



The Law Society

**Employment Related Settlement Tier 5 and overseas
Domestic Workers
September 2011**

supporting
solicitors

Response to the UK Border Agency's Employment Related Settlement, Tier 5 and Overseas Domestic Workers Consultation

Introduction

The Law Society is the representative body for more than 140,000 solicitors in England and Wales ('the Society'). The Society negotiates on behalf of the profession, and lobbies regulators, government and others. This response has been prepared by the Society's Immigration Law Committee whose members are experienced immigration and asylum practitioners.

Our role in influencing immigration policy is twofold:

- the public interest requires an immigration policy which is evidence-based, underpinned by fairness and transparency for migrants and which provides certainty for employers.
- the Society represents the interests of the legal services sector who contribute nearly 2% of UK GDP (approximately £4 billion), much of which is generated by large City firms which operate in a global marketplace and rely on the expertise of skilled migrant workers.

Summary of our response

The proposals made in this consultation paper, which have the aim of breaking the link between temporary migration and settlement, risks further harm to the legal sector as well as other business sectors in the UK and will not provide fairness for migrants.

This view is shared by the Immigration Law Practitioners Association and by City firms which have been kind enough to share with us their proposed submissions.

The Coalition Government's commitment to reducing the level of net migration to the UK to the 'tens of thousands each year' by the end of the current parliament is looking increasingly unlikely, if not impossible, to achieve. The rapid succession of UK Border Agency consultations, made in an attempt to clothe this policy are creating problems for UK business. In our discussions with a wide range of interests it is clear that business leaders recognise this, but are often reluctant to speak out because immigration is an emotive issue.

We question the Government's determination to pursue policies designed to meet an unrealistic target at the cost of fairness to individual migrants and the competitiveness of UK business. It is a sign of some desperation that the proposal is to apply the new rules retrospectively to migrants who came to the country after April 2011. This is almost certain to lead to legal challenge.

Employers have invested significantly in the Points-Based System (PBS). The many changes to the PBS and other aspects of immigration policy have created confusion for employers and migrants alike. Further change will create more confusion and cost - which we appreciate, could be to the benefit of those law firms which offer advice on immigration. As welcome as that might be, the combined effect of these changes and the accompanying uncertainty is likely to deter businesses from seeking the workers that they need. This would certainly align with Government policy, but does not seem to be a satisfactory basis for policy-making.

Law firms turn to the international market because the UK workforce cannot meet their requirements. For example, very few EEA nationals will be qualified in US law, but many UK law firms are active in the USA. Firms which specialise in US law will invariably recruit directly from US law schools.

One City firm has told us that despite recruiting in 30 UK universities and receiving 4000 applications for its training contracts, it does not expect to fill all its training vacancies from within the UK because the standard of applicants is not high enough (notwithstanding their ever-increasing educational attainments). At this level, international migrants are not displacing jobs for the resident workforce, they are taking jobs that the resident workforce is unable to fulfil in sufficient numbers.

Global legal businesses are interested in recruiting only the best talent from the global marketplace. It takes two years for a trainee to qualify. If a migrant's leave to remain in the UK is capped at five years, that gives them three years in which to practise here as a qualified lawyer. City firms tell us that this is not a good return on their investment in training and that non-EEA candidates are saying to them that a three-year limit will make the UK a less attractive destination. There are other more attractive workplaces of choice available.

Non-EEA migrants employed by law firms tend to be high earners. A trainee in a City firm might be on over £40k, yielding tax and NI of around £15k. After two years, that tax and NI yield may well be around £25k; and after around 5 years, around £45k. They will be spending their disposable income in the UK. They and their dependants are unlikely to be a drain on UK state benefits, nor on the NHS as they are likely to have private medical cover provided by their employer.

The longer-term impact of restricting mobility and the settlement of lawyers is likely to harm the competitiveness of firms and inhibit their ability to develop business internationally.

The Law Society works with UK trade missions to open up international markets to UK business. UK immigration restrictions are being cited by other countries as a reason for resisting opening up their markets - why should they, if the UK is closing down opportunities in the other direction?

Turning to the consultation paper itself we are dismayed by the simplistic tick-box approach. The first question is a good example of why this is an unsatisfactory approach. Further restrictions on immigration might add clarity, but a 'yes' response to that question cannot be taken as agreement to the proposals. Use of such a simplistic approach to obtain views on proposals of such significance is inappropriate.

The Home Secretary's foreword makes clear that the proposals are all but a fait accompli. Nevertheless we hope that our response will inform the Government's thinking not only on this consultation but on a broader view of immigration policy.

Q.1 Would creating clear categories of temporary and permanent visas help migrants and the public better understand the immigration system?

A tick-box answer does not do justice to this question.

Clarity and certainty are important attributes of an effective immigration system for migrants and employers alike. Clear visa categories might well assist their understanding and that of the public. The difficulty here is that successive changes to immigration policy are combining to create greater uncertainty in the business community.

Specifically, migrants already in the country under Tier 2 will face greater uncertainty about their prospects of settlement following a rule change applied retrospectively after their arrival. Such a lack of fairness and transparency is likely to make the UK less attractive to potential migrants - and while this might help the Government which has created a rod for its own back, it does not help UK businesses such as City law firms.

No-one has an automatic right to settlement. The key requirement is that they continue to meet the terms of their original immigration status. A migrant worker who is settled in the UK after five years and whose skills continue to be required by their employer should continue to be eligible for settled status.

Steps which restrict employers' choice have the potential to restrict the UK's competitiveness in attracting workers, irrevocably damaging the interests of business. This is especially so where significant resources are spent on training migrant workers for skilled roles, only for the migrant worker to be required to leave the UK.

Q.2 Should exceptional talent migrants have an automatic route to settlement after five years?

Yes.

We see no reason to treat this route differently than other Tier 1 subcategories. By definition, such migrants are fulfilling a role at the highest level of skill and talent which could not be undertaken to an equal level by a resident worker.

In line with migrants in the Tier 1 Entrepreneur and Investor subcategories, migrants in the recently created Tier 1 Exceptional Talent subcategory should have the same route to settlement. Although this route is described as 'automatic' it is surely desirable for anyone who seeks settlement here, however talented they may be, to demonstrate that they do not have any criminal convictions.

We would urge the creation of an accelerated route for Tier 1 Exceptional Talent migrants, as is the case for the other subcategories of Tier 1, which enjoy an accelerated settlement option if they provide an enhanced level of investment or business activity. A similar accelerated route for those who have contributed at the highest level in science or the arts while in the UK is justified.

Q.3 Should temporary leave for Tier 1 migrants be capped at a maximum of five years (those who wish to stay longer will be obliged to apply for settlement)? (Please select one answer only)

No.

This proposal does not do anything to help the UK economy to attract and retain highly skilled people, and might actually deter such migrants. There are a number of reasons why such migrants might not wish to apply for settlement. The removal of the flexibility of the current arrangements may serve to encourage the brightest and best to move away from the UK and take their talents to competitor economies.

In our view, there is no reason to change the options available to Tier 1 migrants wishing to extend their time in the UK past an initial five years.

Q.4 Should temporary leave for Tier 2 migrants be capped at a maximum of five years? (Please select one answer only)

No.

Tier 2 migrants are important to law firms as a means of filling skills gaps in the domestic workforce. Generally, sponsors must show that there is no suitably qualified resident worker. Tier 2 migrants who wish to stay beyond five years have to demonstrate that there is a continuing need for their employment, that they are still employed and their employer wishes to retain their services.

This proposal cannot help UK business to attract or retain skilled migrants. We do not believe that there is any reason to change the current options available to Tier 2 migrants wishing to extend their leave past the initial five year grant. Other than to say that Tier 2 (General) and its work permit category predecessors were intended to be 'a means of filling temporary skills gaps in the domestic labour market' the UK Border Agency offers no substantive evidence to support the introduction of a five year cap.

Notably, as a result of the recent changes to the Tier 2 ICT route, migrants earning between £24,000 and £40,000 per annum may only stay one year in the UK. As many workers are likely to fall within this salary window, it may not be surprising to see a dramatic increase in migrants staying a year or less.

This will hamper business continuity, reduce returns on investment in training, and lead to further costs being expended on recruiting and training new staff.

Prohibiting all Tier 2 migrants from extending their stay in the UK beyond five years may also have an impact on social and cultural cohesion as a result of a number of migrants never properly integrating within the UK and having no incentive to do so.

Q.5 If you answered 'yes' to question 4, should a Tier 2 migrant who has completed five years in a temporary capacity be permitted to re-apply for a Tier 2 visa after they have left the UK?

Although we do not agree with the proposal contained in Question 4 we have a view on this question.

If the proposal in question 4 is implemented then Tier 2 migrants should be permitted to re-apply for further leave without being required to apply from abroad. In-country applications for extension should be permitted.

There must be a question about whether migrant workers who do not apply for settlement should be included in net migration figures: they will leave the country at some point.

Q.6 If you answered 'yes' to question 5, should there be a grace period (say 12 months) before resubmitting a further application for a Tier 2 visa?

We see no justification for preventing a Tier 2 migrant who has been in the UK for five years from re-submitting a further application less than 12 months after their last period of leave ended.

A grace period would only make the rules more complex and uncertain for employers.

Q.7 Should Tier 2 General become a wholly temporary route with no avenue to settlement?

No.

Tier 2 General should not become a wholly temporary route with no avenue for settlement. We are very concerned about the potential effects on business if such a proposal were to be implemented.

There is no doubt that the attraction of the UK as a destination of choice for skilled workers would be diminished. It is a big decision for migrants to decide to work in another country and perhaps to bring their families with them. The prospect of settlement rights in the future might help a skilled migrant make the choice to come to the UK rather than to a competitor economy.

Tier 2 General is specifically intended to compensate for gaps in the resident workforce, either through the resident labour test or the occupational shortage list, so migrants are not displacing UK workers.

This proposal would do nothing to help employers who rely upon skilled migrant workers, and may reduce their ability to hire or retain the workers they require.

Prohibiting skilled migrants from the option to settle could result in a lack of emotional, economic and social investment in the UK on their part. This in turn could compound the perception in sections of the public that immigrants are unwilling to integrate, though it would be a result of them not being permitted to do so.

Skilled migrants who are permitted to stay beyond five years may form lasting personal bonds with their communities which have lasting economic and political advantages.

Q.8 If you answered yes to question 7, should the following migrants be exempt from the policy and continue to have a direct route to settlement?

Those migrants who meet the settlement criteria by completing their five year stay and who continue to meet the conditions of their stay should be permitted to apply for, and be considered for settlement.

However, these categories should not be permitted an accelerated route of settlement. There should be no preferential treatment for them.

Resolving the UK skills gap is not a short term project and it may take a generation to tackle it effectively. In the meantime businesses should not be expected to recruit unqualified candidates or those without the requisite experience, or to lose qualified and able staff after five years simply because they earn below a threshold.

There is a strong business case for reducing the minimum income threshold for Tier 1 to a lower sum. It cannot be said that the brightest and best or those who represent a unique value to business (specifically SMEs) all earn in excess of £150,000.

Q.9 Should there be an annual limit on the number of Tier 2 migrants progressing to settlement?

No.

Annual limits create uncertainty for business and makes it all but impossible for employers and migrants to plan.

We understand that the numbers qualifying each year are relatively small and we do not believe that there should be an annual limit on the number of Tier 2 migrants progressing to settlement. We believe that there should be eligibility criteria (see our response to Question 11 below).

We have concerns for those earning over £40,000 per annum who are permitted to remain for 5 years in the UK but thereafter cannot extend their stay nor indeed qualify for settlement. It is possible that these migrants have been transferred to the UK under the ICT route due to business time constraints and would otherwise have qualified under Tier 2 General (e.g. the employer was willing to advertise to test the resident labour market but due to business needs it was not possible to wait 28 days for the outcome of the RLMT and that was the primary reason the migrant transferred under the ICT rules). The UK Border Agency should consider circumstances in which ICT migrants can also qualify for settlement.

Q.10 If you answered yes to question 9, what proportion of Tier 2 migrants should be allowed to progress towards settlement?

We do not agree that there should be an annual limit based on percentages but instead that there should be a pre-determined qualifying criteria.

Q.11 How should we determine which migrants can apply for settlement? By setting objective criteria or by random allocation?

The principles of fairness, certainty and consistency require that determination of settlement be decided against objective criteria.

It has been the case up until now that objective criteria are set for those wishing to apply for settlement. That policy should continue to prevail not least for reasons of consistency.

Q.12 If you answered 'objective criteria' to question 11, what criteria should we use to identify settlement candidates?

- Professional/vocational qualifications
- Pre-determined sectoral or occupational groups
- Working in a recognised shortage occupation

Salary alone should not be the determining factor qualifying individuals for settlement. Nor should age be taken into account, given that age discrimination legislation exists in England and Wales to protect the resident labour market.

Q.13 If some Tier 2 migrants are permitted to enter a route that leads to settlement, when should the decision be taken?

We are in favour of all migrants in this category having the option to move towards settlement if they meet the existing criteria.

We believe that if the only two options are 'after three years in the UK for all cases' or 'on entry in selected cases, but after three years in the UK for the majority', then the decision should be taken on entry for those who have entered under Tier 2 General and after three years in the UK for those who are intra-company transferees based on qualifying salary/academic or vocational or professional qualifications.

Q.14 Should employers be required to sponsor a Tier 2 General migrant seeking to stay in the UK permanently?

No.

We do not think it is necessary to compel employers to sponsor a Tier 2 General migrant in seeking to stay in the UK indefinitely.

It is implicit in the Tier 2 (General) arrangements that the employer would have originally undertaken a resident labour market test. Having invested in the employee for five years, the employer should not then have to undertake another resident labour test to support the employee's application for settlement. The employer should be required only to confirm the prospect of continuing employment.

We do not want to see a position where:

- further administrative, financial and regulatory burdens are placed on employers over and above that with which they already have to contend under the PBS system
- migrants are irrevocably tied to sponsor employers thus losing their ability to change employment if they so wish or indeed, apply for settlement.

Employers are unlikely to sponsor applications if they are to be subject to random allocation or numerical caps.

Q.15 If you answered 'yes' to question 14, should sponsorship be required at the 3 year or 5 year point, or both?

As stated above, we do not believe that employers should be required to sponsor migrants who wish to apply for settlement whether at the 3 year or 5 year point.

Q.16 Should the *employer* be expected to pay to sponsor their Tier 2 General employee's transfer to a permanent visa?

No.

In our experience many UK law firms support Tier 2 General migrants for permanent residency applications in terms of legal costs and administrative support.

We do not believe that the employer should be expected to pay to sponsor their migrant employee in these circumstances. It is up to the individual if they wish to apply for permanent residency. We believe that it would place an unnecessary financial burden on employers when the primary benefits pertains to the individual migrant and their dependents. It should be a matter for the employer's discretion whether to provide financial support to a migrant employee.

Q.17 Should Tier 2 migrants be able to switch employers as they can now?

Yes.

We feel strongly that Tier 2 migrants should be able to switch employer's in-country and we believe that completion of the resident labour market test plays an important role in this process to ensure that no resident workers are overlooked. The ability to switch employment may have a significant bearing on a migrant's initial decision on whether or not to seek employment in the UK if the Government persist with the policy of a five year cap on Tier 2 General visas.

Q.18 Should adult dependants of Tier 2 migrants, who switch from a temporary to a permanent route, be subject to an English language test?

Yes.

We see no disadvantage in this requirement since the purpose of the English language test is to ensure that those who are seeking to make the UK their main home will more easily integrate if language is not a barrier.

Q.19 If you answered yes to question 18, what level of language requirement would be appropriate?

We believe that a basic level of English should be all that is required.

Q.20 If you answered yes to question 18, which of the following should we test?

The test should comprise all the suggested criteria - reading, writing, listening and speaking.

Q.21 Should those who enter on the temporary worker route be restricted to a maximum of 12 months leave to reinforce the temporary nature of the route?

No.

Q.22 If you answered 'no' to question 21, please explain why below.

The consultation paper fails to provide any justification for introducing such a restriction. By definition Tier 5 temporary workers are granted entry to meet cultural, charitable, religious or international objectives on a temporary basis, but there seems to be no objective reason for limiting this to 12 months.

Law firms will use this category to bring migrants into the UK on secondments which are usually very short-term but which may exceed 12 months.

Tier 5 temporary workers should not be included in the calculation of net migration.

Q.23 Should the ability to bring dependants in the Tier 5 Temporary Worker category be removed?

In line with the general position that all workers should be able to bring their dependants, unless there is evidence of abuse or that dependants do not comply with their immigration leave restrictions we would advocate continued right for dependants to join Tier 5 temporary workers.

A decision in the alternative would be contrary to the spirit of international and domestic human rights obligations.

Q.24 If we were to continue to allow Tier 5 Temporary workers to bring their dependants, should dependants' right to work be removed?

Unless there is evidence of abuse we would consider this an unnecessary restriction and an intentionally placed obstacle to social cohesion and the ability of migrant dependants' to contribute to the UK economy. Such migrants are only in the UK temporarily and often work in poorly paid sectors.

Q.25 Should the minimum skill level in the Government Authorised Exchange sub-category be raised to graduate level (N/SVQ level 4 or above)?

As government authorised exchange sub-category workers are already required to be supernumerary they have no impact on the level of domestic employment. To require them to fill a graduate level position would be an unnecessary restriction.

These schemes are carefully vetted by Tier 5 sponsors, who often provide very bespoke type work opportunities, reflecting the respective Tier 5 sponsor values/institutions.

To impose a further and higher level of skill restriction would hamper the ability of Tier 5 sponsors to implement their exchange programmes and would raise the entry qualification level to that of a Tier 2 General migrant undermining the very purpose of this specific route.

Q.26 Should the route for domestic workers in private households be closed?

The UK Border Agency's reasoning behind removing this immigration route is flawed. Paragraph 7.2 outlines the core reason why the migrants come to the UK - to assist and support their skilled employers. If the UK wishes to attract skilled Tier 1 and 2 migrants, then it has to accept that these migrants come with a potential entourage. In the same way a Tier 1 or 2 migrant would like their family to accompany them, associated domestic staff are also a crucial component of their decision making process. For example, a nanny is often an integral part of a Russian Tier 1 investor's family. The relationship is often very established, and to demand that this person be replaced by domestic workers from the UK labour pool would be highly unattractive to a Russian family. Although a domestic worker may not be highly skilled, they have detailed knowledge and the trust of the families they work for, combined with the ability to communicate in the Tier 1 and 2 migrants' native language. These qualities cannot be readily replaced, nor would Tier 1 and 2 migrants wish them to be.

The Overseas Domestic Worker visa is a transparent channel for properly employing the domestic staff of employers who chose to come to the UK. If this route were to be closed, domestic workers would have to rely on precarious entry vehicles, such as the UK Border Agency's proposed visitor category, which would not adequately reflect their intention in coming to the UK to work. There would also be increased risk of exploitation and trafficking if the domestic worker was not as visible in the immigration system. In addition, removing domestic workers from a work entry category, would complicate their ability to raise employment issues under UK law, were relations with their employer to deteriorate.

Q.27 If we were to continue to allow domestic workers in private households to enter the UK, should their leave be capped (at a maximum of 6 months, or 12 months if accompanying a skilled worker)?

For the reasons outlined above, any restrictions placed on domestic workers will act as a serious disincentive for Tier 1 and 2 migrants. It seems to be contrary to the expressed intention of the UK Border Agency, to seek wider measures to attract Tier 1 investors and entrepreneurs to the UK. It would send out the message, that these individuals alone are sought, not their families who require and depend on familiar established support staff employed in their households.

Q.28 Given the existence of the National Referral Mechanism for identifying victims of trafficking, should the unrestricted right of overseas domestic workers in private households to change employer be removed?

No.

The National Referral Mechanism (NRM) has rightly received serious criticism [from the Anti-Trafficking Monitoring Group Briefing: Assistance to Trafficked People, January 2011] and cannot deal with all types of exploitation experienced by domestic workers. The ability to leave an employer and move on without concern over immigration status, when a situation becomes unsafe and untenable is the strongest protection afforded to a domestic worker. By switching employers, the domestic worker is not freely entering the UK labour market because they have to transfer to another domestic worker position, and thereby maintaining continuity in their immigration category. Making domestic workers rely on NRM assistance would increase government costs. Kalayaan, an established charity promoting migrant domestic worker rights, estimates that 'over a two year period, it is likely that costs to the Government alone would increase by £850,000 for accommodation and maintenance alone.' [*Lalani, M Ending the abuse: Policies that protect migrant domestic workers. Kalayaan. May 2011. P30-31*]

Q.29 Should leave for private servants in diplomatic households be capped at 12 months?

No. For similar reasons outlined in response to question 26.

Although diplomats do not have much latitude to refuse a posting to the UK, they may well be used to bringing their own support network of staff to mainly assist their families wherever they are transferred.

Q.30 Should an avenue to settlement be removed from overseas domestic workers (private servants in diplomatic households and domestic workers in private households)?

No.

Kalayaan reports that 94% of domestic workers return home with their employer within the time period of their first visa granted in this category. [Kalayaan briefing July 2011] Approximately 1000 of those entering as domestic workers renew their visas. Most importantly it is vital to recognise that domestic worker accounted for only 0.5% of the total grants of settlement in 2009. [*Lalani, M Ending the abuse: Policies that protect migrant domestic workers. Kalayaan. May 2011. P22*] Therefore removing settlement rights would have a negligible effect on the Government's aim to reduce immigration resulting in settlement.

Q.31 Should the right for overseas domestic workers (private servants in diplomatic households and domestic workers in private households) to bring their dependants (spouses and children) to the UK be removed?

No.

Removing the ability of dependants to accompany domestic staff would breach international principles of maintaining family unity. Domestic workers take up opportunities in private or diplomatic households often to improve their earning capacity, and should not be separated from their families unnecessarily. We request evidence as to why this restriction is necessary as none has been provided.

Q.32 If we were to continue to allow overseas domestic workers to bring their dependants, should those dependants' right to work be removed?

No.

There is no evidence to support this proposed measure. In our view, if there is no evidence of abuse or contravention of immigration conditions there can be no case for introducing this restriction.