

RESPONSE BY JOINT COUNCIL FOR THE WELFARE OF IMMIGRANTS TO ‘EARNING THE RIGHT TO STAY: A NEW POINTS TEST FOR CITIZENSHIP’.

Joint Council for the Welfare of Immigrants (“JCWI”) 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 promote the welfare of migrants within a human rights framework.

Introduction

We welcome this opportunity to comment on the proposal for a points-based test for British citizenship and access to permanent residence. Whilst we feel that questions of migration and development would have been better dealt with in a self contained consultation paper, we have none the less focused heavily on this, and used this paper as an opportunity to raise some of JCWI’s long standing concerns about what we see as one of the more important immigration issues.

We have previously set out in detail our views about the proposed reforms to citizenship and settlement, together with the approach and principles around which we believe naturalisation and settlement laws should be framed.¹ In brief, we believe that laws should: (i) reflect international human rights standards and the principles that underpin them- a commitment to legal certainty/rule of law, human dignity, proportionality and equality, (ii) facilitate swift naturalisation and settlement of migrants, (iii) be clear, simple and relatively easy for migrants to fulfil, (iv) reflect the principle of migrant stake-holding and (v) respect the distinction between immigration law and control designed to regulate entry and on going residence where there is no significant nexus with the state, and naturalisation where there is a significant nexus with the state. Laws structured around these values in our view are an effective way in which to facilitate integration, participation, democratic legitimacy, and efficient administration. The foregoing analysis of the consultation paper proposals is structured around the above principles.

¹ See JCWI’s response to the Government’s Green Paper - The Path to Citizenship, JCWI’s response to the Lord Goldsmith Citizenship Review and our briefings regarding the Draft (partial) Immigration and Citizenship Bill and our briefings for the Borders, Citizenship and Immigration Act (2009). These are available at: www.jcwi.org.uk.

Overview

In the first part of this paper we argue against the introduction of a points-based test for British citizenship/permanent residence. In our view there is no sound objective basis for its introduction. We argue that it will ultimately lead to: (i) a reduction of the UK's ability to attract the skilled workers it requires in order to remain competitive (ii) increased insecurity for migrant workers, (iii) the generation of a pool of undocumented workers, (iv) administrative inefficiency and (v) inconsistency with the policy objective of facilitating circular migration.

In the second part of this paper we identify our concerns about the introduction of a series of hurdles to settlement/naturalisation in the form of further and more demanding language and UK knowledge testing and mandatory orientation schemes. The UKBA suggests that this will facilitate the integration of migrants in the UK. We accept that it is in the interests of migrants to learn and improve their English language skills, and that it is useful for migrants and indeed nationals to learn about governance in the UK and British history. We argue however that introducing further and more demanding compulsory testing which could result in removal and the splitting of families will not foster the necessary sense of belonging in migrants that is a prerequisite for integration. In our view integration, and indeed the acquisition of the above knowledge can more effectively be acquired by migrants through the prompt provision of secure status together with the extension of full rights of participation.

In part three we note that circular migration (as we understand it) can bring significant benefits to migrants, developing countries and indeed the UK. To this end, we cautiously welcome the proposals advanced by the UKBA. We also identify other means through which circularity could be achieved in particular through: (i) reducing the costs of migrating to the UK, (ii) expanding existing short-term circular migration schemes to those from developing countries, (iii) minimising the effects of insecure status in the pathway to citizenship and settlement, (iv) exploring possibilities for portability of national insurance contributions for migrants from outside of the EU and (v) amending the design of tier 3 of the Points-Based System.

We also go to argue that immigration laws should also be constructed with a view to reducing global inequality in a way that honours the UK's commitment to attaining the Millennium Development Goals.² We identify some key ways in which this might be achieved. These include (i) reducing the costs of movement, (ii) removing the suspension of tier 3, and introducing a demand based tier subject to a resident labour market test given that there is a structural long term need for unskilled labour from outside of the EU, (iii) providing asylum seekers with an immediate right to work, (iv) integrating immigration law and policy into the UK's development strategy, (v) improving the conditions of migrant workers in the UK with a view to eliminating the 'reverse remittance scenario' and (vi) facilitating access to further and higher education for migrants in the UK so that they might employ the additional skills and expertise they acquire in the UK to aid development in origin countries.

² Millennium Declaration agreed at the UN Millennium Summit, September 2000. The Millennium Development Goals are eight international development goals that reflect the commitment of the international community to human rights principles of human dignity and non discrimination.

Chapter 2: Delivering Earned citizenship

Q1. Do you agree that we should operate a flexible system that allows us to control the number of migrants progressing to probationary citizenship?

No.

JCWI does not agree that there should be a new flexible system of the kind suggested that allows the Home Office to control the number of migrants progressing to probationary citizenship for the following reasons:

a. lack of an evidence based approach to policy formulation

The consultation paper at paragraph 2.2 justifies the policy proposal by reference to ONS statistics on population growth. The growth in population (some of which is attributable to migration) is said to necessitate the establishment of further 'mechanisms to control who is allowed to stay on a permanent basis'. These statistics however in no way provide evidence establishing the necessity of this kind of system.

ONS statistics count population by reference to those people who have been in the country for 12 months or more. As such, the minimal 4 % increase in population of which 61 % is attributable to immigration is based on counting all temporary migrants including overseas students, EEA nationals, and all others in the Points-Based System. They are therefore in no way reflective of population growth on account of *settlement* by migrants. Estimates in fact suggest that the percentage of migrants who presently go on to settle is already negligible.³ Accordingly, these measures seem to us entirely unnecessary given that settlement by migrants is quite clearly not the problem. Even however if it were, these measures would have such negligible impact on population numbers that the public expenditure entailed in implementing the scheme would simply outweigh any benefit.

b. population control mechanisms and the need to break the 'perceived' link between work migration and settlement

The recently introduced Points-Based System has already deliberately been constructed with a range of levers that can be employed to control the number of migrants from outside of the European Union. In the case of EEA nationals the ability to control their movement is rather more limited but contingent upon 'economic activity.' Additionally there are further requirements at the settlement stage which yet further control population numbers. In the case of a tier 2 applicant for example, they are already required to demonstrate that they are required for further

³ See The Economic Impact of Immigration, Volume II: Evidence. 1st Report of Session 2007-2008. House of Lords Select Committee on Economic Affairs at p. 382. Evidence provided by Professor John Salt of the Migration Research Institute of University College London, suggests that only approximately 20% of temporary migrants go on to acquire permanent residence status.

employment and do not fall under the general grounds for refusal.⁴ It is unclear therefore from the perspective of controlling numbers why further measures are necessary, and how they will actually better control population growth. So far as using law as communication with a view to breaking the ‘perceived automatic link’ between coming to the UK to work, and settling, there is of course no automatic link, and it would be equally effective to publicise and explain this.

c. damaging British economic interests - diversion of skilled labour

The UK Border Agency acknowledges at paragraph 1 of the document that one of its key objectives is to ensure that the UK remains competitive in the global economy. It is well known that global competition for skilled labour in short supply is set to intensify.

An uncertain, complex, potentially demanding system of this kind is unlikely to attract skilled migrants in the long term. Whilst we accept that there are a range of factors that determine the destination of skilled migrants, settlement *is* still part of the ‘global relocation’ package for many. As such, whilst most skilled migrants ultimately chose not to stay, it continues to remain important though the provision of a guarantee that they will be able to remain in the country for a sufficiently long period during which they can offset their costs of migration.

It must also be recalled that global competitors such as Australia, Canada and the US do not operate a flexible points-based system of this kind for citizenship. It is also noteworthy that most of the above, and indeed a number of European countries offer far more certain and shorter waiting periods for settlement/naturalisation.⁵

d. human rights principles of legal certainty

We note that paragraph 2.6 of the consultation paper suggests that the proposed scheme will improve matters for migrants through ‘allowing [them] to plan activity to meet our threshold’.

One of our key criticisms of this kind of flexible system is that it achieves the very antithesis of its intended objective. It is in fact entirely inconsistent with the principle of legal certainty. This kind of flexibility *would not* in the long run permit migrants to foresee with certainty the consequences of their actions with a view to planning accordingly. Given that so much is at stake for migrants - the ability to earn a living, look after children, and enjoy family life, and given that migrants would have been in the territory for several years by this stage (which could exceed 5 years due to the new

⁴ Para 245Z HC 395 as amended.

⁵ See JCWI’s response to the Path to Citizenship available at www.jcwi.org.uk for details of naturalisation/settlement packages in other countries.

definition of what counts as ‘qualifying leave’⁶ on the pathway to naturalisation), our preference is for a far less flexibility.

Q2. Do you agree that a points based test should be introduced in the application process for permanent settlement?

No.

We assume that ‘permanent settlement’ refers to both British citizenship and permanent residence. The above comments in relation to question 1 apply here. Additionally we believe if anything, that the application of a further points based test is likely to generate three further problems:

a. undocumented migration

A frequent unintended consequence of complex immigration systems, rigorous legal and administrative requirements and generally increasing the costs of migration is to generate irregularity in the long term. Given also that the tendency of migrants is to seek to remain in a territory until the costs of migration have been offset, there is a real risk that migrants who cannot fulfil the new requirements will simply end up remaining in the territory in any event until they have achieved their objective. To this extent these measures may well end up creating a pool of undocumented migrants and in so doing actually increasing the ‘invisible’ population in the UK. Additionally, associated social problems of loss of taxation revenue, depreciation of wages, and democratic deficits are all problems that would be exacerbated by this.

b. administrative inefficiency and rule of law

A new step in the process to the road to settlement and citizenship will invariably necessitate a larger workload for the UK Border Agency. One can expect this to be considerably higher than at present given that the new legal requirements will also necessitate demanding administrative requirements i.e. migrants will be required to supply acceptable forms of evidence to substantiate their applications.

It therefore seems likely that the new scheme will clog up the system and generate delays. One also anticipates further delays at the appellate level in view of the increased number of appeals that one can expect to arise on Article 8 ECHR (private and family life) grounds.

From the perspective of the rule of law the above delays are problematic as it will simply mean that migrants will not be able to claim their entitlements in law. This is of particular importance given that various socio-economic rights entitlements attach to settled status.

⁶ Borders, Citizenship and Immigration Act 2009, s 41.

c. inconsistency with facilitation of circular migration

At paragraphs 31-33, and in chapter 4 of the consultation paper the potential benefits of circular migration are acknowledged with a view facilitating this. Research shows that one of the most effective ways to encourage circularity is through ‘security of status’. This provides migrants with some guarantee that they will be able to offset their extensive costs of migration⁷. Given that the effect of the new tests will be to inject further status insecurity and uncertainty into the process, these proposals seem to militate against the policy objective of circularity.

Q3. Do you agree that the test should be applied before entry to the probationary citizenship stage? If no, at which stage should the test be applied?

Yes.

For clarity, we do not agree that any test should be applicable nor as we have repeatedly said do we agree with the existence of probationary citizenship. If however this is to apply, any test should take place at the probationary citizenship stage. It should be inapplicable to dependants granted leave in line with the principal applicant.

Application of a points based test at a later period is likely to generate hardship, greater uncertainty for migrants over a longer period, and increased litigation given that applicants would have developed strong ties with the country which could form the basis of further human rights based appeals.

Q4: Which attributes should attract points?

All listed options and other.

It is impossible to answer this question meaningfully given that there is insufficient information in relation to the categories and how they might be assessed. (e.g. it is unclear what ‘qualification’ would cover and how ‘earning potential’ might be assessed) Further, there is nothing about the proposed calibration of the points scheme or indeed the number of points that might be required to secure probationary citizenship. We feel that it would have been far more useful to have set out the detail of the proposed scheme and invite comment, rather than seek responses on the basis of such generalised information.

In the spirit of generality however, we believe that if there is to be a points-based system, it should recognise the widest possible range of contributions and skills. It

⁷ The Paradox of Permanency: An Incentive-based Approach to Circular Migration Policy in conference proceedings 15-16 October 2009, Malmo Sweden in the European Union, Kathleen Newland, in Labour Migration and its Development Potential in the Age of Mobility, Roundtable theme 2: Circular migration, p.22.

should also be simple and easy to fulfil (i.e. the pointing threshold should be relatively easy to attain). This in our view would make an effective contribution to facilitating integration. We are aware that other immigration based systems such as the Australian system awards points for possession of other languages, skills of family members, past employment experience, domestic qualifications, family sponsorship and age.⁸ The Canadian system awards points for ‘adaptability’ which takes into account possession of relatives in Canada.⁹ It seems to us that volunteering should also be something that potentially attracts points.

So far as earning *potential* goes, whilst we believe that if the system must be introduced this should appear as one of a number of attributes for which pointing might be awarded. the key point here however revolves around the mode of calculation given the lower average salaries for women, certain ethnic groups, and the disabled.¹⁰ It is essential in our view to ensure that such a requirement does not indirectly discriminate against applicants on objectionable grounds of race, gender, sex or disability.

Q5. Which of these attributes is most important?

No single attribute is of most importance. See above comments in relation to question 4.

Q6. Should points be deducted or penalties applied for failure to meet requirements for integration into British life?

No.

As we do not agree with a citizenship points based system, it follows that we do not agree that points should be deducted for ‘failure to meet requirements for integration into British life’/demonstration of disregard for UK values, antisocial behaviour or criminality. Assuming however that a points-based system is implemented, we have the following comments to make about the four separate issues this question raises.

⁸ The Effectiveness of Australia’s points- tested skilled entry system, Australian Department of Immigration and Citizenship, Mark Cully, Migration Advisory Committee conference, 07.09.09.

⁹ Points-Based Systems and Other migrant worker admission policies: Experiences of Canada, Director General Research and Evaluation, citizenship and Immigration, Canada, Eliazbeth Ruddick, Migration Advisory Committee conference, 07.09.09.

¹⁰ For example, in the UK Black Africans and certain South Asian groups earn up to 27 % less than white men (See summary of K Clark and S Drinkwater, ‘Ethnic minorities in the labour market: dynamics and diversity’, Joseph Rowntree Foundation, p.3 available at www.jrf.org.uk). Additionally, the Equality and Human Rights Commission has pointed out that the gender pay gap widened between 2007 and 2008 and that the gap between women’s median hourly pay and men’s was 17% and for women working part-time the gap was 35.6% (see Equality and Human Rights Commission, Equal Pay Position Paper. Para 5 available at: http://www.equalityhumanrights.com/uploaded_files/briefings/ehrc_equal_pay_position_paper_mar09.doc).

1. Integration into the British way of life/demonstration for disregard of UK values

a. inconsistency with the principle of legal certainty

It is unclear precisely what these requirements might entail, however these kind of ambiguous requirements potentially open the door to the exercise of very wide discretionary powers by the State. This is inconsistent with the principle of legal certainty that requires that migrants can foresee with certainty the consequences of their actions.

b. inconsistency with ‘British values’

Even however assuming the above terms were defined with certainty, and that definition in this way is sensible or desirable (we do not believe it is), the proposed test is ironically in our view inconsistent with the so called ‘British values’ it seeks to engender. Democracy, and the conditions that permit it to flourish, (as well as being values embraced by a number of other countries) are surely values that one associates with ‘Britishness.’

c. inconsistency with ECHR

Such requirements also open the possibility for potential breaches and incompatibility with Articles 9-11 ECHR (freedom of thought, free speech, freedom of association)

d. hindering integration

Quite aside from the above however, the imposition of such an illiberal requirement together with the withholding of full rights of participation for those who are unable to fulfil it seems unlikely to develop in migrants the sense of membership that is necessary for their successful integration. To this extent the measures are likely to run counter to the very objectives that they seek to secure.

e. existence of adequate powers

Additionally of course, there already exist extensive powers to deport individuals who are subject to immigration control on grounds that this is conducive to the public good. This is already interpreted by reference to a list of unacceptable behaviours.¹¹ Given that these powers would apply to anyone who has probationary status we cannot see that the case for these proposals is adequately made out.

¹¹ See Exclusion from the UK for engaging in unacceptable behaviour, UK Border Agency.

2. Criminal behaviour

a. the criminal justice system- the most effective system to deal with crime

JCWI believes that migrants who commit crimes should be dealt with in exactly the same way as anyone else i.e. through the criminal justice system. The criminal justice system has been deliberately designed to deal with deviant behaviour, and has procedures in place to determine in the context of each case, taking into account all relevant circumstances, the most suitable punishment. These include custodial sentences, community service, fining, conditional discharge etc.

In the light of the above, we do not believe it is necessary for the imposition of any further immigration based penalties in any case involving criminality. Any migrant who would have been through the criminal justice system would have already served their debt to society. Alternatively, if after having considered the details and circumstances surrounding the case, punishment was considered unnecessary we do not see any basis for further immigration ‘penalties’ to apply.

b. sufficient pre-existing immigration powers to deal with crime

Furthermore, wide immigration powers also already exist with which to deal with criminality including wide powers of deportation,¹² the use of restricted immigration status where deportation is not possible on human rights grounds,¹³ and other penalties further down the line through the use of the ‘good character requirement’ for the acquisition of British citizenship¹⁴. These powers in our view are more than sufficient to deal with perpetrators of crime and retain public confidence in the system.

c. rehabilitating offenders

Importantly, from the point of view of the societal interest of rehabilitation of offenders and eliminating crime, JCWI’s experience based on over 40 years of direct work with migrants is that withholding the social and economic rights that come attached to particular kinds of status tends on the whole to marginalise migrants. This impairs societal participation, and in so doing hampers rehabilitation.

d. ensuring consistency with international standards

Finally, we think if such penalties are to apply, they should be implemented in the points-based system is a way that respects international standards. In particular, whilst we note that the UK has neither signed nor ratified the 1997 European Convention on Nationality, the Convention represents European practice and consensus about maximum periods for naturalisation. As such, if there is to be a

¹² Immigration Act 1971, S 3(5),(6), and UK Borders Act 2007, s32(2),

¹³ Criminal Justice and Immigration Act 2008, Part 10.

¹⁴ see chapter 18, Annexe D, Nationality Instructions for the British Nationality Act (1981).

penalty it should ensure that the migrants total waiting time for naturalisation does not exceed 10 years in total. Furthermore, the possibility for naturalisation must not be foreclosed.¹⁵

3. Antisocial behaviour

There already exist ample measures which address ‘anti social’ behaviour through either through the use of criminal law where an offence has been committed or through the use of civil law.

In our view the existence of the above powers is more than adequate to deal with the above issues. To this extent these provisions are entirely unnecessary. Furthermore, they are simply procedurally ill-equipped to deal with the evidential intricacies of allegations of anti-social behaviour. Our comments above are also applicable here.

Q8. Do you think that the current Nationality Checking Service model can be successfully built upon to provide a ‘check and send’ service for Earned Citizenship?

No.

A decision in relation to probationary citizenship will result in the removal of a migrant. A number of consequences may arise from this, some of which might engage the UK’s international obligations. We feel therefore that the complexity of the potential issues involved and the potential ramifications for migrants mean that this service would be inappropriate for this kind of application.

Q9. Do you think it appropriate that local authorities perform an additional service around advice and co-ordination?

No.

See above.

¹⁵ European Convention on Nationality (1997) Article 6 (3) ‘Each State Party shall provide in its internal law for the possibility of naturalisation of persons lawfully and habitually resident on its territory. In establishing the conditions for naturalisation, it shall not provide for a period of residence exceeding ten years before the lodging of an application.’

Chapter 3: Supporting integration

Q.10: Should we require applicants to meet English and Knowledge of Life requirements at both probationary citizenship and British citizenship stages?

No.

We do not believe that there should be two stages of testing for the following reasons:

- a. this will increase the likelihood of the splitting of families as there is always the possibility that a spouse or other dependant relative may fail to satisfy the requirements. This is inconsistent with the principle of respect for human dignity or more specifically family unity embodied in a number of European instruments;
- b. migrants already experience grave difficulties in accessing ESOL classes whether on a paid or unpaid basis¹⁶. The issue of access and availability to English language classes must first be resolved before the imposition of further language/knowledge of life in the UK requirements;
- c. two stages of testing will considerably push up the costs of migrating to the UK i.e. through course/course material fees. This is inconsistent with the with the UKBA policy objective of facilitating circular migration from developing countries. (see below);
- d. this is inconsistent with the spirit of the international obligation to facilitate the integration of refugees.¹⁷ Research shows that nationals from refugee producing countries already tend to have far lower pass rates in these tests¹⁸. One might extrapolate from this that a second round of testing may have disproportionate impacts on the ability of refugees and migrants from certain countries to ultimately settle/naturalise in the UK.
- e. it will do little to foster a sense of membership of British society in migrants and is therefore likely to run counter to the aim of integration. Migrants are likely to feel a sense of injustice at the fact that they are required (under pain of removal/splitting of families) to

¹⁶ See the current campaigns: Campaigning Alliance for Lifelong Learning, <http://www.callcampaign.org.uk/?p=733> and A Right to a Voice, <http://www.niace.org.uk/campaigns-events/campaigns/a-right-to-a-voice>.

¹⁷ Convention relating to the Status of Refugees (1954). Article 34, 'The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.'

¹⁸ B Ryan *Integration Requirements: A New Model in Migration Law*, (2008) Vol.21, No.3 p.18.

acquire skills and knowledge that most British nationals do not themselves possess.

However, regardless of whether there are ultimately one or two stages for testing, the key points for us are that:

- a. the ability to apply for further periods of limited leave to remain pending satisfaction of the requirement continues¹⁹;
- b. there should remain the possibility of appropriate exemptions from the requirements.²⁰

Q.11: Should these two stages of testing be different based on information relevant at each stage? This would involve testing on new topics not currently tested, for example British history.

No. We do not believe that there should be two tests. See comments above

Whilst we do not believe that there should be two stages of testing with a more complex test dealing with UK governance etc at the second stage, we do believe that the acquisition of knowledge about UK governance could be useful for both migrants and indeed nationals. An effective way with which to encourage the acquisition of this kind of knowledge would be through facilitating access to further and higher education. This would better capture the ‘two way approach to integration’. This could be achieved by ensuring that migrants who have probationary citizenship have access to further and higher education at home rates. It is not presently anticipated that they will.

Q.12: Should this two-stage test require a higher standard of English for the second stage?

No. See above comments

Migrants coming through the Points-Based System are already required to have relatively advanced English language skills as a pre-condition for their entry. This, as the consultation paper notes is to be extended to spouses. Our view therefore is that whilst it is desirable for these skills to be improved, it is by no means necessary, and certainly not something upon which security of status should be contingent upon.

A more effective approach to raising the general levels of English language levels of migrants would be to encourage the acquisition of these skills through for example by enabling access to further and higher education during probationary citizenship status and ensuring that the supply of ESOL classes matches demand. This would also have

¹⁹ This is currently the case . See Explanatory Memorandum to HC 398, para 7 and Knowledge of Life in the UK: Requirements for settlement applications, UKBA.

²⁰ See footnote 19.

the advantage of avoiding the discriminatory impacts on objectionable grounds including nationality.²¹

Q13. Do you think mentoring schemes should be extended to cater for non-refugees?

Don't know.

We believe that there are more effective ways of facilitating migrant integration e.g. through combating discrimination and through providing access to equal social and economic rights which enable migrants to participate in all spheres of society. Having said this, we acknowledge that for some migrants, a mentoring scheme could be of benefit. We would therefore support a scheme that provides migrants with *the option* of participating in such a scheme. We would oppose any element of compulsion in relation to this.

Q14. Do you think that orientation days for new migrants should be introduced to encourage integration?

Don't know. Above comments apply.

Q15. Do you think it should be compulsory for migrants to attend an orientation day?

No. Above comments apply.

We do not believe that these orientation days should be compulsory and it therefore follows that we do not believe that migrants should be required to pay for these compulsory sessions. A compulsory day of this kind will inevitably present practical difficulties for migrants for example in full time/shift work and for those with caring responsibilities whilst yet further increasing the costs of immigrating to the UK. The latter is prohibitive and problematic from a development perspective.

Q16. Do you think migrants should be awarded points towards probationary citizenship for attending an orientation day?

Yes.

Whilst we do not agree with the introduction of a points-based test for citizenship or probationary citizenship, if such a system is to exist, the attributes for which points are awarded should be as broad as possible with a view to ensuring that it is relatively easily capable of satisfaction.

²¹ See B Ryan *Integration Requirements: A New Model in Migration Law*, (2008) Vol.21, No.3 p.18.

Q. 17: Who do you think orientation days should be run by? a) Local authorities? b) Employers? c) Local authorities and employers? d) Other? Please specify.

Other

All of the above options with the possibility of online orientation.

Q.18: How do you think orientation days should be funded? a) By the migrant? b) By employers? c) Other? Please specify

c. The Government

It is to be recalled that migrants pay taxes and make national insurance contributions. They are already denied full access to the welfare state and permitted access only to non-contributory benefits. Additionally, since April 2009 there has been an increase in fees to pay for the 'transitional impacts of migration.' This has resulted in many applicants being charged at levels that exceed cost price. Given this, and given that this paper proceeds on the basis that these measures would achieve a societal good i.e. through facilitating integration of migrants into the UK, we believe that the Government should be responsible for the provision of funding for these days, particularly if they are to be made compulsory.

Q. 19: What do you think an orientation day should involve?

JCWI believes that there should be further detailed discussions directly with migrants to determine the information they might find most useful on arrival. This could be done through the use of focus groups.

With regards to economic migrants, JCWI would strongly advocate that information about joining trade unions is made available- migrant workers are particularly vulnerable to exploitation and unlawful practices in the UK. For all migrants it would be useful for to supply information about the availability of legal advice and representation on immigration matters. We feel that information about employment rights and access to healthcare and social and economic entitlements would also be useful.

Q.20: Do you think that online orientation is a good idea?

Yes.

Providing useful information via the internet could be useful for those migrants that have access to the internet and are internet-literate. There will however be a number of migrants who will not be able to use the internet, either because they cannot access a computer or have not had experience using one. Allowance should therefore be made for this if such a system is to be implemented.

Q.21: Do you think a group should be set up to add value to the development and implementation of integration strategies for migrants?

Yes.

If 'integration' strategies are to be developed, it would be helpful for this to be done in within a more coherent joined up framework.

Q.22: If set up, do you think this group should just include representatives from across government?

No.

If this is to be meaningful it is crucial that involves a range of actors including migrants, community groups and other relevant stakeholders.

Q.23: Do you think that the group should also involve independent representatives, for example, from the voluntary or community sector?

Yes.

See above comments. This will not only aid insight into potential barriers to integration, as such groups have greater front line experience but will also allow migrants to have a stake in decision making and therefore help to increase their future integration.

PART 4: MIGRATION AND INTERNATIONAL DEVELOPMENT

Q24. Do you think we should facilitate circular migration in order to reduce the negative impact of brain drain on developing countries?

Don't know

It is not entirely clear from this consultation paper what 'facilitation of circular migration' refers to. Whilst we note that for some, the term is synonymous with 'temporary' or cyclical migration, JCWI understands the term more broadly to refer to all policies that simply facilitate movement between migrant's countries of origin and recipient states, these policies may equally apply to settled migrants. To this extent we believe that certain measures that increase engagement by migrants with developing countries of origin can potentially result in a 'triple win' situation for migrants, countries of origin and recipient states. Such measures might also in certain situations address the issue of 'brain drain' (though see our more detailed commentary on this below).

Subject to the above, we welcome the proposals outlined in paragraph 4.10 for a 'pause button' which might dispense with the need to reapply for entry clearance for periods that fall outside the defined period together with the possibility of migrants being able to bolster naturalisation applications through undertaking developmental work. In so far as the reference to a 'two year period for short term study or work' goes, if this refers to expanding overall possibilities for migration from developing countries, this again is something that we would cautiously support subject to the points below.

There are however a number of other amendments that JCWI believes could be made to *existing* law and policy which could better facilitate circular migration from developing countries. Our policy suggestions appear below:

a. Reduce the costs of migrating to the UK through lower visa/extension fees and less demanding maintenance requirements

There are a number of transaction costs associated with migration. These include the use of commercial agents to secure a job offer, fees for securing official documents and passports, internal/external travelling costs, language learning, and the use of other intermediaries. High visa and extension fees (which are set to increase)²², together with demanding maintenance requirements significantly add to the costs of migrating to the UK. Given that migrants will often seek to recoup the costs of migration before considering return, one way to facilitate engagement or 'circular migration' from developing countries would be to reduce the above costs and lower the level at which English language testing is set.²³

²² UKBA Consultation on charging for immigration and visa applications, September 2009. Proposals include increasing fees for dependents of applicants, adding charges for those migrants who overstay and charging for fees above the cost of delivery.

²³ Appendix B, HC 395 as amended.

b. Expanding existing short-term circular schemes for temporary migration to developing countries – tiers 4 and 5 of the Points-Based System

Tiers 4 and 5 are presently the only short-term circular migration routes into the UK. Tier 5 of the Points-Based System is effectively closed to nationals from developing countries, and tier 4 operates in such a way that it is likely to disproportionately impact on the ability of migrants from developing countries to make use of it. These tiers could be amended in a way that could better facilitate movement between developing countries and the UK through:

- i. amending the list of participating countries listed for the tier 5 youth mobility scheme, and removing as a prerequisite for entry the requirement that applicants for the tier 5 temporary worker scheme must be non-visa nationals²⁴. This clearly excludes nationals from developing countries;
- ii. see above comments on relaxing maintenance requirements. These are particularly significant for tier 4 given that applicants are required to show that they have available to themselves, the full cost of the course, together with £800 for each month of the course (for courses up to 9 months). For a course longer than twelve months, applicants must show that they have the full cost of the course fees for the first year plus an additional £7,200 available to them.²⁵

c. Create possibilities for circularity in the new pathway to citizenship in the future regulations, rules and guidance

Evidence from Australia, Canada and Spain demonstrates that *secure legal status facilitates circulation*²⁶. The rationale for this is that migrants are provided with security that enables them to leave destination countries without cutting out off possibility of returning to it. In the light of this it is regrettable that the thrust of the earned citizenship proposals extend the length of time for which migrants enjoy insecure status. Within this structure, circulation could be better facilitated by ensuring that:

- i. immigration rules in future that reflect the new pathway to citizenship/settlement do not penalise those who seek permanent residence rather than British citizenship by subjecting them to considerably longer periods of insecurity. If they must, then the additional period should be minimal;
- ii. future immigration rules governing non-satisfaction of the new requirements for citizenship/probationary citizenship/settlement

²⁴ HC 395 of 1993-1994 as amended, para 245ZK(b)(i). Currently, the only countries listed are: Australia, Canada, Japan and New Zealand.

²⁵ UKBA Tier 4 of the Points Based System – Policy Guidance. Annex 6.

²⁶ The Paradox of Permanency: An Incentive-based Approach to Circular Migration Policy in conference proceedings 15-16 October 2009, Malmo Sweden in the European Union, Kathleen Newland, in Labour Migration and its Development Potential in the Age of Mobility, Roundtable theme 2: Circular migration, p.22

provide the ability to reapply for further periods of temporary leave (as is presently the position with regards to satisfaction of certain requirements for settlement) pending satisfaction of the requirements with a view to minimising the insecurity within the scheme;

iii. the ‘returning residents rule’²⁷ is relaxed with a view to lengthening the period for which migrants can remain outside of the country and abolishing the requirement to demonstrate a future intention to settle in the UK.

iv. future guidance for the use of discretion, regulations and rules determining the pathway to citizenship encourage circularity in particular with regards to:

1. residence requirements;²⁸
2. the requirement for continuous employment²⁹;
3. activities that count for the purpose of volunteering;

v. application fees for probationary citizenship, permanent residence and British citizenship are minimal.

d. Explore possibilities for portability of national insurance contributions

Presently if a migrant works in the UK, they will often be paying tax, and making national insurance contributions. In the case of EEA workers, national insurance contributions paid in the UK can count towards benefits in the country of origin. This may not however be the case with migrants from outside of the European Union. Another way therefore to facilitate circularity would be to allow for greater portability of national insurance contributions for those migrants from developing countries.

e. Amend the design of the currently suspended tier 3 of the Points-Based System

In the event that the suspension of tier 3 is lifted, the proposal is for migrants to be granted leave for a maximum of 12 months with no possibility of extension or switching.³⁰ This design is inconsistent with the idea of circularity given the well known tendency of migrants to return only at the point at which they have been able

²⁷ HC 395 of 1993-1994 as amended, paras 18-20

²⁸ See residence requirements in Borders, Citizenship and Immigration Act 2009, s39-40

²⁹ Borders, Citizenship and Immigration Act 2009, Section 39, 2 (2)(e) ‘that, where on the date of the application A has probationary citizenship leave granted for the purpose of taking employment in the United Kingdom, A has been in continuous employment since the date of the grant of that leave;’

³⁰ Home Office. A Points- Based System; Making Migration Work for Britain. March 2006. p. 28-30.

to offset the costs of migration³¹.

In the light of the above points, we believe that in future tier 3 should offer the possibility of settlement. Failing this however the period of leave should, if it is to encourage circularity whilst also avoiding the possibility of generating irregularity (as with the German guest-worker scheme) last sufficiently long so that migrants are given sufficient time in which to offset the costs of migration. There should also be the possibility of multiple renewals of leave together with the possibility of switching. Associated costs must also be kept to a minimum, and legal and administrative requirements must be relatively easy to satisfy - the evidence is that demanding requirements discourages return due to future concerns about the ability to renegotiate entry to the UK.

Q25. In order to combat brain drain do you think it would be feasible to develop a list, similar to the NHS list but covering other sectors?

Don't know

There are two aspects to this question. Firstly about the assumed desirability of addressing 'brain drain' through discouraging migration of 'skilled labour', and secondly, about the use of lists as a mechanism with which to do this.

In relation to the initial question it cannot be assumed that discouraging migration with a view to avoiding 'brain drain' is necessarily desirable in every case. It's desirability will vary, and be country specific. Whilst migration may therefore lead to 'brain drain' from certain countries, the disadvantages that flow from it may well be offset by the advantages - greater remittances, encouragement of the 'stay behinds' to study and reduction in unemployment for example.

Secondly 'brain drain' itself may simply be symptomatic of other problems rather than the cause of difficulties themselves. Internal conflict, lack of investment in health and education structures, and high unemployment as a result of poor economic management are just some reasons that 'brain drain' can occur³². It is not therefore skilled migration that needs to be addressed in these circumstances, but instead the domestic problems that generate it.

As to the use of lists to address migration of skilled personnel in circumstances where this is identified as a genuine issue, it is not clear to us how effective and useful these lists have ultimately been in addressing the problem given that there has been little analysis of the use of these lists. We are unable therefore to comment on the desirability of this, but would suggest further research and consultation with the

³¹ The Paradox of Permanency: An Incentive-based Approach to Circular Migration Policy in conference proceedings 15-16 October 2009, Malmo Sweden in the European Union, Kathleen Newland, in Labour Migration and its Development Potential in the Age of Mobility, Roundtable theme 2: Circular migration, p.19.

³² Mobility and Human Development, Hein de Hass, United Nations Development Programme, Human Development Reports, April 2009 p55.

Department for International Development, other development stakeholders and Governments in origin countries.

Q26. What evidence could be drawn upon to develop such a list? (please specify)

Don't know

Please see comments above.

Q27. What further views do you have on how we could mitigate against the negative impacts of migration from developing countries.

JCWI believes that the policy objective behind these development based immigration policy **should not** only be designed to 'mitigate the negative impacts of migration from developing countries' but should instead actively seek to reduce global inequality, and secure the UK's commitment to the Millennium Development Goals³³.

Ultimately in our view the above objectives could only occur through global co-operation. In the longer term, this would require the establishment of formal mechanisms such as a 'World Migration Organisation' which could for example set standards for migration, and encourage bilateral and multilateral agreements to implement those standards. Whilst there has been a flurry of recent international activity in this respect, we are obviously aware that mechanisms have yet to be established. To this end we would urge the Government to be proactive, and pioneering in relation to international efforts and discussions in this respect.

On a more practical level, we have set out a series of recommendations with a view to achieving the above objectives.

a. Reduce transaction costs associated with movement

As noted above at there are a range of transaction costs associated with migration. The effect of these transaction costs is not only to discourage circularity but to preclude the possibility of movement for the poor with particularly acute impacts for developing countries. We recommend cutting visa and extension costs, and relaxing the maintenance/income requirements that appear throughout the Point-Based System.

³³See above at 2.

b. Lift the existing suspension on tier 3 and consider amending the proposed shape of tier 3 through the use of a demand based tier subject to a resident labour market test for unskilled migrants from outside of the European Union

Whilst the loss of highly skilled migrant labour can often have detrimental effects on developing countries as global demand for highly skilled labour often outstrips supply in origin countries, the same cannot be said for low skilled labour. In the case of low skilled labour there is a vast oversupply in developing countries. Low skilled migration is therefore potentially one of the most valuable exports for developing countries. As the Department for International Development notes:

‘For developing countries with an abundance of poorly educated people internal and international migration into low skilled jobs could bring about huge poverty reduction and development benefits...³⁸ through ‘helping individuals to increase their income, learn new skills, improve their social status, build up assets and improve their quality of life. For communities and developing countries, emigration can relieve labour market and political pressures; result in money being sent home (remittances); increase trade and financial investment from abroad; and lead to support from migrant communities (diasporas) such as technology transfer, tourism and charitable activities’³⁴

As the UN Human Development Report 2009,³⁵ the OECD³⁶ and the Department for International Development³⁷ recommend, routes for unskilled labour should be liberalised. This would as the OECD notes in its report have the added advantage of addressing the issue of irregularity³⁸.

Given that the demand for low skilled labour is simply not temporary but structural, we believe that tier 3 should not only permit migration on the basis of shortage lists, but should also incorporate the possibility of demand based low skilled migration through the use of a domestic labour market test which would also have the added advantage of safeguarding domestic labour market interests of low skilled nationals and recruiting migrants only to the extent that the employment market can cater for it.

³⁴ Moving out of Poverty- making migration work better for poor people, Department for International Development, March 2007 at p.2 .

³⁵ Overcoming barriers: Human mobility and development. UN Human Development Report 2009. United Nations Development Programme at p.17.

³⁶ International Migration Outlook, SOPEMI, Organisation for Economic Co-operation and Development 2009, P.79,

³⁷ Moving out of Poverty- making migration work better for poor people, Department for International Development, March 2007 at p.28,

³⁸ International Migration Outlook, SOPEMI 2009, P.78. See also, Can Migration be an Instrument for Reducing Inequality, presentation by Stephen Castles, International Migration Institute, University of Oxford, Metropolis Conference, Melbourne 8-12 October 2007,

c. Provide asylum seekers with an immediate right to work

Developing countries produce some of the largest flows of asylum seekers. The UN Human Development Report 2009³⁹ recommends that restrictions on access to work for asylum seekers should be abolished not only on account of this, but because of the longer term impact of such restrictions. These have been found generally to encourage dependency and a corresponding reduction of the positive benefits of migration. Accordingly, we would recommend that existing requirements⁴⁰ which permit work only after 1 year are amended to allow the right to work forthwith. This would also accord with the UK's legal obligations under Article 6 of the 1966 International Covenant on Economic, Social and Cultural Rights⁴¹.

d. Integrate immigration law and policy into the UK's development strategy

The Department for International Development and other development stakeholders including the governments of developing countries, should as the parliamentary International Development Committee recommended be consulted about the design not only of temporary migration schemes, but also in our view on other relevant aspects of immigration policy in the light of the multiple ways in which it has implications for development.⁴²

e. Improve conditions of migrants in the UK

As the Department for International Development notes, migrants are less likely to pass on the benefits of migration to communities in developing countries where they are subject to denial of rights⁴³. Indeed in the worst case scenario this can lead to a situation of 'reverse remittances' where migrants who find themselves in difficult situations require assistance from home⁴⁴.

In our view, the UK ought as a minimum to extend socio-economic welfare rights entitlements to migrants in line with the 1990 Migrant Workers Convention⁴⁵, or at the very least the 1977 European Convention on the Legal Status of Migrant Workers.⁴⁶ This would strengthen social welfare entitlements for migrants at all stages of their residence in the UK including probationary citizenship status. We believe that

³⁹ Human Development Report 2009, Overcoming Barriers, Human mobility and development, United Nations Development Programme, p.104

⁴⁰ HC 395 of 1993-1994 as amended, para 360/360A.

⁴¹ Article 6 states: '1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right'

⁴² Moving out of Poverty- making migration work better for poor people, Department for International Development, March 2007 at para 25, p.87.

⁴³ Moving out of Poverty- making migration work better for poor people, Department for International Development, March 2007 at page 24.

⁴⁴ See Creating a Virtuous Circle by Frans Bieckmann and Roeland Muskens, the Broker issue 1 April 2007

⁴⁵ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. United Nations. (1990).

⁴⁶ European Convention on the Legal Status of Migrant Workers. European Council. (1977)

there should also be a significant strengthening of employment law protection more generally⁴⁷. Failing this, given that the effect of the new pathway to citizenship is to generally extend the period for which migrants are subject to insecure status and denied full access to the welfare state, consideration should be given to extending selected non-contributory benefits to migrants during the probationary citizenship period. Welfare access could be limited to homelessness housing assistance under the Housing Act 1996, Housing Benefit, and Jobseekers Allowance/Income Support.

f. Facilitate access to further and higher education for migrants in the UK

Education is widely acknowledged as one of the key mechanisms through which individuals can lift themselves out of poverty and participate in communities. Migrants who are subject to immigration control have limited access to further and higher education as they cannot access education at home rates. The difference in chargeable rates can be very significant⁴⁸.

A development friendly perspective requires more generous access to further and higher education for migrants, particularly those who are here on a temporary basis and who aim to return to developing countries and employ their newly acquired skills in 'brain drain' areas. Regrettably the effect of the new pathway to citizenship is to generally extend the period of time for which migrants (including those from developing countries) will be ineligible for further and higher education at home rates. In our view at a minimum, consideration should be given to allowing migrants on probationary citizenship to access further and higher education at home rate fees.

g. Other

The 2009 International Migration Outlook report⁴⁹ makes a number of useful suggestions that could contribute to the maximisation of development, and the means for achieving these including:

1. Reducing remittance costs
2. Sharing the costs of education and training between receiving and sending states through twinning programmes and/or direct support to education and training programmes for which labour is required
3. Increasing yet further student enrolment through nominal tuition fees for migrants.

⁴⁷ See JCWI's submission to the Home Affairs Committee in response to the UKBA JCWI's response to the Home Office Consultation: *Selective Admission: Making Migration Work for Britain*. Available at: www.jcwi.org.uk

⁴⁸ For a comparative purposes the LSE charge foreign students between £21,000-£28,000 for a taught Masters degree and between £6192.-£18048 (save for MSc finance which is £22, 464)

⁴⁹ International Migration Outlook, SOPEMI, Organisation for Economic Co-operation and Development. 2009 at p.195-200.

