



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

CONTENTS

Executive Summary	2
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Urgent Asks

Highly Skilled Migrant-related and wider recommendations	5
Highly Skilled Migrant-specific recommendations.....	7

Issues & Key Findings

HSMs and the refusal of ILR on the basis of clause 322(5)	9
The Highly Skilled Migrants & the hostile environment	10
The remaining cases: falling between the cracks	12
Current realities & the impact of Covid-19	15

METHODOLOGY & THANKS

This report's investigation was conducted with the Highly Skilled UK group and included 2 comprehensive surveys in June and October 2020 with 67 and 63 responses respectively. Extensive interviews were also conducted with members of the Highly Skilled UK group, legal professionals, those working on relevant immigration matters in NGOs and in UK Parliament.

Sincere thanks to the members of the Highly Skilled UK group who have taken time to share their stories in their difficult circumstances. We are deeply impressed by the resilience of the community, and especially its secretariat, Salman Faruqui, Ihsam Uddin and Inam Raziq, who voluntarily support hundreds of HSMs through the difficulties outlined in the report in their free time and sometimes from their own pockets.

Sincere thanks also for the wisdom provided by many including Syed Naqvi (ITN Solicitors), Sonali Naik QC, Maha Sardar and Adrian Berry (Garden Court Chambers), Zainul Jafferji (Clarendon Park Chambers), Rakhi Rashmi (MRN Board) and colleagues at MRN who have worked on these, Windrush and other immigration issues closely.

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EXECUTIVE SUMMARY

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 to ensure fair and compassionate immigration decision-making in which the dignity and talents of people from 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 or damage to the public interest that justifies interference with their rights.

HSMs in the UK have however been criminalised and denied indefinite leave to remain (ILR) based on the Home Office's subjective 'bad character' or 'dishonesty' judgements under immigration rule 322(5) for historic self-employment tax discrepancies up to 10 years ago. The denial of ILR has left them in legal limbo. All those affected are migrants of colour from 6 South Asian and African countries. As Commonwealth citizens, they might have the right to vote but as part of enforcement of hostile environment policies, over half have no ability to work, rent, drive, receive NHS healthcare, open bank accounts or receive access to public funding (*Immigration Act*, section 3C). There is no secure future in the UK for any HSM, and British-born children of HSMs with no ILR are not eligible for British citizenship, even if they were born here. The 2019 *Balajigari* judgement found that if HSM applicants are not found "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".

The HSM case is another example of the impact of discriminatory 'hostile environment policies' experienced by migrants of colour and that Windrush lessons have not been learnt. It also sets a concerning precedent for the use of 'good character' references against EU, Windrush, TOEIC and other migrants.

The HSMs chose to apply to the UK Tier 1 (general) visa scheme which opened under the Labour Government in 2008, to bring their talents and build 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. There are now severe regrets about building a life and career in the UK. 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.

The Tier 1 (General) visa scheme closed in April 2015 under Home Secretary May. A simultaneous move to greater cooperation across government departments to enforce “hostile environment” immigration policies, saw data sharing established between the Home Office and HMRC. HSMs were made easily traceable, low hanging fruit to target. Despite the *Balajigari* ruling that found the Home Office’s (then) decision-making process unlawful and saw up to 80% of HSMs granted ILR, at least 70 people’s cases have fallen through the cracks for reasons including the timing of their applications and having no opportunity to answer questions to ‘tell their story’ regarding the discrepancies. 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. This raises questions of the Home Office’s ‘duty to act fairly’. In many of the cases, there is also no clear evidence that the Home Office acted on their burden of proof to evidence ‘dishonesty’ or undertake a sufficient “balancing exercise” in making its decision. This exercise must be “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 inhuman policies towards these Highly Skilled Commonwealth Migrants of colour, who were brought in to help boost the UK economy, have not achieved the policy objectives sought: to reduce net numbers of migrants in the UK. Pushed into destitution, homelessness and with serious stress-related illnesses, local authorities and the taxpayer are picking up the bill while nearly all HSMs stay in the UK resolute to fight their cases. With serious debt restricting them from pursuing their cases in the UK or leaving the country, even if they wanted to, they remain in a state of paralysis. The HSMs instead now rely on local authorities (for example Section 17 child support), friends, family and charity to survive. This is a further strain on local authorities, and the taxpayer, in a time of national crisis.

The policies have had a devastating impact on those still 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 studied and lived in the UK for up to 17 years. All HSMs are in a significantly worse position with fewer rights than when on their Tier 1 visa. Many family relationships have broken down. Some HSMs 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. The Home Office is therefore failing to safeguard HSM children under its section 55 of the Borders, Citizenship and Immigration Act (2009).

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. A significant number of the HSMs report stress-related illnesses, for example having heart attacks in their 30s or 40s. This raises questions about their Article 3 ECHR rights and demonstrates the impact of removal to health after integrating in the UK has not been considered (*R (Razgar) v. SSHD 2004*). 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. Opportunist lawyers have also substantially hiked their legal fees for specifically taking on HSM cases, sometimes charging twice as much as

they were when the cases first emerged. With such insecurity, the UK Government is violating their rights of liberty and security of person. The Balajiigari case states:

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

U* 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."*

* Wishes to remain anonymous

Shahriar is concerned that the Home Office have *"weaponised paperwork against the highly skilled"*. The stress-related health issues he and his family have developed from Home Office decisions have been significant, making them no longer a "normal family" and costing them a lot in healthcare. Additionally paying to renew 4 30-month leave to remain visas has left the family with "nothing but crumbs".

Without ILR, even the future of those with 30 months leave to remain (LTR) in the UK is uncertain, while they have an 'undesirable' stamp against their name. For those who have been granted limited or indefinite leave to remain, the Home Office has not clarified how 'bad character references' in relation to historic tax discrepancies will be held against them in settlement and naturalisation applications. **Wider questions also 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 such as unconscious racial biases within hiring processes.** For these migrants of colour, underlying systemic racism in the UK within the job market undoubtedly restricts their options.

While Home Office policy and wider society continues to block these highly skilled from participating in society, 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 use to meet immigration objectives.

URGENT ASKS

We ask the Home Office to immediately undertake the following actions:

Highly Skilled Migrant-related and wider recommendations:

1. **End the use of rule 322(5) to Highly Skilled Migrants (HSMs) and other migrants** who do not fall under the named refusal reasons in 322(5): a) convicted of committing a criminal offence, b) pose a threat to national security or c) are on a travel ban list. This includes ending the use of discretionary and subjective character, conduct and/or association judgement-based decisions in relation to actions or facts that do not meet the high threshold of being convicted of a criminal offence (under UKVI's 2018 policy guidance).
2. **Clarify circumstances and terms:** a) Clarify circumstances in which there can be a proper finding of dishonesty, avoiding subjectivity in that process and allowing the process to be reviewed in a fair hearing; and b) Clarify 'deception/dishonesty' terms and remove the nebulous concept of 'lack of integrity'.
3. **Guarantee that tax discrepancies cannot be used to refuse immigration status and/or naturalisation** after 10 years, in line with criminal offence provisions (e.g. finality principle).
4. **Consider human rights grounds in Indefinite Leave to Remain (ILR) / Leave to Remain (LTR) applications** by making an *Ahsan* exception and implementing *Balajigari's* position that due to the significant disadvantage and consequences (being liable to removal and being exposed to the hostile environment), refusal of ILR engages the European Convention on Human Rights (ECHR) grounds, including those in Article.8.
5. **Grant a right of appeal to all Set(O) ILR applicants who have not varied their application** if some evidence of their family and private life was submitted to the decision-maker, including on the basis that the denial and impact of ILR refusals engages the ECHR.
6. **Grant Section 3C rights:** Treat those with pending ILR or LTR applications (neither decided nor withdrawn) as benefitting from the effect of *Immigration Act 1971* section 3C leave, allowing HSMs and other migrants the right to work, rent, drive etc. This is asked for on the basis of the Home Office's policy position that a person "should not be disadvantaged" by the fact that their section 3C rights have ended and "cannot be

resurrected”, which is the case at present. “Outstanding applications should be considered as if the person still has section 3C leave.”

7. **Provide emergency support for migrants in legal limbo without Section 3C rights during the Covid-19 pandemic** to reduce the number of those being forced into further destitution or homelessness. Everyone in the UK should be granted their dignity and rights to have enough food and access to health supplies to support them and their families during this pandemic (see ‘Current Realities & the impact of Covid-19’ section below). Failure to do so also impacts the UK general public.
8. **Disregard so-called ‘current periods of overstay,’ for subsequent ILR or 30-month Leave to Remain (LTR) applications**, after administrative review refusals for example, ending the use of 39e of the Immigration Rules to deny ILR / LTR applications. *Balajigari* notably found that administrative reviews are not an appropriate remedy for ILR refusals and form part of the procedural unfairness.
9. **Apply a fee waiver** to any new application from those (including HSMS) who have been refused ILR on the basis that Article 8 and other ECHR grounds are engaged by refusal of ILR.
10. **End the use of MTR letters as a fishing exercise:** End the inclusion of questions relating to facts and issues beyond the specific grounds for refusal listed in the initial ILR refusal letter. (e.g. Do not include questions relating to issues and facts beyond the scope of the discrepancies listed in relation to (a) specific tax return(s).)
11. **Consider children born in the UK to parents without ILR for immediate discretionary registration as British citizens** under section 3(1) BNA 1981 due to the significant detrimental impact to the child’s wellbeing and rights while their parents’ ILR is pending or deferred if on the 10 year route to ILR and where it’s clear the child’s future lies in the UK.

Highly Skilled Migrant-Specific recommendations:

12. **Compensate HSMs** via a scheme akin to that introduced for Windrush victims where it is found an ‘innocent mistake’ was made and there is no proper evidence of dishonesty.
13. **Expedite decision-making** on all pending HSM cases with unjustified delays, on the (human rights) basis that the delays have significantly disadvantaged HSMs through extended exposure to the hostile environment and in some cases, ineligibility to section 3C rights.
14. **Immediately reconsider cases where it cannot be shown that the Home Office acted consistently and sufficiently** in relation to:
 - a. **Applying a balancing exercising** that took into account ‘all other relevant [and positive] factors’ – no criminal record or breach of immigration terms; circumstances and facts of the (mis)conduct in question, in light of it not meeting the high threshold of criminality; positive contribution to the UK; family and dependents in school in the UK etc. - as per *Balajigari*, *Yaseen* and *Babar*. Yaseen (para.46) states: “*In all but the most extreme cases, where the conduct complained of is such that on any view the balance must fall against an applicant, even where a sufficient character or conduct issue is proved, a balancing exercise is required*”. Re-consider the approx. 84% of remaining cases where it is not evident this has been done by the Home Office.
 - b. **Establishing ‘dishonesty’** under its legal burden without placing the burden of proof on the applicant to prove their ‘innocence’.
 - c. **Carried out an ‘exercise of discretion’** where individuals were required to prove that an ‘innocent mistake’ was not made in relation to tax discrepancies.
15. **Immediately reconsider HSM cases** where a refusal of ILR has been given without allowing the chance to answer questions and outline the discrepancy circumstances through a ‘minded to refuse’ (MTR) letter, right of appeal, or neither, which indicates a procedural unfairness. Under the *Balajigari* judgement (para.42), the respondent has the legal burden to establish dishonesty. Approximately 80% of remaining cases have received no MTR letter and of these, 22% have had no MTR letter or right of appeal.
16. **Grant a fact-finding remedy** to challenge the refusal of ILR for those who have denied fraud or ‘dishonesty’ in their tax statements, even where they have been given limited leave.
17. **Reconsider cases where the accountant has provided a letter** of their error, however, this should not solely be relied upon where one does not exist. The *Ashfaq* (17 June 2020) UT guidance places significant weight on an accountant’s letter because it ‘goes to their professional standing’. This and the *Abbasi* (2020) case almost reverses the burden of proof and does not take into account the unwillingness or inability of the accountant to provide such a letter or attend court, especially under scrutiny of their professional standing. A balance of probability should be applied instead, taking all relevant factors

into account.

18. **Grant ILR instead of 30 months Leave to Remain in cases where the HSM has been successful** in appeal and judges have made a discretionary judgement in favour of them in regard to their 'dishonesty' on the basis of tax returns. Due to the significant disadvantageousness of securing LTR compared to ILR, LTR should not be granted in place of the ILR being sought. The Home Office should particularly apply this to people who have not received a 'minded to refuse' letter (80% of remaining cases).
19. **Grant 30 months LTR on human rights grounds** instead of a blanket refusal of ILR and nothing more where it is agreed that an 'innocent mistake' was *not* made.
20. **Outline a fair and uniform approach** to dealing with HSM cases and implement a fair and uniform approach to the type of leave to remain given.
21. **Update the Home Office False Representation Tier 1 General Visa Guidance** (November 2019) in several ways, including:
 - d. Outlining the legal burden of proof on the Home Office to establish dishonesty, and the process for this. (accountant's letters)
 - e. Providing guidance as to fresh human rights claims where there has been procedural unfairness experienced by appellants in relation to not having received: **i)** a balancing exercise (see point 14a. above), taking all relevant points into account; **ii)** a full fact-finding remedy (see point 16. above) where 'dishonesty' has been denied, **iii)** a 'minded to refuse' letter (see point 15. above) or **iv)** not having had a right of appeal.
 - f. Establishing that ILR refusals engage ECHR Article 8 grounds (see point 4. above).
 - g. Clarifying the weight put on accountant's letters outlining the circumstances for the discrepancy.
 - h. Treating those with pending claims as entitled to the equivalent of the benefits of Section 3C leave, including the right to work and access public funding etc.
22. **Provide an explanation as to why those known to have been denied ILR come from a limited number of Commonwealth countries** in South Asia and Africa, under the Public Sector Equality Duty (section 149 of *Equality Act 2010*).

ISSUES & KEY FINDINGS

HSMs & THE REFUSAL OF ILR ON THE BASIS OF CLAUSE 322(5)

The UK's Highly Skilled Migrants (HSMs), like all migrant people 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. The UK has a legal tradition of seeking equality and justice. It is critical that this is not forgotten now with the criminalisation of the UK's Highly Skilled Migrants (HSMs) under clause 322(5) and refusal of their ILR.

The denial of indefinite leave to remain (ILR) to the remaining HSMs - all people of colour -, on the basis of historic tax discrepancies, highlights the Home Office's determination to maintain 'hostile environment' policies. In the scramble to settle the 400+ HSM cases post-*Balajigari* (16 April 2019), at least 65 cases have fallen between the cracks, pushing these HSMs and their families into near or actual destitution, and giving no guarantees of security in the place they call home. Even with 30 months leave to remain (LTR), or ILR for some, there is no guarantee that their historic tax discrepancies will not continue to be held against them in future immigration decisions. For those putting themselves into ever-more debt by challenging the Home Office's refusal of ILR, the decision to not grant section 3C rights in this difficult time, means families are not being able to take care of even their basic needs. Covid-19 has further exacerbated and entrenched the insecurity and lack of access to basic needs that HSMs experience (see Covid-19 realities on page 11).

All the HSMs who have lived lawfully in the UK under their Tier 1 visa have been let down by the UK when they are most vulnerable. They have been afforded no safety and security in line with their rights under the ICCPR and ECHR. And through necessitating a points-based ILR application, they have been retrospectively punished for working in job market conditions beyond their control and undoubtedly influenced by underlying systemic racism issues. Many of the HSMs that Migrants' Rights Network (MRN) communicates with severely regret their decision to choose to live, work and build a life in the UK.

THE HIGHLY SKILLED MIGRANTS & THE HOSTILE ENVIRONMENT

On 6 April 2015, the HSMs' Tier 1 (general) visa scheme was shut down and they were told they must apply for ILR by 6 April 2018. During this process, a number of HSMs started noticing a systematic pattern of being denied ILR on the basis of historic tax discrepancies. With the HMRC and UKVI databases now merged, HSMs became easily traceable migrants.

- All remaining HSMs without ILR are people of colour, originating from 6 South Asian and African countries. All of these countries are in the Commonwealth. Over half (52%) are from Pakistan and others are from India (24%), Nigeria (12%), Bangladesh (7%), Sri Lanka (3%) and Zimbabwe (2%). All of them, apart from 2 who have been here 9.5+ years, have been in the UK for over 10 years, and some as many as 17 years. This profile raises immediate questions over government "institutional ignorance and thoughtlessness towards the issues of race" as the Windrush Lessons Learnt Review (2020) found. The Equalities and Human Rights Commission November 2020 report finds that hostile environment policies have accelerated the impacts of decades of complex policy and practice in which black and white immigrants are treated differently.
- 76% of HSMs have children in the UK. At least three quarters of these children are aged 10 or under; half are aged 6 or under. The remaining 24% have wider family or partners who they financially support. Children of HSMs without ILR are not eligible for citizenship, even if they are born in the UK.
- After studying in the UK (95% of HSMs) and taking a post-study work visa (89%), the Home Office welcomed these people under the Tier 1 General Visa to build a life in the UK. At least 93% of HSMs hold a postgraduate degree and a quarter hold an MBA or DBA.
- For 83% of HSMs, the self-employment tax returns in questions were their first ever tax returns in the UK after being welcomed under the Tier 1 (general) visa. 37% of cases relate to the 2010/11 tax return only – the first year of tax returns for Tier 1 General visa migrants - and 71% of cases involve the 2010/11 tax return. Over half of cases only relate to one tax return in the HSM's 10+ years in the UK.
- 87% enlisted help from an accountant, and the others relied on advice from friends. Many HSMs are confident that it is the combination of these factors which made them particularly vulnerable to making errors and/or not being able to detect intentional or unintentional mistakes by the accountant. Over 90% of HSMs have

amended discrepancies and the remaining 10% state that they have no discrepancy to amend (their case relating to late submissions of tax returns for example).

Even if HSMs have paid back (with interest) any tax deficits, Home Office policy is to regard this as suspicious and an indication of their 'dishonesty' and 'bad character'. Amendments to tax discrepancies, especially those made around the time of their ILR application, were regarded as an attempt to get ILR where applicants did not deserve it. The idea that HSMs amended tax discrepancies only after double-checking and realising they had them on the back of discussions between themselves that discrepancies would be held against them in their ILR applications, was largely dismissed.

Clause 322(5) of the immigration rules had been applied to terrorists, criminals or those deemed a national security threat. But now, in conjunction with the 2014 introduction of 'good character requirements', 322(5) was used to deny ILR to HSMs on non-criminal grounds. Without any leave to remain, HSMs and their families must leave the UK which they have called their home for 9.5+ years.

Latest UKVI rules state that a person may be refused if their "character, conduct and/or association make it undesirable to permit [them] to remain in the UK. This could be because of criminal convictions, criminal related activity short of a conviction or other wider reasons". It is for these undefined "wider reasons" that HSMs have been deemed 'undesirable' for the UK and had clause 322(5) triggered. Because of this categorization, HSMs are banned from working, renting property, receiving NHS care and other basic needs while challenging refusals. The reality of this becomes particularly tortuous with issues such as unexplained delays in Home Office and court decisions and significant hikes in legal fees for HSM cases by opportunist lawyers which has forced over 80% into significant debt or destitution.

The latest November 2019 Home Office policy guidance still only states that Balajigari 'removed the argument 322(5) is concerned with only cases of national security (para. 32)'. But It does not give any justification for applying 322(5) to HSMs and how this is linked to being 'undesirable' for the UK and makes them 'dishonest' or failing 'good character requirements' (any more than other people with tax discrepancies in the UK). There is a *disproportionate* inconsistency and double standard applied for people born in the UK vs. those who are not.

THE REMAINING CASES: FALLING BETWEEN THE CRACKS

The complexity of remaining HSM cases means that little has been possible to comprehensively unpick or challenge Home Office decisions including in the unique use of discretionary rule 322(5) for HSMs' ILR applications. The processes and decisions for HSMs have been inconsistent – almost on a case-by-case basis – making the process and decisions bamboozling for HSMs, lawyers and policy analysts alike. Due to the complexity of cases and unique threshold and application of 322(5) to HSMs, many applicants report lawyers significantly hiking their fees - some at least doubling - for taking on HSM 322(5) cases, charging many more thousands of pounds than HSMs are able to afford.

The 2019 *Balajigari* and 2020 *Yaseen* rulings determined that the government had been acting unlawfully where there has been no opportunity for the applicant to explain the tax discrepancy and where there had not been a 'balancing exercise' in the decision-making process, "informed by all relevant [and positive] factors." These factors include 'substantial positive contribution to the UK', 'no criminal record or breach of immigration terms', 'circumstances and facts of the (mis)conduct in question', in light of it not meeting the high threshold of criminality, 'family' and 'dependents in school in the UK' etc.'. When determining whether granting ILR is in public interest, *Babar* [2018] confirms that "all relevant factors should be considered which may be sufficiently compelling to justify granting ILR."

Expanding on this, *Yaseen* para.46 makes clear: "In all but the most extreme cases, where the conduct complained of is such that on any view the balance must fall against an applicant, even where a sufficient character or conduct issue is proved, a balancing exercise is required." A "serious injustice will have been done" to those where the Home Office, through its burden of proof, has not been able to show that the HSM did not make an 'innocent mistake'. *Yaseen* (para.44) states "there should be a balancing exercise, taking into account any positive factors"

Despite these judgments, there remains inconsistency in providing HSMs with a right to appeal (58% of cases). For some, the right of appeal has been granted in country and for others, outside. There are inconsistencies in HSMs having the opportunity to explain the circumstances of the discrepancy through a 'Minded to Refuse' letter (80% of HSMs have not received one), which requires a response within 28 days. 38% of remaining HSMs have received neither a right of appeal or MTR letter, enabling them to "tell their story". MTR letters themselves have been inconsistent in the number of questions asked. Some letters have included over 100 questions raising the question of what can be reasonably answered in the time frame. Other MTR letters have been used to fish for information **in scope** far wider than the tax discrepancy in question. It is also uncertain in many cases that the Home Office has undertaken a 'balancing exercise' in its refusal of ILR, as per *Balajigari*. When applicants have responded that there has been no intentional dishonesty on their part, it is also unclear whether a full fact-finding remedy has been provided in that case.

The timing of the HSMs' applications – pre- or post-*Balajigari* judgement, has also made a significant impact on cases because the 16 April 2019 judgement is not retrospectively

applicable. Moreover, in some cases, accountants' letters taking responsibility for the discrepancy have been taken seriously, in other cases they have been ignored. Applicants' cases have also been refused on the basis of their accountants being unwilling or unable to provide letters. Under the *Abbasi* (2020) case, there is also now a concerning emphasis placed on the importance of accountants attending court for the applicant to be believed. This fails to account for accountant's reluctance for their reputation to be called publicly into account. The family and health situation of the applicant - including at the time of the ILR application - has been taken seriously in some cases and in other cases not. Some of the remaining HSM applicants or their children for example have disabilities including autism or polio. For all of these, and many more reasons, the remaining cases have fallen between the cracks.

87% of HSMs have experienced unexplained delays in Home Office and/or court decisions. The length of delay is also inconsistent with some waiting up to 2-3 years. One in three state that the Covid-19 pandemic has caused further significant delays to decisions around their cases. 30% report that their lawyers have been difficult to reach or uncontactable during the Covid-19 pandemic.

Some of the remaining HSMs have also seemingly been punished for the unique situations they find themselves in:

- Imran Mubarik used a solicitor who purposefully misguided them, meaning that the applicant broke their 10 years residency in the UK. The solicitor did not use their ILR application money to make the application and instead pocketed the money. The solicitor had been found to be acting fraudulently through the SRA's Solicitor's Disciplinary Tribunal in June 2020. This has not had any impact on this applicant's case and the applicant has since been left homeless and destitute without any financial means to pursue his case further.
- Muhammad Ashfaq's accountant was on holiday when the Home Office sent the MTR letter. His request for a time extension without the support of his accountant was denied and his application was refused.
- Another HSM's tax discrepancies were found by his current accountant. Upon chasing their previous accountant to provide a letter explaining the discrepancies and tracking him down to another office, the applicant found that the accountant had passed away.
- Another HSM was told by the Home Office that when their administrative review was turned down in 2016, at that point they had been committing a criminal act by staying unlawfully in the UK. On this basis, the Home Office refused their subsequent application.

The Government outlines four key principles for procedural justice:

- Treating people with respect and dignity
- Making unbiased decisions and interpreting and applying rules consistently and transparently
- Giving people a voice and hearing their concerns and experiences
- Showing and encouraging trust by being sincere, caring and authentic, and trying to do what is right for everyone.

The above inconsistencies in Home Office and court decisions and processes however indicate that the government has not bided by or fully implemented its own principles for the remaining HSMs, undermining the UK's desire to be a country where equality and justice is important.

CURRENT REALITIES & THE IMPACT OF COVID-19

When asked in October 2020 where they currently find themselves, many of the HSMs spoke in their own words of the impact Home Office decisions have had on their lives:

M* said that the Home Office refusal of ILR has “taken everything from me, leaving me in a state of paralysis and unable to make any decisions”. For Has Mukh Panchal, he “wishes that the Home Office execute him instead of carrying on with its delays and mental harassment techniques”. Amarnath Pendyala said he had “not smiled heartfully in 4.5 years” since the ILR refusal.

Zeeshan Mukhtar explains that he has “given more than 13 years to this country but it is all wasted”. Noor Shad says that *“after 14 years of my hard work in my education and career, and after paying so much to this country, the Home Office is now treating me like an illegal immigrant.”*

U* eloquently explains that his and his family’s situation and talks about his disbelief due to his “impeccable immigration record with no criminal convictions or civil judgements.” He said: *“the UK has been my home for nearly 15 years with friends, family, education and professional qualifications all built here. We have now been forced to sell what little valuables we have left. Each passing 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.”*

Waleed Siddiqui said that before his ILR application: *“I have never asked for a penny from friends or unknown people but since the delay in ILR decisions, my life is upside down. My grandmother died on 7th October 2020 and 6 other dear ones have died since 2016. I have not seen my mother or been able to introduce her to her grandchildren.”*

M* said that *“I have paid over £73,000 in tax and national insurance to the UK economy. I am a regular blood donor and NHS volunteer. For others in the UK to be granted leave or not punished for criminal incidents when I have committed none is blind injustice.”*

Shahriar Daudopta is concerned that the Home Office have “weaponised paperwork against the highly skilled” and purposefully “destroyed the ability to build a normal life”. The stress-related health issues he and his family have developed from Home Office decisions have been significant, making them no longer a “normal family” and costing them a lot in healthcare. Additionally paying to renew 4 30-month leave to remain visas has left the family with “nothing but crumbs”.

G* explains her difficulty in *“buying things for my children when needed, especially when I can’t pay for rent and there are urgent medical situations in the family”*.

Theresa states that *“my self-confidence is now very low and I freeze with anxiety and am unable to function and make decisions sometimes with money worries constantly on my mind.”*

*- HSMs who wish to remain anonymous.

The denial of ILR has left people 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). Applicants are also committing a criminal offence by remaining in the UK without leave, which further criminalises them and their families. Through these policies, the Home Office is directly impairing HSMs ability to survive in the UK. We do not believe that it is a coincidence that all HSMs experiencing this hostile environment are migrants of colour from 6 South Asian and African Commonwealth countries. The Equality and Human Rights Commission November 2020 report finds that these ‘hostile environment’ immigration policies have accelerated the impacts of decades of complex policy and practice that treats white and black immigrants differently.

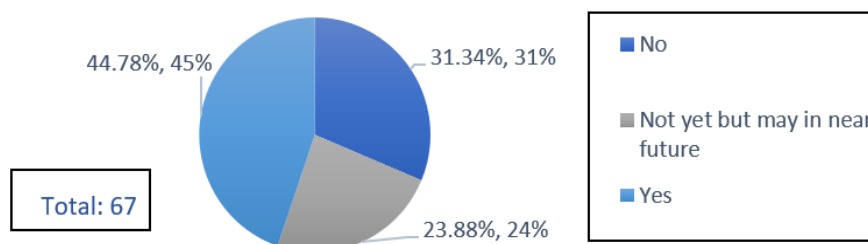
Section 3C(1)(2) states that “leave is extended by virtue of this section during any period when ... (a) the application for variation is neither decided nor withdrawn...”. Section 3C allows HSMs and other migrants the right to work, access healthcare and funding for any necessary support etc. Operation of section 3C(2)(a) does bite for HSM applicants as they are awaiting a decision on their application for ILR (albeit that this is a reconsideration of an earlier decision that has now been withdrawn).

Despite these laws, the Secretary of State for the Home Department has decided that section 3C specifically does not apply to HSMs. This decision contradicts the Home Office’s own policy position is that a person “should not be disadvantaged” by the fact that their section 3C has ended and “cannot be resurrected”. Mr Biggs’ August 2019 submission on behalf of Balajigari contends that Home Office decisions to refuse ILR and deny section 3C rights engage European Convention on Human Rights (including Article 8) grounds – i.e. refusing ILR and denying 3C protections calls into question the very protection of the human rights of the HSMs.

The disadvantages faced by HSMs without ILR that are now evident and multi-faceted paint a deeply concerning picture. The EU Fundamental Rights Agency (FRA)’s research has found that across the EU, Covid-19 “disproportionately affects migrants” through often poor accommodation and hygiene options, limited access to health services, having no right to work and losing jobs and rising poverty and exclusion, including for children. And the HSM people are no different. The Covid-19 pandemic has further impacted HSMs’ financial stability, mental and physical wellbeing and ability to pursue their ILR:

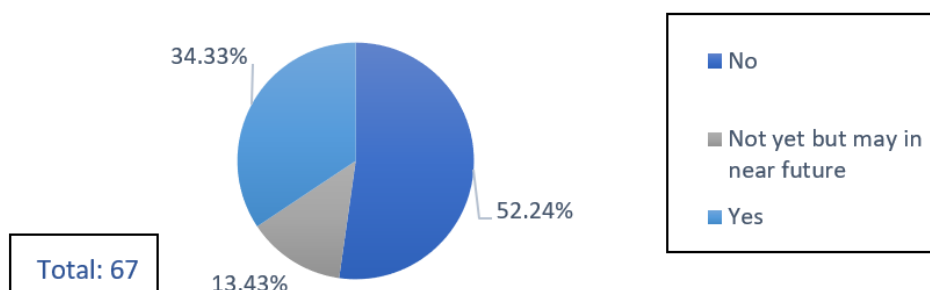
- 87% of HSMs have experienced unexplained and, in some cases, significant delays in decisions on their case, leaving them in an extended state of legal limbo. There is no sense of safety and security within this state.
- At least 55% have no right to work, receive healthcare, rent, drive, access public funds etc. Despite having no right to work or income, all HSMs who are able, volunteer to support their communities. 73% say that their expenditure has had to increase because of the pandemic.
- Additional research carried out by MRN finds that even HSMs with jobs will not inherently be safe and secure. 21% of migrants surveyed in this research said that their ethnicity influenced how their employer treated them during the pandemic and 28% experienced overt racist abuse or harassment. 82% of them were not offered the opportunity to be furloughed making their jobs and careers uncertain.
- 94% of HSMs are in debt due to legal fees and the cost of living while pursuing their cases to prove they are innocent of 'dishonesty'. Many are in tens of thousands of pounds in debt with some over £60,000. Lawyers working specifically on 322(5) cases have hiked up their fees making pursuing cases unsustainable - for example, some lawyers have increased fees from £2,000 to £4,500 for one case. 48% said that the Covid-19 pandemic means they are no longer able to afford legal support to challenge the Home Office finding of their dishonesty and pursue their ILR.
- Around half (51%) have said that they have already experienced reduced support from external organisations since the pandemic. Despite experiencing major difficulties during the pandemic, two thirds said that they had not turned to others for additional support. 70.5% of those who had no choice but to turn to others for financial support have relied on friends and family (37.5%) or charities or local authorities (33%).
- Debts and the inability to work have pushed many HSMs into destitution or homelessness. In a June 2020 Covid-19 survey, 45% said that they are already experiencing homelessness, destitution or the inability to pay rent as a result of the Covid-19 pandemic. 24% were concerned that they will imminently become homeless, destitute or unable to pay rent. (69% in total.) In the October 2020 survey, this had increased to 86% saying they are currently or worry that they will soon be destitute.

Have you experienced homelessness, destitution or inability to pay rent as a result of Covid-19



- Those who are homeless include two women, one of whom lives on an acquaintance's sofa with her 6-year-old son. Some HSMs have told MRN about the difficulty in compiling the necessary documents for their legal cases when they are in such a precarious situation.
- Nearly half (48%) report that they are already struggling or will soon struggle to have enough food for them and their families. Imran for example, lives on £40 food vouchers a month which is not enough to sufficiently feed himself. This forces many in the current pandemic to choose between contagion and hunger, hazardous work and personal security.

Have you experienced not having enough food as a result of Covid-19?

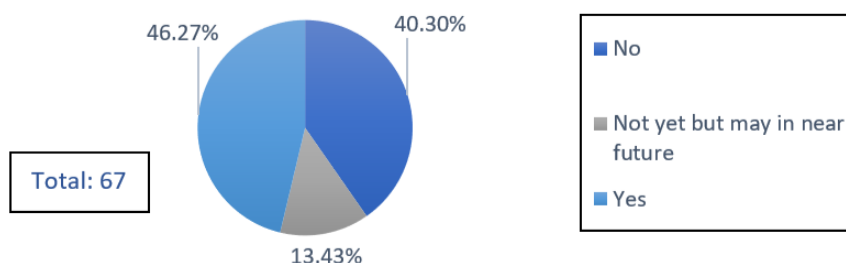


- Nearly half of HSMs told MRN that they suffer from anxiety, high blood pressure or hypertension which has been exacerbated by the state of their cases. At least 7 have told MRN that they or a family member they live with have contemplated or attempted suicide.
- During Covid-19, HSMs and their families have been pushed into a deeper mental or physical state of crisis:

- All of those surveyed stated that Covid-19 has negatively impacted their mental health (73%) or their partner's mental health (27%).
 - 1 in 5 of HSMs have experienced domestic abuse or are worried about experiencing it imminently.
 - 55% already have or expect soon to have additional caring responsibilities due to the pandemic or lockdown measures, putting further pressure on them.
- Many of the HSMs also report serious health issues for them and their family:
 - Glory (40) is living with polio.
 - Kirubakaran's child was born severely delayed and must be fed through a NG tube and will require a high level of medical support through her life. Syed's prematurely born son has chronic lung disease.
 - At least 3 HSMs have sons that are autistic and require support.
 - Noor (40), Waseem (33) and Muhammad (42)'s wife have a heart problem requiring medication. Shahzad (37) was hospitalised and nearly died due to his high blood pressure.
 - Mohammed has kidney issues also and a blood clot in the lungs. Another HSM suffers from kidney and stomach problems. And another has type 2 diabetes and liver problems.
 - Muhammad (47) has hypertension, is diabetic and his wife has cerebral veins sinus thrombosis through a recent stroke.
 - Mohammed (37)'s wife has cauda equina syndrome and Zaheer (46) is suffering from arthritis and a bulged disc.
 - Another HSM's wife is pregnant and is due to give birth in December 2020 but has no right of access to healthcare in the UK. At least a couple HSMs report miscarriages from the stress of the current situation.
 - With regard to Covid-19 healthcare, 46% report that they do not have sufficient access to hygiene items or medication during the current pandemic. 13% say that they foresee this imminently happening in the near future. 82% are not able to sufficiently self-isolate or socially distance in their accommodation, posing a risk to them, their families and general public.

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Have you experienced insufficient access to hygiene items or medication?



- Relationship breakdowns between spouses and family members in the UK and overseas are also frequently reported by HSMs, as a result of their ILR refusals. Several have had family members – mothers, fathers, siblings etc. - die since their ILR applications, including some in the past month. Because of their pending status, they have been unable to visit their family to grieve with them. Many have family members overseas who are very sick and are aware of the urgent need to go and pay their last respects. For many, not being able to leave the country has been a tipping point into deeper mental health issues.

It is on this final bleak picture that we call upon the Home Office again to reflect on its actions and implement policies that are humane and treat HSMs with dignity and ensure equity, as every other person in the UK is entitled. We ask that the use of 322(5) is ended for non-criminal actions and that all of those where the Home Office, under its burden of proof, has not established or proven 'dishonesty', reconsider cases and grant ILR immediately. In the words of *Balajigari* judgement, if not carried out, "then a serious injustice will have been done".

*For more information or to discuss the content of this report, contact Katharine at
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Visit the website for more research done by MRN via <https://migrantsrights.org.uk/>*

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