



## HSMP Judgments

20<sup>th</sup> April 2009

This information sheet provides information about two judgments of the High Court concerning migrants who came to the UK under the highly skilled migrant programme (HSMP).

### The HSMP programme

This programme concerned how highly skilled migrants could come to and settle in the UK. It was introduced in January 2002. It was designed to attract skilled individuals to come to the UK so as to enhance the UK's economy. Those who met the criteria for entry under the programme were encouraged to come by the opportunity for the migrant and his or her family to obtain indefinite leave to remain (ILR) after they had been here on the programme for 4 years. The route to ILR was that someone accepted onto the programme would be granted one year's leave to enter the UK. If he or she continued to meet the criteria, a further 3 year's leave to remain could be obtained; and thereafter ILR could be obtained. In order to get onto the programme, migrants had to agree to make the UK their main home.

### Changes to the programme

Although the published guidance stated that the programme might be withdrawn (or changes might be made), it also stated:

*“Should this occur those already in the United Kingdom, as skilled migrants, will continue to benefit from the programme's provisions.”*

In the years following 2002, changes were made to the programme. In 2006, the Government announced further changes to the programme. These changes were different to previous changes in that they affected individuals who were already on the programme. Previous changes had only applied to new applicants to join the programme. The 2006 changes were:

- on 3 April 2006, the Government changed the length of time someone would have to be on the programme before an ILR application can be made – the period was extended from 4 to 5 years
- on 7 November 2006, the Government changed the criteria that someone had to meet in order to obtain the further 3 year's leave to remain or ILR – the criteria was more restrictive, and meant that some people on the programme would be unable to continue on it or obtain ILR despite still meeting the original criteria

### Joint Committee on Human Rights (JCHR)

The JCHR, a select committee of Parliament, conducted an inquiry into the changes. Their report is available at:

<http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/173/173.pdf>

The JCHR concluded that the changes seriously disadvantaged those who had already been accepted onto the programme. Some of these migrants would not be able to meet the new criteria, and might have to leave the UK – despite having moved to the UK, with their family, in order to make the UK their main home as had been required of them. The JCHR concluded this was an unlawful interference with their right to private and family life (Article 8, European Convention on Human Rights).

### R(HSMP Forum Ltd) v SSHD [2008] EWHC 664 (Admin)

The High Court gave judgment in this case in April 2008. In this case, the court considered the 7

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November 2006 change.

The court considered the various statements and guidance published by the Government about the scheme. The court concluded:

*“...the terms of the scheme, properly interpreted in context and read with the guidance and the rules, contain a clear representation, made by the defendant [the Government], that once a migrant had embarked on the scheme he would enjoy the benefits of the scheme according to the terms prevailing at the date he joined.”*

The court concluded that this created (what lawyer's refer to as) a legitimate expectation that the criteria for continuing under the programme would not change once the migrant had been accepted onto the programme. The court found the change was unlawful.

**R(HSMP Forum (UK) Ltd) v SSHD [2009] EWHC (Admin)**

The High Court gave judgment in this case in March 2009. In this case, the court considered the 3 April 2006 change.

The court considered the High Court judgment given in 2008. The court considered the reasons for the 2008 judgment were relevant to the issue now before the court. The court concluded that:

*“...there was, in this case, the clearest of representations to those already on the HSMP before 3 April 2006 that they would qualify for indefinite leave to remain after a period of continuous residence of 4 years...”*

The court also noted that those affected by this change were “*a specific, well-defined group of people*”. The court was, therefore, satisfied that the effect of the court decision was itself clearly defined and limited; and did not interfere with matters that should properly be left to the political arena (i.e. Government and Parliament).

The court decided that it was not lawful to require those who had entered the programme before April 2006 to wait the additional year before applying for ILR.

**General note**

The High Court, in these cases, accepted that the Government is entitled to make changes to the Immigration Rules and immigration policy. The judgments do not mean that changes can never apply to migrants who have already entered the UK under existing or pre-existing Rules or policy. The changes to the HSMP could not be applied to migrants already on the programme, because clear statements had been made to them that they should expect changes such as these would not be made. This was particularly important since those statements had been made expressly in order to encourage them to come and make the UK their family home.

The JCHR recognised a wider point. Changes that affect migrants who have already come to the UK may interfere with their private and family life (Article 8). This does not necessarily mean that such changes would be unlawful. More information on Article 8 is given in the August 2008 “Article 8” information sheet.

People may rely on these judgments in other circumstances where the Immigration Rules change in ways that affect people who are in the UK. Whether reliance on these judgments will be successful, will depend on the particular change or changes, the effect of such changes and any representations or promises that had been made to people about whether there would be any changes.