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Immigration briefing from Magrath LLP published in the December 2010/January 2011 issue of The In-House Lawyer:

- If the cap fits: call for highly skilled migrants to fill highly skilled jobs
- Economic migration to the UK: a testing time

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If the cap fits: MAC recommendations

ON 18 NOVEMBER 2010, THE MIGRATION Advisory Committee (MAC) published its recommendations to the government on the level for the 2011/12 permanent annual limit on economic migration to the UK under Tier 1 and Tier 2 of the points-based system (PBS).

The recommendations are drawn from a public consultation undertaken by MAC and carried out between 30 June and 7 September 2010. In its deliberations, MAC took into account the economic, social and public service effects of migration.

MAC has conceded that economic migration only accounts for a relatively small proportion of the country's annual net migration. To achieve the government's aim of reducing net migration to 'tens of thousands', other immigration routes must also be reduced. For example, the student and family routes.

It has also acknowledged widespread concern among employers regarding the effects that the limits may have. However, to achieve the reduction by the end of this Parliament, MAC recommends an overall reduction for 2011/12 in the economic migration categories of between 13-25%, or numerically a reduction of between 6,300 to 12,600. It has also conceded that more stringent reductions should be made to the self-sponsored Tier 1 category than in the employer-sponsored Tier 2 category.

MAC RECOMMENDATIONS

In respect of individual immigration routes, MAC recommends:

Tier 1 (General)

- A limit on the number of Tier 1 entry clearance visas issued in the range of 8,000 to 11,100;
- periodic recalibration of the Tier 1 (General) eligibility criteria to attract only the most highly skilled;

- introducing a requirement that, on extension, the Tier 1 (General) migrant must evidence being employed in a skilled graduate-level occupation; and
- revision of the methodology for calculating salary multipliers in respect of applications that can rely on multiplication of their annual salary in home currency (eg Indian nationals can currently multiply their annual salary by 5.3 to demonstrate a UK salary equivalent).

Tier 2

- A limit on the number of Tier 2 shortage occupations, resident labour market tests and intra-company transfer visas issued to between 29,400 and 32,600;
- exclusion of any Tier 2 visa issued for less than 12 months from the limits on the assumption that such short-term migrants cannot switch into other work-related routes in their country or, if they are able to, their switching application counts towards the annual limit of an otherwise out-of-country cap;
- a recalibration of the Tier 2 eligibility criteria to ensure that only skilled migrants can enter the UK under this tier;
- scaling down allowances used for points purposes in relation to intra-company transferees;
- applying more stringent extension criteria for any intra-company transferee wishing to extend their existing visa;
- strengthening the existing resident labour market test route through the introduction of a certification regime; and
- asking MAC to reconsider the criteria used to identify skilled occupations under the shortage occupation route.



'The UK Border Agency has published a study, calling for those who enter the UK under the highly skilled Tier 1 category to only undertake highly skilled employment.'

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It is important to note, however, that the government has also undertaken a separate public consultation on the proposed mechanisms of annual limits, and further detail on its response to that consultation is expected before the end of 2010.

At 324 pages, the report is justifiably long, a physical demonstration that the question posed to MAC is a complex one; its answer not just having an effect on net migration into the UK, but undeniably an effect on the ways and means international organisations will continue to do business in the UK in the coming years. It is clear from the report that MAC has listened to the widespread lobby of UK businesses that restrictions to the employer-sponsored Tier 2 should not detrimentally affect the UK economy, and in light of the associated developments surrounding the Tier 1 (General) scheme, it is likely that the self-sponsored will fare worse than those who can establish and cultivate employer sponsorship within the UK.

ASSOCIATED DEVELOPMENTS IN TIER 1

The furore surrounding the MAC recommendations in respect of the more permanent limits to Tiers 1 and 2 in 2011 has somewhat overshadowed the very real development that, since 20 October 2010, the mechanics of the interim limits in respect of the self-sponsored have been utilised twice, and it seems very likely that it will be utilised again in the coming months.

Tier 1 limit for October 2010 reached 20 days into the month

On 20 October 2010, the UK Border Agency (UKBA) announced that the interim cap in respect of Tier 1 (General) had been reached for the month of October and that migrant applicants wishing to make applications to enter the UK after that date will not be issued a visa until 1 November 2010. The UKBA also confirmed that, each month until 1 April 2011 (when the permanent cap will be introduced) there will only be 600 visas available for issue in the Tier 1 (General) scheme, worldwide. Applicants were still able to make their applications between 20 October and 1 November, and their applications were 'held' until the visas for the month of November were released.

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Tier 1 limit for November 2010 reached ten days into the month

Then, on 10 November 2010, just ten days after the visa scheme was reopened, the 600 limit was reached again. Given that the cap for November was reached ten days into the month and ten days earlier than the October cap was reached, it was predicted that a similar situation would have arisen in December – possibly leading to the cap opening and closing on the first day of the month. This would undoubtedly lead to increased delays for all applicants wishing to enter the UK in this category between now and April 2011.

Calls for highly skilled migrants to only fulfil highly skilled roles

Between the interim limit being reached in October 2010 and it again being reached in November 2010, the UKBA has published a study that examines the jobs being undertaken by migrant workers under the Tier 1 visa, with calls that those who enter the UK under the highly skilled Tier 1 category should only undertake highly skilled employment.

The government's methodology used data gathered from Tier 1 dependant visa applications in June 2010, made in circumstances where the Tier 1 migrant already in the UK was to be joined by a dependant spouse, civil or unmarried partner, or child under the age of 18. At the time of making their visa application, the applicant was asked to give information as to the current employment of the Tier 1 migrant. This data has been used to extract the employment status of the main applicant in each case after arriving in the UK.

The government study found the following:

- 25% of Tier 1 migrants were in skilled work. The measure of defining 'skilled

work' refers to not only the UKBA's Standard Occupational Classification (SOC) used to identify skilled work in the employer-sponsored Tier 2 categories, but also the Tier 1 (General) migrant's salary. Those shown to have annual salaries of £25,000 or more are deemed to be skilled.

- 29% of Tier 1 migrants were in unskilled work. The measure of defining 'unskilled work' refers not only to those roles that the UKBA's SOC class as unskilled, but also to those who earn less than £25,000 per annum.
- 46% of Tier 1 migrants were in employment that could not be classified as skilled or unskilled. The measure of defining this category refers to responses that appeared to demonstrate employment in a skilled category, but did not provide sufficient data to classify, or where no data was provided.

RESULTS AND REASONS TO BE CAUTIOUS

These figures compare to a 2009 survey, which found that 70% of respondents reported being in skilled work, 20% in unskilled work and 10% were not working at the time of the survey.

Immigration Minister Damian Green surmises:

'Those coming to the UK under the highly skilled migrant route should only be able to do highly skilled jobs – it should not be used as a means to enter the low-skilled jobs market... the findings will play a key part in discussions on how the annual limit will be shaped.'

As these new statistics will be used to design the mechanics of the permanent cap, it is important to note that they are

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only, at best, indicative for the following reasons:

- The study appears to include dependants of all Tier 1 migrants, including for example the Tier 1 (Investor) migrant who is under no obligation to work in the UK, even on extending their visa, provided they have maintained an investment into the UK economy of at least £750,000. It also includes Tier 1 (Post-study Work) migrants who are eligible for a further two-year visa having successfully completed a degree qualification at a registered UK university. The visa is meant to act as a bridge between study and economic migration (ie sponsorship under Tier 2 or self sponsorship under Tier 1 (General)).
- The majority of those questioned did not provide enough detail to categorise the main applicant as either being in skilled or unskilled work. Correspondingly, the sharp difference between the 70% of skilled employment in 2009 and the 25% of skilled employment in 2010 could have been readdressed if the UKBA had gathered more detail from the 46% of unclear responses in June 2010.
- The data is limited only to those Tier 1 migrants who are to be joined by dependants. It excludes Tier 1 migrants who are in the UK and are not being joined by dependants. Similarly it excludes Tier 1 migrants who entered the UK with their dependants, only focusing on those dependants joining the main applicant at a later date.
- The data does not take into account the timing of the Tier 1 migrant's first entry into the UK. Tier 1 migrants are not expected to have employer sponsorship

before coming to the UK. Therefore, if the majority of applicants questions were joining the Tier 1 migrant who has only recently entered the UK, it would seem disproportionate to conclude that the migrant who is seeking employment is working in an unskilled category, or further, not working at all.

A CHANGING TIDE FOR TIER 1

If the nature of the occupation undertaken by a Tier 1 migrant becomes part of the eligibility criteria (ie insisting that Tier 1 migrant undertakes a specific occupation, or even as far as insisting that a Tier 1 migrant demonstrate employment in a specific occupation before the grant of a visa) then this will blur the distinction between the self-sponsored and the employer-sponsored.

Similarly, the MAC recommendations clearly indicate that the more permanent immigration caps will favour the employer-sponsored Tier 2 over the self-sponsored Tier 1. While this may lead to a collective sigh of relief from those employers who regularly utilise the Tier 2 regime, it does not provide good news to those employers who are not registered to sponsor migrant workers under the employer sponsorship provisions of the tier, either through choice or otherwise.

FINALLY

In her first substantive speech on immigration on 5 November 2010, the Home Secretary Theresa May indicated that migration to the UK will become more difficult for the majority of non-European Economic Area nationals.

May cited immigration as one of the most important issues facing the UK, indicating that the government intends to review each aspect of the current immigration regime to ensure better management.

May emphasised the need to attract the 'brightest and the best'.

The speech contained the much-publicised confirmation that intra-company transfers will not be included in the permanent cap of Tier 2 (employer-sponsored applications) and that the government is reforming the rules in respect of entrepreneurs as a means to encourage those with a business idea (and corresponding investment) to set up business in the UK. This echoes David Cameron's call that the UK is 'open for business'.

May has announced that the government will overhaul the existing system, where periods of temporary residence lead to permanent residency. The coalition government has abandoned plans to introduce the previous government's 'earned citizenship' measures, commenting that if people enter the UK saying that they will only stay here temporarily, they should only stay temporarily. What this means for the thousands of migrants who are already in the UK in immigration categories that lead to settlement, for example all Tier 1 (General) and some Tier 2 migrants, is yet to be seen.

The question remains, why is the government now proposing to cap the revenue-generating, business and enterprise-oriented, economic migration categories. MAC has itself conceded that even if the economic categories of Tiers 1 and 2 were closed in their entirety, the effect would not itself lead to reduction of annual net migration to tens of thousands. Evidence suggests that 80% of annual net migration is a result of those entering under the student or family immigration routes. Undoubtedly, the economic downturn and 2009's call for 'British jobs for British workers' has some effect on the wording of the Conservative Party's 2010 election manifesto. Conversely, however, annual net migration in the categories the government now wishes to cap decreased during the recent financial crisis, as overseas workers returned home and the British pound lost strength to other international currencies.

The issue of limiting the number of migrants entering the UK is not a new phenomenon. It appeared in the Conservative Party's 2005 manifesto and was widely believe to be a key tranche of the Conservative Party's mandate

in the intervening years between a Labour success in 2005 and the formal coalition agreement in 2010. Interestingly, it did not appear in the Liberal Democrat manifesto and was widely contested by Nick Clegg, leader of the Liberal Democrats and now Deputy Prime Minister, in the much-publicised and televised debates in the run up to polling day. However, the government line, as expressed by May, remains clear:

‘Over-reliance on migrant labour has done nothing to help the millions of

unemployed and low-skilled British citizens who deserve the government’s help to get back to work and improve their skills.’

LAST QUESTION

Are the calls for annual quotas on migrant workers an attempt to ring-fence opportunities for existing settled workers or does it represent a form of protectionism that the UK immigration regime has not seen in this increasingly globalised world since the early

twentieth century? Moreover, it begs the question (in light of May’s concession that Tier 2 will be safeguarded further, MAC’s suggestion that the self-sponsored should be affected more by the permanent limits than the employer-sponsored, and the UKBA’s report that, of those self-sponsored migrants in Tier 1 currently, many are not fulfilling skilled roles), should there be a separate visa category for the highly skilled?

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