

29 November 2007

**Equality and
Human Rights
Commission**

Mr Amit Kapadia
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equalityhumanrights.com

Dear Mr Kapadia

Re Changes to Highly Skilled Migrants Programme

Further to your emails and our recent telephone conversations I am writing, as requested, to confirm that the Equality and Human Rights Commission (EHRC) now has responsibility for enforcing the Race Relations Act 1976 (the Act), and is aware of the concern that the Commission for Racial Equality (CRE) had about the introduction of the rule changes to the above programme, in particular the extent to which they were introduced in full compliance with the race equality duty under s71(1) of the Act. I refer in particular to the CRE's letter dated 6th June 2007 which outlines its critique of the Home Office's race equality impact assessment (REIA). The Home Office's reply of 6th July 2007, which I attach, accepts that the REIA had significant omissions and did not comply with Home Office guidelines. Although it addresses some of the points raised in the CRE's letter, the EHRC does not agree that the reason given for not publishing the REIA prior to the rule changes is legitimate. Furthermore, consultation forms part of the impact assessment requirement and the reasons for not consulting do not appear to be valid. Consideration of the race relations aspect of the duty also remains brief.

The Home Office concedes that the REIA should have included details of their monitoring processes, and undertakes to monitor the rule changes. The race equality duty is a continuing one and the EHRC would expect that these are sufficiently robust to ensure that any monitoring of policies being implemented identifies any adverse impact and that the public authority in question introduces measures to mitigate such impact.

Yours sincerely



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Dear Nick

Re: Recent changes to the Highly Skilled Migrant Programme

1. Thank you for your letter of 6 June expressing your concerns over the content of the Race Equality Impact Assessment (REIA) drawn up for the November 2006 changes to the Highly Skilled Migrant Programme (HSMP). As I have mentioned to you previously, I take the Race Equality Duty very seriously, and I value your engagement with us on this issue. The HSMP REIA had significant omissions and did not comply with Home Office guidelines. However, in practice we went beyond what the REIA recorded in our consideration of the race equality impact of the HSMP changes, as I detail below. You raise a number of serious issues, and I would like to respond to them in detail.

Timing and publication

2. The REIA was drawn up before the rules change in November 2006. We did not publish it before the rules change because of our concerns that an announcement of the changes to the HSMP prior to implementation would lead to a rush of speculative applications. This would have compromised our ability manage the transition from the 'old' HSMP to the new. A core component of the new policy is to ensure that all those extending their leave under HSMP are making an economic contribution to the UK by finding highly skilled employment. Under the 'old' HSMP this was not always the case.
3. Previous policy announcements have led to surges of applications. HSMP applications increased by over 110% on the previous month in March 2005 following the announcement of the IND Five Year Plan in February 2005, and by nearly 50% following the publication of the Command Paper on the Points-Based System in March 2006. It was reasonable to assume that the announcement of a tightening of the rules would lead to another rush of speculative applications.

Consultation

4. The court in the *BAPIO* Judicial Review did not criticise the Home Office for the failure to consult with the affected parties prior to the rules change: it rejected *BAPIO*'s claim that the Home Office was under a duty to consult. It found that 'if there would otherwise have been a duty to consult, it was inapplicable for good administrative reasons', specifically, a concern about applicants applying before they would otherwise have done so. It was fully justified not to conduct a public consultation prior to the changes to HSMP for this reason.

5. Our decision not to consult publicly on the HSMP changes was consistent with Home Office guidelines. As stated in paragraph 28 of Section 5 of the Race Equality Scheme that applied at the time of the changes, 'IND will not normally consult in circumstances where to do so might have significant adverse operational consequences or prejudice the public interest'.

6. It is important to remember that the principles behind the changes to HSMP- deciding which attributes are the best predictors of labour market success- had in any case made up a significant part of the July 2005 full public consultation on the Points-Based System.

7. English language and skills, identified by respondents as the two most important attributes, have been included in the criteria under HSMP: there is an English language requirement, and the skills criterion is reflected in the points awarded for qualifications. The fact that respondents did not consider age and previous salary the most important attributes does not prevent us from using these criteria when we have rational grounds for doing so.

Analysis of the impact of 'old' HSMP criteria

8. We conducted research within the Home Office on the 'old' HSMP criteria to discern which criteria were the best predictors of labour market success. I attach a summary of the research. That the 'old' HSMP scheme was subject to abuse was evidenced by the fact that we received applications submitted with false or fraudulent documents. The new documents verification powers were instituted to deal with this problem.

9. The REIA mentioned EEA nationals only in order to point out that if the new HSMP were to reduce the numbers of HSMP participants in the UK (which it makes clear is not a policy intention) EEA nationals may benefit because there would be less competition for jobs. This is a valid point to make in a REIA. We do not anticipate that the new scheme will result in a significant reduction in the number of successful applications, and our monitoring of the scheme will detect this if it occurs

Duty to promote good race relations

10. The REIA mentioned the duty to promote good race relations in the final two paragraphs of the document. It clearly states that an effectively functioning immigration scheme that meets its objectives may have a positive impact on race relations in the UK.

The 'ethnic penalty' in the workplace

11. The HSMP extension test places significant weight on earnings in the UK. This is because the purpose of HSMP is to attract and retain the most highly skilled migrants in order to boost Britain's economy. The most important measure of their economic contribution is their salary. If HSMP participants are unable, for whatever reason, to make an economic contribution to the UK economy, then they have not met the objective of the scheme, and it is right that their leave under the scheme should not be extended.

12. It must be remembered that the HSMP is one of a number of routes that allows entry to the UK labour market. It is designed specifically for the most highly skilled, who contribute most to Britain's economy, and the eligibility criteria are correspondingly demanding. Those who cannot meet the requirements for HSMP may still be able to gain leave in the UK under another category of the Immigration Rules, such as that for work permit employment.

Impact of the removal of the 'work experience' and 'significant achievement' criteria

13. We removed the 'work experience' and 'exceptional achievement' criteria because they were not accurate predictors of labour market success, and required a more subjective judgement than the clear, objective criteria we now use to assess applications. Any disproportionate impact on particular national groups will be detected in the monitoring process I outline below.

14. The HSMP does not require applicants to be 'fluent' in English prior to arrival, as you suggest. The English language requirement is set at IELTS level 6 or equivalent. Someone with IELTS level 6 is described by IELTS as being a 'competent user' who has generally effective command of the language despite some inaccuracies. A 'fluent' user would be at IELTS level 9, a very much more demanding level of language proficiency.

Mitigation of identified adverse impacts

15. The REIA identified potential adverse impacts with regard to new attributes, the English language requirement, the new test at the extension stage, and the new rules on document verification. It goes on to outline the steps we have taken to mitigate them. The REIA also detailed the extensive transitional arrangements that we put in place so that current HSMP participants who are making an economic contribution to the UK, but who will not be able to pass the new HSMP points test for extension applications, will be able to extend their stay

in the UK. The new powers to refuse specific documents about which case workers have reasonable doubts (for example, where evidence exists that fraudulent examples of a particular degree certificates are widely available) are strictly defined in the guidance. Applicants are given clear information in the published guidance notes to inform them of the new verification requirements, and are able to apply for a review of their application if it is refused. I am confident that this constitutes a sufficient safeguard over the use of the new powers.

Monitoring

16. I acknowledge that the REIA should have included details of our monitoring processes. We are conducting an extensive monitoring exercise on the new HSMP, analysing both initial and extension applications, and monitoring the reasons for refusal for refused applications. This data can be disaggregated by nationality. We will be able to identify adverse, differential, or disproportionate impacts on particular national groups caused by the changes. Interim results of this monitoring have already been shown to the Minister of State for Immigration and Asylum, Liam Byrne, and shared with other government departments. This monitoring will continue, and is being used to inform our design of the Points-Based System. [The data so far demonstrates that the number of successful initial applications under the new HSMP is on-trend, maintaining the year on year increase in the numbers of successful applicants. The top ten nationalities using HSMP (by volume of applications, comparing Q1 2006 with Q1 2007) has remained virtually the same, with Malaysia replacing Bangladesh in tenth place the only change. India remains in first place. Five of the top ten nationalities- India, Nigeria, South Africa, China, and Malaysia- have seen the approval rate increase under the new HSMP. This strongly suggests that the new HSMP is not having a disproportionate impact on particular nationalities, though we will continue to monitor this.]

17. I believe we took care to consider the race equality impact of our policy, and have taken concrete steps to mitigate those adverse impacts that were identified as appropriate. Our detailed monitoring of the new system will allow us to amend the system in the future if we find that it is having a disproportionate impact on particular groups.

18. I would be happy to talk further on any of these points if that would be helpful. As I said when we talked on the telephone, we have to accept that much of our core business is about making judgements as people's entitlement is based in part on their background, ethnicity and skills. That is why we are not subject to all the components of the Race Equality Duty. Nonetheless, we are committed to the highest standards of behaviour and thinking around equality issues.

Lin Homer

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