

22 April 2008

**BRIEFING**  
**House of Commons debate on the UK Border Agency's**  
**Points Based System**  
**24 April 2008**

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ILPA is a professional association with around 1,000 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through training, disseminating information and providing evidence-based research and opinion. ILPA is represented on numerous government and other stakeholder and advisory groups, including the Employer's Task Force and Corporate Stakeholder Group. In addition, ILPA representatives meet regularly with those working on different aspects of the Points-Based System.

**Introduction:**

**To date, one part of the Points-Based System has been partially implemented: Tier 1 (General), for in-country applicants and applicants from India. This implementation has given rise to the following fundamental concerns, which also have implications for other Tiers of the system.**

- **The system both directly and indirectly discriminates against people on the basis of their age and their race via its maintenance requirements – (appendixes C and E of the immigration rules – added by the statement of changes in the immigration rules HC321)**
- **Despite its attempt to reduce subjectivity in decision making by removing discretion from the process of reaching decisions on entry clearance applications – the Points Based system is likely instead to have the effect of making discrimination more prevalent than it is under the system it replaces.**

**The structure of Tier one of the points based system**

When it is fully implemented there will be four subcategories of Tier one. These are:

- General, which replaces the Highly Skilled Migrant Programme (“HSMP”) – those in this category can work for any employer, or work as self-employed.
- Entrepreneurs – those intending to establish themselves in business and what are currently called innovators.
- Investors
- Post –study work (replacing the current International Graduate Scheme (“IGS”)) for those who have been educated to degree level or above in the UK.

Of these only the General category is currently operational. Since 1 April 2008 applicants in India must apply under the Tier 1 (General) category, In the UK people who entered the country under the HSMP have since 29 February had to apply to extend their leave to remain as a Tier 1 (General) migrant under the new rule 245B.

The system, like the current Highly Skilled Migrant Programme (in force since December 2006 – the report by the Joint Committee on Human Rights on the existing scheme is of particular relevance) makes no provision for ‘highly skilled’ individuals who do not have at least a Bachelors degree. Among those who appear to have no place in the new system are artists, writers or actors and sportspeople because it is not possible to qualify for Tier 1 without a degree (and they are often not employees so cannot qualify under Tier 2 either). Tier 1, like the current Highly-Skilled Migrant Programme (following the sudden changes in November 2006 which have recently been the subject of a successful judicial review), no longer takes no account of work experience or significant achievement. Salary, age (youth) and qualifications are the only matters for which ‘attributes’ points are awarded and there is a mandatory requirement to speak a high level of English and possess a certain level of clear funds. Those most likely to qualify are thus young anglophone graduates earning good salaries, and it is arguable that Tier 1 (General), like the current Highly Skilled Migrants Programme, has become primarily a graduate mobility scheme<sup>1</sup>.

### **A discriminatory scheme**

The system is inherently discriminatory. Such a fault does not only disadvantage those applicants who suffer the discrimination – since if there is discrimination in the way in which the criteria are applied, this may result in the UK not obtaining the migrants who would most benefit the economy.

### **Maintenance requirements**

It is in respect of the maintenance requirements that migrants must satisfy in respect of themselves and their families that the potential for discrimination is most obvious.

The maintenance requirements under Tier 1 have been finalised and published. Maintenance requirements will apply to other Tiers but remain to be confirmed. The levels indicated below apply to Tier 1.

To obtain entry clearance it will be necessary to demonstrate that £2,800 is available to the migrant to allow for set up / maintenance costs within the UK plus an additional £1,600 for every accompanying dependant (see Annex 1). Clearly, in real terms, this is a proportionately higher cost to an Indian national than an Australian national. This is recognised in respect of the attributed points for past earnings: the points awarded for earnings are subject to multipliers which vary according to country in which the applicant worked (see Annex 2).

The rationale for not applying the multipliers to the maintenance requirement is that the sum required is for future costs on relocating to the UK and is therefore not variable by nationality. However, no evidence has been provided by the UKBA to demonstrate that such a substantiated sum is actually necessary to prevent the migrant from becoming destitute or claiming public funds (the latter being prohibited in any event) and we understand that no research has been undertaken to

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<sup>1</sup> See *Is the New Highly Skilled Migrant Programme ‘fit for purpose?’ If not, the Government’s Proposed Points Based Immigration System is Fundamentally Flawed* Devine, L., (2007) Vol 21 No 2 IANL 90 (IANL is ILPA’s official journal, the peer review Journal of Immigration, Asylum and Nationality Law).

cause UKBA to conclude that there has been any problem detected under the current work permit scheme or HSMP (where the maintenance requirements exist but with no set sum) with migrants who have been granted entry in these categories becoming unable to maintain themselves and their families.

This cost may be so high as to prevent certain nationalities applying under Tier 1 and is therefore indirectly discriminatory on grounds of race (Annex 3). While the Agency may plead the need to support oneself as a reason to require this figure, there is no reason for this when the Highly Skilled Migrant has a particular job offer (there is nothing to stop a person offered a job determining that it is in their best interests to come as a highly skilled migrant rather than on a work permit), or can demonstrate that his/her skills are so in demand as to make the notion of languishing without a paid job for any length of time highly unlikely. After all, the attributes that such applicants attain points for are attributes which UKBA has stated have been selected on the basis that they are the best predictors of labour market success.

Further, this sum must have been in the person's bank account for each day of the last three months prior to the date of application. Even if the average balance far exceeds £2,800 just if one day during those three months the sum drops to £2799.99 the application will be refused. The UK Border Agency agreed a transitional provision for applicants applying within the UK whereby people applying in the first three months (who will thus be relying on the contents of their bank accounts during the three months before the system was announced) whereby it is only necessary to show the sum at time of application. If the maintenance requirement is to continue, the government should be urged to remove the 'three months' requirement permanently and not only for a transitional period for in-country applicants alone.

Since the launch of Tier 1 in India on 1 April 2008, members are already reporting anecdotally a decline in Indian national applicants, specifically due to the maintenance criteria. ILPA is most concerned that adequate data is taken by UKBA to monitor the changing profile of applicants as a result of these additional criteria.

### **English language**

The requirement to demonstrate English language competence to a high level (equivalent to GCSE Grade C or above) discriminates against those nationals who are not from the listed majority English speaking countries and who do not have a bachelor's degree from an English speaking university. There are two difficulties here.

The first is that historical accidents of birth are privileged over the contribution an individual may be able to make. A university degree is no proof that a person has contributed successfully to an economy – our understanding is that the UK Borders Agency has selected this criterion (as it has selected previous earnings) on the basis that it is an indicator of likely future success in the labour market. Linguistic competence may be relevant to whether a person will learn English, but the proposed system has no way of allowing for the linguistic competence of a person who does not have English as a first language but will acquire it with ease. Such a person may have highly specialised skills that do not require high level of competence in English to start work in the UK and perform well in the labour market. Were ability to speak English tested at the point of applying to extend limited leave in Tier 1, it would be easier to understand. When it is made an entry requirement, it has every appearance of being discriminatory.

### ***‘Majority English Speaking Countries’***

The second question, and one that gives rise to a clear possibility of direct discrimination, is the question of which countries are on the list of being ‘majority English speaking countries’. The Agency’s list in the Statement of Intent on Tier 1 of majority English speaking countries is as follows: Antigua and Barbuda, Australia, the Bahamas, Barbados, Belize, Canada, Dominica, Grenada, Guyana, Jamaica, New Zealand, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Trinidad and Tobago, the USA.

Canada, for example, is a dual language country and in the Francophone province of Quebec an individual need speak no English to earn a degree and a high level of earnings. States of the United States of America such as California recognise both English and Spanish as official languages. Why is Canada on the list, while Nigeria is not? If one takes the class of Canadians holding university degrees and the class of Nigerians holding those degrees, which has the greater proportion of English speakers in it? Do more or fewer Canadians than Nigerians holding Bachelor’s degrees meet the requisite level of English language? In certain West African countries, for example, the majority of the educated elite (those who achieve university degrees and thus make up the subset from which those who can qualify under Tier 1 is comprised) will speak English. The list of countries offers the greatest scope that we can see within the scheme for direct discrimination.

The language requirement will especially affect those who are on the cusp of an age category and who will therefore not receive (enough) points for age because of the delay in the timing of their application caused by the need to sit a test before the application may be submitted. This therefore raises issues of indirect race discrimination.

### **Age**

By having points available for those under 31 and tailored for different ages up to 31, the system is treating people differently on the basis of age. The UK Border Agency contends that this is to avoid younger people being disadvantaged because of their lower earnings. However, it is necessary to demonstrate that this is indeed the case, and that the effect is accurately reflected in the way the points are calibrated and then stop at age 31. ILPA has a particular concern that this criterion may unfairly disadvantage women, who may be more likely to take a career break to have children in their twenties (a combination of gender and other factors may be relevant here as ages at which people have their first children do differ from country to country and faith and cultural considerations can play a role<sup>2</sup>). The BIA should therefore undertake and publish research (including drawing on existing research) to show that this different treatment may be objectively justified and if not, adjust these criteria accordingly.

At the moment, the age criterion is stated to compensate the young for their lower earnings, but it does so in a way that may well be shown to discriminate against older people. Since December 2006, when the criterion for the Highly Skilled Migrant Programme changed, it has been more difficult for the old to compensate for this and the problem is exacerbated by the way in which it interacts with the degree requirement (see below). No longer are work experience and skills taken into account. In addition, there are no additional points to be scored for earnings above a level equivalent to £40,000 (scoring 50 points), so that those who have very high earnings cannot earn extra points on this basis. If the age criterion exists

because it assumes that young people earn less, this suggests an assumption that older people are more likely to earn more. As the scheme stands, and as it is proposed that Tier 1 will stand, there will be no opportunity for them to earn extra points for very high earnings. There is scope for investigation as to whether the current programme, and the proposed Tier 1 disadvantages older people in a way that cannot be reconciled with any measure of their likely contribution to the labour market

Members' experience is that the demographic of those applying under the HSMP and now Tier 1(General) has dramatically changed since December 2006. The impression is that the current combination of age, degree and earning requirements favour young men over other groups. ILPA raised in meetings with the BIA in August 2007 the question of how the gender profile of applicants under the Highly Skilled Migrant Programme had changed since the December 2006 changes. We were told that the baseline data to make the comparison were not available. The changed criteria in December 2006 appeared to be more the product of a desire to move to a more objective, points-based system, than a desire to attract a different profile of applicant under the Highly Skilled Migrant Programme. This raises the spectre that women may have been disadvantaged for reasons of administrative convenience.

Tier 1 does not make any adjustment for the sector in which people work and so does not recognise that a very senior caring role pays less than a very junior role in a bank. This is likely indirectly to discriminate against women. Under the pre-December 2006 Highly Skilled Migrant Programme a person who could not demonstrate high earnings could nonetheless have demonstrated skills and experience and thus there would have been compensation for a group, such as women, working in lower paid sectors. Under the current scheme, and the proposed Tier 1, such compensation is not possible.

Experience of the existing Highly Skilled Migrant Programme has demonstrated the extent to which evidential requirements that appear to be neutral are, when closely examined, based on UK or Anglophone models. The means by which people are paid, for example, would appear to have been examined through filters based on the UK tax system. Thus the question of whether dividends paid by the company are to be regarded as part of earnings is examined in a way that is based on UK tax models and may fail to reflect the realities of payments elsewhere. Current evidential requirements appear to be based on form rather substance. Not merely do they require that a person satisfy a criterion, it is required that it be satisfied in a particular way. For example, a degree certificate is accepted, a transcript is not. This increases the risks of discrimination described above and again, appears to be based on administrative convenience rather than on what would show the required attribute, or on a robust risk assessment. This could keep out workers the UK needs.

ILPA recommends that:

1. The government should reduce the maintenance funds requirements and dispense with this requirement altogether where a job offer is in place or where it can be demonstrated that the individual's skills are in such short demand that s/he is extremely unlikely to remain without a job offer for any significant period. It should in any event extend the requirement operating during the transitional period for funds to be demonstrated once, and not as a sum continuously in the bank account for three months.

2. The current list of English speaking countries should be withdrawn and the contents of any list reconsidered. If language requirements are imposed, this should be at the point of renewal of leave and not entry.
3. The government should revisit the question of a degree being an essential requirement. In addition it should amend guidance to allow for such instances as mentioned above, where, if a degree is completed later, one would not necessarily expect the lower earnings arising from being newly qualified to have been eradicated by the age of 31.
4. The government should keep detailed statistics on numbers of applications and success rates by broken down by age, nationality and gender and number of dependants and interrogate these to measure the extent to which the new requirements are making it more difficult for some groups than for others to be included.
5. The reintroduction of points for skills and work experience would provide a means to ensure that those disadvantaged on the grounds of their sex and age were able to compensate for this in other areas and would reduce the risk of discrimination against women and older people.
6. Making provision for extra points to be scored by those with very high earnings would provide opportunities for older people and for people without degrees (in which group women and older people may be disproportionately represented) to accrue points that would contribute toward offsetting the ways in which the system appears to be biased against them
9. The Agency should be clear about what it is that they wish an applicant to prove – give guidance as to what they wish to establish but do not be prescriptive as to evidence. The rules' insistence upon "specified documents" is inflexible and likely to result in further discrimination. In addition, work should be undertaken to ensure that risk assessments do not result in cases being rejected without adequate consideration of the individual case.

## Annex 1 - Tier 1 - Maintenance – required sums

	<b>Overseas</b>	<b>In UK under 12 months</b>	<b>In UK at least 12 months</b>
Main applicant	£2,800	£800	£800
Each dependant	£1,600	£1,600	£533
Example totals for a family of 4	£7,600	£5,600	£2399

# Annex 2 - Tier 1 (General) – previous earnings calculator

Country Code	Income points (£) / multiplier								
	5 pts 16,000+	10 pts 18,000+	15 points 20,000+	20 points 23,000+	25 points 26,000+	30 points 29,000+	35 points 32,000+	40 points 35,000+	45 points 40,000+
<b>A</b> e.g. UK & US	x 1								
<b>B</b> e.g. Malaysia	x 2.3								
<b>C</b> e.g. China	x 3.2								
<b>D</b> e.g. India	x 5.3								
<b>E</b> e.g. Ghana	x 11.4								



## **Annex 3 - Tier 1 - Maintenance sums – real value**

	<b>Overseas</b>	<b>In UK under 12 months</b>	<b>In UK at least 12 months</b>
'Real' value using band E multiplier (see Annex 2) for family of 4	£86,640	£63,840	£27,349