ILPA to Home Affairs committee:

Enquiry into immigration skills shortages

1. The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, 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 advisory and consultative groups convened by Government departments, public bodies and non-governmental organisations including UK Visas and Immigration's Business User Forum.

What impact has the cap of 20,700 employer-sponsored skilled migration (Tier 2 general) visas had upon employers?

2. For a considerable period the cap had little impact because it was not reached and showed no signs of being reached. Nervousness among employers increased as numbers of restricted certificates of sponsorship tended toward the cap's being reached. Businesses started investigating making applications earlier than they would have done for fear of rejection and to give themselves as many chances of success as possible. The cap was hit for the first time in June 2015. The cap was hit again in July. Because when the cap is exceeded by more than 100 applications no applications over the limit are granted and the unused certificates are carried forward to the next month, the cap was not hit in August. It would have been hit without the places carried forward.

3. The overwhelming majority of applications presented by ILPA members which were rejected because the cap had been hit in June, were represented in July. Some applications which would normally have been presented in August, September, October and even November were presented in July. From the moment the cap was hit there was particular anxiety that given the width of the £46,000 to £75,000 salary band that sizeable numbers of applications would be carried forward.

4. Members' impression in June was of UK Visas and Immigration being caught unawares, although the cap being hit in June was envisaged at the UK Visas and Immigration Business User Forum on 27 May 2015, at which ILPA was represented.

5. Businesses need certainty to plan and providing such certainty is also an important part of preventing a run on certificates of sponsorship through businesses bringing forward their applications.

6. ILPA wrote to the Minister on the occasion of the cap's being reached. He replied on 16 July 2015. In his reply he stated

"…we have been clear with employers since 2010 that, as the economy continues to grow, they should recruit more British workers and not depend on immigration."

7. Employers are only permitted to engage workers under Tier 2 when they cannot fill the vacancy from the resident labour market or in cases where there is a shortage across a particular sector. Where there is a shortage, one has first to attract persons to train for that sector, and then allow time for that training to take place. Many of the shortage occupations are in areas where years of training and on the job experience will be required and even more complex skill sets may be sought for an individual vacancy. The shortage occupation list contains professions from engineers, to digital IT specialists. Members of all of these professions undergo several years of training to qualify in their particular industry. It is not responsible to resort to telling employers off rather than addressing how they are to get the skilled workers they need now in 2015.

Which sectors have been particularly affected?

8. When we examined refusals in June in detail, many of those affected were professionals, including experienced workers, not just new entrants, on lower salaries because:
   - They work in a field which is less well-paid;
   - They work in small and medium sized enterprises and start-ups, where salaries are lower;
   - They work in the North of England and in Scotland, where salaries were lower (while we have few examples from Wales and Northern Ireland this month, the same considerations apply).

9. Among the rejections: engineers, teachers, lawyers, IT workers, architects, those in technology companies, nurses and healthcare professionals and those in the creative industries, where pay is lower and in Tier 2 as the result of closure of other routes.

10. Another group affected were graduates and entry level staff including in the financial and insurance sectors, marketing and trainees in "magic circle" law firms. June/July is a time of year when applications are being made for graduate hires. Graduates from the resident labour market lose places if multi-nationals have to move their graduate schemes off-shore.

If a cap on Tier 2 skilled workers remains, what is the best way to meet the needs of the UK economy while maintaining control of the number of skilled workers coming to the UK from outside the EEA?

11. To maintain the cap at the current level as numbers of vacancies rise[1] will inhibit economic recovery and will have a particular effect on those businesses and in those

[1] See, for example, PriceWaterhouseCoopers UK Economic Outlook, March 2015, available at http://www.pwc.co.uk/en_uk/uk/assets/pdf/ukeo-mar2015.pdf (accessed 18 June 2015) and Ernst and Young's Spring 2015 Quarterly UK forecast, available at http://www.ey.com/UK/en/Issues/Business-environment/Financial-markets-and-economy/Economic-Outlook (accessed 18 June 2015).

regions that have the potential to drive economic growth. Efforts to develop skills within the resident labour market will take time to bear fruit and also depend upon the presence of those who have skills to transfer.

12. There are different ways in which Government could attempt to demonstrate that the effects of the cap's being hit are under control and we identify the following as worthy of further exploration.

Step up the ability of the shortage occupation lists to respond rapidly to changes

13. In particular, accelerate discussions about placing nurses on the shortage occupation lists and ensuring that action is taken promptly. The Minister acknowledged in his 16 July 2015 letter to ILPA that there are 8,200 overseas nurses, visitors and midwives working in the National Health Service. He said that increased reliance on overseas recruitment should not form part of the Department of Health's strategy, currently being examined by a task force. This is all very well to proclaim as to a long-term strategy, but in the meantime the National Health Service must function and it cannot do so for the time being without workers recruited overseas as is demonstrated by the figure of 8,200.

14. In members' experience, in addition to nurses, the current shortage occupation lists do not cater adequately for health workers, public sector workers, and engineers.

Review existing routes to ensure that displacement to these routes is managed and controlled rather than random

15. It is desirable to ensure that alternatives to Tier 2 can be used for the groups for which they are intended rather than seeing scattergun displacement. We set out some examples in the paragraphs which follow. In his letter of 16 July, the Minister rejected the suggestion of altering other routes, saying that the purpose of the cap was to "control economic migration". This appears to be a statement about "control" of overall numbers, rather than control of how overseas workers are deployed in the labour force. There will be displacement onto other routes. The government can either seek to influence this, or try to ignore it.

16. A number of companies would be able to manage short-term staff and providing training to new recruits in the UK through the Intra-Company transfer route if problems with that route were addressed. The first of these is the barrier presented by the 12 month "cooling off" period whereby those who come to the UK on an intra-company transfer are then barred from returning for 12 months. The second is the "five per sponsor" limit on the international graduate intra-company transfer which is blind to sponsor size and the size of the sponsor's graduate programme. The third is the limitations on switching from the Intra-Company transfer routes into routes leading to settlement in appropriate cases.
17. The graduate entrepreneur scheme has failed to retain those whom the UK did not want to lose following closure of the Post-Study work route and they have instead had to be retained through Tier 2. One of the purported justifications for the closure of the Post-

study work route was the availability of the alternative presented by Tier 2. The ability of students to switch into Tier 2 in-country should be reviewed, in particular the range of post-graduate qualifications than can be relied upon. If Tier 2 is not available then consideration must be given to what will be used to ensure that this does not deter students would previously have benefited from Tier 2 from coming to the UK. Consideration must be given to ensure that those students UK employers most desire to retain, whether temporarily in the UK or for the longer term have proper options. Among them consideration should be given to exploring options for graduates already present in the UK to switch in-country rather than having to make fresh applications for entry clearance.

18. The Tier 1 Exceptional Talent route should be opened up so that it can function in a similar way to the O1A and B visas in the United States of America in ensuring those whose immigration is most highly desired are not affected by the cap.

19. Consideration should be given to options for creative workers: artists, photographers etc. to enter as self-employed persons rather than having to use Tier 2.

20. Consideration should be given to permitting switching into Tier 5 (Youth Mobility) and Tier 5 (Temporary worker) in-country. In particular restrictions on the Tier (Temporary Worker: Government Authorised Exchange Schemes) should be reviewed. It is desirable that those who wish to spend a short period working in the UK have a real opportunity to use Tier 5.

Consider the position of Croatian nationals

21. Given that the numbers of Croatian nationals entering under the Workers Authorisation Scheme is unrestricted, their counting toward the calculation of whether the cap has been met has the potential to have a distorting effect and mean that Tier 2 is not being used for the purposes for which it was intended. To preserve the purpose and protect the functioning of Tier 2, Croatian nationals should be taken out of the cap. It will be very difficult to manage the principles of EU preference and no less favourable treatment while Croatian nationals remain subject to a cap being hit. Croatian workers should cease to be subject to the cap as a temporary measure in the short term, with consideration being given to removing them from the cap as a permanent measure in the medium term. The Minister indicated in his letter of 16 July 2015 that the number of Croatian nationals was small. He jumped from thence to stating that their inclusion in the cap would not therefore have a distorting effect, but did so without any analysis of the distribution of Croatian workers in the labour market. He went on to say that providing that the number of places for non-EEA nationals should be reduced by the number of places taken by Croatians was "consistent with the purpose of the limit in reducing net migration." But the relationship between cap and limit is not straightforward. A Croatian national could enter as a self-employed person and perform exactly the same tasks, provided s/he did so under a contract for services, with no impact on the cap, but contributing to net migration.

22. We suggest that it is desirable to review the details of the way in which the cap works to ensure that it is fit for purpose in circumstances where it is being reached. The following should be included in such a review.

23. Consideration should be given to allowing Certificates of Sponsorship to be returned to the pool available within the cap when a worker who is sponsored under a Restricted Certificate of Sponsorship ceases to be sponsored. The Minister in his letter of 16 July said that this would "be complex to administer" and would have a detrimental effect on efforts to manage net migration. He suggested that the workers might have switched to working for other sponsors "outside the limit" or switched to other immigration routes and that the change "could be heavily open to abuse." This is scaremongering and it is irrational. The worker could only switch to working "outside the limit" in a way permitted by the immigration rules, for example in a job paying more than the higher salary threshold and would still have to satisfy resident labour market tests. Switching from being a worker to another immigration route, such as being a spouse, is not "abuse." It involves satisfying all the requirements of the immigration rules and, if those requirements are satisfied, is permitted by those rules. This response to this most modest suggestion, perhaps more than any response in the letter, exposes the ideology without rational basis that informs too much of thinking about the cap.

24. The sponsorship system is already complex to administer, the burden falling on employers and workers and returning certificates to the pool adds little complexity to the overall scheme. Salary bands should be reviewed to ensure that smaller and medium sized enterprises, lower paid professions and different regions are not disproportionately affected. The Minister indicated in his 16 July 2015 letter to ILPA that the distribution of salary bandings was one area where possible refinements would be considered. Such refinements are essential if global multi-nationals are not to be privileged over small and medium sized enterprises based wholly or mainly in the UK.

25. Regional variation should be reviewed. While we are aware that the Migration Advisory Committee has considered the question of regional variation in depth,[2] it remains our experience that those in Scotland, Northern Ireland, Wales and the North of England find it most difficult to meet the salary thresholds.

26. Finally we suggest that consideration be given to reducing the higher earning threshold above which places are not subject to the cap.

If the cap on Tier 2 did not remain, what would replace it?

27. Businesses have no incentive to recruit a worker from overseas, with the attendant costs and bureaucracy, when a member of the resident labour market can do the job as

[2] See e.g. Limit on Tier 2 (General) for 2012/13 and associated policies, Migration Advisory Committee 2012.

well and therefore the case for a cap is not made out. A resident labour market test and sensitive and accurate shortage occupation lists, properly applied, can be used to ensure that workers are only brought in when no member of the resident labour market can do the job.

28. Measures already in place will have an effect over the next few years. Changes which were made to the Immigration Rules in 2011,[3] limited Tier 2 Intra-Company Transfer Long Term Staff transferees to a maximum of five years in the UK (nine years if the salary is £155,300), and provided no route to settlement. We can therefore expect a large reduction in the number of Tier 2 intra-company transferees who are residing in the UK from 2016/2017, where all those who entered the UK between 6 April 2011 and 5 March 2012 will be required to leave the UK and will be subject to the 'cooling off period'. This "natural wastage" will then continue year on year post 2016 as transferees reach their five-year grant of leave limit.

29. In any event, the allocation of points allows the number of persons qualifying for entry in any particular immigration route to be controlled. We see no virtue in requiring businesses to compete against each other for the right to employ essential workers, but it can be done. The question of that for which points are awarded is an important one and we suggest that there should be scope for an assessment of the skill/experience that the individual brings to an organization rather than salary level.

30. At the moment various additions to the cap are contemplated, which could also be viewed as alternatives. We make some comments about these below.

Comments on proposals for a skills levy

31. The Prime Minister in his speech on immigration on 21 May 2015[4] stated

> *"…we're going to get far better at training our own people. This involves creating 3 million more apprenticeships – and we will consult on getting the businesses that use foreign labour to help fund them through a new visa levy."*

32. We question the extent to which a skills levy would make a difference, and in particular the extent to which it would make a difference in the short to medium term. Teachers and nurses are not recruited through apprenticeship schemes and it is difficult to see how diverting new funds to such schemes will alleviate recruitment pressures in those sectors. Introducing a skills levy for organisations such as NHS trusts and schools put extra pressure on already stretched budgets. The Skills Development Levies in South Africa exempt public services and charities, for example.[5]

33. Apprenticeship generally lead to NVQ Level 4 and above, or a foundation degree at the highest level[6]; this is well below the starting skill level for Tier 2 sponsorship and an expanded apprenticeship scheme will thus not address the needs of employers looking

[3] HC 395, paragraphs 245GC(b) and 245GE(b).
[4] https://www.gov.uk/government/speeches/pm-speech-on-immigration (accessed 25 August 2014)
[5] See http://www.labour.gov.za/DOL/legislation/acts/basic-guides/basic-guide-to-skills-development-levies, (accessed 25 August 2014)
[6] https://www.gov.uk/apprenticeships-guide (accessed 25 August 2014)

for skilled workers in the short to medium term. The Skills Levy report of December 2003 by the World Bank[7] identifies that evidence suggests that a skills levy is inequitable, benefitting larger companies over small and medium-sized enterprises. A skills levy that is too expensive for a small employer could prevent the business from succeeding in a competitive market and/or otherwise slow expansion. The Skills Development Levies administered in South Africa[8] exempts companies based on their current tax obligations and there total annual wages expenditure.

34. If the stated aim of the levy is to assist the UK in training its own nationals, then alternatives to investment in the apprenticeship scheme should be considered. A solution may be to encourage universities to offer industry schemes, such as offering more degrees with work placements. Survey data compiled in 2009 found that only 30% of courses on offer in the UK contained a work placement compared to 84% in France[9].

Comments on proposals for Tier 2 Dependants to be barred from working

35. The Migration Advisory Committee is currently consulting on prohibiting Tier 2 Dependants from working.

36. The Migration Advisory Committee's 2014 work on investors identified the importance of "social" factors in the choice of the UK as destination:

> *Partners told us that, whilst the UK does offer a relatively attractive business environment for investors and entrepreneurs, this was not the only or main driver behind investors" desire to come to the UK. Social, legal and cultural factors were equally, if not more, important.* [10]

37. In ILPA members' experience, and perhaps unsurprisingly, conditions for dependants, including, but not limited to, their right to work are more likely to be a factor in decision-making for those principal applicants who have a choice of country in which to make their home because their skills are very much in demand.

38. In the United States of America, the Committee on the Judiciary recommended that L visa dependents be allowed to work because:
    a. "*….working spouses are now becoming the rule rather than the exception in the U.S. and many ... corporations are finding it increasingly difficult to persuade their employees to relocate to the United States. Spouses hesitate to forgo their own career ambitions or a second income to accommodate an overseas assignment. This factor places an impediment in the way of these employers' use of the L visa program and their competitiveness in the international economy.*"[11]

39. Magdalena Braun's article in the Seattle Law Review "The golden cage: how immigration law turns foreign into involuntary housewives"[12] looks in detail at the effects of denying

[7] Available at (accessed 25 August 2015) http://documents.worldbank.org/curated/en/2003/12/8913510/training-levies-evidence-evaluations
[8] *Op.cit.*
[9] https://www.open.ac.uk/cheri/documents/student-experience-report.pdf (ACCESSED 25 August 2015). See also the Daily Telegraph *Apprentice levies will not solve skills crisis warns CBI, op.cit* July 2015.
[10] Tier 1 Investor Route: investment thresholds and economic benefits, February 2014, at 4.21.
[11] H.R. REP. No. 107-188, at **2-3** (2001), *reprinted in* 2002 U.S.C.C.A.N. 1789, 1790.
[12] 31 Seattle U. L. Rev. 937 (2008), available at http://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1842&context=sulr (accessed 18 August 2015).

spouses of H1-B visa holders in the United States permission to work and is relevant to this and subsequent questions. She identified the following advantages to the policy change which has now taken place

> *First, it will eliminate the dependency and vulnerability currently experienced by H-4 visa holders; second, it will ensure that there are no unjustified or arbitrary differences in treatment of similarly situated classes of nonimmigrants. … authorizing spouses of foreign professionals to work will help ensure that the United States remains an attractive workplace for the most competitive H-1B candidates worldwide. Moreover, it will enable the United States to take advantage of the unique training and education of H-4 holders without bearing any of the cost of such training and education. Finally, changing the current law will bolster the Social Security Administration's attempts to ameliorate its funding deficit problem without increasing current taxes or the current level of legal immigration."*[13]

40. See also the data cited in the Migration Advisory Committee's 2009 report.[14]
41. Dependants of Tier 2 workers are barred from recourse to public funds, therefore whether they work or not they cannot become a burden on public finances.
42. There are also social impacts. The Migration Advisory Committee captured these succinctly in its 2009 report under the rubric "the dignity of the spouse":

    a. *We are also aware of the argument that allowing the spouse to work is a desirable end in itself, in terms of preserving the dignity of the spouse. Working spouses have wider social benefits than the purely economic ones we have focused on.*[15]

43. See the extracts from the Office for Economic Cooperation and Development 2014 report *International Migration Outlook*. All the data available suggests that more accompanying spouses and partners are women than men. In its 2009 report the Migration Advisory Committee identified that 92% of Tier 2 Dependants were women.[16] UK Visas and Immigration's 13 August 2015 response to Paul McCarthy of Charles Russell Speechly's Freedom of Information Act request on gender breakdown shows that in all categories and for all years, with the one exception in 2013 (75 women; 70 men), more men than women were principal applicants. This does not determine how many of those were accompanied by dependants,[17] nor how many had a partner of the same sex, but given the very numerical differences the data strongly suggests that an accompanying partner is more likely to be female than male.
44. The Migration Advisory Committee identified in its 2009 report into Tier 2 migrants and dependants, that at least 29% of dependants were degree educated (Bachelors or Masters) but often lower skilled than the principal.[18] If the government were to consider restricting permitted work to shortage occupation or skilled levels, as most dependants

[13] *Ibid.,* page 950-951.
[14] *Op.cit.* paragraphs 7.84-7.86.
[15] *Op. cit* at 7.91
[16] *Op. cit.* paragraph 7.26
[17] In its 2009 report the Migration Advisory Committee identified a ratio of 0.44 dependants per work permit holder, see 7.20 and of 0.31 spouses per work permit holder in Tier 2.
[18] Op. cit., paragraph 7.30. See paragraph 7.32 for the Permits Foundation data.

are women and lower skilled (often in personal service occupations: Migration Advisory Committee AC report 2009) this would therefore remain discriminatory.

45. It is reasonable to conclude that proposals to restrict the access of spouses and partners to the labour market would affect more women more than men[19]. This raises the prospect that to deny or restrict spouses and partners access to the labour market would entail discrimination against women and violate the Government's public sector equality duties.

46. The attitudes taken to dependants working have repercussions across government, including in areas quite other than migration because they involve grappling with questions of division of labour within the family and of the potential of different family members to make economic contributions. Where a government policy affects women's access to the labour market in particular, this has implications for all government policy addressing women's access to the labour market. The Conservative Party manifesto stated

> *…we will make our economy more inclusive, by removing barriers that stop women and disabled people from participating in our workforce… We want to see full, genuine gender equality.*

47. Restricting the rights of women spouses of Tier 2 workers to work cannot be reconciled with these aspirations. It is also likely to have an effect on whether the UK is perceived as a progressive country striving for gender equality.

Comments on proposals to raise salary thresholds

48. If salary levels are increased it does not necessarily follow that this will reduce employer demand for migrant workers. Employers may relocate their business or parts of their business elsewhere to enable them to recruit the staff they need which would result in a loss of jobs in the UK for resident workers. Increasing salary levels will not create a pool of suitably skilled resident workers if there is a skills shortage. It will also make it difficult for small and medium-sized to compete and hire the best as they will not be able to offer the higher salaries and may not have the same opportunities to move overseas.

49. We suggest that consideration be given to the following:

- Providing a Tier 5 sponsored route for skilled workers coming for under 12 months which can be used for short term assignments.
- Moving graduates into Tier 5 or reintroduce Tier 1 Post Study Work
- Points assessments based on work experience not just salary
- Tier 2 "short term" Intra-Company Transfers being capped at 11 months so that it does not feature in the net migration figure. It is a temporary category that does not lead to settlement and its inclusion in net migration figures is therefore problematic.

[19] http://permitsfoundation.com/docs/permits_survey_summary.pdf

50. More generally, in the days of work permits that preceded the points-based system, judgment was used both for and against applicants and their sponsors. There was then a move to the objectivity of the allocation of points (albeit that subjective assessments of risk still featured). Now, with the introduction of "genuineness" tests subjectivity has been reintroduced, but always to be used against business not for business. The skills and experience of the work permits teams could be deployed to consider the needs of business and not just political headlines. This is badly needed today.

51. Finally, we need to create the conditions in which circular migration can flourish. At the moment, the way to ensure that you are free to come to the UK and work then return to your country of origin or a third country safe in the knowledge that you will have the option of returning to the UK to work in future, is to become a British citizen or to settle in the UK. In the time taken to achieve that you, and any dependants, are very likely to have put down roots in the UK and hence to be reluctant to move. Even where a route to return is open, a worker cannot trust that it will remain open in the future. Settled routes, based on comprehensible underlying policy choices that inspire confidence in their stability and longevity, could begin to create the conditions for circular migration, avoiding a "brain drain" from countries that can ill afford the loss of their skilled workers and allowing workers to feel free to leave the UK.

ILPA

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