

MACFARLANES

GENUINENESS TESTING

JAMES PERROTT

3 FEBRUARY 2016

AGENDA

- **Introduction**
- **Tier 1**
 - Tier 1 (Investor)
 - Tier 1 (Entrepreneur)
- **Tier 2 (General) / (Intra-Company Transfers)**
 - Sponsor Licence applications
 - Leave to enter / remain applications
- **Tier 4 (General)**
- **Questions**

INTRODUCTION

- **5 main examples in the PBS of “genuineness” tests**
 - Tier 1 (Entrepreneur) – Genuine Entrepreneur Test
 - Tier 2 (General) Sponsor Licence Applications
 - Tier 2 – Genuine Vacancy Test
 - Tier 4 (General) – Genuine student
 - Tier 5 (Temporary Worker) – Genuine intention to undertake role
- **Tier 1 (Investor) – source / control of funds – “Genuine Gift”**
- **Other areas of subjectivity / flexibility within the PBS**

TIER 1 (INVESTOR)

- **Caseworkers empowered to refuse applications if have *reasonable grounds* to believe that:**
 - applicant is not in control and at liberty to freely invest funds
 - funds were obtained unlawfully, or
 - character, conduct or associations of a party providing the funds mean that approving application is not conducive to public good
- **What practical measures can be taken?**
 - In deed of gift situations, undertake “Know Your Client” / Client Due Diligence checks on both applicant and donor
 - If checks do uncover anything, be prepared to explain any issues

TIER 1 (ENTREPRENEUR)

- **Caseworkers must be satisfied that:**
 - applicant *genuinely intends and is able to* establish, take over or become a director of a business in the UK within six months
 - applicant *genuinely intends* to invest funds in this business, and
 - the funds are and will remain *genuinely available* to the applicant, and
 - the applicant *does not intend* to take employment in the UK other than under the terms specified for this category
- **Applicant must:**
 - provide a business plan, setting out proposed business activities in the UK and how he expects to make his business succeed
- **Normally tested at interview**

TIER 2 SPONSOR LICENCE APPLICATIONS

- **Caseworker assesses whether Company can offer genuine employment which meets Tier 2 (General) criteria on skill level and appropriate rates of pay**
- **Non-exhaustive list of examples:**
 - Company does not, or has never, employed anyone in a role which meets the Tier 2 requirements, e.g. Company is a small retail outlet and only has people working as shop assistants or in other low-skilled roles
 - Company says it requires (or has already sponsored) a person in a managerial role which appears unnecessary, e.g. Company is small fast food outlet and says it needs a full-time HR or publicity manager

TIER 2 (GENERAL) / (INTRA-COMPANY TRANSFER)

- **A genuine vacancy is one which:**
 - requires jobholder to perform specific duties and responsibilities for job and meets all requirements of Tier 2 (General) category for duration of vacancy shown on assigned CoS, and
 - does not include dissimilar and / or lower-skilled duties and must not have been tailored to exclude suitable qualified or skilled settled workers
- **Examples of vacancies that are not considered to be genuine include:**
 - one which contains an exaggerated or incorrect job description to deliberately make it appear to meet the requirements of the Tier 2 (General) category when it does not
 - a role that does not exist save to enable a migrant to come to, or stay in, the UK
 - advertisements with requirements inappropriate for the job on offer tailored to exclude resident workers from being recruited

TIER 2 (GENERAL) / (INTRA-COMPANY TRANSFER)

- **Caseworkers may refuse an application if they are concerned that the vacancy is not genuine, for example:**
 - applicant has been working for employer and job vacancy was not advertised
 - the description appears to be a standard or template response used for other businesses and the application is in a high risk sector
 - applicant is switching from a route that has been identified as high risk, e.g. Tier 1 (Post study worker) or Tier 4 student category

TIER 4 (GENERAL)

- **Applicant must be a genuine student**
- **R (on the application of Mushtaq) v Entry Clearance Officer of Islamabad, Pakistan IJR [2015] UKUT 224 (IAC) – held:**
 - Decision-making process manifestly unfair
 - Refusal decision tainted by irrationality
 - Case Worker Guidance relating to Tier 4 interviews and the genuine student rule had been breached

GENUINENESS TESTING

- **How onerous is the "genuine requirements" test for applicants?**
 - Introduces a high degree of subjectivity
 - Application and interpretation varies widely
- **Does the subjective element of the test leave adverse decisions vulnerable to challenge?**
 - No appeal
 - Administrative review – difficulty in substituting one subsection decision for another
 - Judicial Review – can be time consuming and costly
 - Possible to persuade the Home Office to change its decision without going down formal review routes – must have a strong case

MACFARLANES

GENUINENESS TESTING

JAMES PERROTT

This presentation is intended to provide general information. It is not intended to be comprehensive nor to provide any specific legal advice and should not be acted or relied upon as doing so. Professional advice appropriate to the specific situation should always be obtained.

This presentation is given on behalf of Macfarlanes LLP. Macfarlanes LLP is a limited liability partnership registered in England with number OC334406. Its registered office and principal place of business are at 20 Cursitor Street, London EC4A 1LT.

The firm is not authorised under the Financial Services and Markets Act 2000, but it is able in certain circumstances to offer a limited range of investment services to clients because it is authorised and regulated by the Solicitors Regulation Authority. It can provide these investment services if they are an incidental part of the professional services it has been engaged to provide. © Macfarlanes LLP 2016