Neutral Citation Number: [2009] EWCA Civ 825

Case No: C5 2008/2790

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Immigration Appeal Tribunal
OA/47965/2007

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2009

Before:

LORD JUSTICE PILL
LORD JUSTICE HOOPER
and
LORD JUSTICE WILSON

- -

Between:

A (AFGHANISTAN)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Mr Abid Mahmood and Mr Basharat Ali (instructed by Aman Solicitors Advocates) for the Appellant
Mr Jason Beer (instructed by Treasury Solicitors) for the Respondent

Hearing date: 23 July 2009

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Approved Judgment

LORD JUSTICE HOOPER:

1. The appellant appeals, with the leave of the AIT, against the decision of the AIT on second stage reconsideration dismissing her appeal against the refusal on 13 August 2007 to grant her entry clearance to join her husband, the sponsor, in this country. She had applied for entry clearance in November 2006 (three and a half years ago).

2. The sponsor, of Afghani nationality, was granted refugee status in the United Kingdom on 7 September 2005 with leave to remain for five years. Having been granted refugee status, he used his Refugee Travel Document to visit Pakistan the following year. The sponsor and the appellant married in Pakistan on 16 February 2006. The appellant is also an Afghani national presently living with family members in Peshawar in Pakistan. She is now 23 years of age. There is no point taken as to the genuineness of the marriage. The sponsor has visited Pakistan on at least three occasions to be with his wife. His wife gave birth to a daughter in 2007. At the time of the interview in August 2007 (the relevant time for our purposes) she was heavily pregnant. She has since had another child.

3. Paragraph 352A of the Immigration Rules HC 395 provides that the spouse of a refugee is eligible for the grant of leave to enter and remain in the United Kingdom (on the same terms as the refugee) but only if 'the marriage did not take place after the person granted asylum left the country of his former habitual residence in order to seek asylum.' Chapter 16 of the General Instructions for Entry Clearance Guidance confirms this and also permits entry if there are compelling, compassionate circumstances:

> 16.2 Only pre-existing families are eligible for family re-union i.e. the spouse, civil partner and minor children who formed part of the family unit prior to the time the sponsor fled to seek asylum. Other members of the family (e.g. elderly parents) may be allowed to come to the United Kingdom if there are compelling, compassionate circumstances…'.

4. In 16.3 the Guidance states:

> Post flight family members
>
> Spouses/civil/unmarried/same sex partners who married/entered into a civil partnership/relationship after the sponsor fled to seek asylum, do not qualify under family reunion.

5. In the present case the AIT said as to this discretionary power:

> It is of course, possible for discretion to be exercised outside the Rules, and it may be that in some cases the spouse of a refugee should be admitted earlier than the Rules would allow, for compassionate reasons. We are unaware of any policy governing this particular situation, however, since the Refugee Family Reunion Policy does not apply to it.

6. As the Entry Clearance Guidance also points out, the entry clearance officers must also bear in mind the provisions of article 8 of the European Convention on Human Rights.

7. The history of Paragraph 352A of the Immigration Rules is helpfully set out by the AIT in paragraph 18:

> Until August 2005, those recognised as refugees got indefinite leave to remain, and they could be joined by their spouses either by way of rule 352A, which was inserted from 18 September 2002, or, if they were not married before leaving their country to seek asylum, by way of rule 281. When the practice of granting indefinite leave to refugees ended in August 2005, it either was or was not appreciated that the second of these routes was now closed off.

8. Rule 281 lays down the requirements for leave to enter the UK of spouses of persons present and settled in the UK. A person with limited leave to remain is not regarded as "settled".

9. I turn to the procedural history of this appeal.

10. An immigration judge in March 2008 refused the appellant's appeal against the refusal to grant her entry clearance. A review having been sought of that decision, SIJs Moulden and McKee ordered re-consideration. They did so on two grounds, one of which was that the IJ had erred in law in finding that the sponsor could reasonably be expected to live in Pakistan on a long term basis. It follows that in this case it cannot be said, when considering article 8, that the sponsor should go to Pakistan to enjoy his family life.

11. The SIJs then proceeded to a second stage re-consideration and dismissed the appeal.

12. The appellant filed grounds of appeal. The ground which is relevant to the issues we have to decide is 2(i). That states:

> The tribunal has erred in law by finding that Article 8 does not apply. In doing so the tribunal accept that there are no immigration rules that are applicable or alternatively can facilitate an application by A to join the sponsor (at present), A's spouse. The tribunal accept that due to the sponsor's status that a direct applicable rule to allow for entry clearance as a spouse will not be available to A until 2010. The tribunal accept that as the sponsor is a refugee it would be unreasonable for him to give up his status in order to claim asylum in Pakistan (temporary place of residence of A). The tribunal accept that until August 2005, those recognised as refugees got indefinite leave to remain and could be joined by their spouses under rule 352A, or if not married before they left their country to seek asylum, by way of rule 281. However when the practice of granting indefinite leave to remain to refugees ended 'the second of these routes was closed off'. The tribunal accept that

> they are unable to identify any public interest in the disparity of treatment that prevails between refugees like the sponsor (who are prevented from being joined by their spouse) and immigrants with limited leave who can be joined by their spouse. The tribunal accept that in the UK there is a disparity between two groups of refugees which leads to a delay in family reunion for one group. The tribunal also accept there is no Discretionary Policies applicable to this group.

13. Leave to appeal was granted by AIT in September 2008. The two SIJs who gave the decision wrote:

> **Reasons for decision:** the grounds for seeking leave to appeal draw attention to the tribunal's inability to identify any public interest being served by the omission from the Immigration Rules of any provision for a refugee to bring his spouse to this country, if he married her abroad after getting asylum, until he has become settled here, which takes at least five years. This contrasts with the ability of many other migrants, who are here with limited leave, to bring their spouses here under the Immigration Rules, no matter when or where they got married. The tribunal reasoned, however, that Article 8 cannot simply be used to plug *lacunae* in the Immigration Rules, and that it has to be shown in an individual case that Article 8 is engaged by the refusal of entry clearance as the spouse of a refugee, who must be taken to appreciate that a matrimonial home cannot be established in the United Kingdom until the refugee has achieved settled status.
>
> It is arguable that the Immigration Rules discriminate unfairly against refugees who marry after leaving their country of habitual residence to seek asylum, when other classes of migrant are under no such disability. It is also arguable that, contrary to the tribunal's view, the inability of a refugee to establish a matrimonial home in the country of refuge constitutes an interference with his family life for the purposes of Article 8, even if he contracted a marriage abroad in the (imputed) knowledge that he would not be able to bring his spouse to the United Kingdom under the Immigration Rules until after he had achieved settlement. These issues are clearly apt for consideration by the Court of Appeal.

14. The appellant filed and served a skeleton argument on 31 December 2008, making many points and seeking to add new grounds. Importantly for our purposes are paragraphs 17-19:

> Ground Two: Article 8 engaged or not
>
> The tribunal materially erred in law in finding that the appellant, sponsor and their child's family life did not engage

> Article 8 of the ECHR. AG (Eritrea) v Secretary of State for the Home Department [2007] EWCA Civ 801 (31 July 2007:
>
> *28 It follows, in our judgment, that while an interference with private or family life must be real if it is to engage art. 8(1), the threshold of engagement (the 'minimum level') is not a specially high one. Once the article is engaged, the focus moves, as Lord Bingham's remaining questions indicate, to the process of justification under art. 8(2). It is this which, in all cases which engage article 8(1), will determine whether there has been a breach of the article. [Emphasis added]*
>
> The tribunal failed to consider or properly apply the above authority (and the legal test) in determining whether the family life which was repeatedly referred to by the IJ and the tribunal engaged Article 8 of the ECHR. This is illustrated by what was said [CB P.28 para 19-20].
>
> In consequence the assessment purportedly made under 5 stage approach as laid down in Razgar, R (on the Application of) v Secretary of State for the Home Department [2004] UKHL 27 (17 June 2004) was not lawfully carried out.

15. The appeal was listed for hearing on 23/24 April. It was adjourned at the respondent's request because the respondent wanted further time to decide how to respond to the appeal. A letter sent to the appellant's solicitors by the Treasury Solicitors dated 15 April states:

> As set out previously, this case involves important policy issues and has required extensive liaison with various departments within UKBA. It was envisaged that the SSHD would be able to inform you and the court well before the hearing of her position. Unfortunately this has taken longer than hoped.
>
> In light of this, the points raised in your letter and the hearing date in this case, I think it would be appropriate for a short adjournment of four weeks to allow the SSHD to finalise her position.

16. The appeal was re-listed for a hearing on 23 July, not at the expiry of the four weeks referred to in the last paragraph of the letter. Notwithstanding numerous requests made by the appellant's solicitors, the respondent's lengthy skeleton argument was only served on the respondent at 4.00 pm on 20 July, in breach of the Part 52 Practice Direction ("PD"), paragraph 7.7(2). We asked why. We were told that the Treasury Solicitors had only been instructed as to how the appeal should be conducted at noon on Thursday 16 July, leaving only a few hours to serve the skeleton argument in accordance with the PD. Mr Beer, for the respondent, said that the reasons for the delay in serving the skeleton argument were the same reasons as had been presented to the court to obtain the adjournment in April.

17. Rule 52.5 provides:

> 2) A respondent who –
>
> (a) ...
>
> (b) wishes to ask the appeal court to uphold the order of the lower court for reasons different from or additional to those given by the lower court,
>
> must file a respondent's notice.

18. No respondent's notice was served. If a respondent's notice is served then the skeleton argument must be served within 14 days thereafter.

19. Paragraph 7.3 of the PD provides:

> (2) If the respondent does not file a respondent's notice, he will not be entitled, except with the permission of the court, to rely on any reason not relied on in the lower court.

20. I turn to the grounds of appeal.

21. The first ground of appeal (for which leave to amend was needed) was rightfully abandoned at the start of the hearing.

22. I turn therefore to the second ground. In the second ground the appellant takes issue with the manner in which the AIT dealt with the issue of article 8.

23. At the outset of the discussion I set out the five questions listed by Lord Bingham in paragraph 17 of his speech in *Razgar, R (on the Application of) v. Secretary of State for the Home Department* [2004] UKHL 27; [2004] 2 AC 368.

> (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of art 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

24. It is not disputed that the same five questions must be asked when considering article 8 in the context of a refusal to grant entry clearance.

25. The AIT found that article 8 was not engaged. The AIT said:

> 20. ... On the facts of the case, it cannot be said that the refusal of entry clearance is an interference with the family life of the appellant and the sponsor, far less an interference so grave as to engage the operation of Article 8. ...

26. A little later the AIT said:

> 21. ... But for the reasons we have given, Article 8 does not avail the appellant in the present case, since the 'step-by-step' approach does not reach the question of proportionality, and indeed does not even get past the first of Lord Bingham's five questions.

27. The AIT also said:

> 13. ... we agree with Mr Smart [the Home Office Presenting Officer] that what the appellant and sponsor are seeking is not the continuance of their family life, but rather an improvement upon it.

28. As we have seen, the AIT recognised, in granting leave to appeal, that the conclusion was arguably wrong.

29. The respondent submits that the AIT was entitled to find that the refusal of entry clearance to the appellant did not engage article 8. It would not be an interference with the exercise of the sponsor's right to respect for his family life because family life within the meaning of Article 8 did not exist between the sponsor and the appellant.

30. Mr Beer, for the respondent, relies on the point that the appellant and sponsor were only seeking an improvement in their family life. He further relies on the following points:

> (i) First, when the appellant and sponsor married on 16.2.06 they knew, or at least ought to have known, that the immigration law of the United Kingdom made no provision for them to live together in the United Kingdom until the sponsor had become settled – namely after 5 years;
>
> (ii) Second, the appellant can go on living (a comfortable life, according to the AIT), in Pakistan until September 2010 when the sponsor becomes eligible to apply for indefinite leave to remain;
>
> (iii) Third, in September 2010 (subject to, for example, significant and non-temporary changes in Afghanistan or other cessation issues)it is probable that the sponsor will be granted indefinite leave to remain – as the AIT pointed out, such leave is nearly always granted;

> (iv) Fourth, the period between the decision as to entry clearance (August 2008) and the earliest time at which the sponsor can apply for indefinite leave to remain, together with an application by the appellant under rule 281 (September 2010), is relatively short: 2 years or so;
>
> (v) Fifth, in that period, the appellant and sponsor can continue to enjoy some family life, by the sponsor visiting the appellant in Pakistan (as he did on a significant number of occasions: in February 2006 for 2 months; in November 2006; in the Summer of 2007, and in October 2007).

31. In oral argument he noted that this is an entry case, not a removal case in which the family life has been formed in the UK.

32. These arguments reflect what the AIT said when dealing with the proportionality test. I shall refer to what the AIT said about proportionality shortly.

33. In my view, none of these five paragraphs assist on the question of whether there has been an interference with the sponsor's right to respect for his family life. Mr Beer was unable to point to any authority for the proposition that a lawful, genuine and subsisting marriage falls outside the ambit of family life, although we gave him an adjournment to see whether he could find any cases. It is not surprising that he was unable to do so.

34. The appellant relies on *Abdulaziz and others v. UK* (1985) 7 EHRR 471. The applicants in that case complained, "as persons lawfully settled in the UK, of being deprived (Mrs. Cabales), or threatened with deprivation (Mrs. Abdulaziz and Mrs. Balkandali), of the society of their spouses" in the UK (see para. 60). The UK Government argued that article 8 guaranteed respect solely for existing family life, whereas here the couples concerned had not, at the time when the request was made for permission for the men to enter or remain in the United Kingdom, established any such life with the legitimate expectation of the enjoyment of it in that country. The Government also argued that since there was no obstacle to the couples' living together in, respectively, Portugal, the Philippines or Turkey, they were in reality claiming a right to choose their country of residence, something that was not guaranteed by Article 8 (an argument that does not apply in this case). Both arguments were rejected by the Court when considering whether Article 8 applied. The Court said in paragraph 62:

> The Court recalls that, by guaranteeing the right to respect for family life, Article 8 "presupposes the existence of a family"... . However, this does not mean that all intended family life falls entirely outside its ambit. Whatever else the word "family" may mean, it must at any rate include the relationship that arises from a lawful and genuine marriage, such as that contracted by Mr. and Mrs. Abdulaziz and Mr. and Mrs. Balkandali, even if a family life of the kind referred to by the Government has not yet been fully established. Those marriages must be considered sufficient to attract such respect as may be due under Article 8. (Emphasis added)

35. This passage is, in my view, completely inconsistent with the decision of the AIT on the engagement of article 8 and the respondent's support thereof.

36. Mr Beer refers us to the next passage from the same paragraph.

> Furthermore, the expression "family life", in the case of a married couple, normally comprises cohabitation. The latter proposition is reinforced by the existence of Article 12, for it is scarcely conceivable that the right to found a family should not encompass the right to live together. The Court further notes that Mr. and Mrs. Abdulaziz had not only contracted marriage but had also cohabited for a certain period before Mr. Abdulaziz was refused leave to remain in the United Kingdom ... . Mr. and Mrs. Balkandali had also cohabited and had a son, although they were not married until after Mr. Balkandali's leave to remain as a student had expired and an extension been refused; their cohabitation was continuing when his application for leave to remain as a husband was rejected ... .

37. Mr Beer submits that the reference to family life normally comprising cohabitation detracts from the earlier passage and supports his argument that, in the absence of cohabitation, the AIT was entitled to find that article 8 was not engaged. That cannot be right. This passage is merely adding another reason why there was family life on the facts of the case. The passage in no way undermines the first quoted passage. It is inconceivable that a state party to the Convention could prevent a newly and genuinely wed husband and wife from cohabiting and then successfully claim that, because of the absence of cohabitation, there is no family life and therefore article 8 is not engaged.

38. Of course, the absence of cohabitation may well be a factor to be taken into when deciding cases involving family relationships other than the relationship of genuine and subsisting marriage. But it is trite law that family life may be found to exist in the absence of cohabitation. See for example the important decision in *Singh v Entry Clearance Officer, Delhi* [2004] EWCA Civ 1075; [2004] INLR 515. In that case the Court of Appeal upheld a finding that an adopted child who had never lived with his adoptive parents in the United Kingdom was a member of the adoptive parents' family for the purposes of article 8. We were taken to a number of paragraphs in *Singh*, e.g. 19, 21, 40, 58, 59, 73, 74 (where Munby J said that the absence of cohabitation can never be determinative of the issue as to whether there is family life). In none of the passages is there any suggestion that family life does not exist between a husband and wife in a genuine subsisting marriage.

39. Counsel provided us with a copy of *R (on the application of Fawad Ahmadi and another) v. the Secretary of State for the Home Department* [2005] EWCA Civ 1721. Moses LJ said:

> Para 18…There is ample authority for the proposition that the obligations under Article 8 require a state not only to refrain from interference with existing life, but also from inhibiting the development of a real family life in the future.

40. That passage provides further support for the conclusion that family life exists between a husband and wife in a genuine subsisting marriage and ties in with the reference to article 12 in paragraph 62 of *Abdulaziz*. It is also of importance that the appellant was heavily pregnant at the time of the ECO's decision.

41. Mr Beer took us to *Navaratnam Kugathas v. the Secretary of State for the Home Department* [2003] EWCA Civ 31. He referred to paragraph 14 in which Sedley LJ quoted a passage in a Commission decision to the effect that "the protection of family life under Article 8 involves cohabiting dependents, such as parents and their dependent minor children." Sedley LJ described this as a proper approach. There is no suggestion that he was making absence of cohabitation a determining factor, at any rate in the cases of husband and wife. We were then referred to paragraphs 16-19, 24, and 31. The appellant was a single man who had lived in the UK for three years. Before then he had lived in Germany where his mother and siblings lived and with whom he had had only limited contact, namely a single three week visit and periodic phone calls. He was to be deported to Sri Lanka. It was held that on the evidence no family life had, for the purposes of article 8, been enjoyed by the appellant. Sedley LJ examined a number of cases in which such phrases as "committed relationship" and "real and effective family ties" were used. He himself used the expression real, or committed or effective support. Nothing in that case, the facts of which are a long way away from this case, would support a conclusion that family life does not exist between a husband and wife in a genuine subsisting marriage.

42. In my view there can be no doubt that, on the facts of this case, family life exists between the appellant and the sponsor and the AIT was wrong to find otherwise.

43. I turn to Lord Bingham's second question. As the appellant rightly submits, one starts with what Sedley LJ said in *AG(Eritrea) v Secretary of State for the Home Department* [2007] EWCA Civ 801 [28], "the threshold of engagement (the minimum level) is not a specifically high one."

44. The fifth paragraph of Mr Beer's arguments (paragraph 30 above) is relevant to Lord Bingham's second question,

45. There can, in my view, be no doubt that the interference with family life which will result from not allowing a husband and his heavily pregnant wife in a genuine and subsisting marriage to cohabit, has consequences of such gravity as potentially to engage the operation of article 8, bearing in mind what Sedley LJ said in *AG*.

46. It follows that the AIT was required to consider Lord Bingham's third, fourth and fifth questions. Notwithstanding that the AIT decided that article 8 was not engaged, it devoted considerable space to the issue set out in Lord Bingham's fifth question: "Is such interference proportionate to the legitimate public end sought to be achieved?" The AIT said:

> 19…As parties to a genuine marriage, it can hardly be said that the appellant and sponsor do not have a family life at all, and if we were to find that the refusal of entry clearance in this case amounted to an interference with it, such as to engage Article 8, the proportionality balancing exercise would differ greatly from the norm. For the reasons given above the weight to be

> accorded to the public interest side of the balance would be much reduced. Where there is no discernible public interest to justify the refusal, the scales would inevitably start to tip in the appellant's favour.

47. The AIT analysed over about a page and a half the issue of the public interest. The AIT said:

> 15. On the other hand, we must address Mr Williams' point that it is unfair to refugees in the sponsor's position to have to wait until they are settled before they can establish family life in this country. Refugees who already had families before coming here do not have this problem, being catered for by paragraphs 352A-F of the Immigration Rules. The Rules also make provision for many other categories of person to be joined by their spouses and minor children, although they only have limited leave to enter or remain, and regardless of whether they got married before or after first coming here. Why, for example, should a businessman or work-permit holder, who has leave to remain in the United Kingdom for five years, be permitted to go abroad, get married and bring his wife here when the sponsor, who is working here and has five years' leave to remain, cannot bring his wife to the United Kingdom until he obtains indefinite leave, at which point she can apply under rule 281?
>
> 16. Mr Williams invites us to plug this gap in the Immigration Rules with Article 8. We appreciate that Article 8 can do many things, but we must be wary of using it to correct perceived faults in legislative provisions. The House of Lords in *Huang* has explained that the Immigration Rules do not themselves strike the balance between the public interest and the private right under Article 8, but where the Rules do not provide something which an applicant might reasonably want, we must start from the assumption that there is a reason for this, and if it is not set out in a policy document, we must endeavour to work out for ourselves what public interest, if any, is being served.
>
> 17. It may be that the reason why refugees with limited leave cannot generally be joined by their spouses whom they married after coming here to seek asylum is that this situation falls outwith the principle of refugee family reunion, namely that a family which has been sundered because one of its members had to flee persecution ought to he reunited in the country of refuge. But why should a refugee who did not found a family before fleeing persecution be in a worse position than a businessman who may have got married abroad during the currency of his limited leave, and is not prevented by the Rules from being joined thereafter by his dependent spouse? It an hardly be said that the former enjoys a more precarious immigration status than the latter. Both may apply for indefinite

> leave on the basis of five years' residence, and while refugee status is said to be subject to 'active review' at this point, in practice indefinite leave is nearly always granted. It is nearly always granted to businessmen too, but likewise that is not guaranteed.
>
> 18. What then is the public interest being served by preventing refugees like the sponsor from being joined by their spouses? No doubt it would be unduly cynical to suggest that asylum seekers may thereby be deterred from coming here in the first place. Or can it be that the present position results from sheer inadvertence on the part of the Home Office? We have no way of knowing. ... We at any rate cannot identify a public interest in preventing refugees like the sponsor from being joined by spouses whom they can maintain and accommodate adequately, when other categories of immigrant who are here with limited leave, and who may not be intending to stay permanently, can be joined by theirs. Indeed, there seems to be an inconsistency between delaying family reunion for one class of refugee and encouraging all refugees to integrate fully into the community once they have been granted asylum, a process for which the Home Office provides financial and other assistance.

48. If the AIT had no way of knowing what the public interest was and concluded that it was unable to identify a public interest in preventing refugees like the sponsor from being joined by genuine spouses whom they can maintain and accommodate adequately, then it would follow that the interference imposed by Regulation 352A is not "proportionate to the legitimate public end sought to be engaged".

49. The respondent now seeks, without the benefit of a respondent's notice and after very considerable delay, to present a substantial argument, not put before the AIT, that there is a public interest in drawing a distinction between refugees and other persons granted leave to remain for a limited period. Mr Beer seeks to justify the lack of a notice, submitting that it was only new grounds of appeal raised in the original skeleton argument which required an analysis of the public interest and that leave to add the new grounds had not been obtained. Whilst accepting that the position could have been made clearer by the appellant, I do not agree with Mr Beer. The decision of the AIT, ground 2 of the original grounds, the AIT's reasons for giving permission to appeal and the paragraphs from the skeleton argument which I have quoted should have alerted the respondent to the need to file a respondent's notice, if we were to proceed to uphold the decision on an analysis of public interest different from that presented to and conducted by the AIT.

50. Mr Beer accepts that if we are against him on the issue of the engagement of Article 8, then the choice which this court has to make is whether to remit the case or allow the appeal against the ECO's decision. He submits that what the AIT said about the public interest should not be taken as their concluded view given their conclusions on the engagement of Article 8. On the other hand the AIT devoted a considerable amount of space to the issue and, as a specialist Tribunal, were quite unable to identify the public interest.

51. In the light of the procedural history of the case I take the view that the respondent should now be foreclosed in this case (and I stress those words) from re-opening the issue and that the proper course is to allow this appeal against the ECO's decision. If we were to allow the appeal, our decision would be of no authority, persuasive or otherwise, if and when this issue falls to be decided in the future.

52. I accept that the public interest arguments now submitted may lead to a Tribunal or Court in the future agreeing that in a case like the present it would not be a violation of article 8 to prevent the spouse from joining the refugee. However, it would be desirable for that issue to be considered first by the AIT, given the specialist knowledge of its members. It would not be desirable for the issues to be considered in this court for the first time.

53. For these reasons I would allow the appellant's appeal against the refusal to grant entry clearance to her.

LORD JUSTICE WILSON:

54. I agree.

LORD JUSTICE PILL:

55. I also agree that the appeal should be allowed. There was a genuine and subsisting marriage such as to engage article 8 of the Convention (*Abdulaziz* and *Berrehab v Netherlands* [1988] ECHR 14, "lawful and genuine marriage"). While there may be argument in other cases as to whether the marriage of parties who have been through a ceremony of marriage can be regarded as genuine and subsisting, this marriage on the present facts undoubtedly was.

56. There remains of course the possibility of justification under article 8(2) of a decision adverse to an applicant. Mr Beer submitted that the case should be remitted to allow the AIT to consider article 8(2). I do not agree. The time for the Secretary of State for the Home Department ("SSHD") to do that was at the earlier hearing and, in the context of this case and the delays involved, I agree with Hooper LJ that the SSHD should not be given another opportunity.

57. I am far from saying that, on a consideration of article 8 as a whole, a spouse of a refugee, whose marriage did not take place until after the person granted asylum left the country of his former habitual residence in order to seek asylum, can expect a favourable decision under article 8. It will be for the AIT to consider each case on its merits, applying the usual principles.

58. I need to say more about the delay which has occurred in this case. The respondent, the Entry Clearance Officer in Islamabad, clearly cannot be held responsible.

59. The appellant, resident in Pakistan, seeks, with her child aged under 2, to join her husband, and father of the child, in the United Kingdom. He has been granted refugee status in the United Kingdom. He has leave to remain for 5 years from September 2005 with good prospects of that leave becoming indefinite.

60. Entry clearance was sought by the appellant in November 2006 and was refused and appealed. The decision of the AIT was notified on 15 August 2008. Grounds of

appeal against the decision of the AIT were submitted on 24 August 2008 and plainly alleged, among other things, that the Tribunal had erred in law in finding that article 8 of the Convention did not apply. Permission to appeal was granted and a skeleton argument, in which the engagement of article 8 was again plainly raised, submitted on 29 December 2008. (Paragraph 14(iii) and "Ground Two: article 8 engaged or not").

61. On 18 December 2008, the Treasury Solicitor ("TS") wrote to the court stating that the SSHD was not yet able to tell the court whether it was intended to serve a respondent's notice: "The SSHD is not aware that this hearing has been listed yet, and the SSHD hopes that any delay does not prejudice proceedings. In any event, the SSHD will comply with these requirements at the earliest opportunity and [she] trusts, without any prejudice to the appeal proceedings". On 25 March 2009, apologies were made by the TS "for the continued delay in updating the court and the appellant's representatives in this matter".The appeal was listed for hearing on 22 April and a bundle of authorities lodged. On 15 April 2009, the TS wrote to the appellant's solicitors apologising for the continuing delay. Instructions were still awaited. It was noted that "the SSHD's skeleton argument is due today". The letter continued:

> "In light of this, the points raised in your letter and the hearing date in this case, I think that it would be appropriate for a short adjournment of 4 weeks to allow the SSHD to finalise her position."

62. On reference to me, as presider in the constitution due to hear the case on 22 April, I ordered on 20 April:

> "1. Adjourned to a date not before 20 May 2009.
>
> 2. Respondent to pay the costs occasioned by the adjournment.
>
> 3. In fixing new date, consideration be given to the availability of appellant's counsel."

63. The hearing was listed for 23 July 2009, that is 3 months later. The appellant's solicitors wrote to the TS on 19 June and 1 July requesting a skeleton argument, as a matter of urgency. The request was repeated on 7 July 2009, the solicitors referring to the "very lengthy delay by you". It was again repeated, in writing, on 13 July, that is 10 days before the date fixed for the hearing.

64. Only then is there evidence of effective action. The TS wrote to the court on 16 July requesting an extension of time for serving the skeleton argument until Monday 20 July.

65. The application reached me on 17 July. I granted it, though short of striking out the respondent's case or adjourning the matter again, I could follow no other course. The TS had not been instructed by the SSHD until 11.56 am on 16 July. I readily accept that when eventually they received instructions, the TS and counsel acted as swiftly as they possibly could. A 23 page skeleton argument was submitted by counsel in the afternoon of Monday, 20 July.

66. I accept that re-amendment of the grounds of appeal, if it was to be sought, could have been sought earlier. However, there is substance in the submission by the appellant's solicitors that the long delay and absence of skeleton argument suggested to them that there might not be a contested hearing and that additional expenditure should be avoided. I accept that much of the respondent's skeleton argument deals with points made by the appellant which at the hearing were not pursued. It has not, however, been suggested that the failure to deal earlier with the skeleton argument submitted in December 2008 was because of difficulty in dealing with those points.

67. The bland submission for the SSHD at the hearing was that the court was concerned with a delay of 4 days, that is from 16 July to 20 July, in submitting a skeleton argument. At the conclusion of the hearing, the SSHD was given an opportunity to make submissions in writing about the delays.

68. In written submissions now made it is repeated:

> "The respondent apologises to the court for filing his skeleton argument on 20.7.09 when it ought to have been filed on 16.7.09."

The broader context of the delay is, however, belatedly recognised. The much longer delay involved is said to have been caused by "a need to locate and obtain material relating to the change in status given to refugees from ILR to 5 years' LTR from 30.8.05 (in particular whether - as the IAT put it - the consequences for the spouses of refugees whose marriage occurred post-flight were deliberate or accidental; in short whether a legitimate aim was provided by paragraph 352A(ii))".

69. I have read the paragraph in the skeleton argument dealing with this issue, paragraph 6(iii). It is a very long paragraph but I have found nothing in it which begins to justify the need for 11 months from the grant of permission by the AIT to obtain the information.

70. I am concerned by the attitude of the Department not only to the particular case but to the court that is revealed by the events described. Notwithstanding the passage of 8 months from the grant of permission and over 3 months from the appellant's skeleton argument, application for an adjournment was made in April only days before the hearing date, thereby causing a loss of court time. The application was for "a short adjournment of 4 weeks" to finalise the position. In the event, the adjournment was for 3 months but a skeleton was still not filed in time, despite the appellant's proper requests. The request for an adjournment of 4 weeks demonstrates either a lack of diligence subsequently or a gross underestimate of the requirement.

71. No satisfactory explanation has been given as to why it took so long to provide instructions to counsel to draft the relevant paragraph. Even if the need for considerable time to enquire is assumed, the failure, with knowledge of the date fixed for the hearing, to instruct counsel in reasonable time was deplorable. The requirement for a respondent's skeleton argument 7 days before the hearing, is a modest one. The period of 7 days should not be abridged, particularly in the case of experienced litigants dealing with what they consider to be a complex matter.

72. The delay has had an obvious impact on the lives of the appellant and sponsor whose appeal has been held by this court to be well founded. Moreover, the attitude to the court revealed by the above sequence of events is not acceptable one. Drastic action by the court against the SSHD is not readily taken because, if it is to serve the public interest, the court usually needs the assistance of the SSHD in immigration cases. The SSHD must not take advantage of that. If her Department does, more drastic action will need to be considered.