ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Birmingham Date of Hearing: 16 November 2007

Before:

Mr C M G Ockelton, Deputy President of the Asylum and Immigration Tribunal
Designated Immigration Judge O'Malley
Immigration Judge M F Parkes

Between

Appellant

and

THE ENTRY CLEARANCE OFFICER, AMMAN

Respondent

Representation
For the Appellant: Miss E Rutherford, instructed by Derby Law Centre
For the Respondent: Mr I Neal, Home Office Presenting Officer

A person who cannot meet the requirements of the Immigration Rules is unlikely to be able to show that the decision was contrary to the Disability Discrimination Act 1995 (as amended) by reason of the sponsor's disability or perhaps at all.

DETERMINATION AND REASONS

1. The appellant, a citizen of Iraq, appealed to the Tribunal against the decision of the respondent on 23 March 2007 refusing her entry clearance to the United Kingdom as the spouse of a person present and settled here ("the sponsor"). The Immigration Judge dismissed the appeal. The appellant sought and obtained an order for reconsideration. Thus the matter comes before us.

2. We do not know the sponsor's immigration history in any detail, but he comes from Iraq. He claimed asylum in the United Kingdom, probably in 2000, and apparently successfully. A grant of British citizenship to him is

evident by his passport dated 1 March 2007. In the spring of 2004 he was on holiday in Iran, staying at a hotel. He met the appellant there and, according to the evidence both from the appellant and the sponsor, they immediately, on the day that they met, started a relationship. She says not merely that, but also that she lived with him as his fiancée from then until 20 July 2004, which was presumably when one or the other of them left Iran. They remained in touch by telephone and they were married by proxy in Iraq on 20 June 2006. On that date the appellant was in Iraq and the sponsor was in the United Kingdom. The sponsor and the appellant then both went on a holiday to Syria and lived together as husband and wife from 30 June to 6 September 2006. They both then apparently returned home. Although the present application was made shortly after the sponsor obtained British citizenship, and is said to be the appellant's first application, there is amongst the appellant's bundle a letter to the Entry Clearance Officer, Damascus dated 20 October 2006 and referring to an application for entry clearance being made to that officer at that time. The respondent has, however, taken no point on this.

3. The sponsor is entirely reliant upon benefits. He receives Income Support and Disability Living allowance, both of which are "public funds" for the purposes of the Immigration Rules, because they fall within the definition of that phrase in para 6 in the Statement of Changes in Immigration Rules HC 395. Partly for that reason, the appellant included with her application declarations from a number of individuals who said they were prepared to support her. At the time of the application to the Entry Clearance Officer in Damascus, those individuals were described as "five close family friends", but so far as this application is concerned there appears to have been no evidence of third party support before the Entry Clearance Officer, although the Immigration Judge in due course heard oral evidence from three individuals.

4. The Entry Clearance Officer refused the application for a number of reasons, set out in the notice of decision. Following the service of the appellant's notice of appeal, the decision was reviewed, but the decision that the respondent was not satisfied that the appellant could be adequately maintained and accommodated without recourse to public funds was maintained. There was an issue about accommodation, which, for reasons we will explain below, we do not need to set out here. The two substantive paragraphs of the review read as follows:

> "3. The appellant states the sponsor's income is higher than the minimum. However, the level of income support and Disability Living Allowance for the sponsor has been assessed according to his individual need. The bank statements provided with the application showed reliance on additional funds and an account run down to just a few pounds. As such he has little disposable income to support an additional adult regardless of whether his income is deemed officially to be higher than the 'minimum'. With this appeal, the appellant has now submitted up to date accounts. These merely confirm that the sponsor spends his

entire income and is still dependent on additional funds — I note the two unexplained deposits each of £200 into the account on 27th and 28th March for example. I am not satisfied still that the sponsor can accommodate [meaning, apparently, "maintain"] the appellant without further recourse to public funds.

4. The appellant states I have failed to take account of third party support on offer to the appellant. However, there is no indication of any third party sponsorship whatsoever. Even if there were, third party offers are unenforceable and often made purely to facilitate an application. A third party can withdraw their support at any time. Ultimately the responsibility lies with the sponsor to maintain his wife adequately."

5. The part of the Immigration Rules that is of concern in this appeal is para 281(v), which requires that as a person seeking admission as the spouse of a person settled and present in the United Kingdom must show that:

> "The parties will be able to maintain themselves and any dependents adequately without recourse to public funds".

6. At the hearing of the appeal before the Immigration Judge, there was oral and documentary evidence. The respondent was unrepresented; the appellant was represented by counsel. The Immigration Judge accepted that the appellant was sending some money to his wife in Iraq, and was able to do so because he "could live frugally". She declined, however, to find that the sponsor's income was sufficient for the adequate maintenance of himself and his wife in the United Kingdom. She rejected the suggestion that there could be third party support. She accepted that the three individuals that appeared before her offering such support were honest and truthful, generous and genuine. She found that they genuinely intended to offer short term financial support if necessary. She referred to AK and others [2006] UKAIT 00069 and AM [2007] UKAIT 00058 and held that para 281 of HC 395 does not permit third party support. She then looked at a job offer which another individual had made to the appellant. She said:

> "Despite the job offer…, I am not satisfied that the appellant would immediately find work. [The perspective employer] did not attend at court, there was no indication in his letter as to how long the job offer would be open and, indeed, I do not know whether or not the position had been filled by the time of the hearing. Further, even if the offer was genuine, there was no indication as to the hours that the appellant would be able to work or the income she would be likely to derive from this job. Therefore, applying the balance of probabilities test, I am not satisfied that the appellant would start work and be able to support herself financially as soon as she arrived in the UK."

7. The Immigration Judge then looked at Article 8. She noted the circumstances of the appellant and the sponsor and of their marriage and of the contact since. She remarked that "it must have been obvious

to them that there would be very significant difficulties in them being able to live together", but that they "took the step of marrying". She concluded that in the circumstances any interference in the appellant's private or family life resulting from the decision under appeal would be proportionate. She then dealt briefly with an argument on disability discrimination, based on Article 14 of the European Convention on Human Rights and s 21B of the Disability Discrimination Act 1995 (as amended). Her conclusion was as follows:

> "I do not find that the ECO's decision discriminates against the Appellant because of the Sponsor's disability or disabilities. The parties are discriminated against, in the general sense, because the Sponsor is on benefits, irrespective of the *type* of benefit. The fact that the Sponsor has recourse to public funds means that paragraph 281(v) operates against the parties in a way that it would not if the Appellant were financially self-sufficient. The ECO's decision would be the same if the Sponsor was simply on IS and not additionally in receipt of DLA".

8. The Immigration Judge made no specific finding on questions of accommodation. She did not need to because she was dismissing the appeal on other grounds. In fact, however, as we understand the position, there is no continuing concern about the accommodation requirements of the Immigration Rules. The Entry Clearance Officer appears to have been struck by a difference between two documents submitted to him, but it is clear that the sponsor's present accommodation could be occupied by him and his wife without statutory overcrowding.

9. The grounds for review, on the basis on which the order for reconsideration was made, raise the following issues. First, the Immigration Judge ought not to have followed reported Tribunal cases on the interpretation on para 281 and whether it permitted third party support, but ought instead to have followed the decision of the High Court on Judicial Review in R (Arman Ali) v SSHD [2000] INLR 89. Secondly, the Immigration Judge was wrong to consider whether there was a job available at the date of the hearing, because she was concerned with matters as they were at the date of the decision. Thirdly, her decision in respect of Article 8 was defective in that she had taken into account the circumstances of "war-torn countries and the like" and that if her reasoning was correct "not many would ever be able to come to the UK". Fourthly, the grounds assert that the Immigration Judge failed to take proper account of the argument on Disability Discrimination. On that issue, the grounds read as follows:

> "As to paragraph 38 of the determination the issue was in fact an assessment of whether because the Sponsor receives DLA and how it affects the overall situation as he cannot work. It is unlikely that he will ever be able to work. If he can never work and if third party support is not permitted then he can never become financially able to meet the Immigration Rules. In the premises the Rules are not Human Rights compliant and further or alternatively, this issue of disability is of such

significance as to mean that Article 8 is engaged to permit the Appellant and Sponsor to live together in the UK. Article 14 of the HRA is of relevance too."

10. Miss Rutherford (who did not draft those grounds) elaborated on all of them before us, in her written skeleton argument and in her oral submissions.

11. We should begin by noting that no criticism is made of the Immigration Judge's finding that the appellant and the sponsor could not be maintained adequately from the sponsor's present income. It is right that this should be so, even taking into account the decision of the Court of Appeal in MK (Somalia) v SSHD [2007] EWCA Civ 1521 of which a note became available shortly after the hearing of this reconsideration, but of which the full text was published on 5 March 2008. It is not said, and we doubt if the Tribunal ever has said, that disability benefits are to be "ring fenced" and so unavailable to anybody except their recipient. But a person who receives benefits on account of a disability may be assumed to be being paid them because he needs them; and in that context it will generally be difficult to show that his maintenance will be adequate without them. There may be exceptional cases, but in general it ought not to be possible to say that the adequate level of maintenance for an immigrant is fixed at a level lower than that for a British citizen. That, however, would be the effect if benefits fixed at a level adequate for the maintenance of a disabled person were in addition to be available for the maintenance of immigrant members of his family, whilst still giving all the members of that family an adequate level overall. "Adequate" would then be nearer to poverty for an immigrant family than for a wholly citizen family. That way lies the development of ghettos.

12. The first ground for reconsideration suggests that it was an error of law for the Immigration Judge to follow recent authoritative decisions of the Tribunal in preference to an old decision of the High Court. There is perhaps room for doubt on whether decisions of the High Court on Judicial Review are formally binding on the Tribunal, but there is no doubt that a decision of the High Court on a relevant matter ought to be followed by an Immigration Judge. Arman Ali is not such a decision. The actual immigration decision in that case was made under the Statement of Changes in the Immigration Rules HC 251, which was replaced by the present code of Immigration Rules in 1994. Although Collins J's remarks in Arman Ali are directed to the interpretation of HC 395, it does not appear that that was a matter that was, strictly speaking, before him. He looked at HC 395 in order to test the Secretary of State's assertion that he had a consistent approach to such issues. Secondly, insofar as dependent children are concerned, Collins J's observations have been reversed by amendment to the Immigration Rules. Thirdly, Arman Ali predates the coming into force of the Human Rights Act 1998 and the review of Immigration Rules that took place to coincide with that event. Great though be the respect that any Immigration Judge ought to have to anything falling from the lips of Collins J's, particularly in this specialist

field, it appears to us that his decision in Arman Ali should be regarded as having little or no current application. The Immigration Judge in the present appeal was right to follow recent Tribunal authority specifically on the matter in question. As it happens, since her decision, and since the hearing of this reconsideration, the Court of Appeal has endorsed that the Tribunal's interpretation in MW (Liberia) v SSHD [2007] EWCA Civ 1376 at [15].

13. Even if that had not been the case, however, there are very considerable difficulties about the offer of third party support. In cases where third party support is allowed, there is clearly a need to ensure that it is genuinely available. The level of support must be clear, and the promise of support must go beyond the most genuine of generosity: although no legally binding agreement is necessary, it will, generally speaking, be necessary to show that the person providing the support will give it priority over any other demands that may be made on his finances — for example, by his own family. Only so can a decision maker (whether official or Immigration Judge) be satisfied that the support "will be" available. The evidence in the present case falls lamentably short of showing that support would be available at any particular level or with any degree of stability or continuity.

14. There is a third problem which we have to say we are astonished was not drawn to the attention to the Immigration Judge by counsel who appeared before her; nor was it specifically drawn to our attention. As the Entry Clearance Officer in the present appeal notes, there was at the date of the decision no evidence of third party support. The evidence before the Immigration Judge consisted of witness statements made in August 2007, five months after the date of the decision, and oral evidence from the makers of those statements. Post-decision evidence would have been insufficient to displace the decision of the Entry Clearance Officer on the circumstances as they were at the date of the decision, even if the evidence was in other respects adequate, or was on a matter which had any relevance to the application of the Rules.

15. For those reasons we reject the first argument raised by the grounds. The second is similarly surprising. The Immigration Judge is criticised for remarking that she did not know whether the job said to be available to the appellant was still available at the date of the hearing. She is criticised because it is said that she should have been looking only at the date of the decision. But there was no job offer at all at the date of the decision. The job offer is also made in two letters dated in August 2007. There is no evidence that there was a job available to the appellant on the date of the decision. So far as the appellant is concerned, the evidence is to the contrary. In her application form she said she intended to work, but only "after learning English". If the job offer had been open at the date of the decision, it would still have had the defects identified by the Immigration Judge in her determination, but it was not:

and the criticism of her treatment of it is, in the circumstances, entirely unmerited.

16. We turn now to the issue of Article 8, divorced for the moment from issues related to the sponsor's benefit payments. The phrase "war-torn countries", cited in the grounds, refers to a passage in the Immigration Judge's discussion of the issue, leading up to her conclusion on Article 8, which is as follows.

> "Exercising my judgement, I find that in not granting entry clearance the ECO deprived the Appellant and the Sponsor of a potentially new way of life together in the UK and a style of marriage where they could live together (other than on holiday) that they have never hitherto enjoyed. Further, a novel lifestyle together which they knew obtaining would be fraught with difficulties. If it were capable of being measured, their family life together and shared experiences would be small, as of the date of refusal. As against that, I can only presume that it is not unusual, never mind exceptional, for people from war-torn countries or countries such as Iraq, where there is serious and dangerous political upheaval, to meet and to be attracted to someone who lives in a safe country. Sadly, as there are many people in war-torn countries or countries undergoing upheaval, I find … the refusal to be proportionate to the legitimate goal of Immigration control which is "workable, predictable, consistent, fair and effective so as to ensure that it is not perceived as unduly porous". In essence, if the ECO (and now I) were wrong in relation to this decision on Article 8, then, logically the effect would be that it would be very likely that paragraph 281 would be circumvented very frequently by spouses from war-torn countries who had met whist living in different countries. I find the potential cost and effort of the State catering for the needs of such people far outweighs the personal cost to the parties in having to continue their relationship in the way that they have been doing."

17. It may be that certain criticisms could be made of that paragraph: but there is no doubt, that as a whole, it shows that the Immigration Judge was doing her best to weigh the competing interests of the public, and immigration control, on the one hand, and the individual circumstances of the appellant on the other. She may have had in mind the notion of "exceptionality", but it does not appear to us that there is any obvious error of law in her approach. We therefore confine our consideration to the matters specifically raised by the grounds. It is that, if the Immigration Judge's comments on this type of case in general were right, "not many would ever be able to come to the UK". That, however, is to miss the point of the issue and of what the Immigration Judge wrote. Her remarks were made in the context of para 281. There is no reason at all why very many people should be able to come to this country *in reliance on Article 8 alone*. Whether or not the cases in which a judgement of proportionality demands that a person be allowed entry clearance despite the provisions of the Immigration Rules are called "exceptional", the assumption that such cases will be rare is entirely consistent with high authority at all levels including that of the House of Lords in Huang

[2007] UKHL 11. The grounds appear to assume that such cases ought to be frequent and commonplace.

18. It does not appear to us that the Immigration Judge materially erred in her assessment of proportionality under Article 8, as argued in the grounds or at all.

19. We turn then to fourth matter: that relating to an allegation of discrimination on grounds of disability. We are sorry to say that we received little help from either of the parties on this difficult and novel point. We have therefore had to do our best to deal, without such assistance, with an argument which, if it had any substance, might be of general importance. We have concluded, however, that the arguments raised do not establish a case which ought to require this appeal to be allowed either under the provisions of the Disability Discrimination Act or under Article 14 taken with Article 8 of the European Convention on Human Rights.

20. We have indicated the way in which the matter was put in the grounds for reconsideration. In Miss Rutherford's skeleton argument the relevant passage is as follows:

> "The argument raised on the behalf of the Appellant was clear. The sponsor is accepted to be disabled and in receipt of Disability Living Allowance (DLA) as a consequence. He is unfit to work and he is unlikely to ever to be able to work. As a consequence if third party support is not allowed in his circumstances he simply cannot satisfy the Immigration Rules as they stand and the Appellant and the sponsor will not be able to live together as husband and wife. This situation arises because the sponsor is disabled and therefore is unlikely to ever be able to obtain employment. Therefore the Appellant is unlikely to ever satisfy paragraph 281 as the sponsor is unlikely to ever be in a position where he can demonstrate that he has sufficient funds to support the Appellant adequately without the need for recourse to public funds. This it is submitted contravenes Article 14 ECHR which requires that the fundamental freedoms protected by the ECHR are applied equally and without discrimination to all persons.
>
> It is submitted that the Immigration Judge materially erred in her assessment as to whether the respondent's decision discriminates against the appellant because of the sponsor's disability. The Immigration Judge's findings at paragraph 38 of the determination failed to take into account the fact the appellant is not being discriminated against because he is receipt of public funds but because he is disabled he is unlikely ever to be in a position to obtain employment and therefore it cannot be said that he can put himself in a position where he would not be in receipt of public funds. Therefore it is due to his disability that he finds himself in this position. It is therefore due to his disability that the appellant cannot satisfy the Immigration Rules. The Immigration Judge has therefore materially erred in law by failing to properly consider the appellant's claim under Article 8 and under Article 14 ECHR."

21. Miss Rutherford mentioned the Disability Discrimination Act in passing in an earlier paragraph of her skeleton and in similarly vague terms at the hearing. Extracts from it, however, accompanied the grounds for review and we have to assume that we are intended to take it into account in making our decision. But it is very difficult indeed to see that that Act can assist the appellant.

22. There is, first, the difficulty that the appellant herself is not disabled. Although the Act makes various provisions against discrimination on account of disability, it provides no benefits to the family members or carers of disabled people, who are not brought within the ambit of the Act. Before us the appellant is the only possible party, because the sponsor is a British citizen and not within the jurisdiction of this Tribunal that, insofar as the Act is concerned, the sponsor is the one who would have to make any relevant claim. Secondly, although the Act applies to discrimination by public authorities, and although the definition of such authorities is very wide, there is no clear indication that it applies to a public authority abroad, even if operating under the Crown. We asked at the hearing what the position was: neither party was able to inform us. As a result we have reached no view, but we note that it is unusual for a British statute to have extra-territorial effect save by express provision. In the present case the decision said to be discriminatory was taken by a British official in Jordan.

23. Thirdly, despite Miss Rutherford's assertion that the argument on behalf of the appellant was clear, it is unfortunately clear neither in her written skeleton (which wavers rather between the appellant and the sponsor) nor in her oral submissions where arguments on the Act are being put. Is it said that the rule is bad because it has the effect of discriminating against disabled people: so, presumably the rule should not be applied to anybody. Or is it, alternatively, being said that the rule is bad in its discriminatory effect only and that non-disabled people should be bound by it but disabled people should not be bound by it? Or, finally, is it said that the rule is only bad in the circumstances of the case and that in the present case the decision should have been made without regard to it? As we understand the matter, different considerations might arise in relation to each of these arguments. All of them, however, suggest that, in order to avoid discrimination in relation to the sponsor's disability, the appellant was entitled to have a decision in her favour contrary to the Immigration Rules.

24. That is a difficult argument to make, for the following reason. The Immigration Rules are made under s 3(2) of the Immigration Act 1971, which requires the Secretary of State to make such rules and lay them before Parliament, where they are subject to the negative resolution procedure. As we have said, the Disability Discrimination Act (which, for these purposes, means Disability Discrimination Act 1995 as amended by the Disability Discrimination Act 2005) prohibits discrimination by

"public authorities" as defined. The principal provision upon which the appellant relies is s 21B(1) which provides that:

> "It is unlawful for a public authority to discriminate against a disabled person in carrying out its functions".

25. There are, however, a number of exceptions. "Public authority" is defined in ss 21B(2) and (3) for the principal substantive provisions of the Act as excluding "either House of Parliament". In s 21C we find the following:

> "(2) Section 21B(1) does not apply to any act of, or relating to, making, confirming or approving —
> (a) an Act, an Act of the Scottish Parliament or an Order in Council; or
> (b) an instrument made under an Act, or under an Act of the Scottish Parliament, by —
> (i) a Minister of the Crown;
> …".

26. Those provisions ensure that legislation cannot itself be attacked as discriminatory: that is to say, the rights given to disabled people by the Act are subject to any specific provisions in legislation. The Act gives no dispensation from duties imposed by legislation, and gives no right or obligation to "read down" legislation in order to prevent discrimination. Thus, a person may be obliged by legislation which is discriminatory; and neither the maker of the decision nor the legislation under which he was acting can be the subject of questioning under the Disability Discrimination Act.

27. The Immigration Rules are in mandatory terms. The sponsor's problem is that it is said that he cannot meet those terms. Even if the Entry Clearance Officer is subject to the Disability Discrimination Act, he is bound to apply the Immigration Rules; and those rules themselves, whether regarded as made by "either House of Parliament" or whether regarded as "an instrument made under an Act" by the Secretary of State, are immune from the provisions of the Disability Discrimination Act. It follows that almost any argument based on the discriminatory nature of the Rules themselves is unlikely to be successful if framed within the terms of the Disability Discrimination Act. In the absence of more focused arguments we can take it no further than that.

28. Before looking at Article 14, we should note a number of features of the evidence in the present case and the way in which it has been put. We have already observed that evidence of third party support was both entirely lacking at the date of the decision and in any event wholly inadequate. Yet it is clear that the appellant's argument is based on a suggestion that in her case she should be allowed to rely on third party support. It appears to us that even if that argument were to be successful in principle, on the facts and evidence in this case she would

not be successful. Secondly, it is suggested that the appellant has to be maintained by the sponsor. We do not know exactly where that came from, although a suggestion of it does feature in the original notice of refusal and in the respondent's review. The position under the Rules is that the parties have to maintain themselves, not that one of them has to maintain both of them. Thirdly, it is very far from clear why any assumption is made that the appellant cannot herself work. Miss Rutherford argued that she was in a worse position in obtaining work than she would be if her husband was not disabled. We do not understand why that is said. Nor do we understand it to be said on her behalf that she would generally find it difficult to obtain work: on the contrary, her case as put to the Immigration Judge was that she had a job available to her. It is also important to appreciate that the financial contribution from the appellant, required by the Immigration Rules, is the marginal cost of bringing the household income up to the level of adequacy. That may well be not a very great sum, and there is no reason at all to suppose that the appellant is unable to earn it. Lastly, but by no means least, we must refer to the sponsor's own position. As we have indicated, the grounds assert that he cannot work and that he is unlikely to ever be able to work. We do not know on what evidence that assertion is based. It is true that he currently receives benefits, which may be assumed to be paid in recognition of a present inability to work, although, as the Immigration Judge pointed out, he appears to be able to take long foreign holidays. So far as prognosis is concerned, however, the only medical evidence appears to be a doctor's letter dated 18 September 2006 and prepared in connection with the application to the Entry Clearance Officer Damascus. Certainly, Miss Rutherford was unable to point to any more recent or specific evidence. It reads, in full, as follows:

> "[The sponsor] is depressed and needs support. His condition would be greatly improved if his wife were allowed into the country to join him."

If that is the evidence on which it was based, it was quite wrong for counsel before the Immigration Judge and counsel before us to make the assertions about prognosis that they did.

29. For those reasons it seems to us that the general arguments based on discrimination, whether framed under the Disability Discrimination Act or by reference to Article 14, are bound to fail on the facts. In addition, however, there is the point made by the Immigration Judge. All that is being required is that the appellant, who proposes to come to the United Kingdom, show that the marginal cost of her upkeep will be met. That is the position she would be in if her husband was not disabled, but was on income support; it is also the position she would be in if her husband had a low-paid job which was only adequate for his own maintenance; it would also be the case if her husband had family responsibilities preventing him from taking employment. The suggestion made by Miss Rutherford that the appellant's position is different and more difficult because of her husband's disability is entirely undemonstrated. It

follows that no question of discrimination in fact arises. If it did arise, the remedy proposed is to allow the appellant to rely on third party support, but, as we have pointed out, if her case depended on third party support it could not succeed.

30. Both before the Immigration Judge and before us complicated and difficult arguments have been put, inadequately reasoned, and without proper regard to the evidence upon which they had to be based. For the reasons we have given we consider that the Immigration Judge was amply justified in dismissing the appeal and did not err in law in doing so. We order that her determination shall stand.

C M G OCKELTON
DEPUTY PRESIDENT
Date: