

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 19th February 2004

Date Determination notified:

29th April 2004

Before:

The Honourable Mr Justice Ouseley (President)

Miss K Eshun (Vice President)

Mr D J Parkes (Acting Vice President)

Between:

APPELLANT

and

Entry Clearance Officer, Kuala Lumpur

RESPONDENT

For the Appellant:

Mr D Seddon, instructed by Laura Devine Solicitors

For the Respondent:

Ms E Grey, instructed by Treasury Solicitors

DETERMINATION AND REASONS

1. This is an appeal against the decision of an Adjudicator, Mrs C A Scott-Baker, promulgated on 10th October 2002, whereby she dismissed the appeal of SS against the refusal by the Entry Clearance Officer, Kuala Lumpur, on 21st March 2001 to grant entry clearance under paragraph 317 of HC 395. The Appellant is a citizen of Malaysia, born 28th July 1978, applying for indefinite leave to enter. His mother is settled in the United Kingdom. The Appellant was 22 at the date of decision by the Entry Clearance Officer and 24 when the Adjudicator reached her decision; he is now 25 years old.

Background

2. The background to the case is that the Appellant's mother was a Muslim, ethnic Malay. She married a Malay of Indian origin who converted to Islam when they were married in 1970. After her first child was born, she and her husband converted to Christianity. They had two further children of whom the Appellant is the youngest. The three children were brought up as Christians. Her witness statement states that she was treated as an apostate because of her conversion from Islam. We were told that her then husband

did not so suffer because, as a Muslim by conversion, he was perceived differently. She said that she had suffered ever since her conversion because although Christianity is tolerated, apostasy is not. She spoke of being shunned by her sister and of harassment by the Government. In 1992, after marital differences, she left her husband and the marriage was nullified because of her change of religion. She married her present husband, a British national working in Malaysia, in December 1993. He worked in Kuala Lumpur. From the time the Appellant left school in 1995, he came to live with them in Kuala Lumpur. After that time, his natural father would have nothing more to do with him. Her witness statement said, somewhat surprisingly, that this was because of the stigma of her apostasy; after all they had both become Christians together more than 25 years before.

3. The Appellant's mother and stepfather had decided to retire to the United Kingdom; she applied for leave to enter as the spouse of a British citizen and was granted leave in April 1998; she was granted indefinite leave to remain in 1999. However, even though they had bought a house for their retirement in Sheffield, they had had to postpone their settlement in the United Kingdom because her husband had been required to stay on in Kuala Lumpur for work.
4. Her children experienced religious and racial discrimination in their applications for places at university in Malaysia. Her eldest child studied in Canada and is now married to a US citizen and lives in the USA. Her second child obtained a place at Sheffield University, graduated and lives in the United Kingdom, in Beckenham. He has a work permit which expires in 2006. The Appellant also studied at Sheffield University, graduating in geography with a 3rd class. He had entry clearance as a student from August 1997 to March 2001. He returned to Malaysia in March 2001 and made an immediate application for entry clearance for settlement, which was refused in March 2001. He said that he had been led to believe that it would probably be granted, though there has been no evidence as to who said what and no legal argument relating to that has been pursued. His mother was his sponsor, supported by her husband. His brother was also prepared to support his application for entry clearance with accommodation and money. His application for a visitor visa to attend his graduation ceremony in May 2001 was also refused; it was thought that he would not return to Malaysia.
5. The Adjudicator had evidence of the position in Malaysia for non-Muslims and in particular those who were apostates. She summarised that material as follows:

“To assist me in the assessment of the discriminatory measures in Malaysia there was before me a copy of the US State Department Report of 1998 together with two reports on religion from the US Department of State of 1999 and 2000. I note from the US State Department Report of 1999 that religious freedom was subject to some restrictions and in particular the right of Muslims to practice beliefs other than Sunni Islam. The right of Muslims to change their religion face many practical obstacles. Longstanding policies give preferential status to ethnic Malays and other indigenous people in business, education and other areas and some discrimination against indigenous people in ethnic minorities and some restrictions on worker rights persisted. However the constitution does provide for freedom of religion and religious minorities which include large

Hindu, Buddhist, Sikh and Christian communities who generally worship freely although with some restrictions. Adherence to Islam was considered intrinsic to Malay ethnic identity and therefore Islamic religious laws administered by the state authorities to Islamic courts bind all ethnic Malays in some matters. But the government has not imposed Islamic religious law beyond the Muslim community. The government generally respects non-Muslims' rights of worship but the state government carefully controls the building of non-Muslim places of worship and the allocation of land for non-Muslim cemeteries. The right of a Muslim to leave Islam to adhere to another faith is a very controversial question and in practice it is very difficult for a Muslim to change religion. However in August 1998 the government had stated that apostates would not face punishment as long as they did not defame Islam after their conversion. Whilst for a long time the government has discouraged and in practical terms forbidden the circulation in peninsular Malaysia of Malay language translations of the Bible and distribution of Christian tapes and printed materials in Malay, Malay language Christian materials can be found. I note from the US State Annual Report on International Religious Freedom for 1999 in Malaysia that in 1991 8% of the population were Christian and only 59% Muslim. In societal attitudes at Section II of this report it stated that the country's various believers generally live amicably.

The report of 2000 stated that for ethnic Malays the right to leave the Islamic faith and adherence to another religion was a controversial question and in practice it was difficult for Muslims to change religions. In March 1999 the country's highest court ruled that secular courts had no jurisdiction to hear applications by Muslims to change religion and that the religious conversion of Muslims was solely the jurisdiction of Islamic courts. It noted that if the High Court continued to affirm that ruling in future cases it would make conversion of Muslims nearly impossible in practice. The same report still confirmed that apostates would not face government punishment as long as they did not defame Islam after their conversion.

It is clear from these US State Department Reports therefore that there is a sizeable Christian community in Malaysia and that whilst conversion may be coming more difficult the communities continue to live peacefully together and there are no harsh penalties for apostates provided they do not defame Islam. The expert report of Andrew Harding confirmed that Malaysia's population was multi-racial and multi-religious and the Muslims formed only about 55% of the population. I note from the appellant's evidence that his mother had converted to Christianity in 1972 and he was born and raised in the Christian faith. I noted that there is evidence before me from the appellant that he was bullied and discriminated at school because he was a Christian but the background evidence before me indicates that the communities do live peacefully together."

6. There was some criticism that the Adjudicator had focused on the degree of general religious tolerance rather than on the position of apostates and the particular difficulties which they faced. The Appellant's mother gave specific examples of discrimination which she had experienced and of harassment at the hands of religious police.
7. The Appellant produced to the Adjudicator and to us a report from Mr A J Harding, Professor of Law at SOAS. Its contents are largely reflected in the passages set out above. It emphasises the severe social isolation risked by those who convert from Islam, their difficulties in dealing with the state authorities and the growth of opposition parties who seek to impose strict religious Islamic law. A Muslim family would disown any apostate members.

Conversion was rare. He also said that whilst children of full age are allowed under the Constitution to choose their own religion, in practice the child of an apostate would be stigmatised by their parent's apostasy and would face the same social exclusions, discrimination and hostility if the relationship was known.

8. The Appellant said that he had experienced a lack of success in the very many job applications which he had made in Malaysia; he was certain that the lack of success was attributable to his Christian and mixed Malay background. It was standard practice to give preference to ethnic Malays. His middle two names are English. He said that his mother's maiden name would sometimes be asked for at interviews and he would be questioned about his ethnic background and religion. Application forms often asked for his parent's names and his religion. His birth certificate would also show his mother's maiden name.

9. The Adjudicator commented on the evidence about that in paragraphs 19-20:

"He explained that he had concentrated on looking for positions with non-Malay companies and international companies but prejudice discrimination and intolerance of apostates and the children of apostates were evident in Malaysia.

There was a schedule at page 180 of the bundle showing the numerous positions applied for by the appellant since July 2001 until June 2002. There was no further evidence to corroborate the appellant's assertion that he had applied for these jobs or had in fact been rejected as he had suggested. I note that the appellant had applied for various positions in Malay, non-Malay and international companies and whilst he had been unsuccessful in the majority of applications, since April 2002 there were applications pending although no further evidence was placed before me as to whether the appellant had been successful in any of these job applications."

10. She did accept that he was experiencing difficulties in obtaining employment when dealing with his personal circumstances:

"I note the appellant's endeavours to obtain employment in Malaysia. I noted that he obtained a third class honours in geography from the University of Sheffield which is of course an achievement in itself but does not immediately make him obviously suited to any position of employment as the degree is not vocationally linked. No evidence was placed before me as to what other commercial or professional experience the appellant had but I accept that he is encountering difficulties in finding employment which he wishes to undertake."

11. She described his other personal circumstances as follows in the light of the background evidence and his employment position, in paragraph 21:

"I was told that he was living in a room in a house in Kuala Lumpur where he had access to a kitchen and a bathroom. I am not persuaded on the background evidence that the discrimination such as it may exist in Malaysia can be said to reduce the appellant to be living in the most exceptional compassionate circumstance. I accept that Islam is the predominant religion in Malaysia but there is a significant Christian community in that country. The appellant himself, a Christian since birth, has been living in Malaysia for the majority of

his life, apart from the time that he studied in the United Kingdom. His mother chose to continue to reside in Malaysia with her husband until they decided to leave because of his pending retirement. Whilst it was asserted at the hearing that they had all suffered from discriminatory practices in Malaysia the family did continue to live in that country. He has the good fortune that his stepfather is in the position to be able to support him. His parents and siblings may be living overseas but those were choices made out of volition and not unilaterally imposed on the family.”

12. She concluded that although it was natural that his mother and stepfather would wish him to be able to live in the UK and whilst there were compassionate circumstances, they were not exceptional let alone the most exceptional compassionate circumstances. She made it clear that she did not take into account in that assessment the circumstances of the mother, because paragraph 317 of the Rules focused on the circumstances of the applicant for entry clearance.

13. Paragraph 317 provides so far as material:

“... 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.”

14. The Adjudicator, unlike the Entry Clearance Officer, had accepted that the Appellant was financially dependent on his mother and stepfather as a matter of necessity.
15. The Adjudicator then turned to the argument addressed to her on Article 8, saying that the Immigration Rules had been reviewed after the Human Rights Act 1988 and that paragraph 317 had been concluded to be compatible with the ECHR. There was evidence that the mother had been suffering from chronic depression which was said largely to be due to the separation from the Appellant, for whom she said she had always had a special affection as her youngest. However, the Adjudicator pointed out that she had been receiving treatment for depression since 1995 when the Appellant was still living with her and that although she had spent some 6 months in England visiting the Appellant when he was in Sheffield and he had spent a few months in Malaysia, they had obviously spent the majority of his student life apart. In paragraph 28 the Adjudicator said:

“I find the appellant's mother's evidence in this regard to be somewhat inconsistent. She has asked me to have regard to the fact that she was worried about her son but she had voluntarily chosen to live in Malaysia whilst her son was in the United Kingdom. Whilst she is not resident in the United Kingdom, voluntarily, her son, the appellant, is in Malaysia. There is no reason as to why she cannot visit him on a regular basis. The choice of the appellant's mother and stepfather is one of choice to reside in the United Kingdom. They do have rights of residence in Malaysia and I am not persuaded on the testimony before me that the family could not continue to live in Malaysia as they have done in the past.”

We were told that her anxieties for her son at that period were obviously less because he was safe in England and his brother had been in Sheffield for some of that time.

16. The Adjudicator then considered whether or not the Appellant had shown that exclusion would breach the State's positive obligation to show respect for private and family life. She said:

"Relevant to this consideration is whether there are insurmountable obstacles to relevant family members enjoying their family life elsewhere".

There was some criticism that she had elevated that into an overriding test. She continued:

"There is no credible evidence before me as to why the appellant's mother and stepfather could not have continued to reside in Malaysia.

The appellant's evidence is that he is a healthy young man looking for work in Malaysia. There is no evidence that he had particular reasons of health or of mental or emotional immaturity for his relationship with his mother and stepfather to require an ongoing dependency.

Under Article 8 there is no general obligation on a state to admit family members of those within their jurisdiction. There is no real obstacle to the appellant and his mother re-establishing their family life in Malaysia. Whilst I heard evidence as to why the appellant's mother wished to live in the United Kingdom with her husband who is a British citizen and she of course herself has indefinite leave to remain, this is her choice."

17. The Adjudicator then turned to proportionality, and said:

"The only real issue in this appeal is whether the exclusion of the appellant is proportionate. The appellant is now aged 24. He has been educated and is supported by his stepfather. He has hopefully by now found a job in Malaysia but there was no up-to-date evidence of that before me. On the evidence before me his mother and stepfather can continue to return to Malaysia to visit and/or reside with him. They may exercise their choice to live in either Malaysia or the United Kingdom."

18. The Adjudicator again made it clear that she had had regard only to the Appellant's position; if the rights of others were said to be affected they could take other proceedings. The Appellant's rights were not breached by his exclusion, though the Adjudicator expressed her regret at that conclusion.
19. The Adjudicator also heard evidence from the Appellant's girlfriend, a UK citizen. They were not engaged; their relationship was being hampered because one party to it was not in the United Kingdom. The Adjudicator concluded that the Appellant had no family life with her.

The scope of the appeals

20. Section 59 appeals fall within the provisions of Schedule 4, paragraphs 21 and 22, to the 1999 Act. Paragraph 21(1) contains the power to allow appeals if the decision was not in accordance with the law or the Rules. But in

paragraph 21(2) that power is subject “*to any restriction*” on the ground of appeal. Section 65 also falls within the scope of those provisions; but by section 65(5), the appeal may be allowed either on the ground of racial discrimination, which does not arise here, or on the ground that the authority “*acted in breach of the Appellant's human rights*”.

21. Mr Seddon recognised that on a normal and unstrained reading of paragraph 317 of the Rules, the relevant exceptionally compassionate circumstances were those of the Appellant alone and not those of his relatives. Indeed, we regard that as perfectly clear.
22. Mr Seddon accordingly submitted first that the phrase “*not in accordance with the law*” was broad enough to enable an appeal under section 59 to include human rights points, including the human rights of those who were not Appellants. The decision would not be in accordance with law if it infringed the human rights of someone other than the Appellant and there was a duty on the Tribunal, by virtue of section 6 of the Human Rights Act 1998 not to act in a way which was incompatible with anyone's ECHR rights. He supported that point by referring to an obiter remark of the Tribunal to that effect in Box v ECO Dhaka [2003] UKIAT 02212. In addition, he said that Singh v IAT [1986] 2 All ER 721 HL assisted because it referred to the potential relevance of the interests of third parties in the exercise of discretion in a deportation case. If a relevant third party consideration were not taken into account, the decision could be challenged as not being in accordance with the law. He contended that the Rules should be interpreted so as to make them compatible with the ECHR.
23. Miss Grey submitted that this would mean that section 65 was unnecessary. It could not have been intended simply to provide for a human rights appeal in the limited number of cases which would not generate an appeal under section 59. It would mean that the restrictions in section 65(1) and (3), which confine the appellate bodies to an examination of human rights of the Appellant, would be set aside. The existence and impact of that restriction had been noted in Kehinde*, (01/TH/02668) 19th December 2001, by the Tribunal and confirmed by Jack J in R (AC) v IAT [2002] EWHC 389 Admin. If a decision on entry clearance interfered with the rights of someone other than the Appellant, the issue could be tested by way of Judicial Review.
24. We accept Miss Grey's submissions. Section 65 was introduced so as to provide a general right of appeal on the ground that a decision relating to leave to enter or remain breaches an Appellant's human rights and is the sole route for an Appellant to raise that question. It is difficult to see why the provision would have been enacted in that general way, if the power had already been available under section 59 for all appeals which lay under that section on the basis that a breach of human rights would “*not [be] in accordance with the law*”.
25. Moreover, section 65 contains a clear limitation on what may be considered in an appeal under it. There was no real dispute about it; in any event it is clear from Kehinde*. Section 65(1) gives the right of appeal to someone who alleges that a decision “*relating to [his] entitlement*” to enter is “*in breach of his human rights ...*”. The same language appears in (3). The appeal may be

allowed if the authority “*acted in breach of the appellant's human rights ...*”; (5)(b); emphasis added. The relevant human rights in a section 65 appeal are those of the Appellant and not his relatives or those others whose rights may be affected by a decision on the Appellant’s case. The true understanding of the judgment in AC is to the like effect; in his conclusion at paragraph 38, whatever may have been said en route, Jack J says:

“In consideration of this appeal I have had regard to the appellant’s rights and entitlements only. If the appellant’s mother or stepfather or any other witnesses considers that exclusion of the appellant would amount to a violation of their rights then they are perfectly at liberty to take proceedings under Section 6 of the Human Rights Act 1998 themselves.”

26. We also agree with the point made by him in paragraph 32 where he points out that the impact of removal, or refusal of entry may have an impact on a person other than the Appellant and that impact in turn may affect the Appellant; for example, the anxiety that the non-Appellant may feel about the absence of the Appellant may in turn make the Appellant distressed. However, it is only in that indirect way that the position of someone other than the Appellant can be taken into account. The Tribunal is still examining the Appellant’s position when it allows for the indirect impact of the position of others. It is right to say that there are passages in Jack J’s judgment which suggest that a broader approach was being taken, which appear to contradict what he said elsewhere. However, if a broader approach had been intended, which we doubt, we would not have followed it. We are bound by Kehinde*, which is correct as a matter of statutory interpretation.
27. If section 59 were as broad as Mr Seddon suggested, that limitation in section 65 would simply be sidestepped. The obiter suggestion to the contrary in Box is wrong. The reference in Singh to considering all relevant factors, including those which affected the position of third parties, shows a misunderstanding of what that case was about. It was considering the exercise of a discretionary power to deport. That discretionary power required all relevant matters to be considered and in that broad consideration, the position of third parties was relevant. That case was not purporting to lay down any rule that the position of third parties is relevant to all or any appeal in any immigration context. Both parties in this context relied upon what was said in Macdonald’s Immigration Law and Practice 5th ed, para 8.73. But what he says is capable of being read in two ways; we think that what he says agrees with what we think, but if it does not, so be it.
28. We do not accept the suggestion by Miss Grey that section 65 itself incorporated a jurisdiction to decide that a decision was not in accordance with the law. True, section 65 falls within Part IV and the provision of Schedule 4 paragraphs 21 and 22 apply to it. But it is the restriction in paragraph 21 (2) which bites here. Section 65(5) contains a clear delineation of the grounds of appeal available; there are but two and the more general power is excluded. Accordingly, section 65 does not itself provide a route whereby the rights of those other than the Appellant can be part of the decision.

29. We do not accept that this puts the Tribunal at risk of breaching the obligation in section 6(1) of the HRA 1998. Section 7 provides for proceedings to be brought in the appropriate court or tribunal. That is the IAT where the statutory right of appeal exists for that person. Otherwise remedy is available through Judicial Review. Two related sets of proceedings in separate fora are of course cumbersome and it might be thought more sensible if all the relevant matters could be dealt with by the one body at one time. But that is not the statutory framework which has been adopted. Even were the Tribunal to have the power to look more widely than it does at the position of a family, it would still be necessary for those who were not the Appellant to identify themselves as “*victims*”. Only those who so identify themselves have the right to challenge decisions on human rights grounds by section 7 of the 1998 Act; it would be entirely inappropriate for someone, the Appellant, to seek to advance his case by reliance on the rights which he asserts for others but which they do not seek to vindicate themselves. Indeed it is possible to envisage circumstances where those others might either be unaware of Tribunal proceedings in which they were not parties or hostile to what was being asserted. (We point out that those comments do not apply to the dependants of Appellants who are liable to removal with the named Appellant and who are treated as Appellants therefore by reference to specific statutory provisions.)
30. The suggestion by Mr Seddon that the Tribunal had to consider the compatibility of the Rules with the ECHR and to use its powers under section 3 to the 1998 Act so as to achieve a result which reflected the human rights of all involved, is misconceived. It misunderstands the significance of the Rules and hence of the Tribunal's function in relation to them. Article 8, in so far as it is engaged, is a qualified right, qualified by the interests of the maintenance of an effective system of immigration control. Whether any immigration decision represents a proportionate response to any interference with Article 8(1) rights is a matter, at least in the first instance, for the Secretary of State. The Rules represent what the executive, with Parliamentary approval, consider to be an appropriate system of immigration control and a proportionate response to the many and varied circumstances which arise. Those Rules are supplemented by discretionary powers outside the Rules.
31. We repeat what the Tribunal said in H ECO Addis Ababa TH/22006/2002 at paragraph 46:

“It would normally be the position that the combination of the provisions of the Immigration Rules and extra-statutory policy and discretion would provide a proportionate basis for any interference with or lack of respect for family life in the light of the well-established right of a state to control entry, whether or not that is to be regarded as a free-standing restriction on the scope of Article 8 or as failing within the qualification in Article 8(2). Those provisions represent what the State, in part with express Parliamentary approval and in part through the executive, have thought fit provisions for the entry into the United Kingdom of those who have some form of family life with someone established here. As Edore v SSHD [2003] EWCA Civ 716, [2003] INLR 361 holds, the question of whether an interference or lack of respect is proportionate to the need for control over immigration and for the maintenance of the system for its enforcement, is a matter for the Secretary of State's judgment in the first place and it is only reviewable if it is outside the range of responses reasonably open

to him. It would be the exceptional case where circumstances fell outside the Rules and the compassionate discretionary policy, and yet were such that exclusion was an unreasonable response by the Secretary of State.”

32. For the Tribunal to interpret the Rules so as to make them fit what it thought was a proportionate response would be to usurp the Secretary of State’s function. It is possible where a case falls outside the Rules for the Tribunal to consider whether the decision is disproportionate to the interference with Article 8(1) rights. That is the purpose of the section 65 appeal. There is no need for the scope of that appeal to be subverted by altering the role which the Tribunal performs in relation to the interpretation or application of the Rules in a section 59 appeal. We see no incompatibility between ECHR and the Rules, especially as it is supplemented by extra-statutory discretions, and policies.

Post decision events

33. The next point raised by Mr Seddon was that the Tribunal, in both appeals, was entitled to have regard to events which happened after the date of the Entry Clearance Officer’s decision. We accept that the approach in SK [2002] UKIAT 05613* is not applicable here as both parties agreed; the decision is inapplicable to entry clearance and revolved around the wording of section 77 relating to removals. The Rules eg Rule 26, distinguish entry clearance from leave to enter; the rationale for the distinction lies in the ability to make further out of country applications, with fresh evidence, for entry clearance. The position in relation to an entry clearance appeal is that the appeal is considered as a review of the Secretary of State’s decision. The question of whether that was in accordance with the law is to be determined by the circumstances prevailing at the time of the Entry Clearance Officer’s decision; R v IAT ex parte Kotecha [1983] 1 WLR 487.
34. Mr Seddon raised a broader point about the relevant factors in relation to a human rights appeal, submitting that it would always be relevant to examine the current situation for those purposes.
35. Miss Grey submitted that the same approach should be adopted as for a section 59 appeal, because the language of section 65 was about a past decision and there was an opportunity for a further application for entry clearance. We accept that the language of section 65 relates to the taking of a past decision by someone who in so deciding has acted in breach of the Appellant’s human rights. But that language cannot be conclusive because, in removal cases, it is the prospective removal, albeit pursuant to a past decision which would create the breach of human rights. On the other hand, in an entry clearance case, it is the refusal of entry which is a past act which has created the breach of human rights. It is not in any sense a continuing decision which has yet to be acted on. The Appellant is also entitled to make a further application and there is no equivalent provision to that in section 77 (3) which can be called in aid so as to lead to a different result. We concluded that the reasoning in Kotecha is also the correct reasoning to apply to this section 65 appeal.

36. It has long been recognised that the decision date did not create a clean cut-off point for evidence about post-decision events. Evidence which relates to what had previously happened or to events, which were reasonably foreseeable at the date of decision continued to be admissible. Evidence which illuminates and shows in a truer light what had previously occurred is also admissible. Here, there was little debate but that the evidence that the Appellant's relationship with his girlfriend in the United Kingdom had broken down was admissible; the relationship had existed at the date of decision and its uncertain future, in the absence of the Appellant to nurture it, had been relied on at that time. The other matter, which would have advantaged the Appellant, was the evidence of his mother's declining health, the return of her cancer, the impact which that had on her ability to fly to Malaysia to visit her son and the distress which their separation caused both of them, made the more acute at such a time. As Miss Grey pointed out, although the mother's chronic depressive illness, which she attributed largely to worrying about her children and to her separation from her youngest, the Appellant, had been part of the circumstances existing at the time of decision, the then past cancer had not been part of those circumstances. We do not consider that the return of that earlier cancer is properly related to events at the date of decision so as to make evidence about it admissible on this appeal. It cannot be said, merely because there was a health issue at the time of the decision, that all subsequent health-related material is admissible even though the later illness is unrelated to the health of the mother at the date of decision; it has not been suggested that the return of the cancer was reasonably foreseeable at that date, nor does it in any way illuminate what had previously been said to be the position. In any event, the relevance of the cancer would have been limited to the impact which that had on the Appellant's circumstances.

The substantive merits of the appeals

37. Mr Seddon made a number of criticisms of the Adjudicator's findings and approach in relation to compassionate circumstances and family life. He said that she had not drawn the necessary distinction between the way in which indigenous Christians were tolerated and the different and discriminatory treatment which apostates and their children experienced. She had treated the family separation while the Appellant was at university in the United Kingdom as a voluntary choice, whereas it was the consequences of the need for the Appellant and his siblings to study abroad because of the discrimination which they experienced in their university applications in Malaysia and their stepfather's need to remain at work in Malaysia longer than he had intended. Although there were factors behind the mother's depression other than her separation from her youngest son, the refusal of his entry clearance had triggered a severe relapse. Her anxiety for his well-being when separated from him was much more acute when he was in Malaysia than when he was safe, living in the family house in England. His social isolation there had been ignored; she had made insufficient findings about his employment applications and prospects.
38. We shall deal with those points as we consider the conclusions of the Adjudicator, starting with the Rules, and the Section 59 appeal. This, as we have said, is concerned only with the Appellant's circumstances, as at the

date of decision and subject to the limited scope for evidence as to post-decision events.

39. We agree with the Adjudicator's assessment that whilst the Appellant may be living in compassionate circumstances, he is not living in the most exceptional compassionate circumstances as required by the Rules. It is a high threshold test. He has accommodation with kitchen and bathroom; he has financial support from his stepfather which enables him to sustain the necessities of life. He is in the country in which he had been brought up and in which he has spent all his life as a Christian. Although we accept that the mother faced discrimination because of her conversion and that there has been an increase in the state and non state discrimination faced by apostates and their children, including increased difficulties in entering universities, the decisions which have led to the family being dispersed, as they are, cannot be regarded as responses to persecution. They are the choices, albeit difficult, made in response to a combination of circumstances, personal, political and economic, which they faced. There was an expectation perhaps, that they would all eventually live in England, which has been confounded; but that is not to deny the fact that the mother and stepfather decided to live in the UK when the Appellant's status here was uncertain, and decided that the separation which occurred during university studies was one which they would accept. We do not see the latter as indicating any indifference to family life; it is a commonplace for students to leave home, as the start of their developing adult life, loosening the parental ties.
40. He has split from his girlfriend and sadly for the Appellant that relationship cannot provide a component of any compassionate circumstances. We accept that he has experienced difficulties in obtaining employment and that his mother's conversion is probably making that considerably more difficult for him. He has applied for a range of jobs from a variety of firms including international firms; but there is no updated material as to how those applications have progressed. The Adjudicator was entitled to take into account that there may have been other factors affecting his prospects, including the type of job he was seeking with the degree which he had. There is now evidence that he has a job with an international company but at a level well below normal graduate employment. That is relevant to the situation at the time of decision, but even if he had no job, the balance of circumstances would not have altered significantly. We do not think that the Adjudicator was obliged to make further findings than she did in this matter.
41. The Adjudicator may not have drawn clearly the distinction between the position of a Christian, who was neither a convert from Islam nor the child of such a convert, and one in the position of the Appellant. It is a relevant distinction in that there is a growing hostility to the latter, whereas those who have always been Christian are seen in a different light. But that does not assist the Appellant as much as was contended. There is no suggestion that any such distinction is drawn by the Christian community itself. There is a significant Christian community in Malaysia and there is no reason to suppose that the Appellant is isolated from it and unable to seek their fellowship. It is also legitimate for the Adjudicator to comment that the family lived in Malaysia for many years while discrimination occurred. We would accept however that the issue was seen too much as one of religious

tolerance as between communities, ignoring the discrimination suffered by apostates even though they were not directly punished by the government for apostasy. But that does not cause us to conclude that he comes within the Rules.

42. The position in which the Appellant thus finds himself cannot in our view come within the scope of the high threshold test of the most exceptional compassionate circumstances. It must be remembered that the purpose of the Rule in question is to provide a basis for entry for settlement and it is against that purpose that the test has to be judged.
43. We turn to consider Article 8, and the section 65 appeal, examining the Appellant's position as at the date of decision as for the section 59 appeal. We should first say something about the scope of section 65 in relation to the human rights of someone who is outside the territory of the United Kingdom and not a national or otherwise entitled to enter the United Kingdom. It does not follow from the mere fact that there is an appeal available under section 65 for someone who is seeking entry into the country that he has available to him all the rights under ECHR as a source of a right of entry. The Tribunal considered at some length the nature and source of the rights available under the ECHR to someone seeking entry to the United Kingdom but who was outside the territory of the state, in H UKIAT [2004] 00027 Somalia. In paragraph 42-45 it said:

"42. It seems to us that the answer to the existence of Article 8 rights for those outside the United Kingdom is to be found in the way in which the jurisprudence of the ECtHR has developed over time in relation to various areas of human experience, here the entry of non-nationals to a country. It is not always possible to trace a clear line of reasoning from Article 1 through the various decisions which that Court has reached so as deduce the principles which apply. The decisions are not always consistent nor do they deal with some of the problems which might be thought to stand in the way of the result reached. Ullah illustrates the problems of some of the reasoning in Soering v United Kingdom [1989] 11 HRR 439, and then with the basis upon which Chahal v United Kingdom [1997] 23 EHRR 413 was said to be consistent with it. Similar problems are in respect of the ECtHR approach to entry cases. But, rather than hunting for a clear line of reasoning or principle, which deals with the effect of Article 1, a line which seems unlikely to exist, the better solution is the more pragmatic one of looking to see what has been decided by that Court and domestically in relation to this particular area.

43. The issue was discussed in Ullah in paragraphs 41-47 as part of the more general discussion of Article 8. In particular, the Court was of the belief which we regard as well-founded, that Article 8 has been invoked, but only successfully in an immigration case, including refusal of entry where that "*has impacted on the enjoyment of family life of those already established within the jurisdiction*". The Court referred to its review of the cases in Mahmood. It noted that the basis of the ECtHR decision in Abdulaziz, Cabales and Balkandali v United Kingdom [1985] 7 EHRR 471 was that the applicants were established within the jurisdiction and complained that they were being deprived of the company of their husbands who were not within the jurisdiction; the right of the State to control entry acted as a free-standing restriction on

Article 8 rather than being a legitimate aim within Article 8(2). Later ECtHR cases, such as Bensaid v United Kingdom [2001] 33 EHRR 10, [2001] INLR 325, treat immigration control as falling within that qualification. It appears to have been assumed or decided in both Kugathas and Ekinici, that the effective trigger for the existence of Article 8 rights, enforceable against the United Kingdom by non-nationals who are outside it, is the existence of family life with those who are established in the United Kingdom.

44. We have already referred to Sen v Netherlands and Ahmut v Netherlands, both of which are consistent with what the Court of Appeal said in Ullah about the need for the family relationship, of those relying on Article 8 as a basis for entry, to be with someone who was established in the United Kingdom in order for them to have Article 8 rights in respect of family life which are enforceable against the State with which they are seeking entry.
 45. Accordingly, we consider, on the basis of ECtHR jurisprudence and Ullah, that the existence of family life with someone who is established in the United Kingdom provides the basis for the existence of Article 8 rights, enforceable against the United Kingdom and is the basis for the examination of whether that life is interfered with or shown a lack of respect. This may reflect a developing ECtHR jurisprudence from the position in Abdulaziz. Such an approach would reflect what the Court of Appeal seems consistently to regard as the position. (We have some reservations about the basis upon which Ms Hanrahan conceded the point because the short comment in Mahmood may have been overtaken by the greater consideration of the issue of jurisdiction in Ullah.) It does, however, represent an *ad hoc* extension of the Convention, but it is not as wide as that which would arise from full acceptance of the appellant's submissions. But it also makes some sense of the jurisdictional provisions in the 1998 Act, with the Parliamentary assumption seen as having some basis."
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44. We have already set out above in a further citation from paragraph 46 of that case the significance of the Rules to a case which falls outside them and outside any additional discretionary provision outside the Rules. Although there is scope for such a case to involve a breach of Article 8 that scope is likely to be very limited. Miss Grey for the SSHD adopted the conclusions which the Tribunal had set out. Mr Seddon sought to emphasise the particular facts of this case. It is unnecessary to set out the full reasoning; it is set out in that case.
 45. No argument was addressed to us to the effect that Article 9 provided any basis for entry. Mr Seddon submitted that the Article 8 right to respect for private life should also be a part of the basis upon which someone could assert a right under ECHR to enter the UK. Private life with family life represented a composite right albeit one which varied in its precise mix from case to case. He cited Nhundu and Chiwera, (01/TH/0613), 1st June 2001, and CF v SSHD [2004] EWHC 111 Fam, [2004] All ER (D) 322. He relied on the Appellant's relationship with his girlfriend, his residence and his studies here, his intention to work here, and his isolation, the discrimination experienced in Malaysia and the restrictions on his practising his religion there. Miss Grey was inclined to accept that such components of a private life as had once been enjoyed in the UK could form a basis for a right under

Article 8 to enter. Here, those factors would be his study and residence together with the lifestyle more broadly which he had enjoyed here.

46. Of course, Article 8 rights include respect for a person's private life as well as his family life. The two may overlap and also be distinct. But the question is not how that right should be approached in the context of removal, as arose in Nhundu and Chiwera, but whether the effect on private life, as distinct from family life, also afforded a basis for a contention that refusal of entry clearance to someone outside the jurisdiction could be a breach of his human rights. As we have said, the ECHR rights do not extend to those outside the jurisdiction. It is by an extension of the Convention that the right to a family life has become a basis for a right of entry, but it has only become so where the family life relied on is with someone who is established within the jurisdiction. We have had no authority cited to us, domestic or ECtHR, which holds that any provisions of the ECHR other than the right to family life within Article 8 afford a basis for a right of entry. We do not regard any further extension as well founded. Private as distinct from family life is not a basis upon which an ECHR right of entry can be based. Were it otherwise, the implications for entry rights would be very significant. Many aspects of private life are restricted in less happy countries eg divorce, remarriage, homosexual relationships, religious practices; there is no reason to construe the 1999 Act nor the ECHR as providing rights of entry for those whose Convention rights are breached in signatory or non-signatory countries. Refugees have no such rights, yet the logic of extending entry under Article 8 by reference to factors other than family life with someone established here, would mean that Article 3 breaches in a Convention or non-Convention country would become a basis for a right of entry. If Parliament chooses so to legislate, that is for Parliament. It is not for judicial extension of the scope of the ECHR. Removal and entry are not to be equated. The relevance of a private life enjoyed while here as a student also seems a poor basis for the distinction which Miss Grey was prepared to accept. Those are no longer aspects of his private life; they are in the past and a student granted entry to study has no basis in general for supposing that he can rely on that to supply the basis for a right of return. It is to the contrary; his private life at that time was subject to the limitations on his entry.
47. Mr Seddon submitted that the Appellant enjoyed a family life with his parents who were established in the United Kingdom. He also relied on the fact that the other brother was living here and on the relationship with the girlfriend. At least he said that the Adjudicator had been wrong to discount that relationship simply because they were not engaged. She had ignored the strong and constant contacts between the mother and her youngest son. The Adjudicator had applied too severe a test in examining whether there were any "*insurmountable obstacles*" to the mother and stepfather returning to Malaysia to live; it would be correct to ask whether it would be reasonable to expect them to live there or whether there were major obstacles, which on the facts of this case there were. Apart from the particular difficulties which the mother's cancer now posed for flying, and the cost, they were established in the United Kingdom, they had always intended to retire here and had their house here; in Malaysia they would face again the religious discrimination which they had faced before. It was unrealistic to suggest that they could

choose to return to Malaysia. She had not chosen to be apart from him, and would have been less worried about him when he was living in England.

48. The Appellant is now nearing 26. He was nearing 23 at the date of decision. At that age, it is possible to have a family life with parents but one would normally expect something stronger than the normal ties of love and affection and concern for a child or parent's well-being. There should be evidence of specific emotional dependency or a serious lack of maturity. There is no evidence of any especial mental or emotional dependency of the Appellant on his parents; he is financially dependant on them. Although he has had illnesses in Malaysia, he is in good health and is not physically or mentally disabled. We would accept that he does at present enjoy some form of family life with them but that is inevitably one which will diminish as the years go by and the normal expectation would be that in the United Kingdom he would set up home away from them in due course, as have his brother and sister, and that it would be stretching a point to say that he then enjoyed family life with them. We accept that a family life can be constituted by the relationship with adult siblings but it is not usually strong in the absence of any particular dependencies; they would normally be regarded as separate families who have grown up and gone their separate ways however much the bonds of affection and contact remained. This evolution reflects the way in which the Rules make it fairly easy for children up to 12 years old to join their parents, somewhat more difficult for those under 18, and impose very much more stringent tests for those over 18.
49. For the present case, we accept that there is a form of family life with the brother in the United Kingdom noting that the former's position in the United Kingdom is certain only for the relatively short term. It is difficult to see why it is not also said that he has a family life with his sister in the USA.
50. There is force in the suggestion that the Adjudicator should have treated the relationship with the girlfriend as constituting family life or an element of his family life. They described each other as "*partners*" although accepting that no decision about marriage had been made. Such a relationship can constitute family life as Keegan v Ireland [1994] 18 EHRR 342 shows, although the facts of that case were rather stronger. Indeed, the fact that the Appellant, as a young adult, claims a family life with his girlfriend or partner and also with his parents suggests that he was already at the natural stage of development in his relationships where the family ties with the parents were dissolving in favour of a new adult relationship. However, that relationship is now over and cannot constitute any component of family life now, and it would not have been a strong one when the Adjudicator was considering matters even before any issue of proportionality. It was a relationship formed when his position would be uncertain after he ceased to be a student. She might have been able to join him in Malaysia.
51. The Adjudicator concluded that the refusal of entry clearance would not interfere or show a lack of positive respect for his family life. She concluded that there was no real obstacle to his parents re-establishing their lives in Malaysia. We consider that the refusal of entry clearance would constitute an interference with his family life, but we do not consider that it would be a very significant one. This is because of his age and the lack of any particular

reasons for emotional, mental or physical dependency on his parents. He is in at least reasonable health and is able to look for work and has a job. The financial dependency does not require entry into the United Kingdom in order for it to be met. His family ties with his parents will necessarily diminish, indeed will have diminished, over the years since the Entry Clearance Officer's decision, even though bonds of affection and love will remain. It can be expected that he would very shortly establish his own family life in this country even if for a while he lived with his parents. He could expect to move out to live with someone else and to start his own family. He can always seek a visitor visa. We know that he has been refused one once on the ground that he might not return. That seems harsh. He did return to Malaysia and the fact that an application for settlement has been made does not always mean that a later visitor visa should be refused.

52. The Adjudicator also said that his parents could visit him, which, ignoring the mother's illness, is true and a part of the picture. His brother can visit him as can his sister.
53. The Adjudicator also considered the prospects of the Appellant's parents rejoining him in Malaysia. It is a possibility that his brother will, but that is essentially speculative, even if the brother were unable to stay in the United Kingdom. The Adjudicator did not apply a test as to whether there were "*insurmountable obstacles*" to the parents returning to Malaysia. That was a consideration. It is the language of Lord Phillips MR in Mahmood v SSHD [2001] INLR 1 at paragraph 55. In Bakir [2002] UKIAT 01176, the then President said at paragraph 9 that the real test was "*whether in all the circumstances it was reasonable to require the family members to leave the country, that is to say, whether the interference is proportional.*" He commented that the phrase "*insurmountable obstacle*" in Mahmood was not specifically adopted by the other two members of the Court. It depended on what was reasonable in the case and had not been suggested as a test which each case had to pass. Sen v Netherlands [2003] 36 EHRR 7 at paragraph 40, used the phrase "*major obstacle*" in examining, in an entry case, the significance of the obstacles which the Turkish child entrant's family, established in the Netherlands, would face if family life could only be enjoyed by their return to Turkey to be with the child.
54. We are not sure that very much is gained by analysing what distinctions the various choices of word were intended to convey, if indeed there is a difference in practice. It does not appear to advance the analysis of whether a decision is proportionate to say that the question is whether it was reasonable to require family members to leave the country, because that is but one aspect of what makes a decision proportionate. It is unreasonable to expect someone to leave when facing "*insurmountable obstacles*". That phrase, read with the rest of paragraph 55, is not at odds with the other Mahmood judgments and it should not be discounted as appearing in only one judgment.
55. The flavour of the relevant language is clear; there must be really significant problems which the family could not realistically be expected to overcome.

56. The Adjudicator examined that issue here as a factor in her decision rather than as the test of proportionality. We agree with Mr Seddon that the Adjudicator, in her conclusion that there was no real obstacle to the Appellant's mother, with her husband, returning to Malaysia to re-establish their family life there, does not appear to have taken into account the discrimination faced by apostates beyond saying that the mother had lived there for many years since her conversion. Nonetheless, although we can understand why she and her husband much prefer to remain in the United Kingdom, where they have decided to retire, and have their house, and although we accept that there has been a growing discrimination against Christian apostates, the evidence does not show the really significant problems which we would expect if real weight is to be attached to the inability of the parents to move, when looking at lack of respect for the son's family life. The mother was not persecuted nor would she be persecuted. The relevance of the ease of return also seems to us to be likely to be of greater significance to an analysis of the human rights of those other than the would-be entrant Appellant.
57. Such interference or lack of respect for the Appellant's family life, as there is in the Entry Clearance Officer's decision, is proportionate, in the sense that it lies within the range of responses open to the Entry Clearance Officer. The primary position is that the Rules, supplemented by extra-statutory discretion and policies, provide what should be seen as a proportionate basis for that interference or lack of respect. There is nothing in this particular case which, exceptionally, shows that the application of the Rules is disproportionate and that a different decision is required.
58. There is no difficulty in applying Razgar [2003] EWCA Civ 840 to the Entry Clearance Officer's decision. The fact that there is a limit on the post-decision events which can be taken into account is likely to limit the extent of any unanticipated changes in circumstances. Here, none of the post-decision events are of such a nature as substantially to undermine the basis of the ECO decision. If the decision were for us, it is plain that it falls within the scope of those of reasonably open to the Secretary of State and we would not have interfered with it. Our attention was drawn to SSH D v Vujnovic [2003] EWCA Civ 1843, but nothing in this case turns upon it though we regard our decision as consistent with it.
59. We should add that we would not have reached a different conclusion even if we had taken into account the mother's rights and circumstances, including her up to date circumstances. Nor were the private life considerations weighty even taken at their highest.
60. This appeal is accordingly dismissed. The decision is starred for what we say about the scope of section 59 and 65 in relation to an appellant's rights, post-decision events, the relevance of family life to entry cases based on ECHR and the significance of the Rules for the proportionality of any Article 8 family life decision in any entry case.

**MR JUSTICE OUSELEY
PRESIDENT**