Asylum and Immigration Tribunal Appeal Number: IA/05920/2007

THE IMMIGRATION ACTS

Heard at: Taylor House
On: 23rd May 2007
Prepared: 28th May 2007

Determination Promulgated
- 5 JUN 2007

Before:
Immigration Judge McMahon

Between

[redacted] Shah

Appellant

And

Secretary of State for the Home Department

Respondent

Representation

For the appellant: Ms. M. Phelan, Counsel
For the respondent: No-one present

DETERMINATION AND REASONS

1. **Details of Appellant and Nature of Appeal**

The appellant is a citizen of India and his date of birth is 5th January [redacted]. He entered the United Kingdom in August 2006 on the basis of permission granted under the Highly Skilled Migrant Worker Programme (HSMP) with authority to remain until December 2006. That entry clearance had been granted in December 2005 but the appellant had been unable to travel until August 2006 because of family circumstances. In November 2006 he applied for an extension of his leave under the HSMP. Unknown to the appellant there had been a change in the terms of the scheme. The appellant's application for extension was refused and he appeals against that refusal.

2. **Reasons for Refusal**

2.1 The reasons given are set out in letters from the respondent dated 19th December 2006 and 30th March 2007. The respondent said that the previous provisions relating to HSMP had been removed on 8th November 2006 and replaced by revised provisions taking effect on 5th December 2006. The appellant's application had been considered against the new provisions. The scheme required an applicant to meet a criteria relating

to points and to be successful an applicant had to achieve a minimum of 75 points. In the view of the respondent the appellant did not do so and his application was refused. In the letter dated 19th December 2006 the appellant was invited to consider an alternative basis to remain under, for example, the Work Permits Scheme.

2.2 The appellant did not wish to make application under the Work Permits Scheme. His current employer did not support work permit applications. The appellant made further representations to support his application under HSMP. Those further representations were refused in the letter dated 30th March 2007.

3. The Appeal Hearing

3.1 The appellant attended the hearing and gave evidence and I received submissions on his behalf. There was no attendance on behalf of the respondent. I was satisfied that notice of the hearing showing the time, date and place had been sent to the respondent. I had been given no reason for the non-attendance of the representative. I decided to proceed in the absence of the respondent.

3.2 On behalf of the appellant Ms. Phelan replied upon her written submissions. The appellant had entered the United Kingdom on a completely lawful basis under the HSMP. The United Kingdom government decided to change the basis of the HSMP. It did so without consultation or warning. The old rules (being the rules under which the appellant had entered) were removed on 8th November 2006. New rules were introduced on 5th December 2006. Those new rules carried a requirement that a person should show, by his previous earnings experience in the U.K., the achievement of a certain number of points. A person in the circumstances of the appellant was likely to fail under the new points scheme because of their limited period of employment in the United Kingdom. He would not have had time to establish sufficient earnings history. The appellant did not dispute that the respondent had the right to change the immigration rules from time to time. But the way in which the rules were changed should be done on a fair basis. In the circumstances of the appellant's case the rules should have made some kind of transitional provision. The manner in which the respondent had operated amounted to conspicuous administrative unfairness or breach of the appellant's legitimate expectation. In addition the refusal decision amounted to a breach of the appellant's article 8 right to respect for his private life. He had established a private life in the United Kingdom. He had undertaken significant cost in travelling to the United Kingdom. He had re-ordered his life by becoming separated from his wife and mother. He had acted upon clear statements made by the respondent in written material relating to the old HSMP that there would be a natural progression under the old scheme towards indefinite leave to remain.

4. The Law

It is for the appellant to show on the balance of probabilities that the refusal decision appealed against was not in accordance with law and/or the decision amounts to a breach of his human rights.

5. Evaluation of Issues and Findings of Fact

5.1 I have accepted the appellant's evidence as entirely credible and reliable. There are no unreliable or inconsistent features within that evidence. He is 30 years of age. He is married and his wife remains living in India and she lives with the appellant's mother. The appellant is from Gujarat and graduated in 1999 with a Bachelor's Degree in Commerce. He obtained a Master's Degree in Computer Applications in 2002. Subsequently he was appointed principal lecturer in information technology at Gujarat University.

5.2 The appellant lived in India with his wife and mother. They had no other family. The appellant's wife is a lecturer in mathematics and science at a high school. The appellant's mother is a school teacher of languages. In December 2005 the appellant made a successful application under the HSMP. But before he could travel his mother was taken seriously ill and his departure was delayed until August 2006. Entry clearance had been granted until only December 2006. Thus, in the circumstances of the case, the appellant had, effectively, only three months of permitted employment in the United Kingdom. That became very relevant in the circumstances of his application for an extension.

5.3 As part of the arrangements of leaving India the appellant arranged for the family farm to be sold. He and an uncle had previously shared responsibility for the farm.

5.4 Within the appellant's bundle are extracts from the respondent's instructions in respect of the old HSMP. At 18.1 is "If your application is successful you will be given permission to enter the United Kingdom for a period of twelve months. In the last month before the end of that period you will be able to apply for further permission to stay as a Highly Skilled Migrant. You should apply directly to Work Permits (UK) in Cannock, using the form FLR(IED) available from the IND website. You will be asked to provide evidence of your economic activity during your period of stay in the U.K. and evidence of your personal earnings during the period, if you are employed. If you are self-employed a business plan and evidence that you have established a business bank account, which has been active, will suffice. If you have been active in employment and self-employment then you should submit evidence of both. You will also need to declare that you and your family have not had access to public funds and have not received a criminal conviction. If your application is approved you will normally be given permission to remain for a further three-year period. Further details on the application process for an extension of stay after one year will be provided to successful applicants".

5.5 At 24.10 was comment "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 HSMP will be allowed to stay and apply for settlement after four years qualifying residence regardless of these revisions to HSMP".

5.6 At 26.5 was comment on how long a person could stay in the United Kingdom as a Skilled Migrant. "You will initially be given twelve months stay. If you want to

remain in the U.K. under the HSMP, you should apply for an extension of your stay in the last month before the expiry of your permission to stay in the United Kingdom. For further information, please see "Extension of stay in the United Kingdom" section. You will be able to amalgamate leave in other categories that lead to settlement for example, please see "Extension of stay in the United Kingdom" section. Towards the end of that period you can apply to remain in the same capacity for a further period of up to three years.

5.7 At 26.6 is comment about what a migrant would have to demonstrate in order to stay after the first twelve months. "You will need to show that you are lawfully economically active or, if you are not, that you have taken all reasonable steps to become lawfully economically active (e.g. evidence of several job application forms or a business plan). Applications are made to Work Permits (U.K.) in Cannock, using a form FLR (IED) together with supporting HSMP evidence. The evidence that you will be required to provide is covered in the section "Extension of stay in the United Kingdom" in this guidance" .

5.8 Within paragraph 9 of the guidance was comment on other evidence that would be required in considering an application. "That you are willing and able to make the United Kingdom your main home. We will ask you to provide a written undertaking to that effect. You will be expected to make the U.K. your country of habitual residence".

5.9 The old scheme was removed on 8th November 2006. So far as I am aware that was done without consultation. The new rule was implemented from 5th December 2006. The new rules are now contained at paragraph 135D of the Immigration Rules. That paragraph refers to appendix 4 of those Rules which sets out a points scoring scheme and part of that scheme is a requirement that an applicant for extension must demonstrate a minimum previous earning level.

5.10 Ms. Phelan has relied upon, in the main, the cases of Rashid [2005] EWCA Civ 744 and Nadarajah [2005] EWCA Civ 1363 both before the Court of Appeal. From Rashid I have taken particular note of paragraph 45 where there is reference to the book by Professor Craig "Administrative Law" where he identifies four circumstances in which problems of legitimate expectation can arise; "(i) where a general policy choice which an individual has relied on has been replaced by a different policy choice; (ii) where a general policy choice has been departed from in the circumstances of a particular case; (iii) where an individual representation has been relied on by a person, which the administration seeks to resile from in the light of a shift in general policy; and (iv) where an individualised representation has been relied on, and the administration then changes its mind and makes a decision that is inconsistent with the original representation". In paragraph 46 is a reference to the earlier Court of Appeal case of Bibi v Newham LBC "In all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is to what has the public authority, whether by practice or promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do". Then at paragraph 48 is the comment "It is in the second question where the real difficulty lies.

As was made clear in R v North and East Devon Health Authority, ex parte Coughlin [2001] QB 213 at [57], where the court considers that a lawful promise or practice has given rise to a substantive legitimate expectation, the court will in a proper case decide whether "to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power". It is for the courts to decide whether the frustration of an individual's expectation is so unfair as to be a misuse of the authority's power. In performing this exercise, the court is not confined to a consideration of the rationality of the decision which is under challenge".

5.11 There is further helpful comment in paragraph 49. "....the facts of the case, viewed always in their statutory context, will steer the court to a more or less intrusive quality of review. In some cases, a change of tack by public authority, though unfair from the applicant's stance, may involve questions of general policy affecting the public at large; in such cases the judges may not be in a position to adjudicate save at most on a bare Wednesbury basis "*without themselves donning the garb of policy-maker, which they cannot wear*". In other cases, where, for example, there are no wide-ranging policy issues, the court may be able to apply a more intrusive form of review to the decision. The more the decision which is challenged lies in the field of pure policy, particularly in relation to issues which the court is ill-equipped to judge, the less likely it is that true abuse of power will be found ".

5.12 The judgment in Nadarajah also relied upon the earlier judgement in Bibi. Within paragraph 56 of Nadarajah is further reference to Professor Craig's book. "Detrimental reliance will normally be required in order for the claimant to show that it would be unlawful to go back on a representation. This is in accord with policy, since if the individual has suffered no hardship there is no reason based on legal certainty to hold the agency to its representation. It should not, however, be necessary to show any monetary loss, or anything equivalent thereto". There is the further comment "Where an agency seeks to depart from an established policy in relation to a particular person detrimental reliance should not be required. Consistency of treatment and equality are at stake in such cases, and these values should be protected irrespective of whether there has been any reliance as such". Then further "But, on any view, if an authority, without even considering the fact that it is in breach of a promise which has given rise to a legitimate expectation that it will be honoured, makes a decision to adopt a course of action at variance with that promise then the authority is abusing its powers".

5.13 Prior to leaving India the appellant lived with his wife and mother in a family home some 10 kilometres away from the family farm. The appellant's evidence, which I accept, is that the farm was sold at about 11 lakhs and, because of inflation, would now be worth about 20 lakhs. In my view the appellant has been candid in giving his evidence. He accepts that if he were to return to India he would not be destitute. He has good qualifications and experience. He has a supportive family and accommodation. But nevertheless he would be returning to, initial, unemployment. He could not expect to walk back into a job having the status of principal lecturer that he previously enjoyed. The phrase of Ms. Phelan was that he would "have to start again" which I largely agree with.

5.14 My assessment of what was on offer from the respondent to the appellant in the terms of the HSMP was that if the appellant initially qualified (which clearly he did) then, thereafter, he was on a fairly clear route to indefinite leave to remain provided he fulfilled fairly minimal requirements. See for example 24.10 "Those who have (already) entered under HSMP will be allowed to stay and apply for settlement after four years qualifying residence regardless of these revisions to HSMP". For an extension after the first twelve months an applicant merely had to demonstrate, as a minimum, "that you have taken all reasonable steps to become lawfully economically active (e.g. evidence of several job application forms or a business plan)". Thus it was not even necessary for an applicant to be in work to obtain an extension.

5.15 Upon arrival in the United Kingdom the appellant obtained employment with ICICI Bank UK Limited as an operation agent. The nature of the employer's business is banking. His net pay is about £1,200 a month. That is a modest level of pay for someone with the appellant's qualifications. But his evidence has been that he was taken on without any assurance of permanency until his status had become more established under HSMP. The appellant took the view, given the assurances in the HSMP literature, that he could successfully progress through the scheme and thus obtain more secure employment. His employer had indicated that once he had become more secure his salary would increase. Thus on the strength of the HSMP literature the appellant, in my view understandably, has taken on short-term salary loss in the expectation of longer-term gain.

5.16 It is relevant to note that the new HSMP rules seem to pay no recognition to someone such as the appellant who, because he arrived in the U.K. very shortly before a change to the rules, was unable to achieve a sufficient earnings level so as to be qualified under the new rules for an extension of stay.

5.17 I take into account paragraph 49 in Rashid. In my view this is an area of executive activity where there are no wide-ranging policy issues. Therefore there may properly be an more intrusive form of review of the decision. Looking back at paragraph 45 of Rashid I am satisfied that this is in category (i) where a general policy choice which an individual has relied on has been replaced by a different policy choice. There was a practice set out under old HSMP. I am satisfied, having regard to the clear language in the literature, that someone such as the appellant had a substantive legitimate expectation that provided he continued in acceptable employment he would remain on track towards indefinite leave to remain. I find that the introduction of the new HSMP without any recognition of the circumstances of persons such as the appellant did in fact frustrate that expectation in a way so unfair as to be an abuse of power. Thus the decision to refuse variation of leave was not in accordance with law and on that basis this appeal succeeds. That may mean that the respondent should look again at the circumstances.

5.18 This appeal is also put on human rights grounds. I am satisfied that the appellant has established private life in the United Kingdom. He gave an undertaking that he would reside in the United Kingdom on a long-term basis. He gave up much to be here.

The article 8 point should be approached on the basis of the steps set out in the case of Razgar v SSHD [2004] UKHL 27 and the more recent guidance from Huang v SSHD [2007] UKHL 11.

5.19 Razgar identified the following five steps:

(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or family life?

(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

(3) If so, is such interference in accordance with the law?

(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

5.20 In paragraph 16 of Huang is the comment "The authority will wish to consider and weigh all that tells in favour of the refusal of leave which is challenged, with particular reference to justification under Article 8(2). There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another, the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain, the need to discourage fraud, deception and deliberate breaches of the law; and so on".

5.21 At paragraph 20 of the judgment is reference to the questions of proportionality in the context of family life. In my view the principle applies equally when making a judgment on private life. "…the ultimate question for the appellate immigration authority 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. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality.".

5.22 I am satisfied that the refusal to vary the leave to enter amounts to an interference in the appellant's private life. That interference will have consequences of such gravity so as to engage Article 8. It would require the appellant to return to India and nullify the very elaborate and costly actions he took in leaving his family and career to come to the United Kingdom. The refusal of variation was in accordance with the law as it stood as from 5th December 2006. It is necessary for the economic well-being of the country and for the prevention of disorder or crime to have proper regulation of immigration. But, in the circumstances of this particular case, was the decision proportionate?

5.23 I take into account the clear expectation derived from the old HSMP Scheme. I also take into account that the respondent appeared to give no consideration to persons such as the appellant who had entered in good faith under the old scheme but, because of the timing of their entry, would not be able to succeed under the new scheme. I mention in passing that I accept entirely the appellant's reason for his delayed entry to the United Kingdom following the grant of leave. His mother was seriously ill. But in any event that point may be academic because whilst the new scheme has a requirement of previous employment in the United Kingdom the old scheme did not. I am satisfied that, for this particular appellant, the decision to refuse variation of leave was not proportionate and amounted to a breach of his Article 8 Right.

6. Decision

6.1 This appeal in respect of the Immigration Rules is allowed.

6.2 This appeal on human rights grounds is allowed.

Signed **28th May 2007**

J. McMahon
Immigration Judge

Tribunals Service
Asylum and Immigration Tribunal

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Date : 5 June 2007

THE IMMIGRATION ACTS

Appeal No: IA/05920/2007
Appellant: Mr, Keyur Nareshchandra, Shah
Respondent: Secretary of State

HO Ref: K1259936
Port Ref:
FCONumber:
Reps Ref:

To the Appellant and Respondent

Enclosed is the Tribunal's determination of the above appeal.

Either party may apply to the appropriate court *(the High Court or, where the Appeal was decided in Scotland, the Court of Session)* for a review of the Tribunal's decision on the ground of an error of law.

Any application must be made in accordance with the relevant Rules of Court and must be made within 5 days of receipt (or deemed receipt) of this determination, except where the Appellant is outside the United Kingdom, in which case any application by the Appellant must be made within 28 days of receipt (or deemed receipt) of this determination.

All applications must be sent to:

Secretary to the Asylum and Immigration Tribunal:

Arnhem House Review Applications, Arnhem Support Centre (Tribunal), P O Box 6987, Leicester, LE1 6ZX.
Fax: 0116 249 4214

Clerk to the Tribunal

Copy issued to Representative: Christine - Lee Company, NW9 5HD
Copy issued to Home Office: Presenting Officers Unit, Angel Square, EC1V 1SX

ALL CORRESPONDENCE SHOULD BE SENT TO THE ADDRESS AT THE TOP OF THIS NOTICE QUOTING THE APPEAL NUMBER AND ANY HEARING DATE