Neutral Citation Number: [2015] EWHC 1478 (Admin)

Case No: CO/7842/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/06/2015

Before :

HHJ COE QC SITTING AS A JUDGE OF THE HIGH COURT

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Between :

VLADIMIR GRANOVSKI	**Claimants**
(and 3 Others)	
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

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Ms A Weston (instructed by Kingsley Napley) for the Claimants
Mr W Hansen (instructed by Treasury Solicitor) for the Defendant

Hearing dates: 5th February 2015

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Approved Judgment

HHJ Coe QC :

History and background

1. The Claimant is a national of Ukraine who was granted leave to enter the United Kingdom via the Highly Skilled Migrant Programme ("HSMP") on 20th April 2005. The three additional Claimants are his wife, Svitlana Granovska, and his two children Maria, born 17th May 2002 and Gregory, born 9th December 2006. Both children were born in the United Kingdom, although Maria was born when the family were here temporarily.

2. The Claimant is a political analyst/media consultant and director of Granovski and Associates Ltd. His business activities involve extensive travel outside the UK. There is no evidence to suggest that this has not always been the pattern of his work and at paragraph 6 of his statement dated 21st January 2015 he says that his business requires him to travel regularly within Europe and particularly to Germany, Austria and Ukraine. The trips are short in duration and he returns to his home and family in the UK following each trip. His clients expect his personal attendance at face-to-face meetings. The general pattern is for the Claimant to spend weeks or so at a time in Ukraine. There has been a longer period of absence when he was undergoing medical treatment. Almost all of his trips abroad are directly connected with his business.

3. The Claimant and his family live in the UK in their privately owned home. His children are at private schools here. He (now) files tax returns in the UK and pays tax in the UK. His daughter has lived here almost all her life and his son has always lived here. The Claimant has no home elsewhere.

4. Following the approval letter in respect of the acceptance onto the HSMP in February 2005 the family moved here and on 11th April 2006 was granted further leave to remain until 20th April 2010. The HSMP ended in March 2008 and the Tier 1 (General) Migrant System was introduced. On 20th April 2010 the Claimant and his family had their leave to remain extended until 20th April 2013. In accordance with the provisions of the HSMP at the time that the Claimant entered the scheme he applied for indefinite leave to remain ("ILR") on 14th January 2013. That application was refused on 22nd March 2013. A "Supplementary Reasons for Refusal" letter was issued by the Defendant on 20th December 2013 and by this claim the Claimant challenges that refusal. The full chronology is set out as an attachment to the Claimant's skeleton argument and I do not intend to repeat it here. The Claim Form was lodged on 21st June 2013 and following a period of stay permission to bring these judicial review proceedings was granted on 26th March 2014.

5. The Reasons for Refusal letter dated 22nd March 2013 sets out the Defendant's view that the Claimant's application must be considered under Paragraph 245 CD of the Immigration Rules because the Claimant was a Tier 1 (General) Migrant and that under Appendix S the applicant must have a "continuous period of lawful leave" in the UK. The Defendant notes that during the four-year qualifying period from 14th January 2009 until 13th January 2013 the Claimant spent a total of 1,045 days outside the United Kingdom and that the Defendant considers that these absences served to break the Claimant's period of "continuous residence". Guidance which came into effect on 13th December 2012 provides that the permissible period of absence was increased to a maximum 180 days per calendar year and the Claimant has spent in

excess of 180 days outside the United Kingdom during each of the calendar years in question.

6. The Defendant concedes that the wording of the Rules (135G) does not specifically refer to "residence" as such but the Defendant considers that the plain meaning and intention of the rule is for continuous residence where it states that "the applicant must have a continuous period of four years' lawful leave in the UK".

7. The Defendant's letter states that given that the Claimant had "far exceeded the permitted number of absences from the United Kingdom it is not considered that it would be appropriate to exercise discretion given your circumstances. Nor is it considered that the reasons you have given for your excessive absences from the United Kingdom…are sufficient to warrant discretion being exercised in your favour".

8. The Defendant states in the letter that no consideration had been given to the Claimant's rights under Paragraph EX.1 of Appendix FM because the Claimant had not made a specified application paying the appropriate fee.

9. The penultimate paragraph of the letter reads "Having considered all of your circumstances as a whole it is not accepted that there are any factors of a sufficiently compelling or compassionate nature to warrant granting you any period of leave to remain in the United Kingdom exceptionally outside the Immigration Rules, particularly given that you continue to have valid leave to remain in the United Kingdom."

10. In the Supplementary Reasons for Refusal letter dated 20th December 2013 the Defendant refers to the fact that following the refusal of the Claimant's application for indefinite leave to remain a decision was taken on 17th April 2013 to grant a further period of leave to remain as a Tier 1 (General) Migrant until 20th April 2016. I note that that decision was taken following the refusal of the application for indefinite leave and following the Claimant's further application for limited leave and was made three days before expiry of the Claimant's previous grant of leave to remain.

11. The letter reiterates that it is the Defendant's view that the plain meaning and intention of paragraph 245 CD (e) is that the relevant qualifying period must be spent resident in the United Kingdom. Reference is again made to Appendix S of the Immigration Rules. The Defendant repeats that one of the requirements of paragraph 135G (which was the rule applicable to the Claimant when he entered the HSMP) was that the most recent grant of leave to remain must have been as a highly skilled migrant whereas the Claimant's most recent grant of leave to remain was as a Tier 1 (General) Migrant. The Defendant has applied the rules relevant to a Tier 1 (General) Migrant, therefore, namely paragraph 245 CD.

12. The Defendant contends that there is no disadvantage to the Claimant because following closure of the HSMP in March 2008, the requirements of those rules were encapsulated within Paragraph 245 CD.

13. It is the Claimant's case that the Defendant's decision is wrong because he does meet and has met all of the requirements of the relevant rule for settlement. Further and alternatively it is submitted that the Defendant had in any event a discretion to grant

settlement and that discretion has been unfairly exercised. Briefly, the Claimant says that his application for indefinite leave to remain should have been dealt with by reference to the Immigration Rules in force at the date of the Claimant's entry to the HSMP. He says that the rules then in force did not refer to any need to demonstrate "continuous residence" but only required four years' leave to remain including a period of leave under the HSMP. He says that even if a residence test could be legitimately imposed physical presence would not be determinative of such a test. The Claimant says that the guidance at the date of his entry into the HSMP indicated that absence from the UK for reasons related to business or employment were to be disregarded and the Defendant has failed to apply relevant policy. He contends that the Defendant had unlawfully imposed a rigid and restrictive set of criteria. He further says that the Defendant has acted unlawfully, unfairly and irrationally in concluding that no different outcome should pertain.

14. There are three limbs to the Claimant's claim.

The First Limb

15. Paragraph 34 (i), (ii) and (iii) of the Claimant's skeleton argument sets out the first limb, namely, that he is entitled to indefinite leave to remain under the rules which were current at the time that he entered the HSMP and that properly construed those rules do not contain any requirement of continuous residence. He submits that the Defendant's power is fettered by two things: firstly, that she must not impose any more restrictive conditions than were in existence under the rules at the date of the Claimant's entry onto the scheme; and, secondly, the Defendant has no general power outside the immigration rules to impose any more restrictive conditions.

16. The Claimant refers me to the two HSMP Forum cases (HSMP Forum Limited v SSHD [2008] EWHC 664 (Admin) ("HSMP 1) and HSMP Forum UK Limited v SSHD [2009] EWHC 711 (Admin) ("HSMP 2")). I am also referred to the authorities of Alvi v SSHD [2004) UKSC 33 and Munir v SSHD [2012] UKSC 32.

17. In looking at the two HSMP cases the Claimant submits that I should consider them "through the prism" of the decisions in Alvi and Munir. The HSMP cases highlight features of the scheme, including that it was a scheme intended to encourage people to settle in the UK, that those accepted onto the scheme had a sense of invitation and that the scheme itself was intended to encourage settlement in the UK of highly skilled persons with the skills and experience required by the UK to compete in the global economy. At paragraph 14 of that judgement is set out that the HSMP was enshrined in the Immigration Rules from April 2003 (rules 135 A-H) (these rules are in the authorities bundle at 15) and were the rules in place at the time that the Claimant applied. The requirements for leave to enter the UK as a highly skilled migrant are set out at paragraph 135. I note that 135A(ii) provides that the applicant must intend to make the United Kingdom his main home and at 135G it is set out that "indefinite leave to remain may be granted on application to a person currently with leave as a highly skilled migrant provided that he: (i) has had a continuous period of at least four years' leave to enter or remain in the United Kingdom in this capacity or has had a continuous period of at least four years' leave to enter or remain in the United Kingdom which includes periods of leave to enter or remain granted under paragraphs 128 - 139 of these rules;".

18. None of the rest of the provisions of this section refers to any period of residence or continuous residence or any details of periods of absence which will not qualify or which will break the continuous period referred to. All of the evidence points to the fact that the Claimant has made his main (and only) home here. The Claimant argues that physical presence is a small factor in the decision as to whether or not the Claimant has made the United Kingdom his home.

19. The HSMP 1 decision concerned whether acceptance under the old HSMP scheme conferred fixed benefits upon a migrant for the duration of the scheme. The argument was that the old scheme constituted an integrated and entire programme and that it was not open to the government to alter the terms and conditions upon which the pre-arranged stages were to be implemented. Briefly the conclusion (paragraph 57) was 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. Clearly the Claimant relies upon this conclusion and says that the Defendant is therefore wrong to have applied any later rules.

20. The HSMP 2 case concerned the extension of the qualifying period which was introduced later and the issue was whether the Defendant was entitled to apply the new qualifying period to the migrants who joined before that extension. In that case the Defendant argued that the increase in the qualifying period did not preclude the migrants from obtaining either an extension of stay or indefinite leave to remain and therefore did not impinge on any legitimate expectation. Cox J in this second case found that in the first case the fact that the scheme was not composed of several parts but of interlocking provisions which provided a route to settlement was fundamental to the Court's analysis. It was a substantive legitimate expectation for those in the HSMP that they would enjoy the benefits of the programme as they were at the time they joined it. It was held that there was in that case the clearest of representations to those already on the HSMP before 3rd April 2006 that they would qualify for indefinite leave to remain in the UK after a period of continuous residence for 4 years. It was noted that there is a requirement of good administration, a legal standard by which public bodies will deal straightforwardly and consistently with the public and ought to be held to their promises. The learned judge was unable to identify a sufficient public interest which justified a departure from the requirement of good administration and straightforward dealing with the public and which outweighed the unfairness of the increase in the qualifying period visited upon those already admitted under the scheme. She referred to the sorts of difficulties faced by those on the scheme who had expected that they would qualify and who were being refused on the basis that they needed a longer period of qualification.

21. Thus the Claimant argues it is clear that I should be concerned only with the rules that applied at the point of admission to the scheme and that the Defendant's attempt to rely on the later rules is obviously wrong and does not accord with these earlier decisions.

22. The Defendant argues that since these decisions rely on the interlocking provisions of the rules and the guidance, even if the Claimant is right and the rules and policy applicable at the time of entry to the scheme should be applied then taken with the

guidance at that time there was a requirement of "continuous residence". To counter this, the Claimant relies upon the decisions of Alvi and Munir.

23. In the case of Alvi it was held that the Home Secretary could not rely on the statements in the Occupation Code of Practice in respect of qualifying jobs because those provisions amounted to a requirement which a migrant had to satisfy as a condition of being given leave to enter or remain in the United Kingdom, but had not been laid before Parliament in accordance with Section 3 (2) of the Immigration Act 1971. Similarly any provisions as to the period for which leave was given and any conditions attached to the grant of leave had to be laid before Parliament. The Immigration Rules should therefore include all provisions which set out criteria which were or might be determinative of an application for leave to enter or remain.

24. In Munir the Supreme Court held that the duty under section 3(2) to lay rules before Parliament applied to a policy which laid down the criteria for granting leave to remain for reasons not covered by the rules if those criteria had the character of rules.

25. The Claimant submits therefore that the Defendant is obliged to lay Immigration Rules before Parliament and she may not rely on any requirement which amounts to a "rule" to refuse an application for leave to enter or remain if that rule has not been laid before Parliament. He argues that this arises equally whether the requirement qualifies or limits the provisions of the existing rules as in Alvi or lays down requirements for the granting of leave for reasons not covered by the rules as in Munir.

26. He says it is unfair to change the conditions and any condition should not be changed by introducing a requirement that should have been laid before Parliament and was not.

27. The Claimant could never have applied if the business requirement had been not more than 180 days' absence for himself. He emphasises the international nature of his business which seems to be directly in keeping with the HSMP's intention of helping the UK to compete in the global economy. By reference to the Defendant's documents at pages 576, 601, 605 and 633 in the bundle the Claimant asserted he would know nothing of a set number of days' absence.

28. The Defendant accepts that one cannot now see Annex F as it was in 2005 but it is of a piece with guidance. The Claimant would have known about the December 2006 guidance although there is no need to speculate. The Defendant cannot say what the relevant Annex F would say. The Defendant relies upon the wording of the guidance (see page 8 of the Defendant's skeleton) (see also paragraph 38) and counters the legitimate expectation argument (see paragraph 40) by reference to what the Claimant must have understood from the guidance.

29. By reference to the supplementary decision taken on 20th December 2013 (paragraph 10 of the Claimant's skeleton) the Claimant refers to a post decision rationalisation defining "continuous residence" under rule 245 CD by reference to departmental guidance external to the Immigration Rules and by reference to Appendix S in force as from 6th September 2012.

30. The Claimant set out his understanding of the legal position (see paragraph 8 of the skeleton argument) by which he was entitled to have his settlement application

considered under the provisions in force at the date that he entered into the scheme, that is, paragraph 135G of HC 395 Immigration Rules (set out above). The Claimant says that his application for ILR stood to be determined under section 135G as it was at the date when he was accepted on HSMP, that is, 20th April 2005. At that date there was no requirement that he should hold HSMP leave or that he be continuously present in the UK. The amended version of paragraph 135G (i) upon which the Defendant relies came into force on the 1st October 2009 and postdates the standstill date which applies in HSMP cases.

31. Thus the Claimant says that the Defendant cannot rely on guidance outside of the Immigration Rules (see Alvi) or a rule which post-dated the Claimant's entry onto the scheme.

32. The Defendant argues that the core issue is whether or not it was part of the original HSMP that the applicant must continuously reside for at least four years. The programme included rules and guidance (pre-Alvi) and the Secretary of State has to adhere to the judgments HSMP 1 and 2. The Defendant says the short answer to the Alvi point is that whilst it is now the law that requirements have be in rules, such requirements are now in the rules and were in the rules at the time of the Claimant's application and the Defendant's decision.

33. The Defendant refers to the original intention of the programme which she says has evolved by reference to guidance external to the rules. The Defendant refers to the integrated package as a whole as referred to in the HSMP decisions and says that the Claimant cannot pick and choose.

34. The Defendant submits that Paragraph 245 CD read together with Appendix S is not inconsistent in any way with the original scheme. The Defendant concedes that the first decision letter did not refer in terms to Appendix S, but the second letter (page 437) did.

35. The Defendant says that she has not moved the goalposts. The continuous residence requirement has always been the case. I am referred (page 570) to the guidance in April 2005 and to the relevant guidance in October 2003 at page 586.

36. As is set out in the evidence of Mr Jackson on behalf of the Defendant (see paragraph 23 on page 562), the policy document was incorporated into the Immigration Rules as Appendix S on 6th September 2012 to comply with the Supreme Court judgments in Alvi and Munir. It is Mr Jackson's evidence that it was always clear that the intention behind the rules was that applicants for indefinite leave to remain must have spent the continuous period of four years in the UK (see paragraph 33 of his statement) and that even if the 2005 Rules were to be read in isolation the Claimant would still be required to show that he intended to make the UK his main home and the scale of his absences would have to be taken into account when assessing whether or not he met this requirement (see paragraph 38).

37. In this case of course the Defendant does not suggest that the Claimant has not established his main home here. The Defendant does not really put forward an alternative case on this "main home" issue. Indeed insofar as there is a public interest issue it is to be noted that the Defendant does not suggest that the Claimant and his

family are not suitable people to settle here but only that the Claimant has not been present in the United Kingdom enough.

38. The Defendant submits that whilst the Alvi principle is clear the requirement is in the rules now. The Defendant accepts that the requirement was not in the rules themselves at the time (see the Defendant's skeleton argument p.11 paragraph 40). The question is whether or not the Defendant can apply those rules or would to do so be unfair and defeat a legitimate expectation.

39. The Defendant says that the requirement is consistent with the guidance in the rules in place at the time. In the HSMP cases both Sir George Newman and Cox J founded their criticism by reference to the guidance.

40. The Defendant relies upon the guidance being consistent with the rules and the scheme and the criteria she applied as being consistent and so says she could apply the rules as they were at the date of the decision. Reference is made to Odelola v SSHD [2009] 1 WLR 1230 which the Defendant says can only be departed from if the Defendant was acting unfairly in defeating a legitimate expectation or depriving the Claimant of an accrued and vested right. The requirements were in the rules in this case at the time of the application and the decision and therefore the question is whether there is a reason to depart from them. To which the Defendant says the answer is no.

41. The Claimant suggests that the Defendant's analysis in respect of Odelola is circular because in Odelola the applicant had made an application which was not decided by the time of the rule change, but the Claimant was in the scheme. The Defendant's decision is ignoring the fundamental principles in Alvi and Munir and HSMP.

42. The Defendant refers (see page 7 of the Defendant's skeleton argument) to the fact that 135G gave rise to a discretion and not an automatic grant of indefinite leave to remain. At paragraph 69 the Defendant repeats the point about a discretion not a duty which the Defendant says was expressly considered in the March 2013 letter and that the Defendant specifically refused to exercise her discretion in favour of the Claimant because of his prolonged absences from the UK which was a decision she was entitled to come to.

43. The Claimant says that the exercise of the Defendant's residual discretion has to be in accordance with Article 8 (see Blake J in Philipson at Tab 12) and that a free-standing application under Article 8 could not in any event have resulted in indefinite leave to remain. The Defendant should exercise her discretion outside the rules if not satisfied and this feeds into the reasoning in Patel. The Claimant says that the Defendant's policy has to be flexible. The Claimant contends that BD is relevant because rules on the face of it have to be interpreted in accordance with the circumstances of the case in hand. A policy excluding all of those issues would be irrational.

44. The Claimant says that in this case there was ample material put before the Defendant triggering her duty to consider whether denial of indefinite leave to remain or "settlement" to the family would be disproportionate in accordance with Article 8 and section 55. The Claimant says that the Defendant is now arguing that a separate application had to be made whereas the role of the Defendant's discretion to grant

leave to remain outside of the rules is the essential means by which the Defendant's public law duty not to fetter her discretion is met.

45. The Defendant suggests that paragraph 135G cannot avail the Claimant as paragraph 135G (i) imposes in its current form a requirement for the most recent grant of leave to have been as a highly skilled migrant whereas the Claimant was last granted leave as a Tier 1 (General) Migrant (see paragraphs 59, 60 and 62 of the Defendant's skeleton argument).

The Second Limb

46. Paragraph 34 (iv), (v) and (vi) of the Claimant's skeleton argument sets out the second limb of his argument which is that if there is a condition of continuing residence, a rational, proportionate and lawful interpretation must be wider than simple presence and the Defendant's interpretation is not rational or lawful.

47. The meaning of "continuous period of four years in the UK" has to be viewed in light of the decision of the Upper Tribunal in BD (work permit – "continuous period") Nigeria [2010] UKUT 418 (IAC) as upheld in R (Vellore) v SSHD [2013] EWHC 724 (Admin).

48. By reference to BD (which dealt with a slightly different wording relating to work permits) it was held that a continuous period of four years' in the United Kingdom should not be read literally, but of relevance would be the reason for the absence and the strength of the person's ties to the UK as shown in other ways. In BD the Appellant's absences were required of him by his employer, a British company and he had at all times retained his base in the UK (see Claimant's skeleton argument at paragraph 31).

49. In Vellore the court concluded that a refusal to grant indefinite leave to remain to the applicant had breached the Defendant's public law duty and in the exercise of her discretion to act fairly and failed to give proper consideration to the impact of a refusal on the Claimant's wife and child.

50. In so far as it is relevant to the question of continuous residence the Claimant says that the tax position was out of his control but he is now deemed to be resident for tax purposes.

51. The Claimant thus asserts that "continuous residence" cannot be interpreted as the Defendant contends.

52. I am referred to the Immigration Directorate's Instructions for April 2006 paragraph 7.1 (see page 702). Annex F (referred to at page 703) was not on the website at that date and would not have been available. The version at page 692 is from December 2006, refers to 5 years and is policy not statute. It provides that the period of residence should not be broken by "short absences abroad, for example for holidays… or business trips (consistent with maintaining employment or self-employment in the United Kingdom)" which may be disregarded "provided he has clearly continued to be based here". 3.1 makes an additional (my emphasis) discretionary provision for the aggregation of time spent in the UK where "there have been no absences abroad (apart from those described in paragraph 3 above) and authorised business or

employment here has not been broken by any interruptions of more than 3 months or amounting to more than 6 months in all". The Claimant points out that this is guidance and not a rule. The Defendant has merely done a mathematical calculation and not given adequate consideration to the situation.

53. With regard to the definition of continuous periods of residence and the BD point the Defendant says this is not a marginal case or a "near miss". The Claimant cannot satisfy the requirement on any sensible basis given that he has been out of the UK for 70% of the time.

54. The Defendant also queried how it can be said that the Claimant is working for a British employer when he is working for himself. The Defendant does not know what the Claimant's business practices were in the earlier periods and submitted that that would all be conjecture and not the subject of this application. It has never been part of this case and would be illegitimate speculation.

The Third Limb

55. Paragraph 34 (vii) of the Claimant's skeleton sets out the third limb which is that in any event the Defendant has a residual discretion which has to be exercised fairly and in particular in relation to Article 8 ECHR and Section 55 of the Borders, Citizenship and Immigration Act 2009 in respect of the children.

56. The Claimant contends that the Defendant did not refer adequately to section 55 in respect of the children who have their life, language, school, friends etc here.

57. The Defendant has not, it is argued, taken account of the Claimant's particular circumstances. For example, the Claimant could never have applied if the business requirement had been not more than 180 days' absence. By reference to page 576, 601, 605 and 633 the Claimant says he would have known nothing of a set number of days' absence. The first Claimant could not satisfy the condition. In the circumstances the Claimant says that the Defendant was wrong not to exercise her discretion and disregard absences and no consideration was given to section 55 and Article 8.

58. This third limb represents the Claimant's supplementary submissions. It is contended that the interests of the children and private and family life have to be considered and were not or were not adequately so. The Defendant has a discretion outside the rules derived from statute which must be exercised. It cannot depend upon the Claimant making a further application. By reference to R (Patel) v SSHD [2012] EWHC 210 (Admin), section 55 and Article 8 duty should have been considered. Referring to Philipson (India) [2012] UKUT 00039 (IAC) (at Tab 12) (a work permit case), it is submitted that it is not for the Defendant to require the Claimant to make a separate Article 8 application.

59. On this third issue the Defendant contends that the residual Article 8 issue is a makeweight and an afterthought. She suggests (see paragraph 78 of the Defendant's skeleton) that the Claimant cannot just tack on to an application such as this an Article 8 application. He should have applied in Form FLR (O) using version 12/2012: see Appendix FM, GEN 1.9. The Defendant has not made a removal decision. In any event this point has been overtaken by the grant of leave. The Defendant relies on Ali v SSHD [2015] EWHC 7 (Admin) (at Tab 9) and argues that the Defendant is entitled

to take a staged approach, that any Article 8 consideration has been superseded by the grant of further leave to remain and further that any Section 55 arguments are academic because that leave was granted.

60. At paragraph 80 the Defendant maintains that a consideration of any Article 8 claim is not required in the absence of a proper application and/or whilst the Claimants still have leave and in any event ought to await the outcome of this application.

61. In reply the Claimant says that this case has nothing to do with Ali in respect of Article 8. The Claimant has gone through the stages and it is against that background that section 55 becomes relevant. The Claimant does not satisfy the criteria for an application for indefinite leave to remain other than through the HSMP. In any event, the Claimant suggests that Article 8 and section 55 were raised in terms in the application.

62. In the course of the hearing I raised an issue about the penultimate paragraph of the Defendant's decision letter dated 22nd March 2013 which reads: "having considered all your circumstances as a whole it is not accepted that there are any factors of a sufficient, compelling or compassionate nature to warrant granting you any period of leave to remain in the United Kingdom exceptionally outside the Immigration Rules…".

63. The Defendant says that this was the Defendant's decision on the application by the Claimant for indefinite leave outside the rules on the basis of exceptional circumstances (page 40-42). The Defendant contends that it is not inconsistent with the earlier passage in the letter which required the Claimant to make a paid for application in so far as he wished to apply for leave under the rules relating to private and/or family life (page 14a). In that connection the Defendant continues to rely on GEN 1.9 in Appendix FM and paragraphs A34 to A34E of the rules.

64. In reply the Claimant says that in this case there was ample material put before the Defendant triggering her duty to consider whether denial of indefinite leave to remain or “settlement” to the family would be disproportionate in accordance with Article 8 and section 55. The Claimant says that the Defendant is now arguing that an application had to be made whereas the role of the Defendant's discretion to grant leave to remain outside of the rules is the essential means by which the Defendant's public law duty not to fetter her discretion is met. The Claimant suggests that the adoption of an inflexible policy would be unlawful in essence, (see Paragraph 10 of the Supplementary Note where the Claimant contends that the rigid approach taken by the Defendant was unlawful for the reasons advanced).

Conclusions

65. I conclude that the Claimant is right when he says that his application for indefinite leave to remain falls to be dealt with under paragraph 135G of the Immigration Rules as it was when he entered the HSMP scheme. He correctly places reliance on the decision in the second of the HSMP Forum cases which provided that “In respect of all persons admitted to the Highly Skilled Migrant Programme as at 7 November 2006, those individuals are entitled to the benefits of the scheme (including settlement) according to the terms (including as to qualifying period) which applied on the date when they joined.”

66. I find that the Claimant is therefore right having regard to paragraph 135G as it was when he entered the programme that there was no "continuous residence" requirement to be satisfied. There was only a requirement to hold continuing leave in a relevant capacity. In so far as a requirement is to be found in the Guidance outside the Immigration Rules it is right that such Guidance would, if treated as founding refusal under the rules, fall foul of the principal in Alvi.

67. I therefore find that the Defendant considered the application under the wrong rule(s) and that the Defendant cannot refuse the Claimant indefinite leave to remain for failing to satisfy a “continuous residence” requirement. The Claimant had the required four years’ leave to remain.

68. This is in accordance with the reasoning in HSMP 1 and 2 and the principle is clear, namely that the Claimant is entitled to the benefit of the scheme as it was when he entered it.

69. The Defendant cannot rely on the principle in Odelola. It does not necessarily apply in all cases and where as here the Claimant has an extant application or a vested right or a legitimate expectation then it would not apply. In any event applying Odelola to an HSMP application would make a nonsense/nullity of the decisions in HSMP 1 and 2. The rule changes clearly do disadvantage the Claimant in respect of whom there is no evidence of any change in the nature and pattern of his work since his acceptance on the programme.

70. I accept that the Claimant is right when he says that because HSMP 1 and 2 were decided before Alvi and Munir those decisions have to be looked at "through the prism" of Alvi and Munir. Thus he says that any guidance or policy cannot found a decision to refuse him indefinite leave to remain. The Defendant's argument is essentially that the Claimant cannot pick and choose. The rationale behind the HSMP decisions was that the rules, guidance and policy have to be looked at as a whole and the Defendant lost those cases on that basis. However, this Claimant makes this application now, that is, after the decisions in Alvi and Munir. The court cannot simply ignore those later decisions. Moreover, all of the wording in those decisions refers to the Claimant being entitled to the benefits of the scheme. There is in fact no reference to a Claimant being fixed with its burdens. In any event the later decisions that only the rules are determinative do not undermine in my view the fundamental reasoning of the HSMP decisions which was that the Claimants were entitled to have the benefit of the scheme as it was when they applied.

71. I consider that the Defendant's reliance on the "Tier 1 (General) Migrant" point is spurious. The Claimant entered the highly skilled migrant programme and obtained leave initially as a highly skilled migrant. It was not possible to continue to obtain leave as a highly skilled migrant after the programme ended in March 2008. It was the Defendant's decision to require that those who wished to continue to pursue their highly skilled migrant applications to apply for leave as a Tier 1 (General) Migrant, presumably because it was the only appropriate category of migrant available at the time. It is apparent from the Defendant’s documents that those entitled to continue to claim the benefit of the highly skilled migrant programme after its cessation could qualify if they had obtained leave as a highly skilled migrant and then as a Tier 1 (General) Migrant. The new categorisation could not in my view in light of the decisions in HSMP 1 and 2 alter their actual status as migrants still within the HSMP.

The effect of the principles in those decisions is that the Claimants continue to have the benefit of the scheme and were not transferred to a new regime applicable to Tier 1 (General) Migrants not originally in the highly skilled migrant programme.

72. The Defendant's argument therefore at paragraphs 58 to 61 of her skeleton is rejected. The Claimant had no choice but to apply for indefinite leave to remain as a Tier 1 (General) Migrant. I reject that as a justification for the Claimant's application being considered under paragraph 245CD and Appendix S.

73. The Defendant argues that even if the Claimant is right and there is only a requirement for four years' leave, rule 135G confers a discretion not a duty on the Defendant to grant indefinite leave to remain (see paragraph 69 of the Defendant's skeleton argument) and so the outcome would have been the same for the Claimant. The Defendant suggests that she expressly considered the exercise of discretion in her letter of March 2013 and refused to exercise it because of the Claimant's prolonged absences from the United Kingdom.

74. I reject this argument. I find that the Defendant considered the Claimant's application under the wrong rules. The provisions she relied on contained (as she interpreted them) a requirement of continuous residence. The reason put forward for refusing to exercise her discretion was the Claimant's prolonged absences only. It was the sole matter taken into account (see page 14). The Defendant has not suggested that there was any other reason. The Defendant does not suggest that she considered: the nature and pattern of the claimants work; the fact of his being based here with his family; his family's life here; the fact of his main home being here; or the fact of his children having their lives, language, schools and friends here. The argument put forward by the Claimant that he could never have applied had there been a requirement of continuous residence is not considered by the Defendant. It is not challenged that his main home is here. The Defendant does not say that the Claimant was not a suitable applicant for indefinite leave to remain save for by reference to his absences.

75. In the supplementary letter at page 436 the Defendant asserts that the Claimant was not prejudiced by her decision. I find that it is apparent that she failed adequately to consider the impact of that decision on the Claimant and his family. Thus the Defendant's approach was too rigid, was incomplete and therefore she did not exercise her discretion in a fair and lawful manner.

76. In fact the letter from the Defendant (page 13) does not use the word "may" by reference to the rules but sets out "if the applicant [meets all the requirements listed below] indefinite leave to remain will be granted" (my emphasis).

77. Having reached my conclusion under the first limb it is not technically necessary to consider the other two limbs. I will however set out my decisions on those issues having heard the arguments.

78. The Claimant contends that even if there is a requirement of continuous residence then the ordinary meaning of "continuous residence" must apply and on the authority of BD he has in fact been continuously resident in the United Kingdom which he has made his home and which is where his family have made their home. Further the Claimant relies on Annex F Chapter 5 section 11 IDI to contend that work absences

should be disregarded and/or the Defendant's discretion should have been exercised in his favour.

79. I can deal with this point quite shortly. The meaning of continuous residence cannot be literal. I consider the approach in BD to be correct. There is a wealth of evidence here which would support the fact that the Claimant resides here. He does not reside anywhere else and has not done so since he came to the United Kingdom in 2005. His wife and children have settled lives here as the evidence shows. The Defendant has applied a rigid mathematical formula without considering the broader picture. There is significant material which she could and should have considered in deciding the issue of residence. She did not. She only considered the percentage of time the Claimant spent abroad. There is a proper analogy made by the Claimant, for example, with an airline pilot resident in the UK, but who is abroad most of his working time. In this respect the Defendant's decision was flawed. Similarly, the Defendant failed to exercise her discretion on this point properly or at all. She did not consider whether or not to disregard the absences by balancing them against the other factors. The exercise of discretion was not carried out in an appropriate manner.

80. Finally with regard to the third limb, namely the exercise of the residual discretion, there is confusion as I find in the Defendant's approach. The letter at page 13 says that the Defendant will not consider Article 8 and section 55 unless a paid-for application is made. The supplementary note provided in response to my question about it says that the penultimate paragraph of the letter at page 15 is the Defendant's decision on the Claimant's application for indefinite leave to remain outside the rules on the basis of exceptional circumstances. The Defendant suggests that this is not inconsistent with the earlier passage in the letter which required the Claimants to make a paid-for application in so far as he wished to apply for leave under the rules relating to private and family life.

81. I agree with the Claimant's analysis in the supplementary note at paragraph 3 (i) and (ii). Whether on the basis of her residual discretion or otherwise the Claimant is right to say that there is no category of immigration decision-making to which consideration of section 55 or the duty under section 6 Human Rights Act 1998 does not apply. In the circumstances of this case the Defendant has not considered section 55, Article 8 and proportionality at each relevant stage of her decision-making process. She specifically says that a consideration of any Article 8 claim is not required in the absence of a proper application and/or whilst the Claimant still has leave and in any event the Claimant ought to await the outcome of this application. Her consideration of section 55 factors is limited to the following words "this decision is not considered to raise any particular concerns with regards to the welfare of your children".

82. Thus I consider that the Defendant has not adequately performed the exercise of discretion and has not considered the factors raised in this particular case. The Defendant's failure in this regard would render her decision unlawful in any event.

83. Therefore the Claimants' application for judicial review succeeds and the Defendant's refusal decision (including the supplementary reasons in the letter dated 20th December 2013) of 22nd March 2013 is quashed.