

Liam Byrne MP
Minister of Immigration
2 Marsham Street
London SW1 4DF

16 November 2006

Dear Minister

THE FIRST STEP TOWARDS THE POINTS BASED SYSTEM

We write to arrange an urgent meeting with you regarding the announcement you made on 7 November 2006 in which you confirmed that the 'first step towards a points based system for managing migration' was being launched with the introduction of new rules for highly skilled foreign workers.¹

We understand that caseworkers in the Immigration and Nationality Directorate have advised some of our members that this is not the start of the Points Based System (PBS). However the wording of your announcement, combined with the fact that the changes are identical to the criteria suggested for Tier 1 cases as set out in the Command Paper,² in addition to Paula Higson's announcement of 7 November, in which she states that these changes support 'an objective set out by the IND review (July 2006),'³ make it very clear that this is indeed the first step in relation to PBS.

ILPA is a professional association with some 1200 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through teaching, provision of high quality resources and information. ILPA is represented on numerous government and appellate authority stakeholder and advisory groups.

ILPA members see a wide spectrum of work relating to immigration and employment. Members practising in business immigration represent both employers seeking to bring workers to the UK or who employ those under immigration control, and talented and exceptionally skilled people wanting to migrate here for self employment and employment purposes.

Our members are extremely concerned by the announcement made on 7 November 2006 in regards to both timing and content and we set out our concerns below. The Government describes the Highly Skilled Migrant Programme (HSMP) as providing 'talented people with exceptional skills the opportunity to come to the UK to seek work.'⁴ We consider that the decision to suspend this scheme, which has been operational since January 2002, with no prior warning whatsoever, is entirely unreasonable and unfair given the very significant disadvantages this will lead to for many of these talented and exceptionally skilled people.

LEGITIMATE EXPECTATION

Extensions and Indefinite Leave to Remain

Individuals who are already in the UK under the HSMP scheme and who have remained economically active and complied with the Immigration Rules in force since their applications were approved, have a legitimate expectation that they will qualify for extensions of stay and eventually for Indefinite Leave to Remain in the UK.

¹ Minister's Statement - 7.11.06

² Page 23 'A Points Based System: Making Migration Work for Britain' - March 2006

³ Announcement - Paula Higson - Senior Director: Managed Migration - 7 November 2006

⁴ UK Visas website today (UKvisas is a joint Home Office/FCO initiative.)

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It is clear from the work of our members that there is a substantial body of talented and exceptionally skilled individuals who currently have leave to remain under the HSMP scheme and who will not now qualify to extend their leave to remain. Many who are due to qualify for extensions of stay in the next few months will have insufficient time to change their work, employment circumstances and the way they pay themselves or are paid, where necessary, in order to qualify under the new requirements.

In the July 2005 consultation document concerning the Points Based Scheme the Government told those entities and individuals whom it wished to participate in the consultation (see below) that HSMP and work permit holders can qualify for permanent residence.⁵ No mention at all was made that the ability to qualify for Indefinite Leave to Remain would be removed from some of those individuals less than 18 months later.

Requirement to make the UK the main home

When these individuals obtained leave to remain or enter under the scheme, the Home Office required and still requires them to intend to make the UK their main home.⁶ Indeed, the guidance notes for those making HSMP applications specifically stated that individuals would be asked to provide a 'written undertaking' that they would make the UK their main home.⁷ If those already in the UK under the scheme had not intended to make the UK their main home, as required, the Home Office would have refused to grant them leave to remain or enter at the time of their original applications.

Therefore, having been required to undertake the long term commitments inherent in making a new country one's main home, this group of individuals has transferred spouses and children to this country with the associated educational/emotional upheavals entailed; secured mortgages and other financial responsibilities; formed business relationships and personal relationships and committed themselves to long term economic and contractual plans in the UK. At the same time, because the UK has had to become their main home, many have had to relinquish other economic and migration possibilities in alternative countries.

Changes to declaration and certainty

We note that the newly issued forms FLR (IED) and FLR (HSMP) contain the sentence

'I am aware that the rules and regulations governing leave applications may change in the future and I do not assume that the requirements covering any future applications will be the same.'

This raises four issues of great concern

- 1 It is unreasonable and unfair to expect a talented and exceptionally skilled individual who intends, and indeed is compelled as shown above, to make the UK their main home, to sign a declaration which permits the Home Office to change the basis of his or her status at any point in the future without any notice at all. There is little incentive to make the associated arrangements, described above, to transfer one's private and professional life to the UK, if certainty as to long term future cannot be provided.
2. The application forms completed by individuals prior to November 2006 did not contain this notification. Applicants who completed those forms received no reasonable warning that there was a risk that, regardless of whether or not they complied with criteria published at the time of their application, the scheme could be changed and they could be excluded from complying in the future. They were not afforded the opportunity to choose whether or not to accept the uncertainty associated with making the UK their main home under this scheme, or to establish themselves in another country which could offer long term certainty. There is no reference at all to the possibility that the scheme may be changed in the guidance notes referred to above.
3. The Home Office has never consulted stakeholders and other interested bodies as to whether or not it is reasonable to expect talented and exceptionally skilled individuals to sign such a clause, with the associated uncertainty this brings. We are sure that consultation would show that those individuals, who are 'most successful in benefiting Britain's economy'⁸ and whom the UK welcomes, will be deterred from transferring to a country which cannot offer long term certainty; especially taking into account the economic desirability of many other countries. We are also sure that UK based business partners who rely on talented and exceptionally skilled independent consultants would require certainty that they can continue to perform contracts and provide services.

⁵ Paragraph 4.7 'Selective Admission: Making Migration Work for Britain' 19 July 2005

⁶ Immigration Rules (HC395) paragraph 135A (ii)

⁷ Paragraph 22 – HSMP 1 guidance notes- version 06/06

⁸ Minister's Statement – 7 November 2006

4. The fact that you have deemed it necessary to include this wording at this stage suggests very strongly that you acknowledge that you are currently susceptible to claims based on legitimate expectation/unfairness in relation to immediately effective and potentially life changing alterations to this scheme.

THE CONSULTATION PROCESS

The lack of any formal consultation or notice whatsoever concerning the measures announced on 7 November appears to contradict a number of public pledges the Home Office has made since the 2005 announcement of the Five Year Strategy for Asylum and Immigration.⁹

It is regrettable that in making this announcement in this manner, you have chosen to bypass entirely entities which you requested should participate in the managed migration consultation process and which spent considerable time, effort and resources in ensuring that they did respond to your request.

In September 2005 the Home Office, CBI and TUC published a joint statement clarifying their agreed obligations under Managed Migration. The Government stated that it would:

...consult employers and trade unions about migration policies that are in the interest of Britain...¹⁰

In the July 2005 consultation document the Government stated that it is:

'...committed to wide consultation with those who will be affected by such changes, and will undertake comprehensive evidence-based impact assessment, to ensure the reforms are developed and implemented in a way that best meets the needs of the British public, employers, employees, employee organisations such as trade unions, educational institutions and migrants.'¹¹

It is regrettable that the announcement made on 7 November 2006 which has made fundamental changes to migration policies in Britain was made without the consultation the Government promised.

When our own members were invited to meet James Quinault on 28 September 2006, Mr Quinault informed them that at that stage the point based system was unlikely to be introduced until the first quarter of 2007 at the earliest, beginning with Tier 1, and he assured them that ILPA would continue to be consulted.¹² We have not been consulted.

THE NEW REQUIREMENTS OF THE SCHEME

We are very concerned that the new criteria exclude talented and exceptionally skilled individuals who do not possess a degree, regardless of what their other achievements may be, from entering the UK under the HSMP scheme

By way of example, a wealthy, talented and exceptionally skilled finance expert who has, for instance, established a successful consultancy practice abroad and who wishes to come to the UK as an independent financial consultant, but who does not possess a degree, would be ineligible to come to the UK under this route. Such an individual would also be ineligible to come to the UK under any other route because s/he would either be excluded from working (investor category) or would be tied to one employer and unable to undertake consultancy work (work permit holder) or would be required to work exclusively for one business (business-persons category).

Even if individuals can switch to another category, they will be unable to combine time spent in the UK under the HSMP scheme and will need to wait a further period of five years before qualifying for settlement.

In this regard, the new scheme appears to contradict the statement made by the Home Secretary in February 2005, when he expressly stated that the new scheme would be focusing, amongst other roles, on 'finance experts.'¹³

The Highly Skilled Migrant Programme has attracted thousands of individuals who have come to the UK because of the flexibility the scheme has offered them in terms of being able to undertake either employed work or self employed work, or a combination of both. In today's highly competitive economic markets, talented and exceptionally skilled entrepreneurs need to have flexibility to determine the manner in which they wish to conduct their economic activities.

⁹ 'Controlling our borders: Making migration work for Britain' – February 2005

¹⁰ Managed Migration: Working for Britain. A joint statement from the Home Office, CBI and TUC' – September 2005

¹¹ Paragraph 1.12 'Selective Admission: Making Migration Work for Britain' - 19 July 2005

¹² Attached notes of ILPA meeting with James Quinault, Managed Migration Strategy and Review – 28 September 2006

¹³ Foreword by the Home Secretary to 'Controlling our borders: Making migration work for Britain' – February 2005

We believe that the restrictive criteria of the new scheme will mean that many such individuals will simply choose to undertake their high-net worth professional activities elsewhere.

Furthermore the statistical data provided by the Home Office in the March 2006 Command Paper¹⁴ does not provide any rationale behind the decision that the possession of a degree should be the minimum entry requirement for talented and exceptionally skilled individuals under the HSMP scheme.

The Command Paper states that the organisations and individuals which responded to question 11 of the consultation document; 'Which attributes do you think are the most important for Tiers 1 and 2?' replied as follows:-

Figure 8: Question 11¹⁵

	Age	English Language	Job Offer	Previous Salary	Work Experience	Skills
<i>Least</i>	27%	4%	3%	34%	0%	0%
<i>Less</i>	19%	7%	5%	15%	2%	2%
<i>Neutral</i>	39%	12%	18%	32%	10%	7%
<i>More</i>	12%	52%	36%	8%	47%	27%
<i>Most</i>	2%	26%	38%	1%	40%	64%

To qualify for the scheme you announced on 7 November, individuals must possess a degree. However, this was not listed by those participating in the consultation as one of the most important attributes and none of the information issued by the Government since February 2005 defines skills solely in the terms of possessing a graduate level qualification. We are concerned that those who responded to the consultation and who rated 'skilled' as an important attribute may well feel they have been misled if 'skills' are defined solely in terms of the possession of a degree.

We cannot find any evidence which suggests that you have undertaken any consultation whatsoever as to whether or not 'the British public, employers, employees, employee organisations such as trade unions, educational institutions and migrants' consider a graduate level degree to be one of the most important attributes to those seeking entry under Tiers 1 and 2.

In relation to the consultation you have undertaken, those possessing a degree can only qualify via a combination of age and previous earnings in order to gain further points under the new scheme. Out of age, English language, job offer, previous earnings, work experience and skills, age was considered by those you asked to participate in the consultation as the second least important attribute after previous salary, which was considered to be the least important attribute.

We are therefore extremely concerned that the criteria for Tier 1 of the Points Based System, of which the 7 November 2006 announcement relating to the HSMP scheme is the 'first step',¹⁶ have been primarily based on two out of the four criteria on attributes which those you asked to participate in the consultation listed as of least importance. It would appear that your desire for certainty and objectivity has overridden the overwhelming views of those whose views you sought, and will undoubtedly cause many of those talented and exceptionally skilled entrepreneurs who Tier 1/the HSMP scheme is designed to attract to simply take their talents elsewhere.

We are also very concerned that work experience, which your data shows was considered by those you consulted to be the second most important attribute, has been completely excluded from the scheme. This is particularly concerning because in February 2005 the Home Office stated that;

'Points will be allocated according to qualifications, work experience, income and other relevant factors.'¹⁷

Furthermore, in the consultation document those being consulted were informed by the Home Office that:

¹⁴ 'A Points Based System: Making Migration Work for Britain' – March 2006

¹⁵ Figure 8, page 44 'A Points Based System: Making Migration Work for Britain.'

¹⁶ Minister's statement – 7 November 2006

¹⁷ Paragraph 18 'Controlling our borders: Making migration work for Britain' – February 2005

'Evidence from longitudinal studies of migrants in Australia, Canada and New Zealand suggests that.....transferability of work experience and skills... is also important.'¹⁸

We are very concerned that misleading statements appear to have been made to the public by the Home Office and that information relating to attributes provided by those who were asked to participate in the consultation has been wholly ignored.

TIMING OF THE CHANGES AND TRANSITIONAL ARRANGEMENTS

The haste with which these changes have been announced has failed to make any provision whatsoever for those individuals who have been preparing applications under the pre-8 November 2006 rules, and who were just about to submit their applications.

The announcement that the changes would take place on 8 November was made on the afternoon of 7 November, by which time the working day in a vast proportion of the world had already ended. There was no effective notice whatsoever.

The complicated nature of the HSMP scheme itself and also the financial and business affairs of many talented and exceptionally skilled entrepreneurs means that many of the individuals who were preparing applications will have spent weeks obtaining reference letters and documentation in support of their personal skills and financial/business status, and many will have also incurred accountants' and solicitors' fees, which may have been avoided had notice been provided. Some of those individuals will have ceased taking on new long-term contracts in their home countries and will have made tentative plans to move their careers to the UK and their families once their applications are approved, including locating accommodation and arranging schools.

We strongly dispute that reasonable notification of 21 days would have prompted 'a rush of speculative applications'¹⁹ but would have instead permitted those individuals referred to above, who were in the final stages of completing their applications, to choose whether or not to continue with their plans.

A reasonable notice period would have also enabled 'the British public, employers, employees, employee organisations such as trade unions, educational institutions and migrants' whom you asked to participate in consultation on managed migration and whom you promised would be consulted 'about migration policies that are in the interest of Britain,' to provide you with their views as to the viability of these changes and potential impacts on the UK labour market, employers, businesses and talented and exceptionally skilled migrants.

No reasonable explanation at all has been provided as to why these changes must take place before 5 December 2006, thereby precluding reasonable consultation.

The transitional arrangements²⁰ in relation to those who are already in the UK under the scheme and who do not meet the new criteria are vague, unfair and restrictive. Many individuals under the Highly Skilled Migrant Programme are independent contractors who work from project to project, often responding to urgent market needs; they may not have six months' worth of documents relating to formal contractual/business commitments. Other individuals are highly talented sports persons, authors and artists who may work on one or two highly lucrative 'formal' projects during the course of a year, but who may spend the remainder of their time working on an informal basis researching, training, writing and recording. Again, these individuals will not benefit from the transitional provisions.

CONCLUSION

1. The matters raised in this letter constitute the most urgent points which we believe require immediate consideration. We request an urgent meeting to discuss these and other matters which we may raise when the full impact of these changes become apparent to our members, those organisations with which we share information with and our members' business and employment clients.
2. We request that you continue to decide both new HSMP and extension applications under the old scheme until you have undertaken a formal consultation about these changes as you have previously agreed.
3. We request an immediate declaration that those who are already in the UK, who have made the UK their main home as they were required to do and who fulfilled and continue to fulfil the requirements of the pre-8 November scheme, be permitted to remain in the UK and apply for Indefinite Leave to Remain when they become eligible to do so, under the old rules.

¹⁸ Paragraph 6.7 'Selective Admission: Making Migration Work for Britain' 19 July 2005

¹⁹ Paragraph 3.1 Explanatory Memorandum HC 1702

²⁰ Annex C 'FLR HSMP Guidance Notes' valid from 8 November 2006

4. We request confirmation that at least 21 days' notice will be given for all future changes to 'migration policies that are in the interest of Britain'.
5. We request an explanation as to why these changes must be implemented on 5 December 2006, which has necessitated the suspension of the scheme until then, and why this scheme could not have been phased in.

Please note that copies of this letter have been distributed to organisations with which ILPA shares information, including the CBI and TUC.

We look forward to hearing from you as a matter of urgency.

Yours sincerely .

C. White
P.P. CHRIS RANDALL
CHAIR OF ILPA

Enc

Note of Meeting with James Quinault (footnote 12)

c.c

Lin Homer, Director General, IND
Chris Hudson, Regional Director, IND North East
W. Sullivan, TUC
Neil Carberry, CBI