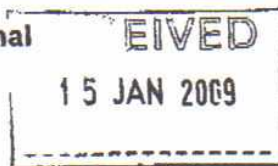


AIT-AH-LEF-V1

Asylum and Immigration Tribunal



Appeal Numbers: IA/19340/2008
IA/19342/2008
IA/19345/2008
IA/19396/2008

THE IMMIGRATION ACTS

Heard at Hatton Cross
On 5th January 2009
Prepared 6th January 2009

Determination Promulgated
14 JAN 2009

Before

IMMIGRATION JUDGE WYMAN

Between

(FIRST APPELLANT)
(SECOND APPELLANT)
(THIRD APPELLANT)
(FOURTH APPELLANT)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Counsel
For the Respondent: No Home Office Presenting Officer

DETERMINATION AND REASONS

Details of the Appellants and Nature of Appeal

1. The first appellant (whom I shall call "the appellant") is a citizen of Pakistan whose date of birth is . His wife and children are dependants upon his claim.
2. The first appellant arrived in the United Kingdom on 6th November 2004 and was granted leave to enter under the Highly Skilled Migrant Programme (HSMP) for one year. His wife and son followed shortly afterwards on 18th December 2004, and were

given leave to remain in line with the appellant as his dependants. In July 2005 the first three appellants were granted further leave to remain under the HSMP. The fourth appellant was born in the United Kingdom on 12th October 2006, and given leave to remain in line with other family members. On 12th August 2008 the appellant applied for indefinite leave to remain in the United Kingdom under the HSMP category. This application was refused by the Secretary of State on 11th November 2008 on the grounds that the appellant had not yet completed five years in the HSMP category. They now appeal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 against this decision on the grounds that the decisions are not in accordance with the law and that they are incompatible with their right to respect for family and private life, protected by Article 8 of the ECHR.

The Highly Skilled Migrant Scheme

3. When an appellant originally came to the United Kingdom, s/he would be granted one year's leave to enter. S/he can then apply for an extension of three years if, during the first year, the appellant had taken all reasonable steps to become lawfully economically active and is able to maintain themselves adequately without recourse to public funds. At the end of three years s/he would then be eligible to apply for indefinite leave to remain if s/he could show that s/he had spent at least four years continuously in the United Kingdom under the HSMP without having had recourse to public funds and that he had been lawfully economically active.
4. In April 2006, the terms of the scheme were changed. The qualifying period for settlement was lengthened from four to five years. This change affected not just new applicants, but also to those who had already been granted leave to remain under the HSMP scheme. Further changes were also introduced in November 2006 and appellants now had to show that they qualified under a new points test which were awarded on the basis of earnings, qualifications and age.

The Appellant's Claim

5. The appellants claim that the respondent's decision resulting from the 2006 Rule changes to refuse to grant them settlement after four years under the HSMP scheme represented a disproportionate interference with their right to respect for their private life. The appellants claim that they entered the United Kingdom in the reasonable expectation that they would be permitted to settle after four years if they met the conditions of the scheme as it then was. They claim that they could not reasonably have anticipated that the scheme would change in the way that it did. They further claim that such interference is not lawful, necessary or proportionate, in that it breaches their legitimate expectation of being permitted to settle in the United Kingdom.
6. The first appellant explains in his witness statement that having completed his school education, he trained as a qualified accountant with Deloitte Touche Tohmatsu in Pakistan. In December 2002 he passed all the exams of the Association of

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Chartered Certified Accountants, and in May 2003 was admitted as a full member of the association.

7. The appellant explains that he worked in Pakistan from December 1999-October 2004. He worked for three years as supervising senior with Deloitte Touche Tohmatsu. Then he worked as a visiting faculty member at the University of Faisalabad until September 2003. He was also a partner in a consultancy firm from February 2003-October 2004.
8. The appellant explains that before he came to the United Kingdom, he earned a very high salary of 1,000,000 rupees per annum. The appellant however decided to move to the United Kingdom under the HSMP scheme as the challenge of working in the United Kingdom appealed to him. The appellant understood that the HSMP scheme meant that he had to intend to make the UK his permanent home.
9. The appellant stated that he travelled to the United Kingdom on 6th November 2004, and within four days was able to secure the post of external auditor. He has not had any periods of unemployment, and on average his earnings have been well above the £40,000 HSMP threshold.
10. The appellant explains that when making the decision to come to the United Kingdom he relied on the HSMP guidelines and information available at the time. That information assured him that he would be granted indefinite leave to remain if he completed four years under the HSMP scheme.
11. The appellant explains that without obtaining permanent residence status, he is unable to obtain permanent jobs in the United Kingdom. Nor is he able to obtain a mortgage to purchase a family home.

The Respondent's Case

12. The respondent refused the appellants' application solely on the ground that they had not completed five years leave to remain under the category of the HSMP, as required under the new Rules.

The Law

13. The requirements of indefinite leave to remain as a highly skilled migrant are set out at Rule 135G of the Immigration Rules. They state as follows.

"135G The requirements for indefinite leave to remain for a person who has been granted leave as a highly skilled migrant are that the applicant:

- (i) has spent a continuous period of 5 years lawfully in the United Kingdom, of which the most recent period must have been spent with leave as a highly skilled migrant (in accordance with paragraphs 135A to 135F of these Rules), and the remainder must be made up of leave as a highly skilled migrant, leave as a work permit holder (under paragraphs 128 to 133 of these Rules), or

leave as an Innovator (under paragraphs 210A to 210F of these Rules); and

- (ii) throughout the five years spent in the United Kingdom has been able to maintain and accommodate himself and any dependants adequately without recourse to public funds; and
- (iii) is lawfully economically active in the United Kingdom in employment, self-employment or a combination of both; and
- (iv) has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application."

"Indefinite leave to remain as a highly skilled migrant

135GA Indefinite leave to remain may be granted provided that the Secretary of State is satisfied that each of the requirements of paragraph 135G is met and that the application does not fall for refusal under paragraph 135HA."

The Burden and Standard of Proof

14. The burden of proof is on the appellant. The standard of proof is the 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 Appeal Hearing

15. The appellant gave evidence. There was no HOPO present in court. The appellant adopted his witness statement dated 12th December 2008. The appellant explains that he currently worked for Sutton Borough Council and had been working there since April 2005. He explained that he is unable to obtain a permanent job with Sutton Borough Council due to his current immigration status, as a result he had been retained on a rolling interim contract. The appellant also explained that he had been offered a job with the Audit Commission. However he is unable to take up this job offer until he had further leave to remain.
16. The appellant stated that he had been living in rented accommodation for the past three years. He wished to buy the accommodation as a family home and the landlord is willing to sell the property to him. However he was unable to get a mortgage due to his current immigration status.
17. Mr [redacted] also stated that if he was granted further leave to remain, his plan in the long term would be to become a British citizen. He was clear that he would make the United Kingdom his main home. Indeed he had not been back to Pakistan for the last three years.

18. Full details of the oral evidence of Mr [redacted] together with the detailed submissions made by Counsel are recorded in the Record of Proceedings, which now forms part of the appeal file. At the end of the hearing I reserved my decision.

Findings and Conclusions

19. I accept the appellant's account that he and his family came to the United Kingdom with the intention of settling here permanently, under the expectation that they will be able to settle after four years if he continued to be economically active and have no recourse to public funds. I note that the appellant was able to obtain employment having been in the United Kingdom for only four days, and has remained in employment since this time. He has never sought any public funds. At present, the only reason preventing his obtaining a permanent job at a higher level is his immigration status. It is noted that the letter from the London Borough of Sutton dated 4th August 2008 confirms that he is employed on an ongoing basis as an assistant audits manager but that his immigration status acts as a barrier to be considered for a permanent role. I also note the appellant has been now offered a job with the Audit Commission, but this job is conditional on his immigration status.
20. Counsel referred me to the case of **HSMP Forum Ltd v SSHD [2008] EWHC 664**. In this case, Sir George Newman held (at paragraph 52) that the scheme up to November 2006 "was designed to provide a path to settlement and once a migrant had embarked on the scheme it was intended that he should carry the expectation of attaining settlement. That was the purpose of the scheme." Sir Newman also quotes from the 2002 guidance which stated that if the scheme changes "those who have already entered under the HSMP will be allowed to stay and apply for settlement after four years qualifying residence, regardless of revisions to HSMP." Sir Newman also stated that "he was unable to see a sufficient public interest which outweighs the unfairness which I am satisfied the changes visit upon those already admitted under the programme."
21. It is noted that following the HSMP case, the Home Office issued a policy document in July 2008. This document covered migrants who had received an HSMP approval letter before November 2006 and had been granted an extension of stay on the basis of that letter. However it does not cover the position where individuals who had previously been granted extensions of stay then needs to apply for indefinite leave to remain after the initial qualifying period of four years. Instead it mostly discusses those who may have been caught by the stricter extension test that was introduced in December 2006.
22. I find that the appellants entered the United Kingdom in the belief that they were joining a scheme that would lead to settlement after four years provided they continued to meet the basic criteria. It was one of the initial criteria that the appellants had to intend to make the UK their main home. I find that the appellant fully accepts this. This was why the appellant wound up his consultancy firm in October 2004 in Pakistan. I note the appellant, in his statement, stated that he relied entirely on the HSMP guidelines and information available at the time he took the decision.

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23. I note that the appellant has only taken jobs in the public sector (and not the private sector) as private sector jobs would require him to travel extensively, and thereby he would not be able to satisfy the various Immigration Rules.
24. I accept that the decision to apply to come to the United Kingdom under the HSMP was a decision that the appellant took together with his wife, as it would mean leaving their very high standard of living that they experienced in Pakistan, together with their friends and families. I note that at the time the decision was made, the appellant's wife was pregnant with their first child.
25. I note that when the appellant applied for indefinite leave to remain, he expected that this would be granted without a problem. He had not previously had any problems when applying earlier for an extension of his leave to remain. He was not forewarned that he needed to apply for a further extension, and accordingly did not do so. Had he been advised to do so, he would have taken such a step.
26. I find that the appellants have established a family life here in the United Kingdom. Their eldest child is due to start school in 2009. Mrs. [redacted] has since given birth to a second child. The family have also developed significant private life ties in the United Kingdom.
27. I find that the respondent's decision to refuse to grant them indefinite leave to remain has sufficiently serious consequences that it engages Article 8 of the ECHR and amounts to an interference with their right to respect for family and private life. Whilst I find that the respondent's decision was taken in pursuit of the legitimate aims of pursuing national and economic wellbeing, I conclude that this decision was not lawful or proportionate to these aims. They are not lawful as they were taken pursuant to Rule changes which were in my view unpredictable and had a degree of retrospectivity. This appellant was at an advanced stage of the HSMP when the Rule changes were introduced. I also note that had the appellant been granted indefinite leave to remain in November 2008, he would have been able to take up the offer of a job from the Audit Commission.
28. I therefore find that the appellant is entitled to succeed under Article 8.
29. I also find that the decision of the respondent was not in accordance with the law.

Decision

30. I allow the appeals on the ground that the decisions are not otherwise in accordance with the law.
31. I allow the appeals on human rights grounds.

Signed

Dated

Immigration Judge Wyman

