



30 September 2008

Keith Vaz MP
Chair, Home Affairs Committee
House of Commons
7 Millbank
London SW1P 3JA

Dear Chair

Following the evidence given on 17 July 2008, we now submit a supplementary memorandum, to further clarify matters raised during the evidence and providing additional relevant information to assist you.

ILPA's mandate

ILPA was founded in 1984 and incorporated as a company in 1989. It is ILPA's mandate is set out in summary form on the front page of our website, www.ilpa.org.uk. The full version is set out in our Memorandum and Articles of Association which states:

'The objects for which the Company is established are:

To promote further and assist by whatever means the giving of advice to and assistance and representation of immigrants to any part of Great Britain, Northern Ireland, the Channel Islands and the Isle of Man (together "the United Kingdom") from whatever part of the world whether coming or intending to come to the United Kingdom for settlement or for some more limited purpose; to promote further or assist by whatever means the giving of advice to and assistance and representation of Immigrants or emigrants of whatever nationality to or from any other part of the world; to disseminate by whatever means, information and views on the law and practice of immigration and nationality in the United Kingdom and elsewhere; to enhance and expand the teaching of immigration and nationality law in the United Kingdom and elsewhere; to co-ordinate the activities and interest of immigration and nationality law practitioners, to make contacts with similar bodies in other countries and to make representations for and on behalf of immigration and nationality practitioners, and to secure a non-racist, non-sexist, just and equitable system of immigration and nationality law practice in the United Kingdom and elsewhere.

Membership of ILPA is open to those who qualify in accordance with articles 3 and 4 of the articles of association which state as follows:

3. Membership of the Association shall be open to any individual who is:

(1) a lawyer, legal worker, teacher or student of law, apprentice lawyer, or other person who, in the opinion of the Executive Committee, is substantially engaged or interested in the law; and

(2) in general sympathy with the objects of the Association, but membership shall not be granted to any individual undertaking advisory or representation work unless:

(a) the individual is a member of a recognised professional body exercising a disciplinary function in respect of professional misconduct by the individual; or

(b) the individual is an employee of an organisation which is subject to professional discipline as described in (a) above; or

(c) the individual is an employee of an organisation which is a charitable or non-profit making organisation with a constitution whose terms are consistent with the objectives of the Association's constitution; or

(d) the individual is an employee of an organisation which is in receipt of funds as provided for in section 23 of the Immigration Act 1971 or any statutory re-enactment thereof.

(3) named as an adviser on a registration certificate issued by the Office of the Immigration Services Commissioner or has been notified to and accepted by the Office of the Immigration Services Commissioner as a competent adviser by an organisation with a certificate of exemption issued by the Office of the Immigration Services Commissioner and is in general sympathy with the objects of the Association

4. Membership of the Association shall be open to any organisation which is:

(1) in the opinion of the Executive Committee substantially engaged or interested in the law; and

(2) in general sympathy with the objects of the Association, but membership shall not be granted to any such organisation undertaking advisory or representation work unless:

(a) the organisation is a member of a recognised professional body exercising a disciplinary function in respect of professional misconduct by the organisation; or

(b) the organisation is a charitable or non-profit making organisation with a constitution whose terms are consistent with the objectives of the Association's constitution; or

(c) the organisation is in receipt of funds as provided for in section 23 of the Immigration Act 1971 or any statutory re-enactment thereof.

(3) holds a registration certificate or certificate of exemption issued by the Office of the Immigration Services Commissioner and is in general sympathy with the objects of the Association.

A full copy of the Memorandum and Articles of Association is available on request.

ILPA has some 1000 members but, as the above indicates, both individuals and organisations are members. Organisation members range from small companies of a few people to very large city law firms. All applications for membership must be approved by the Executive Committee.

ILPA also has a complaints procedure and the Executive Committee has the power to investigate complaints and can use the sanctions of suspension of membership or expulsion against those found to have behaved in a way that is 'injurious to the interests of ILPA'.

The President and members of the Executive Committee are elected annually by the membership. Appointment of convenors of specialist subcommittees are approved by the Executive Committee which also approves all submissions and evidence presented in the name of ILPA.

A list of Executive Committee members, members of subcommittees and those who represent ILPA at stakeholder and other meetings appears on our website, www.ilpa.org.uk in the 'Members' section (which is publicly accessible). Full details are given in ILPA's Annual Report, a copy of which is appended hereto. Those who represent ILPA at regular 'stakeholder' and other meetings report back to ILPA and reports are circulated via ILPA's monthly mailing to members. A full list of all those who have represented ILPA is provided in ILPA's Annual Report. The training pages of the website also list those delivering training on behalf of ILPA. Again, a full list of those who have delivered training for ILPA is listed in the Annual Report. As to members of ILPA not holding positions of responsibility within ILPA, the majority of members of ILPA are listed in our Directory of Members. At any one time, the most up to date version of the Directory appears on the website, although it is collated in hard copy regularly. It is up to members whether they are listed in the Directory; the majority elect to be listed but members of the judiciary or academics, or, for example, retired members using their home address, may choose not to be listed.

Funding

The vast majority of ILPA's income comes from membership fees and revenue from training. A copy of our most recent set of audited accounts are enclosed. In addition, funding is obtained for specific projects. This is set out in the Annual Report. At the moment, ILPA receives external funding from the Joseph Rowntree Charitable Trust, contributing towards the salary of the Legal Officer and the work undertaken by the Legal Officer to disseminate information to charitable and voluntary organisations, including migrant and refugee community organisations. Examples of this work will be found on the Info Service part of the website. In the past year ILPA has also received funding from the Nuffield Foundation to produce our research *When is a child not a child: Age Disputes and the Process of Age Assessment* and from the Legal Services Commission to produce *"The Detained Fast Track: a best practice guide and to deliver training free at point of delivery to those contracted with the Legal Services to provide legal services within the Detained Fast Track"*.

Other matters

Legal Aid

Matters not eligible for legal aid are set out in section 23 of the Access to Justice Act 1999, and Schedule 2 (Excluded Services) to that Act. Paragraph 1 of Schedule lists *inter alia*

‘...matters of company or partnership law; and other matters arising out of the carrying on of a business’

The effect of this is that business immigration services are excluded, thus the majority of the matters falling within the Points-Based System are not eligible for legal aid, whatever the merits of the case or the means of the individual or organisation.

Addressing the problems of the current system

The command paper, “A Points-Based System (PBS): making migration work for Britain” (published March 2006) set out the key advances the PBS was intended to achieve. These were principally:

- better identifying and attracting of migrants who have most to contribute to the UK;
- *a more efficient, transparent and objective application process;*
- improved compliance and reduced scope for abuse¹.

The document went on to set out the key tests for the PBS of objectivity, transparency, operability, usability, flexibility, robustness, cost effectiveness and compatibility. Throughout the development of the PBS since that date, UKBA has placed tremendous emphasis in particular on seeking to create a streamlined, transparent and objective system, rationalising multiple routes of entry into a single points based system with the intention that that system will be easy to use and understand by employers, migrants and the general public. The PBS does not achieve these goals.

The attempt at streamlining the system and reducing the number of routes of entry cannot be said to have achieved when the PBS is divided into five tiers, each of which is divided into further sub-tiers, many of which are further divided into sub-sub-tiers creating approximately 35 categories within the PBS, with many additional categories remaining in place outside the PBS. It is a necessary part of any effective immigration system that there are relatively sophisticated tools for assessing eligibility for leave to enter/remain in the UK for a wide range of appropriate purposes and accordingly ILPA believes that it is necessary to have a significant number of categories of entry to the UK; the aim of simply trying to reduce the number of categories in an attempt to make the system appear more straightforward does not achieve the substantive objectives of an effective immigration system in any event. In several respects the PBS has replaced a finely calibrated, sophisticated system with a rather blunt clumsy instrument, less able to accommodate the migrants who will most benefit Britain or exclude those who will not. It is notable that several categories under the PBS are not truly points-based, insofar as there are no “tradable” points involved (the applicant cannot score points on some attributes to contribute for a lack of points on others), the mandatory criteria have simply been allocated a number of points in order to meet the label of a points based system whilst actually retaining the approach of set criteria prevailing under the immigration rules historically.

With regard to making the system more streamlined and easy to understand, this is simply not the case under the PBS. For example, the employer guidance as a

¹ “A points based system (PBS): making migration work for Britain” (published March 2006)

sponsor is some 130 pages long, with additional supplementary information required from the website (for example in relation to how Human Resources processes and compliance is assessed for eligibility to register as a sponsor). In addition there are further essential tools to which an employer sponsor must refer, including the codes of practice (published only in late September 2008) and the shortage occupation lists (published 9 September 2008), both of which run into hundreds of pages. Further guidance, including the guidance relating to migrants actually applying for leave to enter/remain in the UK (ie. the points element of the PBS for Tiers 2, 4 and 5) remains to be published and will be an additional factor which employer sponsors will need to appraise themselves of before issuing a certificate of sponsorship (CoS) to any migrant.

The Tier 1 application form for highly skilled migrants now runs to a remarkable 65 pages (for in-country applicants), with out of country applicants having an even more confusing array of different forms that they must complete – in all cases two separate forms and in some cases three, with different application procedures in place at different British diplomatic posts around the world. In addition, dependent family members must now all apply on separate forms (whereas under the Highly Skilled Migrants Programme, innovator, business person and investor categories, that have now been replaced by Tier 1, family members could be included on the principal's application form).

Attracting only the migrants Britain needs

This is a further misnomer. The new PBS makes no greater attempt than the current system to attract and facilitate admission to only the migrants Britain needs and is unable to make any proper assessment of skills or any intelligent protection of the resident labour market.

The Consultation UKBA carried out regarding Tier 1 indicated that the most important factors for employers when recruiting were skills and experience (87% of respondents specified work experience as either being 'most' or 'more' important. 91% rated skills as 'most' or 'more' important), and the least important factors were age and previous salary. Yet in producing the criteria for the new Tier 1 (General), the UK government created criteria for attributes based on age, qualifications and previous salary alone. Indeed, the criteria make it impossible to qualify under Tier 1 (General) unless the applicant holds at least a bachelor's degree, regardless of the decades of invaluable and high profile experience an applicant may have to offer to the UK.

The attributes (skills) requirements for Tier 1 (General) migrants are no higher than under the highly skilled migrant programme, indeed they are especially identical to the revised HSMP criteria (from 8 November 2006), with the exception of adding the highly onerous maintenance requirements. This has the affect of making no alternation to admission to the UK based on skills but restricts entry to the UK for skilled individuals from less affluent countries, as explained further below.

Under Tier 2 of the PBS, there has in fact been a reduction in the skills criteria. Under the work permit scheme the absolute minimum level of skills permitted is that the job is at NVQ level three *and* necessitates at least three years' experience at that level to be able to perform the role. Under the Tier 2 skills criteria the minimum requirement is that the job must be at NVQ level 3 or above. Accordingly, lower skilled posts can be filled under Tier 2 of the PBS than can currently be the subject of a successful work permit application.

Neither does PBS ensure that jobs are first made available to resident workers significantly more than under the current work permit scheme. The work permit scheme requires jobs to be advertised in the European Economic Area (EEA) for four weeks. The PBS requires jobs to be advertised for two weeks (or one week if the salary is over £40,000).

In practical terms there are also serious disadvantages in the operation of the resident labour market test under the PBS as there is no provision for being able to waive the advertising requirements in clearly meritorious circumstances where advertising the post would be inappropriate (for example where the skills are particularly unusual, the position is senior board level, it is known that there are only a handful of individuals in the world capable of performing the role, or it is highly commercially sensitive).

To satisfy the resident labour market test under the PBS the advertisement can either be placed in a medium recognized as acceptable under the recently published Codes of Practice or, regardless of the sector, the advertisement can be placed in JobCentre Plus. An investment bank recruiting MBA graduates or board level roles would be most unlikely to use JobCentre Plus if genuinely seeking to attract resident applicants, yet this is the one medium which is acceptable for all sectors.

Further, due to the highly onerous nature of sponsorship, many employers who regularly used the work permit scheme are applying for their staff under Tier 1 (General), thus the vacancies are not necessarily made known to the resident work force.

Improved compliance and reduced scope for abuse

It is difficult to envisage how the allocation of points to criteria reduces the scope for abuse or improves compliance. In particular, it is difficult to envisage how such objectives will be achieved under Tiers 2-5 by a system which essentially represents self-certification by employers and educational establishments.

The vast majority of employers who are concerned to ensure compliance will face highly onerous duties and additional costs in ensuring they meet these duties, which they will seek to carry out with great diligence to minimise risk (as indeed they do under the current work permit scheme). Whereas employers who are not concerned about compliance to the same extent will be able to issue CoS knowing that the chances of an incorrectly issued CoS being detected after the event may well be slim.

It is notable that the UKBA is abandoning many of the elements of the PBS checks, including pre-registration visits to sponsor applicants in the majority of cases (previously anticipated as at least 90% of applicants), largely due to the relentless pursuance of the timetable, over and above the importance of ensuring that these changes, which represent the greatest changes in UK immigration in 45 years, are thoroughly considered and tested prior to implementation.

Maintenance

Under all Tier 1 categories (except investor), Tier 2 and Tier 4, applicants are required to demonstrate that in addition to the attributes tests, they have a specific sum of money in order to maintain themselves and their families in the UK. As previously highlighted the requirement that an applicant can maintain and accommodate themselves and any dependants is not new. However, it was previously based on the circumstances of the individual migrant, recognising

that what is 'sufficient' depends upon each individual's own expenses, lifestyle, and prospects. The new maintenance test is arbitrary and impractical, creating perverse results.

A Tier 1 applicant outside the UK must show £2,800 for themselves and £1,600 for each family member. For a typical family of four this would therefore be £7,600.

For an applicant from Ghana for example this would be equivalent in real terms to £83,600 (by the UKBA's own measures of relative income values world-wide, which it uses for calculating the points for the past earnings attribute).

A Tier 2 applicant must show £800, plus £533 for each dependant.

A Tier 4 application studying for 12 months or more must show £9600 for themselves and £535 (in addition to the funds to pay their fees in full).

Further applicants must demonstrate that they have held such a sum for **at least the last three months**. Moreover, they must demonstrate that that sum has been in their account for **ever single day** of the last three months. Therefore, if a single applicant who ordinarily maintains a balance of £100,000 but on one day in the last three months dropped to £2,799 simply due to the order in which transactions were processed by his bank, his application will be refused. This requirement is not even explicitly expressed in the guidance and many applicants misunderstand the requirement to the balance to never have dropped below the specified sum in the entire three-month period.

Since the first introduction of the new maintenance tests, despite ILPA's repeatedly expressed concerns, more arbitrary documentary requirements have been introduced, including that the bank statements must not be more than a month old for in country applications and if applying overseas the statements must be dated no earlier than 7 days prior to the date of application. It is extremely difficult for an applicant to control the timing both of the issue of his statements by his bank (they may often be over 7 days old by the time he receives them from his bank) and the date of application (which you should note is defined in three different ways in the immigration Rules and the Tier 1 guidance as variously being: the date of on-line submission of the entry clearance application form; the date when both on-line form has been submitted and payment received; or the date on which the form had been submitted on-line, payment has been received and the applicant's biometric data has been captured – the latter often being several weeks after the form has been lodged due to availability of appointments in some areas and certainly rarely being within 7 days).

Whilst UKBA international group agreed, in writing, that the 7 day requirement for out-of-country application, would be amended to one month, in line with in-country applications, ILPA has now been informed that this revision may not occur. In the meantime, applications are being refused.

Accordingly, clearly meritorious applications are being refused on technical evidential grounds and there is a concerning appearance of form over substance in the implementation of the PBS.

It should further be born in mind that the entry clearance application fee for Tier 1 is now £600 for the main applicant and £600 for each dependant (£2,400 for a family of four) all of which will be forfeited if the main applicant's application is refused because his bank statement is eight days old.

This is further compounded by the fact that no evidence whatsoever has been provided to indicate that there has been any problem with highly skilled migrants or work permit holders claiming public funds or becoming destitute. As with most immigration categories, the conditions of leave for highly skilled migrants or work permit holders prohibits claiming public funds in any event and, given that these categories of migrant represent the most elite of all migrants to the UK and those with guaranteed jobs, it would appear most unlikely that they represent a risk to public funds or of destitution. ILPA has informally enquired as to what evidence has been obtained and what research has been carried out to identify that there are problems with the maintenance requirement necessitating the changes brought about under the PBS and the response has been: none.

Accordingly there is real concern that the maintenance requirement serves to operate in a purely discriminatory and arbitrary manner.

Yours sincerely

Sophie Barrett-Brown
Chair, ILPA

Enclosures:
Annual Report
Accounts