



THE GOVERNMENT REPLY TO
THE TWENTIETH REPORT FROM THE
JOINT COMMITTEE ON HUMAN RIGHTS
SESSION 2006-07, HL PAPER 173, HC 993

Highly Skilled Migrants: Changes to the Immigration Rules

**Presented to Parliament by the Secretary of State
for the Home Department
by Command of Her Majesty
November 2007**



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**THE GOVERNMENT REPLY TO THE TWENTIETH REPORT
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**HIGHLY SKILLED MIGRANTS: CHANGES TO THE
IMMIGRATION RULES**

Reasons for the changes

1. We made changes to the Highly Skilled Migrant Programme (HSMP) because our analysis of the way the HSMP worked in practice prior to the changes showed that some of those with HSMP visas were not doing highly skilled work. The previous test for extensions of leave was not sufficiently rigorous to select those migrants who were making the greatest economic contribution to the UK. We want to ensure that those on HSMP visas are actually doing highly skilled work, in line with the aims of the scheme. We amended the criteria for initial applications and extension applications in order to better reflect the likelihood of migrants' labour market success; to make the scheme clearer and more objective; and to tackle previous instances of abuse under the scheme.

2. As the Committee correctly notes, the change to the qualifying period for settlement, for all employment categories, was made because the Government believes that permanent migration must also be a journey towards being as socially integrated as possible. The move to 5 years brings us in line with the European norm for these purposes and helps to ensure that settlement is the final stage in an ongoing process of building up an attachment to the UK. The Government first set out its view on this matter in its February 2005 document *Controlling Our Borders: the Five Year Strategy for Asylum and Immigration*.

Article 8 and the HSMP Rules change in itself

3. The Rules changes in themselves do not breach Article 8 because there are safeguards in place to ensure that in a particular case, the individual's human rights are considered and protected. These safeguards include the fact that it is open to the applicant to include Article 8 grounds in any application for further leave under the HSMP. Such applications will, of course, be properly assessed by the Border and Immigration Agency and discretionary leave will be granted where the applicant is found to have a valid Article 8 claim. A refusal would bring the usual appeal rights, where once again there is the opportunity to raise human rights claims. Moreover if the Border and Immigration Agency decides to remove the individual then Article 8 will be considered at that point. If it is found that removal would result in a breach of Article 8 in an individual case then the applicant would be granted discretionary leave.

People affected by the HSMP Rules change

4. We have put significant transitional arrangements in place so that those who are making an economic contribution to the UK, but are unable to meet the new points test for extension applications, are able to stay in the UK. These transitional arrangements were detailed in Liam Byrne's letter to the JCHR of 30 March 2007 (Appendix 2 in your report). For ease of reference, we reproduce them here. There are four substantive provisions:

- a) 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.
- b) 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.
- c) 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.
- d) Applicants with leave to do the Professional Linguistic Assessment Board 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.

5. The number of HSMP participants who will have difficulty passing the points test for extension applications depends in large part on how successful they have been in the UK labour market. Our analysis of HSMP extension applications prior to the changes suggested that about 80% earned above the average UK salary, and about 40% earned salaries in the top ten percentiles of all UK earnings. Only about 5% of approved HSMP applicants did not claim any points for qualifications (some of these applicants may have had qualifications, but did not need to claim points with them because they gained sufficient points under other criteria). Predicting the number of HSMP participants who will need to rely on the transitional arrangements is difficult because each individual will score points differently against the four criteria. For example, those with qualifications of the highest level may be able to pass the extension test even with earnings significantly below the UK average salary. Points are awarded for earnings of £10,650 per annum upwards.

6. The transitional arrangements are designed to ensure that all those who are making an economic contribution to the UK are able to extend their leave, either through the work permit scheme or under special arrangements for the self-employed. Given the transitional arrangements and the earnings profile of HSMP applicants for extensions of leave in the past, we do not accept the HSMP Forum's estimate that as many as 90% of HSMP participants with existing leave will not be able to extend their leave, as noted by the Committee at paragraph 26.

7. We now address the specific Article 8 issues raised by the Committee: interference with private and family life; “in accordance with the law”; legitimate aim; and proportionality.

Interference with private and family life

8. In order for Article 8 to be engaged in a particular case the applicant needs to have established a private or family life in the UK and needs to show that exclusion from the UK would be an interference with that private/family life of sufficient gravity to engage Article 8.

9. Paragraph 35 of your report misrepresents the Government’s position. We accept that the requirement to make the UK the applicant’s “main home” *may* lead applicants to establish their family life here more definitively than they would have done otherwise. But this is not to say that private and/or family life will *inevitably* be established. Whether or not HSMP participants have established private and/or family life in the UK must depend on the facts of the individual case.

10. Before we address the issues of “accordance with the law”, serving a legitimate aim, and proportionality, we must note that whether or not there is *interference* with private or family life must also depend on the facts of a particular case. It cannot be said in all cases that such interference will occur by reason of an applicant’s inability to meet the new HSMP Rules.

11. In very many cases there will not be an interference with family life: if the individual has made the UK their main home and in doing so has brought his family to live with him he may well have family life in the UK, but that family life will not be interfered with by his return to his country of origin because the family will accompany him back there. The family will not be separated. Private life may be more readily established in the UK if someone lives and works here for a number of years and makes the UK his “main home”. But again, in many cases he will be able to carry out his private life in his country of origin: for example, he will be able to work there and establish and enjoy social networks. Of course, every case needs to be assessed on its own facts, so interference cannot be ruled out in all cases. But it is fundamentally flawed to consider that in every case there will be an interference with private and family life.

12. Your report did not specifically consider whether any such interference would be sufficiently grave to engage Article 8. Again, each case should be assessed on its own facts: in some cases there might be an interference with private/family life so grave as to engage Article 8 but this cannot be said, without more, about every case.

“In accordance with the law”

Retrospective impact

13. The HSMP changes are not ‘indisputably retrospective in effect’, as the Committee claims on page 18 of the report. The amended HSMP Rules apply only to those making applications for initial leave or extensions of leave under the HSMP from the date the new rules came into effect. Existing grants of leave are unaffected. We ask immigrants to apply for further leave to remain in part to ensure that the skills they have to offer remain in line with what is needed or to ensure that the purposes of the route are being upheld.

14. BIA officials are clear that HSMP applicants were never told that the criteria for extensions of leave under HSMP would not change in the future. Indeed, the guidance notes for the ‘old’ HSMP informed applicants that changes to the scheme in the future

were possible. Contrary to the assertion made in paragraph 39 of the JCHR report it was 'foreseeable and predictable' that the Rules could be changed.

15. For example, the "Questions and Answers" section of the 2003 HSMP guidance stated that the HSMP requirements may change in the future:

Q: What if the scheme changes?

A: As with any immigration scheme we reserve the right to adapt some of the criteria or documentation associated with the scheme and will inform you via our websites of any such changes. All applications will be treated on the basis of the HSMP provisions at the time that they were submitted.¹

Elsewhere in the same document it was stated that:

[T]he Home Office may decide it is appropriate to make further changes to HSMP in the future.²

In the revised guidance issued in April 2005 it was stated that:

The Home Office may decide it is appropriate to make future changes to HSMP.³

16. We intended our advice to applicants to be clear: we gave no explicit guarantees that the criteria for extensions of leave under HSMP would not change in the future and it was clear that changes to the criteria for extensions could be applied to people already in the UK.

The Legal Basis of the Rules changes

17. We note the Committee accuses the Government of acting with 'unconstrained power' and in an arbitrary manner (paragraph 39 of the report). The 1971 Act ss 1 and 3 established the Immigration Rules and the procedure by which 'statements' of the Rules are laid before parliament. We do not understand the Committee to be claiming that this procedure itself is somehow unlawful or inconsistent with the Human Rights Act or the European Convention on Human Rights.

18. Under this procedure, the Rules are subject to parliamentary scrutiny. In the case of *R (on the application of) Bapio & Yousaf v Secretary of State for the Home Department* (a case relating to changes in the Immigration Rules) the Judge Stanley Burnton J stated "when the exercise of a power of a Minister is subject to scrutiny by Parliament, it is not for the Courts to subject the Minister's decision to the test of reasonableness or to otherwise impugn the substance of the decision." The Judge did go on to say that "it has been held that the Immigration Rules may be impugned if they are 'manifestly unjust or in any such extreme fashion unreasonable'". As we stated above this change in the Rules cannot be so described, in particular because of the safeguards in place to ensure Article 8 is not breached in individual cases.

19. Given the parliamentary scrutiny of the Rules it cannot be properly said that the change in the Rules is 'unconstrained'. Any changes to the Immigration Rules are laid before, and approved by, Parliament. This is not an arbitrary exercise of power.

Legitimate aim

20. We welcome the Committee's recognition, at paragraph 42 of the report, that the policy aim in making changes to the HSMP was legitimate.

1 Highly Skilled Migrant Programme (HSMP) Guidance Notes: Revised Programme effective from 31 October 2003, paragraph 24.9

2 *ibid.* paragraph 16

3 HSMP Guidance for Applicants 28 Years of Age and Over (issued April 2005) paragraph 1. Identical wording is used at paragraph 1 of the HSMP Guidance for Applicants Under 28 Years of Age (issued April 2005).

Proportionality

21. As with the other Article 8 considerations, each case has to be considered on its own facts. There is nothing inherently disproportionate about the change in the Rules itself. The Committee suggests, at paragraph 47 of the report, that the absence of transitional provisions that would permit those HSMP participants to benefit from the Rules for extensions of leave as they stood when their initial leave was granted makes the Rules change disproportionate.

22. The Government considers the fact that there was never any promise that the Rules would stay the same; the fact that there is a mechanism for an individual's rights to be considered (as described above); and the fact that there are transitional provisions to facilitate switching to the work permit category and to cater for the self employed all mean that the change is proportionate.

23. When an individual case is considered under Article 8 the decision maker will assess whether, on the facts of that individual case, the private and/or family life rights of the applicant outweigh the rights of the UK to protect the economic well-being of the country by controlling immigration. It may be that in some cases it does, in which case leave can be granted. But that does not mean that all cases fall into this category or that the change in the Rules is disproportionate in itself.

The Committee's Recommendations

24. We now turn to the Committee's recommendations (page 19 of the report). These are reproduced in bold type. Our response to each recommendation follows underneath.

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.

25. For the reasons explained above we do not accept the Committee's argument that the changes to the Rules are incompatible with Article 8. Nor do we accept that they are contrary to basic notions of fairness. We therefore do not see the case for revisiting them in Parliament.

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.

26. The Rules changes do not apply retrospectively; they only apply prospectively. Existing grants of leave were not affected by either Rules change. Applications for initial leave or an extension of leave under HSMP, and for settlement (Indefinite Leave to Remain) under all the employment categories of the Immigration Rules, will be treated according to the Rules in place at the time of the application. The Government does not intend to amend the Immigration Rules as the Committee suggests.

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.

27. The Government does not claim to have an ‘unfettered’ power to make changes to the Immigration Rules. As explained above, all Rules changes are subject to parliamentary scrutiny. At paragraph 55 of the report the Committee refers to the House of Lords case *Huang* to suggest that the Immigration Rules are an ‘unfettered power’.

28. Their Lordships’ comments in *Huang* were made in response to Counsel for the Secretary of State’s argument that the Rules are, *de facto*, human rights compliant and therefore that there can be no cases where a person who does not meet the requirements of the Rules can have their case allowed under the ECHR. Their Lordships disagreed with this submission: they found that in some cases the Rules alone did not adequately give effect to an individual’s human rights, and that if this were the case the individual’s claim should be allowed under the ECHR even if not under the Rules. It is important to note that their Lordships found that this would be the case only in an exceptionally small number of cases.

29. This is consistent with the Government’s position (detailed above at paras 17 – 19 of this Command Paper) that the Rules in themselves cannot be considered an arbitrary exercise of power, and that in accordance with Stanley Burnton J’s comments in *Bapio* changes to the Rules should not, except in cases where they are ‘manifestly unjust’ or ‘extreme(ly)...unreasonable’, be impugned by the courts.

30. The Secretary of State, applying the law as set out in *Huang* accepts that in a very small number of cases the Rules (or, as here, a change in the Rules) could, if that were the end of the matter, cause a breach of an individual’s human rights. However that is not the end of the matter: in those cases the individual will be entitled to apply for, and will be considered for, discretionary leave allowing them to remain in the UK so as to protect their human rights. Thus there is no breach of their human rights.

31. This mechanism for granting discretionary leave to those who would not be entitled to remain under the Rules but for whom removal would breach Article 8, together with the existence of parliamentary procedure whenever the Rules are changed, mean that the Rules do not amount to ‘an uncontrollable discretion to interfere with Convention Rights’. It also means that the Rules cannot be considered in themselves to be in breach of human rights: even though the effect of the Rules might, in a very few cases, be a potential breach of human rights there would be no actual breach of human rights because there are mechanisms in place to ensure that this does not happen.

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.

32. Changes to the Immigration Rules are subject to parliamentary scrutiny. We are not persuaded of the need for a statement of compatibility with the ECHR to accompany every change to the Immigration Rules.



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