ILPA briefing for the House of Lords re Secondary Legislation Scrutiny Committee on consultation practice

The Immigration Law Practitioners' Association (ILPA) is a professional membership association the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous Government, including UK Border Agency, and other consultative and advisory groups.

ILPA provides the following case study of Statement of Changes of Immigration Rules HC760 as an illustration of why Departments should not be given complete discretion over whether to consult or not.

The statements in the Explanatory Memorandum to HC760 that the changes will have no impact on business, charities or the public sector are as follows:

> *8. Consultation*
> *8.1 The changes in this Statement have not been subject to consultations as this would be disproportionate to the nature of the changes.*
> …
> *10. Impact*
> *10.1 There is limited or no impact on business, charities, the public sector or voluntary bodies such that an impact assessment is unnecessary.*
> *11. Regulating small business*
> *11.1 The changes relating to Tier 2, Tier 4 and Tier 5 will apply to small businesses that are licensed as Sponsors in these tiers. The changes are minor, and are not expected to have any negative impact on small businesses.*

They are inaccurate. We have described this with reference to HC 760 but observe that HC 760 is atypical of recent Statements of Changes as follows:

- HC 760 was ordered to be printed on 22 November and most provisions come into force on 13 December. This is a much longer lead in time than has been the case for most recent statements of changes. For example Cm 84233 appeared on the UK Border Agency website late on the evening of 19 July 2012 and came into force at midnight on 20 July 2012.
- A number of the changes relax requirements rather than tighten them.
- (Applying only to ILPA) Unusually, ILPA was aware that the instrument was to be laid, but we do not know of anyone outside the ILPA membership and the Home Office/UK Border Agency who was. We did not know anything of the contents of the new rules in advance save that they included minor changes and not major changes to the rules on investors. We were told because we asked the Agency having become aware of rumours circulating and wanting to scotch those that were unfounded.

The reasons set out above mean that HC 760 had less impact than other recent statements of changes. Nonetheless, it had an impact and as such provides an excellent test of whether the statements highlighted in the Committee's question are ever justified. In what follows we by no means deal with the all changes effected by the rules, but just highlight some examples.

The Explanatory Note says at 7.64 "A number of corrections are being made to paragraph numbering and other minor drafting errors." This is an understatement. Drafting errors and paragraph numbering may be technical matters but they are not minor matters for the UK Border Agency staff, legal representatives and unrepresented individuals and businesses seeking to use the rules.

1. Effect on business

There are 14 working days between the instrument being ordered to be printed and its coming into force. Its contents were unknown in advance. The immigration rules on the UK Border Agency website will only be consolidated with the changes when they come into force. Until then one has only the Statement of Changes which reads as a series of instructions to amend the rules, and explanatory material produced by the UK Border Agency. HC 760 comprises 67 pages of changes in immigration rules. Guidance has also been amended. Firms affected or who may be affected by them must read them and take advice from lawyers on their meaning.

A "correction" is being made to ensure applicants are not automatically awarded points for English language ability unless they have proven their ability, or proven that they are exempt from the requirement, in an earlier application. Employers wishing to employ persons qualifying as persons of exceptional talent who previously anticipated those persons' levels of English not being a barrier to their recruitment will need to revise their plans. Many persons exceptionality talented in a whole range of fields: the arts and the sciences, do not speak English.

The rules for Tier 2 are changed to "make clear" that the use of head-hunters does not obviate the requirement for vacancies to be advertised . Employers who had relied on the previous version of the rules and used headhunters alone will now need to change their recruitment. Recruitment plans that have been developed, some of which will be in the process of being implemented, may need to be altered

Institutions are added to the list of financial institution with which the UK Border Agency is unable to make satisfactory verification checks. This may affect the reputation of these institutions and their business.

An amendment is being made to conditions of leave to prevent Tier 1 (Investor) migrants working as professional sportspeople, although we do not know how many actual cases this affects. The requirements of the investor category are not difficult for persons with large sums of money to meet, providing that they do not have criminal convictions. There are thus a number of highly paid professional sportspeople potentially affected by this change. Where they were to be employed by a club, the club will also be affected.

Amendments are made to the provision enabling a Tier 4 applicant to use a loan letter to evidence the required level of maintenance, limiting this to loan schemes provided by a government, or a government sponsored student loan company or where the loan is part of an academic or educational loans scheme. Where an applicant uses another type of loan then the funds will need to have been held for at least 28 days prior to application. This may affect colleges who had anticipated accepting students using other loan schemes for places.

Amendments are made to the Tier 5 (International Agreement) sub-category which provides for workers who may be admitted under the UK's international commitments, but who are not otherwise covered by provisions in the immigration rules, to make more specific provision for contractual service suppliers (who do not otherwise have a UK presence) seeking admission under the relevant commitments in certain international trade agreements to which the UK is a party. These changes are complex but their overall effect is to restrict entry in this category.

Changes that relax requirements rather than tighten them

Because these provisions relax requirements it is unlikely that anyone will be moaning about them. We include them here however to: illustrate the myriad ways in which changes in immigration rules do affect business. The requirements being relaxed in this statement of changes have been imposed, often unnecessarily and without being thought through, in previous statements of changes.

It is also the case that even where new rules are more favourable, they are likely to necessitate changes of plan: delays to wait for them to come into force, revisions of previous plans etc.

HC 760 makes changes to Tier 2 of the Points-Based System so that the length of time that senior intra-company transferees earning £150,000 or above can stay increases from five years to nine years, to make provision for barristers to apply, and to make the operation of 12-month periods between one period of leave and the next (known as "cooling-off" periods) more flexible. Cooling off periods have been a source of tremendous vexation to businesses, who do not think that the amendments made in HC 760 go far enough.

These changes might cause companies to rethink their plans on who to locate where and indeed to revisit strategic planning decisions based on not being able to have particular staff in the country. It may lead to their wishing to withdraw offers of relocation allowances. Vacancies for barristers may have been filled while those who would otherwise have applied for them are now rethinking their decision to leave the UK.

What is described as a "correction" is made to Tier 1 (Exceptional Talent) category to allow those who switch into it while in the UK with leave in another category to be granted three years' leave to remain (as intended), rather than two years. The previous rules have already affected businesses who are challenging them, suggesting that this is a change of stance rather than a mere 'correction'.

The English language requirement for entrepreneurs and graduate entrepreneurs is being lowered from level C1 (advanced) to level B1 (intermediate), in line with other

Points-Based System categories. While this is likely to be welcomed by the entrepreneurs and those who wish to do business with them, it may result in persons withdrawing from or not taking up places in, English language courses and affect the businesses providing those courses.

What the explanatory note describes as "a clarification" is made, that employer pension contributions do not count towards appropriate salary points for Tier 2 (General) and Tier 2 (Intra-Company Transfer). Employers who had included these in their calculations may find recruitment affected: the person does not earn enough and is not eligible to come to the UK in the category previously identified.

Those changes that provide greater flexibility may give candidates for employment more options leading them to throw one business over in favour of another.

Statement of Changes HC565 included amendments relating to Points-Based System dependants. Those amendments removed the ability of a child to come to the UK with or to join parents other than where one is a Points-Based System migrant and the other has leave as that parent's partner. The amendments to paragraphs 319H and 319J restore the possibility of a child entering or being granted leave to remain or indefinite leave to remain where, for instance, both parents are Points-Based System migrants. This change, while beneficial, was necessitated by drafting errors. Firstly, Statement of Changes HC 194 failed to make any provision for these dependants at all, an error, which ILPA pointed out to the Agency in meetings and correspondence. HC 565 was supposed to address this but created the problem described above.

The rules are amended to increase the absences that are permitted from the UK during the continuous period of lawful residence required for indefinite leave to remain in work –related categories leading to indefinite leave to remain. ILPA has long (since at least 2005) argued for this change.

Effect on law firms

Law firms are businesses too. On 21 November a client might have been given an accurate statement of the rules as they would apply to them when they made their application. The first necessity is to get on top of the changes – to spend time reading them, or reading what others have to say about them, to attend meetings or training courses, many of which will cost money. Any rule change has cost implications for a law firm working in immigration or on cases affected by immigration status.

On 22 November the client is told that either they must bring forward the date of application or that they no longer qualify. This affects for example lawyers advising employers, those advising diplomats on the employment of private servants. This does little for the relationship of trust and confidence between lawyer and client.

It is necessary to explain to clients who do not qualify under the current rules but may qualify under the new ones whether they have the option to delay until the new rules come into force to make their application and to identify any associated risks. Or it may be necessary to

Law firms advising diplomats on the rules for employing a private servant in a diplomatic household must take account of the rules requiring the employer enjoy

certain privileges and immunity under UK or international law, and not a family member. This could change the advice previously given to these clients.

Not only immigration lawyers are affected. A criminal lawyer, who is much less likely to be aware of the minutiae of changes in the immigration rules will fail to advise their client adequately if they do not advise that leave can be curtailed if a person commits an offence within the first six months of being given leave to enter the UK and is sentenced to a period of imprisonment. This may affect whether a person enters a guilty plea or alternatives to imprisonment that are put forward.

Where the existing rules are more beneficial to particular clients than the old rules, law firms work round the clock to ensure that their clients can make applications under the existing rules. Similarly businesses may be convulsed by trying to squeeze persons in before the rules change in ways that are disadvantageous to them.

Effect on charities

Charities are also employers and may be affected in the same ways as businesses.

Law Centres and other charities offering advice may face the same difficulties as described for law firms above, although they are less likely to be advising business clients and more likely to be advising individuals, for example students and workers.

Effect on the public sector

In a meeting with the Criminal Casework Directorate of the UK Border Agency on 27 November 2012, which an ILPA representative attended, UK Border Agency staff responsible for quality assurance explained that rule changes could lead to a "spike" in errors. There is no reason to think that this directorate is different from any other part of the Agency. The errors affect the Agency, those whose claims are wrongly determined and those representing or assisting them.

The public sector is one employer of migrants and thus the effects on the public sector will in many cases mirror the effect on business.

Other public sector bodies take account of immigration status, for examples those dealing with benefits. See above re the implications for those advising persons accused of crimes, which may also be relevant to those sentencing or writing probation reports.

Students will no longer be able to switch directly into Tier 1 (Graduate Entrepreneur) route, unless they have £50,000 funding from a specified source (registered venture capitalist firms, UK Government or Devolved Administration Departments). UK Government and Devolved Administration Departments may have to deal with an increased number of applications, which will require increased resources.

The Legal Services Commission provides legal aid, which is currently provided for immigration and asylum cases (although not for business cases) subject to means and merits tests. When the rules change, those affected need advice. Those previously advised need new and amended advice. It is extremely likely that elements of new rules will be unclear. There may be errors on ambiguities.

In letters to the UK Border Agency since 1 August 2012 ILPA has pointed out numerous errors in recent statements of changes in immigration rules, a number of which are corrected by HC 760. We counted and across two of our letters the Agency had accepted some 29 errors we had pointed out as needing rapid correction (others were to be looked at).

Those affected by rules containing errors are likely at the very least to need to make lengthy representations and at worst to have to bring appeals. What is true for the Legal Services Commission is also true for those funding their own applications and thus for businesses and charities.

Changes that relax requirements rather than tighten them

Applicants under the Tier 1 (Entrepreneur) category, which caters for those with financial backing who are coming to the UK to set up, take over, or otherwise be actively involved in the running of a business normally require funding of £200,000, but this is reduced to £50,000 if the funding is from a specified source, which includes UK Government Departments. HC 760 expands this provision to include funding from Departments of Devolved Administrations. Those departments are affected by this change, quite possibly in a beneficial manner, but nonetheless guidance needs to be revised etc.

One effect is very clearly described in the Explanatory note

> *"A temporary exemption from the requirement to advertise in Jobcentre Plus (or JobCentre Online in Northern Ireland) is being made for positions in the NHS advertised on NHS Jobs between 19 November 2012 and 6 April 2013. This is due to downtime in the automatic posting of vacancies from NHS Jobs to Jobcentre Plus while DWP systems are upgraded. A workaround could only be put in place for this period at significant cost to the public purse, so it has been agreed to temporarily waive the requirement."*

Another change, which appears beneficial, is to conditions of leave that prevent Tier 4 (General) Students working as a doctor or dentist in training unless they have been granted leave to do a recognised NHS Foundation Programme. These changes allow students to start working as a doctor or dentist as soon as they have submitted an application in which they are sponsored to do a recognised NHS Foundation Programme, while they are waiting for that application to be decided. This is stated to be to avoid potential delays for medical degree students in beginning the next stage of their training.

The Tier 5 Government Authorised Exchange sub-category, which caters for people coming to the UK through approved schemes that aim to share knowledge, experience and best practice is amended by the addition, *inter alia,* of training by HM Armed Forces or by UK emergency services to the training programmes that may be up to two years in length (as opposed to one year for work experience schemes).

Miscellaneous effects

We have not, despite the length of this memorandum, attempted to address all changes covered by the rules. However, a few effects not easily categorised under the categories above, merit mention.

The requirements for entry clearance, leave to remain and indefinite leave to remain as a private servant in a diplomatic household are amended to specify that the employer must be diplomat, or in the case of an employee of an international organisation enjoying certain immunities and privileges in the UK, that employee, and not a member of their family living in the household. While this is described as though it were a mere technical change, there is nothing to prevent the UK being more generous than its international obligations require and thus the changes represent a restriction.

Changes are made to the conditions of leave that prevent Tier 4 (General) Students from working in self-employment to allow students who have been endorsed by their institution for the Tier 1 (Graduate Entrepreneur) category to work in self-employment as they have submitted their Tier 1 (Graduate Entrepreneur) application and while they are waiting for it to be decided.

The role of consultation

ILPA met with Home Office officials when HC 194 was published in the June 2012. We pointed out numerous errors in the instrument. We met with officials again on 3 July 2013 only to find, to our despair, that nothing was being done to amend HC 194 before it was coming into force and that they had not even got to the stage of satisfying themselves that the errors we had pointed out were indeed errors or discussing them with staff who had not been present at the meeting. In that meeting we pointed out that the decision of the Supreme Court in the case of *Alvi* was imminent and that it was likely to confirm the decision of the Court of Appeal in *Pankina v SSHD* [2010] EWCA Civ 719, which the Home Office had not appealed and by which it was already bound, that requirements, failure to comply with which would result in a mandatory refusal, should be contained in the immigration rules not in guidance. This time we followed up the meeting with a detailed letter, running to some 11 pages, enumerating our concerns.

On 18 July 2012 the Supreme Court gave judgment in *Alvi v SSHD* [2012] UKSC, confirming the decision in *Pankina*. CM 8423 was laid on 19 July 2012, appearing on the UK Border Agency website late at night, and coming into force on 20 July 2012.

Cm 8423 contained numerous errors. ILPA detailed these in a letter that ran to 13 pages. Just as that letter was being finalised, HC 565 was published. It addressed some of errors, and introduced new ones.

We do place on record that officials have expressed their gratitude for the enormous amount of work that ILPA members have done on these rules. Had there been proper consultation we could have done that work in good time and done it once, rather than having to point out where corrections to errors had introduced new errors.

Errors pointed out by ILPA that have been addressed in HC 760 include
For family members:

- Amendments to address the calculation of annual income for workers paid an hourly rate.
- Treatment of salary increases
- Clarity in the definition of gross income
- Changes to allow income from self-employment by a director of a company in the UK to be counted
- Treatment of self-employment income of fiancé(e)s and civil partners
- Provisions as to the format of bank statements
- Provisions as to the treatment of wage slips/P45s
- Provisions as to evidence of employment
- Provisions as to providing the contract of employment
- Provisions as to providing ban k statements
- Provisions as to furnishing tax returns
- Provisions as to evidence of registration as a self-employed person
- Provisions as furnishing audited accounts
- Provisions as to furnishing the VAT return
- Provisions as to furnishing title deeds.

All these changes bring the family rules into line with the existing rules for Points-Based System dependants. The confusion created by requirements as originally placed in the rules was thus unnecessary.

Amendments to align the bereaved partner and domestic violence provisions of Part 8 with the policy for partners and allow those who cannot qualify for indefinite leave to remain because of past criminal convictions to be granted further leave to remain.

Amendments to allow applicants last granted limited leave to enter the UK under Part 8 to benefit from the same transitional provisions as those last granted limited leave to remain under Part 8.

Amendments making provision for dependants of points-based system migrants, as discussed above.

Amendments to allow a parent who was granted leave on the basis of a child in the UK to be allowed to remain in the UK once the child has turned 18, provided the child has not formed an independent family unit and is not living an independent life.

Amendments to allow child dependants to be granted the same leave as a parent granted after five on ten years on the basis of that parent's relationship with another child.

Amendments to the settlement (indefinite leave to remain) requirements for children to allow a child who has overstayed to qualify for settlement.

Amendments to make provision for a migrant parent and child to be able to apply for leave to remain in the UK on the basis of the migrant parent's shared parental responsibility for the child's upbringing, in addition to circumstances in which the migrant parent has sole parental responsibility.

Amendments to provide that Appendix FM does not apply to applications for family reunion from a pre-flight partner or child of a refugee or person with humanitarian protection.

Had there been consultation, ILPA would have pointed out errors and infelicities before the event, rather than asking for them to be corrected afterwards.

We emphasise that we have not dealt exhaustively with the effects of HC 760 in this paper, but have instead given examples.

ILPA

4 December 2012

Erratum

14 December 2012 Contrary to what was stated in an earlier version of this briefing, the change that restricts sources of funds for students who wish to switch to become entrepreneurs applies only to the Tier 1 (Entrepreneur) route. Paragraph 287 of the Statement of Changes adds paragraph 36A to Appendix A and this affects only Tier 1 (Entrepreneurs), not Tier 1 (Graduate Entrepreneurs).