ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Field House Date of Hearing: 28 January 2009

Before:

Mr C M G Ockelton, Deputy President of the Asylum and Immigration Tribunal
Senior Immigration Judge Ward

Between

SD

Appellant

and

ENTRY CLEARANCE OFFICER, ISLAMABAD

Respondent

Representation
For the Appellant: Ms Kareena Maciel, instructed by Alexander Solicitors & Advocates
For the Respondent: Mr Peter Deller, Home Office Presenting Officer

In view of the influence that a decision under para 320 may have on subsequent applications by an appellant, it is desirable that the Tribunal should give its view on issues arising under that paragraph even if they are not material to the determination, provided that there has been sufficient evidence to enable it to do so.

DETERMINATION AND REASONS

1. The appellant is a national of Pakistan. He appealed to the Tribunal against the decision of the respondent on 25 October 2007 refusing him entry clearance to the United Kingdom as the spouse of the sponsor. The Immigration Judge dismissed his appeal. The appellant sought and obtained an order for reconsideration. Thus the matter comes before us.

2. It is right to say that the history of this case is somewhat unedifying. The appellant made his application on the basis of a marriage, but it is

accepted on his behalf that the appellant is not married to the sponsor. The position is that they have been through a religious ceremony in this country and regard themselves as married; but they are not married in English Law because the requirements of the Marriage Acts have not been complied with. The application was nevertheless, as we say, made on that basis. It was refused partly on the basis of paragraph 320 of the Immigration Rules.

3. When the matter came before the Immigration Judge, the Immigration Judge indicated to Ms Maciel, who represented the appellant before him as she does before us, that she had no need to deal with paragraph 320: but the Immigration Judge then, having indicated (we are told) that he rarely upheld decisions based on paragraph 320, mentioned it not at all in his decision. The Immigration Judge that added further errors, firstly and most remarkably by concluding, on what basis we know not, that the sponsor was in the United Kingdom not as settled but merely as a work permit holder; and secondly by failing to take account of or perhaps misunderstanding some of the evidence said to support the human rights arguments.

4. We are satisfied that the Immigration Judge made a number of errors of law. The most important of those is no doubt the error in thinking that the sponsor was not settled in the United Kingdom. There is a further error perhaps in that, having made that error, he did not follow it up by concluding that the application could not succeed on the basis it was made – that of a person married to someone present and settled in the United Kingdom; but that is another matter. He gave lamentably little attention to the complex and cumulative arguments made on human rights grounds, both on the basis of the position of members of the appellant's family, if we may call them that, in this country and on the circumstances that they would meet if they were in Pakistan with him.

5. In our view he also erred in failing to give a view on paragraph 320. It is right to say, as Mr Deller has said, that in the circumstances of his determination, as he was dismissing the appeal in any event, the considerations relating paragraph 320 could not have affected the outcome of the appeal. Any error on that point would therefore not be material to the outcome of the appeal, and in the circumstances of this case failure to deal with paragraph 320 could not of itself justify an order for reconsideration. Nevertheless, it appears to us that when matters going to paragraph 320 have been the subject of submissions at a hearing, it is highly desirable (but not, we would emphasise, essential, unless of course the outcome of the appeal depends on this point) for an Immigration Judge to give his views on the applicability of that paragraph, if he can readily do so on the basis of the material before him. This is particularly so now when, following amendments to paragraph 320 since the decision in this case, an individual's previous immigration history may be of very considerable and perhaps determinative importance in any future application by him. Where

paragraph 320, or matters going to paragraph 320, are dealt with at a hearing an Immigration Judge should if possible give a view in his determination on the issue. We say that because we are aware that, if there has been a refusal based on paragraph 320, and that aspect of the refusal has not been specifically dealt with or reversed in a determination, an Entry Clearance Officer, who may have made a mistake of fact or of law in relying on it first time, will feel reinforced in his view on a second application.

6. The position in this appeal is that the sponsor is settled in the United Kingdom. She was settled at the date of the decision and we are told that she has now British citizenship. The appellant is not a person who, as the Entry Clearance Officer thought, entered as a visitor in 1992 and overstayed. He came seeking asylum in 1999. His asylum claim was unsuccessful but he was entitled to work as he did. Nothing in the matters mentioned by the Entry Clearance Officer gives any reason for the Entry Clearance Officer to refuse under paragraph 320 and paragraph 320 should not have appeared in the notice of decision.

7. There remains however the difficulty that the application was made for Entry Clearance as a spouse and the appellant is not a spouse. It was suggested to the Immigration Judge, and it was suggested again to us, that on appeal the matter should be looked at as though the application had been made as a fiancé. The problem with that is that the application was not made as a fiancé and, looking at the circumstances of that application and decision today in respect of a fiancé, the appeal would be bound to fail because there is no suggestion that at the date of the decision the appellant intended to marry the sponsor or she him. They both say, or at any rate said, that they were married.

8. There are numerous human rights arguments made on behalf of the appellant, of the sponsor and of their child. We do not think that Ms Maciel would say that any of them is sufficient alone to cause an appeal of this sort to succeed. She relies on them cumulatively: but even taken at their best and cumulatively they would fail unless they had the effect that the (not very unusual) circumstances of this family entitled them completely to ignore immigration law and procedures. What Ms Maciel would have to say if she pressed her arguments is that, although the appellant did not make the appropriate application, he is entitled to entry clearance on appeal. That, as she appreciates, is a difficult argument: and it is fair to say that without withdrawing any of the considerations which went towards it she has not pressed it before us. We reject it.

9. The position is that the appellant can and no doubt soon will make an application for entry clearance as a fiancé, recognising that the religious ceremony that he has gone through is not effective to make him the sponsor’s husband in English law, but that he can readily remedy that by a civil ceremony. He will say no doubt in the application that he meets

all the requirements of the immigration rules. He will rely on this determination to demonstrate that there was nothing in the present application that should have caused paragraph 320 to be invoked.

10. For the reasons we have given, having found that the Immigration Judge erred in law, we substitute a determination dismissing the appellant's appeal.

C M G OCKELTON
DEPUTY PRESIDENT
Date: 12 March 2009