

## Appealing against civil penalties imposed for employing illegal migrant workers

The civil penalty regime, which was introduced by the Immigration, Asylum and Nationality Act 2006 (IANA 2006), will celebrate its second birthday on 2nd March 2010.

The act gives the UK Border Agency (UKBA) the power to issue penalty notices against employers of foreign nationals who are working in the UK without permission to do so.

Between 29 February 2008 and 30 November 2009 a total of 3,376 Notices of Liability for a Civil Penalty were issued to employers of illegal migrant workers. In June last year the total value of penalties issued was already over £14m. Some of Britain's biggest companies are among more than 1,100 firms fined.

The IANA 2006 provides a three-stage process whereby: - the UKBA is allowed to serve a penalty, - the penalized employer is entitled to object to the penalty through an internal review, - this failing, the employer can appeal to the county court.

### Section 15: The penalty

Section 15 of the act allows the UKBA to impose a penalty notice on an employer who employs a foreign worker who is not entitled to work in the UK.

Before serving a penalty notice the UKBA must satisfy itself that the worker is not entitled to work in the UK and that the work



is carried out under a contract of employment or apprenticeship.

In some cases it is not always clear whether or not there is a contract of employment in place.

For agencies workers, the preferred test is one of 'necessity'. In the case of *James v London Borough of Greenwich* [2008] EWCA Civ 35; [2008] IRLR 302 the Court of Appeal: confirmed that the mere passage of time would not result in an implied contractual relationship between the individual and the end-user; that unless an end-user can insist on an agency supplying a particular worker, a contract between the worker and then end-user could not be implied; and – established that where the parties enter into a particular arrangement at the outset of the relationship, that arrangement would continue to apply unless it no longer accurately reflected the way the relationship operated in practice.

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immigration

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For contractors there are a number of tests for deciding whether a particular individual is an employee or a self-employed contractor. This is an extremely complicated point of employment law which is dealt with by a vast amount of case law. Caution is required. To avoid the risk of prosecution, employers should ensure that all contractors working on their premises are entitled to work in the UK.

The burden is on the UKBA to show that an offence has been committed.

An employer found in breach of the Immigration Law may be liable to a fine of up to £10,000 for each illegal worker.

When assessing the breach and the amount of fine which should be imposed, the UKBA takes into account a number of factors including:

- The nature of the checks carried out by the employer
- The number of offences previously committed by the employer
- If the employer reported suspected illegal workers to the UKBA
- Whether the employer co-operated with the UKBA in any investigation

## Section 15 (3): The statutory excuse

The act provides a 'due diligence' defence whereby the employer will be excused from paying the penalty if he can show that he has complied with the requirement to check the employee's documentation as set out in the code of practice prior to the foreign worker starting his employment.

Here the burden of proof is on the employer.

The documentation of foreign workers with limited leave to remain in the UK

must be checked every 12 months. This applies only to employees who joined after the law came into effect at the end of February 2008.

An employer who knowingly employs a foreign worker illegally commits a criminal offence. In these circumstances the statutory excuse cannot be relied upon and the employer could face a custodial sentence of up to 2 years.

In certain circumstances it may be impossible for an employer to ascertain whether its employee is working in the UK illegally.

For instance in the case of a foreign national who is in the UK under the auspices of a student visa valid for 6 months and therefore entitled to work for up to 20 hours per week during term time, an employer will be unaware that his employee, having taken on additional work with another employer, is in fact working 40 hours per week in breach of the conditions imposed on his leave.

Another area of concern is the position of the employer when the employee has an application for an extension pending with the UKBA. Strictly speaking as the employer cannot collect the documents prescribed by the code (i.e. a valid visa), the statutory excuse will not be available.

However the UKBA website seems to suggest that employers can rely on the excuse providing they can show that they used the employers checking service. This again will not always be possible since it can take up to 5 working days to get confirmation as to whether a foreign worker has an application pending. Employers are advised to obtain evidence of the submission of the

further leave to remain application.

Section 16: The objection

A penalized employer has 28 days from the date of the issuance of the penalty notice to object.

An employer can object on the basis that he is not in breach of section 15 and therefore not liable to pay the penalty or that although he is in breach of section 15 he can rely on the statutory excuse since he carried out the necessary checks of the foreign worker's documentation.

An employer can also object to the level of penalty.

The UKBA can increase the penalty on review following objections and serve a new penalty notice.

Employers wishing to object should make sure that there are no grounds the UKBA could rely on to increase the level of penalty before proceeding.

## Section 17: The appeal

A penalized employer can appeal to the county court whether or not he chooses to use the objection procedure. The appeal can be on the grounds that the employer has not breached section 15, the employer has breached section 15 but the statutory excuse applies, or the level of penalty is too high.

A penalized employer has 28 days from either the penalty notice or the rejection of the objection to commence the appeal.

The appeal will be a re-hearing during which the court may look at any material it thinks relevant. This includes material that was not available to the UKBA when the penalty notice was issued.

On appeal by re-hearing it will be up

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# Biometrics

From 6 January 2010 all sponsored skilled workers are required to obtain an Identity Card for Foreign Nationals (ICFN) when they apply to extend their stay in the UK under Tier 2 of the Points Based System.

Tier 2 is the latest category of application to be added to those where biometrics are now required – others include those making applications for leave under UK Ancestry, spouses, civil partners, unmarried or same sex partners and domestic workers in private households and those simply seeking a transfer of conditions.

This change to the Tier 2 application process means that all applicants and their dependent family members must attend a biometric enrolment centre to provide their biometrics (fingerprints and a photograph).

Once the biometrics have been provided, they are checked against existing UKBA records, and are then stored on UKBA systems and on the identity card's own secure electronic chip.

The ICFN has been introduced to help combat illegal working and reduce illegal immigration. It is designed to enable holders to confirm their identity and their immigration status, and to access their entitlements more easily. If the holder of an ICFN travels outside the UK during their time here, they will be required to show the card together with their national passport at the port or airport when they leave the UK and when they return.

For categories other than Tier 2,

premium same day appointments are generally available within two to three weeks but appointments for Tier 2 applicants are currently extremely limited. Applicants who are prepared to travel outside of London to locations such as Cardiff or Sheffield may be able to secure an appointment within six weeks. The Public Enquiry Office of the UK Border Agency in Croydon has recently announced that they will be allocating ten appointments per day to legal representatives but no more than one a week to any single representative. Consequently most applications are being submitted by post during which time the passports of the applicant and their accompanying dependants are retained.

## Practicalities & timings of the new system:

- Current experience indicates that once the initial further leave application is submitted, it takes one to three weeks for the applicant to be sent a letter inviting them to submit biometrics.
- Once the invitation letter is received, appointments at one of the biometric enrolment centres are usually available within one week.
- Applicants living within some postcodes are permitted to use a walk in service at a number of Post Offices for an additional fee of £8.00. However this service is only available to the main applicant and not to dependants.
- Once biometrics are submitted, the UK Border Agency states that their aim is to process 75% of applications within four weeks and then passports and documents are returned to the applicants.
- The ICFN is issued approximately

five working days after the decision is made by secure delivery.

## Potential issues:

- Tier 2 extension applicants need to be aware that the process could take eight to ten weeks during which time they and their family members will not be able to travel. Providing the application has been submitted prior to the expiry of their current leave to remain, they will be permitted to continue in employment.
- Tier 2 (General) applicants who are switching employers in the UK will not be able to start work with the new employer until they receive their ID card endorsed with approval for the new employment.
- Employers need to be aware of the impact this new further leave process will have on their recruitment process. The resident labour market test was increased in December 2009 to four weeks of advertising so this combined with the further leave process means that the entire Tier 2 process could now take from 12-16 weeks.

Consequently, in such situations, it may be worthwhile considering an out of country application and the applicant returning to their home county to apply for a fresh entry visa. They may be accompanied by their family members or if necessary family members may remain in the UK and apply for leave once the main applicant returns to the UK. In the latter scenario the main applicant will be required to submit their passport with the family member's applications so will be restricted from travelling but will be able to commence the new employment in good time.

# Tier 4 – Students

The Tier 4 category of the Points Based System (PBS), launched in March 2009, brought major changes to the procedure for applying for a student visa.

From the 22nd February 2010 new responsibilities and procedures will be implemented for Tier 4 Sponsors which will make it even harder for students to gain visas to study in the UK.

All Non EEA foreign students must meet specific criteria to qualify to pass the 40 point threshold. There is a greater responsibility on educational institutions to manage their own students and to prevent bogus students from failing to show up or overstaying their leave to remain.

Any college or university wanting to enroll international students must be accredited and licensed. This requirement has reduced the number of institutions able to bring students to the UK from over 4,000 to approximately 2,000.

The institutions face losing their licence if they fail to:

- keep copies of all their foreign students' passports;
- keep and update their students' contact details;
- alert the UKBA to any students who fail to enroll on their course;
- report unauthorised absences to the UKBA; and
- inform the UKBA if any students stop studying.

Reporting obligations

Since 22nd February 2010 it is mandatory for Tier 4 Sponsors to report the following information to the UK Border Agency within the



required timeframe and using the Sponsor Management System (SMS):

- If a student does not enroll on the course at the expected time the Tier 4 Sponsor must inform the UK Border Agency within 10 working days and a reason for the non attendance must be provided.
- If the student misses 10 'expected contacts' on the course of study without the Academic Institutions permission the UKBA must be informed within 10 working days of the 10th day of absence, or 10 working days of the 10th missed contact.
- If the student withdraws from studies the Sponsor must inform the UKBA within 10 working days of the event and provide the name and address of the new Academic Institution if known.
- If the Academic Institution stops sponsoring the student for any reason the UKBA must be informed within 10 working days.
- If there are any significant changes to the student's circumstances (e.g. the length of course) the UKBA must be informed within 10 working days.

Students must prove that they have the means to support themselves and their families and provide biometric information. Students and their dependents who wish to apply for an extension within the UK must apply for an identity card which will replace the vignette sticker previously placed

in the passport.

## Funds

Students on courses for longer than 12 months will have to show they have sufficient funds to pay their first year of fees, plus £7,200 to cover their first year in the UK and a further £535 per month for nine months for each dependant accompanying them. They must normally show that they have held this money for a 28-day period ending no more than one month before their application.

## CAS

From 22 February 2010, all sponsored students must possess an electronic confirmation of acceptance for studies (CAS), a 10 digit reference number which corresponds to a database record on the SMS from their prospective sponsor.

## Further restrictions

Further restrictions will be implemented after 3 March 2010 on students enrolling on courses below degree level and which is not a foundation degree course. These include:

- demonstrating a minimum level of English - just below a GCSE in a foreign language;
- restricting the lowest-level courses (A levels and equivalent) to only the most trusted institutions;
- halving the amount of time these students will be able to work from 20 hours, to just 10 hours during term time;
- a ban on bringing in dependants for anyone studying a course for less than six months;
- a ban on dependants of anyone studying a course lower than foundation or undergraduate degree level from working;
- a ban on foreign students studying

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# UK Immigration – The Points Based System

## Important changes to take effect 6 April 2010.

The UK Border Agency (UKBA) has announced changes to Tier 1 and Tier 2 of the points based system. These follow extensive consultations with various stakeholders over the course of 2009.

Foreign national employees with passports from outside the European Economic Area are normally sponsored under Tier 2 of the points based system (PBS). There have been a number of changes announced in respect of Tier 2. These are outlined below.

### Intra Company Transfers

The intra company transfer route allows for experienced employees to be transferred to employment in the UK, either on an assignment basis or into a local role. Currently applicants must have been employed by the company overseas for a period of at least six months immediately prior to the date of application. The intra company transfer route will be sub-divided into three sub-categories with effect from 6 April 2010. These will be:-

#### 1. Established staff

UKBA will increase the period of required prior employment from six months to twelve months. This means that employees with less than twelve months prior service with the company overseas will not be eligible under the ICT route. A Tier 2 ICT approval will be made for a maximum period of three years, renewable for a further two.

#### 2. Graduate Trainees

A new sub-category will be created under the ICT route for recently recruited graduates who have at least three months experience with a company overseas. This route will facilitate participation in graduate rotation

schemes. The idea behind the scheme is to enable international graduates to benefit from a period of experience in a UK office before returning to their home country to continue with a graduate programme. The maximum period of permission under this route will be for twelve months and no extensions will be permitted.

Not all positions will be considered "graduate occupations". UKBA provides a list of seventy-five graduate occupations that migrants can be sponsored in for the new Tier 2 sub-category for graduate trainees.

#### 3. Skills Transfer

The skills transfer sub-category will enable newly recruited employees to transfer temporarily to the United Kingdom to acquire or impart skills and knowledge relevant to their new role. They will not need any previous company experience before coming to the UK.

The key principle underpinning the category is that skills transfer will be incidental to the applicant's employment overseas. The skills transfer route cannot be used to fill vacancies or to displace resident workers. The maximum period of stay granted under the skills transfer sub-category will be six months.

The role must fall within the list of "graduate occupations" published by UKBA. Employees who come to UK under this route will not be permitted to extend their stay or switch into another immigration category such as Tier 1 or Tier 2 (General).

### Indefinite Leave to Remain

Indefinite Leave to Remain (ILR), also known as "permanent residence" or "settlement", is normally granted to

overseas nationals who work lawfully in the UK for a five year period. Until now, intra company transferees have benefited from the right to apply for ILR after five years working in the UK under the ICT category. The changes from 6 April 2010 will take away the entitlement to apply for ILR under the ICT category. This means that time spent by employees in the UK under Tier 2 ICT will not lead to settlement. The applicant will be required to switch in to Tier 2 (General) or Tier 1 in order to be in a category that leads to permanent residence.

Tier 2 (General) requires employers to test the resident labour market through advertising before sponsoring an overseas national. Consideration should therefore be given to undertaking a resident labour market test before the overseas employee transfers into the UK as the Tier 2 (General) route carries greater benefits for long term settlement for the employee and family members.

Consideration may also be given to submitting an application under Tier 1 (General) of the points based system. This avoids resident labour market testing and reduces the number of reporting obligations to UKBA. Tier 1 (General) migrants may apply for permanent residence after five years in the UK. However, Tier 1 migrants are "self sponsored". This means that they are free to take any form of employment within the UK labour market and their immigration status is not linked to one employer. Changes have also been announced to the criteria for Tier 1 (see below).

### Tier 1 (General)

A new points table will come into effect on 6 April 2010 that will apply to migrants making an application under the Tier 1 (General) category. This is the scheme that enables highly skilled migrants to obtain long term work visas for the UK that are not

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to the UKBA to prove a breach of section 15. However an employer wishing to rely on the statutory excuse will have to show that the required documentation checks were carried out.

Appeals by re-hearing in this context are similar to trials. A penalized employer wishing to appeal must ensure that he builds a strong case relying on facts supported by evidence.

The recent figures show that the UKBA tend to settle appeals when faced with a strong case.

Prepared employers are likely to reach an early resolution without having to face the headache of a full re-hearing.

Employers are therefore advised to have a management strategy in place in the eventuality of an announced UKBA visit.

For further information on keeping your business off the UKBA's 'name and shame' list or dealing with an unannounced UKBA visit or challenging a Civil Penalty Notice, please contact our Immigration Department at [immigration@magrath.co.uk](mailto:immigration@magrath.co.uk) or on 020 7495 3003.

The material contained in this article is intended to provide a general guide to the subject matter. Readers should not act on the basis of the information without taking professional advice.

## Tier 4 Students

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below degree level if the course includes a work placement - unless that course is being provided by a university, college or training provider which has the status of 'highly trusted sponsor'.

The UK Border Agency has also announced that, from 1 February 2010, it is temporarily not accepting any new applications under the Tier 4 student route of the points-based system at the visa application centres in North India, Bangladesh and Nepal.

On 6 April 2010 the Tier 4 application fee for entry clearance will increase from £145 to £199. The fee of £357 for extensions stays the same for postal applications but increases from £565 to £628 for the premium service at a public enquiry office. The fee for a dependant who applies at the same time will increase from £50 to £80 for a postal application and £107 for an application at a public enquiry office.

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employer specific. Tier 1 migrants may take any form of employment or self-employment.

The most important change is that applicants with a Bachelor's Degree will be able to obtain thirty points for the degree. This will open up the route to a significant number of potential applicants. It will also afford flexibility to companies who wish to use this route to recruit skilled foreign nationals quickly without undertaking extensive resident labour market tests (these typically take at least four weeks).

The previous earnings threshold has been amended. This will make the threshold for points acquisition under previous earnings higher than under the current points table; however this change is unlikely to have an adverse effect on applications from experienced individuals within the financial services sector. The new table also allows applicants with high previous earnings (£150,000.00 or above) to qualify under Tier 1 (General), even if they have no formal qualifications at a high level. Applicants within this earning band will obtain the full points allocation automatically.

Applicants will be granted permission to stay under Tier 1 (General) for two years, rather than the current three years. After two years, Tier 1 (General) migrants will be able to apply to extend their permission for a further three years.

## Changes of Employment

From 6 April 2010 UKBA will clarify their policy in respect of job changes once a sponsored migrant is already established in the UK. At present change of employment applications should be made when employees have a change to their core duties and responsibilities or their pay changes from the level indicated on their original Certificate of Sponsorship, other than changes due to annual increments. Promotions are also currently considered to be change of employment situations.

The new guidance will confirm that a new application for sponsorship will not be required if the migrant is changing jobs, but remaining with the same employer and within the same standard occupational classification (SOC) Code. These codes provide generic descriptions of different "types" of role. As there are limited SOC Codes within the financial services sector, the new policy will be extremely advantageous to UK employers.