Upper Tribunal
(Immigration and Asylum Chamber)

FH (Post-flight spouses) Iran [2010] UKUT 275 (IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 13 July 2010

Before

Lord Justice Sedley
Mr C M G Ockelton, Vice President
Senior Immigration Judge Perkins

Between

FH

Appellant

and

ENTRY CLEARANCE OFFICER, TEHRAN

Respondent

Representation:

For the Appellant: Mr A Mahmood and Miss N Ismail, instructed by IAS
For the Respondent: Mr S Ouseley, Home Office Presenting Officer

1. *The Immigration Rules make no provision for the admission of post-flight spouses of refugees with limited leave. The Rules should be changed. In the mean time it is most unlikely that it will be proportionate to refuse the admission of the spouse of a refugee where all the requirements of paragraph 281 are met save that relating to settlement.*

2. *Immigration Rules cannot be the subject of a declaration of incompatibility under s.4 of the Human Rights Act 1998, and in any event, a Tribunal has no power to make such a declaration.*

DETERMINATION AND REASONS

1. This is the judgement of the Tribunal.

2. The appellant is a national of Iran. She appealed to the Asylum and Immigration Tribunal against the decision of the respondent on 4 March 2009 refusing her entry clearance to the United Kingdom as the spouse of the sponsor, who is also a national of Iran, and is in the United Kingdom with leave as a refugee. Immigration Judge Rose dismissed her appeal. The appellant sought and obtained an order for reconsideration, which under the provisions of paragraph 4 of Schedule 4 to the Transfer of Functions of the Asylum and Immigration Tribunal Order 2010 takes effect as a grant of permission to appeal to this Tribunal.

The facts

3. The sponsor was born in 1980. He came to the United Kingdom in 2002 and claimed asylum. Following an appeal, he was in due course recognised as a refugee on the basis of his conversion to Christianity, and granted limited leave to remain in the United Kingdom. That grant was made on 15 May 2006 and was for (nearly) five years: it expires, for some reason, on 11 May 2011. Under the terms of the Refugee Convention he was also issued with a Refugee Travel Document.

4. The appellant was born in 1976. She and the sponsor had known each other since 1999, and had been in contact since the sponsor left Iran. In 2008 they both travelled to Turkey, and were married there on 16 November 2008. They then each returned to their countries of usual residence. The appellant applied on 4 February 2009 for a visit visa, which was refused; she then applied on 17 February for a settlement visa as the sponsor's wife. It is convenient to indicate at this point that the Immigration Judge found that the marriage was valid, genuine and subsisting; and Mr Ouseley indicated to us, on the basis of the evidence that has been made available at various stages during the course of this appeal, that there was no doubt that, at the date of the decision and now, the sponsor's financial circumstances were such that the appellant would be maintained and accommodated adequately without recourse to public funds in the manner required by paragraph 281 of the Statement of Changes in Immigration Rules, HC 395 insofar as that paragraph applies to the appellant.

The Immigration Rules

5. We turn, then, to the Immigration Rules. The Rules which appear to touch the appellant's situation most closely are paragraphs 281 and 352A. We set them out below omitting parts which are certainly not relevant to the present appeal.

> "281. The requirements to be met by a person seeking leave to enter the United Kingdom with a view to settlement as the spouse of a person present and settled in the United Kingdom or who is on the same occasion being admitted for settlement are that:
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> (i) (a) the applicant is married to a person present and settled in the United Kingdom or who is on the same occasion being admitted for settlement ….
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> (ii) the parties to the marriage have met; and
>
> (iii) each of the parties intends to live permanently with the other as his or her spouse and the marriage is subsisting; and
>
> (iv) there will be adequate accommodation for the parties and any dependents without recourse to public funds in accommodation which they own or occupy exclusively; and
>
> (v) the parties will be available to maintain themselves and any dependants adequately without recourse to public funds ….
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> 352A. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the spouse of a refugee are that:
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> (i) the applicant is married to a person granted asylum in the United Kingdom; and
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> (ii) the marriage 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 Nations 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 and the marriage is subsisting; …."

6. Those familiar with the Immigration Rules will be aware that paragraph 281 is the normal route for the admission of a foreign spouse. Paragraph 352A arises from the United Kingdom government's acceptance of a principle of family reunion for refugees. As will be seen from its terms, paragraph 352A is limited to the spouses of those who have been recognised as refugees; it differs also from paragraph 281 in that there is, for spouses of refugees, no financial requirement: it is not necessary to show that adequate maintenance and accommodation will be available without recourse to public funds. The phrase "a person granted asylum" in paragraph 352A(i) was the subject of authoritative interpretation by the Supreme Court in ZN (Afghanistan) and others v Entry Clearance Officer [2010] UKSC 21. The Court was

there concerned with the family members of an individual who, after being granted asylum, had subsequently attained British citizenship. The Secretary of State's argument was that the provisions of paragraph 352A were no longer applicable and that the sponsor's family members should seek admission under the normal provisions relating to those present and settled in the United Kingdom (in other words, for a spouse, paragraph 281, with its requirements as to maintenance and accommodation). The Supreme Court rejected that argument, holding that the grant of asylum was a historical fact and that a person who had been granted asylum did not cease to be "a person granted asylum" if his status was no longer that of a refugee but that of a British citizen.

7. That decision means that a person who was the sponsor's spouse before he left his own country continues to benefit from the more generous provisions of paragraph 352A despite any change in the sponsor's status in the United Kingdom. It does not assist the appellant in the present case, however, because she was not the sponsor's spouse before he left Iran.

8. Paragraph 281 does not assist the appellant either. Although, as we have said, there is no dispute about the nature of the marriage, and the appellant's ability to meet the financial requirements of paragraph 281, the difficulty here relates to the requirement in the opening words of paragraph 281 that she be intending to join a person "present and settled in the United Kingdom". That phrase, for the purposes of the Immigration Rules, is defined in paragraph 6, which, so far as relevant for present purposes, reads as follows:

> "'settled in the United Kingdom' means that the person concerned:
>
> (a) is free from any restriction on the period for which he may remain…
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> (b) is either:
>
> (i) ordinarily resident in the United Kingdom without having entered or remained in breach of the immigration laws; or
>
> (ii) despite having entered or remained in breach of the immigration laws, has subsequently entered lawfully or has been granted leave to remain and is ordinarily resident."

9. Subparagraphs (a) and (b) are cumulative requirements. As we have said, the sponsor has limited leave to remain, until May next year. He is thus not "settled" for the purposes of paragraph 281, and it follows that the appellant is not entitled to admission under that paragraph.

10. Neither paragraph 281 nor paragraph 352A appears to admit of any argument as to ambiguity. It is not for the Tribunal to write or rewrite Immigration Rules. It follows that the appellant cannot succeed under the Immigration Rules.

Comparable situations

11. The Secretary of State recognises that "post-flight spouses", such as the appellant, cannot qualify under the Immigration Rules. In that respect, they are treated differently not only from pre-flight spouses (paragraph 352A) and the spouses of those settled in the UK (paragraph 281), but also from the spouses of others granted temporary leave in the United Kingdom. The spouses of students, those working in the United Kingdom, businessmen, artists, ministers of religion and so on may obtain leave in the United Kingdom under paragraphs 76 or (principally) 194, even though the sponsor has only limited leave, and even though the marriage took place after the sponsor came to the United Kingdom. From that point of view, therefore, refugees are in a particularly disadvantageous position. If, after leaving their country of nationality, they contract a marriage to a person who is not a British (or EEA) national, the Immigration Rules do not provide for the couple to live together in the United Kingdom. It is, as we remarked at the hearing, odd that the refugee should be disadvantaged in that way, because, unlike other persons with limited leave in the United Kingdom under the Rules, the refugee is a person who cannot return home to enjoy married life there.

12. The disadvantage which we have identified is if anything rendered even more surprising by ZN (Afghanistan), to which we have already referred. The Immigration Rules themselves provide for the pre-flight spouse and family of a refugee to continue to be so treated even after the refugee himself is "settled". It begins to look as though the post-flight spouse of a refugee is indeed being treated in a particularly adverse way.

13. The Secretary of State's position, put formally on behalf of the Entry Clearance Officer before us by Mr Ouseley, and similarly to the Court of Appeal in A (Afghanistan) v SSHD [2009] EWCA Civ 825, is that the Secretary of State is entitled to make Immigration Rules in the terms we have identified. In particular, the Secretary of State is entitled to distinguish between pre-flight and post-flight families of refugees, between those who are "settled" in the UK and those who are not, and between the types of temporary presence in the UK which should attract the right to have a spouse here too. When the point arose in A (Afghanistan), the Court of Appeal described that case as involving "important policy issues". The Secretary of State asked for time to deal with them in full. Time was granted, but no substantive answer was raised in time for the appellant to deal with it. Indeed, it was very shortly before the hearing in the Court of Appeal on 23 July 2009 that the Secretary of State sought, in the words of Hooper LJ at [49]:

> "without the benefit of a respondent's notice and after very considerable delay, to present a substantial argument, not put before the AIT, that there is a public interest in drawing a distinction between refugees and other persons granted leave to remain for a limited period".

In the circumstances, the court refused to allow the Secretary of State to develop that argument. It noted that the AIT had been unable to identify the public interest on the basis of the material before it. It allowed the appellant's appeal, but Hooper LJ noted at [52]:

> "I accept that the public interest arguments now submitted may lead to a Tribunal or Court in the future agreeing that in a case like the present it would not be a violation of Article 8 to prevent the spouse from joining the refugee. However, it would be desirable for that issue to be considered first by the AIT, given the specialist knowledge of its members. It would not be desirable for the issues to be considered in this court for the first time."

14. The present appeal, so far as we are aware, is the first opportunity that the Tribunal has had to consider the matter. It is clear that Mr Ouseley has endeavoured to obtain all the information he could, in order to put the Secretary of State's case before us in full. Without any disrespect to Mr Ouseley, we think it is fair to say that his success has been only moderate. In his written skeleton he points out that the appellant does not qualify under paragraph 352A or paragraph 281, and continues as follows:

> "The issue of settled status
>
> Granting refugees limited leave rather than settlement in the first instance allows the refugee a period of integration and time for reflection in case the situation in the country of origin improves sufficiently for a return to be possible. It also allows for any cases where asylum status has been gained fraudulently to be acted upon more effectively and, at the end of the five-year period, for UKBA officials to review whether the situation in the refugee's country of origin has improved sufficiently for there to be no further need for protection. During their period of leave refugees are permitted to be joined by the members of their existing family and are encouraged to find work and participate in local communities. This seeks to ensure that they make a full contribution to the UK while here, and that the have the skills to benefit their country of origin if they return home. Refugees without a pre-flight family who subsequently marry and wish to commence a family life in the UK will clearly not be able to return to their country of origin to do so. That, by and large, means that anyone seeking leave to enter or remain to join a refugee a post-flight spouse will not be a refugee, and the UK will not have the same obligations towards them. There are other categories of immigrant (e.g. work permit holders and students) whom UK wishes to attract to the UK for the contribution they make to the economy and the education sector. Not to allow them to bring family members here could detract from that goal. In relation to refugees, the Rules give effect to the UK's international obligations to offer protection, but do not actively seek to encourage asylum seekers to come to the UK."

15. In the course of his submissions, Mr Ouseley was challenged as to the final sentiment. He accepted that it was not the task of the Secretary of State to encourage or discourage refugees, but to process their applications, in conformity with the United Kingdom's international obligations.

16. With that modification, however, Mr Ouseley's written skeleton, and his brief oral expansion of it, is evidently the best the Secretary of State can offer, despite the passage of some 15 months since the application for an adjournment in A (Afghanistan) in order to deal with this very issue.

17. In A (Afghanistan), the Court of Appeal noted that the Tribunal had said this:

> "Until August 2005, those recognised as refugees got indefinite leave to remain, and they could by joined by their spouses either by way of Rule 352A, which was inserted from 18 September 2002, or, if they were not married before leaving their country to seek asylum, by way of Rule 281. When the practice of granting indefinite leave to refugees ended in August 2005, it either was or was not appreciated that the second of these routes was now closed off."

18. The Tribunal (as cited by Hooper LJ at [47]), continued as follows:

> "17. It may be that the reason why refugees with limited leave cannot generally be joined by their spouses whom they married after coming here to seek asylum is that this situation falls outwith the principle of refugee family reunion, namely that a family which has been sundered because one of its members had to flee persecution ought to he reunited in the country of refuge. But why should a refugee who did not found a family before fleeing persecution be in a worse position than a businessman who may have got married abroad during the currency of his limited leave, and is not prevented by the Rules from being joined thereafter by his dependent spouse? It can hardly be said that the former enjoys a more precarious immigration status than the latter. Both may apply for indefinite leave on the basis of five years' residence, and while refugee status is said to be subject to 'active review' at this point, in practice indefinite leave is nearly always granted. It is nearly always granted to businessmen too, but likewise that is not guaranteed.
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> 18. What then is the public interest being served by preventing refugees like the sponsor from being joined by their spouses? No doubt it would be unduly cynical to suggest that asylum seekers may thereby be deterred from coming here in the first place. Or can it be that the present position results from sheer inadvertence on the part of the Home Office? We have no way of knowing. ... We at any rate cannot identify a public interest in preventing refugees like the sponsor from being joined by spouses whom they can maintain and accommodate adequately, when other categories of immigrant who are here with limited leave, and who may not be intending to stay permanently, can be joined by theirs. Indeed, there seems to be an inconsistency between delaying family reunion for one class of refugee and encouraging all refugees to integrate fully into the community once they have been granted asylum, a process for which the Home Office provides financial and other assistance."

19. Mr Ouseley told us that he was still unable to say whether the consequence for spouses of the change of policy was intentional or unintentional. The position as it is before us is that, as we have indicated, the appellant and other post-flight spouses seem to be the subject of particularly disadvantageous treatment; no public interest in that treatment has been identified; the Secretary of State is not even able to say whether the difference is intentional; but the effect of the Rules is that the difference undoubtedly exists.

Resolution

20. Before us, both parties agreed that it was open to the Tribunal to allow the appellant's appeal on the basis that, in the particular circumstances of her case, to refuse entry clearance would be a breach of her protected rights under the European Convention on Human Rights. Mr Ouseley made no remotely spirited attempt to suggest that the appeal should not be allowed simply on the basis that,

given the Immigration Judge's findings of fact, it would be disproportionate to refuse entry clearance in her case. He argued that, given that post-flight spouses cannot qualify under the Immigration Rules, they should be subject to an individual assessment on an Article 8 basis. It was always open to the Secretary of State or, if necessary, the Tribunal, to produce a decision in an individual applicant's favour if the facts warranted it.

21. Mr Mahmood drew his arguments from a rather wider spectrum. As well as an argument based on Article 8 alone, he submitted that the treatment of post-flight spouses infringed Article 14 (discrimination) taken with Article 8, and Article 12 (the freedom to marry). He suggested both originally and in a supplementary skeleton argument produced during the hearing, that the Tribunal should make a "declaration of incompatibility" of the existing Immigration Rules with the European Convention on Human Rights, because of the discrimination against post-flight spouses to be found in the Immigration Rules read as a whole.

22. It is difficult to understand quite what Mr Mahmood meant by "declaration of incompatibility" in this context. The phrase has a precise meaning under Section 4 of the Human Rights Act 1998, but that relates to a declaration made by a court no lower than the High Court, that a provision of primary legislation is incompatible with a Convention Right. Although this Tribunal is a superior court of record, it is not the High Court; and, as we understand it, there is no suggestion in Mr Mahmood's skeleton argument that any provision of primary legislation is incompatible with a Convention Right. His arguments relate to the Immigration Rules, which are not even "subordinate legislation" within the meaning of the Human Rights Act (see the definition in Section 21).

23. So far as the present case is concerned, it is not suggested that there is any country in the world other than the United Kingdom, where the appellant and the sponsor can live together as husband and wife. The appellant meets all the requirements of paragraph 281, save that relating to the sponsor's status in the United Kingdom. No argument justifying her exclusion, on grounds that her exclusion would in the circumstances be proportionate, has been adduced by the respondent or on his behalf. We have no hesitation in saying that in this case, the Article 8 rights of the appellant and the sponsor demand that she be granted entry clearance. We shall therefore allow this appeal.

24. Can we go further? It does no harm to remind ourselves that we should be very cautious about using the European Convention on Human Rights to cover perceived defects in the Immigration Rules. Rules are essentially general, whereas rights are essentially individual. To that extent, we have considerable sympathy with Mr Ouseley's argument that, while the Rules are as they are at present, an individual post-flight spouse's remedy is in an individual assessment of the relevant factors under Article 8.

25. But, on the other hand, the appellant's situation is by no means an unusual one, and it arises from provisions of the Rules for which there appears to be no justification. Unless there is some justification, of which we have not been made aware, of the

Rules' treatment of post-flight spouses, we think that the Secretary of State ought to give urgent attention to amending the Rules, by extending either paragraph 281 or, (perhaps preferably) paragraph 194, so as to extend to the spouses of those with limited leave to remain as refugees. In the mean time, it seems to us that although a decision based on Article 8 does have to be an individual one in each case, it is most unlikely that the Secretary of State or an Entry Clearance Officer will be able to establish that it is proportionate to exclude from the United Kingdom the post-flight spouse of a refugee where the applicant meets all the requirements of paragraph 281 save that relating to settlement.

26. For the reasons we have given, we find that the Immigration Judge materially erred in law. We substitute a determination allowing the appellant's appeal, and direct that entry clearance in the usual form issue to her.

C M G OCKELTON
Vice President of the Upper Tribunal,
Immigration and Asylum Chamber