

**NEW POINTS-BASED SYSTEM**

**UK Government Publishes Details of Post-Brexit Immigration Reform**

**GLOBAL BRITAIN**

**Attracting the Brightest and the Best**

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# THE UK'S POINTS-BASED SYSTEM

## UK GOVERNMENT ANNOUNCES DETAILS OF A NEW IMMIGRATION FRAMEWORK

*"We intend to create a high wage, high-skill, high productivity economy". UK Government 19/02/2020<sup>1</sup>*

The UK Government has now announced details of its plans for immigration reform leading up to the end of the Brexit transition period on 1 January 2021.

The new schemes are designed to ensure that the country continues to attract the talent and skills required to boost the economy whilst "taking back control" of the movement of people and reducing the flow of unskilled workers.

### Context

At the end of the transition period the UK will leave the EU Single Market and cross-border freedom of movement of people will no longer apply. The country is therefore free to set its own rules regarding the conditions of entry, stay, work and long-term residence of citizens from outside the British Common Travel Area. Under EU membership the "resident labour market" consisted of citizens of the United Kingdom and the European Economic Area. This arrangement ceases at the end of 2020.



### Purpose

The purpose of the new framework will be to ensure that the country remains open for business; attracting the skills and attributes needed by key sectors of the economy and regions of the country, whilst at the same time reducing overall migration numbers and boosting the skills and opportunities of local workers.

Meeting all of these objectives is a major policy challenge for ministers and their officials. Designing and implementing the legal and administrative architecture required to launch these changes by the end of the year is also a significant task for the Home Office.

The Government will shortly introduce an Immigration Bill to *"bring in a firm and fair points-based system that will attract the high-skilled workers we need to contribute to our economy, our communities and our public services"*.

### A Phased Approach

Given the sharp deadline (the Government has written into law<sup>2</sup> its commitment not to seek an extension of the transition period), the plan is to introduce a simple Points-Based System (PBS) on 1 January 2021 with further reforms being introduced at a later date in 2021. The Government describes this policy announcement as:

*".. part of a wider multi-year programme of change, led by the Home Office, to transform the operation of the border and immigration system"*.

### Phase One

Under the new "simple", employer-led PBS, migrants will score points for:

- A job offer at an appropriate skill level (set at RQF3)
- A job offer with an approved sponsor
- A salary offer of at least £25,600 per annum (this represents a reduction on the current requirement under Tier 2 (General) of a salary of at least £30,000)

<sup>1</sup> <https://www.gov.uk/government/publications/the-uks-points-based-immigration-system-policy-statement>

<sup>2</sup> European Union (Withdrawal Agreement) Act 2020

- Proficiency in the English language
- Additional points for those with an “outstanding” educational background

The Government plans to suspend the cap on the number of people who can come on the skilled worker route (currently under the Tier 2 General Restricted Certificate of Sponsorship scheme) as well as remove the resident labour market test. Both of these decisions are welcome.

Points awarded for salary will be “tradeable” on a sliding scale, so that individuals with a salary of £23,040 will still be able to earn points for salary. Individuals earning £20,480 or more may still be eligible under the scheme through the acquisition of points in other areas.

70 points must be acquired overall. Three characteristics will be fixed and the others tradeable as set out in the following table:

Characteristics	Tradeable	Points
Offer of job by approved sponsor	No	20
Job at appropriate skill level	No	20
Speaks English at required level	No	10
Salary of £20,480 (minimum) - £23,039	Yes	0
Salary of £23,040 - £25,999	Yes	10
Salary of £25,600 or above	Yes	20
Job in a shortage occupation (as designated by the MAC)	Yes	20
Education qualification: PhD in subject relevant to the job	Yes	10
Education qualification: PhD in a STEM subject relevant to the job	Yes	20

## “Going Rate”

Employers will still be required to pay sponsored migrants the appropriate rate for the role (as set out in the SOC codes). It will not be sufficient to pay the general salary threshold when the recognised standard rate is higher.

## Skills Shortages

Applicants earning less than £25,600 will score extra points for working in a sector where there is a skills shortage. The Migration Advisory Committee (MAC) will be commissioned to produce a shortage occupation list covering all jobs encompassed by the skilled worker route and to keep the list under regular review.

## Phase Two – Return of the Highly Skilled Migrant Programme?

From January 2021, the Global Talent route will open to EU citizens on the same basis as non-EU citizens: **“the most highly-skilled, who can achieve the required level of points, will be able to enter the UK without a job offer if they are endorsed by a relevant and competent body.”**

In the second phase, the Government intends to create a “broader unsponsored route” within the PBS to run alongside the employer-led system. Qualifying individuals will be able to come to the UK without a job offer. The document suggests that a cautious approach is being taken in the development of this route, presumably to maintain the integrity of their policy to **“take back control”** of immigration numbers:

**“We will explore proposals for this additional route to the points-based system with stakeholders in the coming year”.**

The document suggests that the route will be capped and carefully monitored during an implementation phase. Example characteristics for which points could be awarded include academic qualifications, age and relevant work experience.

## Lower-Skilled Workers

Perhaps the most politically charged part of the policy document is the announcement that there will not be a route for “low-skilled” workers, even on a temporary or transitional basis:

*“UK businesses will need to adapt and adjust to the end of free movement, and we will not seek to recreate the outcomes from free movement within the points-based system. As such, it is important that employers move away from a reliance on the UK’s immigration system as an alternative to investment in staff retention, productivity, and wider investment in technology and automation”.*



This decision will cause concern for the care, construction and hospitality sectors that rely heavily on the free-flow of labour from Europe.

The document suggests that there will be sufficient labour in the UK from amongst the 3.2 million people who have already applied to remain under the EU Settlement Scheme, as well as non-EU citizens who come as dependents of skilled migrants. Stakeholders from the affected sectors are likely to make their opinions heard in the coming days.

## Students

Students from Europe will be covered by the points-based system in the same way as non-EU students. Applicants will be required to have an offer from an approved educational establishment, proficiency in English and evidence of financial resources.

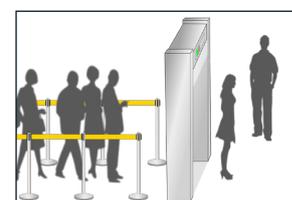
## Other Categories

Under the immigration rules and current points based system, there are a number of other immigration routes for specialist occupations and business-related activities including innovators, sportspeople, representatives of overseas businesses and ministers of religion. The Government’s “broad approach” for January 2021 will be to open these routes to EU citizens in the same way as they apply currently to non-EU citizens.

The document indicates that there will not be a revised route for self-employed people (although a new highly skilled migrant programme may go some way towards creating one). This will concern stakeholders frustrated by the inflexibility of the current innovator and start-up routes.

## Visitors

EU citizens will be treated as non-visa nationals, meaning they will be able to come to the UK as visitors for six months without the need to obtain a visa. They will also continue to benefit from entering the UK via the e-gates.



## Costs and Levies

Employers will have to be mindful of the costs of engaging with the new PBS as it begins to apply to EU citizens as well as “rest of world” citizens. Visa applications will incur a fee. The Government will also levy the Immigration Skills Charge on employers and the Immigration Health Surcharge on the same basis as now. Cost implications for businesses are therefore significant.

## Processing Time and Travel

The Government intends to open key routes from Autumn 2020, so that migrants can start to apply ahead of the system taking effect in January 2021. Employers who do not currently have a sponsor licence are encouraged to consider applying for one now, so that they are ready for the new system.

The intention is to create a streamlined system and to reduce processing times for sponsored migrants by up to eight weeks. Taking away the requirement of external advertising under a resident labour market test will go some way towards achieving this goal. The Government intends to continue investing in online systems and biometric enrolment in order to create faster and more efficient services.

## Conclusion

There is a great deal for employers and stakeholders to unpack in this new policy announcement. There is no doubt that immigration reform will remain one of the most important and politically charged areas of debate throughout 2020 as the country prepares to leave the Single Market.

**Magrath Sheldrick LLP** will continue to update clients and professional colleagues as the situation develops.

## GLOBAL BRITAIN TO ATTRACT MORE TOP SCIENTISTS WITH FAST TRACKED ENTRY

UK immigration policy continues to be under the microscope on the national and international stages with wholesale changes planned over the course of the next 18 months.



Some small policy shifts have started creeping in, with the Prime Minister already having outlined Home Office plans to offer “fast-track processes” for leading scientists applying for visas to come to the UK. Now the Home Secretary has announced that the number of eligible fellowships which can offer accelerated endorsement for visas for scientists wanting to conduct research in the UK will double from 62 to over 120.

This expansion will be achieved through a wide package of measures designed to welcome the “brightest and best” researchers to the UK. One such measure will be the expansion of the list of endorsing organisations for the Tier 1 (Exceptional Talent) route. This will now include world renowned research fellowships such as Marie Skłodowska-Curie Actions, Human Frontier Science, European Research Council and the European Molecular Biology Organization. A number of additional awards from UK Research and Innovation and its research councils will also be added.

Recipients of these fellowships will only need to provide a letter from the relevant funding organisation, which will enable them to fast-track to the UKVI visa application stage.

The Home Office is also bringing forward plans to abolish the cap on the numbers under the Tier 1 (Exceptional Talent) route and to introduce an accelerated path to settlement for those who arrive under this scheme. These changes are expected in early 2020.

These policy shifts indicate the Government’s thinking on immigration policy for highly skilled migrants, with the likelihood being that businesses that recruit highly educated and skilled workers are likely to benefit from expedited or more straightforward visa processing. A shift towards bolstering the numbers of highly skilled or exceptional talent type visa holders coming to the UK may also be an indication of how a new Points Based System may be structured in the future.

## UK ANCESTRY

The Home Office has issued updated Policy Guidance for caseworkers in relation to UK Ancestry applications. The updated guidance is designed to improve consistency with the Immigration Rules and to provide clarity on the requirements in a category that is susceptible to subjective decision making.

### Overview

If approved, a UK Ancestry visa is granted for five years initially. After five years, the applicant can apply for Indefinite Leave to Remain (ILR), provided they continue to satisfy the criteria for the Ancestry category as well as the additional requirements for ILR (such as not having excessive absences from the UK, passing a Life in the UK Test, proficiency in English language, etc.).

## Criteria

A UK Ancestry application is based on three primary criteria:

- 1 The applicant must be a Commonwealth citizen; and
- 2 S/he must have had a grandparent born in the UK; and
- 3 S/he must have an intention to work or have a job offer in the UK.

There is also a somewhat subjective maintenance and accommodation requirement, whereby applicants must show they can support themselves “without recourse to public funds” (i.e. state benefits). There is no minimum savings or income threshold applicable under the rules.

Provided these criteria are satisfied, an application should be approved (this is on the assumption there are no other complications in the applicant’s personal history such as prior criminality).

Although applicants must be aged over 17, there is no upper age limit.

The requirements to be a Commonwealth citizen and to have a UK born grandparent are straightforward. There may however be difficulties in obtaining the necessary supporting evidence and complications may arise where the spelling of names differs across the paperwork.



## Intention to Work

The legal basis for the Ancestry category is set out in Part 5 of the Immigration Rules. It is a working visa category and the Rules state that the applicant must be:

*“... able to work and intends to take or seek employment in the United Kingdom”.*

Separately to Part 5 of the Rules, in the Interpretation section of the Rules, the term “employment” is defined as:

*“Unless the contrary intention appears, includes paid and unpaid employment, paid and unpaid work placements undertaken as part of a course or period of study, self-employment and engaging in business or any professional activity.”*

If an applicant has a job offer in the UK, it may be assumed that the requirement is satisfied. However, applicants frequently do not have a job offer prior to arrival. It has long been the case that self-employment or an intention to work would satisfy the requirements, and the new guidance clarifies how this can be evidenced. The guidance also confirms that voluntary or unpaid work is included in the definition of “work”.

## Job Seeking / Voluntary Work

If an applicant does not have a job offer in the UK, they must demonstrate an intention to find work when applying for their first Ancestry visa. This includes having a realistic prospect of being able to work, regardless of age, although if an applicant is retired in their home country greater scrutiny may be applied by the caseworker. If the applicant is not working at the date of an ILR application (continuous employment is not required), evidence of a genuine attempt to find work must be submitted. Failure to be in work at the time of applying for ILR does not therefore preclude success.

The new guidance provides a suggested list of the evidence which an applicant can submit for either application:

- Work record throughout the five years, including employment, voluntary, self-employment
- Job offers
- Registration with a recruitment agency
- Evidence of job applications
- Bookings for relevant training courses
- A business plan (for self-employment)

It is not mandatory to submit precisely these documents, as the Immigration Rules do not provide for “specified documents” as they do in other categories.

Throughout the guidance, reference is made to voluntary work being included in the definition of employment, with a new paragraph in the “Employment Requirement” section. This confirms that if the applicant is working as an unpaid volunteer (or intends to be), this will satisfy the working criteria of the application. Applicants must still be mindful of the requirement to be financially independent of public funds.

Caseworkers are prompted to apply greater scrutiny to the maintenance and accommodation of the applicant where they are either a volunteer worker or not working, as earned income may be very low or non-existent.

## Recent cases

The changes to the Ancestry guidance have enabled us to obtain ILR for a client aged over 80 who has been volunteering throughout her five years as an Ancestry migrant. Clarifying the inclusion of voluntary work within the definition of work in the Immigration Rules potentially expands this category for those who are financially self-sufficient and who would be willing to work for free, even on a part-time basis, to move to the UK, often to be closer to family members here. Consequently these changes are highly welcomed.

## ARTIFICIAL INTELLIGENCE (AI) AND THE IMMIGRATION PROCESS

Technology has become a crucial part of the way we conduct our lives, so it is perhaps not surprising that technology now plays a significant role in the UK immigration system. Major changes were implemented last year when a number of paper forms were made obsolete and applications were moved to a smoother online system. Other welcome changes include the uploading of scanned documents to a third party system instead of sending off large packs of original documents, and the introduction of an app to process applications under the EU Settlement Scheme.



A recent significant development involves the introduction of AI to the visa application process. The new tools are intended to improve the Home Office’s efficiency in processing applications and to improve service standards and processing times – a notorious subject with the Home Office.

The new AI is used to stream visa submissions and assign a “predictive grade” to each application. The Home Office has confirmed that the tool is used to allocate applications but not to decide them. Applications streamed into the Green category are flagged to the caseworkers as suitable for approval, whereas applications streamed into Red are flagged as a potential refusal.

There have been a number of concerns cited regarding the method for streaming the applications. The Home Office has not been transparent about the algorithm or what factors are used to distinguish applications from each other. This has led to speculation that applications are being streamed by such factors as nationality,

country of application, age or gender. The mystery of the system is cause for concern. Streaming in such a way may be discriminatory and unlawful under the Equalities Act 2010. These worries exist in a context where applications from African countries experience far higher rates of refusal compared to regions such as North America.

Concern has been raised for other reasons as well. The streaming system can potentially introduce confirmation bias with caseworkers, where an application may be looked on unfavourably by a caseworker simply because it has been streamed into the Red category. A near identical application streamed into the Green category may be considered far more favourably just because the system has identified it as worthy of approval.

Additionally, the streaming could potentially have an effect on processing times, delaying those streamed into the Red category as they receive greater scrutiny. All applicants pay the same Home Office fees.

AI technology has considerable capacity to support an overwhelmed immigration system and help process applications more quickly, but AI can only be as fair and balanced as the data used in the algorithms. For this reason, it is important for the basis of the algorithm to be transparent and communicated by the Home Office. By raising these issues, the AI can be scrutinised and improved – reducing the risk of discrimination. The development of this technology is both an exciting addition to the immigration system and a legitimate cause for concern.

## CHANGES TO THE IMMIGRATION RULES

### The T2G annual limit, PhD level occupations and the Shortage Occupation List

#### Changes to the Tier 2 (General) annual limit and PhD level occupations

The Tier 2 (General) category is a category used by sponsors/employers in the UK who are looking to recruit for a position that cannot be filled by a settled worker. There is a limit to the number of Certificates of Sponsorship (CoS) for nationals seeking entry clearance to the UK under the Tier 2 (General) category, and for those who are applying to switch into the Tier 2 (General) category from within the UK as the dependant spouse of a Tier 4 (General) Student. The annual quota is 20,700 across all registered sponsors.



These are known as “restricted” Certificates of Sponsorships (RCOS). There are some applications that are not subject to the limit and such exceptions include but are not limited to, roles attracting a salary package of £159,600 (figure subject to change). Recent changes to the Immigration Rules have expanded the applications that are not subject to the annual limit to include applicants who are sponsored for a job at PhD level as listed in table 1 in Appendix J of the Immigration Rules.

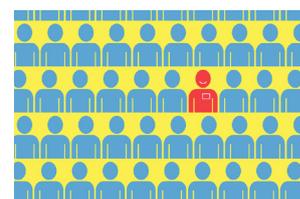
#### What does this mean for PhD roles?

This means that a sponsor is able to assign a CoS for the PhD role without first applying for permission under the RCoS system.

⚠️ Please note that an exemption to an application being an RCoS does not mean an exemption to the Resident Labour Market Test (RLMT) and each case must be assessed on a case by case basis.

#### The Shortage Occupation List (SOL)

The Tier 2 Shortage Occupation List (SOL) is a list of occupations recognised by the Migration Advisory Committee (MAC) as being in national shortage and which they believe should be filled, in part, through non-EEA migration. Shortage occupations are skilled roles where there are insufficient numbers of settled workers residing in the resident labour market available to fill jobs in a particular sector.



In most cases where an employer wishes to recruit a non-settled worker under the Tier 2 (General) category to fill a role in the UK, they are firstly required to carry out a RLMT in order to satisfy themselves that there are no settled workers available to fill the role.

There are a number of exceptions to the RLMT and one of these exceptions is where a company is looking to recruit into a role that is listed on the SOL. Should the role fall within this list, an RLMT will not be required and the roles on this list are given a higher priority within the Tier 2 (General) annual limit. Individuals whose occupations are listed are also exempt from the relevant Tier 2 earnings threshold when they apply for ILR. They must however still be paid the relevant rate for their Standard Occupational Code (SOC) classification.

• An exception to the above is if the job being recruited for is in the occupation code '2231 Nurses', where an employer must carry out a resident labour market test.

• An exemption to the RLMT does not mean an exemption to the requirement to apply for an RCOS and it is important to assess this on a case by case basis.

## Changes to the SOL

The SOL has been amended following a review by the MAC. The recent Statement of Changes to the Immigration Rules included:

- more occupations were added to the SOL
- a number of SOC codes that were already on the list but were limited to specific job titles within the code were expanded to include all listed jobs in the code
- the restriction that prevented chefs for working for a sponsor/company that provided a takeaway service was lifted
- the qualifying company criteria that applied to occupations in digitech were amended/removed.

This SOL list can be found in Appendix K to the Immigration Rules and is reviewed regularly by the MAC. It is important to note that there is one list for the UK and an additional list for Scotland, and if a company wishes to fill a vacancy which is listed only on the SOL for Scotland, the vacancy must be in Scotland. An employer must also meet any additional criteria for employing individuals in shortage occupations as specified in Appendix K to the Immigration Rules.

## How does this affect employers and workers?

- For employers/sponsors, this means that they are able to move more quickly and efficiently in recruiting talent
- Individual migrants are able to take up employment more quickly with minimal disruption to their lives.

## SHAM MARRIAGES CONSIDERED ONE OF THE MOST SIGNIFICANT THREATS TO IMMIGRATION CONTROL

*Note: The generic term of "sham marriage" also covers sham civil partnerships, marriages of convenience and civil partnerships of convenience.*

Sham marriages in a UK immigration context occur when a non-EEA national marries someone, typically a British citizen or an EEA national, as a means of attempting to gain UK residence rights not otherwise available to them.



Under sections 24 and 24A of the Immigration and Asylum Act 1999, as amended by section 55 of the Immigration Act 2014, a sham marriage or civil partnership is one in which **all** of the following apply:

- one or both of the parties is not a British citizen or an EEA or Swiss national
- there is no genuine relationship between the parties

- either or both of the parties enter into the marriage or civil partnership for the purpose of circumventing (avoiding) UK immigration controls, including under the Immigration Rules or the Immigration (EEA) Regulations 2016.

The most important factor for the Home Office to consider when investigating a potential sham marriage is whether the relationship between the two parties is “genuine and subsisting”.

Entering into a sham marriage does not entitle migrants to any rights to remain or reside in the UK, however the Home Office estimates that around 4,000 to 10,000 applications a year to stay in the UK are made on the basis of a sham marriage or sham civil partnership.

Couples wishing to marry in the UK are required to give notice of intention to marry at a Designated Register Office. A referral and investigation scheme under part 4 of the Immigration Act 2014 came into force on 2 March 2015, requiring all intended marriages involving a non-EEA national who could gain an immigration advantage to be referred to the Home Office for investigation. Previously, the time between giving notice of intent to marry and the marriage was 15 days. This scheme extended that time to 28 days, which could be further increased to 70 days in order to allow the Home Office to properly investigate the genuineness of a relationship.

Entering into a marriage for immigration purposes can appear to be an attractive option for migrants seeking to enter or remain in the UK.

However, choosing to go down this route can have serious legal ramifications. The Home Office can submit a report of a sham marriage at any point from when initial contact was made at the Register Office to any time immediately after the marriage or civil partnership has taken place.

The main types of offences relating to sham marriages are facilitation, conspiracy to facilitate, deception, bigamy and perjury. These are found within section 1 of the Criminal Law Act 1977 and section 1 of the Immigration Act 1971.

Both parties to the offence are generally treated equally and can face a sentence of up to 14 years imprisonment. Conspiracy to facilitate can also include other parties who knew about the sham or who assisted in the union. Additionally, removal action will be considered for anyone who is found to have entered into or be attempting to enter into a sham marriage, as well as anyone found to have cooperated in the sham.

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