Case Nos: 1.C4/2010/0150
2.C4/2009/1750

Neutral Citation Number: [2010] EWCA Civ 1482
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THEADMINISTRATIVE COURT
1. MR JUSTICE BURNETT
[2009] EWHC 3189 (Admin)
2. HHJ PEARL(Sitting as a Deputy High Court Judge)
[2009] EWHC 2322 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2010

Before :

LORD JUSTICE SEDLEY
LORD JUSTICE PITCHFORD
and
LORD JUSTICE GROSS

- -

Between :

1. DIEGO ANDRES AGUILAR QUILA **and** **AMBER AGUILAR**	**Claimants/ Appellants Interested Party**
2. SHAKIRA BIBI **and** **SUHYAL MOHAMMED**	**Claimants/ Appellants Interested Party**
and **SECRETARY OF STATE FOR THE HOME DEPARTMENT**	**Defendant/ Respondent**
ADVICE ON INDIVIDUAL RIGHTS IN EUROPE (AIRE CENTRE)	1st Intervener
SOUTHALL BLACK SISTERS and the HENNA FOUNDATION	2nd Interveners

- -

(Transcript of the Handed Down Judgment of
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Mr Richard Drabble QC and Mr Christopher Jacobs (instructed by JCWI) for the **First Appellant**

Mr Angus McCullough QC and Mr Neil Sheldon (instructed by Treasury Solicitor) for the **Respondent**

Mr Al Mustakim (instructed by Davies Blunden & Evans) for the **Second Appellant**
Mr Angus McCullough QC and Mr Neil Sheldon (instructed by Treasury Solicitor) for the **Respondent**
Ms Karon Monaghan QC, Mr Sharam Taghavi and Mr Eric Fripp (instructed by Mishcon de Reya) by written submissions only for the **1st Intervener**
Mr Henry Setright QC and Mr Michael Gration (instructed by Dawson Cornwell) for the **2nd Interveners**

Hearing dates: 21 and 22 October 2010

- -

Judgment

Lord Justice Sedley :

Summary

1. These two appeals raise the question whether the ban contained in paragraph 277 of the immigration rules on the entry for settlement of foreign spouses between the ages of 18 and 21 is a lawful way of dealing with the problem of forced marriages.

2. Forced marriage is not merely a cultural or social problem. A woman forced into marriage is in the law of this country a victim of false imprisonment and rape, and those arranging and procuring it are likely to be guilty of kidnapping and conspiracy. The Home Office is justified in doing everything it properly can to prevent or inhibit it. But is immigration control an appropriate means of doing so, and if it is, is the method adopted in the rules lawful?

3. It might seem at first sight that a rule restricting the age at which spouses can be united here has no appreciable bearing on the problem. But research and other data have satisfied the Home Secretary, first, that the targeted age-group is particularly vulnerable to this form of abuse, and secondly that there is no practical way of differentiating within it between forced and voluntary marriages. The Home Secretary has concluded that the unavoidable cost in terms of innocent casualties is justified by the expectation that the rule will frustrate a significant number of forced marriages.

4. For reasons to which I now turn, I have reached the conclusion that the arbitrary and disruptive impact of the rule on the lives of a large number of innocent young people makes it impossible to justify, at least where one spouse is a United Kingdom citizen, notwithstanding its proper objective. It follows, for reasons I shall explain, that the rule cannot lawfully be applied to the present appellants or, by parity of reasoning, to others like them. But it is not the role of this court to rewrite it: that is for the Home Secretary to do in the light of the court's reasoning, unless she decides to abandon it altogether. We shall accordingly welcome the parties' submissions on consequential relief when we come to hand down this judgment.

The rule

5. Subject to a variety of conditions which are not presently material, a foreign national may in principle be granted entry clearance or leave to enter or remain as the spouse or civil partner of a person lawfully present or settled in the United Kingdom. For procedural purposes the UK-based spouse is known as the sponsor. Among sponsors are United Kingdom citizens with an indefeasible right of abode and a constitutional right to marry; but a sponsor may also be present in the United Kingdom only by virtue of leave to enter or remain. The material rule does not differentiate between these classes.

6. Until November 2008, rule 277 of the Immigration Rules (HC 1113) required the sponsor and the incoming spouse both to be aged over 18. (Until 2003 the sponsor could be as young as 16; in 2003 this was raised to 18, as was the age of the incoming spouse in 2004.) While this too is capable of having had an impact on bona fide

marriages, no point is taken or arises on it in the present appeals, and I treat it as a lawful restriction, whatever its purpose.

7. With effect from 27 November 2008, however, rule 277 was amended to read:

> Nothing in these Rules shall be construed as permitting a person to be granted entry clearance, leave to enter, leave to remain or variation of leave as a spouse or civil partner of another if either the applicant or the sponsor will be aged under 21 on the date of arrival in the United Kingdom or (as the case may be) on the date on which the leave to remain or variation of leave would be granted.

8. With effect from 6 April 2010 the rule was amended by interposing after the words "aged under 21":

> "(or aged under 18 if either party is a serving member of HM Forces)".

9. The rule, being at base a policy, is capable of waiver. The Home Secretary's policy is to grant waivers only (in the words of the letter sent in the Aguilar case) in "clear exceptional compassionate circumstances which have not previously been considered and which merit the exercise of discretion outside the Immigration Rules". It was conceded on the Home Secretary's behalf by counsel at first instance in the Aguilar case that the Home Office was bound to exercise the discretion to depart from the rules in any case where not to do so would violate article 8 of the ECHR. In practice, we are told by Angus McCullough QC for the present Home Secretary, this may be done where, for example, the wife is pregnant and unable to travel.

The rationale of the rule

10. I can do no better than to set out the explanation of the rule accepted by Burnett J in the *Aguilar* case and spelt out in his skeleton argument by Mr McCullough for the Home Secretary:

> (i) The problem of forced marriage is a very serious one. It often involves rape, child abuse and domestic violence. The need to take effective and robust measures to address the problem is self evident.
>
> (ii) The scale of the problem cannot precisely be identified as a large proportion of forced marriages go unreported. One report indicates that there may have been between 5,000 and 8,000 reported cases in the UK in 2008. On any view, the problem is a large one.
>
> (iii) The older the individual, the better equipped he or she is likely to be to resist pressure to enter a forced marriage. Opportunities to mature and/or to complete education and/or to seek help and advice will all be of potential benefit in this regard.

(iv) A significant proportion of those forced marriages identified by the FMU involve victims aged between 18 and 20. The FMU's figures for 2005-2008 show that 28% of all cases involved those aged 18-20. There is, therefore, cogent evidence to indicate that an increase in the age limit will reduce the prevalence of forced marriage.

(v) The evidence relied upon by those who oppose the policy as being ineffective is neither conclusive nor particularly reliable. The SSHD's reservations regarding the Hester report are well justified and the sharp division amongst consultation responses demonstrates that those who seek to engage in this debate generally do so from a position of entrenched interest.

(vi) There is plainly room for legitimate difference of opinion as to whether the increased age limit, and the inconvenience this will cause to young people under the age of 21 who wish to live together in the UK, is proportionate to the problem of forced marriage which it seeks to address. At the heart of the assessment will be the individual's view as to the importance of facilitating the cohabitation of young married couples as against his view as to the perniciousness of forced marriage.

(vii) The SSHD was entitled to balance these considerations in the way that she did. Of particular relevance in this regard are:

(a) The seriousness of the problem of forced marriage;

(b) The fact that the effect of the policy does not extend to preventing genuine marriage but only to the temporary prevention of married life in the UK as opposed to elsewhere;

(c) The availability of leave outside the rules in compelling compassionate circumstances.

(viii) A relevant indication of both the effectiveness and proportionality of the SSHD's policy is provided by the fact that other countries who have sought to address this problem have reached similar conclusions. The Netherlands increased the age limit to 21 in 2004 and, contrary to the assertions advanced by the Appellants, this policy remains in force and has not been overturned by the ECJ. The coalition agreement of the new Dutch Government indicates their intention to increase the age limit to 24. Denmark increased its limit to 24 in 2002.

11. Both the premises and the logic of this rationale have been criticised by counsel for the appellants and by the interveners. It is pointed out that the Home Office had bespoken independent academic research which it rejected on grounds related to its intrinsic quality; but it has had no alternative research to rely on. Richard Drabble QC for Mr Aguilar submits, however, that the Home Office's own statistics, which were in evidence, indicate that while about a third of all forced marriages involve

individuals aged 18-20, in 2007 (the last complete year before the rule came in) no more than 4% of marriages of 18- to 20-year-olds for which visas were sought were considered by the Forced Migration Unit to be forced marriages. If roughly the same proportions still obtain, some 96% of young couples who are shut out by the rule fall outside its purpose.

12. Mr McCullough rejects this as specious because it assumes that the full extent of forced marriage is actually known. His position is that, since its true extent is bound to be under-reported, all one can be sure of is that it substantially exceeds the known figures. I accept this; but I also accept that such evidence as there is supports the contention that rule 277 is predictably keeping a very substantial majority of bona fide young couples either apart or in exile. The Home Secretary does not seriously dispute this, but she considers that it is a proportionate price to be paid for a necessary measure. Even if the proportion of forced to voluntary marriages caught by the rule is as low as 5%, this spells 90 victims of a very serious crime.

13. To this, the appellants counterpose the plain fact that any protection that the rule affords the victims can only be temporary and indirect. It cannot prevent forced marriages from taking place, whether here or abroad. All it does is defer entry until both parties are over 21. In doing so it assumes without any empirical foundation that, rather than simply wait, those arranging such marriages will (a) abandon the enterprise and (b) not find an alternative victim. The appellants also point out that the rationale not only assumes a series of unproven things but elects to treat as no more than "inconvenience" the drastic effect of the rule on thousands of young adults who have entered into bona fide marriages.

These cases

14. Diego Andres Aguilar Quila is a Chilean national, born on 12 July 1990 and therefore still under 21. He entered the United Kingdom on a student visa which expired on 3 August 2009. By then – in fact in 2006 when he first came here with his parents - he had met and fallen in love with Amber Jeffery, a British citizen. On 22 November 2008, when she was 17, they married.

15. Amber Aguilar's date of birth is 25 April 1991. At the time of marriage Diego Aguilar would have been eligible for a visa as a spouse when his wife reached 18, but before that date arrived the new rule was introduced. Mr Aguilar therefore applied before the announced rule-change took effect, but the application was refused on the ground that his wife was still only 17. By the time she turned 18 the amended rule was in force and the Home Office refused to waive it. A notice of refusal to vary Mr Aguilar's leave to enter was simultaneously issued.

16. The effect has been severe. Since he still had an unexpired period of leave to remain, Mr Aguilar had no right of appeal. Had he done what many entrants do and overstayed, he would have acquired rights of appeal to which we will come later in this judgment. Instead he behaved responsibly and on 31 July 2009 left the United Kingdom. His wife, as was to be expected, left with him. To do so she had to give up a place which she had been offered, on the basis of A-level results which included distinctions in French and Spanish, on the joint honours degree course in modern languages beginning that autumn at Royal Holloway College of London University. There was no equivalent course available in Chile, and her plans to become a modern

language teacher here have had to be put on hold. The couple went to live in cramped conditions with the Aguilar family in a suburb of Santiago. They have since moved to the Republic of Ireland; but they are still forbidden to live together here.

17. Shakira Bibi is a Pakistani national, born on 7 July 1990. She was married on 30 October 2008 in Pakistan, of which she is a national, to Suhayl Mohammed, a United Kingdom citizen and resident, born on 8 April 1990. Their marriage was a traditional arranged marriage, but there is no suggestion that it was forced. On 1 December 2008 Ms Bibi applied for entry clearance to join her husband here. It was refused by the entry clearance officer in Islamabad on the ground that both parties were under 21. The couple are still apart.

The proceedings

18. Importantly, neither of the would-be entrants has appealed to an immigration judge. In Mr Aguilar's case this is because, as we have explained, his correct conduct deprived him of a right to appeal. In Ms Bibi's case an appeal was lodged but was abandoned in favour of judicial review proceedings because the principal challenge which it was desired to make was to the legality of the rule itself.

19. By a judgment given on 7 December 2009 on a rolled-up application for judicial review, Burnett J dismissed Mr Aguilar's challenges both to the rule and to its application to him, the former on grounds of rationality and proportionality, the latter on article 8 grounds. The availability of the full text - [2009] EWHC 3189 (Admin) - makes it unnecessary for us to do more than pay tribute to its comprehensiveness and clarity.

20. Before this, on 5 August 2009, Judge Pearl, sitting as a deputy judge of the Queen's Bench Division, had refused Ms Bibi permission to apply for judicial review on the principal ground that a more appropriate remedy was available by way of statutory appeal, an argument which had been met with a sacrificial submission that any such appeal was doomed to failure.

21. Permission to appeal in the Bibi case was given, however, by Sullivan LJ with a direction that the grant was to operate as a grant of permission to apply for judicial review and that the substantive application be retained in this court. His reason was that the legality of rule 277 was more apt for judicial review than for appeal, but that otherwise the judge's reasons for refusal were sound. Permission to appeal in the Aguilar case was given unconditionally by Stanley Burnton LJ on consideration of the papers.

The interveners

22. Four organisations sought to intervene in the argument. The AIRE Centre (the acronym stands for Advice on Individual Rights in Europe) applied and were given leave by Stanley Burnton LJ to make written submissions. Thereafter Southall Black Sisters together with the Henna Foundation were given similar permission, together with leave to renew their application to make oral submissions on the hearing of the appeal. In the event we have heard Henry Setright QC on their behalf. We record our gratitude to all of them.

23. Subsequently the Asian Community Action Group, based in Sheffield, asked for permission to make written and oral representations. They were invited to set out in writing who they were and what they felt they could usefully address in addition to the parties and the other interveners. By the time the court sat to hear the appeals no reply was apparently to hand. It has now been established that a full response had reached the civil appeals office before the hearing but had failed to find its way to the court. On behalf of the court administration we apologise for this. Its effect is mitigated, however, by the fact that we already had among our papers, and had read, an anticipatory 33-page skeleton argument settled by counsel on behalf of the Group. We are therefore reasonably confident that nothing substantial that they might have advanced has escaped our attention.

24. This said, it needs to be remembered that litigation, even on issues of general importance, is not an open battleground. The court may well welcome help, such as it has had in this case, on law or, more occasionally, on fact from knowledgeable third parties. But there is no legal right to intervene and a limit to the amount of material the court can cope with from other quarters. We note with approval that in public interest litigation Treasury counsel today do not stand in the way of interventions unless they consider that there is good reason to do so. But potential interveners do need to be able to contribute something relevant that is not already before the court.

The validity of rule 277

25. The rule is attacked on three levels. First it is alleged that it is irrational in the fundamental sense that it is both incapable of having its intended effect and certain (as in the present cases) to have harmful and unnecessary consequences: put shortly, that it makes no sense. Secondly it is said that it is in any event a disproportionate inhibition on family and private life and on the right to marry: it does incalculable harm to a large number of genuine young couples without any appreciable or proportionate impact on the admittedly grave problem of forced marriages. Thirdly it is said that, at least in its amended form, it is discriminatory, making an illogical exception in favour of service personnel. In the alternative it has been submitted that the application of the rule to the two appellants is unlawful because they fall outside the mischief at which it is directed; but this argument is bound to fail if the proportionality argument does not succeed.

Irrationality

26. Logically the first argument is that of Al Mustakim, counsel for Ms Bibi, that the objective which it is sought to achieve by the rule has nothing, or next to nothing, to do with immigration, so that it is an abuse of the prerogative power of immigration control to use the rules (which have no separate statutory basis) for that purpose. Mr Mustakim draws an analogy between this case and the Belmarsh case, *A v Home Secretary* [2004] UKHL 56. One of the issues there was the differential treatment of suspected terrorists who were and who were not UK nationals. The comparison of the two classes, Lord Bingham said at §54,

> "might be reasonable and justified in an immigration context but cannot … be so in a security context, since the threat presented by suspected international terrorists did not depend on their nationality or immigration status."

Lord Scott said, at §158,

> "If those who are suspected terrorists include some non-Muslims as well as Muslims, it would, in my opinion, be irrational and discriminatory to restrict the application of the measures to Muslims even though the bulk of those suspected are likely to profess to be Muslims."

27. The analogy in the present case has to be that the risk of spouses being brought into the UK on the basis of forced marriages is not addressed by an immigration rule that operates simply by reference to age. Such a rule is discriminatory – intentionally so – but the criterion of discrimination, it is said, has little or nothing to do with preventing forced marriages.

28. The answer, as it seems to me, is that the rule has little, but not nothing, to do with preventing forced marriages. It can rationally, albeit very contestably, be judged that excluding spouses in an age-group which is thought to include about a third of all forced marriages is capable of having an impact on the incidence of forced marriage. Once this point is reached, it is not the court's proper role to intervene in the process of policy formation. Whatever our own view might have been of the asserted link between the mischief and the rule, the process of reasoning which I have outlined above does not make it possible to categorise rule 277 as a policy which either lies outwith the lawful purposes of policy formation, or which intrinsically makes no sense, or which is incapable of contributing to its professed objective.

29. I accordingly approach the remaining questions before us on the premise that the Home Secretary in 2008 had reached the debatable but tenable view that the new rule 277, albeit an admittedly blunt instrument, would have some effect in reducing the incidence of forced marriages. The marginality of the evidence for this is nevertheless something to which I shall need to return when I consider proportionality.

The issue

30. Before I come to the question of principle, there is a substantive question to be addressed: are we concerned with the rule itself, albeit as illustrated by the facts of these two cases, or are we concerned with its impact on the present appellants? The reason why the distinction may matter is that both sponsors are British citizens who can legitimately take their stand on an indefeasible right of abode, arguing that it must take the strongest possible reasons if the executive is to be allowed to interfere materially with their legal right to marry at (or even below) the age of 18 and to found a family. The position of a person who is present here temporarily or by revocable leave may be different in principle.

31. In my judgment the correct course is to decide these two cases in relation to their own facts, leaving it to the Home Secretary, at least in the first instance, to decide how far their ripples spread. This means that we are moving from the possibility of striking down the rule (which has been Mr Mustakim's main aim) to the possibility of disapplying it.

32. The facts relevant to this aspect of the appeals include an unequivocal acceptance by the Home Secretary that both of these marriages are entirely voluntary. There is no suggestion that because one of them was contracted in Pakistan it is more suspect than

the other. Nor is it disputed that the operation of the rule is compelling one couple to live abroad and the other couple to live apart.

33. The first question of law is whether the court is required to consider the proportionality of the rule at all. Mr McCullough submits that all that counts is its legality and its rationality. There are two parallel reasons why the appellants contend that the rule, even if not unlawful in itself, cannot lawfully be applied to them if its operation is disproportionate. One is that, because it interferes with a fundamental right, it is required at common law either to be proportionate in principle or to operate proportionately. The other is that, because it engages article 8(1) of the Convention by denying respect to the appellants' family life, it requires justification under article 8(2). I will consider these in turn.

Proportionality at common law

34. In *R v Home Secretary, ex p Daly* [2001] UKHL 26, [2001] 2 AC 532 the House of Lords, on the eve of the coming into force of the Human Rights Act 1998, took the opportunity to make it clear that proportionality was already required by the common law where an executive measure would interfere with a fundamental individual right. The case concerned a blanket rule that prisoners were to be excluded when their cells were searched, even when the search might reveal correspondence protected by legal professional privilege. The right, albeit reflected in the Convention, could not yet be relied on as a Convention right; if it was to be effective, it could only be at common law. Their Lordships unanimously held that the rule involved a disproportionate invasion of a prisoner's fundamental right to free communication with his lawyers and so could not stand.

35. This decision did not come out of the blue. The future adoption of proportionality as a criterion of legality in public law was contemplated by Lord Diplock in *CCSU v Minister for the Civil Service* [1985] AC 374, 410. Although it was rejected by the House in *R v Home Secretary, ex parte Brind* [1991] 1 AC 696 (the case concerning the ban on broadcasting), Lord Bingham, in the leading speech in *Daly*, §6-12, traced the cases in which the doctrine had eventually taken shape. He went on:

> 17. The next question is whether there can be any ground for infringing in any way a prisoner's right to maintain the confidentiality of his privileged legal correspondence. Plainly there can. Some examination may well be necessary to establish that privileged legal correspondence is what it appears to be and is not a hiding place for illicit materials or information prejudicial to security or good order.
>
> 18. It is then necessary to ask whether, to the extent that it infringes a prisoner's common law right to privilege, the policy can be justified as a necessary and proper response to the acknowledged need to maintain security, order and discipline in prisons and to prevent crime. Mr Daly's challenge at this point is directed to the blanket nature of the policy, applicable as it is to all prisoners of whatever category in all closed prisons in England and Wales, irrespective of a prisoner's past or present conduct and of any operational emergency or urgent

> intelligence. The Home Secretary's justification rests firmly on the points already mentioned: the risk of intimidation, the risk that staff may be conditioned by prisoners to relax security and the danger of disclosing searching methods.
>
> 19. In considering these justifications, based as they are on the extensive experience of the prison service, it must be recognised that the prison population includes a core of dangerous, disruptive and manipulative prisoners, hostile to authority and ready to exploit for their own advantage any concession granted to them. Any search policy must accommodate this inescapable fact. I cannot however accept that the reasons put forward justify the policy in its present blanket form. …..

36. Having then concluded that the rule in question went further than was necessary for its legitimate purpose, Lord Bingham said at §23:

> 23. I have reached the conclusions so far expressed on an orthodox application of common law principles derived from the authorities and an orthodox domestic approach to judicial review. But the same result is achieved by reliance on the European Convention.

In important concurring speeches, Lord Steyn and Lord Cooke went on to consider what continuing relevance the *Wednesbury* test of irrationality might now have. The consequent academic discussion[1] has not settled on a single doctrinal model, but I am content for present purposes to accept that there is still a discrete category of irrationality (which I have addressed above). What is also clear, however, is that proportionality, although it may well overlap in particular cases with irrationality and even tend to subsume it, now has a life of its own in public law. It is succinctly summarised at the start of his chapter on proportionality by Michael Fordham QC in the *Judicial Review Handbook* (5th ed, 2008) under the rubric: "Certain contexts require a body's response to be appropriate and necessary to achieve a legitimate aim":

> "Proportionality provides a disciplined framework for substantive review. It has been applied to test the justification for interferences with EC, HRA and common law rights, and the imposition of sanctions. Its wider application is an open question. As a principle to complement reasonableness it offers much: a focused analysis, variable standards of scrutiny, and an inbuilt recognition of latitude."

Rights at common law and under the Convention

37. The critical initial question is therefore what right, if any, either appellant can rely on in order to found a case on proportionality. The common law has not operated historically by declaring affirmative rights: it has preferred to guarantee freedoms –

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[1] See for example Wade and Forsyth *Administrative Law* (10th ed) 312-4; De Smith *Judicial Review* (6th ed) §11-073-085; Craig *Administrative Law* (5th ed) 618-9. See also the remarks of Dyson LJ in the *British Civilian Internees case* [2003] EWCA Civ 473, §33-5; per contra, Lord Slynn in *Alconbury* [2001] UKHL 23, §50-1.

freedom from arbitrary detention, for example, or from trial without due process of law. But almost every such freedom can be, and commonly is, restated in the language of correlative rights. Some of these, such as the right not to be arbitrarily detained, are part of the fabric of the common law itself. Others, such as the right to jury trial, are or have become artefacts of legislation, but they are no less fundamental for this. Two such rights are founded upon here: the right of a citizen of the United Kingdom to live here, and the right of an adult to marry. The first is an indefeasible and unconditional right, for the British state has no power of exile. The second is a right which is governed and qualified by statute, but it is in the eyes of the common law a fundamental right with which the state may interfere only within measured limits – for example, in relation to age, consent, formality and so forth.

38. Partly but not wholly in parallel with the common law, the appellants found on articles 8, 12 and 14 of the Convention, with each of which the Home Secretary, as a public authority, is required by s.6 of the Human Rights Act 1998 to comply.

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.

39. Two obstacles, in the Home Secretary's submission, stand in the appellants' way: first, rule 277 does not either prevent anybody from marrying or restrict their ability to do so; secondly, although it places a temporary handicap on cohabitation in the United Kingdom, it does nothing to prevent cohabitation elsewhere in the world. Thus a British citizen is still free both to marry and to enjoy family life with his or her spouse even while both are under 22.

40. I do not accept that either of these facts means that the two rights, both singly and in combination, are not very sharply interfered with by rule 277. They are reasons for saying (as the Home Secretary does in the alternative say) that the interference is as little as practicable and thus proportionate. But in order to explain why I consider that fundamental rights are invaded at all by the rule, I need first to turn to the principal case relied on by Mr McCullough, *Abdulaziz v United Kingdom* (1985) 7 EHRR 471. Although we are considering rights at common law as well as under the Convention, it is strongly arguable that at least in this regard the two ought to be congruent.

41. The three applicants in *Abdulaziz* were not UK citizens. They were women of other nationalities who were lawfully settled here without limitation of time and who wanted to bring their husbands here to join them. It was held by the full court that, while family life existed in sufficient measure to make article 8 applicable, the restrictive immigration rule which frustrated it was justified because the wives were free to join their husbands abroad. I will come separately to article 8, but in this limb of the argument Mr McCullough adopts the court's reasons for finding no sufficient interference with family life to attract the protection of article 8.

42. The court (§61-65) decided that family life could be engaged by marriage notwithstanding that the spouses were living apart. What the court then said was this:

> *Compliance with Article 8*
>
> 66. The applicants contended that respect for family life - which in their cases the United Kingdom had to secure within its own jurisdiction - encompassed the right to establish one's home in the State of one's nationality or lawful residence; subject only to the provisions of paragraph 2 of Article 8, the dilemma either of moving abroad or of being separated from one's spouse was inconsistent with this principle. Furthermore, hindrance in fact was just as relevant as hindrance in law: for the couples to live in, respectively, Portugal, the Philippines or Turkey would involve or would have involved them in serious difficulties, although there was no legal impediment to their doing so.
>
> 67. The Court recalls that, although the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective "respect" for family life. However, especially as far as those positive obligations are concerned, the notion of "respect" is not clear-cut: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's

> requirements will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals. In particular, in the area now under consideration, the extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved. Moreover, the Court cannot ignore that the present case is concerned not only with family life but also with immigration and that, as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory.
>
> 68. The Court observes that the present proceedings do not relate to immigrants who already had a family which they left behind in another country until they had achieved settled status in the United Kingdom. It was only after becoming settled in the United Kingdom, as single persons, that the applicants contracted marriage (see paragraphs 39-40, 44-45 and 50-52 above). The duty imposed by Article 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country.
>
> In the present case, the applicants have not shown that there were obstacles to establishing family life in their own or their husbands' home countries or that there were special reasons why that could not be expected of them.
>
> ….
>
> 69. There was accordingly no "lack of respect" for family life and, hence, no breach of Article 8 taken alone.

43. Mr McCullough submits that this decision, which has been repeatedly cited in more recent jurisprudence, is dispositive of the present appeals. He accepts that none of the three applicants was a UK national, but all three sponsors were lawfully and indefinitely settled here and at least one had a child who was a UK citizen. Nationality, he submits on behalf of the Home Secretary, confers no better status than this. I do not agree. In the first place, the last words quoted above from §68 of the Strasbourg judgment make it clear that the reason why the rule did not interfere with family life was that the applicants had shown no reason why they could not establish family life "in their own or their husbands' home countries": in other words, neither party was a British national – both had a right of abode elsewhere, and neither had a right of abode (as opposed to leave to remain) here. We simply do not know whether the Court would have considered this to be the case even if the sponsor was a UK citizen. It is conceivable that it would have extended its reasoning to embrace Mr McCullough's submission; but it is in my view at least as likely that it would have

drawn the distinction that Mr Drabble draws between sponsors who are foreign nationals and sponsors who are UK nationals.

44. In my judgment neither *Abdulaziz* nor any of the cases which follow it decides this critical issue. It is correct, as Mr McCullough points out, that the applicant Chinese spouse in *Y v Russia* (2010) 51 EHRR 21, whose article 8 case against removal was held to be manifestly ill-founded, had married a Russian national and sought article 8 protection on that basis. But it is evident from the judgment that what the decision turned on was the fact that the applicant had married her when he was in the precarious position of an asylum-seeker (and one whose claim in due course failed). For the rest, the Court said no more than this:

> 103. ….Where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect a married couple's choice of country for their matrimonial residence or to authorise family reunion on its territory. However, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life, as guaranteed by Article 8 (1) of the Convention.
>
> 104. Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, whether there are factors of immigration control (for instance, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion. Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. Where this is the case the removal of the non-national family member would be incompatible with Article 8 only in exceptional circumstances.
>
> 105. Turning to the present case, the Court observes that the applicants married on 5 April 2005. Prior to that date the first applicant had no legal grounds entitling him to remain in Russia, except for the pending appeal against the decision of the Migration Department of 20 May 2004 concerning his refugee status. The Court can assume that the applicants were engaged in a genuine family relationship. However, while under the provisions of Russian law the first applicant could not be deported while the appeal proceedings were pending, it is clear that his immigration status prior to 5 April 2005 gave him no expectation that he would obtain a right to residence permit.
>
> 106. ….In any event, the applicants had never sought to obtain a residence permit for the first applicant as the spouse of a

> Russian national and therefore the question of whether he would have received such a permit remained open. The question whether the second applicant could join her husband in China, should she choose to do so, also remains open.

45. In my judgment the question whether the spouse of a United Kingdom national who exercises the right to marry is entitled prima facie to the benefit of the other spouse's right of abode without interference under the immigration rules is not concluded by any Strasbourg authority. (I say prima facie because I would not wish to exclude cases in which there are good grounds, such as criminality, for excluding the non-national spouse.) It is, however, the subject of domestic authority.

46. *R(Baiai) v Home Secretary* [2008] UKHL 53 concerned three couples, all foreign nationals with differing entitlements or none to be present here, and all wishing to marry. Dealing with the Home Secretary's submission that there is no absolute right to marry, Lord Bingham said (§13):

> 13. If by "absolute" is meant that anyone within the jurisdiction is free to marry any other person irrespective of age, gender, consanguinity, affinity or any existing marriage, then plainly the right protected by article 12 is not absolute. But equally plainly, in my opinion, it is a strong right. It follows and gives teeth to article 16 of the Universal Declaration of Human Rights (1948) and anticipates article 23(2) of the International Covenant on Civil and Political Rights (1966). In contrast with articles 8, 9, 10 and 11 of the Convention, it contains no second paragraph permitting interferences with or limitations of the right in question which are prescribed by law and necessary in a democratic society for one or other of a number of specified purposes. The right is subject only to national laws governing its exercise.
>
> 14. The Strasbourg case law reveals a restrictive approach towards national laws. Thus it has been accepted that national laws may lay down rules of substance based on generally recognised considerations of public interest, of which rules concerning capacity, consent, prohibited degrees of consanguinity and the prevention of bigamy are examples ….
>
> …. But from early days the right to marry has been described as "fundamental", it has been made clear that the scope afforded to national law is not unlimited and it has been emphasised that national laws governing the exercise of the right to marry must never injure or impair the substance of the right and must not deprive a person or category of person of full legal capacity of the right to marry or substantially interfere with their exercise of the right ….

47. It seems to me that on this subject common law and Convention law are, as they should be, coextensive. Although Mr Drabble has not placed the right to marry at the centre of his argument, Mr Mustakim and the AIRE Centre have done so. Mr Drabble,

more cautiously, brings the right to marry into his article 8 argument on family life: one of the principal purposes of marriage, he says with some cogency, is to live together.

48. In my judgment rule 277 represents a direct interference with what the common law and Convention both value as a fundamental right. In the eyes of the common law it is not simply the right to marry and not simply the right to respect for family life but their combined effect which constitutes the material right: that is to say a right not merely to go through a ceremony of marriage but to make a reality of it by living together. For the state to make exile for one of the spouses the price of exercising the right to marry and embark on family life requires powerful justification – considerably more powerful, in my judgment, than existed in *Abdulaziz*. In Convention terms the two rights are discrete, but their practical relation to each other is in my view very much the same.

49. It is not disputed, even so, that there will be measures which a state is entitled to take which impede the right, for instance by excluding spouses with serious criminal records or – materially – parties to forced marriages. In deciding whether to apply such measures it is established by *Abdulaziz* that the state may place weight on the fact (if it is a fact) that neither spouse has a citizen's right of abode here. But I accept the appellants' case that the starting point is not, as the Home Secretary suggests, a thin entitlement which, so long as it can be exercised somewhere in the world, can legitimately be stultified here. It is a fundamental right which, whether at common law or by virtue of article 8 read with article 12 of the Convention, the state is ordinarily required to respect.

Proportionality

50. It follows, if we are right so far, that the proportionality of a rule which interferes with fundamental common law and Convention rights falls to be gauged by a single measure. This is the now conventional measure derived by the Privy Council in *De Freitas v Ministry of Agriculture* [1999] 1 AC 69 from a number of common law jurisdictions. In determining whether a measure "arbitrarily or excessively invades the enjoyment of [a] guaranteed right according to the standards of a society that has a proper respect for the rights and freedoms of the individual", the court will ask:

> "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

For present purposes this corresponds with the jurisprudence of the European Court of Human Rights, and I see no need to elaborate it.

51. I have accepted that the objective of frustrating or discouraging forced marriages is a legitimate one. I have also accepted that rule 277 is rationally connected to it in the minimalist (or *Wednesbury*) sense that one cannot exclude as irrational the Home Secretary's view that the one may have an impact on the other. The critical question is

therefore whether the rule exceeds what is necessary and proportionate to accomplish the objective.

52. It is relevant, in answering this question, to keep in mind the very oblique bearing which the one has on the other. If the rule excludes parties to forced marriages, it does so only by fortuitously sweeping them into a far larger net. The question is thus, in concrete terms, whether the mischief it deals with (so far as it does) can justify the adverse impact on what on any view is a far larger class of innocent young couples.

53. The reasons for saying that it cannot are in my judgment formidable. The rule subjects all young couples to an unspoken but irrebuttable presumption that their marriage is a forced one. It is said by Mr McCullough, however, that the rigidity of the rule is in fact its virtue, because there is no feasible way of inquiring into the voluntariness of a marriage. I recognise some force in this. Suppose that the rule raised a rebuttable presumption of forced marriage in the material age-group, and that a foreign national who had in truth forcibly married a woman of United Kingdom nationality appealed to the Tribunal against refusal of entry. If, as would be likely, the wife was produced to say that the marriage was voluntary, the likelihood of her denying it in the presence of the very family members who had overborne her will would be slight, and the price to be paid by her for telling the truth might be very grave.

54. But the problem with this argument is that the door which it seeks to keep closed is already open. First, because the Home Secretary is forbidden by law to violate Convention rights, it is Home Office policy, in deference to article 8, to consider waiving the rule when, for example, the wife is pregnant and unable to travel. It follows that a significant proportion of forced marriages which have been consummated by what in law is rape will escape the ban.

55. More than this, it is common ground that in a variety of situations an appeal will lie to the First-Tier Tribunal against a refusal of entry or of permission to remain pursuant to rule 277. In such an appeal reliance on article 8 will inexorably open up the voluntariness of the marriage. Thus if Mr Aguilar, instead of behaving with a proper regard for the law, had overstayed, he would have been entitled to resist removal on article 8 grounds and to conduct his appeal in-country. His case in that event would have been that his marriage fell outside the mischief at which the rule was directed (a fact which the Home Secretary unhesitatingly accepts) and that to compel his wife, if she was to live with him, to give up her university place and emigrate from her own country was – to put it mildly – disproportionate. We have heard no suggestion that there would be any answer to such a claim, save a question-begging plea that rule 277 could operate only if its impact on individual cases was disregarded. While the facts of Ms Bibi's and Mr Mohammad's case are known to us in less detail, there is here too no suggestion of a less than voluntary marriage, albeit an arranged one. Their case too appears to stand clear of the mischief at which the rule is directed, and Mr Mohammad consequently faces exactly the same unjust choice as Mrs Aguilar.

56. An out-of-country appeal also lies from the decision of an entry clearance officer. Unlike many out-of-country appeals which are doomed to failure by the appellant's absence, rule 277 appeals can be efficiently conducted by the UK-based sponsor with live evidence from a variety of sources – including quite possibly videolink evidence from the foreign spouse. The same issues will be open, and the same outcome on the cards, as with an in-country appeal.

57. The Home Secretary's stance that only a rigid rule will serve the necessary purpose is lastly, in my judgment, undermined by the exception made by amendment in favour of members of the armed services. It is impossible to see, and no reason has been suggested, why the possibility of a forced marriage on which the rule is predicated is any less present among members of the armed services than among the population generally. The introduction of the exception, in our view, makes all but untenable the Home Secretary's contention that an all-embracing rule, making no distinction of persons, is necessary if the objective is to be met.

58. This is not the end of the proportionality exercise. It is also appropriate to consider the strength of the case that rule 277 will have the intended effect. A proven case that an important social objective will be achieved by limiting certain individual rights may suffice to justify an invasive measure. By parity of reasoning, a speculative or conjectural case will carry far less weight as justification for such restrictions. The Home Office's reasoning on proportionality – not ex post facto but at the time when the rule was formulated – is set out in the witness statements of Nicola Smith, a deputy director of immigration policy and the head of the permanent migration team in the Home Office's Borders Agency. It confirms that the scale of forced marriage in the UK is "very difficult to estimate". I have mentioned above that such estimates as there are indicate that only a small fraction of the many marriages caught by rule 277 are likely to be forced marriages. As to these, Ms Smith gives the following reasons for introducing the rule:

> "i. To help tackle the problem of forced marriage by allowing young people extra time to develop maturity and life skills which would help them to resist inappropriate family pressure to marry.
>
> ii. To provide an opportunity to complete education and training
>
> iii. To delay sponsorship and therefore time spent with a (sometimes abusive) spouse if the sponsor returns to the UK.
>
> iv. To allow a victim of forced marriage an opportunity to seek help and advice during the period when they cannot sponsor their spouse and extra time to make a decision about whether to sponsor.

59. It has to be observed that the first of these reasons assumes that no marriage has taken place. If so, the rule has no bearing on it. The second and third purposes may be palliative but are in no way preventative. The fourth does seek to address the situation of a victim of forced marriage. The last part of it, however, assumes the very free will which forced marriage overbears. It is only the first part of it which has a concrete bearing on the problem, but it bears only on cases where the sponsor is the victim – that is, where a female UK Citizen has been forced to marry a foreign national. There may well be good reason to suspect that this class of case – where entry to the UK can be 'sold' to a foreign national by forcing a woman with British nationality to marry him – is the major and most pernicious sub-group. This, in fact, was the primary group identified as in need of protection in the 2008 consultation paper *Marriage Visas: the Way Forward* (see §1.3). But it is only on this sub-group that the first part of reason iv. can have a bearing.

60. While therefore we must be careful to refrain from substituting our judgment for that of the Home Secretary on policy issues, we are not entitled to refrain from evaluating the strength of the policy imperative and its rationale in deciding whether its impact on innocent persons is proportionate. In my judgment the policy imperative is only obliquely, partially and in large part speculatively related to the measure under scrutiny.

61. If the Home Office had made its own structured appraisal of the proportionality of the rule before introducing it, the court would of course pay careful attention to it. But Mr Drabble is in my judgment right when he points out that Ms Smith's account of this aspect of the scheme treats proportionality simply as a mathematical calculation:

> "We concluded that as the policy would affect less than 3% of those granted both leave to enter and leave to remain in the UK as a spouse in 2007, and as the evidence demonstrated that the rates of forced marriage were highest among those aged 17-20 in 2005-2008, the policy would represent a proportionate response to the issue of forced marriage, and the importance of protecting the rights and freedoms of vulnerable persons who might be forced into marriage would outweigh the significance of any adverse impact on particular communities or age groups, in accordance with ECHR Article 8(2), and that the policy would not therefore contravene ECHR Article 14."

62. As I hope my consideration of proportionality has indicated, this is both inadequate and muddled. Perhaps this is unsurprising: there is, disturbingly, no suggestion that we have seen that the government's lawyers were consulted before this view was reached. Proportionality is not gauged by headcount. The critical question was *why* the protection of the vulnerable justified a blanket rule which invaded the fundamental rights of a far greater number of innocent people. This was apparently not addressed.

Discrimination

63. It has been submitted that the rule also violates the prohibition on discrimination in article 14. This contention is based principally on the exception introduced by amendment in favour of members of the armed services, but also on the disproportionate effect of the rule on individuals of South Asian origin.

64. The first of these arguments has now been addressed in relation to proportionality. It can, it is true, be recycled as an argument on discrimination, but the form it has to take is that the victim is everybody but members of the armed forces. As such it adds nothing of practical value to the arguments already canvassed, and we do not consider it necessary to rule on it.

65. The second argument is entirely misconceived. The vice of the rule is precisely that, in an endeavour not to single out those communities where forced marriage is likeliest to occur, it fails to discriminate. As Mr Mustakim must appreciate, it could not be otherwise: a rule which singled out persons of South Asian origin would be highly objectionable on more than one ground. The Home Office's problem is that, in order to avoid this trap, it has fallen into another one.

Conclusion

66. I would limit the court's judgment, for the reasons we have respectively given, to allowing these two appeals on the ground that the application of rule 277 to the two appellants and their sponsors is unlawful. I would not strike down the rule, since we have not been dealing with its impact on couples where neither spouse is a United Kingdom national. Whether to keep it in limited form or to drop it altogether is a matter for the Home Secretary, not for the court.

67. What is a matter for us is what is now to happen to Ms Bibi and Mr Aguilar. In my view each is entitled, in the absence of any other valid objection to their admission, to enter this country forthwith as the spouse of a British citizen. We will welcome counsel's submissions, in the first instance in writing and if possible by agreement, as to the form of order which is appropriate.

Lord Justice Pitchford:

68. I am grateful to Sedley LJ for his compelling analysis. For the reasons he has given I agree that the court should confine itself to a consideration of the impact of rule 277 upon these particular appellants. I understand it to be common ground that the sole basis for declining leave to enter was the age restriction imposed by rule 277. I agree, for the reasons given by Sedley LJ, that refusal of leave on the ground of age alone represents such a disproportionate interference with a fundamental right that the decisions cannot stand. I propose to make only a small contribution of my own on the subject of interference by the state with a fundamental right under Art 8. I accept that Art 12 has in the present appeal no life of its own.

69. Burnett J (to whose judgement I also pay tribute) found, [§43], that "Given the approach of the Strasbourg Court in *Abdulaziz* [*Abdulaziz, Cabales and Balkandali v United Kingdom* [1985] 7 EHRR 471] it is likely that only in some cases will the State be called upon to justify its action under Article 8(2)...". Mr McCullough, on behalf of the Secretary of State, adopts for present purposes, Lord Bingham's first two questions in *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27 [at §18]:

> (1)Will the proposed removal [in our case refusal of leave] be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2)If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?

The second question, Lord Bingham explained [at §18], "reflects the consistent case law of the Strasbourg court, holding that conduct must attain a minimum level of severity to engage the operation of the Convention: see, for example, *Costello-Roberts v United Kingdom* [1993] 19 EHRR 112)".

70. In *Abdulaziz* the European Court of Human Rights (ECtHR or the European Court) rejected the argument that Article 8 did not apply to a family which had not yet been established by cohabitation. Article 8 applied to a relationship (§62) "that arises from a lawful and genuine marriage, (such as that contracted by Mr and Mrs Abdulaziz and Mr and Mrs Balkandali) even if a family life has not yet been fully established". The Court went further:

> "Furthermore, the expression 'family life' in the case of a married couple, normally comprises cohabitation. The latter proposition is reinforced by the existence of Article 12, for it is scarcely conceivable that the right to found a family should not encompass the right to live together."

Mr McCullough submitted and the judge accepted that in the field of immigration policy and decision making the ECtHR had made it clear in *Abdulaziz* [§§66-68] that the state enjoyed a wide margin of appreciation. The exercise of control over the admission of foreign nationals did not alone imply a lack of respect for family life under Art 8.1; all depended upon the circumstances of the particular case. It seems to me an unavoidable conclusion that the European Court in *Abdulaziz* found that Art 8.2 did not come into play because the United Kingdom was not, by refusing leave to enter to the spouses, failing to accord respect to family life. In other words, having regard to the individual circumstances of the applicants and the immigration context, the interference was not of such gravity that Art 8 was engaged. The Court did not get to the stage of examining whether there had been an "interference by a public authority with the exercise of this right [to respect for...family life]" which was nevertheless justifiable under Art 8.2.

71. The ECtHR has in many subsequent cases considered what it referred to in *Abdulaziz* as the "positive" obligation to accord respect to family life. They include *Gül v Switzerland* [1996] ECHR 5; *Ahmut v Netherlands* [1996] ECHR 61; *Tuquabo-Tekle and Others v The Netherlands* [2005] ECHR 803; *Rodrigues da Silva and Hoogkamer v. the Netherlands*, no. 50435/99, ECHR 2006; *Darren Omorengie and Others v Norway* [2008] ECHR 761 (First Section); *Y v Russia* [2008] ECHR 1585; *Guluev v Lithuania* [2008] ECHR 1714; and *Esmail Narenji Haghighi v Netherlands* [2009] ECHR 765. The Court has said on several occasions, as in *Gül v Switzerland*, that:

> "38...The essential object of Art 8 (art. 8) is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision (art. 8) do not lend themselves to precise definition. The applicable principles are, nonetheless, similar."

It is noticeable that the only *principles* repeatedly applied in such cases are those stated most recently by the Third Section in *Haghighi v Netherlands*:

> "The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation. Moreover, the Court has held that Article 8 cannot be considered as imposing 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 (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, p. 94, § 68). In a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of

persons residing there will vary according to the particular circumstances of the persons involved and the general interest (see *Gül v. Switzerland*, judgment of 19 February 1996, *Reports* 1996-I, pp. 174-75, § 38)."

Factors which will be considered in the judgement whether there has been interference include (1) the extent to which family life will be disrupted, (2) the extent of ties with the contracting state, (3) whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, (4) whether there are factors of immigration control weighing in favour of exclusion, (5) whether family life was created at a time when the applicants were aware that the immigration status of one of them would from the outset be precarious. On those occasions when the European Court has found an interference with the Art 8 right of respect it has proceeded to consider the self-same factors in its analysis whether the interference was necessary under Art 8.2.

72. In the present cases there is no doubt that family life was established. Further, each sponsor was a British citizen; each spouse contemplated marriage at a time when compliance with rule paragraph 281 of the Immigration Rules was assured or virtually assured (this is not, in other words, a case in which an applicant has abused the asylum process for the purpose of establishing ties in the host country); while no insurmountable obstacles to the enjoyment of family life in the applicants country of origin existed, the effect of refusal was, as Sedley LJ has cogently pointed out, either exile of a British national or disruption of family life (I find it perplexing that Mr and Mrs Aguilar may live lawfully in the Republic of Ireland but not in the United Kingdom); while there are factors of immigration control (discouragement of forced marriages) which purportedly justify rule 277, the application of rule 277 to the circumstances of these particular appellants and many like them is arbitrary in effect. For these reasons I join Sedley LJ in his conclusion that the application of rule 277 to the appellants interfered with their right to respect for family life under Art 8.

Lord Justice Gross:

73. I have read with great respect the judgments of Sedley LJ and Pitchford LJ in draft. I agree entirely with the outcome they propose, namely, that although we do not strike down the rule itself, rule 277 of the Immigration Rules (HC 1113) ("rule 277") cannot lawfully be applied to the present appellants. However, I find myself in the invidious position of reaching the same conclusion by a somewhat different route. I therefore, if with no little diffidence, add a very few words of my own.

74. For my part:

i) In the light of *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471, together with subsequent Strasbourg jurisprudence, in particular *Y v Russia* (2010) 51 EHRR 21, I would be reluctant to base my decision on Art. 8, ECHR. While I would not accept the submission of Mr. McCullough QC for the Respondent, that *Abdulaziz* was dispositive of these appeals, I do see this line of Strasbourg jurisprudence as furnishing a formidable obstacle to the Appellants' reliance upon Art. 8. That is so despite, if I may say so, the obvious force in the distinguishing feature of these appeals, underlined by both Sedley LJ and Pitchford LJ, that the sponsors are British citizens (certainly in the case of Mrs. Aguilar, by birth).

ii) I accept the submission of Mr. McCullough, essentially for the reasons he gave, that Art. 12 ECHR (the right to marry) has "no material bearing" on the issues raised by these appeals. I note in this regard the reluctance of both Mr. Drabble QC for the *Quila* appellants and Mr. Setright QC for certain of the Interveners, to press Art. 12 and thereby to extend the Strasbourg jurisprudence, on the facts of these appeals.

iii) I am also wary, for the traditional reasons, with respect, acknowledged by Sedley LJ, of approaching common law issues, even potentially fundamental issues, in terms of affirmative rights rather than freedoms. Though it may not matter, I would also be minded to talk of rights and correlative duties rather than treating freedoms and rights as correlatives.

75. Turning to the subject-matter of the appeals, I can readily understand the Respondent's legitimate objective of combating forced marriages by a variety of measures, including immigration control. Forced marriages are an evil, very likely involving the commission of a number of criminal offences. Euphemisms are to be avoided; forced marriages have no place in our society.

76. However, as expressed by Sedley LJ, the vice of rule 277:

> " ….is precisely that because it is not allowed to discriminate directly, it is unable to single out those communities where forced marriage is likeliest to occur."

77. The upshot is that rule 277 is a blunt instrument, to the Respondent's knowledge impacting on couples such as Mr. and Mrs. Aguilar, whose marriage is on all hands acknowledged to be genuine and anything but forced. Indeed, they come from communities where forced marriage is, for practical purposes, unknown. Invited to disapply rule 277 to this couple, the Respondent retorts that to make an exception of this couple (or couples like it) would render the rule unworkable.

78. As it seems to me, it is unnecessary to decide whether proportionality is now part of English law for purposes of judicial review on an issue such as this: see the discussion in *R (Abcifer) v Defence Secretary* [2003] EWCA Civ 473; [2003] QB 1397, at [32] – [37], *per* Dyson LJ (as he then was). That is so because, in my judgment and even allowing for a wide margin of appreciation, the application of rule 277 to a couple such as Mr. and Mrs. Aguilar, is irrational or unreasonable in the traditional, common law, *Wednesbury* sense. There is simply no reason capable of justifying the application of this rule to this couple; this is an unacceptable instance of the tail wagging the dog, with the considerable consequences for the British born Mrs. Aguilar, summarised by Sedley LJ and Pitchford LJ.

79. The Respondent's argument that only a blanket policy is workable, without any exception for a couple such as Mr and Mrs Aguilar, strikes me, with great respect and however sympathetically considered, as an unpersuasive counsel of despair. It is in any event belied, as illuminated in the examples given by Sedley LJ, by the need to consider individual circumstances: (1) in cases where the Respondent is content to waive the policy on Art. 8 grounds; (2) in in-country appeals to the First-Tier Tribunal; and (3) in out-of-country appeals from the decision of an entry clearance officer.

80. Although much less is known on the facts about Ms. Bibi and Mr. Mohammed than is apparent as to Mr. and Mrs. Aguilar, no grounds have been presented for distinguishing them, in the event that the *Aguilar* appeal succeeds.

81. Accordingly and for the very simple common law reason/s outlined above, I would allow these appeals, though joining with Sedley LJ and Pitchford LJ in their tribute to the judgment of Burnett J, from which the *Aguilar* appeal has been brought.