Draft Copy of LETTER BEFORE CLAIM

We write about the arrangements made by the Home Office for migrants covered by the HSMP judicial review judgment of 8 April 2008. The guidance (entitled 'HSMP Forum Ltd judicial review: policy document') is dated 9 July 2008 and is available on the BIA's web-site.

Introduction and summary

This letter is written pursuant to the judicial review Pre-Action Protocol. The essence of our complaint about the guidance is that the Secretary of State has failed completely to deal in the guidance with the issue of the increase in the qualifying period for settlement from 4 to 5 years. Stated shortly it is our contention that such failure to make provision to preserve the four year qualifying period for certain migrants and/or at vey least to address this matter in light of the judgment of Sir George Newman is unlawful and not vindicated by the terms only of the declaration made. The reasons for our position are set out fully in the following paragraphs.

Particulars

Background

As characterised by Sir George Newman, the highly skilled migrant programme conferred a "mutuality of benefit" providing a new way for individuals to migrate to the UK whilst providing the UK with the skills and experience necessary to enable it to compete in the global economy. There cannot be the slightest doubt that qualification for settlement after **four** years was an integral part of the package of measures by which migrants were encouraged to enter the scheme.

Initial guidance issued in 2002 spelt out that "residency in the United Kingdom" could be achieved after four years.

In January 2003 guidance drew the firm distinction between, on the one hand, aspects of the scheme that might change and, on the other, the express statement that as regards those who had already "entered under the programme" for whom any such changes would have no impact at all. As the following extracts of the guidance show this was expressly in relation to settlement after four years:

> **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 they were submitted.

Q: I have already applied successfully under HSMP. How does the revised HSMP affect me?

A: Not at all. It is important to note that once you have entered under 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 4 years qualifying residence regardless of revisions to HSMP.

There is no ambiguity here at all: changes would not affect the four year qualifying residence requirement for those already here. We should emphasise that the October 2003 guidance was in identical terms (see question and answers 24.10 and 24.11) and indeed has always emphasised that the route to settlement was four years (until that is the April 2006 guidance mentioned five years following the immigration rule change).

The report of the Joint Committee on Human Rights

As you are aware the 9 August 2007 report of the Joint Committee on Human Rights ("Highly Skilled Migrants: Changes to the Immigration Rules") recommended amendment of the rules 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" (conclusions and recommendations at paragraph 8 refers).

The judgment of Sir George Newman

Turning to the judgment of Sir George Newman, he set out at paragraph 28 of his judgment the proper approach to be taken to the complaint made by HSMP:

> .28. In my judgment, proper consideration to the claimants' complaint requires due weight to be given to the character and purpose of the scheme. I am satisfied that migrants were encouraged to enter the scheme, not simply because they would gain admission for one year, but because, in accordance with conditions and criteria which were set out and offered to them, they would obtain, if the conditions and criteria were met, an extension of leave to remain and ultimate settlement. Obviously they were not "guaranteed" an extension or settlement because they had to meet the conditions and criteria which had been laid down. But, equally, they were being told that if they met the conditions they would be entitled to remain. I am wholly unimpressed by the attempt to interpret the scheme as a commitment only to the terms of entry and only those terms could not subsequently be altered. The real question is whether, properly interpreted, the scheme conferred a commitment on the part of the government not to change the conditions in connection with the continuing implementation of the scheme.

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There is no doubt that Sir George Newman's analysis which followed focussed in part on the four year period of residence which would generally lead to the grant of indefinite leave to remain. See for example paragraph 31. Then most important the four year period was referred to (at paragraph 55) in considering the scope of the legitimate expectation enjoyed by migrants who had entered under

the pre November 2006 regime. To give context to the reference however we refer first to paragraph 52 where Sir George Newman directed himself as follows:

> .52. In my judgment the correct answer to the "dispositive" question requires a contextual analysis of the purpose and terms of the HSMP up to November 2006, not a textual analysis of its parts interpreted in isolation from the other parts of the scheme. My analysis, which is to a large extent laid out in the preceding paragraphs of this judgment, is as follows:
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> (1) The scheme represented a change in the policy of controlling immigration.
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> (2) The policy was designed to target a particular group of migrants and to encourage them to come to the UK to assist the UK economy.
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> (3) The scheme was not composed of severable parts but of interlocking provisions. Once a migrant had joined the scheme he was entitled to enjoy the benefits of the scheme according to its terms. He was obliged to establish a migrational intent to make the UK his main home.
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> (4) Participation in the scheme was designed to provide a path to settlement and once a migrant had embarked on the scheme it was intended that he should carry the expectation of attaining settlement. That was the purpose of the scheme.

It is to be emphasized that in not appealing the Secretary of State is plainly to be taken to accept the correctness of this analysis.

As regards the four year qualifying period the essential matter that we raise with the Secretary of State is whether this was one of the 'benefits of the scheme according to its terms'. In light of the above quoted extracts from the guidance there is in our submission only one possible answer, namely 'yes'. Indeed, there is overwhelming support for this in the judgment of Sir George Newman who at paragraph 55 alights on precisely that part of the scheme (referred to above) which confirmed that those who had already entered would be able to apply to settle after four years:

> 55. But the guidance went further. The January 2002 guidance stated that even if the programme was suspended:
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> "those already in the United Kingdom, as Skilled Migrants, will continue to benefit from the programme's provisions".

The later guidance stated in answer to the question "What if the scheme changes?" and "I have already applied successfully under the HSMP. How does the revised HSMP affect me?"

> "A. Not at all. It is important to note that once you have entered under the programme you are in a category that has an avenue to settlement. 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".

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Whilst correct that in the following paragraph of his judgment Sir George Newman focuses on the second sentence in the answer just cited (as opposed to the third), he held (at paragraph 57 of his judgment) that the representation made to migrants was as follows:

> 57. I find that 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, 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 9 July 2008 guidance

We turn next to the guidance issued by the Secretary of State and which is the subject matter of this letter. It is our submission that in order properly to reflect and respect the terms of the judgment of Sir George Newman it was incumbent on the Secretary of State to identify (adapting the words of Sir George Newman) 'the benefits of the scheme according to its terms at the date that migrants joined' and to make provision for the preservation of those rights existing at that date.

For present purposes it is accepted that for migrants that joined HSMP between April and November 2006 there could be no expectation of being able to qualify for settlement after four years. As already noted above, the April 2006 guidance refers at paragraph 22 to the need to have five years in the UK in order to qualify for settlement.

For others on the other hand who joined the scheme before the April 2006 increase from four to five years the position is different. As stated expressly by Sir George Newman, the scope of the representation in their cases was that they would enjoy the benefits of the scheme which existed at that time. As already made clear it is our firm view that it is beyond argument that such benefits included the possibility of qualifying for settlement after four years.

The guidance is silent as to any of the foregoing. It simply does not address the point. Whilst replete with references to "the qualifying period for applying for settlement as a highly skilled migrant" the guidance does not indicate how long such period is and certainly makes no provision that we submit it should contain to preserve the four year status quo for those persons who entered the scheme prior to April 2006.

We are aware that in a number of cases applications for settlement made since the judgment of Sir George Newman by migrants who have been here for four years have been refused. In one case we have seen[1] the reasons for refusal letter makes the point that the judgment has "no bearing on the length of time people have to spend in certain immigration categories before they can apply for settlement" (since it s said to relate only to "the Immigration Rules in respect of applications for further leave to remain under the [HSMP]").

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[1] D A W, HO reference xxxxxxxxx, ……2008

It is also correct to acknowledge that – responding to a letter from Amit Kapadia, Executive Director of HSMP Forum dated 3 June 2008 to Liam Byrne – Marc Owen of the UK Border Agency's Managed Migration Policy stated that there were no plans "to revisit the settlement rules changes implemented in April 2006". However, although Mr Kapadia's letter had itself made reference to the judgment of Sir George Newman, Marc Owen's 17 June 2008 reply made no reference at all to the judgment.

The Pre-action Protocol

With an eye to the pre-action protocol we trust from the foregoing that the following is plain.

The proposed claimant is HSMP Forum (UK) Limited (the organisation created to conduct legal challenges by the parent organisation HSMP Forum), while the proposed defendant is the Secretary of State for the Home Department. We seek to challenge the terms of the guidance issued 9 July 2008 and at issue is the obligation – explained above – on the Secretary of State to make (or at very least to consider making) provision for those who entered the scheme before April 2006 so as to enable them to qualify for settlement after four years (the benefit given by the scheme at the date such persons joined). As regards the action the Secretary of State is expected to take, this again is clear, namely to commit to do that which we assert she is required lawfully to do in order properly to reflect and respect the judgment of Sir George Newman. As regards a proposed reply date, we would expect that a reply be provided within fourteen days of the date of this letter.

Conclusion

For the reasons here given it is incumbent on the Secretary of State to make provision so as to enable migrants who joined the scheme before April 2006 to apply for settlement after four years. This was very plainly a benefit of the scheme then in existence and there is no reason why provision ought not be made for such persons in the guidance.