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MIGRATION ADVISORY COMMITTEE

CALL FOR EVIDENCE ON THE LEVEL OF THE 2012/13 ANNUAL LIMIT ON TIER 2 AND ASSOCIATED POLICIES

RESPONSE BY THE EMPLOYMENT LAWYERS ASSOCIATION

21 DECEMBER 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 ("the Working Group") to consider and comment on the Migration Advisory Committee's Call for Evidence on the Level of the 2012/2013 Annual Limit on Tier 2 and Associated Policies of October 2011 ("the Call for Evidence"). A full list of the members of the working group is attached.

iv. ELA has not responded to Questions 6 and 8 by virtue of the technical and broader 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 has been the impact of the annual limit on Tier 2 (General) of 20,700 in 2011/2012 on the UK economy and labour market? What would be the impacts of setting a limit below the 2011/12 level in 2012/13?

The response of the Working Group is necessarily influenced by recent experience of assisting employer clients in relation to their need for immigration-related advice. We recognise that certain of the statistics contained in the Call for Evidence indicate that the numbers of Restricted COS applications under Tier 2 General are well within the annual limit prescribed by the Government; our practical experience aligns with this. As such, the Working Group is not aware that the annual limit has had any significant impact on the ability of employers to recruit migrants under Tier 2 General.

Whilst we recognise that the Government may therefore want to review and potentially to reduce the annual limit given the content of the Coalition Agreement, we would, however, sound a note of caution.

In our experience, due to the economic downturn businesses have chosen to limit their recruitment of new staff to those who were crucial to the growth of their business; thus leading to what might be viewed as an inevitably lower uptake of the Tier 2 General restricted category than might arise in less straitened economic circumstances. Therefore, when setting the 2012/13 levels, it would appear to be a potentially inappropriate (and inaccurate) basis of comparison solely to rely on the uptake of the 2011/12 levels.

The limit has operated well based on the current criteria i.e. the fact that it only applies (broadly speaking) to new out of country recruits. In the event that the criteria were altered so as to capture more migrants (such as the ICT category) we would expect the statistics to look significantly different. Secondly, we consider that a potential consequence of any reduction in the limits would be to send a "mixed message" to international businesses about the UK as a destination and location for successful business activity. We would suggest that this could be viewed negatively.

Question 2: Why has uptake of the Tier 2 (General) visas consistently been below the implied monthly limit during 2011? Do you expect the level of uptake of such visas to change in the future, and why?

Until there is an appreciable upturn in the prospects for the UK economy, we consider it likely that employers will continue to take a very cautious approach to the way they recruit staff.

We do not anticipate the level of uptake to change significantly, subject to the caveat regarding keeping the criteria for restricted COS applications the same as highlighted in our response to Question 1.

Question 3: What responses to the limit on Tier 2 (General) migration have been considered and put in place by employers, including measures to recruit from and train the UK workforce?

It is the experience of certain of the Working Group that employers recognise the fact that it is more cost effective (and often significantly so) to recruit from the local resident labour market. However,

when key skills are not available locally, they must inevitably look further afield. We are aware that, for example, some employers the in the engineering sector have tried to recruit and train sufficient numbers of domestic recruits but this has proved very difficult for them as, anecdotally, we understand that many candidates do not have the necessary Maths and Science experience (and qualifications).

Intra-Company Transfers

Question 4: If intra-company transfers were strictly limited to the GATS definition of senior managers and specialists, what impact would that have on employers? Is £40,000 per year a reasonable minimum pay threshold for such jobs, or should this threshold be higher? Should it vary amongst different regions of the UK and why?

Our view is that changes to the Intra-company transfer route (ICT) to limit applicants to the GATS definition of senior managers and specialists would create a number of issues and problems for international businesses.

The GATS definition anticipates a degree of seniority that would appear materially higher than may be utilised with the ICT route in respect of "senior managers" – the implication being a tier of management one-removed from the Board. Aside from the issues that arise from matrix- and dotted-line reporting structures this would appear to raise the bar too high. The ICT route can encompass employees of such seniority but equally it operates to facilitate the necessary movement of more junior employees. Although the "specialists" definition may afford some greater leeway there is a degree of inevitable ambiguity with regard to "uncommon knowledge". Many businesses will share widely certain key items of information integral to service delivery – but it is the ability of the individual to perform based on such information coupled with the experience and knowledge of the business in question that often necessitates and triggers the transfer of the individual employee concerned through the ICT route.

(Also, by way of one example which is inevitably "close to home" for the Working Group, the exclusive utilisation of a GATS-derived definition would appear to exclude trainee solicitors from entering the UK to receive the necessary training.)

Drawing on the Working Group's experiences when advising multinational employers, the ICT route is vital for enabling such businesses to operate on a global basis. If it were to be limited in the way proposed, we consider that it could significantly hamper the ability to operate in the UK and may lead some to reconsider doing business in the UK at all. Our view is that the current ICT criteria (which, of course, includes restrictions as to skill level, appropriate rate and, in most cases, prior service abroad) are operating well, without further restrictions being necessary.

Further, our view is that the £40,000 salary threshold is set at a fair level and means that only those individuals who are fairly senior within an organisation are eligible to apply as ICT migrants. The £40,000 minimum pay threshold should remain as it is, not only to cover the roles that are considered to be at NQF level 6, but also to recognise the fact that salaries for staff outside of London commonly prove to be significantly lower from region to region. We are not of the view that the level should increase, nor that regional variations would be helpful. If regional variations are considered necessary for specific roles, we would suggest the appropriate way to address this issue would be via

the "appropriate rate" requirements, so as to reflect regional variations in salary under a specific role code.

Question 5: Does the current inclusion of non-salary remuneration (allowances) in the £40,000 pay threshold for the intra-company transfer route undermine the validity of that threshold as a test of skill? Does it actually or potentially create and unfair advantage to migrants and their employers as discussed in Box 3.2 and, if not, why not?

The Working Group considers that the inclusion of non-salary remuneration (allowances) in the £40,000 pay threshold for the ICT route does not undermine the validity of that threshold as a test of skill. We consider that it is an advantage for employers to be able to retain the control over how they pay employees and in many cases certain (generous) allowances are paid to employees to make positions more attractive where higher basic salaries cannot be offered. This does not undermine the skill level of the role. Moreover, multinational employers when transferring staff to the UK may often rely on allowances, especially when dealing with countries such as India and China, where the salary scales can be appreciably lower in order to achieve an acceptable level of fairness in remuneration arrangements across their organisation.

It can certainly be argued that remuneration of £40,000 for a role is relatively high in many regions in the UK where resident workers would not necessarily be paid this salary level. Further, the basic premise of the ICT route is to enable skilled individuals within Group companies to come to the UK to use their skill set for the benefit of the UK workforce/company. The test of skill therefore should be linked to the amount of relevant experience in the Group company outside of the EEA and not determined solely by how much pay the individual will receive once in the UK. We do not consider that allowing non-salary remuneration to be included creates any unfair advantage to migrants and/or their employers.

Question 6: This question is considered to be beyond our scope and has not been assessed.

Question 7: Are any of the occupations listed in Table A.2 skilled to National Qualifications Framework level 6 or above (NQF6+)? Are any of the occupations listed in Table A.1 not skilled to NQF6+? In either case please supply evidence to support your view.

Concern was expressed within the Working Group Party that the role of a Journalist is not considered to NQF6 level; and this was felt not to be a true reflection of the skill level for this position and occupational codes could be further subcategorised in order to reflect the true skill level of the job.

Question 8: This question is considered to be beyond our scope and has not been answered.

Question 9: What would be the impact on employers and the economy of lowering the threshold for exemption for the RLMT from the current level of £150,000 per year to somewhere in the range of £70,000 to £100,000 per year?

The Working Group considers that the impact of lowering the threshold for exemption from the RLMT from the current level of £150,000 per year to somewhere in the range of £70,000 to £100,000 would be beneficial for UK employers. At present, having to advertise on Job Centre Plus for roles up to

£150,000 is arguably superficial in many instances as roles with such salaries are, on the whole, unlikely to be filled in response to advertising in this way. It is a reasonable expectation in our experience that salaries of between £70,000 to £100,000 would be paid to individuals undertaking senior roles and as such there would be an advantage if employers were able to recruit to fill such roles without the additional hurdle of advertising in this manner. In addition removing the burden of having to wait for 4 weeks before requesting the restricted COS will help businesses ensure a smooth recruitment process. It is likely that employers wishing to recruit individuals where the above range of salaries will be paid will do so after an appropriate recruitment process in any event or as a result of recommendations/knowledge of the individual's skill set.

Question 10: What would be the impact on the UK labour market, including on employment opportunities of UK workers, of making the above change?

Please see the comments above. We consider that there should not be a negative impact on the UK labour market, and that employment opportunities of UK workers will not be limited or affected by making the change above.

It is our general experience that employers will ordinarily try to source an individual from the UK labour market as they would like to avoid the cost of relocating a foreign national to the UK. Therefore, impact on the UK labour market would be expected to be minimal.

List of Working Group Members

Robert Davies, Dundas & Wilson LLP (Chair)

Elaine McIlroy, Dundas & Wilson LLP

Sue Ashtiany, Ashtiany Associates

Laura Darnley, Addleshaw Goddard LLP

Cyril Dennemont, Harold Benjamin Solicitors

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