AIT-BH-PMP-V1

**Asylum and Immigration Tribunal**

Appeal Number: IA/08615/2007
IA/08619/2007
IA/08624/2007
IA/08622/2007

**THE IMMIGRATION ACTS**

**Heard at Bennett House, Stoke on Trent**
**On 31st August 2007**
**Prepared 14th September 2007**

**Determination Promulgated**

.....10 OCT 2007.....

**Before**

**IMMIGRATION JUDGE S J PACEY**

**Between**

**MR [redacted] SHARMA**
**MRS [redacted] SHARMA**
**MS [redacted] SHARMA**
**MASTER [redacted] SHARMA**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Mr R Bircumshaw, Solicitor
For the Respondent: Mr V Fox, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The Appellants are all Indian citizens. The appeals are linked because, in effect, their outcome depends upon the determination in the appeal of the adult male. He was born on [redacted] July [redacted], his wife on [redacted] August [redacted], his daughter on [redacted] August [redacted] and his son on [redacted] November [redacted]. I heard evidence from the adult male Appellant, having confirmed that he and the interpreter could understand each other. I heard submissions from both representatives. All of this is set out in the Record of

Proceedings and has been taken into account by me in the determination of this application.

2. The factual scenario is not disputed. Shortly stated it is that on 14th December 2006 the adult male Appellant (whom I shall simply refer to as "the Appellant" in the remainder of this determination) applied for leave to remain in the United Kingdom as a highly skilled migrant. It is not disputed, and I accept, that he qualified for 30 points under the qualification criteria. He would have needed to have scored 75 points to meet the relevant criteria. The application was refused. It was decided by the Respondent that the Appellant did not meet the requirements of paragraph 135F (with reference to paragraph 135D(iii)) of HC 395, as amended. The appeal is from that refusal. The burden of proof rests upon the Appellant and the standard of proof is the civil one, the balance of probabilities.

3. On 16th January 2006 the Appellant obtained entry clearance under the Highly Skilled Migrant Programme, valid for one year. He landed at Heathrow on 9th February 2006. In connection with his application which was subsequently refused he provided a number of supporting documents. These are summarised in the reasons for refusal letter dated 13th April 2007 and I need not recite them here.

4. The Highly Skilled Migrant Programme is, in essence, designed to allow highly skilled individuals with certain skills to come to the UK to seek work or opportunities for self-employment. The Rules changed on 5th October 2006. The effect of the change, in relation to the Appellant, was that the requirements in the Immigration Rules for applicants who had previously had a grant of leave under the HSMP, and were applying for an extension, would, instead of having to show that they had taken all reasonable steps to become gainfully economically active in the UK (as under the previous Rules), in contrast, need to show that they can meet a points test similar to that required for applicants who were applying afresh for an approval letter under the HSMP. The points criteria for extension applications, and the evidence required, is set out in the Immigration Rules.

5. I was referred by Mr Bircumshaw to a number of determinations of other Immigration judiciary. I remind myself of the criteria of paragraph 7.1(b) of the AIT Practice Directions. I need to give permission (neither the Appellant nor any member of his family having been party to the other proceedings) for such citation. Full transcripts have been provided and the proposition for which the determinations are to be cited is that advanced on behalf of the Appellant by Mr Bircumshaw, as to which see below. I am not aware of any reported determinations of the Tribunal dealing with this point or decisions of the higher courts. I am not aware of any other decisions in point save those referred to by Mr Bircumshaw and none were referred to by Mr Fox. In my judgment the determinations provided materially assist me. They are not, naturally, binding upon me but the reasoning illuminates the issues in this difficult area. I remind myself that there was no objection to citation of these authorities on behalf of the Respondent.

6. The Respondent's decision is in simple terms: the Appellant does not obtain the necessary number of points, so he fails. The argument of the Appellant is that the decision is not in accordance with the law because removal of the Appellant from the UK would be incompatible with his protected rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms. In support of this

contention it is said that the Appellant had a legitimate expectation of being allowed to remain in the UK (under the old criteria) so long as he complied with the Rules, but only as they were at the time of the application. The legitimate expectation also arises from the fact that the Appellant was entitled to rely not only upon the old Rules but upon published guidance. In support of this argument it is pointed out that the Appellant and his wife gave up good careers in India, the Appellant having been an approved government engineering contractor and his wife was a primary school teacher. They gave up these careers in India in order to come to the UK and uprooted their children from their education in India. In summary the arguments advanced on behalf of the Appellant really reduce to a form of estoppel, framed under the relevant provisions of administrative law (legitimate expectation) and Article 8 of the European Convention.

7. There is no dispute as to credibility of the Appellant or the reliability of the objective evidence provided. I accept that he worked as a government approved contractor (in civil engineering) in India and had done so since February 1995 on a three year renewable contract. I also accept that his wife worked as a teacher in India and that, self-evidently, the fact that they and their family came to the UK, to settle under the HSMP, involved giving up established careers and disrupting the education of their children. It is also not disputed, and I accept, that during his time in the UK the Appellant has been supporting himself and his family and that there has been no recourse to public funds. He and his family have now been in the UK for a significant period of time and it is reasonable to accept, as he says in his witness statement, that his children have now largely adjusted to life in the UK and, of course, are receiving education here. In summary what the Appellant says about the economic activity of himself and his wife, in his witness statement dated 28th June 2007, is not disputed and I accept it.

8. I have been assisted by the House of Lords and House of Commons Joint Committee on Human Rights Report on the changes to the HSMP. The committee, I note, concluded that the changes to the HSMP were not compatible with the right to respect for home and family life under Article 8 and they recommended amendment to the Rules so that the changes applied only prospectively, that is to say in relation to future applicants. To my mind it cannot reasonably be argued that the changes were not retrospective. That is because they clearly had effect in relation to applicants who had come in, and qualified under the old Rules and had no reason to believe that the continuation of their stay in the UK would be dependent upon changes over which they had no control and could, at the outset, have had no means of knowing whether they would have met the new Rules.

9. As was said in paragraph 11 of the report:

> *"Thousands of individuals currently on the HSMP have elected to fulfil the government's requirement that they make the UK their main home and have done so in the expectation that, provided they make their main home here and remain economically active, they will be eligible to apply for indefinite leave to remain after the prescribed amount of time."*

That is exactly what happened in this case. I note also that the committee went on to indicate that an interference with the right to respect for home and family life would result from any change of the Rules which made it more difficult for previous

applicants to obtain an extension of leave and eventually become eligible to stay permanently in the UK. The committee also observed that the changes had a degree of retrospective effect in that they were not confined to new applicants but applied also to people who had already been granted their initial leave

> *"as highly skilled migrants and had relocated to the UK in the expectation that they would be granted further leave and eventually indefinite leave to remain if they satisfy the criteria for such an extension and indefinite leave which applied at the time that they re-located."*

10. The response of the government to enquiries by the committee in relation to Article 8 issues, is in substance the stance taken by the Respondent in the instant appeal. In summary it is said that the changes to the HSMP are compatible with Article 8, that those changes are in accordance with the law, serve a legitimate aim, and are proportionate. The committee rejected the view of the government and concluded

> *"... that any interference [sic] with the right to respect for home and private life in Article 8 ECHR as a result of the changes to the HSMP will not be 'in accordance with the law' as required by Article 8(2) ECHR, because the legal framework does not contain the necessary foreseability and predictability that has been held to be inherent in the requirement that such interferences [sic] be in accordance with the law."*

The committee did, however, accept that the aim of the government in making the changes was a legitimate one, that is to say the economic wellbeing of the country. Notwithstanding that, however, the committee went on to conclude that applying the changes to those who had already made their main home in the UK, in reliance on the government's statements about the future, was a disproportionate interference with the rights of the applicants to respect for their home and family life, the upshot being that the changes to the scheme and decisions made in relation to those changes were not in accordance with the law. Neither were they proportionate to the legitimate aim which the changes sought to achieve.

11. The report of the committee is not, of course, binding upon me but, again, it illuminates the issues and arguments now before me and the clarity and force of the views expressed in that report (from, it must be noted, a cross-party committee) are striking and, with respect, I agree with all that has been said in that report so far as it relates to the issues now before me.

12. In my judgment the decision of the Respondent clearly amounts to an interference with the exercise of the Appellant's right to respect for his private and family life. It is not disputed that the Appellant and his family share family life, and manifestly they do.

13. The interference with the family life of the Appellant (and his family) in my judgment has a consequence of such gravity as potentially to engage the operation of Article 8 and the interference is in pursuit of the legitimate aim of the protection of the economic wellbeing of the country. It is in accordance with the law in that the only authority for the decision the subject of the appeal is the Immigration Rules. I remind myself, however, that the joint committee, responding to the view of the government that they had an unconstrained power in the Immigration Act to change the Immigration Rules with immediate effect in a way which may render people whom the government has required to make their main home in the UK ineligible to stay in the

UK, said that such an unconstrained power was the very essence of arbitrariness because the legal framework did not contain the necessary forseeability and predictability inherent in the requirement that such interference be in accordance with the law.

14. As I have indicated above, however, the Appellant and his family are now settled in the United Kingdom, he and his wife have given up sound careers in their home country and at material times they have complied with relevant Immigration Rules. The changes in those Rules are seriously detrimental to the Appellant and his family and the Appellant was in my judgment entitled to proceed in the legitimate expectation that his immigration status in the United Kingdom would be dependent upon him continuing to satisfy the Immigration Rules current at the time of his application. He had no reason to suppose that the goalposts would be changed halfway through the game and to that extent the refusal to grant the Appellant and his family further leave to remain is disproportionate. The decision is to my mind disproportionate because it frustrates the expectation which was engendered in the mind of the Appellant and the minds of his family by the original decision, made in accordance with the then Immigration Rules. The Appellant and his family were entitled in my judgment reasonably to rely on the Immigration Rules then current which they had no idea would change to their detriment. In summary, then, I find that the decision the subject of the appeal is disproportionate, having regard to the above factors, and I allow the appeal under Article 8(2) of the ECHR.

15. I allow the appeal under Article 8(2) of the ECHR.

Signed Date

Immigration Judge S J Pacey 20 September 2007