

APPEAL NUMBER: IA/18393/2008
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ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Determination Promulgated

..... 18 DEC 2008

Heard at: Taylor House
On: 8 December 2008.

Before

IMMIGRATION JUDGE METZER

BETWEEN:

and

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Appellants

Respondent

Representation

For the Appellants:

For the Respondent: Ms K. Martin, Home Office Presenting Officer

DETERMINATION AND REASONS

BACKGROUND

1. The Appellants, who are citizens of Nigeria who were born on [REDACTED]
[REDACTED] respectively appeal against the Respondent's decision to

refuse to grant the first Appellant leave to remain in the United Kingdom. The second Appellant who is married to the first Appellant is dependent upon the first Appellant's claim.

2. The background circumstances are that the first Appellant entered the United Kingdom on 7 November 2002 with entry clearance as a student valid until 31 October 2003, subject to the usual conditions prohibiting recourse to public funds and work. On 30 October 2003, he applied for leave to remain as a student which was granted on 23 November 2003 until 31 January 2004 subject to the same conditions.
3. On 28 January 2004, the first Appellant applied for leave to remain as a highly skilled migrant which was granted on 12 June 2004 until 12 June 2005 subject to a condition prohibiting recourse to public funds. On 17 May 2005, the first Appellant applied for further leave to remain as a highly skilled migrant which was granted on 20 May 2005 until 20 June 2008 subject to a condition prohibiting recourse to public funds.
4. The second Appellant entered the United Kingdom on 26 September 2002 with entry clearance as a visitor valid until 19 September 2004, subject to conditions prohibiting work and recourse to public funds. On 20 November 2002, the second Appellant applied for leave to remain as the dependent spouse of a student which was granted on the same until 30 October 2003 subject to a condition prohibiting recourse to public funds.
5. On 30 October 2003, the second Appellant applied for leave to remain in line with the first Appellant which was granted on 23 November 2003 until 31 January

2004. On 28 January 2004, she applied for further leave to remain in line with her husband which was granted until 12 June 2005 and thereafter until 12 June 2008.

6. On 28 October 2008, a decision was made to refuse to vary the first Appellant's leave to remain in the United Kingdom on the basis that the Respondent was not satisfied the first Appellant had spent a continuous period of five years in the United Kingdom. In the circumstances the Appellant's application was refused under Paragraph 135H with reference to 135G (i) of HC395 (as amended). The second Appellant, as the first Appellant's spouse, was refused under Paragraph 196 of HC395 (as amended). The Appellants' appeal against that refusal both under Article 8 of the European Convention on Human Rights and is "otherwise not in accordance with the law".

DOCUMENTARY EVIDENCE

7. I have taken into account the documents which have been placed before me which includes (but is not limited to) the following:

- (i) The first Appellant's application;
- (ii) The Respondent's reasons for refusal letter, dated 28 October 2008;
- (iii) The first Appellant's notice and grounds of appeal;
- (iv) Copy of the first Appellant's passport;
- (v) Copy of the second Appellant's passport;
- (vi) Witness statement of the first Appellant, dated 1 December 2008;
- (vii) The first Appellant's CV;
- (viii) Invoices for the first Appellant's company [REDACTED]

- (ix) Financial accounts for the [REDACTED] for years ending April [REDACTED] 2007 and April 2008;
- (x) Copy of the Appellant's bank statements;
- (xi) Copy of the first Appellant's tax assessment;
- (xii) Various AIT Determinations concerning the same issue as that in the present appeal.

THE EVIDENCE

8. After taking brief instructions, Ms Martin on behalf of the Respondent indicated that she would not be challenging any of the evidence of the Appellants and in those circumstances, they were not required to give live evidence.
9. In summary, the first Appellant stated that he was educated in Nigeria and qualified as a lawyer and obtained a Masters degree in Law in Lagos. He practiced in Nigeria and then decided to go to Queen Mary and Westfield College in London to obtain a Diploma in International Commercial Arbitration. The second Appellant is a graduate of business administration who since her arrival in the United Kingdom has undergone training in housing management.
10. The Appellants married on [REDACTED] and were legally resident in the United Kingdom for six years. The first Appellant attended further specialised courses and was admitted as a solicitor in England and Wales in 2005 and holds full registration as a Chartered Institute of Arbitrators. He was granted further leave to remain under the highly skilled migrant programme. A crucial part of their decision for the first Appellant to apply onto the programme was upon satisfactory completion of the initial four years, they would be able to remain in

the United Kingdom indefinitely. As a result, they decided to sell off the second Appellant's thriving business and the first Appellant's legal practice.

11. Prior to the expiration of the four year period which previously was a requirement for the highly skilled migrant programme, the first Appellant made an application for indefinite leave to remain as he was advised that prior to changes in the rules in 2006, he would be so entitled. The rules were changed but they anticipated that their application would not have any difficulties as changes in the law would not affect them. He is now aware that of a pre-requisite to have spent five years rather than four years in the United Kingdom. The Appellants have bought a permanent home in the United Kingdom and are fully integrated. They accept that the UK government is entitled to change its rules but submit that it has been applied retrospectively despite their assurances and undertakings provided to them when the scheme was joined in 2004.

BURDEN AND STANDARD OF PROOF

12. In relation to the Article 8 claim, the burden of proof is on the Appellant to satisfy that he has a private or family life in the United Kingdom and secondly that it would be disproportionate under Article 8(2) for the Appellant to be returned to Nigeria.
13. In relation to the submission based as to whether the decision was not in accordance with the law, the burden of proof is again upon the Appellant. The standard of proof is the balance of probabilities as of the date of Hearing.

MY FINDINGS

14. There was no challenge to the Appellants' evidence. The first Appellant understood when he commenced the highly skilled migrant programme that he would be allowed to stay and applied for settlement after four years' qualifying residence regardless of any subsequent revisions to the HSMP. The rules changed on 5 December 2006. There are no difficulties in relation to any previous applications for leave to remain and the Appellants have been in the United Kingdom lawfully for a number of years.
15. In the decision of HSMP Forum Limited [2008] EWHC 664 Admin, the old rules and the new rules were noted and compared. It was considered that there was an expectation under the rules that a highly skilled migrant would be allowed to stay and apply for settlement after four years' qualifying residence regardless of provisions that occurred to the rules in 2003.
16. Other decisions have followed the decision in HSMP Forum; the first Appellant could not reasonably have expected that the revised HSMP would adversely affect him and expected his application for indefinite leave to remain to be granted without difficulty. He was not forewarned that he needed to apply for a further extension. If he had been so forewarned, I find that he would have so applied and been granted it. In all the circumstances, I find that seeking to enforce the new five year rule upon the first Appellant retrospectively is not "in accordance with the law". Further, I find that the first Appellant's private life established a considerable degree by his and the second Appellant's work and qualifications in the United Kingdom would be disproportionately interfered with applying the


Razgar test, were the Appellants to be returned to Nigeria. The immigration history set out above and the Appellants' legitimate expectation that they would be able to remain and apply for indefinite leave to remain.

17. In all the circumstances, I find that the first Appellant and therefore the second Appellant as his dependent, have established to the relevant standard that the decision to apply the five year rule retrospectively is not in accordance with the law and to return the Appellants to Nigeria in these particular circumstances would be a disproportionate interference with the Appellants' right to private life.

DECISION

18. The appeal in relation to whether the decision "is not in accordance with the law" is allowed.

19. The appeal in relation to Article 8 of the human rights grounds is allowed.



IMMIGRATION JUDGE METZER

DATED: 15/12/08