ILPA Response to the Statement of Changes to the Immigration Rules: HC 1919 (7 March 2019)

The Statement of Changes to the Immigration Rules (HC1919) released on 7 March 2019 make a wide-ranging set of changes to existing systems of migration, whilst also bringing further changes to the EU Settlement Scheme. Perhaps the most striking of the changes is the clear commitment expressed within the changes and the explanatory memorandum to ending the points-based system ('PBS'). Indeed, Tier 1 (Graduate Entrepreneur) is to be updated and expanded to form the new Start-up category, and a new form of category (Innovator) is also being created. As stated above: "*The new categories are set out in a new Appendix W to the Immigration Rules. They do not form part of the Points-Based System and do not include points-scoring tables*."

This paper will look at the changes to the economic migration system and the EU Settlement Scheme in turn.

Innovators and Start-Ups

It is of value to note that the introduction of Appendix W reads:

> "*A Worker is a person who is coming to the UK for employment-related reasons. At present, the Immigration Rules also contain various categories for workers in Part 5 and Part 6A. The Worker rules in this Appendix currently contain the Start-up and Innovator categories, which were introduced on 29 March 2019. It is anticipated that other categories for workers will be added to this Appendix as the immigration system is reformed over time*" (emphasis added).

It is additionally noted that while the Tier 1 (Entrepreneur) route will remain open for those renewing their Tier 1 (Entrepreneur) visas until 5 April 2023, it will be closed to new applicants on 29 March 2019 – so new applicants will have to apply by 28 March 2019.

Start Up

The Start-up category is for those who are looking to establish a business in the United Kingdom for the first time. In order to qualify under this category, applicants need a business idea that is (a) innovative, (b) scalable; and (c) viable. The idea itself must be supported by an 'endorsing body'. A grant of leave under this category is for 2-years and does not lead directly to settlement. It is important to note that the 2 year time-limit for length of leave will include time already granted under the Tier 1 (Graduate Entrepreneur) route. Whilst applicants are 'timed out' of leave after 2 years, they may, if they wish, switch to the innovator category.

Innovator

The innovator category is for a businessperson with more experience. Presumably this is defined as someone who has already set up a business in the United Kingdom, or has prior business experience abroad. In any event, the definition of 'innovator' sits in juxtaposition to the definition of the Start-up category, which is for those who are looking to establish a business in the UK *for the first time*. An innovator, like a Start-up migrant, must have a business idea that is (a) innovative, (b) scalable; and (c) viable, which is supported by an

'endorsing body'. With a few exceptions, applicants under the innovator category will also have to demonstrate that they have funding to invest in their business. In particular, applicant will need £50,000 to invest in their business from any legitimate source. Dependant on how an applicant has performed with regards to the business they submitted for a start-up visa (if they did this) the funding requirement may be waived. The key difference between the innovator and start-up categories is that someone in the innovator category is on the route to settlement if they so wish.

Leave under both categories will be subject to a, fully inclusive, list of conditions. The prospective migrant must not (a) undertake employment as a doctor or dentist in training or (b) undertake employment as a professional sportsperson, including coaches. Finally, innovators must not undertake employment other than working for the business/es that the applicant has established.

The rules go on to clarify that: "*working for such business(es) does not include any work pursuant to a contract of service or apprenticeship, whether express or implied and whether oral or written, with another business. This means successful applicants cannot effectively fill a position or hire their labour to another business, even if the work is undertaken through contracting with the applicant's own business or through a recruitment or employment agency.*"

Applicants will be granted leave subject to 3 conditions, namely (a) they will have no recourse to public funds, (b) they must register with the police if required by Part 10 of the Immigration Rules; and (c) they may study, subject to the conditions in Part 15 of the Rules. Applicants can have their leave curtailed pursuant to paragraph 323 (Part 9) of the Immigration Rules, as usual. Additionally, however, leave may be curtailed under these categories if an 'endorsing body' either (a) withdraws their endorsement of the migrant; or (b) loses their status as an endorsing body.

The new Appendix W, with regards to the new categories above "*includes similar provisions to the Points-Based System regarding evidential flexibility, switching categories, English language and maintenance funds requirements, qualifying for settlement and the ability for dependants (partners and children under age 18) to apply*."

A prospective applicant will need at least £945 in maintenance funds, which increases in line with dependants, English language requirements have been toughened up to B2 level, up from B1. Finally, members should note that the after 3 years' continuous residence under the Innovator category, an applicant will be eligible for indefinite leave to remain. However, the knowledge of life in the UK test remains an integral part of acquiring indefinite leave to remain.

With regards to switching from the existing PBS into the new categories, Appendix W also lays out some equivalences. People in either (a) Tier 1 (Graduate Entrepreneur), (b) Tier 2, (c) Tier 4 (General) – with restrictions; and (d) a visitor undertaking permitted activities pursuant to Appendix V of the rule may switch in to the Start-up category. This list is reproduced for those eligible to switch to the innovator category, with the addition of those in the start-up category.

Appendix W

ILPA welcomes the seeming simplicity of the drafting style of Appendix W. The Rules are structured in a logical and coherent manner. It is to be hoped that further changes to this Appendix will follow the ethos of attempting to make the Rules simpler, and easier to navigate. ILPA also welcomes that the Tier 1 (Entrepreneur) route will remain open for those renewing their visas until 5 April 2023, and settlement applications until 5 April 2025. In a nutshell, the changes in W2-W4 of Appendix W take effect on 1 August 2019. Applicants who submit their

applications before 1 August 2019 will have their application decided on the basis of the Rules in force on 31 July 2019. It would appear that the Home Office has learned from their swift transition to their new front end services, and this more measured and phased approach to wide ranging reform is to be lauded. It is not just Appendix W which is clearly drafted: diverse parts of the Rules have had small, but helpful changes to their drafting, including a couple of paragraphs in the rules surrounding Tier 4 migrants.

Tier 1 (Investor)

The Tier 1 (Investor) Scheme has been tightened up in several ways:

1. There is now a requirement for investors to provide evidence of the source of any investment funds they have obtained within the last two years (up from 90 days at present)
2. As a corollary to this, investors must now have held the funds for a consecutive two-year period of time.
3. UK banks have a requirement to confirm they have carried out the checks they are required to make before opening an investment account
4. Applicants will no longer be allowed to invest in UK Government bonds unless their initial grant of leave was as a Tier 1 (Investor) Migrant under the Rules in place before 29 March 2019 and the date of application is before 6 April 2023.
5. The rules around investment in companies have become more strict, with longer definitions of active and trading UK registered companies, and further more detailed changes. These can be found under new paragraph 65A.
6. An Entry Clearance Officer must not have reasonable grounds to believe that the applicant is or was not in control of and at liberty to freely invest the money specified in their application for the purposes of meeting the requirements of the Tier 1 (Investor) visa.
7. Similarly, there must not be reasonable grounds to believe that any of the money has been or will be transferred internationally by means which are unlawful in any of the countries involved, additional to the current rule that it must not have been acquired by means of conduct unlawful in the UK.
8. Anyone who has held Tier 1 (Investor) Migrant status in the 12 months before their application will be granted 2 years rather than 3 years 4 months entry clearance.

Another change is that the requirements will be at a new Appendix A: Table 7 has been removed.

EU Settlement Scheme

A key change to the EU Settlement Scheme, which ILPA has long been pushing for, is that Zambrano carers and those with derivative rights to reside such as under Chen and Ibrahim/Teixeira are now included.

A Zambrano carer is defined as a person:
(a)With, by the specified date, a right to reside in the UK by virtue of regulation 16(1) of the EEA Regulations, by satisfying the criteria in:
(i) paragraph (5) of that regulation; or
(ii) paragraph (6)(c) of that regulation where that person's primary carer is, or (as the case may be) was, entitled to a derivative right to reside in the UK under paragraph (5); and
(b) without leave to enter or remain in the UK granted under another part of these Rules

A person with a derivative right to reside is defined as a person:

With, by the specified date, a right to reside in the UK by virtue of regulation 16(1) of the EEA Regulations:
(a) regardless of whether, in respect of the criterion in regulation 16(2)(b)(ii) of the EEA Regulations, the EEA citizen meets, or (as the case may be) met, the requirement in regulation 4(1)(c)(ii) of the EEA Regulations for comprehensive sickness insurance cover in the UK; and
(b) excluding a person satisfying the criteria in:
(i) paragraph (5) of regulation 16(1) of the EEA Regulations; or
(ii) paragraph (6)(c) of that regulation where that person's primary carer is, or (as the case may be) was, entitled to a derivative right to reside in the UK under paragraph (5)

ILPA is pleased that the Home Office appear to be giving thought to where easy changes can improve the clarity of the Rules. In particular, the use of bold in key places throughout Appendix EU is commendable.

Additionally, applications may now be made outside the UK., so long as required proof of entitlement to do so is provided, namely a valid passport or national identity card so long as such card has an interoperable biometric chip. In certain circumstances alternative evidence of entitlement to apply from outside the UK may be provided.

Note too that a family permit system has been introduced. The proof will be in the pudding but the requirements appear consistent with those in Appendix EU, and as such ILPA has no objections to this development.

General grounds for refusal

One concern relates to what could be considered the start of the hostile environment being applied to EU citizens: Part 9 paragraph 320(17) which applies the current Immigration Rule which allows entry clearance to be denied for 'refusal to undergo a medical examination when required to do so by the Immigration Officer' to EU citizens.

Statelessness

ILPA is encouraged that statelessness leave is to be extended from 30 months to 5 years. However, the rules appear to have become more stringent by a new set of requirements to be fulfilled for the purpose of a statelessness application:

Currently Rule 403 reads as follows:

The requirements for leave to remain in the United Kingdom as a stateless person are that the applicant:
(a) has made a valid application to the Secretary of State for limited leave to remain as a stateless person;
(b) is recognised as a stateless person by the Secretary of State in accordance with paragraph 401;
(c) is not admissible to their country of former habitual residence or any other country; and
(d) has obtained and submitted all reasonably available evidence to enable the Secretary of State to determine whether they are stateless.

The new Rules add in a new (c) as well as (e) and (f):

New (c) requires that an individual has taken reasonable steps to facilitate admission to their country of former habitual residence or any other country but has been unable to secure the right of admission.

New (e) and (f) state as follows:

“(e) has sought and failed to obtain or re-establish their nationality with the appropriate authorities of the relevant country; and
(f) if, in the case of a child born in the UK, has provided evidence that they have attempted to register their birth with the relevant authorities but have been refused.”

Time will tell what impact this new rule change will have on stateless cases, but it is of concern that an already difficult procedure appears to be made even tougher.