

ILPA'S RESPONSE TO THE EQUALITY IMPACT ASSESSMENT: POINTS BASED SYSTEM HIGHLY SKILLED TIER

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 and has given its views to the Border and Immigration Agency (BIA) throughout the development of the Points Based system.

1. Does this policy put in place any barriers to full participation from members of the community or communities you represent?

Yes, many groups will face difficulties in qualifying under Tier 1. In particular, the Statement of Intent for Tier 1 raises issues of:

- a. Indirect sex discrimination
- b. Indirect (and arguably direct) race discrimination
- c. Direct and indirect age discrimination

It is useful to note that throughout, the terms “direct” and “indirect” discrimination are used. These should be given the following meaning:

Direct discrimination occurs when someone is treated less favourably than another on grounds of his or her perceived or actual (age), disability, gender, nationality, religion, gender orientation or sexual orientation.

Indirect discrimination occurs where the effect of certain requirements, conditions or practices imposed has a disproportionately adverse impact on one group or other. Indirect discrimination generally occurs when a rule or condition, which is applied equally to everyone, can be met by a considerably smaller proportion of people from a particular group.

It is also useful to remember that race discrimination includes discrimination on the grounds of nationality.

There are two ways of looking at questions of discrimination in the context of Tier 1. The first is to contend that the criteria by which a person is judged to be ‘highly skilled’ – earnings, university qualifications etc., raise questions of cultural and gender bias of sufficient seriousness to amount to discrimination. One could contend, for example, that the investor class is inherently discriminatory because of patterns of distribution of wealth between men and women. The language of ‘highly skilled’ is arguably unfortunate – as press furores have revealed¹. Moreover, the derivation of the attributes against which points are scored, stated to be ‘*points will be awarded for attributes which measure the applicant’s potential value to the UK labour market*’², is obscure. ‘Highly skilled’ is not a

¹ See for example *Fury of Taxi Drivers as Minister calls them ‘low-skilled’* 9 August 2007, <http://london-taxi.taxiblog.co.uk/165/fury-of-taxi-drivers-as-minister-calls-them-low-skilled/>

² *A Points-based system: making migration work for Britain* CM 6741, paragraph 43

clear, albeit complex, descriptor, on a par with, for example 'student'. It is a matter of some complexity to divide questions of semantics from those of value and bias in this context. Without wishing to underplay the strength of these arguments, ILPA has limited comments to make here as some of the matters raised go beyond our specialist expertise.

The second way of looking at the question is to say 'Do the criteria by which the highly skilled and those in Tier 1 have been defined prejudice certain groups who might be expected to hold those attributes as compared to others?' Thus, to return to the example of the investor category and gender, the question would become 'Among the men and women with a million pounds, are women disadvantaged by comparison with men (or vice versa) by the other criteria for the category? Here the criteria must be viewed as they interact, not only in isolation, and questions of evidence will be as important as questions of the criteria themselves. It is on these questions that we focus in this response; please see answers set out below for further details of the impact.

2. What opportunities, and what challenges, does this policy offer?

As a Points Based system, Tier 1 aims to reduce subjectivity. ILPA has previously contended³ that this goal may prove illusive: questions of e.g. the probative value of documents will always involve exercise of judgment. As subjectivity is reduced, there should be less room for prejudiced decision making on the grounds of race, religion, disability, gender, gender orientation, sexual orientation and age. At present, accusations of prejudice are dealt with through an appeals system. What happens where there is no appeals system is discussed in the reports of the Independent Monitor for entry clearance applications without right of appeal.

Whilst it is laudable to seek to remove direct discrimination/ prejudice in decision making, in reality, by removing the ability to exercise discretion, instances of indirect discrimination may become more prevalent. To give just one example: in Tier 1 attempts have been made to set out the documents that will be held to evidence that particular criteria are met. Where the type or format of these documents is based upon UK models, then people ordinarily resident in countries whose documentation (be it payslips, contracts of employment, or bank statements) are most similar to those produced in the UK will have advantages over others. It is the case that the majority of people resident in the vast majority of countries will be nationals of those countries, thus the specifying of particular documentation gives rise to a risk of indirect discrimination on the grounds of nationality and thus race. It is of course no answer to indirect discrimination to say all those applying from country X are treated in the same way, whatever their nationality. If it can be shown that the majority of those applying in country X are nationals of that country, then, in the absence of justification of the differential treatment on objective grounds, there is indirect discrimination.

It is incumbent upon the Border and Immigration Agency to allow adjustments to the points based system to minimise the adverse impact that it will have upon certain groups, including women, disabled people, certain nationalities and certain age groups.

The challenges and the opportunities are to design a system which removes direct discrimination from the decision making process, whilst having enough discretion to prevent decisions being so universally applied as to be indirectly discriminatory.

The following must be considered when implementing policy:

1. ensuring that documentary requirements can be met by all groups, and where they cannot, allowing flexibility;

³ See for example our briefings in the Immigration Asylum and Nationality Bill, on the briefings section of www.ilpa.org.uk and our submissions on the submissions part of that website.

2. ensuring that the points available are designed, and include adjustment mechanisms, to avoid indirect discrimination on grounds of age, disability, gender, nationality, religion, gender orientation, sexual orientation and other categories relating to age.
3. ensuring that processes and timings at each of the diplomatic posts and outsourced partners do not create direct or indirect discrimination, either by applying a universal rule stringently and without regard for the indirectly discriminatory impact this may have on certain groups or by having such different practices, procedures and timings that certain groups are adversely affected, for example where nationals of country X have a noticeably worse service than nationals of country Y (creating the grounds for an accusation of direct discrimination).

3. Will this policy have a disproportionate impact, positive or negative, on any particular groups or communities?

The following policies will have disproportionate effects and give risk to discrimination or to a risk of discrimination:

1. English language – The requirement to have to take a test to demonstrate English language ability 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 (race and nationality) 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 Border and Immigration 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 market⁴. 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.

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 BIA’s list in the Statement of Intent on Tier 1 of majority English speaking countries⁵ 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

⁴ See *A Points-based system: making migration work for Britain* CM 6741, paragraph 43 ‘points will be awarded for attributes which measure the applicant’s potential value to the UK labour market’ and *passim*.

⁵ *Highly Skilled Migrants Under the Points Based System Statement of Intent* Annexe B note 6

list of countries offers the greatest scope that we can see within the scheme for direct discrimination.

The language requirement will especially impact 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.

2. The age criterion.(Tier 1 – general) – 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 Border and Immigration 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 role⁶). 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

The question of proof of age may also be a complex one – UNICEF’s Progress Report for 2007 states:

‘Around 51 million children born in 2006 have not had their births registered. Forty-four per cent of these children live in South Asia. One in three developing countries has birth registration rates of less than 50 per cent. Two out of three African children under age five are not registered.’⁷

Similar reports have been produced for many years. Thus, if a premium is to be placed on age, it is necessary to look very carefully at what is required to prove age. A requirement of a birth certificate is likely to introduce indirect discrimination on the grounds of nationality. ILPA’s report on disputes of age of children⁸ is well-known, but we see the problem in a much

⁶ See the United Nations Statistics Division Demographic and Social Statistics – Age of mother at birth of first child ever born. <http://unstats.un.org/unsd/Demographic/sconcerns/natality/natmethods.htm>

⁷ See http://www.unicef.org/progressforchildren/2007n6/index_41845.htm

⁸ *When is a child not a child? Asylum, age disputes and the process of age assessment* Crawley, H., for ILPA, 2007, available on www.ilpa.org.uk

wider variety of contexts, for example in cases where it is not accepted that elderly parents seeking to enter as dependants under rule 317 of the Immigration Rules are over 65.

3. Requirement for a degree (Tier 1 – general) – It is impossible to score the numbers of points required for Tier 1 without holding a degree. The notion that a degree level qualification is required for Tier 1 entry is problematic in the sense noted in our introduction – that a degree is proof of having skills likely to benefit the UK may be seen as the product of cultural and gender stereotypes, not to mention an attitude to the importance of higher education qualifications with which younger would-be applicants may have grown up, but which may not have prevailed when older would-be applicants were of an age to decide whether to continue their education or start work. It would be very interesting to examine, across a range of countries, statistics on the percentage of the population holding a degree stratified by age.

As to the way in which this criterion interacts with the other criteria: women, and particularly women from certain cultures, may go to university later or take longer to complete a degree because of child-bearing responsibilities, and the age at which people embark on a degree may also differ from country to country (earnings is part of this mix – if the degree finishes later, one would not necessarily expect the lower earnings arising from being newly qualified to have been eradicated by the age of 31).

Under the Highly Skilled Migrant programme existing prior to December 2006, there was scope to compensate for the lack of a degree by demonstrating work experience or skills. This provided a mechanism by which to ensure that women or older people were not unfairly disadvantaged. It is possible that the ability to score extra points for earnings above £40,000 also contributed, as discussed at point 2 above. No compensating mechanisms are in place in the current scheme and that proposed under Tier 1.

4. Women (Tier 1 - general)– ILPA is not an organisation concerned with the collation of sociological data nor its analysis. However, it appears that in every country where published analyses of male/ female pay are available, women earn significantly less than men⁹. For example, in February 2006, it was reported that women in the UK were paid 13% (using a median average) or 17% (using a mean average) less than men¹⁰. Having a previous earnings requirement that applies to men and women without taking the pay gap into account has a negative impact on women’s ability to qualify under Tier 1. One might contrast older models (pre December 2006) of the Highly Skilled Migrant programme where previous experience was taken into account, making the quality of the work done, rather than only the remuneration for that work, of importance. Members’ experience is that the demographic of those applying under Tier has dramatically changed since December 2006¹¹. 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. We would strongly suggest that the BIA collate these data (applicants must specify their gender and age on application forms so the data is available), if necessary by the use of examination of random samples. We anticipate that the sampling would show that the combination of age and earning requirements, and the removal of points for work experience, has disadvantaged women.

⁹ See the International Labour Organisation’s Annual *Global Employment Trends for Women* at www.ilo.org

¹⁰ Women and Work Commission’s *Shaping a Fairer Future*
http://www.womenandequalityunit.gov.uk/publications/wwc_shaping_fairer_future06.pdf

¹¹ For a more detailed discussion of the changes 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).

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.

5. Part-time workers (Tier 1 - general) – it is a matter of UK case law that the majority of part-time workers are female and that measures which discriminate against part-time workers therefore indirectly discriminate against women. Having an earnings requirement for the previous 12 months without having an adjustment for part-time workers indirectly discriminates against women.
6. Areas of expertise (Tier 1 – general) – In the UK it has been reported that women are more likely to enter poorly paid professions than men¹². It would be useful to examine equivalent data for other countries. For example, globally, are there proportionately more women in the caring professions than men and proportionately more men in the financial services industry than women? What are the pay scales within these professions? At present 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.
7. Funds requirement – 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. This is a proportionately higher cost to an Indian national than an Australian national, as is recognised by the adjustments made for earnings in Band A-E countries. This cost may be so high as to prevent certain nationalities applying under Tier 1 and is therefore indirectly discriminatory on grounds of race. While the BIA may plead the need to support oneself 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.
8. Evidential requirements - ILPA has long been critical of letters of refusal that, to paraphrase, say, for example ‘Lots of documents from the Indian sub-continent are false; therefore we do not believe yours are genuine.’ Risk-profiling is one thing, direct or indirect discrimination on the grounds of race, religion or nationality is quite another. The distinction between them is not merely the quality of the general evidence base but the way in which the individual case is judged against the evidence. The most obvious ‘subjective’ or ‘judgement’ element remaining in Tier 1 is that of the question of the falsity or genuine nature of documents. The scope for discrimination – unjustified differential treatment on the grounds of nationality through ‘guilt by association’, is enormous. That false degree certificates have been produced from a certain country or university maybe a reason to examine a person’s documents with care, it is not a reason to reject them or to conclude that they are false without evidence in the individual case.

¹²See, July 2007 Communication From The Commission To The Council, The European Parliament, The European Economic And Social Committee And The Committee Of The Regions *Tackling The Pay Gap Between Women And Men*
http://ec.europa.eu/employment_social/news/2007/jul/genderpaygap_en.pdf

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. Bank statements or payslips that do not resemble UK bank statements or payslips may not be held to prove earnings, but the combination of documents required does not allow a different combination of documents that will satisfy the requirements to be produced by applicants from certain countries. Attempts to draw up very tight evidential requirements are likely to run repeatedly into cultural specificity amounting to indirect discrimination. As stated above, it is no answer to indirect discrimination to say all those applying from country X are treated in the same way, whatever their nationality. If it can be shown that the majority of those applying in country X are nationals of that country, then, in the absence of justification of the differential treatment on objective grounds, there is indirect discrimination.

Current evidential requirements appear to be based on form rather than 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.

4. If you have identified any disproportionate impacts, what changes could we make to this policy to mitigate them?

1. English language – 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.
2. Those over 31 years old (Tier 1 – general) – The Border and Immigration Agency should undertake and publish research to determine the extent to which age affects earnings and should either demonstrate that the giving of additional points to those under 31 can be objectively justified or adjust this criterion. Such adjustment may involve having different age-related points for men and women.
3. Requirement for a degree (Tier 1 – general) – The Border and Immigration Agency 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. Women (Tier 1 - general)– The Border and Immigration Agency should examine the available statistical information on the differential earnings between men and women and adjust the previous earnings criterion accordingly – either in isolation or in conjunction with the age criterion.
5. Part-time workers (Tier 1 - general) – The Border and Immigration Agency should examine the available statistical and other information on the gender composition of the part time work-force in different countries of the world. Points for earnings (and/or the time period during which such points can be accrued should be adapted accordingly).
6. Points for skills and work experience. As described above, 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.

7. Points for earnings in excess of the equivalent of £40,000. As discussed above, 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.
8. Areas of expertise (Tier 1 – general)
See point 4 (above).
9. Funds requirement – The Border and Immigration Agency should reduce the 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
9. Evidential requirements – The BIA 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. 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).

Elizabeth White

pp. Sophie Barrett Brown
Chair
ILPA
24 January 2008