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Joint Committee on Human Rights

Highly Skilled Migrants: Changes to the Immigration Rules

Twentieth Report of Session 2006–07

Report, together with formal minutes and appendices

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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The current staff of the Committee are: Mark Egan (Commons Clerk), Bill Sinton (Lords Clerk), Murray Hunt (Legal Adviser), Angela Patrick and Joanne Sawyer (Committee Specialists), Jackie Recardo (Committee Assistant), Suzanne Moezzi (Committee Secretary) and Robert Long (Senior Office Clerk).

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In addition to its scrutiny of human rights implications of Government Bills, the Committee reports on other legislative measures raising significant human rights issues such as the Changes in Immigration Rules introduced in 2006.

In the Committee's view, the effect of the changes on those who came to the UK under the Highly Skilled Migrants Programme (HSMP) of 2002 raises a significant human rights issue about compatibility with the right to respect for home and family life (paragraphs 1 -4).

HSMP provides a route to becoming permanently resident in the UK. Migrants under it must meet certain requirements and "intend to make their main home" in the UK. Since 2002, over 49000 applications under HSMP have been granted (paragraphs 5 – 12).

The changes to the Immigration Rules apply to those already granted leave to remain under the HSMP. The Committee notes the HSMP Forum's view that as many as 90% of those admitted under HSMP may not now be able under the new rules to stay when their leave to remain expires (paragraphs 13 – 26).

The Committee concludes that the changes to the HSMP are clearly not compatible with the right to respect for home and family life under Article 8 ECHR and contrary to basic notions of fairness. It recommends that the Immigration Rules should be amended so that the changes apply only prospectively, that is to future applicants to the HSMP, and that those already granted leave to remain under HSMP when the relevant changes took effect should be treated according to the rules which applied before those changes (paragraphs 27 - 51).

The Committee recommends acceptance by the Government that it does not have unfettered power to make changes to the Immigration Rules which engage Convention rights and would interfere with a right, that such changes should be prospective only, and that changes to the Immigration Rules should always be accompanied by a statement as to their compatibility with the ECHR (paragraphs 52 -56).

1 Introduction

Purpose of our report

1. In this Report we consider the human rights compatibility of certain changes in the Immigration Rules concerning highly skilled migrants which have caused widespread concern because of their harsh impact on people who have made this country their main home in reliance on what they have previously been told by the Government.

2. The Government introduced the Highly Skilled Migrants Programme in 2002 to encourage highly skilled people to come to the UK to work. The programme provides a route to permanent residence if certain criteria are satisfied. The Government made it a precondition of entry onto the programme that individuals "intend to make the UK their main home." Thousands of highly skilled people relocated their homes, families, jobs and businesses to the UK as a result.

3. In 2006, however, the Government changed the rules. It extended the required period of residence from 4 to 5 years and tightened the requirements which have to be met in order to qualify for an extension of leave. Those changes apply not merely to future applicants under the Highly Skilled Migrants Programme, but to the large number of individuals who have already relocated to the UK under the programme. As a result, a very significant number of people who have moved their homes, families and careers to the UK in the expectation that they would be eligible for permanent residence now find that they are not in fact eligible because the rules have changed. Instead of becoming permanently resident, as they had been led to expect, they and their families now face deportation. In our view this raises a significant human rights issue about the compatibility of the changes with the right to respect for home and family life, on which we now report.

4. We have exchanged correspondence with the Minister, which is annexed to this Report. We have also received a written submission on this matter from a group called the Voice of Britain's Skilled Immigrants ("VBSI"),[1] and been sent information about the impact of the changes by the HSMP Forum, an organisation formed to campaign against the changes.[2]

The Highly Skilled Migrant Programme

5. The Highly Skilled Migrant Programme (hereafter "the HSMP") is designed to allow highly skilled individuals with exceptional skills to come to the UK to seek work or opportunities for self-employment.

6. Those applying for the first time to the HSMP must go through a two-stage application process. First, they must apply for a HSMP approval letter for entry to the programme, in which the Home Office confirms that the person meets the criteria specified for entry to the UK under the HSMP. Second, they must meet all of the requirements of the relevant Immigration Rule in order to obtain leave to remain as a highly skilled migrant.

[1] The submission is available under "Research documents" on VBSI's website, http://www.vbsi.org.uk.

[2] Public submissions made by the HSMP Forum are available on its website, http://www.hsmpforum.org.

7. One of those requirements was that the person concerned must "intend to make the United Kingdom his main home."[3] This express requirement in the Immigration Rules was reflected in the Guidance Notes for those making HSMP applications, which specifically stated that individuals would be asked to provide a "written undertaking" that they would make the UK their main home.[4]

8. The HSMP provides a route to becoming permanently resident in the UK. Before the changes introduced in April 2006 (considered below), an applicant to the HSMP who met the criteria would be granted initial leave to enter for a year.[5] At the end of the first year's leave, highly skilled migrants were eligible to apply for a 3 year extension of leave, which would be granted if they demonstrated that during the first year they had taken all reasonable steps to become lawfully economically active. At the end of the 3 years' leave, they were eligible to apply for indefinite leave to remain ("ILR") which would be granted if the person could show that they have had a continuous period of at least 4 years as a highly skilled migrant and that they had become lawfully economically active in the UK.[6] The Guidance Notes explained all this unequivocally to applicants. They were told that, once they had entered under the HSMP, they were in a category that has an avenue to settlement, and that they would be allowed to stay and apply for settlement after four years' qualifying residence.

9. In short, when the HSMP was introduced in 2002, a highly skilled migrant who met the initial criteria would be granted a year's leave if they could also show that they intended to make the UK their main home, then a 3 year extension if they could show that they had taken all reasonable steps to become economically active in the UK, and after 4 years would be granted permanent residence if they could show that they actually are economically active. In return for a commitment to permanent relocation, the HSMP held out the prospect of further leave and ultimately settlement.

10. Not surprisingly, in light of the requirement that people on the HSMP intend to make the UK their main home, individuals with leave to enter or remain under the HSMP have taken a number of important and long-term steps to establish their main home in the UK: they have left permanent jobs in their home countries, sold their homes, relocated their families (spouses and children) to be in the UK also, entered into financial commitments such as mortgages, transferred businesses, entered into long term financial arrangements, made long term economic and contractual plans, and the lives of their families have been transferred (for example, spouses have new jobs, children new schools).

11. Thousands of individuals currently on the HSMP have acted in this way to fulfil the Government's requirement that they make the UK their main home, and have done so in the expectation that, provided they make their main home here and remain economically active, they will be eligible to apply for indefinite leave to remain after the prescribed amount of time.

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[3] *Immigration Rules* (HC 395), para. 135A(ii).

[4] HSMP 1 Guidance Notes, version 06/06, para. 22.

[5] *Immigration Rules*, para 135B.

[6] *Immigration Rules*, para 135G.

12. According to a Written Answer, between January 2002 and October 2006 the total number of applications granted under the HSMP was 49,188.[7]

The Immigration Rules

13. The Immigration Rules are the Rules made by the Home Secretary under the Immigration Act 1971.[8]

14. They constitute a statement of practice, as laid before Parliament by the Home Secretary, to be followed in regulating entry into, and stay of persons in, the UK. The Home Secretary is obliged by statute to lay before Parliament statements of the Rules, or any changes in the Rules.

15. Statements of changes in the Immigration Rules are subject to negative resolution procedure. The Government's practice is not to provide statements about the compatibility of such instruments with the European Convention on Human Rights.

[7] HL Deb, 28 November 2006, col WA47 (Baroness Scotland).

[8] Section 3(2).

2 The changes to the Immigration Rules

Changes to the HSMP

16. The Government has made two changes to the Immigration Rules which affect the position of those who have already been granted leave as highly skilled migrants under the HSMP: one lengthening the qualifying period for settlement and the other changing the requirements which have to be satisfied by highly skilled migrants when they apply for further leave to remain.

(1) Lengthening the qualifying period before settlement

17. In April 2006 the Government made changes to the Immigration Rules which lengthened the qualifying period for settlement (ILR) for all employment related categories of entry to the UK, including the HSMP, from 4 years to 5 years. [9]

18. As the Explanatory Memorandum[10] accompanying the Statement of Changes points out, the lengthening of the qualifying period had been foreshadowed in the Home Office's February 2005 strategy document, *Controlling Our Borders: the Five Year Strategy for Asylum and Immigration*. There, according to the Explanatory Memorandum,

> "the Government set out its view that permanent migration must also be a journey towards being as socially integrated as possible. Those in employment related routes to settlement will now have to spend 5 years working in the UK before being eligible to apply for settlement. This brings us in line with the European norm for these purposes and also helps to ensure that settlement is a final stage in an ongoing process of building up an attachment to the UK."

19. The lengthening of the qualifying period for settlement from 4 to 5 years in April 2006 meant that from that date on those granted leave on the HSMP were granted an initial leave of 2 years followed by an extension of 3 years. The Explanatory Memorandum states that this will be of benefit to those setting up in business or entering as investors, innovators and in a self-employed capacity where a 2-year initial leave period for establishing oneself is more realistic.

20. The change in the rules, however, was not merely prospective in effect: it applied also to people already in the country with leave as a highly skilled migrant. As a result, many people on the HSMP who had expected to be able to settle in the UK after four years were suddenly unable to do so. Instead of applying for permanent residence, they had to apply instead for a further extension of their limited leave to remain. Limited leave to remain carries many disadvantages compared to settled status, making it more difficult to obtain jobs, visas to travel, and important financial services such as mortgages. The extension of the qualifying period therefore caused considerable hardship for many of those individuals, including disruption to careers, family separation and financial loss. The matter was the

[9] *Statement of Changes in Immigration Rules*, HC 1016 of 2005-06, laid before Parliament 30 March 2006 under s. 3(2) Immigration Act 1971. The change took effect from 3 April 2006.

[10] *Explanatory Memorandum*, HC 1016.

subject of an Early Day Motion signed by 59 Members[11] and was raised in a Westminster Hall debate on 2 November 2006.[12]

(2) Tightening the requirements for extending leave

21. In November 2006 the Government made further changes to the HSMP by laying a Statement of Changes in the Immigration Rules which included the introduction of tighter requirements for both the grant of initial leave and the extension of leave under HSMP.[13]

22. Instead of having to show that they have taken all reasonable steps to become economically active in the UK, as they did under the previous rules, under the new rules highly skilled migrants already in the UK and applying for an extension of their initial period of leave have to show that they can meet a new enhanced points test. Points are no longer awarded for certain attributes which previously counted, such as past work experience, significant achievements in a person's chosen field, and having a skilled partner, but are awarded in relation to previous earnings, qualifications and age. A new mandatory English language requirement was also introduced.

23. The rationale for tightening the criteria for further leave to remain was said to be in order better to reflect the likelihood of migrants' labour market success. In the words of the Explanatory Memorandum, the new approach "will be more effective in ensuring that the HSMP helps us to select those migrants who will make the greatest economic contribution to the UK."[14]

24. Again, however, the changes in the HSMP rules made in November 2006 apply not only to *future* applicants under the HSMP: they apply also to those who have *already* been granted leave as a highly skilled migrant. When their applications to extend their leave come up, their applications are considered under the new rules and they therefore have to satisfy the more onerous requirements which were introduced after their initial leave was granted.

25. The immediate effect of the tightening of the requirements for extending leave is to make it likely that a considerable number of those highly skilled migrants who have moved to this country and made it their main home under the HSMP will not now be eligible for further leave when their current period of leave expires because they do not meet the new tighter criteria. For example, those who do not have a degree, but qualified under the old rules relying on their previous achievements, will no longer qualify, since without a degree the maximum number of points available can only ever be fewer than the required number.

[11] EDM 2834.

[12] HC Deb, 2 November 2006, cols 161WH-164WH.

[13] *Statement of Changes in Immigration Rules*, HC 1702 of 2006-07, laid before Parliament 7 November 2006.

[14] *Explanatory Memorandum*, HC 1702.

26. We do not know precisely how many highly skilled migrants on the HSMP programme may not now be eligible to stay when their leave expires under the new rules, but we note that the HSMP Forum estimates that it is as many as 90% of the 49,000 migrants who have already been admitted onto the programme.[15]

[15] *Highly Skilled Migrants face deportation in Great Britain*, HSMP Forum, http://www.hsmpforum.org.

3 The human rights concerns

The compatibility issue

27. In our view, the right to respect for home and family life in Article 8 ECHR is clearly engaged by these changes to the Immigration Rules because of the Government making it a precondition of application under the HSMP that the individual intend to make his or her main home in the UK.

28. In view of that requirement, any subsequent change of the rules which makes it more difficult for such a person to obtain an extension of leave and eventually become eligible to stay permanently in the UK, and which may therefore lead to them being required to leave the UK, is in our view an interference with the right to respect for home and family life.

29. The issue, therefore, is whether the changes to the HSMP are compatible with the right to respect for home and family in Article 8 ECHR.

30. Such interferences with the right to respect for home and family life are required to be "in accordance with the law", that is, they must be pursuant to a measure which satisfies certain minimum criteria of predictability and foreseeability. They must also serve a legitimate aim and be proportionate to that aim.

31. Having carried out an initial examination of the changes to the HSMP described above, we were particularly concerned about the application of the changes to highly skilled migrants who had already made their main home in the UK. It seemed to us that the changes had a degree of retrospective effect, because they were not confined to new applicants under the HSMP, but applied to people who had already been granted their initial leave as highly skilled migrants and had relocated to the UK in the expectation that they would be granted further leave and eventually indefinite leave to remain if they satisfied the criteria for such an extension and indefinite leave which applied at the time that they relocated.

32. We therefore wrote to the Government setting out the nature of our concern and asking it to provide a detailed explanation of why, in the Government's view, the interference with the right to respect for family life and home resulting from the changes in the Rules satisfies the requirement of foreseeability and predictability which has been held to be inherent in the requirement that such interferences must be "in accordance with the law" as required by Article 8 ECHR.[16]

33. We also asked for the Government's reasons for not making transitional provision to protect the position of those highly skilled migrants who have already made their main home in the UK, as they were required to do by the UK Government as a condition of their participation in the HSMP.

34. The Government responded in two letters dated 30 March 2007 and 18 May 2007. We consider those responses in detail below.

[16] Letter from the Chair to Liam Byrne MP, Minister of State for Nationality, Citizenship and Immigration, 21 March 2007 (Appendix 1).

Assessment of compatibility

Interference with the right to respect for home and family life

35. The Government accepts that the requirement on HSMP participants to make the UK their "main home" may lead them to establish their family life in the UK more definitively than they would have done otherwise.[17] It therefore appears to accept that the right to respect for home and family life in Article 8 ECHR is engaged and that the changes in the Immigration Rules constitute an interference with that right in so far as they may lead to a person who has made their home in the UK being required to leave the UK.

36. However, the Government argues that any interference with the right to respect for home and family life as a result of the changes to the HSMP is compatible with Article 8 ECHR because those changes are "in accordance with the law", serve a legitimate aim, and are proportionate.

"In accordance with the law"

37. The Government argues that the changes to the HSMP "do not have retrospective application."[18] It says that a migrant with initial leave will not have that grant of initial leave reassessed, and that the new, stricter test for extension of leave applies to all those who choose to take the test from the date that it was introduced. It says that it has always been the case that applicants seeking an extension of leave will face an extension test, and that those granted initial leave under HSMP could fail at this stage and therefore be required to leave the UK. Those granted initial leave under the HSMP were aware that a further test was necessary if they were to be granted further leave.[19] There has never been a guarantee that a grant of initial leave would lead to settlement. Grants of extension of leave and settlement have always been contingent upon the applicant meeting the relevant criteria. Moreover, the Government says that it was foreseeable and predictable that the nature of this test may be subject to change in the future, because the Government is entitled to amend the Immigration Rules from time to time in order to carry out its policies and it has regularly done so in recent years. There is therefore, in the Government's view, "no retrospective element in these changes".

38. **We are not persuaded by the Government's argument that the changes it has made to the HSMP do not have a degree of retrospective effect. In our view it overlooks the fact that people who have made the UK their main home, as they are required to do under the HSMP, have done so on the basis of clear statements by the Government that they would be granted a further extension of their leave if they met certain criteria, and then be eligible for permanent residence if they met certain other criteria. In those circumstances, changing the relevant criteria to be met by those who have already made their home in the UK on a clear understanding of the criteria that would be applied to them in the future is, in our view, indisputably retrospective in effect. The Government could have made the changes apply only to new applicants to the HSMP, in which case the changes would have been purely prospective. By choosing to apply them to**

[17] Appendix 3.

[18] Appendix 2.

[19] Appendix 3.

migrants already in the UK on the HSMP, they are giving them a degree of retrospective effect.

39. **We therefore conclude that any interferences with the right to respect for home and private life in Article 8 ECHR as a result of the changes to the HSMP will not be "in accordance with the law" as required by Article 8(2) ECHR, because the legal framework does not contain the necessary foreseeability and predictability that has been held to be inherent in the requirement that such interferences be in accordance with the law.** The legal basis for the change in the rules is, according to the Government, an unconstrained power in the Immigration Act to change the Immigration Rules with immediate effect in a way which may render people whom the Government has required to make their main home in the UK ineligible to stay in the UK. In our view such an unconstrained power is the very essence of arbitrariness, not "in accordance with the law".

40. **For this reason alone, therefore, we conclude that the changes to the HSMP are not compatible with the right to respect for home and family life in Article 8 ECHR in so far as they apply to people who have already made their main home in the UK under the HSMP scheme. To be in accordance with the law, in our view, the changes to the HSMP should apply only to new applicants under the HSMP who have not yet made their main home in the UK, and should exclude those who have already done so in reliance on the Government's statements about the criteria which will be applied to future decisions about their status.**

Legitimate aim

41. The Government argues that the changes to the HSMP are necessary in the interests of the economic well-being of the country.[20] It says that the HSMP is designed to bring talented people to the UK who can make a strong contribution to our economy. The scheme was not always meeting this policy objective because the previous test for extension of leave was not a sufficiently robust measure of whether the migrant had been making an economic contribution to the UK. The Government's review of the operation of the scheme had revealed, for example, that some HSMP migrants were employed in low-skilled jobs such as food production operatives and taxi-drivers. The new rules were designed to overcome this problem by using criteria that more accurately predict labour market success at the initial application stage and by testing HSMP participants' success in the UK Labour market more rigorously at the extension stage.

42. **We accept that the Government's aim in making changes to the HSMP, namely for the purposes of the country's economic well-being, is a legitimate aim for the purposes of Article 8(2) ECHR. The effective operation of the HSMP is clearly in the economic interests of the country.**

43. In order to be compatible with Article 8, however, any interference with the right to respect for home and private life must also be proportionate to the pursuit of that legitimate aim. We therefore turn to consider whether the impact of the changes on the homes and family life of those already living in the UK is proportionate to the aim pursued.

[20] Appendix 3.

Proportionality

44. The Government argues that any interference is proportionate because it has put in place significant transitional measures to help those HSMP participants who are making a contribution to the UK economy but who will not pass the new, stricter points test when they apply for an extension of their leave.[21]

45. For example, migrants who are in employment but do not pass the new stricter test for an extension of leave can vary their application to one for work permit employment, and their employers will be given a grace period of 42 days to apply for a work permit and the requirement that the post be advertised to the resident labour market will be waived. Migrants who are in self-employment but do not pass the new points test may also be granted leave under the transitional arrangements for self-employed people if they meet certain conditions.

46. The Government is satisfied that these transitional measures will cater for the vast majority of those who have been economically active during the period of their initial leave and allow them to gain further leave to remain. It says that a refusal of further leave under HSMP will not therefore necessarily lead to an interference with family or private life since the applicant is likely to qualify for further leave under these transitional arrangements.

47. We have considered the transitional arrangements made but we note that they fall very far short of meeting what we regard as the wholly understandable expectation of those who have relocated to the UK under the HSMP scheme. Those individuals were led by the Government itself to believe that if they made the UK their main home and remained economically active, they would be eligible to apply for settlement in the UK after 4 years. At no point did the Government suggest to those on the HSMP that at any time the eligibility requirements for indefinite leave to remain might change so that they may become ineligible even after they have made their main home in the UK. The transitional arrangements relied on by the Government may allow some of those who will fail the new stricter test to remain in the UK, but they amount to considerably less than the route to settlement which they had been led to expect.

48. **We conclude that, while a prospective change to the HSMP Rules would clearly be a proportionate means of achieving the Government's legitimate aim of protecting the economic well-being of the country, applying those changes to those who have already made their main home in the UK in reliance on the Government's statements about the future is a disproportionate interference with those migrants' right to respect for their home and family life, which is not rendered proportionate by the transitional arrangements.**

Conclusion on compatibility

49. **We conclude that the changes to the HSMP are incompatible with the right to respect for home and family life of migrants who have already made their main home in the UK in reliance on the previous rules and the Government's statements about the HSMP. Applying the changes in the scheme to such people is neither "in accordance**

[21] Appendix 2.

with the law" nor proportionate to the legitimate aim which the changes seek to achieve.

50. We are aware of at least two recent cases in which the Asylum and Immigration Tribunal has allowed appeals by highly skilled migrants against their refusal of leave to remain, on the ground that their removal from the UK would be in breach of Article 8 ECHR for reasons similar to those explained above. We are also aware that an application by the HSMP Forum for judicial review of the changes to the Immigration Rules is pending, although we understand that a hearing is not imminent. In our view, however, it is quite unacceptable, in the circumstances, to subject thousands of highly skilled migrants and their families to prolonged uncertainty about whether they will be deported from the UK whilst they await the outcome of either their individual appeals or the judicial review. **The changes to the Rules are so clearly incompatible with Article 8, and so contrary to basic notions of fairness, that the case for immediately revisiting the changes to the Rules in Parliament is in our view overwhelming.**

51. **We therefore recommend that the Immigration Rules be urgently amended so that both the lengthening of the qualifying period for settlement and the introduction of stricter requirements for the extension of leave apply only prospectively, that is, to future applicants to the HSMP. We recommend that those who had already been granted leave as a highly skilled migrant on the HSMP when the relevant changes took effect should be treated according to the rules which applied before those changes.**

4 Future changes to the Immigration Rules affecting Convention rights

52. We are concerned that the particular problem which has arisen in relation to the HSMP may be symptomatic of a deeper problem about the way in which changes are made to the Immigration Rules which affect fundamental rights.

53. In the course of justifying its changes to the HSMP the Government has claimed that the Immigration Rules must be capable of being changed from time to time by the Government so that it can carry out its policies. It does not accept that there can be any legitimate expectation about the criteria which will be applied to future applications for leave. In the Government's view, 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.

54. This is an exorbitant claim about the scope of the statutory power in the Immigration Act 1971 to make changes to the Immigration Rules. As we have pointed out above, it amounts to a claim that the power to change those Rules from time to time, and without warning, is wholly unfettered in legal terms. However, since changes to the Immigration Rules are capable of interfering with Convention rights (as the Government appears to accept the changes did here), this amounts to a claim to an uncontrollable discretion to interfere with Convention rights.

55. Changes to the Immigration Rules are not normally preceded by formal public consultation. They are made by negative resolution procedure. They are not accompanied by any statement of compatibility with the ECHR. They receive very little parliamentary scrutiny. Indeed, this was recently the subject of judicial comment by a unanimous House of Lords in a case concerning the proper role of the immigration appellate authorities when deciding appeals against immigration decisions on human rights grounds.[22] The Home Secretary argued in that case that the appellate immigration authority should assume that the Immigration Rules, made by the responsible minister and laid before Parliament, "had the imprimatur of democratic approval and should be taken to strike the right balance between the interests of the individual and those of the community."[23] The House of Lords rejected this argument, commenting that whereas certain legislation "may truly be said to represent a considered democratic compromise … [t]his cannot be said in the same way of the Immigration Rules … which are not the product of active debate in Parliament, where non-nationals seeking leave to enter or remain are not in any event represented."

56. We recommend that the Government accept that where a change to the Immigration Rules engages a Convention right (as here), it does not have an unfettered power to make changes to the Rules, and that where a change would lead to an interference with a right such as the right to respect for home and family life, the

[22] *Huang v Secretary of State for the Home Department* (2007) 2 WLR 581.

[23] *Ibid* at para. 17.

requirement that any such interference be in accordance with the law requires that such changes should be prospective only. We also recommend that changes to the Immigration Rules should always be accompanied by a statement as to the compatibility of the changes with the ECHR.

Conclusions and recommendations

1. We are not persuaded by the Government's argument that the changes it has made to the HSMP do not have a degree of retrospective effect. In our view it overlooks the fact that people who have made the UK their main home, as they are required to do under the HSMP, have done so on the basis of clear statements by the Government that they would be granted a further extension of their leave if they met certain criteria, and then be eligible for permanent residence if they met certain other criteria. In those circumstances, changing the relevant criteria to be met by those who have already made their home in the UK on a clear understanding of the criteria that would be applied to them in the future is, in our view, indisputably retrospective in effect. The Government could have made the changes apply only to new applicants to the HSMP, in which case the changes would have been purely prospective. By choosing to apply them to migrants already in the UK on the HSMP, they are giving them a degree of retrospective effect. (Paragraph 38)

2. We therefore conclude that any interferences with the right to respect for home and private life in Article 8 ECHR as a result of the changes to the HSMP will not be "in accordance with the law" as required by Article 8(2) ECHR, because the legal framework does not contain the necessary foreseeability and predictability that has been held to be inherent in the requirement that such interferences be in accordance with the law. (Paragraph 39)

3. For this reason alone, therefore, we conclude that the changes to the HSMP are not compatible with the right to respect for home and family life in Article 8 ECHR in so far as they apply to people who have already made their main home in the UK under the HSMP scheme. To be in accordance with the law, in our view, the changes to the HSMP should apply only to new applicants under the HSMP who have not yet made their main home in the UK, and should exclude those who have already done so in reliance on the Government's statements about the criteria which will be applied to future decisions about their status. (Paragraph 40)

4. We accept that the Government's aim in making changes to the HSMP, namely for the purposes of the country's economic well-being, is a legitimate aim for the purposes of Article 8(2) ECHR. The effective operation of the HSMP is clearly in the economic interests of the country. (Paragraph 42)

5. We conclude that, while a prospective change to the HSMP Rules would clearly be a proportionate means of achieving the Government's legitimate aim of protecting the economic well-being of the country, applying those changes to those who have already made their main home in the UK in reliance on the Government's statements about the future is a disproportionate interference with those migrants' right to respect for their home and family life, which is not rendered proportionate by the transitional arrangements. (Paragraph 48)

6. We conclude that the changes to the HSMP are incompatible with the right to respect for home and family life of migrants who have already made their main home in the UK in reliance on the previous rules and the Government's statements

about the HSMP. Applying the changes in the scheme to such people is neither "in accordance with the law" nor proportionate to the legitimate aim which the changes seek to achieve. (Paragraph 49)

7. The changes to the Rules are so clearly incompatible with Article 8, and so contrary to basic notions of fairness, that the case for immediately revisiting the changes to the Rules in Parliament is in our view overwhelming. (Paragraph 50)

8. We therefore recommend that the Immigration Rules be urgently amended so that both the lengthening of the qualifying period for settlement and the introduction of stricter requirements for the extension of leave apply only prospectively, that is, to future applicants to the HSMP. We recommend that those who had already been granted leave as a highly skilled migrant on the HSMP when the relevant changes took effect should be treated according to the rules which applied before those changes. (Paragraph 51)

9. We recommend that the Government accept that where a change to the Immigration Rules engages a Convention right (as here), it does not have an unfettered power to make changes to the Rules, and that where a change would lead to an interference with a right such as the right to respect for home and family life, the requirement that any such interference be in accordance with the law requires that such changes should be prospective only. We also recommend that changes to the Immigration Rules should always be accompanied by a statement as to the compatibility of the changes with the ECHR. (Paragraph 56)

Formal Minutes

Thursday 26 July 2007

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Judd	Nia Griffith MP
Lord Plant of Highfield	Dr Evan Harris MP

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Draft Report [Highly Skilled Migrants: Changes to the Immigration Rules], proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 56 read and agreed to.

Summary read and agreed to.

Resolved, That the Report be the Twentieth Report of the Committee to each House.

Several Papers were ordered to be appended to the Report.

Ordered, That the Chairman make the Report to the House of Commons and that the Lord Plant of Highfield make the Report to the House of Lords.

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[Adjourned till Thursday 20 September at 2pm.

Appendices

Appendix 1: Letter dated 21 March 2007 to Liam Byrne MP, Minister of State for Nationality, Citizenship and Immigration, Home Office

The Joint Committee on Human Rights is considering the human rights compatibility of the Statement of Changes in the Immigration Rules announced by the Government on 7 November 2006, concerning changes to the Highly Skilled Migrant Programme ("HSMP").[24] Having carried out an initial examination of the Statement of Changes, the Committee is concerned about the retrospective application of the changes to migrants who have already made their main home in the UK, which raises a significant human rights issue. For the reasons set out in this letter, the Committee would be grateful if you could provide a detailed explanation of why, in the Government's view, the interference with the right to respect for family life and home is "in accordance with the law" as required by Article 8 ECHR.

The immediate effect of the changes is to make it likely that a considerable number of those highly skilled migrants who have moved to this country and made it their main home under the HSMP will not now be eligible for indefinite leave to remain when their current period of leave expires because they do not meet the new tighter criteria. We understand that it is estimated that about 20,000 people have come to the UK under the HSMP since January 2002, and that as many as 6,000 of those may not be eligible to stay when their leave expires under the new rules.

Individuals who currently have leave to enter or remain in the UK under the HSMP were required by the Immigration Rules to intend to make the UK their main home.[25] This was reflected in the Guidance Notes for those making HSMP applications, which specifically stated that individuals would be asked to provide a "written undertaking" that they would make the UK their main home.[26]

Not surprisingly, in light of this requirement, individuals with leave to enter or remain under the HSMP have taken a number of important and long-term steps to establish their main home in the UK: spouses and children have relocated to this country to be with the individual, financial commitments such as mortgages have been entered into, career decisions taken, financial arrangements and businesses have been transferred, business and personal relationships have been entered into, long term economic and contractual plans have been altered, and the lives of the individual's families have been transferred (e.g. spouses have new jobs, children new schools).

Thousands of individuals currently on the HSMP have acted in this way to fulfil the Government's requirement that they make the UK their main home, and have done so in the expectation that, provided they make their main home here and remain economically active, they will be eligible to apply for indefinite leave to remain after the prescribed amount of time. Indeed, in its July 2005 consultation document on the Points Based

[24] HC 1702.

[25] *Immigration Rules*, para. 135A(ii).

[26] HSMP 1 Guidance Notes, version 06/06, para. 22.

Scheme, the Government itself publicly stated that those on the HSMP can qualify for permanent residence. At no point did the Government suggest to those on the HSMP that at any time the eligibility requirements for indefinite leave to remain might change so that they may become ineligible even after they have made their main home in the UK.

The Government's response to the criticism that it is acting fundamentally unfairly by applying the new eligibility criteria to those already in the UK under the HSMP is that it has the power to change the Immigration Rules at any time in order to pursue the Government's legitimate policy aims, which in this case is said to be to ensure that those granted further leave to remain under HSMP will benefit the UK economy. You have said in a letter to ILPA that you 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. You argue that the only expectation that applicants should have is that the rules and policies which are in force when their application is decided will be correctly applied to them.

In the Committee's view, the right to respect for home and family life is clearly engaged by these changes to the Immigration Rules because of the Government making it effectively a precondition of application under the HSMP that the individual make his or her main home in the UK. Any subsequent change of the rules which makes it more difficult for such a person to become eligible to stay permanently in the UK is in the Committee's view an interference with the right to respect for home and family life. Such interferences are required to be "in accordance with the law", that is, they must be pursuant to a measure which satisfies certain minimum criteria of predictability and foreseeability.

The power claimed by the Government in this instance is in effect a power to change the Immigration Rules with immediate effect in a way which makes it more difficult for individuals who the Government has required to make their main home here eligible to be allowed to continue to make their main home here.

In light of the above we would be grateful to receive your answers to the following questions:

Q1: Please provide a detailed explanation as to why in the Government's view this change in the rules satisfies the requirement of foreseeability and predictability that the European Court of Human Rights has held to be inherent in the requirement that interferences with home and family life must be "in accordance with the law".

Q2: What are the Government's reasons for not making transitional provision to protect the position of those who have already made their main home in the UK as they were required by the Government to do as a condition of their participation in the HSMP?

I would be grateful for your response, if at all possible, by 27 March 2007.

Appendix 2: Letter dated 30 March 2007 from Liam Byrne MP, Minister of State for Nationality, Citizenship and Immigration, Home Office

Thank you for your letter of 21 March regarding the compatibility of the recent changes to the Highly Skilled Migrant Programme (HSMP) and Article 8 of the European Convention on Human Rights (ECHR). I take these concerns very seriously.

Before I address your two questions, there are a number of issues that I feel it is important to clarify. Firstly, you mention that the Committee is concerned about the 'retrospective application' of the changes to HSMP. These changes do not have retrospective application. A migrant with initial leave will not have that grant of initial leave re-assessed. The new extension test applies to all those who choose to take the test from the date it was introduced- there is no retrospective element in these changes.

I should also point out that the changes to HSMP are not changes to the eligibility criteria for indefinite leave to remain, as you suggest in your letter. The changes we made were to the criteria for initial leave and further leave to remain.

It has always been the case that applicants seeking an extension of leave will face an extension test, and that those granted initial leave under HSMP could fail at this stage, and consequently be required to leave the UK. There has never been a guarantee that a grant of initial leave would lead to settlement. Grants of extension of leave and settlement have always been contingent upon the applicant meeting the relevant criteria.

You also mention the Home Office's July 2005 consultation document, 'Selective Admission'. It remains correct that HSMP participants will be able to qualify for permanent residence. They may apply for this having achieved sufficient leave in the UK- currently five years. The statement in 'Selective Admission' did not imply that the qualifying criteria for grants of leave will remain unchanged.

Your first question raises the issue of Article 8 rights to private and family life. This is a complex legal area which my officials are considering in detail. I will respond on this point in due course.

Your second question raises the issue of transitional arrangements. We have put significant transitional measures in place to help those HSMP participants who are making a contribution to the UK economy but who will not pass the points test at extension. There are four substantive provisions.

1. Applicants who are in employment, but who do not pass the points test at extension stage, may vary their application to one for work permit employment. Although this is possible anyway, the two concessions in these cases are that:

— Employers will have a period of grace (42 days from the date of the letter telling the applicant that they do not pass the points test) to apply for a work permit.

— The resident labour market test (the requirement to advertise the post to prospective UK and European Economic Area nationals in advance of the application) will be waived, provided that the applicant has been in post for at least eight months (if their

grant of leave was for twelve months or less) or at least twelve months (if their grant of leave was for more than twelve months).

Applicants must still satisfy the requirements to maintain and accommodate themselves, and to make the UK their main home.

2. Applicants who are in self-employment, but who do not pass the points test, may be granted leave under the transitional arrangements for self-employed people, provided that:

— They have, during their HSMP leave, set up their own business, either singly or with others.

— Their business has been established and actively trading for at least the last four months prior to their application.

— Their business has ongoing contractual/business commitments to cover at least the next six months.

3. Applicants who need to take an IELTS test to verify their English language ability at extension stage, will be allowed an additional period of ten weeks in which to arrange the test. In addition, English language tests equivalent to IELTS which have already been received at the time of the application will be accepted for extension applications, as will degrees taught in English.

4. Applicants with leave to do the Professional and Linguistic Assessments Board (PLAB) test or a clinical attachment who had received an approval letter under the GP provision before the changes will still be able to switch, notwithstanding the general deletion of the rules allowing such people to switch into the HSMP.

I am satisfied that these measures will cater for the vast majority of those who have been economically active during the period of their initial leave, and allow them to gain further leave to remain.

I hope that this letter helps clarify this matter. I shall provide a detailed response on Article 8 issues shortly.

Appendix 3: Letter dated 18 May 2007 from Liam Byrne MP, Minister of State for Nationality, Citizenship and Immigration

I replied to your letter of 21 March 2007 promising a further, more detailed response to your question regarding the compatibility of our changes to the Highly Skilled Migrant Programme (HSMP) with Article 8 of the European Convention of Human Rights. In particular, you requested an explanation of how the changes to the Immigration Rules satisfy the requirement of foreseeability and predictability that the European Court of Human Rights has held to be inherent in the requirement that interference with home and family life be "in accordance with the law".

Those granted initial leave under the HSMP were aware that a further test was necessary if they were to be granted further leave. It was foreseeable and predictable that the nature of this test may be subject to change in the future. The Government is entitled to amend the Immigration Rules from time to time in order to carry out its policies and has regularly

done so in recent years. This closely relates to questions over the 'legitimate expectations' of HSMP participants which will be examined in a forthcoming Judicial Review brought against the Home Office by the HSMP Forum.

As you know, Article 8 allows for interference by a public authority when that action is in accordance with the law and is necessary in the interests of the economic well-being of the country. The Highly Skilled Migrant Programme is designed to bring talented people to the UK who can make a strong contribution to our economy. Its effective operation is in the interests of the economic well-being of the country.

We made the changes in order to:

- Ensure that the programme continues to attract those migrants who are of the greatest benefit to the UK economy
- Make it clearer and more objective, inline with our aims for the forth-coming Points-Based System for managed migration; and
- Tackle previous instances of abuse under the system.

The previous extension test was not a sufficient robust measure of whether the migrant had been making an economic contribution to the UK. This meant that the scheme was not always meeting its policy objective of bringing talented people to the UK who can make a strong contribution to our economy. Analysis of labour market outcomes at the extension test stage showed that whilst the majority of HSMP migrants are earning good salaries in the UK, around one in ten earn equivalent to the bottom 25% of UK earners, and around 2 in 10 earn below the average wage. Further, we found that some were employed in low-skilled jobs such as food production operatives and taxi drivers.

The new rules have been designed to overcome this problem by using criteria that more accurately predict labour market success at the initial application stage and by testing HSMP participants' success in the UK labour market more rigorously at the extension stage. We believe that these measures are therefore necessary in the interests of the economic well-being of the country.

We do accept that the requirement on HSMP participants to make the UK their "main home" may lead them establish their family life here more definitively than they would have done otherwise. This is something which has been and will continue to be taken into account. However, as I mentioned in my previous letter, we have put in place significant transitional arrangements so that those who are making a contribution to the UK economy, but who do not pass the new points test at the extensions stage, will be able to stay in the UK by other means. A refusal of further leave under HSMP will not, therefore, necessarily lead to an interference with family or private life since the applicant is likely to qualify for further leave under these transitional arrangements.

I hope that this and my preceding letter have helped to clarify the issues for you.

Reports from the Joint Committee on Human Rights in this Parliament

The following reports have been produced

Session 2006–07

First Report	The Council of Europe Convention on the Prevention of Terrorism	HL Paper 26/HC 247
Second Report	Legislative Scrutiny: First Progress Report	HL Paper 34/HC 263
Third Report	Legislative Scrutiny: Second Progress Report	HL Paper 39/HC 287
Fourth Report	Legislative Scrutiny: Mental Health Bill	HL Paper 40/HC 288
Fifth Report	Legislative Scrutiny: Third Progress Report	HL Paper 46/HC 303
Sixth Report	Legislative Scrutiny: Sexual Orientation Regulations	HL Paper 58/HC 350
Seventh Report	Deaths in Custody: Further Developments	HL Paper 59/HC 364
Eighth Report	Counter-terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005	HL Paper 60/HC 365
Ninth Report	The Meaning of Public Authority Under the Human Rights Act	HL Paper 77/HC 410
Tenth Report	The Treatment of Asylum Seekers: Volume I Report and Formal Minutes	HL Paper 81-I/HC 60-I
Tenth Report	The Treatment of Asylum Seekers: Volume II Oral and Written Evidence	HL Paper 81-II/HC 60-II
Eleventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 83/HC 424
Twelfth Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 91/HC 490
Thirteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 105/HC 538
Fourteenth Report	Government Response to the Committee's Eighth Report of this Session: Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9 order 2007)	HL Paper 106/HC 539
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 112/HC 555
Sixteenth Report	Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights	HL Paper 128/HC 728
Seventeenth Report	Government Response to the Committee's Tenth Report of this Session: The Treatment of Asylum Seekers	HL Paper 134/HC 790
Eighteenth Report	The Human Rights of Older People in Healthcare: Volume I- Report and Formal Minutes	HL Paper 156-I/HC 378-I
Eighteenth Report	The Human Rights of Older People in Healthcare: Volume II- Oral and Written Evidence	HL Paper 156-II/HC 378-II
Nineteenth Report	Counter–Terrorism Policy and Human Rights: 28 days, intercept and post–charge questioning	HL Paper 157/HC 394
Twentieth Report	Highly Skilled Migrants: Changes to the Immigration Rules	HL Paper 173/HC 993

Session 2005–06

First Report	Legislative Scrutiny: First Progress Report	HL Paper 48/HC 560
Second Report	Deaths in Custody: Further Government Response to the Third Report from the Committee, Session 2004–05	HL Paper 60/HC 651
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume I Report and Formal Minutes	HL Paper 75-I/HC 561-I
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume II Oral and Written Evidence	HL Paper 75-II/ HC 561-II
Fourth Report	Legislative Scrutiny: Equality Bill	HL Paper 89/HC 766
Fifth Report	Legislative Scrutiny: Second Progress Report	HL Paper 90/HC 767
Sixth Report	Legislative Scrutiny: Third Progress Report	HL Paper 96/HC 787
Seventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 98/HC 829
Eighth Report	Government Responses to Reports from the Committee in the last Parliament	HL Paper 104/HC 850
Ninth Report	Schools White Paper	HL Paper 113/HC 887
Tenth Report	Government Response to the Committee's Third Report of this Session: Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters	HL Paper 114/HC 888
Eleventh Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 115/HC 899
Twelfth Report	Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006	HL Paper 122/HC 915
Thirteenth Report	Implementation of Strasbourg Judgments: First Progress Report	HL Paper 133/HC 954
Fourteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 134/HC 955
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 144/HC 989
Sixteenth Report	Proposal for a Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 154/HC 1022
Seventeenth Report	Legislative Scrutiny: Eighth Progress Report	HL Paper 164/HC 1062
Eighteenth Report	Legislative Scrutiny: Ninth Progress Report	HL Paper 177/ HC 1098
Nineteenth Report	The UN Convention Against Torture (UNCAT) Volume I Report and Formal Minutes	HL Paper 185-I/ HC 701-I
Twentieth Report	Legislative Scrutiny: Tenth Progress Report	HL Paper 186/HC 1138
Twenty-first Report	Legislative Scrutiny: Eleventh Progress Report	HL Paper 201/HC 1216
Twenty-second Report	Legislative Scrutiny: Twelfth Progress Report	HL Paper 233/HC 1547
Twenty-third Report	The Committee's Future Working Practices	HL Paper 239/HC1575
Twenty-fourth Report	Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention	HL Paper 240/HC 1576
Twenty-fifth Report	Legislative Scrutiny: Thirteenth Progress Report	HL Paper 241/HC 1577
Twenty-sixth Report	Human trafficking	HL Paper 245-I/HC 1127-I
Twenty-seventh Report	Legislative Scrutiny: Corporate Manslaughter and Corporate Homicide Bill	HL Paper 246/HC 1625
Twenty-eighth Report	Legislative Scrutiny: Fourteenth Progress Report	HL Paper 247/HC 1626

Twenty-ninth Report	Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 248/HC 1627
Thirtieth Report	Government Response to the Committee's Nineteenth Report of this Session: The UN Convention Against Torture (UNCAT)	HL Paper 276/HC 1714
Thirty-first Report	Legislative Scrutiny: Final Progress Report	HL Paper 277/HC 1715
Thirty-second Report	The Human Rights Act: the DCA and Home Office Reviews	HL Paper 278/HC 1716