

JCWI'S BRIEFING ON THE STATEMENT OF CHANGES IN THE IMMIGRATION RULES, HC 1113

About the Joint Council for the Welfare of Immigrants

The Joint Council for the Welfare of Immigrants is an independent, voluntary organisation working in the field of immigration, asylum and nationality law and policy. Established in 1967, JCWI provides legally aided immigration advice to migrants and actively lobbies and campaigns for changes in immigration and asylum law and practice. Its mission is to eliminate discrimination in this sphere and to promote the rights of migrants within a human rights framework.

Introduction

We have a number of concerns about HC113 both in terms of its conformity with international human rights obligations that the UK has voluntarily assumed, and more generally from the perspective of its likely impact upon migrants, and those seeking entry from non OECD states. In this briefing we focus on a few of our key concerns. They are as follows: 1. the sponsorship licensing system, 2. tier 2 maintenance requirements, 3. the tier 5 youth mobility scheme and 4. the increase in the marriage visa age. We have had sight of the two briefings prepared by the Immigration Law Practitioners Association, and fully support the points raised therein. As such, we do not propose to rehearse those arguments save to the extent that it is necessary to make additional points we feel are relevant to the scheme.

Key areas of concern

The licensing system for sponsors

1.1 Inconsistency of the sponsorship scheme with obligations imposed by Article 7 International Covenant on Economic Social and Cultural Rights 1966

The UK has ratified the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR). Article 7 (a)(i) of the Convention states:

‘The States parties to the present Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) remuneration which provides all workers, as a minimum with:

(i) fair wages and equal remuneration of for work of equal value without distinction of any kind...’

We understand from our discussions with trade unions such as UNISON that it is not currently unusual for employers to attempt to seek to pass of the relatively small costs associated with work permits to migrant workers. This is achieved through the state sanctioned, and lawful practice of making deductions from their salaries.

The sponsorship scheme entails for employers a vast increase in expenditure should they chose to employ migrant workers. Employers will therefore incur expenditure on ensuring that; they have appropriate ‘management systems’ in place in order to comply with the licensing arrangements and that they have the legal assistance and training they require in order to secure licences and comply with their reporting obligations applications. They will also be required to pay fees of £300.00 or £1000.00 for the license depending on the size of the business, and pay for the renewal of their fees every four years, as well as meet the costs of each certificate of sponsorship. The substantial increase in expenditure by employers is likely to lead to higher deductions from the salaries of migrant workers on a more frequent basis. We do not believe that state sanctioning of this kind of practice is consistent with the duties outlined above in Article 7 of ICSECR.

1.2 Undermining the ability of migrants to claim their legitimate labour/human rights

We note from our discussions with trade unions that it is presently not uncommon for employers to threaten to revoke work permits or to refuse to complete extension forms in cases where migrants seek to claim and exercise labour rights (statutory/contractual/other human rights) to which they are lawfully entitled. The London Discrimination Unit told us of a recent example where two female employees at the same business had tolerated sexual harassment from their employee for sustained periods of time due to their fear of the ramifications (i.e. employer activity resulting in their removal from the country) that would flow from reporting, and taking legal action against them.

We note that under the scheme, the employer will continue to play a significant role in the migrant workers applications through the system of certificates of sponsorship. This role will be fortified through the introduction of reporting requirements which require by way of example the reporting of ‘suspicions that the migrant is breaching [their]conditions of his or her leave’. This imbalance in power, and the transformation of the role of the employer into an tool for immigration control significantly increases the scope, and possibility for abusive employment practices of the kind referred to above. The overall effect of this in practical terms will be to render contractual, statutory, and human/labour rights migrants enjoy illusory.

1. Para 327(f) of *Guidance for sponsor applications: Tier 2, Tier 4 and Tier 5 of the points based system*

1.3 Potential inconsistency with Article 1, Protocol 1 European Convention on Human Rights (ECHR)

Article 1 of Protocol 1 of the ECHR states:

‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.’

Companies are capable of possessing ‘human rights’ as they may be considered ‘legal persons’.² Damage to a business emanating from the inability to secure a license and appoint/retain appropriate employees, and the attendant loss of goodwill that comes with this (as opposed to a loss of future earnings) can constitute a possession under Article 1 of Protocol 1 ECHR.³ It is notable that the guidance regulating the grant, and withdrawal of sponsorship applications contained within the ‘*Guidance for sponsor applications: Tier 2, Tier 4 and Tier 5 of the points based system*’ is extremely vague allowing applications to be refused for example ‘*if there is anything in the sponsor body’s history or that of the people managing or controlling it, that suggests that it could be a threat to immigration control or that it would be unable or unwilling to carry out its duties*’.⁴ Other examples appear in the footnotes below.⁵ These requirements are not sufficiently clear for employers to foresee in advance the consequences of their actions for the purposes of acquiring/retaining sponsorship licenses. In our view they are therefore insufficient to satisfy the requirement that they are ‘provided for by law’. As to the second limb of the requirement, a court would

2. *Pye (Oxford) Ltd v United Kingdom* App. No. 44302/02

3. See; *Wendenburg v Germany* (2003) 36 EHRR CD 154, 169. In *Tre Traktörer AB v Sweden* (1989) 13 EHRR 309 and *Ian Edgar (Liverpool) Ltd v United Kingdom* Reports of Judgments and Decisions 2000-I, [2000] ECHR 700, p 46.

4. Para 14

5. Para 84 explains how applications will be dealt with. It indicates that when considering applications decision makers will ask three questions. These include at 11. Is the applicant ‘dependable and reliable?’ In order to judge this, we will look at the history and background of the organisation, its key personnel and of the people who control it. Any history of dishonest conduct or immigration crime will be viewed seriously and may lead to us refusing the application. .iii. Is the applicant capable of carrying out its duties as a sponsor? We will judge this by looking at the organisation’s processes and human resource practices to ensure that it will be able to carry out its duties. If we have significant doubts we may award a B-rating or, in more serious cases, refuse the application.”

Para 107 states “To meet the suitability criteria an organisation must show that: i. the sponsor has effective human resource systems in place (more information is on our website at <http://www.ukba.homeoffice.gov.uk/employers/points/sponsorduties/assessment/>); ii. the sponsor has not been given a civil penalty for immigration offences; iii. the authorising officer, level 1 user and key contact does not have any criminal convictions in their name for any of the offences, listed in Appendix B (convictions which are spent under the Rehabilitation of Offenders Act 1974, will not be taken into account). Any other unspent convictions could also lead to an application being refused; and iv. we do not have any evidence of previous non compliance.” See paras 396 under ‘Circumstances in which we will award a B rating’ ‘We will award a B-rating if: a. the prospective sponsor or another relevant person has been issued with one of the “offence” listed in Appendix C within the 5 years ending on the date of the application, unless: i. we withdrew that penalty or it was cancelled on appeal; or ii. the sponsor or another relevant person has been issued with a maximum civil penalty within the previous six months, in which case we will refuse the application instead; b. the applicant is an existing sponsor applying to renew its license and is already B-rated (unless we are satisfied that it has successfully completed its plan). Para 397 Circumstances in which we may award a B rating states “We may award a B rating if, the prospective sponsor or another relevant person has a conviction for serious offences to do with how it runs its business and this makes us doubt its suitability as a sponsor (for example a conviction under the National Minimum Wage Act or for benefit fraud).....

would approach the question by balancing the interests of the individual with those of the general interest (i.e. in this case immigration control/prevention of unlawful working/) in order to ascertain whether such action would be necessary.

2. Tier 2 and maintenance requirements

2.1 Differential impacts and non OECD countries

Work permit applications (which tier 2 now embraces) have historically overwhelmingly emanated from male applicants⁶ drawn mainly from India but also from Pakistan, Philippines and the US and Canada.⁷ It is uncontroversial as ILPA point out that non OECD countries have weaker currencies, that salaries are lower and that these salaries are subject to disparities according to gender, race and disability. It is also uncontroversial that gender/race/nationality/disability disparities in income exist in the British labour market (with these categories generally tending to earn less than the average income for identical work). The new maintenance requirements (£800.00 per principal applicant and £533 for each dependant) which, like those of tier 1, are not subject to any multiplier, can be expected to work to the detriment of nationals from non OECD states (who tend overwhelmingly to be non white).

It should be recalled that the British Government has, along with 189 states committed itself to securing the Millenium Development Goals.⁸ Further, the Government's own Department of International Development has noted the link between migration policy, and development and has supported the employment of migration policy as an instrument to achieve the MDG.⁹ These requirements are in our view inconsistent with the MDG pledges. They are also likely to work to the detriment of women and those with disabilities because of disparities in income, but also on account of the fact that women often enter this category as dependants. The additional costs, are likely to deter primary applicants from bringing family members with them.

2.2 Article 14 and 8 ECHR and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women

Article 14 ECHR prohibits discrimination in relation to rights that fall within the *ambit* of a Convention right on grounds of sex, colour national or social origins or other status. The Convention recognises indirect discrimination.¹⁰ Article 8 ECHR requires states to provide respect for private and family life. Restrictions on the ability to find work have been held to fall within the ambit of Article 8.¹¹ Article 2 (a) of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women requires states to '*To embody the principle of the equality of men and women in... other appropriate legislation if not yet incorporated*'. Given the differential impacts

6. See UK Borders Agency Impact Assessment at p.12. 68% of all approved applications came from men in 2007 and 64% the previous year

7. J Salt *International Migration and the United Kingdom report of the UK SOPEMI correspondent to the OECD*, 2007 at p. 75.

8. Millenium Declaration agreed at the UN Millenium Summit, September 2000

9. *Moving out of Poverty- making migration work better for poor people*, Department for International Development, March 2007 p.2

10. *Thlimmenos v Greece* (2000) 31 EHRR 411

11. *Sidabras and Dziautas v Lithuania* App. No. 55480/00 and 59330/00

on women, certain ethnic groups, and the disabled, there is a real risk that these provisions are inconsistent with these equality and non discrimination obligations. In the case of Article 14/8 ECHR, these obligations may well not be justifiable given that migrant workers under tier 2 will in any event be subject to a public funds restriction, and the British Government accept in the context of the level of benefits it chooses to award its nationals, a lower figure.¹²

2.3 Statutory duties to consider discriminatory impacts and promote equality

We are extremely concerned that the UK Borders Agency has altogether failed to consider the impact of the maintenance requirements on women and the disabled in its Equality Impact. It has given only a cursory consideration of the issue in respect to race. The UK Borders Agency are under the terms of their own Race, Equality and Gender Scheme¹³, together with the Race Relations Act 1976, the Sex Discrimination Act and the Disability Discrimination Act 1995 required to consider these factors, in order to comply with the general statutory duties they create. To this extent, the requirements may in fact be unlawful.¹⁴

3. TIER 5 and the youth mobility scheme

3.1 We are extremely concerned by the shape of the youth mobility scheme which subsumes the Working Holiday Makers Scheme. In particular we are concerned by:

- (i) Its automatic closure to all states save for *Australia, Canada, New Zealand and Japan (the Working Holiday Makers scheme has historically been open to all Commonwealth citizens)*
- (ii) *The absolute prohibition on bringing dependant children to the UK (presently children under 5 may enter the UK under the Working Holiday Makers scheme)*

12. For example, a young person aged 16-24 could expect to receive £47.95/week and those 25-59 £60.50/week Income Support.
13. Para. 45 of the UK Border Agency Race, Disability and Gender Equality Scheme the UK Border Agency

14. Section 71 (1) of the Race Relations Act 1976 imposes an obligation on the UK Border Agency and the Secretary of State³ to have *'due regard'* to the need to eliminate unlawful racial discrimination and to *promote* good race relations between different racial groups.⁴

Section 76(A) of the Sex Discrimination Act requires that the UK Border Agency/Secretary of State to have *due regard* for the need, amongst other things to: a. eliminate unlawful discrimination and b. *promote* equality of opportunity between men and women.⁵

Section 49(A) of the Disability Discrimination Act 1995 requires public authorities, and therefore the UK Border Agency and the Secretary of State to have *due regard* amongst other things to the need to; a. eliminate unlawful discrimination, b. promote equality of opportunity between disabled persons and others and promote positive attitudes towards them and encourage their participation in public life.⁶

'Unlawful discrimination' in all of the above cases extends to cases of indirect discrimination.⁴ The Home Office and UK Border Agency have, as statutorily required to do so, published details of their equality scheme. This sets out how they intend to comply with their statutory duties. To this end, it is Home Office policy for equality impact assessments to be undertaken which fully consider the implications of 'what is proposed' in circumstances that this constitutes a new policy or significant change to existing policy

See also the approach of the Court of Appeal in *R (on the application of C) v Secretary of State for Justice* where the amendment Secure Training Centre (Amendment Rules) made by the Parliamentary Under Secretary of State were quashed for want of compliance with the general equality duty. See also *Kruse v Johnson* [1898] 2 QB 91 at p 99 -100)

- (iii) *The requirement that applicants fulfil the maintenance requirement of £1600.00*

The effect of (i) will be to further limit the temporary migration possibilities for non OECD nationals (overwhelmingly non white nationals) to enter the UK in a way that in our view is inconsistent with the MDG. Additionally (ii) can be expected to deter women who overwhelmingly assume responsibility for child care from entering the UK under this capacity. Finally (iii) could lead to indirect discrimination against women and disabled migrants given their lower average incomes, with (i) and (ii) operating in such a way that may be contrary to the obligations under Article 2 of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (for which see above)

4. Raising the age limit for the purpose of spouse/civil partner/fiance applications

Whilst we are wholly supportive of the need to eliminate forced marriages we oppose the proposed increase from 18-21 for the purpose of spouse/civil partner/fiance applications and sponsorship for the following reasons:

4.1 Inefficacy

The measures are likely to be ineffective, and on the contrary are likely to render victims even more vulnerable as they will simply be taken to countries in which forced marriage can take place, and in which they may not have any route of redress or meaningful support available to them. Indeed it was *Government* sponsored research that found *'not only that any new immigration control would not solve the problem but that young South Asians would be simply coerced into marriages and sent back without any expectation of returning.'*¹⁵

4.2 Article 14 and 8 ECHR

The measures are likely to constitute indirect discrimination under Article 14 (freedom from discrimination) in conjunction with 8/12 ECHR (the right to respect to private and family life; and the right to marry) given that the minimum age for marriage in the UK is 16 with parental consent and 18 without such consent. The new requirements are likely to have a disproportionate effect on certain communities, but also for women given that spouse migration is feminised.¹⁶ Such measures are likely to be unjustifiable given the repercussions for the vast majority of non forced international marriages, the implications for the individuals concerned and the availability of far less intrusive detection mechanisms.¹⁷

15. See *Marriage to Overseas Partners*, A Response to the Government Consultation Paper titled *Marriage to Partners from Overseas: A Consultation Paper* (December 2007) by the Migration and Law Network quoting Samad, T. and Eade, J., *Community Perceptions of Force Marriage* (Foreign and Commonwealth Office) 2002 and p.58

16. Research shows in 2005 for example that 68% of migrants joining families in the UK were female, see *International Migration: Migrants entering or leaving the UK*, 2007 Office for National Statistics

17. S see R (on the application) of *Baiai, Trczinska, and others v Secretary of State for the Home Department* [2008] UKHL 53 and see R (on the application) of *Baiai, Trczinska, and others v Secretary of State for the Home Department* [2007] EWCA Civ 478)

