

**CONSULTATION BY THE MIGRATION ADVISORY COMMITTEE ON
THE LEVEL OF AN ANNUAL LIMIT ON ECONOMIC MIGRATION TO
THE UK**

RESPONSE BY THE EMPLOYMENT LAWYERS' ASSOCIATION

6 SEPTEMBER 2010

1. INTRODUCTION

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law. As such some of our members engage in advising clients on related immigration matters: hence our response to your paper. ELA's role is not to comment on the political merits or otherwise of proposed legislation, but rather to make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

A sub-committee was set up by the Legislative and Policy Committee of the ELA under the chairmanship of Richard Fox of Kingsley Napley to consider and comment on the Migration Advisory Committee's consultation paper. Its report is set out below. A full list of the members of the sub-committee is annexed to the report.

The Migration Advisory Committee ("MAC") has invited views on the level at which the first annual limited on migration should be set. ELA's comments are divided according to the questions posed in the consultation paper.

ELA has not responded to Questions 1 to 7. Given our remit we did not feel it appropriate to do so. However, we have responded to questions 8, 9 and 10.

2. QUESTION 8: What would be the likely impact on your organisation, sector or local area of reducing (from 2010) the number of main migrants through the Tier 1 general route in 2011/2012?

ELA is aware that employers and individuals are concerned by the possibility of restrictions on numbers of applicants allowed through the Tier 1 general route, particularly in sectors which rely on employees with specialist skills and knowledge.

Since the introduction of the points-based system in November 2008, individuals have been able to make applications under Tier 1 general relatively swiftly, in comparison with Tier 2 which requires the employer to first have to apply to become a licensed sponsor and, in the majority of cases, to complete the time-consuming Resident Labour Market Test. The introduction of a temporary limit on Tier 1 general on 19 July 2010 may soon result in some applications being held over to the following month when the current month's quota has already been reached, leading to delays and uncertainty for employers and potential employees as to the outcome of applications.

ELA has not seen any discussion about the likely length of the "waiting list" that will result from imposition of a limit on numbers of migrants through Tier 1 general. However, given current flows through Tier 1 general it is assumed that, without additional changes to the points required, this would very quickly building up to become many months.

Members of the Working Party formed to provide this response have highlighted where they can foresee negative impacts as a result of reducing the number of migrants through the Tier 1 general route, reflecting concerns of clients in sectors that they have acted for:

- 2.1 The **finance industry** (and in particular *stockbrokers, hedge funds* and *interdealer brokers*) characteristically recruits globally and there is a high degree of movement amongst brokers and other workers in finance. Individuals in this field score almost all of the points required currently for a Tier 1 general application on the basis of remuneration package alone. The ability to recruit the most talented individuals quickly and easily is highly prized by employers and individuals alike. A cap on numbers allowed into the UK through this route could have the effect of causing significant delays or even blocking recruitment, which could deter the best talent from coming to work in UK finance and brokerage houses.
- 2.2 Within the top-end **gaming industry sector**, senior executives with significant expertise in the world of gaming and casinos are recruited from both outside and inside the EU for the gaming and betting industry in the UK. These applicants do not qualify under Tier 2 as intra-company transfers because the employers in the UK are not part of worldwide group companies. Executives in this field are usually recruited via head-hunters or through personal contacts and therefore the requirements of the Resident Labour Market test are not satisfied. Generally these executives are paid in excess of £150,000 per annum and are therefore capable of amassing sufficient points for a Tier 1 general visa without difficulty. In this industry, the global pool of expertise is

small and the ability to recruit at senior management level is already constrained by numbers of individuals who possess relevant industry knowledge. The added constraint of a delay in appointing a recruit owing to a cap on visa entry numbers is unattractive.

- 2.3 Architects would be prejudiced by a decrease in the number of migrants permitted through Tier 1 general if this were by way of an increase in the points requirements because salaries in this industry are generally lower than on other comparable industries. This would, therefore, have the effect of cutting off this as a potential route into the UK for skilled architects.

3. QUESTION 9: What would be the impact on your organisation, sector or local area of reducing the number of main migrants through the Tier 2 shortage, Resident Market Labour test and intra-company transfer route?

Addressing each of the three routes in turn:

3.1 Shortage occupations

The impact of a reduction in this area would, generally, be fairly limited for clients of ELA members. Noteworthy exceptions are **chefs**, for which the West End high-end restaurant industry relies on the ability to speed up the recruitment process which is afforded by the advertising dispensation and points awarded; and the expanding **energy industry** in the United Kingdom, for which the swift availability of skilled engineers from outside the EEA is vital to meet the UK's increasing demands.

3.2 Resident Labour Market Test

This route appears to be viewed in a number of industries and sectors as an unnecessary layer of bureaucracy under Tier 2, with the advertising requirement causing inevitable delay in the recruitment process and burdening employers with additional expense. Therefore, it is often viewed as a "last resort" when an individual has been identified for a role, but would not qualify under any of the other routes.

ELA members suspect that, due to the circumstances in which this route is most often used, in some cases it has been ineffective in achieving its stated policy aims. This is because some employers view it as a 'box ticking' exercise, going through the advertising process as the final step and, regardless of any applications received through the Test, recruit the worker they have already decided upon.

Although employers have flexibility in the sense that they may split the advertising period into two to avoid employers incurring unnecessary costs of advertising for the full period if they receive applications from skills resident labour during the first period, because the requirements of the Resident Labour Market Test are not usually met through an employer's standard advertising process, this is a rarely used option.

There is also some evidence that the requirement to advertise in Job Centre Plus together with any other advertisement required under the relevant standard occupational code, when included with all the other requirements for obtaining a sponsorship licence and recruiting under Tier 2, deters some employers, even fairly large employers, from using this option if another is available.

However, a restriction on numbers of main migrants through this route would cause severe difficulties for those employers who cannot obtain the necessary skills through the resident labour market and who have been unable to rely on the shortage occupation list or any other route.

3.3 Intra-company transfer route

In ELA's experience this is a very popular route across a wide range of sectors, and this experience accords with the UK Border Agency's statistics which shows this has been the most popular Tier 2 route. However, the UK Border Agency's suggestion that this is one route potentially to be reduced is of concern to ELA and clients of its membership.

ELA is aware of many examples where overseas companies have set up UK operations, several of which have been very substantial and some which have gone on to form the head of EMEA operations for multinational companies. The government has always expressed the view that they welcome this kind of inward investment, however, ELA is of the view that a cap on numbers who may enter the UK through the intra-company transfer route may deter such companies from setting up in the UK.

The ease with which an overseas company can transfer experienced staff from its home country to assist with setting up a new branch, subsidiary or other operation is a significant factor when a company is considering expanding into a new geographic location. In most cases where significant investment into the UK is proposed by an overseas company, the sole representative category is insufficient to transfer the necessary employees to the UK to organise and facilitate the formation of a UK branch or subsidiary. These companies are therefore required to look to Tiers 1 and 2, for which the Tier 2 intra-company transfer route is the obvious option where the individuals concerned would not qualify under Tier 1 general.

A restriction on the number of migrants permitted to enter the UK through the intra-company transfer route, either by way of a cap or pooling system, is likely to cause delays and uncertainty about when individuals might gain entry clearance for the UK. If such restrictions were to be introduced, ELA is concerned that overseas companies would re-evaluate decisions to open in the UK and consider investing elsewhere where they can be more certain about the timing of when it could transfer staff to facilitate the opening of a new operation.

The flexibility of the intra-company transfer route is useful for a wide range of companies, for example, where a company headquartered in Europe decides to send a US national working in a group company and resident in Switzerland to the UK office to work for a few days each month or for a specific period of time. This would not be a situation where a UK resident worker could easily be recruited to carry out the work, but such large multinational companies and the individuals transferred contribute widely to the UK economy. Flexibility is important for many companies who want their skilled staff to be mobile and able to carry out work in a number of locations. Companies with a subsidiary in the UK often value the ability to transfer key staff on a temporary or permanent basis to carry out work in the UK.

The imposition of a cap on numbers of applicants in this area (in addition to restrictions placed on the number of certificates of sponsorship available to

licensed sponsors) would lead to delays and uncertainty, thereby removing the beneficial effects of this route. A significant blanket cap on the Tier 2 intra-company transfer route would not be attractive for companies who have a presence in more than one country including the UK and could lead such companies to avoid the UK for business and trading purposes.

4. QUESTION 10: The Government's objective is to lower net migration overall. If you are proposing small or zero reductions in migration through a particular tier or route, through which Tier 1 or 2 routes do you think migration should be reduced instead?

Instead of introducing a cap or a pool, ELA favours **increasing the points thresholds for both Tier 1 and Tier 2** to a level that would limit net immigration to the desired level and would provide a greater level of certainty for employers and individuals as to whether applications will be successful and realistic timescales for obtaining entry clearance for the UK.

If entry to the UK for non-EU economic migrants is going to be rationed, ELA's view is that it is preferable to ration on the basis of criteria formed from a combination of need within the UK and personal attributes, rather than on the basis of willingness to wait in a queue. The points-based system was designed with this in mind and it could be adapted with minimal changes to the Immigration Rules and Guidance.

The key question would then be the level at which the thresholds need to be set to achieve the desired level of immigration. There would be a degree of uncertainty in the initial stages as the threshold changed to meet the target number of applications and, as envisioned, the government's target of migration in the tens of thousands would not be met until 2013. The threshold may also need to change over time in response to demand.

ELA envisages that the number of points would need to be reassessed on a monthly or quarterly basis and the points required for applications during that month should be published at the start of each review period. Borderline applicants would then have some certainty that they would qualify within one review period, but with no guarantee in the future. Employers could also make informed judgements about what the levels are likely to be in future months and plan accordingly.

In conjunction with regular reviews of the points required for each route, the points' criteria for both Tier 1 and Tier 2 could be redesigned so that entry is based on a broader range of attributes (as envisaged in the UK Border Agency's consultation).

If there must be a capping or pooling process, then there should be some kind of "vent" to allow priority migrants to circumvent the queue and enter immediately. This could be operated in a number of ways, which might include:

- 4.1 a higher points threshold under both Tier 1 and Tier 2 according such applicants priority;
- 4.2 an enhanced sponsorship fee payable by Tier 2 employers (although that might be seen to unfairly favour "City" employers who are more readily able to pay);
- 4.3 priority afforded to applicants or additional points available for those Tier 2 employers willing to locate migrant labour to areas targeted for development and regeneration;
- 4.4 a short term Tier 2 inter-company transfer route to facilitate the transfer of employee to the UK for urgent, short-term projects, including work which falls within the current skills transfer category and otherwise; and

4.5 those involved in setting up new UK branches/subsidiaries, for which the swift availability of visas can be a deciding factor as to whether to set up in the UK.

There is also scope for fusing the shortage occupation and Resident Labour Market test, perhaps with a more frequent review of shortage occupations combined with more flexibility in the advertising criteria, so it more realistically represents normal advertising routes for employers. Employers, understandably, are keen to recruit the most suitable people. A key area of concern is maintaining flexibility where, for example, the ideal recruit may not clock up sufficient points for Tier 1 general but the employer does not want to go through the onerous process of obtaining and maintaining a sponsorship licence and an advertising process under Tier 2 for a single hire.

Annex

Members of the ELA Sub-Committee which prepared this response are:

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