



Supporting Professionalism
in Admissions



Equality Challenge Unit

Equality Challenge Unit Update

Student admissions: exclusion of native language qualifications

Date: 27 October 2008

This briefing alerts Heads of Institutions and admissions staff to the risk that some admissions procedures for higher education courses and programmes may breach equality legislation.

This relates to the exclusion of native language qualifications (ie mother tongue qualifications) from eligibility in entry criteria.

This briefing provides an outline of the main issues but does not constitute legal advice. If an institution wishes to operate such an exclusion, detailed legal advice may be advisable.

Admissions and 'native foreign language' qualifications

Some higher education institutions specify in their subject entry requirements and Entry Profiles that 'native foreign language qualifications' are excluded from consideration when assessing an applicant for admission to certain courses or programmes. The rationale for this policy appears to be that a language qualification may be less demanding for a native language speaker than for a non-native speaker and consequently institutions attach less importance to that qualification.

However, there is a risk that the operation of such an exclusion may unlawfully discriminate on the grounds of race against those regarded as possessing the native language qualifications.

Discrimination on the grounds of race

Applicants are afforded protection under a number of strands of anti-discrimination legislation. In relation to admissions and 'native foreign language' qualifications there is the potential that an individual may be afforded less favourable treatment on racial grounds or by being a member of a particular racial group.

The Race Relations Act 1976 makes it unlawful for an institution to treat applicants less favourably on the grounds of race relating to, among other things, the terms on which the institution offers to admit them, a refusal or deliberate omission by the institution to accept their application for admission, excluding them or subjecting them to any other detriment. Institutions also have a positive duty to eliminate race discrimination and promote equality of opportunity.

Direct and indirect discrimination in admissions procedures

Discrimination broadly takes two forms: direct and indirect discrimination. Direct discrimination occurs where, on racial grounds, an individual is treated less favourably. Indirect discrimination occurs where an institution's treatment of individuals is the same irrespective of race but where there is a disparity in the effect of such treatment on a particular racial group. It typically involves the imposition of a requirement which members of one racial group are less likely to be able to satisfy than others.

Admissions' policies that operate a blanket ban that is either based on race (whether actual or perceived) and/or that does not take into account an individual's particular circumstances may be particularly vulnerable in this situation.

If an institution makes assumptions about people's names and backgrounds or the nature of a qualification, or encourages applicants to make those assumptions, it may constitute direct race discrimination, which is incapable of being justified.

Further, if an institution unjustifiably decides to exclude certain qualifications from consideration in a way that disadvantages one racial group more than another, this may constitute indirect discrimination. The institution would then need to objectively justify the exclusion by demonstrating that the exclusion is a proportionate means of achieving a legitimate aim. This would be a difficult hurdle to overcome, not least because an institution should be able to examine each individual on a case by case basis without a blanket ban being in force. It is also unclear whether the aim could be perceived as being legitimate in the circumstances.

The risk in relation to indirect race discrimination specifically concerns exclusions for native language qualifications and that institutions may make unjustifiable

assumptions about the significance of native language qualifications, or about what is and what is not a native language qualification, in a way that disadvantages certain racial groups and which cannot be justified by reference to a person's own individual circumstances or indeed the qualification itself.

For example, it may not be clear cut to establish who is and who is not a native language speaker. Applicants themselves may also not have a clear or consistent understanding of this: some may have only a rudimentary understanding of a second language, some may have oral but not written fluency, and others may be fully bilingual.

Similarly, the qualification itself may prioritise literary criticism and study of history and culture, rather than language, in which case the significance of native language skills may be less. Indeed, some qualifications expressly differentiate between native language speakers and non-native language speakers: the former engage with broader cultural issues, the latter with language acquisition skills.

The way forward

It is likely that the most sensible way forward would be for institutions to adopt a policy that avoids blanket exemptions for the courses concerned and instead considers the individual circumstances of each applicant and their individual qualifications. If an individual sought to challenge the policy claiming either direct or indirect discrimination the publicity arising from litigation could be adverse and financial costs not insignificant.

Institutions may well be entitled to conclude that on the facts of a particular case a native language qualification carries less weight for a particular candidate, and that should therefore affect the decision as to whether to admit them and if so on what terms. This may, for example, be the case where a self-declared native language speaker has acquired a qualification designed to enable non-native language speakers to learn the language. Where this is the case, and where evidence appropriately obtained confirms that this is the case, then this is likely to be a lawful and legitimate decision. However, in practice this is unlikely to arise frequently.

Good practice in admissions

Generally, individual circumstances should always be taken into account. No assumptions should be made simply by virtue of a person's race. The likely multi-faceted nature of a qualification, whereby native language speaking may only constitute a part of the qualification, will also need to be taken into account.

This approach is in line with good practice recommended by SPA (Supporting Professionalism in Admissions) that all applicants should be considered on an individual basis. Fairness does not necessarily mean the same treatment of all

applicants, but that all applicants should have the same equality of opportunity. In order to ensure fairness for applications, institutions should make it transparent (via their website, Entry Profile and prospectus etc) what factors in addition to qualifications, competencies and skills, they take into consideration when making decisions on applications. Applicants should be able to expect fair outcomes on the basis of transparent processes and policies, fairly applied and regularly monitored and evaluated.

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About the Equality Challenge Unit

Equality Challenge Unit supports the higher education sector in its mission to realise the potential of all staff and students whatever their race, gender, disability, sexual orientation, religion and belief, or age, to the benefit of those individuals, higher education institutions and society

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