Neutral Citation Number: [2013] EWHC 1900 (Admin)

Case No: CO/7031/2012
CO8588/2012
C0/6529/2012

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/07/2013

Before :

THE HONOURABLE MR JUSTICE BLAKE

- -

Between :

MM (1) **ABDUL MAJID (2)** **SHABANA JAVED (3)**	**Claimants**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**
-and- **EM** **AF**	**Interested Parties**

- -
- -

Manjit Gill QC and Tony Muman and Navtej Ahluwahlia (instructed by **JM Wilson**) **for MM**
Ramby De Mello and Danny Bazini (instructed by **Bhatia Best Solicitors) for Majid**
Ramby De Mello and Aftab Rashid (instructed by **Britannia Law Practice) for Javed**
Lisa Giovannetti QC and Neil Sheldon (instructed by **Treasury Solicitors**) for the **Defendant**
Richard Drabble QC and Tony Muman (instructed by **RBM Solicitors) for AF.**

Hearing dates: 5, 6, 7 and 8 February 2013

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE BLAKE:

Part 1: The claimants and their challenges

1. These are three applications for judicial review directed to common parts of amendments made to the Immigration Rules promoted and laid before Parliament by the defendant Secretary of State in June 2012. The relevant rules are set out in Appendix 1 to this judgment. The applications have been listed for hearing together.

MM

2. MM is a 34 year old national of the Lebanon. He entered the United Kingdom in 2001. He subsequently sought refugee status and has been granted limited leave to remain in the United Kingdom as a refugee until 28 January 2014. He has two brothers with similar leave to remain. He lives with his sister EF who has discretionary leave to remain arising from the breakdown of her marriage. She has a son AF who looks to MM as a father figure.

3. MM became engaged in the summer of 2010 to a Lebanese woman. As a result of his refugee status he was unable to visit his fiancée in Lebanon but they met in Syria where they originally planned to marry in 2012. Those plans have had to change because of the deteriorating security situation in Syria. Since the issue of these proceedings, MM and his fiancée have met twice in Cyprus on visit visas, and in January 2013 married by proxy in Lebanon.

4. MM is a post-graduate student of the University of Wolverhampton presently working towards a Ph.D. He has been unable to find employment commensurate with his qualifications and at present works 37 hours per week with different employment agencies as a quality inspector on varying shift rates. He states that he earns approximately £15,600 on average per annum gross. His wife is also well qualified. She has a B.Sc in nutrition, has computing skills and is employed in Lebanon as a pharmacist. She speaks fluent English. Initial inquiries with employers in the UK indicate that she is likely to find skilled employment if she were lawfully resident here.

5. The problem for MM and his wife is that the amended Immigration Rules governing applications made from 9 July 2012 (see Part 8 rule A277) impose a mandatory financial requirement for the admission of a spouse without children to be met by the sponsor of a minimum income of £18,600 per annum gross (see Appendix FM paragraph E-ECP 3.1 to 3.2). He cannot meet that threshold.

6. He and his wife would be staying in the same accommodation as that presently occupied by MM and his sister and so her arrival would not occasion any additional housing costs.

7. He further complains that the Rules prevent the couple being able to rely on his wife's earning capacity if she applies for entry clearance. It is necessary for the sponsor to show that he can support his spouse from his earnings alone and/or any savings or other source of income throughout the 30 month probationary period that applies to spouses (Appendix FM-SE at paragraph 1 (c).

8. Further the Rules prevent the couple from being able to rely on a deed of covenant made by MM's brother to the effect that he will provide £80 per week to the couple over a five year period; neither can they rely on a promise by MM's father to provide an equal amount in remittances from Lebanon (Appendix FM –SE at paragraph 1 (b)).

9. The combination of these measures means that MM cannot enjoy married life with his wife. He cannot live in their mutual country of nationality as he is a refugee from persecution there. She cannot meet the maintenance requirements for entry clearance to come to the United Kingdom. She has not applied for entry clearance as the requirements are mandatory and there is no discretion under the rules for the Entry Clearance Officer to waive them. She would have to pay a substantial fee (at present £826 for a spouse) for an application that could not succeed. There is no other country in which they have the right to reside.

10. He contends that the restrictions are an unjustified interference with his right to respect for private and family life. Until July 2012, the only material requirement of the Immigration Rules was that admission of the spouse would not lead to additional recourse to public funds and that the couple would be adequately accommodated (see rule 281 (iv) and (v)). This rule continues to apply for certain classes of admission. On the claimed facts he could meet that requirement without difficulty.

11. Whilst he acknowledges that the rules make provision for the spouses of refugees who have not yet been granted indefinite leave to remain, he contends that they do not sufficiently recognise the problems facing refugees. These problems include not merely the inability to live elsewhere, but also difficulties in finding employment and establishing themselves economically in the host society, particularly in the early years when they still have only limited leave to remain.

12. MM further contends that his problems in achieving family unity have an adverse impact on his nephew AF who benefits from the care MM provides. AF has been granted leave to join these proceedings as an interested party and contends that amongst other things, the Immigration Rules when applied to MM's case infringe not only the Human Rights Act but the statutory duty to have regard to the welfare of the

child with respect to immigration decision making: see s.55 Borders Citizenship and Immigration Act 2009 (BCIA), that came into force in November 2009.

Abdul Majid

13. Mr Majid is aged 55 years and is a British citizen of Pakistani origins. He has been resident in the United Kingdom since 1972. In 1991 he married a Pakistani woman who lives in Kashmir, although the marriage was not formally registered until 2006. The couple have five children, four of whom have been resident in the United Kingdom since 2001 and the youngest of whom lives with his mother.

14. Mr Majid's wife has had problems in obtaining an entry clearance to join him in the United Kingdom. She was refused entry clearance as a spouse in 2002, 2006 and 2010 and refused admission as a visitor in 2012. These dates indicate that none of those refusals had anything to do with the new Immigration Rules in force from 9 July 2012. There have been problems about recognition of the marriage and satisfying the previous maintenance and accommodation requirements.

15. Mr Majid has been out of work since 2006 and now receives £17,361 per annum in benefits. He believes that his prospects of employment would be improved if his wife were admitted and she could look after the children. He also contends that he has relatives who are willing to provide him and his wife with financial support until they are self sufficient.

16. His essential complaint is that the provisions of Appendix FM that deal with the admission parents of children settled in the UK for 7 years do not apply to parents who also seeking to enter as spouses (contrast rule E-LTRPT 2.3(b)(iii) and 4.1).

Shabana Javed

17. Ms Javed is a British citizen of Pakistani origins. She has been resident in the United Kingdom for the past 30 years. She lives in the Handsworth area of Birmingham that she describes as economically and socially deprived. She has no qualifications and her employment history is intermittent.

18. She is presently unemployed and states that she is unaware that any of her female peers when in employment have been able to earn more than £18,000. She further contends that her local job centre only offers employment vacancies at salaries that are below this rate of pay.

19. On 4 May 2012 she married a Pakistan national who lives and works in Pakistan as a civil servant. She is unable to sponsor him to come to the United Kingdom because of her lack of employment or employment prospects at the requisite salary level. She

states that she cannot leave Handsworth to find better paid employment because she would lose her free accommodation with her extended family. She does not consider that she has the financial resources or personal background to improve her qualifications so as to enhance her ability to find better paid employment.

20. Ms Javed complains of the same provisions of the rules as MM. In addition she states that the requirements of Appendix FM-SE and in particular rule 2 and 13, to prove the requisite income of the sponsor by six months continuous wage slips before the date of application by the same employer or twelve months with a change of employer is unnecessarily onerous and operates harshly on those with casual employment records.

21. She further submits that the whole regime of financial sponsorship introduced by Appendix FM as a whole is unjustifiably discriminatory as it impacts on women and in particular on British Asian women, because the socio-economic data demonstrates that this segment of society suffers from significantly lower rates of pay or employment than others, notably men. She particularly complains that the exclusion of her husband's potential earnings in the UK constitutes discrimination as the statistical data considered below suggests that male migrants are able to obtain employment and support their families without difficulty.

Part 2: The Legislative Provisions

22. The modern era of immigration control dates from the Immigration Act 1971 mainly in force in January 1973. Section 1 of that Act is into the following terms:

> 'General principles.
> (1) All those who are in this Act expressed to have the right of abode in the United Kingdom shall be free to live in, and to come and go into and from, the United Kingdom without let or hindrance except such as may be required under and in accordance with this Act to enable their right to be established or as may be otherwise lawfully imposed on any person.
>
> (2) Those not having that right may live, work and settle in the United Kingdom by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by this Act; and indefinite leave to enter or remain in the United Kingdom shall, by virtue of this provision, be treated as having been given under this Act to those in the United Kingdom at its coming into force, if they are then settled there (and not exempt under this Act from the provisions relating to leave to enter or remain).
>
> (3)……
>
> (4) The rules laid down by the Secretary of State as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons not having the right of abode shall include provision for admitting (in such cases and subject to such restrictions as may be provided by the rules, and subject or not to

conditions as to length of stay or otherwise) persons coming for the purpose of taking employment, or for purposes of study, or as visitors, or as dependants of persons lawfully in or entering the United Kingdom.

23. Three points are worth noting at the outset. First, British citizens like Mr Majid and Ms Javed are 'free to live in the United Kingdom without let or hindrance'. The permitted restrictions on this right are the measures to prove that they are British citizens when entering or leaving the country or general measures such as a lawful order of a court preventing a person from travelling abroad in certain circumstances. Such measures are not in contention in these applications. Second, the rules laid down by the Secretary of State as to the practice to be followed in the administration of the Act for regulating the admission of those not having the rights of abode (essentially those who are not British citizens) shall include provisions for admitting dependants of persons lawfully in the United Kingdom. Third, the original statutory scheme included s. 2(2) of the Act that granted the right of abode to Commonwealth wives of British citizens, and reflected a historic social presumption that wives would follow husbands. This provision has long since been repealed, but its influence can be detected in previous versions of the Immigration Rules where more generous provisions were once made for the admission of wives of men settled here than the husbands of women settled here.

24. Central to the present challenge is the extent to which the statutory power of the Secretary of State to make rules of immigration practice is governed by the duty to act compatibly with the human rights of the sponsors pursuant to s.6 Human Rights Act 1998, and whether the Immigration Rules impugned in these challenges are unlawful in that they fail to comply with such a duty. It is therefore appropriate at this point in the survey of the legal context for this case to examine the European contribution to the issue.

25. Article 8 is the following terms:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being 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."

Article 14 prohibits discrimination in the application of Convention rights on

> 'any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

26. In May 1985 overt gender discrimination in the then Immigration Rules led to one of the early decisions of the European Court of Human Rights with respect to Article 8 and Article 14 of the European Convention on Human Rights. The cases of Abdulaziz, Cabales, and Balkandali v United Kingdom 7 EHRR 471 (1985) concerned women who were unable to sponsor the admission of their husbands.

27. The Court found that the Rules were a violation of Article 14 when taken together with Article 8, but not a violation of Article 8 taken alone. In a well- known passage the Court observed:-

> '67. The Court recalls that, although the essential object of Article 8 (art. 8) is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective "respect" for family life (see the above-mentioned Marckx judgment, Series A no. 31, p. 15, para. 31). However, especially as far as those positive obligations are concerned, the notion of "respect" is not clear-cut: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals (see, amongst other authorities, mutatis mutandis, the above-mentioned "Belgian Linguistic" judgment, Series A no. 6, p. 32, para. 5; the National Union of Belgian Police judgment of 27 October 1975, Series A no. 19, p. 18, para. 39; the above-mentioned Marckx judgment, Series A no. 31, p. 15, para. 31; and the Rasmussen judgment of 28 November 1984, Series A no. 87, p. 15, para. 40). In particular, in the area now under consideration, the extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved. Moreover, the Court cannot ignore that the present case is concerned not only with family life but also with immigration and that, as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory.
>
> 68. The Court observes that the present proceedings do not relate to immigrants who already had a family which they left behind in another country until they had achieved settled status in the United Kingdom. It was only after becoming settled in the United Kingdom, as single persons, that the applicants contracted marriage (see paragraphs 39-40, 44-45 and 50-52 above). The duty imposed by Article 8 (art. 8) cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country. In the present case, the applicants have not shown that there were obstacles to establishing family life in their own or their husbands' home countries or that there were special reasons why that could not be expected of them. In addition, at the time of their marriage
>
> (i) Mrs. Abdulaziz knew that her husband had been admitted to the United Kingdom for a limited period as a visitor only and that it would be necessary for him to make an application to remain permanently, and she could have known, in the light of

> draft provisions already published (see paragraph 20 above), that this would probably be refused;
>
> (ii) Mrs. Balkandali must have been aware that her husband's leave to remain temporarily as a student had already expired, that his residence in the United Kingdom was therefore unlawful and that under the 1980 Rules, which were then in force, his acceptance for settlement could not be expected.
>
> In the case of Mrs. Cabales, who had never cohabited with Mr. Cabales in the United Kingdom, she should have known that he would require leave to enter and that under the rules then in force this would be refused.
>
> 69. There was accordingly no "lack of respect" for family life and, hence, no breach of Article 8 (art. 8) taken alone.'

28. The finding that there was no lack of respect for family life in rules that did not permit female sponsors to bring in their husbands has constituted a major restriction on the ability of claimants to rely on Article 8 in entry clearance cases. The jurisprudence of the Court has developed considerably since 1985 with respect to Article 8. In particular the distinction between the positive obligation to respect family life found in Article 8(1) and the negative obligation to refrain from unjustified interferences with it under Article 8(2) has been reduced. Although the Court in Abdulaziz characterised the three applicants as women settled in the United Kingdom, one of them was a naturalised British citizen, and the rights of the citizen to enjoy family life in his or her country of nationality has emerged as a significant theme in the intervening period in European and domestic law.

29. Most of the significant developments in the European case law with respect to the admission of family members have occurred where a parent seeks to be reunited with a child. The case law is now replete with references to the importance of the interests of children, both in cases of admission to the territory of a Contracting State, (see for example Sen v Netherlands (2001) 36 EHHR 81 and Tuquabo-Tekle v Netherlands (2006) 1 FLR 978) and restrictions upon the expulsion of those admitted as children (see Maslov v Austria (2009) INLR 47).

30. Both the Court's decision in Maslov v Austria and that of the Supreme Court in ZH (Tanzania) v SSHD [2011] UKSC 4; [2011] 2 AC 166 emphasise the importance of the welfare of the child as a primary albeit not paramount consideration in any administrative decision making that touches upon those interests and cite Article 3 of the United Nations Convention on the Rights of the Child 1989 (UN CRC) as the international law source of that proposition[1].

[1] 'In all actions concerning children, whether undertaken by public or private social welfare institutions , courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.

31. Further, when the United Kingdom withdrew its reservation relating to immigration control from its accession to the UN CRC Parliament enacted s.55 of the UK Borders Citizenship and Immigration Act 2009 in the following terms:

> Duty regarding the welfare of children
> (1) The Secretary of State must make arrangements for ensuring that—
>
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
>
> (b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.
>
> (2) The functions referred to in subsection (1) are—
>
> (a) any function of the Secretary of State in relation to immigration, asylum or nationality;
>
> (b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;
>
> (c) any general customs function of the Secretary of State;
>
> (d) any customs function conferred on a designated customs official.
>
> (3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).'

32. It may be noted from the terms of s.55 (1) (a) that the statutory duty only relates to children who are in the United Kingdom. The Guidance issued by the Secretary of State invites Entry Clearance Officers to consider the spirit of the guidance when making entry clearance decisions about children abroad and the Upper Tribunal has indicated in T (s.55 BCIA 2009- entry clearance) (Jamaica) [2011] UKUT 483; [2012] Imm AR 346 how the guidance and Article 8 may combine to require a detailed evaluation and consideration of the impact of the immigration decision of the welfare on a child.

33. Apart from cases involving children there have been many significant developments in the Article 8 case law of the Strasbourg Court. The case of Boultif v Switzerland (2001) 33 EHRR 50 was intended by the Grand Chamber to give guidance in respect of the principles to be applied where a foreign spouse faced deportation for criminal conduct. Nevertheless, none of the claimants has suggested that the Article 8 case law of the European Court, whether alone or in conjunction with Article 14, has resulted in any decision declaring disproportionate rules relating to the maintenance requirements applied by Contracting States for the admission of spouses unaccompanied by children. On the international plane this remains an area where the national authorities have a wide margin of appreciation or discretionary area of judgment because they are better placed to assess and be democratically accountable for the economic consequences of migration. There have, however, been significant developments in domestic law, to which I will turn later in this judgment.

34. A decision of an European court that the claimants refer to and might have been of direct relevance to these claimants is the decision of the European Court of Justice in Case C-578/08 Chakroun v Minister van Buitenlandse Zaken [2010] ECR 1-1839 [2010] 3 CMLR 83. This was a case in which the claimant challenged Dutch legislation requiring a Moroccan national lawfully resident in the Netherlands to have resources equivalent to 120% of the minimum income laid down in Dutch law to be able to sponsor the admission of her Moroccan husband. The claimant relied on Council Directive 2003/86/EC of 23 September 2003 on the right to family reunification. Article 7 (1)(b) of Directive enables the Member State concerned to require the applicant to provide evidence that the sponsor has:

> 'Stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family without recourse to the social assistance system of the Member State concerned. Member States shall evaluate those resources by reference to their nature and regularity and may take into account the levels of minimum national wages and pensions as well as the number of family members".

35. The Court of Justice concluded that the measure has to be strictly construed as derogating from a right to family re-union, and that a minimum income requirement imposed without regard to the particular circumstances of the family was not lawful. Relevant extracts from the judgment are set out at Appendix 2.

36. However, notwithstanding the Court's reference to Article 8 ECHR, the decision cannot be relied on by the claimants in the present challenge as the United Kingdom exercised its rights not to participate in the Family Reunification Directive, and it is not suggested that any of the present applications involve the application of European Union law to engage the provisions of the Charter. In the absence of such a link, neither European Union law generally, nor the Charter of Fundamental Rights in particular, falls to be applied by the national court. The Court of Justice has recently emphasised the point succinctly in Case C-87/12 Ymeraga and Others v Ministre du Travail, de l'Emploi et de l'Immigration CJEU (Second Chamber), 8 May 2013.

37. For similar reasons, Mr Majid and Ms Javed as British and therefore European citizens, cannot rely on the observation of the Court of Justice in Case 60/00 Carpenter v Secretary of State for the Home Department [2002] ECR1-2679, [2003] QB 416. In that case a British citizen who provided commercial services in France resisted the removal of his spouse who had no leave to remain at the time of marriage. The Court said:

> 39. It is clear that the separation of Mr and Mrs Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom. That freedom could not be fully effective if Mr Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse (see, to that effect, *Singh*, cited above, paragraph 23).
>
> 40. A Member State may invoke reasons of public interest to justify a national measure which is likely to obstruct the exercise of the freedom to provide services only if that measure is compatible with the fundamental rights whose observance the Court

ensures (see, to that effect, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 43, and Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 24).

38. With this brief review of the UK's primary legislation and some of the principles stated in European law it is appropriate to revert to UK domestic case law before considering in greater detail the submission of the parties.

Part 3: Decisions of UK Courts challenging the provisions of the Immigration Rules

The status of the rules

39. It is well established that the Immigration Rules are neither primary nor delegated legislation, but a statement of the Secretary of State's policy, albeit laid before Parliament and subject to the negative resolution procedure and in respect of these rules a positive vote of the House of Commons[2]. The status of the rules and the legislative history are sufficiently summarised for present purposes in the decision of the Upper Tribunal to which I was a party in Izuazu (Article8-new rules) [2013] UKUT IAC 45. From that decision and the citations therein, the following propositions of law can be ascertained.

40. The nature of the rules has the following consequences:-

    i. They can be struck down as irrational or otherwise unlawful by the Administrative Court exercising its supervisory function in judicial review proceedings.

    ii. In laying the rules the Secretary of State is subject to the duty under s.6(1) Human Rights Act 1998 to act compatibly with the Convention rights of people affected by the rules, and cannot rely on a defence that she was required so to act by a provision of primary legislation.

    iii. As the rules are not legislation they are not subject of the court's duty under s.2 (2) Human Rights Act 1998 to interpret legislation compatibly with human rights where possible.

    iv. Although the rules are not law, they govern the decisions of immigration decision makers subject to any policy more favourable to a claimant issued

[2] In fact because of the unanimity of approval there was no division or vote.

by the Secretary of State pursuant to her statutory responsibilities but outside the rules.

v. Where there is a right of appeal to the First-tier Tribunal against an immigration decision, the terms of the rules are binding on the judge considering the appeal in so far as the grounds of appeal allege that the decision was not in accordance with the rules or that the claimant seeks to persuade the judge to exercise a discretion of the Secretary of State to depart from the rules: (s. 84 (1)(a) and (f) and s.86(6) Nationality, Immigration and Asylum Act 2002 (NIAA).

vi. The rules are to be interpreted sensibly and flexibly in accordance with their plain words and context.

vii. If the application of a rule results in an immigration decision that is said to breach human rights there is a right of appeal to the First-tier Tribunal on the grounds that a refusal of entry clearance was not in accordance with the law and breached the claimant's human rights (see s. 82 (2) (b) and s.84 (1) (c) and (e) Nationality, Immigration and Asylum Act 2002 (NIAA).

41. Human rights challenges depend on the particular facts of the case. It is rare for generic challenges to be made to the Immigration Rules. An individual aggrieved by the application of a particular immigration rule could exercise a right of appeal whereby the compatibility of the decision with the human rights of the parties affected could be examined on the basis of the relevant facts of the case. However, even before the coming into force of the Human Rights Act 1998 and s.55 of the Borders and Citizenship and Immigration Act 2009 such challenges have been made.

42. In R v IAT ex p Manshoora Begum [1986] Imm AR 385 Simon Brown J (as he then was) was concerned with a rule relating to the admission of dependent distressed relatives in circumstances including having a standard of living substantially below that of their own country. He was conscious of the high threshold necessary for a common law rationality challenge in a field of policy where the responsible Minister has secured Parliamentary approval but nevertheless concluded that the rule was so unreasonable as to be *ultra vires* the Secretary of State's powers[3].

[3] 'I recognise that section 3(2) of the Act expressly empowers the Secretary of State not to make uniform provision for the admission of persons coming, *inter alia,* as dependants, and allows him to take account of nationality. Nevertheless I see no possible basis in sense or justice for a requirement which will automatically disqualify from admission under the rule virtually all those from the poorer countries of the world, irrespective of whatever exceptional compassionate circumstances may surround their case, and yet allow most dependants from more affluent countries to be considered on general compassionate grounds. Whether, moreover, one is considering the application of the rule to dependants living in rich or poor countries, I regard it as manifestly unjust that – however extreme may be the compassionate circumstances of the case – a dependant is barred from admission under the rule unless only his or her sponsor (who, of course, equally seeks their admission) cannot afford to send abroad enough money to raise the dependant's standard of living to above that where it is still

Cases relating to the maintenance requirements of the rules

43. The maintenance requirements for the admission of spouses have been essentially the same since 1973. Any person who seeks to sponsor the admission of a spouse who falls outside the provisions of European Union law will need to satisfy the Entry Clearance Officer, that the spouse can be maintained without recourse to public funds. Since the coming into force of s.115 of the Immigration and Asylum Act 1999 it has been clear that a person from abroad, such as a spouse seeking admission, cannot have recourse to income support or other forms of non-contributory social assistance.

44. Equally, it has been established that a person with the right of abode or settled status in the United Kingdom may have entitlements under the scheme of social security legislation and the way the person chooses to spend any benefit is not a matter for investigation by the immigration authorities. Prior to July 2012 the question focused, therefore, on whether the admission of the spouse gave rise to a risk of additional public funds, inflating the entitlement of the sponsor by reference to the presence of an additional person from abroad.

45. The result depended on the particular facts established in the case. Not infrequently a claimant and appellant contended that because of a frugal way of life and a cultural tradition of a shared budget within an extended family household, admission of a spouse would cost very little additional income. In KA and others (Adequacy of maintenance) (Pakistan) [2006] UKAIT 65, the Asylum and Immigration Tribunal decided that the proper meaning of the rules could not have been intended to permit people to live at levels below the subsistence level set by income support. It said as follows:

> 46. In the course of his submissions in response to the grounds, Mr Park asserted that there are indeed in the Immigration Rules no specific requirements that the level of maintenance available to applicants be at any particular standard. He said that if the Immigration Rules had intended to impose such a standard, whether by reference to the income support levels or otherwise, they could have said so. The fact that they did not say so meant that adequacy was a matter purely for the discretion, or perhaps more properly assessment, of the Immigration Judge.
>
> 47. We do not accept that submission. Although it may be said that there is an element of imprecision in the relevant Immigration Rules, the requirement that the maintenance be "adequate" cannot properly be ignored. To our mind the use of that word imposes an objective standard. It is not sufficient that maintenance and accommodation be available at a standard which the parties and their family are prepared to tolerate: the

---

remains substantially below the general standard of living in that country, but yet has enough (presumably, only just enough) to maintain the dependants were he or she to be admitted for settlement here. All other dependants, namely those whose sponsors are able to afford to send them enough money that they may live above a substantially sub-standard level, are doomed to fail in their applications for leave. To them and their sponsors the rule is indeed but a mirage. In my judgment, it is unreasonable in the narrow sense indicted in *Kruse v Johnson,* and thus *ultra vires* the enabling statutory power.'

maintenance and accommodation must be at a level which can properly be called adequate.

48. There is a good reason for using the levels of income support as a test. The reason is that income support is the level of income provided by the United Kingdom government to those who have no other source of income. It follows from that that the Respondent could not properly argue that a family who have as much as they would have on income support is not adequately maintained.

49. It perhaps does not necessarily follow that in order to be adequately maintained one has to have resources at least equivalent to those which would be available to a family on income support. But there are very good reasons for taking that view. A family of British (or EU) citizens resident in this country will not have less than that level. It is extremely undesirable that the Rules should be interpreted in such a way as to envisage immigrant families existing (and hence being required to exist, because social security benefits are not available to them) on resources less than those which would be available through the social security system to citizen families. To do so is to encourage the view that immigrant families need less, or can be expected to live on less, and in certain areas of the country would be prone to create whole communities living at a lower standard than even the poorest of British citizens. It is for this reason that a number of Tribunal cases, including Islam (13183), Momotaz Begum (18699), Uvovo (00 TH 01450) (which alone was the subject of reference by the Immigration Judge in this case) and RB [2004] UKIAT 00142 have held that the basic task for Appellants attempting to show that there maintenance will be "adequate" is to show that they will have as much as they would have if they were able to claim income support. Similar considerations apply to the different benefit structure when there is a disabled person in the family, as Munibun Nisa v ECO Islamabad [2002] UKIAT01369 shows. There have been one or two cases which have indicated that a frugal life style can be taken into account in deciding whether maintenance would be "adequate", but in our view those cases should not be followed. In particular, we doubt whether it would ever be right to say that children could be maintained "adequately" at less than the level which would be available to the family on income support, merely because one of their parents asserts that the family will live frugally. The purpose of the requirement of adequacy is to ensure that a proper standard, appropriate to a family living in a not inexpensive western society, is available to those who seek to live here.

50. It, therefore, concluded that irrespective of the projected outgoings of the family, as a minimum, a sponsor would need to demonstrate that resources equivalent to the income support level of a single couple of £5,500 needed to be shown, net of housing costs and any tax liabilities.

51. Judicial examination of the maintenance rules for spouses or dependent children arose in a sequence of cases between 2007 and 2009, where the primary problem was whether additional recourse was being sought by the family and whether regard could be had to third party financial support.

52. In MK (Somalia) v ECO Addis Abbaba [2007] EWCA Civ 1521; [2008] INLR 574, the Court of Appeal approved by a majority the conclusion of Collins J in Ali v SSHD [2002] UKIAT 92 that the Immigration Rules as then in force did not preclude

a disabled sponsor from using her disability living allowance (DLA) to support her husband.

53. In MW (Liberia) v SSHD [2007] EWCA Civ 1376 the Court of Appeal preferred the approach of another former President of the AIT, Hodge J, given in the case of AA (3rd party maintenance Bangladesh (2005) UKAIT 00015 and concluded that the Immigration Rules precluded recourse to third party funding of children. Tuckey LJ noted at [16] that '[t]hird party arrangements of the kind in question in this case are necessarily more precarious and, as the Tribunal said in *AA*, more difficult to verify.'

54. In AM (Ethiopia) V Entry Clearance Officer [2008] EWCA Civ 1082 the Court of Appeal noted (with Carnwath LJ dissenting in part) that it was bound by the decision in MW (Liberia) to reject the proposition that the rules permitted third party support. Mr Gill QC, who appeared in that case as this, then developed a submission founded on a purposive construction in applying Article 8 ECHR, in part relying on the reasoning of Collins J to similar effect in Ali.

55. Laws LJ was unimpressed with this submission. I set out the relevant part of his judgment in full at Appendix 3 as it is a passage on which Ms Giovannetti QC places considerable reliance. He concluded not only that it was an error to interpret the rules compatibly with the Human Rights Act as Collins J had done, but that the rules had no aim of family reunion but were merely an expression of immigration policy. Human rights assessments had to be made on individual facts outside the context of the rules. If this judgment accurately summarises the present state of the law it represents a serious obstacle to the claimants' contentions.

56. In the case of AM (Somalia) v ECO Addis Abbaba [2009] EWCA Civ 634 the Court of Appeal was concerned with an entry clearance application by the husband of an unemployed British citizen sponsor who was in receipt of disability living allowance (DLA). The applicant had to satisfy the ECO that 'the parties will be able to maintain themselves and any dependent adequately without recourse to public funds'. The sponsor had the offer of support from a cousin for a period while her husband established himself in the UK. As a result of the previous decisions of the Court of Appeal, it was common ground before the Court of Appeal in this case that these rules allowed the sponsor to spend her DLA on supporting herself and her husband as long as his presence did not lead to additional recourse to public funds but did not enable her to have recourse to third party support offered to the couple by a cousin (see AM (Ethiopia) [2008] EWCA Civ 1082).

57. The claimant could only meet the requirements of the rules if she could rely on the third party support which she was bound to concede before the Court of Appeal the rules did not permit. Instead she argued that the rule denying her recourse to third party support was discriminatory against her as a disabled person and was a violation of Article 14 combined with Article 8. Maurice Kay LJ examined the Strasbourg case law on discrimination in the field of social security and suspect grounds for differential treatment. He concluded:-

(i) Disabled people were in a different position from other sponsors who had no real earning capacity because of difficulties in speaking English, educational disadvantages, family responsibilities or other reasons. He disagreed at [14] with the decision of the AIT in NM (Disability Discrimination) Iraq [2008] UKAIT 26 to the contrary.

(ii) Disability may be a 'suspect ground' for which 'weighty reasons' are required to justify differential treatment where the state treats disabled people differently because of their disability. The same is not the case where a neutral immigration rule operates to the disadvantage of disabled people and in substance the claimant is relying on the principle of equal treatment or more favourable treatment [24].

(iii) There was a legitimate aim in having a 'no recourse to public funds' rule and there was nothing disproportionate in making self-sufficiency a requirement of entry [29].

(iv) In the particular policy context it was not disproportionate to exclude the disabled from the general requirement. This sponsor was not so disabled as to prevent her from travelling to Somaliland and the Immigration Judge had concluded there were no insurmountable obstacles to the couple enjoying family life there.

(v) In reaching this conclusion, regard was had to what Tuckey LJ had said about precariousness and verifiability in MW (Liberia) (quoted at [53] above) and endorsed by the Court of Appeal in AM (Ethiopia).

58. Elias LJ agreed with Maurice Kay LJ and added observations of his own on the concept of direct and indirect discrimination in the Strasbourg case law. These claimants do not rely on discrimination on the grounds of disability and indeed Appendix FM makes different provision for classes of disabled sponsor, for whom the old rule 281 criteria generally apply (see E-ECP 3.3(b). His observations have continued relevance to the other grounds of discrimination alive in these applications:

> 64. Mr Fordham submits that precisely because the number of potential beneficiaries of an exemption from the rule will be relatively small, the additional cost will be limited. The Article 8 rights of the disabled demand that the state supports this group and therefore the failure to make an exception to rule 281(v) is plainly disproportionate.
>
> 65. I reject this argument, essentially for the following reasons, which are in large part interrelated. First, this is an area of social policy concerning control of who should be allowed to enter into this country and in what circumstances. As I have noted, the courts are particularly reluctant to interfere in such areas.
>
> 66. Second, as Maurice Kay LJ has pointed out, the courts have frequently recognised that "bright line" rules are generally acceptable in such cases notwithstanding that they might produce some hardship.

> 67. Third, the practical effect of making the exception involves public expenditure. In my judgment the courts will be particularly slow to require special treatment for a group where it affects the distribution of national resources, even if it be the case that the sums will be relatively small.
>
> 68. Fourth, and in my view importantly - and this is likely to be true of most indirect discrimination claims of this nature - it is difficult to foresee what other potential claims of a similar kind there may be. As I have indicated, some individuals may find it difficult to find work because their English is poor, which is capable of being a characteristic related to race; or because they have responsibility for children, which is related to sex; or because they are old, which is age related. Indeed, given the wide potential category of personal characteristics which might fall under the concept of "status" in Article 14, there is potentially a broad range of cases where persons would be adversely affected by the application of a rule because of some characteristic related to that status. This does not merely create a difficulty in foreseeing the potential range of claimants urging special treatment, but it also makes the potential cost very difficult to predict. These uncertainties reinforce the justification for a bright line rule.
>
> 69. Fifth, as Ms Giovannetti, counsel for the Secretary of State, emphasised, there would be additional administrative costs in having to identify whether a particular case falls within or outwith the exception - a particular difficulty given that the concept of disability itself is imprecise - and such cases would have to be periodically reviewed. Indeed, administrative burdens will almost inevitably be created once one departs from a bright line rule because of the need to draw the distinctions which a more nuanced rule will create.
>
> 70. Sixth, as I have said, this is a not a case of direct or planned discrimination; as Lord Hope observed in *AL (Serbia),* para 10, the absence of targeting will be an important factor when determining whether potential discrimination is justified.
>
> 71. Finally, a factor lending some additional support to this conclusion is the fact that the Secretary of State is empowered in particularly compassionate cases to exercise a discretion in favour of entry. This was a factor which helped to render the rule proportionate in the *AL (Serbia*) case: see the observations of Lord Bingham of Cornhill at paragraph 3.

59. In fact, when AM (Somalia) and AM (Ethiopia) reached the Supreme Court and the case became known as Mahad and others v ECO [2010] I WLR 48, it was decided that properly construed the Immigration Rules did not prohibit recourse to third party support at all. Lord Brown (as he had now become) reviewed the various authorities.

60. First, he observed at [19] that the strength of the argument that recourse to third party support made assessments precarious and difficult to verify was weakened by other factors:

> Whilst I readily acknowledge the legitimacy of each of these concerns, their strength seems to me much diminished by a number of considerations. First, whilst I accept that generally speaking unenforceable third party promises are likely to be more precarious and less easily verifiable than a sponsor's own legal entitlements, that will not invariably be so. And it would surely be somewhat anomalous if ECOs could accept promises of continuing accommodation and/or employment and yet not

> promises of continuing payments, however regularly they can be shown to have been made in the past and however wealthy the third party can be seen to be. Are rich and devoted uncles (or, indeed, large supportive immigrant communities such as often assist those seeking entry) really to be ignored in this way? A second consideration, never to be lost sight of, is that it is always for the applicant to satisfy the ECO that any third party support relied upon is indeed assured. If he fails to do so, his application will fail. That this may be difficult was recognised by Collins J himself in *Arman Ali* (page 103):
>
> > "I do not doubt that it will be rare for applicants to be able to satisfy an entry clearance officer, the Secretary of State or an adjudicator that long-term maintenance by a third party will be provided so that there will be no recourse to public funds. But whether or not such long-term support will be provided is a question of fact to be determined on the evidence."
>
> Of course there may be difficulties of investigation. But that is already so with regard to many different sorts of application and, indeed, is likely to be so with regard to some of the kinds of third party support already conceded to be acceptable.

61. Second, he concluded that the plain language of the rules relating to third party support in family reunification cases did not rule it out when it could have done and the construction applied by the Court of Appeal in MW Liberia was wrong.

62. Third, he noted the respective human rights arguments for and against such a rule, but concluded at [29] to [31] that it was not necessary to re-visit Laws LJ's judgment, unless or until the Secretary of State promulgated new rules accepted by Parliament that would unambiguously exclude them. This is, of course, precisely what the July 2012 Rules have done. It thus falls to this court to examine the issue for itself in the light of the relevant recent jurisprudence.

63. Fourth, Lord Brown noted at [38] that the disability discrimination argument did not need to be further explored as the claimant had now been granted an entry clearance when the decision on the third party support point had been announced.

64. The other members of the Supreme Court agreed with Lord Brown and Lord Kerr added some concurring remarks of his own:-

> 54. The rationale which, it is said, underpins the exclusion of third party support in the relevant rules is that it is inherently more difficult to police and that it is precarious to rely on it in order to forestall recourse to public funds. In the first place, I question whether, even if it is more precarious, that is a legitimate basis on which to adopt an interpretation that seems at odds with the natural and plain meaning of the words. But, in any event, I have been persuaded, particularly by the examples given by Mr Fordham QC on behalf of the appellants, SA and AW, that the exceptions to self generated income that undeniably exist are at least as "precarious" as funds supplied by, say, a close relative. The vaunted precariousness of support from a third party source is, in my opinion, no greater than that which might arise in the course of the ordinary vagaries and vicissitudes of life. Promised employment may not materialise or may last for only a short time. Dependence on benefits received by the family member who is settled in the United Kingdom may cease. As Lord Brown has pointed out, there is no warrant for

(and much to be said against) the view that third party support occupies a particular category of uncertainty.

55. In any event, as the appellants have submitted, availability of third party support as a means of fulfilling the rules' requirements proceeds on the premise that the applicant *can* demonstrate that he or she will *not* be a drain on public funds. This may well prove a formidable hurdle in most cases. But it is entirely conceivable that support from a number of family members and friends of the person seeking to enter will be a more dependable resource and a more effective prevention of dependence on public funds than prospective employment. As Lord Pannick QC, for MI and KA, pointed out, the practical reality in many of these cases is that funding will come from a number of sources.

Human rights challenges to the rules

65. Although the Supreme Court in Mahad did not determine the human rights challenge to the rules, the House of Lords had done so earlier in the case of R (Baiai and another) and others v Secretary of State for the Home Department [2008] UKHL 53 [2009] AC 1 AC 287, a case that featured prominently in the submissions of the claimants etc. The decision was concerned with a scheme of regulations made under s.19 of the Asylum and Immigration (Treatment of Claimants) Act 2004 whereby a person who was subject to immigration control needed to obtain a prior certificate of approval to enter a marriage otherwise than in accordance with the rites of the Church of England. The promotion of the scheme was in the pursuit of the legitimate aim of deterring and preventing marriages of convenience entered into for immigration purposes. However, the subject matter was an interference with the right to marry guaranteed by Article 12 of the ECHR.

66. The House of Lords upheld the decision of the Court of Appeal below that the scheme was both discriminatory on the grounds of religion and an unjustified and disproportionate interference with the right to marry recognised by the ECHR. The scheme was subsequently repealed.

67. In the course of his judgment Lord Bingham noted that, apart from their discriminatory character, the regulations themselves were unobjectionable with one reservation that he spelt out at [30] :

> "My qualification relates to the prescribed fee. It is plain that a fee fixed at a level which a needy applicant cannot afford may impair the essence of the right to marry which is in issue. A fee of £295 (£590 for a couple both subject to immigration control) could be expected to have that effect."

68. The issue went to Strasbourg where in the case of O' Donoghue v United Kingdom (2011) 53 EHRR 1 the Court of Human Rights reached a similar conclusion. It found the blanket nature of the requirement objectionable. It rejected the United Kingdom's

submission that the existence of a discretion to avoid the requirement where there were compassionate circumstances could save the scheme. It said as follows:

> '89. ……Likewise, in the present case, the Court considers that there is no justification whatsoever for imposing a blanket prohibition on the right of persons falling within these categories to exercise their right to marry. Even if there was evidence to suggest that persons falling within these categories were more likely to enter into marriages of convenience for immigration purposes – and the Government have submitted no such evidence to the Court in the course of these proceedings – the Court finds that a blanket prohibition, without any attempt being made to investigate the genuineness of the proposed marriages, restricted the right to marry to such an extent that the very essence of the right was impaired. The existence of the exception on compassionate grounds did not remove the impairment of the essence of the right, as this was an exceptional procedure which was entirely at the discretion of the Secretary of State. Moreover, the Secretary of State's decision whether or not to exercise this discretion appears to have been based entirely on the personal circumstances of the applicants and not on the genuineness of the proposed marriages.
>
> 90. Thirdly, the Court agrees with the view expressed by Lord Bingham (set out at paragraph 22 above) that a fee fixed at a level which a needy applicant could not afford could impair the essence of the right to marry. It recalls that it has previously found, in the context of a complaint under Article 6 § 1 of the Convention, that depending on the circumstances of a case, including the applicant's ability to pay, the level of a fee may in itself be such as to restrict the enjoyment of a Convention right (see, for example, *Kreuz v. Poland*, no. 28249/95, § 60, ECHR 2001 VI). In view of the fact that many persons who are subject to immigration control will either be unable to work in the United Kingdom, such as the second applicant, or will fall into the lower income bracket, the Court also agrees that in the present case the fee of GBP 295 was sufficiently high to impair the right to marry. Moreover, the Court does not consider that the system of refunding fees to needy applicants, such as the second applicant, which was introduced in July 2010, constitutes an effective means of removing any impairment as the requirement to pay a fee, even if there is a possibility that it could be later refunded, may act as a powerful disincentive to marriage".

69. The next major challenge to an Immigration Rule related to the measures adopted by the Secretary of State to deter forced marriages. The Home Office considered, after appropriate investigation and consultation, that younger women were more vulnerable to being compelled to enter a forced marriage with a person from abroad against their will. In 2003 an amendment to the Rules required both parties to a marriage to be aged 18 for an entry clearance to be issued. In 2008 the minimum age was raised to 21.

70. Home Office statistics indicated that about one third of all forced marriages investigated by the relevant unit involved parties who were aged between 18 and 20, but of the cases investigated only 4% were found to be forced marriages. Whilst such statistics might under report the number of forced marriages, it was common ground that the rule would mean that a great many couples one of whom was under 21 would be prevented from living together in the UK for a period without any reason to believe that theirs was a forced marriage. The Home Office contended that this was a proportionate price to pay to suppress such a social evil. The Home Office had a

policy to waive the rule 'in clear exceptional compassionate circumstances which have not been previously been considered and which merit the exercise of discretion under the rules exceptional cases'. It was accepted that this discretion was bound to be exercised where not to do so would violate Article 8 ECHR.

71. In the case of Quila [2010] EWCA Civ 1482, a group of claimants challenged the application of the rule to them by judicial review proceedings. They failed before the Administrative Court but succeeded before the Court of Appeal. They were supported by three interveners: the AIRE Centre, Southall Black Sisters and the Asian Community Action Group from Sheffield.

72. Lord Justice Sedley first noted the background history summarised above and then observed:

(i) It was appropriate to consider the proportionality of the rule on the facts of the claimants' case. The judicial review investigation therefore moved from striking down the rule *per se* to dis-applying it where it was disproportionate (see [31]).

(ii) Factual distinctions may be relevant but the present claimants were all British citizens who can 'legitimately take their stand on an indefeasible right of abode, arguing that it must take the strongest possible reasons if the executive is to be allowed to interfere materially with their legal right to marry…and found a family' ([30]).

(iii) Proportionality was the relevant test both under the common law and ECHR. As far as the common law is concerned the decision in Daly v SSHD [2001] UKHL26; [2001] 2 AC 532 applied the test of proportionality to a common law right to receive legal correspondence ([50]).

(iv) In the present case two common law rights were at stake. The first was 'the right of a citizen of the UK to live here, and the right of an adult to marry. The first is an indefeasible and unconditional right, for the British state has no power of exile.' ([37]),

(v) He did not accept that the fact the claimants were able to contract a marriage, meant that there was no interference with the right to marry, although this may be relevant to the degree of interference ([40] and [49]).

(vi) Having examined the decision in Abdulaziz v United Kingdom he observed at [45] that :

> 'the question whether the spouse of a UK national who exercises the right to marry is entitled prima facie to the other spouse's right of abode within interference under the immigration rules is not concluded by any Strasbourg authority. (I say prima facie because I would not wish to exclude cases in which there are good grounds, such as criminality, for excluding the non-national spouse)'.

The authority of Baiai (see above) was relevant domestic authority for the need to justify such interference.

(vii) He concluded at [48] that the rule in issue was :

> 'A direct interference with what the common law and European Convention both value as a fundamental right. In the eyes of the common law it is not simply the right to marry and not simply the right to respect for family life but their combined effect which constitutes the material right: that is to say a right not merely to go through the ceremony of marriage but to make a reality of it by living together. For the State to make exile for one of the spouses the price of exercising the right to marry and embark on family life requires powerful justification'.

(viii) He concluded at [51] to [62] that the rule was disproportionate to the legitimate aim applying the approach in Daly.

(ix) He did not consider the claimants' discrimination and Article 14 arguments served to advance their case [63] to [65].

73. Lord Justice Pitchford agreed with the analysis of Lord Justice Sedley at [72]. Lord Justice Gross agreed with the outcome but not the route by which the decision was reached.

74. The Secretary of State appealed to the Supreme Court where the appeal was dismissed but with different reasoning to that of the Court of Appeal: Quila v SSHD [2011] UKSC 45; [2012] 1 AC 241. The leading judgment was that of Lord Wilson. The analysis was based on an interference with Article 8 rights. This is a decision of profound importance for the present challenges. I propose to quote from it at some length.

75. First, the proposition in Abdulaziz that refusal of entry clearance was not an interference with the right to respect for family was swept away. Hitherto the case was a serious obstacle for claimants who sought to found a right of admission of a spouse under Article 8. Lord Wilson said this at [43]

> 'Having duly taken account of the decision in *Abdulaziz* pursuant to section 2 of the Human Rights Act 1998, we should in my view decline to follow it. It is an old decision. There was dissent from it even at the time. More recent decisions of the ECtHR, in particular *Boultif* and *Tuquabo-Tekle*, are inconsistent with it. There is no "clear and consistent jurisprudence" of the ECtHR which our courts ought to follow: see *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295 at para 26, per Lord Slynn. The court in *Abdulaziz* was in particular exercised by the fact that the asserted obligation was positive. Since then, however, the ECtHR has recognised that the often elusive distinction between positive and negative obligations should not, in this context, generate a different outcome. The area of engagement of article 8 - in this limited context - is, or should be, wider now. In that in *Tuquabo-Tekle* the state's refusal to admit the 15-year-old daughter of the mother, in circumstances in which they had not seen each other for seven years, represented an interference with respect for their family life, the refusals of the Secretary of State in the present case to allow the foreign spouses to reside in the UK with the British citizens with whom they had so recently entered into a consensual marriage must a fortiori represent such an interference. The only sensible enquiry can be into whether the refusals were justified.'

76. Second, the issue whether any interference was justified and proportionate in pursuit of the legitimate aim permitted by Article 8 was to be decided by the application of the test developed in UK public law and ultimately derived from the decision of Daly (citation at [72 (iii)] above):

> 45. The amendment had a legitimate aim: it was "for the protection of the rights and freedoms of others", namely those who might otherwise be forced into marriage. It was "in accordance with the law." But was it "necessary in a democratic society"? It is within this question that an assessment of the amendment's proportionality must be undertaken. In *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, Lord Bingham suggested, at para 19, that in such a context four questions generally arise, namely:
>
> a) is the legislative objective sufficiently important to justify limiting a fundamental right?
> b) are the measures which have been designed to meet it rationally connected to it?
> c) are they no more than are necessary to accomplish it?
> d) do they strike a fair balance between the rights of the individual and the interests of the community?
>
> In the present case the requisite enquiry may touch on question (b) but the main focus is on questions (c) and (d)'.
>
> 46. But what is the nature of the court's enquiry? In *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 Lord Bingham said, at para 30:
>
> > "it is clear that the court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting… There is no shift to a merits review, but the intensity of review is greater than was previously appropriate, and greater even than the heightened scrutiny test… The domestic court must now make a value judgment, an

evaluation, by reference to the circumstances prevailing at the relevant time... Proportionality must be judged objectively, by the court…"

77. Having reviewed the evidence and directed attention to a number of relevant questions Lord Wilson concluded:

> 56. 'The Secretary of State suggests that the Select Committee's recent report, not available to the Court of Appeal, remedies any deficiencies in her case in relation to the proportionality of the amendment and thus to the justification for her interference with the rights of the respondents. I disagree. Although its reference to discrimination against migrant communities is, by implication, a reference to unforced marriages within those communities, the Select Committee's report is, as its title suggests, upon forced marriage; and the focus of the conflicting evidence which it surveyed related to whether the amendment had succeeded in deterring it. The committee did not also weigh its effect on unforced marriages in the manner mandated of the court by article 8(2).
>
> 57. There is a helpful parallel with the decision in *R (Baiai) v Secretary of State for the Home Department* [2008] UKHL 53, [2009] AC 287. In order to prevent marriages of convenience in the UK the Secretary of State introduced a scheme under which certain persons subject to immigration control required her written permission to marry and would not receive it unless they were present in the UK pursuant to a grant of leave for more than six months of which at least three months was unexpired. The House of Lords held that, notwithstanding that the right to marry under article 12 was not qualified in the way in which article 8(2) qualified the right in article 8(1), the state could take reasonable steps to prevent marriages of convenience; but that the scheme represented a disproportionate interference with the right to marry. It was, said Lord Bingham at para 31, "a blanket prohibition on exercise of the right to marry by all in the specified categories, irrespective of whether their proposed marriages are marriages of convenience". The scheme, said Lady Hale at para 43, was "over–inclusive" and "[m]aking a serious attempt to distinguish between the 'sham' and the genuine was considered too difficult and too expensive". On 14 December 2010, in *O'Donoghue v United Kingdom* (Application No 34848/07), the ECtHR approved the decision in *Baiai* and extended it to two later versions of the Secretary of State's scheme. Furthermore, in *Thlimmenos v Greece* (2000) 31 EHRR 411 it held that the application of a rule that a felon could not become a chartered accountant infringed the rights under article 14, taken in conjunction with article 9, of a pacifist convicted of the felony of refusing to perform military service. The court observed, at para 47, that it was legitimate to exclude some felons from entitlement to become chartered accountants but that there was no objective and reasonable justification for having treated the applicant in that way.
>
> 58. I would, in conclusion, acknowledge that the amendment is rationally connected to the objective of deterring forced marriages. So the Secretary of State provides a satisfactory answer to question (b) set out in para 45 above. But the number of forced marriages which it deters is highly debatable. What seems clear is that the number of unforced marriages which it obstructs from their intended development for up to three years vastly exceeds the number of forced marriages which it deters. Neither in the material which she published prior to the introduction of the amendment in 2008 nor in her evidence in these proceedings has the Secretary of State addressed this imbalance – still less sought to identify the scale of it. Even had it been correct to say that the scale of the imbalance was a matter of judgement for the Secretary of State rather than for the courts, it is not a judgement which, on the evidence before the court, she has ever made. She clearly fails to establish, in the words of question (c), that the amendment is no

more than is necessary to accomplish her objective and, in the words of question (d), that it strikes a fair balance between the rights of the parties to unforced marriages and the interests of the community in preventing forced marriages. On any view it is a sledge-hammer but she has not attempted to identify the size of the nut. At all events she fails to establish that the interference with the rights of the respondents under article 8 is justified.

59. By refusing to grant marriage visas to the respondents the Secretary of State infringed their rights under article 8. Her appeals must be dismissed. In line with the helpful analysis of the Upper Tribunal (Immigration and Asylum Chamber) conducted in somewhat similar circumstances in *FH (Post-flight spouses: Iran) v Entry Clearance Officer, Tehran* [2010] UKUT 275 (IAC), I consider that, while decisions founded on human rights are essentially individual, it is hard to conceive that the Secretary of State could ever avoid infringement of article 8 when applying the amendment to an unforced marriage. So in relation to its future operation she faces an unenviable decision.'

78. Lady Hale agreed with this analysis and added her own observations:

78. There is a further reason for holding the interference disproportionate. Although the means used is an interference with article 8 rights, the object is to interfere with article 12 rights. The aim is to prevent, deter or delay marriage to a person from abroad. The right to marry is a fundamental right. It does not include the right to marry in any particular place, at least if it is possible to marry elsewhere: see *Savoia and Bounegru v Italy* (Application No 8407/05) (unreported), Admissibility Decision of 11 July 2006. But it is not a qualified right: the state can only restrict it to a limited extent, and not in such a way or to such an extent as to impair its very essence. In *O'Donoghue v United Kingdom* (Application No 34848/07) (unreported) given 14 December 2010, the Court was concerned with the Home Office scheme for approving marriages with people from abroad, the first version of which was struck down by the House of Lords in *R (Baiai) v Secretary of State for the Home Department* [2008] UKHL 53, [2009] 1 AC 287. The Court agreed that a system of approval designed to establish the capacity of the parties to marry and whether or not it is a marriage of convenience is not objectionable. But this scheme was objectionable for a number of reasons: first, the decision to grant a certificate was not based on the genuineness of the marriage; second, it imposed a blanket prohibition on certain categories of people; and third, the fee was set at a level which the needy could not pay. A fee fixed at such a level could impair the essence of the right to marry.

79. This scheme shares all three characteristics. The delay on entry is not designed to detect and deter those marriages which are or may be forced. It is a blanket rule which applies to all marriages, whether forced or free. And it imposes a delay on cohabitation in the place of their choice which may act as at least as severe a deterrent as a large fee. I say this, not to conclude that there has been a violation of these couples' right to marry. They have in fact both been able to get married, one in England and one in Pakistan. But these factors lend weight to the conclusion that it is a disproportionate and unjustified interference with the right to respect for family life to use that interference for the purpose of impeding the exercise of another and even more fundamental Convention right in an unacceptable way.

80. Like Lord Wilson, therefore, I would hold that the Secretary of State has acted incompatibly with the Convention rights of these two couples. I also agree with him that, although we are only concerned with these young people, it is difficult to see how

she could avoid infringing article 8 whenever she applied the rule to an unforced marriage.'

79. Lord Phillips and Lord Clarke agreed with Lord Wilson and Lady Hale. Lord Brown dissented. He concluded that the right at stake could be no higher than the right to found a family, and that weight should be given to the Secretary of State's policy reason for the rule. Commenting on this dissent Lord Wilson noted:

> 'Lord Brown's call, at para 91 below, for the courts in this context to afford to government a very substantial area of discretionary judgement is at odds with my understanding of the nature of their duty. Indeed, in the case of *Huang* cited above, Lord Bingham proceeded to explain, at para 16, that it would be wrong to afford "deference" to the judgments of the Secretary of State on matters related to the above questions albeit that appropriate weight had to be given to them to the extent, in particular, that she was likely to have had access to special sources of knowledge and advice in connection with them. He added, at para 17, that, notwithstanding the limited right of Parliament to call upon the Secretary of State to reconsider proposed changes in the Immigration Rules provided by section 3(2) of the Immigration Act 1971, it would go too far to say that any changes ultimately made had the imprimatur of democratic approval such as would be relevant in particular to any answer to question (d) set out in para 45 above.'

The rule was subsequently amended to require a minimum age of 18.

80. The next case concerned with the Immigration Rules concerned with the admission of spouses was R (Chapti) v SSHD [2011] EWHC 3370 (Admin). The claimant brought a challenge was to rules introduced in November 2010 requiring most foreign spouses to produce a test certificate of basic knowledge of the English language before an entry clearance could be granted.

81. The application was heard by Beatson J (as he then was) and dismissed. Summarising the salient features of the claim discussed in a lengthy judgment reviewing many of the authorities already considered, the following points may be noted:-

i. The Secretary of State's submission that the rule did not interfere with the right to marry was accepted because the learning showed that there was no right to enter the United Kingdom to get married.

ii. The right to respect for family life was engaged and the question was whether the interference with the right was proportionate having regards to the legitimate aim. This aim included facilitating the prospects of integration by requiring spouses to have some basic knowledge of the language of their place of future residence.

iii. A challenge to the rules generally, as opposed to an appeal where the individual facts were found, was possible but a demanding test should be applied in such a challenge that the application of the rules could not lead with a result compatible with the Convention.

iv. Having regard to the modest burden imposed of acquiring basic English skills, and the various exceptions to the requirement combined with the possibility of individual hardship being adjudicated on outside the rules in a human rights appeal, the rules in themselves were lawful and a justified and proportionate interference with the right in question.

82. At the time of the hearing of these applications in February, the claimants' appeals to the Court of Appeal were outstanding. I indicated to parties at the hearing that I would make enquiries when judgment was expected as some issues in the present application were likely to be addressed in the appeal. The Court delivered its decision in R (Bibi and others) v SSHD [2013] EWCA Civ 322 on 12 April 2013. By a majority it dismissed the conjoined appeals. Lord Justice Maurice Kay gave the leading judgement with whom Lord Justice Toulson (as he then was) concurred. He concluded:

> 27. I accept that, as both parties submit, the circumstances of the present case differ from those in *Quila* where the aim was to reduce a severe social problem, namely forced marriages. The social problem in the present case, whilst "pressing", is less pronounced. To that extent, it may be said to be more difficult to justify the interference with the protected right as "necessary". On the other hand, if the interference is less invasive, it may be more readily classified as proportionate. It seems to me that we are in the territory of an important right (private life relating to marriage and similar relationships) but where the interference is not, to use Lord Wilson's word, colossal. It involves a relatively simple test, satisfaction of which will generally be achievable within a relatively short time. At this point, it is appropriate to remind oneself that one is concerned with the proportionality of the Rule, absent any judicial findings of facts in individual cases.
>
> 28. I do not doubt that the Rule creates anomalies. For example, a foreign spouse who is from one of the exempt countries but who does not speak English is able to enter without satisfying the pre-entry test, whilst a fluent English-speaking spouse from a non-exempt country who does not have the necessary educational qualifications has the inconvenience of satisfying the pre-entry requirement. It is simply not possible to predict with precision how many people fall into either of those categories. This brings me to the heart of Mr Gill's conceptual case. His principal complaint, it seems to me, is that the justification proffered by the Secretary of State is long on estimates, assumptions, predictions and speculative assertions but short on empirical proof that the amended Rule will not operate in a disproportionate manner.
>
> 29. In my judgment, there are two answers to this submission. First, it is difficult for a court to adjudicate upon such a submission in the abstract. In a sense, the appellants have set a hypothetical ball rolling and are seeking to take advantage of its hypothetical nature. Secondly, and more importantly, the submission misunderstands the scope for judicial intervention in a case such as this. I consider this to be the most important point in this case. It calls for further elucidation.

> 30. The pre-entry test was conceived as a benign measure of social policy with the purpose of facilitating the integration of non-English-speaking spouses. Where a State seeks to change its immigration rules in order to produce a benign result, it would be regrettable if, in order to justify the measure, whether pursuant to Article 8.2 or Article 14, it faced a burden which could only be discharged by irrefutable empirical evidence. The Secretary of State's perception is essentially one of predictive judgment. Many a well-intentioned social change is supported by a rational belief in its potential to achieve its benign purpose but without being susceptible to empirical proof prior to its introduction. It is for this reason that it is appropriate for the State authority to be accorded a margin of appreciation in the formulation of its social policy. Without such an indulgence, many benign reforms would be stifled *in limine*. Of course the implications of the change of policy may be so dubious that it is demonstrably not justifiable. However, in some situations a margin of appreciation has to be pitched at a level which allows for change, even if there is some risk to some individuals, that they will be adversely affected by it. The principle was articulated in *Stec v United Kingdom* (2006) 43 EHHR 47, a case concerning Article 14, together with Article 1 of the First Protocol, but relevant to the present case, not least because the appellants emphasise the discriminatory aspect of the pre-entry test requirement (to which I shall return). The Strasbourg Court said (at paragraph 52):
>
> > "… a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. … Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds and the Court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'."
>
> This test informed the recent decision of the Supreme Court in *Humphreys v Revenue and Customs Commissioners* ([2012] 1 WLR 1545, [2012] UKSC 18). Without it, it might become impossible for a government to govern without waiting for judges to judge.

83. He similarly applied a wide margin in justification of the indirect discrimination resulting from the rules taking Article 8 together with Article 14.

84. Two other recent decisions of the Administrative Court have been delivered since the conclusion of the argument. In R (ota) Nagre v SSHD [2013] EWHC 720 (Admin) Sales J rejected a challenge to the deportation and removal provision of the new rules. He noted the ability of the Tribunal to make an independent evaluation of Article 8 claims on appeal in the event that the rules did not reflect existing case law.

85. In R (ota) Zhang [2013] EWHC 891 (Admin) 18 April 2013 Turner J concluded that requirements in the rules for a person with limited leave to remain to depart the UK and make an Entry Clearance application to remain as a spouse were likely to be disproportionate interference with Article 8 rights in the vast majority of ordinary cases. He was not persuaded that any defect in the rule could be cured by inviting an applicant to ask the Secretary of State to exercise discretion outside the rules.

Part 4: The respondent's case

86. In the light of the decision of the Supreme Court in Quila as reflected in the decision of Beatson J in Chapti and the Court of Appeal in Bibi, it is apparent that the substantial changes to the maintenance requirements of the rules represent a significant interference with the ability of a couple in a genuine relationship to live together in the United Kingdom and bring up a family here, if the income of the sponsor does not meet the minimum threshold as required by the rules. There is no doubt that their application in an individual case is an interference with the right to respect for family life. The question is whether the interference is for a legitimate aim, proportionate to the aim and justified.

87. Although the facts asserted by each claimant have not been evaluated in an application or appeal, the parties are agreed that I should proceed on the basis that the summary facts noted in the first part of this judgment can for present purposes be assumed to be true for the purpose of deciding these applications.

88. The burden of justification rests on the respondent to show that any interference is necessary and proportionate to the legitimate aim. The respondent seeks to do so by reference to the following materials-

    i. The terms of a consultation paper issued by UKBA (as it then was) in July 2011 for reform of the family migration rules.

    ii. The advice of the Migration Advisory Committee, a group of distinguished economists delivered in November 2011.

    iii. A general impact assessment and an equality impact assessment published in June 2012 when the new rules were laid before Parliament.

    iv. A statement of intent published by the Secretary of State in June 2012 to the effect that the intention was to incorporate article 8 claims within the rules and reflect the government's view of how the balance should be struck between the right of the claimant to respect for family life and in the public interest.

    v. An unusual degree of parliamentary approval for the new rules, by means of a positive resolution of the House of Commons and an absence of any negative resolution in the House of Lords when the rules were tabled and subsequently a motion of regret was proposed.

    vi. The evidence of Clive Peckover, a senior civil servant in the Migration Policy Unit of the Home Office who had been responsible for the development

and delivery of new policies on family migration since January 2011 as part of the Government's programme of reforms of the immigration system.

89. A sufficient summary of the respondent's case can be derived from the witness statement of Clive Peckover (Bundle C 89 at paragraphs 8 – 17 and 24) as follows:

> "8. However, consideration of whether the sponsor and migrant partner could maintain themselves and any dependants by this definition was not based on an income threshold, but on a complex assessment of the current and prospective employment income of the parties; the extent of other financial means, including current or promised third party support, available to them; and their housing costs. As reflected in paragraph 24, below, this framework was not conducive to clear, straightforward, consistent and transparent decision –making by Entry Clearance Officers and caseworkers.
>
> 9. This contrasted with the move away from broad, discretionary criteria towards more precise, objective requirements for the management of work and student migration routes under the Points Based System. However 'adequate' maintenance for migrant partners and dependants was defined therefore, the Secretary of State saw a good case for a new framework for decision-making that provided greater clarity, both for applicants and sponsors and for her Entry Clearance Officers and caseworkers, as to the requirement and how this was to be assessed.
>
> 10. In addition to the maintenance requirement the Immigration Rules set for family migrants, other relevant provisions for applications made before 9 July 2012 (or since) are contained in:
>
> i. Paragraphs 6A-6C of the Immigration Rules which make additional provision in relation to recourse to public funds. In particular, where the migrant partner is applying for entry clearance, paragraph 6C seeks to prevent the sponsor relying for the purpose of sponsoring that application on any future entitlement to public funds that would be payable as a result of the migrant partner's presence in the UK. Paragraph 6A seeks to prevent the migrant partner's presence in the UK increasing the sponsor's entitlement to public funds, but does not prevent the migrant partner being wholly or partly reliant on any public funds provided to the sponsor.
>
> ii. Section 115 of the Immigration and Asylum Act 1999, under which a migrant partner is generally unable to access welfare benefits until they qualify for and are granted settlement (indefinite leave to remain), though they can access contributory benefits after paying two years' National Insurance contributions.
>
> 11. Paragraphs 6A-6C of the Immigration Rules and section 115 of the 1999 Act provided some protection for the welfare system from immediate pressures arising from the arrival of family migrants in the UK, but those provisions:

(x) Are necessarily complex to administer. This is particularly so with regard to any benefit entitlement that may accrue to the sponsor (rather than any benefit claim made by the migrant) by dint of the relationship with the migrant. Paragraph 6A seeks to address this, but in practice it is difficult for the Secretary of State to be satisfied that any such entitlement (e.g. to Housing Benefit) has not been claimed, given the necessarily complex process, involving local authorities and central government, required to check that the sponsor's Housing Benefit entitlement has been correctly calculated in any situation in which paragraph 6A applies.

(xi) Do not establish a system that prevents burdens on that system arising over the longer term, once the migrant has qualified for settlement and thereby for full access to welfare benefits. As a broad illustration of the overall number of people claiming benefits who came to the UK as migrants of non-EEA nationality and the extent of taxpayer burden this represents, analysis undertaken by the Department for Work and Pensions (and published in January 2012 …) showed that, in February 2011, around 267,000 claimants of working age benefits (around 5 per cent of more than 5.5 million such claimants) are estimated to have been non-EEA nationals when they registered for a National Insurance number (i.e. first entered the labour market). It is not possible to break this number down by the immigration route by which these non-EEA nationals entered the UK. However, the top 5 non-EEA nationalities at National Insurance number registration claiming working age benefits were Pakistani, Somali, Indian, Bangladeshi and Iraqi, which is consistent with nationalities which, in significant numbers in recent years, have been granted asylum in the UK … or have been granted a partner visa on the family route ….

12. The Secretary of State's overall assessment was that a maintenance requirement at the basic subsistence level of Income Support was not sufficient to provide a reasonable degree of assurance that UK-based sponsors and their migrant partner could support themselves and any dependants financially over the long term and that the migrant partner's integration in the UK would not be inhibited by lack of financial resources.

13. As reflected in paragraph 76 of the Statement of Intent published on 11 June 2012 … the Secretary of State's intention therefore is that those who choose to establish their family life in the UK by sponsoring a non-EEA partner to settle here should have sufficient financial independence to be able to support themselves without becoming a burden on the taxpayer, and moreover should have the financial wherewithal to ensure that their migrant partner is able to participate in everyday life beyond a subsistence level and therefore able to integrates in British society.

14. That policy intention is reflected in the Secretary of State's foreword to the Consultation Document on Family Migration published on 13 July 2011… in which she stated that the key themes of her overall approach to family migration were tackling abuse, promoting integration and reducing the burden on the taxpayer.

15. In short, the Secretary of State wants to see *better* family migration with better outcomes for migrants, local communities and the UK as a whole, She wants a system which is clear and consistent and which is fair – and is seen to be fair – to migrants and to the public as a whole.

16. To set that policy intention in its wider context, the new measures on family migration contained in the Statement of Changes in Immigration Rules (HC194) laid before Parliament by the Secretary of State on 13 June 2012 (pages 168 to 223… including the new financial requirement in Appendix FM, are part of the Government's programme of reform across all routes of entry to the UK, including also the work and study routes. The programme is intended to reduce net migration to the UK back to sustainable levels and bring a sense of fairness back to the immigration system.

17. The Secretary of State anticipates that this programme as a whole will reduce net migration to the UK to the tens of thousands a year, compared with 252,000 in the year to September 2011. The Impact Assessment published on 13 June 2012 of the new financial requirement in Appendix FM and the other new family migration measures estimates that they will reduce net migration to the UK by around 9,000 a year. The Secretary of State welcomes that contribution to the overall reduction of net migration, but it is not one of the primary objectives of the new financial requirement in Appendix FM, which are to prevent burdens on the taxpayer and promote successful integration. No cap on family migration to the UK has been imposed, nor any other measure directly aimed at reducing numbers….

…….

24. In addition, we discussed the operation of the 'adequately maintained' requirement –summarised at pages 20 – 21 of the Consultation Document – with Entry Clearance Officers, caseworkers and operational policy staff in the UK Border agency. As reflected in paragraph 2.16 of the Consultation document …, the thrust of these discussions was that the broadly defined requirement, which took account, amongst other things, of the current and prospective employment of both parties and of promises of support from parents and other third parties, was difficult for them to apply consistently and for applicants and their sponsors to assess themselves against. A consistent application of the 'adequately maintained' requirement would have required the Entry Clearance Officer or caseworker to establish a balance sheet of income and expenditure for each applicant and their sponsor, taking account of all debts, assets, sources of income and expenses. This was not feasible. There was therefore a risk that in some cases the assessment was partial, to the possible disadvantage of the applicant or the Secretary of State, depending on the circumstances."

90. Synthesising the core aspects of this evidence along with the detailed grounds of defence the respondent's case on justification may be summarised as follows:-

i. The previous evaluation of whether recourse was had to public funds was complex, time-consuming and difficult for ECOs to apply.

ii. The intention of immigration policy generally was to move to more transparent and objective criteria such as now used under the Points Based System.

iii. It was not considered sufficient that spouses would not have recourse to benefits during the time when they were on limited leave but a long term freedom from public subsidy for such families was desirable.

iv. Low income and absence of assets diminished the capacity of families from abroad to integrate successfully in British economic and social life, and an ability to better integrate was an important consideration of policy.

v. Although the Government aimed to reduce voluntary immigration to the United Kingdom generally, this was not the aim of the family migration rules and a numerical limit on entry clearance for spouses was not being adopted. Rather what was aimed at was better migration of the economically self-sufficient who were likely to be better integrated into British society.

vi. Each of the above are legitimate aims for promoting the economic welfare of the United Kingdom and respecting the rights and freedoms of others.

vii. The Immigration Rules generally and Appendix FM in particular are intended to represent where the government concludes the right balance between the rights of the individual claimant and the public interest should fall. It will only be in exceptional cases where a claim that does not meet the requirements of the rules will meet human rights criteria.

viii. Although the financial requirements are mandatory, exceptional circumstances could be identified outside the rules on a case by case basis by the Secretary of State applying the Immigration Directorate Instructions on exceptional circumstances. The most recent version of these instructions at the date of hearing was dated December 2012.

ix. Those instructions explain at 23.2.7d that;

> "'Exceptional' does not mean 'unusual' or 'unique'. Whilst all cases are to some extent unique, those unique factors do not make them exceptional. For example, a case is not exceptional just because the criteria set out in EX.1. of Appendix FM have been missed by a small margin. Instead 'exceptional' means circumstances

in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate. That is likely to be the case only very rarely."

91. It was further submitted that the measures were justified and proportionate to the aim because:-

    i. They were an assessment of economic policy in which a wide margin of discretion is accorded to the executive by the courts.

    ii. None of the criteria adopted were overtly discriminatory on the grounds of race, religion, gender, disability or other protected grounds.

    iii. In so far as the measures had indirect discriminatory impact on women, lower income households, members of ethnic minorities or others, sufficient regard had been given to this differential impact in the process of consultation and policy formation.

    iv. Special rules applied for the admission of pre-flight spouses of refugees, the disabled, the families of service men and some other special categories.

    v. The right at issue was a limited one. There was no right in couples to chooce the UK as their place of matrimonial residence and the right was a lesser right than the right to marry concerned in Baiai or the measures taken to control forced marriages considered in Quila.

    vi. Since Quila there have been other cases in judicial review where something closer to a Wednesbury rationality test has been held to satisfy the requirements of proportionality where human rights issues are raised.

    vii. In the light of the above the court should assess proportionality by a test closer to Wednesbury unreasonableness.

92. To this case, the claimants have responded with social and economic data of their own demonstrating how these measures impact with particular severity on the migrant community from Asia and Africa, on women sponsors whose earnings nationally are lower than men, on people from urban centres outside London and the South East, and on refugees.

93. The evidential material extended to six volumes and over 3,000 pages. I am very conscious of all the points made by the claimants and the interveners in the evidence and filed, the written and oral submissions but do not propose to lengthen an already lengthy judgment by seeking to summarise it, but will refer to some parts of this material in reaching my conclusions.

Part 5 Conclusions:

Introduction

94. I have found this to be a challenging case. It represents in an acute form the tensions between the competing calls for judicial respect for sensitive issues of policy making by the democratically accountable executive and judicial scrutiny with an appropriate degree of intensity of rules that affect the enjoyment of a fundamental human right.

95. The cases cited in Part 3 of this judgment demonstrate how judicial decisions in this contentious area of policy endeavour to navigate a course between the Scylla of improper intrusion into the sphere of executive policy where Parliament has set few overt restrictions on the exercise of the power and where it has approved the policy itself and the Charybdis of undue deference to policy measures not incorporated in primary legislation that seriously interfere with the ability of couples to live together in the United Kingdom where one party to the marriage is from abroad.

96. I readily accept that a wide margin of appreciation or discretionary area of judgment is to be afforded to the Secretary of State's policy in respect of immigration. In particular, in the case of couples who are both foreign nationals, these are generally people who are seeking admission or continued leave and have no established right to reside here. In such circumstances, their preference as to the place of matrimonial home outside the countries of their respective nationalities is largely one of choice, and in general the case law is consistent that there is no particular reason why their choice of place of residence has to be positively facilitated by immigration rules that must provide for the admission of spouses and other dependents.

97. By foreign, I mean those who are neither British nationals nor citizens of the European Union or the wider European Economic Area or the family members of such nationals, who are exercising treaty rights in the United Kingdom, defined in the Immigration (EEA) Regulations as a 'qualified person'. Such people and their family members fall under a distinct directly applicable European Union regime that is not applicable in the present cases. Nevertheless, I have found the case law informative in explaining how an EU citizen's right to reside is undermined by an unjustified refusal to permit a foreign spouse to reside with the citizen.

98. The present challenge consists of claims by a recognised refugee and two British citizens.

99. As to refugees, they are in a different position from foreigners generally, because they are unable to reside in their country of nationality. Similar considerations are likely to apply to those with humanitarian protection. They are not voluntary migrants exercising a choice of where to live but people who have been compelled to leave the country of nationality and reside in a host state with which they may have no prior connections by way of family, means of support, knowledge of the language or other social ties. There may be a distinction between a family nexus constituted before flight and later, but even in the latter context the state must afford some means of reasonable access to ensure that a post flight spouse can join the sponsor in the host state. I note the approval of Lord Wilson in Quila at [59] of the analysis of the Upper Tribunal in FH (post flight spouses) Iran [2011] Imm AR 29. In MM's case it is not surprising that a refugee of Lebanese origin should want to marry someone from the same country, albeit that there are insuperable obstacles to the couple living there together.

100. British citizens are also in a different position from foreign sponsors generally. This is because they have an independent right to reside in their own country. This is not a right afforded by permission of the Secretary of State but it is a fundamental right of constitutional significance recognised by the common law before the legislation was codified in the Immigration Act 1971. This Act describes the right as the ability to reside without 'let or hindrance'. The right to enter one's own country is also a fundamental human right recognised by all civilised societies and reflected in Protocol 4 Article 3 to the ECHR and Article 12 of the International Covenant on Civil and Political Rights. An inability to continue to reside in the country of one's nationality because of the exclusion of a spouse of a genuine relationship is an interference with that right of residence. Doubtless there may be legitimate and proportionate restrictions on the admission of foreign spouses, and if a British citizen marries someone who is already subject to a deportation order, or has remained in breach of immigration control or is otherwise considered a threat by reason of criminal conduct such exclusion may be justified and proportionate. I further accept that financial self-sufficiency of a family from abroad is a legitimate consideration; in general, British citizens cannot expect their future enjoyment of family life to be entirely at the expense of the tax payer.

101. I recognise also that it can be said that the present rules do not forbid any of the claimants from residing in the United Kingdom or indeed prevent them from marrying anyone they choose. By contrast with the case of Baiai I accept that the present cases are not concerned with restrictions on the right to marry taken alone. The Strasbourg Court has said the same in respect of some of the case law on Article 12 of the ECHR. It has also made the point that the right to marry does not carry with it a right to respect for a choice of matrimonial home. However it would seem to me difficult to exercise the associated right to found a family if there are serious obstacles to matrimonial cohabitation.

102. However, following the decision of the Supreme Court in Quila, it is now clear that a rule restricting admission of a spouse is an interference with family life itself, the conclusion expressed in Abdulaziz notwithstanding. As a result, previous decisions of the UK courts assessing claims to a violation of Article 8 on the basis of rules excluding a spouse need to be treated with some caution. Before Quila the focus was whether in the particular circumstances of the case, there was a positive duty to admit the foreign spouse; now the question is whether the state can justify the exclusion of the spouse as necessary and proportionate in pursuit of a legitimate aim. A further reason to treat older authorities with some caution is that previous versions of the rules were drafted in a looser way and made general provision to be supplemented by human rights considerations. The explanatory materials to the present rules make clear that their intention is to accommodate Article 8 claims in the detailed requirements of the rules.

103. In the context of justification of this interference I respectfully agree with the observations of Lord Justice Sedley in Quila in the Court of Appeal, that in the case of British citizen sponsors, we are dealing with a combination of factors: a fundamental domestic law right for the sponsor to reside in the United Kingdom without let or hindrance, a right for such sponsors to both marry and found a family, and a right to respect for the family and private life created as a result of the exercise of the two previous rights.

104. I accept that Quila decides that interference with family life is not limited to those who are British citizens and this was not a sufficient basis to distinguish or depart from Abdulaziz (see Lord Wilson at [33]). Further, the distinction between British citizens and others was ultimately not considered to be of importance by the Supreme Court in Quila in the context of whether rules designed to deter forced marriages were justified. Forced marriage was a social evil irrespective of the nationality of the sponsor. However, I consider that British nationality is of importance in the present context, because if the spouse cannot obtain admission under the rules, and the citizen sponsor wants to enjoy family life and matrimonial cohabitation following marriage he or she will have to leave the country of nationality in order to do so. Even if there are no insurmountable obstacles to a British citizen doing so, this is a serious interference with the right of residence (see Pitchford LJ in Quila at [72]). This is an interference with three rights and not just one. It requires compelling justification such as the considerations noted at [100] above.

105. My conclusions on the relevance of British citizenship in this context derive support from other decisions:

i. The Strasbourg Court itself has drawn attention to the importance of the nationality of the parties in making Article 8 evaluations (see Boultif v Switzerland at [40].

ii. The Luxembourg Court has explained in Carpenter and Chakroun how denying admission to a spouse undermines the right of the sponsor to reside.

iii. In Bibi Maurice Kay LJ noted some comparative jurisprudence on pre -entry language tests in Europe:

> 'At the hearing of these appeals, reference was made to a specific German case in the Federal Administrative Court dated 30 March 2010. It appeared to support the position of the Secretary of State in that it held a pre-entry German language test requirement to be compatible with Article 8. However, there the resident spouse was not a German national. Immediately after the hearing we were made aware of a more recent case in the Federal Administrative Court dated 4 September 2012, where the resident spouse did have German (and Afghan) nationality. It is therefore more analogous to the present appeals. The Court found in favour of the foreign spouse to the extent that the spouse of a German national should not be kept waiting for more than a year by the application of the pre-entry test. However, the reasoning seems to be based on provisions in the German Basic Law rather than on the ECHR.'

106. In my judgment, the contingent right of an EEA qualified person to reside in another state whilst treaty rights are being exercised can rank no higher in terms of constitutional significance than the indefeasible right of the British national to reside in her or her own country. Just as one right is interfered with by preventing the admission of a spouse (family reunion) so is the other. The right of the British citizen to reside in the United Kingdom is just as well founded in domestic law as in constitutional law of Germany, or the law of other EU states. Given the importance in human affairs of matrimonial cohabitation with a chosen partner, and recognising the basic policy response in Appendix FM, that partners who cannot comply with the rules will not generally be admitted to the United Kingdom unless there are insurmountable obstacles[4] to the couple living elsewhere in the world, the administrative measures that prevent the cohabitation interfere just as much with the British citizen's right of residence as that of the European Union national.

107. Further, I have no doubt that the scale of the interference with these rights represented by the maintenance requirements of Appendix FM is very significant having regard to the following features of the policy:

i. For the first time in forty years of rule making under the 1971 Act, a specific income figure is set, regardless of circumstances and is set at a level for a couple without children more than three times higher than the previous rules

[4] In Appendix FM ' insurmountable obstacles' is one of the tests applied as to whether a family member should be given leave to remain or removed, and the rules set no criteria for admission on human rights grounds where the financial requirements are not met. The exceptional circumstances policy (see [90 (ix)] below) demonstrates that a narrow test of harsh consequences is the only permissible basis for admission despite non-compliance with the rules. In practice this means at least an insurmountable obstacles test (see also the conclusions at[153 (viii)]).

required[5]. This is considerably more intrusive than the measures considered in Chakroun where an uplift of 120% was considered unlawful when applied to the foreign spouses of lawfully resident third country nationals.

ii. The Migration Advisory Committee calculated that the minimum income figure of £18,600 would mean that 45% of the sponsors who had applied in 2009 and whose data they analysed would not be able to meet this requirement (Conclusions paragraph 5.18 at C 543).

iii. The alternative mode of proof by savings requires the sponsor to meet the income shortfall by savings over £16,000 x 2 ½ years. Thus MM states he has a shortfall in income of £3,000 per annum. He would need to supplement that income by savings of £16,000 plus £3,000 x 2 ½ = £23,500 to be able to sponsor his wife's admission.

iv. The two and a half year period is derived from current policy as to the length of the leave granted when the spouse is first admitted. Over the years the period has changed from immediate indefinite leave (as remains the case for children and dependent elderly relatives), leave for one year and indefinite leave thereafter, and leave for two and a half years. Whilst there may be sound policy reasons for all marriages to endure for a substantial period before indefinite leave to remain is granted, the capital cost to the low income sponsor of requiring pre entry proof of an ability to maintain before the first review of the couple's immigration position is accentuated by these austere rules.

v. The income figure is set at a level higher than the average salaries for a great many trades and occupations in the United Kingdom (see [124 (i)] below). It is also introduced at a time of high unemployment, wage restraint, and real economic difficulty. It is further to be noted that a person working 40 hours per week for 52 weeks a year at the national minimum wage for adults over 21 of £6.31 per hour would earn £13,124 per annum and people under 21 somewhat less.

vi. National economic and social data demonstrate that complying with these new measures will be particularly difficult for many members of the ethnic minority communities and female sponsors where income levels have been consistently lower than national averages excluding these characteristics (see [113] to [114] below).

vii. The income figure is set at a level to make provision for a national average for rented accommodation or mortgage repayment[6], even though house prices and

[5] I recognise that the multiplier would be less if the family had to pay housing and other costs see [50] above.

rental costs vary dramatically throughout the country notably as between London and the South East and parts of the Midlands, the North-West, North-East, Wales, Scotland and Northern Ireland on the other. Further the rules accept that many sponsors will be able to demonstrate suitable accommodation at no or minimal costs because a family or friend is providing a couple with a free or subsided home as they establish themselves. Availability of such accommodation does not enable the minimum income figure to be reduced.

viii. The new rules carry with them stringent new modes of proof of the requisite income that require a minimum period of six months continuity of employment before entry clearance can be sponsored, and in many cases twelve months where there has been a change of employment or dip in earnings for a single month.

ix. The unambiguous exclusion for the first time of all third party support for income maintenance requirements exacerbates all the above features for sponsors whose earnings are below the specified earning level.

x. The novel exclusion of the ability to rely on the future earning capacity of the spouse being admitted further exacerbates all these problems. It is particularly notable that husbands of female sponsors have historically had a good record of entering the job market within the first twelve months of arrival but their earning capacity or indeed that of a well qualified spouse is by and large excluded from consideration for the whole 2 ½ year period of the first leave to remain.[7]

108. Taken together, I am satisfied that these measures amount to a considerably more intrusive interference than the 'colossal'[8] interference deriving from the minimum age rule in Quila or indeed the basic language test in Chapti. In Quila a couple were prevented from obtaining entry clearance until both parties were 21. It may be noted that while death and taxes are certain, so also is the prospect of getting older. A couple who would have been forced to wait until they were both 21 to apply for entry clearance, will at least have the happy assurance of knowing that that date will arrive at a maximum of three years from the 18 birthday of the younger member. By contrast the ability of a sponsor to earn £18,600 per annum gross or have accumulated £16,000 or more in savings is neither assured nor even reasonably likely

---

[6] The MAC assume that a sponsor will have to discharge housing costs of £119 per week or £6,188 per annum from the minimum income.

[7] Home Office data reveals that in 2010, 68% of partner applications were by men. The Labour Force survey relied on by the claimant's expert reveals that 66% of male partners are in employment compared with 44 % of women. Mr Peckover's second witness statement (para 68 at C 666) reveals that after 12 months the employment rate is 44% for men and 23% for women. Even on these lower figures this is earning capacity that the rules prevent being taken into account.

[8] Lord Wilson in Quila at [32].

at the age of 21[9]. No young person who attends university is likely to enter the job market until after that age, and many young people however energetic and well-qualified are discovering that finding paid employment of any kind or sufficiently well-paid employment for the purposes of the Immigration Rules is a real challenge.

109. The language requirement upheld by the majority of the Court of Appeal in Bibi, placed the initiative in the hands of the claimant who seeks to come here. Whilst the acquisition of pre-entry language skills in the ordinary case was an interference with family reunification it was not considered to be a particularly difficult or insuperable one, and does not depend on the happenstance of the state of the economy. By contrast the ability to find well paid and stable employment may well be beyond the ability of the average sponsor to influence.

Legitimate Aim

110. I am satisfied from the respondent's evidence and the submissions of Ms. Giovannetti QC that the measures both have a legitimate aim and are rationally connected with the aim. The Secretary of State is entitled to conclude the economic and social welfare of the whole community is promoted by measures that require spouses to be maintained at a somewhat higher level than the bare subsistence level set under previous interpretations of the rules. The facilitation of social integration by requiring some basic pre-entry knowledge of the English language was considered a legitimate aim justifying the interference with family life in Chapti/Bibi. Here the Secretary of State considers that an income above subsistence level is an important contribution to integration, and gives the foreign spouse sufficient resource to develop skills and community ties. Such a requirement may also serve to combat a negative view of family migration based on densely occupied extended family homes operating at a very basic level of economic sustainability. This reflects the approach of the AIT in the case of KA and others (Adequacy of maintenance) (Pakistan) [2006] where it observed:

> 'It is extremely undesirable that the Rules should be interpreted in such a way as to envisage immigrant families existing (and hence being required to exist, because social security benefits are not available to them) on resources less than those which would be available through the social security system to citizen families. To do so is to encourage the view that immigrant families need less, or can be expected to live on less, and in certain areas of the country would be prone to create whole communities living at a lower standard than even the poorest of British citizens.'

I agree with the AIT's observations in that case. In any event, the Secretary of State is entitled to conclude that public concern about immigration and its effects on British society, require a fresh approach to the maintenance requirements. She is accountable to a democratically elected Parliament for that policy choice.

---

[9] The Home Office impact assessment reveals that those aged 18-21 have the lowest weekly average earnings (£273 per week or x 52= £14,196) .

111. I am further satisfied that she is entitled to make that judgment on the extensive data before her without having to demonstrate it by empirical proof. Such a consideration involves a political judgment for which again she is answerable to Parliament. By contrast to Quila, the aim here is firmly within the field of immigration policy as opposed to simply combating the admitted social evil of forced marriage by means of the immigration rules.

Discrimination

112. For similar reasons and following the reasoning of the Court of Appeal in AM (Somalia) (see above at [58]), Quila (see above at [73] (viii) and Bibi, (see above at [83]) I am not satisfied that any of the claimants succeeds in demonstrating that the rules are unlawfully discriminatory taking Article 8 and Article 14 together. Setting the minimum income threshold above the subsistence level is a judgment in economic as well as immigration policy, and an appropriately broad discretionary area of judgment must be afforded to the Secretary of State in such a case. The need for the courts to respect a wide margin of appreciation is underlined by the extensive consultation exercise and the high degree of Parliamentary scrutiny these measures have received.

113. No overtly discriminatory criteria are used. It is inevitable having regard to the legitimate aim that these measures will impact disproportionately on migrant families on low incomes, but this is the group to whom the legitimate policy aim is directed. I recognise that the impact on women is particularly noticeable[10]. The claimant's experts[11] estimate that the gender pay gap has remained consistent at 14.9% between men and women;[12] male migrant spouses earn on average £21,300 per annum while female spouses earn £15,600 so the exclusion of the earnings of the former from the joint family income is particularly onerous[13]. I further recognise that the economic data supports the proposition that these measures will have a more significant effect on both women sponsors and all those living outside the South East as wage levels compared to either male workers or Londoners are demonstrably lower[14], whilst the

[10] Mr Peckover indicates that on the 2010 data women accounted for approximately two thirds or migrant partners, and were therefore sponsors in approximately one third of cases (C-652 2nd witness statement [25].

[11] Dr Howard, Professor Kofman, Dr Wray all of Middlesex University

[12] First statement paragraph 68 D 27

[13] First statement paragraph 37 D. 15

[14] The Annual Survey of Hours and Earnings 2012 reveals that women's earnings are below the £18,600 figure (divided by 52 to produce a weekly sum of £357.68) in five of the nine major occupation groups including: caring and leisure services (£322.5), sales (£309.1) and elementary occupations (£279) whilst men fell below the average weekly sum in only two of these occupations (C 803). The same survey showed that comprising median gross weekly earnings by region the figures were London: men £707, women £591; South East men £ 588 women £ 461; Midlands men £508 ; women £402-409; North East men £490 women £407; Scotland men £533 women £440; Northern Ireland men £478; women £440 (C802).

fact that accommodation costs are significantly lower[15] cannot be taken into account in mitigating the minimum income.

114. Nevertheless, the fact of such differential impact was sufficiently noted in the equality impact assessments for the due regard required by domestic law to have been paid to it. It is both impractical and inappropriate to make provision for such differential impact in the Immigration Rules themselves: e.g. those women sponsors are entitled to a 15% discount on the minimum sums, or that a regional discount should apply. Immigration, of course, is a national matter, and a person admitted as a spouse of a Birmingham resident sponsor would be entitled to reside anywhere in the United Kingdom, albeit that they may encounter greater difficulty in satisfying the requirements for an extension of stay or indefinite leave if they live in a high cost area. I nevertheless will take this information into account when considering whether the basic scheme under Appendix FM is a proportionate interference with the Article 8 rights of the present claimants.

The welfare of children

115. For different reasons, I am not persuaded that the maintenance provision of the rules is unlawful because they make no over-riding accommodation for the best interests of children affected by the immigration decisions. In principle, it is not unreasonable to expect more funds to be available where children who are not British citizens are coming to the United Kingdom in addition to a spouse. I accept that the additional sums required to be paid for each child impose a barrier to the admission of children, but for reasons considered below the essential problem is the austerity of the combined elements of the basic scheme itself rather than the supplementary requirements for each child.

116. Mr Majid complains of the rules that the sponsor would have to meet to bring in his wife and remaining dependent children in Pakistan, where there is no such minimum requirement where apply if the wife were being admitted alone to look after her children in the UK. But here the rule maker is undoubtedly reflecting the fact a minimum income requirement is inappropriate where it is in the interests of children that they should admitted to join a parent or carer and there is adequate accommodation and no additional recourse to public funds. The position is materially different if such children living abroad have a parent or step parent to care for them. Mr Majid's claim of irrationality, discriminatory treatment and /or disproportionate interference with family life does not compare like with like. The complaint reveals the real problems for decision makers where the rules are tailored to different circumstances.

117. Mr Drabble QC for the intervener AF makes the submission that inflexible rules of general application are contrary to a careful appraisal of the interests of children that

[15] The claimant's second expert report from Mr. Aspinall at 41 D119

depend on particular facts. I accept the premise and note the recent observations of Holman J in R (ota SM and others) v SSHD [2013] EWHC Admin 9 May 2013. It does not follow that these rules are unlawful given the legislative context in which they operate, because alongside the rules there are also legal duties towards children, that can be applied on a case by case basis when the relevant facts are established.

118. There is a statutory duty on the Entry Clearance Officer to have regard to the best interests and welfare of a child in the United Kingdom when considering the admission of someone whose presence or absence impacts on the child. The Upper Tribunal in Izuazu (a decision on deportation) has rejected the proposition that Appendix FM perfectly captures every circumstance where the welfare of a child or the requirements of Article 8 impact on immigration decision making. Both the initial decision maker and the judge on appeal would be able to assess how the immigration decision affects the best interests of the child in a particular context and where that assessment requires the admission of another, irrespective of the requirements of the rules. It is important to note that there is a statutory basis for the judge on appeal to so decide. It is not possible to summarise the circumstances when application of the maintenance rules would be contrary to Article 8 and the best interests of the child, and doubtless law and policy will need to develop with experience. There is already an extensive case law in the Upper Tribunal considering cases on admission, extension, removal and deportation. It is at the least likely that this consequence will arise, however, if young children are forcibly separated from their principal carer or both parents or their welfare is endangered by other loss of a carer.

119. Moreover, the proposition that denial of admission of MM's wife interferes unduly with AF's best interests because it leads MM to spend time in Cyprus away from his nephew and *de facto* child, is a challenging one to substantiate. It is not possible to do so in the context of a generic challenge to legality of the rules as such.

The relief of quashing the rules

120. I further accept Ms. Giovannetti's submission that if the Immigration Rules are capable of leading to an Article 8 compatible result they should be left undisturbed and claims of individual violations should be examined in the context of an application when the relevant facts can be established and the factors weighed in the balance. If MM's spouse had made an Entry Clearance application, then the proportionality of the consequences of the particular decision to deny entry clearance under the rules could have been examined in the particular context of a refugee who cannot be expected to live abroad in the country of nationality, and whose earnings are substantially above the subsistence level. Any Article 8 claim that Mr Majid may want to advance would need to be considered in the light of the particular factual conclusions relating to his family circumstances and it is clear that the present separation of his family preceded the Immigration Rules of which complaint is made in this challenge. His contention that denial of admission of his wife is unlawful because it harms the welfare of his children here and abroad could have been considered under the statutory scheme since November 2009.

121. I equally accept the submission of Ms Giovannetti that even if I concluded that certain of the maintenance requirements would inevitably result in a violation of Article 8 if applied to a particular individual I should not quash the rules as a whole. My preliminary conclusions expressly recognised that a wider margin and greater justification for a robust minimum income rule could be advanced in respect of a foreign sponsor here with limited or even indefinite leave than by contrast with a British citizen or refugee sponsor. The position is different from the decision on common law irrationality in the case of Manshoora Begum where the rule was internally inconsistent in requiring both dependence and a standard of living below that of the claimant's own country. The rules are far more wide-ranging in scope than the marriage licensing scheme struck down in Baiai as contrary to the more focused Article 12 right to marry. The rules under challenge in this application are closer in nature to the rules considered in Quila, although the legitimate aim and policy context is different. I accept that even in that case both the Court of Appeal and the Supreme Court contented themselves with judicial observations of the improbability that the rules could be applied without a breach of Article 8 without granting the relief of a quashing as such.

Justification of interference

122. I can now finally turn to what I consider the central question in this challenge, namely whether the minimum income provisions of the maintenance rules when applied to sponsors who are British citizens or refugees whose incomes and savings combined do not meet them are a disproportionate interference with the right to respect for family life?

123. Although there may be sound reasons in favour of some of the individual requirements taken in isolation, I conclude that when applied to either recognised refugees or British citizens the combination of more than one of the following five features of the rules to be so onerous in effect as to be an unjustified and disproportionate interference with a genuine spousal relationship. In particular that it likely to be the case where the minimum income requirement is combined with one or more than one of the other requirements discussed below. The consequences are so excessive in impact as to be beyond a reasonable means of giving effect to the legitimate aim.

124. The five features are:

i. The setting of the minimum income level to be provided by the sponsor at above the £13,400 level identified by the Migration Advisory Committee as the lowest maintenance threshold under the benefits and net fiscal approach (Conclusion 5.3). Such a level would be close to the adult minimum wage for a 40 hour week. Further the claimants have shown through by their experts

that of the 422 occupations listed in the 2011 UK Earnings Index, only 301 were above the £18,600 threshold[16].

ii. The requirement of £16,000 before savings can be said to contribute to rectify an income shortfall.

iii. The use of a 30 month period for forward income projection, as opposed to a twelve month period that could be applied in a borderline case of ability to maintain.

iv. The disregard of even credible and reliable evidence of undertakings of third party support effected by deed and supported by evidence of ability to fund.

v. The disregard of the spouse's own earning capacity during the thirty month period of initial entry.

125. In reaching my conclusions I understand and have given weight to the wide discretionary area of judgment open to the Secretary of State in making economic and social judgments in the context of immigration. In particular I recognise that the figure of £18,600 was the lower of the two options identified by the Migration Advisory Committee in their report and represented the level at which a two person household would be completely ineligible for housing benefit. I accept that the policy aim was to identify a figure above mere subsistence and from which future recourse to any form of benefit would be made impossible for all practical purposes (thus savings of £16,000 excludes a person from any claim to income support). I further recognise that Parliament must have been aware of the minimum income figure when expressing its satisfaction with the Secretary of State's policies.

126. Nevertheless, to set the figure significantly higher than even the £13,400 gross annual wage effectively denies young people and many thousands of low-wage earners in full time employment the ability to be joined by their non-EEA spouses from abroad unless they happen to have wealthy relatives or to have won the lottery. This frustrates the right of refugees and British citizens to live with their chosen partner and found a family unless such modest earnings could be supplemented by any reasonably substantial savings, third party support or the future earnings or the spouse seeking admission. The executive can hardly be heard to say that the minimum adult wage is a manifestly inadequate sum to provide a basic standard of living over the subsistence threshold for a household without dependent children.

127. Moreover, the legitimate aim could not be to prevent whatever income related benefits a British citizen might be entitled to in their own right but only the additional costs arising by the admission of the foreign spouse. The foreign spouse is precluded

[16] Aspinall 2nd report at D 182 and following.

by statute from claiming such benefits until they have achieved indefinite leave to remain at the end of five years. To set an income figure that deprives either spouse of the possibility of claiming housing benefit at the outset of the five year period is thus more austere than it needs to be to preclude unjustified recourse to public funds either during the five year period or at the end of it. Indeed an individual claimant and his spouse may have no housing costs at all or costs considerably below the assumed figure adopted by the Migration Advisory Committee.

128. The Migration Advisory Committee were clear in their advice that they were providing statistics about the level at which any family would have no recourse to means tested benefits of any kind. They were thus professionals in 'the dismal science' of economics and not making an assessment of when it would be justified to prevent a British citizen or refugee from being joined by a spouse on economic grounds alone. Their economic advice cannot provide a sufficient justification for the terms in which the policy is set.

129. Parliamentary approval of immigration policy is different in kind from primary legislation, where there the possibility exists to debate each clause of a statute and make amendments. In any event, Parliament may fail to achieve the right balance between the political interests of the majority and the human rights of a minority.

130. When decision-makers and judges assess pre-July 2012 applications for adequacy of maintenance, particularly where the maintenance limits rise because of dependent children, any short fall in proven earnings can be met by evidence of capital resources. Thus, suppose a person with a dependent spouse and children needed to show an income of £15,000 to meet the income support subsistence level test then applicable could only show part-time earnings of £12,500; such a person could make good the difference, if at the time of the application, there were cash assets of £6,250 available to support the couple for the full thirty month period before next review. It was not necessary that savings of £16,000 first had to be shown before regard could be had to such savings. This approach will still apply to classes of people exempt from the new requirements.

131. If a similar approach had been permitted on the new £18,600 target, particularly if limited to the first twelve months before review, then if a claimant such as MM could demonstrate savings of £3,000 when added to his £15,600 income, he could meet the threshold to permit his wife to come to the UK. To inform a low earner that there is fairness and flexibility in the scheme because they can count any savings over £16,000 to add to their low earnings seems a rather cruel piece of mockery: how is a person earning the minimum wage likely to accumulate savings of £16,000? For a sponsor with no income at all that would mean £16,000 plus £18,600 x 2.5 years = £62,500. Moreover this requirement is additional to the statutory prohibition on access to income support or similar benefits whilst a person has limited leave to remain. I recognise that the Secretary of State's case is that she is looking for long-term economic viability of families after the spouse has acquired settlement five years after entry, but if so it seems to me that examination of the financial circumstances of the couple at the end of the five year period when the earning

capacities of both parties can be taken into account is the time to make the assessment rather than to front load these substantial financial burdens on a self-sufficient but low-paid earner before the spouse is admitted.

132. Although the requirement of 30 month assessment preceded the July 2012 rules, the inflexible continued use of such a period, when the income and capital requirements have been so dramatically heightened, is not permissible when the potential consequences are so severe. All predictions of future events are somewhat arbitrary; even the most stable and well paid job can be lost at times of economic uncertainty or the most unpromising applicant find work. A twelve month period as was once the case, gives the family members a reasonable chance to settle themselves and absorb the expenses connected with the application itself: the application fee of £851, and the costs of preparing the documents and travel costs.

133. Ms. Giovannetti submitted that considerations of administrative convenience and expense militated against a review of status after 12 months, but in my judgment those are not sufficiently weighty factors when set against the consequences of the new rules. Immigration practice has long reflected a probationary period of twelve months in certain cases before indefinite leave to remain was granted on the basis of marriage, the present rules envisage a check after 2 ½ years and a further examination after 5 years. The idea of post-entry checks on spouses and partners remains a principle of the rules. The question is when the first check should take place. If the rules permitted an earlier check on sponsors whose financial arrangements were marginal or depended on the support of others, the rigours of the consequences would be mitigated without any loss of the aim of long term self-sufficiency. Thus if there was doubt whether third parties would in fact deliver on the promised support, or a spouse would take the job they stated pre-entry they intended to take, the best safeguard is to inquire at an early period after entry rather than impose extravagant requirements for pre-entry income and savings over a thirty month period.

134. The issues relating to the difficulty of assessing third party support, have already been canvassed in the decision of the Supreme Court in Mahad. At that time, problems of predictability of the reliability of the undertakings of others was not considered a sufficient reason to prohibit them from being taken into account. I cannot see that the parameters of the debate have significantly changed during the process of the adoption of the new rules. Again, judges and decision makers in this specialist jurisdiction are well used to evaluating the reliability of claims of third party support, and if the surrounding data and the credibility of the relevant informant is insufficient to discharge the burden of proof on the applicant the case fails on the facts.

135. Moreover, administrative convenience falls to be evaluated in a context where the applicant has to pay a substantial fee for an entry clearance application and the preparation of the documents imposes additional costs. As immigration decision making resembles more closely a commercial service, the interests of the user are entitled to greater consideration than the convenience of the executive officer who

apparently has difficulty in assessing evidence although this has been and will remain the essence of immigration determination.

136. I acknowledge the rules permit a wealthy relative to transfer capital to the sponsor to meet the rules. However, there is no reason why a sponsor with a parent or sibling in remunerative employment but without substantial capital resources should be prevented from relying on a standing order in his/her favour. Such an arrangement is likely to be a more practical means of financial support for the majority of the population. The respondent submits that there is no guarantee that promises are delivered on, but the knowledge that there will be checks after 1 year and/or 3 years and 5 years may well be an incentive to deliver and in any event in reality such support will probably only be needed until the couple establish themselves and the foreign spouse is able to contribute to the family budget.

137. However, it is the fifth factor set out at [124] above that I consider the most striking feature of the new scheme. To prevent a couple from having any regard to the future earning capacity of the spouse to be admitted for the first thirty months of the residence, strikes me as both irrational and manifestly disproportionate in its impact on the ability for the spouses to live together. On the evidence before the Migration Advisory Committee[17] and the Secretary of State, the minimum income figures were geared to the needs of a family of two people, and it would be logical that the economic resources of both partners to the relationship should be taken into account to discharge those needs. Such empirical data as was presented in the applications indicates that men admitted as spouses had a better record than the resident population in accessing employment within twelve moths or so, although I accept that conclusions from such data must be limited. The data for female spouses was less compelling although in the past there may have been less need for them to contribute to the family budget than with a high minimum income threshold.

138. Although I have not accepted the claimants' case on gender discrimination, it is well established that despite many decades of equal pay legislation women workers tend as a group to earn less than men, the employment sectors, the greater use of part time and flexible working arrangements to accommodate other family responsibilities and such like doubtless reflect social reality. However the discriminatory impact of the new rules would be significantly reduced if the earning capacity of the female sponsor's spouse could be taken into account after July 2012 as it has always been previously. Thus Ms Javed might well be able to demonstrate that her civil servant husband who speaks English would be able to enter employment at a higher salary than she is able to and his contributions when combined with hers meets the threshold. Equally the encouragement of a female spouse of a male sponsor to enter the workforce of the UK shortly after arrival is likely to make a positive contribution to the legitimate aim of better integration.

[17] MAC report at 4.20

139. The respondent's justification for the new rule is transparency and improvement of ease of assessment. Those are no doubt reasonable aims, but not if transparency comes at too high a price in terms of family re-union. Moreover, the aim of transparency is positively undermined by the exceptional circumstance policy to which regard is had at [153] and following below. The comparison between the Points Based System and its ever more complex precise code of requirements is inappropriate with regard to measures designed to regulate the admission of dependants and shape the way respect for family life is regulated. There is no human or constitutional right for a foreign national to study or work in the United Kingdom, and thus this is an area where the Secretary of State has a very wide discretion as to how to manage immigration. The contrast with permitting spouses and children of British citizens and refugees is notable. Both have rights to reside and rights to family life that the state must respect. The essence of the right cannot be impaired by measures designed to give effect to them and ensure that the consequence is not an undue burden on the tax payer.

140. In my judgment, the aim of transparency cannot justify an agglomeration of measures that cumulatively very severely restrict the ability of many law abiding and decent citizens of this nation who happen not to earn substantial incomes in their employment from living with their spouses in the land of their nationality. Transparency can be best achieved by clarity as to the kinds of documents required to demonstrate the relevant facts rather than a blanket rule preventing receipt of data that may well be sufficient and reliable. The most obvious way of proving the earning capacity of the spouse is a job offer. In the past one problem has been the timing of the offer with respect to the processing of the application, but there is no reason why historic failure to process applications speedily should frustrate the ability of a couple to live together; again in my judgment the answer lies in the discharge of the burden of proof and not an unnecessarily austere exclusionary rule. Here again checks after twelve months may well be proportionate and informative as that would afford a reasonable opportunity for the spouse with skills to have attended selection interviews and demonstrated requisite skills.

141. Moreover, both past practice in the administration of the rules and the survival of a number of instances in the new rules where the additional recourse to public funds approach is retained, belies the alleged difficulty or complexity in making an assessment of future economic prospects based on data before the Entry Clearance Officer. The experience of the Tribunal judiciary suggests that these are not inherently complex and imponderable questions; having a minimum income significantly above subsistence level identifies clearly what is to be achieved but the denial of legitimate means of being able to demonstrate that a couple will meet the minimum and be self -sufficient, is to require the means of proof to predominate over the right itself, and results in a disconnection from the legitimate aim of economic self-sufficiency and the promotion of integration.

Summary of conclusions

142. In summary, I accept that there is a legitimate aim that the families of migrants should be encouraged by the terms of admission to integrate, not live at or near the subsistence level and not be perceived to be a long term drain on the public purse in the form of increased access to state benefits. A subordinate aspect of such an aim is transparency and clarity although administrative convenience cannot be an end in itself or justify the separation of spouses. However the combination of features identified above amount together to a disproportionate interference with the rights of British citizen sponsors and refugees to enjoy respect for family life. In terms of the Strasbourg approach they do not represent a fair balance between the competing interests and fall outside the margin of appreciation or discretionary area of judgment available in policy making in this sphere of administration. I accept that a wider margin of appreciation is likely to be relevant to foreign sponsors who are voluntary migrants but not British citizens or refugees.

143. The domestic law of the United Kingdom, inspired by the experience of Commonwealth jurisprudence in applying human rights, applies a more intrusive test in examining proportionality where the measure in question interferes substantially with a core human right such as is engaged in these cases. In such circumstances it inquires of the measures under scrutiny 'are they no more than are necessary to accomplish it?' (see paragraph [76] above citing Quila quoting Huang in turn applying Daly). I recognise that even with this refinement, the Administrative Court on judicial review is far from adopting a full blown merits review of policies that are the proper constitutional province of the executive. The court does not substitute its own view of what is preferable.

144. Nevertheless, the rights are of such fundamental importance and the effect of the five aspects on which I have focused attention are so intrusive, that I conclude that taken together they are more than is necessary to promote the legitimate aim. The substance of this claim is both the human rights of the sponsor claimants to enjoy respect for family life and the constitutional right of the British citizen to reside in the country of nationality without let or hindrance. From this perspective the application of the combination of the five factors to people in the position of these claimants is not merely disproportionate as a matter of human rights law but also an irrational and unjustified restriction on rights under the law relating to recognised refugees and the constitutional rights of British citizens.

145. I do not accept the claimants' case that the Secretary of State was required to adhere to the rule 281 (v) formula in all cases of entry clearance application by spouses of British citizens and recognised refugees. She was justified in concluding that greater resources than £5,500 per annum for a couple without children and adequate accommodation were needed in pursuit of the aims she has identified. It may be that the £18,600 minimum income without recourse to other sources of funding would be within the limits of the Secretary of State's margin of appreciation in setting the terms in which foreign sponsors can bring in their spouses and partners, even though this represents a radical departure from the norm in the European Union based on the Family Reunion Directive.

146. However, I conclude that this measure is disproportionate when applied to British citizens and recognised refugees. In particular, it is more intrusive in its restrictions on family life to ensure that couples are self sufficient at the time of the spouse's first admission, and are above the level of recourse to public funds at the end of the five year period when the spouse's application for settlement is being considered.

147. There are a variety of less intrusive responses available. They include:

    i. reducing the minimum income required of the sponsor alone to £13,500; or thereabouts;

    ii. permitting any savings over the £1,000 that may be spent on processing the application itself to be used to supplement the income figure;

    iii. permitting account to be taken of the earning capacity of the spouse after entry or the satisfactorily supported maintenance undertakings of third parties;

    iv. reducing to twelve months the period for which the pre estimate of financial viability is assessed.

148. It is neither necessary nor desirable in these applications to go further than this judgment does in identifying what might be a proportionate financial requirement. It will be for the Secretary of State if she sees fit to make such adjustments to the rules as will meet the observations in this judgment. My conclusions, if they prove durable, are equally designed to assist people in the position of the claimants and their families as to whether there is a reasonable prospect of success in making an entry clearance application, and judges of the First-tier and Upper Tribunals who will have the difficult task of determining on the basis of particular facts as found or are undisputed whether Article 8 requires the admission of the particular person. By contrast with decisions on deportation or decisions affecting children where the principles are now established and clear, the problems facing judges on appeal to decide on human rights in individual cases without some assessment by the higher courts of whether the essential package is a legitimate starting point would be formidable.

Exceptional circumstances

149. These conclusions are subject to the final submission of the defendant that the terms of the rules and accompanying policy are sufficiently flexible to permit of departures from the rules in exceptional circumstances.

150. I have already accepted this may be the case as far as the impact of the rules on children are concerned, because the approach of both decision makers and judges is

governed by s.55 Borders, Citizenship and Immigration Act 2009 and the terms of the guidance issued thereunder, and the principles of Article 3 of the UN Convention of the Rights of the Child incorporated into all decision-making relating to the private life of the child for reasons explained in Maslov and ZH Tanzania. Together this provides a sufficient coherent framework of principle to enable assessment of when departures from the terms of the rules may be required to vindicate human rights. The recent experience of the Upper Tribunal in deportation cases is a case in point when the principles are clear and it is possible to evaluate the extent if any that the rules fail to give effect to them.

151. I further accept that this litigation has been conducted at a level of abstraction that means no individual adjudication can be reached whether the Convention rights of any of these claimants have in fact been breached. It may be despite my conclusions on the application of the five principles generally, this would have little purchase on the cases of Mr Majid and Ms Javed who may well be unable to substantiate any claim to self-sufficiency of their family after admission of their spouse whatever financial resources they may be able to demonstrate are available for them. MM may well be better placed to demonstrate breach of his human rights if the facts assumed to be true turn out to be so.

152. I recognise that even in an entry clearance case, on appeal a claimant can contend that the decision breaches human rights and this is a separate ground of appeal.

153. However, I am not persuaded that the arrangements where the Entry Clearance Office is able to refer a difficult case to the Secretary of State for advice on the application of the exceptional circumstances policy is sufficient to render the decision making process as a whole lawful and compatible with the European Convention on Human Rights. I would make the following observations in support of this conclusion:-

i. By contrast to previous versions of the rules the current versions are intended to be exhaustive and conclusive statements of executive policy on all issues including the extent to which the right to family life can be subjected to proof of prior financial stability. There is substance in the claimants' contention that in so far as the immigration rules themselves claim to be Convention compatible and reflect the appropriate balance as to Article 8 rights the court should examine whether this is the case, rather than leaving the issue to exiguous discretion to depart from the rules.

ii. In the field of applications for entry clearance by family members in particular claimants must know where they stand and what has to be established as it is of importance for people to plan their lives and decide whether they have an application worthy of consideration. The rare or exceptional circumstance criterion does not explain sufficiently or at all what the criteria are for people who have a significant degree of financial self sufficiency but fall short of the requirements of the rules.

iii. The developing jurisprudence of the Court of Appeal makes clear that there is no doctrine of a near miss[18], namely that a narrow failure to meet the requirements of the rules can be cured in an Article 8 balance. The principle has hitherto been enunciated in cases of students and private life, rather than cases of core family life rights. The issued guidance appears to build on this jurisprudence and indicate that a family that can demonstrate income of £18,000 rather than £18,600 will not for that reason be considered an exceptional case. If so, it becomes more important for the Administrative Court to reach a conclusion on whether a general requirement of such an income level is itself compatible with Article 8. I have reached the conclusion that in conjunction with the other factors mentioned it is not.

iv. The courts have recognised that economic and social policies require lines to be drawn somewhere and once drawn they need to be respected as part of the policy choice of the decision maker. This is so but immigration control is not an end in itself and only a means to promoting the legitimate aim of economic and social order, and other such aims. In any event, human rights adjudication does reveal cases where a claimant who can comply with all the rules save one but whose other circumstances generate a significant family nexus with the host state make the application of the bright line rule disproportionate. The case of Mrs Huang that reached the House of Lords was precisely such a case; she was too young to meet the dependent relative rule but following clarification of the law she was admitted for settlement.

v. Where the terms of the policy under scrutiny are themselves so severe and inflexible as to be a disproportionate interference with an important right, the existence of an imprecise residual discretion to depart from the rule will not suffice to achieve convention compatibility. The European Court said so in its observations in O' Donoghue v United Kingdom (cited above at [68]). I accept that those remarks were in the context of restrictions on the right to marry whilst temporarily in the United Kingdom, but following Quila, the right of residence with one's spouse, enjoy cohabitation and family life and found a family resulting from such cohabitation is also an important right, and particularly important for citizens and refugees.

vi. I agree with the conclusions of Turner J in Zhang that a discretion to depart from the clear terms of the policy did not cure the defects of the rule. I further agree with Sir David Keene's conclusion to similar effect in Bibi at [60] albeit his was a dissenting opinion on whether the pre-entry language restrictions are proportionate.[19] In the version of the rules he was considering whether there

[18] See Miah and others v Secretary of State for the Home Department [2012] EWCA Civ 261; [2013] QB 35; see also the decision of Hickinbottom J in R (on the application of Rostami) v Secretary of State for the Home Department [2013] EWHC 1494 (Admin), 7 June 2013 where all the authorities are cited.

[19] 'Nor is it saved by the reference in Rule 281 (i) (a) (ii) (c) to "exceptional compassionate circumstances" preventing an applicant from meeting the requirement. It is well-established that the Secretary of State has in any event a discretion to depart from the strict terms of the Immigration Rules where she considers it appropriate to make a relaxation in an individual case, so the reference in sub-paragraph (a) (ii) (c) merely

was an exceptional circumstance exception by contrast to the present scheme. In either event to require claimants to identify a narrow class of exceptional reasons to depart from the mandatory provisions of the rules, when the combined effect of the rules themselves is disproportionate, at least in the case of British citizens and recognised refugees, does not redress the harm done by the rule.

vii. The position in entry clearance cases is rather different from deportation or removal appeals where the application of the principles very much depends on the particular facts that can be teased out on a case by case basis by decision makers and judges on appeal. In an entry clearance cases the couple remain apart until the entry clearance is granted applying the criteria of the rules and supplementary guidance. As it is a requirement that the sponsor can demonstrate adequacy of home and maintenance over an appreciable period before the application, the parties will thus not be able to cohabit until the application is granted. A significant fee is paid for the privilege and a further fee is paid to lodge an appeal against a negative decision. Further costs are incurred if the claimant seeks legal advice for which legal aid is not provided and there are no clear criteria as to when an application that does not meet the income threshold of the rules as presently applied might succeed. The delay, cost and uncertainty of the process during which time the couple cannot live together all contribute to making the exceptional circumstances test inadequate to secure respect for Convention rights.

viii. Indeed it is not impossible to discern precisely what the Secretary of State would consider to be the unusual case where the rules are not met but Article 8 requires admission. The focus is on the consequences for the couple of the refusal. In a refugee case, it may be possible to demonstrate that there are insurmountable obstacles to the couple living together elsewhere in the world, but otherwise British citizens will be told by the executive that if they want to live with their spouse they must abandon job, home, relatives and residence of their own and move elsewhere.

ix. I recognise that there may be some circumstances where the character, conduct or immigration history of the foreign spouse and the economic circumstances of the couple in the United Kingdom are so dire that this was the foreseeable consequence of the particular marriage, but in the vast bulk of ordinary cases where the relationship is genuine and subsisting and there is no adverse history of the spouse to weigh in the balance, the imposition of such a stark choice is precisely what Sedley LJ described as indirectly sending the citizen into exile. I agree that in the broad generality of ordinary cases, the

---

makes explicit what is always implicit. If anything, it represents a more restrictive approach, since it requires that the applicant show that he or she is prevented from meeting the requirement by the exceptional circumstances. According to the Home Office evidence of Mrs Sayeed, this would cover applicants who have no test centre anywhere in the country of which they are a national (first witness statement, paragraph 12). It would not, however, apply to countries such as India and Pakistan, where there are test centres but where the distance involved may make it extremely difficult for an applicant to obtain access to the necessary tuition and testing'.

abandonment of the citizen's right is residence in order to enjoy family life with his or her spouse of an unacceptable choice, and a disproportionately high price to pay for choosing a foreign spouse in an increasingly international world.

Part 6: Conclusions

154. For the reasons set out above, I conclude that it is not appropriate to strike down the financial requirements of the rules under challenge or indeed to seek to encapsulate the nuances of this judgement in a formal declaration.

155. Neither do I accede to the defendant's invitation to dismiss the claims without more as lacking in merit. To the contrary I conclude that there is substantial merit in the contention that the interference represented by the combination of the five factors in the family life of the claimants on the assumed facts is disproportionate and unlawful.

Appendix 1 The July 20012 Immigration Rules Appendix FM

Section EC-P: Entry clearance as a partner
EC-P.1.1. The requirements to be met for entry clearance as a partner are that-

(a) the applicant must be outside the UK;
(b) the applicant must have made a valid application for entry clearance as a partner;
(c) the applicant must not fall for refusal under any of the grounds in Section S-EC: Suitability–entry clearance; and
(d) the applicant must meet all of the requirements of Section E-ECP:
Eligibility for entry clearance as a partner.

Section S-EC: Suitability-entry clearance

S-EC.1.1. The applicant will be refused entry clearance on grounds of suitability if any of paragraphs S-EC.1.2. to 1.8. apply.

S-EC.1.2. The Secretary of State has personally directed that the exclusion of the applicant from the UK is conducive to the public good.

S-EC.1.3. The applicant is at the date of application the subject of a deportation order.

S-EC.1.4. The exclusion of the applicant from the UK is conducive to the public good because they have:

(a) been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years; or

(b) been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 12 months but less than 4 years, unless a period of 10 years has passed since the end of the sentence; or

(c) been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 12 months, unless a period of 5 years has passed since the end of the sentence.

Where this paragraph applies, unless refusal would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, it will only be in exceptional circumstances that the public interest in maintaining refusal will be outweighed by compelling factors.

S-EC.1.5. The exclusion of the applicant from the UK is conducive to the public good because, for example, the applicant's conduct (including convictions which do not fall within paragraph S-EC.1.4.), character, associations, or other reasons, make it undesirable to grant them entry clearance.

S-EC.1.6. The applicant has failed without reasonable excuse to comply with a requirement to-
(a) attend an interview;
(b) provide information;
(c) provide physical data; or
(d) undergo a medical examination or provide a medical report.

S-EC.1.7. It is undesirable to grant entry clearance to the applicant for medical reasons.

S-EC.1.8. The applicant left or was removed from the UK as a condition of a caution issued in accordance with section 134 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 less than 5 years prior to the date on which the application is decided.

S-EC.2.1. The applicant will normally be refused on grounds of suitability if any of paragraphs S-EC.2.2. to 2.5. apply.

S-EC.2.2. Whether or not to the applicant's knowledge-

(a) false information, representations or documents have been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application); or
(b) there has been a failure to disclose material facts in relation to the application.

S-EC.2.3. One or more relevant NHS body has notified the Secretary of State that the applicant has failed to pay charges in accordance with the relevant NHS regulations on charges to overseas visitors and the outstanding charges have a total value of at least £1000.

S-EC.2.4. A maintenance and accommodation undertaking has been requested or required under paragraph 35 of these Rules or otherwise and has not been provided.

S-EC.2.5. The exclusion of the applicant from the UK is conducive to the public good because:

(a) within the 12 months preceding the date of the application, the person has been convicted of or admitted an offence for which they received a non-custodial sentence or other out of court disposal that is recorded on their criminal record; or

(b) in the view of the Secretary of State:

(i) the person's offending has caused serious harm; or

(ii) the person is a persistent offender who shows a particular disregard for the law.

Section E-ECP: Eligibility for entry clearance as a partner

E-ECP.1.1. To meet the eligibility requirements for entry clearance as a partner all of the requirements in paragraphs E-ECP.2.1. to 4.2. must be met.

Relationship requirements
E-ECP.2.1. The applicant's partner must be-

(a) a British Citizen in the UK, subject to paragraph GEN.1.3.(c); or
(b) present and settled in the UK, subject to paragraph GEN.1.3.(b); or
(c) in the UK with refugee leave or with humanitarian protection.

E-ECP.2.2. The applicant must be aged 18 or over at the date of application.

E-ECP.2.3. The partner must be aged 18 or over at the date of application.

E-ECP.2.4. The applicant and their partner must not be within the prohibited degree of relationship.

E-ECP.2.5. The applicant and their partner must have met in person.

E-ECP.2.6. The relationship between the applicant and their partner must be genuine and subsisting.

E-ECP.2.7. If the applicant and partner are married or in a civil partnership it must be a valid marriage or civil partnership, as specified.

E-ECP.2.8. If the applicant is a fiancé(e) or proposed civil partner they must be seeking entry to the UK to enable their marriage or civil partnership to take place.

E-ECP.2.9. Any previous relationship of the applicant or their partner must have broken down permanently, unless it is a relationship which falls within paragraph 278(i) of these Rules.

E-ECP.2.10. The applicant and partner must intend to live together permanently in the UK.

Financial requirements
E-ECP.3.1. The applicant must provide specified evidence, from the sources listed in paragraph E-ECP.3.2., of-

(a) a specified gross annual income of at least-

(i) £18,600;
(ii) an additional £3,800 for the first child; and
(iii) an additional £2,400 for each additional child; alone or in combination with

(b) specified savings of-

(i) £16,000; and
(ii) additional savings of an amount equivalent to 2.5 times the amount which is the difference between the gross annual income from the sources listed in paragraph E-ECP.3.2.(a)-(d) and the total amount required under paragraph E-ECP.3.1.(a); or

(c) the requirements in paragraph E-ECP.3.3.being met.

In this paragraph "child" means a dependent child of the applicant who is-

(a) under the age of 18 years, or who was under the age of 18 years when they were first granted entry under this route;

(b) applying for entry clearance as a dependant of the applicant, or has limited leave to enter or remain in the UK;

(c) not a British Citizen or settled in the UK; and

(d) not an EEA national with a right to be admitted under the Immigration (EEA) Regulations 2006.

E-ECP.3.2. When determining whether the financial requirement in paragraph EECP.

3.1. is met only the following sources will be taken into account-

(a) income of the partner from specified employment or self-employment, which, in respect of a partner returning to the UK with the applicant, can include specified employment or self-employment overseas and in the UK;

(b) specified pension income of the applicant and partner;

(c) any specified maternity allowance or bereavement benefit received by the partner in the UK;

(d) other specified income of the applicant and partner; and

(e) specified savings of the applicant and partner.

E-ECP.3.3. The requirements to be met under this paragraph are-

(a) the applicant's partner must be receiving one or more of the following -

(i) disability living allowance;
(ii) severe disablement allowance;
(iii) industrial injury disablement benefit;
(iv) attendance allowance;
(v) carer's allowance; or
(vi) personal independence payment; and

(b) the applicant must provide evidence that their partner is able to maintain and accommodate themselves, the applicant and any dependants adequately in the UK without recourse to public funds.

E-ECP.3.4. The applicant must provide evidence that there will be adequate accommodation, without recourse to public funds, for the family, including other family members who are not included in the application but who live in the same household, which the family own or occupy exclusively: accommodation will not be regarded as adequate if-

(a) it is, or will be, overcrowded; or

(b) it contravenes public health regulations.

English language requirement
E-ECP.4.1. The applicant must provide specified evidence that they-

(a) are a national of a majority English speaking country listed in paragraph GEN.1.6.;

(b) have passed an English language test in speaking and listening at a minimum of level A1 of the Common European Framework of Reference for Languages with a provider approved by the UK Border Agency;

(c) have an academic qualification recognised by UK NARIC to be equivalent to the standard of a Bachelor's or Master's degree or PhD in the UK, which was taught in English; or

(d) are exempt from the English language requirement under paragraph EECP. 4.2.

E-ECP.4.2. The applicant is exempt from the English language requirement if at the date of application-

(a) the applicant is aged 65 or over;

(b) the applicant has a disability (physical or mental condition) which prevents the applicant from meeting the requirement; or

(c) there are exceptional circumstances which prevent the applicant from being able to meet the requirement prior to entry to the UK.

Section D-ECP: Decision on application for entry clearance as a partner
D-ECP.1.1. If the applicant meets the requirements for entry clearance as a partner the applicant will be granted entry clearance for an initial period not exceeding 33 months, and subject to a condition of no recourse to public funds; or, where the applicant is a fiancé(e) or proposed civil partner, the applicant will be granted entry clearance for a period not exceeding 6 months, and subject to a condition of no recourse to public funds and a prohibition on employment.

D-ECP.1.2. Where the applicant does not meet the requirements for entry clearance as a partner the application will be refused.

Section R-LTRP: Requirements for limited leave to remain as a partner
R-LTRP.1.1. The requirements to be met for limited leave to remain as a partner are-

(a) the applicant and their partner must be in the UK;
(b) the applicant must have made a valid application for limited or indefinite leave to remain as a partner; and either
(c) (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and

(ii) the applicant meets all of the requirements of Section E-LTRP:

Eligibility for leave to remain as a partner; or

(d) (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and

(ii) the applicant meets the requirements of paragraphs E-LTRP.1.2-1.12. and E-LTRP.2.1.; and

(iii) paragraph EX.1. applies.

Section S-LTR: Suitability-leave to remain
S-LTR.1.1. The applicant will be refused limited leave to remain on grounds of suitability if any of paragraphs S-LTR.1.2. to 1.7. apply.

S-LTR.1.2. The applicant is at the date of application the subject of a deportation order.

S-LTR.1.3. The presence of the applicant in the UK is not conducive to the public good because they have been convicted of an offence for which they have been sentenced to imprisonment for at least 4 years.

S-LTR.1.4. The presence of the applicant in the UK is not conducive to the public good because they have been convicted of an offence for which they have been sentenced to imprisonment for less than 4 years but at least 12 months.

S-LTR.1.5. The presence of the applicant in the UK is not conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law.

S-LTR.1.6. The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK.

S-LTR.1.7. The applicant has failed without reasonable excuse to comply with a requirement to-
(a) attend an interview;
(b) provide information;
(c) provide physical data; or
(d) undergo a medical examination or provide a medical report.

S-LTR.2.1. The applicant will normally be refused on grounds of suitability if any of paragraphs S-LTR.2.2. to 2.4. apply.

S-LTR.2.2. Whether or not to the applicant's knowledge –

(a) false information, representations or documents have been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application); or
(b) there has been a failure to disclose material facts in relation to the application.

S-LTR.2.3. One or more relevant NHS body has notified the Secretary of State that the applicant has failed to pay charges in accordance with the relevant NHS regulations on charges to overseas visitors and the outstanding charges have a total value of at least £1000.

S-LTR.2.4. A maintenance and accommodation undertaking has been requested under paragraph 35 of these Rules and has not been provided.

S-LTR.3.1. When considering whether the presence of the applicant in the UK is not conducive to the public good any legal or practical reasons why the applicant cannot presently be removed from the UK must be ignored.

Section E-LTRP: Eligibility for limited leave to remain as a partner
E-LTRP.1.1. To qualify for limited leave to remain as a partner all of the requirements of paragraphs E-LTRP.1.2. to 4.2. must be met.

Relationship requirements
E-LTRP.1.2. The applicant's partner must be-

(a) a British Citizen in the UK;
(b) present and settled in the UK; or
(c) in the UK with refugee leave or as a person with humanitarian protection.

E-LTRP.1.3. The applicant must be aged 18 or over at the date of application.

E-LTRP.1.4. The partner must be aged 18 or over at the date of application.

E-LTRP.1.5. The applicant and their partner must not be within the prohibited degree of relationship.

E-LTRP.1.6. The applicant and their partner must have met in person.

E-LTRP.1.7. The relationship between the applicant and their partner must be genuine and subsisting.

E-LTRP.1.8. If the applicant and partner are married or in a civil partnership it must be a valid marriage or civil partnership, as specified.

E-LTRP.1.9. Any previous relationship of the applicant or their partner must have broken down permanently, unless it is a relationship which falls within paragraph 278(i) of these Rules.

E-LTRP.1.10. The applicant and their partner must intend to live together permanently in the UK and, in any application for further leave to remain as a partner (except where the applicant is in the UK as a fiancé(e) or proposed civil partner) and in any application for indefinite leave to remain as a partner, the applicant must provide evidence that, since entry clearance as a partner was granted under paragraph D-ECP1.1. or since the last grant of limited leave to remain as a partner, the applicant and their partner have lived together in the UK or there is good reason, consistent with a continuing intention to live together permanently in the UK, for any period in which they have not done so.

E-LTRP.1.11. If the applicant is in the UK with leave as a fiancé(e) or proposed civil partner and the marriage or civil partnership did not take place during that period of leave, there must be good reason why and evidence that it will take place within the next 6 months.

E-LTRP.1.12. The applicant's partner cannot be the applicant's fiancé(e) or proposed civil partner, unless the applicant was granted entry clearance as that person's fiancé(e) or proposed civil partner.

Immigration status requirements
E-LTRP.2.1. The applicant must not be in the UK-

(a) as a visitor;
(b) with valid leave granted for a period of 6 months or less, unless that leave is as a fiancé(e) or proposed civil partner, or was granted pending the outcome of family court or divorce proceedings; or
(c) on temporary admission or temporary release (unless paragraph EX.1. applies).

E-LTRP.2.2. The applicant must not be in the UK in breach of immigration laws (disregarding any period of overstaying for a period of 28 days or less), unless paragraph EX.1. applies.

Financial requirements
E-LTRP.3.1. The applicant must provide specified evidence, from the sources listed in paragraph E-LTRP.3.2., of-

(a) a specified gross annual income of at least-

(i) £18,600;
(ii) an additional £3,800 for the first child; and
(iii) an additional £2,400 for each additional child; alone or in combination with

(b) specified savings of-

(i) £16,000; and
(ii) additional savings of an amount equivalent to 2.5 times the amount which is the difference between the gross annual income from the sources listed in paragraph E-LTRP.3.2.(a)-(f) and the total amount required under paragraph E-LTRP.3.1.(a); or

(c) the requirements in paragraph E-LTRP.3.3.being met, unless paragraph EX.1. applies.

In this paragraph "child" means a dependent child of the applicant who is-

(a) under the age of 18 years, or who was under the age of 18 years when they were first granted entry under this route;
(b) applying for entry clearance or is in the UK as a dependant of the applicant;
(c) not a British Citizen or settled in the UK; and
(d) not an EEA national with a right to remain in the UK under the Immigration (EEA) Regulations 2006.

E-LTRP.3.2. When determining whether the financial requirement in paragraph ELTRP.

3.1. is met only the following sources may be taken into account-

(a) income of the partner from specified employment or self-employment;
(b) income of the applicant from specified employment or self-employment unless they are working illegally;
(c) specified pension income of the applicant and partner;
(d) any specified maternity allowance or bereavement benefit received by the applicant and partner in the UK;
(e) other specified income of the applicant and partner;
(f) income from the sources at (b), (d) or (e) of a dependent child of the applicant under paragraph E-LTRP.3.1. who is aged 18 years or over; and
(g) specified savings of the applicant, partner and a dependent child of the applicant under paragraph E-LTRP.3.1. who is aged 18 years or over.

E-LTRP.3.3. The requirements to meet this paragraph are-

(a) the applicant's partner must be receiving one or more of the following -

(i) disability living allowance;
(ii) severe disablement allowance;
(iii) industrial injury disablement benefit;
(iv) attendance allowance;
(v) carer's allowance; or
(vi) personal independence payment; and

(b) the applicant must provide evidence that their partner is able to maintain and accommodate themselves, the applicant and any dependants adequately in the UK without recourse to public funds.

E-LTRP.3.4. The applicant must provide evidence that there will be adequate accommodation, without recourse to public funds, for the family, including other family members who are not included in the application but who live in the same household, which the family own or occupy exclusively, unless paragraph EX.1. applies: accommodation will not be regarded as adequate if-

(a) it is, or will be, overcrowded; or
(b) it contravenes public health regulations.

English language requirement
E-LTRP.4.1. If the applicant has not met the requirement in a previous application for leave as a partner, the applicant must provide specified evidence that they-

(a) are a national of a majority English speaking country listed in paragraph GEN.1.6.;
(b) have passed an English language test in speaking and listening at a minimum of level A1 of the Common European Framework of Reference for Languages with a provider approved by the UK Border Agency;
(c) have an academic qualification recognised by UK NARIC to be equivalent to the standard of a Bachelor's or Master's degree or PhD in the UK, which was taught in English; or
(d) are exempt from the English language requirement under paragraph ELTRP. 4.2;
unless paragraph EX.1. applies.

E-LTRP.4.2. The applicant is exempt from the English language requirement if at the date of application-

(a) the applicant is aged 65 or over;
(b) the applicant has a disability (physical or mental condition) which prevents the applicant from meeting the requirement; or
(c) there are exceptional circumstances which prevent the applicant from being able to meet the requirement.

Section D-LTRP: Decision on application for limited leave to remain as a partner
D-LTRP.1.1. If the applicant meets the requirements in paragraph R-LTRP.1.1.(a) to (c) for limited leave to remain as a partner the applicant will be granted limited leave to remain for a period not exceeding 30 months, and subject to a condition of no recourse to public funds, and they will be eligible to apply for settlement after a continuous period of at least 60 months with such leave or in the UK with entry clearance as a partner under paragraph D-ECP1.1. (excluding in all cases any period of entry clearance or limited leave as a fiance(e) or proposed civil partner); or, if paragraph E-LTRP.1.11. applies, the applicant will be granted limited leave for a period not exceeding 6 months and subject to a condition of no recourse to public funds and a prohibition on employment.

D-LTRP.1.2. If the applicant meets the requirements in paragraph R-LTRP.1.1.(a), (b) and (d) for limited leave to remain as a partner they will be granted leave to remain for a period not exceeding 30 months and subject to a condition of no recourse to public funds unless the Secretary of State deems such recourse to be appropriate, and they will be eligible to apply for settlement after a continuous period of at least 120 months with such leave, with limited leave as a partner under paragraph D-LTRP.1.1., or in the UK with entry clearance as a partner under paragraph D-ECP1.1. (excluding in all cases any period of entry clearance or limited leave as a fiancé(e) or proposed civil partner), or, if paragraph E-LTRP.1.11. applies, the applicant will be granted limited leave for a period not exceeding 6 months and subject to a condition of no recourse to public funds and a prohibition on employment.

D-LTRP.1.3. If the applicant does not meet the requirements for limited leave to remain as a partner the application will be refused.

Relationship requirements
E-ECC.1.2. The applicant must be under the age of 18 at the date of application.

E-ECC.1.3. The applicant must not be married or in a civil partnership.

E-ECC.1.4. The applicant must not have formed an independent family unit.

E-ECC.1.5. The applicant must not be leading an independent life.

E-ECC.1.6. One of the applicant's parents must be in the UK with limited leave to enter or remain, or be applying, or have applied, for entry clearance, as a partner or a parent under this Appendix (referred to in this section as the "applicant's parent"), and

(a) the applicant's parent's partner under Appendix FM is also a parent of the applicant; or

(b) the applicant's parent has had and continues to have sole responsibility for the child's upbringing; or

(c) there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care.

Financial requirement
E-ECC.2.1. The applicant must provide specified evidence, from the sources listed in paragraph E-ECC.2.2., of-

(a) a specified gross annual income of at least-

(i) £18,600;
(ii) an additional £3,800 for the first child; and
(iii) an additional £2,400 for each additional child; alone or in combination with

(b) specified savings of

(i) £16,000; and
(ii) additional savings of an amount equivalent to 2.5 times the amount which is the difference between the gross annual income from the sources listed in paragraph E-ECC.2.2.(a)-(f) and the total amount required under paragraph E-ECC.2.1.(a); or

(c) the requirements in paragraph E-ECC.2.3. being met.

In this paragraph "child" means the applicant and any other dependent child of the applicant's parent who is -

(a) under the age of 18 years, or who was under the age of 18 years when they were first granted entry under this route;
(b) in the UK;
(c) not a British Citizen or settled in the UK; and
(d) not an EEA national with a right to remain in the UK under the Immigration (EEA) Regulations 2006.

E-ECC.2.2. When determining whether the financial requirement in paragraph EECC. 2.1. is met only the following sources may be taken into account-

(a) income of the applicant's parent's partner from specified employment or self-employment, which, in respect of an applicant's parent's partner returning to the UK with the applicant, can include specified employment or self-employment overseas and in the UK;
(b) income of the applicant's parent from specified employment or self employment if they are in the UK unless they are working illegally;
(c) specified pension income of the applicant's parent and that parent's partner;
(d) any specified maternity allowance or bereavement benefit received by the applicant's parent and that parent's partner in the UK;
(e) other specified income of the applicant's parent and that parent's partner;
(f) income from the sources at (b), (d) or (e) of a dependent child of the applicant's parent under paragraph E-ECC.2.1. who is aged 18 years or over; and
(g) specified savings of the applicant's parent, that parent's partner and a dependent child of the applicant's parent under paragraph E-ECC.2.1. who is aged 18 years or over.

E-ECC.2.3. The requirements to be met under this paragraph are-

(a) the applicant's parent's partner must be receiving one or more of the following-

(i) disability living allowance;
(ii) severe disablement allowance;
(iii) industrial injury disablement benefit;
(iv) attendance allowance;
(v) carer's allowance; or
(vi) personal independence payment; and

(b) the applicant must provide evidence that their parent's partner is able to maintain and accommodate themselves, the applicant's parent, the applicant and any dependants adequately in the UK without recourse to public funds.

E-EEC.2.4. The applicant must provide evidence that there will be adequate accommodation, without recourse to public funds, for the family, including other family members who are not included in the application but who live in the same household, which the family own or occupy exclusively: accommodation will not be regarded as adequate if-

(a) it is, or will be, overcrowded; or
(b) it contravenes public health regulations.

Section D-ECC: Decision on application for entry clearance as a child D-ECC.1.1. If the applicant meets the requirements for entry clearance as a child they will be granted entry clearance of a duration which will expire at the same time as the leave granted to the applicant's parent, and subject to a condition of no recourse to public funds.

D-ECC.1.2. If the applicant does not meet the requirements for entry clearance as a child the application will be refused

Family life as a parent of a child in the UK

Section EC-PT: Entry clearance as a parent of a child in the UK
EC-PT.1.1. The requirements to be met for entry clearance as a parent are that-

(a) the applicant must be outside the UK;
(b) the applicant must have made a valid application for entry clearance as a parent;
(c) the applicant must not fall for refusal under any of the grounds in Section S-EC: Suitability–entry clearance; and
(d) the applicant must meet all of the requirements of Section E-ECPT:
Eligibility for entry clearance as a parent.

Section E-ECPT: Eligibility for entry clearance as a parent
E-ECPT.1.1. To meet the eligibility requirements for entry clearance as a parent all of the requirements in paragraphs E-ECPT.2.1. to 4.2. must be met.

Relationship requirements
E-ECPT.2.1. The applicant must be aged 18 years or over.

E-ECPT.2.2. The child of the applicant must be-

(a) under the age of 18 years at the date of application;
(b) living in the UK; and
(c) a British Citizen or settled in the UK.

E-ECPT.2.3. Either -

(a) the applicant must have sole parental responsibility for the child; or
(b) the parent or carer with whom the child normally lives must be-

(i) a British Citizen in the UK or settled in the UK;
(ii) not the partner of the applicant; and
(iii) the applicant must not be eligible to apply for entry clearance as a partner under this Appendix.

E-ECPT.2.4. (a) The applicant must provide evidence that they have either-

(i) sole parental responsibility for the child; or
(ii) access rights to the child; and

(b) The applicant must provide evidence that they are taking, and intend to continue to take, an active role in the child's upbringing.

Financial requirements
E-ECPT.3.1. The applicant must provide evidence that they will be able to adequately maintain and accommodate themselves and any dependants in the UK without recourse to public funds

E-ECPT.3.2. The applicant must provide evidence that there will be adequate accommodation in the UK, without recourse to public funds, for the family, including other family members who are not included in the application but who live in the same household, which the family own or occupy exclusively: accommodation will not be regarded as adequate if-

(a) it is, or will be, overcrowded; or
(b) it contravenes public health regulations.

English language requirement
E-ECPT.4.1. The applicant must provide specified evidence that they-

(a) are a national of a majority English speaking country listed in paragraph GEN.1.6.;
(b) have passed an English language test in speaking and listening at a minimum of level A1 of the Common European Framework of Reference for Languages with a provider approved by the UK Border Agency;
(c) have an academic qualification recognised by UK NARIC to be equivalent to the standard of a Bachelor's or Master's degree or PhD in the UK, which was taught in English; or
(d) are exempt from the English language requirement under paragraph EECPT. 4.2.

E-ECPT.4.2. The applicant is exempt from the English language requirement if at the date of application-

(a) the applicant is aged 65 or over;
(b) the applicant has a disability (physical or mental condition) which prevents the applicant from meeting the requirement; or
(c) there are exceptional circumstances which prevent the applicant from being able to meet the requirement prior to entry to the UK.

Appendix 2

Chakroun (extracts from judgment of the Court of Justice)

43. Since authorisation of family reunification is the general rule, the faculty provided for in Article 7(1)(c) of the Directive must be interpreted strictly. Furthermore, the margin for manoeuvre which the Member States are recognised as having must not be used by them in a manner which would undermine the objective of the Directive, which is to promote family reunification, and the effectiveness thereof.

44. In that regard, it follows from recital 2 in the preamble to the Directive that measures concerning family reunification should be adopted in conformity with the obligation to protect the family and respect family life enshrined in many instruments of international law. The Directive respects the fundamental rights and observes the principles recognised in particular in Article 8 of the ECHR and in the Charter. It follows that the provisions of the Directive, particularly Article 7(1)(c) thereof, must be interpreted in the light of the fundamental rights and, more particularly, in the light of the right to respect for family life enshrined in both the ECHR and the Charter. It should be added that, under the first subparagraph of Article 6(1) TEU, the European Union recognises the rights, freedoms and principles set out in the Charter, as adapted at Strasbourg on 12 December 2007 (OJ 2007 C 303, p. 1), which has the same legal value as the Treaties.

…….

47. The second sentence of Article 7(1)(c) of the Directive allows Member States to take into account the level of minimum national wages and pensions as well as the number of family members when evaluating the sponsor's resources. As has been pointed out in paragraph 43 of the present judgment, that faculty must be exercised in a manner which avoids undermining the objective of the Directive, which is to promote family reunification, and the effectiveness thereof.

48. Since the extent of needs can vary greatly depending on the individuals, that authorisation must, moreover, be interpreted as meaning that the Member States may indicate a certain sum as a reference amount, but not as meaning that they may impose a minimum income level below which all family reunifications will be refused, irrespective of an actual examination of the situation of each applicant. That interpretation is supported by Article 17 of the Directive, which requires individual examination of applications for family reunification.

49. To use as a reference amount a level of income equivalent to 120% of the minimum income of a worker aged 23, above which amount special assistance cannot, in principle, be claimed, does not appear to meet the objective of determining whether an individual has stable and regular resources which are sufficient for his own maintenance. The concept of 'social assistance' in Article 7(1)(c) of the Directive must be interpreted as referring to assistance which compensates for a lack of stable, regular and sufficient resources, and not as referring to assistance which enables exceptional or unforeseen needs to be addressed.

50. Furthermore, the figure of 120% used to set the amount required by the Vb 2000 is merely an average figure, determined when the statistics on special assistance granted by the local authorities in the Netherlands and the income criteria taken into account by them are drawn up. As was stated at the hearing, some local authorities use as their reference amount an income which is lower than that corresponding to 120% of the minimum wage, which contradicts the assertion that income corresponding to 120% of the minimum wage is essential.

51. Finally, it is not for the Court to determine whether the minimum income required by Netherlands legislation is sufficient to enable workers of that State to meet their everyday needs. However, it is sufficient to note, as has been rightly contended by the Commission, that if, in the main proceedings, the family relationship between the Chakrouns had existed before Mr Chakroun's entry into the territory of the Union, the amount of income taken into consideration in the examination of Mrs Chakroun's application would have been the minimum wage and not 120% thereof. The conclusion must therefore be that the minimum wage is regarded by the Netherlands authorities themselves as corresponding to resources which are sufficient for the purposes of Article 7(1)(c) of the Directive.

52. Having regard to those factors, the answer to the first question is that the phrase 'recourse to the social assistance system' in Article 7(1)(c) of the Directive must be interpreted as precluding a Member State from adopting rules in respect of family reunification which result in such reunification being refused to a sponsor who has proved that he has stable and regular resources which are sufficient to maintain himself and the members of his family, but who, given the level of his resources, will nevertheless be entitled to claim special assistance in order to meet exceptional, individually determined, essential living costs, tax refunds granted by local authorities on the basis of his income, or income-support measures in the context of local-authority minimum-income policies ('minimabeleid').

Appendix 3

AM (Ethiopia) [2008] EWCA Civ 1082 extract from judgment of Laws LJ

34. More ambitiously, Mr Gill advanced an argument that unless the Rules – and the reference is in terms to Rules 281(v) and 317(iii) – are construed so as to allow for third party support, they are *ultra vires* the enabling power (s.3(2) of the Immigration Act 1971) as being unreasonable and disproportionate, and repugnant to ECHR Article 8.

35. In my judgment these wide-ranging submissions betray a misconceived appreciation of the nature of the Immigration Rules. Mr Gill argues for a purposive construction of the Rules, and identifies the relevant purpose as the promotion of family life, albeit without the imposition of additional economic burdens on the State. He submits that this construction is the price both of the Rules' reasonableness at common law and their compatibility with the Convention rights. Such an argument was rejected by this court in *MW (Liberia)*: see paragraph 16, to which I have referred. But there is other learning on the subject. As I have said Tuckey LJ at paragraph 10 in *MW (Liberia)* referred to the decision of Collins J in the Administrative Court in *Arman Ali* [2000] INLR 89. In that case Collins J was concerned to construe one of the provisions in the Rules requiring the availability of adequate accommodation for the applicant without recourse to public funds. He adopted an approach which is very much in line with Mr Gill's first argument before us. He said (102B):

> "In any event, apart from the Convention, I would have assumed that Parliament did not intend to create any greater impediment than necessary to the ability of those settled in this country to enjoy family life here. It is therefore in my view appropriate to apply a purposive construction to the Rules, particularly as they are not to be construed strictly as if they were statutory provisions but sensibly in accordance with their natural meaning and purpose, bearing in mind that they are not intended to enact a precise code but frequently give only a broad indication of how discretion is to be exercised..."

As for the ECHR (Mr Gill's second argument, as I have recorded it), just above this passage Collins J said this:

> "Even if there has been an interference with respect for family life, there has not necessarily been a breach of Article 8. The interference may be justified under Article 8(2), but it must be proportionate to the legitimate aim concerned, which in this case is the maintenance of the economic well-being of the state: see *Beldjoudi v France* (1992) 14 EHRR 801. Thus it is, as it seems to me, justifiable to avoid any recourse to public funds. But the barrier must not be greater than necessary. Accordingly, the Rules would not in my view be in accordance with Article 8 if they were construed so as to exclude a spouse when his or her admission would not affect the economic well-being of the country because there would be no recourse to public funds or any other detriment caused by it."

36. The first of these passages was the subject of comment by this court in *MB (Somalia)* [2008] EWCA Civ 102. At paragraph 24 Dyson LJ said this:

> "There is a difficulty with the observations of Collins J in *Arman Ali*. The purposive construction to which he refers [sc. in the first passage set out above] is

> a construction which avoids imposing a 'greater impediment than necessary to the ability of those settled in this country to enjoy family life here'. It seems to me that this fails to recognise that, although they are subject to a negative resolution by either House of Parliament, the rules are laid down by the Secretary of State 'as to the practice to be followed in the administration of this Act': see section 3(2) of the Immigration Act 1971. They are statements of policy: see *MO (Nigeria) v Secretary of State for the Home Department* [2007] UKAIT 00057 para 14. To say that a rule should not be construed as imposing a greater impediment to family life than is necessary simply begs the question whether an impediment is necessary. Whether it is necessary involves the policy questions to which I have referred and which are for the Secretary of State to determine."

At paragraph 59 I said:

> "Like Dyson LJ (paragraph 24) I disagree with Collins J's insistence on a purposive construction of the Immigration Rule, if it is thought that such an approach would produce a result in any way different from the application of the Rule's ordinary language. As Dyson LJ indicates, the purpose of the Rules generally is to state the Secretary of State's policy with regard to immigration. The Secretary of State is thus concerned to articulate the balance to be struck, as a matter of policy, between the requirements of immigration control on the one hand and on the other the claims of aliens, or classes of aliens, to enter the United Kingdom on this or that particular basis. Subject to the public law imperatives of reason and fair procedure, and the statutory imperatives of the Human Rights Act 1998, there can be no *a priori* bias which tilts the policy in a liberal, or a restrictive direction. The policy's direction is entirely for the Secretary of State, subject to Parliament's approval by the negative procedure provided for by the legislation. It follows that the purpose of the Rule (barring a verbal mistake or an eccentric use of language) is necessarily satisfied by the ordinary meaning of its words. Any other conclusion must constitute a qualification by the court, on merits grounds, of the Secretary of State's policy; and that would be unprincipled."

37. Their Lordships' House stated in *Huang* [2007] 2 AC 167 at paragraph 6:

> "In this country, successive administrations over the years have endeavoured, in Immigration Rules and administrative directions revised and updated from time to time, to identify those to whom, on grounds such as kinship and family relationship and dependence, leave to enter or remain should be granted. Such rules, to be administratively workable, require that a line be drawn somewhere."

38. It is thus in the nature of the Immigration Rules that they include no over-arching implicit purposes. Their only purpose is to articulate the Secretary of State's specific policies with regard to immigration control from time to time, as to which there are no presumptions, liberal or restrictive. The whole of their meaning is, so to speak, worn on their sleeve. Mr Gill's plea for a construction which gives added value to family life assumes, or asserts, an internal force or impetus which the Rules entirely lack. There is no material basis for the suggestion that Mr Gill's favoured construction must be adopted to save the *vires* of the relevant Rules. Indeed in light of *MW (Liberia)* I do not consider that he was entitled to advance such a submission.

39. The linked argument that third party support must be admitted for compliance with ECHR Article 8 is likewise without merit, and for a shorter reason. It is well established that a prospective immigrant may have no claim to enter or remain under the Rules, and yet may succeed under Article 8: see for example *Huang* paragraph 6, and also paragraph 17: "It is a premise of the statutory scheme enacted

by Parliament that an applicant may fail to qualify under the Rules and yet may have a valid claim by virtue of article 8". Mr Gill, however, must assert a contrary premise: he must say that the prospective immigrant's Article 8 rights have to be systematically protected by the Rules, since to the extent that they are not so protected there will on his argument be a violation of the Article. But this premise is plainly false. The immigrant's Article 8 rights will be (must be) protected by the Secretary of State and the court whether or not that is done through the medium of the Immigration Rules. It follows that the Rules are not of themselves required to guarantee compliance with the Article.

40. For these reasons I would with respect disapprove the second passage which I have set out above from Collins J's judgment in *Arman Ali*, so far as it was intended to found the construction of the Rule upon Article 8.