Easter Term
[2010] UKSC 21
On appeal from: [2008] EWCA Civ 1420

JUDGMENT

ZN (Afghanistan) (FC) and Others (Appellants) *v* Entry Clearance Officer (Karachi) (Respondent) and one other action

before

Lord Phillips, President
Lord Rodger
Lord Collins
Lord Kerr
Lord Clarke

JUDGMENT GIVEN ON

12 May 2010

Heard on 15 February 2010

Appellant	*Respondent*
Manjit Gill QC Edward Nicholson Sophie Weller (Instructed by Fisher Meredith)	Lisa Giovannetti Samantha Broadfoot (Instructed by Treasury Solicitor)

LORD CLARKE (delivering the judgment of the court):

Introduction

1. This appeal raises a short question on the true construction of the Immigration Rules, House of Commons Paper 395 ('HC 395'). The question is what rules apply to family members seeking entry to the United Kingdom, where the sponsor has been granted asylum and has subsequently obtained British citizenship. The respondent Entry Clearance Officer ('ECO') says that they must satisfy the ordinary rules dealing with applications by family members, notably paras 281 (spouses and civil partners) and 297 (children) of HC 395. The appellant family members say that that is wrong and 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 paras 352A (spouses and civil partners) and 352D (children) of HC 395. The distinction is important to the family because a person entitled to apply under para 352A or 352D does not have to meet the requirements concerning maintenance and accommodation imposed by paras 281 and 297.

The facts

2. The appellants are nationals of Afghanistan. The first appellant, ZN, married her husband ('the sponsor') in Afghanistan in 1979. ZN and the sponsor are the parents of the other six appellants, who were born between 1985 and 1998. The sponsor fled Afghanistan in order to seek international protection and arrived in the United Kingdom on 8 August 1999. At some time in 1999 the family went to Pakistan, where they have extended family members. The sponsor was granted indefinite leave to remain in the United Kingdom as a refugee on 13 December 2001. Since 2002 the sponsor has made a number of attempts to bring his family to the UK to join him. None of these is relevant to the resolution of the issues in this appeal. The sponsor's application for British citizenship was granted on 22 March 2005.

3. On 15 October 2005 the appellants made a fresh application for entry clearance as, respectively, the spouse and children of a person granted asylum. It was stated that the appellants were seeking entry clearance under paras 352A and 352D of HC 395. On 7 July 2006 the ECO refused the applications under the rules relating to family members, namely paras 281 and 297 of HC 395. He held that they could not meet the accommodation and maintenance requirements imposed by sub-paras (iv) and (v) of paras 281 and 297. The appellants appealed against

those refusals to the Asylum and Immigration Tribunal ('the Tribunal') on the ground that ZN's application should have been considered under para 352A as the sponsor's wife and that four of the children's applications should have been considered under para 352D. The other two children, the sixth and seventh appellants, were by that time over eighteen years of age. All the appellants also relied upon their rights protected by Article 8 of the European Convention on Human Rights ('ECHR').

The appeals

4. The appeals were heard by IJ Wiseman on 23 July 2007 and were dismissed on 9 August 2007. He held that the sponsor and ZN had been married in 1979, which had been in dispute, and that the remaining appellants were their children. He also found that the sponsor had at all material times been in poor health, suffering from heart disease and osteoarthritis, and must on any showing be significantly handicapped in the labour market. He held that paras 352A and 352D did not apply because the sponsor had acquired British nationality at the time of the ECO's decision. He rejected the appellants' case under Article 8 on the basis (1) that the decision did not interfere with their right to respect for their private life because the sponsor could return to Pakistan and resume family life there, and/or (2) that any such interference was proportionate to the interests of immigration control and/or (3) that the decision was in accordance with the law because the appellants had the ability to comply with the immigration rules by various means.

5. The appellants sought and obtained an order for the reconsideration of that decision but on 8 February 2008 SIJ Eshun held that IJ Wiseman had made no error of law and that the decision therefore stood. On 17 May 2008, on consideration of the papers, Buxton LJ gave permission to appeal to the Court of Appeal on the basis that the issue as to the extent of paras 352A and 352D was important.

6. The appeal was heard with another appeal in the case of *ECO (Pretoria) v DL (DRC)*, in which the appellants had succeeded. This Court is not concerned with that case. The Court of Appeal considered three issues as follows:

> "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?"

7. Laws LJ, with whom Rix and Wilson LJJ agreed, considered issue 3 first. He restated the question as being whether the sponsor must enjoy refugee status at the time his spouse or child seeks to join him under the paras 352A and 352D. He held that the references to 'asylum' and 'refugee' were directed to a status of the sponsor that was current and accepted. He so held as a matter of construction of the language (at paras 18 to 20), which he said was entirely clear (at para 25), because any other result would lead to absurdity (at para 21) and because there are no considerations going the other way (at paras 22 to 24).

8. In the light of that conclusion, he considered issues 1 and 2 together, which he restated as being whether a person who has been recognised as a refugee, but thereafter assumes the nationality of his host country, remains a refugee within the meaning of the Refugee Convention and, if not, whether his status ceases automatically or only by a procedure as contemplated by EC Directives 2004/83 and 2005/85 ('the Directives').

9. Laws LJ answered the first of those questions in the negative (at paras 29 to 31). As to the second, he held that it was open to a State Party to the Refugee Convention to prescribe the procedures under which cessation of refugee status pursuant to Article 1C(3) would have effect but that, if a State Party had not done so, cessation would occur automatically (see para 32). He then considered whether the Directives laid down such a procedure and held that they did not (see paras 33 to 35).

10. In a judgment handed down on 18 December 2008 the Court of Appeal accordingly rejected the appellants' submission that paras 352A and 352D applied. It also rejected their case under Article 8 of the ECHR (at paras 44 and 45). It refused permission to appeal but this Court subsequently gave permission.

Is this appeal academic?

11. The circumstances have recently changed from those that existed when the case was before the Court of Appeal. On 27 January 2010 the UK Border Agency wrote to the appellants' solicitors saying that the position under Article 8 had been reconsidered and that it was accepted that the Immigration Judge's decision was not sustainable, principally because he did not take the family's recent history into account when considering whether it was reasonable to expect the sponsor to relocate to Pakistan. There followed some correspondence between the parties. The upshot was that the Treasury Solicitor ('TSol') wrote on 3 February to say that the appellants would be granted three years' discretionary leave to remain without any restrictions on employment or recourse to public funds. The TSol further wrote on 9 February to say that, if the appellants were successful on issues one and/or two they would, "due to the particular circumstances, and subject to the terms of the judgment" be granted indefinite leave to enter or remain, depending upon whether the person concerned was in the United Kingdom by then.

12. It follows from the exchanges between the parties that the appeal against the decision under Article 8 is academic but that the appeal on "issues one and/or two" is not. Those issues are as stated in the statement of facts and issues, as follows:

> "1) Did the Court of Appeal err in its construction of paragraphs 352A and 352D of HC 395 and, in particular, did it err in concluding that the said paragraphs apply only to the family members of a person who has the status of a refugee at the time those family members apply to join him or her in the UK?
>
> 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; or does his status cease automatically upon acquisition of that nationality or only by a procedure such as that contemplated by Directives 2004/83 and 2005/85?"

13. The correspondence thus shows that if, for example, this Court were to hold that the Court of Appeal erred in holding that paras 352A and 352D did not apply to the appellants because their sponsor had become a British citizen on 22 March 2005 and was thus a British citizen when they made their application for entry clearance on 15 October, they would be granted indefinite leave to enter or remain, depending upon whether the particular appellant was in the United Kingdom by then. That position was subject only to the terms of the judgment.

14. When this appeal came on for hearing on 15 February, this Court accepted that there is a significant difference between the position, on the one hand, of a person to whom paras 352A or 352D apply and, on the other hand, of each of the appellants as set out in the letter of 3 February. It is true that in each case there would be no restrictions on employment or recourse to public funds. However, in the former case the appellants would have indefinite leave to remain or enter, whereas in the latter case they would only have three years' discretionary leave to remain. In these circumstances the Court decided that the appeal was not academic in the case of all the appellants other than the sixth and seventh appellants and heard argument on the true construction of paras 352A and 352D. The sixth and seventh appellants cannot succeed under para 352D because they were over 18 at the relevant time. They do however have the benefit of the concession of three years' discretionary leave to remain granted under Article 8 of the ECHR.

The decision of the court

15. Having heard argument directed to paras 352A and 352D, the Court considered the submissions and decided to allow the appeal. It said that it would give its reasons later. These are the reasons of the Court for reaching that conclusion.

The Refugee Convention and the Immigration Rules

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

> "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a 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".

Article 1F provides:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

17. As Laws LJ observed, the ordinary rules dealing with applications by family members seeking leave to enter to join a sponsor are to be found in Part 8 of HC 395. Para 281 (as it stood at the material time) includes a number of specific requirements. Critically for present purposes they include requirements (iv) and (v):

> "(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;"

There are similar provisions relating to children under 18 in para 297, which, like para 281, is set out by Laws LJ at his para 9.

18. For present purposes the critical paras of HC 395 are paras 352A and 352D because they deal with applications to join relations who have been granted asylum here. At the material time they provided:

> "352A. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the spouse or 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 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 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.
>
> ….
>
> 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 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

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

19. Para 352E provided:

"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."

The question

20. The essential question is the third question considered by the Court of Appeal and the first issue in the statement of facts and issues set out at paras 6 and 12 above respectively. It is whether paras 352A and 352D apply to a person who has been recognised as a refugee and granted asylum but has become a British citizen before the date of the relevant application for, or perhaps decision as to, entry clearance.

Discussion

21. The answer to the question depends upon the true construction of paras 352A and 352D. The correct approach to such a question in the context of the Immigration Rules has recently been considered in both the House of Lords and this Court. In *Odelola v Secretary of State for the Home Department* [2009] UKHL

25, [2009] 1 WLR 1230, Lord Hoffmann said at para 4 that the correct interpretation:

> "depends upon the language of the rule, construed against the relevant background. That involves a consideration of the immigration rules as a whole and the function which they serve in the administration of immigration policy."

In *Ahmed Mahad v Entry Clearance Officer* [2009] UKSC 16, [2010] 1 WLR 48, Lord Brown said at para 10:

> "The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy. ... the court's task is to discover from the words used in the Rules what the Secretary of State must be taken to have intended."

See also per Lord Kerr at para 51.

22. The critical words of para 352A (omitting the references to civil partnership for simplicity) are these:

> "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:
>
> (i) the applicant is married to … a person granted asylum in the United Kingdom; …"

There is also a reference to "the person granted asylum" in sub-para (ii). The respondent ECO points to the necessity for the applicant to be the spouse "of a refugee" and submits that that indicates that he or she must be a refugee at the time of the application. The ECO further relies upon para 352E, which refers to "the child of a refugee".

23. The appellants, on the other hand, say that the opening words of para 352A make it clear that the rule is identifying the requirements to be met by an applicant

"seeking leave to enter or remain in the United Kingdom as the spouse … of a refugee" and that the sub-paras simply identify the criteria to be satisfied by the applicant. The only relevant requirements, which are contained in sub-paras (i) and (ii) respectively, are that the applicant must be married to a person "granted asylum" and that the marriage did not take place after "the person granted asylum" left his former habitual residence in order to seek asylum. The appellants point to the fact that the rules do not say when the person must have been granted asylum. Nor do they say that such a person is not a refugee for this purpose once he or she becomes a British citizen.

24. Para 352D contains a curiosity. When it was introduced it was in the same terms as para 352A. However, with effect from 18 September 2002, the words "in order to join or remain with the parent who has been granted asylum" replaced the original phrase "as the child of a refugee". It is submitted on behalf of the appellants that that is significant because it shows that the expression "the child of a refugee" in the original para 352D could not have referred to the status of the refugee at the time of the application for, or decision as to, entry, at any rate unless it was intended to have a different test for 'refugee' in para 352D from the test in para 352A, which seems very unlikely.

25. It is further submitted that in the new para 352D, the position is clear. The expression "parent who has been granted asylum" appears, not only in the first words of the para but also in sub-para (i), where the applicant must be "the child of a parent who has been granted asylum". Similarly, by sub-para (iv) the applicant must have been "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". It is submitted that para 352D makes it clear that part of the purpose of the rules was to protect the refugee's family unit as recommended in the Final Act of the Conference that adopted the Refugee Convention. Reliance in this regard is placed on Chapter VI, entitled "The Principle of Family Unity", in the UN High Commissioner for Refugees' Handbook on Procedures for Determining Refugee Status under the Refugee Convention and the 1967 Protocol.

26. The reasoning of the Court of Appeal accepting the ECO's submissions can be seen in paras 18 to 20 of Laws LJ's judgment. The key to his analysis is in para 18:

> "18. … 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'."

27. The Court is not persuaded by that approach. In particular, it is not persuaded that the difference between the language of paras 352D and 352A can be explained by reference to the familiar use of the perfect tense to denote that the state of affairs is still continuing. This involves reading the expression "the parent who has been granted asylum" as if it read "the parent who has been granted asylum and remains a refugee", which it does not.

28. The Court regards the construction advanced on behalf of the appellants as the more natural meaning of the words used. The grant of asylum is a specific event. This is underlined by the words of sub-para (i) of para 352A, which simply says that the applicant must be married to "a person granted asylum" and thus naturally refers to a particular historic event and not to an existing condition. See also sub-para (ii).

29. In para 19 Laws LJ made the point that 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. He added that it was plain that those who drafted the 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. The Court entirely accepts that that is so. It further accepts that the term "has been granted asylum" is used in para 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. Finally, it accepts that the expression "person granted asylum" in sub-paras 352A(i) and (ii) has the same effect.

30. However, these conclusions are not inconsistent with the appellants' case. As the Court understands it, it is accepted that a person is not granted asylum until the Secretary of State has formally granted it. In any event, whether it is accepted or not, in the instant case it could not properly be argued that the sponsor had been granted asylum until he was given indefinite leave to remain as a refugee on 13 December 2001. Until then he was not a person granted "asylum" within the meaning of the rules.

31. In para 20 Laws LJ gave a particular example of his conclusion that the indications are that the references to "asylum/refugee" in 352A, 352D and 352E are directed to a status of the sponsor which is current and accepted. It was that the requirements in sub-paras (iii) and (v) of paras 352A and 352D respectively that 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" suggests that the rule is directed to current status.

32. The Court does not agree that it is appropriate to draw the inference sought to be drawn from those sub-paras. They apply, not to the sponsor, but to the applicant. The fact that, by Article 1F, the Refugee Convention does not apply to an applicant where there are serious reasons for considering that he or she has committed a serious crime of the kind identified in sub-paras (a) or (b) or has been guilty of acts contrary to the purposes and principles of the United Nations within the meaning of (c), is not, in the opinion of the Court, relevant to the question whether a sponsor is no longer a "refugee" within the meaning of para 352A or para 352E or whether he is a "parent who has been granted asylum" within the meaning of para 352D.

33. At para 21 the Court of Appeal accepted a submission made to it that any other construction would lead to absurd results. The plainest instance was said to be where a person's refugee status has been cancelled because it had been obtained by fraud. On the appellants' argument he would still be a person "who has been granted asylum" and his relatives could rely on the special provisions of paras 352A *et seq*. However, in the opinion of this Court it is implicit in the rules read as a whole that a person would not be treated as having been granted asylum for the purpose of the rules if he or she had obtained the grant by fraud.

34. At paras 22 to 24 the Court of Appeal rejected a number of policy points made on behalf of the appellants. However, it ultimately did so on the basis that, as Laws LJ put it at para 25, the language of paras 352A and 352D is clear. This Court has reached a different conclusion on the language of the rules. It has done so for the reasons given above.

35. As to policy, it may well be that it would be possible to produce a coherent policy argument for the view that applications for leave to enter or remain in the United Kingdom made by the spouse or children of those granted asylum should be dealt with under paras 352A and 352D until the other spouse or parent became a British citizen but that thereafter such applications should be dealt with under paras 281 and 297. It can be said with force that all applications by a spouse or child to join or remain with a British citizen should be subject to the same rules. On the other hand there are coherent policy reasons for applying the same principles to applications to join or remain with a spouse or parent who has been

granted asylum both before and after such a sponsor has become a British citizen. An important factor in this regard is that referred to in para 25 above, namely that one of the purposes of the Refugee Convention is to protect and preserve the family unit of a refugee. The need for protection for a member of such a family unit is likely to be the same whether the sponsor obtains British citizenship or not. Moreover, the risk of persecution may be such that the need for protection for family members is particularly stark.

36. The question is what policy is encapsulated in the rules, which is essentially a matter of construction of the language of the rules. For the reasons given above the Court has reached a different conclusion from the Court of Appeal. It agrees that the sponsor must have been granted asylum in order to be (1) a "refugee" within the meaning of the opening words of para 352A and of para 352E; (2) a "person granted asylum" within sub-paras (i) and (ii) of para 352A and sub-para (iv) of para 352D; and (3) a "person who has been granted asylum" within the opening words of para 352D.

37. However it does not agree that there is an additional requirement, namely that the "person granted asylum" or the "person who has been granted asylum" must not have become a British citizen before the application for entry clearance is made, or perhaps determined. There is no express language to that effect and it is not, in the judgment of the Court, implicit in the language used. The fact that British citizenship has been granted to the spouse or parent does not change the fact that the spouse or parent is a person granted asylum or a person who has been granted asylum.

38. The Court has reached this conclusion as a matter of construction of the rules. In these circumstances there is no need for the Court to analyse the decisions of the Tribunal. It is sufficient to note that there have been a number of decisions of the Tribunal which reached a conclusion consistent with that stated above: see eg *Case no OA/27245/2007, 1 September 2008 Joined Appeals OA/45531, OA/45526/2007* and *OA/45522/2007, 27 June 2008*, and *YS and YY, 16 September 2008* [2008] UKAIT 00093.

39. It was for the reasons stated above that the Court decided that the appeals of the first to fifth appellants should be allowed on the footing that para 352A applied to the first appellant as the sponsor's wife, and that para 352D applied to the second, third, fourth and fifth appellants as the sponsor's children who were under 18 at the relevant time. As the Court reads the letter of 9 February 2010, it follows that in the light of this judgment they will be granted indefinite leave to enter or remain without any restrictions on employment or recourse to public funds. The appeals of the sixth and seventh defendants, which relied only upon Article 8 of the ECHR, became academic because of the concession referred to above, namely

that they would be granted three years' discretionary leave to remain without any restrictions on employment or recourse to public funds.

40. In the light of the decision made at the hearing on the construction of paras 352A and 352D, the Court did not hear oral submissions on any of the other issues raised in the written cases. In particular, the Court did not hear argument on the position which would have obtained if, contrary to the Court's conclusion, paras 352A and 352D would only have applied if they required that the sponsor remain a refugee after being granted British citizenship. This would have involved argument on issues one and two identified by the Court of Appeal (set out at para 6 above) and issue two in the statement of facts and issues (set out in para 12 above), which covers essentially the same ground. In these circumstances the Court expresses no view upon these questions one way or the other.