Neutral Citation Number: [2014] EWCA Civ 985

Case No: C4/2013/2084, 2085 & 2086

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
MR JUSTICE BLAKE
CO85882012

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/07/2014

Before :

LORD JUSTICE MAURICE KAY, VICE-PRESIDENT OF THE COURT OF APPEAL, CIVIL DIVISION
LORD JUSTICE AIKENS
and
LORD JUSTICE TREACY

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Between :

The Queen on the application of (1) MM (Lebanon), (2) AM (Pakistan) & (3) SJ (Pakistan)	**Respondents**
- and -	
The Secretary of State for the Home Department	**Appellant**
Master AF	**Interested Party**

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Manjit Gill QC, Tony Muman & Navtej Singh Ahluwalia (instructed by **J M Wilson Solicitors LLP**) for the **1st Respondent**
Ramby De Mello, Danny Bazini & Aftab Rashid (instructed by **Bhatia Best Solicitors**) for the **2nd Respondent**
Ramby De Mello & Aftab Rashid (instructed by **Britannia Law Practice LLP**) for the **3rd Respondent**
Lisa Giovannetti QC and Neil Sheldon (instructed by **Treasury Solicitors**) for the **Appellant**
Richard Drabble QC, Tony Muman & Ineza Hussain (instructed by **RBM Solicitors**) for the **Interested Party**

Hearing dates : 4-5 March 2014

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Approved Judgment

Lord Justice Aikens:

I. The issues on appeal

1. These appeals concern two British citizens, Mr Abdul Majid and Ms Shabana Javed, who (obviously) have the "right of abode" in the United Kingdom and Mr MM, who has refugee status and as such has the right to remain in the UK. All three are married to spouses who do not have the "right of abode", who are not citizens of an European Economic Area state ("EEA") and who currently live outside the UK and wish to come and live with their spouses here. For convenience only I will give those that have the right to live in the UK the label "UK partners" and the spouses who wish to join their UK partners the rather inelegant label "non-EEA partners". On 9 July 2012 changes were made to the Immigration Rules which, in summary, created a requirement that a UK partner who wishes to sponsor the entry of a non-EEA partner must have a "Minimum Income Requirement" of £18,600 gross per annum and additional income in respect of each child who wishes to enter the UK. Various other new income and savings requirements were also introduced. The key question on this appeal is whether these provisions are unlawful as being a disproportionate interference with the UK partners' European Convention of Human Rights (ECHR) ***Article 8*** rights. In effect Blake J held that they were. There are some subsidiary questions on appeal, the chief one of which is whether the provisions, which the Secretary of State for the Home Department ("SSHD") accepts are indirectly discriminatory within ***Article 14*** of the ECHR, can be justified.

2. ***The Immigration Act 1971*** ("the 1971 Act"), which came into force in January 1973, remains the legislative framework that defines who has a "right of abode" in the United Kingdom and, for those who do not have that right, creates the structure for making rules on how they might obtain it on either a temporary or a permanent basis. Thus ***sections 1(4)*** and ***3(2)*** of the 1971 Act recognise that it is for the SSHD to lay down the rules which set out the practice to be followed to regulate entry and residence in the UK for people who do not have a "right of abode". These Immigration Rules ("IRs") are statements of administrative policy, despite the fact that they are laid before Parliament;[1] that is they are "an indication of how at any particular time the Secretary of State will exercise her discretion with regard to the grant of leave to enter or remain"[2] for those who do not have the "right of abode" in the UK. The IRs are voluminous and they change with dizzying frequency.

3. There have long been restrictions on the right of entry into the UK of partners who do not have the "right of abode" in the UK and who are not EEA citizens. However, in this regard the IR changes as from 9 July 2012, after a "Statement of Changes in the Immigration Rules" had been laid before Parliament on 13 June 2012, are very significant.[3] The relevant amendments are contained in ***Appendix FM Family***

[1] ***Section 3(2)*** of the 1971 Act. This provides for the "negative resolution" procedure, i.e. either House of Parliament can pass a negative resolution within 40 days of the changes being laid before it. If such a resolution is passed, the Secretary of State will "as soon as may be" make such changes as seem required in the circumstances.

[2] ***MO (Nigeria) v Sec of State for the Home Department [2009] 1 WLR 1230 at [34]*** per Lord Brown of Eaton-under-Heywood, with whom the other law lords agreed.

[3] Unusually, the new rules were the subject of a unanimous *positive* resolution of the House of Commons after a debate on 19 June 2012 and were also debated in the House of Lords on 23 October 2012 when a motion of regret was proposed but was withdrawn after debate.

Members Section E-ECP Eligibility for entry clearance as a partner, which I will call "Section E-ECP" for short. These provisions are set out in Appendix One to this judgment as are the terms of the "Guidance" that was provided for Entry Clearance Officers, published first in draft in December 2012 and subsequently in a final form. In Appendix Two I have set out ***sections 1(4)*** and ***3(2)*** of the 1971 Act and ***sections 2, 3*** and ***6*** of the Human Rights Act 1998 and ***section 55*** of the ***Borders Citizenship and Immigration Act 2009*** ("BCIA 2009"). In Appendix Three I have set out ***Articles 8, 12*** and ***14*** of the ECHR as scheduled to the 1998 Act. Lastly, in Appendix Four I have set out the relevant provisions of ***Immigration Directorate Instructions*** on Family Members under the Immigration Rules.

4. The new rules stipulate that a UK partner who wishes to sponsor the entry into the UK of a partner who does not have a "right of abode" in the UK under the 1971 Act or any other independent right to enter and remain in the UK must have a "Minimum Income Requirement" of at least £18,600 per annum gross and an additional income of £3,800 for the first child and a further supplementary £2,400 income for each additional child who wishes to enter or remain in the UK. If the UK partner does not have the requisite minimum gross income, then to obtain entry of the non-EEA partner the UK partner must demonstrate having a minimum of £16,000 savings *plus* additional savings of 2.5 times the amount that is the difference between the UK partner's actual gross annual income and the total amount of income required. Of significance is the fact that neither the income of the non-EEA partner nor any promised third party support can be taken into account to calculate the UK partner's income or savings, save in limited circumstances. I will refer to this income and/or savings requirement compendiously as the "new MIR".

5. In ***R(on the application of New College Limited) v Secretary of State for the Home Department***[4] Lord Sumption JSC said that the 1971 Act had "not aged well" and that it was now "widely acknowledged" to be "ill-adapted to the mounting scale and complexity of the problems associated with immigration control". Three further statutes have added to the complexity of the problems associated with immigration control and are fundamental to these appeals. First, ***section 6(1)*** of the ***Human Rights Act 1998*** ("HRA"), which came into force in 2000, stipulates that it is "unlawful for a public authority to act in a way which is incompatible with a Convention right". So the operation of the IRs made by the SSHD must be compatible with rights set out in the ECHR as scheduled to HRA. The three particular Convention rights with which these appeals are concerned are: the right to respect for private and family life enshrined in ***Article 8(1), Article 12*** which enshrines the right to marry and found a family, but "subject to the national laws governing the exercise of this right", and ***Article 14,*** which prohibits discrimination in the application of other Convention rights.

6. Secondly, there is ***section 115*** of the ***Immigration and Asylum Act 1999***, ("IAA 1999") under which a person subject to immigration control, including someone who is a partner of a person who has the right to remain in the UK is, in general, not entitled to welfare benefits until the immigrant partner qualifies for and is granted indefinite leave to remain (known as "ILR") for which a minimum of 5 years lawful residence is needed, although the immigrant partner can obtain contributory benefits after paying National Insurance contributions for two years. Thirdly, there is ***section***

[4] ***[2013] UKSC 51***

55(1) and ***(2)*** of the BCIA 2009. This section has placed a statutory duty on the SSHD to discharge her function in relation to immigration, asylum and nationality, with "regard to the need to safeguard and promote the welfare of children who are in the United Kingdom". The SSHD also has to ensure that services provided pursuant to arrangements which are made by the SSHD in relation to those three matters have regard to that need.

7. None of MM, Abdul Majid and Shabana Javed can satisfy the new MIR. Before Blake J they successfully challenged the amendments to the IR introducing the new MIR as being unlawful on Human Rights grounds. Blake J held that those amendments would amount to a disproportionate interference with the UK partners' ***Article 8*** rights, which he characterised as the right to reside with one's spouse, to enjoy cohabitation and to found a family. However, he refused to grant the claimants any declaratory relief to that effect. Blake J dismissed the claimants' cases based on discrimination and ***Article 14*** of the ECHR.

8. On appeal the SSHD challenges Blake J's conclusion. The UK partners support it on the grounds the judge gave but also on a number of further grounds. The most important is that the new MIR imposed by the amendments leads to discriminatory consequences based on race, ethnic, cultural and national origins, gender (in the case of Ms Javed) and status, where the UK partner is a refugee or someone granted Humanitarian Protection but having only limited leave to remain in the UK. It is argued by the respondents that these discriminatory consequences cannot be justified for the purposes of ***Article 14*** of the ECHR. In addition, the child AF was granted permission to cross-appeal to argue that the new MIR were incompatible with the statutory requirement of ***section 55*** of the BCIA 2009 that the Secretary of State have regard to the best interests of children in relation to her immigration functions. Lastly, Mr Majid seeks permission to cross-appeal in relation to two requirements set out in paragraph E-ECPT.2.3(b)(ii) and (iii) of Appendix FM concerning the requirement that a non-EEA parent of a child resident in the UK who applies for entry clearance can only do so under the UK partner/non-EEA spouse provisions, unless the applicant is not a partner of the parent or carer of the child. It is said that the judge failed adequately to deal with this issue.

II. The facts concerning the claimants, their partners and AF, the nephew of MM.

9. The summary of the assumed facts set out below is taken directly from [4] to [21] of Blake J's judgment. On behalf of the appellant SSHD, Ms Lisa Giovannetti QC said these could be accepted for the purposes of the appeals, although she emphasised that none of the facts had been proved and that this appeal was not concerned with any individual cases because no individual decisions had been made.

10. **MM.** MM is a 34 year old national of the Lebanon. He entered the United Kingdom in 2001. He subsequently sought refugee status and was granted limited leave to remain in the United Kingdom as a refugee until 28 January 2014. He has since been granted further limited leave to remain in the UK until 16 June 2017. 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.

11. 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 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.

12. MM is a post-graduate student of the University of Wolverhampton presently working towards a PhD. 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 on average approximately £15,600 per annum gross. His wife is also well qualified. She has a BSc in nutrition, has computing skills and is employed in Lebanon as a pharmacist. She speaks fluent English. Initial enquiries with employers in the UK indicate that she would be likely to find skilled employment if she were lawfully resident here.

13. The problem for MM and his wife is the requirement of the amended IR governing applications made from 9 July 2012 (Part 8 rule A277) imposing 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.[5] He cannot meet that threshold.

14. MM 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.

15. MM 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.[6] Further the IR 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.[7]

16. The combination of these measures means that MM claims that he cannot enjoy married life with his wife. He cannot live in their mutual country of nationality as he is a refugee from persecution there. He cannot meet the maintenance requirements to enable his wife to gain 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 (ECO) 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.

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[5] See Appendix FM paragraph E-ECP 3.1 to 3.2.
[6] See Appendix FM-SE at paragraph 1 (c).
[7] See Appendix FM –SE at paragraph 1 (b).

17. MM 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 IR was that admission of the spouse would not lead to additional recourse to public funds and that the couple would be adequately accommodated.[8] On the claimed facts he could meet that requirement without difficulty.

18. Whilst MM 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.

19. 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 was granted leave to join these proceedings as an interested party and contended before Blake J, amongst other things, that the Immigration Rules when applied to MM's case infringe not only the HRA but also the statutory duty to have regard to the welfare of the child with respect to immigration decision making under ***section 55*** of the BCIA 2009.

20. **Abdul Majid.** 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.

21. 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 IR in force from 9 July 2012. There have been problems about recognition of the marriage and satisfying the previous IR maintenance and accommodation requirements.

22. 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 to be 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.

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

24. **Shabana Javed.** 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 which she describes as economically and socially deprived. She has no qualifications and her employment history is intermittent.

[8] See Rule 281 (iv) and (v). This requirement continues to apply for certain classes of admission.

25. 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.

26. 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.

27. 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 rules 2 and 13, necessitating proof of 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.

28. Ms Javed further submits that the whole regime of financial sponsorship introduced by Appendix FM is unjustifiably discriminatory as it impacts on women and in particular on British Asian women, because the socio-economic data demonstrate 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, because statistical data suggest that male migrants are able to obtain employment and support their families without difficulty.

III. How the changes to the IRs on income requirement came about.

29. Mr Clive Peckover is a senior civil servant in the Migration Policy Unit of the Home Office. He has been responsible for the development and realisation of the new government policies on family migration since January 2011. Mr Peckover prepared five witness statements that were before Blake J. He set out the history of the IRs regarding the minimum maintenance required before a non-EEA spouse/partner of a British citizen (or someone granted refugee status in the UK) could be given entry clearance and the circumstances in which the new MIR came about. The government's family migration policy review was a part of its programme of reform of the immigration system of the UK. The following is a very brief summary taken from Mr Peckover's evidence.

30. Before the new MIR in July 2012, the maintenance requirement before a non-EEA spouse/partner of a British citizen (or someone granted refugee status in the UK) could be given entry clearance was that the parties had to demonstrate that they could maintain themselves "adequately" without recourse to "public funds". That phrase included social housing and most welfare benefits, but excluded the NHS, education and social care. In 2006 the Asylum and Immigration Tribunal decided ***KA and others (Adequacy of maintenance)(Pakistan)***.[9] This established that the IR

[9] ***[2006] UKAIT 65***

stipulating the necessity for an "adequate" available level of income had to be interpreted as imposing an objective standard, irrespective of the projected outgoings of any particular family and irrespective of its own standard of living. In practice a sponsor had to demonstrate resources equivalent to the income support level of a single couple of £5,500, net of housing costs and any tax liabilities.

31. Mr Peckover's first witness statement explains why changes in the IRs were sought. First, the existing rules for determining whether a UK partner could maintain a non-EEA spouse or other dependants were regarded as too complex and not conducive to consistent and clear decision making by Entry Clearance Officers ("ECOs") and caseworkers. Secondly, government policies in other areas of immigration control, such as non-EEA students and workers, were being changed so as to to establish more precise, objective requirements. Thirdly, existing prohibitions and controls on the ability of migrant spouses or dependants to take advantage of public funds such as welfare benefits (contained e.g. in ***paragraphs 6A-6C*** of the IRs and ***section 115*** of the IAA 1999) were regarded as complex to administer and observance difficult to ensure. Fourthly, once a non-EEA migrant had obtained Indefinite Leave to Remain, there was a considerable burden on the public purse, mostly in the form of claims for working age benefits.[10] Fifthly, the SSHD's overall assessment was that a maintenance requirement fixed at the basic subsistence level of Income Support was insufficient to provide a reasonable degree of assurance that the UK partner and the non-EEA spouse could support themselves and any dependent family financially "over the long term". Moreover, the lack of financial resources would inhibit the migrant partner's integration in the UK.

32. Mr Peckover therefore summarised the policy intention of the SSHD as follows:

> "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 financial 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 integrate in British society".[11]

33. Mr Peckover's evidence was that the Secretary of State regarded the new MIR provisions as part of an overall reform programme of the immigration system that would tackle abuse, make it fairer and clearer and would, taken overall, reduce net migration to the UK to "the tens of thousands a year, compared with 252,000 in the

[10] The figures quoted by Mr Peckover in para 11(ii) of his first witness statement are for February 2011: he says that there were some 267,000 claimants of working age benefits (that is about 5% of more than 5.5 million such claimants) were estimated to be non-EEA nationals when they registered for a National Insurance number. The top 5 non-EEA nationalities at NI number registration claiming working age benefits were Pakistani, Somali, Indian, Bangladeshi and Iraqi. Mr Peckover said that was "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".

[11] Para 13 of Mr Peckover's first witness statement.

year to September 2011".[12] The new MIR rules themselves were estimated to reduce net migration to the UK by 9,000 a year.[13] However, Mr Peckover stated that reduction of immigration was not one of the primary objectives of the new MIR; those objectives were "to prevent burdens on the taxpayer and to promote successful integration. No cap on family migration to the UK has been imposed nor any other measure directly aimed at reducing numbers…".[14]

34. Mr Peckover dealt with the history of the work on "policy development and consultation" from January 2011. First, research was carried out on the level and type of family migration to the UK. Secondly, there was an analysis of the level of employment and the pay of migrant male and female spouses in the UK.[15] Thirdly, a study of 531 case files of those granted entry clearance in 2009 on the basis of marriage or civil partnerships was undertaken. 94% of UK partners reported being in paid employment at the point of application with median post-tax earnings of £14,400 per annum, but there was a wide variation between nationalities. The figure for those with Bangladeshi partners was much lower and the figures of both those Bangladeshi and Pakistani partners was below the median. That for those with Indian, Chinese, Thai and US partners was above. The conclusion drawn was that the figures "raised concerns about whether [these groups] had the financial wherewithal for the long term to avoid increasing burdens on the taxpayer through the welfare system and to ensure that migrant partners and dependants were well enough supported to promote their effective integration".[16] Fourthly, there were investigations of how other EU and non-EU countries dealt with this issue. Some countries had established a minimum income threshold requirement. Fifthly, there were discussions with ECOs about how they managed the current requirement of "adequate maintenance", which drew the conclusion that the test was difficult to apply consistently.

35. Following this research the SSHD published a Consultation Document on 13 July 2011 in which she announced she would seek views on the option of introducing a minimum income threshold into the IR for the entry of non-EEA partners of UK partners. The SSHD announced she would seek the advice of the Migration Advisory Committee (MAC), a non-departmental public body consisting of distinguished economists and migration experts, who provide independent, evidence-based advice to the government on migration issues. The Consultation Document also announced that the proposed new MIR would take account only of the income of the UK partner (but including joint accounts with the spouse); it would not take account of the potential earnings in the UK of the non-EEA partner and would "review" whether support from third parties should be allowed "only in compelling and compassionate circumstances". There was a consultation period until October 2011 which evinced 5046 responses. Reaction to the proposals was mixed.[17]

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[12] Para 17 of Mr Peckover's first witness statement.
[13] This was the estimate of the Impact Assessment published on 13 June 2012.
[14] Para 17 of Mr Peckover's first witness statement.
[15] It found that the gross median earnings for males in 2010 was £21,300, with variations from £10,400 for those from Bangladesh, £13,600 from Pakistan, £13,700 from India, £14,900 from Nigeria and £28,000 from USA. For females the median was £15,000 "with less variation between nationalities".
[16] Para 22 of Mr Peckover's first witness statement.
[17] With regard to spouses: 57% of individuals and 31% of organisations were in favour of a MIR; 41% of individuals and 65% of organisations were against.

36. The MAC's brief was to report by the end of October 2011 on "what should the minimum income threshold be for sponsoring spouses/partners and dependants in order to ensure that the sponsor can support his/her spouse…and other dependants without them becoming a burden on the State". The MAC report was published on 16 November 2011. Chapter 5 set out its conclusions. It considered two particular options: the first was to set a minimum income threshold by reference to the benefits system, which it called "the benefits approach". Its preferred threshold using this method was a gross income of £18,600 per annum, which was the level at which a couple paying average rent and Council Tax generally ceased to be entitled to receive any income-related benefits or tax credits. The MAC estimated that 45% of applicants would not meet this requirement. The alternative was to set a threshold by reference to the net fiscal impact of the sponsor's family, the so-called "net fiscal approach". Using this method, the MAC's proposed income threshold would be £25,700 gross per annum. At that point the UK partner might reasonably be expected to pay more in tax than the cost of the public services consumed. The MAC estimated that 64% of all applicants would not meet this threshold. It recommended adopting a figure between these two sums. The MAC considered the possibility of different levels of income for different parts of the UK to reflect cost of living variations but concluded that there was not a clear cut case for differentiation.

37. Mr Peckover's evidence explains how his team worked on the form and operational design of the proposed new financial requirements during the period July 2011 to July 2012 when the SSHD published her Statement of Intent and Response to Consultation. The SSHD decided that there should be a minimum income threshold; she reasoned that this would be clearer, more objective and a fairer framework than the old "adequately maintained" requirement. She also decided that, as a matter of public policy, this level should be higher than the basic subsistence level of Income Support. In paragraph 52 of Mr Peckover's first witness statement he says:

> "The Secretary of State remained satisfied that the legitimate public policy aim under *Article 8(2)* of the ECHR of safeguarding the economic well-being of the UK necessitated that the level of the financial requirement should reflect consideration of what was required to prevent burdens on the taxpayer and promote integration, as well as of what was proportionate to that public policy aim in terms of the associated interference in the right to respect for family life".

38. To this end it was noted that setting the threshold at either level suggested by the MAC would reduce the level of family migration to the UK; if the threshold was set at the lower level of £18,600 it would produce welfare benefit payment savings of £530 millions over 10 years, savings of £570 million on NHS expenditure and savings of £340 million on education and other public services over the same period. It was considered that setting a threshold of income higher than subsistence would support the effective integration in the UK of migrant partners, although this proposition could not be tested quantitatively.

39. The SSHD decided that the UK partner's employment at the required salary level must have been held for at least 6 months prior to the application (if working in the UK), but "non-employment" and pension income could count towards the requisite minimum needed. However, income-related benefits and tax credits, "out of work"

contributory benefits (eg. jobseekers' allowance) and child benefit could not be counted. There were to be exemptions from the financial requirement in certain circumstances, e.g. where the UK partner was a serving member of HM Forces or in receipt of a specified disability related benefit or Carer's Allowance. The SSHD adopted the MAC's proposal that the cost of housing should not be treated separately and so was taken into account in setting the threshold figure of £18,600 based on the "benefits approach". The figure of minimum savings of £16,000 (relevant if the minimum income level could not be reached) was chosen because that is the level of savings at which a person generally ceases to be eligible for income-related benefits and tax credits and so is "consistent with the basis on which the MAC calculated the income threshold of £18,600".[18]

40. The economic and operational impacts of the new MIR were considered in an Impact Assessment published by the SSHD on 13 June 2012. The equalities impacts were assessed in the Policy Equality Statement published by the SSHD on the same date. The latter considered the possibility of an indirect discrimination effect of taking an income threshold at £18,600 and its impact on groups with a protected characteristic under ***section 19*** of the ***Equality Act 2010.*** To the extent that there might be such indirect discrimination, Mr Peckover states that the SSHD considered "…that it is justified by and proportionate to the policy aim of safeguarding the economic well-being of the UK by reducing burdens on the taxpayer and promoting integration".[19] The Policy Equality Statement recognised that there were potential impacts on groups from the Indian sub-continent because figures showed that reported median gross sponsor earnings of Pakistani and Bangladeshi applicants were below the proposed threshold of £18,600, although those of Indian applicants were above it. The compatibility of the new MIR with ***Articles 8*** and ***14*** of the ECHR was assessed as reflected in paragraphs 52-64 of the Statement on Grounds of Compatibility published by the SSHD on 13 June 2012.

41. The claimants responded to Mr Peckover's first witness statement by adducing evidence of social and economic data which demonstrated how the measures would: (1) have a particularly severe impact on both non-EEA spouses from Asia and Africa generally and in particular on women UK partners whose earnings in the UK were lower than those of men; (2) be particularly onerous for women UK partners if the potential earnings of male migrant spouses were excluded when calculating whether the threshold minimum had been obtained because, male migrant spouses earn on average £21,300 per annum; (3) have a particular impact on UK partners living in urban centres outside London and the South East of England and upon UK partners who were refugees. The claimants' experts also demonstrated that of the 422 occupations listed in the 2011 UK Earnings Index, only 301 of them were above the £18,600 gross annual income threshold.

42. The second, third and fourth witness statements of Mr Peckover responded to the claimants' material. In his second witness statement Mr Peckover pointed out that the Secretary of State had fully explored the scope for including third party support in the MIR calculation. It had been allowed in five main forms: (a) accommodation provided by third parties for the purposes of meeting the requirements imposed by E-ECP 3.4, reflecting the need or preference of some to live with family or friends; (b)

[18] Para 69(i) of Mr Peckover's first witness statement.
[19] Para 87 first witness statement.

gifts of cash savings provided that they are held by the couple for at least 6 months and are under their control; (c) child maintenance or alimony payments from a former partner of the non-EEA partner; (d) income from a dependent child who had achieved the age of 18 and who remained in the same household as the non-EEA partner, provided the child was still a part of the financial requirements that had to be met; (e) a maintenance grant or stipend associated with undergraduate or postgraduate study or research.

43. In his fifth witness statement Mr Peckover provided further details of how the new policy had been developed. He summarised the position at paragraph 23 of this witness statement:

> "The process of gathering and analysing the evidence; seeking views from those within and outside the Home Office; developing the policy; and translating the policy into rules and operational procedures and guidance that could be implemented effectively that I have briefly summarised above took approximately 17 months. It proceeded throughout on the fundamental premise that, in meeting the Secretary of State's objectives, it had to be firmly based on evidence and operationally workable. I have been a civil servant for 22 years and I have been involved in the development of numerous policies and green papers, white papers and legislation in that time. The process of evidence gathering, consultation and analysis that was undertaken in respect of this policy was the most extensive and rigorous that I have ever been involved in. The Secretary of State took a close personal interest in these issues during the process I have described above."

IV. The structure of the new MIR and the Guidance

44. The new MIR in "Immigration Rules Appendix FM: family members" are part of a set of changes to the IR that were laid before Parliament on 13 June 2012, known as HC 194. An Explanatory Statement to HC 194 describes the purpose of the rules as:

> "To provide a clear basis for considering immigration family and private life cases in compliance with Article 8 of the European Convention on Human Rights (the right to respect for private and family life). In particular the new Immigration Rues reflect the qualified nature of ***Article 8,*** setting requirements which correctly balance the individual's right to respect for private and family life with the public interest in safeguarding the economic well-being of the UK by controlling immigration and protecting the public from foreign criminals".

45. Appendix FM has been changed again since the new MIR were introduced in July 2012, but I have used the wording as at July 2012. There is a "General" section at the outset, which sets out the purpose of Appendix FM. Gen.1.1. states:

> "This route is for those seeking to enter or remain in the UK on the basis of their family life with a person who is a British

> Citizen, is settled in the UK, or is in the UK with limited leave as a refugee or person granted humanitarian protection (and the applicant cannot seek leave to enter or remain in the UK as their family member under Part 11 of these rules). It sets out the requirements to be met and, in considering applications under this route, it reflects how, under Article 8 of the Human Rights Convention, the balance will be struck between the right to respect for private and family life and the legitimate aims of protecting national security, public safety and the economic well-being of the UK; the prevention of disorder and crime; the protection of health or morals; and the protection of the rights and freedoms of others. It also takes into account the need to safeguard and promote the welfare of children in the UK."

46. After the General section, there is a section headed "Family Life with a Partner" which is divided into various sections setting out requirements, starting with a section on the requirements for entry clearance as a partner (Section EC-P), which include the financial requirements that I have already referred to (E-ECP.3.1). The requirements for various other categorisations are then set out, eg. the requirements for limited leave to remain as a partner and for indefinite leave to remain as a partner. In each case there are the same financial requirement provisions. Next there are sections concerning applications by children under 18 for entry clearance where the parent is in the UK and then a section on applications by a parent of a child who is in the UK. This last category, dealt with in Section E-ECPT, is relevant to the proposed cross-appeal of Mr Majid, because of the requirement, at E-ECPT.2.3, that the parent or carer with whom the child normally lives in the UK is "not the partner of the applicant" and that the applicant "must not be eligible to apply for entry clearance as a partner" under Appendix FM. If entry clearance is sought under Section E-ECPT, the financial requirements are not the same as for entry clearance as a "partner". The only requirement under Section E-ECPT is that the applicant "must provide evidence that they will be able adequately to maintain and accommodate themselves and any dependants in the UK without recourse to public funds". Lastly there is a section dealing with entry clearance as an adult dependent relative. The applicant adult dependent relative must provide evidence that he can be adequately maintained, accommodated and cared for in the UK by the person in the UK (the "sponsor") who must be over 18. The applicant must not be in a subsisting relationship with a partner unless that partner is also applying for entry clearance at the same time.

47. Guidance to ECOs, which was in a draft dated February 2013 when put before Blake J (but which now represents current policy), advises ECOs with regard to possible "exceptional circumstances" in "family route cases". The draft guidance of February 2013 "…seeks to remind ECOs how to deal with "the family route applications where the applicant does not meet the requirements of the Rules but there may be grounds to grant leave outside of (*sic*) the Immigration Rules either on exceptional or compassionate grounds". The draft Guidance says that the ECO should first undertake a full consideration of the application against the "relevant family Immigration Rules" and consider whether there are any "exceptional circumstances which might make a refusal of entry clearance a breach of ***Article 8*** because the effect of refusal would result in unjustifiably harsh consequences for the applicants or their

family" or any compassionate factors which might justify a grant of entry clearance outside the IR. In either case the matter has to be considered by the Referred Casework Unit ("RCU"). This guidance was published in May 2013. There are then two further headings in this document: "Exceptional Circumstances", which attempts to define that term; and "Process to be followed in considering exceptional circumstances". I have set out the contents of the paragraphs under those headings in Appendix Four.

48. Subsequently, a much more elaborate document called the Immigration Directorate Instructions for "Family Members under the Immigration Rules: Partner and ECHR Article 8 Guidance" was produced. In the current[20] version Section 1 is an Introduction. It explains in general terms how caseworkers must approach decision-making under the new rules concerning applications for entry clearance to and leave to remain, further leave to remain and indefinite leave to remain in the UK submitted after 9 July 2012 as a partner of a person who is a British citizen, or present and settled in the UK or who has leave to remain as a refugee or has been granted Humanitarian Protection ("HP"). The Introduction states that there are two stages to the caseworker's task. First the caseworker must consider applications under the rules. If the applicant does not meet the requirement of the rules then he must move onto a second stage: "whether, based on an overall consideration of the facts of the case, there are exceptional circumstances which mean refusal of the application would result in unjustifiably harsh consequences for the individual or their family such that refusal would not be proportionate under ***Article 8.*** If there are such exceptional circumstances, leave outside the rules should be granted, if not, the application should be refused". [21]

49. The Introductory section goes on to state that the rules in Appendix FM "together with the Secretary of State's policy on exceptional circumstances reflect the qualified right to respect for private and family life under ***Article 8…***". Appendix FM (and paragraph 276ADE) "reflect how under ***Article 8*** the balance will be struck, other than in exceptional circumstances" between the right for respect for private and family life and the legitimate aims set out in ***Article 8(2)***. It is said that "they also take proper account of the need to safeguard and promote the welfare of children in the UK".

50. Section 3 of the Guidance is headed "Family Life with a Partner". Section 3.1 deals with applications for entry clearance as a partner. Paragraph 3.1.5 is headed "Exceptional circumstances or compassionate factors". It states that where an applicant for entry clearance as a partner fails to meet the requirements of the rules under Appendix FM (or FM-SE) the ECO must go on to consider whether there are "exceptional circumstances" and if he thinks that there may be "in line with this guidance" he must refer the application to the Referred Casework Unit or RCU. The paragraph goes on to state that "consideration of exceptional circumstances must include consideration of any factors relevant to the best interests of a child in the UK" and further guidance on that is given in "the children's best interests guidance", referred to below.

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[20] This is dated October 2013. In the version dated December 2012 before Blake J the relevant para was 3.2.7d. The wording is identical.

[21] As authority for this approach the decision of Sales J in ***R(Nagre) v SSHD [2013] EWHC 720 (Admin)*** is cited.

51. Section 3.2 is headed "Leave to remain as a partner". Paragraph 3.2.8, under the heading "Exceptional Circumstances" is slightly different from paragraph 3.1.5:

> "Where an applicant does not meet the requirements of the rules under Appendix FM and/or Appendix FM-SE, refusal of the application will normally be appropriate. However, leave can be granted outside the rules where exceptional circumstances apply. Where an applicant fails to meet the requirements of the rules, caseworkers must go on to consider whether there are exceptional circumstances".

52. In the same paragraph it explains "exceptional" in the following terms (which are not set out in the Section 3.1):

> " '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".

53. The same paragraph then stipulates that the decision maker must consider all relevant factors and gives two examples: the circumstances around the applicant's entry to the UK and cumulative factors. In paragraph there is a further heading: "Particular considerations concerning the best interests of a child in the UK". Elaborate further guidance is given: "Guidance on consideration of a child's best interests under the family and private life rules and in Article 8 claims where the criminality thresholds in paragraph 398[22] of the rules do not apply".

V. The judgment of Blake J

54. The judgment undertakes an impressive review of the relevant case law and the evidence on which the Secretary of State relied to justify the changes in the IR to introduce the new MIR. An analysis of the judgment is a convenient way of introducing this case law in the context of the evidence that was before both the judge and us and I hope that a rather more extensive reference to the cases in dealing with Blake J's analysis will make my summary of the arguments of the parties to us more comprehensible. So I make no apology for this section being quite long.

55. The judge made a number of preliminary observations on the 1971 Act and the BCIA 2009, then analysed the case law of the European Court of Human Rights ("ECtHR") concerning provisions in national rules that restrict the right of immigration into the UK. He then considered domestic case law before making his conclusions. The key points he made about the 1971 Act, the IRs and the Strasbourg case law are: first, it

[22] Para 398 (together with paras 399 and 399A) of the revised IRs deal with how ***Article 8*** claims are to be dealt with in cases where a person is to be deported from the UK either under ***section 3(5)*** of the ***Immigration Act 1971,*** or under ***section 32(4)*** and ***(5)*** of the ***UK Borders Act 2007.*** These were described as a "complete code" in ***MF(Nigeria) v SSHD [2014] 1 WLR 544.***

was fundamental that under ***section 1(1)*** of the 1971 Act, British citizens are "free to live in the United Kingdom without let or hindrance", subject only to specific and limited statutory restrictions.[23] Secondly, however, the IRs have, historically, extended to making provision restricting the admission of dependants of persons lawfully within the UK.[24] Thirdly, concerning a person's ***Article 8*** rights, in the important 1985 decision of ***Abdulaziz, Cabales and Balkandali v UK***[25] the majority of the European Court of Human Rights ("ECtHR") re-stated not only the well-established international law rule that a State has the right to control the entry of non-nationals into its territory, but also confirmed the principle that "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".[26] In the next paragraph of the same judgment the court had formulated the broad proposition that "the duty imposed by ***Article 8*** could not 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", particularly where it was not shown that there were obstacles to establishing family life in their own or their husbands' own home states or that could not be expected of them.[27] Fourthly, Blake J noted that since then, the most significant developments in the Strasbourg case law and the English decisions regarding the admission and right of residence of family members to a Contracting State have concerned children who seek to be united with their parents. He cited the ECtHR decision in ***Maslov v Austria***[28] and the Supreme Court decision of ***ZH(Tanzania) v SSHD***[29] which both underlined the importance of the welfare of the child as a primary, although not paramount, consideration of any administrative decision concerning where the child might live. Both those decisions in turn rely on ***Article 3*** of the ***United Nations Convention on the Rights of the Child 1989.***[30]

56. Blake J next analysed a large number of decisions of the UK courts where challenges had been made to provisions of the IRs. In relation to those IRs that require that a "sponsor"[31] of an aspirant non-EEA partner entrant must provide a minimum level of income support, he noted the important decision in 2006 of the Asylum and

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[23] [23]

[24] Blake J pointed out that, originally, ***section 2(2)*** of the 1971 Act granted the "right of abode" to Commonwealth wives of British citizens, reflecting "[an] historic social presumption that wives should follow husbands".

[25] ***(1985) 7 EHRR 471*** – hereafter "***Abdulaziz".***

[26] ***(1985) 7 EHRR 471*** at [67]. The three women applicants were not UK citizens at the time of the refusal to allow their husbands to enter the UK, but they were lawfully and permanently settled in the UK, whereas their husbands had no such rights. One of the three husbands in the UK (Mr Cabales) had only been admitted for a limited period, the second (Mr Abdulaziz) was an illegal "overstayer" in the UK and the third (Mr Balkandali) had no leave to remain but no action was to be taken against him because of the pending decision by the ECtHR.

[27] *Ibid* at [68].

[28] ***(2009) INLR 47***

[29] ***[2011] 2 AC 166***

[30] ***Article 3(1)*** provides: "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] In the IR the word "sponsor" has been used as a term of art, meaning the person in relation to whom an applicant for entry to the UK is seeking leave to enter or remain as that person's spouse, fiancé, civil partner, proposed civil partner, unmarried partner, same-sex partner or dependent relative.

Immigration Tribunal in ***KA and others (Adequacy of maintenance)(Pakistan)***[32] to which I have already referred above.

57. Blake J then referred to a series of cases concerning the maintenance rules for spouses or dependent children where the primary issue was whether third party support could be taken into account when considering whether a sufficient level of support had been attained. ***AM(Ethiopia) v Entry Clearance Officer***[33] is one such case. The decision of the Court of Appeal is of particular importance because of the analysis by Laws LJ on how the IRs are to be construed and the relationship between the IRs and rights guaranteed to individuals by the ECHR. I will have to examine this case in some detail later, so I will not do so here. I need only note that, in essence Laws LJ stated[34] at [39] that an immigrant's ***Article 8*** rights must be protected by the Secretary of State and the courts, "whether or not that is done through the medium of the [IR]. It follows that the Rules are not themselves required to guarantee compliance with the Article".

58. Blake J said, at [55] of his judgment, that if Laws LJ's statement accurately summarised the present state of the law on the proper approach to the IRs then it represented "a serious obstacle to the claimants' contentions". I agree. In my view, at the heart of this appeal is the question of whether it was incumbent upon the SSHD to frame the new MIR so that they systematically protect the ***Article 8*** rights of the UK partner and the non-EEA partner (and/or children), or whether it is sufficient that even if an applicant UK partner cannot fulfil the new MIR, the non-EEA partner may yet have a valid claim to enter by virtue of the ***Article 8*** rights of the UK partner and the non-EEA partner (and/or children), whether by means of the "Exceptional Circumstances" Guidance or otherwise.

59. Blake J next analysed a number of English cases in which there had been "Human rights challenges" to immigration rules. He referred to ***R (Baiai and another) and others v SSHD***[35] in which there was a challenge to a scheme set out in ***section 19*** of the ***Asylum and Immigration (Treatment of Claimants) Act 2004*** and Regulations made under it by which, under ***section 19(3)(b)***, a person who was subject to immigration control who did not have entry clearance had to obtain from the Secretary of State (for a fee) a prior certificate of approval to enter into a marriage if it was otherwise than in accordance with the rites of the Church of England. The aim of the scheme was to discourage marriages of convenience made for immigration purposes; but it was argued that the scheme constituted an interference with the right to marry guaranteed by ***Article 12*** of the ECHR. I have to analyse this case in some detail later in this judgment so will not do so now. The matter went to the ECtHR as ***O'Donoghue v UK***[36] which found the requirement to obtain prior approval objectionable.

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[32] ***[2006] UKAIT 65***

[33] ***[2008] EWCA Civ 1082.*** That case and ***AM(Somalia) v ECO Addis Abbaba [2009] EWCA Civ 634*** went to the Supreme Court *sub nom*. ***Mahad and others v ECO [2010] 1 WLR 48,*** but the statements of Laws LJ were not reconsidered. The SC decided that the IR, properly construed, did not prohibit recourse to third party support to reach the minimum income requirements.

[34] Pill and Carnwath LJJ agreed.

[35] ***[2009] 1 AC 287***

[36] ***(2011) 53 EHRR 1***

60. Blake J then considered the case of ***R(Quila) v SSHD***[37] which he characterised as being a decision of profound importance for the present challenge and I agree. Again, I will need to analyse this case in some detail, so I will only outline it now. The case concerned an IR which prohibited entry (or the right to remain) to a non-EEA spouse of a person lawfully present in the UK if either person was under the age of 21. Its aim was to counter "forced marriages". The IR provided for a discretionary grant of permission where there were exceptional, compassionate circumstances which would justify it. The challenge was successful in the Court of Appeal and the Supreme Court, although Lord Brown of Eaton-under-Heywood JSC gave a powerful dissenting judgment in which he said it would be "not merely impermissible but positively unwise for the courts yet again to frustrate Government policy except in the clearest of cases" and this was not one.[38]

61. Blake J concluded his review of the domestic case law by referring to three further cases. First, this court's decision in ***R (Bibi and others) v SSHD***,[39] concerning the IR requiring most non-EEA spouses to produce a test certificate of basic knowledge of the English language before entry clearance could be granted; secondly, the decision of Sales J in ***R(Nagre) v SSHD***[40] concerning the deportation and removal provision in the new IR; and, lastly, ***R(Zhang) v SSHD***,[41] in which Turner J decided that the rule that a person with limited leave to remain in the UK had to leave and re-apply to return and remain as a spouse was likely to be a disproportionate interference with the ***Article 8*** rights of the vast majority of ordinary cases. Turner J said that this could not be cured by an applicant asking the SSHD to exercise a discretion outside the IR.

62. In the light of his review of the case law, Blake J concluded that the new IR on MIR represented a "significant interference with the ability of a couple in a genuine relationship to live together in the UK and bring up a family here if the income of the [UK partner] does not meet the [MIR]". It was therefore an interference with the right to respect to family life within ***Article 8(1)***, so the question was whether that interference was "for a legitimate aim, proportionate to the aim and justified".[42] Blake J then reminded himself that it was for the SSHD to establish that this interference was justified. He reviewed the evidence of Mr Peckover and the material he referred to.

63. I will attempt to summarise Blake J's conclusions. First, he pointed out that refugees to the UK were not voluntary migrants but people who had been forced to quit their country of nationality and reside in the UK as a host state, even though they may have had no previous ties of any sort with it. Secondly, British citizens had a fundamental right of constitutional significance at common law, which was recognised in ***section 1*** of the 1971 Act, to reside in the UK "without let or hindrance". This must include the right to enter one's own country.[43] In his view an inability to reside in the country of nationality "because of the exclusion of a spouse of a genuine relationship is an interference with that right of residence". However,

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[37] ***[2012] 1 AC 621.***
[38] At [97].
[39] ***[2013] EWCA Civ 322***
[40] ***[2013] EWHC (Admin) 720***
[41] ***[2013] EWHC 891 (Admin)***
[42] [86] of Blake J's judgment
[43] Blake J noted that this was reflected in ***Protocol 4 Article 3*** to the ECHR and ***Article 12*** of the International Covenant on Civil and Political Rights.

Blake J accepted that there could be legitimate and proportionate restrictions on the admission of non-EEA partners, including a need for financial self-sufficiency to avoid the future enjoyment of family life being at the expense of the taxpayer.[44] Thirdly, it was clear since the decision of the Supreme Court in ***Quila*** that a rule restricting admission of a spouse (into the UK) is an interference with family life itself, notwithstanding the earlier ECtHR decision in ***Abdulaziz***. The test now is whether the state can justify the exclusion of the spouse as necessary and proportionate in pursuit of a legitimate aim. He noted that "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".[45] Fourthly, it followed that in the case of UK partners who were British citizens, restrictions on the entry of non-EEA spouses to the UK constituted an interference with three rights: the fundamental domestic law right of the British citizen to reside in the UK "without let or hindrance"; the right of that person to marry and found a family; and the right to respect for the family and private life created as a result of the two previous rights.[46] Fifthly, taken overall, the maintenance requirements of Appendix FM amounted to a "considerably more intrusive interference" than the "colossal" interference deriving from the minimum age for marriage for immigrants that was struck down in ***Quila,*** or the basic language test that was challenged unsuccessfully in ***Chapti/Bibi***. In those cases, at least the requirement could be satisfied in time; it might never be in the present case.[47]

64. Blake J concluded, sixthly, that the new measures had both a legitimate aim and that they were rationally connected to the aim. The aim was social integration through having an income above subsistence level. However, this aim was "firmly within the field of immigration policy" as opposed to some other social evil such as forced marriage. The SSHD was entitled to conclude that public concern about immigration and its effect on British society required a fresh approach to maintenance requirements. Moreover, the SSHD was entitled to make a judgment about the need for that aim and the means of achieving it on the basis of the "extensive data" before her without having to demonstrate it with empirical proof. This involved "a political judgment for which [the SSHD] is responsible to Parliament". [48]

65. Seventhly, Blake J concluded that he was not satisfied that any of the claimants had succeeded in demonstrating that any of the rules were unlawfully discriminatory taking ***Articles 8*** and ***14*** together. Whilst the measures would inevitably have a disproportionate impact on migrant families of low income, "that is the group to whom the legitimate policy aim is directed". The judge accepted that the measures would have a more significant impact on women UK partners, those living outside London and UK partners living outside SE England, but those had been recognised in the equality impact assessments undertaken and it was impractical to try and differentiate in the IRs themselves.[49]

66. Eighthly, the maintenance provisions in the new IR were not unlawful for failing to make an over-riding accommodation for the best interests of the children who were

[44] [100] of Blake J's judgment.
[45] [102] of Blake J's judgment.
[46] [103] of Blake J's judgment.
[47] [107]-[109] of Blake J's judgment.
[48] [110]-[111] of Blake J's judgment.
[49] [112]-[114] of Blake J's judgment.

affected by particular immigration decisions. In principle, higher financial requirements for children who would come to the UK with a non-EEA partner were unobjectionable. If there were difficulties in particular cases, they could be dealt with in the context of the specific legal duties owed towards children which could be applied on a case by case basis according to the facts. [50]

67. Blake J then considered the question of whether the new IRs should be quashed or whether they should be left undisturbed leaving individual claims that they violated ***Article 8*** rights to be dealt with on the facts of each case. He accepted two propositions advanced on behalf of the SSHD. First, that the correct test was whether the new IR were *capable* of leading to a result that was compatible with ***Article 8***. If so, they should not be quashed as a whole, even if, secondly, certain of the maintenance requirements would, *inevitably,* result in a violation of ***Article 8*** if applied to a particular individual.

68. However, Blake J concluded that a combination of more than one of five features of the new IR, when applied either to recognised refugees or British citizens was so onerous in effect as to constitute "an unjustified and disproportionate interference with a genuine spousal relationship" and the consequences were so excessive in impact as to be "beyond a reasonable means of giving effect to the legitimate aim".[51] He identified the five features as being: (1) setting the new MIR of the UK partner above the figure of £13,400, which the Migration Advisory Committee identified as the lowest maintenance threshold "under the benefits and net fiscal approach";[52] (2) the requirement of a minimum savings figure of £16,000 before they could be taken into account to rectify any income shortfall; (3) the requirement that the forward income projection period be 30 months, as opposed to 12 months for ability to maintain; (4) the fact that undertakings of third party support, however credible and supported by reliable evidence (eg. of a deed and an ability to fund) were to be disregarded totally. In this connection, Blake J noted that when the Supreme Court considered the issue of third party support towards an adequate maintenance without recourse to public funds in ***Mahad***, problems of predictability of the reliability of the undertakings of others was not regarded as a significant factor and there was no evidence to indicate why it should be now;[53] and (5) the fact that the non-EEA partner's own earning capacity during the first 30 months of residence was to be disregarded.

69. Blake J recognised both the policy and evidential bases on which the figures had been determined. He regarded feature (5) as being the most striking in the new scheme. He characterised the rule that there should be no regard for the future earnings capacity of the non-EEA spouse for the first 30 months of the non-EEA spouse's residence as "both irrational and manifestly disproportionate in its impact on the ability of the spouses to live together".[54] Given that the minimum income figures are based on the needs of a family of two, "it would be logical that the resources of both partners to the relationship should be taken into account to discharge those needs." This would

[50] [115]-[119] of Blake J's judgment.
[51] [123]-[148] of Blake J's judgment.
[52] Blake J relied particularly on the fact that the claimants' experts had shown that of 422 occupations listed in the 2011 UK Earnings Index, 301 were below the £18,600 average annual wage threshold.
[53] [124]-[134] of Blake J's judgment.
[54] [137] of Blake J's judgment.

be particularly useful in the case of a female UK partner and a male non-EEA partner seeking entry into the UK. The SSHD's justification that the prohibition on having regard to the non-EEA partner's income promoted transparency and ease of assessment was too high a price to pay for the infringement of the respect for a family life that was thereby created.[55] The requirement of £18,600 of minimum income of the UK partner without recourse to other sources of funding may, itself, have been within the band of terms that could be imposed to permit *foreign* partners resident in the UK to bring in their spouses and partners, but that measure is disproportionate when applied to British citizens and recognised refugees.[56] Less intrusive responses were available.[57]

70. Blake J dealt lastly with the submission of the SSHD that the terms of the IR and the accompanying policy were sufficiently flexible to allow departures from the rules in "exceptional circumstances". Before him it was emphasised on behalf of the SSHD that although the financial requirements in the new IR were mandatory, there was room for "exceptional circumstances" to be identified outside the rules.

71. The judge concluded that the arrangement whereby the ECO could refer a difficult case to the SSHD for advice on the application of the "exceptional circumstances policy" was not sufficient to render the decision making process lawful and ECHR compatible. He gave nine reasons for this conclusion: (1) the current IR were intended to be exhaustive and conclusive statements of executive policy on all issues, so the court had to examine them to see whether they reflected the appropriate ***Article 8*** balance, rather than leaving the issue to "exiguous discretion to depart from the rules"; (2) it is important that the criteria are set out in rules rather than be left to an unexplained "rare or exceptional circumstances" criterion; (3) there is no doctrine of the "near miss" whereby a narrow failure to meet a requirement of the rules can be cured by indulging in an ***Article 8*** balance.[58] That emphasised the need to examine the rules themselves to see if they were compliant; (4) although "bright line" rules have to be respected, they must not be disproportionate; (5) the ECtHR decision in ***O'Donoghue v UK*** demonstrated that where the terms of policy were 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 would not achieve Convention compatibility; (6) a discretion to depart from the clear terms of a policy does not cure the defects in the rule itself; (7) the delay, cost and uncertainty of the whole process before a non-EEA spouse can gain entry to the UK to live with the UK partner together combine to make the exceptional circumstances test inadequate to secure Convention rights; (8) although a refugee might be able to satisfy the "exceptional circumstances" test, because the focus is on the consequences for a couple, a British citizen UK partner will be told by the executive that he or she must move outside the UK to live with his/her non-EEA spouse; (9) the effect of this will be, in many cases, to send British citizens into exile because of whom they have married or with whom they have formed a lasting partnership. That is both

[55] [138]-[141] of Blake J's judgment.
[56] [145]-[146] of Blake J's judgment.
[57] Blake J gave examples at [147]] but said at [148] that these were intended to identify what "might be a proportionate financial requirement."
[58] Blake J referred to the CA decision in ***Miah and others v SSHD [2013] QB 35.***

unacceptable and "a disproportionately high price to pay for choosing a foreign spouse in an increasingly international world".[59]

72. In the result, Blake J did not strike down the financial requirements in the new IR or make a formal declaration. He simply concluded that there was "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".[60]

VI. The arguments of the parties before the Court of Appeal

73. Ms Giovannetti QC on behalf of the SSHD, submitted that four principal issues arose on the appeals and the respondents' notices. They were: (1) are the MIR compatible with ***Article 8*** of the ECHR; (2) are they compatible with ***Article 14,*** taken with ***Article 8*** of the ECHR; (3) is any part of the new MIR "irrational" in common law terms; and (4) are the MIR unlawful because they are inconsistent with ***section 55*** of the BCIA 2009? Ms Giovannetti accepted that ***Article 8*** was "engaged" and she adopted the judge's analysis at [113]-[114] of the judgment so far as discrimination was concerned. Ms Giovannetti also accepted that the new MIR would have a greater effect on women. In general, Ms Giovannetti submitted, when a court is considering whether or not the SSHD's policy can be challenged in this area, which is dealing with economic and social strategy that relates to immigration control and with a balance of interests in the community, a broad degree of judgment is to be accorded to the state. Ms Giovannetti relied on the statement of general principle made by the ECtHR in ***Stec v United Kingdom***[61] at [51] and, in particular its statement at [52]:

> "The scope of this margin [of appreciation] will vary according to the circumstances of the subject-matter and the background. As a general rule, very weighty considerations would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention. On the other hand, 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".

74. Ms Giovannetti submitted that the same principle applied in relation to executive policy decisions on "economic or social strategy" such as the new MIR. In support of this proposition she referred us to a large number of other authorities, in particular:

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[59] [153] of Blake J's judgment.
[60] [155] of Blake J's judgment.
[61] ***(2006) 43 EHRR 47.*** The case concerned alleged sex discrimination in relation to changes concerning pension and reduced earning allowances, so concerned ***Art 14*** and ***Art 1*** of ***Protocol 1,*** but Ms Giovannetti submitted the statements of the ECtHR were of general application.

AL(Serbia) v SSHD;[62] ***R(RJM) v Work and Pensions Secretary;***[63] ***AM(Somalia) v Entry Clearance Officer***[64]***; R(British Telecommunications PLC) & another v Secretary of State for Business, Innovations & Skills.***[65] The court must scrutinise the matter carefully, but without invading the responsibility of the primary policy maker: ***R (Sinclair Collis Ltd) v Secretary of State for Health***;[66] ***R (Bibi) v SSHD.***[67] "Bright lines" have to be drawn and there is no concept of the "near miss". Ms Giovannetti referred to ***Huang v SSHD***[68] and other cases. If the policy is rationally connected to a legitimate aim then it is not for the court to say that the terms of the policy should have been drawn somewhat differently. That was the nature of the judge's intervention and it was an error of law. Ms Giovannetti distinguished the ***Quila*** case as not being concerned with immigration.

75. Ms Giovannetti submitted that the fundamental error of the judge is set out in [103] and [104] of the judgment. He wrongly aggregated three rights of British citizens, viz. the common law and statutory right to reside in the UK "without let or hindrance", the common law and Convention right to marry and found a family and the Convention right of respect for the family and private life and then said that the new MIR interfered with this tri-partite right in such a way as to require "compelling justification". Upon a correct analysis the first right was personal to the British citizen, the second was not concerned with where the married couple lived and the third was accepted but could not be unilaterally enlarged. Moreover "compelling justification" was the wrong test; it should be the opposite, viz. was the policy within a reasonable margin of executive discretion? The "irrational" argument had focused on the fact that the SSHD decided, as a matter of policy, that job offers in the UK to the non-EEA spouse were not to be taken into account in considering whether the new MIR had been achieved. But the decision was rational; there could easily be abuse, a job offer made at one point may not subsequently be available for one reason or another and the facts indicate that many more immigrants say that they intend to work than actually get work on arrival in the UK.

76. The judge erred further in not taking into account sufficiently the "exceptional circumstances" provisions in the Guidance that had been given to ECOs and he was wrong to conclude that the new IR together with the residual discretion were not capable of achieving compliance with ***Article 8.*** Ms Giovannetti relied on ***Nagre v SSHD***.***[69]*** Provided that the new IR and the "exceptional circumstances" provisions together enabled the SSHD to consider and grant the entry of a non-EEA spouse on ***Article 8*** grounds, despite the fact that he/she did not comply with the new MIR, that was sufficient.

77. As for the respondent's notice argument based on ***section 55*** of the BCIA 2009, that section does not elevate the best interests of the child to the status of a 'trump card'

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[62] ***[2008] 1 WLR 1434 at [8], [10], [48] and [53].***
[63] ***[2009] 1 AC 311 at [54], [56] and [57].***
[64] ***2009 [EWCA] Civ 634 at [26]–[29], [59]–[67].***
[65] ***[2011] EWHC 1021 (Admin) at [207]-[215]***
[66] ***[2012] QB 394 at [213]***
[67] ***[2014] 1 WLR 208 at [30]-[32], [52]***
[68] ***[2007] 2 AC 167 [16]-[20].***
[69] ***[2013] EWHC 720 (Admin) at [35]-[36] per Sales J.***

which prevails over all other considerations.[70] The IR recognise that the best interests of the child are an important consideration (see paragraph GEN.1.1 of appendix FM) although not determinative. To assert, in the abstract, that the financial requirements of the new MIR do not take adequate account of the best interests of children is both incorrect and insufficient. Each case has to be dealt with on the merits, and if it appears ***Article 8*** requires a grant of entry clearance outside the IR, that is a decision to be taken on the application but not in the abstract.

78. In relation to the respondents' notice on the discrimination issue, Ms Giovannetti said that the SSHD accepted the conclusion of the judge at [113] that the new MIR would have a more significant effect on women UK partners because their wage levels were demonstrably lower. But the effect of the MIR on female UK partners was dealt with in detail in the Home Office Equality Statement of 13 June 2012. Insofar as there was indirect discrimination the legal test is clear. The difference in treatment or impact must be "justified". That requires a demonstration that (1) the policy pursues a legitimate aim; and (2) there is a relationship of proportionality between the means employed and the aim sought to be realised;[71] the only issue appeared to be (2).

79. Mr Manjit Gill QC, who appeared on behalf of MM, responded first. He submitted that the judge was correct to reach the conclusion he did for the reasons he gave. However the judge erred in not granting the declaratory relief sought. Mr Gill summarised the main arguments in support of such a declaration as follows: first, the minimum income requirement was irrational, unlawful and actually contrary to the pursuit of the SSHD's stated aims because of the requirements imposed by the MIR, in particular because (a) the stipulated income had to be available for a period of at least 2 ½ years post entry; (b) ECOs are not entitled to take account of savings or other sources of funds, (other than those over £16,000), such as regular financial support from third parties, the earning capacity of the partner seeking entry, and the UK partner's earned income unless established for at least six months, or twelve months in some cases. Secondly, Mr Gill submitted that the new MIR effectively forced British citizens, settled persons, refugees and those granted Humanitarian Protection (HP) into "exile", by having to leave the UK, which was the country in which they were entitled under both domestic and international law to pursue their basic and fundamental human rights of living, marrying and having a family and of exercising all the benefits associated with nationality. Thirdly, the new MIR was irrational or contrary to ***Article 8*** requirements because they failed to provide for (a) consideration of the best interests of children, in particular as required by ***section 55*** of the BCIA 2009, (b) consideration of other reasons which require the admission of the non-EEA partner or children to the UK, and (c) consideration of whether there are serious obstacles to the enjoyment of family life outside the UK. Fourthly, Mr Gill submitted that the application of the new MIR led to discriminatory consequences based on race, ethnic, cultural and national origins, gender and status, in particular the status of being a refugee or a person granted HP and having only a limited leave to remain. Such discriminatory consequences required "the most weighty justification" which there was not.

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[70] Miss Giovannetti relied on statements of Sales J in ***R (on the application of Shueb Sheikh) v SSHD [2011] EWHC 3390 (Admin).***

[71] Ms Giovannetti relied on ***R(JS) v Sec of State for Work and Pensions [2013] EWHC 3350 at [76] per Elias LJ.***

80. Fifthly, given the admitted interference with ***Article 8*** rights, together with ***Article 12*** rights and the discriminatory consequences of the new MIR, which the SSHD accepted, the burden was on the SSHD to demonstrate that the interference was both justified and proportionate. In Mr Gill's submission the SSHD had failed to discharge the burden of showing that the new MIR was necessary to achieve the aim that was stated; in fact it did not achieve even the intended aim. The SSHD had not demonstrated that less intrusive measures had been considered and rejected as being insufficient to achieve the intended aim.

81. In response to the submissions of Ms Giovannetti, Mr Gill submitted that ***Stec v UK*** did not set out the correct test for judicial intervention; the correct test was that set out in ***Quila***. Mr Gill also referred to ***Connors v UK.***[72] Thus the margin for judgment is much more constrained when the fundamental right of living together in a family unit is engaged. Given the fundamental rights involved and the stated aims of the SSHD ie. (1) to simplify the decision making process for ECOs; (2) to protect the public purse; (3) to encourage integration of migrants which were both vague and general, the margin was narrowed. It was further narrowed when, as admitted, the measure being considered gives rise to discrimination. The new MIR had not been the subject of full parliamentary scrutiny or "democratic approval". The judge should have found that the preclusion of reliance on third party support was irrational at common law: see the ***Mahad case.***[73]

82. On the issue of "exceptional consideration" outside the IR, the rules concerning the new MIR were deficient in making no reference to or provision for exceptions.[74] The new MIR are also deficient in not permitting a true assessment of the true financial position of the UK partner and the non-EEA spouse to see if their circumstances would be a threat to the identified aims, or even if they did, whether there are "exceptional circumstances" to permit entry. Moreover, the evidence is that ECOs do not exercise any discretion.[75] The Guidance is incompatible with ***Article 8.***

83. Mr Richard Drabble QC, on behalf of Master AF, the nephew of MM, submitted that the new MIR could not be relied on to produce a determination which was consistent with ***Article 8*** or with ***section 55*** of the BCIA 2009 where children were concerned in family reunion cases affected by the amended IR; or cases where those with refugee status or who have been granted HP apply to be joined by a non-EEA partner. The judge should have so held and granted Master AF specific declaratory relief. The evidence (including that of Ms Sonel Mehta) shows that decision makers applying the new MIR were not considering individual facts or applying their minds to achieving a Convention compliant balance and were not considering the best interests of affected children. The Guidance is contrary to ***section 55*** because it requires the decision maker to address the MIR as the starting point and if it is not met, then to apply his mind to search for undefined "exceptional circumstances". The consequence, for children of parents where one is a UK partner and one is a non-

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[72] ***(2005) 40 EHRR 9 at [81]-[82].***
[73] ***[2010] 1 WLR 48***
[74] Mr Gill contrasted this with the position in the case of (i) English language requirements: ***Bibi et al v SSHD [2014] 1 WLR 208;*** (ii) in-country applications for leave to remain: ***Nagre v SSHD [2013] EWHC 720;*** (iii) the deportation of "foreign criminals": ***MF (Nigeria) v SSHD [2014] 1 WLR 544.***
[75] Mr Gill invited the court to consider some fresh evidence on this from Ms Sonel Mehta, dated 21 Feb 2014, on behalf of BritCits, in which she said that she had never encountered an instance where an ECO had exercised discretion or considered ***Art 8 ECHR*** in this context.

EEA partner, is that the child is compelled to live in a one-parent household (in the UK) where the parent has to work long hours to try and meet the new MIR.

84. In relation to refugees and persons granted humanitarian protection, as a matter of law the margin of judgment given to the policy maker is narrow. The 30 month gap before the income of the non-EEA partner can be taken into account is particularly onerous. Nor can deficiencies in the new IR be remedied by the possibility of decisions outside the Rules that allow consideration of ***Article 8***.

85. On behalf of Ms Javed and Mr Majid, Mr de Mello first concentrated on the indirect discrimination issue. Ms Javed is a member of a particular group, viz. a female of Pakistani origin who had long been resident in the UK. The new MIR had an admittedly discriminatory impact on particular groups of UK partners, especially those who are women, who are from Pakistani, Bangladeshi and Afghan backgrounds and those that are younger. The SSHD had provided no proper justification nor reasons for the assertion that the new rules were considered "proportionate". If a careful assessment has not been done then it is difficult for the executive to rely on a "margin of judgment" when subsequently claiming justification: ***R (Morris) v Westminster Council***.[76]

86. Mr Majid's application for permission to cross-appeal deals with a different issue. This challenges the new rules relating to an application to enter or remain in the UK by a person exercising rights of access to a child resident in the UK. The requirements in paragraph E-LTRPT 2.3(b)(ii) and (iii) of Appendix FM of the new IR are not directly concerned with the income requirement. They require that when there is a minor child resident in the UK, the parent or carer with whom the child normally lives must not (i) be the partner of the non-EEA spouse applicant and that (ii) the non-EEA applicant must ***not*** be eligible to apply for leave to remain as a partner under that Appendix. These provisions were, therefore, effectively intended to prevent evasion of the new spouse/financial provision MIR. Mr de Mello submitted that the difference in the financial requirements between this rule and the "spouse" rules is irrational. Furthermore, the requirements appear to have been drafted without regard for the interests of the child, either in accordance with ***section 55*** of the BCIA 2009 or ***Article 8***. If E-LTRPT 2.3(b)(ii) and (iii) applies, the migrant mother need only be maintained "adequately", thus producing a difference in the income requirements that is not justifiable. Moreover, the effect of E-LTRPT 2.3 (b)(ii) and (iii) is discriminatory and also not conducive to integration, but rather separation between child and parent; they could not be justified.

87. After argument had been concluded on 5 March 2014, Treacy LJ noted a new decision of the Upper Tribunal in ***Secretary of State for the Home Department v Atif Shahzad***.[77] That case concerned a man whose application to remain as a Tier 4 (general) student had been refused and he relied on ***Article 8*** grounds to continue his stay. In the course of a very elaborate judgment the UT discussed the different approaches applicable when, first, a specific area of the IR sets out not only the rules that have to be complied with by a potential immigrant, but also attempts to codify how that applicant's ***Article 8*** rights should be considered in that context (ie. where

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[76] ***[2006] 1 WLR 505 at [49];*** reliance also placed on ***R (Elias) v Defence Secretary [2006] 1 WLR 3212 at [12] and [273=4].***

[77] ***[2014] UKUT 85 (IAC).***

there is a "complete code"), and, secondly, the specific area of the IR does not do so. The UT considered this court's decision in ***MF (Nigeria) v SSHD***[78] and that of Sales J in ***R(Nagre) v SSHD***.[79] The decision seemed potentially relevant to the arguments about the Guidance and "exceptional circumstances". We therefore called for further written submissions on the effect, if any, of ***Shahzad***, in particular the remarks of the Upper Tribunal at [31].

88. Ms Giovannetti for the SSHD submitted that ***Shahzad*** correctly stated the law as set out in the previous Upper Tribunal decision in ***Gulshan***[80] and in ***Nagre***. The respondents submitted that the summary of the law in ***Shahzad*** was incorrect and so was that in ***Gulshan***.

89. There were written submissions from the Sheffield Asian Community Action Group ("ACAG") in support of the respondents, arguing that the new MIR violated the "right to marry". The new MIR were therefore unlawful and an abuse of power.

VII. The issues for consideration and decision by this court.

90. In my view the issues for consideration and decision by this court are:

i) Did the judge correctly characterise the nature of the new MIR and their aims?

ii) What are the legal principles by which the court should consider the question of the compatibility of the new MIR with the ***Article 8*** rights of UK partners (and other relevant persons)?

iii) Was the judge's analysis and conclusion that the new MIR are, in principle, incapable of being compatible with ***Article 8*** rights of UK partners (and others if relevant) correct?

iv) Is the provision in the new MIR precluding reliance on third party funding "irrational" under the common law?

v) On the basis that the new MIR did result in indirect discrimination within ***Article 14***, was the judge correct to hold that such discrimination was "justified"?

vi) Is there a separate ground of objection to the new MIR, based on ***section 55*** of the 2009 Act?

vii) What is the relevance of the "exceptional circumstances" provisions in the draft Guidance and the Immigration Directorate Instructions?

viii) The application for permission to cross-appeal by Mr Majid.

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[78] ***[2014] 1 WLR 545***
[79] ***[2013] EWHC 720 (Admin)*** in particular at [29]-[31].
[80] ***Gulshan (Article 8-new Rules-correct approach) [2013] UKUT 640 (IAC).***

VIII. Issue one: did the judge correctly characterise the nature of the new MIR and their aims?

91. The judge was obviously correct to state that new MIR, as a part of the new IR effected by the Statement of Changes laid before Parliament on 13 June 2012 pursuant to ***section 3(2)*** of the 1971 Act, constitute the Secretary of State's policy on a particular financial requirement that has to be fulfilled before a non-EEA partner of a UK partner can receive entry clearance. They are her conclusion on how the balance is to be struck as far as that requirement is concerned. The policy decision was made by the SSHD as a member of the executive, but the executive is in place as a result of a proper democratic process. As Mr Peckover makes clear in his first witness statement, the new MIR are a part of a much wider reform programme of the immigration system. Moreover, the new MIR, having been debated to a limited extent in both Houses of Parliament, do have some degree of specific democratic endorsement in addition to the fact that they are the policy of the elected government of the day.

92. The judge was also correct to state, at [110], that the Secretary of State was entitled to conclude that the economic and social welfare of the whole community in the UK would be promoted by measures that require spouses/partners to be maintained at a level that is higher than subsistence level, which had been the case under the previous IR. The judge was also entitled to conclude, at [110], that the provision of an income above subsistence levels can be an important contribution to integration and also give the non-EEA spouse sufficient resources to have the opportunity to develop both skills and community ties. The conclusion of the SSHD on this issue was based on research and extensive data that was before her and her officials. Admittedly there was no "empirical proof" that higher income levels would result in better integration, but the law does not require that there should be.[81] Mr Peckover's evidence also establishes that considerable work was done on the economic impact of non-EEA migrants and the cost to the public purse. Therefore the judge was justified in concluding that higher income requirements had, as their legitimate aim: (i) the reduction of expense on the public purse and (ii) a better opportunity for greater integration of non-EEA spouses within British society.

IX. Issue Two: What are the legal principles by which the court should consider the question of the compatibility of the new MIR with the *Article 8* rights of UK partners (and other relevant persons)?

93. The object of the respondents' judicial review proceedings is to strike down the new MIR altogether as being incompatible with ***Articles 8, 12*** and ***14*** of the ECHR, or as being irrational at common law. They are therefore attempting to mount a "pre-emptive strike" upon the policy of the new MIR. There cannot be any attack on whether a particular decision to refuse to give entry clearance to a non- EEA spouse is unlawful as being disproportionate within ***Article 8(2)*** of the ECHR or discriminatory and unjustified under ***Article 14,*** because none of the non-EEA partners of the claimants have yet made entry requests or been refused entry on the ground of being unable to meet the new MIR. The facts of the three cases are to be assumed as correct, thus providing the framework in which to test the lawfulness of the new MIR.

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[81] See ***R(Bibi) v SSHD [2014] 1 WLR 208 at [30] per Maurice Kay LJ and [52] per Toulson LJ.*** Sir David Keene dissented.

It is therefore fundamental to decide on what basis, if any, such a "pre-emptive" attack can be mounted.

94. It is accepted that the challenge can be made on both "common law" grounds and under ***section 6(1)*** of the HRA 1998. As for the former, we were referred to the decision of Simon Brown J in ***R v Immigration Appeal Tribunal ex parte Manshoora Begum***,[82] given in 1986, therefore long before the HRA came into force. The claim was for judicial review of an IAT decision to refuse entry to a 48 year old lady as the dependent relative of her brother, a UK citizen, under paragraph 52 of Immigration Rules HC 169. This provided (amongst other things) that it should not apply to a dependent relative under the age of 65 except "where they are living alone in the most exceptional compassionate circumstances, including having a standard of living substantially below that of their own country". The first question was whether, on the correct construction of the rule, account had to be taken of support given by the UK relative in deciding whether the dependent's standard of living was substantially below that of their own country. Having dealt with that issue, (on which different IATs had disagreed) and held that account did have to be taken of that support, Simon Brown J went on to consider whether the paragraph was, as he phrased it, "invalid for unreasonableness".[83] He referred to the celebrated judgment of Lord Russell CJ in ***Kruse v Johnson***[84] who had identified the ways in which a by-law could be struck down as being *ultra vires*. In modern terms Lord Russell said that the by-law could be struck down if discriminatory; manifestly unjust; made in bad faith or if it "involved such oppressive or gratuitous interference with the right of those subject to them as could find no justification in the minds of reasonable men". (It might be commented that this summary says it all). Simon Brown J concluded that the effect of the paragraph relating to relatives under 65 was "unreasonable" and so invalid, with the consequence that the offending wording had to be severed from the rest of the rule.

95. This decision is still good law. It must be the duty of the SSHD to promulgate IRs that are not "unreasonable". An IR can be challenged at common law for being "unreasonable" in the sense described by Lord Russell in ***Kruse v Johnson***.

96. By ***section 6(1)*** of the HRA 1998 it is unlawful for a "public authority" to act in a way that is incompatible with a Convention right. The SSHD, being a person whose functions as such are of a public nature, must therefore operate executive policy on immigration in a way that is "compatible" with Convention rights. What precisely is that duty in the context of the IRs which are neither primary nor secondary legislation but only a statement of executive policy in relation to immigration? In particular, does the duty imposed by ***section 6(1)*** mean that the Secretary of State is obliged to produce IRs that themselves guarantee compliance with the Convention rights of individuals that are subject to them, so that the individual's Convention rights are systematically protected by individual IRs? Or is the duty such that even if a particular IR is not itself "Convention compliant", so long as there is a mechanism, either within the IRs or through the ability to challenge a particular decision particularly in a tribunal or court, whereby the Secretary of State always ultimately protects an individual applicant's Convention rights (either herself or through

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[82] ***[1986] Imm AR 385.***
[83] Page 393 of the report.
[84] ***[1893] 2 QB 91***

enforcement of the rights by appeals to the tribunals/courts), that is sufficient? In effect, the respondents argue for the first and the appellant argues for the second of these alternatives.

97. This issue must primarily be a domestic law question, because it concerns the way in which the ***section 6(1)*** duty is to be fulfilled. However, I accept, first, that in deciding on whether a provision comes within the scope of the ***Article 8(1)*** obligation and within the way ***Article 8(2)*** is to be operated, a court must take account of ECtHR decisions. I also accept, of course, that if the Secretary of State's duty is of the second type identified above, then the Convention will come in again, through ***section 6*** and also because of the right to have appropriate access to a court under ***Article 6*** in any challenge to a decision. The question of the nature of the Secretary of State's duty is hardly new. However, we were shown few cases where the issue has been dealt with in circumstances such as the present, viz. where it is the IRs themselves that are being challenged as being unlawful in principle because they are, of themselves, contrary to ***Article 8*** and/or ***Article 12*** and/or ***14***. This is to be contrasted with the usual situation where an individual decision taken on behalf of the Secretary of State is being challenged as being unlawful because that decision is contrary to a particular individual's Convention rights.

98. In ***Huang***[85] neither of the applicants qualified for the grant of leave to remain in the UK under the relevant IR. They had appealed the refusal to allow them to remain as being unlawful because they said the refusal was contrary to their ***Article 8*** rights. Lord Bingham of Cornhill gave the opinion of the committee of the House of Lords that heard the appeal. He said, at [6], that the relevant IR had a "rational basis" and that it could not be stigmatised as being either "arbitrary" or "objectionable". He did not elaborate on those tests, but those expressions are reminiscent of ***Kruse v Johnson***. In my view they give a strong guide. If in relation to ***Article 8*** rights, a new IR is irrational, or arbitrary or "objectionable", it can be challenged.

99. However, Lord Bingham went on to say in the same paragraph that the applicants' failure to qualify under the IR was "the point at which to begin, not end, consideration of the claim under ***Article 8***. The terms of the [relevant IRs] are relevant to that consideration, but they are not determinative". That might appear to indicate that the Secretary of State is not under a duty to produce IRs that are, themselves, guarantors of ***Article 8*** rights. That view is reinforced by Lord Bingham's statement at [17]. Having referred to the statutory scheme for appeals from decisions of immigration officials, Lord Bingham said that: "it is a premise of the statutory scheme enacted by Parliament that an applicant may fail to qualify under the [relevant IRs] yet may have a valid claim by virtue of ***Article 8***".

100. At [18], having pointed out that the ECtHR had repeatedly recognised the general right of states to control the entry and residence of non-nationals and "repeatedly acknowledged that the Convention confers no right on individuals or families to choose where they prefer to live", Lord Bingham summarised what the approach of the courts must be to individual cases where it is said that an ***Article 8*** right is infringed by virtue of a particular decision. Paragraph [18] continues:

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[85] ***[2007] 2 AC 167*** .

> "In most cases where the applicants complain of a violation of their Article 8 rights, in a case where the impugned decision is authorised by law for a legitimate object and the interference (or lack of respect) is of sufficient seriousness to engage the operation of Article 8**,** the crucial question is likely to be whether the interference (or lack of respect) complained of is proportionate to the legitimate end sought to be achieved. Proportionality is a subject of such importance as to require separate treatment".

101. In the two subsequent paragraphs, Lord Bingham analyses how proportionality should be tackled by an "appellate immigration authority". But the statements from [6], [17] and [18] give some guidance on how an IR itself is to be judged. If a particular IR lacks a "rational basis" or is "arbitrary" it can be challenged. The test of "objectionable" is not elaborated in [6], but I suggest that Lord Bingham must have been thinking in Convention terms, given the articulation of the further tests set out in [18]. As I read the passage I have quoted above, Lord Bingham is saying that the individual decision will have been be authorised "by law", i.e. by the relevant IR, but that IR itself must have a "legitimate object". What is less clear is whether there is scope for examining whether the relevant IR itself is a disproportionate interference with ***Article 8*** rights before considering the individual case and proportionality. It is apparent from [19] and [20] that Lord Bingham considered that, usually, the "proportionality" exercise had to be conducted by reference to the facts of individual cases and is not to be judged in the abstract. But it could be argued that if a particular IR was *incapable* of being applied in any particular case in a proportionate manner, then the particular IR itself could be struck down as unlawful.

102. The extent to which a statute, or regulations under that statute or the Secretary of State's policy document issued in connection with the statute and the regulations had to be consistent with the ECHR, in that case ***Article 12,*** was considered by the House of Lords in ***R (Baiai and another) v Secretary of State for the Home Department (No 2)*** and conjoined appeals.[86] The case concerned statutory, regulatory and policy rules on marriage by those who were subject to immigration controls and who wished to be married in the UK other than according to the rites of the Church of England. The stated aim of the scheme was to prevent "marriages of convenience". ***Section 19(3)*** of the ***Asylum and Immigration (Treatment of Claimants etc) Act 2004***, required that a person subject to immigration controls had to have both entry clearance for the specific purpose of marriage and the written permission of the Secretary of State before the marriage (not according to Anglican rites) could take place. None of the applicants had fulfilled those requirements. The regulations, called the ***Immigration (Procedure for Marriage) Regulations 2005*** provided that applicants had to provide certain information to the Secretary of State before the permission to marry would be given. The applicant also had to pay a fee of £295 (or £590 for a couple both subject to immigration controls) to the Secretary of State for the permission to marry. There was no power in the regulations to waive or reduce the fee. The policy, promulgated in the Immigration Directorate's Instructions, stipulated that permission to marry would be denied to all those who did not have leave to enter the UK or whose leave was for less than a certain period.

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[86] ***[2009] 1 AC 287.***

103. The issue before the House of Lords was whether the provision of ***section 19(3)*** of the Act, the 2005 Regulations or the policy were contrary to the rights guaranteed by ***Article 12*** that "men and women of marriagable age have the right to marry and to found a family, according to the national laws governing the exercise of this right". Lord Bingham gave the principal speech. He said that the provisions of ***section 19(3)*** were (apart from discriminatory features concerning non-Anglican marriages which were to be removed anyway) "legally unobjectionable". [87] The regulations were equally unobjectionable apart from the provision for the fixed fee, which a needy applicant could not afford and so the rule might thereby impair the essence of the right to marry.[88] But the policy in the Instructions which required that certain conditions as to leave to enter or remain be fulfilled before the Secretary of State would give permission to marry was objectionable, because it had nothing to do with whether the proposed marriage was genuine or a "marriage of convenience." The scheme (subject to the discretionary compassionate exception) imposed a "blanket prohibition on the right to marry by all in the specified categories, irrespective of whether their proposed marriages are marriages of convenience …or not". That was a disproportionate interference with the right to marry as set out in ***Article 12***.[89] Baroness Hale of Richmond, who said her reasons were a "footnote" to those given by Lord Bingham, described the scheme as an "arbitrary and unjust" interference with the right to marry, because of its discriminatory nature in respect of non-Anglican marriages and the pre-requisite that there be leave to enter for a certain minimum period.[90]

104. This decision is therefore helpful in the search to ascertain the principle on which a statute, regulation or policy will be struck down as being contrary to a Convention right. In my view, the effect of Lord Bingham and Baroness Hale's speeches is that provisions will be struck down if the policy, on its face, constitutes a disproportionate interference with the Convention right, or constitutes an "arbitrary or unjust" interference.

105. As already noted, the matter went to the ECtHR as ***O'Donoghue v UK***[91] which found the requirement to obtain prior approval of the SSHD objectionable. Significantly for the present appeal, the ECtHR rejected a submission of the UK government that the existence of a discretion by the Secretary of State to waive the requirement on compassionate grounds should save the scheme. The ECtHR said that this discretion did not remove the "impairment of the essence of the right" to marry, because the discretion was in the form of an exceptional procedure, which was based entirely on the personal circumstances of an applicant, not the genuineness of the proposed marriage.[92] The ECtHR also held that the level of the fee could impair the essence of the right to marry, even if the fee could later be refunded.[93] The scheme was later scrapped.

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[87] At [29]
[88] At [30]
[89] At [31].
[90] At [44]
[91] ***(2011) 53 EHRR 1***
[92] See [89] of the judgment of the ECtHR.
[93] See [90] of the judgment of the ECtHR.

106. The issue of whether a particular IR had itself to guarantee compliance with the Convention was considered by the Court of Appeal in ***AM(Ethiopia) v SSHD***.[94] As I have already noted, this case is very important to the outcome of this appeal. ***AM(Ethiopia)*** was not an attack on an IR in the abstract but concerned five applicants who had been refused entry to the UK to join family members already settled here on the ground that they could not satisfy the IR requirement that they be able to be accommodated and maintained in the UK without recourse to public funds. The issue, as I have stated above, was whether, on the correct construction of the IR, in deciding if that requirement had been fulfilled, account could be taken of maintenance provided by someone other than the UK sponsor. The Court of Appeal answered the question "no", but that was reversed in the Supreme Court.

107. For present purposes what matters are the statements of Laws LJ at [37] – [39] of his judgment. First, Laws LJ quoted from [6] of Lord Bingham's speech in ***Huang***. Then, in [38], Laws LJ drew from ***Huang*** a general principle of construction of Immigration Rules. In essence, Laws LJ concluded first, that the IR's meaning and purpose were to be derived solely from their wording and there was no basis for searching for some further, extraneous, "purposive" or meta-construction, because the IRs' only purpose was 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".[95] Secondly, relying on Lord Bingham's statements at [6] and [17] of ***Huang,*** Laws LJ said that although a potential immigrant's rights under ***Article 8*** of the ECHR must be protected by both the Secretary of State and the courts, this protection will be "whether or not that is done through the medium of the Immigration Rules". In the opinion of Laws LJ it therefore followed that the IRs "are not of themselves required to guarantee compliance with [***Article 8***]".[96] Carnwath LJ said that the third party support issue had to be decided on the interpretation of the relevant rules, which were to be given their ordinary meaning, without distortion by reference to any supposed over-arching objective, such as the promotion of family life.[97] Pill LJ agreed with Laws LJ's conclusion that the IRs are not themselves required to guarantee compliance with ***Article 8***. The SSHD was bound by the ECHR whether or not there are appropriate provisions in the IR. However, Pill LJ considered that it was "highly desirable" that the IRs be framed in such a way that they complied with Convention rights and should be drafted accordingly. He said: "Where Rules purport to cover particular situations, it does no service to the coherence of a legal system if a claimant has to go outside the Rules to assert a Convention right arising from the situation".[98]

108. In the Supreme Court[99] Lord Brown of Eaton-under-Heywood gave the first judgment. In relation to how IRs are to be construed, Lord Brown said[100] that they were not to be construed "with all the strictness applicable to the construction of a statute or statutory instrument", but "sensibly, according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy". At [29] –[31] Lord Brown noted the arguments that

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[94] ***[2008] EWCA Civ 1082.***
[95] See [38] of Laws LJ's judgment.
[96] See [39] of Laws LJ's judgment.
[97] See [101]. Carnwath LJ dissented in part but not in the result.
[98] See [117] and [119] of Pill LJ's judgment.
[99] ***[2010] 1 WLR 48***
[100] At [10]

Laws LJ had dealt with at [38] and [39] of his judgment. He said that because the Supreme Court had decided that (on the construction of the Rules) third party financial support could be taken into account, it was unnecessary to deal with the points Laws LJ had made.[101]

109. The question of whether the IRs should be construed having regard to the Convention was next considered by the Court of Appeal in ***Pankina v SSHD***.[102] The various applicants in that appeal were graduates who sought leave to remain in the UK to work. One IR requirement was that the applicant had to be able to demonstrate that he had £800 and he also had to provide certain specified documents which were identified in "Guidance". The applicants could not comply with all the requirements. In the Court of Appeal, there were two key issues. The first and constitutionally significant issue was whether the changes required Parliamentary approval to be effective; the second was whether, when applying the IR and the policy, the Secretary of State had to have regard to ***Article 8*** of the ECHR and if so how. Only the second issue is relevant here. The rules were not being attacked in the abstract as being unlawful contrary to ***Article 8***. ***AM(Ethiopia)*** was cited to the court but not referred to in the judgment of Sedley LJ, with whom Rimer and Sullivan LJJ agreed.

110. Counsel for the Secretary of State (Ms Giovannetti) argued that the scheme set out in the IR was not primarily intended to protect or benefit applicants but to operate in the public interest. A mandatory requirement was the simplest system. Sedley LJ appears to have rejected that argument. He concluded, at [45], that there was "no escape" from the proposition that when exercising her powers, "whether within or outside the rules of practice for the time being in force", the SSHD "must have regard to and give effect to the applicants' Convention rights". That meant evaluating the extent and quality of the family and private life of the applicants in the UK. At [46], Sedley LJ said that this exercise would involve the decision maker (or court) having regard to the "significance of the criteria by which their eligibility has been gauged and found wanting". The Home Office had to use common sense. "If the Home Secretary wishes the rules to be black letter law, she needs to achieve this by an established legislative route". So Sedley LJ concluded, at [47]:

> "So long as the rules are what the Immigration Act 1971 says they are, they must in my judgment be operated in conformity with section 6 of the Human Rights Act 1998".

At [51]-[53] Sedley LJ dealt with the applicant who had £800. It is clear that he considered that, quite apart from the issue of whether the applicant had conformed with the relevant IR, it was necessary for the ***Article 8*** claim of the applicant to be decided.

111. Sedley LJ's analysis suggests that the relevant IR itself does not have systematically to protect the applicant's ***Article 8*** rights and that the relevant IR itself is not required to guarantee compliance with the Article. It is the exercise of the powers that

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[101] See [30] and [31]. Lords Hope, Rodger and Collins JJSC agreed with Lord Brown. Lord Kerr gave a concurring judgment but did not deal with this point.

[102] ***[2011] QB 376***

counts.[103] However, in ***R(Syed) v SSHD***[104] it was argued that what Laws LJ had said at [38]-[39] of ***AM(Ethiopia)*** was inconsistent with what Sedley LJ had said at [45]-[46] of ***Pankina***. In ***Syed*** one applicant had failed to apply in time to renew his limited leave to remain as a student; the second had not fulfilled the requirements of the IR as to financial independence so as to remain as a parent or dependant relative of a person settled in the UK. In neither case was the relevant IR itself attacked as unlawful as being inherently incompatible with ***Article 8***.

112. Sir Anthony May, President of the Queen's Bench Division, gave the judgment of the court.[105] Sir Anthony analysed ***AM(Ethiopia)*** and ***Pankina*** and concluded that Sedley LJ's judgment in ***Pankina*** was not inconsistent with Laws LJ's statements at [38]-[39] of ***AM(Ethiopia)***. Sir Anthony summed up the position as follows:

> "*Pankina* does not decide, as Mr Malik contends, that the Immigration Rules are to be *construed* so as to be compliant with Article 8 of the Convention; that is that their wording is to be modulated so as to be compliant. They are to be construed and applied according to their natural and ordinary meaning. In applying the *policy* of the rules, Article 8 may have an application – *Pankina* paragraphs 23 and 47. In applying the rules, the Secretary of State must respect Convention rights whether or not the rules explicitly introduce them – *Pankina* Paragraph 44. In exercising her powers, whether *within or outside* the rules of practice, the Secretary of State must have regard and give effect to applicants' convention rights – *Pankina* paragraph 45. 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 – *AM (Ethiopia)* paragraph 39. The actual decision in *Pankina* rejected the second applicant's appeal by deciding her Article 8 claim on a free-standing basis apart from the rules, which she failed to satisfy."

113. ***R (Aguilar Quila and another) v Secretary of State for the Home Department***[106] (***Quila)*** concerned two young UK citizens who had each consensually married non-EEA spouses when all four were under the age of 21. The UK citizens and their spouses challenged a new IR that prohibited the grant of an entry visa for marriage (a "marriage visa") to a non- EEA spouse of a person lawfully present in the UK if either person was under the age of 21. The IR also provided for a discretionary grant of permission where there were "exceptional, compassionate circumstances" which would justify it.[107] The purpose of the IR, which had amended an earlier rule setting the permissible age for entry of future spouses at 18, was said to be to deter forced marriages; it was not to control immigration. The rule was based on research which indicated that about one third of all forced marriages involved parties between 18 and

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[103] I have deliberately used the wording of Laws LJ at [39] of ***AM(Ethiopia)*** in characterising the argument of counsel in that case (Mr Gill QC) to the contrary.
[104] ***[2011] EWCA Civ 1059***
[105] The other members were Thomas and Elias LJJ.
[106] ***[2012] 1 AC 621***
[107] See [7] of Lord Wilson's judgment in the Supreme Court.

21, although the total percentage of forced marriages was very low. The two couples had not entered forced marriages. The challenge failed in the Administrative Court, but succeeded in the Court of Appeal and in the Supreme Court.

114. In the Court of Appeal Sedley LJ concluded that the relevant IR was a "direct interference" with a common law and Convention right to marry and "to make a reality of [that right] by living together". For a state to "make an exile of one of the spouses the price of exercising the right to marry and embark on family life requires powerful justification" which, he concluded, was not present in that case.[108] The Court of Appeal declared the refusal to grant visas unlawful.

115. In the Supreme Court the leading judgment was given by Lord Wilson JSC. He considered the issue of whether, in principle, the new IR was lawful. He identified the key issue as being "the nexus between entry into a forced marriage and the increase in the minimum ages requisite for the grant of [an entry visa to the non-EEA spouse of a person settled in the UK] " and thus whether the new IR was an unlawful interference with the parties' ***Article 8*** rights.[109] He said that, "unconstrained by authority", the refusal to grant "marriage visas" to the two young non-EEA spouses imposed a choice on them (ie. living apart or having to live together outside the UK) which was, on the face of things, (as the marriages were unforced), a "colossal interference with the rights of the claimants to respect for their family life however exiguous the latter might be".[110] Lord Wilson then analysed five ECtHR decisions, starting with ***Abdulaziz,***[111] which had dealt with refusals by states to permit entry of non-national spouses or children into the state of which their partners were citizens. The refusals had been challenged as being (amongst other things) an unjustifiable breach of the spouse's (or child's) ***Article 8*** rights. In addition to ***Abdulaziz,*** Lord Wilson considered ***Gül v Switzerland,***[112] ***Boultif v Switzerland,***[113] ***Tuquabo-Tekle v The Netherlands***[114] and ***Rodrigues da Silva, Hoogkamer v The Netherlands.***[115] He said that the difficulty for the claimants in ***Quila*** lay with the actual *decision* of the majority of the ECtHR judges in ***Abdulaziz.*** They had held that there was no interference by the UK with the ***Article 8*** rights (considered alone) of the three women by refusing to allow their husbands to join them in the UK. Lord Wilson regarded the proposition expounded by the majority, viz. that ***Article 8*** imposed no general obligation upon a state to facilitate the choice made by a married couple to reside in that state as being in itself "unexceptional". However, the key question was more whether an obstruction of that choice could, on a "fact specific investigation", be characterised as unjustifiable under ***Article 8(2).***[116] Lord Wilson concluded that the Supreme Court should "decline to follow" the rationale of ***Abdulaziz*** that ***Article 8*** was not "engaged" by the IR under discussion. He justified not following ***Abdulaziz*** on the ground that it was an "old decision", that the distinction drawn in it between "positive" and "negative" obligations of the state had since been recognised as an

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[108] See [48] of Sedley LJ's judgment. Pitchford LJ agreed with Sedley LJ's reasoning. Gross LJ agreed in the result.
[109] All the parties were married so there was no interference with their ***Article 12*** right to marry.
[110] See [32] of Lod Wilson's judgment.
[111] ***(1985) 7 EHRR 471***
[112] ***(1996) 22 EHRR 93.***
[113] ***(2001) 33 EHRR 1179.***
[114] ***[2006] 1 FLR 788***
[115] ***(2006) 44 EHRR 729.***
[116] See [42] of the judgment of Lord Wilson.

"elusive distinction" and that subsequent ECtHR cases had accepted that the concept of interference with family life was broader than it was believed to be in 1985. Therefore, the refusal of the Secretary of State to permit the non-EEA spouses to reside in the UK with their UK spouses must be an interference with the parties' ***Article 8(1)*** rights. Accordingly, "the only sensible enquiry can be into whether the refusals were justified" under ***Article 8(2).***[117]

116. Lord Wilson stated that to decide that question, each of the four tests set out by Lord Bingham in ***Huang***[118] at [19] had to be considered and answered.[119] Having analysed the evidence, Lord Wilson concluded that even if the Secretary of State established that the legislative objective of the IR was sufficiently important to justify limiting the fundamental right to family life in the way it did and that the relevant rules were rationally connected to that objective, on the evidence before them the Secretary of State had failed to demonstrate that the rules were "no more than necessary to accomplish her objective" or that they "struck a fair balance between the rights of the parties to unforced marriages and the interests of the community in preventing forced marriages", so that the interference with the rights of the claimants was not justified. Lord Wilson did not deal expressly with the question of whether the lawfulness of the IR was saved by the provision that permitted the grant of a "marriage visa" outside the ambit of the rules in "exceptional, compassionate circumstances", which, in theory, could be applied to cases of unforced marriages where the parties were under 21. However, he must have concluded that the "exceptional" provision did not save the IR. I think this is clear from the last paragraph of his judgment where he states:

> "By refusing to grant marriage visas to the claimants the Secretary of State infringed their rights under ***Article 8***….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 [the scheme's] future operation she faces an unenviable decision".

117. In other words, because the "exceptional, compassionate circumstances" provision did not envisage the grant of a "marriage visa" where it was clear the marriage was unforced, that provision was not specifically directed to the objective that the new IR was intended to deal with, viz. the problem of forced marriages. So that provision did not even answer the second of Lord Bingham's ***Huang*** questions. In this respect, the logic of Lord Wilson's view follows that of the ECtHR in ***O'Donoghue v UK***[120] which considered the scheme that was the subject of the Supreme Court's decision in ***Baiai.*** It will be recalled that the ECtHR held that the existence of the "exception on compassionate grounds" did not remove the impairment of the ***Article 12*** right imposed by the scheme, because the "exceptional" procedure was "entirely at the discretion of the Secretary of State". Moreover, the exercise of the discretion

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[117] See [43] of the judgment of Lord Wilson
[118] ***[2007 2 AC 167.***
[119] That is: (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; and (d) do they strike a fair balance between the rights of the individual and the interests of the community.
[120] ***[2011] 53 EHRR 1*** at [89].

was based on the personal circumstances of the applicants, not whether the proposed marriage was genuine.

118. Baroness Hale of Richmond JSC, agreeing with Lord Wilson, emphasised the fact that the measure had not been adopted as a means of immigration control, so that the immigration "dimension" could be ignored, leaving the way to concentrate on whether the "colossal" interference with respect for family life was justified.[121] In Baroness Hale's opinion the rules were unjustifiable because they imposed a "blanket bar" (*sic*) applying to all married people under the age of 21; and it imposed a delay on cohabitation in the place of the couple's choice.

119. Lord Phillips of Worth Matravers PSC and Lord Clarke of Stone-cum-Ebony JSC agreed with Lord Wilson and Baroness Hale's judgments.

120. Lord Brown of Eaton-under-Heywood JSC dissented. In his opinion the balance between the extent to which the IR would help combat forced marriage and the temporary disruption it would impose on the lives of innocent couples was a question of judgment, which was a matter for elected politicians rather than the courts, unless the judgment was "demonstrably wrong". Whilst the ultimate decision on whether a measure was proportionate within ***Article 8(2)*** was for the court to decide, in his view the courts should "accord government a very substantial area of discretionary judgment".[122] In the view of Lord Brown it would be "positively unwise" for the court "yet again" to frustrate Government policy in a sensitive context such as forced marriages except in the clearest of cases and this one could not possibly be so regarded.[123]

121. It is correct that the Court of Appeal and the Supreme Court had two cases before them where applications had been refused.[124] To that extent the courts were dealing with individual cases on their own facts. Nonetheless, Sedley LJ characterised the issue as being whether the "ban" on entry for settlement of foreign spouses between 18-21 was a lawful way of dealing with the problem of forced marriages. The tenor of the judgments of Lord Wilson and Baroness Hale is to deal with the lawfulness of the new IR as a matter of principle and, indeed, by the time the case reached the Supreme Court, the SSHD had actually granted the necessary visas. Therefore, I think that the Supreme Court decision in ***Quila*** is important in showing how the court should tackle the question of whether a new IR is, in principle, unlawful because it will disproportionately infringe a relevant party's ***Article 8*** rights. First, the court must decide whether the IR concerned infringes the ***Article 8*** right of respect for private and family life of those who will be subject to and affected by the IR. In investigating that question, the court has to decide on whether the interference would have consequences of such gravity as potentially to engage the operation of the ***Article.*** However, that "threshold requirement" is not an especially high one.[125] Secondly, if the court finds that there is interference which passes this threshold test, it must then consider whether the Secretary of State has established that the interference is justified. The four questions set out by Lord Bingham at [19] of

[121] See [72] of Baroness Hale's judgment.
[122] See [91] of Lord Brown's judgment.
[123] See [97] of Lord Brown's judgment.
[124] Beatson J acknowledged this at [59] of his judgment in ***R on the application of Chapti, Ali, and Bibi v SSHD***
[125] See [30] of Lord Wilson's judgment.

Huang have to be considered in relation to the IR in question. Where the evaluation concerns whether an IR is, in principle, justified, then this exercise is an "evaluation which transcends matters of fact". This means, according to Lord Wilson, that it "is not apt to describe the requisite standard of proof as being, for example, on the balance of probabilities". As I understand his judgment, he regarded the nature of the enquiry in these circumstances as being different: the court has to decide whether, objectively speaking, the IR is proportionate. The problem the Secretary of State had in that case was the huge imbalance between the small number of forced marriages that would be deterred by the new IR compared with the large number of legitimate, unforced marriages where a non-EEA spouse could not get a "marriage visa" simply because one or both of the spouses were under 21, so the IR was, in Baroness Hale's phrase "a blanket bar" to entry for spouses under 21; so it could not be proportionate.

122. Thirdly, if the IR is not justified, then the fact that, in individual cases of an unforced marriage, the non-EEA spouse would succeed in obtaining a "marriage visa" on ***Article 8*** grounds would not save the IR from being unlawful. In reaching this conclusion Lord Wilson referred to the decision of the Upper Tribunal (Immigration and Asylum Chamber) in ***FH(Post-flight spouses)(Iran) v Entry Clearance Officer, Tehran,***[126] in which the tribunal was presided over by Sedley LJ. In that case the UT found that the effect of the relevant IRs was that there was no provision that dealt specifically with entry conditions for a person who had married a refugee after he had fled to the UK. Thus there was no IR to strike down as unlawful because it was a disproportionate interference with an ***Article 8*** right. But the lack of any appropriately worded IR would mean that it was "most unlikely" that an ECO or the SSHD would be able to establish that it was proportionate to exclude from the UK the post-flight spouse of a refugee who otherwise met all other IR requirements (e.g. as to maintenance).[127] The situation in that case was, therefore, not exactly equivalent to that in ***Quila***.

123. The next case in which a new IR was challenged in principle is that of ***R on the application of Chapti, Ali, and Bibi v SSHD***, which was determined at first instance[128] by Beatson J and which then went to the Court of Appeal as ***R(Bibi) v SSHD*** and ***R(Ali) v SSHD***.[129] These cases concerned the amendment to paragraph 281 of the Statement of Changes in Immigration Rules (1994) (HC 395) which required a non-EEA spouse who was not a national of one of a number of specified English-speaking countries (or who was within other exceptions) to produce a certificate of knowledge of the English language to a required standard before the spouse could enter the UK. There was an exemption in the case of those in respect of whom there were "exceptional compassionate circumstances" that would prevent them from meeting the requirement. The new IR was the result of a consultation paper and two equality impact assessments. It was attacked as an unjustifiable interference with ***Article 8*** and ***Article 12*** rights. None of the three applicants concerned had been refused entry under the new rule, so the lawfulness of the new language requirement was being challenged in principle. The submission on behalf of the Secretary of State before Beatson J was that an "abstract challenge" to the new IR

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[126] ***[2011] Imm AR 29.***
[127] [25] of the judgment of the tribunal.
[128] ***[2011] EWHC 3370 (Admin)***
[129] ***[2014] 1 WLR 208.***

could only succeed if the claimants could establish that it was "incapable of applying consistently with the ECHR to the circumstances of *any* case, or [could] establish that the very adoption of the amendment was an abuse of power".[130] Beatson J said that the second part of that submission was uncontroversial, but he thought the first part "may put the matter too broadly." As I read Beatson J's judgment, he held that it was the court's duty to see whether the IR challenged was unlawful because it was irrational or because it did infringe a Convention right and could not be justified, but in doing this exercise, the court had to treat with "appropriate respect" the views of the Home Secretary, whose duty it was to make the rules in this area of social and economic policy.[131]

124. Beatson J therefore considered the question of whether the new IR did interfere with ***Article 12*** or ***Article 8*** rights. He rejected the submission that it interfered with the former, but held it plainly interfered with the latter. He then analysed the evidence relating to justification by reference to the questions posed by Lord Bingham in ***Huang***. He concluded that the new IR was justified, and that even if it was discriminatory it was objectively justifiable and that it was not irrational.

125. In the Court of Appeal the first judgment was given by Maurice Kay LJ, with whom Toulson LJ agreed in a short judgment. Sir David Keene dissented. Maurice Kay LJ stated that the court would consider the cases as matters of principle "in the context of challenges to the lawfulness of the amendment", as Beatson J had done.[132] He therefore analysed the issues in terms of whether ***Article 8(1)*** was infringed by the new English language requirement and, finding that it was, whether that infringement was justified under ***Article 8(2)***. He held that "proportionality" was the "real ***Article 8*** battleground" and conducted this latter exercise by reference to the ***Huang*** questions.[133]

126. Maurice Kay LJ concluded that the interference was justified. He emphasised four factors that the court should keep in mind when considering proportionality: (1) that the view of the Home Secretary as to the need for a limit on the Convention right and her approach to it must be given "appropriate weight" as she was the person with responsibility for this part of economic and social policy;[134] (2) that the precise nature of the interference and the gravity of it were important considerations;[135] (3) that justification by the SSHD (whether for ***Article 8(2)*** or ***Article 14*** purposes) did not have to be based on "irrefutable empirical evidence", but on whether the proposed social aim is supported by a rational belief in its potential to achieve the identified aim;[136] and (4) that in deciding on proportionality, the fact that many who could not satisfy the English language test could benefit from the exceptions, particularly that of "exceptional compassionate circumstances" was significant.[137]

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[130] See [56] of Beatson J's judgment.
[131] See [61] of Beatson J's judgment.
[132] [7] of Maurice Kay LJ's judgment.
[133] [21] of Maurice Kay LJ's judgment.
[134] [23] of Maurice Kay LJ's judgment.
[135] [27] of Maurice Kay LJ's judgment.
[136] [30] of Maurice Kay LJ's judgment. Toulson LJ expressly agreed with this approach at [52], save he would have preferred to substitute the word "unobtainable" for "irrefutable".
[137] [32] of Maurice Kay LJ's judgment.

127. There are three further cases to note where the court has analysed the correct approach to the lawfulness of an IR in principle, as opposed to whether a refusal to grant entry on individual facts was justified. The first is: ***R(Nagre) v SSHD*** a decision of Sales J.[138] The case was a challenge to the lawfulness of new IRs presented to Parliament at the same time as those with which this case is concerned. The ***Nagre*** IRs were new paragraphs 276ADE to 276CE, introduced by HC 194 and they concerned the requirements to be met by an applicant for leave to remain on the grounds of "private life". The object of the new rules was to address more explicitly than previous IRs had done the factors which (under UK and Strasbourg case law) weigh in favour of or against a claim by a foreign national to remain in the UK, based on ***Article 8***. Along with the new IRs, the Secretary of State issued guidance in the form of instructions regarding the approach of officials in deciding whether to grant leave to remain outside the Rules, in the exercise of the residual discretion that the SSHD had to grant such leave. It could be granted in "exceptional circumstances", which are defined in the same terms as those applicable to the present appeals. No challenge was made to the guidance. Sales J held that the new IRs could not provide for all possible circumstances that might arise under ***Article 8.*** But the new rules would guide the decision makers in most cases. In those that were not covered by the new IRs, only if there was an "arguable case that there may be good grounds for granting leave to remain outside the Rule by reference to ***Article 8*** that it [would] be necessary for ***Article 8*** purposes to go on to consider whether there were compelling circumstances" to grant such leave.[139] He followed the guidance in ***R(Izuazu) v SSHD (Article 9 – new rules).***[140] At [35] and [36] Sales J said:

> "The important points for the present purposes are that there is full coverage of an individual's rights under Article 8 in all cases by a combination of the new rules and (so far as is necessary) under the Secretary of State's residual discretion to grant leave to remain outside the Rules and that, consequent upon this feature of the overall legal framework, there is no legal requirement that the new rules themselves provide for leave to remain to be granted under the rules in *every* case where Article 8 gives rise to a good claim for an individual to be allowed to remain. This had always been the position in relation to the operation of the regime of immigration control prior to the introduction of the new rules and the introduction of the new rules has not changed these basic features of the regime.
>
> Therefore, in my judgment, the Claimant's challenge to the lawfulness of the new rules fails. No matter how closely, or not, the new rules track the detailed application of Article 8 in individual cases, the immigration control regime as a whole (including the Secretary of State's residual discretion) fully accommodates the requirements of Article 8. The fact that the new rules do not do that in all cases by themselves does not render them unlawful".

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[138] ***[2013] EWHC 720 (Admin).***
[139] [29] of Sales J's judgment.
[140] ***[2013] UKUT 00045 (IAC).***

128. Sales J's decision therefore follows the logic of Laws LJ's statements in [38]-[39] of ***AM(Ethiopia),*** analysed above. However, there is a difference in that in ***Nagre*** the new rules were themselves attempting to cover, generally, circumstances where an individual should be allowed to remain in the UK on ***Article 8*** grounds; whereas in ***AM(Ethiopia)*** and in the present appeals the rule challenged stipulates a particular requirement that has to be fulfilled before the applicant will be allowed to enter or remain. The argument in each case is that it is that specific requirement that offends ***Article 8. Nagre*** does not add anything to the debate, save for the statement that if a particular person is outside the rule then he has to demonstrate, as a preliminary to a consideration outside the rule, that he has an arguable case that there may be good grounds for granting leave to remain outside the rules. I cannot see much utility in imposing this further, intermediary, test. If the applicant cannot satisfy the rule, then there either is or there is not a further ***Article 8*** claim. That will have to be determined by the relevant decision-maker.

129. The next case on this topic is ***MF(Nigeria) v SSHD***.[141] New paragraphs 398, 399, 399A and 399B of the IRs were introduced in July 2012 and set out criteria by reference to which the right to respect for a person's private and family life under ***Article 8*** was to be assessed in criminal deportation cases. In the Court of Appeal, Lord Dyson MR gave the judgment of the court. The court held that the new rules constituted a "comprehensive code" of criteria by which to determine whether or not a "foreign criminal" who would otherwise be liable to deportation under the terms of ***section 32(4)*** of the ***UKBA 2009*** and ***section 3(5)*** of the 1971 Act might be permitted to remain in the UK on ***Article 8*** grounds.[142] The consequence of this conclusion is that any claim by a "foreign criminal" to remain in the UK on ***Article 8*** grounds has to be considered in accordance with the new rules 398, 399 and 399A. This involves a "two stage" test: does the "foreign criminal's" case come within rule 399 or 399A; if not, then does he fall within the circumstances as set out in rule 398, as construed by the Court of Appeal.[143] The other point to note is that Lord Dyson MR specifically referred to the analysis of Lord Bingham at [17] of ***Huang*** and endorsed it.

130. We did not specifically hear argument on whether the new MIR together with the Guidance constituted a "comprehensive code". But whether or not they do makes no difference, on the analysis of the Master of the Rolls in ***MF(Nigeria)***. This is because, as he said at [45], in any event it would be necessary to apply a "proportionality test" with regard to the "exceptional circumstances" guidance in order to be compatible with the Convention and in compliance with ***Huang*** at [20].[144]

131. The last case to consider under this heading is ***SSHD v Shahzad***.[145] It concerned a student who had made a renewed application for leave to remain in the UK as a Tier 4 (General) Student migrant under the Points Based System. As such the IRs required that he demonstrate that he had private financial support from a parent or legal guardian, which the applicant could not do. The FTT had, nonetheless, allowed his appeal from the refusal of the SSHD's decision not to grant leave to remain, doing so on ***Article 8*** grounds. The SSHD appealed to the UT and (effectively) her appeal was

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[141] ***[2014] 1 WLR 544.***
[142] See [44] of Lord Dyson MR's judgment.
[143] [46] of Lord Dyson MR's judgment.
[144] See [40]-[41] of Lord Dyson MR's judgment.
[145] ***[2014] UKUT 85(IAC).***

allowed.[146] For present purposes the important conclusions of the UT are: (1) ***MF(Nigeria)*** did not rule that all other provisions of the new IRs constituted a "complete code" on how to consider ***Article 8*** rights of applicants in relation to the IR concerned in that particular case; (2) where an area of the Rules does contain an express provision requiring consideration in the ***Article 8*** context of "exceptional circumstances" and "other factors" it would constitute such a "complete code"; (3) where an area of the IRs does not have such an express mechanism, the approach in ***Nagre***[147] should be followed: "ie. after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for ***Article 8*** purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them".[148]

132. What is the upshot of all these decisions? First, the Secretary of State plainly is under a common law duty not to promulgate an IR that is discriminatory, manifestly unjust, made in bad faith or involves "such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men". If she does promulgate such an IR, it can be struck down or the offending part can be severed. Secondly, I think that ***Huang, Baiai, Quila*** and ***Bibi*** all support the proposition that it is the duty of the Secretary of State to formulate an IR in a way that means that even if it does interfere with a relevant Convention right, it has to be capable of doing so in a manner which is not inherently disproportionate or inherently unfair. Otherwise it will not be "rational", or it could be stigmatised as being "arbitrary" or objectionable",[149] or be characterised as being "arbitrary and unjust".[150] Thirdly, the analysis of the Supreme Court in ***Quila*** and of this Court in ***Bibi*** make it clear that if the relevant IR is challenged as being contrary to a Convention right, then the ***Huang*** tests have to be applied. The only difference, when it is an IR that is being challenged in principle, as opposed to a an individual ***Article 8*** decision, is that the "proportionality" questions have to be considered in principle. In that case, it seems to me the test must be whether, assuming the relevant IR constitutes an interference with a Convention right, the IR and its application to particular cases, would be inherently disproportionate or unfair. Another way of putting the test is whether the IR is incapable of being proportionate and so is inherently unjustified.

133. Where does that leave the statements made in the ***AM(Ethiopia), Pankina*** and ***Nagre*** line of cases, viz. that the Secretary of State's duty is to protect an immigrant's Convention rights whether or not that is done through the medium of the IRs so that "it follows that the Rules are not of themselves required to guarantee compliance with the [relevant Article]".[151] I think that the reconciliation must be along the following lines: first, Laws LJ was dealing with the principles of construction of IRs. IRs are not to be construed upon the presumption that they will guarantee compliance with the relevant Convention right. Secondly, therefore, a particular IR does not, in each case, have to result in a person's Convention rights being "guaranteed". In a

[146] Technically, the UT held that the FTT had erred in law, set aside its decision to allow the student's appeal, and remade the FTT's decision, dismissing the student's appeal from the SSHD's refusal to grant leave to remain.
[147] And also ***Gulshan (Art 8 – new rules – correct approach) [2013] UKUT 640 (IAC).***
[148] See [25]-[31] of the UT's decision.
[149] ***Huang*** at [6]**.**
[150] ***Baiai*** at [44]
[151] Per Laws LJ in ***AM(Ethiopia)*** at [39].

particular case, an IR may result in a person's Convention rights being interfered with in a manner which is not proportionate or justifiable on the facts of that case. That will not make the IR unlawful. But if the particular IR is one which, being an interference with the relevant Convention right, is also incapable of being applied in a manner which is proportionate or justifiable or is disproportionate in all (or nearly all cases), then it is unlawful.

134. Where the relevant group of IRs, upon their proper construction, provide a "complete code" for dealing with a person's Convention rights in the context of a particular IR or statutory provision, such as in the case of "foreign criminals",[152] then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although references to "exceptional circumstances" in the code will nonetheless entail a proportionality exercise.[153] But if the relevant group of IRs is not such a "complete code" then the proportionality test will be more at large, albeit guided by the ***Huang*** tests and UK and Strasbourg case law.[154]

X. Issue Three: Was the judge's analysis and conclusion that the new MIR are, in principle, incapable of being compatible with *Article 8* rights of UK partners (and others if relevant) correct?

135. Before us the emphasis was very much on ***Article 8*** and ***Article 14.*** The judge had rejected the argument that the present cases were not concerned with restrictions on the right to marry alone: see [101]. There is the associated right in ***Article 12*** to found a family. But that is so bound up with the ***Article 8*** rights that the judge was correct, in my view, to concentrate on those, as I shall do.

136. Blake J's analysis of the lawfulness of the new MIR was along the lines of that of Lord Wilson in ***Quila*** and Maurice Kay LJ in ***Bibi.*** He asked whether they were an interference with ***Article 8*** and ***Article 12*** rights, concluded that they did infringe the former and then went on to conclude, ultimately, that, taken as a whole, the interference was disproportionate and not justifiable.[155] Ms Giovannetti accepts that the new MIR do interfere with the ***Article 8*** rights of the UK partners. She was right to do so. However, the judge said that the new MIR was an interference with "three rights and not just one":[156] the statutory right of the UK partner to reside in the UK "without let or hindrance"; the right of that person to marry and found a family and the right to respect of the private and family life created as a result of the exercise of the previous rights. Moreover, in his view the interference created by the new MIR was "considerably more intrusive" than the "colossal" interference identified in ***Quila.***

137. I would not accept the full breadth of the judge's reasoning on this point. The UK partner's statutory right to reside in the UK "without let or hindrance" is, in my view, a personal right. It cannot be extended to others. Nor can the rights of a person with refugee or HP status be extended to others. There is nothing in the 1971 Act or the common law that grants a "constitutional right" of British citizens to live in the UK

[152] ***MF(Nigerial) v SSHD [2014] 1 WLR 544.***
[153] ***MF (Nigeria)*** at [14]-[16] and [44]
[154] ***MF(Nigeria)*** at [45]
[155] [123] – [148]
[156] [104]

with non-EEA partners who do not have the right of abode in the UK and who are currently living outside the UK. Of course, I accept that the UK partner (whether a UK citizen of a refugee or person with HP) is entitled to respect of his or her right to marry and to found a family. But those are not absolute rights; there is no absolute right to marry and found a family *in the UK* if it involves marriage to a non-EEA citizen who then wishes to reside in the UK. In ***Quila*** Lord Wilson accepted that the principle stated by the majority of the ECtHR in ***Abdulaziz,*** to the effect that ***Article 8*** did not impose a general obligation on a member state to facilitate the choice made by a married couple to reside in it, was "unexceptionable". With respect, I agree. In ***Quila*** the obstruction on the married couple exercising their choice of where to live was created by the total ban on marriage visas for those under 21. It was this total ban on all marriages with a non-EEA citizen under the age of 21 which constituted "a colossal interference" with ***Article 8*** rights.

138. In this case the obstruction on the choice of the married couple (or on two partners) to live in the UK is a financial one which effectively prevents all UK partners whose earnings and savings are below a certain amount (as calculated by the new MIR) from being able to sponsor the entry of their non-EEA partner. The new MIR must therefore constitute a very significant interference with the ***Article 8*** rights of a UK partner who cannot fulfil the new MIR conditions. Whether or not, in law, the non-EEA partners have "***Article 8*** rights", plainly their private and family lives are affected if their UK partners cannot fulfil the requirements.

139. Therefore, as in ***Quila*** and ***Bibi,*** the focus must shift to "justification" of the new MIR under ***Article 8(2).*** The new MIR were created in accordance with the law. Although it is not entirely clear whether the judge specifically addressed the first of the four ***Huang*** questions on the topic of whether the measure was "necessary in a democratic society",[157] Blake J characterised the general aim of the new MIR as being that "the families of migrants should be encouraged by the terms of admission to integrate, not live at or near subsistence levels and not be perceived to be a long term drain on the public purse in the form of increased access to state benefits".[158] I did not understand the respondents to challenge that aim as being both legitimate and sufficiently important to justify limiting the right to respect for private and family life. The aim which Blake J identified comes within the expression "the economic wellbeing of the country" in ***Article 8(2)***. The impact of migrants who join households with low incomes on working age benefits and other social services was properly researched. The conclusion of the SSHD that the aims that Blake J identified were sufficiently important to justify limiting ***Article 8*** rights was both rational and unobjectionable.

140. However the respondents attempt to challenge the judge's conclusion on this point because they argue that, individually, one or more of the five key elements of the new MIR which Blake J lists at [124] of his judgment did not do anything towards achieving the identified and legitimate aims and so were not "rationally connected" with the overall aim. They particularly focused on the fifth feature, viz. the disregard for non-EEA partner's own earning capacity during the thirty month period after initial entry.

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[157] [19] of Lord Bingham's speech.
[158] [142]

141. I cannot accept these arguments in principle. The Secretary of State does not have to have "irrefutable empirical evidence" that the individual features of the policy proposed will achieve the social aim intended. It is enough that she should have a rational belief that the policy will, overall, achieve the identified aim.[159] The new MIR were the result of a great deal of work to identify (a) the long-term requirements of some immigrants on the welfare system and (b) what income was needed to lessen or avoid that dependence and how that income could be calculated. The conclusion that a family with more income would be more likely to be capable of integrating is not susceptible of empirical proof, but a belief in the link between higher income and the likelihood of better integration is rational.

142. As for the individual features, it is important at this stage to remember the question being considered: are those features "rationally connected" to the aims. The overall aim is sufficient income; but whether a family will have sufficient income depends on setting a certain level and then deciding what elements can and cannot be taken into account to see whether the relevant level will be reached in a particular case. Given the work of the MAC and the conclusions it reached, there is clearly a "rational connection" between both the figures chosen and the aim of the policy. Whether it is proportionate or the minimum needed to achieve the aim are different points.

143. As for the elements that must not be included in calculating whether the level of income has been achieved in a particular case viz. no savings below £16,000; 30 month forward projection of the UK partner's income; no account for third party support (generally speaking) and disregard of the non-EEA partner's potential income for 30 months, the question must be whether it is rational, bearing in mind the policy aim, to stipulate that those elements must be excluded in deciding whether the relevant level of income for the household of the UK partner and non-EEA spouse will be reached. The respondents particularly focused on the last element (non-EEA partner's potential income) as being irrational, not only in Convention terms but also under the common law. Reliance was placed on the Supreme Court's decision in ***Mahad***.[160]

144. There are two answers to the respondents' arguments, bearing in mind I am only considering at the moment the "rational connection" issue. First, the executive is entitled to examine the evidence it had on necessary levels of income and savings and the reliability of income or other support being received in order to take a view on what the new MIR should stipulate(as a policy statement) could be included or not in calculating whether the required income level had been achieved. The executive did so. It did not just take the figures or the considerations out of the air in an unthinking way. Secondly, ***Mahad*** was a decision on the *construction* of the relevant IR. The Supreme Court held that, properly construed, the relevant IR did not prohibit recourse to third party support to reach the required minimum income requirements. The Supreme Court decision was not concerned with the policy issue of whether third party income should be disregarded in principle.

145. Although the judge concluded that the new MIR had a legitimate aim, he went on to say (at [142]) that the five economic/financial features of the new MIR that he had

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[159] ***Bibi*** at [30] per Maurice Kay LJ with whom Toulson LJ agreed at [52].
[160] ***[2010] 1 WLR 48***

identified at [124][161] were "together… a disproportionate interference with the rights of the British citizen sponsors and refugees to enjoy respect for family life" and were not a "fair balance" between competing private and public interests. He went further, in [144], in concluding that that the five features were together "more than was necessary to promote the legitimate aim" and that, for both UK partners who were British citizens or refugees (and presumably those with HP), they were an "irrational and unjustified restriction" on their rights, particularly the "constitutional rights" of British citizens. These two conclusions are at the heart of the appeal. They are the judge's conclusions on the third and fourth questions posed in [19] of ***Huang***, viz: are the measures no more than is necessary to accomplish the identified aim, and do the measures strike a fair balance between the rights of the individual and the interests of the community?

146. The judge recognised that the SSHD was entitled to conclude that greater resources than £5,500 per couple (without children and with adequate accommodation) were needed for the identified aims. But he concluded that the figure of £18,600 chosen was more than the minimum necessary to accomplish the identified aim, particularly if (contrary to the stated policy) account could be taken of the non-EEA partner's potential income. Therefore the SSHD had failed to discharge the burden of demonstrating that the interference with ***Article 8*** rights was justified.

147. Essentially the debate is about figures and what should be the minimum necessary income figure and what other possible sources of income should or should not be taken into account to see if that minimum can be reached. This case is not the same as ***Quila***, where the policy imposed a total ban on entry of persons between 18 and 21 who wished to be married to UK citizens; or ***Baiai*** where the policy (subject to a discretionary compassionate exception) imposed a "blanket prohibition on the right to marry at all in the specified categories".[162] Here, the non-EEA partner can enter the UK, provided the UK partner's level of income, judged by the policy of the new MIR to be appropriate, is reached. Admittedly there is a total ban on the entry of non-EEA partners where the UK partner cannot reach the required minimum and I appreciate that this ban could be life-long. But there has always been a maintenance requirement at a certain level and if that level was not reached by the UK partner, then there was a total ban on the entry of the non-EEA partner unless, in an individual case, it would be disproportionate under ***Article 8(2)*** to refuse entry in that instance. Moreover, maintenance requirements are not unique to the UK and it does not set the highest minimum annual income; Norway does.[163]

148. So the key question is: to what extent should the court substitute its own view of what, as a general policy, is the appropriate level of income for that rationally chosen as a matter of policy by the executive, which is headed by ministers who are democratically accountable? Blake J suggested, at [147], that there were "less intrusive responses" that were available and he gave examples. What he meant by this is that, in his view, these "less intrusive responses" constituted what was "no more than necessary" to accomplish the policy aim and, in his view, constituted a

[161] Summarised at [67] above.
[162] Per Lord Bingham at [31]
[163] Referred to in Pt 2 of the report on behalf of the claimants by Dr Erica Howard, Prof Eleonore Kofman and Dr Helena Wray of the School of Law, Middlesex University. Mr Peckover responded to it in his second witness statement paras 52-55.

fair balance between the rights of the individual and the interests of the community. I appreciate that proportionality has to be judged "objectively by the court".[164] However, in making this objective judgment appropriate weight has to be given to the judgment of the Secretary of State, particularly where, as here, she has acted on the results of independent research and wide consultations.

149. As I have already noted, there was a keen debate before us as to the extent to which the court will accord the executive a degree of flexibility as to where it pitches its policy in the area of economic and social strategy when the policy affects the fundamental right of living together as a family. In ***Stec***, the ECtHR said that national authorities will be accorded a "wide margin" when it comes to "general measures of economic or social strategy"[165] but that was in relation to the payment of state benefits. In ***Quila***, Lord Wilson thought the correct approach was to give "appropriate weight" to the Secretary of State's view, at least when it was demonstrated that this was based on a proper consideration of relevant factors and evidence.[166] In this case the evidence of Mr Peckover (as noted above) is that the compatibility of the new MIR with ***Article 8*** was assessed by the Secretary of State as reflected in the Statement on Grounds of Compatibility (paragraphs 52-64) published in June 2012.[167]

150. I am very conscious of the evidence submitted by the claimants to demonstrate how the new MIR will have an impact on particular groups and, in particular, the evidence that only 301 occupations out of 422 listed in the 2011 UK Earnings data had average annual earnings over £18,600. But, given the work that was done on behalf of the Secretary of State to analyse the effect of the immigration of non-EEA partners and dependent children on the benefits system, the level of income needed to minimise dependence on the state for families where non-EEA partners enter the UK and what I regard as a rational conclusion on the link between better income and greater chances of integration, my conclusion is that the Secretary of State's judgment cannot be impugned. She has discharged the burden of demonstrating that the interference was both the minimum necessary and strikes a fair balance between the interests of the groups concerned and the community in general. Individuals will have different views on what constitutes the minimum income requirements needed to accomplish the stated policy aims. In my judgment it is not the court's job to impose its own view unless, objectively judged, the levels chosen are to be characterised as irrational, or inherently unjust or inherently unfair. In my view they cannot be.

151. The respondents argued that the rule making process had not had regard to the particular need of refugees, such as MM, who are not in a position to return to their country and may have difficulty leaving the UK to meet their spouse/partner. I accept Ms Giovannetti's response that refugees could not be more favourably treated than British citizen sponsors; that would be discriminatory and difficult to justify. Moreover, as Mr Peckover points out in his second witness statement,[168] the reunion of refugees with "pre-flight" partners and family is dealt with in Part 11 of the IRs and

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[164] Per Lord Bingham in ***R(SB) v Governors of Denbigh High School [2007] 1 AC 100*** at [30], quoted by Lord Wilson in ***Quila*** at [46].
[165] At [52]
[166] [46], [50] and [58].
[167] Peckover (1) at para 90.
[168] Paras 71 and 72.

Appendix FM does not apply to them. Appendix FM only applies to "post-flight" families and it is logical that they should be subject to the same rules as British citizen sponsors.

152. Therefore, my answer to Issue Three is "no, the judge's analysis and conclusion that the new MIR were, in principle, incapable of being compatible with the ***Article 8*** rights of the UK partners (and others if relevant) was not correct".

XI. Issue Four: : Is the provision in the new MIR precluding reliance on third party funding "irrational" under the common law?

153. The respondents focused on this particular requirement of the new MIR as being "irrational" at common law. I do not need to add much to what I have already said, as it must follow from the previous discussion that I think it was not. The decision to exclude third party funding generally was not taken on a whim. It was thought out. The ***Mahad*** decision is of no help to the respondents. Moreover, the exclusion is not absolute, as Mr Peckover pointed out at paragraphs 37 and 38 of his second witness statement. So I would answer this question "no".

XII. Issue Five: on the basis that the new MIR did result in indirect discrimination within *Article 14,* was the judge correct to hold that such discrimination was "justified"?

154. As I have already noted, Ms Giovannetti accepted the judge's conclusions, at [113], that the new MIR would impact disproportionately on migrant families on low incomes; on women UK partners, whose male migrant partners are likely to have a significantly higher income than them and on all those living outside the South East of England. The respondents argued that the judge was wrong to conclude that this indirect discrimination was, nonetheless, justified.

155. As Maurice Kay LJ said in ***Bibi***[169] all immigration law is inherently discriminatory. The "underlying concern" here (to use Maurice Kay LJ's phrase in that case) is that UK partners and their non-EEA partners have the financial wherewithal to live without being a burden on the state and to integrate satisfactorily. The discrimination involved here is indirect because migrants from certain national or regional backgrounds are more likely to be unable to meet the new MIR than others. The question is whether the fact that the new MIR has the effect of treating different national, ethnic, racial or sexual groups differently has a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.[170] There can be no doubt that the aims of new MIR, viz. to reduce the burden on the state and to encourage integration, are legitimate.

156. In relation to the degree of proportionality needed between the means employed by the MIR and the aim sought to be realised, there was argument before us on the degree to which the executive is entitled to a "margin of discretion" in adopting measures of economic or social strategy when they affect rights as important as a married couple (or established partners) being able to live together in the UK and have a family here. It is unwise to be prescriptive and the fact is that if some form of

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[169] At [41]
[170] See ***Stec v UK (2006] 43EHRR 47 at [51].***

income requirement is to be imposed at all, then the executive has to draw a line somewhere. Unless it is wholly unreasonable then, it seems to me, the court should not interfere with the judgment of the executive in deciding where the line is to be drawn.

157. As Blake J pointed out,[171] the Secretary of State was aware of the indirect discriminatory impact that the new MIR would or might have on different groups.[172] These were taken into account. I agree with the judge's view that it is both impractical and, indeed, inappropriate to try and make provision in the IRs themselves for the possible impact on different groups, for the reasons he gives at [115]. Virtually all attempts at creating sub-rules, divisions, or exceptions are bound to create more, rather than less discrimination.

158. So I would answer Issue Five "yes".

XII Issue Six: What is the relevance of the "Exceptional circumstances" provisions in the Immigration Directorate Instructions?

159. As I have concluded that the new MIR are lawful, there is no need to deal with Ms Giovannetti's subsidiary submission that all ***Article 8*** issues could be dealt with by taking the new MIR and the "Exceptional circumstances" provisions in the Instructions together. It seems clear from the statement of Lord Dyson MR in ***MF(Nigeria)*** and Sales J in ***Nagre*** that a court would have to consider first whether the new MIR and the "Exceptional circumstances" created a "complete code" and, if they did, precisely how the "proportionality test" would be applied by reference to that "code". But those issues do not arise given my conclusions above.

160. If, as is suggested in the evidence of the respondents, decision makers have not been applying their minds to whether a "proportionality" test has to be used when considering "Exceptional circumstances" in individual cases, then that is not a basis on which to challenge the lawfulness of the MIR themselves. Such an approach may be a ground for challenging an individual decision; but that is not the object of the present litigation.

XIV Issue Seven: Is there a separate ground of objection to the new MIR based on *section 55* of the 2009 Act?

161. Mr Drabble was correct to identify the two stages at which the duty imposed by ***section 55*** on the Secretary of State arises; first, when the new rules are being formulated and, secondly, when individual decisions are being made. The present cases are only concerned with the first stage. Mr Drabble submitted that the Secretary of State was under a duty to ensure that the new rules established a framework whereby the best interests of a child in the UK would be capable of being considered when necessary in two particular classes of case. As noted above these are cases where a child is in the UK as a citizen or has leave to remain and a non-EEA partner is attempting to obtain leave to enter or remain and cases where a child is in the UK whose parent is a refugee or has been granted HP and the non-EEA partner wishes to join them in the UK.

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[171] At [114].
[172] See Peckover (1) at paras 87-89.

162. I accept that Mr Drabble's general proposition must be correct, but in my view Mr Drabble's argument that the Secretary of State has not fulfilled her duty is not sustainable. First, paragraph GEN.1.1 of Appendix FM states that the provision of the family route "takes into account the need to safeguard and promote the welfare of children in the UK", which indicates that the Secretary of State has had regard to the statutory duty. Secondly, there is no legal requirement that the IRs should provide that the best interests of the child should be determinative. ***Section 55*** is not a "trump card" to be played whenever the interests of a child arise. Thus, thirdly, the new MIR are only a part of requirements set out in Appendix FM, but an important part. If a child in the UK is to be joined by a non-EEA partner under the "partner rules" (as compared with those under E-LTRPT.2.3) then it is reasonable to require, for the child's best interests, that there be adequate financial provision for the unit of which the child will be a part if the non-EEA partner joins it. If the financial requirements are otherwise judged to be lawful, then, on the financial front, that must mean the ***section 55*** duty has been discharged in framing the relevant IR. Fourthly, the amended IRs specifically stipulate that where the applicant has sole parental responsibility the welfare of children in the UK or fulfils the other requirements of E-LTRPT.2.3 of Appendix FM, the new MIR are not applicable, because the applicant need only provide evidence that they will be able adequately to maintain and accommodate themselves and any dependants in the UK without recourse to public funds. As Blake J pointed out at [116] these different provisions reflect a policy that a minimum income requirement is inappropriate when it is in the best interests of a child that a parent or carer should be admitted to look after a child in the UK and there are adequate funds and accommodation for that purpose (and any dependants joining the carer).

163. These appeals are not dealing with individual cases where the new MIR might produce a harsh result in relation to a child in the UK. The way that the "Exceptional circumstances" provision and ***Article 8*** will work in those individual cases is not for decision now.

XV Issue Eight: The application for permission to cross-appeal by Mr Majid.

164. As already noted, the case of Mr Majid raises different issues. His wife lives in Kashmir with one child of the family. Mr Majid, a UK citizen, lives in the UK with five other children, who are also UK citizens. The wife and youngest child wishes to join the family. But Mr Majid cannot meet the MIR requirements. So an attempt is made to rely on another part of Appendix FM which deals specifically with parents of children in the UK. Section E-LTRPT of Appendix FM sets out the conditions for eligibility for limited leave to remain as a parent of a child in the UK. Section E-LTRPT.2.3 stipulates that either the parent must have sole parental responsibility for the child (which is not the case here) or the parent (or carer) with whom the child normally lives must be a British citizen (or settled in the UK) and ***not the partner of the applicant and the applicant must not be eligible to apply for leave to remain as a partner under this Appendix:*** (my emphasis). As already noted, under what I might call "the parent" provisions the financial requirements (as set out in E-LTRPT.4.1) are that the applicant must provide evidence that "they will be able adequately to maintain and accommodate themselves and any dependants in the UK without recourse to public funds". So if, somehow, the wife can utilise the "parent provisions", the financial requirements will be much less stringent. But Mr de

Mello accepts that in this case the wife is eligible to apply for leave to remain under the "partner" provisions. So to rely on the "parent provisions" Mr Majid and his wife must attack the lawfulness of the two requirements that I have highlighted above.

165. In Mr Peckover's second witness statement he explains why there is a difference in the financial requirements for an applicant who is exercising sole parental responsibility for or access rights to a UK citizen child. He says that it is because the applicant has no partner in the UK who can provide for them and the rules "must reflect their different family circumstances". Therefore the Secretary of State determined that different financial requirements should apply in such cases. [173]

166. As I understand it, Mr de Mello raises three arguments. First, the requirement in E-LTRPT.2.3(b)(ii) and (iii) that the other parent must not be the partner of the applicant and that the applicant must not be eligible to apply for leave to remain as a partner are irrational. Secondly, the lack of a specific rule for a migrant parent who shares equally the responsibility for the care of a UK citizen child (in the UK) or a settled child amounts to an unjustified breach of ***Article 8*** and constitutes a failure by the Secretary of State to fulfil her duty under ***section 55.*** Thirdly, the effect of E-LTRPT 2.3(b)(ii) and (iii) requirements is discriminatory and cannot be justified.

167. I cannot accept any of these arguments. First, the situation in a case where the UK citizen child (or settled child) has a parent or carer in the UK who is ***not*** a partner of the applicant is plainly different from one where the parent or carer is a partner of the applicant. The Secretary of State was entitled to mark the difference. Further, the imposition of less stringent financial requirements in the first of these two cases was both logical and sensible.

168. Secondly, the IRs do, in fact, cover all cases of migrant parents. In the case where there is a partner who is in the UK the "spouse" provisions apply; in a case where there is not a partner here, the "parent" provisions apply. I accept that each constitutes an interference with ***Article 8*** rights of the child in the UK. The question is whether that is justifiable. I have dealt with that in relation to the "spouse" provisions. In relation to the parent provisions, it must be justifiable for the executive to impose a condition that the applicant is not eligible under the spouse conditions or else they would be easily evaded.

169. Thirdly, apart from the fact that it is stated at the outset of Appendix FM that the best interests of the child have been considered, I think it is clear that the Secretary of State has fulfilled her duty under ***section 55.*** She has had regard to the needs of the UK citizen child in a family unit where there is already one parent/partner in the UK and she has differentiated that from the situation where the child has a carer or parent in the UK who is not a partner of an applicant. In the latter case the Secretary of State has imposed less stringent financial conditions, which will encourage family union, even perhaps at the price of reducing the scope for proper integration.

[173] Paras 41 and 102(ii).

170. Lastly, these provisions are not discriminatory because, as Blake J pointed out,[174] there is no comparison of like with like. The rule makers were attempting to deal with different circumstances.

171. I would therefore refuse Mr Majid permission to cross-appeal.

XVI. Disposal

172. I would allow the Secretary of State's appeals in all three cases and set aside paragraph 1 of Blake J's order in each case. I would refuse Mr Majid's application for permission to cross-appeal. This would mean that there will be costs consequences for the hearing before us and below, on which counsel will have to make written submissions.

Lord Justice Treacy

173. I agree.

Lord Justice Maurice Kay

174. I also agree.

[174] See [116]

Appendix One

The July 2012 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 Two

Immigration Act 1971

1 General Principles

(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.

3 General provisions for regulation and control

(2) The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him 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 required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances; and section 1(4) above shall not be taken to require uniform provision to be made by the rules as regards admission of persons for a purpose or in a capacity specified in section 1(4) (and in particular, for this as well as other purposes of this Act, account may be taken of citizenship or nationality).

If a statement laid before either House of Parliament under this subsection is disapproved by a resolution of that House passed within the period of forty days beginning with the date of laying (and exclusive of any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days), then the Secretary of State shall as soon as may be make such changes or further changes in the rules as appear to him to be required in the circumstances, so that the statement of those changes be laid before Parliament at latest by the end of the period of forty days beginning with the date of the resolution (but exclusive as aforesaid).

Human Rights Act 1998

2 Interpretation of Convention rights.

(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,

(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,

(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or

(d) decision of the Committee of Ministers taken under Article 46 of the Convention,

whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

(2) Evidence of any judgment, decision, declaration or opinion of which account may have to be taken under this section is to be given in proceedings before any court or tribunal in such manner as may be provided by rules.

(3) In this section "rules" means rules of court or, in the case of proceedings before a tribunal, rules made for the purposes of this section—

(a) by . . . [the Lord Chancellor or] the Secretary of State, in relation to any proceedings outside Scotland;

(b) by the Secretary of State, in relation to proceedings in Scotland; or

(c) by a Northern Ireland department, in relation to proceedings before a tribunal in Northern Ireland—

(i) which deals with transferred matters; and

(ii) for which no rules made under paragraph (a) are in force.

3 Interpretation of legislation.

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

6 Acts of public authorities.

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section "public authority" includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) . . . . . .

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) "An act" includes a failure to act but does not include a failure to

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order.

Borders, Citizenship and Immigration Act 2009 (BCIA 2009)

55 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).

(4) The Director of Border Revenue must make arrangements for ensuring that—

(a) the Director's functions 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 made by the Director in the discharge of such a function are provided having regard to that need.

(5) A person exercising a function of the Director of Border Revenue must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (4).

(6) In this section—

"children" means persons who are under the age of 18;

"customs function", "designated customs official" and "general customs function" have the meanings given by Part 1.

(7) A reference in an enactment (other than this Act) to the Immigration Acts includes a reference to this section.

(8) Section 21 of the UK Borders Act 2007 (c. 30) (children) ceases to have effect.

Appendix Three

European Convention on Human Rights

Article 8 Right to respect for private and family life

(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 12 Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 14 Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination 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.

Appendix Four

Immigration Directorate Instructions

Family Members under the Immigration Rules

Section FM 1.0

Partner & ECHR Article 8 Guidance

Exceptional circumstances

Where an applicant for entry clearance as a partner fails to meet the requirements of the rules under Appendix FM and/or Appendix FM-SE, the Entry Clearance Officer must go on to consider whether there may be exceptional circumstances. If the Entry Clearance Officer is of the view that there may be exceptional circumstances in line with this guidance, they must refer the application to RCU. The consideration of exceptional circumstances must include consideration of any factors relevant to the best interests of a child in the UK. For further guidance on how to undertake this consideration, please see the children's best interests guidance.

Process to be followed in considering exceptional circumstances

Where possible exceptional circumstances are raised, even if implicitly (e.g. where it is clear that the applicant has a child in the UK), there should be a consideration as to whether or not these factors might mean that a refusal would result in unjustifiably harsh consequences for the applicant or their family:

- If the Entry Clearance Officer does not consider that the factors raised might make refusal unjustifiably harsh for the applicant or their family, the refusal notice should explain that:

"I have also considered whether the particular circumstances set out in your application constitute exceptional circumstances which, consistent with the right to respect for family life contained in Article 8 of the European Convention on Human Rights, might warrant consideration by the Secretary of State of a grant of entry clearance to come to the United Kingdom outside the requirements of the Immigration Rules. I have decided that they do not, because [set out reasons why the circumstances are not considered exceptional, including, where relevant, consideration of the best interests of any child in the UK]. Your application for entry clearance to come to the
United Kingdom is therefore refused".

- If the Entry Clearance Officer considers that the factors raised might amount to exceptional circumstances warranting a grant of leave outside the rules, the case must be referred for consideration by RCU. The Entry Clearance Officer should then make a recommendation for RCU to consider, setting out clear reasons as to whether a grant of entry clearance outside the rules is appropriate taking into account this guidance on exceptional circumstances.

If no exceptional circumstances are raised, either explicitly or implicitly, in an application, the refusal notice should state this. After explaining that the applicant has failed to meet the requirements of the Immigration Rules and why this is so, the refusal notice should state:

> "I have also considered whether your application raises or contains any exceptional circumstances which, consistent with the right to respect for family life contained in Article 8 of the European Convention on Human Rights, might warrant consideration by the Secretary of State of a grant of entry clearance to come to the United Kingdom outside the requirements of the Immigration Rules. I have decided that it does not. Your application for entry clearance to come to the United Kingdom is therefore refused."