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The Highly Skilled Migrant Programme (HSMP): A Proposal for Reform

This paper examines the recent changes to the Immigration Rules pertaining to the Highly Skilled Migrant Programme (HSMP). The scheme, a points-based system introduced by the Government in 2002, was set up to attract skilled workers to come to the UK to work. The programme provides an avenue to permanent residence if certain criteria are fulfilled, including an undertaking that the applicants 'intend to make the UK their main home.' [1] However, in 2006 the Government made a number of changes to the Immigration Rules, most notably lengthening the qualifying period before settlement, and changing the requirements that highly skilled migrants need to satisfy to extend their leave to remain. The changes apply not only to new applicants to HSMP, but also retrospectively to those already in the UK under this category.

On 7 November 2006 the Government announced the changes to the Highly Skilled Migrant Programme, which took effect 24 hours from notification, on 8 November 2006.[2] Thousands of people who moved their homes, families and careers to the UK suddenly found themselves ineligible for permanent residence - and facing deportation as a result. The changes have been controversial, attracting widespread criticism. It is estimated that up to 49,000 people already living in the UK have been affected.[3]

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[1] HSMP 1 Guidance Notes, version 06/06, para. 22.
[2] *Statement of Changes in Immigration Rules,* HC 1702.
[3] HL Deb, 28 November 2006, col WA47 (Baroness Scotland).

The Government's rationale for the changes was a 'simplification' of the process, in line with its long-term goal of managed migration as outlined in 2005 by then Home Secretary Charles Clarke.[4] The HSMP, as the only existing immigration points system, is supposed to be a harbinger of the five-tier points based system scheduled to be rolled out by 2009, with Tier 1 (Highly Skilled), functional by April 2008.

In this paper it will be argued that the current legislation is in need of reform. It will be demonstrated that the fact that the changes apply retrospectively to existing migrants, instead of *prospectively* to new applicants, poses significant problems. Moreover, the amended eligibility criteria for HSMP call into question the compatibility of these changes with the right to respect for home and family life under Article 8 of the European Convention of Human Rights.[5]

In order to examine the effect of the changes, it is necessary to compare them with the pre-November 2006 ('old') HSMP rules. Under the old regime, an applicant would be awarded points for various criteria, including work experience, past earnings, and significant career achievements. Extra points were awarded for those under the age of 28 and those with skilled partners. The individual needed 65 points to be successful. GPs came under a provision that automatically awarded them the 65 points, as well as did MBAs from a list of 'top 50' business schools.[6]

[4] Home Office, Controlling our borders: Making migration work for Britain, Five Year Strategy for Asylum and Immigration, Cm 6472 February 2005.
[5] Under s. 3 of the Human Rights Act 1998, primary and subordinate legislation must be read and given effect so as to be 'compatible' with ECHR rights.
[6] HSMP Revised Programme effective from 31 October 2003 (MBA provision added in April 2005).

Post-November 2006, however, applicants can only gain points under previous earnings, educational qualifications, and age. The work experience and significant achievement criteria disappeared and were replaced by 'UK experience', which awards only 5 points. The GP provision was eliminated, and a mandatory English language requirement introduced. The pass mark was raised to 75. Under the new criteria, individuals must have at least a bachelor's degree; without it, they cannot qualify for HSMP.

The requirements for extension of leave to remain were similarly tightened. Migrants were given an initial leave of 12 months[7], which they would then renew for a further three years where they had taken 'all reasonable steps to become lawfully economically active.'[8] Being 'economically active' meant evidence of job application forms, interview offers, or a business plan, all of which were relatively straightforward requirements for those genuinely working or seeking work. Those fulfilling these criteria would be granted settlement, or indefinite leave to remain (ILR), effectively the final step before gaining citizenship.

In April 2006, however, the Government increased the initial period of leave to 2 years, making the qualifying period for settlement 5 years instead of the previous 4.[9] In addition, since November 2006 migrants have been forced to re-qualify under the new points system, as outlined above; simply proving economic activity is no longer sufficient.

[7] HC 395, para. 135B.
[8] HSMP Revised Programme, Question 26.6.
[9] HC 1702, para. 135G(i).

The amended criteria raise a number of issues. The first is that of retrospective effect, i.e. the need of *existing* migrants to re-qualify under the new rules. Several groups – from individuals without degrees, no matter how successful in their field, to GPs and people with significant work experience but in lower-paid industries such as the public sector – have become ineligible for HSMP. The English language requirement is similarly controversial; graduates now have to pass the IELTS Level 6 Test if their bachelor's degree was not obtained in English. Graduates from English-speaking countries are not exempt: they have to produce a certificate proving their degrees were taught in English. As Laura Devine, an immigration solicitor, put it:

> 'Neither Bill Gates nor Nicole Kidman would qualify under the new HSMP, whereas an English-speaking 22-year old with a bachelor's degree from a dubious educational establishment and earnings…of just £23,000 in their first graduate level role will qualify.'[10]

The retrospective effect applied by the changes to existing migrants under HSMP is a major cause for concern, which was recently raised by the House of Lords and Commons Joint Committee on Human Rights. In its report, *Highly Skilled Migrants: Changes to the Immigration Rules*, released in August 2007, the Committee pointed out that one of the key requirements for HSMP eligibility was for migrants to make the UK their main home. As the Committee stated,

[10] 'Is the new highly skilled migrant programme "fit for purpose"?' JIANL, 2007, 21(2), 90-108

> '[Those under 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. Changing the relevant criteria is…indisputably retrospective in effect.'[11]

The Committee then considered whether the retrospective changes were compatible with the right to respect for home and family life in Article 8 of the ECHR. They stated that Article 8 was engaged when the Immigration Rules made applicants for HSMP undertake to make the UK their main home. These individuals relocated their families, selling their homes and uprooting their lives on the expectation that, after the initial period of leave under HSMP, they would be allowed to continue living in the UK. For migrants to have that expectation thwarted when the new rules came into effect, and to be subjected to prolonged uncertainty about possible deportation whilst awaiting the outcome of any pending appeals or judicial review, was simply not acceptable.

In considering whether the interference of the Home Office with the right to respect for home and family life was 'in accordance with the law' as required in Art. 8(2), the Committee concluded that it was not, because the legal framework did 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.'[12]

[11] HL Paper 173, HC 993, para. 38.
[12] Ibid, para. 39.

The Committee summed up its views with the following statement:

> '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.'[13]

It must be noted that the views of the Joint Committee on Human Rights are recommendatory; they cannot strike out or amend existing legislation. However, the arguments of the Committee can be seen to significantly advance the case for a reform of the law. They highlight the flaws in the current rules, in which the Government appears to be exercising an 'unconstrained power'[14] in the Immigration Act in order to change the Immigration Rules with immediate effect in a way that disadvantages the very people who have committed to make the UK their home.

Since the changes were introduced, there has been at least one successful appeal which invokes Article 8, although at present no appeals specifically relating to the 2006 HSMP changes have yet gone any further than the Asylum and Immigration Tribunal. In *GJ and others v Secretary of State for the Home Department*[15], Digney J allowed the appeal of George Joseph, an Indian national, who could not re-qualify under the 2006 HSMP rules and, when he attempted to apply for a work permit to remain legal in the UK, was refused leave to remain.

[13] Ibid, para. 50.
[14] Ibid, para. 39.
[15] IA 03838/07. The Home Office did not appeal the decision.

Joseph appealed on the grounds that he had a legitimate expectation that his leave would be extended, and that the interference with his right to private and family life when his application was refused was disproportionate and therefore breached his human rights under Article 8. The HSMP guidance notes in force during the summer of 2005, when Joseph applied, stated:

> 'How will the revised[16] HSMP affect me?
> Not at all. It is important to note that once you have entered the programme you are in a category that has an avenue to settlement. Those who have already entered under HSMP will be allowed to stay and apply for settlement after four years qualifying residence regardless of these revisions to HSMP.'

Thus we come to the second issue: whether or not the pre-2006 HSMP guidelines created a substantive legitimate expectation. In his judgment, Digney J stated this in the affirmative:

> '[Joseph] has a strong legitimate expectation of further HSMP visa extension according to the rules and he changed his position to his detriment as a result of what he was told and that there was no overriding public interest that demands the treatment to which he was subjected.'[17]

A significant number of other 'Questions and Answers' in the guidelines provide statements that appear to be clear and express promises by the Home Office: 'After four years in the UK as a highly skilled migrant you can apply for settlement…the main

[16] HSMP Revised Programme effective from 31 October 2003, Question 24.10.
[17] IA 03838/07.

criteria will be that you have spent a continuous period of four years in the UK in a category leading to settlement and that you continue to be economically active in the UK as a highly skilled migrant.'[18]

Aside from the above statements that can be seen as amounting to promises, the wording of the HSMP guidance notes is likewise encouraging throughout the document. In Question 23.12, 'Do I need a job before coming to the UK?', the answer provided was an unequivocal 'No.' It is reasonable to infer that the lack of requirement for migrants to have an existing job with a specific employer was one of the attributes that made HSMP attractive relative to other routes to immigration, and another reason why a prospective migrant would choose HSMP – to their detriment – as opposed to, say, a work permit, which ties an individual to a single employer.

GJ and others v SSHD is but the first in a long line of cases anticipated to come before the courts as more people come to the end of their existing leave and are forced to re-qualify under the new rules. Indeed, the refusal rate of HSMP applications has soared; between 5 December 2006 and 4 January 2007, 63 percent were refused.[19] In addition, an application for judicial review has been lodged by the HSMP Forum, which was formed by 800 individuals adversely affected by the changes. This rash of cases would not only burden the court system considerably but also give the impression that the UK operates according to a brutally utilitarian policy that throws highly skilled migrants to the dogs as soon as the Government no longer has any use for them.

[18] HSMP Revised Programme, Question 26.5.
[19] JIANL, 2007, 21(2), 90-108.

One of the main criticisms of the scheme is that the types of people the Government wishes to attract under the new HSMP has changed dramatically: whereas under the old rules work experience, as well as experience in a variety of business sectors, was welcomed, the new regime can be said to favour young graduates with little commercial experience, but who work in highly-paid sectors such as finance. One need only look at the sliding scale of points for age (20 for people below the age of 27 to zero for individuals 32 and above) and previous earnings (45 points for £40,000+ to zero for incomes below £16,000) to realise that this is the situation.[20] While it may be argued that a plethora of young graduates is beneficial to the economy, there is a concern that the current rules will end up creating an imbalance in the highly skilled migrant workforce, pushing out the self-employed and the entrepreneurs. Should an economic downturn occur, does this mean that these graduates will be the first to be sacked?

The third issue encompasses the procedural aspects of the amended HSMP. The so-called 'simplification' exercise has not only created additional bureaucracy as applicants rush to take the English language tests or get additional certificates that were not necessary in the past, but has also resulted in higher refusal rates. The way in which the information must be presented is very specific. For instance, a P60 is the preferred method of evidence of previous earnings; without it, one must corroborate this information through both payslips and original bank statements. There have been numerous incidents where applications have been refused due to one missing payslip.

[20] HC 1702, Appendix 4.

In the face of these issues, reform of the Immigration Rules relating to HSMP, as well as of the HSMP guidelines and provisions incorporating the 2006 changes, is necessary. It has already been suggested that a review of the existing legislation should be undertaken. A number of ways on how this could be carried out are discussed below.

Firstly, the changes that applied retrospectively to existing migrants should be amended so that they would apply only to *prospective* applicants. Those already in the UK under HSMP should therefore be subject to the old (pre-2006) rules. In terms of practicality, this is a sensible approach that retains the new points system for incoming applicants, while maintaining the status quo for those who harboured what is arguably a legitimate expectation to continue their stay in the UK as highly skilled migrants.

Secondly, the human rights concerns relating to the changes should be adequately addressed. Legislation that may be construed as incompatible with Article 8 of the ECHR (even by a recommendatory body such as the Joint Committee of Human Rights) could put the Government in an uncomfortable position. If the courts eventually declare the amended Immigration Rules as incompatible – a possibility given the potential flood of litigation – this could operate as a trigger for remedial action under s.10(2) of the HRA 1998, which is to amend the relevant legislation in Parliament. It would seem more sensible, however, not to wait until the law is declared incompatible, and take action sooner rather than later. One possible way to resolve this issue has been put forward by

the Joint Committee on Human Rights: that any changes to the Immigration Rules should be accompanied by a statement as to the compatibility of the changes with the ECHR.[21]

Thirdly, the feasibility of the current '2+3' (2 years initial leave, followed by 3 years extension) is open to debate. The model set by Work Permits (UK), the work permit operation of the Border and Immigration Agency, where work permits are already being given for a period of up to five years, may prove a more useful solution, so as to eliminate the uncertainty of migrants' extension of leave to remain, and make the path toward settlement more straightforward.

Finally, with regard to future changes to the Immigration Rules, it would be desirable for the Government to consider rolling out the amendments within a reasonable time frame, in contrast to the 'stealth bomber' approach it took with the HSMP announcement on 7 November 2006, which took effect a mere 24 hours later. The abruptness of the changes and lack of a realistic notice period left no time for applicants or their solicitors to adequately assess their impact.

It is recognised that while some of the reforms proposed above seem at first glance to be relatively simple to implement, a holistic view of the issues surrounding the Immigration Rules exposes problems that stem from the current attitudes toward immigration. Immigration law tends to be seen in overly simplistic terms by the electorate, who are bombarded by the media with images of asylum seekers and illegal immigrants. Politicians are often hesitant to take a positive stance toward immigration, as this wins

[21] HL Paper 173, HC 993, para. 52.

few votes; in *Huang v SSHD*[22], the House of Lords commented that the Immigration Rules 'are not the product of active debate in Parliament, where non-nationals seeking leave to enter or remain are not in any event represented.' However, it must not be forgotten that many of those who are migrants now will eventually become citizens – and voters. This is an area of the law that has long been sidelined, and it is hoped that a purposeful reform of the HSMP changes will be in conjunction with the principles of fairness, equality, and the protection of human rights.

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[22] (2007) 2 WLR 581.