ST

**Asylum and Immigration Tribunal** **Appeal Number IA/07499/2007**

## THE IMMIGRATION ACTS

Heard at: Surbiton
On: 21 June 2007

Determination Promulgated
11 JUL 2007
.....................................

Before

Mr M S Emerton
Immigration Judge

Between

**Mr Khalid**

Appellant

and

**Secretary of State for the Home Department**

Respondent

Representation

For the Appellant: Mr A Slatter (Counsel)
For the Respondent: Ms A Pos (Presenting Officer)

## DETERMINATION AND REASONS

Brief Details of the Appeal

1. This is an in-country appeal by a male citizen of Pakistan, born . The appeal is against a decision (on May 2007) expressed to be to refuse to vary leave to remain for work permit employment. The decision was stated to be taken under Paragraph 133 of HC 395 (the Immigration Rules). Removal directions were given.

2. The appellant's wife ( ) was served with a decision the same day, under Paragraph 196 (as a dependant spouse). Although no separate notice of appeal was submitted, her status falls to be decided in line with her husband's.

3. The appellant relies upon Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") and on other arguments which are set out below.

The Proceedings

4. I had been provided with bundles by both parties, together with a skeleton argument and various other papers (referred to below as required) by Mr Slatter. In view of the complexities of the case, I spent some time at the start of the hearing clarifying the issues. I then heard oral evidence, in English, from the appellant and his wife. After oral submissions from both parties I reserved my decision.

5. On 26 June 2007, solicitors for the appellants submitted further documents, copy to the Home Office Presenting Officers Unit, relating the appellant's wife having been offered a job (in a Fixed Term Speciality Training Appointment) by the Royal Liverpool and Broadgreen University Hospitals NHS Trust. This is relevant background, and I have duly noted the contents in the course of producing this determination. It has not, however, affected the outcome of the appeal.

The Applicable Law

6. In immigration appeals, the burden of proof is on the appellant and the standard of proof required is a balance of probabilities. This appeal is brought under Section 82(1) of the Nationality, Immigration and Asylum Act 2002, and by virtue of Section 85(4) I may consider evidence about any matter which I consider relevant to the substance of the decision, including evidence which concerns a matter arising after the date of decision. In effect, the relevant date at which I must consider the facts is the date of the hearing.

7. Article 8 ECHR protects the right to family and private life. I must consider the facts as at the date of the hearing, based upon the appellant establishing the facts upon a balance of probabilities. As made clear in the key case law, such as *Mahmood* [2000] EWCA Civ 385, *Nhundu and Chiwera* (01/TH/613), *Razgar* [2004] UKHL 27 and the recent House of Lords decision of *Huang* [2007] UKHL 11, I must determine the following separate questions:

    a. Is there an interference to the right?
    b. Is that interference in accordance with the law?
    c. Does that interference have legitimate aims?
    d. Is the interference proportionate in a democratic society to the legitimate aim to be achieved?

8. The case of *Huang* (paragraphs 19 and 20) re-affirms the explanation in *Razgar* (paragraph 20) that the Immigration Judge's decision on proportionality,

"must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage."

9. *Huang* confirms that there is no additional test of "exceptionality" but (at paragraph 20) when the question of proportionality is reached,

"the ultimate question for the Judge is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8."

10. Section 88(2)(a) of the Nationality, immigration and Asylum Act 2002 provides as follows:

(2) A person may not appeal under section 82(1) against an immigration decision which is taken on the grounds that he or a person of whom he is a dependant-

(b) does not have an immigration document of a particular kind (or any immigration document),

11. The paragraph of the Immigration Rules dealing with extensions of work permits is Paragraph 133, as follows:

133.An extension of stay for employment is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraphs 131, 131A, 131B, 131C, 131D, 131E, 131F, 131G or 131H is met (unless the applicant is otherwise eligible for an extension of stay for employment under these Rules).

12. The relevant parts of Paragraph 131 are as follows:

131A. The requirements for an extension of stay to take employment (unless the applicant is otherwise eligible for an extension of stay for employment under these Rules) for a student are that the applicant:

(iii) holds a valid Home Office immigration employment document for employment;

131C The requirements for an extension of stay to take employment for a Science and Engineering Graduate Scheme or International Graduates Scheme participant are that the applicant:

(ii) holds a valid Home Office immigration employment document for employment;

131E The requirements for an extension of stay to take employment for a highly skilled migrant are that the applicant:

(ii) holds a valid work permit;

131F The requirements for an extension of stay to take employment (unless the applicant is otherwise eligible for an extension of stay for employment under these Rules) for an Innovator are that the applicant:

(ii) holds a valid Home Office immigration employment document for employment;

13. The paragraph of the Immigration Rules dealing specifically with the Highly Skilled Migrant programme (HSMP) is Paragraph 135D, as follows:

135D. The requirements for an extension of stay as a highly skilled migrant for a person who has previously been granted entry clearance or leave in this capacity, are that the applicant:

(i) entered the United Kingdom with a valid United Kingdom entry clearance as a highly skilled migrant, or has previously been granted leave in accordance with paragraphs 135DA-135DH of these Rules; and

(ii) has achieved at least 75 points in accordance with the criteria specified in Appendix 4 of these Rules, having provided all the documents which are set out in Appendix 5 (Part I) of these Rules which correspond to the points which he is claiming; and

(iii) (a) has produced an International English Language Testing System certificate issued to him to certify that he has achieved at least band 6 competence in English; or

(b) has demonstrated that he holds a qualification which was taught in English and which is of an equivalent level to a UK Bachelors degree by providing both documents which are set out in Appendix 5 (Part II) of these Rules; and

(iv) meets the requirements of paragraph 135A(ii)-(iii). [*not in dispute in this case*]

Summarised Immigration History (Including Application to Remain)

14. This is a case where an understanding of the immigration history is crucial. The facts relating to that history are not in dispute.

15. The appellant had successfully applied to enter the UK under the highly skilled migrant programme ("HSMP"). He was awarded a one-year initial visa, valid from 1 March 2006 to 1 March 2007. He entered the UK in September 2006, accompanied by his wife.

16. On 25 February 2007 the appellant applied to extend his visa under the highly skilled migrant programme. He filled in form FLR(HSMP) [version 11/2006] and provided all the required information, including a breakdown of his points under the scheme; he claimed a total of 75 points, which if correctly claimed would have been sufficient to merit an extension of his visa. On 28 February 2007 the application was acknowledged, and the appellant was told to expect a decision shortly.

17. On March 2007 a Mr P , of the Respondent's WPUK Managed Migration Directorate, wrote again to the appellant, explaining that on 8 November 2006 the provisions allowing leave to remain under the HSMP had been suspended, and that the appellant's application would be considered under the revised provisions in the Immigration Rules, which had commenced on 5 December 2007. His attention was drawn to the new points scoring assessment and a separate mandatory English Language requirement. It was asserted that the appellant had not scored sufficient points because his overseas earnings could not be taken into account. He was informed that his application under the HSMP was bound to fail under Paragraphs 135F and 135D(ii) of the Immigration Rules. It was suggested to the appellant that he should, in the alternative, apply for a work permit holder, and that his employers should therefore apply for a work permit. He was supplied with a "request to vary" slip.

18. On March 2007 the appellant replied by faxed letter to Mr P , asking for some documents to be returned and explaining that he was considering his options. Mr P replied the same day.

19. On April 2007 the appellant wrote again to Mr P , enclosing his request to vary leave as a work permit holder and supporting documents. He confirmed that his employers would file the work permit application, but also asking that his application was decided under the HSMP if possible.

20. It is clear that Mr P received the application, and telephoned the appellant on 11 or 12 April to explain that the boxes on the form needed to be ticked. It is also clear that he explained that the application could not be left open both for HSMP and work permit.

21. On 12 April 2007 the appellant wrote by fax again, referring to the telephone call, requesting that his application was considered only on the basis of work permit employment. He submitted a suitably ticked request to vary application.

22. The appellant's employers ( ) applied for a Tier 2 work permit. A copy of the application has not been provided by either party.

23. Work Permits UK produced a reply to the Company's HR manager, dated May 2007, stating that the application could not be approved because the appellant's qualifications were not of a sufficiently high level, the job was not sufficiently responsible and it was not accepted that the employer was UK based. It also explained that up to two reviews of the decision could be requested, and that an application for a review needed to be submitted within 28 days of the letter. This letter was, apparently, not received until May 2007, after the date of decision on the appellant's application (see below). In any event, it is clear that there was no application for a review and that the respondent's decision was taken almost immediately after the refusal of a work permit, which would have militated against any review being practicable.

The Respondent's Decision

24. In a notice of decision dated May 2007, signed by Mr P on behalf of the respondent, the application was refused. The brief reason given was that the appellant did not have a valid work permit. The application was refused under Paragraphs 133, 131A(iii), 131C(ii) and 131F(ii) of the Immigration Rules, and Section 88(2)(b) of the Nationality, Immigration and Asylum Act 2002 [*see above under "The Applicable Law"*]. Reference was made to limited right of appeal under Section 82(1).

The Appeal

25. The appeal was received on May 2007 from Solicitors. Detailed typed grounds of appeal were submitted. In view of the fact that issues were fully aired at the hearing, I will summarise those grounds of appeal only briefly. In essence, it was argued that the way the applications had been handled was unfair, and that the appellant should have been granted leave under the HSMP scheme. The transitional rules were unfair and the appellant had a legitimate expectation of having his visa extended. Article 8 was pleaded in the alternative. Sections 84(1)(f) and (g) of the 2002 Act were relied upon.

The Appellant's Evidence at the Hearing

26. The applications, correspondence and decision referred to above were provided to me, together with documentary evidence of the appellant's qualifications, old IND guidance notes on the HSMP and other background documents. In his oral evidence, the appellant relied upon his witness statement and gave further oral evidence in chief and in cross-examination, concerning his employment, qualifications and the history of the case. A Khalid also gave oral evidence, adopting her witness statement and further explaining her situation. She was not cross-examined.

Submissions

27. For the respondent, Ms Pos submitted (before evidence was called) that the only decision was regarding the work permit (no "Immigration Document"), against which there could be no right of appeal save on human rights grounds. She conceded that the respondent's letter about the HSMP was incorrect, and also pointed out that a successful Article 8 appeal and an extension under the HSMP would both result in 3 years leave to remain. She had been instructed not to present arguments relating to the HSMP, but agreed that I might find the evidence relating to the HSMP relevant. She did not seek to dissent from the appellant's arguments that under the new HSMP scoring system, overseas earnings could and should be taken into account. In closing submissions. She explained that she had been instructed to rely upon the decision, against which (in this particular case) the only remedy was a Human Rights

appeal. She suggested that if I judged that I could decide the HSMP issue on appeal under Paragraph 135D and was sympathetic to the appellant's arguments, it might be more appropriate to allow the appeal on this basis. As for Article 8, it was accepted that there was a private life in the UK; she suggested that any interference would be proportionate. The couple would leave together, and rights to a family life would not be engaged by removal.

28. Mr Slatter had also addressed me at the start of the hearing, explaining that he would be arguing that although he relied upon Article 8, the grounds of appeal should not be limited. He suggested that the appeal should be allowed under the old HSMP rules, and that the legitimate expectation meant that the decision was "not in accordance with the law". The appeal could also be allowed under the new paragraph 135D Rules.

29. In submissions at the end of the hearing, Mr Slatter relied upon his skeleton argument. In summary, this argued that the appellant was not afforded a proper opportunity to obtain a valid work permit, but in any event his original application under the HSMP was still valid and no proper decision had been made; the application should have been decided under the old guidance but the appellant also qualified under the new Paragraph 135D. He had a legitimate expectation of being granted an extension under the old arrangements and the arrangements actually enforced were unlawful. In the alternative, Article 8 was relied upon: the couple's private lives would suffer undue interference, as against the maladministration of the respondent's attempts to control immigration. In oral submissions, Mr Slatter suggested that the problems were all the fault of the Home Office – perhaps one case worker. The appellant should have been granted leave either under the HSMP or as a work permit employee. If not, Article 8 applied. He suggested that the proper course would be to start by considering Article 8, and then going on to consider the Immigration Rules.

30. Mr Slatter handed up copies of recent first-instance determinations in IA/04476/2007 and IA/03838/2007 (and others), which had been allowed under Article 8 in similar circumstances. He invited me to adopt a similar approach.

<u>Findings of Credibility and Fact</u>

31. I found that the appellant and his wife were both entirely credible witnesses. I have no concerns as to the accuracy of their accounts.

32. My fining of fact, in summary, is as follows. The outline immigration history is as set out at paragraphs15-21 above. I should make it clear that I accept that the work-permit refusal was only served on the appellant after the respondent's immigration decision, and indeed after he had submitted his notice of appeal. The appellant, born in Pakistan, obtained a recognised BSc degree in Engineering from . This was taught in English. He was

working as IT for before coming to the UK under the HSMP. The appellant's wife is a junior doctor, having qualified in Pakistan and done her initial training in Saudi Arabia (where her visa has now expired), but having taken the PLAB and Royal College exams she is ready and committed to carrying out her training rotations in the UK. I have noted that she has now been offered a job in the UK, albeit I doubt that she would be able to secure a full training rotation under the new NHS scheme until her immigration status is resolved. The appellant read the guidance notes before selling his property in Saudi Arabia and making the decision to give up his work and come to the UK under the HSMP. He obtained work in the UK with the in November 2006 with the understanding of a permanent post once his visa was extended. At the time of applying to extend his 12-month HSMP visa, his earnings for the previous eight months totalled £23,425, of which had been earned overseas. Had he known of the difficulties he would face, he would not have come to the UK. He has been out of Pakistan for nine years and would find it hard to return there or to Saudi Arabia. When he agreed to transfer his HSMP application to a work permit application, he only did so because he was explicitly told by the Home Office that he could not qualify under the HSMP.

Consideration of the Position under Immigration Legislation

33. I was assisted by the valiant efforts of Mr Slatter and Ms Pos to try to impose some sort of legal order on the chaos caused by the muddle-headed way in which the respondent introduced the new arrangements for the Highly Skilled Migrant Programme, and the bureaucratic muddle caused by the inappropriate way in which the respondent handled the appellant's application to extend his leave.

34. As indicated above, I was impressed by the appellant and his wife, and have no doubt that they are just the sort of couple for whom the HSMP was devised. That they have fallen foul of the system, through no fault of their own, is a regrettable indictment of the system, and no reflection of their own *bona fides*. I find it highly regrettable that the respondent, through the Home Office's own errors, should seek to deny a well-qualified applicant the opportunity of extending leave, and at the same time try to limit the right to appeal against what is clearly a deeply flawed decision.

35. Having set out the facts and the history of the case in some detail above, I will attempt to take matters comparatively briefly. I have noted the approach taken by Designated Immigration Judge Digney and Immigration Judge Barker in the determinations to which I have been referred, and have received these cases in the spirit of, in effect, an annex to the skeleton arguments rather than any attempt to assert that they should provide a precedent. However, although I recognise the force of the Article 8 arguments (see below), I am inclined to consider that this is primarily an immigration case, involving someone who applied to remain in the UK under the Immigration Rules, and if it is possible to see justice done by recourse to those Rules, then this should be the starting point. Each case

will always turn on its own facts, and although the law must be applied to those facts, it is often the position that a pragmatic and fact-based decision can better do justice than an attempt at a potentially over-legalistic solution. Mr Slatter has had to construct a number of alternative legal hypotheses in order to serve the legitimate interests of his client, and of course I do not blame him for that. I do, however, agree with Ms Pos's analysis (albeit within the constraints of the rather restrictive instructions which she ahs clearly received), that the correct starting point is Paragraph 135D of the Immigration Rules. Even if there was, strictly, no decision or no right of appeal, this would still help to inform a properly balanced decision under Article 8.

36. I have carefully considered Paragraph 135D, together with Appendix 4 of the Immigration Rules, which sets out the points regime (which I have not included in the body of this determination). On the basis of the facts I have found proved (which I consider to be uncontroversial), there is no doubt that the appellant satisfied the criteria in 135D(i). The evidence submitted, which I accept to be accurate, demonstrates to me that under the Appendix 4 criteria, 40 points should have been allocated for previous earnings. It appears to me to be self-evident, as Ms Pos rightly conceded, that the way the provisions are drafted make it clear that earnings prior to arriving in the UK can be taken into account. The respondent (in the person of Mr P ) was clearly in error in writing to the appellant March 2007. I agree that 30 points should accrue for the qualifications (a Bachelors degree, recognised by UK NARIC in their letter of 13 July 2005) and 5 points for age. The total of 75 points satisfied that criteria of Paragraph 135D(ii). As for proficiency in English (and I also note that the appellant's oral evidence was fluent), I accept that his bachelors degree was taught in English and as such satisfied the requirements of 135D(iii). 135D(iv) refers to additional matters which are not in dispute (and upon which in any event I am satisfied).

37. I thus accept, with no hesitation, that the appellant satisfied all the requirements of paragraph 135D and clearly should have been granted an extension under the HSMP. He applied for this, providing all the necessary information and evidence, but was met with the letter of March 2007 telling him (incorrectly) that the application could not succeed. The letter states, at the foot of the first page "We have not, to date, refused your application however." On a sensible construction, however, I consider that the practical effect of the letter is precisely that – a refusal. I attach weight to the fact that the appellant responded by writing that he wished to be considered for the HSMP. He did not willingly resile from that aspect of his application: this happened only after Mr P persuaded him, in a telephone call on or May 2007, that he should do so. My finding is that the combination of the clear written advice from the respondent on March that the appellant was not eligible for a HSMP extension, in combination with the telephone conversation on or and the eventual formal refusal of the application (albeit referring to the work permit) on May 2007, *did* in reality amount to a refusal under Paragraph

135D, primarily on the basis that there were insufficient points (135D(ii)) against which there is a right of appeal.

38. In the circumstances, I am satisfied that the appellant did satisfy the requirements of the Immigration Rules (namely Paragraph 135D), that there is a right of appeal against the Immigration decision under Section 82(1) of the 2002 Act, and that I should allow that appeal.

39. I do not need (at least under this heading) to consider the issue of whether the old criteria for the HSMP should have been applied in the transitional period, although it is self-evident from the material before me that the appellant would satisfied those criteria too. Similarly, although I accept that, strictly applied, there is no appeal against the work permit aspect of the application (by virtue of section 88(2)(a) of the 2002 Act), the decision was clearly flawed. On the face of it, there was no work permit, but the evidence before me tends to suggest that the conclusions of Work Permits (UK), given on May 2007, were wrong. However, even if there might be some merit in the refusal to provide a work permit, there was supposed to be an opportunity to challenge this and ask for up to two reviews. I accept that the letter was not sent to the appellant's employers until May 2007 (after the appellant had submitted the notice of appeal), but even if it had been posted immediately, allowing 28 days to apply for a review, as the final decision on the application was taken only two days later the decision was clearly flawed. It is inequitable and illogical to refuse the application on the grounds that there is no work permit, thereby removing a right of appeal, when the established method for challenging the failure to provide a work permit are not offered to the appellant, and where there are reasonable grounds to consider that a review might have been resolved in the appellant's favour.

40. I do not consider that even on a broad construction there is a right of appeal against the decision to refuse to grant leave on the basis of not holding a valid immigration document (a work permit), save for a human rights appeal (or other grounds not arguable here), but my finding of fact on a balance of probabilities is that the respondent should have granted an extension of leave for work permit employment in any event, even if the appellant had not qualified under the HSMP. It has not been suggested by the Respondent that the appellant would have fallen foul of the supplementary requirements in any other parts of the immigration Rules, and it appears fairly self-evident that he would have qualified save for the failure to have a work permit. I am also entirely satisfied that it was highly improper and unfair to make the decision with such indecent haste, thereby denying the appellant the opportunity to challenge the failure to supply a work permit.

Article 8 ECHR

41. I now turn to my consideration of Article 8 (see my general summary of the law, set out above, and my findings of fact). I can take matters briefly, having already allowed the appeal in any event. I consider that the appeal

has been allowed primarily under the Immigration Rules, and that an extension of leave should be granted on that basis. Article 8 is in the alternative. I have included an analysis of Article 8 because I consider that as this was an arguable ground of appeal I am bound to make a determination upon it. Furthermore, should the respondent seek to challenge my decision to allow the appeal under Paragraph 135D of the Immigration Rules, the appellant is at least afforded the safety-net of his Article 8 rights.

42. The appellant has been in the UK since September 2006, and the evidence before me is sufficient for me to be satisfied that he and his wife have established a private life in the UK. I accept that removal would interfere with those rights. In the light of my findings above, I am less convinced that removal would be in accordance with the law. Certainly, in view of the inappropriate and unfair way that the case was handled by the respondent, when in reality the appellant should have been assessed as being qualified to remain in the UK, I find it difficult to see how such interference can have legitimate aims. In any event, even if the respondent satisfied all the criteria short of proportionality, it is difficult to see removal as being capable of amounting to a proportionate response.

43. Here, the "legitimate expectation" aspect of the case is worth considering. I have no doubt that the appellant (and his wife) made a considered decision to give up careers overseas in order to come to the UK under the HSMP. The arrangements of which they were informed would have seemed to give a very strong indication that they could reasonably expect to be able to extend their stay. Indeed, the "Q & A" part of the guidance provided by the respondent (see, for example, pages 93-94 of the appellant's bundle) are clearly designed to reassure applicants that the revised HSMP would not affect applicants (question 24.10) and that it would be possible to extend for a further three years and then settle, provided the applicant was still economically active in the UK as a HSM. I accept that the appellant changed his position to his detriment by, effectively, closing off career avenues abroad to come to the UK. The change in policy, *if* it had caused the appellant to fall foul of the Immigration Rules, would in my view have meant that removal would be disproportionate. In reality, as the decision to refuse the application was flawed, and the appellant should in any event have been granted leave to remain under the new HSMP provisions, the case becomes even more clear cut.

44. In conducting the necessary balancing exercise under Article 8, I conclude that the decision appealed against prejudices the private life of the appellant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8. It is disproportionate.

45. I also allow the appeal under Article 8.

## DECISION

46. I allow the appeal under the Immigration Rules (Paragraph 135D).

47. I allow the appeal on human rights grounds (Article 8 ECHR).

Signed.................................................................dated 9 July 2007

M S EMERTON
Immigration Judge