

### **Changes to the Immigration Rules:**

1. This paper accompanies a presentation and discussion on changes to the Immigration Rules on Wednesday, 22<sup>nd</sup> April 2009.
2. There have been many changes to the Immigration Rules over the last couple of years, and these are not comprehensively addressed in this paper. Rather, it provides an overview of some of the key changes that have been made; and also introduces some of the key changes that are intended to be made (including changes to naturalisation, provision for which is contained not in the Immigration Rules but in the British Nationality Act 1981).

### **What are the Immigration Rules?**

3. The Immigration Rules are made by the Home Secretary under powers contained in the Immigration Act 1971. The Rules may be, and are, subject to frequent change. Changes do not have to receive the approval of Parliament. Parliament may reject changes to the Rules by a resolution of either House. Although, it is not common for Parliament to consider changes made by the Immigration Rules, certain changes to the Immigration Rules were debated in both the House of Commons and the House of Lords in 2008.
4. The Immigration Rules are to be found on the UK Border Agency website:  
<http://www.ind.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/>
5. The Immigration Rules set out the main circumstances in which someone may be granted leave to enter or remain in the UK. Leave to enter the UK is required for someone (who is not a British national, does not have the right of abode and is not exercising European free movement rights) to lawfully come to the UK. Such

a person will need leave to remain in the UK if he or she has come here lawfully, but has leave to enter or remain which is about to expire.

**Key changes to the Immigration Rules in recent years:**

6. The UK Border Agency has initiated a simplification project. This project is designed to make changes to all aspects of immigration law, including the Immigration Rules.
7. Key changes have been the introduction of the points-based system, the changes to the Highly Skilled Migrants Programme (HSMP), the introduction of new mandatory grounds for refusal and the introduction of Protection Rules.

**Points-based system:**

8. The Immigration Rules have changed significantly with the introduction of the points-based system, replacing Immigration Rules which dealt with economic migration to the UK by those who are not British citizens, do not have the right of abode and are not exercising European free movement rights. Generally speaking, those coming to the UK to study or work, who do not fall within the noted exceptions, will be subject to the new points-based system – unless they are student or business visitors who may be permitted to visit for short periods (not longer than 6 months).
9. Sponsorship is a key element of the points-based system. Except for highly skilled migrants (tier 1 of the system), those coming to the UK under this system will require a sponsor. This will usually be the employer for whom they intend to work or the institution at which they intend to study. The sponsor must be licensed by the UK Border Agency, and in order to obtain and retain a license the sponsor must comply with certain requirements, which will include notifying the UK Border Agency of failures or suspected failures on the part of a sponsored migrant to comply with immigration

conditions. A key feature of the points-based system is the burden placed on employers and institutions by shifting immigration control responsibilities from the UK Border Agency, with the threat of significant fines or withdrawal of a sponsorship license for failure to meet these burdens.

10. For the most part, the points-based system is a misnomer. It is not a system based on points. Instead, it is a system based on certain mandatory requirements (usually sponsorship, maintenance and English language requirements). Although points are awarded for each of these requirements, since the requirements are all mandatory the allocation of points is irrelevant. A person must meet the requirements. Except for tier 1 (for highly skilled migrants), where there is some limited flexibility in certain of the requirements (relating to age and earnings), the system is simply based upon the mandatory requirements.
11. A further important feature of the points-based system is the lack of flexibility in the system, e.g. in relation to what documentation may be required in order to satisfy a requirement. For example, applicants have been refused under the points-based system because their online banking means they do not have bank statements as required (and print-outs of their online account have not been accepted as adequate).
12. More information about the points-based system can be found from ILPA information sheets.

**Highly Skilled Migrants Programme (HSMP):**

13. The Highly Skilled Migrants Programme (HSMP) was withdrawn in 2006, but there remain people in the UK who came under this programme. There has been significant litigation around HSMP over the last couple of years. This arose because, when withdrawing the programme, the Government also changed the

Immigration Rules regarding when someone already here on HSMP could apply for further leave or for indefinite leave to remain (ILR). Changes made included that the period of time required on HSMP to apply for ILR was increased from 4 to 5 years, and the qualifying criteria for extending leave was changed.

14. Those who had come on the HSMP had been required as a condition of their applications to agree to make the UK their home. Hence they had resettled here along with their families. As an inducement to come here (because their skills, experience and qualifications were then much sought after), they were effectively promised that they could apply for ILR after 4 years; and that the criteria for continuing on the programme and for applying for ILR would not change.
15. Last year, the High Court held that those on the HSMP had a legitimate expectation that the Government would keep its promise that they would be dealt with under the criteria that was set when they originally applied to come to the UK. This year, the High Court also held that they had a legitimate expectation that the promise that they could apply for ILR after 4 years would be kept.
16. The UK Border Agency is considering its response to the most recent judgment. The Government has been heavily criticised for its treatment of migrants on the HSMP, in seeking to change the Rules, including by the Joint Committee on Human Rights.
17. More information on changes to the HSMP can be found in the Joint Committee's reports – Twentieth Report for the Session 2006/07, 9 August 2007; and Ninth Report for the Session 2008/09, 25 March 2009. These are available on the Committee's website at:  
[http://www.parliament.uk/parliamentary\\_committees/joint\\_committee\\_on\\_human\\_rights.cfm](http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights.cfm)

### **New mandatory grounds for refusal:**

18. Last year, the Immigration Rules were changed to introduce new mandatory grounds for refusal. Effectively, these introduced mandatory bans on people wishing to come to the UK if they had previously breached immigration laws in certain defined ways – e.g. overstaying, breaching conditions of leave to enter or remain and making false representations. The length of the ban could last up to 10 years.
  
19. This is one of the few times that Parliament has debated changes to the Immigration Rules. Although this did not lead to a vote upon the Rules, pressure through debates in both Houses led to important concessions; some of which have since been incorporated into the Rules. These concessions protect children and victims of trafficking, allowed a short window for some people to avoid the effect of the changes by making a voluntary return and have removed the effect of mandatory bans upon applications for leave to enter the UK in order to join family members. A person's previous immigration history may, nevertheless, affect an application to come to or stay in the UK, even if these concessions apply.
  
20. Further details of the mandatory grounds for refusal can be found from ILPA information sheets.

### **Protection Rules:**

21. A feature of how the Immigration Rules have developed in recent years is the inclusion of more law and policy in relation to asylum claims within the Rules, where previously more had been left to policy instructions or guidance.
  
22. It is proposed that the simplification project will carry this much further, with much more detail as to procedures and criteria for determining asylum claims. However, this raises new problems –

especially where the UK Border Agency is seeking to provide for interpretations of the Refugee Convention within the Immigration Rules. The Refugee Convention has not been incorporated into UK domestic law, so misinterpretation of the UK's obligations under the Convention that are contained in the Immigration Rules could prove problematic. It is clearly not appropriate that the UK should redefine or re-interpret an international Convention in its domestic law (whether intentionally or inadvertently). Hence, these developments in the Immigration Rules ought to be made expressly subordinate to the Convention.

**Naturalisation:**

23. The Borders, Citizenship and Immigration Bill contains provisions that will change how migrants can naturalise as a British citizen. The Bill will introduce 'probationary citizenship', 'active citizenship' and 'permanent residence'.
24. Currently, a migrant may naturalise by first having leave to enter or remain for a limited period of time (5 years for most people, 2 years for certain family migration cases). At the end of this period, he or she may apply for ILR, which if granted allows the migrant to claim welfare services and benefits. After one year of ILR, he or she may then apply to naturalise. It is important to note that not all migrants have a route to indefinite leave to remain (ILR), and if there is no route to ILR there is no route to citizenship.
25. The Bill will mean that a migrant would first need to have leave to enter or remain for a limited period (it is intended that this will work as now, and for the same period as now). At the end of this period, he or she may apply for probationary citizenship. This is nothing more than more limited leave to enter or remain. The period to be spent by the migrant on probationary citizenship would vary depending on whether he or she wanted to apply for citizenship or permanent residence (what is now called ILR), any criminal history

and whether he or she had done his or her active citizenship. The period on probationary citizenship might be as short as one year and might be as long as 5 years.

26. During the period on probationary citizenship, the migrant would continue to be excluded from welfare services or benefits just as he or she would have been excluded during the initial period of leave to enter or remain. (Refugees and others granted a form of protection status, e.g. humanitarian protection, would continue to be entitled to receive these services or benefits.)
27. The active citizenship requirement is under development. However, it is the general intention that any migrant who wants to become a British citizen must do some community or voluntary work, or face significant delay (up to 2 years) in the time before which he or she can apply to naturalise.
28. The route to permanent residence would be longer than the route to citizenship (by 2 years). The Government says this is because it wants to encourage people to become citizens as this will promote better integration. The Government has not produced evidence for these assertions, but it is clear that some migrants will be especially prejudiced. Those whose current nationality precludes dual citizenship will not be able to become British citizens unless they are willing to give up their current nationality. However, if they are unwilling to do this, they must spend an additional 2 years on probationary citizenship before they can apply for permanent residence; and throughout this time they will continue to be excluded from welfare services or benefits.
29. Further information about the proposals for naturalisation contained in the Bill may be found from ILPA information sheets, and ILPA briefings on the Bill, which are available on the ILPA website.

**Final notes:**

30. ILPA does not provide advice or representation to individuals. Members of ILPA may be able to assist with this, and many of them have their contact details displayed in the 'Directory' section of the ILPA website.
  
31. ILPA produces information sheets that are available in the 'Info service' section of the ILPA website. Some papers and notes that have been produced for seminars or discussions are also available in that part of the ILPA website.
  
32. Further information on ILPA's website includes 'Briefings' (e.g. for Parliamentarians on Immigration Bills) and 'Submissions' (which include responses to formal consultations).
  
33. The ILPA website is at [www.ilpa.org.uk](http://www.ilpa.org.uk)

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