



HIGHLY SKILLED MIGRANT INDEFINITE LEAVE TO REMAIN REFUSALS & COVID-19 REALITIES

EXECUTIVE SUMMARY

December 2020

We all need a secure place to call home and we all want to ensure that the UK emerges from the Covid-19 pandemic as a strong, cohesive and tolerant nation on the post-Brexit world stage. This position necessitates calling on the UK's long tradition of equality and justice to ensure fair and compassionate immigration decision-making in which the dignity and talents of people from all nations around the world are safeguarded and recognised as needed for what lies ahead. This position also necessitates good relationships with our international partners, including the Commonwealth, which requires not treating migrants in a way that we would not tolerate for UK migrants overseas. The UK's Highly Skilled Migrants (HSMs), like all people who move to the UK, deserve to be treated with fairness and dignity and given agency to build and maintain a life in the UK where there is no harm, material loss to others or damage to the public interest that justifies interference with their rights.

HSMs in the UK have however been criminalised, denied indefinite leave to remain (ILR) based on the Home Office's subjective 'bad character' or 'dishonesty' judgements using immigration rule 322(5) in relation to historic self-employment tax discrepancies; some over 10 years ago. The denial of ILR leaves them in legal limbo, and in a hostile environment, with no ability to work, rent, drive, receive NHS healthcare, open bank accounts or receive access to public funding (as a result of *Immigration Act 1971* section 3C). The 2019 *Balajigari* judgement found that if HSM applicants are not found to be "guilty of conduct bringing them within the reach of clause 322" which is otherwise applied to criminals, terrorists and those deemed a national security threat, "then a serious injustice will have been done".¹

The HSMs chose to apply to the UK Tier 1 (general) visa scheme, bringing their talents and building lives in the UK with the knowledge and expectation that if no rules were broken or crime committed, they would be on a route to settlement after 5 years. These people now severely regret taking this decision. Although we recognise that ILR is a privilege to be earned, any refusal must be fair and proportionate, and applied consistently to those who fall within the rules and policy. Where refusal is justified, consideration must be then given to the human rights of that person to determine what status they should then be granted.

Through shutting the Tier 1 (General) visa scheme in April 2015 and merging the Home Office and HMRC databases, HSMs – nearly all of whom are people of colour – were made easily-traceable, low

¹ *Balajigari vs. SSHD* (16 April 2019), para.14. See: <https://www.judiciary.uk/wp-content/uploads/2019/04/balajigari-others-v-sshd-judgment16.4.19.pdf>

hanging fruit to target. Despite the *Balajigari*² ruling that found the Home Office's (then) decision-making process unlawful and saw up to 80% of HSMs granted ILR, at least 65 people's cases have fallen through the cracks for reasons including the timing of their applications and having no opportunity to answer questions or 'tell their story'³ as to why the discrepancies occurred. 80% of remaining HSMs have received no 'Minded to Refuse' letter and of these, 22% have had no chance to explain the discrepancies through a right of appeal. In many of the cases, there is also no clear evidence that the Home Office acknowledged that the burden of proof was on themselves to evidence 'dishonesty' or undertake a sufficient "balancing exercise" in making its decision, "informed by all relevant factors", including "substantial positive contribution to the UK ... and circumstances relating to the (mis)conduct in question" (*Balajigari*).

The Home Office's initial decisions have had a devastating impact on the remaining people without ILR and their families, all of whom chose and were welcomed to work in the UK 10-12 years ago. By now, some have lived in the UK for up to 17 years. All HSMs are in a significantly worse position with fewer rights in comparison to when they were on the Tier 1 visa. Some have additional compelling characteristics such as children (including some who have lived here for more than 7 years) or have protected characteristics such as living with disabilities. Being required to leave the UK is clearly contrary to their best interest. For those with no leave, the combination of significant unexplained delays in Home Office and court decisions, having no section 3C work, healthcare, and other rights, has pushed them into near or actual destitution or homelessness. The Covid-19 pandemic has further exacerbated these already difficult situations, causing further delays or reducing the financial ability to pursue cases. 45% say they are already homeless, destitute, or unable to pay rent. With such insecurity, the UK Government is violating their rights of liberty and security of person.⁴

'The gravity and intensification of the practical and emotional difficulties inflicted on, and disabilities experienced by applicants for ILR and their families by a refusal on paragraph 322 grounds, who will by definition have been resident in this country for many years, must be fully appreciated'.

(*Balajigari*, para.14)⁵

One of the many HSMs, Omar*, explains his family's disbelief at the denial of his ILR due to his "impeccable immigration record with no criminal convictions or civil judgements." He says "*the UK has been my home for nearly 15 years with friends, family, education and professional qualifications all built here. We have been forced to sell what little valuables we have left. Each day piles further misery on us. We are falling into a cycle of debt and have only managed to stay afloat due to the generosity of friends and local food banks. Me and my wife are proud members of the NHS volunteer responder team and have been continuously volunteering for the NHS and care sector during the Covid-19 pandemic.*"

Without ILR, the future of even those with 30 months leave to remain (LTR) in the UK is uncertain, with their historic tax returns potentially making them 'undesirable'. For those granted limited leave on a ten year route to ILR, it is unclear what the impact of their historic tax discrepancies will be for the assessment of 'good character' once they reach the point of settlement and/or naturalisation.

*- pseudonym

² *ibid*, See: <https://www.judiciary.uk/wp-content/uploads/2019/04/balajigari-others-v-sshd-judgment16.4.19.pdf>

³ <https://www.gov.uk/guidance/procedural-justice>

⁴ Article 9 of the International Convention on Civil and Political Rights; Article 5, European Convention on Human Rights. See UN HRCOMM General Comment 35 (CCPR/C/GC/35).

⁵ *Balajigari vs. SSHD* (16 April 2019), para.14. See: <https://www.judiciary.uk/wp-content/uploads/2019/04/balajigari-others-v-sshd-judgment16.4.19.pdf>

Wider questions remain about the use of points-based (ILR) application processes for HSMs and other migrants which retrospectively punishes applicants for failing to maintain certain standards or running into barriers in their career beyond their control. For the many migrants of colour, underlying systemic racism in the UK within the job market undoubtedly restricts their options.

While hostility towards these highly skilled people, and blocking them from participating in society through Home Office policy,⁶ decision-making and wider society continues, we lose part of what the Covid-19 pandemic has reminded us makes our communities (and economy) stronger. As we emerge, post-Brexit, from the Covid-19 pandemic, a stronger UK needs all of our talents, including those held by the NHS workers, biomedical scientists, accountants, IT consultants, factory production managers and many others within the HSM group.

We ask the Home Office to immediately review and repeal its decisions to refuse ILR where no criminality has taken place and act on the urgent asks below. The unique, discretionary application of rule 322(5) to refuse ILR is a wholly disproportionate tool to operate in this context.

The full report will be launched in January 2021.

For more information or to access the recommendations or content of the full advanced copy of the report, contact Katharine at Migrants' Rights Network via k.thane@migrantsrights.org.uk

This report has been carried out jointly with the Highly Skilled UK Group. Follow them on Twitter at @HighlySkilledUK. For more information, contact Salman via salmanfaruqui@hotmail.com