ASYLUM AND IMMIGRATION TRIBUNAL

KP (Para 317: mothers-in-law) India [2006] UKAIT 00093

THE IMMIGRATION ACTS

Heard at: Field House Date of Hearing: 22 August 2006

Promulgated on: 06 December 2006

Before:

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

Between

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

(1) A mother-in-law is not within the wording of paragraph 317, and there is no requirement to read that paragraph as applying to mothers-in-law. The Immigration Rules can lawfully distinguish between different relationships. R (Carson) v SSWP applied. (2) Before s 3 of the Human Rights Act 1998 comes into play, a claimant must establish that the rule as expressed is inconsistent with a Convention right. (3) Counsel appearing before a specialist Tribunal should be prepared to inform the Tribunal about cases he cites that are outside the Tribunal's usual field.

DETERMINATION AND REASONS

1. The appellant is a citizen of India, born on 2 October 1937. This is the reconsideration of her appeal against the decision of the respondent on 7 October 2004 refusing to vary her leave in order to allow her to remain in the United Kingdom for settlement.

2. The appellant, a widowed lady with family in England and India, came to the United Kingdom on 13 March 2004 with entry clearance. She obtained six months leave to enter in order to visit her son and

daughter-in-law. A few days before the end of her leave, she applied to remain for settlement, with her son as sponsor. The application was refused, as we have said, on 7 October 2004. The grounds of refusal were that the respondent was not satisfied that the appellant was financially wholly or mainly dependent on the sponsor, or that she had no other close relatives in her own country to whom she could for financial support. We should point out, in view of subsequent events, that those grounds were a comment on the financial position, not on the status of the sponsor. The appellant appealed. Her notice of appeal is dated 12 October 2004. The grounds are simply as follows:

> *"The Secretary of State's decision is not in accordance with the Immigration Rules"* and *"The applicant's has emotional ties in the UK with her relatives".*

3. By the time of that notice, the sponsor was very ill. We do not know whether his illness was diagnosed before or after his mother arrived in the United Kingdom, but by as early as 4 August 2004 his doctor wrote that he was suffering from a neuro-endocrine tumour of oat cell type with metastatic disease involving his liver. He was receiving chemotherapy, which was expected to continue for some time. No mention of the sponsor's illness was made in the appellant's application or her appeal. Indeed, the application was firmly based on an assertion that the sponsor was receiving net pay of £2,600 per month, and had an additional household income of £962 a month from his wife's work.

4. The appellant's son, her sponsor for the purposes of her application, died on 19 May 2005. That was, of course, during the currency of the present appeal. On 9 September 2005 the appellant made a further application for her leave to be extended. This time she named her daughter-in-law, her late son's wife, as her sponsor. The sponsor's net pay was given as £1,100 per month, with additional household income of £1,872.12 from a pension. In the course of the application the appellant refers to the death of her son and the support provided by her daughter-in-law and grandchildren in the UK: she says that her son in India "is not willing to help me financially and he is very unhelpful to me at me time of needs".

5. Section 3C of the Immigration Act 1971, as inserted by s118 of the 2002 Act, provides that, where an application for further leave is made during the currency of existing leave, the leave continues until determination of the application and any subsequent appeal. Sub-Sections 4 and 5 are as follows:

> *"(4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section*
>
> *(5) But sub-section (4) does not prevent the variation of the application* [that was made in time]*."*

What was in form a second application by the appellant was therefore considered as a variation of the original application.

The Secretary of State's Decision

6. On 23 January 2006 the respondent issued an expanded Explanatory Statement containing the following passage.

> *"4.3 The Secretary of State has carefully considered the further grounds, however, the Secretary of State remains satisfied that the appellant would not be living alone in the most exceptional compassionate circumstances and that she did not have close relatives in her country to whom she could turn for financial support.*
>
> *4.4 Furthermore, the Secretary of State notes the appellant has visited the United Kingdom on several occasions and sees no reason why she cannot continue to do so. Moreover, the relationship between her daughter-in-law and grandchildren could be maintained from overseas. The Secretary of State remains satisfied that the appellant circumstances is not of a compelling enough nature to grant the appellant indefinite leave to remain in the United Kingdom.*
>
> *4.5 The Secretary of State is not persuaded to reverse his decision."*

The Immigration Judge's Decision

7. The appeal came before an Immigration Judge on 20 March 2006. He heard oral evidence from the appellant and from her daughter-in-law. He had before him a witness statement by the appellant and the submissions made at various stages on her behalf by her representatives. There was little documentary evidence relating to the financial consequence of the appellant's son's death. It was asserted that the appellant's daughter-in-law had available to her a sum of £60,000, representing her husband's "life savings", but the only evidence of that was a letter from the bank, addressed after the husband's death to both husband and wife, confirming the amount of the balance.

8. At the hearing, the Presenting Officer, readily acknowledged that, because the appellant is over 65 years old, the reference in the latest Explanatory Statement to "most exceptional compassionate circumstances" was inappropriate. There is no requirement to prove such circumstances in a case of the appellant's age. He indicated, however, that in his view the real problem now was that the relationship between the appellant and the proposed sponsor, her daughter-in-law, was not one which would allow the daughter-in-law to sponsor the appellant for settlement within the Immigration Rules. The Immigration Judge said that he would hear submissions on that after taking the evidence. He did so. He agreed with the Presenting Officer. He therefore found that the appellant could not meet the requirements of

the Immigration Rules, and made no further findings on whether she would have been able to do so if her daughter-in-law could have been her sponsor. We do not criticise him for that, but it is important to note that no concession had been made as to the original and continuing reasons for refusal, which were that the respondent was not satisfied that the appellant was wholly or mainly financially dependent on her sponsor or that she had no close relatives in her own country to turn to for financial support. We do not read the subsequent reasons, provided in the supplemented Explanatory Statement, as superseding those reasons, which clearly, remained relevant to the substantive decision: they merely supplement those reasons in answer to a new application made on a new basis.

9. Having decided that the appellant could not succeed under the Immigration Rules, the Immigration Judge continued his determination as follows:

> *"14. … the appellant therefore has to seek to rely on Article 8 of the European Convention on Human Rights.*
>
> *15. In order to satisfy Article 8 of the European Convention on Human Rights I have to be satisfied that the appellant has established a family life in the United Kingdom. At the date of the hearing the appellant had been in the United Kingdom for approximately 2 years. She is an adult and lived with her son and daughter-in-law and their family. Unfortunately her son is now deceased and she is living simply with her daughter-in-law and her family. There is nothing truly exceptional in the appellant's relationship to her daughter-in-law and her family It is no more than a normal relationship of mother-in-law/daughter-in-law and grandparent/grandchild with the one exception that clearly the appellant and her daughter-in-law are able to support and console each other in relation to the death of the appellant's son Chakarworti Singh Parmar who died on 19th May 2005 but the appellant lived with her son, a Police Officer, and his wife and family in India before she came to the United Kingdom as a visitor.*
>
> *16. There appears to be no particular reason why she could not return to her son's home from where she came in India. Although there may have been some difficulties between the appellant and her daughter-in-law, these do not appear, from the evidence before me, to have been particularly severe and if this was the case, it tends to suggest that the appellant obtained a Visa whilst planning to come to the United Kingdom for settlement. Alternatively, if the appellant was not intending to settle in the United Kingdom when she made her visit then if returned she would go back to the existing situation in India, which is as it was when she came to the United Kingdom, this is evidenced by the appellant's letters. These circumstances appear not to have altered. As far as the appellant's health is concerned, she states that she suffers from Arthritis and depression. There is no medical evidence to support the appellant's claimed health problems. I am not therefore prepared to accept that the appellant's health problems are such that they would cause her any particular difficulty*

if returned to India. There is no evidence of the treatment she receives in the United Kingdom or that any treatment she requires is not available in India. There is no reason why her family in the United Kingdom couldn't send money to her in India if she is returned thereto.

17. *On balance therefore I am prepared to accept the appellant has a degree of family life in the United Kingdom but it would not be disproportionate, considering the United Kingdom's entitlement to control immigration into this country and standing* [sic] *that there are no truly exceptional circumstances in relation to the appellant, to return the appellant to India. I am not satisfied therefore that there would be a breach of Article 8 if the appellant were returned to India.*

18. *Although neither the Immigration Rules nor Article 8 of the European Convention on human rights are of assistance to the appellant, the Home Office may wish to reconsider their decision considering the particular facts of this case although I make no recommendation in relation thereto."*

10. The Immigration Judge accordingly dismissed the appeal. The appellant applied for reconsideration.

The Reconsideration Grounds and Submissions

11. The grounds for reconsideration were drafted and signed by counsel who also appeared before us. The grounds begin with a not quite accurate statement of the reconsideration process, and continue with two paragraphs headed "background facts", which unfortunately contain a misstatement as to the age of the appellant and a misstatement as to the date of her son's death. The latter error (only) was corrected at the hearing before us. The "background facts" clearly acknowledge that the ground for the respondent's refusal was that the Secretary of State was not satisfied that the appellant was financially wholly or mainly dependent on the relative present and settled in the UK. The other reasons for refusal, in particular, the question whether the appellant has close relatives in her own country to whom she can turn for financial support, are omitted. After two short extracts from the Immigration Judge's determination, the grounds for reconsideration are summarised as follows:

"8. There are three submissions:

(i) that the reference to 'mother or grandmother who is a widow…' in para 317(i)(a) should be read not to exclude 'mother-in-law' in circumstances such as the present;

(ii) that on the facts of this case, the present application could be determined on that basis because it was initiated by the mother's son, … before he dies, and is indeed being sustained by funds from his savings; and

(iii) that he has determined the Article 8 application wrongly. Therefore it is submitted that in a number of material respects the learned IJ has misdirected herself [sic] *and/or committed an error of law."*

12. On the construction of the Rules, the grounds assert as follows. First,

> *"The correct Rule that applies to the appellant is* para 317(i)(a) *which simply requires her to be the '*mother or grandmother who is a widow aged 65 years or over … .' *once it is accepted that the appellant falls under* para 317(i)**(a)** *then all she has to do is to comply with the requirements of para 317(ii) – (vi), which include the requirements of dependency and maintenance and accommodation."*

We pause there to note that the phrase "all she has to do" appears to be a rather casual dismissal of the actual reasons for refusal in the present case. The grounds continue by asserting that "the cultural expectations of the appellant and her daughter-in-law militates against an interpretation of the word 'mother' that does not also include the relationship of a mother and daughter-in-law". It is unnecessarily limiting and destructive of the relationship at hand. That submission is supported by a few words cited from the judgment of Munby J in Singh v ECO [2004] EWCA (Civ) 1075. It is not easy to understand the relevance of those dicta in this context, because Singh v ECO was a case in which the argument was wholly about whether the appellants could succeed *under Article 8*: it is a necessary part of the background to that case that the Immigration Rules, correctly interpreted, excluded the appellant, cultural considerations notwithstanding.

13. The grounds continue as follows:

> *"11. In the alternative, this application should be seen as a 'continuing application'. The application is that of being a dependant of the son … . A second application by the appellant to remain here as the dependant of her daughter-in-law … has never been determined by the SSHD. The appeal is in relation to the refusal of the first application. The application should be seen as a continuing application because the financial support remains that of the son … whose life-savings have been passed onto his wife … ."*

14. As we have already pointed out, there could be no second application. What was in form a second application has, so far as we can see, been properly dealt with. Counsel's submission that it had not been "determined", fails to take account of s3C(4) with its prohibition on a further application.

15. The grounds relating to Article 8 assert that the Immigration Judge failed to adopt a proper step-by-step approach to discovering whether the appellant's Article 8 rights had been breached by the decision to refuse her leave. In the alternative it is submitted (as ground 3) that the Immigration Judge had failed to consider whether the decision might be regarded as a breach of the appellant's right to private life (as distinct

from family life), which is equally protected by Article 8. The grounds put this as follows:

> *"15. There is no evidence that the learned IJ has considered the appeal from the basis of 'private rights'.*
>
> *16. Yet, if he had considered them there is every likelihood that given the fact that – she is 65 years old, a widow, and has lived with her sponsor for two years – that the learned IJ could have concluded that these circumstances were 'exceptional' of the way that 'dependency' has been defined in the judicial authorities: See,* **Sayid Marjan [1989] Imm AR 162 (***which is mentioned in* **Swaran Singh***) where it was said that dependency arises* 'where a person is isolated from his or her close relatives and is therefore unable to turn to them for those things for which a person can normally expect to turn to his family, such as companionship, affection, discussion of problems and courses of action, advice, physical help. This is not an exhausted definition'."

16. We find it surprising that in making that submission counsel did not take the opportunity to draw attention to the fact that Sayid Marjan was not concerned with the interpretation of Article 8 or with paragraph 317 of HC 395, but with a previous version of the Immigration Rules, whose requirements as to dependency were very much vaguer than those in the present Rules and therefore became subject to considerable judicial elaboration. In the present Rules, dependency is explicitly stated to be a matter of financial dependency alone. It is not easy to see how a decision on the detailed construction of the previous Rules could be of very much assistance in defining the rights protected by Article 8.

17. The grounds conclude with two pages headed "Appendix". There are paragraphs numbered 12, 13, 18, and 19 – 24; they are grouped under sub-headings, lettered E, F and F. The contents appear to be a general but rather outdated treatment of some of the decisions on "living alone in the most exceptional compassionate circumstances". That is not a matter relevant to this reconsideration, and was never a matter relevant to this appeal, as the Presenting Officer so readily acknowledged before the Immigration Judge. Many of the cases cited in this "Appendix" are very old; the most recent is 2000. Of the eleven cases, nine are unreported. It is difficult to understand counsel's decision to raise an issue of no importance in this case in this way as anything other than an obvious flouting of paragraph 17 of the President's Practice Direction. We say no more about it.

18. Reconsideration was ordered by a Senior Immigration Judge, who gave the following reasons for his order:

> *"It is arguable that the Immigration Judge was wrong to find, at paragraph 13 of his determination, that a* 'daughter-in-law is not covered by paragraph 317' *and that* 'the appellant's daughter-in-law is not a relative in terms of paragraph 317'*. In the unusual circumstance where the*

appellant applies for leave to remain in the household of her son and daughter-in-law, and – after variation has been refused – on the demise of the son, the daughter-in-law takes over the role of 'sponsor', it is arguable that 'sponsor'*, as defined at paragraph 6 of HC 395 (as amended by Cm 6330), is capable of including the daughter-in-law in the instant case.*

Reconsideration is not granted on Article 8 grounds. The judge gave sustainable reasons for finding nothing 'truly exceptional' *about the appellant's private and family life in the UK. Human rights are not arguable in any event, this being a 'variation' appeal: see* JM* *[2006] UKAIT 9."*

19. At the beginning of the hearing before us, counsel handed up his skeleton argument, and told us that he relied primarily upon it and on the grounds for reconsideration. The precise structure of the skeleton argument is not immediately clear. It begins by asserting that there are "two central issues in this case", and then proceeds to list four issues, in three separate paragraphs. The following nine pages then make various assertions of fact and of law. So far as the law is concerned, it is not entirely clear what position is being put on behalf of the appellant. For example para 19 of the skeleton says (in a footnote) that "no reference will be made" to Ghaidan v Godin-Mendoza [2004] UKHL 30. Paragraph 33 of the skeleton consists almost entirely of a long extract from that case.

20. There was a second problem dealing with counsel's submissions on the law. When we asked him, at the hearing, to give us some indication of what was the subject of the litigation in the cases from which he had cited long or short extracts, he told us that he knew nothing about the cases other than that, as reported, they contained the extracts he had cited. He confirmed the limits of his knowledge by telling us that he thought that Ghaidan v Godin-Mendoza was one of the "one of the Gurkha pension cases" and that the extract he had cited was from the speech in the House of Lords of "Lord Justice Brooke". He justified his position by telling us that, in the higher courts, there is never any need to have any knowledge of a case beyond any extract from a judgment cited in a skeleton argument. We have to say that we do not think that is right. Even if it is, however, it may often be necessary for counsel (in particular) to do more, before a specialist Tribunal. Although we try not to be entirely ignorant of the development of other areas of the law, a specialist Tribunal cannot perhaps be expected to have the general legal knowledge that other courts have. In the present case, the position has been that we have had to take the appropriate steps to inform ourselves about the cases which counsel cited.

21. In preparation for the hearing of the reconsideration, the appellant's representatives submitted documents relating to the financial consequences of the appellant's son's death. There have been substantial payments from insurance policies, apparently enabling the mortgage on their house to be discharged, and there is a pension

payable to the widow and two of the children. (It is by no means clear why only two of the children are covered, but it may be that the fact that the father was already very ill when the third child was born has something to do with the matter.) No reference at all was made to that at the hearing or in counsel's skeleton. So far from pursuing any application to introduce it, counsel relied solely on the sum of merely £60,000 to which reference was made at the hearing before the Immigration Judge. He was of course right to confine himself to the evidence before the Immigration Judge in attempting to show an error in the determination, but we have to say that we have no idea why no reference was made to what was said to be the present financial position. What is clear from counsel's skeleton is that there are apparently relevant facts which have not previously been disclosed. Paragraph 11 of the skeleton gives, for the first time, the information that the appellant's mother (who must be a very old lady) is also in the United Kingdom. We do not think there can be any mistake about this. The period of her leave is given, in the context of an explanation why she herself could not act as the sponsor in this appeal. If questions of available finance are in issue, as they are in this appeal, it is surprising that nobody has previously indicated whether there is any commitment in respect of the appellant's mother, and her being mentioned at this late stage might naturally give rise to questions about whether there are other relatives who may need supporting out of the finances available.

22. So far as the original reasons for refusal are concerned, counsel's skeleton, like his grounds, mystifyingly leaves them unargued. The skeleton simply asserts that "if the appellant satisfies paragraph 317(a) [presumably paragraph 317(i) is meant] of HC 395 then she also satisfies the other provisions of the Rules." We have to say that we do not know how that submission could properly be made in the context of this appeal, given the reasons for the refusal and the decision not to pursue matters relating to evidence of finances here, financial dependency, or other close relatives in India. We shall have to return, later in this determination, to the appellant's ability to satisfy the requirements of the Rules other than paragraph 317(i).

The Claim of Failure to Consider the 'Application'

23. Looking now at the matters that are raised by the appellant in this appeal, we may begin with the question put in the skeleton in the following way: "Can this application be treated as a 'continuing application'?" The substantive submission on that is as follows:

> *"In the alternative [that is to say, if the Tribunal is against the appellant on all other issues] it is submitted that the application by the son … to have his mother, the claimant, stay with him, be treated as a continuing application. The application was put in when he was alive. The funds that are currently being used to support this application (namely, the £59,501-75) are very much the son's funds and this would obviate the need to*

consider the application made to stay with the daughter-in-law which remains outstanding."

24. It is very difficult to see what argument is intended here. As the Secretary of State explains, and as we have explained in this determination, to treat the matter as "continuing" was precisely what the Secretary of State did. What he did not do, of course, was to treat the matter as continuing with unchanged facts when it was quite obvious that the facts had changed. If what is being said is that the Secretary of State should have ignored the death of the appellant's son, the submission would appear to be obviously wrong. The Secretary of State was specifically invited to take into account the son's death; and, by s85(4), the Immigration Judge was entitled (and, we would say, in the circumstances essentially bound) to take into account evidence of facts arising since the date of the decision. Further, it does not appear to us to be right to say that the original application was supported entirely by the savings. The savings are not mentioned in the application. What is mentioned is a substantial monthly income, which ceased on the appellant's son's death, although it is in part replaced by a pension to which counsel makes no reference in his submissions on the "continuing application".

25. It appears to us that there is nothing in this point at all. The new information was considered by the Secretary of State and considered by the Immigration Judge. If the financial basis of the application was now the son's "life savings", there had been a very substantial change in the circumstances even apart from the son's death, since the date of the decision. In order to determine whether the appellant was entitled under the Immigration Rules or otherwise, matters need to be considered at the date of any decision, whether by the Secretary of State or on appeal.

26. There was no procedural error here. Contrary to counsel's submission, there is no application which remains outstanding. What purports to be an application was made at a time when, by statute, it could not be made, but the appellant has had, through the appeals process, every opportunity to challenge the decision as a whole. It could rightly be said that the Secretary of State's initial response was, in its reference to most exceptional compassionate circumstances, somewhat wide of the mark. That error has, however, subsequently been cured and the appellant is no worse for it.

27. That is, we think, sufficient to deal with that part of the submissions made on the appellant's behalf. We think we shall do no injustice to the appellant if we summarise the remainder of counsel's submissions as posing the following four questions.

    (1) Do the Immigration Rules, correctly interpreted and read in their ordinary sense, permit the appellant, as the mother-in-law of her sponsor, to succeed in her application for further leave?

(2) If not, is there some rule of law which requires the Immigration Rules to be read in such a way as to give mothers-in-law the same entitlements as mothers?

(3) If not, is there some rule of law under which the appellant, as a mother-in-law, is entitled to the leave she seeks?

(4) If not, is there some rule under which, in all the circumstances of the present case, the appellant is entitled to the leave she seeks on an exceptional basis?

We shall attempt to answer those questions in turn. We remind ourselves, however, despite the terms in which the skeleton argument is put, the question whether the appellant can benefit from her status as the sponsor's mother-in-law by no means deals with all issues as to her entitlement. The actual reasons why the Secretary of State refused this application have always to be borne in mind.

Question 1

28. Can mothers-in-laws succeed under the Rules? The Rules primarily applicable to this application are those contained in paragraph 317 of HC 395, which reads as follows:

> *"**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***
> *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) parents 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 entered into a second relationship of marriage or civil partnership but cannot look to the spouse, civil partner or children of that second relationship 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 civil partner or child of the second relationship who would be admissible as a dependant; or*
> *(e) 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; or*

(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 relatives 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."

29. The submissions made in the skeleton argument are these:

> *"12. The starting point in this appeal is the reference to who is '*the parent, grandparent, or other dependent relative of a person present and settled in the UK...' *(see **PARA 317**).*
>
> *13. It is submitted that the Claimant qualifies as the '*mother*' under paragraph 317(a) HC 395, as the '*mother or grandmother who is a widow aged 65 years of over ...'. *Mother is not defined in paragraph 6 HC 395. Para 6 is simply concerned in defining 'a parent', and includes both a 'stepmother' (at 6B) and 'the mother of an illegitimate child' (at paragraph 6C), but does not exclude a mother-in law. It is submitted that '*mother*' includes '*mother-in-law*' even though the natural mother may still be alive. This interpretation is also consistent with the reference in para 317 to 'or other dependent relative' who can qualify."*
>
> *14. This interpretation does not distort the purpose of the Rule which is to unite close families. It is not designed to separate families unnecessarily. This interpretation will not weaken the application of the Immigration Rules. This must be so if regard is taken of the other conditions which have to be satisfied in paragraph 317(i)(iii)-(vi) (i.e. is mainly dependent financially on the sponsor in the UK."*

30. It is very difficult indeed to see how those submissions can be made out. So far as concerns paragraph 317, the opening words, mentioning parents, grandparent and other dependent relative serves to describe the scope of the Rule, but the precise relationships which qualify under the Rule are immediately set out. It cannot properly be argued in these circumstances that the Rule is intended to benefit all those who come within the category of parents, grandparents or other dependent relatives. In particular, the initial description "other dependent relative" is confined, in paragraph 317(i)(f) to "son, daughter, sister, brother,

uncle or aunt". There is no scope here for the inclusion of other relatives, such as parents-in-law. To this extent at least the Rule is precisely drafted: in order to qualify, the applicant must be related to the sponsor in one of the ways specified in paragraph 317(i)(a) – (f).

31. Counsel's submission is not improved by his reference to relevant definition in paragraph 6, some of the words of which he quotes, unfortunately in a context that fails to give their true meaning. Paragraph 6 contains a number of definitions including the following:

> "*'A parent' includes*
> *(a) the stepfather of a child whose father is dead;*
> *(b) the stepmother of a child whose mother is dead;*
> *(c) the father as well as the mother of an illegitimate child where he is proved to be the father;*
> *(d) an adoptive parent, where a child was adopted in accordance with a decision taken by the competent administrative authority or court in a country whose adoption orders are recognised by the United Kingdom or where the child is the subject of a de facto adoption in accordance with the requirements of paragraph 309A of these Rules...*
> *(e) in the case of a child born in the United Kingdom who is not a British citizen, a person to whom there has been a genuine transfer of parental responsibility on the ground of the original parent(s)' inability to care for the child."*

32. Of course the grammatical form of the definition is inclusive: definitions often are, because their purpose is to extend the natural meaning of a word in a defined way. But the full wording of the definition of "parent" in paragraph 6 makes it absolutely clear that the basic submission in the skeleton, based as it is on a few selected words from that paragraph, cannot be sustained. Step-parents only count if the relevant parent is no longer still alive. It is absolutely clear that the effect of the definition is that if the natural parent is still alive, a step-parent does not count for the purposes of the Rules as a parent, however close the relationship between stepparent and stepchild may be. There is no foundation here for an argument that the Rule intends "parent" to apply to anybody who is in a close quasi-parental relationship with a sponsor. There is certainly no basis for the submission that, in this context, "'mother' includes 'mother-in-law' even though the natural mother may still be alive", as the skeleton suggests. There does not need to be a definition of mother: in cases raising no issues of reproductive technology, one's mother is obviously the woman from whose womb one came. One's mother-in-law is not one's mother. It would have been open to the draftsmen of the Rules to extend the definition of "parent" to include parents-in-law, but, despite making a number of extensions by the definition in paragraph 6 he has not done so: and nothing in the Rules suggests that "parent" or "mother" is to be given the wider meaning advocated by counsel.

33. We conclude that the wording of the Rules, properly constructed, does not enable the appellant to succeed as the sponsor's mother-in-law.

Question 2

34. We now pass to the second question. This must be distinguished from the third. We are not here concerned with departing from the Rules, but merely with departing from their wording. The question is whether the effect of the Rules as they are expressed demands that they be expressed another way with, evidently, a different effect. If the claimant can show that the Rules as expressed infringe her human rights, she may in principle be able to demand that they be read, using different words, in order to prevent the infringement. She then might succeed as a mother-in-law, not because the rights of mothers-in-law are not recognised by the Rules, but because the rights of mothers-in-law themselves compel the Rules to be read so as to include them.

35. It goes without saying that this is a difficult argument to establish. Generally speaking, courts are concerned with the law as written and as enacted or otherwise authorised, not with some different form of words which might have been used but was not. But, as the speeches of the House of Lords in Ghaidan v Godin-Mendoza make clear, s3 of the Human Rights Act 1998 may require legislation to bear a meaning which departs from the unambiguous meaning that it would otherwise bear, in order to make it Convention compliant. So the doctrine espoused in Ghaidan v Godin-Mendoza may provide a remedy for a threatened breach of human rights, by allowing the impugned legislation to be read in a way differently from the way in which it is expressed. That does not, of course, mean that the words of statutes and other legislative instruments can generally be disregarded. One needs first to establish whether the rule as such breaches the claimant's human rights. If the claimant could show, as Mr Godin-Mendoza did, that the legal rule violates his Convention rights, judicial rewriting of the rule may be the way forward. But the claimant cannot start with the proposal for change. Before any such issue arises, a claimant must establish that the rule as expressed is inconsistent with a Convention right. Only if it is will s3's requirement to read and apply the rule "in a way which is compatible with the Convention rights" require the rule to be read in a way other than that in which it is written.

36. In order to establish the incompatibility with a Convention right, counsel advanced an argument based on Article 14 that there is simply no justification for a distinction between mothers and mother-in-law in the Immigration Rules. He referred to the well known process set out by Brooke LJ in Michalak v Wandsworth LBC [2002] EWCA Civ 271 at paragraph 20. He submitted that the facts fell within the ambit of Article 8, and that there was an obvious difference between mothers-in-law and mothers, his chosen comparator, in that mothers are treated more favourably under the Immigration Rules than mothers-in-law. He

submitted that the situations of mothers and mothers-in-law were "broadly analogous". His skeleton argument, which he expanded at the hearing, continues as follows:

> *"26. There is simply no justification for the difference of treatment in the case of a mother/mother-in-law's son who will be maintained and accommodated adequately without recourse to public funds.*
>
> *27. The corrected approach in order to determine justification was described, obiter, by Elias J in the case of Williamson v Secretary of State for Education and Employment [2001] EWHC Admin 960 at paragraph 60, describing how he would have approached mere assertions by counsel for the Secretary of State as to justification under Article 9(2) of the Convention. The learned Judge said that he would have required evidence to support the contention that a ban on corporal punishment (and not other forms of punishment) in schools was justified:*
>
> > *'Without such evidence, it is impossible to say whether the response was a proportionate one. The Court cannot find justification simply on the basis of counsel's assertion as to possible grounds which a state might be able to rely upon to justify the provisions in question.'*
>
> *28. The burden of establishing justification is on the state.*
>
> *29. No justification has been advanced for the difference of treatment between the two analogous groups.*
>
> *30. Clearly if the* mother-in-law *meets all the conditions of the Rule in question but is excluded from its scope simply on the grounds of her status then there can be no immigration defence for the difference of treatment. The* mother-in-law *is not dependent on her natural son and her dependency on her daughter-in-law is one of necessity not choice."*

37. In his oral submissions counsel relied firmly on the extract from the judgment of Elias J. He said there was no evidence in this case either that there was any justification for treating mothers-in-laws different from mothers. He said that he put the Secretary of State to proof. Where, he submitted, there is a challenge to the Rules, as here, alleging direct discrimination between mothers and mothers-in-law, "plainly, the Secretary of State had the burden of proof to establish why the distinction was made".

38. This submission is on its face remarkable. As we remarked at the hearing, every one of the Immigration Rules draws a distinction between those who are entitled and those who are not entitled. The purpose of the Rules is to draw a line and it is clear that there will often be cases very close to the line. If it is right that it is for the Secretary of State to justify all distinctions, by evidence, then every immigration appeal would probably have to start with such a process. Counsel confirmed that that

was his view, and that it was the process to which Elias J had pointed; although he confirmed that he was unaware of any immigration appeals having actually taken that course.

39. As we have indicated previously, counsel was unable to tell us anything about the cases he had cited. The proposition derived from Williamson seemed to us to be unlikely to be right, and we said so. It was in this context that counsel told us that he was unable to tell us any more about the case.

40. In Williamson, the claimants were members of a Christian sect who believed that corporal punishment of children was authorised and demanded by the Bible. Section 548 of the Education Act 1996, as amended by the Schools Standards and Framework Act 1998, prohibited corporal punishment by teachers in schools. The claimants claimed that a total prohibition would breach their right to manifest their religion, protected by Article 9 of the European Convention on Human Rights. They accordingly sought a declaration that s548 did not prevent them delegating to a school teacher their own right as parents to administer corporal punishment to their children. Their case was based in part on the argument that there was no lawful or rational justification for a regime in which parents were permitted to administer corporal punishment, but teachers were not. The Secretary of State called no evidence to justify the distinction.

41. Elias J held that the parents' wish to administer corporal punishment to their children did not amount to the manifestation of a religious belief; so he dismissed the claim on the ground that s548 was not inconsistent with a right protected by Article 9. His remarks on justification were therefore, indeed, obiter. The matter did not end there. We have to say that we are very surprised indeed that counsel did not refer us to the fact that the parents appealled to the Court of Appeal [2002] EWCA Civ 1926, where the justification point was not taken, and to the House of Lords [2005] UKHL 15, where it was taken and where it was decisive. All the members of the House of Lords who heard the appeal took the view that the parents' rights under Article 9 were engaged, and that s548 interfered with them. On justification, Lord Nicholls, who gave the leading speech, at paragraph [42] described Elias J as having dismissed the Secretary of State's submissions on justification "with a degree of briskness". He then went on to hold that the justification was made out, *without hearing any evidence*. He held that Parliament was amply entitled to take a considered view and to espouse a policy on corporal punishment such as that contained in s548. All the other members of the House shared Lord Nicholls' view.

42. It seems to us that the subsequent history of Williamson v Secretary of State for Education and Employment demonstrates conclusively that the dictum upon which counsel relied in this appeal does not represent the law. Given the final decision on the matter, reached apparently without

evidence ever being called by the Secretary of State, it cannot be right to say that the justification of a distinction requires evidence. In our view the citation from Elias J's judgment was certain to mislead. Whatever view is taken of counsel's obligation to have some knowledge of the authorities he cites, we are confident that counsel has a duty not to mislead. The claim that the Secretary of State can be put to proof and required to produce evidence in order to justify any distinction made in the Immigration Rules between similar classes of people, and that a finding on human rights grounds against him will follow unless he do so, appears to be entirely without substance. We reject it.

43. The Secretary of State is bound by the Immigration Act 1971 to make rules governing non-UK nationals' admission to and stay in the United Kingdom. In doing so he is bound to make distinctions, even between members of families. He is responsible for general policy on immigration, and the rules are to an extent an emanation of his policy. The Rules have to distinguish between those who are allowed to enter and remain in the United Kingdom and those who have no such entitlement. A line has to be drawn somewhere. In the present context, it is drawn between mothers and mothers-in-law. As counsel submitted, the effect is that mothers are for these purposes treated more beneficially under the Rules than mothers-in-law. But there is no reason why they should not be, because, wherever the line is drawn, those on one side of it will be treated more beneficially than those on the other. There will always be a distinction, and it may be a fine one.

44. A similar issue came before this Tribunal in HK (Discrimination – refugees' family policy) Somalia [2006] UKAIT 00021. There is was argued that the Secretary of State's policy for the admission of certain members of a refugee's family constituted unlawful discrimination against other family members. In its determination rejecting that argument the Tribunal referred to R (Carson) v Secretary of State for Work and Pensions [2005] UKHL 37, [2005] 2WLR 1369. At paragraphs [15]-[17], Lord Hoffmann (with whose reasoning Lord Nicholls, Lord Rodger and Lord Carswell expressly agreed) said this:

> "15. *Whether cases are sufficiently different is partly a matter of values and partly a question of rationality. Article 14 expresses the Enlightenment value that every human being is entitled to equal respect and to be treated as an end and not a means. Characteristics such as race, caste, noble birth, membership of a political party and (here a change in values since the Enlightenment) gender, are seldom, if ever, acceptable grounds for differences in treatment. In some constitutions, the prohibition on discrimination is confined to grounds of this kind and I rather suspect that article 14 was also intended to be so limited. But the Strasbourg court has given it a wide interpretation, approaching that of the 14th Amendment, and it is therefore necessary, as in the United States, to distinguish between those grounds of discrimination which prima facie appear to offend our notions of the respect due to the individual and those which*

merely require some rational justification: Massachusetts Board of Retirement v Murgia *(1976) 438 US 285.*

16. *There are two important consequences of making this distinction. First, discrimination in the first category cannot be justified merely on utilitarian grounds, e.g. that it is rational to prefer to employ men rather than women because more women than men give up employment to look after children. That offends the notion that everyone is entitled to be treated as an individual and not a statistical unit. On the other hand, differences in treatment in the second category (e.g. on grounds of ability, education, wealth, occupation) usually depend upon considerations of the general public interest. 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.*

17. *There may be borderline cases in which it is not easy to allocate the ground of discrimination to one category or the other and, as I have observed, there are shifts in the values of society on these matters.* Ghaidan v Godin-Mendoza *[2004] 2 AC 557 recognised that discrimination on grounds of sexual orientation was now firmly in the first category. Discrimination on grounds of old age may be a contemporary example of a borderline case. 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. In the present case, the answer seems to me to be clear."*

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 has to be drawn when the Secretary of State decides which family members are to be entitled to settlement in the United 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.

46. No unlawful discrimination has been established. There is no breach of Article 14, and accordingly no reason under s3 of the 1998 Act to read paragraph 317 in any way other than that in which it is written.

Question 3

47. The third question is whether, in all the circumstances of the case, the appellant should be entitled simply as a mother-in-law to the leave she claims. We have posed this question because it appears to be raised by counsel's submission that Articles 8 and 14 might enable the claimant to succeed other than under paragraph 317. This submission is at paragraph 37 of the skeleton. It is not a simple human rights argument, because of the reference to Article 14, which, in the context of this appeal, must be a reference to the distinction between mothers and mothers-in-law. It seems to us, however, that precisely the same considerations apply in answering this question as the last. The distinction is justifiable; it is not unlawful discrimination; applying the distinction is not of itself a breach of the claimant's human rights; the claimant has no more claim solely as a mother-in-law outside the Rules than she has within them.

Question 4

48. The last question is whether, in all the circumstances of the case, the appellant is entitled by reason of the Human Rights Act to settle in the United Kingdom despite not meeting the requirements of the Immigration Rules. That is the same as the question whether the appellant's circumstances are so truly exceptional that the Secretary of State's immigration policy contained in the Immigration Rules cannot properly be applied to her. This is different from the other questions. It is unlike the second, because we are here concerned with whether the appellant has a claim outside the Rules rather than within them; it is different from the second and the third because we are here concerned with all the circumstances of the case rather than the appellant's claim simply as a mother-in-law. Despite counsel's submissions, we are not prepared to ignore the decision of the Court of Appeal in Huang and Others v SSHD [2005] EWCA Civ 105, which is clearly binding on us.

49. The question whether the appellant's circumstances were truly exceptional was considered by the Immigration Judge in the terms we have set out earlier in this determination. The Senior Immigration Judge who made the order for reconsideration regarded his treatment of the issue as adequate, and so do we. The order for reconsideration rejects the possibility of further argument on this issue, and counsel gave no reason for going behind that order. As AH (Sudan) [2006] UKAIT 00038 makes clear, all the matters that were before the Immigration Judge may be before the Tribunal on reconsideration, but there will need to be a good reason for going again into an issue which has already been properly dealt with. No such good reason is shown here.

50. Nevertheless, counsel made brief submissions on this issue. In our view they lacked reality. In particular, we entirely reject his suggestion that it is "truly exceptional" for a man's wife and his mother to be united in mutual sympathy and grief at his death.

51. For the reasons given by the Immigration Judge, we find that the appellant's circumstances are not truly exceptional, and that she is therefore not entitled to remain in the United Kingdom for settlement despite the Rules.

Other Requirements of Paragraph 317

52. So the four questions put by counsel's argument are answered. We should not part from this case, however, without pointing out that, despite the way in which the matter was put before us, the relationship between the appellant and her proposed sponsor is far from being the only issue in this case. The matters raised by the Entry Clearance Officer are, so far as we are aware, still live. The way in which the appellant might seek to meet the other requirements of paragraph 317 may well have changed as a result of her son's death. Counsel made no submissions in any detail on the financial requirements of the Rules, simply asserting that the appellant met them. It is very difficult to see the basis for that assertion. Two particular requirements of paragraph 317 are in issue: the financial dependence of the appellant upon her relative settled in the United Kingdom, and the absence of other close relatives in her own country to whom she can turn for financial support. As the Immigration Judge pointed out, nothing appears to have changed in the appellant's own country since she came to the United Kingdom. We must assume that, when she used her visit visa, she intended to return to India. The circumstances in India must therefore be ones to which, in her view, she could return. If nothing has changed in India, however, a great deal has changed in the United Kingdom. And because this is an in-country appeal, it is the facts at the date of any hearing which are to be taken into account. It seems to us that the evidence before the Immigration Judge and before us is wholly insufficient to establish that the appellant met or meets the relevant requirements of the Immigration Rules.

53. We remind ourselves that when an application for an extension of stay has to be determined by reference to paragraph 317, the questions to be asked are not whether whilst the applicant is in the United Kingdom she meets the requirements of the Rules, but whether she would meet them if she were notionally considered as being in her own country at the time when the decision has to be made. (If it were not so, the requirement of "living alone in the most exceptional compassionate circumstances", for example, would be impossible to fulfil.) The appellant has said that her other son, the son who lives in India, is unwilling to provide for her. The evidence that that was the case was rightly regarded by the Immigration Judge as difficult to reconcile with the appellant's intention to return to India at the end of her visit. But things are different now: the son in India is the appellant's only son. She has no other male descendant. There is no evidence that, in those circumstances, he would decline to look after her.

54. Similarly, the question of support has to be looked at from a different angle. The appellant's claim was that when she was in India she was financially mainly dependent upon her son in the United Kingdom. Her daughter-in-law may or may not be prepared to send money to India in the same way: we do not know, and there is no evidence on it. But even if the appellant met the requirements of paragraph 317(i), she would need to show that, if she were in India at the present time, she would be financially wholly or mainly dependent upon her daughter-in-law in England, and that her own son in India would not provide her with financial support.

55. In the light of the conclusions we have reached in the issues arising from the relationship between the appellant and her proposed sponsor, we, like the Immigration Judge, do not need to reach any firm conclusion on the other aspects of paragraph 317. But it seems to us that even if we had been persuaded by counsel's arguments on the relevance of the relationship, we could not have allowed this appeal, because of the lack of evidence that the other requirements of the Immigration Rules are met.

56. For the reasons we have given we find that the Immigration Judge made no material error of law, and we order that his determination, dismissing this appeal, shall stand.

C M G OCKELTON
DEPUTY PRESIDENT
Date: