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Asylum and Immigration Tribunal

Appeal Number: IA/14261/2008

THE IMMIGRATION ACTS

Heard at Surbiton
On 18th September 2008
Prepared 1st October 2008

Determination Promulgated
- 6 Oct 2008
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Before

MR P ROWLANDS
Immigration Judge

Between

R. M.

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS

Representation:

For the Appellant: Mr M
For the Respondent: The Respondent was unrepresented

1. The Appellant is a citizen of India whose date of birth is the
His wife and daughter are dependants upon his claim. On the 4th July 2008 he applied for indefinite leave to remain as a highly skilled migrant worker under Paragraph 135 of the Immigration Rules. On the 12th August 2008 his application was refused by the Respondent in the following terms:-

"In view of the fact that you have only been in the United Kingdom since the 9th June 2004 as a highly skilled migrant, the Secretary of State is not satisfied that you have spent a continuous period of five years lawfully in the United Kingdom, of which the most recent period must have been spent with leave as a highly skilled migrant."

2. It is against this refusal that this appeal is brought.

3. In considering the appeal I had before me the Respondent's bundle dated 27 August 2008 together with its attachments and the notice of appeal. I also had an Appellant's bundle dated 10th September together with Appellant's CV and I heard evidence from him. I had received a small bundle of standard submissions from the Respondent who was not represented at the hearing. I heard representations from the Appellant's representative.
4. The requirements to be met by a person seeking leave to remain in the United Kingdom as a Highly Skilled Migrant Worker contained in Paragraph 135H with reference to 135G(i) of HC395 (as amended). This requires that the Appellant shows that he 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 Paragraph 135A-F of these Rules), and the remainder must be made up of leave as a Highly Skilled Migrant, leave as a Work Permit Holder or leave as an Innovator.
5. The onus of showing that he can comply with the Immigration Rules lies with the Appellant. He must do so on the balance of probabilities. As far as any breach of his human rights are concerned it is for him to show that there is a real likelihood that there would be a breach if he were removed.
6. The Appellant's evidence was relatively short he started simply by adopting his witness statement which is effectively the witness statement of he and his wife. Their statement reads as follows:

We are both doctors, both working in the National Health Service and both dedicated to our profession. I specialise in paediatric medicine; my wife is an obstetrician but has also qualified as a general practitioner. I qualified as a doctor in India in 1997. My wife qualified in 2000, both of us having studied medicine at the University of Rajasthan, one of the premier universities in India. That course, including internship, lasted five and a half years, and when completed, we both took up positions as junior doctors in Jaipur. I later gained a post-graduate degree in paediatric medicine.

We married in December 1999, in Jodhpur and together made the joint decision to seek employment in the United Kingdom. Initially, that decision was to come here to gain more experience in our chosen fields, but we now have settled here, have a child, property, experience and community here, and wish to remain. We both believe we have a great deal to offer. The process of coming to the United Kingdom to practice as doctors is necessarily rigorous. We both first had to pass an English examination in India (the International English Language Test System (IELTS) Examination) and then a further professional English examination (the Professional Linguistic Board Examination Part I). Both these examinations are taken (and were taken) in India and only after passing were we permitted to proceed to the next stage, which is the in the United Kingdom.

We came to the UK in November 2001. We lived initially with my wife's brother in Harrow whilst we studied for the next exams. We passed Part II of the Professional Linguistic Board Examination which entitled us to obtain limited registration as medical practitioners – this is a GMC requirement: limited registration lasts for one year (but can be renewed) and is necessary before a doctor from overseas can commence work in the United Kingdom. We then applied and commenced work in

June 2002. I obtained a position at Warrington General Hospital and my wife at the United Hospital in Antrim, Northern Ireland. These were both locum posts. We were able after some months to be reunited and work together at Aberdeen Hospital, happily in our chosen fields of paediatric and obstetric medicine. In June 2003 the General Medical Council accepted our applications for full registration.

The process of immigration control and entry into the United Kingdom will be documented by the Home Office, but briefly, we together entered in November 2001 on visitors visas for 6 months. This is the normal procedure when entering to complete the professional exams that were undertaking. The visas were extended and in June 2002 we obtained permit free training visas which enabled us to commence our employment. After extensions, we obtained a HSMO visa for one year to June 2005, the effect of which (as the court will know) is to grant formally limited leave to remain, which was further extended in June 2005 for three years to June 2008. During this period my wife and I practiced at a number of different hospitals where we able to develop our skills and expertise. Our CVs show our professional development. I am presently at _____ Hospital, _____, Surrey. My wife, having completed her training as a general practitioner, is a locum GP in Surrey.

We are dedicated to our professions and decided to make the UK our home. We anticipated that we would wish to live here permanently when we first came – if we were to qualify – and subsequently made all efforts to achieve the criterion for settlement in UK. To that end we changed our visa to the Highly Skilled Migrant Programme (HSMP), when the revised programme effective from 31st October 2003 issued by The Immigration & National Directorate Highly Skilled Migrant Programme which promised us settlement after four years. Initially we were granted 1 years HSMP visa & then further extension for 3 years after meeting all the criteria. Both of us were working within the NHS. We made ourselves economically active to ensure that we can make UK our home. As set out at Paragraph 18.2 of the revised programme, we became (or were to become) eligible for settlement permanently in UK after a stay of 4 years on the HSMP visa. We obtained further qualifications while working in UK. I obtained Membership of Royal College of Paediatrics & Child Health (MRCPCH) to be eligible for a Consultant position in Paediatrics. Now I am in the Training Programme (Year 2) with London Deanery for a period of 5 years ending September 2012. R _____ obtained a Diploma in Obstetrics & Gynaecology (DRCOG), Diploma in Child Health (DCH), Diploma of faculty of Family Planning (DFFP) and finally has obtained Membership of Royal College of General Practitioners (MRCGP). She is on the Medical Performers list in Surrey and – as above stated – is working as a locum GP after completion of her 3 years GP Training Programme.

In order to make ourselves economically strong we purchased investment properties while working in these cities after being able to make significant deposits and continue to make the required mortgage payments:

- (i) _____ Manchester – currently rented.
- (ii) _____ Middlesex – currently rented.
- (iii) _____ Twickenham – presently residing

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Both of us have all the outward trappings of success. Indeed, we are successful in our careers. We are included in the Register of Electors in 2008 in Richmond. R gave birth to our daughter A in Dorchester, Dorset in 2003 and she has been going to Reception at St Catherine School in Twickenham since the 3rd September 2008. Her first language is English and she enjoys her life in the UK. We are happily expecting another baby girl in November 2008.

In view of the above it is evident that we have spent our golden period of life to serve this country as medical practitioners after obtaining relevant qualifications and experience and have been contributing to the UK economy. We were eligible for Indefinite Leave to Remain in UK under the original Rule for HSMP visa holders and the recent Judicial Review dated 8th April 2008. Both of us passed the Life in the UK test. Since we had been in the UK for more than 6 years and last four years on HSMP, we decided to apply for ILR. We applied for ILR on the 4th July 2008. My application was received by the Home Office on the 7th July 2008. At that time there was no clear specific guidelines regarding the judicial reviews implications for eligibility for ILR on the Home Office website. I spoke to the Home Office (Border and Immigration Control) and was specifically told that our applications for ILR ought to be processed without difficulty but that they were awaiting fresh guidelines. The new guidelines after the judicial review came on the 12th July 2008.

Neither of us have availed ourselves of any public money and or benefits. We regularly pay income tax, council tax, NI contributions, NHS pension as other resident citizens. Copies of P60 forms, bank statements, recent payslips are enclosed to verify that we are economically active and entitled on the criterion for settlement in the UK. We were eligible for extension to Tier 1 General (HSMP) but in view of the judicial review, (which I read, and to which paragraph para 57 refers), I understood that we were eligible for ILR as per the original HSMP clauses effective from 31st October 2003. In view of above it is prayed that our appeal for ILR be considered. My current position in the NHS continues up to September 2012; my wife is presently working as Locum GP. We are economically active having enough funds to work in UK, we are experienced medical practitioners and contribute much more to the UK economy and to the NS. I firmly believe we meet the entire criteria for settlement in UK as per law.

7. I then heard submissions from his representative before reserving my determination which I now give.
8. I have spent some time looking through Dr M's CV which is impressive to say the least. He is extremely highly thought of by a number of Consultants and is someone who has a great deal to give to the United Kingdom health service. He is very much the kind of person who Highly Skilled Migrant Programme was designed to attract to the United Kingdom to settle. His wife R has an equally enviable CV, she also comes highly recommended. In 2004 when he applied for leave to remain under the HSMP he had no trouble in meeting the criteria and being allowed to stay. In June 2005 that leave was extended for a further 3 years and he was told that he could apply for a further extension. The changes that have been made to the programme have had no effect in terms of the Appellants ability to meet the points criteria they have however affected when he could apply for indefinite leave to remain.

9. I am not persuaded that the change in the Rules is in any way unlawful and agree with the Respondent that this application must fail under the Rules.
10. However, I do believe that removal of Dr M and his family would be an unlawful interference with his and their right to a family life in the United Kingdom. Both doctors were attracted to the United Kingdom by the HSMP and have clearly decided to settle here. They have brought property here and have a daughter attending school with another child on the way. They had a legitimate expectation that at the end of the four years, they would be allowed to remain here. In deed the government gave them that legitimate expectation in some questions and answers which were given about the HSMP in its guidance. One of the questions was what if the scheme changes? The answer was "as with any immigration scheme we receive the right to adapt some of the criteria or 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 HSMP provisions at the time that they were submitted."
11. Furthermore another question was "I have already applied successfully under HSMP. How does the revised HSMP affect me?" The answer given there was "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 4 years qualifying residence regardless of these revisions to HSMP".
12. When he applied for ILR in July 2008 they expected it to be granted without problem. They were not forewarned that they needed to apply for a further extension so had not done so. They could have done and would have done had they known. They clearly have established a family life here in the United Kingdom and their removal would amount to an interference with that. The consequences to them and their daughter would be grave, it would amount to them having to give up all that they have established here and return to India to start afresh. This would be particularly harsh on the daughter who has grown up in the United Kingdom and known no other life.
13. Enforcing the five year rule upon them retrospectively is in my view not in accordance with the law nor is it a proportionate act taking into account the circumstances and everything that they have done to settle here.

Decision

I dismiss their Immigration Appeal.

I allow their Human Rights Appeal.

Signed



Date 2nd October 2008

P Rowlands
Immigration Judge