

In the Asylum and Immigration Tribunal

Appeal Numbers: IA/07589/2007
IA/07586/2007
IA/07591/2007
IA/07593/2007

THE IMMIGRATION ACTS

Heard at BENNET HOUSE, STOKE
On 21st June 2007.

Determination Promulgated

9 JUL 2007

Before

Immigration Judge

G J NATHINE

Between

MR. [REDACTED] VYAS
MS. [REDACTED] VYAS
MS. [REDACTED] VYAS
MR. [REDACTED] VYAS

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. J. Gillespie, counsel.
For the Respondent: Mr. Aigbokie (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellants are citizens of India. The first Appellant was born on [REDACTED] August [REDACTED].
The second Appellant is his wife and the third and fourth are his children,

2. The Appellant applied for an extension of stay as a highly skilled migrant. The application was refused because the Respondent was not satisfied that the Appellant fulfilled the requirements laid down in Paragraph 135D (ii) of the Immigration Rules HC 395 (as amended). Full reasons are set out in the Notice of Refusal. The present appeal is against that refusal.
3. The burden of proof is on the Appellant to show on the balance of probabilities that all the requirements laid down in paragraph 135D of the Immigration Rules are fulfilled. I will set out that paragraph here for the avoidance of doubt:

Paragraph 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 135A-135D 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 1) of these Rules which correspond to the points 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 1) of these Rules
- (iv) meets the requirements of paragraph 135 A(ii)-(iii).

Paragraph 135A

- (ii) intends to make the United Kingdom his main home; and
- (iii) is able to maintain and accommodate himself and any dependants adequately without recourse to public funds.

4. On file was the Respondent's bundle containing the application, copies of various letters to the Appellant, the refusal notice with explanatory paragraphs and the appeal statement. Also enclosed are documents that accompanied the application and those which accompanied the appeal together with the Appellant and his wife's statements. The HSMP guidance Notes in force at the time the Appellant applied under the scheme and excerpts from HSMP Guidance Notes relating to transitional arrangements were also provided.

The Appellant's Case.

- 5. The Appellants case was set out in a Skeleton Argument prepared by Mr. Gillespie.
- 6. The First Appellant (hereinafter referred to as the Appellant) arrived in the UK on 2nd March 2006 with 12 months leave under the HSMP scheme. His family joined him on 8th April 2006. Before coming to the UK he and his wife had been working in Muscat as graphic designers. They had been there for over 7 years in comparatively good jobs. They were settled in a house with their children and possessions.
- 7. On 22nd May 2006, the Appellant started work under a three month contract with Travel Computer Systems UK Ltd. Since 6th April 2007 he has been working for Elite Graphics.
- 8. On 4th January 2007, the Appellant and his family applied for an extension of stay. The Respondent refused this because the Appellant did not meet the required points set out in paragraph 135D(ii). It is accepted by him that he does

not meet the requirements of the paragraph. It is further accepted by the other Appellants that their appeals are reliant upon the success of the First Appellant.

9. The Rules had been subject to a change in requirements relating to extensions of stay after 8th November 2006. These changes were introduced by a Statement of Changes in Immigration Rules (HC 1702) laid before Parliament on 7th November 2006.
10. The effect of the change in relation to the Appellant was that he was now required to comply with the points requirement of 135D(ii). There was no such requirement when he applied for leave to enter under the scheme. At that time and until the change the requirement of 135D (ii) was that a person seeking an extension :
 "has already taken during his period of leave all reasonable steps to become lawfully economically active in the United Kingdom in employment, self employment, or a combination of both."
11. It is the Appellant's case that he had a legitimate expectation that acting upon the offer of entry clearance as one under the HSMP scheme [which at 135A(ii) stated at the date of his entry and still states that it is a requirement that a Highly Skilled Migrant "intends to make the United Kingdom his main home,"] he should be able to rely upon the promise both explicit and implicit in the scheme that if he fulfilled the requirements of the scheme he would be able to apply before the end of the initial 12 months leave for Further Leave to Remain.
12. He stated in answer to questions in cross-examination that he had been unable to avail himself of the opportunity to apply for a work permit because his employer was unwilling to go to the bother of applying for a permit for him and as he had not had 8 months employment he was unable to apply for himself.
13. He further claimed that to seek his removal would be in breach of his rights under Article 8 ECHR to respect for his private and family life.

The Respondent's Case.

14. At no time did Mr. Aigboke, for the Respondent, dispute the proposition that the Appellant would have met the criteria before the change to 135D(ii). He stated : "the fact that the process has changed does not shift the burden of proof. It is still the Appellant who has to meet the rule they are applying under."
15. In response to the argument that the Appellant had a Legitimate Expectation, all Mr. Aigboke had to say is that "the Secretary of State has the power to change the Rules. If the application has to be in line with the Rule operative at the time."
16. He stated what was clear from the correspondence from the Home Office to the Appellant that the difficulty and potential for unfairness had been recognised and addressed by the Respondent who, in a letter dated 25th January 2007, had written to the Appellant stating his application was falling for refusal and he could have the opportunity to vary his leave to that of a Work Permit Holder. Mr. Aigboke submitted "It is not a matter for the Secretary of State if the Appellant will not or cannot apply for a work permit."
17. Mr. Aigboke further submitted that the Appellants could easily pursue their family life elsewhere and he established in cross examination of the First Appellant and his wife that they had family in India and that there are work opportunities there. The Respondent argued that "There is no indication here of breach of Article 8 – they've been here a limited time."

My Findings.

18. I Find, for the reasons stated hereafter, that the Appellant had a Legitimate Expectation that having acted upon the stated and implied promise of the HSMP scheme, that if during his initial period under the scheme, he fulfilled the criteria, he would be able to apply for leave to remain which in itself could lead to permanent residence after a further 4 year period.

19. Further I find that the Appellant's rights under Article 8 of the ECHR would be breached were he to be removed from the UK.
20. The Appellant came to the UK under the requirement that existed at that time and which is still a requirement of paragraph 135A (ii) that he "intends to make the United Kingdom his main home." He gave up his home in Muscat, as did the rest of the Appellants. It was their intention to make the UK their main home. The Appellant and his wife gave up their employment.
21. In the "Guidance to Applicants" provided by the Respondent at 26.6 it states
 "Q : What will I need to do to qualify over the first 12 months?
 A : 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)."
 At 24.10 it states
 "Q : I have already applied successfully under HSMP, how does the revised HSMP 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 HSMP will be allowed to stay and apply for settlement after four years qualifying residence regardless of these revisions to HSMP."
22. In his evidence the Appellant explained that if he had to leave he would not get his job back in Muscat. He stated he had studied the literature and website provided by the Respondent and :
 "I thought I could stay for 1 year visa and then apply for 3 years extension."
23. In the case of Nadarajah [2005] EWCA Civ 1363 Laws J stated at para 68 :
 "Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law requires the promise or practice to be honoured unless there is good reason not to do so..... Accordingly a public body's promise or practice as to future conduct may only be denied, and thus the standard I have expressed may only be

departed from, in circumstances where to do so is the public body's legal duty, or is otherwise, to use a now familiar vocabulary, a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest. The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances."

24. I find that "the Respondent's actions in seeking the removal of the Appellant is not a "proportionate measure in the circumstances " of this case given the promises made to the Appellant and the extent to which he has relied upon them.
25. Further I find for the reasons here given that the Appellant's removal would constitute a breach of his rights under Article 8 of the ECHR. I am satisfied that he has established family life in the UK and that in doing so he and the other appellants gave up their home and lives in Muscat where they had lived for a number of years. I am satisfied on a balance of probabilities that the Appellant could not take up employment at the level he left in Muscat. If he were to return to India his employment prospects would not be good and in any event he has not lived there for over 8 years.
26. It is clear to me that the Appellants relying upon the offer under the HSMP scheme, and indeed not only the offer, but the requirement of para. 135A(ii) have made their home and family life here. I find that removal will prejudice their fundamental rights to family and private life to such an extent that Article 8 is engaged.
27. Having found that Article 8 is engaged the question remains as to whether the Respondent's actions are proportionate. I find that they are not and that the Appellant's interests outweigh those of the state.
28. As I have already stated the other Appellants appeal stand or fall with that of the First Appellant.

On the totality of the evidence before me, I find that the Appellants have discharged the burden of proof and the reasons given by the Respondent do not justify the refusals. Therefore the Respondent's decisions are not in accordance with the law and the applicable Immigration Rules.

I allow the appeals.

Signed



Dated

3rd July 2007

G J Napthine
Immigration Judge

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