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MIGRATION ADVISORY COMMITTEE

**ANALYSIS OF SETTLEMENT OF MIGRANTS USING TIERS 1 AND 2 OF THE POINTS BASED
SYSTEM**

CALL FOR EVIDENCE

RESPONSE BY THE EMPLOYMENT LAWYERS ASSOCIATION

31 AUGUST 2011

INTRODUCTION

i. The Employment Lawyers Association (“ELA”) is an unaffiliated group of specialists in employment law including those who represent both employers and employees. It is not our role to comment on the political merits or otherwise of proposed legislation; rather we make observations from a legal standpoint. Some of our members engage in advising clients on related immigration matters hence our response to the Call for Evidence.

ii. ELA’s Policy and Legislative Committee consists of barristers and solicitors (both in private practice and in-house) who meet regularly for a number of purposes, including considering and responding to proposed new laws.

iii. A working group was set up under the Chairmanship of Robert Davies of Dundas & Wilson LLP to consider and comment on the Migration Advisory Committee’s Call for Evidence on the Settlement of Migrants using Tiers 1 and 2 of the Points Based System (“the Call for Evidence”). A full list of the members of the working group is attached.

iv. ELA has not responded to Questions 1, 2, 3 and 9 by virtue of the broader technical macro-economic subject-matter being addressed by those Questions. We have responded to the balance of the Call for Evidence as set out below:

Question 1: What would be the effects on the growth of specific firms, sectors and occupations, and on UK GDP and GDP per capita?

This would include impacts on productivity, trade, investment and on attraction of highly skilled migrants to the UK.

ELA has chosen not to respond to this question.

Question 2: What would be the effects on employment opportunities and pay of current permanent UK residents in the labour market as a whole and at the firm, sectoral and occupational level?

ELA has chosen not to respond to this question.

Question 3: What would be the effects, over time, on consumption and provision of public services and benefits and tax payments?

ELA has chosen not to respond to this question.

Question 4: To the extent that negative effects are anticipated, how will employers adapt? Will they replace migrants who have to exit the UK with other migrants, accelerate efforts to upskill and retrain the resident workforce, or adjust in other ways?

ELA anticipates that restricting or removing settlement rights and/or restricting leave to a maximum of five years may well have (in some cases considerable) negative effects (both commercial and practical) for various employers. Managing issues such as succession planning and disseminating skills and knowledge amongst a workforce will present different challenges according to the sector and size of the employer in question; the prospect of inevitably losing skilled and knowledgeable migrant workers after 5 years clearly may adversely impact some businesses more acutely than others. This is particularly likely given that these employers will have gone through a time consuming and costly Tier 2 (General) recruitment process which, with limited exceptions, necessitates fulfilment of the Resident Labour Market Test ('RLMT') and (from 6 April 2011) an application for a restricted Certificate of Sponsorship.

ELA can envisage scenarios where employers may well struggle to recruit suitable replacement candidates from the resident workforce in place of Tier 2 General migrants forced to leave the UK after 5 years given that they would initially have been required to fulfil the RLMT which requires the employer to advertise the vacancy and demonstrate that no suitably qualified resident worker can be recruited to fill the role. The scope for upskilling the resident workforce will vary significantly according to the size and scale of the employer in question.

Presumably employers will assess whether they can envisage circumstances which are so crucial/extreme whereby if they cannot plan/operate with particular personnel on an indefinite basis such that they would need to relocate their operations outside the UK, or downsize their operations in the UK with a view to setting up another office in another country which would allow them to retain the skilled personnel within their organisation.

Employers are also likely to be deterred from incurring the costs of upskilling and retraining a member of the resident workforce which may have limited success or be impossible to achieve altogether. In those circumstances employers are likely to consider completion of the RLMT as preferable both in terms of time and cost to the effort of upskilling and retraining the resident workforce.

Question 5: If economic criteria were used under Tier 2, what criteria (see list on page 6) should be used to identify settlement candidates?

Clearly any set of criteria runs the risk of being an overly "blunt tool" for selection. The factors identified are likely to be indicative of where specific shortages within the labour market may arise but they are unlikely to be the only relevant criteria. For example, ELA holds the view that the criteria for enabling a candidate to settle should necessarily also be related to their ability to perform in their Tier 2 role for the employer in question at the time of the settlement decision. Businesses are interested in whether that person has been doing a competent job, and whether they intend to continue to employ them. The criteria for the determination of "a recognised shortage occupation" have not been articulated. Also, there is some ambiguity between the UKBA Consultation provision at 4.22 (page 20) and the criteria at page 6 of the MAC paper: for example, the former refers to "whether the job being filled was liable to remain in shortage" whereas the latter appears to focus exclusively on whether there is a "recognised shortage occupation" at the date of the settlement application. If the application is to be made after 3 years as is currently suggested, this will be a very important point to clarify. Likewise whether the determination of a "recognised shortage occupation" is to be reserved exclusively for Government or whether individual employers are able to opine.

Question 6: Should the pay or income criteria for settlement of Tier 2 migrants differ from time of entry? To what extent should candidates for settlement show evidence of economic progression during their time in the UK?

ELA holds the view that pay and income criteria cannot always reflect consistently either the quality of the individual candidate or the significance of the actual role/activity in question. These criteria are predominantly affected by external economic forces and may not reflect the candidate's ability. It would seem appropriate therefore for there to be a combination of considerations of economic stability, as well as economic growth. A mandatory requirement to demonstrate, say, material economic progression could place an unfair/unrealistic burden on migrants, particularly in a difficult economic climate where pay freezes become the norm, and inadequately addresses the significance of the activity to the economy per se. A further concern is that making settlement dependent on economic growth could place an additional financial burden on (whilst also creating potentially adverse employee relations for) employers wishing to retain skilled migrants by requiring that they inevitably increase their pay (even in circumstances of a wage freeze).

Question 7: Should age be considered alongside pay, on the basis that, on average, younger migrants have more years of economic activity ahead of them than older migrants?

Age has played a role to date in settlement decisions, albeit more as a method of ensuring that age becomes a neutral rather than a determinative factor. We assume that this question is inter-related with Question 3 in that a balance is sought to be struck between the tax revenues that may be created by the employment and the likely "cost" of additional demand upon public services. Therefore, we confine our response to noting the potential technical challenges of utilising age as a factor from the perspective of the Government being challenged that such approach is potentially discriminatory.

It is by no means clear how an age factor could be applied with certainty to take into account the relevant European (and domestic) equality obligations. Presumably considerable statistical evidence would be needed to demonstrate the proposition and analysis would be needed for different age bands. Much more detail would be needed in order to assess the feasibility of such an approach.

Question 8: Is the long-term economic value of professional and vocational qualifications always reflected in levels of pay? If not, why not?

ELA holds the view that the long-term economic value of professional and vocational qualifications is not universally (or consistently) reflected in levels of pay when comparing different sectors and roles. For example:

- a) they are sensitive to short-term economic requirements;
- b) perceptions of the value of certain qualifications changes over time;
- c) there is often a disparity between supply and demand of particular qualifications;
- d) rates of pay are often dictated by changing needs in the workplace; and
- e) there is a perceived devaluation of particular qualifications

Examples of where this is the case include teaching and other public sector vocations such as nursing as well as private sector professions such as, arguably, architecture and engineering, all of which might be said to command lower levels of salary relative to the time and effort expended in obtaining the relevant qualifications and the rewards available within other sectors/professions.

Question 9: Does attraction and retention of top global talent in certain sectors or occupations make a particularly valuable long-term or strategic economic contribution or a crucial contribution to key public services? If yes, will the list of such sectors and occupations change over time?

ELA has chosen not to respond to this question.

Question 10: Should competent professional bodies have a role in deciding which Tier 2 migrants can settle permanently in the UK, and what form might that role take?

ELA holds the view that it would be inappropriate for a “competent professional body” solely to determine who can and cannot settle permanently in the UK. The route to settlement needs to be clear and ELA does not consider that creating a further layer between the migrant, employer and UKBA would assist. The employer will be aware of its own business needs and needs in relation to succession planning, which are things that any professional body is not in a position to comment on. No doubt competent professional bodies will have information (and opinions) that may be relevant and useful – the provision of such information to the Government, however, would appear to be the appropriate level of involvement in such processes.

Question 11: For those Tier 2 routes for which access to settlement is determined on the basis of objective criteria, should the criteria used differ between routes (RLMT, shortage occupations, ministers of religion, sportspeople)? If yes, why and how?

Please refer to Response 5 for our general concerns in this regard.

List of Working Group Members

Robert Davies, Dundas & Wilson LLP (Chair)

Laura Allner, Dundas & Wilson LLP

Sue Ashtiany, Ashtiany Associates

Laura Darnley, Eversheds LLP

Cyril Dennemont, Harold Benjamin Solicitors

Ilda de Sousa, Kingsley Napley LLP

Colin Godfrey, Veale Wasbrough Vizards

Natasha Gya Williams, Nicholas Moore

Nick Hobson, Speechly Bircham LLP

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Annabel Mace, Squire Sanders Hammonds

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Annabel Porter, Weightmans LLP

Georgina Porter, Weightmans LLP

Gloria Troke, Sainsburys