14 November 2014

Carol-Ann Sweeney, Lead Inspector
Office of the Independent Chief Inspector of Borders and Immigration
Email: carol-ann.sweeney@icinspector.gsi.gov.uk

Dear Ms Sweeney,

The inspection into the efficiency and effectiveness of the Home Office action against illegal working

Thank you for your letter inviting our submission to your enquiry on the efficiency and effectiveness of the Home Office action against illegal working.

In our detailed response[1] to the government's consultation which preceded the most recent changes to the civil penalty regime, *Strengthening and simplifying the civil penalty regime*[2], we stated that the

…current regime fails to concentrate on the worst employers or on the workers most vulnerable to exploitation. It does nothing to contribute to the general raising of employment law standards that would protect migrant workers and ethnic minorities in the labour market. Instead it creates red tape and can contribute to an atmosphere in the generality of workplaces that is at best unhappy and at worst oppressive'[3]*. In our view. none of the subsequent changes to the regime, which took effect on and from 16 May 2014, have addressed these core concerns, including its discriminatory effect. Indeed, some of the changes have exacerbated existing problems.*

Our focus in this response has been:

(i) to review the impact and the effectiveness of the 16 May 2014 changes[4] to the civil penalty scheme and the concurrent changes to the guidance for employers regarding how to undertake the appropriate right to work document checks, and

(ii) to reiterate some of the most common ongoing practical problems faced by clients as a result of the civil penalty regime.

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

[1] Appendix D hereto.
[2] Home Office consultation document 9 July 2013, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/227055/consultation.pdf
[3] Immigration Law Practitioners' Association response to consultation: *Strengthening and simplifying the civil penalty regime to prevent illegal working* 13 August 2013 (http://www.ilpa.org.uk/resources.php/19317/ilpa-response-to-the-home-office-consultation-strengthening-and-simplifying-the-civil-penalty-regime (Appendix D)
[4] On 16 May 2014 the Government published the Code of Practice on preventing illegal working: civil penalty scheme for employers and the Code of Practice for employers on avoiding unlawful discrimination while preventing illegal working, available at https://www.gov.uk/government/publications/preventing-illegal-working-code-of-practice-for-employers.

immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members.

As a membership organisation, the experiences and views of members inform our responses. Examples of client experiences, which have been anonymised, are included as Appendix B to this letter. These provide specific detail regarding the ongoing difficulties with the existing right to work regime and particular impacts of the recent changes.

We have numerous examples of employees being suspended and dismissed who do have the right to work but cannot prove this with documents that meet the requirements to provide their employer with a statutory excuse against a civil penalty.

There are three key problems with the scheme which continue to give rise to this situation:

(i) the overly prescriptive documentary requirements contained in the relevant legislation and guidance,

(ii) the quality of information provided to employers by the Home Office's Employer Checking Service, and

(iii) the lack of understanding, or over-caution, by employers in relation to the civil penalty regime (in that a civil penalty can only be enforced if against them if they really are employing someone who is not allowed to work).

The scheme continues unfairly to prevent persons who hold the right to work in the UK from doing so. In the case of non-EEA national family members of EEA nationals this is in breach of EU law. It perpetuates potentially discriminatory actions by employers in seeking to minimize their liability to civil penalties. As set out in our response to the *Strengthening and simplifying the civil penalty regime* consultation[5], these problems were anticipated by ILPA and various other commentators[6] prior to and subsequent to the imposition of the civil penalty regime in 2008.

Background

On 16 May 2014, following the tightening of the civil penalty scheme and the substantial raising of the maximum penalties levied against employers[7], the Home Office issued a suite of new guidance, including a document for employers regarding how to undertake a compliant right to work check: *An employer's guide to right to work checks*[8]. This guidance was subsequently amended and reissued on 28 July 2014 and a copy is attached as Appendix A.

This document reflects the key aspects of the various pieces of legislation that underpin the civil penalty regime, but as it is, in our experience, the primary document relied upon by employers, we have referred only to the requirements of this guidance ('the guidance') in this response. [9]

The guidance makes clear that employers will be liable for a civil penalty/civil penalties in the event that they are found to be employing illegal workers as defined (non-EEA nationals who are subject to

[5] Annex D hereto.
[6] See eg the Migrants' Rights Network 'Papers please': The Impact of the Civil Penalty Regime on the Employment Rights of Migrants in the UK, November 2008.
[7] The Immigration (Employment of Adults Subject to Immigration Control) (Maximum Penalty) (Amendment) Order 2014 (SI 2014/1262).
[8] Available at https://www.gov.uk/government/publications/right-to-work-checks-employers-guide .
[9] Including: Immigration Asylum and Nationality Act 2006, s 15; Immigration (Restrictions on Employment) Order 2007, as amended by the Immigration (Restrictions on Employment) (Codes of Practice and Amendment) Order 2014; Accession of Croatia (Immigration and Worker Authorisation) Regulations 2013, reg 11

immigration control who do not have leave, or whose leave does not allow them to undertake the particular job, or Croatian nationals who are not appropriately authorized or exempt from worker authorisation.[10]) An employer can obtain a statutory excuse against such penalties but only if they have carried out right to work check(s) on the relevant individual(s) in accordance with the published guidance.

In addition to the risk of financial liability under the civil penalty scheme, the failure to undertake compliant right to work checks can have further impacts if an employer is found to be employing one or more illegal workers as defined. For an employer who holds a sponsor license under Tiers 2 & 5 of the Points Based System, it can result in the downgrading and/or revocation of their sponsor licence[11]. Failure to undertake a correct right to work check which results in a civil penalty can also affect employers who are themselves subject to immigration control. The guidance provides that 'if you are liable for a civil penalty, this will be recorded on Home Office systems and may be taken into account when considering any future immigration application.[12]

The changes which are particularly problematic

The guidance includes the following changes to the pre-16 May 2014 position:

1. A reduction in the number of acceptable documents required when undertaking a right to work check; including a provision that all documents with expiry dates must be current (and if the document is evidence of UK entry clearance/leave to remain, that it is contained either in the holder's current passport or on a biometric residence permit).

2. A requirement that non-EEA passports which contain Indefinite Leave to Remain/No Time Limit endorsements or endorsements exempting the individual from immigration control are current.

3. A requirement that when an EEA Residence Card (but not a Permanent Residence Card) is issued to a third country family member of an EEA/Swiss national, or someone with a derived right, in that person's passport, that the passport must be current.

4. An extension of the statutory excuse against a civil penalty to 28 days past the date of expiry of the permission to work, but only if the employee has either a further application or an appeal pending and the Home Office Employer Checking Service has verified that the employee in question does continue to hold the right to work in the UK. If the Employer Checking Service issues a Positive Verification Notice, the statutory excuse cover period is extended to six months.

5. The removal of the provision in the guidance which allowed a partial (i.e. incorrectly undertaken) right to work check to be considered as a mitigating factor in the calculation of a civil penalty.

The guidance goes further to state that where a repeat check is required after 16 May 2014 on an existing employee (employed on or after 29 February 2008), that repeat check must be undertaken in accordance with the new guidance.

This means that an employer whose employee previously satisfied the documentary requirements by providing an entry clearance/leave to remain or other endorsement in a previous passport cannot rely on the same document when undertaking a repeat check now. In such circumstances, the employee would need to apply immediately to transfer the conditions of their leave to a Biometric Residence Permit (in the case of someone subject to immigration control) or to apply for further documentation

[10] See section "References in this guide."
[11] Tiers 2 & 5 Sponsor Guidance as at 5 November 2014, Annex 4,(c), Annex 5, paras (e)-(g)
[12] An Employer's guide to right to work checks (Appendix A), p 11

evidencing their rights under EU law (in the case of third country national family members of EEA nationals) and the employer would need to receive a Positive Verification Notice to obtain a statutory excuse.

ILPA's concerns

ILPA is familiar with dealing with persons subject to immigration control and makes the following comments (these are in part based on our August 2013 response to *Strengthening and simplifying the civil penalty scheme to prevent illegal working*[13] and in part, based on recent member experiences):

1. Third country national family members of EEA nationals who are exercising rights of residence under EU law are not under any obligation to obtain endorsements/EEA residence cards. Furthermore, if such documents are obtained, the EEA Treaty rights are not affected by the expiry of such documents nor are they affected by the acquisition of a new passport.

2. Many non-EEA nationals who are lawfully present and hold the right to work in the UK are still reliant on leave to remain endorsed in passports which have expired or been superseded by new passports (eg due to the holder's frequent need to travel for business reasons). This frequently arises in the cases of those who hold indefinite leave to remain in the UK as it has never been compulsory for them to transfer this status to their current passport/to a Biometric Residence Permit in order to be readmitted to the UK following overseas travel.

3. Getting in touch with the Home Office's Employer Checking Service remains a time-consuming exercise. Different answers can be given at different times, which can be a result of either; the employer's or the checking service's understanding of the person's status (as described by the employer), or because the Home Office database has not been updated, the latter being a problem that can last for considerable periods.

4. There are significant and ongoing problems with the accuracy of the Home Office Employer Checking Service. It often provides wrong information, as described in several of the examples listed by in Appendix B, which results in a potentially unlawful suspension and/or termination of employment.

5. Members report many instances where applications to the Home Office for further status documents have been made but the Employer Checking Service has simply failed to provide the requisite Positive Verification Notices[14]. This often results in employment being suspended and/or terminated.

6. Many British citizens who for whatever reasons, do not possess the requisite documentation to evidence their right to work are also being impacted.[15]

The position of third country national family members of EEA nationals

As detailed in ILPA's consultation response[16], it remains our view that the scheme is in breach of articles 23 and 25 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of

[13] See ILPA response – Immigration Law Practitioners' Association response to consultation: *Strengthening and simplifying the civil penalty regime* 13 August 2013 (http://www.ilpa.org.uk/resources.php/19317/ilpa-response-to-the-home-office-consultation-strengthening-and-simplifying-the-civil-penalty-regime).
[14] See Appendix B to this letter.
[15] See Fiona Bawdon of the Legal Action Group, *Chasing Status*, October 2014 (http://new.lag.org.uk/media/186917/small_chasing_status.pdf)
[16] Annex D.

the Member States ('the Citizens' Directive) as it pertains to third country national family members of EEA nationals who have a right of residence under EU law.

The right to work and reside in the UK as the third country national family member of an EEA national is not dependent upon obtaining a status document. The status document is a document issued to such a person to evidence the right afforded to them under the TFEU and the Citizens' Directive. A third country national family member who has a right of residence under EU law is under no obligation to obtain a status document.

Where the third country national is, in fact, exercising EU Treaty rights, their inability to provide List B documents will not result in a civil penalty being issued against an employer, and should not give an employer any protection against any claim in employment law following non-recruitment, or suspension or dismissal on these grounds alone

The point is well illustrated in the case of *Okuoimose v City Facilities Management (UK) Ltd* UKEAT/0192/11/DA, where a third country national family member employee's claim for unlawful deduction of wages, relating to a period of suspension without wages following her inability to provide her employer with List B documents on the date her existing EEA residence document 'expired', was upheld by the Employment Appeal Tribunal.

The further wording added to the guidance by the Home Office at p. 39, which confirms the non-mandatory nature of EEA documentation, does little in practice to address the issues described above and the Employer Checking Service continues to advise employers that unless current EEA status documents are viewed and copied, employers are not provided with the protection of a statutory excuse (unless the status document is a Permanent Residence Card – in which case it can itself be expired and contained in a previous passport). Employers, particularly those with Tier 2/5 Sponsor Licences, are not prepared to take such a risk.

Indeed, it is noteworthy that the new 'right to work tool' has no reference whatsoever to the ability of non-EEA national family members to evidence their right to work by other means[17]. In practice, third country national family members are still being forced to obtain documents if they wish to work in the UK and furthermore, are being forced to reapply for renewed documents when they expire or when the family member renews their passport (as the majority of the EEA residence card endorsements are contained in passports). To impose such obligations on EEA family members when there are other means of establishing that an EEA Treaty Right exists breaches European Union law.

Are employer checks being made in a discriminatory fashion?

According to a freedom of information request response of 16 May 2014, based on data extracted on 23 July 2014[18], the Home Office undertook 5740 illegal working visits between January and September 2014. According to data released on 11 June 2014, 617 of these involved arrests of Chinese nationals, of which 564 involved visits to restaurants and takeaways[19]. Nationality of persons having been found in

[17]'Check if someone can work in the UK', GOV.UK: https://www.gov.uk/legal-right-work-uk/y/no/it-is-not-up-to-date-or-without-certificate/a-non-eea-family-member-of-someone-from-the-eu-eea-or-switzerland/no/no/no/no/no/no/no/no/no/no

[18] *Enforcement visits linked to illegal working between January 2012 and September 2013* available at https://www.gov.uk/government/publications/enforcement-visits-linked-to-illegal-working-between-january-2012-and-september-2013/enforcement-visits-linked-to-illegal-working-between-january-2012-and-september-2013. See also Enforcement visits linked to illegal working between January 2012 and September 2013

[19] Freedom of Information Act release FOI release China nationals arrested as a result of illegal working enforcement visits from 2009 to 2013, published 11 June 2014.

restaurants was prominent in Home Office press releases[20]. Restaurants and takeaways dominate in the table of fines levied in Scotland.[21]

Conclusion

The problems with documents stem from the guidance being based upon a civil penalty regime that does not include all the documents that could evidence a person's right to work. As anticipated in ILPA's consultation response[22] the reduction in the number of acceptable documents has increased what were already high levels of risk of leaving those with a right to work without the means to prove it in a way that complies with the guidance.

The regime, including the most recent changes, is fraught with unnecessary administrative difficulty, both for the employer and the employee/prospective employee and in our view fails to address the stated objective of efficient and effective prevention of illegal working. It fails to enable employers to come to a reasoned conclusion on whether a current/prospective employee actually has the right to work in the UK and in the employment in question. In some ways, the changes have actually turned this process completely on its head, as illustrated in one ILPA member's recent correspondence with the Business Helpdesk (see Appendix C):

'… Everything [other than an EEA Permanent Residence status document] must be in a current passport in order to provide the employer with a statutory excuse – *this does not affect someone's right to work, ILR doesn't cease to be valid when the passport expires.'* [23] (Emphasis added).

Rather than enabling employers to take reasonable and proportionate action to prevent illegal working, the guidance leads employers to suspend and/or terminate employment simply because the 'correct' documents do not exist. Very often they rush to mitigate perceived liability, often without consideration as to whether the employee has in fact the requisite right to work.

The current employer sanctions and right to work check scheme serves to encourage and promote discrimination in the workplace and fails to concentrate on the worst employers or on the workers most vulnerable to exploitation.

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[20] See e.g. the following consecutive (http://webarchive.nationalarchives.gov.uk/20130430082330/http://www.ukba.homeoffice.gov.uk/news-and-updates/?area=Enforcingthelaw) enforcement press releases *Six illegal workers caught in Dorset raids* 18 March 2013 http://webarchive.nationalarchives.gov.uk/20130430082330/http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2013/march/31-illegal-dorset **18 March 2013** *Oxford restaurants face illegal worker fines* http://webarchive.nationalarchives.gov.uk/20130430082330/http:/www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2013/march/30-oxford-illegal and 14 March 2013 *Two illegal workers found at Prestonpans takeaway* http://webarchive.nationalarchives.gov.uk/20130430082330/http:/www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2013/march/26-prestonpans; 13 March 2013 Immigration offender removed from UK after Borough green raid http://webarchive.nationalarchives.gov.uk/20130430082330/http:/www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2013/march/18-borough-raid ; 13 March 2013 Eleven arrested by UK Border Agency after operation in Southall http://webarchive.nationalarchives.gov.uk/20130430082330/http:/www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2013/march/21-southall-arrests

[21] Civil penalties for employers in Scotland from 2008 to 2013, undated https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/263907/29139-Civil_penalties_annex.pdf

[22] See ILPA response to consultation: *Strengthening and simplifying the civil penalty regime* 13 August 2013.

[23] See Appendix C.

Adrian Berry

Chair

ILPA

Appendix A – *An employer's guide to right to work checks, Home Office* 28 July 2014 (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/338399/An_employers_guide-28-07-14.pdf)

Appendix B Cases

Appendix C Correspondence between ILPA member and the UK Visas and Immigration Business Helpdesk October 2014

Appendix D ILPA response to *Strengthening and simplifying the civil penalty regime* 20 August 2014.

Appendix A see separate document

Appendix B Cases

Case 1

We are now dealing with a citizenship application for a non EEA spouse of a Dutch national exercising treaty right for over six years. Our non-EEA national client is a doctor by profession and works for ****. She has submitted her application to the Home Office in October - this is the same date endorsed on her residence card. Despite our attempts to clarify her immigration status with the hospital that employs her i.e. she is a settled person by virtue of her Dutch national spouse exercising treaty rights, the hospital has received instructions for the Home Office (Employer's checking service) to stop her resuming her duties at the hospital, with immediate effect.

She has been told she cannot return to work until she receives confirmation from the Home Office that her application has been submitted (which we were told would be in 10 days' time). Our client is therefore very distressed. It would appear that the Home Office and the hospital have been treating her case as a work permit holder, under UK immigration rules.

We had also checked the Right to Work online tool to ascertain if this would provide any relief - again this appears not to cater to our client's situation and only gives rise to more confusion.

Case 2

One of my employer clients has agreed that I may share an example of recent problems with the Employers' Checking Service in respect of EEA nationals' family members.

5. Employee commenced employment in January 2012. His employer completed a pre-employment right to work check. He provided his Nigerian passport and a permit showing he was the family member of an EEA national. That permit was valid until August 2014.

6. Employer repeated the right to work check as required. When completing the check in August 2014, the employer was provided with a copy of the employee's ongoing right to work, but received a reply saying employee did NOT have the right to work.

7. In light of the above, employer suspended employee on full pay and made further enquiries of employee. Employee explained he is currently going through a divorce and we established he had applied for permanent residence on the basis he has a retained right of residence in the UK. The application was missing some key information (details of EEA national).

8. Employer requested a copy of employee's Certificate of Application. This said the Home Office was unable to confirm whether or not employee has the right to work.

9. We advised employer that a retained right of residence means employee IS permitted to work in the UK. Dismissal would be risky and was undesirable. But the reply from the Employer Checking Service posed a problem, would be foolish to ignore it.

10. Employer is a licensed sponsor and had been inspected earlier this year by the Home Office, so we advised them to contact the inspector for advice, they referred the query to enforcement.

11. Enforcement tried to refer back to the Employers' Helpline. We held firm and pushed for advice from enforcement. Enforcement advised employer not to employ employee. We went back, reiterated that he was already employed, current suspension could not be maintained, employer believed employee had retained rights and queried if enforcement were saying employer had to dismiss. Query was referred up and eventually enforcement backed down and said it was "an unusual situation", but employer could continue to employ employee pending the outcome of his application and as the query had been logged would not be subject to enforcement action if later found employee had no right to work.

12. After over four weeks of suspension, employee has been allowed to return to work.

If the employer had not been prepared to take advice from us and persist with the Home Office, this employee could easily have been (unfairly) dismissed by the employer relying upon the Checking Service response.

Case 3

I have a client whose employment with the University of **** has just been suspended pending investigation. He made an in-time application. This was refused. An in-time appeal was submitted. Capita texted him to say he had no leave. We telephoned them to explain that they were wrong. They confirmed they would update their system. he then received a letter from Capita in similar terms. We wrote to them to again explain that he did have leave as his appeal is outstanding.

His employer then used the Employers' Checking Service and received a negative verification report. We have made reps to the employer and the Home Office. Eployment has been suspended pending investigation.

Cases 4-6

Three examples in the last 12 months. EEA2 lodged, confirmation of application with employment rights issued, employer calls the Home Office and they say that they cannot confirm that the client is permitted to work. We issue a letter to the employer and the employer does not accept it saying it is not from the Home office. Employment is suspended.

Case 7

The main problem we have grappled with concerns the consequences of delays in proving a right to continue in employment when the Home Office fails to issue an EEA residence card within the six-month deadline. There is a risk that delay in issuing a residence card will result in the Certificate of Application

expiring and the employer terminating employment. There are more than 30,000 applications made for residence cards per year and 39% of residence cards do not get issued within the legal deadline (see the recent independent Inspectors's report findings on EEA case work: http://icinspector.independent.gov.uk/wp-content/uploads/2014/06/European-Casework-Report-Final.pdf

The Home Office might therefore be invited to consider putting in place a policy to extend the validity of certificates of application in case of delay in issuing residence cards beyond the six-month legal deadline.

Then there is the issued of (unfairly) refused applications which are later overturned on appeal. We have recently advised a non-EU national family member whose employment was terminated as a result of the Home Office refusing to issue her a residence card. She appealed against the decision (which she eventually won). However, regardless of showing proof of having appealed, her employer went ahead and terminated her employment. She decided not to file an unfair dismissal case because of unhelpful cases such as *Kurumuth (*EAT 2011) and *Klusova* (CA 2007).

Here the source of the problem appears to be that Article 23 (family member's right to work) and Article 25 (rights not conditional on possession of residence card) of Directive 2004/38 are not adequately transposed into UK law.

Case 8

Mrs O is Nigerian and her husband Mr Y is Danish, of Nigerian origin. Mr Y has worked for a courier company all the time since 2005. They married in 2006 and Mrs O lived with her husband in the UK since 2007, their three children were born here. They had obtained EEA residence documents dated until November 2012; the length of time they had lived here meant they had in fact obtained permanent residence under EU law. They had applied to the Home Office for confirmation of this in October 2012. The Home Office refused to confirm it in November 2013 as they stated insufficient evidence was provided; the couple then sought advice. Then the institution where Mrs O worked sacked her in December 2013 because she had no up-to-date evidence of her status. The employers wrote: "An ECS Enquiry form was completed and sent to UKBA in October 2012, February 2013, May 2013 and November 2013 to seek confirmation of your right to work in the UK on the basis of an outstanding application for leave to remain in the UK which was made before your previous leave to enter or remain in the UK expired … the outcome of the first three checks carried out was satisfactory, however having checked their records for the November 2013 request the UKBA cannot confirm that you are currently entitled to work in the UK … during the formal hearing [of her appeal against dismissal] you produced a letter from your solicitor stating you have the right of residence in the UK under Regulation 14 of the Immigration (EEA) Regulations 2006…. I contacted the UKBA by phone to discuss your immigration status and unfortunately the UKBA reiterated that you do not have the right to work in the UK."

The information from the Employers Checking Service was incorrect – even if the Home Office had not yet recognised Mrs O's permanent residence, she was still married to an EEA national exercising Treaty rights and had the right to reside and work here. Her advisers made a new application for permanent residence in January 2014 and it was granted in April 2014. There is no legal aid for Mrs O to take any action for compensation against her employer or the Home Office and she was afraid to risk anything more herself.

Case 9

Mrs N is Gambian and worked for a major supermarket. Her ex-husband is German, of Gambian origin, they have a daughter born in the UK. Her husband had worked in the UK but had then had to stop work

for some time because of illness; the marriage broke down and they were divorced in August 2009. Mrs N retained rights of residence on divorce as they had been married and lived in the UK since 2005, and her husband was working at the date of the decree absolute. When she applied for recognition of her rights, the Home Office refused as there was not enough evidence of the precise dates of her husband's work. She appealed, but the supermarket sacked her in January 2013 as she could not provide the evidence to show that she was allowed to work in the UK. She contested her dismissal and then took a claim to an employment tribunal, with letters from her solicitors explaining the immigration position, but her union withdrew from representing her at the hearing and she was too scared to go on her own, so withdrew. Her immigration appeal was allowed in February 2014 and she was given an EEA residence card in March – but she had been out of work for more than a year and of course the supermarket had filled her post.

Case 10

Mrs S is a French citizen and met her husband, who is Ghanaian, when he was working in France. They got married there and their twins were born there in 2005 and Mr S was given a residence document there. The family travelled to the UK in 2007. Mrs S works for a local council, Mr S in a hospital. After five years, they applied for confirmation of their permanent residence status but got no answer from the Home Office for many months. Mr S's employers became increasingly restive about this delay and pressed him to get documents from the Home Office (as it was more than six months since his Certificate of Application). Eventually the Home Office refused, on the grounds of inadequate evidence. They were advised that it would be quicker not to appeal, but to apply again with still more detailed evidence. While this new application was pending, in July 2013, Mr S's employers suspended him. They wrote:

"… you explained to [the HR manager] that your Visa application had been refused and you had missed the deadline to appeal against this decision. You had decided to submit a new application. As you were unable to provide any evidence that would confirm your eligibility to work [the HR manager] confirmed to you that you would be suspended from duty until you are able to produce a new Visa. Your suspension is on a no pay basis. … in order to resolve this matter you are required to produce evidence from the Home Office UK Border Agency that clearly confirms you have a new Visa and your eligibility to work in the UK."

The family were devastated as they need the two salaries to survive. They explained EU law to the hospital. The hospital refused to make any further inquiries to confirm Mr S's true position. Mr S's union made representations on his behalf, which led to his reinstatement, and then to his back pay. Mrs S's permanent residence was confirmed in November 2013 but Mr S's not until January 2014.

Case 11

My client is a Canadian national and holds Indefinite Leave to Remain. He and his British citizen wife had been living in Holland for several years. My client maintained his ILR status and earlier this year decided to move back to the UK permanently. He obtained an offer from a UK employer whilst still in Holland to work in financial services. His interviews were conducted over the phone and he sent the employer scanned copied of his ILR endorsement to verify his UK immigration status. It was not appreciated by his employer at that time that the endorsement was in a previous passport (and our client did not appreciate that this would be a problem - as he has held this status for several years and of course, does not need the endorsement transferred to a BRP/new passport to travel back to the UK).

On arriving here, he presented his previous passport containing his ILR endorsement and his new passport to his employer. His employment offer was rescinded until such a time as he could provide satisfactory evidence of his right to work. He was denied access to corporate housing which he had

expected to be moving his family into that same day and was extremely distressed when he instructed us.

Despite several attempts by our firm to explain he had the right to work in the UK, the refused to allow him because of the new guidance on the Right to Work checks. For three weeks, our client and his family lived with his brother-in-law as he collated the documents he needed to lodge a successful NTL/TOC application.

The family were financially stretched from their recent return to the UK. The additional and very unexpected cost to the family to obtain a BRP for my client put them under significant pressure. In our client's case, he was fortunate to have family members in the UK who could help them.

Case 12

Mr T is a recognised refugee who has had indefinite leave since 2002. He has mislaid his Home Office letter recognizing his status. He had obtained a Home Office refugee travel document but this ran out in summer 2013. He had worked for a local council for eight years when they asked for confirmation of his status in summer 2014 and would not accept his old travel document. The council contacted the Employer Checking Service on three occasions, trying to be helpful as they were concerned about his status. He was then sacked without notice, the council writing to him that the ECS had not confirmed that his application for a new travel document was pending (though he had his Home Office receipt for the application) and that his 'contract of employment is void through illegality.' Later, the Home Office rejected his travel document application because he had not sent in his status letter. The council complained that 'every time you speak to the Home Office they say something different' and dealing with them was 'a nightmare' but stated that it wanted to continue to employ him. It took six weeks before the Home Office confirmed his settlement and eligibility to work and even longer before he got his new travel document. He was reinstated in his job but as he hadn't been paid for six weeks he had got into rent arrears and he and his family were pressurised by his landlord for some time until he got his back pay.

Appendix C Correspondence between ILPA member and the UK Visas and Immigration Business Helpdesk October 2014

From: Business Helpdesk [mailto:BusinessHelpdesk@homeoffice.gsi.gov.uk]
Sent:
To: M
Subject: RE: Right to work check - EEA Family Member

Dear M,

Thank you for your email.

Your understanding is correct – a Permanent Residence Card issued to the family member of an EEA national is the only endorsement that can be accepted in an expired passport. Everything else must be in a current passport in order to provide the employer with a statutory excuse – this does not affect someone's right to work, ILR doesn't cease to be valid when a passport expires.

Yours Sincerely,

Business Helpdesk | Home Office | Vulcan House - Iron | Sheffield | S3 8NS
BusinessHelpdesk@homeoffice.gsi.gov.uk
Accredited to the Customer Service Excellence standard

From: M
Sent:
To: Business Helpdesk
Subject: RE: Right to work check - EEA Family Member

Apologies, on re-reading your emails of last week, I just have one more (hopefully the last!) question for you.

Thanks for clarifying that a Permanent Residence Card issued to the family member of an EEA national can be accepted in an expired passport. Would therefore an ILR/No time limit stamp in an expired passport also be accepted? My understanding is that it won't?

Many thanks,

M

From: Business Helpdesk [mailto:BusinessHelpdesk@homeoffice.gsi.gov.uk]
Sent:
To: M
Subject: RE: Right to work check - EEA Family Member

Dear M

Thank you for your email.

Prior to May 16th 2014:

1.2 This would have protected the employer for 12 months, each subsequent check would need to be done using the guidance that was current at the date of the repeat check.

1.3: This would not have protected the employer.

1.4 This would not have protected the employer either. At the time the Employer Checking Service didn't cover citizenship applications, so that wouldn't have been an option.

In all 3 cases, the right to work of the individual would be based on their personal circumstances and not whether they had a document to protect an employer – even having such a document doesn't necessarily mean the person is allowed to work as their situation may have changed.

2) In the circumstances you describe it would safer the employer to check right to work documents before someone commences employment. With regards to doing checks on the first day of employment, our policy team have advised as follows:

The regulations are quite clear. The check must be concluded before employment commences in order to provide a statutory excuse. When document verification is required from the Home Office Employers Checking Service, this must also be completed before employment commences.

There is no prohibition against the check being completed on the same day for example with the check completed at 9am and employment starting at 10am. However, we would not generally recommend this as best practice as there could be some confusion as to the moment that employment starts. Employment would also have to be delayed if verification is required. If the employer does decide to undertake the check on the first day, this should be clearly documented in HR guidance.

With regards to suspending someone, the following advice is from out policy team:

Most employment contracts provide an ability for the employer to suspend an employee and during the period of suspension the worker continues to be in an employment relationship. As such, their employer could be liable for a civil penalty as the Act clearly states that the employer is liable if he employs someone.

Although we are not aware of any planned changes I cannot state that there are no planned changes. We regularly provide feedback to the team that writes the guidance which has lead to some changes. If you feel any aspect of the guidance could be clearer please let us know so we can pass that on.

Yours Sincerely,

Business Helpdesk | Home Office | Vulcan House - Iron | Sheffield | S3 8NS
BusinessHelpdesk@homeoffice.gsi.gov.uk
Accredited to the Customer Service Excellence standard

From: M
Sent:
To: Business Helpdesk
Cc:
Subject: RE: Right to work check - EEA Family Member

RE: Right to work check - EEA Family Member

Thanks, as always, for your quick and helpful reply. Apologies also for my personal shorthand creeping into my email – by 'Residence permit', I meant 'Residence Card issued to the family member of an EEA national'.

1. Please let me know if your answers to 1.2-1.4 below are affected if the copies of the passport and Residence Card were taken before 16 May 2014 (under the old guidance, the Residence Card could still have been relied upon if issued in a previous/expired passport).

2. I think that most employers are approaching the right to work checks pragmatically. The example I referred to (where employment was suspended) was a circumstance where the employee presented a Residence Card in an expired passport, together with a current passport on the employee's first day of employment. Whilst UKVI is not advising employment be suspended in the event that a right to work check cannot be taken at the correct time, there are circumstances where it is happening as some employers are quite jittery about this (particularly those with Tier 2 licences).

I think I must have misunderstood a comment made at an ILPA subcommittee with regard to proposed 'fixes' to the illegal working guidance. Thanks for clarifying this.

Best wishes,

M

From: Business Helpdesk [mailto:BusinessHelpdesk@homeoffice.gsi.gov.uk]
Sent:
To: M
Subject: RE: Right to work check - EEA Family Member

Dear M,

Thank you for your email.

1.1) This document won't protect the employer if presented by a prospective employee. If it expires after the person commences employment the employer has 28 days to do another check (details below), which would typically be done by sending in an Employer Checking Service form after the individual has submitted their EEA2 form.

If however, at the point that permission expires, you are reasonably satisfied that your employee has an outstanding application or appeal to vary or extend their leave in the UK, your time-limited statutory excuse will continue from the expiry date of your employee's permission for a further period of up to 28 days. This is to enable you to verify whether the employee has permission to continue working for you.

Copied from: https://www.gov.uk/government/publications/preventing-illegal-working-code-of-practice-for-employers (page 16).

We do not specify how an employer satisfies themselves that someone has applied, the rules do not specify that evidence of application is required.

For 1.2 onwards I assume that by 'residence permit' you are referring to the Residence Card issued to the family member of an EEA national. If not, please let me know. For info, a Permanent Residence Card issued to the family member of an EEA national can be accepted in an expired passport.

1.2) This also won't protect the employer if presented by a prospective employee, however if it was copied when the passport was current then the employer is covered up until the expiry date of the permit (and not the passport).

1.3) This won't protect the employer if presented by a prospective employee, however if it was copied when the passport and permit were current then the employer is covered up until the expiry date of the permit (and not the passport).

1.4) The employer will need to verify the person's right to work using the Employer Checking Service in order to obtain a statutory excuse. The form can be found here: https://www.gov.uk/government/publications/employer-checking-service-form-check-employees-right-to-work - replies take up to 5 working days.

UKVI do not advise employers to suspend workers in any circumstances, we can only suggest employers take legal advice if they find themselves in a position where their statutory excuse has come to an end.

I am not aware of any plans to change these rules, or of any re-consideration of the changes.

If someone needs to travel while their application is ongoing they can request the documents back – unlike LTR applications it won't withdraw the application, they can do these here: https://eforms.homeoffice.gov.uk/outreach/Return_of_Documents.ofml

If someone gets a new passport this won't have an impact on an existing employer, although it would cause a problem if they were seeking employment.

Please note that the guidance we issue to employers on right to work checks (https://www.gov.uk/government/collections/employers-illegal-working-penalties) does not affect whether someone is allowed to work, just whether the employer is protected in the event the person is found working illegally.

If you have any further queries please let us know.

Yours Sincerely,

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From: M
Sent:
To: Business Helpdesk
Subject: Right to work check - EEA Family Member

Dear Sirs

Right to work check - EEA Family Member

We are frequently being asked by our clients for advice regarding how to undertake valid right to work checks on employees who are here as the family members of EEA nationals.

1. There are four circumstances which seem to cause employers the most difficulty:

1.1 Employee has an EEA Family Permit which has expired. Application for a residence card has not yet been made.

1.2 Employee has an unexpired Residence permit. Residence permit is in previous passport.

1.3 Employee has an expired Residence permit. No application for a permanent residence card has been made.

1.4 Employee has an expired Residence permit. Application to naturalise has been submitted and is pending – Certificate of Application presented.

2. In each circumstance our clients have called and spoken to the Sponsorship helpline. In each instance they have been told that the EEA Family Member must make a further application for a residence card/permanent residence card and must present a Certificate of Application to their employer before the Right to Work Check can be deemed valid. In at least one instance, this has resulted in an employee being suspended and unable to work.

3. The Sponsorship helpline cites the 28 July 2014 guidance, 'An employer's guide to right to work checks' as the authority which contains the provision that, "All documents which contain an expiry date must now be current" (first bullet point, page 4). This clause is extremely problematic for clients whose employees are frequently required to travel. Frequent travellers often are unable to relinquish their passports for the time it takes for EEA residence documents to be issued. Additionally, frequently travellers often need to regularly renew their passports (if they are unable to get further pages inserted into current ones). This means that quite often unexpired Residence cards are endorsed in cancelled/previous passports.

4. My understanding is that the issues outlined above are being considered by the Home Office. Could you please clarify the current Home Office position with regard to undertaking Right to Work checks on the Family Members of EEA nationals and also whether the Guides may be amended to address these problems.

Many thanks in advance for your consideration of these questions.

Kind regards,

M

Appendix D ILPA response to consultation *Strengthening and simplifying the civil penalty regime.*

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 Home Office, and other consultative and advisory groups.

ILPA has opposed employer sanctions since their inception in 1996. They serve to encourage and promote discrimination in the workplace, affecting not only those with limited leave to be in the UK but also settled persons and British citizens, in particular from ethnic minority backgrounds[24]. Relationships in the workplace can be put under strain.

Employer sanctions have also, particularly since the introduction of the sponsor licensing schemes under the Points-Based System[25], greatly increased the regulatory burden for businesses. They have increased businesses' reliance on lawyers.

All too often illegal working is in exploitative, sometimes dangerous conditions[26]. The rhetoric around this consultation suggests that it is about increasing sanctions for the worst, most exploitative employers but we do not consider that the substance of the proposals has this effect. We recall the analysis in the report[27] of the TUC Commission on vulnerable employment[28]: "…firms that are found to be non-compliant in one area are often non-compliant in others."

Disregard for the rights of migrant workers is likely to go hand in hand with disregard for health and safety, and for more general employment law and workplace standards[29]. The Commission said:

… it is the weak position of migrant workers that has made them vulnerable. If you increase the supply of vulnerable workers then the unscrupulous will come along to exploit them. So the worst way to respond

[24] See the Migrants' Rights Network *'Papers please': The Impact of the Civil Penalty Regime on the Employment Rights of Migrants in the UK*, November 2008.

[25] 27 November 2008.

[26] See, for example, the Joseph Rowntree Foundation Programme Paper: Forced labour and UK immigration policy: status matters? Peter Dwyer, Hannah Lewis, Lisa Scullion and Louise Waite, October 2011.

[27] *Hard Work; Hidden lives, the full report of the TUC Commission on vulnerable employment*, 7 May 2008.

[28] See http://www.vulnerableworkers.org.uk/ .

[29] *Hard Work; Hidden lives, the full report of the TUC Commission on vulnerable employment, op. cit.*

to concern about migration is to further reduce migrant workers' rights. That will simply cause an even greater downwards pressure on standards.

…

We have therefore concluded that there is a need for the scope of government enforcement agencies to be extended to cover a wider range of workplace rights.

This recommendation should be revisited. The current regime fails to concentrate on the worst employers or on the workers most vulnerable to exploitation. It does nothing to contribute to the general raising of employment law standards that would protect migrant workers and ethnic minorities in the labour market. Instead it creates red tape and can contribute to an atmosphere in the generality of workplaces that is at best unhappy and at worst oppressive.

1. If an employer breaches the right to work checks on more than one occasion, should a maximum civil penalty of £20,000 per illegal worker be levied?

No.

Given that the maximum penalty is already £10,000 per head, ILPA is unconvinced that increasing the maximum penalty will serve significantly to affect employer behaviour. It is difficult to see how increasing the maximum penalty will offer any more of a disincentive to the exploitative employer who intentionally employs somebody without permission to work: we suggest that the fear of detection is a far greater deterrent than the severity of the penalty. For those employers who have failed to comply with the legislation by mistake or because of error, in members' experience the level of penalty is seen of little relevance to them until it is too late. The proposed change thus appears thus to be symbolic, of style rather than substance. No statistics or other analyses have been provided in the consultation paper to suggest that the increase of the maximum civil penalty from £5,000 to £10,000 on 29 February 2008 increased compliance.

2. Should the calculation of civil penalties be simplified as proposed in the consultation?

No – what is proposed would make it a more crude, as opposed to a simpler, tool.

Mitigating factors

As to the proposed new mitigating factors, employers have statutory employment law responsibilities as well as responsibilities under their own terms and conditions of employment. We have seen too many cases where persons subsequently given leave to remain have in the meantime lost their jobs. Employers who have wrongfully and peremptorily dismissed employees on an assumption that they have lost the right to work have lost unfair dismissal cases in the employment tribunals but by that time reinstating the employee in work may no longer be possible, for example because there is no subsisting relationship of trust and confidence between employer and employee.

Where the immigration status of an employee is unclear and that employee cannot provide documents that give the employer a defence against a civil penalty, the employer will be in violation of employment law if it suspends without pay or dismisses an employee who does have the right to work.

For example, there are significant and ongoing problems with the application process for EEA residence documents and the timely obtaining of Certificates of Approval by those who have applied for such documents. These delays are leading to third country national family members being unable to access employment and can lead to problems with existing employers and have in some cases led to suspension and dismissal.

There are significant ongoing problems with the accuracy and efficiency of the Home Office's Employer Checking service. A third country national's inability to provide List B documents will not (and should not) give an employer any protection against any claim in employment law following non-recruitment, or suspension or dismissal on these grounds alone where the third country national is, in fact, exercising EU Treaty rights.

The latter point is well illustrated in the case of *Okuoimose v City Facilities Management (UK) Ltd*, UKEAT/0192/11/DA, where a third country national family member employee's claim for unlawful deduction of wages, relating to a period of suspension without wages following her inability to provide her employer with List B documents on the date her existing EEA residence document 'expired', was upheld by the Employment Appeal Tribunal. The judge, Jeremy McMullen QC said that section 15 of the Immigration, Asylum and Nationality Act 2006, s.15 'has no application here'. He emphasised the wording of Directive 2004/38/EC, Art 25:

' 1. Possession of a registration certificate as referred to in Article 8, of a document certifying permanent residence, of a certificate attesting submission of an application for a family member residence card, of a residence card or of a permanent residence card, may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof.'

We consider that EU Regulation 492/2011, on the freedom of movement for workers within the Union, acts to disapply any aspect of the illegal working regime which has the practical effect of impeding access to employment by a third country national family member and prohibits unequal treatment in relation to employment, social and tax advantages. Art 3(1) of the Regulation provides:

'Under this Regulation, provisions laid down by law, regulation or administrative action or administrative practices of a Member State shall not apply:

(a) where they limit application for and offers of employment, or the right of foreign nationals to take up and pursue employment or subject these to conditions not applicable in respect of their own nationals; or

(b) where, though applicable irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered.

The first subparagraph shall not apply to conditions relating to linguistic knowledge required by reason of the nature of the post to be filled.'

Article 7 of the Regulation confirms the prohibition on unequal treatment.

Employees have been treated harshly by employers who dismiss them in circumstances where the employee does have the right to work but cannot prove this with documents that meet the requirements for a statutory defence against a civil penalty. This was the case in *Kurumuth v NHS Trust North Middlesex University Hospital* UKEAT/0524/10/CEA where the employee had been waiting for a decision on her immigration application for a number of years. The Employment Appeal Tribunal held that it was acceptable for the employer to rely upon the Home Office guidance on preventing illegal working to decide whether or not the employee should be dismissed. This was despite the employee's having the right to work in the UK, although in a way not covered in the guidance. The failure of the Home Office guidance adequately to address all the bases of a right to work in the UK results in people losing their jobs. Non-EEA nationals and ethnic minorities are more likely to be affected than British citizens and thus the shortcomings in the guidance give rise to discrimination on the grounds of race. Thus, for employers, shortcomings in the guidance can result in legal expenses.

We consider it highly unlikely that any employer would report a suspected illegal worker to the employer helpline. Either, there has been a genuine error which is being investigated in accordance with employment law or the employer is exploiting persons without permission to work and therefore highly unlikely to report this.

Guidance should identify as a mitigating factor the employer's having taken prompt action that respects employment law obligations on discovering that somebody may be working unlawfully. For example, suspension on full pay while a fair investigative procedure is followed.

There are implications of checks for relationships in the workplace between all migrant workers, whether or not they have permission to work, and their employers. Employers will not always "know" that an employee does not have the right to work; they may have a concern that this may be the case. In such cases the required documents to check status are not always available, for example when a person's leave is shortly to expire and those documents are with the Home Office, supporting an in-time application or when an EEA national of family member of an EEA national has applied for residence documentation. Employers are not always the sponsors of the migrant workers they employ. For example, an employer may employ a person who has permission to work as a family member of a British citizen, EEA national or settled person. To report an employee as a person who does not have permission to work or to share information that should be confidential under the contract of employment in the course of trying actively to cooperate with the Home Office investigation may put the employer in breach of responsibilities under the contract of employment, employment law statutes and other statutes.

It is unclear why cooperation with an investigation is given such weight as against the underlying cause of the investigation, the conduct being investigated. Has the employer made a mistake in record keeping or have they knowingly and deliberately employed a person without permission to work, including with intent to exploit that person?

There are situations in which an employer tries to carry out checks but makes a mistake in following the guidance. In very many of the situations where persons have been found to be working unlawfully there has been an error. For example, in one case an individual applied for further leave to remain and did not include the correct fee. The application was rejected as invalid by which time his leave had expired. In another case, the individual failed to sign the cheque that accompanied the application. The application was returned as invalid but the individual's leave had in the meantime expired. Applications that employer and employee thought were in order have been refused for technical reasons such as payslips or bank statements in formats that do not meet the requirements being provided. In these cases, the employer was then employing the individual unlawfully.

Caution in cooperating with the investigation may be evidence of trying to ensure compliance with employment law and data protection responsibilities, not to mention supporting a valued employee whom the employer is aware may turn out to have been in the UK lawfully.

Partial checks

A partial check may be evidence of good faith. To refuse to continue to treat such a check as a mitigating factor in appropriate cases, risks fettering the Secretary of State's discretion to take it into account, resulting in the unreasonable and potentially unlawful imposition of a penalty. During audits members frequently identify that employers have not complied with all the requirements set out in the legislation. For example they have not copied the documents before the first day of employment and have instead taken the copies on the first day. There are also many cases where the employers have not photocopied the cover pages of a passport. We consider it wrong that employer could not rely on the partial check in

circumstances such as these where the error is technical and has made very little substantive difference. The guidance should permit those who carry out checks on the first day of employment to maintain the statutory defence.

Any changes to the civil penalty regime short of abolition must improve legal certainty and mitigate the discriminatory effect of penalties, *inter alia* by:

- making provision for all documents that evidence a right to work, for example in the situations described above, to found a defence against the imposition of a civil penalty when they have been checked;
- making clear that civil penalties can only be imposed where an employee is not permitted to work, not for not making the checks on an employee who does have the right to work, save insofar as any checks have been carried out in a discriminatory manner;
- providing guidance that helps employers accurately to determine the right to work of their employees in situations where this is not clear; and
- providing for a defence against a civil penalty where an employer reasonably believes after reasonable investigation that an employee does have the right to work in the UK.

3. Should a warning letter no longer be issued for a first time breach of the right to work checks?

Yes.

We consider it essential that it continue to be possible to issue a warning letter. The consultation paper does not recognise the severity of the consequences of not doing so and these do not appear to have been appreciated.

The impact of a civil penalty on a Tier 2, 4 or 5 sponsor or an organisation that wishes to become such a sponsor goes far beyond financial sanctions. A Tier 2, 4 or 5 sponsor will lose its licence for receiving a penalty of the maximum possible amount[30]. This is mandatory. There is no right of appeal against this decision; the only challenge is by way on an application for judicial review. The sponsor cannot apply for a new licence for six months from the date of the revocation[31]. A Tier 4 sponsor cannot obtain Highly Trusted Sponsor status for three years after receiving any civil penalty. A Tier 4 sponsor that cannot renew its Highly Trusted Sponsor status will have its sponsor licence revoked. An organisation cannot obtain a Tier 4 sponsor licence within 12 months of receiving any civil penalty.

A warning letter should not be automatic: there is a difference between a person who has made a mistake or been careless and a person who is exploiting and ill-treating migrant workers. Warnings are more appropriate in the former case where the consequences of a civil penalty are disproportionate.

4. If an employer has already received one or more civil penalty notices, should these be considered an aggravating factor when determining the current penalty level?

This should depend on the circumstances of the cases. It should not be automatic.

5**. What should be the starting point for the calculation of a first civil penalty to act as an effective deterrent to employing illegal workers?**

[30] See paragraph 677 (d) of the Home Office *Tier 2 and 5 of the Points Based System Policy Guidance for Sponsors* (version 07/13)).

[31] *Op.cit.* paragraph 678.

- £15,000

- £12,000

- £10,000

None of the above.

All these are too high and, as set out in response to question 3 above, zero value civil penalties still have more severe consequences for an employer than a warning. The imposition of a penalty, with the attendant consequences for the employer, may be disproportionate and a warning letter more appropriate. Home Office press releases about those who have employed persons without permission to work in the UK usually describe small businesses, where the level of penalty is likely to significant rather than large employers. It is unclear whether this is because only small businesses are targeted, or because larger ones are not "named and shamed," all too often before the question of whether the employer is liable to a civil penalty can possibly have been resolved.[32]

It should be possible to reduce the amount of a civil penalty to zero in the circumstances of an appropriate case.

6. Would reducing the number of acceptable documents simplify the right to work checks?

No.

See the response to question 2 above. It is not suggested in the consultation that the number of documents that evidence status would be reduced, that the system of grants of leave would be simplified, that documents would be quickly and easily verified or that documents would be replaced quickly if lost or stolen or upon expiry. Thus to reduce the number of acceptable documents risks increasing what are already high levels of complexity and increasing what are already high levels of risk of leaving those with a right to work without the means to prove it.

Currently, the page of the Home Office website dealing with Preventing Illegal Working[33] provides links to some eight separate current documents, totalling some 194 pages. List A of acceptable documents[34] goes on for 12 pages and list B for 11[35]. This gives some notion of the difficulties employers face.

The problems with documents stem from the guidance's being based upon a civil penalty regime that does not include all the documents that could evidence a person's right to work. See our response to question 2 above. The circumstances that are not catered for are principally:

- British citizens born outside the UK (and therefore without a UK birth certificate) who do not have a UK passport;
- People with leave under sections 3C or 3D of the Immigration Act 1971;

[32] See for example Home Office press releases in the last Six illegal workers arrested in Glasgow, 5 August 2013; Illegal workers arrested in raids on Mull, 5 August 2013; Six illegal workers arrested in Highland raids, 5 August 2013; Seven Immigration Offenders Arrested in Essex, 31 July 2013; Cornwall Restaurants face heavy fines after immigration raids, 31 July 2013; Two arrested following raid in Kent, 25 July 2013; month "Two arrested in Immigration raids" 24 July 2013; Three arrested following raid in West London, 24 July 2013.

[33] http://www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/preventingillegalworking/ (accessed 12 August 2013).

[34] *Full guide for employers on preventing illegal working in the UK*, UK Border Agency May 2013, page 14. Available at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/preventingillegalworking/currentguidanceandcodes/comprehensiveguidancefeb08.pdf?view=Binary (accessed 12 August 2013).

[35] *Full guide for employers on preventing illegal working in the UK*, UK Border Agency May 2013, page 26.

- Family members of EEA nationals exercising Treaty rights in the UK who do not have a current family permit or residence card. As a matter of EU law, these documents are not required, although families are entitled to obtain them; and
- Individuals from EU accession states who have the right to work, e.g. where they have been working lawfully for another employer for a period of 12 months. It is often very difficult for Romanian and Bulgarian nationals to demonstrate their right to work, for example where they have been working lawfully for another employer for a period of 12 months. This is also likely to be the case for Croatian nationals who have been working lawfully in the UK for 12 months on 30 June 2013.

The system is meaningless if a person who has the right to work cannot prove it. Meanwhile, checks properly carried out do not evidence a right to work. For example the documents asked for in lieu of passports at the moment do not necessarily prove that someone has the right to work. At the moment in the guidance[36] under List A someone can produce a birth certificate and an official document bearing their National Insurance number. Neither of which bears a photograph. These documents prove nothing for someone born after 31 December 1982 when birth in the UK ceased to confer British citizenship without more. Furthermore, where leave is curtailed, this is extremely unlikely to be shown on a vignette or biometric residence permit.

Other circumstances where an employee's leave will not have an expiry date are where the employee is enjoying leave under section 3C or 3D of the Immigration Act 1971. As explained elsewhere in this response, if a civil penalty is maintained, the list of documents that provide a defence against a civil penalty should be amended to allow a defence in circumstances where an employee has leave under section 3C or 3D of the Immigration Act 1971. The Home Office should issue a letter immediately upon receipt of an in-time application for leave to remain. This would state what the person's current leave is and that it continues until the application has been determined and all appeal rights have been exhausted. Such a letter would be useful to an employee with continuing leave and mention of it could also be incorporated into guidance to avail the employer of a defence against a civil penalty for a specific period.

7. Do you support working towards the biometric residence permit being the main acceptable document for right to work checks for most non-EEA nationals?

We neither support nor oppose this. It is a question of carrots not sticks. If biometric residence permits are the simplest thing to check and are adequate, it should be easy to promote their use by employers. It is unfair that the list of acceptable documents and the way in which checks are operated mean that persons with the right to work cannot evidence this and it is unfair that in general it is so complicated for persons without a British citizen passport to evidence their right to work.

At the moment reliance on biometric residence permits is impossible, as most people with a right to work in the UK do not have a biometric residence permit. This will continue to be the case for a very considerable period of time. There will always be a need even for a person with a biometric residence permit to be able to rely on alternative documents to evidence their right to work, for example in cases of loss or theft of the document, or when it expires but the person has continuing leave under sections 3C or 3D of the Immigration Act 1971.

8. Would a follow-up check linked to the expiry of permission to stay in the UK reduce the burden on employers?

[36] *Full guide for employers on preventing illegal working in the UK*, UK Border Agency May 2013, page 14).

We are unclear how it is proposed that such a check would work and thus we are unable to determine whether it would reduce the burden on employers or not.

What would a check at the time when an employee's leave was due to expire prove? That the employee has leave, but that it will expire in two weeks? That the person may or may not then have 3C (of the Immigration Act 1971) leave for a period that is not known? It is unclear from the consultation paper what the implications of such knowledge are first for the employer's liability to the civil penalty under section 15 of the Immigration, Asylum and Nationality Act 2006 but also for their risk of prosecution for the criminal offence of knowingly employing a person without permission to work under section 21 of that Act.

In cases where an employee provides documents from List B[37], Article 4(2) of the Immigration (Restrictions on Employment) Order 2007 (SI 2007/3290) provides:

…an employer will be excused under this article from paying a penalty under section 15 of the 2006 Act for a period of twelve months, beginning with the date on which the employee produced the document or combination of documents.

In the consultation paper, at paragraph 44, this is interpreted as meaning that the defence against a civil penalty will carry on for 12 months from making the document check regardless of the employee's leave expiring during this period. However, this ignores section 15(4) of the Immigration, Asylum and Nationality Act 2006, which provides:

...the excuse… shall not apply to an employer who knew, at any time during the period of the employment, that [the employment] was contrary to this section.

When exactly would the checks be carried out? Would they have to be carried out prior to the expiry of the grant of leave as recorded in the biometric residence permit or certificate of entry clearance? When the check is carried out it will simply show that the person's leave is due to expire very shortly. If two months prior to expiry of that employee's leave, the employer checked the employee's leave and took and retained copies of the relevant documents, it might be argued that It would appear that the employer knew, two months later, that the employee had no right to work. To deny an employer the statutory excuse, the Home Office would only need to prove the knowledge of the employer on the balance of probabilities. Were a prosecution brought the criminal threshold of beyond reasonable doubt would apply.

The current system of having a defence for one year once documents have been checked applies where List B documents that avail the employer of a defence against a civil penalty do not have an expiry date. These are the following:

- a certificate of application (List B, paragraph 4)
- an Application Registration Card combined with confirmation by the employer (List B, paragraph 6)
- an Immigration Status Document combined with an official document giving the individual's NI number (List B, paragraph 7)
- a letter from the Home Office combined with an official document giving the individual's NI number (List B, paragraph 8)

[37] *Full guide for employers on preventing illegal working in the UK*, op. *cit.*, page 26.

It is not clear how the Home Office intends to the situations of persons whose documents with no expiry date.

Even if these problems were addressed there would remain practical problems. It is at the time when the leave expires that the employee is least likely to have the necessary documents to prove to their employer that they have current leave because they have submitted their personal documents to the Home Office. Establishing when a person's leave expires is not always easy. It can be particularly difficult at the time when it is close to expiring: establishing that a person has lawful leave under section 3C or, 3D of the Immigration Act 1971 is not straightforward. The consultation paper does not make clear what the employer would have to do and how frequently checks would have to be carried out where the employee had section 3C or section 3D leave. Would checking really be less frequent under the new proposals?

The employer getting in touch with the Employers' helpline receives either confirmation that there is an application with the Home Office or is told that the Home Office cannot confirm that it has received such an application. The Home Office never confirms that it has not received an application. Where the Home Office cannot confirm that it has received an application, the employer is left having to investigate the employee's immigration status on its own, for example by taking evidence of the employee having posted their application.

Employers are not infrequently given inaccurate information when they check with the Employers' helpline. Even if the helpline accurately reports what is on the Home Office database, what is on that database may be inaccurate because an application has not been entered on the database. We have seen for example situations where the Home Office computer only has records of the main applicant's name and application and perhaps 'plus one dependant' without the name of that dependant or perhaps no record of the family member at all. The Employers Checking Service will then say there is no record of the person who has made a valid in-time application. Examples include where there is no record of a spouse or partner. The employer needs confirmation from the Employer Checking Service to establish a defence and, given inaccurate or incomplete advice, may dismiss or suspend a worker, including on terms not compatible with employment law.

There were a lot of delays in getting settlement applications in protection cases entered on to the computer for a long time, resulting in employees being sacked, or not being considered for jobs. Many employers will not take the trouble to get in touch with the Employers Checking Service, with the result that people do not get jobs, or risk losing their jobs. One member gives the example of a woman who applied in December for settlement after six years' discretionary leave as a wife and has no answer. She reports that every time sees see the administrative staff in the school where she works, those staff ask why she has not heard from the Home Office but they will not undertake the check themselves.

There can be very lengthy delays in updating the database, this is one of the causes of the problems with Capita PLC's phoning and texting people allegedly in the UK without lawful leave but all too often in practice British citizens or persons with leave. Capita is consulting a database that is both difficult to understand and not up to date.

Capita case December 2012

A client of mine received a text message on his phone from Capita Plc. and messages say they need to leave the UK and a phone number to call them on. He has also been getting phone calls from them - quite a few on a daily basis. Needless to say that our client is actually waiting for his application to be reviewed and we have a letter to confirm this, but obviously Capita have not been informed of this and he was extremely concerned.

I called them and asked if we could have a letter and I was told they only send it to the individual immigrants not to their legal representatives ... Interestingly enough they phoned my client again straight after my call.

Capita case December 2012

… one of my clients who informs me that she received the following message: " Message from UK Border Agency. You are required to leave the UK as you no longer have the right to remain. Please contact us on 08443751636 to discuss".

She received the message at 11:08AM yesterday and then, this morning at 09:32AM, received a missed call from the number 08452930035, which is possibly related.

Our client is currently on a Tier 1 (General) visa valid until 02 March 2013.

Capita case December 2013

I attach "statement of intention to depart"(!) sent to my client by Capita. …He's a new client so I don't know much about him but he does appear to have a SET (O) application outstanding and his wife's case is in the C[ase] A[udit] and A[ssurance] U[nit].

Capita case December 2012

The student has ...only been given until the 1 Jan 2013 to respond… (I'm assuming most institutions will not be operating an Independent Student Advisor service until term starts…).

…the student previously had a Tier 1 visa that was due to expire in 2011. … in 2010 the student obtained Tier 4 entry clearance to study a PhD. This leave is valid from 1 May 2010 until August 2014 and was stamped on entry on 10 May 2010. .. the Capita case ID has been logged on the UKBA system against this student but she could not see any record of the student's Tier 4 leave. It therefore looks like the UKBA (and Capita) think that the student has been an overstayer since his Tier 1 leave expired in 2011 – very alarming since as far as X knows the student doesn't in fact have any irregularities on his history to prompt this kind of confusion / action.

Capita January 2013

…some of my clients are still receiving letters directly from Capita despite the fact that they have outstanding applications and also the UKBA has our details on records as the legal representatives. One of the family's Human Rights application was lodged in November 2009, the UKBA acknowledge receipt of the application and my client has been reporting monthly since 2008.

There is no consensus among ILPA members as to whether a workable system, could one be found, of checks when leave is due to expire is preferable to a system of annual checks. This is in part because we struggle, as described, to understand how checks on the expiry of permission to stay would work but is also because we consider it likely that the answer will be different for different employers. Our tentative suggestion is that employers be allowed to choose whether they evidence annual checks or checks on the expiry of leave.

For some those employing large numbers of migrant workers it may be easier to do a check once a year. However, some large employers have sophisticated systems (often installed at very great expense) that would enable them to identify the date of expiry of leave for an individual worker.

In members' experience, many employers are failing to carry out the annual checks even though they may be aware of the need to do so. The reasons given for this are most often that it administratively inconvenient for those who employ large numbers of migrant workers. Employers question why they need to carry out repeat checks when the first check identified that the employee had leave to remain for a number of years and they cannot see that anything has changed.

Some legal representatives already advise all corporate clients to undertake checks before work commences, annual checks and checks on expiry of leave. These are clients who retain legal advisors to advise them on sponsor licensing and on workplace checks are thus have experts to whom they can turn if an employee's leave is due to expire.

9. Should directors and partners of limited liability businesses be held jointly and severally liable for civil penalties to allow recovery action to be taken against them if the business does not make payment?

No.

Civil penalties are strict liability offences. The proposed approach is at odds with the notion of limited liability. It equates a strict liability offence with negligent action, for which directors of a limited liability company can be liable. It is not made clear in consultation paper whether the Home Office thinks that amendments to company law would be required. It appears to us that amendments, for example to the Limited Liability Partnerships Act 2000, would be required.

10. Do you think the proposals would have any positive or negative impacts on individuals based on the following protected characteristics?

- Age

- Disability

- Marriage / civil partnership

- Pregnancy

- Race (including nationality, ethnic or national origins, or colour);

- Religion or belief

- Gender

- Gender reassignment

- Sexual orientation

All of the above. These are protected characteristics because of the recognised risks of discrimination on the basis of these characteristics. A person unfairly dismissed because of a workplace check may find it more difficult to obtain another job because of such discrimination.

The proposals will affect individuals differentially because of their race, in particular their nationality, and may affect them because other protected characteristics may decrease the likelihood that they hold passports.

If you answered yes to any of these, please include any suggestions as to how these impacts might be managed or mitigated.

See comments above. Employment law responsibilities and data protection responsibilities must be given primacy and the civil penalty regime must respect these responsibilities.

Race – People who have the right to work but are unable to produce documents that meet the requirements of providing their employer/prospective employer with a defence against a civil penalty are more likely to be of non-EEA nationality than EEA nationality. The existing scheme places such individuals at a disadvantage. Reducing the range of documents that can provide a defence against a civil penalty will increase the occurrence of such denials of employment. There is already a risk of employers trying to avoid the risk of penalties by being selective about who they hire, for example opting for people who are white, thereby increasing the risk of discrimination based on ethnic or national originals or colour[38].

The Home Office should examine whether the likelihood of a British citizen's having a passport is affected by any of the protected characteristics. For example, severely disabled persons may be unable or find it difficult and costly to travel and may therefore be less likely to hold a passport than other British citizens.

Further comments on these questions and/or have suggestions for improvements that can be made to the operation of the Civil Penalty Scheme, including the published guidance.

ILPA considers that the proposal to require students to provide evidence of term dates is problematic given the range of ways in which people study. A postgraduate may have different dates from an undergraduate at the same institution for example. We do not think that the proposal is workable. Attempts at enforcement are likely to be costly and involve a high level of error.

ILPA opposes the proposal to change the rules on enforcement of a penalty to allow enforcement as though the penalty were a debt due under a court order. In other cases where debts accrue under a statutory scheme, such as child support or council tax debts, there is a prior stage where a liability order is made. Here, efforts are being made to avoid such a stage (at which it is possible to contest the making of the order), or the equivalent stage of seeking a civil judgment that a debt is owing, and move directly to the equivalent of the post-making-of the-liability-order stage, where all that remains is for the debt to be enforced as if under court order.

As to the proposal that an objection must be exercised before any appeal - if this is implemented there should be an option to waive the objection and move straight to an appeal. There is no point in spending time and money on an objection in circumstances where the Home Office disagrees with the analysis of law or fact and will not change its mind. Nor should a person be obliged to incur the costs associated with an objection.

In the event of an appeal, where the respondent concedes the appellant is right (e.g. because a civil penalty was wrongly imposed), an order has to be drawn up that addresses costs. The Civil Procedure Rules Practice Direction 52 and Costs Practice Direction are in point. The former provides that where a settlement has been reached disposing of the application or appeal, the parties may make a joint request to the court for the application or appeal to be dismissed by consent. If the request is granted the application or appeal will be dismissed. Where the Home Secretary has conceded the issue, she has no basis to resist a costs order. When the appeal is settled so that it is withdrawn as the underlying decision is accepted to be wrong, the default position that costs follow the event applies.

[38] See *Papers please! Op.cit.*

It is very difficult for family members of EEA nationals to demonstrate they have the right to work in the UK without applying to the Home Office and potentially being without their passport for lengthy periods of time. The guidance on the documents that must be produced by the family members of EEA nationals is in ILPA's view in breach of EU law and should be changed. See comments in response to questions 2 and 6. Paragraph 4 of List B in the Home Office guidance[39] specifies the documents that can provide a statutory excuse for a third country national family member of an EEA national whose application for an EEA residence card is outstanding. These are:

A certificate of application issued by the Home Office or the Border and Immigration Agency to or for [a person who has applied under regulation 18A(1) of the Immigration (European Economic Area) Regulations 2006, or to or for] a family member of a national of a European Economic Area country or Switzerland stating that the holder is permitted to take employment which is less than 6 months old when produced in combination with evidence of verification by the Border and Immigration Agency Employer Checking Service.

It is presumed that these, and other EEA residence documents, were included in List B as an attempt to provide appropriate protection to employers in relation to the employment of third country national family members. However, the current regime is significantly deficient both for prospective/current employees and employer.

List B should be supplemented with such documents as would adequately evidence to an employer:

(i) the relationship between the family member and their third country national family member; and

(ii) that the EEA national is a 'qualified person' (in the terminology of the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003)). This would apply only to family members listed at Article 2(2) of Directive 2004/38/EC.

We highlight a need for better guidance in transfer of undertakings (TUPE) cases about a transferee's position. Normally under TUPE, all terms and conditions affecting the employee are considered as if prior to the transfer, for example, health and safety checks are deemed valid post transfer, even if done by the Transferor prior to the transfer date. It would be helpful if the Home Office followed this approach and respected checks undertaken by Transferor, instead of requiring Transferee to carry out fresh checks. The Home Office's 28 day grace period post transfer is inadequate and needs to be lengthened to at least six months to allow Transferee adequate opportunity to do right to work checks. Many large scale employers bring across thousands of employees under one transfer, and it is impractical and onerous to expect them to undertake comprehensive right to work checks within 28 days of the transfer date.

See comments above for further suggestions.

Adrian Berry

Chair, ILPA

20 August 2013

[39] *Op.cit.*