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IMMIGRATION LAWS AND POLICIES: IMMIGRATION POINTS SYSTEMS

UNITED KINGDOM

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appearing before the U.S. House of Representatives Committee on the Judiciary
Subcommittee on Immigration, Citizenship, Refugees, Border Security, and
International Law

Hearing before the Subcommittee on an
Examination of Point Systems as a Method for Selecting
Immigrants

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Executive Summary

Immigration policy in the UK is highly complex. It provides for a variety of schemes in which individuals can enter the UK either through a system of work permits or through a point-based system for highly skilled migrants to enter the country and seek work. The UK previously had a highly restrictive immigration policy but has recently moved toward a policy of managed migration that operates in the interests of its economy, encouraging individuals to come and work in the UK in either skilled or unskilled jobs where there are shortages of people to fill available vacancies in the UK. Over the next five years it intends to implement a substantive overhaul of its current immigration schemes for workers and students and to phase in an entirely points based system.

I. Introduction

Since 1891, it has been established at common law that “no alien has any right to enter [what is now the UK] except by leave of the Crown.”¹ The government has recently shifted to a policy of managed migration “in the interests of the economy”² in which the skills and benefits that migrants bring to the country are emphasized, with particular support for skilled workers³ and quotas for those without skills, where there is a need in the UK.⁴ The statutory regime governing immigration in the UK is currently contained in the Immigration Act 1971⁵ and the Immigration Rules⁶ made under it by the government. The Immigration Rules are not legislation or regulations per se, but are published as House of Commons Papers and are considered to be part of the law.

II. Number of Immigrants

The last official mid-year estimate for the population of the UK was done in 2005 and reported that there are 60.2 million people resident in the UK, with 97.2 million visitors from outside

¹ *Musgrove v. Chun Teeong Toy* [1891] A.C. 272 followed in *Schmidt v. Home Office* [1969] 2 Ch. 149.

² HOME OFFICE, CONTROLLING OUR BORDERS: MAKING MIGRATION WORK IN BRITAIN, FIVE YEAR STRATEGY FOR ASYLUM AND IMMIGRATION, 2005, Cm. 6472.

³ *Id.*

⁴ HOME OFFICE, SECURE BORDERS, SAFE HAVEN: INTEGRATION WITH DIVERSITY, 2002, Cm. 5387.

⁵ Immigration Act 1971, c. 77.

⁶ Immigration Rules, H.C. 395, (as amended). *R v Chief Immigration Officer, Heathrow Airport, ex. p. Salamat Bibi* [1976] 3 All ER 843 (CA) per Roskill, LJ: “these rules are [not administrative practice and are] just as much delegated legislation as any other form of rule making activity ... which is empowered by an Act of Parliament. Furthermore, these rules are subject to a negative resolution and it is unheard of that something which is no more than an administrative circular stating what the Home Office considers to be good administrative practice should be subject to a negative resolution by both Houses of Parliament. These rules, to my mind, are just as much a part of the law of England as the 1971 Act itself.”

the common travel area arriving in the UK in the same year.⁷ The UK is currently experiencing increasing levels of both inward and outward migration, with one in twelve people resident in the UK born abroad.⁸ In 2004, 342,000 non-British citizens migrated to the UK.⁹ The most common reasons for entering the UK on a visa is for work or study purposes.¹⁰ The number of people granted permanent residency in the UK in 2004 was 144,550; of them 42,265 were employment related, 54,310 were related to asylum, 34,905 were for family formation and reunification, and 8,365 were granted on a discretionary basis to individuals that have been resident in the UK for a long and continuous period.¹¹

The following numbers of visas, extensions for leave, and permanent residencies were granted for the year 2004.¹²

Program	Number Entering Under Scheme for 2004 (excluding EU Accession States)	Number Granted Extension of Leave to Stay	Number Granted Permanent Residency Resulting from Admission into Scheme
Sectors Based Scheme (SBS) limit of 3,500 for 2005/6 (being phased out for 2007).	Unavailable	N/A	N/A
Students	286,000	146,555 granted extension of leave to stay	Unavailable
Students' Dependents	13,100	Unavailable	Unavailable
Working Holidaymakers	62,300	385 granted leave of extension	Unavailable
Work Permit Employment	82,715 (40,450 for less than 12 months; 42,265 for more than 12 months)	54,810 granted extension of leave to remain	16,170
Work Permit Employment Dependents	41,595	Unavailable	17,005
Permit Free Employment (includes writers, artists, businessmen, and persons of	Unavailable	18,885	2,465 (including dependents)

⁷ National Statistics, *Population Estimates*, <http://www.statistics.gov.uk/CCI/nugget.asp?ID=6> (last visited June 6, 2006).

⁸ National Statistics, *People and Migration: Foreign Born*, Dec. 15, 2006, available at <http://www.statistics.gov.uk/cci/nugget.asp?id=1312>.

⁹ National Statistics, *International Migration*, Dec. 15, 2005, available at <http://www.statistics.gov.uk/cci/nugget.asp?id=1311>.

¹⁰ *Id.*

¹¹ Home Office, *Control of Immigration: Statistics United Kingdom, 2004*, Aug. 2005, available at <http://www.home-office.gov.uk/rds/pdfs05/hosb1405.pdf>.

¹² National Statistics, *Control of Immigration: Statistics United Kingdom, 2004*, Aug. 2005.

Program	Number Entering Under Scheme for 2004 (excluding EU Accession States)	Number Granted Extension of Leave to Stay	Number Granted Permanent Residency Resulting from Admission into Scheme
independent means (i.e. investors and innovators)).			
Seasonal Agricultural Workers	11,500	N/A	N/A
Post Graduate Doctors or Dentists	400	Unavailable	Unavailable
Fiancés	895	Unavailable	Unavailable
Fiancées	2,230	Unavailable	Unavailable
Spouse	32,230 (10,835 husbands on the probationary period; 21,395 wives admitted for the probationary period;	17,065 granted extension of leave to remain (6,410 husbands, 10,655 wives)	Unavailable
Dependent Children entering for probationary period of settled persons	4,265	Unavailable	Unavailable
Family formation and reunion grants	Unavailable	Unavailable	34,230
UK Ancestry	7,700	Unavailable	Unavailable
Domestic Workers	10,400	Unavailable	Unavailable
Ministers of Religion	640	Unavailable	Unavailable
Au Pairs	1,730	N/A	N/A
Grants on Discretionary Basis	Unavailable	Unavailable	8,350

III. Current System Overview

The law governing and policy surrounding immigration in the UK is highly complex, with the government attempting to balance the needs of genuine visitors and the contributions they make to the economy of the UK with concern about those that wish to enter the UK for undesirable purposes. There are currently over seventy different ways to enter the UK, with approximately fifty of these being ways to enter the UK to work or study.¹³

Work Permit Employment

The work permit scheme in the UK is the longest standing immigration employment scheme, with 119,000 people admitted under the scheme in 2003. It is possible to transfer from certain immigration categories in the UK to a work permit, and in 2003, 26,000 permits were issued for people meeting these criteria. However, the majority of permits are issued for people who apply

¹³ HOME OFFICE, A POINTS-BASED SYSTEM: MAKING MIGRATION WORK FOR BRITAIN, 2005-6, Cm. 6741, available at <http://www.official-documents.gov.uk/document/cm67/6741/6741.pdf>.

from outside of the country.

There are six main types of work permit that are issued by Work Permits (UK), part of the newly established Border and Immigration Agency. Only employers can apply for a work permit, and they must specify the individual they wish to employ for a specific job that cannot be filled by labor already lawfully present in the UK. The individuals must be able to support themselves and any dependents without claiming certain state benefits. The categories for work permit employment are:

- Business and commercial, which permits UK employers to recruit people from outside the EEA to fill a vacancy that cannot be filled with a resident worker;
- Sportspeople and entertainers;
- GATS (Global Agreement on Trade in Services), which “allows employees of companies based outside the European Union to work in the UK on a service contract awarded to their employer by a UK-based organization”;
- Sectors Based Scheme. This scheme allowed migrants from countries outside of the European Economic Area to enter the UK to take short term or casual jobs within the food manufacturing industry in areas that are hard to fill for up to one year. Fifteen thousand people were allowed to enter the UK under the SBS for the year 2004/5, a number that was reduced dramatically to 3,500 in 2005/6.¹⁴ The employer wishing to hire the person had to apply for a work permit before the person assumed their job.¹⁵ This scheme was due to be stopped at the end of December 2006, given the additional labor that the expanded EU was expected to supply to the UK. However, it was extended but now only allows workers from Romania and Bulgaria, in accordance with EU preferences, to enter the UK for up to twelve months for low-skilled employment in the agricultural and food manufacturing industry, with an initial quota of 19,750;
- Student Internships. This allows students from outside the EEA studying in first or higher degree courses overseas to undertake an internship with an employer in the UK; and
- Training and Work Experience Scheme (TWES). “This scheme allows people from outside the EEA to carry out work-based training for a professional or specialist qualification, or a short period of work experience as an extra member of staff.”¹⁶

In addition to the work permit, individuals that are citizens of a nation from which the UK requires a visa, or who hold a work visa for six or more months, must obtain one for themselves and any dependents in order to enter the UK.¹⁷ The visas are processed separately from the work permit by an entry clearance officer at a British mission overseas.

All employers in the UK are under a legal obligation to verify that any employees are not subject to immigration controls that would prevent them from lawfully working in the UK. Section

¹⁴ Home Office, *Work Permits: General Information – Guidance for Employers 2005-2006*, 2005, available at http://www.workingintheuk.gov.uk/working_in_the_uk/en/homepage/work_permits/sector_based_schemes.Maincontent.0010.file.tmp/generalinformation.pdf.

¹⁵ IMMIGRATION RULES, H.C. 395 ¶ 104, http://www.ind.homeoffice.gov.uk/lawandpolicy/immigration_rules/part4 (last visited Apr. 25, 2007).

¹⁶ Border and Immigration Agency, *Guidance - Work permit holders (INF 13)*, <http://www.ukvisas.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1018721068127#Q2> (last visited Apr. 25, 2007).

¹⁷ Visa countries list at Border and Immigration Agency, *Visa and Direct Airside Transit Visa (DATV) Nationals*, <http://www.ukvisas.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1020786334922> (last visited Apr. 25, 2007).

eight of the Asylum and Immigration Act 1996 provides that it is an offence to employ workers without proper immigration clearance to either work or be in the UK.¹⁸ The maximum penalty for employing an illegal worker is currently £5,000 (approximately US\$10,000), although this is due to increase with the implementation of additional provisions to include up to two years of imprisonment.¹⁹ In 2004, eleven people were prosecuted and nine convicted for employing an illegal worker.

In addition to the work permit route to employment in the UK, there are approximately forty work permit-free routes to employment that vary from working holiday makers, au pairs, and seasonal agricultural workers to highly skilled migrants. A number of other categories exist that are also exempt from the requirement to obtain a work permit and that are not as frequently utilized. These include: sole representatives of overseas firms, servants in diplomatic households, domestic workers in private households, overseas government employees, ministers of religion, missionaries, members of a religious order, innovators, investors, business persons, writers, artists, composers, foreign journalists, and members of the operational ground staff of an overseas owned airline.

Skilled Migration – Points System

Points-based immigration is a fairly recent development in the UK, with a pilot Highly Skilled Migrant Programme (sic) (HSMP) entering into force for a trial period of one year in 2002 that has subsequently been extended and was formally incorporated into the immigration system of the UK in 2003. This program has been cited as “the most dramatic development in commercial immigration law for the past 30 years and has made many of the other commercial immigration categories effectively redundant.”²⁰ When introducing the system, the government considered that “if we are to achieve flexibility and sustainable growth, then legal migration, as opposed to clandestine working, must be the way forward ... [the HSMP will] control migration more effectively, tackle abuse and identify the most talented workers.”²¹ The aim of the new program was to develop the immigration system to maximize the benefits to the UK of receiving highly skilled workers, as the government “believed that properly managed migration is in the interests of the UK and that [they] should aim to attract the brightest and the best from around the globe.”

The creation of the HSMP should be set against the backdrop of concern over a projected decline in the overall and working age population in the UK, leading the government to state that

In this context the Government’s policy of a regulated but flexible system of managed, legal migration is right. Immigration is one part of ensuring the continued success of the UK economy and supporting an ageing population. No modern economy can afford to be anti-immigration ... However, essential to the pursuit of a balanced migration policy is the need to build public trust and confidence by ensuring that we tackle abuse of the system and secure our borders.²²

¹⁸ Asylum and Immigration Act 1996 c. 49, as amended by the Immigration (Restrictions on Employment) Order 2004, SI 2004/755, available at <http://www.ind.homeoffice.gov.uk/6353/18383/18469/si2004755.pdf?view=Binary> (official source).

¹⁹ Immigration, Nationality and Asylum Act 2006, c. 13, § 21.

²⁰ MACDONALD’S IMMIGRATION LAW AND PRACTICE, (Ian McDonald et al eds., 6th ed 2003, ¶ 10.77).

²¹ Border and Immigration Agency, *A Points-Based System: Making Migration Work for Britain*, Mar. 11, 2006, available at <http://www.ind.homeoffice.gov.uk/aboutus/newsarchive/pointsbasedsystem>.

²² Home Office, *International Migration Statistics for 2002*, Nov. 2003, available at http://www.workingintheuk.gov.uk/working_in_the_uk/en/homepage/news/press/international_migration.html.

The HSMP enables individuals to enter the UK for an initial period of up to two years without the need for a work permit, business plan, the requirement to create jobs, invest money in the UK, or a specific job offer.²³ It is designed to “allow highly skilled individuals with exceptional personal skills and experience to come to the United Kingdom to seek work or self-employment opportunities.”²⁴

The rules for the administration of the HSMP were amended in December 2006.²⁵ The HSMP was suspended for twenty-seven days after it was announced that there would be revisions to the existing criteria to prevent speculative applications. The requirement to obtain a permit under the HSMP is currently a score of seventy-five or more points based on various criteria that have evolved over the five years that the HSMP has been in operation to “ensure that the system picks up those migrants most likely to be successful in the UK labour market.”²⁶ Currently, the points are awarded in four main areas:

- educational qualifications;
- work experience;
- past earnings; and
- previous experience in the UK.²⁷

There is also a mandatory English language requirement – applicants must now have an International English Language Testing System certificate of level six or above. Further guidance on the application of these criteria is due to be published by the government at the end of May 2007.²⁸

In 2005, the government introduced a new provision enabling individuals with a Masters Degree in Business Administration from one of the fifty top business schools, as designated by HM Treasury,²⁹ the ability to “meet the points criteria on the basis of their MBA alone.”³⁰ This provision continues in force. Thus, individuals that have graduated from one of the eligible business schools with an MBA are automatically awarded the seventy-five points that are needed to qualify under the HSMP, however, they must still meet the remaining criteria of the HSMP and, where necessary,

²³ Immigration Rules, H.C. 395 ¶ 135, http://www.ind.homeoffice.gov.uk/lawandpolicy/immigration_rules/part5 (last visited Apr. 26, 2007).

²⁴ Previously contained in the Immigration Directorates Instructions, c. 5, § 11.

²⁵ 7 Nov 2006 PARL. DEB. (6th ser.) (H.C.) 40WS, available at http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm061107/wmstext/61107m0002.htm#column_39WS. The statutory instrument altering the forms in which applications are to be made is The Immigration (Leave to Remain) (Prescribed Forms and Procedures)(Amendment No.2) Regulations 2006, SI 2006/2899. This statutory instrument came into force following the annulment procedure.

²⁶ HOUSE OF COMMONS HOME AFFAIRS COMMITTEE, IMMIGRATION CONTROL, 2005-6, HC 775-III at 362.

²⁷ Border and Immigration Agency, *Information about the Highly Skilled Migrant Programme*, Mar. 2006, available at http://www.workingintheuk.gov.uk/working_in_the_uk/en/homepage/schemes_and_programmes/hsmp.html?

²⁸ Border and Immigration Agency, *Highly Skilled Migrant Programme - Publication of Internal Guidance*, Mar. 2007, available at http://www.workingintheuk.gov.uk/working_in_the_uk/en/homepage/news/announcements/hsmp_publication_of_internal_guidance.html.

²⁹ A list of the current fifty top business schools is provided for in the Immigration Directorates Instructions, c. 5, § 11, Annex Z8.

³⁰ Border and Immigration Agency, *Information about the MBA Provision*, http://www.workingintheuk.gov.uk/working_in_the_uk/en/homepage/schemes_and_programmes/hsmp/mba_provision.html? (last visited Apr. 28, 2007).

obtain a visa. The aim of the inclusion of this provision is to “attract highly qualified and talented managers to the UK”³¹ to address a “weakness in the UK economy in the quality of management.”³²

In addition to meeting the above criteria, individuals that apply under the scheme must also have appropriate entry clearance, intend to make the UK their main home, and be able to accommodate and maintain themselves and any dependents without recourse to public funds.³³ As with work permits, individuals that obtain HSMP permits are not automatically guaranteed entry and must show that they qualify for entry to the UK in accordance with the Immigration Rules in order to obtain a visa for themselves and any dependents in order to enter the UK.³⁴

The stay of a highly skilled migrant may, upon application, be extended for an additional three years, provided certain criteria are met. This extension can provide the highly skilled migrant with a total of five years’ lawful residence in the UK, after which they can apply for British citizenship if they wish.

The requirements for an extension have recently been amended to take into account some concerns and provide more objective criteria. The current requirements are that the highly skilled migrant must again score seventy-five points against criteria similar to those that were met to obtain the permit in the first instance – qualifications, previous earnings, age, and UK experience – and they must also meet the mandatory English language requirement. While the point criteria have not yet been made publicly available, the Minister of State for Nationality, Citizenship, and Immigration has stated during Parliamentary debates that “the point scoring structure is flexible and is based on criteria that will indicate success in the labour market. If an applicant claims fewer points in one area, they can make up for it by claiming more points in another.”³⁵

Employment Outcomes of Highly Skilled Migrants

The government has noted that the “HSMP is designed to allow highly skilled individuals with exceptional skills and experience to seek to enter or stay to work in the UK, without having a prior offer of employment, or to take up self-employment opportunities here. We are therefore unable to record which category of work they enter.”³⁶

Source Country Profile of Immigrants Entering under the HSMP

The following is a list of the top ten countries and the number of individuals granted a permit under the HSMP for 2006:³⁷

³¹ *Id.*

³² *Id.*

³³ Immigration Rules, H.C. 395 ¶ 135, http://www.ind.homeoffice.gov.uk/lawandpolicy/immigration_rules/part5 (last visited Apr. 25, 2007).

³⁴ Visa countries listed at: Border and Immigration Agency, *Visa and Direct Airside Transit Visa (DATV) nationals*, <http://www.ukvisas.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1020786334922> (last visited Apr. 25, 2007).

³⁵ 19 Feb 2007, PARL. DEB. (6th ser.) (H.C.). 108W.

³⁶ 23 Jan 2007 PARL. DEB. (6th ser.) (H.C.) 694W, *available at* <http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm070123/text/70123w0017.htm>.

³⁷ Information extracted from 23 Jan. 2007, PARL. DEB. H.C (6th ser.) 1695W.

Country	Number of Approved Applications
India	7,340
Australia	1,577
Pakistan	1,569
Nigeria	1,209
New Zealand	778
South Africa	658
United States of America	509
Sri Lanka	348
Peoples Republic of China	334
Bangladesh	239

Example of Applicability

As the current guidance for the implementation of the criteria of the HSMP is not available until the end of May 2007, it is not possible to give an accurate example of how the points are awarded under the new criteria.³⁸

Benefits of the Highly Skilled Migrant Programme

Prior to the HSMP there were limited, if any, methods for individuals to enter the country to look for and obtain employment without a specific job offer. This made it difficult to “attract highly mobile people with the special talents that are required in a modern economy”³⁹ to not only contribute to the economy, but also help create opportunities for UK workers. The new rules allow employers the flexibility to hire foreign consultants and freelancers, reflecting current business practice, as the old system only permitted the hiring of foreign workers as full time employees. It also allows employers faced with widespread cuts in the work force to have qualified individuals apply under the HSMP and hire them as part time consultants

The government considers that the HSMP has played a crucial role in enabling the UK to follow a managed migration policy in the interests of the UK, by attracting highly skilled workers to both contribute to the economy and create opportunities for UK workers.⁴⁰ Highly skilled migrants have benefited the UK by contributing to the economy, filling skill gaps in the labor market, and creating opportunities for UK workers.

In its first year of operation, the program attracted over 1,100 successful applicants, causing the government to reconsider the application criteria and partially restructure it to encourage more applicants. Since then, the numbers of people seeking entry under the scheme indicate its success, with, in 2006, over 47,000 applications being approved.

³⁸ A number of speculative examples of how the new system will work are available from: HOME OFFICE, A POINTS-BASED SYSTEM: MAKING MIGRATION WORK FOR BRITAIN, 2005-6, Cm. 6741, available at <http://www.official-documents.gov.uk/document/cm67/6741/6741.pdf>.

³⁹ 13 Dec 2001 PARL. DEB. (6th ser.) (H.C.) WA227, available at <http://www.publications.parliament.uk/pa/ld200102/ldhansrd/vo011213/text/11213w01.htm>.

⁴⁰ 7 Nov 2006 PARL. DEB. (6th ser.) (H.C.) 39WS.

Negatives of the Highly Skilled Migrant Programme

Abuses of the System

There were a number of abuses of the system that, if not addressed, could have led to the loss of public confidence in the scheme. The following issues were addressed recently with the revision of the application criteria and processing methods.

The government believed that certain applicants were abusing the extension test. The extension allowed individuals who had already entered the UK under the HSMP to extend their stay if they had taken all reasonable steps to become lawfully economically active and continued to meet other specified criteria. This has since been replaced by an additional points test and a mandatory English language requirement, in order to prevent abuse and “ensure that applicants who are granted further leave under the HSMP have demonstrated their ability to make a contribution to our economy.”

There were also certain abuses of the system with regard to the documentation being submitted. This has been countered in part by the requirement that now only original documents are accepted as evidence of their points claims, to enable the accurate independent verification of documents. Applications are also refused when documents that are not genuine have been submitted, whether or not they are material to the application. The government has stated that “such applicants should not be able to qualify under the scheme and are unlikely to benefit the UK.”⁴¹ Applications can also be refused if there are “reasonable grounds to suspect that documents are not genuine, which remain after verification checks have been undertaken.”⁴²

Lack of Objectivity and Transparency in Procedures

In a partial regulatory impact assessment, the Home Office noted that many of the points scoring criteria under the HSMP were too subjective, particularly with regard for previous work experience, making it

difficult for prospective applicants to measure themselves against and for caseworkers to effectively implement. The uncertainty has resulted in 56% of the 38,728 of HSMP decisions taken in 2005 being refused with each one of these costing the migrant an application fee of over £315 (approximately US\$600) (a total of nearly £7 million (approximately US\$14m) in fees alone). The high percentage of failed applications indicates that the current criteria may be resulting in a high number of fraudulent or speculative applications.⁴³

The government intends that the criteria introduced in December 2006 will resolve this issue, however, as the guidance on the implementation of this program has yet to be published, it is difficult at this point to determine whether the change has been, or will be, successful.

Processing Delays

The large increase in applications from the program's inception to its current application

⁴¹ 7 Nov 2006 PARL. DEB. (6th ser.) (H.C.) 40WS.

⁴² *Id.*

⁴³ Home Office, *A Points Based System: Making Migration Work for Britain, Partial Regulatory Impact Assessment*, ¶ 41, <http://www.homeoffice.gov.uk/documents/ria-making-migration-work-070306?view=Binary> (last visited Apr. 26, 2007).

flooded the department responsible for processing them, leading to delays in the system of processing claims that some claim threaten the success of the system, as it is made unattractive to those that the UK is striving to reach. The subjective criteria and the fact that applicants have to pay a significant application fee, regardless of whether or not the application is approved, led to a number of individuals submitting overwhelming amounts of documentation to support their claims, further adding to the processing times.

In-Country Negative Experiences with the HSMP

Some individuals in the UK under the HSMP have indicated that the HSMP permit has sometimes been an issue for them in obtaining employment. Some studies indicate that some employers are “unsure over the legitimacy of the work permit for HSMP – as they may only know that someone has permission to work in this country, and be unclear as to the reason.”⁴⁴

It has also been reported that there have been some issues with employers understanding the highly skilled migrants’ qualifications and experience and later finding that they are incompatible with what they were seeking in an employee. A government report notes that “this has been attributed to the difficulty of employers in understanding foreign qualifications and sometimes because the legal basis and conduct of a job vary between countries so that qualifications and experience are not directly compatible.”⁴⁵

The “Brain Drain”

The United Kingdom has been accused of “crippling African healthcare” through “poaching” medical professionals from developing countries. The UK has in the past conducted “large-scale, targeted international recruitment ... to address domestic shortages.”⁴⁶ Over a third of doctors practicing in the UK possess overseas qualifications and half of the recently expanded NHS staff qualified abroad.⁴⁷ The UK has relied heavily on overseas medical professionals to reduce the wait times for the use of the National Health Service (NHS) and to counter staffing shortages.⁴⁸ The UK has recognized the problem to a certain degree, has developed a Code of Practice for International Recruitment that applies to the NHS, and claims that it is the “first nation to produce international recruitment guidance based on ethical principles and the first nation to develop a robust code of practice for international recruitment.”⁴⁹ The Code establishes guidelines that provide the NHS does not actively recruit medical professionals from 158 developing countries, unless there is an explicit government-to-government agreement that supports recruitment activity.⁵⁰ While the UK has been

⁴⁴ Home Office, *Employers’ Use of Migrant Labour*, Home Office Online Report 04/06, 46, available at <http://www.homeoffice.gov.uk/rds/pdfs06/rdsolr0406.pdf>.

⁴⁵ Home Office, *Employers’ Use of Migrant Labour*, Home Office Online Report 04/06, 73, available at <http://www.homeoffice.gov.uk/rds/pdfs06/rdsolr0406.pdf>.

⁴⁶ Department of Health, *Code of Practice for the International Recruitment of Healthcare Professionals*, Dec. 2004, available at http://www.dh.gov.uk/PublicationsAndStatistics/Publications/PublicationsPolicyAndGuidance/PublicationsPolicyAndGuidanceArticle/fs/en?CONTENT_ID=4097730&chk=DI/b1A.

⁴⁷ *UK Crippling African Healthcare*, BBC NEWS, May 27, 2005, available at <http://news.bbc.co.uk/2/hi/health/4582283.stm>.

⁴⁸ *Id.*

⁴⁹ Department of Health, *Code of Practice for the International Recruitment of Healthcare Professionals*, Dec. 2004, available at http://www.dh.gov.uk/PublicationsAndStatistics/Publications/PublicationsPolicyAndGuidance/PublicationsPolicyAndGuidanceArticle/fs/en?CONTENT_ID=4097730&chk=DI/b1A.

⁵⁰ Department of Health, *Code of Practice for the International Recruitment of Healthcare Professionals*, *id.*; *NHS Taking Away Africa’s Medics*, BBC NEWS, Mar. 15, 2005, available at <http://news.bbc.co.uk/2/hi/health/4349545.stm>.

taking relatively proactive steps to prevent the active recruitment of medical professionals, it has failed to provide analogous immigration measures to deter medical professionals from developing countries from applying on their own behalf to come and work or live in the UK. The Code does not prohibit doctors from the countries for which active recruitment is prohibited from applying for and receiving, jobs in the UK or entering through the HSMP. A spokesperson from the NHS stated that the ethical recruitment of medical professionals in the NHS has “a strict list of [158] countries from which it does not actively recruit ... [h]owever, if healthcare professionals are determined to come here to work we cannot legally deny them that opportunity.”⁵¹

Recent or Proposed Changes to the System

As noted above, the HSMP has just undergone some changes in December 2006 to increase its efficiency and enhance objectivity in its decision making processes. Despite some of the issues in its application, the government has announced that it is moving a significant amount of its immigration programs over to a points based system. It is currently in the process of replacing over fifty worker and student visa categories, beginning in April 2008, with an entirely points based migration system⁵² based on the Australian system. Family reunification is not touched by these changes. The aim is to replace what many consider to be an inefficiently bureaucratic processes with objective criteria and transparent decision making. The new system aims to simplify the formerly complicated procedures and improve consistency in decision making by caseworkers and immigration officers for the purpose of selectively admitting people to maximize the economic benefit of migration to the UK.

There are to be five tiers in the new system:

- Tier one will replace the existing HSMP with similar criteria.
- Tier two of the new system will replace the current work permit based immigration route in which employers

on a list of approved sponsors will be able to bring in migrant workers who meet the basic criteria (principally relating to a minimum skills and, in some cases, salary threshold)” To ensure that skills shortages are properly addressed, a Skills Advisory Board is to be established that will “will assist in this process by identifying (on the basis of available economic indicators and specific sectoral knowledge) occupations where there are particular shortages for which the process for bringing migrant workers becomes easier for the employer. For those occupations not identified by the Skills Advisory Body the employer will be expected to test the resident labour market to explore whether a domestic worker is available to fill the vacancy in question;⁵³

- Tier three applies to temporary low skilled workers – this would apply to individual who would previously have entered under the Sector Based Scheme or Seasonal Agricultural Workers Scheme;
- Tier four applies to students; and
- Tier five applies to temporary workers and youth mobility

⁵¹ *NHS Taking Away Africa's Medics*, BBC NEWS, Mar. 15, 2005, available at <http://news.bbc.co.uk/2/hi/health/4349545.stm>.

⁵² HOME OFFICE, A POINTS-BASED SYSTEM: MAKING MIGRATION WORK FOR BRITAIN, 2005-6, Cm. 6741, available at <http://www.official-documents.gov.uk/document/cm67/6741/6741.pdf>.

⁵³ HOUSE OF COMMONS HOME AFFAIRS COMMITTEE, IMMIGRATION CONTROL, 2005-6, HC 775-III at 636.

As the scheme is of fairly recent inception, there is limited information currently available about its planned application.⁵⁴

Unskilled Immigration

Currently, in addition to the SBS scheme mentioned briefly above, an additional guest worker scheme, known as the Seasonal Agricultural Workers Scheme (SAWS) allows individuals from outside the EEA that are over the age of eighteen and full-time students to enter the UK to do low skilled seasonal agricultural work, such as planting and gathering crops, or for farm processing and packing of crops, for up to six months.⁵⁵ Individuals entering under this scheme do not need to obtain a work permit, but must obtain appropriate entry clearance before arriving in the UK. For the year 2006, the number of individuals allowed to enter the UK under the SAWS was 16,250.⁵⁶ This scheme is run by the Home Office through operators that are responsible for placing individuals on farms and informing the workers of their “immigration status and the consequences of overstaying.”⁵⁷

Illegal Immigration

Once an individual enters the country he can remain in the UK fairly easily without discovery as, in addition to the lack of departure checks, there is currently no requirement for proof-of-identity documents for services such as health care and education.⁵⁸ Employment in the public sector rarely involves identity checks, and many employers have taken advantage of the opportunity of cheap labor that illegal immigrants are providing.

The issue of the lack of departure checks has resulted in considerable difficulty in accurately estimating the numbers of visitors, students, or failed refugee seekers who have breached the conditions of their stay and remain in the country illegally. It also makes the quantification of the success or failure of the visa process and the accuracy of entry clearance officers’ decisions to issue visas almost impossible. The government recently has estimated, stated as a “best guess,” that the number of illegal immigrations in the country is nearly 500,000.⁵⁹ To ascertain an estimated figure of the number of visa holders that comply with the conditions of the visa upon entry into the UK, the Immigration and Nationality Directorate Intelligence Service conducted a small-scale investigation. Preliminary reports involving visas issued to individuals in Accra, Ghana has shown that thirty-seven percent of visa holders could not be located after entering the UK.⁶⁰

A Home Affairs Select Committee has expressed concern over the lack of exit controls and recommended the reintroduction of embarkation controls at the UK’s borders. The government initially did not consider embarkation controls a viable option in terms of effectiveness, resources,

⁵⁴ HOME OFFICE, A POINTS-BASED SYSTEM: MAKING MIGRATION WORK FOR BRITAIN, 2005-6, Cm. 6741, available at <http://www.official-documents.gov.uk/document/cm67/6741/6741.pdf>.

⁵⁵ Immigration Rules, H.C. 395 ¶¶ 104 - 109, http://www.ind.homeoffice.gov.uk/ind/en/home/laws_policy/immigration_rules/part_1.html (last visited June 15, 2006).

⁵⁶ Home Office, *Information about the Seasonal Agricultural Workers’ Scheme*.

⁵⁷ *Id.*

⁵⁸ NATIONAL AUDIT OFFICE, VISA ENTRY TO THE UNITED KINGDOM: THE ENTRY CLEARANCE OPERATION H.C. 367, 2004 (2003-4), ¶ 76, available at <http://www.fco.gov.uk/Files/kfile/NAO%20Report%20170604.pdf>.

⁵⁹ *Id.*

⁶⁰ NATIONAL AUDIT OFFICE, VISA ENTRY TO THE UK: THE ENTRY CLEARANCE OPERATION H.C. 367, 2004 (2003-4) ¶ 18, available at <http://www.fco.gov.uk/Files/kfile/NAO%20Report%20170604.pdf>.

and costs, estimating that it would require over £26 million (approximately US\$47 million) per year to operate such a system.⁶¹ Despite its initial reservations, it is currently moving towards this type of system through its e-borders program, which will increase electronic pre-boarding checks of passengers, enabling their information to be checked against multi-agency watch lists, and collect information on the departure and arrival of individuals to enable the relevant bodies to determine who has overstayed. The government intends to introduce measures to require airlines to check the information of certain categories of passengers against government databases prior to departing to the UK, with any airline that carries a passenger listed on the database without authority from the government being subjected to a penalty.⁶² The government is also encouraging a “joined up modernised intelligence led border control and security framework”⁶³ and is working to create a duty to share information between the Immigration Services, the Police, and HM Customs to improve their activities.⁶⁴

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⁶¹ SELECT COMMITTEE ON HOME AFFAIRS, FOURTH REPORT, H.C. 654, 2003, (2002-3).

⁶² HOME OFFICE, CONTROLLING OUR BORDERS: MAKING MIGRATION WORK IN BRITAIN, FIVE YEAR STRATEGY FOR ASYLUM AND IMMIGRATION, 2005, Cm. 6472, Annex B.

⁶³ *Id.*

⁶⁴ Immigration, Asylum and Nationality Bill, 2005-6, H.L. [Bill 74], clause 36. This Bill implements the proposals contained in "Controlling our borders: Making migration work for Britain" the Home Office five year strategy for asylum and immigration, published in February 2005 and Confident Communities in a Secure Britain," the Home Office Strategic Plan, 2004-2008, published in July 2004.