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Centre LGS

AHRC Research Centre for Law, Gender and Sexuality

**RESPONSE TO
[HOME OFFICE BORDER AND IMMIGRATION AGENCY:
VISITORS CONSULTATION PAPER]**

March 2008

CentreLGS is the Arts and Humanities Research Council Centre for Law, Gender and Sexuality.

The purpose of CentreLGS is to act as a national and international focal point for academics, practitioners and policy-makers who work in the area of gender, sexuality and the law. It consists of about 70 scholars in three institutions: the Universities of Kent, Keele and Westminster.

CentreLGS aims to support current research and develop new initiatives in this field through regular policy forums and conferences, the publication of books and articles, exchange and visiting scholar programs, and the supervision of postgraduate research students.

SUMMARY

CentreLGS has reservations about the form of the proposals and amendments to current immigration policy set out in the Visitor Consultation Paper. We do not believe that a five Tier immigration system that will polarise migrants into specific categories provides an effective and equitable response to this particular issue. Extant immigration legislation, combined with more research and efforts to provide possibilities for unskilled migrants to work legally and visit the UK, would better address the migration issues that currently face the UK. We have concerns that as the majority of migrants who require a visitor visa to enter temporarily the UK are non – Western, the proposals to implement a points - based immigration system raise issues of fairness and principle. We feel that an approach that constructs foreignness as a ‘problem’ requiring state – parties to increase and intensify knowledge, statistics, governance and regulation of the nation’s borders is problematic on a number of interrelated fronts. Our main unease about this method of border control is that it perpetuates stereotypes of migrants, increases inequality among migrant and minority ethnic groups and denies the clear fact that a mismatch exists between contemporary labour needs in the UK and the perceived need for increased border control and formal immigration policy.

The initiatives laid out in the Consultation Paper reflect a trend in the West to encourage highly skilled migrants to migrate either temporarily or permanently as an important aspect of their skill upgrading and technical transfer in the UK. Our main concern about the new five Tier points-based system is that it has the potential to disadvantage unskilled migrants by making the criteria for entry almost unachievable for all but the wealthy and / or highly educated. Primarily, we are troubled by the fact that once the Government implements the new point - system, a key aspect will be that all migrants, except highly skilled Tier 1 migrants, will require a sponsor before they are even eligible for all visa applications. As a matter of principle and fairness, we would urge the Border and Immigration Agency to broaden the criteria for who can be a sponsor to include relationships such as friends.¹ Although the Border and Immigration Agency’s Consultation Paper raises questions of migration and ‘what is

¹ See our discussion of the sponsorship programme later in this document.

good for the economy’ (page 5). We would urge the Government to tackle the practicalities of the UK’s immigration issues by acknowledging and factoring in the important and positive contributions of migrant labour in the country’s economy, and also the spectrum of benefits of a cosmopolitan society to the UK.

The Border and Immigration Agency’s Consultation Paper prioritises shortening the time visitors can remain in the UK. We do not see sufficient reason for the Government to change the regulations at this point in time. Our main doubts about this move is that it will have a detrimental and disproportionate impact on due legal process and fairness for those individuals attempting to establish the two - year cohabitation requirement for ‘unmarried or same sex partners’ according to the Immigration Rules. Additionally, we do not believe that the key regulatory and classifications systems that will determine who is eligible for transit, entry and stay in the UK are transparent and fully articulated. We would not want to see the Government locate its response to visitor’s visas within the context of public concern about unmanageable numbers of economic migrants from the global South and East. Additionally, we believe that introducing a new visitor’s visa sends out a message that the UK is closing its borders to all except wealthy entrants and / or geospecific populations (read Western).

We take a similar view of the proposal to issue group visas to travellers who wish to visit the UK for cultural or sporting events. We take issue with the fact that the Government has not elaborated on how it intends to manage this scheme. We do not consider that the Border and Immigration Agency has identified how immigration personnel will make their decisions on eligibility for visas. In addition, we have questions about whether or not this initiative will impact on the mobility of those individuals from targeted regions, who wish to travel alone. We would urge the Government to view this issue not just as a problem of managing migration or border control in the UK, but rather as an opportunity for a sustained and high – profile public debate about the issues involved including and not restricted to the vital issue of the UK’s future labour needs. Furthermore, the Government needs to be mindful of the fact that making it difficult for migrants to attain a visitor visa will not stop ‘irregular’ immigration. Rather it will make vulnerable people even more liable to

harm and exploitation, because it will force them to seek alternative and often dangerous routes to the UK.

RECOMMENDATIONS

We recommend, specifically in relation to the proposed five Tier points-based system for immigrants, that:

- **Measures to replace the current immigration system with a points-based system must avoid polarising migrants into categories of wanted and unwanted groups;**
- **Schemes that target ‘visitors’ must not conflate issues of temporary and permanent migration and thus feed into public anxiety about ‘irregular’ migration, issues of sovereignty and border control;**
- **The criteria, by which immigration authorities decide who has the right to enter the UK, must be articulated clearly. This would entail transparent discussion about ‘why’ at this time the Government wants to change the Visitors Visa regulations;**
- **The discretionary powers given to immigration authorities and airline personnel must be clearly and transparently set out;**
- **Projects such as the *Visitors Taskforce* must be informed properly by research and avoid entrenching harmful myths and misinformation about migrants;**
- **Policies that invoke stereotypes of non – Western migrants are problematic, and must be avoided, because they re-enforce xenophobic responses to foreigners within the host country.**

We recommend, specifically in relation to Overseas Domestic Worker’s Visas, that:

- **The Home Office Border and Immigration Agency launch a separate consultation process;**
- **We would encourage the Government to pursue measures that would offer protection to this predominantly female group. Protection in this instance could encompass ensuring that those individuals who do report abuse are not threatened with deportation;**

- **Action is taken to protect overseas domestic workers through existing anti-discrimination and labour laws.**

We recommend, specifically in relation to sponsorship rules, that:

- **Future legislation and amendments to immigration laws do not impact negatively on those individuals attempting to establish a two-year residency in keeping with the Immigration Rules;**
- **As a matter of principle, and given that the discussion here is about rights to visit the UK, not residence, we recommend strongly that the category of eligible sponsors should be as wide as possible. We feel that this initiative does raise harmful presumptions about the automatic use of sponsors. For example, that only wealthy and ‘established’ family groups will be able to support their relative’s applications effectively, and that private family links are favoured over other links such as non-marital partnerships;**
- **It is anomalous that only spouses have ‘family visitor’ appeal rights, but civil partners and co-habitees do not. We recommend that the Government address this imbalance.**

CONSULTATION RESPONSE

CentreLGS has reservations about the form of the proposals and amendments to current immigration policy set out in the Visitors Visas Consultation Paper. Our response reflects concerns over four main themes surrounding the rationale and potential impacts of the proposed new points – based immigration system consisting of five Tiers. First, we question the form of the debate that continues to structure the Border and Immigration Agency’s planned amendments to existing immigration law. Second, we question whether or not a policy that polarises migrants into ‘desirable’ and ‘undesirable’ categories will prove useful over time. In this context, we also question whether stricter visa and immigration regulations will compromise legal fairness and process. This leads to our examination of the potential for the proposed amendments to exacerbate xenophobia, to increase racism and inequality both at home and among migrants. Third, we make some suggestions about how the Border and Immigration Agency might frame a Consultation Paper on Overseas Domestic Servants. Here, we raise questions about how the law might protect these workers.

Finally, we identify a number of key areas where we see the Consultation Paper gives rise to concern about the Government's proposals for the sponsorship of family members who wish to visit the UK.

A. Framing the Immigration Debate

The Consultation Paper sets out the Government's plans to introduce a five Tier points-based immigration system in the UK, which is 'good for travellers and the economy whilst protecting a strong border' (page 5). The Border and Immigration Agency claims that these changes are designed 'to ensure that only those that Britain needs can come here to work, study or train' (page 5). With the emphasis on control and security, the Government continues to put its faith in 'technology and its ability to monitor and manage movements across frontiers' (Schuster and Solomos 2004, 279). In order to deal effectively with immigration, the Border and Immigration Agency states that it intends to regulate the movement of 'three quarters of the world's population' by means of 'biometrics ... a unified border force ... [and] counting people in and out of the UK' (page 5). We believe that these measures would prove to be of questionable effectiveness, and by claiming to restrict immigration from specific parts of the world, these initiatives in fact inflate the extent of the problem (de Haas 2007). We believe that academics, non-governmental organizations and policy makers could work together to produce a more nuanced and effective response to the immigration issue. The evidence suggests that state attempts to increase border and immigration surveillance have generated a series of unintended outcomes. For example, a diversification of overland and maritime migration routes has forced the most vulnerable migrants, such as trafficked migrants, into compromised situations (Jordon 2002). Furthermore, research suggests that it is virtually impossible to seal off all borders, including the coastline, even if Governments 'would be genuinely willing to do so' (de Haas 2007.65). Irregular migration, by its very nature, is clandestine. It is correspondingly difficult for the immigration authorities to detect it (Kapur 2005). In light of these facts, it is unlikely that the proposed amendments will act as a deterrent or provide the Government with a clearer idea of who is actually in the state.

The Consultation Paper discusses schemes to 'securing the UK border' in the context of dangers to public order and stability brought on by 'those who may seek to abuse the hospitality of the UK by overstaying or working illegally' (Page 7). Developments

in UK policy and regulation in relation to immigration indicate that ‘securitisation’ has become the way in which state – parties frame the political debate and the kinds of instruments chosen to tackle the ‘problem’ of immigration (Guiraudon 2003). Government strategies that only address migration through the rubric of security perpetuate misunderstandings about foreigners. This also raises serious questions about the potential for these strategies to inflame public anxiety about security threats after the events of 11 September 2001 and 7 July 2005, in which migrants are often constructed ‘as potential terrorists’ (Yuval – Davis et al 2005, 516). Moreover, such a stance ignores that fact that, in recent years, it has been British citizens and legal residents who have instigated acts of terrorism in the UK. Yet the Government’s failure to define terrorism or who actually constitutes a terrorist has resulted in geospecific and minority groups being exposed to and targeted for serious human rights violations.

We believe that academics and policy makers need to engage in extensive research to properly inform the planned strategies in the Consultation Paper. The border control and security focus of the Consultation Paper overlooks the contributions immigrants make to host countries. We would like to see the UK taking a lead in re-orientating the debate on immigration. There is a need for Border and Immigration Agency to highlight the benefits of a more cosmopolitan society (particularly in the realm of social, cultural and scientific exchange and enrichment). This work would go hand in hand with the need to combine these insights with the understanding that ‘the perspective and location of the transnational migrant must be foregrounded – not as a terrorist, not as a victim, but as a complex subject affected by contemporary global processes’ (Kapur 2005, 135). A joined-up approach, involving Government agencies, academics and NGOs, would certainly refocus debates on the rights of non-citizens whose position in international migration circuits is worsening steadily.

B Polarisation of Migrants

The Consultation Paper puts forward a set of initiatives designed to create ‘a simpler, clearer system for visitors and their status and entitlements, which helps promote travel to the UK but is robust against abuse’ (page 7). The Border and Immigration Agency indicates the ways in which it intends to deploy these initiatives through proposed changes to visitor categories. While the Government acknowledges that

tourism is a vital contributor to the national economy, the focus of this section of the Consultation Paper remains ‘the controlled inflow of selected migrants and the exclusion of undesirable migrants’ (Schuster and Solomos 2004, 279). The Consultation Paper discusses the possibility of rolling back the time visitors are permitted to remain in the UK before they become ‘overstayers’, from six to three months (page 8). We believe that the reasons for this decision are not articulated in the Government’s proposals. We would recommend a public and transparent debate on why this needs to happen now before the Government enforces any changes to the current Immigration Rules.

The Consultation Paper discusses the possibility of creating ‘new visa products’ such as group visas, which are ‘time – limited’ (page 9). The Government explains that it wants to extend its current arrangement with China under the ‘Approved Destination Status Agreement’ to ‘other categories of tourists’ (page 9). Under this scheme, Chinese nationals can obtain a group visa for 30 days to travel to the UK. We perceive that the focus on ‘other categories of tourists’ represents a closing-down rather than an opening-up of our borders to geospecific (read non – Western) groups. Furthermore, the emphasis on ‘*group travel*’ (sic) intersects with entry controls that by their very nature ‘are selective, distinguishing between those who have a right to enter and those who do not’ (Schuster and Solomos 2002, 48).

The focus on state regulation of non-Western migrants’ mobility also suggests that the Border and Immigration Agency wants to stem the flow of migrants who travel on a tourist visa and then attempt to initiate asylum proceedings (Gill and Sharma 2007). Specifically, we have concerns about whether or not restricting an individual’s right to travel to a group visa that immigration officers can ‘discount as appropriate’ (page 11) will exacerbate problems of due legal process, fairness and accountability, especially in the area of genuine refugee and asylum claimants. The Consultation Paper does not set out clearly the criteria, by which the Border and Immigration Agency will determine who must travel on group visas. The proposals to facilitate group travel raise potential concerns about the rights of individual travellers, who fall into ‘other categories of tourists’, to travel alone to academic conferences or for pleasure. We have real concerns that this system will present opportunities for abuse of power among immigration authorities and ‘frontline staff’ such as airline

personnel, who are part of the Government's policy of externalisation of responsibility for strengthening border controls (Tholen 2005). Here we refer to the 'carriers' liability legislation', which places the onus on airlines to check that passengers are properly documented for travel to the UK.

The Government's plan to 'simplify the route that governs business visits to the UK' gives us reason for pause. We believe that the new scheme will exacerbate inequality among migrants. Our main reservations revolve around how racism intersects with class, so that 'decisions on who may enter are taken on the basis of the – usually economic – contribution that an individual can make to the host society' (Schuster and Solomos 2002, 48). Our criticism of the Consultation Paper is that its focus seeks to minimise the number of unskilled migrants eligible for entry to the UK. As Young observes, the solution to the problems of migration is to grant legal status to 'people who are meritocrats – who already have capabilities and the opportunities' (Young 2005, 454). Underlying all of these strategies is the Government's concern 'to guard against the route [visitor's visa] being used for disguised employment in the UK' (page 14). One might reflect with de Haas that the continued polarisation of migrants will neither solve the problem of irregular migration, nor address the future labour needs of the UK (de Haas 2007).

C. Overseas Domestic Servants

The Border and Immigration Agency's Consultation Paper indicates that it has considered the experiences of overseas domestic servants in its proposed amendments to the Immigration Rules. For example, it states that it is aware that these individuals, who are predominantly women, 'may be the target of employer abuse and exploitation' (page 19). The Government claims that it 'is committed to finding a solution that will provide the right level of protection to those who are exploited when they are in the UK' (page 19). We would encourage and agree with the Government that there is a need for extensive research on the status of overseas domestic servants and caregivers, in the UK. We would support the Government in its initiative, and we agree that this issue warrants a separate Consultation Paper.

However we argue that as part of the five Tier points-based system, the Government is rolling back major protective reform it made in 1998-1999, when it gave domestic

workers their own status, included them in the Immigration Rules and gave them the same access to indefinite leave as other workers (Anderson 2000). We have concerns that these workers are loosing out because they do not have sufficient skills to be ‘Tier 2’ under the new points based system.

As feminist researchers, we would encourage the Government to consider the following when it frames the Consultation Paper on Overseas Domestic Servants. We urge the Border and Immigration Agency to consider the issue not simply as a migration matter but as one, which demonstrates the intersections between categories of gender, class and ethnicity. We therefore recommend that the Government should tackle the question as part of a wider agenda concerning non-Western women’s particular experiences of working in the UK in situations where racism and gender inequalities may be amplified by exploitative, hierarchical, restrictive and poorly paid labour relations (Smith 1999). The nature of the work performed by ‘live-in servants’ is more than a job. It ‘assumes that the place, task and time are all detached from the labour market and all social norms’ (Mundlak 2007, 125). In short, employers tend to view live-in servant’s labour as theirs to be used as they see fit and at all times. This unequal relationship leads to the relatively common abuse of rights. Legal responses to labour undertaken in the ‘private’ sphere of the household has denied overseas domestic servants the public protections that are typically found in labour law (Ehrenreich 2002). Therefore, unlike other jobs, it is rare that overseas domestic servants will work fixed hours. We recommend that the Government strengthen the law in relation to live-in domestic workers and the regulation of their time, especially in the area of overtime.

Overseas domestic servants are generally poor and as a consequence they are often willing to compromise over wages that are at the UK legal minimum. As Mundlak notes, the wage they receive in the UK may correspond to wage norms in the women’s country of origin. Therefore, it is ‘this gap that makes statutory manipulation possible’ (Mundlak 2007, 132). We recommend that the Government bring the full force of extant anti-discrimination law and minimum standards of pay and labour conditions to bear in the case of live-in domestic workers.

D. Sponsorship

The Border and Immigration Agency states that in the future sponsorship will be so important that all tiers (except Tier 1) will require a sponsor before UK immigration authorities will consider individuals eligible for visa application. At present, the Government defines eligible sponsors as employers, colleges and ‘others’ who possess a sponsorship license and who might benefit from the applicants’ migration. The proposals in the Visitors Visa Consultation Paper discuss the possibility of ‘transferring the same concept to the sponsored family visitor route’ (Page 21). The rationale behind this proposal is to ‘ensure that genuine family visitors find it easier to come to the UK’ (page 21). We believe that there are also general issues of principle here, both as to the necessity for a formal sponsor at all, and as regards the introduction of financial guarantees. We object to the caveat that sponsors must provide evidence that they have adequate finances to support their visitor: ‘The documents that a sponsor would be required to submit could be a specified number of wage slips or bank statements together with a statement of intent regarding the maintenance and subsistence of the family member’ (page 21).

Our view is that amendments to the Immigration Rules for Visitors Visas should not privilege family relationships. As a matter of principle, given that the discussion in the Consultation paper is about the right to travel and visit the UK, not residence, the category of eligible sponsors should be as wide as possible.

Finally, we object to the narrow availability of the right of appeal if entry clearance is refused. We find it anomalous that spouses have family visitor ‘appeal rights’ if the immigration authorities deny entry clearance but civil partners and (especially long-term) cohabitants do not (page 21). We have concerns about which cohabitants will be affected by the proposed change from a 6 to a 3-month limit. For example, we believe that this change is likely to impact mainly on those cohabitants seeking to become recognised as such under the two years’ cohabitation for the ‘unmarried or same sex partner’ category in the Immigration Rules. In ‘two years plus’ cases, if cohabitants intend to live in the UK, they can apply for settlement. Of course, if they do not seek settlement, even ‘two years plus’ cases could use a visitor’s appeal right.

FURTHER INFORMATION

Method of Consultation

This response is the result of collaboration between Centre members across the three participating institutions in the UK. Co-ordinators Dr. Sharron A. FitzGerald and Dr. Ruth Quiney (Keele University) invite the Membership to send their comments on the Consultation.

Dr FitzGerald wrote the final response, with valuable input from Dr Ruth Quiney.

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