SP (Time for reply – Rules 30(2) and 45(4)(c)) Pakistan [2006] UKAIT 00010

Asylum and Immigration Tribunal

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 8 November 2005	
Prepared	…**08 February 2006**……

Before

Mr D K Allen, Senior Immigration Judge
Mr T B Davey, Immigration Judge
Mr P Rogers, JP

Between

Appellant

and

ENTRY CLEARANCE OFFICER - ISLAMABAD

Respondent

Representation:

For the Appellant: Mr M S Gill, QC, Counsel instructed by Akther & Darby Solicitors
For the Respondent: Mr J Morris, Home Office Presenting Officer.

Procedure Rule 30(2) is mandatory, subject to the possibility of prospective variation of the time-limit, as envisaged in Rule 45(4)(c)

DETERMINATION AND REASONS

1. The appellant, a citizen of Pakistan, appealed to an Adjudicator against the Entry Clearance Officer's decision of 19 February 2003 refusing entry clearance. The appeal was heard by the Adjudicator on 11 June 2004. She dismissed the appeal under the Immigration Rules, but allowed it under Article 8 of the Human Rights Convention. The Entry Clearance Officer subsequently sought and was granted permission to appeal to the Immigration Appeal Tribunal. By virtue of a Transitional Provisions Order the appeal comes before the AIT as a reconsideration of the Adjudicator's decision. At a hearing on 28 April 2005 the Tribunal concluded that

there was an error of law in the Adjudicator's determination. The reason for this was that the Adjudicator had said that she was applying the test in *Edore* (which was correct at that time), that her task was limited to seeing whether the decision lay outside the range of reasonable responses open to the respondent, and the matter was not for her discretion. However at page 28 of her determination she gave reasons for finding a disproportionate interference which amounted largely to speculation about what the future held. Even on the current test in *Huang* and *Kashmiri* these reasons did not make the case "truly exceptional". The Tribunal concluded that it was therefore appropriate for the matter to be considered afresh. It noted that Mr Gill QC wished to cross-appeal on the issue of interpretation of rule 281(iii) and that this deserved to be aired. The wing members had not been provided with copies of the appellant's bundle as important background material. The Tribunal noted that the "respondent's notice" was only served yesterday (i.e. 27 April 2005) and was too late to be considered either under Rule 19 of the 2003 Procedure Rules or under Rule 30 of the 2005 rules, neither of which provided for an extension of time.

2. The appeal came before us on 8 November 2005 for the second stage of the reconsideration. Mr M S Gill, QC instructed by Akther & Darby Solicitors appeared on behalf of the appellant, and Mr J Morris appeared on behalf of the Entry Clearance Officer.

3. Mr Morris was hampered by not having a file. We were able to assist him by providing copies of some of the papers. We were also able to clarify that the Tribunal had found the error of law on the terms as set out above and that reconsideration had been ordered.

4. The first issue that fell for determination was that of the reply or cross-appeal put in by Mr Gill on 27 April 2005. First of all we invited submissions as to whether this fell to be governed by the 2003 Procedure Rules or the 2005 Procedure Rules. It appeared to us that the matter was in principle governed by Rule 62(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. That states as follows,

> "Subject to the following paragraphs of this rule, these rules apply to any appeal or application to an Adjudicator or the Immigration Appeal Tribunal which was pending immediately before 4 April 2005, and which continues on or after that date as if it had been made to the Tribunal by virtue of a transitional provisions order."

5. Mr Gill accepted that the Entry Clearance Officer's appeal was pending on 4 April 2005. He referred us to Article 9 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (Commencement No.5 and Transitional Provisions) Order 2005. Article 9(1) states as follows.

> "Where, immediately before commencement, an appeal to an Adjudicator is pending to which any of the old appeals provisions apply, those provisions shall continue to apply to the appeal after commencement, subject (except where Article 3 applies) to the modification that any reference in those provisions to an Adjudicator shall be treated as a reference to the Asylum and Immigration Tribunal."

6. As we pointed out, this was clearly subject to a consideration of a definition of the phrase "the old appeals provisions" in Article 1(2) of the Order. This is defined as follows:

> " 'The old appeals provisions' means the following provisions, insofar as they continue to have effect immediately before commencement in relation to a pending appeal –
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> (i) Part IV of, and Schedule 4 to, the Asylum and Immigration Act 1999;
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> (ii) Section 8(1) to (4) of the Asylum and Immigration Act 1993;
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> (iii) Sections 13 to 17 of the Immigration Act 1971."

7. Mr Gill argued that Part IV and Schedule 4 of the 1999 Act had created the power to make the procedure rules and therefore the 2003 Procedure Rules came within Part IV and Schedule 4 to the 1999 Act and therefore had to be read as flowing from it and therefore this was a case where Rule 19 of the 2003 Procedure Rules applied.

8. However, if one looks at the explanatory note to the 2003 rules it is stated that the Rules prescribe the procedures to be followed for appeals and applications to an Adjudicator and to the Immigration Appeal Tribunal under Part V of the Nationality, Immigration and Asylum Act 2002, which came into force on 1 April 2003, and under Section 40A of the British Nationality Act 1981, as inserted by Section IV of the 2002 Act. If one then turns to Part V of the Nationality, Immigration and Asylum Act 2002, and in particular to Section 106, it can be seen from Section 106(b) that the Lord Chancellor may make rules "prescribing procedure to be followed in connection with proceedings under Section 82, 83, 101(1) or 103. It is clear therefore that the power to make the 2003 Procedure Rules derived from Section 106 of the Nationality, Immigration and Asylum Act 2002 and not from Part IV of, and Schedule 4 to the Immigration and Asylum Act 1999. In any event, since the 2003 Procedure Rules were revoked by Rule 61 of the 2005 Rules (subject to limited exceptions relating to time limits of no relevance to this case), if the 2005 Rules did not apply to this issue, nothing would; a construction which we were not inclined to apply.

9. We understood Mr Gill to accept our conclusions on this at least on the face of it, but he argued that on the basis of either set of rules there were many cases allowing a statutory tribunal to supplement its rules and the key was to look at the substance of the rules and apply them fairly and justly.

10. He went on to contend in particular with regard to Rule 30 of the 2005 Rules that the words "any hearing of or in relation to the reconsideration of the appeal" had to be read as meaning: any substantive hearing of the reconsideration of the appeal.

11. We pause to remind ourselves of the wording of Rule 30. It states as follows,

> "30(1) When the other party to the appeal is served with an order for reconsideration, he must, if he contends that the Tribunal should uphold the initial determination for reasons different from or additional to those

given in the determination, file with the Tribunal and serve on the applicant a reply setting out his case.

(2) The other party to the appeal must file and serve any reply not later than five days before the earliest date appointed for any hearing of or in relation to the reconsideration of the appeal.

(3) In this rule, 'other party to the appeal' means the party other than the party on whose application the order for reconsideration was made."

12. As we say, Mr Gill contended that this had to be read in order to mean a substantive hearing of the reconsideration of the appeal, as otherwise something such as an erroneous listing of the hearing which was adjourned could be enough. He contended that it did not follow that the fact that a hearing had taken place on 28 April meant that it was a lawfully conducted hearing in any event. The Tribunal had not had the bundles and had no proper basis to assess whether the Adjudicator was in error. No written reasons had been provided so, insofar as it was a decision purporting to identify an error of law, it was an unlawful decision and today was the only substantive hearing and therefore the reply had been put in in time. It was therefore argued that with reference to Rule 30(2) the Tribunal should interpret the words as meaning "for any substantive hearing" which was the hearing today as no lawful ruling had been made on 28 April.

13. Otherwise Mr Gill argued that such a rule should be looked at in terms of its substance and the overriding objective of the rule should be borne in mind. It was saying that the appellant should not be caught by surprise and set only a target timescale and was directory and not mandatory. The Presenting Officer did not argue that he had been prejudiced although he did say that it was late, as had the Presenting Officer at the stage one hearing. It was necessary therefore to look at the rule in that sort of way.

14. Decisions such as *Jeyanthan* dealt with the question of the power of statutory tribunals to go beyond their own black letter rules. The Secretary of State had had plenty of time to prepare a response to the reply.

15. We invited Mr Gill to say why, if it were relevant, the reply had been put in so late.

16. Mr Gill said that it seemed that the clients had wanted a different Counsel after the Adjudicator hearing and another junior Counsel had been identified who considered the case complex and it had come late before the hearing to Mr Gill. He accepted that it could be argued that the problem should have been identified earlier but it was a reason and there was no blame to be ascribed to the appellant for that. There were cases in the context of judicial review and appeals to the Court of Appeal where delay not attributable to an appellant was not usually held against the appellant, especially with regard to something like a respondent's notice in relation to which courts were fairly relaxed. As to whether it was relevant for the Tribunal to know the reason he contended that given the position of the Secretary of State it was not, as no prejudice was claimed on behalf of the Secretary of State but it was simply noted that it was out of time and it was left to the Tribunal. The reason therefore did not really matter.

17. He contended that for the Tribunal to do justice it would be necessary for it to construe the rules accordingly and say the rule was capable of being construed to allow late replies. These were really procedure rules and subordinate legislation not primary and had to be approached with a degree of flexibility.

18. In response Mr Morris said that it was unclear what was before the Tribunal in April but if it was the bundles provided today then there was not a difficulty. The Secretary of State would need time to consider the notice if it were before the Tribunal and he did not have any of the paperwork and there was no suggestion that it had been considered. The reason for the late serving of the notice was relevant but it would not usually be a problem. He would need time if not an adjournment to consider the case in the round and the issue of intention to live together if it were before the Tribunal today. The rules were clear but he accepted that he was in difficulty today.

19. By way of reply Mr Gill referred to the point concerning the bundles and the fact that the Tribunal had purported to identify an error of law with regard to the Article 8 findings. The Tribunal had considered the Adjudicator's reasons which they considered appeared to be inadequate or speculative. They needed to have looked at the evidence in order to make such a finding. The decision of the Adjudicator could not be said to be perverse and the evidence, for example at page 20 of the bundle, showed information from the Lifers Manager giving information about what visits the sponsor would be entitled to and on that evidence the Adjudicator was entitled to find as she did.

20. We adjourned briefly in order to give consideration to and come to conclusions on the issue of the application of Rule 30 to the timing of Mr Gill's reply.

21. After consideration we concluded that the reply could not be said properly to be before us. We read the wording of Rule 30(2) of the 2005 Rules as being mandatory. We do not see any latitude for interpretation otherwise where the wording is that a person in the appellant's position in this situation must file and serve any reply not later than five days before the earliest date appointed for any hearing of or in relation to the reconsideration of the appeal. Clearly service on the day before the hearing, as in this case, would not suffice. We do not see merit in Mr Gill's argument that what took place on 28 April 2005 could not properly be regarded as a hearing. We see nothing to suggest that the fact that the wing members had not been provided with copies of the appellant's bundle in any sense precluded the Tribunal from coming to a proper conclusion on the error of law point. It cannot be said that the Tribunal did not have the material in question. Even if it could, there is no conceivable doubt that it was a hearing. But, further, Mr Gill's submission fails to deal with the fact that time under Rule 30 is not limited by reference to any <u>actual</u> hearing, but by reference to the <u>earliest</u> date <u>appointed</u> for any hearing (our emphasis), whether or not the hearing takes place. That, we think, is not accidental. After all, the service (in time) of the reply might cause the hearing to be adjourned. The reasons given by the Tribunal were clearly based on its assessment of the determination which we have set out above. It is clear from paragraph 14.4 of the President's Practice Directions of 4 April 2005 that:

> "'Where the Tribunal acting under paragraph 14.2 transfers the proceedings, it shall prepare written reasons for its finding that the original Tribunal made a material error of law and those written reasons shall be attached to, and form part of, the determination of the Tribunal which substitutes a fresh decision to allow or dismiss the appeal."

22. We have set out those reasons above. It is a decision of the Tribunal, and the decision on an error of law has already been reached and even if we had the power to revisit the decision that there was an error of law we would see no reason to do so. There is no basis upon which it can be contended that the hearing on 28 April 2005 was not a hearing within the meaning of rule 30(2), and, as we have noted above, it is clear that the reply was only served a day before that hearing and therefore does not comply with the requirements of that sub-paragraph of the Rule.

23. Since the hearing, Rule 45(4)(c) of the 2004 Procedure Rules has come to our attention. This states as follows:

> "Directions of the Tribunal may in particular –
>
> …
>
> vary any time limit in these Rules or in directions previously given by the Tribunal for anything to be done by a party."

24. On the face of it this might appear to permit consideration of the late reply in this case. However, we are of the view that a careful reading of Rule 45(4)(c) indicates a prospective rather than a retrospective variation, in the light of the words: "anything to be done by a party." No direction was sought, and no explanation for the lateness of service of the reply was provided. Though it is clear from Rule 45(4)(c) that variation of the time limit in Rule 30 is possible, we conclude that a power to make prospective directions in no sense connotes a power to condone, ex post facto, a failure to comply with the requirements of the Rules.

25. In any event, even if we had a discretion to vary, and the reply was before us, we would see no merit to it. The point was considered in *Shabbana Bibi [2002] UKIAT 06623*, on which the Adjudicator relied, and we find compelling the reasoning in that determination, in particular at paragraph 13, that intention means more than hope, that it would not have been lawful for the appellant and the sponsor to live together while the sponsor was in prison, and an intention to do something unlawful cannot be recognised by the way in which the Immigration Rules are interpreted.

26. We went on to hear argument on the Article 8 issue which was the only issue before us as a consequence of our ruling above, for reconsideration.

27. Mr Gill referred us to his skeleton argument. He argued that the way in which the Adjudicator had construed the immigration rule was relevant to the Article 8 issue. It was not just a question of being exceptional. He accepted that argument on paragraph 281(iii) was not before the Tribunal because of its ruling on his reply. He argued that it would be artificial however not to take the matter into account as to do so would remove the Secretary of State's own approach to such cases from the

Article 8 issue even if the Tribunal were entitled to rule that Mr Gill could not rely on paragraph 281(iii). There was a question as to the consistency of the approach of the Secretary of State as set out in his guidance, and the State's policy could not be ruled out.

28. Mr Morris on invitation said that he was content for the witness statements that had been before the Adjudicator to stand as being unchallenged. Mr Gill suggested that paragraphs 14 and 15 of the determination could in effect be incorporated into our determination as providing a summary of the oral evidence. We stated however that this would not be appropriate as the matter was being considered afresh. However, we were prepared for the two witnesses who had appeared before the Adjudicator to be called and in essence to go through their evidence as given to the Adjudicator and confirm that it remained the case that that was their evidence today.

29. The first witness was the sponsor's father. He confirmed that he had given evidence on 11 June to the Adjudicator and he had told the Adjudicator that he confirmed his witness statement and in accordance with their beliefs had taken responsibility for the appellant and her son which necessitated him travelling back and forth to Pakistan to support her. They were a close family unit and respected members of their community both in Pakistan and the United Kingdom and would fulfil their duties and responsibilities. His eldest daughter and her husband would accommodate and support the appellant and her son.

30. The next witness was the sponsor's sister. She had given evidence on 11 June to the Adjudicator. She was referred in particular to the point that she had made in her evidence that the appellant spoke on the telephone to her husband but could not call him. She could not call him in prison but he got cards and he called Pakistan but it was very hard as they lived in a village in Kashmir and there were often problems with crossed lines and it was very hard to speak to the appellant and his child regularly but he tried. She confirmed that the couple intend to live together. There would be difficulties if they could not live together in the United Kingdom as a family unit. She had been in Pakistan earlier this year and spent a lot of time with the appellant. The village was a very small one of some two hundred and fifty people and everybody knew everybody. On marriage the appellant should have gone to her in-law's house and she suffered twice because she could not do this and because her husband was in prison and the community talked about it. She was living with her parents and not her parents in-law and this was a burden on her and on her son who was now nearly four. The family here could not go and see her regularly but visited her for two or three weeks and then had to leave and it was a double life for the appellant's son.

31. The appellant's son was now of an age to be starting school and he could attend pre-school at three. The appellant did her best at home but there were no schools unless privately funded in the area until the child was five or six. If he were in the United Kingdom he would be in pre-school now. The village had suffered some tremors in the recent earthquake but luckily they had not experienced the kind of problems experienced elsewhere.

32. In his submissions Mr Morris said that the grounds covered the points that he wished to make and he queried what was exceptional about the case. The witness

statements did not show the case was exceptional. Family life could be maintained with contact between the sponsor and the family and although it would be erratic there was a workable telephone system. The authority of *Huang* was clearly of significance. Family life could be maintained. The appellant's own actions had caused this problem for his family life not being able to be maintained.

33. In his submissions Mr Gill referred us to the points set out at paragraphs 8 to 21 of his skeleton argument which cross referred back to the intention point. He also stated that the submissions to the Adjudicator at paragraphs 16 to 21 of the determination remained valid. The Adjudicator's findings of fact at paragraph 22 and 26 to 30 needed to be looked at.

34. The only issue under Article 8 was that of proportionality and he queried what it was the State was wishing to protect. He contended that how the State viewed its own rules became important and the Tribunal was obliged to have regard to the Secretary of State's own interpretation of his formerly stated rules which brought in paragraph 2.2 of the Secretary of State guidance referred to in the skeleton. Policy objectives had to be considered. If the approach set out at paragraph 20(a) was adopted as it was suggested it should be then there was no need to consider exceptionality. He referred to an authority of Mr Justice Collins to the effect that if it came within the spirit of the immigration rules if not within the letter then it was enough for Article 8 to be satisfied. The spirit of Article 8 required the Tribunal to consider these arguments. The appellant should have been granted leave to enter under Article 8.

35. If he had to show exceptionality then the Tribunal was referred to the skeleton. Paragraph 26(b)(i) showed that it was especially important where prisoners' families were concerned and he referred to the bundle on that. The sponsor was already being punished for his criminal conduct but deprivation of his family life was not part of that. If they were in the United Kingdom they could go and see him and he queried why he and the family should be denied access because the appellant was abroad. Family life was to be actively promoted. The Secretary of State's policy and Article 8 were designed to protect family life. Page 20 of the bundle concerned the degree of contact that would be possible if the appellant were in the United Kingdom and there was a positive obligation to encourage and assist family relationships. There were further matters in the bundle concerning the children, at pages 130 and 131 and there was the oral evidence also. The effect on the child should be considered. He was entitled to see and be with his father.

36. It was unrealistic to suggest that there could be regular visits from Pakistan. The child was a British citizen and entitled to come here and benefit from British education. It was not an entitlement as a matter of law to come here for his education but if he exercised his right to come here as a British citizen it could be said that he was entitled to that education. However if he moved here and his mother stayed behind in Pakistan there would be disruption to the family. It would be an error of law to say that because the husband was in prison he had to put up with the consequential problems. It was not a point in any event raised in the grounds. It was important to this family with their religious and cultural tradition and the appellant recognised his obligations and wanted to maintain them. The fact of his being in prison should not stop his wife and child from being in the United Kingdom. They were being denied the strong monthly contact that could take place if she were here

and she could not come close to that kind of family life even if she were able to visit once or twice a year. There was a cost to that and in financial terms there were inevitable restrictions on visits. The family did what they could to visit her in Pakistan. It was true that they would not have to do that if she came here but it was questioned how many visits there were to be. As he was in prison there was all the more reason to give effect to his family life. The United Kingdom recognised the need to overcome the obstacles and it compounded it to say that she could not come here. The reality of the problems of making entry clearance applications was not irrelevant and it had to be queried as to whether she would get entry clearance and often it could be that a refused applicant would fail under a visit application in practice, although in theory she could apply.

37. In effect the family was being punished as well as the sponsor. This gave rise to it being an exceptional case. The Tribunal was reminded of the Home Office policy and all the statements in the bundle concerning promoting prisoners' family life. These matters were emphasised in the skeleton argument. But there was no relevant state interest or policy here.

38. Mr Gill also referred us to the decision of the Court of Human Rights in *Boultif* which he argued was relevant to exceptionality since it showed that looking at the relevant criteria the Court of Human Rights looked at a whole range of circumstances but did not use language such as "exceptionality" so this could give meaning to the Court of Human Rights case law. Paragraph 53 in particular in that judgment was relevant and also paragraph 55. It showed how the Court of Human Rights struck such balances. It was less restrictive than the Secretary of State's position in this case. The language of exceptionality could lead to looking at the matter from the most extreme circumstances possible It was necessary to comply with the spirit of the rules and the Court of Human Rights adopted a liberal approach and the Secretary of State accepted the need to promote prisoners' family rights. It was an overwhelmingly strong case and the appeal should be allowed.

39. We stated that we would reserve our determination and subsequently provide full written reasons which we now do.

40. We have set out above our ruling on the matters which led us to the conclusion that the only matter before us was that of Article 8 of the Human Rights Convention. It is important that we remind ourselves of the facts in this case. The appellant married the sponsor, who is a British citizen, on 2 August 2001 in Pakistan. The two families live in the same village and are well known to each other although they are not related. The couple first met when the sponsor was on a visit to Pakistan in 1999 and although the marriage was arranged they had already decided to get married. The sponsor returned to the United Kingdom after the marriage and was arrested in September 2001, charged with murder and convicted with two others in December 2002 and sentenced to life imprisonment.

41. In *MB (Croatia)* (*Huang – Proportionality – Bulletins) [2005] UKIAT 00092*, the IAT examined the implications of *Huang* for the ordinary case. The Tribunal concluded that the immigration rules were the starting point for the assessment of proportionality. If an individual had no case within the rules or the extra-statutory policies and concessions, it would have to be a truly exceptional case on its facts for

an Adjudicator properly to conclude that an immigration decision was disproportionate and unlawful. It is within this framework that we consider the issue of proportionality which as Mr Gill pointed out is the issue that requires determining in the context of the Article 8 appeal here.

42. We do not agree with Mr Gill that it can properly be argued that the case is not one where the exceptionality principle applies. The appeal was dismissed under paragraph 281(iii) of HC 395, on the basis that the requirement of that sub-paragraph was not met, the Adjudicator taking guidance from a determination of the IAT in *Shabbana Bibi [2002] UKIAT 06623*. There is no reconsideration of that finding since as we have set out above the only challenge to that aspect of the decision came so late that on our ruling the reply of Mr Gill setting out the challenge was not before us since it was not put in in time. The case therefore must be regarded as one in which the appellant has no substantive claim within the Immigration Rules. The Tribunal in *MB* went on to say at paragraph 32, that where a Rule or extra-statutory provision covers the sort of circumstance upon which an individual relies, e.g. entry for marriage, but the individual falls outside the specific requirements or limits of the otherwise applicable rules or policy, that is a very clear indication that removal is proportionate and it is not for the judicial decision maker, except in the clear and truly exceptional case, to set aside the limitations set by the executive, accountable to Parliament and, in the case of the Immigration Rules, approved by Parliament.

43. The Tribunal went on to say at paragraph 35 that Article 8 is not a general provision justifying the overriding of immigration control on general compassionate grounds or whether there may be harshness and misfortune from removal.

44. The circumstances in this case are that clearly the quality of family life that can be enjoyed by the appellant and her child from outside the United Kingdom must be significantly less than that that which they would enjoy if in the United Kingdom. We see from the memorandum of the Lifers Manager at pages 20 to 21 of the appellant's bundle that as a well behaved prisoner who is considered to be on "enhanced status" the sponsor is entitled to 6 x 2 hour family visits in open forum per month. He is also able to apply for two family days per year again in open forum (twelve hours). It is also said that there is unlimited contact available by letter and telephone on a daily basis. The point is also made that support for a "lifer" is a critical role as release nears and a prolonged period of sustained contact and support will enhance the resettlement process for any prisoner.

45. Mr Gill also drew our attention to a statement in Parliament on 20 January 2004 on behalf of the Secretary of State for the Home Department that the prison service has been working, together with other agencies, to develop an integrated approach to supporting prisoners and their families in sustaining their relationship. There is a paper from Karen Laing of the Newcastle Centre for Family Studies at the University of Newcastle which notes general acceptance of the fact that prisoners' families suffer a great deal and comments on the effect on the relationships within the family of a prisoner between themselves and with the prisoner. There is also reference to rule 4 of the Prison Rules of 1989 which states as follows:

> "A prisoner shall be encouraged and assisted to establish and maintain such relations with such persons and agencies outside prison as may, in the opinion

of the governor, best promote the interests of his family and his own social rehabilitation."

We have also read the summary of submissions made by Action for Prisoners' Families to the Green Paper consultation and the comments there on the problems experienced most likely by children who have a prisoner, in particular a parent, within the family. It is said that children will never maintain a healthy emotional link with the parent in prison while there are so many barriers both in relation to visiting prison and receiving support in the community. There is also reference to the UN Convention on the Rights of the Child and the Human Rights Act 1988, both holding that all children have a right to maintain personal contact with both parents but that many children find themselves separated from, and unable to maintain contact with the parent or sibling in prison. There is also a paper from a Mr Murray a PhD student at the Institute of Criminology at the University of Cambridge where it is said among other things that over the last ten years some prisons have developed family and children's extended visits giving children longer and more normal contact time with their fathers in prison but that these are few and far between and only offered to a small number of prisoners.

46. These matters tie in with the points made in Mr Gill's skeleton to the effect that Article 8 involves not merely a negative obligation to refrain from interfering with Article 8 rights but involves a positive obligation to promote and develop those rights. He refers to the context of the United Kingdom's policies being very much to promote family relationships of prisoners and points to the danger of any suggestion that the whole situation is simply the fault of the sponsor for being in prison in the first place. He also refers to the fact that there is family life going beyond the husband/wife relationship in that the appellant has a married sister in the United Kingdom and has been fully supported by her husband's family and she seems very much part of his family and is expected in accordance with cultural conditions to move in with them. We have heard from her sister-in-law about the difficulties being experienced by the appellant and her child.

47. It is of course the case, in the light of the fact that this is a reconsideration of the Article 8 issue that the findings in this are a matter for us and the findings of the Adjudicator on this particular point in no sense bind us. We do not consider, bearing in mind the test that we have set out above, that this case can be said to be a truly exceptional one. It is clear as we have noted above that there is a significant adverse impact on the quality of family life in this case by dint of the sponsor being in prison in the United Kingdom and the appellant living in Pakistan. Obviously for a number of years they would not be able to spend more than the relatively limited amount of time together that it appears from the Lifers Manager's evidence they would be able to do on the visits. It is the case however that from Pakistan telephone contact can be and is made. The appellant has the opportunity to apply to visit her husband, and we cannot predict and nor should we attempt to do so what the likely chance of success of such application would be. On the face of it though there seems to be no reason why a visit should not be made from time to time and contact to be made person to person between the appellant, her child and her husband. The context of government policy to families of prisoners is not without relevance to this situation, but we do not consider that the particular situation where the prisoner's wife

and child are in another country rather than in this country is such as to render the Entry Clearance Officer's decision unlawful under the Human Rights Act.

48. We should add that we do not derive assistance from the decision of the European Court of Human Rights in *Boultif v Switzerland [2001] 33 EHRR 50* to which Mr Gill referred us. This, it will be recalled, is a case involving an Algerian national who had entered Switzerland in December 1992, married a Swiss citizen in March 1993, and some four years later was sentenced to two years imprisonment for robbery and damage to property, offences committed in 1994. In May 1998 the Swiss authorities refused to review his residence permit. This was held to comprise a violation of Article 8 of the Convention. It can be seen therefore that it was dealing with a very different situation from that before us. We bear in mind Mr Gill's point that the relevance of this point is that it shows how the Court of Human Rights strikes the balance in such cases, concluding as it did that the appellant had been subjected to a serious impediment to established family life since it was practically impossible for him to live his family life outside Switzerland and the court did not consider that his wife could be expected to follow him to Algeria. That is a far cry however from the situation before us, however, and in particular in a case such as that before us where the Immigration Rule is not satisfied, in considering whether on the facts of the case it can properly be described as one that is truly exceptional. With regard to the decision of Collins J in *Lekstaka [2005] EWHC 0745 (Admin)*, which we think is the authority Mr Gill had in mind, it was a case on removal, with very different facts from those in the instant appeal, and the reference at paragraph 38 to the case falling within the spirit of the Rules, if not the letter, is clearly fact-specific, and we do not read it as being of any more than marginal relevance to the appeal before us.

49. For the reasons stated above, we have concluded that this is not a truly exceptional case. Family life can be carried on albeit to an attenuated extent and over the number of years when it will be required to do so in this form, between the appellant and her husband. The notion of a case being truly exceptional is one which by definition must embrace a very small minority of cases and this is not one which in our view comes close to fulfilling that narrow criterion.

50. This appeal is dismissed.

Signed: Date:

Mr D K Allen, Senior Immigration Judge