

THE IMMIGRATION ACTS

Heard at Taylor House
On 9 October 2007
Prepared on 15 October 2007

Determination Promulgated

17 OCT 2007

Before

IMMIGRATION JUDGE MCWILLIAM

Between

Appellant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs L. V. [redacted], Counsel
For the Respondent: Ms C. Crowe, Home Office Presenting Officer

DETERMINATION AND REASONS

The Appellant

1. The Appellant, Mr [redacted] Ghosh, is a citizen of India. His date of birth is [redacted] August [redacted]. At the date of the hearing he was aged [redacted].
2. The Appellant appeals against the decision of the Respondent on 7 March 2007 to refuse him leave to remain in the UK as a Highly Skilled Migrant. The reason for refusal is that the Appellant has claimed in total 50 points not 75 points in accordance with the criteria specified in the Immigration Rules.

The Legal Background

3. The decision was made under paragraph 135F with reference to 135D (ii) of the Immigration Rules HC 395 (as amended).
4. Relating as the appeal does to a decision made after 31 March 2003, Section 86 of the 2002 Act provides that I must allow the appeal insofar as I think the decision against which it is brought was not in accordance with the law (including Immigration Rules) or that the discretion exercised in making the decision should have been exercised differently. I may consider evidence about any matter which I consider relevant to the substance of the decision, including evidence confirming a matter arising after the date of the decision.
5. The onus of proof in establishing these matters lies upon the Appellant. The standard of proof is that of the balance of probabilities, as it is also for any related human rights issues save in relation to issues of removal, where it is that of reasonable likelihood of removal.

Background of Case and Issues

6. In March 2005 the Appellant made an application to enter the UK under the Highly Skilled Migrant Programme (HSMP). The Appellant was granted entry clearance until 10 December 2006. He arrived in the UK on 9 December 2005. On 13 November 2006 he applied for an extension. On 7 November 2006 the Respondent changed the rules relating to the requirements for HSMP requiring applicants to have 75 points. The earlier rules required 50 points. The Respondent considered not only new applicants under the new rules but also applications for extensions for those already in the UK under the old rules. Therefore the Appellant's extension was considered under the new rules. The Appellant asserts that the retrospective application of the rules breaches the UK's obligations under Article 8 ECHR. It is agreed by the Appellant, through his representative, that this is the sole issue as far as this tribunal is concerned. That the Appellant would have qualified for an extension under the original rules was not challenged by the Respondent. It appears to me that he would have qualified.
7. The matter was listed for a full hearing 26 June 2007. On this occasion the matter was adjourned on the application of the Respondent to reconsider the Appellant's application under the transitional arrangements as he was now economically active. The matter had not been considered under the transitional arrangements and Counsel for the Appellant informed me that the transitional arrangements would not have assisted the Appellant in any event. Mr Crowe indicated that the Respondent's position had not changed since the last hearing.

The Evidence

8. On the file is the Respondent's bundle which contains the original application and enclosures, the notice of refusal and reasons the notice of appeal and grounds and enclosures. The Appellant submitted a statement in support of his appeal. There are two skeleton arguments prepared by Counsel for the Appellant. A further skeleton argument was submitted at the hearing. There is an Appellant's bundle which

contains the first skeleton argument and, amongst other documents, the report of the Joint Committee on Human Rights on Highly Skilled Migrants: Changes to the Immigration Rules, the HSMP Revised Programme effective from October 2003 and the programme as from 1 November 2006 dated 9 August 2007.

The Hearing

The Evidence of the Appellant

9. The Appellant's evidence is contained in his statement which is not dated and his oral evidence. His evidence can be summarised. On 19 December 2005 the Appellant entered the UK with an initial one year visa. Before the Appellant came to the UK he worked as the Director of the Electrical and Instrumentation Division of the Industrial Training Institute in Bahrain where he had resided for eleven years. Prior to this he had been working as an Assistant Professor of Instrumentation and Process Control at the University of Bahrain and prior to this he was the head of Department of Electronic and Instrumentation Engineering at Jadavpur University in India. He is currently self employed and runs the Ghosh Centre for Mathematics and Science which provides tuition and training to various categories of students in the field of Maths, Science, IT and related disciplines.
10. The Appellant gave up a lucrative career in order to relocate to the UK in January 2007. He was unable to do so because of the refusal to extend the Appellants visa. The Appellant would not be able to return to Bahrain unless he obtains employment prior to return. The Appellants daughter, who is aged 9, has been at a British school in Bahrain and is being taught in accordance with the national curriculum. It was expected that she would complete her studies in the UK.
11. The government of Bahrain has provisions for issuing self-sponsored residence permits to foreigners who have lived in Bahrain for a minimum period of 15 years. As the Appellant left after 11 years he has lost the opportunity to obtain a residence permit. His wife and child will not be able to remain in Bahrain. Bahrain was the Appellant's home; he has not lived in India since 1995. He would find it very difficult to find employment in India unless he accepted a low position.
12. The Appellant is now economically active in the UK and has an income. He would like to expand his business and believes that there would not be a shortage of students. However, the pending appeal has prevented him from investing in and expanding his business.
13. Had he known of the 'new' rules he would have done what he could to ensure that he had 75 points. He was not aware of the change until his application had been refused.

Findings of Fact

14. I find that the Appellant is an entirely credible witness and accept his evidence. His evidence was not challenged by the Respondent. I have read with great interest the findings of the Joint Committee and concur with its findings which in summary are that the changes to the HSMP are not compatible with Article 8 ECHR.

Article 8 ECHR

15. There are several elements to a consideration of Article 8, which provides:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

16. In cases where Section 8 is in issue the five stage test in the case of **R (Razgar) v SSHD [2004] UKHL 27** should be applied as follows:-

(1) Will the removal interfere with the applicant's private or family life?

(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

(3) If so, is such interference in accordance with the law?

(4) If so, is such interference necessary in a democratic society?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

17. I conclude that the Appellant does not have a family life in the UK. However, I conclude that the Appellant enjoys a private life in the UK and that removing him would have consequences of such gravity as potentially to engage the operation of article 8. I must consider whether or not the interference is in accordance with the law. The case of **R v IAT, parte Mansoor** makes it clear that the Immigration Rules can themselves be lawful. I am satisfied beyond any reasonable doubt, for the following reasons, that the Appellant had a legitimate expectation that those who fall within the criteria of the programme can expect to be granted settlement.

18. In arriving at the above conclusion I have considered all of the evidence including the following:-

- The Report of the Joint Committee which concludes that any interference with the right to respect for home and private life in Article 8 as a result of the changes to the HSMP will 'not be in accordance with the law' as required by Article 8(2) ECHR Paragraph 39 reads as follows:-

"We conclude that any interference with the right to respect for home and private life in accordance with Article 8 as a result of 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 foreseeability and predictability that has been held to be inherent in the requirement that such interference be in accordance with the law”

- A copy of the programme that the Appellant originally was shown when he applied to enter this country under the scheme. It was on the basis of this that he decided to come to the UK. The following paragraphs are of relevance.

24.9 Q: What if the scheme changes?

A: As with any immigration scheme we reserve the right to adapt some of the criteria, documentation associated with the scheme and will inform you via our websites of any such changes. All applications will be treated on the basis of the HSM provisions at the time that they were submitted.

24.10 Q: I have already applied successfully under HSMP. How does the revised HSMP affect me?

A: Not 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.

- Paragraph 9.1 (c) requires the Appellant to be willing and able to make the United Kingdom your main home.
- The declaration in the original application (page 2 of the Appellant's bundle) and in the declaration in the 'new rules' (page 85 of the Respondent's bundle) required the applicant to confirm that he will make the UK his main home. The declaration in the new rules requires an applicant to declare that he is aware that the rules and regulations may change and that he is not to assume that the requirements covering future applications will be the same.
- I have considered all of the evidence including The Secretary of State for the Home Department -v- R (on the Application of Bakhtiar Rashid) (2005) EWCA Civ 744 and particularly paragraph 24 which states the following (in relation to legitimate expectation) :-

“ the application of the principle must be based upon some objectively identifiable legitimate expectation as to how decisions will be made and discretions exercised”

- I find that the objectively identifiable legitimate expectation in this case is contained in the 2003 guidance notes relating to the programme. The Appellant was made to understand from the old guidance notes that changes in the guidance notes would not affect someone who had entered under the old guidance (the information which was in paragraph 24.10 having been expunged from the new guidance) and his signed undertaking that he would make the UK his home strengthened the expectation.

19. Having found that the decision is not in accordance with the law it is not strictly speaking necessary to address questions 4 and 5. If my answer to question 3 is 'yes', I am in no doubt that the decision is not proportionate. The House of Lords in the case of **Huang (2007) UKHL 11** stated that the question to be asked is whether removal prejudices the private or family life of the applicant in a manner sufficiently serious as to amount to a breach of the fundamental right protected by article 8. I answer this question in the affirmative. It is necessary to balance the interests of the state against those of the individual but here, in my judgement, the interests of the individual do outweigh those of the state. In this respect I have considered my findings above. In addition I find that the Appellant intended to make the UK his main home and look long term at life changing decisions to establish the UK as his main home. He left a comfortable life style and well paid job in Bahrain and it is not reasonable to expect the Appellant and family to return to Bahrain.

Decision

20. The appeal is allowed under Article 8 of ECHR.

Signed Joanna McWilliam

Date 15 October 2007

Immigration Judge McWilliam

