DRAFT FURTHER LETTER

We write on behalf of the proposed claimant in this matter, HSMP Forum (UK) Limited.

Introduction and summary

In your letter dated 18 August 2008 you responded to our letter before claim of 30 July 2008 in which we provided details of our complaint about your 9 July 2008 guidance ('HSMP Forum Limited judicial review: policy document') which fails completely to deal with the issue of the increase in the qualifying period for settlement from 4 to 5 years. As made clear in our letter, it was our contention that in light of the binding judgment of Sir George Newman such failure was unlawful and not vindicated by the terms only of the declaration made.

The purpose of this letter is twofold.

First, to raise with you very obvious shortcomings in your 18 August response which – prior to lodging a claim for judicial review - we would invite you to address.

Second, to draw to your attention difficulties of a number of our members who – having relied on the judgment in support of applications made by them for indefinite leave after four years – have not only had such applications refused, but have also not been given a further year to enable them to complete the five years you say they need in order to obtain settlement and have even been told that their presence here is unlawful and that they will be removed.

In light of the matters set out below we would hope you will reconsider your position so as to avoid the need to make a claim for judicial review. As regards in particular the second matter, we are bound to say that your conduct in respect of such persons is – even on your own analysis of the effect of the judgment – grossly unfair and unlawful. It is our very firm view that in respect of all such persons refused settlement because they have not completed five years they must at very least:

- automatically be given a further year's leave so as to enable them after five years to apply for settlement;
- have the threat of prosecution and/or removal withdrawn; and
- have the fee for a future settlement application waived (ie. carried over).

Particulars

The qualifying period for settlement

We rely on our analysis in the 30 July 2008 letter without repeating it. At its heart is the fact that the unappealed judgment is binding authority for the proposition that migrants who entered the programme who embarked on the scheme were entitled to enjoy its benefits "according to the terms prevailing at the date [they] joined" (paragraph 57 of judgment). That is what the judge decided. You have not said that his conclusion was wrong.

It is true that the judge was directly concerned with the November 2006 changes, whose legality was in issue. But there is no getting away from the logic of his reasoning – which you have not challenged. There can be no doubt but that settlement after four years was a benefit of the scheme for all those who joined prior to the April 2006 rule change, and you have not suggested otherwise.

Your 18 August response fails to address this fundamental point at all.

The point is strongly reinforced by the source of the right of substantive fairness on which the judge relied. It came from the clear representation (judgment paragraph 55) that: "Those who have already entered under the HSMP will be allowed to stay and apply for settlement after 4 years' qualifying residence regardless of revisions to HSMP".

In circumstances where this is the clear conclusion of the High Court, and where the Secretary of State has decided what approach to maintain for the future, there is no escape from the application of the logic to the right to seek settlement "after 4 years qualifying residence", that being part of the "terms prevailing at the date [they] joined".

In this respect what the Secretary of State must do (which she has plainly not done in the guidance or your 18 August response) is to reconcile Sir George Newman's reasoning with her own interpretation seeking to distinguish between different benefits of the scheme. In reality the Secretary of State is quote unable to reconcile her approach with Sir George Newman's binding decision, applying as it does unambiguously to all benefits of the scheme prevailing at the date the migrant joined.

For these reasons we invite the Secretary of State to reconsider her position.

Those refused settlement after four years

There is a second serious problem, which is brought to our attention and which would of itself justify the intervention of the Court, unless it is promptly remedied. It is as follows.

We have had drawn to our attention numerous cases in which (following the judgment) people who have applied for settlement after four years on HSMP have had their applications refused. A good number of such refusals pre-dated your 9 July guidance but such refusals persist even after those changes.

We take but one case as an example. It is that of Xxxxxxxxxxx, an Indian national (HO reference xxxxxxx), who appears to have had an initial one year's leave on HSMP until 30 July 2005, which was then extended for a further three years in June 2005 (until 30 July 2008). On 4 July 2008 application was made for settlement based on 4 years on HSMP.

The application was refused by decision dated 12 August 2008 because he had not spent a continuous period of five years on HSMP, with the consequence that

he had no right to be present and was subject to removal. The letter explained that (absent a successful appeal or voluntary return to India), he would be removed.

This approach is utterly inappropriate and grossly unfair. We cannot imagine any justification at all for treating applicants in this way. Even assuming for the purposes of this question only that the Secretary of State were correct as regards the qualifying period for settlement not being covered by the judgment, what possible justification can there be for preventing people from being able to clock up five years on HSMP?

The answer of course is that there is no justification at all for such an approach which on any view is plainly unlawful. It is utterly intolerable for Mr Xxxxxx and his family (and countless others who have faced the same treatment) to have to resort to litigation to protect their position under threat of removal.

We trust that the Secretary of State will take immediate steps to protect the position of such people to ensure that there are no further refusals taken of this kind, and most important that all those who have been casualties of the Secretary of State's unlawful approach will have their position rectified.

First, plainly and at very least such persons must automatically be given an extension of their existing leave to remain, on the basis that they can and will be given settlement after waiting the further year. This should be the position in all such cases, irrespective as to whether there has been any period of technical overstay following four year's lawful presence on HSMP. Second, any threat of removal must obviously be withdrawn. Third, steps must be taken so as to ensure that such persons do not have to pay a further fee after they have clocked up five years for their settlement application. There can be no justification for penalising this category of individual, by requiring an additional application and an additional fee, based on the time at which they had joined the scheme. The plain and obvious solution would have been to defer the application for settlement for a year, holding over the application fee for that purpose (ie. to 'waive' the future settlement fee where such fee has already been paid for someone who sought settlement after four years on HSMP and was refused).

Conclusion

We look forward to an immediate response to both of the matters raised in this letter, conscious as we are of the need to make an application for judicial review promptly.

Yours sincerely,