers to all the categories in which there is currently a requirement of four years' "continuous residence" leading to settlement, namely:

(1) the business and related categories: businesspersons; innovators; investors; retired persons of independent means; sole representatives;

(2) work permit holders;

(3) employees/workers who do not require work permits: representatives of overseas news agencies; private servants in diplomatic households; domestic workers; ministers of religion; airport-based operational staff;

(4) highly skilled migrants;

(5) those seeking entry based on UK ancestry;

(6) writers, composers, artists;

(7) overseas government employees:

(8) persons admitted under Association Agreements

The starting point: a necessary principle of sympathetic compatibility

ILPA believes that the statutory scheme for naturalisation in the British Nationality Act 1981 must be taken as a blueprint for the related scheme in immigration law whereby persons in the above categories and their dependants attain settlement after four years. The two are plainly to be taken together: Parliament envisages it is appropriate to bestow our citizenship upon persons who have resided in the UK for at least five years, having no time restrictions for at least the final 12 months of that period. Compatibly with this, the Immigration Rules have long provided for settlement to be attained after a maximum period of four years' residence, thereby ensuring that everyone who is subject to immigration control can in principle be eligible for naturalisation after five years' residence, as envisaged by Parliament.

ILPA is fully aware of the details of the *Ghandehari* challenge and fully endorses the argument that within the context of the preceding paragraph, as regards permitted absences in the course of a person's residence in the UK an immigration policy that is twice as restrictive as Schedule 1 to the 1981 Act would subvert the will of parliament and should be struck down for illegality. It is to avoid such a consequence that we say our statutory naturalisation scheme should be regarded as laying down a blueprint to be followed when formulating and implementing policy as regards the attainment of settlement under the Rules generally and, in particular, as regards the categories in question.

ILPA accordingly urges the Secretary of State to accept that the starting point in laying down policy in this area must be that the policy in question should be compatible and sympathetic with the letter and spirit of the naturalisation route to citizenship integration laid down by parliament when enacting the BNA 1981. Clearly, if the route to ILR in immigration law were to make the route to naturalisation more restrictive than parliament envisages, the Secretary of State would be usurping the parliamentary function, as only parliament can restrictively revise what it has already enacted. The Secretary of State's revised scheme will fail to achieve this necessary compatibility and will fail for illegality if, under it, there are persons who cannot jump the ILR hurdle for a reason that would not disqualify them under naturalisation law.

For convenience, we refer to this as a principle of sympathetic compatibility with the BNA 1981 and we suggest it is not only a desirable principle on which to base the revision mentioned in the *FT* article, but also that to avoid contempt of

parliament it is necessarily to be the Secretary of State's basis.

ILPA trusts that the submissions and the material produced by the claimant in *Ghandehari* will be fully taken into account of in the review.

Recommended features of such a policy

ILPA argues that the policy – based, as it must be, on the principle of sympathetic compatibility with the intentions of parliament – should include the following features.

a) *Include the policy in the Immigration Rules:-* ILPA suggests the revised policy should be wholly contained within the Immigration Rules. In large part the present confused state of affairs is caused by the Rules insisting on "continuous" presence and policies outside the Rules providing for exceptions to that. The principles of legal certainty and clarity would be far better served by a Rules change spelling out (i) the level of absences that is routinely to be permitted in the course of the four years, and (ii) any discretion to waive absences in excess of those routinely accepted. There is no need for any policy relating to (i) or (ii) to be outside the Rules. Further, the contemporary trend is to move policies into the Rules so they are clearly visible and justiciable. ILPA fully supports that trend.

b) *The permitted level of absences:-* The BNA effectively allows for 25% absences over the five years prior to applying for naturalisation. Therefore the revised Rules should make a similar provision. It should be stated that the permitted absences during the four years is 25% in total or, to be precisely the same as the BNA 1981, 360 days in total.

c) *No annual maximum:-* The BNA 1981 specifies an annual maximum absence of 90 days, but only during the fifth year when the individual is already without time restrictions. Parliament has, by contrast, laid down no annual maximum in respect of the preceding years, during which the individual will normally be maintaining an immigration status pending settlement. Accordingly the Secretary of State's revised policy should not stipulate any maximum annual absence. The Secretary of State should accordingly take this opportunity to reject his previous policy of no single absence being more than three months.

d) *The discretion to waive excess absences:-* The discretion to waive absences in excess of 25% (or 360 days) over the four years may, in keeping with the BNA 1981, be confined to "special circumstances". However, if, contrary to c) above, the Secretary of State institutes an annual maximum, there should at least be a discretion to waive annual absences in excess of that maximum and that discretion should not be confined to "special circumstances".

e) *Method of calculation:-* A day is to be counted as a day of absence only if the applicant was absent from the UK for the whole of that day, as absences are to be calculated consistently with s50(10)(b) of the BNA 1981 in order to prevent the possibility of absences in respect of a given individual being excessive under immigration law but not excessive under naturalisation law.

Desirable consequences

Our recommendations so far are based in law. Those same recommendations also serve other, non-legal, policy requirements and/or result in desirable consequences, as follows.

a) *Encouraging much-needed investors, entrepreneurs and highly skilled workers:-* As a world financial and insurance centre the UK provides extensive services worldwide but has had difficulty in maintaining a constant supply of suitably qualified and experienced individuals necessary to service this sector. The primary intention behind the creation of our business and employment categories was not to give foreigners a privileged opportunity of coming to work in the UK, but to benefit the UK by making it possible for the most high net worth and highly skilled people from all over the world to choose the UK as the society within which to contribute their skills and/or financial investment. Inevitably their presence in the UK is not only benefiting the UK economy directly, but facilitating the role played by the UK in the globalised economy. Others, such as doctors, nurses, teachers and IT sector workers, have provided vital skills in areas where the UK has shortages. Similar benefits come from academics, innovators and wealth and opportunity creators. It is the consistent experience of ILPA members over many years that a high proportion of such persons require at least six weeks a year on overseas business travel in addition to up to six weeks on family holidays abroad. It is the clear impression of our members that such persons will be dissuaded from coming to the UK in the first place if they cannot be reasonably confident that total absences of about 12 weeks a year will be tolerated, so long as it is clear their base remains in the UK.

Provision for legitimate absences in excess of 25%/360 days:- Having moved their main home to the UK, some in the above categories, particularly those in the 'economic' categories, may find even a limit of 25% absence difficult to comply with – for perfectly valid reasons. These could include a long secondment to a sister company abroad for a work permit holder, or a particularly complex project requiring extensive travel for a highly skilled migrant; or even the absolute requirement for a sole representative to attend weekly meetings in his company headquarters outside the UK. It is impossible to envisage all of the potential scenarios in which absences in excess of the 25% limit could be legitimately incurred and directly connected with the individual's need to preserve his employment or business in the UK. It is therefore vital for the Secretary of State to retain a discretion to consider excessive absences in particular circumstances. This vital need is fully accommodated by the submission we have made above, arising from the principle of sympathetic compatibility and is comprehended within the term 'special circumstances' as used above.

Encouraging companies to establish themselves in the UK:- Large multi-national companies rely on being able to move their most valued executives to the various financial centres of the world with as much ease as possible. From the point of view of those individuals and their spouses and children, flexibility of immigration, settlement and naturalisation requirements is at a premium when considering whether to move to another country in connection with their employment. The UK as one such centre would quickly lose its pre-eminence

without such flexibility. It is for this reason that the UK government has been keen to protect the major wealth-producing industries in the UK from what are competing employment markets in financial centres in France and Germany.

b) *Allowing settling-in time:-* Many of the people identified in a) and b) above may need winding-up time, especially during the first year or two, as they set about moving their main home to the UK. The first arrival following the initial grant of the status in question starts the four year clock ticking. Homes abroad have to be sold, business management restructured, children uprooted from schools and new schools found for them in the UK. In most cases, we believe, more than three months absence from the UK is inevitable in the first year for such reasons and this may well spill into the second year. The submissions we have made, above, would accommodate this need for flexibility in the initial years of a family's relocation to the UK. The time spent by such persons moving their main home to the UK should not be held against them.

Method of implementation

We have suggested that in accordance with legal principles and contemporary trends welcomed by this Association, the right method by which to implement the revised polices would be by amendment to the Immigration Rules, with no significant policy being reserved to the juridical twilight zone of 'discretion outside the Rules'. However, if the Secretary of State were to disagree, perhaps for a practical reason such as lack of time, then without prejudice we suggest the policies for which we contend can be implemented pro tem without amendment of the Rules. This is because for a long time "continuous" has not been construed literally, but in a commonsense manner and without the strictness appropriate when construing legislation. Implementation of this approach could therefore be by way of revision of the IDIs, but subject to the public having access to the revised IDI.

Conclusion

We believe that ILPA's recommendations amount to a clear, non-discriminatory, necessary and sensible ILR regime, which takes into account the realistic travelling needs of the highly skilled in a globalised economy. We believe our recommendations are also vital if we are to attract the very people whom the UK wishes to attract. We believe that our views would be supported by the Department for Trade and Industry, the Confederation of British Industry, and trades union and employers' organisations. We hope the Secretary of State will agree.

Yours faithfully,

Rick Scannell

Chair, ILPA

cc Steve Lamb, Deputy Director, Work Permits (UK)

Paula Higson, Senior Director, IND