

GHERSON

THE IMMIGRATION UPDATE

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Changes to UK Immigration Rules



Kathryn Bradbury, Associate, warns that refusal can jeopardize and delay future applications and affect ability to travel
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UK immigration rules have changed significantly. Individuals wishing to come to the UK for a visit or to reside must understand these new requirements, as penalties for failing to comply can be severe and damaging to the individual's or business's reputation. Certain nationals are required to obtain prior entry clearance ("leave to enter") to visit the UK but now they must also consider the new 5 Tier points based system to determine the type of application to submit.

This article focuses on changes relating to working in the UK and provides a brief summary of Tiers 1 and 2.

TIER 1- introduced on 30th June 2008, includes the following categories:

· **GENERAL** - This applies to highly skilled individuals who want to work in the UK and can satisfy the required Attributes based upon their qualifications, age, UK experience and previous earnings. Calculations for overseas earnings are adjusted to take into account variations in global income. Points are also required for English and Maintenance (ie. £2800 for out of country applications plus an additional sum for each dependant).

· **ENTREPRENEURS** - This applies to individuals who want to come to the UK to establish or take over a business. In addition to English and Maintenance requirements, individuals must have access to £200,000 that is held in regulated financial institutions and disposable in the UK.

· **INVESTORS** - This applies to individuals who wish to invest £1 million in the UK. These rules now allow these investors to work in the UK, other than in roles such as doctors in training.

· **POST STUDY WORK** - Those who have graduated in the UK with a recognized UK qualification can apply within 12 months of graduation for permission to work for up to two years in the UK.

TIER 2 - replaced the work permit scheme on 27th November 2008. It covers skilled workers and intra company transfers where the employee worked for a related overseas company for at least six months. Prospective workers must obtain points based upon qualifications, skills and whether the job is on a shortage occupation list or pass the resident labour market test. There are also English language and maintenance requirements.

To employ anyone under Tier 2, employers must obtain a "sponsorship licence" from the UK Border Agency. Employers must take their responsibilities seriously as penalties have increased. Employers found illegally employing migrant workers may be subject to a civil penalty of up to £10,000 per employee and face criminal prosecution.



Visitors

Visitor rules have been divided into sections including the General Visitor for tourists and the Business Visitor for individuals wishing to visit the UK for up to 6 months to perform limited business activities. A Business Visitor should receive a salary from overseas but can receive reasonable travel and living expenses from UK sources. The UK Border Agency has published a specific list of activities that are permitted by business visitors, go to: www.ukba.homeoffice.gov.uk

Prospective visitors should identify the purpose of their visit so that they can apply for the appropriate entry clearance and explain it to Immigration Officials on arrival. They must also comply with what they can and cannot do once in the UK given the new grounds of refusal (See Richard's article page 4).

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One Parent CAN Bring Dependent Children to UK



Principal partner,
Roger Gherson,
explains how one
parent families
can settle
in the UK

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Many families relocate to the UK in immigration categories leading to settlement. Often at the outset, one parent moves with the children while the other parent stays behind, for example, to provide for the family's financial needs.

Until recently, this did not pose a problem. This well-established practice applied to various immigration categories including work permit holders, highly skilled migrants, sole representatives and investors.

These categories, now largely covered by Tier 1 of the Points Based System, enable children to join one parent in the UK where that parent is either:

- a sole surviving parent; or
- has had sole responsibility for the children's upbringing; or
- where serious and compelling family or other considerations make exclusion from the UK undesirable.

The inability of one parent to care for children because of business commitments was routinely treated as making exclusion undesirable. Problems arose in early 2008 when Entry Clearance Officers at the British Embassy in Moscow surprisingly began refusing applications to children wishing to accompany their mother as dependants because their fathers remained in Russia to continue running family businesses. A new narrow interpretation to 'exclusion undesirable' resulted in applications being refused essentially because

exceptional circumstances were required, such as the father being physically or mentally incapacitated. The view being that the father could simply choose to give up his work commitments to care for his children in Russia.

In effect, this sudden change of policy meant Immigration Rules were being unreasonably interpreted in a manner that prevented migration, save for cases of whole families moving to the UK. Gherson was instructed and appealed the Entry Clearance Officer's decision requesting a Senior Immigration Judge since this was the first time the 'exclusion undesirable' provision in Parts 4-7 of the Immigration Rules was being litigated.



Senior Immigration Judge McKee allowed the appeal, stating that "Mr Gherson, the principal partner of Gherson Solicitors, who has for many years handled the immigration matters of high net worth individuals, including applications for children to accompany to join one parent (in practice, the mother) in this country while the other parent remains abroad because of work commitments" had shown "what is clearly a consistent practice, both in-country and overseas, of granting entry clearance or leave to remain under rule 243 to children of investors..."

...this sudden change of policy meant Immigration Rules were being unreasonably interpreted in a manner that prevented migration, save for cases of whole families moving to the UK

Judge McKee agreed that the new interpretation was too narrow, saying that "the language of exceptionality has no place in deciding what makes exclusion undesirable and that physical or mental incapability of one parent should be understood" as an example, and not as the only situation in which exclusion would be undesirable. The Judge said that the father's work commitments in Russia were not a mere matter of convenience but made "it possible for his wife to be an investor and for his children to receive a private education in this country".

Furthermore, applying such a narrow interpretation in investor cases might be "contrary to the public interest" as it could deter investors from relocating to the UK, a consideration particularly relevant in the current economic climate.

Finally, Judge McKee ruled that the fact the children were allowed to stay in the UK as students did not prevent them from being entitled to stay as their mother's dependants, an immigration status that the Judge acknowledged "may be more secure" and provide the "option of obtaining indefinite leave more quickly".

This success comes as a relief to many parents wishing to bring up their children in the UK and who are not able to relocate at the same time. It also demonstrates that Embassies, Consulates, the Home Office and the FCO cannot arbitrarily change the interpretation of UK Immigration Rules.



Lisa Amos, immigration consultant, is an expert on sponsorship and is happy to advise further on these matters

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New Sponsorship Regime

- terminating employment of individuals if permission to work ceases.
- reporting to UKBA within specified time-frames (eg. if a sponsored worker fails to show up for work, or is absent without reasonable excuse, or if there are significant changes in circumstances, or if management suspects the sponsored worker is breaching the law).



On 27 November 2008, the UK Border Agency "UKBA" introduced Tiers 2 and 5 of the Points Based System "PBS". Under the old scheme, UK employers submitted work permit applications to UKBA for approval. Now employers who have obtained a Sponsor Licence issue Certificates of Sponsorship "CoS" to their prospective migrant employees. All workers coming to the UK from overseas must apply for leave to remain or entry clearance on the basis of their CoS, even if they are coming to the UK for 6 months or less! Unfortunately, Entry Clearance applications are becoming more stringent and time-consuming making urgent intra company transfers increasingly difficult.

Prior to issuing a UK based company with a Sponsor Licence, the UKBA assesses the employer's ability to comply with the scheme's obligations. Once a licence is issued, UKBA undertakes random checks to ensure compliance and that CoS are being issued correctly. Failure to comply with the rules can result in a licence being refused or withdrawn and the employer being no longer able to sponsor workers.

Sponsors' Duties Include:

- keeping full records (i.e. prevention of illegal working, right to work check documents, current contact details and recruitment and employment records for duration of service).
- having measures to ensure compliance with UK immigration law.

- co-operating with UKBA (eg. providing information about sponsored workers upon request, adhering to any plan UKBA implement, allowing UKBA access to premises on demand, allowing them to review personnel files and meet employees).
- complying with UKBA's best practice guides.

Individuals who possess a Master's degree might be eligible to transfer to the UK without sponsorship

Best Practice

To ensure that the employer secures and retains its ability to sponsor employees it is essential that:-

- right to work checks are undertaken for every employee prior to their starting work and rechecked within 12 months of the commencement of employment for all migrants.
- all employees involved in management and recruitment are trained on right to work checks and matters which must be reported to the Authorised Officer (the person responsible for reporting to UKBA).
- handbooks/contracts require sponsored employees to provide the employer with current contact details and notice of any changes in their immigration status.

Penalties

Employers who do not comply with UK immigration legislation or the terms of their Sponsor Licence, may face the following sanctions:-

- civil penalties (up to £10,000 per illegal employee).
- being named on UKBA's public list as receiving a civil penalty.
- prosecution of board members/management for negligent practices and knowingly employing or continuing to employ workers illegally.
- revocation of licence and the curtailment of leave of all the employer's sponsored workers to 60 days, leading to potential employment claims.
- damage to business/management and reputation.

Individuals who possess a Master's degree might be eligible to transfer to the UK without sponsorship under Tier 1 (General). It is vital to consider each prospective migrant's circumstances as well as the business' needs, to ensure that the best route to lawful employment is selected.

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Richard Mills,
Associate,
gives advice to
migrants on
possible dangers
of non
compliance

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A person's leave to enter or remain in the UK can be curtailed (i.e. cut short) by the Home Office if, for example, the person no longer satisfies the rules for which leave was granted.

re-entry to the UK could be subject to... re-entry bans of 1 to 10 years

To date, experience has been that curtailment is used sparingly by the Home Office and only in exceptional circumstances. However, in light of the political landscape and the Home Office reaction to it, it remains to be seen whether curtailment is employed more frequently in the future.

Curtailment of Leave

To be clear, the Home Office has the power to curtail a person's leave to enter or remain in the UK where:

- false representations have been made or there is failure to disclose any material fact in an application for leave to enter or remain;
- there is failure to comply with any conditions attached to a grant of leave;
- a migrant ceases to meet the requirements of the Immigration Rules under which leave was granted;
- the migrant fails to maintain/accommodate himself and any dependants without recourse to public funds;
- a migrant's good character is doubted or he/she is a perceived security threat to the UK;

For example if an Investor allows investments in the UK to drop below the required £750,000, or an Entrepreneur fails to create the specified employment opportunities curtailment of leave could result.

Equally if a migrant is required to report to the Police, and report any change in address/extension throughout the duration of leave, failure to comply could result in curtailment.



Following curtailment migrants must exit the UK as they no longer have valid leave. Consequently, subsequent re-entry to the UK could be subject to mandatory re-entry bans of 1 to 10 years, depending on the exact circumstances of the curtailment and the manner in which they leave the UK.

This means that any years of residence built up towards Indefinite Leave to Remain will also be lost.

A8 Workers Registration

In May 2009 the government will announce its review of the Workers Registration Scheme under which nationals of the 8 countries which joined the EU in April of 2003, are required to register in order to exercise their rights of free movement.

These countries are:

Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia.

The Legal Stuff

Gherson is regulated by the Solicitors Regulation Authority.

This update is correct to the best of our knowledge and belief at the time of going to press. It is, however, written as a general guide, so we recommend that specific advice be sought before any action is taken.

Are You Up-To-Date?

25 Nov 2008 - ID cards introduced - for those applying for Leave to Remain as a spouse or student.

27 Nov 2008 - Tier 2 and Tier 5 of the new Points Based System introduced. Minimum age raised from 18 to 21 for marriage visa.

15 Jan 2009 - The Border, Citizenship and Immigration Bill published.

Mar 2009 - Visas will be required for visitors from Bolivia, Lesotho, South Africa, Swaziland and Venezuela. Implementation of Tier 4 for students.

27 Mar 2009 - Limited concession re maintenance requirement for Tier 2 applicants expires.

31 Mar 2009 - ID cards required for: domestic workers, postgraduate doctors/dentists, academic visitors, visitors for private medical treatment, ancestry and retired persons.

Bulgaria and Romania

On 18 December 2008, the Immigration Minister Phil Woolas announced the UK government's decision to maintain work restrictions on nationals of Bulgaria and Romania, adding that there would be a review at the end of 2009.

The minister said the decision was reached on the basis of information provided by the Migration Advisory Committee and depended upon the likely impact on the UK labour market of any relaxation of the restrictions.

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