



Law Society
of Scotland

Consultation Response

Post-Brexit Migration Policy

July 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Immigration and Asylum sub-committee welcomes the opportunity to consider and respond to the Home Affairs Committee's inquiry on a post-Brexit migration policy. The sub-committee has the following comments to put forward for consideration.

Clarity and certainty

In drawing up a post-Brexit system we would suggest that one of the main objectives should be to provide a clear set of rules that provides certainty to both individuals and businesses. The current rules for non EU nationals have been described as containing "a degree of complexity which even the Byzantine emperors would have envied",¹ and this is reflected by high refusal rates in a number of visa categories. In Scotland legal aid is available for immigration cases (subject to various eligibility tests) but the complexity of the rules is of particular concern for those with lower incomes and unable to access specialist legal advice.² It is our position that the current rules have reached a level of complexity which makes legal representation essential.

We note the Law Commission are due to be undertaking a review of the immigration rules with a view to simplification,³ but as yet there is no timetable for their report. We would urge the Home Office to take this opportunity to review, and simplify, the rules relating to both non EU and EU migration post-Brexit.

¹ Jackson LJ at paragraph 4 of *Pokhriyal v Secretary of State for the Home Department* [2013] EWCA Civ 1568

² In *Khan v Secretary of State for the Home Department* [2017] EWCA Civ 424 Underhill LJ expressed sympathy for unrepresented applicants dealing with the immigration rules (para 21)

³ <https://www.lawcom.gov.uk/13th-programme-of-law-reform/>

One central aspect of the rule of law is that the law should be easily accessible and clearly expressed. One of the major issues with immigration law changing at such a rapid pace is that the primary legislation is now scattered around Acts of Parliament from, 1971, 1981, 1988, 1993, 1996, 1997, 1999, 2002, 2004, 2006, 2007, 2008, 2009, 2013, 2014 and 2016.⁴ This creates a situation where each Act not only sets out free-standing provisions but also amends or repeals previous legislation. The consequential effect of these rapid changes in the law is there is no reliable source, freely available to the public, where the current and previous versions are consolidated.

The complexity of UK immigration law has also been aired before the House of Lords. Lord Justice Ryder (Senior President of Tribunals), in his evidence to the House of Lords' Constitution Committee in 2016, said:

“We have had eight immigration Acts in 12 years, three EU directives and approximately—my apologies for being approximate—30 statutory instruments. The Immigration Rules themselves have been amended 97 times over the same period, which is approximately eight times a year, and are four times larger, and in a smaller typeface, than they were 10 years ago.

The Immigration Rules no longer contain all or indeed most of the policy that is to be implemented, which is of course their primary purpose. The policy is separately provided in—if I may say so—rather dense and unconsolidated guidance that one can access through the Home Office website, but that generally does not show you the previously existing guidance on the same topic, or how the guidance has changed. If you are an unwitting litigant...your chances of accessing any of that material and putting it together in a coherent way are negligible.”⁵

It is not only the Rules and associated legislation which requires review; so too does the practical procedure for making such applications.

For example, the application form by which an applicant would seek to extend their leave to remain as a partner of a settled person, is 79 pages long. Omission of any of the mandatory parts of the application (even by mistake) results in application being rejected as invalid.⁶ As we previously advocated to the Scottish Parliament,⁷ the result of an invalid application can be profound insofar as it can lead to a loss of

⁴ Immigration Act 1971; British Nationality Act 1981; Immigration Act 1988; Asylum and Immigration Appeals Act 1993; Asylum and Immigration Act 1996; Special Immigration Appeals Commission Act 1997; Immigration and Asylum Act 1999; Nationality, Immigration and Asylum Act 2002; Asylum and Immigration (Treatment of Claimants, etc) Act 2004; Immigration, Asylum and Nationality Act 2006; UK Borders Act 2007; Criminal Justice and Immigration Act 2008; Borders, Citizenship and Immigration Act 2009; Crime and Courts Act 2013; Immigration Act 2014; Immigration Act 2016

⁵ Select Committee on the Constitution (House of Lords), *Corrected Oral Evidence: The Legislative Process*, 16 November 2016 at [Q42]

⁶ Paragraph 34(2) (Part 1, Immigration Rules)

⁷ Law Society of Scotland 'Destitution, Asylum and Insecure Immigration Status in Scotland' (Consultation Response) Scottish Parliament (Equalities and Human Rights Committee) (2017)

an applicant's right to work, right to claim benefits and perhaps most importantly, loss of continuity of residence for the purposes of an application made under the long residence provision^{58F}⁸

Fees are also prohibitively expensive for some applicants. There is no sliding scale of fees depending on a person's income. Whilst provisions are available for fees to be waived, that is only the case in applications for further leave to remain and not indefinite leave to remain.

We would also recommend the Home Office prioritise this to provide reassurances for individuals and businesses concerned about the future. We note that further information has been provided for EU nationals currently living in the UK but this comes two years after the vote to leave the EU and we have concerns that uncertainty about post-Brexit arrangements are leading to delays in individuals and businesses relocating to the UK.

Net migration targets

As part of the post-Brexit system we would urge the government to remove or amend the net migration target, as this has resulted in caps on new Tier 2 visas. The monthly cap on the restricted certificates of sponsorship required for this visa has now been exceeded in each of the last six months resulting in applications being turned down. This has affected all sectors, including the NHS.⁹ The demand for restricted certificates has been particularly difficult for Scottish businesses as it has increased the minimum salary requirement to £55,000 which may be particularly challenging for many SMEs.

We would also highlight that Tier 2 visas do not offer a solution to immigration issues for EU nationals after Brexit, as only roles skilled to degree level are suitable for this visa. The post-Brexit immigration system will need to consider all sectors and not just those currently catered for by the immigration rules.

Regional differences

It would be beneficial for the post-Brexit system to reflect regional differences, and consideration should be given to this. Increasing Scottish influence in UK decision making could provide an effective means of ensuring that UK immigration policy responds to Scotland's demographic and skills needs. In particular, Scottish representation on the Migration Advisory Committee would be beneficial. Active review of the Scottish Shortage Occupation List for Tier 2 visas would also be welcome to ensure the list genuinely

⁸ Paragraph 276B(1)(v) (Part 7, Immigration Rules)

⁹ <https://www.theguardian.com/uk-news/2018/jun/12/uk-visa-applications-doctors-thousands-refused-figures-show-nhs>

reflects skills shortages in Scotland and can be updated and amended as necessary to meet the needs of the Scottish economy.

It would also be beneficial to develop distinct salary levels for Tier 2 occupations in Scotland. At present Appendix J of the Immigration Rules contains a list of Standard Occupational Classification codes and provides a required salary level for each. These provisions apply throughout the UK. However, for some occupations, the required salary level is difficult to obtain in Scotland. Gross average salaries vary throughout the different regions of the UK and a more nuanced approach, which recognises the different salary levels in the different parts of the UK, would be appropriate. In 2017 gross annual pay in London was £32,206 compared to £23,150 in Scotland.¹⁰

By way of example, the required annual salary for a 'new entrant' trainee solicitor in Appendix J is £24,700. The Law Society of Scotland's recommended salary for a first year trainee solicitor is £19,000 and is £22,000 for a second year trainee solicitor. Whilst firms may offer a salary above this recommended rate, it is not compulsory. The minimum rate of pay for a trainee solicitor in Scotland is the Living Wage, as set by the Living Wage Foundation.

Regional systems have existed in the past, for example the Fresh Talent Scotland visa which operated successfully before it was replaced by the UK wide Tier 1 (Post Study Work) visa. The current immigration framework also contains a degree of regional flexibility, as The Tier 1 (Exceptional Talent) visa in the digital technology sector contains a fast track route for applicants intending to work in the North East of England.

¹⁰ See SPICe Briefing, [Earnings in Scotland: 2017](#) at page 5.

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