



# Home Office

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24 NOV 2006

*Dear Chris*

Thank you for your letter of 16 November about the recent changes to the Highly Skilled Migrant Programme (HSMP).

We have made these changes in order to make sure that the people who succeed under the programme are those who will make the greatest contribution to the UK economy, to make the requirements clearer and more objective and to make sure that the programme is robust against abuse. I do understand the concerns which you have raised and I will deal with them in turn.

## **Consultation and timing**

1. I should first clarify that these changes are not the points based system (PBS) and that we have not yet introduced the PBS. The changes are, as the announcement stated, the first step towards the PBS, but they are different to that system. The new attributes are indeed the same as those set out in the PBS Command Paper. However, we have changed the HSMP attributes on two previous occasions within the brief lifetime of the programme and these changes are not different in kind to those. Indeed, HSMP has always been a 'points based system'. Many of the features which will define the PBS – the introduction of control tests (for example, funds), the move to a one-stage decision process for Tiers 1-3, and the removal of the right of appeal in entry clearance cases – have not been introduced with this change. It is therefore not correct to assert that we have now introduced the PBS without consultation.

2. The note of your meeting with James Quinault, which you enclosed with your letter, records that James Quinault said that there would be no further formal consultation on general matters relating to the PBS. It is not our normal practice to carry out formal public consultations on changes to the Immigration Rules, and I strongly dispute the contention that we have broken any undertakings to consult. James Quinault did also mention that there would be a new employers group. We did announce the establishment of an Employers Taskforce as part of the announcement relating to HSMP. This will exist in addition to the Joint Education Taskforce and the Arts and Entertainment Taskforce to support us in the implementation of proposals for the PBS.

3. Laying a Statement of Changes to the Immigration Rules before Parliament for less than the usual period of twenty-one days is not a step which we take lightly, although it is not unprecedented. We do this only if there are very good reasons. Such reasons exist in this case. I note that you doubt that there would have been a rush of speculative applications within the twenty-one day period. In fact, after the publication of the PBS Command Paper in March, which merely set out broad policy for changes at an unspecified point in the future, there was a very large rise in the number of HSMP applications. An announcement of a definite policy change within three weeks would, I believe, have led to an even larger increase in the number of applications, which would have resulted in very significant operational difficulties, and, as a result, poor customer service for applicants. In the light of this, there is no reason not to bring the changes in quickly. However, by making the forms and guidance available during the suspension period, we have tried to avoid inconveniencing our clients.

4. You mention that the working day had finished in much of the world by the time the HSMP announcement was made. It was not the intention that 7 November should serve as the notice period for the change. The Rules came into effect one day later, rather than on the day when they were laid, to avoid any confusion about when precisely the Statement of Changes took effect.

5. The changes will come into effect on 5 December and we will be monitoring their impact, fully evaluating the new arrangements before we make formal preparations for the implementation of Tier 1 of the PBS.

6. You are also concerned that people who were in the process of preparing their HSMP applications have been disadvantaged by the changes. I accept that applicants in some cases may need to make further enquiries to obtain additional documents, but this is unlikely to result in significant additional expense – applicants will possess many of the necessary documents themselves and are likely to be able to use some of the others which they were already preparing to submit. In fact, applicants can still submit applications on the old FLR (IED) form during the suspension period, so they will not necessarily have to redo their whole application. They can either send

in additional material or wait for us to write out to them, requesting additional documents. Although we regret any additional time and expense faced by applicants, this is justified by the need to make sure that our policies are implemented. In addition, people are unlikely to have, or should not, make significant changes to their lives until their application has been approved, which would not have been guaranteed even before the changes.

### **Tests at extension**

7. I do not accept that those who receive a grant of leave in a category have a legitimate expectation that the rules for further grants of leave within that category which existed at the time of their first grant of leave will apply to them for the rest of the time that they spend in the UK. The rules must be capable of being changed from time to time so that the Government can carry out its policies – in this case, to ensure that those granted further leave to remain under HSMP will benefit the UK economy. The power to make changes to the Immigration Rules, as laid out in the Immigration Act 1971, is not restricted to changing the rules for entry, or to changing the leave to remain rules only for those who obtained leave to enter when those were in force. The only expectation which applicants should have is that the rules and policies which are in force when their application is decided will be correctly applied to them.

8. Indeed, it has never been guaranteed that applicants would qualify for further or indefinite leave to remain, so there has always been the risk of not qualifying for further leave. We have merely tightened up the rules. I also do not believe that this is incompatible with the requirement under HSMP to have made the UK your main home. This does not require the severing of all connections with the country of origin and refers to the need to make the UK your main home during the course of your leave, which is necessary for highly skilled migrants.

9. As you know, we have introduced extensive transitional arrangements to ensure that we retain many of the talented people who will not pass the new points test for extension applications. These cater both for the self-employed and independent contractors, and make the process of switching into work permit employment for those who have been in employment easier. I am satisfied that this will allow the vast majority of people who have been economically active, but who will not pass the points test, to be granted further leave to remain. I cannot comment on the hypothetical examples which you raise of people who may not be covered by the transitional arrangements but, as a general point, such arrangements will never encompass everybody. Our goal must be to balance the need to avoid inconveniencing applicants with the need to achieve our legitimate policy aims.

10. The statement in the consultation document on the PBS that HSMP participants and work permit holders will be able to qualify for permanent residence remains correct. That statement did not, however, imply that the

qualifying criteria for grants of leave under those categories would remain unchanged.

11. I note your concerns about the introduction into the two new prescribed forms of a declaration that applicants recognise that the Immigration Rules may change during the course of their leave. This does not introduce a new power. As I explain above, we are already able to change the rules in this manner. This merely makes it explicitly clear to the applicant that this is possible, and so is in the interests of applicants. The introduction of this clause is not intended to justify the current changes, nor does it imply that applicants would not have been aware of this possibility beforehand. The power which this clause describes is not about changing 'the basis of [the applicant's] status at any point in the future without any notice at all', as you write. Unless there are individual reasons to curtail somebody's leave, which do not relate to broad policy changes, applicants will always be able to complete their existing leave. The issue in this case is about future grants of leave. I understand that you feel that there should have been consultation about the introduction of this clause. It would not be practicable for us to consult on the introduction of every new clause into a form, especially when the clause relates to the exercise of an existing power.

#### **New attributes**

12. You have raised a number of issues concerning the changes to the points scoring criteria.

13. We have removed the points for work experience in favour of those for previous earnings. When drawing up policy before the publication of the PBS Command Paper, my officials carried out an analysis of existing HSMP participants at the further leave to remain stage. Those applicants who had scored points for previous salary were earning significantly more than those who had not, and those who had not (those who tended to score the majority of their points on the basis of previous work experience) were often not in highly skilled employment. We believe that the best judge of whether an applicant has the appropriate experience to succeed in the labour market is an employer, rather than an immigration official.

14. People with work experience but a lower previous salary are welcome to apply for a work permit; their prospective employer will often offer them a job on this basis. This is reflected in the responses to the consultation. The consultation response covered both Tiers 1 and 2, and the emphasis on the importance of work experience as opposed to salary is likely to be more in relation to Tier 2. This was the impression which my officials gained from their analysis of the consultation responses. Finally, previous salary is a much clearer, more objective attribute than work experience, and the responses to the consultation listed objectivity as the most important factor in drawing up the new system.

15. We have emphasised the degree requirement because we are satisfied that those applicants with degrees are likely to be those who best meet the aims of the HSMP. Applicants may also apply on the basis of equivalent level professional qualifications and those without a degree may apply under other categories of the Immigration Rules. We have included points for age in order to reward young, highly skilled migrants who have good salaries for their age, but who may struggle to gain enough previous salary points because of their lack of work experience. The inclusion of points for age is a natural consequence of the inclusion of those for previous salary.

16. The Home Office has not made misleading statements about the inclusion of work experience as an attribute, nor have we ignored the responses to the consultation. As I have mentioned, the responses about previous work experience in the consultation are likely to have related more to Tier 2. We gave very strong consideration to the consultation responses, but we may sometimes take a different view, particularly if our analysis has led to different conclusions. Any comments on work experience in the five year strategy reflected our thinking at that time and predated that analysis – had we already made a definite decision in February 2005 that points would be included for certain factors, this would have made the consultation superfluous.

17. It is correct that those who switch into another category will not be able to use their previous leave under HSMP to qualify for settlement. Although I am aware that this may cause frustration to some people, the Immigration Rules are drafted in this way (and have been for some time) because those switching from HSMP into another route may not have been economically active during their HSMP leave.

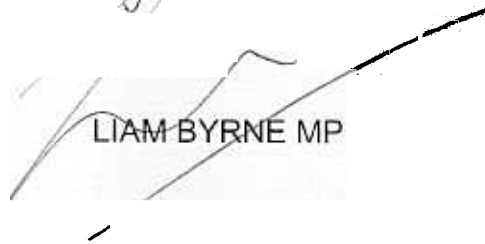
18. Any set of attributes which we choose is likely to exclude some highly skilled people. I am satisfied that the new requirements for HSMP will exclude as few of these people as possible and that they contain sufficient flexibility to cater for talented people from across the world.

19. I do understand your concerns and I realise that the introduction of these changes may at first lead to some uncertainty amongst those who apply for the HSMP. However, I am satisfied that these changes strike the correct balance between the need to address the needs of HSMP applicants with the need to carry out policies which are in the interests of the UK.

20. For the reasons which I have set out, I am afraid that I cannot agree that the changes be suspended pending formal consultation, or that the old rules for extension applications be applied to those already in the UK. Regarding your request for confirmation that at least twenty-one days' notice be given for all future Rules changes, we will always endeavour to give this notice unless there are strong reasons not to, as there were in this case.

Thank you also for your request to meet with me about the changes. As hope that I have dealt in this reply with the matters which concern you, I do not think that I would be able to add anything at a meeting.

*Yes*

  
LIAM BYRNE MP