

1.2 Overview of immigration control and key resources

1.2.1 Immigration Act 1971 and the Immigration Rules

At the heart of UK immigration law is the Immigration Act 1971, which came into force on 1 January 1973. It has been extensively amended by subsequent immigration legislation, most recently by the Immigration Act 2014.

The Immigration Act 1971 provides for those identified as having the 'right of abode' in the UK (mainly British citizens) to be admitted to the UK 'without let or hindrance', and for everyone else to be subject to immigration control. For details of who has the right of abode in the UK, see information on the UK Visas and Immigration section of the Home Office website at www.gov.uk/right-of-abode.

The Act also regulates how the Home Secretary exercises power to make rules concerning the way in which people who are subject to immigration control can enter or stay in the country. These rules are commonly referred to as 'the Immigration Rules', but officially are issued under the title 'Statement of Changes in Immigration Rules'.

Changes are frequently made to the Immigration Rules, each time through the issue of a Statement of Changes in Immigration Rules. Statements of Changes are laid before Parliament for a period of 40 days and are subject to the negative resolution procedure. They are usually published on www.gov.uk around 21 days before they come into force.

The latest consolidated set of rules to be published in hard copy was HC 395, issued on 23 May 1994. Subsequent Statements of Changes amend HC 395, so when referring to the Immigration Rules it is important to find out whether there have been further relevant amendments.

Each Statement of Changes has a separate number, so that it can be distinguished from the others. Some are called House of Commons papers and start with 'HC' followed by a number. Others are Command papers that start with 'Cm' followed by a number. Unlike House of Commons papers, Command papers can be laid before Parliament when the House is not sitting.

A consolidated version of the Immigration Rules (incorporating all Statements of Changes), and all Statements of Changes in Immigration Rules issued since May 2003, are available on the Home Office website. The website version is supposed to incorporate all the Statements of Changes in Immigration Rules that have been issued since 23 May 1994, and is updated with new changes as they come into effect (though sometimes typographical errors occur).

The Immigration Rules can be challenged through judicial review on the grounds of illegality, irrationality or procedural impropriety. Illegality includes breach of rights under the European Convention on Human Rights and European Union law.

Since implementation on 31 March 2009, the Immigration Rules relating to Tier 4 (General) have been amended 27 times, most recently by the Statement of Changes in Immigration Rules HC 693, most of the provisions of which came into effect on 20 October and 6 November 2014. The Tier 4 (Child) Immigration Rules have been amended 23 times since 31 March 2009. The full set of consolidated Tier 4 Immigration Rules is available on our website under 'Reference material for advisers' so it is possible to check the requirements in force on any date since the introduction of Tier 4.

Sources:

Immigration Acts: www.legislation.gov.uk

Immigration Rules and Statements of Changes: www.gov.uk/government/collections/immigration-rules

Home Office information about immigration: www.gov.uk/government/organisations/uk-visas-and-immigration

1.2.1.1 Date on which Rules changes come into effect

An important general principle to bear in mind when advising students about changes to Tier 4, or any provision of the Immigration Rules, is that the requirements which apply to an immigration application are those which are in force on the date of decision by the Home Office, and not on the date of application.

The only exception to this general principle is when the Statement of Changes in Immigration Rules specifically states, usually on the first page, that applications under specific provisions will be assessed against the Immigration Rules in force on the date of application, and not on the date of decision.

This way of providing an exception to the general principle is called a saving or transitional provision. It is usually provided when PBS categories are amended. For example, when Tier 4 was introduced, the relevant Statement of Changes stated that applications made before 31 March 2009 would be decided under the previous rules. Recent Statement of Changes HC 1138 includes this kind of transitional provision for only 26 specific amendments, but does not include it for other changes it brought into effect.

The date on which an application is made is defined in the Immigration Rules. For entry clearance applications, it is the date on which the fee is paid, which is usually the same date on which an online application is submitted. For leave to remain applications, it is the date on which an online application is submitted, or the date of posting or the date on which the application is accepted at a premium service centre or, if sent by courier, the date on which it is delivered to the Home Office.

For more information about the date on which entry clearance and leave to remain applications are made, see **subsections 1.9.4.1 and 1.11.2.1** respectively.

Sources:

Odelola v Secretary of State for the Home Department [2009] UKHL 25
Immigration Rules paragraphs 30 and 34G

Kaur (Entry clearance – date of application) [2013] UKUT 00381 (IAC)

1.2.2 Guidance for applicants, sponsors and caseworkers

Throughout this section, reference is made to a number of Home Office documents which provide important clarification of the way in which the Immigration Rules are interpreted by those who implement them.

All of the documents referred to in this Section are available to download from the www.gov.uk website. The key documents are:

1. Points Based System – policy guidance

For Points Based System (PBS) decisions, the relevant documents are called policy guidance.

There are two separate sets of Tier 4 policy guidance documents, one for applicants and one for sponsors.

There is a separate policy guidance document for the dependants of Points Based System migrants.

2. **Modernised guidance and Immigration Directorates' Instructions (IDIs)**

The instructions that the Home Office issues to staff working in the UK and at the borders on how to interpret the Immigration Rules are, in many cases, called 'modernised guidance'. This guidance provides instructions to Home Office staff on how to make decisions on Points Based System applications, some other types of applications, and how to assess sponsor licence applications.

The modernised guidance has in many cases replaced sections of the Immigration Directorates' Instructions (IDIs) which provide guidance to caseworkers on matters outside the Points Based System.

This guidance should be used by entry clearance officers abroad when making decisions about whether to grant entry clearance to PBS applicants, by border force officers at entry points to the UK, and by caseworkers in the UK when making decisions about leave to remain (extension) applications.

3. **Entry clearance guidance (ECG)**

This guidance is for entry clearance officers abroad who should use it to interpret the Immigration Rules for those who are not applying under the Points Based System – for example, student visitors – and general immigration matters, including replacing lost or stolen evidence of leave in a passport and dealing with those who are exempt from immigration control.

The most relevant sets of guidance for those advising students are:

- Tier 4 policy guidance for applicants
- Points Based System (dependants) policy guidance
- Entry clearance guidance
- Immigration Directorates' Instructions (section 3 provides information about the requirements for student leave before 31 March 2009)
- Modernised guidance:
 - Studying under Tier 4 of the points-based system (under 'Studying')
 - Visiting

- Family members of PBS migrants (under ‘Working in the UK’)
- Application forms and procedures
- Administrative Review
- General grounds for refusal
- Identity checks
- Other cross-cutting information
- 3C and 3D leave
- Online payments
- Curtailment of leave
- Applications from overstayers (non-family routes)
- Police registration
- Reconsiderations
- Points-based system – evidential flexibility
- Public funds
- Retention of valuable documents
- European casework instructions
- Modernised guidance: EEA nationals, Swiss nationals and EC association agreements

The most relevant sets of guidance for those involved with sponsorship and compliance are:

- Tier 4 policy guidance for sponsors:
 - Document 1: Applying for or renewing a Tier 4 sponsor licence and highly trusted sponsor status
 - Document 2: Assigning ‘confirmation of acceptance for studies’ and sponsoring students
 - Document 3: Sponsors’ duties and compliance
 - Appendix A: Supporting documents for sponsor applications
 - Appendix B: Immigration offences and sponsorship
 - Appendix C: Civil penalties and sponsorship
 - Appendix D: Keeping records for sponsorship
 - Appendix G: Croatian workers and students
- User manuals: sponsor management system (SMS)
- Creating a CAS: guide for education sponsors, SMS guide 4a
- Bulk data transfer: technical details
- Modernised guidance:
 - Studying under Tier 4 of the points-based system (under ‘Studying’)
 - Working in the UK

- Points-based system: sponsor management
- Points-based system sponsor licensing: renewals
- Points-based system sponsor licensing: applications
- Points-based system sponsor licensing: maintenance
- Points-based system sponsor licensing: highly trusted sponsors

Sources:

Guidance for applicants:

Tier 4: www.gov.uk/government/publications/guidance-on-application-for-uk-visa-as-tier-4-student

PBS dependants: www.gov.uk/government/publications/guidance-for-dependants-of-uk-visa-applicants-tiers-1-2-4-5

Guidance for caseworkers:

www.gov.uk/immigration-operational-guidance

Guidance for sponsors:

www.gov.uk/government/collections/sponsorship-information-for-employers-and-educators

1.2.3 Case law

Applicants can challenge decisions through judicial review in the High Court or, in Scotland, in the Outer House of the Court of Session. In some cases, decisions can instead be challenged through appeals to tribunals, the Court of Appeal, or the Inner House of the Court of Session in Scotland, and Supreme Court. Cases based on European Union law can be heard in the UK tribunals and courts, and in the Court of Justice of the European Union. Human rights matters can be heard in the UK tribunals and courts, and in the European Court of Human Rights.

It is advisable to keep up to date with relevant case law which can be accessed at www.bailii.org. We highlight case law where it has particular relevance for sponsors and students.

Supreme Court judgments are binding on all courts in the UK. Judgments of other courts are binding on the Home Office, unless or until it changes the law, and on the courts and tribunals below them in each jurisdiction (England and Wales, Northern Ireland, Scotland). Reported decisions of the tribunal can be cited in other tribunal cases.

1.2.4 Hierarchy of sources

Where the different forms of information available are contradictory or lead to discrepancies, you should rely first on the Immigration Rules or other legislation, then the Tier 4 policy guidance for applicants and for sponsors, or the guidance for caseworkers, followed lastly by information for applicants on the Home Office website.

The sponsor guidance is as authoritative as the Immigration Rules when dealing with sponsorship matters that are not covered by the Immigration Rules.

Where differences between these sources are significant and students are likely to rely on incorrect information, you should notify the Home Office through its website and/or let UKCISA know through our advice line or the forum on our website. If the policy guidance appears to contain a concession (a policy which is more generous than the Immigration Rules) and your students need to rely on it, make sure that you keep a dated print-out of the policy guidance in force on the date of the student's application which can be referred to if the policy guidance changes before the date of decision, and this apparent concession disappears or is reworded.

1.2.5 Home Office staff

The Home Office has responsibility for immigration matters. The UK Visas and Immigration directorate processes applications, Border Force controls entry of people and goods, and a separate directorate deals with enforcement.

Immigration control is far-reaching, with many people having to apply for entry clearance before they make their journey to the UK. People working for a number of different branches of government are involved in decision-making at different stages of the immigration process:

1. Entry clearance officers in British diplomatic posts abroad issue visas and other forms of entry clearance to people before they travel to the UK.
2. Border force officers work at ports of entry and make decisions about whether or not to allow someone to enter the UK when they arrive here. They also carry out customs controls on goods.
3. Caseworkers working in the Home Office's offices in Croydon, Sheffield and Liverpool or at one of their premium service centres around the country make decisions about whether to allow people to extend their stay here if

they wish to stay longer than the period they were initially granted by an entry clearance officer or by a border force officer.

4. Policy staff are responsible for the policies underlying the immigration system and the drafting of the Immigration Rules.
5. Operational policy staff draft the policy and sponsor guidance and are responsible for how the policies work in practice.
6. Immigration Enforcement staff are responsible for removing people from the UK.

1.2.6 Points Based System (PBS)

The Points Based System is an immigration system that has been introduced in stages since February 2008. It applies to most people who need immigration permission (leave) to come to the UK to work or study, and to the organisations that offer them employment and/or courses of study.

As each tier has come into effect, applicants under it have lost the right of appeal against entry clearance refusals, which has been replaced by administrative review. The right of appeal against in-country refusals for Tier 4 applicants and their dependants was removed and replaced with administrative review on 20 October 2014, when section 15 of the Immigration Act 2014 came partially into force.

Applicants in tiers 2, 4 and 5 require a sponsor; those applying under Tier 1 (Graduate Entrepreneur) and Tier 1 (Exceptional Talent) require endorsement.

Those already in the UK under the previous Immigration Rules for their category are not affected retrospectively by the introduction of the Points Based System. However, if they make an immigration application after a relevant tier of the Points Based System has come into force, they will need to meet the requirements of that tier.

1.2.6.1 Legal basis of the Points Based System

The Immigration Rules provide the legal basis of the Points Based System and of most other immigration categories. The Supreme Court judgment in the case of *Alvi* has meant that any requirements that can lead to a refusal of leave must be included in the Immigration Rules and not covered only in guidance, which was what regularly happened until 20 July 2012. This now includes the format that evidence must take.

Anything that appears in guidance and not in the Immigration Rules is a concession and can be more generous or flexible than the Immigration Rules but must never be more restrictive than the Rules. This is because the Immigration Rules are laid before Parliament, whereas there are no such checks on the contents of the policy guidance. Concessions in guidance can be removed or changed without warning so it is important not to rely on them too heavily and to be aware that the primary source of information you should check is the Immigration Rules.

The Supreme Court decision in the cases of *New London College Limited* and of *West London Vocational Training College* means that the sponsor guidance is the main basis for the mandatory requirements that govern the licensing and regulation of sponsoring institutions. Lord Sumption held that the lack of parliamentary scrutiny of the guidance does not render it or the sponsor licensing system unlawful because the vetting of sponsors is one of “a range of ancillary and incidental administrative powers not expressly spelt out in the Act” but covered by the Secretary of State’s statutory power to administer the system of immigration control. The need to lay before Parliament requirements that can lead to the refusal of leave applies only to provisions that must be met by the migrant.

Sources:

R (on the application of Alvi) v Secretary of State for the Home Department [2012] UKSC 33

R (on the application of New London College Limited) v Secretary of State for the Home Department; *R (on the application of West London Vocational Training College) v Secretary of State for the Home Department* [2013] UKSC 51

1.2.6.2 Summary of the five PBS tiers

The five tiers of the Points Based System are:

Tier 1

This tier was originally aimed at highly skilled individuals. The Home Office now describes it as being for high value migrants.

On 30 June 2008, the Immigration Rules implementing the Tier 1 (Entrepreneur) and Tier 1 (Investor) categories came into effect, replacing the previous provisions for Business Persons, Investors, Innovators, Self-Employed Lawyers, Writers, Composers and Artists.

In April 2011, the Home Office announced the introduction of Tier 1 (Exceptional Talent). However, it did not accept applications under this route until 9 August 2011 with a limit of 1,000 places per year. These places are divided between the Arts Council, the Royal Society, the Royal Academy of Engineering, the British Academy and, since 6 April 2014, Tech City UK. Those applying under Tier 1 (Exceptional Talent) do not need a licensed sponsor but need to be endorsed by one of these bodies.

On 6 April 2012, the Immigration Rules were amended to introduce a new category, Tier 1 (Graduate Entrepreneur). A maximum of 20 graduates per institution can apply to stay in the UK for one year in the first instance and for a maximum of two years to develop business ideas. They must be endorsed, rather than sponsored, by a UK institution (their “authorised endorsing body”). The list of authorised endorsing bodies is published on the Home Office website and every year the Home Office invites qualifying higher education institutions to become endorsing bodies. They must be Tier 4 sponsors. From 6 April 2013, this scheme was expanded to include a maximum of 100 overseas graduates who can be endorsed each year by UK Trade and Investment to set up a business in the UK.

You can find information about all Tier 1 categories on the Home Office website at www.gov.uk/browse/visas-immigration/work-visas.

Information for institutions endorsing Tier 1 (Graduate Entrepreneurs) is at www.gov.uk/endorse-a-graduate-tier-1-graduate-entrepreneur.

Tier 2

This tier is for skilled workers with a job offer. Since 27 November 2008, it has replaced the provisions for work permit holders, ministers of religion, airport-based operational ground staff, overseas qualified nurses or midwives, seafarers, Jewish agency employees and overseas representatives.

It now has four subcategories: Tier 2 (General); Tier 2 (Sportsperson); Tier 2 (Ministers of religion); Tier 2 (Intra-company transfer). Since Tier 1 (Post-Study Work) was closed on 5 April 2012, Tier 2 (General) has become the main category of leave for graduates of UK institutions who want to stay in the UK for employment.

You can find information about all Tier 2 categories on the Home Office website at www.gov.uk/browse/visas-immigration/work-visas.

Tier 3

This tier is for low skilled workers to fill specific temporary labour shortages. The Home Office currently has no plans to introduce this tier.

Tier 4

This tier is for students, postgraduate doctors and dentists, and students' union sabbatical officers. On 6 April 2013, the Immigration Rules were amended to allow applications under the doctorate extension scheme. This scheme allows doctoral candidates who have almost completed their doctorate to stay for an additional 12 months in order to seek and take work in the UK.

On 31 March 2009, Tier 4 replaced the previous provisions in the Immigration Rules for these and other student categories with two subcategories: Tier 4 (General) Student and Tier 4 (Child) Student.

Tier 4 was introduced in four phases, with full implementation on 22 February 2010. Since this date, anyone applying for immigration permission under Tier 4 has required a valid confirmation of acceptance for studies (CAS) from a Tier 4 sponsor. The reporting duties of Tier 4 sponsorship also became mandatory from this date. Since it was introduced in March 2009, the requirements for both Tier 4 sponsors and applicants have changed many times.

We describe the requirements of Tier 4 in detail in **subsections 1.5 and 1.6**. You can also find information about Tier 4 on the Home Office website at www.gov.uk/browse/visas-immigration/study-visas.

Tier 5

This tier covers youth mobility and temporary work schemes. On 27 November 2008, it replaced the provisions for working holidaymakers, some work permits in the creative and sporting sector, exchange teachers and language assistants, GATS, International Association for the Exchange of Students of Technical Experience, International Firefighter Fellowship programme, EU Leonardo da Vinci programme, Rudolf Steiner, medical training initiative, training and work experience scheme, China graduate work experience programme, non-pastoral religious workers, visiting religious workers, voluntary workers, overseas domestic workers in diplomatic households, overseas government employees, and sponsored researchers.

Tier 5 has six subcategories: Creative and sporting; Charity workers; Religious workers; Government authorised exchange; International agreement; Youth mobility scheme.

Sponsored researchers are covered by a modified version of the Government authorised exchange subcategory, which is available only to Tier 4 sponsors who also hold a valid Tier 5 sponsor licence. Unlike other Tier 5 Government-authorised exchange applicants, sponsored researchers do not need to apply through an over-arching body, nor have support from a government department.

For details of Tier 5, see the Home Office website at www.gov.uk/browse/visas-immigration/work-visas

1.2.6.3 Sponsors under the Points Based System

The Points Based System (PBS) requires sponsors for those seeking to enter or remain in the UK under Tiers 2, 4 and 5. Tier 2 and Tier 5 employers must successfully apply to be on the Home Office's register of sponsors before they can recruit staff under Tiers 2 and 5. Education providers must have a Tier 4 sponsor licence in order to recruit students under Tier 4. They must in addition have Highly Trusted Sponsor status, which is renewable on an annual basis.

Those who are in the UK under Tier 1 (Investor), Tier 1 (Entrepreneur) or Tier 1 (Exceptional Talent), or in different, non-PBS, immigration categories which allow them to work or study (for example, the spouse or civil partner of a settled person, EEA citizens or those with UK ancestry visas), do not require a sponsor. However, Tier 1 (Exceptional Talent) and Tier 1 (Graduate Entrepreneur) migrants require endorsement.

Each category has different requirements for its sponsors. For detailed information about how to apply and the corresponding duties and responsibilities, see the Points Based System sponsor guidance for each of the tiers. These documents can be found in the Employers and Sponsors section of the Home Office website at www.gov.uk/government/collections/sponsorship-information-for-employers-and-educators.

We provide a summary of the key Tier 4 sponsorship requirements and responsibilities in **subsection 1.4**.