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Asylum and Immigration Tribunal

Appeal Numbers: IA/18681/2007
I A/18684/2007
IA/18705/2007
IA/18690/2007

THE IMMIGRATION ACTS

Heard at Hatton Cross

On 10th December 2007

Determination promulgated

18 Dec 2007

Determination prepared 12th December 2007

Before

Immigration Judge Henderson

Between

**Mr A
Ms S Mr/
Master A**

Appellants

and

Secretary of State for the Home Department

Respondent

Determination and reasons

Representation

For the appellant: M, Counsel

For the respondent: Ms S Leyshon, Home Office Presenting Officer

Details of appellants and nature of appeal

1 The appellants are nationals of Bangladesh and are a family unit. Their dates of birth are respectively. The first appellant arrived in the UK on 6th September 2003 and was granted leave to enter under the Highly Skilled Migrant Programme (HSMP) until 26th August 2004. His wife and sons followed shortly afterwards, on 29th September 2003, and were given leave in line as his dependants. On 5th January 2005, all the appellants were granted further leave under the HSMP until 26th August 2007. They now appeal, under S 82(1) Nationality, Immigration and Asylum Act 2002, against the respondent's decisions, dated 23rd October 2007, to refuse to vary their leave so as to grant them indefinite leave to remain. They appeal on the grounds that the decisions are not in accordance with the law

and that they are incompatible with their right to respect for family and private life protected by article 8 ECHR.

2 Upon the appellants' arrival in the UK, and when they were granted an extension of leave the scheme of the HSMP was as follows. Applicants who met the relevant criteria, and their dependants, were initially granted leave to enter for one year. They were eligible to apply for a three year extension of their leave if, during the first year the principal applicant had taken all reasonable steps to become lawfully economically active and they were able to maintain themselves adequately without recourse to public funds. At the end of the period of three years they were eligible to apply for indefinite leave to remain if the principal applicant could show that he had spent at least four years continuously in the UK under the HSMP without having had recourse to public funds and that he had become lawfully economically active.

3 From 3rd April 2006, however, the scheme was changed such that the qualifying period for settlement was lengthened from four to five years, and this change applied not only to new applicants, but also to those who had already been granted leave to enter under the HSMP scheme. From 7th November 2006, the scheme was changed again so that it became more difficult for new applicants to qualify under the scheme and also for those already on the scheme to apply for extensions of their leave; instead of having to show that they had taken all reasonable steps to become economically active, they now had to show that they qualified under a new points test. Points were now awarded on the basis of previous earnings, qualifications and age. Attributes which had previously counted towards meeting the initial eligibility criteria, like past work experience, significant achievements in the applicant's field and having a skilled partner, did not attract points under the new system.

4 The principal effect of this rule change on the appellants was that they were not eligible, under the new rules, to apply for indefinite leave to remain in August 2007 as they would have been under the old scheme. Further, the first appellant's earnings were not high enough to attract the points required to qualify him for leave to remain for one further year so as to make him eligible to apply for settlement in 2008. Though the respondent made "transitional arrangements" for those in employment in the appellant's position, which would have permitted him to apply for a work permit, this would at best have placed him in another temporary immigration category, rather than permitting him to settle.

5 It is the appellants' case that the respondent's decision, resulting from the 2006 rule changes, to refuse to grant them settlement after four years, represented a disproportionate interference with their right to respect for their private life. This is because they entered the UK in the reasonable expectation that they would be permitted to settle after four years if they met the conditions of the scheme as it then was. They claim that they could not reasonably have anticipated that the scheme would change in the way that it did, and that they acted to their detriment in reliance on what was effectively a promise of settlement at the end of four years if they met easily achievable criteria. They claim to have been significantly disadvantaged by not being permitted to settle in 2007 as anticipated and that such disadvantage amounts to an interference with their private life. They further claim that such interference is not lawful, necessary or proportionate to the respondent's legitimate aims of acting in the interests of the economic well-being of the country and/or maintaining an effective immigration control. In the alternative the appellants claim that the respondent's decision is not in accordance with the law in that it breaches their legitimate expectation of being permitted to settle in the UK in August 2007.

Appellants' claims

6 The first appellant explains in his witness statement that he studied in the UK between 1977 and 1985, obtaining A'levels and qualifying as a chartered accountant. After returning to Bangladesh he slowly established himself as an accountant, taking increasingly responsible jobs. Latterly he worked for eight years as chief accountant for a UK based company and then for three years as Finance and Administration Manager, ^ multinational company. In his last employment he headed a department of ten people, and was earning the equivalent of about £19,500 per annum, which was a good salary in Bangladesh. If he had stayed in Bangladesh he would have been promoted to the position Finance Director, in which he would have earned significantly more. Before leaving Bangladesh, he and his family lived comfortably in rented accommodation. They had four domestic employees, owned a car and sent their children to private school.

7 Despite their affluent circumstances, the first appellant wished to take his family abroad to a country where there was less corruption and better education for his children. From 2002, he started investigating immigration schemes in the US, Canada, Australia and New Zealand. Though he would have preferred to come to the UK, the HSMP did not then exist. He and his family spent an experimental six months in the US, but were not persuaded that they wished to move there permanently. The first appellant also applied to go to Canada. However the application process was beset by delays and, in June 2003, he heard about the UK HSMP. He investigated the scheme on the internet, and because it appeared attractive and simpler than the Canadian scheme, he withdrew his application to go to Canada. Had he pursued the Canadian application, he felt sure that it would have been granted, and, if it had been, he would now have permanent status in Canada.

8 The first appellant understood that it was a condition of the UK scheme that he and his family intended to make the UK their permanent home. He further realised that he could easily achieve the 65 points required to qualify, and he understood that he would be granted an extension of stay, followed by permanent settlement if he met some fairly basic criteria. He therefore applied under the scheme and was given approval within one week. It was a condition of the scheme that he had to give an undertaking that he would make the UK his main home. He was happy to do so but did not make such undertaking lightly; he was a professional man with family responsibilities and he was not prepared to gamble on his future. The decision to come to the UK was a calculated one that he and his wife had come to together.

9 The first appellant stated that he brought his life savings (US \$17,000) with him to the UK, including money from the sale of all his possessions in Bangladesh. He used the money to pay for rent and other expenses whilst he sought work in the UK. During his first year in the UK, he narrowly missed getting several jobs in the field of accounting. He felt that this was because he lacked recent UK work experience and familiarity with some software packages. However, he undertook various other jobs, and his wife also worked in a fast food outlet. His children started new schools. The first year was difficult for the family and by the end of it they had used up all their savings. In October 2004, however, the first appellant was taken on as a financial analyst by a multi-national company ; Though this appointment was at a level well below that at which he had been accustomed to work in Bangladesh, it was within his field, and he was therefore grateful to accept it. The first appellant felt that he had probably been disadvantaged within the UK labour market because of his age and because he came from

a developing country; an employee with his level of qualification and experience would normally expect to earn between £40,000 and £100,000 in the UK, whereas he only earned £24,000.

10 The first appellant explained that he had remained in employment with and that he had been promoted to the position of Manufacturing Controller, with effect from 1st December 2007, with an annual salary of £31,000 plus benefits. After six months, his salary should increase to £40,000 plus including benefits. Had been earning at this rate in August 2007, he would have qualified for further leave to remain under the revised HSMP regime. The first appellant said that he was ambitious and determined; his plans were beginning to bear fruit as he now had over three years' work experience in the UK and had been promoted. He was well settled at work and socialised with his colleagues. His wife had been constantly employed and had taken English language lessons to improve her skills. They had both passed their Life in the UK tests. His children had also settled well and his elder son had been offered a place to study for a degree in Medicinal Chemistry at Imperial College.

11 The first appellant said that he knew nothing about the changes to the HSMP until he heard about them on a Bangladeshi television programme in about March 2007. He did not have colleagues or neighbours working under the HSMP who might have told him about the changes earlier. He investigated further on the internet and was very shocked to realise that his position was not as he had thought it to be. He and his wife had been living and planning on the basis that they had moved permanently to the UK. They had been in a state of extreme upset and distress ever since learning of the changes. The first appellant said that he could not now return to his old job in Bangladesh as he had lost his contacts and was now older; unemployment in Bangladesh was high and getting a position was more about who you knew than what your qualifications were. He and his family could not return to anything like their old lifestyle as he would not be able to get a good job and they had no savings left. His father was retired and he had to provide for his disabled brother as he had always done. Returning to Bangladesh would also be humiliating and an advertisement of their failure. This would make him and his family a laughing stock and would make it even more difficult to find employment as he would have a reputation as a poor planner.

12 The first appellant said that he felt particularly bad about his elder son who was now unable to take up the university place that he had been offered in the UK because he could not afford the fees that overseas students had to pay. If he returned to Bangladesh he would not be able to enter university there because he did not have the appropriate Higher Secondary School Certificate and competition for university places was extreme. The first appellant said that he felt that he had prejudiced chances of success in life and feared that he would always blame him for this.

13 The second appellant explained in her witness statement that she had not initially been particularly motivated to relocate abroad but that she had changed her mind after discussing the matter over time with her husband. In particular, they both wanted to do the best thing for • who had great academic promise. She had come to the UK on the clear understanding that the family would make their home here permanently. She said that she had found the language to be a barrier at first, but that she had conquered her difficulties through taking English and computer classes and through working. She had always felt that she would need to have a good command of English in order to integrate and was proud to have passed her Life in the UK test. The family spoke a mixture of

English and Bengali at home and could not now read or write Bengali and increasingly could not understand the more difficult Bengali words. As well as working in paid employment she also undertook voluntary work at a local authority centre helping to run life skills programmes for women. Recently she had offered catering services supplying Indian meals to conferences for Reading Borough Council. The second appellant echoed her husband's dismay at the respondent's unexpected rule change and said that the decision to refuse the family indefinite leave to remain had had very adverse psychological impact on them all.

14 The third appellant explained in his statement that his parents had told him that the family was coming to settle in the UK and that his father had always had high expectations of him and had hoped that he would go to a top British university. He said that he had coped quite well with his GSCE coursework despite joining school half way through the syllabus, and that he had attained two A's and two B's at A'level. After finishing his A'levels he had taken a gap year so that when he started his university course his father would have indefinite leave to remain and he would charged fees at a domestic rate rather than as an overseas student. He had ambitions to do a Masters degree and then a PhD before joining a research team, preferably at Imperial College. The fourth appellant also prepared a statement explaining that he was well settled at school and socially and that he had lost his contacts in Bangladesh.

Respondent's case

15 The only reason given in the reasons for refusal letter for refusing the appellants' applications was that they had not completed five years' participation in the HSMP in the UK, as required by the new rules. It was further asserted that the decision did not breach the appellants' rights under article 8 ECHR.

Hearing

16 The first, second and third appellants each adopted their witness statements and were tendered for cross-examination. However, Ms Leyshon had no questions to ask any of them. I heard submissions from both parties which are noted in my record of proceedings.

Conclusions

17 It is for the appellants to satisfy me that the respondent's decision is incompatible with their human rights and/or that it was not in accordance with the law. Following the approach suggested by Mr Justice Ouseley in *BK (Serbia and Montenegro) [2005] UKIAT 00001* I consider that they must establish the facts upon which they rely in support of their article 8 claims to the standard of the ordinary balance of probabilities.

18 The appellants' accounts are unchallenged by the respondent and are plausible and consistent and I accept that they are true. I accept that the first and second appellants came to the UK with their children, having carefully considered their position and weighed various options, fully intending to make the UK their home and in the expectation that they would be entitled to settle after four years if they continued to be economically active and able to maintain themselves. I consider that the whole family has tried extremely hard to integrate and adapt to the British way of life and that they have been successful in this. Both parents have taken and passed Life in the UK tests and the children appear to have

thrived and been successful at school. After a slow start the first appellant has now built up several years' work experience with an apparently successful international company, and he has at last been offered a promotion to a level which is more appropriate to his level of qualification and experience. A letter from his supervisor makes it clear that he is a valued employee, that his promotion followed from a rigorous and competitive selection procedure and that it involved a leap from grade 8 to grade 11 which was rare. It is not particularly surprising to my mind that it has taken some time for the first appellant to establish himself as a professional at a level appropriate to his skills. His own assessment, that he was somewhat disadvantaged by being older and from a developing country, appears to be borne out by information contained within a letter written by the Commission for Racial Equality to the Border and Immigration Agency on 6th June 2007. That letter states that government and other recent research suggests that, after controlling for other factors, all ethnic minorities experienced lower earnings than white people, with Bangladeshi men faring particularly badly. Further, ethnic minority graduates were finding it increasingly difficult to access high status jobs and earning gaps were substantial for men in professional and managerial occupations. I accept the evidence contained within all the family's statements that they have developed active social lives through school, work and the community and that they participate in a variety of communal activities including sport. They have not been back to Bangladesh since their arrival in September 2003 and this is further indicative of their concerted effort to focus on establishing themselves in the UK.

19 M referred me to the respondent's "HSMP Guidance" relating to the revised programme effective from 31st October 2003. The revisions introduced in October 2003 appear to have been relatively minor and to have effectively widened the scheme by, for example, lowering the points threshold. It is not clear to me whether this guidance had already been published when the appellants made their application to come to the UK or if it was produced shortly afterwards. It seems to me probable that the appellants relied upon the same or a very similar version when they made their decision to enter the UK and it certainly appears to have been the effective guidance at the time that they applied for their three year extension of leave in mid-2004. The guidance explains the requirements of the HSMP scheme as it then was and deals specifically with the question of changes to the scheme as follows:

24.9 Q: What if the scheme changes?

A: As with any immigration scheme we reserve the right to adapt some of the criteria or documentation associated with the scheme and will inform you via our websites of any such changes. All applications will be treated on the basis of the HSMP provisions at the time they were submitted.

24.10 Q: I have already applied successfully under the HSMP. How does the revised scheme affect me?

A: Not at all. It is important to note that once you have entered under the programme you are in a category that has an avenue to settlement. Those who have already entered under the HSMP will be allowed to stay and apply for settlement after four years qualifying residence regardless of these revisions to HSMP.

20 Ms Leyshon understandably sought to rely on the answer provided at paragraph 24.9, stressing that the respondent had always made it clear that the terms of the scheme

might change. Further, it was repeatedly stated throughout the guidance that applicants would be eligible to *apply for* further leave to remain, rather than that they would necessarily be eligible for the grant of such leave. M relied particularly upon the subsequent answer, stressing that a lay person reading the guidance would be bound to conclude that the programme provided an avenue to settlement after four years (and not after any longer period), provided that certain basic criteria were met. These are set out elsewhere in the guidance, for example at para 26.5, as follows:

After four years in the UK as a highly skilled migrant you can apply for settlement. The main criteria for settlement will be that you have spent a continuous period of four years in the UK...in a category leading to settlement and that you continue to be economically active in the UK as a highly skilled migrant.

21 I have little hesitation in finding that the appellants entered the UK in the belief that they were joining a scheme which provided an avenue to settlement after four years, provided that basic criteria, which they felt themselves able to meet, were met. I further find, in relation to the first, second and fourth appellants, that such understanding was reasonably based on Home Office guidance which they consulted both before entering the UK, and at the time they obtained their three year extension. It is true that a close lawyer's reading of the guidance should perhaps have alerted them to the possibility that the scheme might be radically changed before they had acquired settlement. However, the tenor of the guidance is to my mind reassuring in the sense that it seeks to allay applicants' fears that they might be prejudiced by changes to the scheme. I acknowledge that the answer provided at para 24.10 relates specifically to the October 2003 changes, but when the guidance is read as a whole, there is no suggestion whatsoever that any changes are likely to have any really significant effect on those already on the scheme.

22 All of this must, importantly, be considered in light of the fact that it was one of the *requirements* of the scheme (at para 135A (ii) of HC 395) that the first appellant "intend[ed] to make the UK his main home". The first appellant has stated, and I accept, that he was required to, and did, sign a declaration to this effect. I further accept that this was not an undertaking that was lightly made. It was clearly on the basis of having made this commitment to making the UK their home, and on the understanding that they would be eligible for settlement after four years, that this family took the drastic steps of selling their possessions, informing their family, friends and associates of their plans for the future, and relocating to the UK. I conclude that the first appellant considered that he would be eligible for settlement after four years in the UK, that this was a reasonable conclusion to reach given the scheme's entry requirements and the way in which it was explained in the Home Office guidance, and that he and his family acted on this understanding* to their detriment, in the sense that they sacrificed financial, educational and employment opportunities that they would otherwise have had had they remained in Bangladesh.

23 I have accepted that the first and second appellants reasonably understood that they and their younger son, would be eligible for settlement after four years in the UK. I accept that they also believed that their elder son, would be eligible for settlement at the same time. However I consider that they misunderstood the Home Office Guidance which seems to me to make it clear that children under 18 can accompany Highly Skilled Migrants to the UK and that they can attend state schools, but that children who attain the age of eighteen will not be eligible for free higher education (para 26.7) or be eligible for settlement with their parents (para 18.2). The appellants have made much of their hopes that rmLr/ would be allowed to study in the UK, paying domestic fees, but this does not

seem to me to have been an accurate or reasonable apprehension based on the Guidance. I do not doubt, however, that the family held the mistaken belief that would be eligible for settlement after four years with the rest of them.

24 M referred me to a report of the Joint Committee on Human Rights, dated 26th July 2007, entitled *Highly Skilled Migrants: Changes to the Immigration Rules*. The Joint Committee found that the new requirements introduced in the 2006 rule changes engaged the article 8 rights of Highly Skilled Migrants who were already participating in the scheme because, as the government accepted, the requirement to make the UK their main home, may have led people to establish their lives in the UK more definitively than they would have done otherwise. The Committee further found that the rule changes had a degree of retrospective effect in that they applied to those already on the scheme, as well as to new applicants. They found that the effect of the rule change was "...to render people whom the government had required to make their main home in the UK ineligible to stay in the UK". They said that such unconstrained power was "...the very essence of arbitrariness [and] "not in accordance with the law"". The committee found that the respondent was pursuing a legitimate aim, namely the economic well-being of the country, but that the measures were not proportionate to the pursuit of that aim. This was because the "transitional measures" (the opportunity to apply for a work permit) fell "...very far short of meeting ...the wholly understandable expectation of those who have relocated to the UK under the HSMP scheme".

25 The Committee referred in the report to "clear statements by the Government that...[applicants] would be granted a further extension of their leave if they met certain criteria" and concluded as follows:

Those individuals [already on the scheme] were led by the Government itself to believe that if they made the UK their main home and remained economically active, they would be eligible to apply for settlement in the UK after 4 years. At no point did the Government suggest to those on the HSMP that at any time the eligibility requirements for indefinite leave to remain might change so that they may become ineligible even after they have made their main home in the UK. The transitional arrangements relied on by the Government may allow some of those who will fail the new stricter test to remain in the UK, but they amount to considerably less than the route to settlement which they had been led to expect.

The Committee found that, whilst prospective changes to the HSMP rules would be proportionate, the 2006 changes were not lawful or proportionate and therefore "clearly" incompatible with article 8 ECHR.

26 I respectfully agree with the conclusions of the Joint Committee. Though the Committee referred to the rights to respect for family and home being engaged I consider that the appellants' cases can also be analysed in terms of interference with private life. I have found that the appellants relied on clear statements that they (excepting the third appellant) would be eligible for settlement after four years and that they effectively "sold up" and relocated to the UK in reliance on these statements. I agree that there was never any indication from the Government that there would be likely to be any significant rule change affecting those already on the scheme. Had there been any such indication, I accept the first appellant's statement that he would have earnestly sought better paid employment at a much earlier stage so that he could meet the earnings-based points requirement introduced in December 2006. I accept his evidence that he has not lived and

worked in the UK amongst other HSMP participants and it is understandable in my view that he had no knowledge at all of the rule changes until early 2007 as he claims. When the rule changes occurred he was in the middle of a period of three years' leave to remain and there was nothing to alert him to consult the Home Office website. The first appellant has not applied to remain as a work permit holder, and there is no evidence that his employers have applied for a work permit on his behalf. However, even if he were eligible for a work permit, I agree with the Committee's conclusions that this would fall far short of the security and flexibility in employment and other matters which permanent settlement would bring.

27 So far as the first, second and fourth appellants are concerned, I am satisfied that they have developed their family life and also significant private life ties in the UK, at work, in education and socially. Their ties are all the stronger for having been developed in the expectation that they were pursuing an avenue leading to settlement in the UK. The respondent's decision to refuse to grant them indefinite leave to remain has sufficiently serious consequences that it engages article 8 ECHR and also amounts to an interference with their right to respect for family and private life. Their distress at the disruption of their reasonable expectations, their loss of other opportunities in Bangladesh, the UK and possibly other countries like Canada, and the prospect of a humiliating return to Bangladesh are all in my view serious matters for this family. I conclude that the respondent's decision was taken in pursuit of his legitimate aim of pursuing national economic well-being (and possibly also in pursuit of his legitimate aim of maintaining an effective immigration control, which is the justification put forward in the reasons for refusal letters). However, I conclude that the decisions were not lawful or proportionate to these aims. They were not lawful because they were taken pursuant to rule changes which were in my view unpredictable and had a degree of retrospectivity as described in the Joint Committee's report. The possibility that the appellant could move into another temporary immigration category, as a work permit holder, does not in my view render the decisions proportionate. The appellants were at an advanced stage of the HSMP when the rule changes were introduced and it seems to me that it is more difficult for the respondent to argue that his decision was necessary and proportionate in relation to individuals, like them, who were at the better-established end of the spectrum. It is further less likely to be in the country's economic interests to refuse to permit settlement to someone who has done well in their career like the first appellant; at the date of decision, he was on the brink of a promotion that would in any event probably have brought him within the revised scheme.

28 For all these reasons I find that the respondent's decision in respect of the first, second and fourth appellants was incompatible with their right to respect for family and private life and that theirs comes within the small minority of cases, identified in *Huang [2007] UKHL 11*, that is entitled to succeed under article 8,.

29 Though the circumstances of the third appellant are somewhat different in that he was aged over eighteen at the date of application for indefinite leave to remain and at the date of decision, I am also satisfied that the decision to refuse to grant him indefinite leave to remain was incompatible with his right to respect for family and private life. He was brought to the UK by his parents when he was fifteen years old, in the expectation that the UK would become his permanent home. It seems to me that his parents probably misunderstood how the HSMP applied to him, but I am satisfied that it was a genuine misunderstanding and it was certainly not his fault. He seems to have done particularly

well at school and apparently has a promising future at university. It is clear that he has worked hard to achieve as he has done. All of his immediate family members are in my view entitled to remain in the UK, for the reasons that I have given, and I consider that it would be very harsh for him to be treated differently given his youth on arrival and now, and his and his family's expectations that he, too, would be eligible for settlement after four years. He is still only nineteen years of age and, if he were required to return to Bangladesh, he would be without the support of his immediate family and would probably face difficulties entering higher education because he lacks appropriate qualifications.

30 The third appellant has developed strong private life ties in the UK, as his family members have done, and for similar reasons. The decision to refuse to grant him leave to remain similarly amounts to an interference with his family and private life. The decision is not in my view unlawful in respect of the third appellant because the HSMP Guidance did make it clear that children who reached the age of 18 whilst in the UK would not be entitled to settlement after four years along with their parents and minor dependants. However, for reasons I have already given, I am satisfied that the respondent's decision was not necessary or proportionate to his legitimate aims. I am therefore satisfied that the circumstances of the third appellant are also such that the decision prejudices his family and private life in a manner that is sufficiently serious as to amount to a breach of article 8 ECHR.

31 For the reasons given at paragraphs 27 and 30 above I find that the respondent's decisions are not otherwise in accordance with the law in relation to the first, second and fourth appellants only.

Decision

32 I allow the appeals of all the appellants on human rights grounds.

33 I allow the appeals of the first, second and fourth appellants on the grounds that the decisions are not otherwise in accordance with the law.

Signed

**Sophie Henderson
Immigration Judge**

Date

