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## Comments

UK Government White Paper – the UK's future skills-based immigration system

February 2019



## Introduction

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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 UK Government's White Paper: the UK's future skills-based immigration system. The sub-committee has the following comments to put forward for consideration.

## General comments

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On 19 December 2018, the UK Government published a white paper on its plans for a new single immigration system, ending free movement following the UK's exit from the EU. The white paper outlines how the government intends to "introduce a new, skills-based immigration system... where it is workers' skills that matter, not which country they come from... It will attract the brightest and best to a United Kingdom that is open for business".<sup>1</sup> The UK already has a skills-based immigration system, which was designed to attract the 'brightest and best' to the UK.<sup>2</sup> Rather than introducing wholesale reform, the white paper actually suggests a series of changes and improvements to the existing points based system for highly skilled migrants in anticipation of EU nationals becoming subject to this system post-Brexit.

Given the content of the white paper, the suggestion that, under the new system, it will not matter what country a migrant comes from is misleading. As highlighted in the Immigration Law Practitioner Association's (ILPA) response to the white paper, "...the White Paper is littered with references to the exemptions and privileges that will accrue to nationals of 'low-risk' countries, in line with any trade deals or reciprocal arrangements that may be made by the UK".<sup>3</sup> At paragraph 14.4 the white paper confirms: "We

<sup>1</sup> Foreword by the Prime Minister

<sup>2</sup> See Foreword to the Policy Paper "A Points-Based System: Making Migration Work for Britain", March 2006, Cm 67141, available here - [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/272243/6741.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/272243/6741.pdf)

<sup>3</sup> ILPA, *Response to Immigration White Paper "The UK's Future Skills-Based Immigration System"* (19 December 2018) available online at <http://www.ilpa.org.uk/resources.php/34996/ilpa-response-to-immigration-white-paper-the-uks-future-skills-based-immigration-system-19-december->

will retain the ability to make more favourable provision for specific nationalities through the Immigration Rules – for example, as we agree trade deals.”

As such it appears that, as is the case at present, the new system will take account of international and bilateral trade agreements and will allow nationals of countries with whom the UK have concluded trade agreements to enter the UK under different conditions to countries with whom the UK has no trading relationship (just as, at present, nationals of EU Member States are permitted entry to the UK on favourable terms as part of the UK’s membership of the trading bloc that is the European single market).

We have concerns with what appears to be a difference in treatment of nationalities based on whether the country in question is ‘low risk’. Such a difference in treatment requires a proportionate justification to be lawful. To that end, we would request clarification of what ‘low risk’ means, how this definition has been arrived at, and why it is considered to be a proportionate justification for the difference in treatment.

Although it appears that the underlying structure of the immigration system will remain the same, the white paper outlines several significant changes. The proposals within the paper will now be addressed in turn.

## **Strengthening border security**

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### **Visitors**

The proposal to allow nationals of EU Member States to seek entry as a visitor at the UK border, as is currently the case with other ‘non-visa nationals’ such as visitors from the USA, Canada, Australia, and New Zealand, is welcomed.

We agree with the concern highlighted at paragraph 5.7 that it is not always easy to draw the line between permitted business activities under the visit visa rules and employment in the UK and look forward to engaging with the Home Office in relation to this issue further.

### **Workers**

We welcome the decision not to impose a cap on the number of skilled workers who can enter the UK, the abolition of the resident labour market test, the lowering of the skill level to RQF 3, and the commitment to review the administrative burdens on employer sponsors.

We do have concerns over the Home Office's capacity to deal with the increase in Tier 2 and Tier 5 licence applications, which would be inevitable should the white paper proposals be adopted. At present there is a relatively low level of sponsor licence applications, but the necessary checks mean it can take 6-8 weeks

before an application is granted. We would suggest that consideration should be given to a streamlined application system to allow for faster processing times.

In our response to the Home Affairs Committee's consultation on Post-Brexit Migration Policy, dated July 2018, we urged the government to remove or amend the net migration target and highlighted "...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".

The concerns raised have been partially addressed in light of the reforms mentioned above. However, the adoption of the Migration Advisory Committee's recommendation of retaining the £30,000 minimum salary threshold is concerning. We welcome the commitment to "engage extensively with businesses and employers, consider wider evidence of the impact on the economy, and take into account current pay levels in the UK economy"<sup>4</sup> before confirming the level of a future salary threshold.

Maintaining the £30,000 threshold will restrict the ability of small and medium businesses to recruit foreign nationals. The lowering of the skills level to RQF3 is unlikely to achieve the stated aim of allowing workers with intermediate skills to enter the UK labour market if employers require them<sup>5</sup> without also lowering the salary level. As highlighted in ILPA's response to this white paper, particular problems will arise for teachers and nurses. Flexibility will be provided by the Shortage Occupation List (SOL), as it is proposed to allow a lower salary level for occupations that are in shortage. However, at present, the process for revising the SOL is not sufficiently efficient to ensure that the list genuinely reflects shortages in the UK labour market. Arguably the problem is even more acute in relation to the Scottish labour market.<sup>6</sup> The proposal to provide for an enhanced role for the MAC, including annual reports,<sup>7</sup> may address this concern however it remains to be seen whether this will be effective in practice.

A different salary threshold for different Standard Occupation Codes, as provided for in Appendix J of the Immigration Rules, would be more appropriate than a compulsory minimum of £30,000 for all occupations. This would allow for maximum sector specific differentiation. At present most of the salary thresholds in Appendix J are otiose as they fall below the £30,000 minimum provided for by in row one of Table 11CA in Appendix A. This issue will become even more pronounced when the skill level is lowered to RQF 3 and EU migrants are required to meet the requirements of Tier 2 of the points based system before being permitted to work in the UK. In the case of Scottish solicitors, our recommended salary for a first year trainee solicitor is currently £19,000 and is £22,000 for a second year trainee solicitor. While firms may offer a salary above this recommended rate, it is not compulsory. The minimum rate of pay for a trainee

<sup>4</sup> Paragraph 6.24

<sup>5</sup> Paragraph 6.20

<sup>6</sup> As highlighted by organisations such as COSLA in response to the Scottish Affairs Committee's inquiry on Scotland and immigration, see paragraph 44 of the Committee's report published on 11 July 2018 available here - <https://publications.parliament.uk/pa/cm201719/cmselect/cmsscota/488/488.pdf>

<sup>7</sup> Paragraph 3.10

solicitor in Scotland is the Living Wage, as set by the Living Wage Foundation. This already poses challenges in the context of the required annual salary for a 'new entrant' trainee solicitor in Appendix J of £24,700, which would be exacerbated by a higher threshold.

The introduction of a short-term worker route is, in general, welcomed. This will allow for UK employers to employ low skilled foreign workers – such as those working in the hospitality industry, fishing crew, and those carrying out office administrative roles – for up to a maximum of 12 months. However, the imposition of a 12 month 'cooling off period', which will prevent a foreign worker from returning to the UK for 12 months after their departure, will severely limit the utility of this route. Seasonal workers will be prevented from returning to the UK each year to work. The policy aim of ensuring that employers who have built up a reliance on low skilled workers from the EU have a transitional period within which to "change their ways of working" will not be achieved if, each year, new staff need to be recruited and trained.

The policy aim of preventing long term working and preventing migrants from settling in the UK could be achieved by imposing a 'cooling off period' of 181 days as an absence of more than six months will break continuous residence.<sup>8</sup> This would allow seasonal workers to return to the UK each year to work for the same employer, preventing the need for regular recruitment and training.

## Students

The proposal to introduce a period of post-study leave lasting for six months to allow students time to find permanent skilled work is welcomed and will go some way to addressing the difficulties currently faced by students who often fail to find work before expiry of their student visa.<sup>9</sup>

## Family Migration

The white paper indicates that the government does not intend to change significantly the rules for family migration and permanent settlement. This represents a missed opportunity to revise and reform the excessively restrictive rules currently in place, particularly as regards the minimum income requirement, the rules around adult dependent relatives, and the non-provision within the Immigration Rules allowing unaccompanied children with refugee status to access family reunion.

Although the Home Office issued updated guidance in light of the Supreme Court decision in *MM*<sup>10</sup>, members of this committee have not seen any change in practice by caseworkers when assessing cases

<sup>8</sup> Per paragraph 276A(a) of the Immigration Rules.

<sup>9</sup> This issue was addressed in more detail in raised in our consultation response to the Migration Advisory Committee's consultation on "International students: economic and social impacts" dated 26 January 2018.

<sup>10</sup> R (MM (Lebanon)) v Secretary of State for the Home Department [2017] UKSC 10

that fail to meet the Immigration Rules. These continue to be refused regardless of exceptional circumstances or credible alternative sources of financial support. It is submitted that this is an opportunity to review the requirements of Appendix FM and Appendix FM-SE.

We do, however, welcome the intention to “refresh” the Life in the UK test. The test is arbitrary and ineffective in achieving its stated goal; we look forward to reviewing the alternative proposed when details become available.

## Digitalisation

The move towards electronic immigration status is an interesting innovation. Modernisation of the system, and harnessing the advantages of modern technology, are to be welcomed. The electronic status “...will be checked by airlines, so they know whether the person is permitted to travel, at the border before the person is allowed entry, by employers, landlords and public services to assess eligibility in country and linked to the record of the person’s exit from the UK.”<sup>11</sup> When the technology underpinning this system works, it will be a fast, efficient, and convenient way of verifying a person’s immigration status. However, no system is infallible and there will undoubtedly be occasions when it does not work (whether due to technological or human error). Safeguards need to be put in place to prepare for such an eventuality. If, upon arrival at the UK Border, a migrant is told that the Immigration Officer has no record of their status, what does the person do?

The move towards digitalisation of the application process also needs appropriate safeguards. When the consequence of failing to submit an application before the expiry of leave is to become an unlawful migrant, and as such subject to criminal prosecution and the vagaries of the ‘hostile environment’, a technological error could have catastrophic consequences. If the online system fails, there must be an effective opportunity for redress.

Members of our committee have seen decision letters which fail to take into account evidence which was in fact provided with an application, but which was not properly scanned to the decision maker by the Home Office’s commercial partner (in this case VFS Global, who administer out of country applications, rather than Sopra Steria, who administer in country applications). There needs to be a mechanism for addressing minor administrative errors by the Home Office’s commercial partner. At present, the only remedy is to litigate (if possible, at the First-tier Tribunal, failing which through judicial review). This is far from satisfactory. In a system where the onus of proof invariably falls upon the applicant to prove that documentary evidence was provided, it is disconcerting that so many aspects of the application process are being placed beyond the control of the applicant.

<sup>11</sup> Summary at beginning of Chapter 9

The present caseworker guidance only directs caseworkers to ask for additional evidence where this affects the validity of applications, for example a missing passport or sponsor declaration. The Immigration Rules do provide caseworkers with a discretion to request further information from applicants, but this is not a mandatory requirement and is rarely exercised. We would suggest that, in light of digitalisation of the application process, this power should be made mandatory in all cases to provide an adequate safeguard against administrative errors by a commercial partner.

## Protecting the vulnerable

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### Compliance

The introduction of exit checks across the board, and linking this to an individual's electronic immigration status, is welcomed. Control at the border is a more efficient, effective, and humane way of monitoring immigration compliance than outsourcing immigration control to employers, landlords, banks, and hospitals.

It is particularly concerning that EU nationals who fail to apply for settled status by 30 June 2021 will be subject to such provisions. Members of this sub-committee have experienced in their practice barriers for EU nationals to use the EU Settlement Scheme in its pilot phases. For example, those individuals without access to smart phones or the internet face difficulties in making the application. Vulnerable groups – including women and children survivors of domestic violence – continue to face barriers in demonstrating their residence and, in the case of non-EU family members, proving the identity of the EU national and the family relationship. There currently exists certain provisions for relief for spouses who have survived domestic violence in their evidential burden, but none explicitly exist for children.

Furthermore, as highlighted in our briefing prior to the Second Reading of the Immigration and Social Security Co-ordination (EU Withdrawal) Bill,<sup>12</sup>, “...we would urge the government to ensure that there is widespread publicity in advance of commencement to ensure that all those who will be affected by this legislation are aware of its effect and when that will come into force. This should include publicity in a range of European languages to maximise the effectiveness of this communication.” Our experience thus far indicates a significant void in awareness of the EU Settlement Scheme, particularly for those in hard to reach areas and for vulnerable groups.

The above considered, the bright line distinction drawn in the white paper between lawful and unlawful populations, and the suggestion that the area in need of improvement is the ability to differentiate between

<sup>12</sup> Law Society of Scotland, *Briefing for Second Reading – Immigration and Social Security Co-ordination (EU Withdrawal) Bill* (January 2019) - <https://www.lawscot.org.uk/media/361605/19-01-14-imm-second-reading-briefing-immigration-and-social-security-bill-003.pdf>

these two groups,<sup>13</sup> fails to recognise that it is far too easy to inadvertently become an unlawful migrant. The inability to receive accurate advice from Home Office helplines, the lack of communication or cooperation from Home Office case workers, the strict approach to documentary evidence (including from women and children survivors of domestic violence), the inflexible application procedures, and the digitalisation and outsourcing of several aspects of the application process all result in applicants making mistakes and inadvertently becoming an unlawful migrant.<sup>14</sup> This is the issue in need of improvement; not the ability to differentiate between lawful and unlawful migrants. In the absence of proposals to eradicate the underlying hostility built in to the system the commitment to a “fair and humane immigration policy” is meaningless.

<sup>13</sup> Paragraph 45

<sup>14</sup> See, for example, the difficulties faced by an applicant following submission of the wrong application form narrated here - <https://www.freemovement.org.uk/what-happens-if-you-mistakenly-apply-for-british-citizenship-instead-of-indefinite-leave-to-remain/>

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