ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

ILPA Briefing for the debate on 3 May 2011 on the motion by the Lord Hunt of Kings Heath "that this House regrets that the Government have not published a comprehensive explanation of the findings from the consultation on Tiers 1 and 2 relating to the Statement of Changes in Immigration Rules (HC 863)."

Reference is made in the motion to *27th Report from the Merits Committee* (*Dinner break business*) for Tuesday 3 May

ILPA concurs with the Merits Committee that there has been no published comprehensive explanation of the findings from the consultation on Tiers 1 and 2 relating to Statement of Changes in immigration rules HC 863. ILPA further observes that there has not been a comprehensive explanation of the way in which the all of the changes introduced by these rules will work in practice and that there are anomalies and reasons for concerns. We highlight just a few of them in this briefing

The Tier 1 (Exceptional Talent) category.

This is stated to be "for migrants who are internationally recognised, or who show exceptional promise, in scientific and cultural fields". It will 'initially' be limited to 1000 places, 700 in the sciences and 300 in the Arts. Migrants will not need to be sponsored by an employer but do have to be endorsed by a "Designated Competent Body". The UK Border Agency has said that it will publish a list of such bodies on its website, but it has yet to do so. It has said that it will publish further details of the scheme. It is wholly unclear how the scheme will work and to what extent the UK Border Agency will, or will not, exercise supervision or control over the methods by which the Designated Competent Bodies determine which applications will go forward.

Meanwhile the UK Border Agency has been discussing with various stakeholder groups the question of 'Highly Trusted Sponsors' for Tier 2 of the Points-Based System. The ideas to date seem to be to start with a very limited number of such highly trusted sponsors and roll the scheme out very gradually. A number of different selection methods have been mooted, in very general terms. It is clear that a company with 'Highly Trusted Sponsor' status may enjoy a significant advantage in the recruitment market from that status and derive other prestige from the status. Those who are equally well-qualified to enjoy that status but are not selected to be part of the initial cohort may well have cause for complaint.

These developments are of concern to ILPA.

ILPA has long lamented the rigidity of the Points-Based System, its preference for tick-boxes over sensible exercise of judgment and its failure to provide scope for acknowledging experience and expertise although these are the most important attributes identified by employers.[1] But these new proposals, as far as the way in which they will work can be ascertained at this stage, do

[1] See, for example, ILPA's responses to the Home Office Consultations *Selective Admission: Making migration work for Britain,* November 2005 *and A Points-Based System: Making Migration Work for Britain (CM 6741)*, March 2006.

not give the impression of providing a structured framework within which judgment can be exercised to treat like cases alike. Instead it would appear from what is currently known that the system will be vulnerable to accusations that it is not what you know but who you know that is providing an advantage within the immigration system and that like cases are not being treated in a like manner. It is unclear what the basis of comparisons within the 'Exceptional Talent' category might be: how can one adjudicate the competing claims of a Fields medallist and a heart surgeon?

Amendments to bring existing requirements into the Immigration Rules

The Explanatory note to HC 863 state:

> **7**.14 Legal challenges have been brought against the Government regarding the extent to and manner in which various Points-Based System requirements are specified in UK Border Agency guidance rather than in the Immigration Rules.
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> 7.15 The requirements of the Points Based System that featured in those challenges which the Government was unsuccessful in defending have since been brought within the Immigration Rules.
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> 7.16 The Secretary of State considers that the rules and guidance as currently structured are lawful. However, for the avoidance of any doubt and without prejudice to any future position the Secretary of State may take in litigation on this point, these changes bring the following existing minor details and clarifications, which have previously been specified in UK Border Agency guidance, within the Immigration Rules.

ILPA welcomes these efforts to comply with the judgment in *Pankina v SSHD* [2010] EWCA Civ 719 and subsequent cases. In short, a ground of a mandatory refusal must be set out in the immigration rules. Where requirements are specified in guidance only, there must be scope for the exercise of discretion where the applicant cannot meet the requirement. However, ILPA considers first that the changes do not go far enough and there remains the need for a wholesale audit of guidance to ensure that it is compliant with *Pankina*. Otherwise, the cases will keep coming. But the cases also raise, yet again, the whole question of the rigidity of the Points-Based System and its efforts to eliminate the sensible, structured exercise of judgment that would ensure that like cases are treated alike, but on the basis of the substantive merits of the case, rather than whether the applicant has met technical and bureaucratic requirements that do not go to the substantive aims of the immigration rules and the policy that has informed them.

Tier 2 Intra-company transfers

Intra-company transfers have been divided into subcategories. The proposal is that an intra-company transferee may come for a fixed period but must then spend a period outside the UK before being able to make another application. We are not sure that the way in which this will operate in practice has wholly been thought through. The period the person must spend outside the UK will commence from the expiry of a migrant's leave, not the actual date of departure. Thus, for example, in cases where a migrant is granted leave under the 'Long Term Staff' subcategory for three years who leaves after two years and one month, their job done will have to wait not twelve months but a total of twenty-three months before they can come back to the UK. It will be vital that the UK Border Agency alert those who leave early to considering asking for their leave to be curtailed to avoid having to remain out of the UK for over 12 months from

the date of their departure. It will also be vital that the Agency deal with any such requests promptly.

There are a number of anomalies within the new rules on Intra-company transfers. For example, switching from a short-term Intra-Company Transfer category to the long-term staff sub-category does not require the migrant to spend a period outside the UK, but making a second application in one of the short-term Intra-Company Transfer categories with the same or different a sponsor will do so.

Tier 1 (General) Migrants wishing to extend their leave or to settle in the UK, outcome of the transitional provisions

Under the new rules, those already in the UK as Tier 1 Migrants will need to score the same number of points when they apply for an extension of leave or for settlement as they did when they made their initial application. ILPA members have already identified a number of cases of individuals who have been working as Tier 1 (General) migrants who made the decision to set up their own business, to study for MBAs whilst the labour market is quiet or who have lost their jobs through no fault of their own in the current economic climate. At the time when they came to the UK the requirement was that at the time of applying for settlement they would need to show that they were economically active in employment or self employment or both. ILPA members have seen cases of person's refused on their initial applications because their bank balance fell a few pounds below £800 for one day and fear that we shall now see cases of applicants who have spent five years in the UK and who face the prospect of being removed from the UK because they can only show earnings of £79,950 as opposed to £80,000. People applying for extensions or for settlement as Tier 1 (General) migrants at the same time will be required to score different numbers of points; all will depend on the time of their arrival.

It is likely that some of these cases will raise points similar to those litigated in the HSMP Forum case,[2] which was the subject of a report by the Joint Committee on Human Rights,[3] or give rise to challenges under, for example, Article 8 of the European Convention on human rights, or both.

Investors and entrepreneurs

ILPA is pleased that changes have been made to the permitted absences for investors and entrepreneurs. These are changes for which ILPA has been advocating for many years. However, we question whether the changes to the periods within which persons can qualifiy for settlement, or to their permitted absences, will have the effect stated by the Government to be desired, of attracting such persons to the UK, because they go only to whether the investor/entrepreneur qualifies for settlement, while the qualifying periods and permitted

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[2] *R(HSMP Forum Ltd) v SSHD* [2008] EWHC 664 (Admin)

[3] Joint Committee on Human Rights, *Highly Skilled Migrants: Changes to the Immigration Rules*, Twentieth Report of Session 2006–07, 26 July 2007, HL Paper 173, HC 993

absences for naturalization remain unchanged. We recommend that Government monitor whether its changes have had the effects it states that it desires.

HC 863 and HC 908 – changes to the requirement to be free of criminal convictions when applying for settlement.

HC 863 was published on 16 March 2011, to come into force on 6 April 2011. But on 31 March 2011 it was augmented, and indeed amended, by HC 908, which comes into force on the same date. We are aware that there is a separate motion pending before the House on HC 908, and it effects survivors of domestic violence and impedes implementation of the Government's commitment to end violence against women and girls and ILPA has provided briefings to many peers on this most troubling development and would be pleased to provide such briefings to others who would like to receive them. We and others have met with officials and we are delighted that they have agreed to refer the question of the effect of HC 908 to Ministers. We very much hope that the Home Secretary will agree that the rules must be amended to remove the new requirements for survivors of domestic violence and to ensure that existing protection for them is preserved.

We do draw attention to timing. HC 908 was laid on a Thursday, thus a mere four working days before it was to come into force, a period truncated because the House of Commons rose on 5 April. HC 908 made wholly unpredicted changes to the rules pertaining to settlement for survivors of domestic violence and for bereaved spouses and partners. It made new student rules and set out changes to Tiers 2 and 5. It is just the latest is many statements of changes in immigration rules that fails to comply with the convention that such changes be laid 21 days before they come into force. Cm 7929 and Cm 382 (parts taking effect 23 July 2010, thus coming into force the day after they were laid), HC 96 was ordered to be printed on 15 July 2010 and took effect five days later; HC 439 was ordered to be printed on 18 March 2010 and parts took effect on 6 April 2010. The practice has thus continued under two different Governments and we urge members of the House to note protest.

ILPA

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