Neutral Citation Number: [2008] EWCA Civ 1420

Case No: C5/2008/0831 & C5/2008/0687

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM & IMMIGRATION TRIBUNAL
OA/23223/2006 & OA/28966/2006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 18th December 2008

Before :

LORD JUSTICE LAWS
LORD JUSTICE RIX
and
LORD JUSTICE WILSON

- -

Between :

DL (DRC)	**Respondent**
&	
THE ENTRY CLEARANCE OFFICER, PRETORIA	**Appellant**
- and –	
ZN (AFGHANISTAN)	**Appellant**
&	
THE ENTRY CLEARANCE OFFICER, KARACHI	**Respondent**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Mr Mick Chatwin (instructed by **Lawrence Lupin**) for the 1st Respondent
Mr Edward Nicholson (instructed by MSZ Solicitors) for the 2nd Appellant
Ms Samantha Broadfoot (instructed by The Treasury Solicitor) for The Entry Clearance Officers

Hearing dates : 7 October 2008

- -

Judgement

Lord Justice Laws:

INTRODUCTION

1. In these two appeals we are principally concerned with the question, which is the applicable immigration rule in circumstances where family members seek entry to the United Kingdom to join a person who had been recognised as a refugee here, but later acquired British citizenship. The Entry Clearance Officers (the ECOs – appellant in one appeal, respondent in the other) contend that the prospective entrant must satisfy the ordinary rules dealing with applications by family members, notably paragraphs 281 (spouses and civil partners) and 297 (children) of the current Rules contained in House of Commons Paper 395 (HC 395). The applicants (as I shall call those seeking entry) contend by contrast that their cases fall to be considered under the rules dealing with applications to join relatives in this country who have been granted asylum here, notably paragraphs 352A (spouses and civil partners) and 352D (children) of HC 395. The distinction between the two sets of rules matters because a person entitled to apply under paragraph 352A or 352D does not have to meet the requirements concerning maintenance and accommodation imposed by paragraphs 281 and 297.

THE FACTS

2. I will first outline the relevant facts. In appeal no. 0831 the applicant, DL, is the respondent: the appeal is brought by the ECO at Pretoria. DL was born on 25 December 1988 in the Democratic Republic of the Congo. At some point the family went to South Africa. DL's father came to the United Kingdom in 1993 and was granted refugee status in May 1999. Since then DL's mother and siblings have all come to the United Kingdom.

3. DL has twice been granted an entry clearance to enter the United Kingdom, but did not take advantage of it on either occasion. The first time was in his infancy when he was in care in South Africa. The second time was on 7 May 2002. He was, however, arrested at about that time (in South Africa) and subsequently convicted of indecent assault, committed by the non-consensual anal penetration of another male. He was sentenced to three years imprisonment with one year suspended for four years. Had the offence been committed in the United Kingdom, DL would have been liable to a term of imprisonment exceeding twelve months: a fact whose relevance will be clear in due course. He was released from prison on 7 February 2005.

4. Meanwhile his father had applied for and in 2004 been granted British citizenship under s.6 of the British Nationality Act 1981. On 24 June 2005 DL applied for entry clearance to join his father. The application was refused on 18 May 2006. DL appealed, and on 3 July 2007 Immigration Judge Goldfarb allowed his appeal. The ECO sought a reconsideration, which was ordered by Senior Immigration Judge Chalkley on 20 July 2007. On 25 January 2008 SIJ Mather found that there had been an error of law perpetrated by IJ Goldfarb, but nevertheless he also allowed DL's appeal. Both IJ Goldfarb and SIJ Mather proceeded on the footing that the applicable rule was 352D – one of the asylum rules rather than one of the ordinary family member rules. The difference between them was that IJ Goldfarb went on the basis that another rule, paragraph 320(18), was also relevant. Paragraph 320(18), as I shall show, allows entry to the United Kingdom to be refused where the applicant has been convicted of an offence which if committed in the United Kingdom would be

punishable by a sentence of imprisonment of twelve months or more. Although IJ Goldfarb held that 320(18) was as it were engaged, she concluded that on the particular facts it ought not to debar the applicant's entry despite his conviction for indecent assault in South Africa. SIJ Mather, by contrast, held that on the proper construction of the rules, 320(18) had no relevance whatever to a claim to enter advanced under 352D: and so could not in any event bar DL's entry. On 17 May 2008 on consideration of the papers Buxton LJ granted permission to appeal to this court to the ECO, who sought to contend that the applicable rule in DL's case was not 352D at all, but 297.

5. In appeal no. 0687 the first appellant is ZN, wife of Israr Naimi to whom I will refer as the sponsor. They were married in Afghanistan in 1979 and have six children (born between 1985 and 1998) who are the second – seventh appellants. The family went to Pakistan in about 1999 where they have extended family members. The sponsor came to the United Kingdom in August 1999, and on 13 December 2001 was granted refugee status and indefinite leave to remain. On 22 March 2005 he was granted British citizenship.

6. After earlier applications and proceedings which for one reason or another came to nothing, on 15 October 2005 applications for entry clearance to join the sponsor were made by ZN and the children, of whom the two eldest were by now 20 and 18. At length these were dealt with and on 7 July 2006 refused, on the basis that the applicants could not meet the accommodation and maintenance requirements respectively imposed by paragraph 281(iv) and (v) and 297(iv) and (v) of HC 395. Claims advanced under Article 8 of the European Convention on Human Rights (ECHR) were also refused. The applicants appealed. Their appeals were dismissed by IJ Wiseman on 24 July 2007. Reconsideration was ordered, but on 8 February 2008 SIJ Eshun held that there was no error of law in IJ Wiseman's decision which accordingly stood. On 17 May 2008, on consideration of the papers Buxton LJ granted permission to appeal to this court to the applicants. He directed that cases 0687 and 0831 should be heard together, and in both cases observed, "[t]he issue as to the extent of rules 352A and 352D is important and the subject of conflicting decisions, and should be resolved by the Court of Appeal".

THE CONVENTIONS, THE IMMIGRATION RULES, AND THE DIRECTIVES

7. Before identifying the issues more precisely it will make for clarity if at this stage I set out or summarise the principal legal materials.

8. Article 1A(2) of the 1951 United Nations Convention on the Status of Refugees defines a refugee as a person who:

> "…owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country".

Article 1C provides:

> "This Convention shall cease to apply to any person falling under the terms of section A if…
>
> (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality".

I should also set out ECHR Article 8:

> "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 is 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 prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

9. Next, the Immigration Rules. They are divided into thirteen Parts. Part 1 contains general provisions regarding leave to enter or remain in the UK. Parts 2 to 8 lay down specific rules for considering applications for leave to enter or remain for a variety of purposes. Part 9 sets out general grounds for the refusal of entry clearance, leave to enter, and variation of leave to enter or remain in the United Kingdom. Part 10 deals with registration with the police. Part 11, 11A and 11B are together entitled Asylum and Humanitarian Protection. Part 12 relates to appeals. Finally Part 13 is concerned with removal. What I have called the ordinary rules dealing with applications by family members are to be found in Part 8. Amongst them paragraph 281 (as it stood at the material time) provides:

> "281. The requirements to be met by a person seeking leave to enter the United Kingdom with a view to settlement as the spouse [or civil partner] of a person present and settled in the United Kingdom or who is on the same occasion being admitted for settlement are that:
>
> (i) (a) the applicant is married to [or the civil partner of] a person present and settled in the United Kingdom or who is on the same occasion being admitted for settlement; or
>
> (b) the applicant is married to [or the civil partner of] a person who has a right of abode in the United Kingdom or indefinite leave to enter or remain in the United Kingdom and is on the same occasion seeking admission to the United Kingdom for the purposes of settlement and the parties were married [or formed a civil partnership at least 4 years ago], since which time they have been living together outside the United Kingdom; and
>
> (ii) the parties to the marriage or civil partnership have met; and

(iii) each of the parties intends to live permanently with the other as his or her spouse [or civil partner] and the marriage [or civil partnership] is subsisting; and

(iv) there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively; and

(v) the parties will be able to maintain themselves and any dependants adequately without recourse to public funds; and

(vi) the applicant hold a valid United Kingdom entry clearance for entry in this capacity."

Paragraph 297 provides:

"297. The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom are that he:

(i) is seeking leave to enter to accompany or join a parent, parents or a relative in one of the following circumstances:

(a) both parents are present and settled in the United Kingdom; or

(b) both parents are being admitted on the same occasion for settlement; or

(c) one parent is present and settled in the United Kingdom and the other is being admitted on the same occasion for settlement; or

(d) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is dead; or

(e) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and has had sole responsibility for the child's upbringing; or

(f) one parent or relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; and

(ii) is under the age of 18; and

(iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and

(iv) can, and will, be accommodated adequately by the parents or relative the child is seeking to join without recourse to public funds in accommodation which the parent, parents or relative the child is seeking to join, own or occupy exclusively; and

(v) can, and will, be maintained adequately by the parent, parents, or relative the child is seeking to join, without recourse to public funds; and

(vi) holds a valid United Kingdom entry clearance for entry in this capacity".

10. The rules dealing with applications to join relations who have been granted asylum here are to be found in Part 11. Among them is paragraph 352A which at the material time provided:

"352A. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the spouse [or a civil partner] of a refugee are that:

(i) the applicant is married to [or the civil partner of] a person granted asylum in the United Kingdom; and

(ii) the marriage [or civil partnership] did not take place after the person granted asylum left the country of his former habitual residence in order to seek asylum; and

(iii) the applicant would not be excluded from protection by virtue of article 1F of the United National Convention and Protocol relating to the Status of Refugees if he were to seek asylum in his own right; and

(iv) each of the parties intends to live permanently with the other as his or her spouse or civil partner and the marriage or civil partnership is subsisting; and

(v) if seeking leave to enter, the applicant holds a valid United Kingdom entry clearance for entry in this capacity".

Paragraph 352D provides:

"352D. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom in order to join or remain with the parent who has been granted asylum in the United Kingdom are that the applicant:

(i) is the child of a parent who has been granted asylum in the United Kingdom, and

(ii) is under the age of 18, and

(iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and

(iv) was part of the family unit of the person granted asylum at the time that the person granted asylum left the country of his habitual residence in order to seek asylum; and

(v) would not be excluded from protection by virtue or article 1F of the United Nations Convention and Protocol relating to the Status of Refugees if he were to seek asylum in his own right; and

(vi) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity".

For reasons which will appear I should also set out the terms of paragraph 352E:

"352E. Limited leave to enter the United Kingdom as the child of a refugee may be granted provided a valid United Kingdom entry clearance for entry in this capacity is produced to the Immigration Officer on arrival. Limited leave to remain in the United Kingdom as the child of a refugee may be granted provided the Secretary of State is satisfied that each of the requirements of paragraph 352D (i) - (v) are met."

11. Paragraph 320(18), which is relevant to DL's case in appeal no. 0831, appears in Part 9 of the Rules. Part 9 is headed "General grounds for the refusal of entry clearance, leave to enter or variation of leave to enter or remain in the United Kingdom". I should read the following excerpts from Rule 320:

"Refusal of entry clearance or leave to enter the United Kingdom

320. In addition to the grounds of refusal of entry clearance or leave to enter set out in Parts 2-8 of these Rules... the following grounds for the refusal of entry clearance or leave to enter apply:

Grounds on which entry clearance or leave to enter the United Kingdom should normally be refused

(1) the fact that entry is being sought for a purpose not covered by these Rules;

…

(18) save where the Immigration Officer is satisfied that admission would be justified for strong compassionate reasons, conviction in any country including the United Kingdom of an

> offence which, if committed in the United Kingdom, is punishable with imprisonment for a term of 12 months or any greater punishment or, if committed outside the United Kingdom, would be so punishable if the conduct constituting the offence had occurred in the United Kingdom;
>
> (19) where, from information available to the Immigration Officer, it seems right to refuse leave to enter on the ground that exclusion from the United Kingdom is conducive to the public good; if, for example, in the light of the character, conduct or associations of the person seeking leave to enter it is undesirable to given him leave to enter".

12. Lastly before coming to the issues I should refer to two European Directives which are relied on (as I will explain) by the applicants in appeal no. 0687. They are Directive 2004/83/EC ("the Refugee Qualification Directive") and Directive 2005/85/EC on minimum procedural standards. A summary will suffice. Article 11(1)(c) of the Refugee Qualification Directive, reflecting Article 1C(3) of the Refugee Convention, contemplates that a person shall cease to be a refugee if he has acquired a new nationality and enjoys the protection of the country of his new nationality. Article 38(1) of Directive 2005/85/EC requires that Member States ensure (among other things) that written notice is given when "the competent authority is considering withdrawing the refugee status of a third country national". However Article 38(4) allows Member States to derogate from Article 38(1) if they decide that "the refugee status shall lapse by law in case of cessation in accordance with Article 11(1)(a) – (d) of [the Refugee Qualification Directive]..."

13. The Refugee Qualification Directive was implemented in the United Kingdom in October 2006 by the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 and by changes in the Immigration Rules. Thus paragraph 339A(iii) of the Rules now provided that a grant of asylum would be "revoked or not renewed" if the Secretary of State was satisfied that the subject had acquired a new nationality and enjoyed the protection of the country in question. Paragraph 339BA provided for written notice to be given where the Secretary of State is considering revoking refugee status.

THE ISSUES IDENTIFIED

14. There is an agreed list of issues, as follows (I have slightly adapted the text):

> "Issues common to both appeals
>
> 1. (a) Is a person who is outside his country of origin and recognised as a refugee, and who has subsequent to that recognition taken on the nationality of the host country, still a refugee within the meaning of the 1951 Geneva Convention on the Status of Refugees?
>
> (b) If such a person does cease to be a refugee, does his refugee status cease only following a procedural process, or automatically by operation of law?

2. What is the effect, if any, of Directives 2004/83/EC and 2005/85/EC on these cases?

3. Do paragraphs 352A (relating to spouses) and 352D (relating to dependant children) apply to a person who was recognised as a refugee and is now a British citizen?

Issues relating to DL only

4. If Part 11 of the Immigration Rules applies, can the ECO rely upon Part 9 of the Immigration Rules (general grounds for refusal of entry clearance) in considering an application for entry clearance made under Part 11?

5. If yes, does Article 8 nevertheless compel a different outcome in this case?

Issue relating to ZN only

6. Did the Tribunal err in law in their assessment of Article 8 in ZN's case?"

15. Some of these issues could be more clearly articulated. Issues (1)(b) and (2) march together – the Directives referred to in (2) are said to constitute a procedural process such as is mentioned in (1)(b). Furthermore, it is a premise of Issue (3) that the sponsor for the purpose of paragraphs 352A/D has (by the time his dependants apply for entry under either paragraph) lost his refugee status by virtue of his acquisition of British nationality: Issue (3) is concerned with the proper interpretation of those paragraphs, and asks whether they apply in the case of a sponsor who has historically been granted asylum in the United Kingdom, but by the time of his dependants' application has lost his refugee status (in this case by virtue of his British nationality, but it might be for other reasons).

THE COMMON ISSUES CONSIDERED

16. The ECOs' case, advanced by Miss Broadfoot of counsel, is in essence very simple. It is said that (1) paragraphs 352A and 352D have no application to a person who was previously recognised as a refugee but has since acquired British citizenship, because in their natural and ordinary meaning they contemplate that the United Kingdom sponsor should be a refugee, within the meaning of Article 1A(2) of the 1951 Refugee Convention, at the time when his spouse or child seeks to join him here pursuant to either of those paragraphs; (2) a person who was granted refugee status in the United Kingdom, but later acquires British citizenship, thereby loses that status automatically by force of Article 1C(3) of the Refugee Convention; (3) Directives 2004/83/EC and 2005/85/EC have no effect relevant to these cases; (4) on the facts, the sponsor in each case (DL's father in appeal no. 0831, Israr Naimi in appeal no. 0687) thus lost his refugee status upon acquiring British citizenship at a time before the applicants sought to enter the United Kingdom; (5) accordingly, the applicants had no claim to enter pursuant to 352A/352D but were confined to the ordinary family member rules, paragraphs 281 and 297, and were therefore subject to those rules' requirements concerning maintenance and accommodation.

17. Of these propositions (1) obviously represents the ECOs' answer to Issue (3) above, proposition (2) addresses Issue (1), and proposition (3) Issue (2). Propositions (4) and (5) apply the earlier propositions to the facts. I find it convenient to deal with the points in the same order. I will consider Issues (4), (5) and (6), relating to individual applicants, at the end.

Issue (3): HC395 Paragraphs 352A and 352D: Must the Sponsor Enjoy Refugee Status at the Time his Spouse/Child Seeks to Join Him under the Rule?

18. On this issue, it seems to me that as a matter of language Miss Broadfoot's submission (proposition (1) above) is correct. The opening words of paragraph 352A – "seeking leave to enter... as the spouse... of a refugee" – import that the sponsor is *currently* a refugee. Compare 352E: "Limited leave to enter[/remain in] the United Kingdom as the child of a refugee...". The references to "refugee" are references to a current status. It is true that paragraph 352D has a different formulation: "...in order to join or remain with the parent who has been granted asylum...". However this is a familiar use of the perfect tense, to denote a state of affairs which arose in the past but is still continuing. It is in contrast to the aorist or past historic tense, which denotes a past state of affairs which has come to an end. Compare "It rained last night" with "It has been raining since last night".

19. This use of the perfect tense is confirmed in the context of this case by a further consideration. It is apparent from Article 1A(2) of the Refugee Convention that it is no part of the definition of "refugee" that the subject be formally recognised as such. But it is plain that the drafters of the Immigration Rules did not intend that persons seeking entry to the United Kingdom might have the benefit of the especially advantageous provisions of the Rules relating to the family members of a refugee in cases where there was only an *assertion* that the sponsor was a refugee, but no authoritative finding or confirmation to that effect. Hence the term "has been granted asylum" is used in 352D so as to confine the rule's operation to circumstances where the sponsor has been recognised as a refugee by the Secretary of State before an application for family reunion under the paragraph can be made. The expression "person granted asylum" in 352A(i) and (ii) has the same effect.

20. Overall, the indications are that the references to "asylum/refugee" in these paragraphs are directed to a status of the sponsor which is current and accepted. Thus for example the 352A requirement that "(iii) the applicant would not be excluded from protection by virtue of article 1F of the [Refugee Convention] if he were to seek asylum in his own right" (cf. 352D(v)) suggests that the rule is directed to current status.

21. I also accept Miss Broadfoot's submission that any other construction would lead to absurd results. The plainest instance would arise in a case where a person's refugee status has been cancelled because it had been obtained by fraud. On the applicants' argument he would still be a person "who has been granted asylum" and his relatives could rely on the special provisions of paragraphs 352A ff.

22. Are there any considerations going the other way? Mr Nicholson for the applicants in appeal no. 0687 advanced a series of what might be called policy points, designed essentially to underline the special importance of family reunion in cases where

historically the family has been broken up by persecution of one or more of its members, who are thus dispersed through no choice of their own. He cited Ouseley J in *H (Somalia) v ECO (Addis Abbaba)* [2004] UKIAT 00027:

> "It cannot be right to approach the disruption to family life which is caused by someone having to flee persecution as a refugee as if it were of the same nature as someone who voluntarily leaves, or leaves in the normal course of the changes to family life which naturally occur as children grow up."

Thus Mr Nicholson submits it is no surprise that the Immigration Rules offer favourable treatment to members of families which were originally split by the effects of persecution. In similar vein he referred also to Recommendation B of the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (which with respect I need not set out) and to Article 34 of the Refugee Convention, which provides:

> "The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings."

23. Moreover just as Miss Broadfoot advanced a *reductio ad absurdum* in the case of a person whose refugee status is cancelled as having been obtained by fraud, so Mr Nicholson produced one of his own. He submitted that on the ECOs' case a person, recognised as a refugee, who thereafter was refused naturalisation as a British national because he failed the good character test imposed by s.6(1) of the British Nationality Act 1981, would retain his indefinite leave to remain (granted to him as a refugee) and his relatives could apply to join him under the more favourable provisions of 352A/D. It is not clear to me, however, that this is as absurd as Mr Nicholson would have us believe. A person of bad character may be in need of international protection as a refugee. If he is recognised as such he will acquire the rights of a refugee (including the possibility of claims to enter the United Kingdom by family members under paragraph 352 of the Rules) despite his bad character. The fact that he might not qualify for British citizenship is neither here nor there.

24. In any event it is in my judgment quite impossible to justify a purposive, not to say strained, construction of the Rules by reference to the exigencies which undoubtedly face refugees and their families. I would venture to repeat some words of mine in *MB (Somalia)* [2008] EWCA Civ 102, at paragraph 59:

> "Like Dyson LJ (paragraph 24) I disagree with Collins J's insistence [sc. in *Arman Ali* [2000] INLR 89, 102B] on a purposive construction of the Immigration Rule, if it is thought that such an approach would produce a result in any way different from the application of the Rule's ordinary language. As Dyson LJ indicates, the purpose of the Rules generally is to state the Secretary of State's policy with regard to immigration. The Secretary of State is thus concerned to articulate the

> balance to be struck, as a matter of policy, between the requirements of immigration control on the one hand and on the other the claims of aliens, or classes of aliens, to enter the United Kingdom on this or that particular basis. Subject to the public law imperatives of reason and fair procedure, and the statutory imperatives of the Human Rights Act 1998, there can be no *a priori* bias which tilts the policy in a liberal, or a restrictive direction. The policy's direction is entirely for the Secretary of State, subject to Parliament's approval by the negative procedure provided for by the legislation. It follows that the purpose of the Rule (barring a verbal mistake or an eccentric use of language) is necessarily satisfied by the ordinary meaning of its words. Any other conclusion must constitute a qualification by the court, on merits grounds, of the Secretary of State's policy; and that would be unprincipled."

25. In my judgment the language of paragraphs 352A and 352D is entirely clear. Those paragraphs only apply in cases where the sponsor is currently a recognised refugee.

26. It is true, however, as Buxton LJ observed in granting permission in these cases, that the Tribunal has not spoken with a single voice on the interpretation of paragraph 352. In appeal no. 0831 Immigration Judges Goldfarb and Mather favoured the applicants' contention that the words in 352D "has been granted asylum" denote a purely historic event, carrying no implication as to the parent sponsor's current status. Mr Nicholson also cites *Abdikarim v Entry Clearance Officer (Nairobi)* (OA/32386/2005) (20 May 2005) and three further appeals heard together in which the determination was issued on 27 June 2008 (OA/45531/2007, OA/45526/2007 and OA/45522/2007). In that latter determination the Senior Immigration Judge said this:

> "It is not in dispute that the sponsor was granted asylum in the United Kingdom. The fact that he now has British citizenship does not mean that he was not granted asylum. I cannot see why, in principle, the enhancement of the sponsor's immigration status should preclude the appellants from obtaining family reunion. The Immigration Rules on family reunion are designed to put into effect the provisions of the UNHCR Handbook. Had the intention been as Mr Smart argues then there is no reason why a provision should not have been inserted into paragraph 352D on the lines of 'has been granted asylum in the United Kingdom and has not become a British citizen' or 'has been granted asylum in the United Kingdom and retains asylum status'."

27. With respect this reasoning in my view betrays a mistaken approach to the language of the Rule, for the reasons I have given.

28. It is convenient next to take Issues (1) and (2) together.

Issues (1) and (2): Does a person who has been recognised as a refugee, but thereafter assumes the nationality of his host country, remain a refugee within the meaning of the

Refugee Convention? If not, does his status cease automatically or only by a procedure as contemplated by Directives 2004/83 and 2005/85?

29. In my judgment it is plain that a recognised refugee who thereafter obtains the citizenship of his host country, whose protection he then enjoys, loses his refugee status. Article 1C(3) of the Refugee Convention could not be clearer.

30. Moreover this conclusion, in my opinion, is in line with the scope and purpose of the law's protection of refugees. A passage in the UNHCR Handbook dealing with Article 1C(3) of the Convention includes this:

> "129. As in the case of the re-acquisition of nationality, this third cessation clause derives from the principle that a person who enjoys national protection is not in need of international protection.
>
> 130. The nationality that the refugee acquires is usually that of the country of his residence. A refugee living in one country may, however, in certain cases, acquire the nationality of another country. If he does so, his refugee status will also cease, provided that the new nationality also carries the protection of the country of his new nationality."

31. The following passage from Professor Hathaway's book, *The Rights of Refugees under International Law* (Cambridge University Press, 2005), at p. 916 is instructive. It fills out the point made at paragraph 129 of the Handbook:

> "If a refugee opts to accept an offer of citizenship there, with entitlement fully to participate in all aspects of that state's public life, his or her need for the surrogate protection of refugee law comes to an end. There is no need for surrogate protection in such a case, as the refugee is able and entitled to benefit from the protection of his or her new country of nationality."

32. There remains the question whether the cessation of refugee status is automatic, or effective only by force of a procedure such as the giving of notice contemplated in the Directives. I accept that it is open to the States Parties to prescribe the procedures under which cessation pursuant to Article 1C(3) will have effect within their individual jurisdictions. Paragraph 189 of the UNHCR Handbook states:

> "It has been seen that the 1951 Convention and the 1967 Protocol define who is a refugee for the purposes of these instruments. It is obvious that, to enable States parties to the Convention and to the Protocol to implement their provisions, refugees have to be identified. Such identification, i.e. the determination of refugee status, although mentioned in the 1951 Convention (cf. Article 9), is not specifically regulated. In particular, the Convention does not indicate what type of procedures are to be adopted for the determination of refugee

> status. It is therefore left to each Contracting State to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure."

If however a State Party has not established any such procedures, cessation of refugee status pursuant to Article 1C(3) will in my judgment take place automatically. If it were otherwise the absence of a domestic procedure would frustrate the operation of the Article.

33. Here the only candidate for such a procedure consists in the Directives (and measures implementing them in the United Kingdom). Miss Broadfoot submits, however, that the Directives entered into force on dates after the grant of British citizenship to the sponsors in these cases, to which, accordingly, they have no relevance. It will be recalled that in appeal No. 0831 DL's father obtained British citizenship in 2004, and in appeal No. 0687 the sponsor obtained British citizenship on 22 March 2005. The Refugee Qualification Directive entered into force on 20 October 2004 (see Article 39, which I need not set out). The Member States were required to implement the Directive by 10 October 2006: Article 38. Directive 2005/85 entered into force on 2 January 2006 (Article 45). Implementation was to be effected by 1 December 2007 (Article 43). It is thus beyond argument that the Directives did not have effect in the Member States at the time when either sponsor was granted British citizenship. The municipal instruments which gave effect to them in this jurisdiction had not been made or enacted. The Asylum Policy Instructions cited in Mr Nicholson's skeleton argument had not been issued. The Practice Direction issued by the President of the Asylum and Immigration Tribunal (the AIT) on 9 October 2006, referred to by Mr Nicholson at paragraph 65 of his skeleton argument, has no relevant effect given the chronology of events in appeal no. 0687.

34. In the circumstances the Directives have no effect in these cases. The sponsors lost their refugee status by operation of law – Article 1C(3) of the Refugee Convention – upon the grant of British citizenship. It follows that the applicants had no claim to enter pursuant to paragraphs 352A/352D of the Immigration Rules but were confined to the ordinary family member rules, paragraphs 281 and 297, and subject therefore to those rules' requirements concerning maintenance and accommodation.

35. I should add that Miss Broadfoot does not accept that the sponsors' loss of refugee status would necessarily have been subject to any procedural requirements even if the Directives (and implementing measures) had been in force at the relevant time. She submitted that "arguably" (as she put it) Directive 2005/85/EC was never intended to apply to cases where refugee status was lost through naturalisation, and that the determination of SIJ Eshun in appeal no. 0687 (paragraphs 28 – 30) supports that position. It is unnecessary to determine the point for present purposes. We have not heard full argument on it and for my part I prefer to postpone it to a case in which it arises for decision.

36. In addressing the issues common to both appeals I have not so far referred to submissions made by Mr Chatwin for DL in appeal no. 0831. I intend no discourtesy; Mr Nicholson went first and bore the greater burden of the argument. For his part Mr Chatwin sought to build on a distinction between refugee status under the Convention, and the rights which a State Party accords to persons enjoying that status. I accept entirely that a State might accord more ample rights than the Refugee Convention

strictly requires. But that is not to say, of course that in any particular case a State has done so; and there is no trace of the United Kingdom having done so in the present context.

37. I turn to Issues (4), (5) and (6), relating to individual applicants.

Issue (4): If Part 11 of the Immigration Rules applies, can the ECO rely upon Part 9 of the Immigration Rules (general grounds for refusal of entry clearance) in considering an application for entry clearance made under Part 11?

38. This issue arises only in appeal no. 0831. It concerns paragraph 320(18) of the Immigration Rules, in which it appears in Part 9. I have set out the text above. In summary it provides that entry clearance or leave to enter is normally to be refused where the applicant has been convicted of an offence which would be punishable with imprisonment for a term of 12 months or more if the conduct constituting the offence had occurred in the United Kingdom. The ECO had relied on it refusing entry clearance to DL, having regard to his conviction in South Africa of an offence of indecent assault. SIJ Mather concluded (paragraph 12 of his determination) that paragraph 320(18) could only be relied on by the ECO in response to an application brought under any of the provisions contained in Parts 2 – 8 of the Rules. Paragraph 352 is as I have said contained in Part 11. Accordingly the SIJ held that paragraph 320(18) had no application. Miss Broadfoot submits that this was an error, and that paragraph 320(18) potentially applies to every application for entry clearance.

39. On my view of the case DL was in any event not entitled to rely on 352D but was confined to the ordinary family member rules. Accordingly if my Lords agree, this issue becomes moot. We have however heard the matter argued and I think it right to express a concluded view.

40. SIJ Mather appears to have placed some emphasis on the opening words of paragraph 320: "In addition to the grounds of refusal of entry clearance or leave to enter set out in Parts 2-8 of these Rules...". But far from supporting the view that paragraph 320 only applies to applications made under Parts 2 – 8, this expression tends rather to refute it. There is nothing in the text of the Rules to suggest that these additional grounds for refusal do not apply to Part 11 applications. In my judgment they do so apply, and the SIJ was wrong to conclude otherwise.

Issue 5: If paragraph 320(18) is engaged, does ECHR Article 8 nevertheless compel an outcome in DL's favour?

41. In appeal no. 0831 DL's Article 8 case has so far been considered only on the premise that his claim to enter the United Kingdom is correctly brought under paragraph 352D of the Rules – on my view of the law, a false premise. We have to consider the Article 8 case against the correct premise, namely that the ordinary family member rules applied to the claim.

42. IJ Goldfarb's Findings and Conclusions (paragraphs 23ff of her determination) addressed DL's circumstances, not least those of his conviction for indecent assault, in very great detail and the result arrived at in respect of the Article 8 claim was in DL's favour (paragraph 37). SIJ Maher concluded that IJ Goldfarb's reasoning on

Article 8 disclosed no error. I have considered whether that reasoning would apply with equal force if the case had been dealt with, as on my view of the matter it should have been, under paragraph 297 of the Rules. My initial view was that it was unrealistic to suppose that IJ Goldfarb's comprehensive treatment of the matter could be displaced by the need to place in the balance the accommodation and maintenance requirements of paragraph 297. But I have concluded that would be a mistaken approach. Those requirements are an inherent part of the Secretary of State's policy concerning family members' claims to enter the United Kingdom. I cannot say that no reasonable Immigration Judge could reject DL's Article 8 case if the claim to enter were being considered under the appropriate rule.

43. In those circumstances, DL's case should in my judgment be remitted to the AIT for his Article 8 claim to be reconsidered.

Issue 6: Did the Tribunal err in law in their assessment of Article 8 in ZN's case?

44. The first Immigration Judge, IJ Wiseman (paragraphs 108ff of his determination), considered the Article 8 claim by reference to the five steps, or questions, set out by Lord Bingham at paragraph 17 in *Razgar* [2004] 2 AC 368, which with respect I need not set out. SIJ Eshun considered IJ Wiseman's determination betrayed no error of law. IJ Wiseman concluded, looking at the family as a whole, that they could continue family life in Pakistan. Mr Nicholson submits that there is no evidence that his clients (who are Afghan nationals) have any legal immigration status in Pakistan. But there was evidence (paragraphs 2 and 9) that ZN had gone to Pakistan about eight years before her application for entry clearance in October 2005 – thus in about 1997. The children went to school in Pakistan for six years (paragraph 11). Her mother-in-law and six brothers-in-law lived in Pakistan. I accept Miss Broadfoot's submission that there was a proper evidential basis for the IJ's finding that the sponsor could resume family life with the applicants in Pakistan.

45. Other points which were made do not in my judgment avail the applicants. A claim that the elder children's cases should have been considered under the Secretary of State's family reunion policy does not heighten the bar of the Article 8 case. And there is nothing in the suggestion that the House of Lords' decision in *Beoku-Betts* [2008] UKHL 39 might produce a different result on Article 8: as I have said IJ Wiseman considered the family unit as a whole and concluded that its members' family life might be resumed in Pakistan. That finding was open to him on the evidence.

CONCLUSION

46. I would allow the ECO's appeal in 0831, and remit the case to the AIT for the Article 8 claim to be reconsidered. I would dismiss the applicants' appeal in 0687.

Lord Justice Rix:

47. I agree.

Lord Justice Wilson:

48. I also agree.