# Migrants' Rights Network — Written evidence (NTL0042)

1. Migrants' Rights Network (MRN) is a campaigning organisation that creates collaborative partnerships to bring understanding and action within the migrants' rights and related sectors to achieve justice and equality for ALL migrants. We offer a network of advocacy & support that is accessible, inclusive, broad and flexible, depending on need.

## Issue

2. From 2016, the UK government has refused Indefinite Leave to Remain (ILR) to 1,697 Tier 1 (General) Highly Skilled migrant (HSM) visa holders because of historical tax discrepancies. The Tier 1 'Highly Skilled' visa scheme, established under Labour in 2008, was shut down in 2014 as part of the coalition government's aim to reduce net migration numbers to 100,00, after a monthly cap on numbers was found to be unlawful. The evidence used to justify the shutting down of the Tier 1 (general) scheme comprised of a strikingly small number of people. 350 out of the 94,000+ on the visa were 'identified' via a survey (29% of the 1,180 asked) and deemed by the UK Border Agency to not be maintaining 'highly skilled' roles.

3. Profile: All HSMs have been living in the UK for at least 10 years. Nearly all hold a postgraduate degree from the UK – 25% hold an MBA - and were once welcomed as talented individuals, forecast to contribute significantly to the British economy. Since paying significant international student fees and tax, nearly half of the remaining cohort without leave are experiencing destitution or homelessness. 55% have no right to work, rent or NRPF etc. Covid-19 has exacerbated their insecure situations. There has been no clarification how the destitution of many of the HSMs will be addressed. 55% remain without the right to work, rent and with no access to public funds, having to rely on food banks and friends. Many have also struggled with Covid measures such as self-isolation and access to medicines. Over 90% say they are in 'significant' debt from legal fees.

4. There remain at least 300[1] HSMs and their families in limbo in the UK, without leave to remain, experiencing significant hardships because of this. They remain to seek to overturn the Home Office's initial decision that they have been "deceitful," "intentionally misleading" and of "bad character" for their tax discrepancies which are neither a criminal nor immigration offence. The Highly Skilled visa issues below raise a concerning attracting global talent for the newly announced 2021 'Highly Skilled' visa scheme, especially with our Commonwealth partners.

5. While tax fraud should be considered in immigration decisions, it is disproportionate in these HSM cases to refuse visas using a discretionary, subjective and vague "bad character" judgment without investigation. We wish to understand why these specific non-criminal discrepancies, without

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[1] According to barristers at Clarendon Park Chambers working on HSM cases.

investigation or transparency, inherently mean that someone and their family must leave the UK.

6.  An estimated [60% of UK self-assessment tax returns contain discrepancies,](#) for which individuals are not criminalised or punished. Immigration rule 322(5)'s vague "good character" clause was used for the first time in 2016 to refuse these HSMs' ILR. It is a rule which otherwise relates to people deemed 'a national security threat, linked to terrorism or have a travel ban.' Expansion of 322(5) to refuse leave to stay in the UK (after many years) for non-criminal issues, using a discretionary and subjective "good character" clause is disproportionate. In 2019, the Court of Appeal *Balajigari* judgement indeed found that the Home Office had acted unlawfully by not allowing HSMs the opportunity to explain their discrepancies.

7.  MRN notes that in the past few months, the [322(5) and related clauses in the immigration rules](#) used in HSM cases, have been redacted or hidden for 'internal Home Office use only'. We are concerned that this is to prevent scrutiny of how the previously public immigration rules are being implemented.

8.  Before ILR refusal, neither HMRC nor the Home Office investigated whether the discrepancies meet their own "deliberate" or "carelessness" threshold. In many cases, the Home Office re-opened cases that had been resolved with HMRC up to a few years prior. Around 80% of remaining cases have still not been given the opportunity to explain these through a 'minded to refuse' letter. For those who have received the letters, they have been designed to be extremely onerous on the applicant to answer. Tax discrepancies may also still also be used against HSMs' future immigration applications; none of those granted leave are exempt from having their historic discrepancies held against them going forward.

9.  For further information on the general issues please see:
-   BBC 2 Newsnight film on this issue, 1 June 2021: [https://www.bbc.co.uk/programmes/p09kg0mh](https://www.bbc.co.uk/programmes/p09kg0mh)

-   APPG on Race & Community Event, 10 June 2021: What Kind of Highly Skilled Migrant Does the UK Want? [https://www.youtube.com/watch?v=yTB6WERHs8c&feature=youtu.be](https://www.youtube.com/watch?v=yTB6WERHs8c&feature=youtu.be)

-   January 2021 background report: [https://migrantsrights.org.uk/wp-content/uploads/2021/02/HSM-Report-Jan-2021.pdf](https://migrantsrights.org.uk/wp-content/uploads/2021/02/HSM-Report-Jan-2021.pdf)


**Data-sharing, use of AI & racial profiling issues**

10. While we can see the benefits of using new technologies in detecting serious crime and fraud in immigration enforcement, this must be done in line with international non-discrimination standards and be used as a. The Highly Skilled Migrants' cases indicate both that the UK is operating with a much lower bar in immigration cases – punishing those committing no criminal or immigration offence – and that international non-discrimination standards are not being consciously pursued.

11. From 2016, 1,697 HSM were refused ILR using detailed historic HMRC-held tax data prior to any investigation . Despite FoI requests and a pre- pre-action letter via Foxglove Legal, neither the Home Office nor HMRC have clarified the process of the information sharing between the two departments – i.e. that the Home Office requested annual self-employment tax data of specific HSMs or that HMRC provide tax data on all HSMs. In a letter to Anne McLaughlin MP on 31 August, Minister Foster simply stated that "nobody should be surprised that we check each other's notes".

12. Through a FoI response from HMRC on 6 May 2021, we know what 463,000 people's HMRC data was shared with UK Visa and Immigrations between 2015-20 (provided to the JHAC Secretariat).

13. MRN's major concern remains there do not appear to be any due processes or protections in place for the access and sharing of that data, especially those that would now meet the requirements of GDPR. MRN also understand that no investigations into the presumed discrepancies – meeting the HMRC thresholds of 'careless' or 'deliberate' in line with normal HMRC procedures, and within the first 12 months of detection of a discrepancy – were not taken before visa refusals. It is therefore unclear what fair a proportionate standards and tests, in line with international standards, were being used in HSM visa assessments.

14. The terms of the Memorandums of Understanding (MoUs) which allow certain data-sharing between HMRC and the Home Office – accessed via Freedom of Information requests - provide no evident lawful due process or safeguards for sharing the data that used to refuse ILR to HSMs.[2] The HSM discrepancies in question – neither an immigration nor criminal offences - do not amount to the 'offences' described in the MoUs which permit data-sharing. There are therefore questions how the information was accessed and shared and whether unlawful "lists of people of concern" based on nationality were used, like those found to be unlawful in the JCWI & Foxglove vs. SSHD August 2020 case.

15. These data-sharing immigration-enforcement issues also have had an apparent racial element to them which indicates the use of an AI algorithm along ethnicity/national lines:

    • All those with ongoing cases are Commonwealth migrants of colour from 6 South Asian and African countries (Pakistan, India, Bangladesh, Nigeria, Sri Lanka and Zimbabwe). From evidence gathered, all those refused ILR for historic tax discrepancies are non-white.

    • Specifically, while 42% (between 2008-16) of the Highly Skilled visas were granted to Indian nationals and a further 26% to nationals from the other countries listed above, 21% of visas granted were to US (6%), Australian (4.5%), New Zealand (2.5%) and other nationals. There were as many, or even more Canadian,

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[2] Version 3.0 & Version 4.0.

Russian, South African, Ukrainian and New Zealand citizens as there were citizens from traditionally non-white countries: Bangladeshi, Sri Lankan and Zimbabwean citizens on the visa. There is also a disproportionate focus on Pakistani nationals: over half of remaining ILR refusals are Pakistani nationals. 70% are Muslim.

16. We understand that for such a disparity in ILR refusals, there was racial profiling along national lines. JCWI's (2020) case vs. SHHD found unlawful 'racist visa algorithms' to have been used within the Home Office for immigration enforcement. Seemingly automated refusals for discrepancies as low as under £1.30+, before investigation of the issues, in HSM cases appears to support this. MRN is thus concerned that, like the JCWI case found, algorithms which have a 'feed-back loop' of problematic countries according to a traffic light system means that individuals from these countries are disproportionately more likely to be affected by immigration refusals than those not from these countries. Discussions with an individual who was working on HSM and related issues in the Home Office around 2016 confirmed that a culture of bias from one area of immigration enforcement (e.g. the nationalities seen most in border enforcement) can transfer over into other areas of immigration enforcement. Patrick Vernon OBE further indicates the unconscious and conscious bias-related impacts in the context of the UK's legacy of colonialism and foreign policy decisions on more current visa applicants from people from such nations.

17. As such, there remains major questions around how fair, unbiased – and therefore reliable – algorithm use is in immigration enforcement. The lack of transparency within the Home Office and HMRC around the processes used, indicates that there is no resource currently looking at, assessing and seeking to ensure fairness in

18. As the UK has entered into an age in which the use of new technologies and algorithms are extensively used in actions that affects thousands of people such as immigration enforcement, the government has a duty to ensure public awareness of the structure and processes of information sharing and use. Regular time in parliament for parliamentarians to publicly scrutinise the data-sharing processes between government departments for different purposes is required. At present, much of this operates in the dark without public knowledge or understanding, making it opaque and inaccessible. The role of the Information Commissioner's Office in regard to this also need to be clarified and formalised as part of this regular public awareness and scrutiny. (Guidance from the Chief Inspector of Border and Immigration on HSMs' cases would also be welcome.)

19. Finally, the Department of Health's awarding of a £1 contract to collect and process data to private sector company Palantir that has a chequered history in running the US State Department's Immigration & Customs Enforcement programme on the US-Mexico border, is notable. MRN is deeply concerned how this appointment with Department of Health data, without public notification, will further expand and entrench the use of data collection, sharing and algorithm use for immigration enforcement (without scrutiny). Public scrutiny processes such as that indicated above is needed

to assess the scope, plans and legality of all that is currently occurring. See the No Palantir campaign for more information.

**20. MRN is exploring these issues via legal channels with lawyers at Foxglove Legal and has issued a pre- pre- action letter to the Home Office in June 2021 regarding the above issues but has not to date received a reply from the Home Office**

**Recommendations to the Justice & Home Affairs Committee:**

- Find formal, regular time within parliament and a regular process for public scrutiny of the way in which data is collected, processed and shared within and between government departments for immigration enforcement and other purposes.

- Clarify with the SSHD what processes she has established for collecting personal tax from other government departments for immigration enforcement purposes, especially under GDPR.

- Clarify with the SSHD what steps she has taken to investigate whether the historic tax discrepancies of the Highly Skilled migrants refused indefinite leave to remain met the normal HMRC "deliberate" or 'careless' threshold for tax discrepancies? If only using an internal Home Office discretionary judgement, how was it determined that the discrepancies did constitute 'bad character'.

- Clarify with the SSHD how the HMRC-Home Office memorandum of understandings for data-sharing comply with public bodies' obligations under the UK GDPR and Data Protection Act 2018.

- Clarify with the SSHD how non-criminal tax discrepancy data will be held and gathered by UK Visas and Immigration for immigration enforcement going forward. Further clarify with the SSHD what processes are in place that allow cases of tax discrepancies not identified as problematic by HMRC or cases where repayments have been agreed and the case closed, to be re-opened at a later date by the Home Office. Also clarify how non-criminal tax discrepancies will be considered in immigration enforcement going forward.

*27 September 2021*

*Annex*

**Recent Media Coverage on the HSM issue** - please also see the following:
12 August 2021 – The New Arab (& 17 August - WorkPermit.com)
1 June 2021 – BBC 2 Newsnight, film
15 May 2021 - OpenDemocracy

13 May 2021 – The Guardian (long read)
16 March 2021 – LSE British Politics & Policy Blog
27 Jan. 2021 - The Independent
26 Jan. 2021 – The Guardian & 9 Feb. 2021 The Guardian Letters
4 September 2020 – The Independent