



**COMMISSION FOR
RACIAL EQUALITY**

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Lin Homer
Director General
Border and Immigration Agency
2 Marsham Street
London
SW1 4DF

Dear Lin,

Re: Changes to the Highly Skilled Migrants Programme

Further to recent correspondence between the Commission for Racial Equality (the Commission) and the Borders and Immigration Agency (the Agency), I wanted to write to you about the Commission's concerns regarding the development and the content of the race equality impact assessment (REIA) which has recently been published in respect of the changes to the Highly Skilled Migrants Programme (HSMP).

The recent High Court decision in the case of *BAPIO v Home Office* and the Department of Health found that the Secretary of State for the Home Department failed to comply with his duty under section 71 of the Race Relations Act 1976 (the Act) before deciding to make the changes in the Immigration Rules for Postgraduate Doctors and Dentists. In your letter dated 2 May 2007 you assert the importance of the race equality duty and the obligation of the Agency to produce REIAs prior to Rules changes. In this context, the Commission considers that raising its concerns regarding the REIA will assist the Agency in ensuring that it complies with its statutory duty.

As you will be aware, the Commission wrote to you on 12 March 2007 to outline the need for the REIA of the proposed Rules changes to be a rigorous and robust assessment of the potential impact of the proposed policy. You will also be aware that there has been considerable stakeholder unease about the changes and the lack of consultation. These concerns have been directly relayed to the Commission, including those from a significant national organisation which has met with Mr Byrne to appeal for reconsideration of the changes.

The Commission has now had an opportunity to consider the content of the REIA. We are of the clear belief that the REIA of the changes to the HSMP does not fully comply with the requirements of the Race Equality Duty. The Commission's concerns relate to both the process undertaken and the coverage of race equality within the REIA. In

drawing the Agency's attention to these concerns, we would ask that the Agency take proactive steps to address these concerns as soon as possible. At this stage, I only propose to outline the main areas of concern, this is by no means an exhaustive list, but represents the key areas which require further examination. The Commission's primary concerns include:

- The failure to publish the REIA until after the Rule changes came into effect significantly undermines the potential for the REIA to help shape the core policy, and limits stakeholders from providing meaningful comments on its content. The REIA does not appear to have been published in an accessible format and the Commission was only able to access a copy after numerous direct requests.
- The absence of any consultation on the proposed changes prior to introduction. The court in *BAPIO* criticised the failure of the Home Office to consult with affected parties on the proposed changes. Once again, it appears that consultation with key stakeholders has not taken place. The justification that is provided in the REIA is weak and unsubstantiated. No evidence is provided to support the suspicion that a rush of applications would ensue, or what the impact of this rush would be. Furthermore, a failure to consult cannot be replaced by internal "*consideration to the effects of the policy on all stakeholders*". Consultation on the proposed Points Based System, a separate policy which does not make explicit the premature changes to the HSMP, reveals that the advice of stakeholders has not only been ignored but directly contradicted¹. For example, respondents indicated that age and previous salary were among the least important attributes for Tiers 1 and 2, and emphasised that skills and English language should be prioritised. However, age and previous salary have become core priorities through the changes to the HSMP.
- The lack of evidence of analysis of the impact of the existing HSMP criteria. An attempt is made to predict whether the changes will result in a large-scale reduction of successful applications. It is alleged that the current system is subject to abuse and that the new changes will allow new applications from economically valuable migrants. However, no evidence is provided to support the presumption that these new valuable migrants are currently being excluded, and that the changes will target only those who seek to abuse the system. Over half the respondents to the Points-Based System consultation referred to above, indicated that they believed the proposed design for Tiers 1 and 2 (to replace the existing HSMP) *would* exclude migrants who currently enter under the HSMP arrangements. Instead of addressing this clear discrepancy, the REIA refers to EEA nationals and the advantage they will experience — an unusual inclusion considering that this policy is not applicable to them. A significant reduction in the number of successful applications from non-EEA nationals will no doubt create space in the workforce for EEA nationals looking to fill managerial and professional positions. As the REIA rightly asserts, the aim of the HSMP should be to attract the mostly highly skilled migrants to the UK and not to create space for EEA nationals at the expense of non-EEA nationals.

¹ Page 44, Q11, Fig. 8, 'A Points Based System: Making Migration Work for Britain', March 2006

- The REIA correctly stated that as a result of section 71A of the Act, the duty to promote equality of opportunity between persons of different racial groups does not apply in relation to the carrying out of immigration and nationality functions. However, the REIA neglected to address the first limb of the general statutory duty outlined in section 71(1)(a) – to eliminate unlawful racial discrimination – and shows no evidence of consideration of the duty to promote good race relations under section 71(1)(b).
- The failure to address potential adverse impact of the proposals on ethnic minority communities, particularly those suffering the ethnic penalty in the workplace², prior to introduction of the changes. Government research supports the claim that ethnic minority communities experience differential outcomes in the workplace³. This has been backed up by more recent research by the Joseph Rowntree Foundation⁴. Their April 2007 report shows that not only do substantial employment gaps remain⁵, but after controlling for other factors and characteristics, persistent differences remained in social class as measured by occupational status between white groups and other ethnic groups in 2001. All ethnic minority groups experienced lower earnings than white people with differences ranging from 10% for Chinese men to 27% for Bangladeshi men. Most importantly, the research highlights that ethnic minority graduates were finding it increasingly difficult to obtain high-status jobs, and that earning gaps were substantial for men in professional and managerial occupations⁶ – precisely the sort of roles that an HSMP member would seek to fill. This is worrying given that criteria for extension and settlement under the Highly Skilled category demand a high level of income that could only be achieved through access to such professional and managerial positions. The REIA only considers previous income in the context of varying levels of income between countries and fails to address the difference in salary between ethnic groups in the UK labour market. The Agency may not be responsible for the ethnic penalty that prevents individuals accessing these positions and pay grades, but it is obliged, as part of the REIA, to consider the potential impact upon a range of ethnic minority communities, particularly where there is evidence of existing differential outcomes. The failure to do so may mean that this policy perpetuates or reinforces existing situations of racial discrimination within the workplace.
- The wholesale absence of the consideration of relevant data and research, such as that highlighted above. The Home Office Guidance Summary of the Equality Impact Assessment Process clearly states that “*You will need to look at existing information*

² For further details on our concerns see letter to Lin Homer from Nick Johnson, 12 March 2007

³ Ethnic penalties in the labour market: Employers and discrimination, Professor Anthony Heath and Dr Sin Yi Cheung, DWP research report no. 341, 2006

⁴ Ethnic minorities in the labour market: dynamics and diversity, Ken Clark and Stephen Drinkwater, Joseph Rowntree Foundation April 2007

⁵ Black Africans, Pakistanis and Bangladeshis achieved far lower employment rates than white people in 2001.

⁶ The research shows that Black Africans and Bangladeshis earn up to 25% less than white men in similar positions.

when considering whether there are concerns that the policy could have a differential impact on a particular community or group, e.g. racial group...”⁷

- The failure to provide data or reasoned argument to support the Department's dismissal or justification of potential adverse impact. The REIA fails to examine the impact of removing the category for previous work experience, makes unsubstantiated claims that removal of the provision for significant/exceptional achievement will improve equality, and offers no evidence to support the belief that English language ability, no doubt necessary for success in the UK labour market, must be fluent prior to arrival. The REIA is over-reliant on phrases such as 'we expect', 'we anticipate', 'we hope', and 'we consider' and makes unsubstantiated judgements of what is 'likely' or 'potential'. Despite the lack of evidence of research or data analysis, the REIA makes the following statements:

"Those who do not pass the test at extension stage will fail to do so in most cases because they have been unable to secure work, which will not be related to any racial or national factors."

"these changes do not, except in a few minor cases, make it harder for nationals of certain countries to be successful under the scheme."

Where such data, evidence or analysis exists to support these statements, it should be presented. Any assessments of likely outcome should be linked to a particular source of data or evidence. Where this is not currently available one would expect to see a specific action point requiring the collection of relevant data.

- The failure to identify appropriate actions in response to identified adverse impact. The REIA claims to have actively taken steps to mitigate for potential negative impact, although there is almost no evidence of these steps, particularly in the areas of concern that we have highlighted above. The REIA acknowledges that the new rules on verification may disadvantage people from particular countries but makes no effort to mitigate this and fails to ensure adequate safeguards with regard to caseworkers' application of 'reasonable doubts'.
- The distinct lack of monitoring of existing processes and those proposed by the changes. The REIA admits that *"The system is not perfect"* but does not clarify what processes the Agency will put in place to effectively monitor the impact of these changes, how relevant and regular statistical information will be gathered, how ongoing consultation will take place and what actions will be taken to address adverse, differential and disproportionate impact. There is no action plan establishing timelines, outlining processes for reviewing the policy, indicating plans for publication of the REIA and associated research and data, highlighting the need for further research or attributing responsibility for reviewing the policy.

⁷ Page 9, Guidance Summary of the Equality Impact Assessment Process, Home Office. Supplied to us in a letter from Lin Homer to Nick Johnson on 2 May 2007

- It is not clear whether an REIA auditing tool has been used to carry out the REIA. The Agency has recently supplied the Commission with a copy of the Home Office Guidance Summary of the Equality Impact Assessment Process, which does not appear to have been consulted while producing this REIA.

I would be grateful if you could set out how the Agency will:

- i. Address the substantive concerns identified above and incorporate these into the policy.
- ii. Ensure that the comments relating to the REIA process and content of the REIA are incorporated into the changes at the earliest opportunity.

I look forward to your detailed response outlining how the Agency will respond to the Commission's concerns by 5 July 2007.

I'm sure it is no surprise to you that we have been contacted by the HSMP Forum, with whom Liam Byrne has also met concerning this matter. They have asked to be kept up to date with correspondence so we will be sharing this letter with them.

Yours sincerely



Nick Johnson
Director of Policy and Public Sector

cc. Amit Kapadia, HSMP Forum