Neutral Citation Number: [2008] EWCA Civ 102

Case No: C5/2007/1423

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
Insert Lower Court Judge Name here

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/02/2008

Before :

LORD JUSTICE LAWS
LORD JUSTICE DYSON
and
LORD JUSTICE MOORE-BICK

- -

Between :

MB (SOMALIA)	**Appellant**
- and -	
ENTRY CLEARANCE OFFICER	**Respondent**

- -
- -

David Jones (instructed by Messrs Wilson & Co) for the Appellant
Katherine Olley (instructed by **Treasury Solicitor**) for the Respondent

Hearing dates: Thursday 24 January 2008

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Judgment

Lord Justice Dyson :

1. This appeal raises questions as to the proper interpretation of para 317(i) of the Immigration Rules ("the Rules") and the application of articles 8 and 14 of the European Convention on Human Rights ("the Convention") to that paragraph in the light of the facts of this case.

2. Para 317 of the Rules provides as follows:

> "317 The requirements to be met by a person seeking indefinite leave to enter or remain in the United Kingdom as the parent, grandparent or other dependent relative of a person present and settled in the United Kingdom are that the person:
>
> (i) is related to a person present and settled in the United Kingdom in one of the following ways:
>
> (a) mother or grandmother who is a widow aged 65 years or over; or
>
> (b) father or grandfather who is a widower aged 65 years or over; or
>
> (c) parent or grandparents travelling together of whom at least one is aged 65 or over; or
>
> (d) a parent or grandparent aged 65 or over who has remarried but cannot look to the spouse or children of the second marriage for financial support; and where the person settled in the United Kingdom is able and willing to maintain the parent or grandparent and any spouse or child of the second marriage who would be admissible as a dependant; or
>
> (e) a parent or grandparent under the age of 65 if living alone outside the United Kingdom in the most exceptional compassionate circumstances and mainly dependent financially on relatives settled in the United Kingdom; and
>
> (f) the son, daughter, sister, brother, uncle or aunt over the age of 18 if living alone outside the United Kingdom in the most exceptional compassionate circumstances and mainly dependent financially on relatives settled in the United Kingdom; and
>
> (ii) is joining or accompanying a person who is present and settled in the United Kingdom or who is on the same occasion being admitted for settlement; and
>
> (iii) is financially wholly or mainly dependent on the relative present and settled in the United Kingdom; and

> (iv) can, and will, be accommodated adequately, together with any dependants, without recourse to public funds, in accommodation which the sponsor owns or occupies exclusively; and
>
> (iva) can, and will, be maintained adequately, together with any dependants, without recourse to public funds; and
>
> (v) has no other close relative in his own country to whom he could turn for financial support; and
>
> (vi) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity."

3. It is also necessary to refer to the Immigration Directorate Instructions ("IDIs") and in particular to section 6 of Chapter 8 Annex V, which so far as material states:

> "**Parents and Grandparents**
>
> **1. Introduction**
>
> The requirements of Paragraphs 317 -319 must be met in all cases including the maintenance and accommodation requirements. For further guidance see Part 8, Section 1 Annex I – maintenance and accommodation. In addition to the normal requirements applicants seeking leave to enter or remain under the provisions of Paragraph 317(i)(e) must additionally be living alone in the most exceptional compassionate circumstances.
>
> Widowed, single, separated or divorced parents of any age may also be considered under Paragraph 317(i)(e) and also parents travelling together who are both under 65."

The facts

4. The appellant is a citizen of Somalia. She is now 73 years of age. On 16 November 2004, she applied for entry clearance to the United Kingdom as the parent of her son who is present and settled here. He left the appellant in Somalia in 1995 at a time when she was caring for her own mother. He came to the United Kingdom and was recognised as a refugee.

5. In 2002, the appellant travelled from Somalia to Kenya, where she lived with friends in Mombassa. Whilst in Kenya, she contacted her son in the United Kingdom. Subsequently, he travelled to Kenya to see her on two occasions.

6. The appellant was interviewed by the entry clearance officer on 6 June 2005. She told the officer that she was over 65 years of age and that she was married, but about 4 years earlier had become separated from her husband as a result of the war in Somalia. She did not know his current whereabouts.

7. The entry clearance officer was not satisfied as to her age or that she was a widow, and decided that for those reasons she did not meet the requirements of para 317(i)(a). He also considered whether she satisfied the requirements of para 317(i)(e). He did not consider that her circumstances were "exceptional given that they are no worse and are in fact considerably better, than the many thousands of refugees living in Kenya".

The first AIT decision

8. She appealed to the AIT. In a determination promulgated on 30 June 2006, Immigration Judge Bryant dismissed her appeal. He found that at the time of her application for leave to enter the United Kingdom the appellant was over 65 years of age, but she had not proved that she was a widow. Accordingly, she failed to satisfy the requirements of para 317(i)(a). He acknowledged that, on the face of it, para 317(i)(e) did not apply since the appellant was not "under the age of 65". Nevertheless, although she did not strictly meet the age requirements of para 317(i)(e), he went on to consider whether, age requirements apart, she satisfied its requirements.

9. He noted that, far from living alone, the appellant was living with the Anbari family in Kenya and being looked after by them. She received US$ 50 per month from her son. She took no medication other than eye drops for her watering eyes and had no other health problems. She had access to a toilet, water and electricity and she and the family lived in a 2 bedroom house. She had lived in Kenya for 3 years and there was no evidence that she had been harassed by the Kenyan police. The judge concluded that, even if he had found that para 317(i)(e) applied, he would not have been satisfied that the appellant was "living alone outside the United Kingdom in the most exceptional compassionate circumstances". He did, however, find that she was "mainly dependent financially on relatives settled in the United Kingdom" (the payments she received from her son).

10. Finally, the immigration judge considered article 8 of the Convention. He said:

> "56. Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (the Human Rights Convention) is advanced on behalf of the appellant. It is settled that this country has the right under international law to control the entry of non-nationals into its territory. Indeed, the effective enforcement of immigration control is a legitimate aim under Article 8.2. I fully acknowledge the concerns of the sponsor and the appellant's other family in this country and that the sponsor has visited the appellant in Kenya following her departure from Somalia. I also note that the sponsor left Somalia in 1995, leaving the appellant in Somalia, together with her own mother. It was seven years later that the appellant left Somalia and travelled to Kenya. She and the sponsor have therefore been apart for some ten years. The sponsor is able to visit the appellant, his mother, in Kenya and, indeed, has done so in the past. He continues to maintain her and he agrees that he would be in a position to continue to maintain and support her in Kenya in the future. I

> have made my findings above with regard to the medical conditions as described by both the appellant and the sponsor.
>
> 57. I note the judgment of the court of Appeal in Huang and Others and that I may allow an appeal (against removal or deportation) brought on Article 8 grounds if, but only if, I conclude that the case is so exceptional on its particular facts that the imperative of proportionality demands an outcome in the appellant's favour notwithstanding that she cannot succeed under the Immigration Rules. I would have to find that the case is truly exceptional. I take this judgment to apply also to appeals such as this where an appellant is seeking entry into the United Kingdom and raises Article 8 on her behalf.
>
> 58. I take into account the age of the appellant; my findings under the Immigration Rules; the ability of the sponsor to visit the appellant and to continue to maintain her in Kenya; my finding that I relied more upon her description of her health than that of the sponsor; and all the submissions made to me. I find this not to be a truly exceptional case as envisaged within Huang and Others. I find that the decision of the respondent to refuse entry to the appellant is proportionate to the legitimate aims of the respondent in seeking to enforce effective immigration control and is lawful. I find that there are no substantial grounds for believing that the rights of this appellant or the sponsor, under Article 8 of the Human Rights Convention are violated by the respondent's decision."

The AIT decision on reconsideration

11. The appellant applied for reconsideration of the decision under section 103A of the Nationality, Immigration and Asylum Act 2002. The basis of her appeal was that, instead of applying para 317(i)(e) to a person who was over 65 years of age, the immigration judge should have appreciated that the appellant's situation was "clearly more analogous to that of a widow [paragraph 317(i)(a)] or even a parent who had remarried but could not look to the spouse or children of the second marriage for financial support [paragraph 317(i)(d)". To impose a more onerous test was unlawful. A challenge was also made to the judge's approach to article 8.

12. Reconsideration was ordered by Senior Immigration Judge Nichols. She considered that it was arguable that the immigration judge may have erred in his assessment of the article 8 appeal on the question "whether there is a family unit in existence and there is dependency creating family life and in the light of the fact that the appellant is caught by the terms of paragraph 317 in her particular circumstances. It is arguable that his consideration of the Article 8 appeal does not go far enough".

13. In a decision promulgated on 11 April 2007, the AIT (Senior Immigration Judges P R Lane and McGeachy) dismissed the appeal. They held (para 27) that "there are problems facing the submission that the Tribunal should engage in a generalised re-writing of paragraph 317, for example, by reading the words "who is a widow" as

"who is a widow or separated from her husband". They recorded (para 22) that "it was common ground that:

> "…although he did not appreciate it, the Immigration Judge's decision to look at the facts of the appellant's case by reference to paragraph 317(i)(e), in order to see if she could be said to be living alone in the most exceptional compassionate circumstances, is precisely the approach required of caseworkers by Chapter 8, section 6, Annex V (Dependant Relatives, Parents and Grandparents) of the Immigration Directorate's Instructions. This states that:-
>
> *Widowed, single, separated or divorced parents <u>of any age</u> may also be considered under paragraph 317(i)(e)…"*

14. They concluded (para 38) that the immigration decision was in accordance with the Immigration Rules. They rejected the submission that it was necessary to interpret para 317(i)(a) as including separated women as well as widows in order to avoid violation of applicants' human rights. At para 41, they explained why they considered that a distinction between widows and separated women was justifiable in the following terms:

> "41. In the present case, the distinction drawn between widows and separated women is similarly justifiable. The rationale for including widows cannot be dismissed as purely evidential in nature. On such a view, most if not all the distinctions drawn by the Rules could be so characterised, in that they are driven by the desire to identify those who, as a general matter, should be accorded means of access to and residence in the United Kingdom. A widow is by definition a person whose husband has died and who, whatever else her position may be, cannot look to him for companionship and support. Marital separation, by contrast, is a concept that can cover a wide range of different factual and legal circumstances. Any judicial rewriting of paragraph 317(i)(a) so as to include separated women would not only result in casting the net far wider than the individual circumstances of the appellant; it is also unnecessary in the light of the appellate structure of the 2002 Act, whereby an appellant can achieve success by invoking human rights as a free-standing ground of appeal and showing that, despite her failure to come within the Rules, she is entitled to succeed under Article 8 (see paragraph 26 above)."

15. They next considered the human rights issue. They said (para 42) that the fact that a person who is 65 years of age or more is separated from her husband does not come within para 317(i)(a) does not automatically mean that her exclusion would violate article 8.

> "43. The policy inherent in paragraph 317, whereby a different set of requirements applies to certain persons aged sixty-five or over, compared with others who must show that they satisfy the

> high threshold inherent in paragraphs (e) and (f), is not to be taken as a recognition by the Secretary of State that any dependant relative aged sixty-five or over is as such entitled to be admitted, because to do otherwise would violate Article 8. Many people today enjoy good or relatively good health, after attaining the age of sixty-five. Even if the requirement as to age in paragraph 317 represented a recognition by the Secretary of State that, in general terms, a person aged sixty-five or over is more likely than a younger person to experience illness or infirmity, attaining the age of sixty-five is plainly not the pivot on which turns a person's entitlement to enter or remain on *human rights* grounds. If it were, there would be no scope in such cases for the requirements in paragraph 317(iii) to (v). The instruction at paragraph 3.2 of section 6 of the IDI is in no sense an acknowledgment to the contrary. It is an expression of pragmatism and compassion on the part of The Secretary of State, which does not have the effect of enhancing the human rights of the class of persons concerned.
>
> 44. So far as the issue of being separated as opposed to widowed is concerned, the Tribunal has already found that the distinction drawn by the Rules is such that, on a proper analysis, there is no *lacuna* in paragraph 317(i)(a). There is a good reason why widows are treated differently from separated women. The same is true of widowers in paragraph 317(i)(b). But even if we are wrong, the weight to be accorded to that factor, when addressing the issue of proportionality, must necessarily be affected by (1) the policy of the Secretary of State, in paragraph 1 of section 6, to bring widowed, single, separated and divorced parents of any age within the scope of paragraph 317(i)(e); and (2) the finding of the Immigration Judge, applying paragraph 317(i)(e), that the appellant did not meet the requirement of living alone in the most exceptional compassionate circumstances. The Immigration Judge's findings on this issue are well-reasoned and cogent. Even if there were to be a *lacuna* in paragraph 317(i)(a), of the kind asserted by the appellant, it cannot realistically be said that his decision might have been different."

16. The AIT's conclusion on the article 8 issue was expressed at para 47 as follows:

> "…Given that the Immigration Judge took the approach he did to paragraph 317(i)(e), his specific findings on Article 8 at paragraphs 56 to 58 of the determination cannot be criticised. Having examined the appellant's case on the basis of paragraph 317(i)(e), and having found that she failed to comply with the Immigration Rules, the Immigration Judge considered whether Article 8 nevertheless demanded a decision in her favour. In so doing, he plainly was aware of the appellant's age, as he had found it to be. He had regard to the fact that the sponsor, now in

> his late thirties, had been apart for some ten years from the appellant and that he was able to visit her in Kenya as, indeed, he had done in the recent past. The Immigration Judge also had regard to his clear and detailed findings regarding the appellant's medical condition. There was, furthermore, ample evidence to the effect that the appellant's life with her friends in Mombassa, taken together with the other findings of the Immigration Judge, was not such as to compel the conclusion that her case was one where, having taken into account all the considerations weighing in the respondent's favour, the appellant's family life would be so prejudiced as to breach Article 8."

The issues

17. Mr Jones submits that the decision of the AIT is wrong because (i) on its true construction, separated women are included in para 317(i)(a); alternatively (ii) if separated women are excluded from para 317(i)(a), then the rule is arbitrary and irrational and, therefore, unlawful; alternatively (iii) para 317(i)(a) is unjustifiably discriminatory as between widows and separated women and is contrary to the appellant's rights under article 14 of the Convention; alternatively, (iv) the decision to refuse the appellant leave to enter violated her rights under article 8 of the Convention. Mr Jones also sought to raise the argument that the AIT were wrong in failing to apply rule 352D. But when it was pointed out to him that the appellant's case had not been based on this rule, Mr Jones did not pursue the argument.

The first issue: the true construction of rule 317(i)

18. Mr Jones submits that it is necessary to give the rule a "purposive construction" and relies on a statement by Collins J in *R v Secretary of State for the Home Department, ex parte Arman Ali* [2000] INLR 89, 102B:

> "In any event, apart from the Convention, I would have assumed that Parliament did not intend to create any greater impediment than necessary to the ability of those settled in this country to enjoy family life here. It is therefore in my view appropriate to adopt a purposive construction to the rules, particularly as they are not to be construed strictly as if they were statutory provisions, but sensibly in accordance with their natural meaning and purpose, bearing in mind that they are not intended to enact a precise code but frequently give only a broad indication of how a discretion is to be exercised."

19. He also relies on the decision in *R v Immigration Appeal Tribunal, ex parte Zainib Bibi* [1987] Imm AR 392 as an example of a case where the court adopted a purposive construction in the context of the rule which was the predecessor to para 317(i). That rule was para 52 of HC 169. It provided that widowed mothers aged 65 or over should be admitted for settlement where certain conditions were satisfied. It also stated that the provision "should not be extended to people below 65 (other than widowed mothers) except where they are living alone in the most exceptional compassionate circumstances". The applicant was 62 years of age and she was

separated from her husband and not a widow. The question was whether she nevertheless came within the scope of para 52. It was common ground that a rule which excluded a single parent or grandparent under the age of 65, but would admit a more distant relative living in identical circumstances was absurd. A construction of the rule which had that effect should be avoided unless it was inescapable. Kennedy J avoided the absurdity by construing para 52 as providing that single or separated parents under the age of 65 who met the requirements imposed on more distant relatives could be brought within the rule.

20. Mr Jones says that the exclusion altogether from para 317(i) of separated parents who are 65 years of age or more is illogical and cannot have been intended. On a literal reading of the rule, separated parents do not come within (i)(a) to (d); and a separated parent who is 65 or more does not come within (i)(e), because that only applies to parents *under* the age of 65. In order to avoid the absurdity that separated parents are not provided for at all, Mr Jones submits that it is necessary to adopt a purposive construction and assimilate separated mothers to para 317(i)(a) or (e). He says that they should be assimilated to (a). That is because the rule should be given a construction which accords with their clear humanitarian purpose. To support this proposition, Mr Jones not only relies on the passage from the judgment of Collins J to which I have referred, but also on the observation of Dillon LJ in *R v Immigration Appeal Tribunal, ex parte Swaran Singh* [1987] Imm AR 563, 566 where he said: "…much of the trouble in this jurisdiction is that the rule [52 of HC 169] is one of broad humanity which in such instances as *Said Mar Jan* has not been administered humanely". Mr Jones submits that to require separated parents who are 65 years of age or more to satisfy the stringent requirements of 317(i)(e) does not further the evident humanitarian purpose of para 317. Nor has any rationale been advanced for requiring separated parents of such an age to meet those requirements.

21. Finally, in support of his construction of para 317(i)(a) Mr Jones relies on the last sentence in the passage from the IDI to which I have referred. I shall refer to this as "the IDI sentence". He submits that the phrase "of any age" which is used to qualify "widowed, single, separated or divorced parents" must in fact be a reference to parents in these categories who are *under* the age of 65. This is because widows over the age of 65 are covered by para 317(i)(a) and do not have to meet the stringent requirements of para 317(i)(e) and nowhere is it expressly stated in the IDI that separated, single or divorced parents *over* the age of 65 are obliged to meet the para 317(i)(e) criteria. As I understand it, Mr Jones then argues that, since separated, single and divorced mothers who are over 65 are not included in para 317(i)(a) by the IDI sentence, it is necessarily to be implied that they are included in para 317(i)(a).

22. In my judgment, it is impossible to read para 317(i)(a) as including separated mothers, or indeed any of the other categories referred to in the IDI sentence (except widows). Nor do I find it possible to construe the words "of any age" in the IDI sentence as meaning "under the age of 65". The arguments advanced by Mr Jones would also lead to the conclusion that divorced mothers are included in para 317(i)(a). Divorced mothers are obviously different as a class from widows. Indeed, a subset of divorced parents is covered by para 317(i)(d). Para 317(i) itself, therefore, recognises the difference between divorced mothers and widows. I can see no basis for construing para 317(i)(a) as including divorced mothers. Separated mothers (and single mothers) are also different as a class from widows. As a matter of plain language and giving

the words used their ordinary meaning, therefore, I consider that separated mothers are not included in para 317(i)(a).

23. Should the plain and ordinary meaning of the rule be modified in order to give effect to a purposive construction? I accept that any rule, like any other instrument, should be construed so as to further its purpose. That purpose can usually be identified from the terms of the instrument itself. An example of a rule whose purpose can be so identified is para 289A(iv) of HC 395 which was considered by this court in *Ishtiaq v Secretary of State for the Home Department* [2007] EWCA Civ 386: see para 31 of my judgment. But the purpose of para 317 is to state the requirements for indefinite leave to enter or remain in the United Kingdom as the parent, grandparent or other dependent relative of a person present and settled in the United Kingdom. Fixing those requirements involves policy questions as to which class of dependent relative should be included and on what terms. It involves striking a balance between (i) the interests of families in circumstances where dependent relatives want to join those on whom they are dependent and who are present and settled in this country and (ii) the need for an effective system of immigration control. Where that balance is struck is a matter for the Secretary of State. His judgment as to how to balance the competing interests forms the basis of the policy which finds its expression in the rules and IDIs that he publishes. The court will not interfere unless the policy is unlawful (for example because it is irrational) or its application in an individual case violates the individual's rights under the Convention.

24. There is a difficulty with the observations of Collins J in *Arman Ali.* The purposive construction to which he refers is a construction which avoids imposing a "greater impediment than necessary to the ability of those settled in this country to enjoy family life here". It seems to me that this fails to recognise that, although they are subject to a negative resolution by either House of Parliament, the rules are laid down by the Secretary of State "as to the practice to be followed in the administration of this Act": see section 3(2) of the Immigration Act 1971. They are statements of policy: see *MO(Nigeria) v Secretary of State for the Home Department* [2007] UKAIT 00057 para 14. To say that a rule should not be construed as imposing a greater impediment to family life than is necessary simply begs the question whether an impediment is necessary. Whether it is necessary involves the policy questions to which I have referred and which are for the Secretary of State to determine. For similar reasons, I do not find the statement by Dillon LJ that the rule is one of broad humanity points the way, because that raises the question: how humane is the rule? That question too raises the policy questions to which I have referred.

25. That is not to say that, if the plain and ordinary meaning yields an absurd result, the court should not strain to avoid it. This is what Kennedy J did in *Zainib Bibi*. It is to be noted, however, that he assimilated the 62 year old separated mother to the class of [other] people below the age of 65, rather than to the class of widowed mothers aged 65 or over. This meant that she had to meet the stringent "most exceptional compassionate circumstances" requirement.

26. If para 317(i) made no provision at all for separated parents over 65 years of age, it would be absurd. Read literally, the rule has that absurd effect. But it is also necessary to have regard to the IDI sentence. The Secretary of State's rules as to the practice that is to be followed in the administration of the legislation are to be found

both in the Rules and the IDIs. The IDIs contain guidance to caseworkers as to how they should apply the Rules when they make their decisions in individual cases.

27. Paragraph 1 of section 6 of Chapter 8 Annex V is most unhappily drafted. It starts clearly enough by saying that the requirements of paras 317-319 must be met in all cases "including the maintenance and accommodation requirements". These requirements are, I believe, those referred to in para 317(ii) to (v). Paragraph 1 then moves to para 317(i)(e) because it continues by saying that in addition to "the normal requirements" (I assume this is a reference to the maintenance and accommodation requirements), applicants seeking leave under para 317(i)(e) must be living alone in the most exceptional compassionate circumstances. We then come to the IDI sentence. It is clear that it is dealing only with para 317(i)(e). It follows immediately after a sentence which deals with para 317(i)(e) and it identifies other persons who "may *also* be considered" (emphasis added) under para 317(i)(e) ie "widows, single, separated or divorced parents of any age" and "parents travelling together who are both under 65. If the word "widowed" were absent, it would be clear that all that the sentence is saying is that, although para 317(i)(e) applies on its face only to those under the age of 65, the absurdity of that age limitation is removed. The inclusion of the word "widowed" makes little sense, since widows and widowers over the age of 65 will always invoke para 317(i)(a) in preference to para 317(i)(e) and there is no point in saying that they may also be considered under para 317(i)(e). Their cases can be considered under para 317(i)(e) if they are under the age of 65, but it is not apt to say that their cases may *also* be considered para 317(i)(e) because that is not saying anything additional. I am driven to the conclusion that the inclusion of "widowed" is unnecessary.

28. The important point, however, is that the IDI sentence fills the lacuna in para 317(i). It makes provision for separated, single and divorced parents (other than divorced parents whose cases are covered by para 317(i)(d)) who are 65 years of age or more. That is not to say, however, that the sentence may be used to construe para 317(i)(a) to mean something that it plainly does not mean. It means that the relevant practice of the Secretary of State is to be found in para 317(i) and the IDI sentence and that, taken together, they make provision for separated parents (as well as single and divorced parents) of any age.

The second issue: is para 317(i)(a) irrational because it excludes separated women aged 65 or over?

29. Mr Jones submits that the circumstances of the appellant are, for practical purposes, indistinguishable from those of a widow. For all she knows, her husband may indeed be dead. She has not had contact with him for more than 4 years. She has had no support of any kind from him throughout this period. To distinguish her case from that of a widow makes no sense.

30. At first sight, it does appear to be difficult to distinguish between the circumstances of the appellant and those of a widow. But the fact that a policy may produce irrational results in individual cases, although relevant to the question whether the policy is irrational as a whole, is not determinative of it. And the rationality of the policy must be judged by considering the policy as a whole. That is the point that the AIT are making at para 41 of their determination. In my judgment, there is no answer to it. To rewrite para 317(i)(a) merely to include "separated women" would cast the net far

wider than is necessary to catch separated women whose situation, for practical purposes, is indistinguishable from that of widows. There are degrees of separation. Some couples may live apart, but see each other regularly and provide a degree of support for each other. Others may live under the same roof, but lead completely separate lives. Some separations are frequent, but short-lived; others are permanent.

31. In my judgment, it was not irrational for the Secretary of State to take the view that the range of the class of separated mothers is so wide that they should not be assimilated to widows. Mr Jones submits that para 317(i)(a) should be amended to add the words "or who is a separated person". He does not contend for a tighter definition of this category of person. He does not, for example, contend for "or who is a separated person whose circumstances are analogous to those of a widow". He is right not to do so. It was not irrational for the Secretary of State to decide that such a definition would give rise to great uncertainty and difficulty of application.

32. Finally, it is relevant that there is a free-standing right of appeal against immigration decisions on human rights grounds. I would not go so far as to say, as the AIT said at para 41, that it is unnecessary to include separated mothers in para 317(i)(a) because they can achieve success by invoking human rights as a free-standing ground of appeal. As I explain later, even where a person's case falls squarely within the rationale, but not the letter, of a relevant immigration rule, that does not of itself mean that a claim based the Convention (usually article 8) will necessarily succeed. It depends on all the circumstances of the case. Nevertheless, in deciding whether to adopt a policy which includes widows, but not separated mothers, in para 317(i)(a), the Secretary of State was entitled to take into account the fact that separated mothers can invoke their human rights as a free-standing ground of appeal.

33. For these reasons, I would reject the irrationality challenge.

The third issue: is para 317(i)(a) unjustifiably discriminatory as between widows and separated women contrary to the appellant's rights under article 14 of the Convention?

34. It is not in issue that the different treatment accorded by para 317(i)(a) to widows and separated mothers falls within the ambit of article 8 of the Convention. The question is whether the difference is justifiable. If it is not, then it contravenes the appellant's rights under article 14. Mr Jones accepts that, if, as I held, his irrationality challenge fails, then his challenge under article 14 of the Convention must also fail. The two challenges are based on the same argument, that there is no rational justification for treating widows and separated persons differently.

35. The different treatment accorded to the appellant and to a widow requires rational justification if it is to be justified for the purposes of article 14 of the Convention: see per Lord Hoffmann in *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173, paras 14 to 17. Lord Hoffmann drew a distinction between different treatment which appears to offend our notions of the respect due to the individual and those which merely require some rational justification. Examples of the former are differences in treatment based on a person's characteristics such as race, gender etc. Differences in treatment in the second category usually depend on considerations of the general public interest. At para 16, Lord Hoffmann said:

> "Secondly, while the courts, as guardians of the right of the individual to equal respect, will carefully examine the reasons offered for any discrimination in the first category, decisions about the general public interest which underpin differences in treatment in the second category are very much a matter for the democratically elected branches of government."

36. Lord Hoffmann recognised that there might be borderline cases in which it is not easy to allocate the ground of discrimination to one category or the other. But "there is usually no difficulty about deciding whether one is dealing with a case in which the right to respect for the individuality of a human being is at stake or merely a question of general social policy" (para 17).

37. In my view, the discrimination made by the Rules between different classes of dependent relatives is not based on characteristics of those relatives which prima facie appear to offend our notions of the respect due to the individual. The discrimination is based on the decision of the Secretary of State in carrying out the difficult balancing exercise to which I have referred at para 22 above. This was the conclusion reached by the AIT in *KP (India) v Secretary of State for the Home Department* [2006] UKAIT 00093. That was a case where a mother-in law was seeking to invoke para 317(i)(a). The AIT held that mothers-in-law over the age of 65 do not fall within para 317(i)(a) and that the exclusion of mothers-in-law does not involve any violation of human rights. Having referred to the passages in the speech of Lord Hoffmann in *Carson* to which I have referred, the AIT said at para 45:

> "The Secretary of State clearly has power under the Immigration Act to make distinctions in the Immigration Rules. A distinction between one's mother (or stepmother) on the one hand and one's spouse's mother on the other hand is a distinction which is obviously justifiable as the sort of distinction which had to be drawn when the Secretary of State decides which family members are to be entitled to settlement in the Untied Kingdom. It is not a matter in which a right to respect for the individuality of the human being is at stake. It is a matter of social policy, well within the competence of the Secretary of State and Parliament. We very much doubt whether the situation of mothers is so closely analogous to that of mothers-in-law that a distinction between them needs any justification at all. Whether or not it does, the difference between them in this context is not a matter of human rights. "

38. I agree with this passage. For the reasons given in relation to the second issue, the irrationality challenge must be rejected. It follows that the claim based on article 14 must also fail.

The fourth issue: article 8 of the Convention

39. It was common ground that the fact that this was a refusal of entry case rather than an expulsion case was irrelevant to the approach that should be adopted to the article 8

issue. We were referred to para 43 to 45 of *Entry Clearance Officer, Addis Ababa v H (Somalia)* [2004] UKAIT 00027 where Ouseley J said that the existence of family life with someone who is established in the United Kingdom can provide the basis for a successful article 8 claim in a refusal of entry case. Ms Olley does not challenge the correctness of this statement.

40. Mr Jones submits that the immigration judge and the AIT on reconsideration failed to assess properly the extent of the family life enjoyed by the appellant with her son. They erred in concluding that, in effect, there was no family life. They failed to take account of, or attach sufficient weight to, the fact that (i) their separation was forced upon them, both having been forcibly displaced as a result of the conflict in Somalia, (ii) prior to their separation, the appellant and her son lived together as a family in Somalia and (iii) the continuing strength of the ties between them even after their separation. The strength of those ties was confirmed by the consistency of his financial support of her.

41. The AIT also erred in treating as relevant the fact that the appellant failed to satisfy the requirements of para 317(i)(e). Mr Jones relies on *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [22007] 2 AC 167 para 17, where Lord Bingham said: "It is a premise of the statutory scheme enacted by Parliament that an applicant may fail to qualify under the Rules and yet may have a valid claim by virtue of article 8." In any event, he submits that they erred in treating para 317(i)(e) as the relevant "comparator" for the purposes of their consideration of article 8: the correct comparator was para 317(i)(a).

42. Finally, Mr Jones relies on *KL (Article 8, Lekstaka, delay, near misses) Serbia & Montenegro* [2007] UKAIT 00044 in support of the proposition that the fact that the appellant only just failed to qualify for admission under the Rules is a material consideration to be taken into account when determining the proportionality of any interference with her right to respect for family life.

43. I cannot accept these submissions. The immigration judge and the AIT did not conclude that the appellant and her son had no family life. They had to assess its quality and this they did. In assessing its quality, they were entitled, indeed obliged, to take into account the fact that they had been separated for some 10 years, although the appellant's son had visited her occasionally. I would agree that the fact that the separation had been forced upon them was a relevant factor. But the fact remains that the appellant and her son had been separated for some 10 years and, regardless of the reason for the separation, this was a factor of considerable weight in the assessment of the quality of their family life. The immigration judge did take into account the fact that the appellant's son visited her occasionally and gave her financial support.

44. The immigration judge did not treat para 317(i)(e) as a "comparator" for the purposes of his consideration of article 8. He merely held that if, contrary to his opinion, para 317(i)(e) applied, the appellant would not have satisfied its requirements. He made no link between that finding and his conclusion on the article 8 issue. It is true that the first sentence in the passage which I have quoted from para 47 of the AIT's determination at para 16 above does appear to make such a link. But in my view, if para 47 is read as a whole, the AIT were not saying that they considered that the correctness of the immigration judge's decision on the article 8 issue depended on his conclusion on the application of para 317(i)(e). It may be that what the AIT had in

mind was that the immigration judge's conclusion on the para 317(i)(e) issue was consistent with his view that the facts were not sufficiently exceptional to make an interference with the appellant's article 8(1) right disproportionate.

45. I accept that the facts of the appellant's case are very close to those of a widow. In that sense, it can be said that her case comes close to para 317(i)(a). But it does not follow that the infringement of her article 8(1) rights resulting from refusal of entry is disproportionate. Just as a person may fail to qualify under the Rules but have a valid claim by virtue of article 8, so too a person may qualify under the Rules and not have a valid claim by virtue of article 8. The Rules may be more generous to an applicant than article 8. This was the point made in *KL (Serbia and Montenegro)* at para 47:

> "Even when an individual's circumstances fall squarely within the rationale of a relevant immigration rule or policy and so accord with its "spirit" albeit not its "letter", a "near miss" does not of itself mean that an expulsion decision constitutes a disproportionate interference with an appellant's right to respect for private or family life".

46. It is far from self-evident that all widows over the age of 65 who satisfy the requirements of para 317(a) would necessarily succeed in a claim under article 8. It would all depend on the circumstances. The widow might have chosen to live apart from her sponsor son. She might have a substantial family life in her country of origin. She may be in good health. A number of factors may lead to the conclusion that her claim under article 8 would not succeed. Once it is appreciated that there is no necessary link between para 317(i)(a) and article 8, the fact that an applicant's case may be closely analogous to that of a person who comes within para 317(i)(a) loses much of its significance.

47. In my view, subject to one qualification, the AIT were right to hold that the approach of the immigration judge to the article 8 issue cannot be criticised. The qualification is that, for understandable reasons, the immigration judge applied the "exceptionality" test enunciated by the Court of Appeal in *Huang*. The immigration judge did not have the benefit of the decision of the House of Lords in *Huang*. But I have no doubt that, if the immigration judge had directed himself in accordance with the House of Lords decision, his conclusion would have been the same. The immigration judge's refusal of entry to someone whose family life was as limited as was the appellant's was not disproportionate to the legitimate aim of maintaining a regime of immigration control which limited the scope of para 317(i)(a) to widows over the age of 65 years.

Overall conclusion

48. I have great sympathy for the appellant, because her case is close to that of a widow and yet she cannot take advantage of para 317(i)(a). I have tried to explain why her appeal must nevertheless be dismissed.

Postscript

49. I cannot leave this without saying that in a number of respects para 317(i) is unsatisfactory and I would encourage the Secretary of State to review it. First, it seems to me to be unsatisfactory that she should make good an obvious lacuna in para 317(i) by a passage in an IDI. In the interests of transparency, it should be possible to

find all the main provisions in the Rules. These should include the rules as to who is entitled to leave to enter and remain under the rule and in what circumstances. Secondly, the IDI sentence which makes good the lacuna is badly drafted. The inclusion of widows is unnecessary and confusing. Thirdly, it is difficult to see on what rational basis divorced persons aged 65 and over as a class are excluded from para 317(i)(a), but a subset of divorced persons aged 65 and over (those who have remarried and cannot look to the spouse or child of the second relationship for financial support) are included under para 317(i)(d). Divorced persons are a class of certain definition (unlike separated persons).

Lord Justice Moore-Bick :

50. I agree that the appeal should be dismissed and I gratefully adopt the account set out in the judgment of Dyson L.J. of the circumstances which have given rise to this appeal and the relevant provisions of the Immigration Rules and the Immigration Directorate's Instructions. However, in deference to the submission made by Mr. Jones on behalf of the appellant I wish to set out briefly my own views on the effect of the passage in the Immigration Directorate's Instructions to which Dyson L.J. has referred as "the IDI sentence".

51. I have to say that I have found this a troubling case which has exposed some shortcomings in rule 317 and in paragraph 1 of section 6 of Chapter 8 Annex V of the Instructions. The IDI sentence states that

> "Widowed, single, separated or divorced parents of any age may also be considered under paragraph 317(i)(e) and also parents travelling together who are both under 65."

52. Three things stand out when reading rule 317(i) as a whole. The first is that it draws a clear distinction between those aged 65 or over and those aged under 65. That is presumably because the Secretary of State recognises that in general elderly dependent relatives are less able to look after themselves than younger people and deserve particular consideration. A policy which favours the elderly naturally calls for a clear statement of the age at which it operates and that is what one finds in these paragraphs. The second is that between them paragraphs (i)(a)-(c) provide both for

parents aged over 65 who are single as the result of bereavement and for married couples travelling together one of whom is aged 65 or over. The third is that a distinction is drawn between parents and grandparents aged 65 or over and all other adult dependent relatives, however close the relationship; the latter's entry is permitted only if they are living alone and "in the most exceptional compassionate circumstances". By its own terms this is a significant hurdle to surmount, but is no doubt justified, even in the case of parents, where the additional factor of age is not present.

53. As it stands, however, rule 317(i) fails to make any express provision for some categories of dependent relatives whose position might be said to call for similar treatment. Parents or grandparents aged 65 or over who are single mothers or who are divorced but not remarried provide an obvious example. To operate a policy which excluded such people from consideration altogether would border on absurdity and it is no doubt for this reason that it was considered appropriate in the Instructions to deal expressly with the position of those who are single, separated or divorced. It was common ground, therefore, that the policy reflected in rule 317 does apply to such persons; the principal issue was how they are intended to be assimilated to those who are expressly covered by the rule and therefore under which of its paragraphs their applications fall to be considered.

54. Mr. Jones made two submissions in relation to the policy enshrined in rule 317(i) and the IDI sentence. The first was that it is implicit in the passage in the IDI sentence that the position of parents and grandparents aged 65 or over who are separated from their spouses is to be assimilated to that of those who have been bereaved. The second was that a policy which distinguishes between those who have been bereaved and those

who are separated is irrational and therefore unlawful. The two arguments go hand in hand to this extent, that the rule and the IDI sentence should, he submitted, be construed in such a way as to avoid an irrational result, since that cannot have been the intention of the Secretary of State.

55. Mr. Jones's argument depends to a large extent on the presence in the IDI sentence of the words "*widowed* . . . . . parents *of any age* may *also* be considered under paragraph 317(i)(e)" (my emphasis). Viewed in isolation the words "of any age" are obviously apt to include those aged 65 or over as well as those aged under 65, but he submitted that in this context they have been used in contradistinction to the expression "aged 65 years or over" which is found in paragraph 317(i)(a) and that the IDI sentence as a whole must therefore be understood as being directed to persons under 65. He submitted that that conclusion is fortified by the express reference to parents travelling together who are both under 65, which is to be found at the end of the sentence. Moreover, since that sentence refers to single, separated and divorced persons in the same breath, it must equally be referring to single, separated and divorced parents under the age of 65. The position of single, separated or divorced parents and grandparents aged 65 or over is not directly addressed, but since the under-65s are treated in the same way as widows under 65, and because no rational policy would exclude the over-65s from consideration altogether, it is implicit that it was the intention of the Secretary of State to treat them in the same way as widows and widowers of comparable age.

56. This is an argument to which at one stage I was attracted, but it depends on accepting that the expression "of any age" is used in contradistinction to "65 or over", thus making the general point that those who are too young to take advantage of paragraph

(i)(a) can apply under paragraph (i)(e) and in the end I have reached the conclusion, somewhat reluctantly, that it must be rejected because it fails to give adequate consideration to the purpose of including the IDI sentence in the Instructions at all and as a result proves too much. In effect, the argument amounts to saying that the purpose of including the IDI sentence was to assimilate the position of separated, single and divorced persons to that of widows and widowers generally, those aged under 65 being expressly assigned to paragraph (i)(e) and those aged 65 and over being assigned by implication to paragraph (i)(a). However, if that had been the Secretary of State's object, it could have been achieved much more easily and effectively simply by instructing case workers to treat single, separated and divorced parents in the same way as widows and widowers. They would then have been eligible to seek entry under paragraphs (i)(a) or (i)(e) as their age permitted. The Instructions do not deal with the matter in that way, however, and in my view the failure to take that simple and straightforward approach is sufficient to make it clear that that is not what the Secretary of State intended. It follows, in my view, despite the infelicities of drafting to which Dyson L.J. has drawn attention, that the only purpose of the IDI sentence can have been to assimilate the position of single, separated and divorced persons of any age to that of widows and widowers aged under 65. That may be a surprising conclusion, particularly in relation to those who are divorced and have not remarried, but on reflection I am satisfied that the only purpose of the sentence is to recognise the existence of single, separated and divorced persons and to accommodate it in the way I have indicated, despite the fact that it imposes on them the need to satisfy the onerous requirements of paragraph (i)(e), even if they are aged 65 or over.

57. On the remaining questions I also find myself entirely in agreement with Dyson L.J. and do not wish to add anything to what he has said, save to associate myself with the observations made in the final paragraph of his judgment. I would particularly encourage the Secretary of State to give further consideration to the position of divorced parents aged 65 or over whose position is for practical purposes very similar to that of widows and widowers

Lord Justice Laws:

58. I agree that this appeal should be dismissed for the reasons given by my Lord Dyson LJ, whose account of the facts and the relevant legal materials I adopt with gratitude. I desire only to add some observations of my own on two points.

59. The first concerns the reasoning of Collins J in *Arman Ali* [2000] INLR 89 at 102B, cited by Dyson LJ at paragraph 18. Like Dyson LJ (paragraph 24) I disagree with Collins J's insistence 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.

60. My second observation concerns the irrationality argument, addressed by Dyson LJ at paragraphs 29 ff. I agree with my Lord that it is (to say the least) difficult to distinguish between the circumstances of the appellant and those of a widow. But it is in my judgment inevitable that the Immigration Rules will make brightline distinctions. If they did not, they would travel closer and closer to a catalogue of individual cases, inoperable in practice, and hostile to the public interest in clear and open administration. The Secretary of State is not, of course, excused her duty of reason. But her observance of it has to be judged against the nature of her task in setting Immigration Rules, which must involve considerations of broad policy by no means exhausted by the demands of individual claims.

61. Lastly, I would with respect echo Dyson LJ's plea to the Secretary of State to review paragraph 317(i) of the Immigration Rules, for the reasons he gives at paragraph 49.