

In The Asylum and Immigration Tribunal

Appeal Number IA/11892/2008

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THE IMMIGRATION ACTS

Heard at Sheldon

On 15<sup>th</sup> December 2008

Prepared 29<sup>th</sup> December 2008

Determination Promulgated

30 DEC 2008

Before

IMMIGRATION JUDGE PARKES

Between

And

First Appellant

And

Second Appellant

And

Third Appellant

And

Fourth Appellant

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: In person

For the Respondent: Mrs J Caldicott (Home Office Presenting Officer)

DETERMINATION AND REASONS

For the following reasons this appeal is allowed.

1. This is an appeal by (the Appellant) and his family against the decision of the Secretary of State to refuse his application for settlement in the UK having resided in the UK under the Highly Skilled Migrant Programmed (HSMP). The VAF is dated the 13<sup>th</sup> of May 2008, the Refusal Notice is dated the 23<sup>rd</sup> of June 2008, the Notice and Grounds of Appeal are dated the 7<sup>th</sup> of July 2008.
2. In this appeal the burden of proof lies on the Appellant. In order to succeed the Appellant must show that the requirements of HC395 are made out on a balance of probabilities. The relevant date for the consideration of the facts is the date of the hearing as this is an in-country appeal. The evidence and submissions are set out in the Record of Proceedings.

3. At the hearing the Home Office invited me to allow the appeal on the grounds that it is not in accordance with the law. On that basis the Appellant was informed that the decision would be to that effect and that the appeal would be so allowed. This would enable the Home Office to consider the Appellant's position in the light of the case of HSMP Forum Ltd v Secretary of State for the Home Department [2008] EWHC 664 (Admin) (the HSMP case).
4. The Appellant arrived in the UK on the 6<sup>th</sup> of October 2003 and was joined later by his wife and eldest son, his second son was born in the UK. The Appellant had leave to remain in the UK as a Highly Skilled Migrant from the 21<sup>st</sup> of May 2004 until the 21<sup>st</sup> of May 2008. The Refusal Letter of the 23<sup>rd</sup> of June refused his application as he had not been in the UK on that basis for a continuous period of five years as required by the Immigration Rules.
5. The error in the Refusal Letter is that it applied newer rules to the case of the Appellant than his circumstances required. The Appellant was admitted to the UK on an earlier basis of the scheme which did not require the continuous period of five years that now applies, the period of four years would qualify them under the previous terms of the scheme
6. This error was the subject of the HSMP case. It is difficult to see how applying such a change in the Immigration Rules retrospectively could be justified and the issue of the legitimate expectation of the applicants is one that appears not to have been considered at all. If it has been considered and ignored that would make the decision particularly iniquitous.
7. It has also been considered in the AIT case of IA/18681/2007 which was heard by Immigration Judge Henderson on the 10<sup>th</sup> of December 2007 at Hatton Cross. That case concerned a family from Bangladesh who were doctors. They had arrived in the UK under the HSMP scheme and the result in that case was the same and for essentially the same reasons.
8. On the facts that are demonstrated and accepted in the Refusal Letter sent to the Appellant it appears that he qualifies under the terms of the scheme that apply to his situation. In those circumstances I allow the appeal for the Home Office to reconsider their position and to apply the correct law and policies.

#### DECISION

9. For the reasons given this appeal is allowed.



Immigration Judge Parkes

30<sup>th</sup> December 2008