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2011: a year of change for the UK immigration landscape

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DECEMBER 2010 WAS AN INCREDIBLY eventful month for UK immigration practitioners, with further information published concerning the mechanisms of the permanent annual immigration limits (due to be implemented in April 2011), a judicial decision rendering the interim limits introduced by the coalition government as unlawful and the almost immediate removal of one of the UK immigration regime's best known, and highly used, economic migration routes into the UK, Tier 1 (General).

FURTHER INFORMATION PUBLISHED ON ANNUAL LIMITS

Following on from the Migration Advisory Committee (MAC)'s recommendations (reported in *IHL186*, p30) in respect of the annual limits for both Tiers 1 and 2, the Home Secretary has announced several prospective changes to immigration policy in respect of the economic migration routes into the UK. The changes will be implemented in April 2011 to assist with the delivery of the coalition government's commitment to place a limit on non-European Economic Area economic migration to the UK each year, and reduce net migration to the 'tens of thousands' by the end of this Parliament.

As anticipated, the coalition government answered the question as to whether there should be a separate category for the highly skilled by announcing the closing of the self-sponsored Tier 1 (General) route. The government further announced that the first 'annual limit' for individuals seeking entry clearance to the UK will be set at 21,700. This accounts for 20,700 under the skilled route and 1,000 under a new 'exceptional talent' route.

CHANGES TO TIER 1

In addition to the abolishment of Tier 1 (General), the Tier 1 (Entrepreneur) route will be reformed, introducing flexibilities and creating a new avenue for promising start-up companies that do not meet

current investment thresholds, as a means to make it a more attractive route for those with a definite business plan to contribute to the UK economy. Similarly the Tier 1 (Investor) route will be reformed to offer an accelerated route to settlement, depending on the level of investment. Each route remains outside of the permanent April 2011 cap. The UK Border Agency (UKBA) has also launched a consultation in respect of closing the Tier 1 (Post-study work) route, which allows international graduates who have studied in the UK a two-year permission of further stay, and provides a bridge to highly skilled or skilled work.

As the Tier 1 (General) route closes, another Tier 1 route will open, albeit with severely limited space. A route for persons of exceptional talent will be introduced, covering migrants who have won international recognition in scientific and cultural fields, or who show sufficient exceptional promise to be awarded such recognition in the future. Applications by those with exceptional promise will require endorsement by a competent body in the relevant field. The 'exceptional talent' category will be subject to a limit of 1,000 places.

Although these changes remain significant, they were somewhat overshadowed by events in December 2010.

CHANGES TO TIER 2

The Tier 2 (General) route, for applicants earning a salary of less than £150,000 per annum, will be subject to a limit of 20,700 places for 2011/12. This limit will not apply to in-country applications from those already here, or dependants. Additionally, Tier 2 (General) applications will be restricted to only graduate-level vacancies. The MAC has been asked to advise on what are to be considered graduate-level jobs, and on receipt of that advice the shortage occupation list will be amended accordingly. Existing Tier 2



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(General) migrants in jobs below graduate level will be able to extend their permission to stay if they meet current requirements.

The minimum level of English language competency for Tier 2 (General) applications will be increased from basic to intermediate level (B1 on the Common European Framework of Reference).

Applications for certificates of sponsorship will, where the limit applies, be considered on a monthly basis. If the monthly allocation is oversubscribed, applications will be ranked according to:

- 1) shortage occupations in the first instance;
- 2) whether the post requires higher academic qualifications; and
- 3) salary.

Tier 2 (Intra company transfer) migrants are excluded from the annual limit. However, the immigration rules will be changed so that only intra-company transferees in the 'Established staff' sub-category paid more than £40,000 will be able to stay in the UK for up to five years; those paid between £24,000 and £40,000 will be able to enter for up to 12 months within a specified period.

Current rules will remain in place in respect of Tier 2 (Intra company transfer) migrants in the 'Graduate trainee' and 'Skills transfer' sub-categories. Similarly, the Tier 2 (Minister of religion) and Tier 2 (Sportsperson) categories remain outside of the annual limit.

CHANGES TO SETTLEMENT?

In response to MAC's recommendation that the government consider current rules concerning settlement of Tier 1 and Tier 2 migrants, the UKBA has announced

that there will be a new criminality threshold, requiring applicants to be clear of unspent convictions, for all those applying for settlement. Additionally, both Tier 1 and Tier 2 migrants applying for settlement will need to meet the salary criteria that applied when they last extended their permission to stay. Further, if an applicant fails to pass the minimum English language requirement, their application for settlement will be refused.

SHORT AND LONG GOODBYE TO TIER 1 (GENERAL)?

At the end of November 2010, it was announced that by April 2011, Tier 1 (General) would be abolished in respect of both out- (ie those applications made from outside of the UK) and in-country applications. There would, effectively, be no comparative replacement for the Tier 1 (General) regime.

However, a month later, on 21 December 2010, the UKBA announced that it would stop accepting Tier 1 (General) applications made overseas after 22 December 2010. Therefore, applicants who were planning to make a Tier 1 (General) application had less than two working days to prepare and submit their applications. Further to this, the UKBA confirmed that it would only accept applications accompanied by a fee. As such, applicants in the process of submitting a Tier 1 (General) application overseas, for example having completed the online submission of the application, but having booked an appointment to submit the original documents (and in many cases pay for the application) at a later date, had to ensure that they had found an alternative method of paying for their applications. In a further attempt to avoid a flood of applications, the UKBA also stated that worldwide offices would only accept those applications that have a reasonable prospect of being granted.

HOW DID WE GET HERE?

Within the space of less than a month, the UK immigration regime had changed dramatically, moving from a planned and phased removal of Tier 1 (General) from the regime to an almost immediate abolishment of the scheme for overseas applications. A cynical view could look to the timing of the second announcement – less than a week after the High Court's judgment declaring the interim limits in respect of Tiers 1 and 2 unlawful.

In a victory for the Joint Council for the Welfare of Immigrants (JCWI) and the English Community Care Association, who instigated the legal challenge, the High Court found that the Home Secretary, Theresa May, had attempted to 'side-step Parliamentary scrutiny' by issuing the interim limits without first consulting Parliament.

The court found that it was not the limits themselves that were invalid, but the mechanics by which the coalition government had introduced them, with Richard Drabbel QC (representing JCWI) arguing that the Home Secretary had acted outside her powers by introducing the changes without first laying them before Parliament, in accordance with the law. Sullivan LJ said:

'In my judgment, no interim limits were lawfully published or specified by the secretary of state for either Tier 1 or Tier 2... there has never been a limit on the number of applicants who may be admitted.'

Immigration Minister Damian Green responded on behalf of the coalition government:

'[The] judgment will have no impact on the permanent limit on non-European works the government will introduce next April. This ruling is about process, not policy... We will set this right in the next few days to ensure we can continue to operate the limit.'

This is exactly what the coalition government did. The changes not only affected Tier 1 (General), but also confirmed a formal limit in respect of the number of certificates of sponsorship available to all licensed Tier 2 sponsors. The level of the

limit was set at 10,832, and the changes took place immediately, as statements of changes to the Immigration Rules.

SHOULD WE EXPECT MORE CHANGES?

Recent *IHL* articles have focused heavily on the limits, both interim and permanent, in respect of Tiers 1 and 2 of the points-based system (the economic tiers). However, formal consultation has been launched in respect of Tier 4 of the points-based system – the student route – which currently accounts for two-thirds of migrants entering the UK each year. The consultation runs until the end of January and, at the time of writing, seeks the views on a range of measures to reduce the number of students that can come into the UK including:

- for adult students, focusing Tier 4 on higher level courses and those offered by highly trusted sponsors;
- introducing tougher entry criteria, such as English language competence;
- ensuring students wishing to extend their studies show evidence of academic progression;
- limiting students' entitlements to work and sponsor dependants; and
- improving the accreditation process for education providers, alongside more rigorous inspections.

The consultation also poses the question as to whether or not the Tier 1 (Post-study work) category should be abolished in its entirety, restricted further or left in its current form. The Home Secretary, before the launch of the consultation, made the rationale for change very clear:

'I will also consult on closing the post-study route, which last year allowed some 38,000 foreign graduates to enter the UK labour market at a time

December 2010 marked a significant period in the UK immigration regime. The economic routes were reviewed, amended and abolished at some speed, and more detail has been published in respect of how the future, more permanent immigration limits will operate. The coalition government was chastised by the courts for not introducing changes in accordance with the law, and responded swiftly in making the economic routes into the UK even more difficult and narrow. How it will approach limiting the student regime remains to be seen, as

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when one in ten UK graduates were unemployed.'

The student and family immigration routes account for 80% of net migration to the UK. If the government is to achieve its target of reducing net migration to the 'tens of thousands' by the end of this Parliament, it will have to address urgently the numbers who are coming into the UK in the non-economic migration categories.

does the achievement of a net reduction of migration into the UK to the 'tens of thousands'. However, it would appear that 2011 will continue to see much change to the UK immigration landscape, as the coalition government moves forward with the pledges made before the general election and decisions made thereafter.

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