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UK immigration law and procedure updates

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BY BEN SHELDRIK
partner,
Magrath LLP



BY TRACEY MORGAN
legal executive,
Magrath LLP

THIS ARTICLE WILL LOOK AT SEVERAL developments within UK immigration law and procedures that have been implemented over the past two months. These include recommendations for changes to Tier 1 of the Points-Based System (PBS) by the Migration Advisory Committee (MAC), changes to requirements under Tier 2 of the PBS, both for sponsors and sponsored migrants, as well as matters relating to citizenship and Judicial Review.

TIER 1 DEVELOPMENTS

MAC: Tier 1

MAC has published its first review of the highly skilled migration routes (Tier 1) of the government's PBS for managed migration.

The 184-page report is a response to the question posed by the government early in 2009: what further changes to the criteria of the Tier 1 should there be in 2010/11, given the changing economic circumstances?

The report concludes that it is in the best interests of the UK economy and labour market for the current routes under Tier 1 to be maintained. However, they have produced a package of recommendations on key areas of Tier 1. These recommendations are set out below:

- 1) The Tier 1 (general) route should be retained.
- 2) Appropriate professional qualifications held in addition to an undergraduate degree should be recognised as equivalent to a master's degree for the purposes of the PBS and claims that some undergraduate degrees are equivalent to a master's degree should also given consideration on a case-by-case basis. Note: this will give the opportunity to individuals with specific professional-based qualifications to accumulate points under the Tier 1 criteria where they may, until now, have been denied sufficient points.
- 3) Individuals with an undergraduate degree should be allowed to enter under Tier 1, subject to an appropriate earnings threshold. Note: no points have been allocated to bachelor's qualifications since restrictions were introduced in

the early part of 2009 by the UK Border Agency (UKBA) in response to prevailing economic conditions. If recommended, this will make the Tier 1 (general) route available again to a wider number of highly skilled migrants.

- 4) Several changes should be made to the points calibration under Tier 1 (general):
 - For age:
 - those aged 29 and under are awarded 20 points;
 - those aged 30-34, ten points;
 - those aged 35-39, five points; and
 - no points are awarded to those aged 40 and over.
 - For qualifications:
 - 30 points awarded for a bachelor's degree is reinstated;
 - 35 points continue to be awarded for a master's degree; and
 - a PhD is reduced to 45 points.
 - For previous earnings:
 - points are awarded for earnings less than £25,000 and earnings bands are amended; and
 - the five additional points continue to be awarded as at present for UK experience.
- 5) An additional salary band should be introduced with a threshold of £150,000 for which 75 points are awarded. Note: this will mean that applicants who have earned £150,000 in the year preceding the date of applying under Tier 1 (general) will automatically receive the full 75 points required under the scheme.
- 6) The government should carry out a full review of the salary conversion models in respect of the multipliers for the country in which the previous earnings have been generated.

7) The initial leave-to-remain entitlement should be reduced from three years to two years, with a three-year extension subject to evidence that the individual is in highly skilled employment. Note: at present Tier 1 (general) migrants obtain leave-to-enter or remain for a three-year period at the outset. This recommendation, if agreed, would introduce a fresh test at extension stage to confirm that the applicant is in a highly skilled role.

8) The UKBA should consider the feasibility of an employer acting as a guarantor for

12) The entrepreneur and investor routes should remain open.

13) The UKBA should dedicate sufficient resources to the enforcement of the route to allow detailed examination of whether jobs created through the entrepreneur route represent a genuine net increase in jobs. Note: entrepreneurs are required to create employment for at least two settled persons within the UK and labour market.

The chair of MAC, Professor David Metcalf, said:

organisation must report this change, including details of any migrants who will be transferring to the new organisation, to the UKBA via the sponsor management system (SMS) or by e-mailing scoc@ukba.gsi.gov.uk within 28 days of the change taking place.

The sponsor should report, via the SMS, any migrants who are not transferring to the new sponsor, as those migrants' permission to stay and work in the UK will be curtailed.

The sponsors' licence will then be made dormant and all existing SMS users will be deactivated.

The new employing organisation and sponsor must apply for their own sponsor licence, if they do not already have one, within 28 days of the change. If their licence application is unsuccessful, the migrants who were due to transfer to them will have their permission to stay and work in the UK curtailed. Alternatively, the new employing organisation and sponsor can apply to increase their current allocation of certificates of sponsorship (CoS) if they already have a sponsor licence and the change will mean that they will need to recruit more migrants in the future.

The new sponsor must also request access to the old (dormant) sponsor's licence on the SMS so they can report migrant activity for the sponsored migrants who moved to their organisation.

Where part of an existing sponsor organisation splits away to form a new organisation, the existing sponsor must report this change, including details of any migrants transferring to the new organisation, to UKBA within 28 days of the change taking place, via SMS or by e-mail to scoc@ukba.gsi.gov.uk. As situations can be complex, UKBA have indicated a preference to be updated by e-mail. The existing sponsor must also notify UKBA if, for example, their current allocation of CoS will decrease and they must also continue to report on any sponsored migrants they still employ. They will not have any responsibility for reporting on migrants who have moved to the new organisation.

The new organisation must apply for a sponsor licence, if they do not already have one, within 28 days of the change or apply

'Where part of an existing sponsor organisation splits away to form a new organisation, the existing sponsor must report this change, including details of any migrants transferring to the new organisation.'

an individual's maintenance requirement within the Tier 1 (general) route. Note: if accepted, this would remove the need for applicants to produce evidence of a specific amount of money in a bank account for a three-month period preceding the date of applying.

For the post-study work route (PSWR) the following recommendations have been made:

- 9) The PSWR should remain open.
- 10) The period of leave entitlement for the PSWR should remain at its current level of two years.
- 11) The government should commission detailed analysis of the economic returns of studying at particular institutions and for particular degree subjects. The government should also review whether the current policy, with regard to equal PSWR points allowance for graduates of all qualifying institutions and degree subjects, should be amended.

For the entrepreneur and investor routes, the following recommendations have been made:

'The highly skilled route of the PBS is very important to the UK economy. Therefore, it should be maintained and improved to ensure that the UK continues to attract the brightest and the best.

We are clear that Tier 1 migrants must not displace or undercut UK workers. Immigration should not serve as a disincentive to employers to invest in training to improve the skills of workers in Britain.

The recommendations that we have made will ensure that the system is robust enough to deal with the changing global economy and that the UK remains attractive for foreign investment.'

Next steps

It now falls to the government to consider the report, and to decide if and when to implement the MAC recommendations. The changes, if approved, are likely to be implemented in the first quarter of 2010.

TIER 2 DEVELOPMENTS

Tier 2: sponsor takeover

Under the PBS (Tier 2), the sponsor (employing company) taken over by another

for an increase of their current allocation of CoS via SMS.

A new organisation wishing to report on migrants who have transferred to them, should make reports via SMS, using the 'request change of circumstances' function, giving the old sponsor organisation's name and licence number, the migrants' details and the details of the change.

Tier 2: resident labour market test

From 14 December 2009 the period of advertising to be undertaken by UK-based employers prior to sponsoring a migrant worker under Tier 2 of the PBS was increased from two weeks to four weeks.

Tier 2: Identity Cards for Foreign Nationals

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 PBS. This 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 holders of an ICFN travel 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.

Process and timings

The introduction of ICFN for Tier 2 of the PBS will have a significant impact on the time frame for processing further leave-to-remain (FLR) applications.

The application for FLR may be made in one of two ways:

- by postal application; or
- by arranging an appointment in person at UKBA.

The biometric and FLR application may only be made once a CoS has been assigned.

Applicants who wish to apply in person may book a premium appointment. The appointment will enable them to attend a UKBA biometric centre, and register their biometrics and submit the application for FLR on the same day. The application will then be processed and the ICFN will be sent to the applicant within ten working days. Applicants who are changing employment under Tier 2 may only commence their new role once the ICFN has been issued to them.

Please note that there are currently very few premium processing appointments available and UKBA have indicated that there will be no further appointments available until mid-March 2010. Consequently, most applicants will have to submit their FLR application by post.

Postal applications require the standard forms, supporting documents and passports to be sent to UKBA offices in Durham. Current indications are that it will take four weeks before a letter is sent

Clearance processes normally take 10-15 working days, depending on the location.

Employers should be aware of the impact of the new FLR process on the overall Tier 2 sponsorship process. Resident labour market testing for Tier 2 general applications is currently set at four weeks of advertising. A CoS may only be issued once a genuine attempt has been made to recruit from within the resident labour market. Time should be added to the advertising period for consideration to be given to any applicants from the European Economic Area who have applied, so that they may be offered the role if they are suitably qualified. The combined processes of sponsorship and FLR mean that the entire Tier 2 PBS process will take 12-16 weeks from start to finish in the UK.

JUDICIAL REVIEW CHALLENGES TO REMOVAL

UKBA are continually examining their policy concerning judicial review challenges to removal, and some smaller changes have recently been made to ensure the policy is kept clear and is consistently applied. The key changes are:

'All sponsored skilled workers are required to obtain an Identity Card for Foreign Nationals when they apply to extend their stay in the UK.'

to the applicant requiring them to enrol biometrics. Applicants should then attend a biometric enrolment centre to provide fingerprints and photographs to enable the caseworker in Durham to continue processing the application. It is likely to be a further four weeks before the ICFN is issued.

Consequently, in-country applicants under Tier 2 should be aware that the FLR process will take eight to ten weeks, during which time their passports will be retained.

Given the inconvenience that the new process will cause to applicants, consideration should be given to applying for Entry Clearance (a visa from overseas) as an alternative to FLR in the UK. Entry

- 72-hours notice of removal to be provided in most cases, although less than 72-hours notice will be given in the interests of children and people that UKBA are advised are at risk of committing suicide.
- From 11 January 2010 UKBA staff may serve removal directions with less than 72-hours notice:
 - a) when there is a threat or credible risk the person being removed would seek to harm other detainees if notified of removal and that threat cannot be managed in another way;
 - b) in exceptional cases where it is necessary to maintain the order and

discipline of the immigration removal centre; and

- c) where the individual concerned wishes to be removed and has provided their consent in writing.

UKBA have advised they will apply the exceptions in limited cases and only when absolutely necessary. UKBA will also ensure

to reply (or longer to comply with any relevant court order).

If no application to amend the grounds is received within the deadline, the removal directions may be reset and take effect no sooner than 72 hours after this point. The claimant and their legal representative will be informed, by writing, of the new removal directions. If an application to amend the

- Children born overseas to those in armed forces will be entitled to register as a British citizen if:

- i) they were born to a foreign and Commonwealth member of the UK armed forces;
- ii) that parent was serving outside the UK at the time of birth; and
- iii) both parents consent to the registration.

Children born to a British citizen by descent will be able to be registered at any time before the child reaches the age of 18 years.

British nationals (overseas) will be able to register if they do not hold any other citizenship or nationality, unless they did something after 19 March 2009 that resulted in the loss of another nationality.

A child born to a British mother currently has a right to register as a British citizen under s4(c) of the British Nationality Act 1981 if they were born between 7 February 1961 and 1 January 1983, and they would have become a British citizen if women had been able to pass on citizenship in the same way as men at that time. The new Borders, Citizenship and Immigration Act 2009 will extend these provisions to those born before 1961.

By Ben Sheldrick, partner, and Tracey Morgan, legal executive, Magrath LLP.

E-mail: ben.sheldrick@magrath.co.uk; tracey.morgan@magrath.co.uk.

‘Children born to a British citizen by descent will be able to be registered at any time before the child reaches the age of 18 years.’

legal representatives are promptly informed of removal action commencing and that those being removed will be provided access to a telephone before removal.

Stayed cases

When several claimants are legally challenging the UKBA on the same basis, the courts will stay large numbers of cases behind a lead case. In future, once a lead case is resolved (either by way of it being dismissed or refused), the UKBA will proceed with removal despite any outstanding judicial review in stayed cases. When this situation arises, the case should be reviewed against the lead case to see if the claimant’s grounds raise any issues additional to those in the lead case. The Treasury Solicitor may be requested to ask the claimant to either withdraw their judicial review or apply to amend their grounds, making clear that removal directions will be reset immediately if there is no response. The claimant should have at least 14 days

grounds is received, removal directions should be deferred and consideration given to whether the case can be expedited.

Third country and non-suspensive appeal cases

The notification period in these cases has been extended from three days to a minimum of five working days and will run from the setting of removal directions to removal. The UKBA will no longer defer removal on a threat of judicial review in these cases.

NATIONALITY LAW: CHANGES IN JANUARY 2010

The Borders, Citizenship and Immigration Bill, which received Royal Assent on 21 July 2009, introduced certain changes to British nationality law. Changes to registration as a British citizen commenced on 13 January 2010 as follows:

- A person born in the UK to a parent in the armed forces will be a British citizen.