Neutral Citation Number: [2011] EWHC 3370 (Admin)

Case No: CO/11183/11435/11441/2010

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

Birmingham Civil Justice Centre
33 Bull Street, Birmingham, B4 6DS

Date: 16/12/2011

Before :
THE HONOURABLE MR JUSTICE BEATSON

Between :

The Queen on the application of	**Claimants**
(1) Mrs Rashida Vali Chapti and Mr Vali Ahmed Chapti	
(2) Mrs Saffana Abdulla Mohammed Ali	
(3) Mrs Saiqa Bibi	
- and -	
Secretary of State for the Home Department	**Defendant**
- and -	
(1) Liberty	**Interested**
(2) Joint Council for the Welfare of Immigrants	**Parties**

Manjit S Gill QC, Ramby de Mello and Tony Muman (instructed by **JM Wilson Solicitors**) for the **First Claimants**
Ramby de Mello and Abid Mahmood (instructed by **Fountains Solicitors**) for the **Second Claimant**
Manjit S Gill QC, Ramby de Mello and Zainul Jafferji (instructed by **JM Wilson Solicitors**) for the **Third Claimant**
James Eadie QC and Christopher Staker (instructed by **The Treasury Solicitor**) for the **Defendant**
Rabinder Singh QC and Aileen McColgan (instructed by **Liberty**) for the **First Interested Party**
Shahram Taghavi (instructed by **Bates Wells and Braithwaites LLP**) for the **Second Interested Party**

Hearing dates: 26 - 27 July 2011
Further submissions: 5 August, 23 September and 19 October 2011

Approved Judgment

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Mr Justice Beatson :

I. Introduction

1. This is a challenge to the amendments to paragraph 281 of the Immigration Rules which were laid before Parliament on 1 October 2010 and came into effect on 29 November 2010. The amendments (which I refer to as "the new rule") require the foreign spouses and partners of British citizens or persons settled in the UK applying for what I shall refer to as "spouse visas", that is for leave to enter the UK with a view to settlement, to produce a test certificate of knowledge of the English language to a prescribed standard. Hitherto, save where they were applying for indefinite leave, spouses and partners were only required to demonstrate this knowledge two years after entering the United Kingdom. The new pre-entry test assesses speaking and listening. The level required is (see [19]) lower than that required in the post-entry test for those applying for settlement, and it is subject to a number of exceptions: see [22].

2. The claimants maintain that the new rule is a disproportionate and unlawful interference with their and their spouses' human rights and/or irrational under well-known and longstanding common law principles. The Home Secretary contends that it is a lawful way of promoting the integration of foreign spouses and partners into the community and protecting public services.

3. Broadly speaking, it is submitted on behalf of the claimants that the new rule interferes with their rights under Articles 8 and 12 of the European Convention on Human Rights ("the Convention") to marry and live together in this country. This, it is argued, is because significant numbers of applicants for spouse visas will find it difficult or impossible in practice to satisfy the new rule. There are, it is stated, a number of reasons for this difficulty. They include living in places where English tuition and testing facilities are not available, having little or no education, being of limited intellectual ability, and being of an age when learning a new language will be very difficult.

4. It is contended that the resulting interference with the rights of the claimants, as British citizens or otherwise settled in this country, and in the case of Mr Chapti the spouse of such a person, requires powerful justification, and that there is no such justification in this case. It is also contended that the provision is discriminatory on grounds particularly of race and nationality, but also ethnic origins, language, gender and disability, and is thus contrary to Article 14 of the Convention read with Articles 8 and 12. It is also submitted that it is arbitrary, irrational and *ultra vires* at common law.

5. The defendant resisted the general challenge to the new rule, and also maintained that the challenges of the individual claimants are, for slightly different reasons, each premature. It is argued that the challenge to the new rule can only succeed if it is established that the rule is incapable of applying consistently with the Convention to the circumstances of any case, or that its very adoption was an abuse of power. In this case it is submitted this cannot be established because Article 8 does not oblige a state to respect the choice by married couples of the country of their matrimonial residence.

6. If the new rule is not invalid, the defendant submitted that the question whether its application is a disproportionate interference with that person's Article 8 rights has to be resolved by a fact-sensitive consideration of the individual decision. That decision will be made after an application to an Entry Clearance Officer ("ECO") for leave to enter. It may take the form of a decision by the Secretary of State to grant or refuse leave outside the rules on the basis of the individual's Convention rights. A refusal by an ECO will be subject to appeal to the First Tier Tribunal. A decision by the Secretary of State will be susceptible to either an appeal or judicial review.

7. Accordingly, since (see below) the facts in the cases of Mrs Ali and Mrs Bibi have not yet been established, the defendant maintained that at this stage it cannot be said that Article 8 is engaged in either of them. In the case of the claim by Mr and Mrs Chapti, the defendant maintained that judicial review is inappropriate because of an alternative remedy, a pending appeal from a decision of the First Tier Tribunal (Immigration and Asylum Chamber) concerning an application under paragraph 281 before the amendment introducing the new rule. If that appeal succeeds their challenge in these proceedings would be moot. If that appeal is unsuccessful, these proceedings are said to be premature because Mr Chapti has not made an application under the new rule and the facts in relation to its applicability to him have not yet been determined.

8. To the extent that Article 8 is engaged the defendant maintained that any interference with family life is proportionate in the cases of these claimants, none of whom have enjoyed a family life with their spouses in the UK. The Article 12 ground is said not to add anything to that based on Article 8 because Article 12 is concerned only with the right to marry and not with where a married couple can live. As to the case based on Article 14 and common law irrationality, it is submitted on behalf of the defendant that the differences between the requirements for those from English speaking countries and those from other countries have a rational justification.

II. Procedural history

9. Mr and Mrs Chapti's cases were lodged on 26 October 2010, and those of Mrs Ali and Mrs Bibi on 2 November 2010. On 28 January 2011 the three sets of proceedings were consolidated by an order of Hickinbottom J. On 1 March 2011, following a hearing, I granted the claimants permission and made procedural directions. On 19 May 2011 I permitted Liberty and the Joint Council for the Welfare of Immigrants ("JCWI") to intervene. I am grateful for the clear and focussed submissions of Mr Singh QC, Ms McColgan, and Mr Taghavi.

10. On 12 April, in a document entitled "supplementary grounds", the claimants sought to add a new ground of challenge alleging discrimination of those in the position of the claimants as compared to EU nationals and workers and their third country nationals. They did so in the light of the decision in March 2011 of the ECJ in *C – 34/09 Ruiz Zambrano* but the new ground was unparticularised and no application for permission to advance the new EU ground as required by CPR 54.15 was made until 4 July, three weeks before the hearing. The defendant opposed the application to amend on the ground of lack of particularity. It was also submitted on her behalf that the EU ground was unarguable in the light of the decision of the ECJ in *C-434/09 McCarthy (European Citizenship)* because that case held that Article 21 of the Treaty does not

require the United Kingdom to grant immigration status to the spouse of a British citizen who has never exercised his or her right to free movement. Moreover, it was submitted that, since EU law and domestic immigration law are separate sources of rights, it is not arguable that a person who does not qualify for a particular right under EU law can claim that domestic law will be discriminatory unless it confers a similar right upon them.

11. Notwithstanding my order that these claimants' applications were to be the lead test cases and other cases were to be stayed behind them, there have been a number of applications for joinder, including one very shortly before the hearing of these cases (*Bhavyesh* CO/4526/2011) primarily based on EU Law and *Ruiz Zambrano*. All these applications were rejected. As far as these proceedings are concerned, it was agreed at the hearing that, at this stage, only the legality of the pre-entry requirement at common law and its compatibility with the Convention should be dealt with, but that the application to pursue the EU ground could be considered in the light of this judgment and any developments in *Bhavyesh's* case.

12. In the claimants' skeleton argument, dated 16 July, just over a week before the hearing and two days after further particularisation of their EU ground, a number of new bases of challenge, not foreshadowed beforehand either in the grounds or (save in respect of gender and disability discrimination) elsewhere, were introduced. These were: a failure to pay proper and due regard to the views of informed stakeholders in the consultation process; a flawed and irrational identification of spouses of limited leave to remain as "a key target group"; a failure to treat the best interests of children as a primary consideration; and gender and disability discrimination. Mr Gill QC, on behalf of the claimants in the Chapti and Bibi cases, supported by Mr de Mello on behalf of Mr Ali, maintained these matters were raised not as free-standing grounds, but as part of the consideration of the proportionality of the interference with the claimants' rights, a matter on which the burden lay on the defendant. Their submissions, however, went beyond this. I gave the defendant permission to make further written submissions in response to evidence filed by the claimants very shortly before the hearing if so advised, which was done on 23 September. In the result I have been able to determine all but the new ground based on gender discrimination, on which see [140].

13. It was common ground at the hearing that I should not give judgment until the decision of the Supreme Court in *R (Quila) v Secretary of State for the Home Department* was handed down. Judgment was handed down on 12 October, and the parties made written submissions on its implications for these proceedings on 19 October. There were thus both "post-hearing" and "post-*Quila*" submissions.

III. The evidence

14. There was a flurry of additional evidence served on the three working days immediately before the hearing in July. No issue was raised as to its admissibility and submissions based on it were made by the parties and the interveners. As well as the post-hearing and post-*Quila* submissions, both parties filed additional evidence after the hearing. The result is that there is a considerable body of evidence, much of which is sharply contested. My approach to the evidence is described at [77] – [78].

15. The evidence on behalf of Mr and Mrs Chapti consists of the statement of Mrs Chapti dated 25 October 2010 (signed by her solicitor Mr Sharma), and four statements of Mr Sharma dated 25 October 2010, and 11 February, 22 July and 19 October 2011. The evidence on behalf of Mrs Ali and Mrs Bibi consists of statements of Ms Robina Shah, at that time a counsellor employed by the Immigration Advisory Service, both dated 25 October 2010, the statement of Mrs Ali dated 22 July 2011 (signed by Ramzan Sharif, her solicitor, on her behalf), two statements of Ramzan Sharif, dated 22 July and 12 October 2011, and the statement of Ashraf Ali, the Director of Ash Immigration Services, dated 19 October 2011.

16. There are also four reports and three witness statements of Dr Helena Wray, a senior lecturer at Middlesex University. Dr Wray's academic speciality is immigration law and the regulation of marriage migration to the UK. Her reports are dated 17 February, 19 May, and 20 July, and there is an undated report possibly prepared on 21 July 2011. Her witness statements are dated 18 and 25 July and 11 October 2011. Dr Wray's second report, a substantial 67 page document, is in fact a collaborative effort. Part 2 was written by Dr Geoffrey Jordan, a freelance advisor and tutor on Teaching English as a Foreign Language (hereafter "TEFL"); part 3 by Ms Anne-Marie Cliff, a freelance communications consultant; and part 6 by Dr Katherine Charsley, a lecturer in sociology at the University of Bristol.

17. The evidence on behalf of the defendant consists of three statements of Mrs Helen Sayeed, dated 22 June, 21 July, and 22 September 2011. Mrs Sayeed is a Senior Executive Officer and senior policy advisor in the Migration Policy team now in the Home Office. Until 18 July 2011 this team was the Immigration Policy team in the UK Border Agency. Since 2007 Mrs Sayeed has specialised in the development of new policies concerning the "spouse visa" route. She was also a senior policy advisor on the Knowledge of English language and life requirements for settlement and a member of the government's group on English for speakers of other languages.

IV. The new rule

18. The Immigration Rules make provision for those seeking leave to enter the United Kingdom with a view to settlement as the spouse or civil partner of a person present and settled in the UK or being admitted for settlement. Before the introduction of the amendments to paragraph 281, for many years there have been four principal requirements for a spouse visa. These were: that the parties had met (paragraph 281(ii)); intended to live permanently as spouses or civil partners (paragraph 281(iii)); had adequate accommodation for them and any dependents without recourse to public funds (paragraph 281(iv)); and had to be able to maintain themselves and any dependents adequately without recourse to public funds (paragraph 281(v)). Until the introduction of the new rule, only those seeking indefinite entry, i.e. settlement, under a spousal visa were required to satisfy a pre-entry language requirement: see paragraph 281(i)(b)(ii). Those making such an application were required to have "sufficient knowledge of the English language, and sufficient knowledge about life in the United Kingdom". If they did not satisfy this requirement, they could only be granted temporary entry for a period not exceeding 27 months.

19. Since 2007, spouses and partners in the UK who apply for settlement after their initial two year period of leave have been required (paragraph 287(a)(vi)) to demonstrate

that they have "sufficient knowledge of the English language and about life in the UK". One way of doing so is by the "Life in the UK" test (hereafter "KOL"). An alternative method of demonstrating the language and life in the UK requirements is to complete an "English for Speakers of Other Languages with Citizenship" course (hereafter "ESOL") at an accredited College. This ESOL qualification is to accommodate those whose English is of a lower standard than that required for the "KOL" test: see Mrs Sayeed, first statement, paragraph 24. The standard required by the new pre-entry language requirement is also lower than that in the "KOL" test. The language component of the KOL test is level B1 of the Common European Framework of Reference ("the CEFR"), whereas that in the pre-entry requirement is the lower A1 level of the CEFR.

20. As amended, paragraph 281 of HC 395 now provides (the amendments[1] are underlined):

> "281. The requirements to be met by a person seeking leave to enter the United Kingdom with a view to settlement as the spouse or civil partner of a person present and settled in the United Kingdom or who is on the same occasion being admitted for settlement are that:
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> (i) (a)(i) the applicant is married to or the civil partner of a person present and settled in the United Kingdom or who is on the same occasion being admitted for settlement; and
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> (ii) the applicant provides an original English language test certificate in speaking and listening from an English language test provider approved by the Secretary of State for these purposes, which clearly shows the applicant's name and the qualification obtained (which must meet or exceed level A1 of the Common European Framework of Reference) unless:
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> (a) the applicant is aged 65 or over at the time he makes his application; or
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> (b) the applicant has a physical or mental condition that would prevent him from meeting the requirement; or;
>
> (c) there are exceptional compassionate circumstances that would prevent the applicant from meeting the requirement; or
>
> (iii) the applicant is a national of one of the following countries: Antigua and Barbuda; Australia; the Bahamas; Barbados; Belize; Canada; Dominica; Grenada; Guyana; Jamaica; New Zealand; St Kitts and Nevis; St Lucia; St Vincent and the Grenadines; Trinidad and Tobago; United States of America; or
>
> (iv) the applicant has obtained an academic qualification(not a professional or vocational qualification), which is deemed by UK NARIC to meet the recognised standard of a Bachelor's *or Master's* degree *or PhD* in the UK, from an educational establishment in one of the following countries: Antigua and Barbuda; Australia; The Bahamas; Barbados; Belize; Dominica; Grenada; Guyana; Ireland; Jamaica; New Zealand; St Kitts and Nevis; St Lucia; St Vincent and The Grenadines; Trinidad and Tobago; the UK; the USA; and provides the specified documents; or
>
> (v) the applicant has obtained an academic qualification (not a professional or vocational qualification) which is deemed by UK NARIC to meet the recognised standard of a Bachelor's *or Master's* degree *or PhD* in the UK, and

[1] On 4 July 2011 there were further amendments. The italicised references to masters and doctoral degrees were added and paragraphs 281(i)(a)(ii)(b) and (c) were amended to enable ECOs to make decisions on exemptions.

(1) provides the specified evidence to show he has the qualification, and

(2) UK NARIC has confirmed that the *qualification* was taught or researched in English, or

(vi) has obtained an academic qualification (not a professional or vocational qualification) which is deemed by UK NARIC to meet the recognised standard of a Bachelor's *or Master's* degree *or PhD* in the UK, and provides the specified evidence to show:

(1) he has the qualification, and

(2) that the qualification was taught or researched in English.

or

(b)(i) the applicant is married to or the civil partner of a person who has a right of abode in the United Kingdom or indefinite leave to enter or remain in the United Kingdom and is on the same occasion seeking admission to the United Kingdom for the purposes of settlement and the parties were married or formed a civil partnership at least 4 years ago, since which time they have been living together outside the United Kingdom; and

(b)(ii) the applicant has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application; and

…

(ii) the parties to the marriage or civil partnership have met; and

(iii) each of the parties intends to live permanently with the other as his or her spouse or civil partner and the marriage or civil partnership is subsisting; and

(iv) there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively; and

(v) the parties will be able to maintain themselves and any dependants adequately without recourse to public funds; and

(vi) the applicant holds a valid United Kingdom entry clearance for entry in this capacity

For the purposes of this paragraph and paragraphs 282-289 a member of HM Forces serving overseas, or a permanent member of HM Diplomatic Service or a comparable UK-based staff member of the British Council on a tour of duty abroad, or a staff member of the Department for International Development who is a British Citizen or is settled in the United Kingdom, is to be regarded as present and settled in the United Kingdom."

21. By the amendments to paragraph 284 of the Immigration Rules, the pre-entry requirement also applies to applications for leave to remain as a spouse or civil partner and (see paragraph 290, 293, 295A and 295D of the Rules), the requirement also applies to applications for entry and leave to remain as a fiancé(e), proposed civil partner, unmarried partner, or same-sex partner.

22. The language requirement in the new rule is thus met in one of three ways: passing an acceptable test at a minimum A1 CEFR level with an approved provider, being a national of one of the countries listed in paragraph 281(i)(a)(iii), which are the

countries designated by the UK Border Agency as "majority English-speaking", and by having an academic qualification equivalent to a UK bachelors, masters or doctoral degree provided it was taught in English. There are three exempt categories of applicant: those aged 65 or over at the time of the application; those with a physical or mental condition that would prevent them from meeting the requirement, and those in respect of whom there are "exceptional compassionate circumstances" that would prevent them from meeting the requirement. Additionally, applications by nationals of a country with no test centre who apply for leave from that country will (see Mrs Sayeed, first statement, paragraph 12) be exempt from the requirement under the "exceptional compassionate circumstances" exemption. The UK Border Agency website publishes a list of countries where there is no test centre. In July 2011 there were 30 such countries: Mrs Sayeed, first statement, paragraph 41. Since the hearing, Mali and Turkmenistan have been added to the list and the Dominican Republic removed: Mrs Sayeed, third statement, paragraph 19.

V. The position of the claimants

23. I now deal with the basic facts concerning the claimants. No application for entry clearance has been made in the cases of Ali and Bibi, and as a result it is stated on behalf of the Secretary of State that she is not able to take a position in relation to the claimed facts. So, for example, Mr Eadie QC stated the Home Secretary is not able to take a position on the claim that the claimants' husbands know no English or that their circumstances mean it would be burdensome for them to satisfy the requirements of the amendment.

(i) Mr and Mrs Chapti

24. Mrs Chapti married her husband in India. Her witness statement (paragraph 2) states they married in 1976 but the statement of facts in support of her application for judicial review states they married on 7 May 1973. Mrs Chapti was then the holder of a British Overseas Citizen passport. Mr Chapti was and is a citizen of the Republic of India. They lived together at their ancestral village home in Gujarat and have seven children: statement of facts, paragraphs 3, 5 - 6; Mrs Chapti, statement, paragraphs 3 - 4. Mrs Chapti is now aged 53 and her husband is 56. In 2006 Mrs Chapti left the family home in Gujarat and came to the United Kingdom. On 28 February 2007 she became a British citizen by naturalisation. On 28 November that year, Mr Chapti applied for entry clearance to settle in the United Kingdom as "the spouse of a person present and settled in the United Kingdom". His application was refused on 11 January 2008. An appeal by him was allowed on 9 September 2008 but the Home Secretary sought reconsideration of the Immigration Judge's decision. On 1 April 2009, before a decision on the Home Secretary's application for reconsideration was made, acting on the advice of his then lawyers, Mr Chapti withdrew his appeal.

25. In November 2009 Mr Chapti submitted a fresh application for entry clearance in respect of himself and the couple's son, Suhil, now aged nineteen and a half. These applications were refused by the Entry Clearance Officer in Mumbai on 2 December 2009 on the ground that Mrs Chapti could not adequately maintain them as required by paragraph 281(v) of the Immigration Rules, a provision which has been in force for some time and is not challenged in these proceedings. An appeal by Mr Chapti against that decision came before the First Tier Tribunal on 12 August 2010. Mrs

Chapti gave evidence stating *inter alia* that she and her husband do not read or write any English, only Gujarati. On 1 September the Immigration Judge dismissed the appeal. He found that the marriage, although subsisting, was not legally valid at inception, and therefore not recognisable at the date of the decision as valid in law. He also found Mrs Chapti could not adequately maintain her husband and child (see the requirement in paragraph 281(1)(b)(v)) and that Mr Chapti's inability in English meant his ability to find employment in the United Kingdom, save in a Gujarati-speaking environment, was limited.

26. An application for permission to appeal against the Immigration Judge's 1 September 2010 decision was filed by Mr Chapti and his son on 25 October 2010, and granted by the First Tier Tribunal on 21 February 2011. The appeal will be heard in due course by the Upper Tribunal. The introduction of the amendment to the rules, however, has led Mr and Mrs Chapti to conclude that, if the appeal does not succeed, Mr Chapti will not be able to obtain settlement in the United Kingdom under the amended rules because of his inability to speak English. There would thus, it is submitted, be no point in Mr Chapti applying for entry clearance and paying the fee of £810. The defendant contends that the outstanding appeal means that the Chaptis' application for judicial review is premature.

27. The evidence filed on behalf of Mr and Mrs Chapti can be summarised as follows. Mr Chapti is said to have had no formal education and would find it very hard to learn English in his village in rural Gujarat (Mrs Chapti, statement, paragraph 11; Mr Sharma, second statement, 11 February 2011, paragraph 10, although there is confusion in Mr Sharma's statement which proceeds on the basis that the second claimant is female). Mrs Chapti stated that none of her husband's peers have a command of English, there are no places to her knowledge which provide for tuition and, given his age, her husband would have difficulty in passing an English test within the period of 27 months.

(ii) Mrs Ali

28. Mrs Ali is a British citizen now aged 26, who resides in the United Kingdom, and is unemployed. Ms Robina Shah stated (paragraph 2) that, on 6 July 2010,[2] she married Ryadh Saleh Saif Ali, aged 19, a national and resident of the Republic of Yemen. It is also stated (Ms Shah, statement, 25 October 2010, paragraphs 7 – 10; Ramzan Sharif, first statement, paragraphs 3 - 4) that Mr Ali does not speak English, has had no formal schooling, and is illiterate, and as a result he will find it very hard to learn English. The evidence of Ms Shah (statement, paragraph 9) and Ramzan Sharif (statement, paragraphs 4 - 6, 8 – 9) is that there is no UKBA-approved centre in Yemen which provides tuition in English to the level required, and, since the test can only be taken online, Mr Ali will also need to take lessons on computer literacy. Moreover, their evidence is that they found it difficult to navigate through the online test on the website.

29. Mrs Ali and her husband have not made an application for entry clearance for him to enter under the spouses rule. They consider the new language requirement will

[2] The statement of facts with the N461 and Ramzan Sharif's statement dated 22 July 2011 give the date as 7 July.

prevent him from obtaining settlement because of his inability to speak English and because he cannot afford to pay and cannot access facilities in Yemen to study English or to take the test required.

30. In November 2010, when her application was lodged, Mrs Ali was in Yemen visiting her husband. Ramzan Sharif's second statement, paragraph 4, states she is still in Yemen and, as a result, is unable to enjoy her rights as a British citizen.

(iii) Mrs Bibi

31. The factual position asserted in relation to Mrs Bibi is that she is a British citizen aged 20, she married Mohammed Jehangir, a citizen of Pakistan now aged 25 and the interested party in her application, on 12 April 2009, and that they have one child. It is stated that Mrs Bibi wants Mr Jehangir to come to the UK to live as it would be impracticable for her and her child to go and live in Pakistan.

32. It is also stated (Robina Shah, statement, 25 October 2010, paragraph 6) that Mr Jehangir was educated to the level of matriculation in Urdu, but speaks no English and has no computer skills. Ms Shah also stated (paragraph 7) that Mr Jehangir has told her there are no places to his knowledge in Kolti, where he lives, which provide for tuition at the level required. The nearest places for him to study are in Mirpur and Islamabad. The distances from Kolti are respectively 115 and 141 kilometres, which would involve a four-hour return journey which is impracticable on a daily basis. Ms Shah stated he also told her that he would need to relocate to Rawalpindi for a period of 6 months, and that the cost of accommodation and tuition would be approximately RS200,000, with an additional RS100,000 for lessons in computer literacy. She states that it appears from the inquiries she made that the nearest UKBA-approved centre for Mr Jehangir is in Islamabad, where the course is online.

VI. The background to the pre-entry language requirement

33. Mrs Sayeed's first witness statement (paragraph 42) lists 19 documents published or considered by the UK Border Agency during the consultation about the policy. As well as consultation papers, there were Home Office Equality Impact Assessments ("EIA") and Impact Assessments (" IA") in July 2009 and (after the change of government) October 2010, Home Office and other research reports, studies concerned with educational aspects, earnings, translation costs and the 2008 House of Lords Economic Affairs Committee report on the economic impact of migration. Here I only summarise the points made in the consultation, response to consultation, and the EIAs and IAs.

(i) The 2007 Consultation

34. In December 2007 the Border and Immigration Agency published a consultation paper *Marriage Visas: Pre-entry English Requirement for Spouses*. The ministerial foreword to this stated that the government wanted "newcomers who come here with the intention to settle to make a meaningful contribution to our society and to our economy" and that consequently it was "right that we should consider ways to assist a foreign spouse's integration into life here right from day one". The Minister referred to the introduction of the KOL test for all migrants applying for settlement, and the

consequent need to promote the development of English language skills at an early stage. He stated "having a pre-entry English requirement would send a clear signal to the spouse that they will be expected to acquire English language skills in order to remain with their loved ones in the UK on a permanent basis". The government's contemplation of such a requirement had been stated in an earlier consultation paper in 2007, *Securing the UK Border*.

35. In the December 2007 consultation paper's chapter on context, it is stated that the Commission on Integration and Cohesion report published in June 2007 stated that "a common language is fundamental to integration and cohesion for communities". It is stated (paragraph 1.2) that there is a case for examining whether a pre-entry English requirement "would help spouses integrate more quickly into the community, boost confidence in participating in employment, and make clear that, as a country, we do expect those intending to make the UK their long-term home to recognise the importance of speaking English". This paragraph refers to a 2003 article by Dustmann and Fabbri which stated that fluency in English increased a migrant's chances of being employed by about 22% and increased a migrant's likely earnings by 18 – 20%.

36. Paragraph 1.5 of the context section listed the top ten nationalities of those admitted to the UK as a spouse or fiancé(e) for a probationary period. The total number of those admitted in 2006 was 47,100. The top three nationalities are: Pakistan, India, and Bangladesh (they were also the top three in 2009). In 2006 there were 42,110 decisions on in-country applications for settlement as a spouse or partner, of which 99% were granted. The top ten nationalities for spouses granted settlement in-country were: Pakistan, India, USA, Bangladesh, Jamaica, Thailand, Turkey, South Africa, Nigeria, and China.

37. Chapter 2 of the consultation paper stated that a pre-entry requirement would be primarily concerned with speaking and listening language skills which (see paragraph 2.3) may be of more immediate benefit to the spouse and "might also be more appropriate for those with little or no formal education who may be able to speak and understand English but cannot read or write". It was recognised (paragraph 2.5) that not all spouses will live in towns and cities with ready access to test centres or language learning materials, and there was a need to ensure that those living in remote communities had adequate opportunities to learn English to the required standard. There was also a need to take into account the literacy level of spouses. It was stated at that stage (see paragraph 2.7) that if a spouse failed the test, consideration could be given to granting a period of temporary leave solely for the purpose of learning English in the UK before being granted leave to remain.

38. In the chapter on the level of proficiency, it is stated (paragraphs 3.3 – 3.4) that what would be required was CEFR level A1, a lower standard than that for the KOL test. Level A1 was stated to require "a very basic understanding of English such as asking simple questions, reading common signs and symbols, and understanding simple step instructions" and should be achievable for the vast majority of applicants.

39. In 2008 the then government decided to introduce a pre-entry English language requirement for those applying for spouse visas. The UK Border Agency published *Marriage Visas: The Way Forward*, the response to the consultation, in July 2008. The ministerial introduction stated that the government would "require those seeking

spouse visas to enter into an agreement to learn English as part of the visa application process and, once they have arrived in the UK, to show that they have fulfilled this commitment", and that the government's "medium-term goal" was to introduce a pre-entry English test for spouses. But (see paragraph 2.3) it was decided that the new requirement would be introduced "over a period of time" because "there is not currently sufficient access to English language classes overseas, especially in rural areas". The document reiterated that views had been sought on a pre-entry English requirement in order to "help newcomers integrate more quickly into British life and society", "increase their prospects of getting a job", and "make clear the importance of learning English ahead of our tests for permanent residence and citizenship". It is also stated (paragraph 2.8) that there was "a need for the system to recognise those spouses who are already able to speak English".

40. The response described the consultation exercise as "extensive". Annex B analyses the replies of the 101 respondents. 68 disagreed with the proposal for spouses to demonstrate knowledge of English before they entered the UK; 31 agreed with it; and 2 gave a mixed response. The analysis stated that overall the responses, including those who disagreed with the proposal, appreciated the importance of learning English. Organisations were (paragraph 2.14) slightly more likely to disagree with the proposal while individual members of the public were more divided. The document identified (paragraph 2.15) the key concerns about a pre-entry requirement. They were; the potential difficulties of accessing English language lessons overseas owing to limited provision or affordability, perceptions that the proposals are contrary to the right to family life and conflict with individual human rights, and the view that English is best learned in the United Kingdom where facilities are available and the spouse is immersed in the British way of life.

41. Those who supported a pre-entry English requirement stated that a lack of English prevented integration to the wider UK society and created communication problems, referred to a cost to the UK of translation services for non-English speakers, and a perception that English skills could improve employment opportunities and free spouses from being tied to home and family: see paragraph 2.17.

(ii) The 2009 EIA

42. In July 2009 the Home Office prepared its first *Equality Impact Assessment* of the effect of the requirement. This stated *inter alia*: the Home Office had researched the spouse visa rules in other European Member States; the Netherlands, Germany and Denmark have all introduced pre-entry requirements; and France also planned to introduce new pre-entry exams on French language and culture in family reunification applications. The assessment states (at page 5) that concern had been expressed by respondents to the consultation that the requirement would have a discriminatory effect. The concern was that it would discriminate against nationals of countries where English is not widely spoken and where there is a shortage of good English language tuition, and against members of communities from outside Europe where standards of education may not be as high. In relation to disability, it stated that some respondents considered there should be exemptions for applicants with physical impairments or mental health issues. As to gender issues, it referred to four respondents who supported the proposal because of the opportunity it would afford to female spouses to be less tied to the home. But it also stated that one charity

considered that women should have the right to reunite with their husbands and children regardless of their knowledge of English "as many would come from non-developed countries and some would be illiterate due to poverty and war".

43. The EIA stated that the cross-government working group considered that it would take 18 – 24 months to develop a sufficient supply of English tuition to meet the demand required by the requirement and that the Home Office intended to introduce the requirement in 2011. It was also stated (page 12) that the concerns expressed about difficulty of access would be met by the lead time of 18 – 24 months, which would give applicants for spouse visas two years in which to learn English so they have sufficient preparation time to meet the requirement.

(iii) The 2009 IA

44. At about the same time the Home Office also prepared an *Impact Assessment* ("IA") of the requirement. This, dated 27 July 2009, stated that spouses who under the previous rules did not need to demonstrate a knowledge of the English language until they had been in the UK for two years, were the largest group who did not pass the English test after two years. It stated that government intervention was "necessary to highlight the importance of learning English before entry into the UK". This was one of the key objectives of the policy. The other two were to help newcomers integrate into British life as quickly as possible and to increase the prospects of newly-arrived spouses finding productive employment. At that stage it was contemplated that the requirement would be introduced in the summer of 2011. The document also considered the level of proficiency, largely reiterating the points made in the consultation and responses to the consultation.

45. The cost/benefit analysis in the IA stated (page 8) that it was not possible fully to quantify the impact of the costs on the third sector and private sector due to the number of unknown factors or to estimate the savings to public services from a fall in the demand for translation services. The assessment proceeded on the assumption (see page 11) that the mischief being addressed by the new rule was that some 11 – 20% of all spouse visa applicants were unable to demonstrate the required knowledge of English language and life in the UK at the end of the two year probationary period.

46. In Mrs Sayeed's first statement (paragraphs 27 – 37) a series of reports in support of the defendant's belief (noted in the Impact Assessment) that increased English language ability will help reduce the cost of providing translation services is listed. She referred to research undertaken by the BBC in 2006, identifying expenditure across government of at least £100 million on translation in 2005, by the NHS of an estimated £55 million, and by local councils of at least £25 million. She also referred to research suggesting that women without language may receive inappropriate support, information and medical treatment; studies about the effect of fluency on average hourly wages and employment probabilities; and the report of the Commission on Integration and Cohesion in June 2007, which recognised English as both an important part of the country's shared heritage and a key access factor for new communities to the labour market and wider society.

47. Mrs Sayeed's second statement (paragraph 15) exhibited responses to FOI requests by a number of public authorities giving expenditure on translation and interpretation services. She stated these showed "significant evidence" of people seeking such services. For example, the replies by Westminster, Lewisham, Birmingham, Leicester, and the Home Office were of the following expenditure in round figures: £250,000 by Westminster on Arabic, Bengali and Chinese in a three year period ending in 2009; £267,000 by Lewisham in a two and a half year period ending in June 2010; £74,800 by Birmingham in 2009-10; £68,200 by Leicester in 2009; and £245,700 by the Home Office between 2007 and 2009.

(iv) Bringing forward the introduction of the new rule

48. After the change of government further consideration was given to the timing of the introduction of the pre-entry language requirement. It was decided to bring it forward. On 9 June 2010 the Home Secretary announced that it would be required from November 2010. The precise date, 29 November, was announced on 26 July. This gave approximately four months' notice: 2010 EIA, page 21. The approved test providers were announced on 16 August giving applicants "over 3 months notice to arrange and take a test". The "lead time" from the original announcement in August 2009 was almost 18 months.

49. When announcing the change of commencement date, the Home Secretary stated that the justifications for the requirement were: encouraging integration, protecting public services, and saving costs. It is submitted on behalf of the claimants that, essentially, the aims are economic, to make migrant families better off and to save public funds.

(v) The 2010 EIA and IA

50. On 1 October 2010 the Home Office published a further *Equality Impact Assessment* and a further *Impact Assessment*. The 2010 EIA stated that the pre-entry requirement would be introduced on 29 November 2010 at Level A1 of the CEFR. The aims, objectives and projected outcomes are the same as those in previous documents save that there was also a reference to "economic well-being", "encouraging integration" and "protecting public services". It was stated that spouses were "a key group" unable to demonstrate the required knowledge of the English language and life in the UK at the end of the probationary period. The responses to the consultation were said to be those of a self-selected and relatively small group and could not be considered representative. It is also stated (paragraph 1.2) that existing Tier 2 providers would be appointed for the new speaking and listening tests, and that a full procurement exercise would be undertaken for providers in the near future.

51. The October 2010 EIA also referred to a survey based on interviews with migrants from Slavic countries and Russia, which found that those who spoke better English were more likely to participate in their community. It also referred to the attainment of pupils at school whose first language was, or was believed to be, other than English, and to statistics released in January 2010 by the Department for Children, Schools and Families. The latter indicated that whereas 53.5% of pupils whose first language is English achieved a good level of development, 41.9% of those for whom English is an additional language did so. It stated (page 10) that:

> "ensuring that migrant spouses and partners (who are current and future parents of children who will be educated in UK schools) have English language skills before they come to the UK can only have a positive impact on the English language skills of their children. Requiring some English language ability from foreign spouses/partners coming to the UK to settle will help remove current barriers for the second generation who suffer academically when English is not able to be spoken in the home. When compared with pupils with English as an additional language, a greater proportion of pupils (in the Early Years foundation stage) whose first language was English achieved a good level of development."

Mrs Sayeed's evidence (first statement, paragraph 33) is that in 2009 a lower percentage (65.2%) of schoolchildren with "English as an Additional Language" achieved the expected level in both English and Mathematics than children whose first language is English, where the figure is 72.9%. As to employment, the 2010 EIA referred to the research indicating that language skills assist employment prospects, and (page 14) that this is conditional on a large array of background characteristics. It did not, however, refer to the 2009 EIA's statement (page 9) that there may not be more highly paid jobs available to migrant spouses.

52. The October 2010 EIA also stated (page 15) that the new requirement could have an impact on Article 8 if families were separated because a spouse is unable to meet the requirement. The EIA considered that impact was mitigated by the requirement that UK Border Agency caseworkers take Article 8 into account in making decisions, by the number of exemptions that will be in place, and by the ability to grant discretionary leave outside the rules on the basis of Article 8. As to Article 14, it was acknowledged (page 6) that the policy had an impact on more women than men because more women than men applied for entry as a spouse or partner. It also stated (page 15) that the government considered that any direct and indirect discrimination resulting from the rule change was justified on the basis that English language skills are necessary to adjust migrants' integration into British life, to open up opportunities, and to promote the economic wellbeing of the country.

53. The October 2010 IA, *inter alia*, stated that as far as the costs on migrants of the new requirement were concerned, although the costs did not occur within the United Kingdom, it was assumed that 50% of the cost of tuition and test fees would be passed on to UK residents. The 2010 EI and the 2010 IA did not assess the implications of bringing forward the proposed changes from the summer of 2011 to November 2010.

(vi) The exemptions

54. There is little discussion in the consultation documents and assessments of the exemption for those from English speaking countries, although see the passage from paragraph 2.8 of the response to the consultation quoted at [39]. There is also little discussion of the position of those with educational qualifications taught or researched in English. The October 2010 EIA stated (pages 7, 10 and 22) that the impact on those who find it harder or not possible to learn a language because of age or physical or mental impairment would be mitigated. This would be done by exempting those over 65 and those suffering from a disability who produced satisfactory medical evidence.

55. Jumping forward in the chronology, Mrs Sayeed's third statement gives examples of how the mental or physical impairment and exceptional compassionate circumstances exemptions have worked since the introduction of the new rule: paragraphs 20 – 21.

ECOs in Pakistan have granted exemption to a female applicant who had suffered severe gunshot wounds to the head, resulting in partial paralysis and no speech, who had provided medical evidence which was verified as genuine, but have refused to do so in a number of applications on the ground that the medical certificates produced, the majority purportedly from one institution, were found not to be genuine.

VII. Discussion

(i) Challenging an Immigration Rule

56. The challenge brought is to the rule itself and the primary focus of the submissions made by Mr Gill QC and Mr de Mello was as to its general effect rather than the particular positions of the claimants. Accordingly, before turning to the detailed submissions it is necessary to consider the basic approach to a challenge to an Immigration Rule. Mr Eadie QC submitted (skeleton argument, paragraph 27) that what he described as an "abstract challenge" to the amendment to paragraph 281 can only succeed if the claimants can establish that it "is incapable of applying consistently with the ECHR to the circumstances of *any* case, or can establish that the very adoption of the amendment was an abuse of power".

57. The second limb of this submission is uncontroversial whether in relation to the European Convention on Human Rights or common law principles: *R v IAT, ex p Begum* [1986] Imm. AR 385 and *AM (Serbia) v Secretary of State for the Home Department* [2007] INLR 211. But the first limb, that it must be shown that the amended paragraph would inevitably breach ECHR rights, may put the matter too broadly. For instance, in *R v Secretary of State for the Home Department, ex p Saleem* [2001] 1 WLR 443, a rule denying a right of appeal where a person failed to lodge an appeal against the refusal of asylum within five days of the deemed receipt date of the decision was declared invalid insofar as it purported to declare conclusively the moment at which the applicant for asylum received notice of the decision. The Secretary of State's submission that in many cases the rule would operate fairly and that the small risk of injustice to a small number of people had to be balanced against the objective of ensuring the timely disposal of appeals was (see Roche and Hale LJJ at 451 and 458) rejected. See also, in the context of a statutory instrument, *R v Secretary of State for the Home Department, ex p Javeed* [2001] EWCA Civ 789; [2002] 2 QB 129.

58. It may be that those cases are ones in which the adoption of the rule was itself *ultra vires* or an abuse of power, but one reason a rule may be held to be *ultra vires* is because of its impact on rights. This may be so even where not every application of the rule to a particular case will breach the rights of the person to whom it is applied. Although these cases are based on the common law rather than the Convention, it does not follow that there is a bright line between the position of common law and Convention rights. *Saleem*'s case, for example, concerned access to an independent tribunal, an issue which has obvious resonance to Article 6. See also the approach of the court to overinclusive rules such as the restrictions on the right to marry in *R (Baiai) v Secretary of State for the Home Department* [2009] 1 AC 297 at [31] and [43] and *R (Quila) v Secretary of State for the Home Department* [2010] EWCA Civ 1482, [2011] Fam. Law 232; [2011] UKSC 45 at [59], [74] and [79], and the right to adopt in *Re G* [2009] 1 AC 173 at [16] and [18].

59. In *Quila*'s case the Court of Appeal and the Supreme Court decided the two cases before them in relation to their own facts, thus disapplying the rule in those cases rather than striking it down: see [2010] EWCA Civ 1482 at [31], [66], [67] and [73], and [2011] UKSC 45, [2011] 3 WLR 836 at [59] and [80]. Lord Wilson stated this in more general terms. He (at [59]) considered that "decisions founded in human rights are essentially individual". In practical terms, a rule may be held not to apply to the facts of a particular case either by the application of common law principles (an example is the approach of Gross LJ in *Quila*'s case at [78]) or by the application of section 3 of the Human Rights Act 1998 to "read down" the words of the rule.

60. There is undoubtedly some tension between an approach which focuses on the human rights impact of the application of a rule in an individual case, and the approach exemplified by *Saleem*'s case. However, in that case and in *ex parte Begum*, the practical effect of what was done was to "read down" the rule. In *Saleem*'s case this was done by limiting the declaration of invalidity to the conclusive determination point, and in *ex parte Begum* it was done by severance. Even in the context of Convention rights, the line between the two may be wafer thin. In *Quila*'s case Lord Wilson and Lady Hale (see [59] and [80]) considered that, although the court was only concerned with Mr Quila and Ms Bibi, the claimants in that case, it was difficult to see how the Home Secretary could avoid infringing Article 8 whenever she applied the age restriction on spouse visas rule to an unforced marriage.

61. The approach in *Quila* may reflect the recognition that, in areas of social and economic policy, although the rationality or proportionality of a measure or decision is a matter for the court, the court may not be as well placed or as institutionally competent to make the decision as the democratically accountable sections of government: see *Re G* [2009] 1 AC 173 at [48] and *R (British Telecommunications plc) v Secretary of State for Business, Innovation and Skills* [2011] EWHC 1021 (Admin) at [207] – [214]. See also the statement by Lady Hale in *Quila* [2011] UKSC 45 at [61] that, while it is ultimately for the court to decide whether or not Convention rights have been breached, it will treat with "appropriate respect" the views taken by the Home Secretary, whose primary responsibility it is to make the judgments in question. In his dissenting judgment in *Quila*, Lord Brown (at [91]) by implication suggested, in the way he sought to distinguish *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 at [16] as a case involving two particular individuals and not a rule, that where what was at issue is the striking down of an Immigration Rule as opposed to a particular decision, there is a particular need to accord government an area of discretionary judgment.

(ii) Article 12

62. The claimants (skeleton argument, paragraph 27) submitted that the pre-entry English language requirement unreasonably delays, hinders and tends to prevent the exercise of the right in Article 12 "to marry and to found a family". The JCWI's submission (paragraph 36) referred to the fact that the right in Article 12 is also protected by Article 23 of the International Covenant on Civil and Political Rights ("ICCPR"). It also referred to the 1990 statement by the UN Human Rights Committee that the right to found a family "implies, in principle, the possibility to procreate and live together" and that this implies the adoption of appropriate measures to ensure the unity or

reunification of families. It also relied on the statements in *Artico v Italy* (1981) 3 EHRR 1 and *F v Switzerland* (1987) 10 EHRR 411 at [32] that there is a right to "practical and effective" enjoyment of the right to marry so that enforced separation will engage Article 12, and the analysis of the Strasbourg jurisprudence in *Baiai* [2009] 1 AC 297 and the court's conclusion in that case that the right to marry may not be subjected to conditions "which impair the essence of the right": see [14] and [20]. See also *Hamer v United Kingdom* (1979) 4 EHRR 139 at [49]; *B v United Kingdom* (2004) 39 EHRR 30; and *O'Donaghue v United Kingdom* app. 34848/07 21 December 2010 at [82].

63. At the hearing, the claimants, supported by the JCWI, also contended, relying on the judgment of Sedley LJ in *Quila* [2010] EWCA Civ 1482, that Articles 8 and 12 should be considered together. The argument is (skeleton argument, paragraph 20) that "the right to marry, found a family and cohabit is a fundamental right which, whether at common law or by virtue of Article 8 read with Article 12 of the ECHR, is a right of fundamental importance". The provision challenged in *Quila* was the ban in paragraph 277 of the Immigration Rules on the entry for settlement of foreign spouses between the age of 18 and 21. In the words of Sedley LJ in the Court of Appeal (at [48]), the right is "not merely to go through a ceremony of marriage, but to make a reality of it by living together". It was submitted on behalf of the claimants in the cases before me that the pre-entry English language requirement "strikes at the very heart of allowing *in reality* the marriage to take place, allowing the parties to found a family and allowing them to live together as spouses in the UK".

64. Although the claimants relied on the statement of Lady Hale in the Supreme Court in *Quila* (at [67]) that "married couples also have the right to live together", their written submissions in the light of the decision of the Supreme Court in *Quila* were more muted. This was not surprising. The Supreme Court did not hold that the age restriction on the grant of what Lord Wilson referred to as "marriage visas" violated Article 12. Lord Wilson's judgment was solely concerned with Article 8, and Lady Hale (see [79]) explicitly stated she was not concluding there had been a violation of the rights of the claimants in that case to marry. It is also to be noted that, in the Court of Appeal, Pitchford and Gross LJJ proceeded on a very different basis to Sedley LJ. Pitchford LJ (at [68]) rested his decision solely on Article 8, and stated that Article 12 had "no life of its own" in the context of that case. Gross LJ rested his decision on common law "irrationality" or "*Wednesbury* unreasonableness" rather than the Convention (see [78]) but also accepted (see [74]) the submission of the Secretary of State that Article 12 had "no material bearing" on the issues raised.

65. I accept Mr Eadie's submission on behalf of the defendant that the new rule does not interfere with the Article 12 rights of the claimants or other persons. This is because it does not prevent marriage within the United Kingdom, where both parties are present in the jurisdiction, or prevent anyone within the United Kingdom from travelling abroad to get married. Article 12 does not confer a right to marry in the United Kingdom where one party to the proposed marriage is abroad and has no right to enter the United Kingdom: see *A v United Kingdom* (1983) 5 EHRR CD 296, *A v Netherlands* (1986) 8 EHRR CD 308, *Savoia and Bounegru v Italy* Application 8407/05. It is also clear from the jurisprudence of the Strasbourg court that Article 8 and not Article 12 is the appropriate provision in the consideration of whether a couple have a right to cohabit in a particular country. Although it is true that the

decision in *Abdulazziz v United Kingdom* (1985) 7 EHRR 471 has to be read in the light of subsequent decisions, at the hearing Mr Gill was unable to point to one in which this particular aspect of it has been undermined: see also the decisions in *Haghighi v The Netherlands* (2009) 49 EHRR SE8 66 at 71; *Y v Russia* (2008) 51 EHRR 21 at [103], where the Strasbourg court based its reasoning on Article 8 alone. In *Quila*, the Supreme Court, while declining to follow *Abdulazziz* in making a distinction between the positive and negative obligations of a State under Article 8 (see [66]), did not suggest that this aspect of the decision should not be followed.

(iii) Is Article 8 engaged?

66. The obligations imposed on States by Article 8 do not extend to a general obligation to respect the choice by married couples of the country of their matrimonial residence, so as to require them to accept the non-national spouse for settlement. This proposition can be traced back to the decision of the European Court of Human Rights in *Abdulaziz v United Kingdom* (1985) 7 EHRR 471 at [68]. I have mentioned that the decision in that case has to be read in the light of subsequent decisions. Notably, in *Quila's* case the distinction made in *Abdulaziz*'s case between the positive obligation to respect family life by allowing a reunion to take place and the negative obligation not to interfere with family life by expelling a person was questioned and not followed. The distinction was said (at [43]) to be often elusive and (at [69]) to have been eroded by subsequent developments.

67. What was stated in *Abdulaziz*'s case about a married couple's choice of country of matrimonial residence has, however, not been questioned, and has, indeed, been confirmed in recent Strasbourg and English cases: see *Rodrigues Da Silva Hoogkamer v The Netherlands* (2007) 44 EHRR 34 at [39]; *Y v Russia* (2008) 51 EHRR 21 at [103]; and *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 WLR 148 at [19].

68. Another proposition in *Abdulaziz's* case that has not been questioned is that, in relation to immigration control, Member States enjoy a certain margin of appreciation, although there has been discussion about the width of this margin. But, even assuming that in the case of immigration control, there is a broad margin, it must be recalled that the purpose of the rule under consideration in the present proceedings is not pure immigration control, but (in the language of the submissions on behalf of the defendant) to promote integration and to benefit individuals by ensuring they have a minimum level of language skills. So, in that respect, this case has similarities to *Quila*, where the purpose of the measure was to prevent forced marriages. For that reason, in that case, Lady Hale (at [72]) considered the immigration dimension could be ignored. Lord Wilson did not refer to that dimension and considered (at [46]) that to afford the government a substantial area of discretionary judgment was at odds with the nature of the court's duty.

69. At the permission stage in these proceedings, the defendant (then represented by different counsel) accepted that the pre-entry English language test impacted on the Article 8 rights of the claimants: see skeleton argument, paragraph 18. However, at the hearing in July, while Mr Eadie accepted that "family life" within Article 8(1) "may come into being on the marriage of a couple, even where 'family life' at that stage has scarcely been established or is still relatively undeveloped", he argued that

the "rudimentary" nature of such family life may mean that on the facts Article 8 is not engaged. So, relying on *Abdulaziz* at [68], he submitted that "a refusal to accommodate a couple's choice as to the country in which they would prefer to enjoy their family life does not generally amount to a lack of respect sufficient to engage Article 8": paragraph 42. The defendant's position was that since the claimants in the cases before me have never enjoyed a family life together with their spouses in the UK, the introduction of pre-entry English language test (skeleton argument, paragraph 46) "could on no view have the effect of breaking up a family unless the family decamps to a different country" and does not "break up an established family unit in the UK".

70. In the defendant's post-*Quila* submissions it is argued (paragraphs 33 and 36) that the Supreme Court did not find that any refusal of a spouse visa to a British national or a person settled in the United Kingdom will automatically mean that Article 8 is engaged. It was engaged in the particular circumstances of Quila and Bibi, but the Court "left open the possibility that the second *Razgar* question might still be answered negatively in the case of refusal of a spouse visa, if in the circumstances of the particular case, the practical consequences were not such a 'colossal interference'".

71. The factual circumstances of a case must always be relevant to the question whether Article 8 is engaged. But in my judgment Article 8 is clearly engaged in the cases of these claimants on the asserted facts (admittedly untested by the defendant). That was the better view of the state of the jurisprudence even before the decision of the Supreme Court in *Quila*. See, for example, *A (Afghanistan) v Secretary of State for the Home Department* [2009] EWCA Civ 825, where Hooper LJ (at [33] and [37]) observed that the Secretary of State had not pointed "to any authority for the proposition that a lawful, genuine and subsisting marriage falls outside the ambit of family life" and that "it is inconceivable that a State party to the Convention could prevent a newly and genuinely wed husband and wife from co-habiting and then successfully claim that because of the absence of co-habitation, there is no family life and therefore Article 8 is not engaged".

72. The matter has been put beyond question by the decision in *Quila*. In this context it is the position of Mrs Bibi, the second claimant in that case, which is significant.[3] She had never enjoyed a family life with her husband in the United Kingdom. They had only co-habited briefly – perhaps for only a few weeks – in Pakistan before her husband, a British citizen, returned to England. But the Supreme Court held that the couple's Article 8 rights were engaged.

(iv) The approach to justification under Article 8(2)

73. I turn to the question of justification. I first address this purely in terms of Article 8(2). I will then consider the issue of discrimination; that is whether, if Article 14 is taken into account, the pre-entry English language requirement in the rules is incompatible with that provision read with Article 8.

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[3] The Quilas had enjoyed a family life in the United Kingdom between September 2008 and July 2009 when, having failed to obtain a marriage visa, they left.

74. The classic modern formulations of the approach in considering justification are to be found in the decision of the Privy Council in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80, and in the speeches of Lord Bingham in *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 386 at [17] and [20] and *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 at [19]. In *Razgar's case* Lord Bingham stated that five questions were likely to arise in a case involving Article 8. The first two concern whether Article 8 is engaged. The last three concern justification. They are:

> Question 3: Is the interference in accordance with the law?
> Question 4: If so, is such interference necessary in a democratic society in the interests of the public ends specified?
> Question 5: If the interference is so necessary, is it proportionate to the legitimate public end sought to be achieved?

75. Lord Bingham stated (at [18]) that question 3 is likely to permit of an affirmative answer only. That is so in the present cases. Interference with family life caused by a correct application of paragraph 281 of the Immigration Rules would clearly be in accordance with applicable immigration law and rules. The submission on behalf of the claimants was (skeleton argument, paragraph 69) that no consideration has been given to the best interests of the children in this specific context and that the decision to introduce the new rule is not in accordance with the law (in particular section 55 of the Borders, Citizenship and Immigration Act 2009). This appeared to be a free-standing ground although at the hearing Mr Gill stated it was part of the consideration of proportionality. But, however it is put, I reject it. The welfare of children is expressly considered in the October 2010 EIA (see [51]). It is difficult to see how the interests of the children could be further taken into account in an abstract way. I accept Mr Eadie's submission that they fall to be considered in the light of the particular facts of an individual case.

76. In *Huang*'s case Lord Bingham emphasised that (as he had in fact stated in *Razgar* at [20]) the fourth and fifth questions involved a balance between the rights of the individual and those of the community. Adding that to the three questions identified in the earlier *de Freitas* case produces the four questions listed (at [45]) by Lord Wilson in *Quila's* case. These, referred to in Mr Eadie's post-*Quila* submissions as "the *Huang* sub-questions", are:

> (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 necessary to accomplish it?
> (d) Do they strike a fair balance between the rights of the individual and interests of the community?

77. The burden is upon the defendant to establish that the interference with the rights of the claimants by the new rule is justified. The approach to justification and to the *Huang* sub-questions involves a greater intensity of review than was generally considered appropriate in a purely common law context, even under the heightened scrutiny test, but (see *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 at

[30]) it is not a review of the merits of the decision. It is an objective value judgment or evaluation by the court by reference to the circumstances prevailing at the relevant time and bearing in mind the need for "appropriate respect" (see [61]) for the Home Secretary's views, in the light of her governmental responsibility for making the judgments. In *Quila*'s case Lord Wilson stated (at [44]) that "in an evaluation which transcends the matters of fact it is not…apt to describe the requisite standard of proof as being, for example, on the balance of probabilities".

78. In this case, as in *Quila*'s case, there was a substantial amount of evidence put before the court by both the claimants and the defendant. The evidence relates to factual matters and to matters of opinion and evaluation. An example of the former is the evidence about the availability of teaching and testing facilities in a particular country and their nature. An example of the latter is the benefit to the community and to the individual involved of that individual being able to operate with the requisite level of linguistic skill on arrival in this country. Another example is the significance of such figures as are available regarding the impact of the new rule on numbers of applications and success rates, both in general and those from areas where there are no or only limited facilities for tuition and testing. There are significant conflicts in the evidence, primarily that of Mrs Sayeed and that of Dr Wray.

79. The claimants mounted a fundamental attack on the rule, contending that its aims do not justify limiting the Article 8 rights of citizens and those settled in this country and their spouses and families. They also maintained that the defendant's aims are either not supported by evidence or that the evidence relied on by the defendant is flawed in respect of the claimed benefits. Although their submissions maintained that all four *Huang* sub-questions must be answered negatively, the main thrust of the challenge was, as it was in *Quila*'s case, on questions (c) and (d).

80. Broadly speaking, the defendant contended that the aim of the new rule is to promote integration and to protect public services. Mr Eadie submitted that there is evidence from which the defendant was entitled to conclude that it was likely do this to some extent: see Mrs Sayeed, first statement, paragraphs 27 – 37. He also submitted that cases in which the new rule may prevent a spouse from entering the United Kingdom at all are likely to be rare given, first, the basic level of English required and, secondly, the exceptions for the aged, the mentally disabled, and those with exceptional compassionate circumstances. He argued that the evidence is that there has not been a significant change to the number of entry clearance applications since the amendment, and that the percentage refused has not risen significantly.

81. In *Quila*'s case, Lord Wilson approached the evidence by formulating the questions or issues the court had to consider in order to make its evaluation of proportionality according to the test I have set out above. I gratefully adopt that approach. Excluding at present the issue of discrimination, what I will refer to as the "Wilson" questions or issues which arise in the present case, are:

    (1) What is the impact of having little or no English on a person's ability to take part in British life?
    (2) What is the significance of the number or percentage of spouses who are unable to pass the KOL test at the end of their two year period of limited leave

to remain, or who opted for the alternative ESOL test with its lower requirements?

(3) What are the relative advantages and disadvantages of learning English as a second language in this country and abroad before arrival?

(4) Given the basic standard required, to what extent will passing the pre-entry language test confer any job or earnings advantage on a person or benefit that person's children educationally or otherwise?

(5) To what extent will the pre-entry language requirement protect public services, in particular by reducing the need for translation services by government, public and health authorities?

(6) What, if anything, is the significance of the evidence as to the number of applications before and after the introduction of the new requirement, and the numbers of acceptances and refusals in that time; i.e what can be said about the impact of the new requirement on numbers of applications and success rates?

(7) What teaching and testing facilities are available in the countries from which there are significant numbers of applicants, how accessible are those facilities (in terms of geography and cost), and are such tests as are available appropriate for the standard required?

(8) How long, on average would it take a person to learn English to the standard required for the test, and will the interference created by the new rule be limited in its impact and duration?

(9) What information is available to applicants about the exemptions from the language requirement, and what are the implications of those exemptions for the impact of the new requirement?

(v) Are the new rule's aims legitimate?

82. Of the aims identified in Article 8(2) as capable of justifying an interference with private and family life, the following are relevant in the present case: "the economic well-being of the country", "the protection of health or morals", "public safety" and "the protection of the rights and freedoms of others". In their skeleton argument, the claimants submitted that the amendment to the rules does not pursue a legitimate public aim because (paragraph 48) of the "lack of a legitimate aim itself and the lack of fit between the measure and any legitimate aim". This is because (see paragraph 44) the claims that the measure will do something positive for migrants and "thereby indirectly…be helpful in some vague and unsubstantiated way to the economy" cannot justify limiting the right of such families to live together in the United Kingdom as a family unit.

83. The JCWI did not go so far: see post-hearing submissions, paragraphs 7- 9. It accepted that the defendant's aims which (see [33]) include encouraging integration and employment "must be capable of falling within one of the permitted aims of Article 8(2)". That is clearly correct. But it maintained (paragraph 7) that "immigration control" is not a freestanding legitimate aim. It submitted that immigration control is only a legitimate aim insofar as it can fall within the permitted and stated aims of Article 8(2) and that that the less squarely the aims of a measure do so "the harder it will be for the SSHD to discharge her burden of establishing that the interference is proportionate".

84. It is clear that "immigration control" has been regarded as a legitimate aim for the purposes of Article 8(2) without specific reference to the particular aims enumerated: (*Osmond v Denmark* [2011] ECHR 926 at [58]; *VW (Uganda) v Secretary of State for the Home Department* [2009] EWCA Civ 5 at [29]; *SS (India) v Secretary of State for the Home Department* [2010] EWCA Civ 388 at [53]). The defendant contended (post-hearing submissions, paragraph 11) that what one has to focus on is the overall system of immigration control, the aim of which is for the economic wellbeing of the country, rather than the aim of each individual provision of the Immigration Rules. Whether or not immigration control is strictly speaking a freestanding legitimate aim, this submission does not sit altogether comfortably with the approach of the Supreme Court in *Quila.* Lord Wilson and Lady Hale (see [68]) examined a particular aim (prevention of forced marriages) and a particular rule rather than the overall system of immigration control.

85. The breadth of the aims expressly identified in Article 8(2) mean that many more specific aims will fall within them and be capable of justifying an interference with a person's Article 8 rights. In *Quila* the aim of deterring forced marriages fell into the last of the Article 8(2) categories, "the protection of the rights and freedoms of others". In the present case the categories of protection of "economic wellbeing" (in view of the evidence about the impact on job prospects), "health" (in view of the evidence about accessing health services), and possibly "public safety" or the "protection of the rights and freedoms of others" (in view of the evidence about the protection of women from domestic violence) mean that the new requirement does pursue a legitimate public aim.

86. It is also noteworthy to observe in considering whether the aims of the new rule are legitimate the decision dated 30 March 2010 of the First Division of the German Federal Administrative Court, the highest German court in administrative matters. The three judge court, presided over by the court's Chief Justice, held that "requiring a basic knowledge of the language even before entering the country is fundamentally compatible with the special protection that marriage and the family enjoy under Article 6 of [the German Constitution], [and] Article 8 of the European Convention on Human Rights…".

(vi) Proportionality

87. The next question is whether the interference to family life caused by the application of the new rule is proportionate to that legitimate public aim. The defendant maintains that even if the effect of the application of the new requirement would be an inability to enter into the United Kingdom, that would be justified and proportionate, and if so, delay, a lesser form of interference, would also be justified and proportionate. The JCWI submitted (paragraphs 31 – 38) that there were less intrusive alternatives which were not adopted and which rendered the interference disproportionate. It also submitted (post-hearing submissions, paragraph 29) that the defendant's approach was wrong and distracted attention from the real issue, which is that "many hundreds of applicants per year…will refrain from applying (and therefore are not 'refused' leave to enter) until they can meet the requirements". It is suggested that this means that the rule is far more intrusive than suggested by the defendant.

88. Before addressing the "Wilson" questions that arise in the present case, I make two observations. The first is that some of the evidence on behalf of the claimants (see, for example, Mrs Chapti's statement, paragraph 13) is to the effect that an inability to speak English will not affect a person's ability to integrate into UK society .It is conceded, however, on behalf of the claimants and the interveners that those living in this country benefit by having an understanding of the English language. Indeed, those benefits could hardly be contested. In this sense, I accept the defendant's submission that the aims of the rule are fundamentally benign. The responses to the consultation by groups such as Migration and Law Network also accepted that competence in the English language is desirable for most migrants, although they, like the claimants and interveners, did not consider that there should be a pre-entry language requirement.

89. My second observation is that the reliance by the defendant on the absence of a challenge to the post-entry language test on settlement is relevant to the general question as to the benefits of knowing English by those living in this country and possibly of relevance to the Article 14 grounds. But it is not of great assistance in the context of this part of the challenge. As JCWI noted (post-hearing submissions, paragraph 30), a post-entry test is unlikely to interfere with family life because paragraph 284 of the Immigration Rules permits the two-year probationary visa given to a person joining a spouse or partner who is citizen or settled in this country to be indefinitely renewed.

90. Deciding whether the issues raised by the claimants and interveners renders the new rule a disproportionate interference with the Article 8 rights of the claimants and others involves reaching an assessment on a series of questions of judgment as to the extent of the benefit to be derived from it and the extent of the detriment to individuals from it. Although I shall address the principal matters relied on by the claimants, it must be borne in mind that the aim of the policy implemented by the new rule is the achievement of social policy, which is primarily a matter which is for the Home Secretary. Once the detail is considered, it is necessary to stand back and assess whether, in the light of all the material, the interference with family life is such as to be disproportionate to the legitimate aims of the measure. The court must do this bearing in mind that, despite the more intense nature of its scrutiny (see [77]), it does not conduct a review of the merits of the decision that has been challenged.

91. The first of the "Wilson" questions or issues that arise in the present case is the impact of having little or no English on a person's ability to take part in British life. It is submitted on behalf of the claimants (skeleton argument, paragraph 100) that "there is no evidence that a foreign spouse who speaks little or no English will not be able to take active part in British life, both socially and economically, and will not be able to access facilities such as social and health facilities". This is said to be anecdotal stereotyping. It is maintained that such persons "are often well able to access social and health facilities with considerable ease with help from staff based at the relevant centres or from families and friends". But Dr Wray (second statement, paragraph 22) conceded that "it is possible…that lack of language may inhibit access to healthcare". The general point that it is easier to function in Britain if one is able to speak the language at least to a limited degree is a question of common sense and it was, as I have stated (see [88]), accepted that there are benefits to those living in this country in having an understanding of English.

92. The implication of some of the submissions is that, notwithstanding the general benefits to those living here of having an understanding of English, one should test whether those who do not are able to participate in British life and access services by asking what measures the state and public authorities and friends and family take to help those without language. The suggestion is that, if those steps are or can be effective, those who do not understand English can so participate and access services. But while, with assistance they may be able to participate to some extent, it is participation of a limited and dependent nature. I reject the submission (claimants' skeleton argument, paragraph 100) that regarding it in this way is unsubstantiated stereotyping.

93. The second "Wilson" question concerns the significance of the numbers of spouses and partners who are either unable to pass the KOL test, or who opted for the alternative ESOL test, with its lower requirements. Dr Wray pointed to the falling numbers of spouses who fail the KOL English language and life test, and the fact that they are a very small proportion of the overall number of persons from non-English speaking countries granted leave to enter as a spouse or partner. But her evidence did not grapple with the implications of the increase in those taking the ESOL test beyond stating (e.g. second statement, paragraph 16) that only a minority of spouses opt for the ESOL route, and that it does not follow that those who take it could not pass the KOL test. As a matter of logic this may be so. There is, however, a curiosity in regarding the fact that provision is made for those in the country enjoying family life with British citizens or those settled here to take an easier test and obtain renewal of their probationary visa as an indication that there have been no problems in the operation of the requirements for post-entry tests. The provision may reflect anticipation by the Home Secretary that she might face difficulties in removing those who do not pass it at that stage rather than the absence of problems with the test.

94. This question is posited on the assumption that the defendant was "targeting" such persons. It is, however, important to bear in mind that the defendant's aims were (see [34] – [35]) broader. Moreover, Mrs Sayeed's evidence is that, between 2005 and 2010, 71.3% of all people taking the KOL test passed it. In 2010, the figure was 73.4% of the 183,562 tests taken, a slightly lower figure than the 74.4% of the 198,656 tests taken in 2009. Of spouses and partners granted settlement in the twelve months between April 2010 and March 2011, 68.25% passed the KOL test, and 31.75% passed the ESOL test. Mrs Sayeed stated (first statement, paragraph 24) that the data "indicates that after two years in the UK almost a third of spouses/partners are not taking the 'Life in the UK' test which suggests they may have acquired insufficient English to enable them to do so". In the light of her evidence, and in particular the large proportion (albeit a minority) of those taking the ESOL alternative with its lower threshold, I consider that the defendant was justified in considering there was a problem in spouses' acquisition of the English language skills required in the KOL test and thus in regarding spouses on limited leave as a key target group.

95. The next question concerns the relative advantages and disadvantages of learning English as a second language in this country after arrival, or abroad before arrival. The evidence in Dr Wray's first report (in the section prepared by Dr Jordan) is that there are advantages, particularly for older students with poor educational

backgrounds, in learning English here. It is said (paragraph 43) the learning will take place in "a more welcoming, more supportive atmosphere in a community that understands their obligation to learn English". There may also be advantages in terms of opportunities for courses, and cost. However, notwithstanding these advantages, in view of the large minority who choose to take the lower ESOL threshold after two years here, the Home Secretary was entitled to conclude that such advantages did not outweigh the advantages of individuals having some, albeit a limited, knowledge of the language before arrival.

96. I turn to the question whether passing the pre-entry test to Level A1 would confer any job or earnings advantage to the spouse, or benefit the children of the family. Dr Wray's second statement (paragraph 9) stated that the expert evidence contradicts the claim (as to which see Mrs Sayeed's second statement, paragraphs 19 and 23) that a pre-entry test to Level A1 will give a head-start or stepping-stone, or reduce the time during which translation services are needed. In the section of Dr Wray's second report written by Dr Charsley (paragraph 93) it is said that good language skills have an inconsequential effect on the level of earnings if the level of education is poor. But the 2007 report of the Commission on Integration and Cohesion referred to at [35] regarded English as a key factor in relation to access by new communities to the labour market. Moreover, Dr Wray's statement dated 25 July 2011 (paragraph 26) concedes that "English language competence generally increases earnings" and maintains only that "the link between earnings and integration…is not established" and that "the benefits in terms of increasing earnings of the pre-entry as compared to other methods of language acquisition is also not established". This is tied to the view that the pre-entry test is at an insufficient level to achieve these aims.

97. I do not consider that the evidence in the second report contradicts the evidence that a pre-entry test would function as a stepping-stone, which a migrant would build upon immediately on arrival in the United Kingdom. Nor do I consider that the fact that only a minority of foreign spouses seek to enter the labour market means that this factor should be discounted, on the ground (see claimants' skeleton argument, paragraph 47) that it treats immigrant spouses as economic migrants and not as family migrants. It is a factor indicating one benefit of the rule in some cases and it is a legitimate factor in the overall assessment. There are other factors indicating other benefits of having some command of the English language which apply whether or not the spouse is working. Those benefits include improved access to ordinary activities such as shopping and communicating, and to health and other public services.

98. As to the position of children, I reject the submission (claimants' skeleton argument, paragraph 110) that "there is no evidence that there will be benefits to children of those who pass the English test; there is no evidence that children of non-English speaking parents do not attain good educational results". I have referred to the evidence at [51]. Dr Wray's second statement (paragraph 24) considered the picture given was partial, that the lower figure might be a proxy for other problems, such as poverty and low levels of parental education, and that making children wait abroad until their parent passes the test has the undesirable effect of delaying their acquisition of language skills. But, although she considered that Mrs Sayeed's evidence added little to the government's case, she did not deny that having English as an Additional Language was a factor in educational achievement.

99. The savings to public finances from reducing the need for government, public and health authorities to provide translation services identified in the impact assessments may, as the July 2009 IA stated (see [45]), not be susceptible of precise quantification. However, even if they are not large in absolute terms, in a period of financial stringency, they are significant. Mrs Sayeed's evidence (see [46]) points to research indicating the total costs of translation services across the public sector in 2005 may have been in the region of £180 million a year and to other research suggesting that there are other non-financial costs resulting from not being able to communicate in English, such as receiving inappropriate medical treatment. I have referred (see [47]) to the responses from local authorities and other public bodies on the costs of translation and interpretation exhibited to her second statement. Dr Wray (second statement, paragraph 22 – 23) was critical of the reports relied on by the defendant, but I have referred (see [91]) to her concession that lack of language may inhibit access to healthcare. I reject the suggestion that the defendant is not assisted by this factor.

100. I turn to the sixth question, the evidence about numbers of applications and success rates. Its significance and implications were hotly contested. There are difficulties in assessing this because the new rule came into force only eight months before the hearing. There is relatively little evidence, and such evidence as there is may reflect what is a transitional phase.

101. The figures in Table 4 of section 1 of the Annex to Mrs Sayeed's second statement for the periods between January and June in 2009, 2010 and 2011 do not support her view (in paragraph 4) that "overall the figures indicate a small drop in applications in line with expectations…" and that the new requirement "has therefore not had a significant impact on the ability to be granted a spouse visa". The figures show that applications fell in the first half of 2011 by some 21% (not the 6% stated by Mrs Sayeed) and refusals rose by just under 24% (not the 7% stated by Mrs Sayeed). But it is still the case, as she also stated, that "applications are still being received in high numbers with the vast majority being granted". Because the decisions include both decisions received after the new rule came into force and applications made at an earlier date and not subject to it, one cannot compare applications received with spouse visas issued in the same period. Comparing the total number of spouse visas issued and refused in the two six-month periods, in 2010 of the 22,701 decisions, 18,307 visas were issued, and in 2011 of the 21,383 decisions, 15,629 visas were issued.

102. In her third witness statement, Mrs Sayeed referred to applications made to the Visa Application Centre in Ahmedabad in Gujarat. Here too, although a majority of the decisions resulted in a visa being issued (64% of the decisions in the post rule change period, as compared with 70% in the previous 12 month period): the number of applications fell and the proportion of refusals rose. In view of the fluctuations in numbers of applicants and the variety of reasons for refusals, notwithstanding my rejection of Mrs Sayeed's evidence that the figures do not show a significant drop in applications or a significant rise in refusals, it is not possible to conclude that the decrease in applications and rise in refusals was caused by the English language requirement alone, or that it will be anything other than temporary. Mr Eadie

submitted that, while there was a drop in the number of applications while people got used to the new requirement, there was no fundamental change.

103. I have concluded that the evidence available in relation to the approximately seven first months of the operation of the new rule does not fully support the defendant's stance. However, it is not evidence which makes it possible to conclude that the new rule has the effects which the claimants contend it has. It was submitted on behalf of the JCWI that the statistics underestimate the position because they do not take account of the many foreign spouses who, as a result of the new rule, have chosen not to make an application. There is, however, no evidence of this effect before the court. Mrs Sayeed stated (third statement, paragraph 23) that "the figures show that refusals were increasing prior to the introduction of the language policy". Moreover, leaving aside the percentages and looking at the numbers, the defendant's position gains considerable support from the figures in Annex G to Mrs Sayeed's third statement. These show that "spouse entry clearance applications remain largely high" and that in the period between June and August 2011 there were only 40 less compared to the volume of applications in the same two month period in 2009. Mrs Sayeed also stated that the number of settlement visas issued in that period was higher than the number issued in the same period in 2009 and 2010. Those statements are accurate.

104. The next question concerns the provision of English language tuition and testing overseas. On the change of government in May 2010, the policy, including this issue, was reviewed. It was established (Mrs Sayeed, third statement, paragraph 10) that every country with 250 or more applications for leave to enter as a spouse in 2008 had a test centre, and that there were only 13 countries known not to have a test centre run by an approved test provider. Of those 13 countries, all except Somalia had ten or fewer applications for leave to enter as a spouse per annum. Those countries and Somalia were exempted when the policy came into force, and the list of exempt countries is kept under review. So (see Mrs Sayeed, third statement, paragraph 19), exemptions were granted to two additional countries, Mali and Turkmenistan in August 2011, and the exemption covering the Dominican Republic was lifted because Level A1 testing became available in that country. Mrs Sayeed's evidence (third statement, paragraphs 11 – 18) is that the decision to bring forward the commencement date was made because, in the light of the tuition and testing then available, or which would be generated by the creation of a new immigration rule, it was, on reflection, not considered necessary to wait until the previously announced date of summer 2011. She also stated (paragraph 16) that a greater number of applicants than would be expected applied for a spouse visa in the time immediately before implementation, which suggested there was a high level of awareness of the implementation date.

105. The claimants made submissions and filed evidence about the availability of tuition in Gujarat, Yemen and Pakistan. In view of these, in paragraph 18 of her third statement Mrs Sayeed also referred to the fact that English is an international language with tuition in high demand globally, that the British Council offered courses in 80 teaching centres around the world including the major spouse visa countries. She also referred to the absence of evidence that applicants who make an effort to learn English are unable to find English tuition. She stated of Yemen that "a recent search of the internet for English tuition shows that AMIDEAST (a leading

American non-profit organisation engaged in international education, training and development activities in the Middle East and North Africa) provides English language classes to over 1,000 students annually in Yemen" and "the Yemen-American Language Institution (YALI), founded by the US Embassy, also conducts eight five-week terms per year teaching English to adult language learners, enrolment averaging 3,000 students per term". She stated that any cursory search of the internet also reveals considerable English language tuition in the countries, including India, Bangladesh, Thailand and Pakistan, which are major sources of spousal migration. This evidence also supports the position taken by the defendant.

106. The defendant also relied on what was described as flexibility in the test in the sense that applicants who need to learn English may choose how and where to do so. They do not have to take the test in their country of residence or in the country where the entry clearance or immigration application is made: see Mrs Sayeed's first statement, paragraphs 14 and 16. But the fact that the defendant also sought to justify the rule on the ground that applicants from countries in which there is no test centre are exempt shows little weight can be placed on this.

107. The claimants relied heavily on what they submitted were inadequate teaching and testing facilities in the countries from which there are significant numbers of applicants, and on the lack of accessibility of test centres to those in remote areas. Thus it was argued, in relation to Mrs Bibi's husband, that the nearest places for him to study English are in Mirpur and Islamabad, respectively 115 and 141 kilometres from his home. It is also submitted that in a number of places the tuition available is geared at a higher qualification than is required by the new rule, one involving literacy as well as communication skills, and in some cases the only testing facilities are online, requiring access to a computer, computer skills, and literacy skills.

108. The criticism that not all countries in which there is no test centre providing A1 testing in speaking and listening only have been exempt, and the fact that Mrs Sayeed's evidence is that the defendant is "working with" test providers, suggest that availability of appropriate tests is still a problem in certain countries. However, the problem relates to the way the defendant and her officials will apply the exemptions. It does not provide a sound foundation for what is a fundamental attack on the entire rule, which contends that it should be struck down whether or not a country has a test centre providing an appropriate test, and whether or not an individual faces significant difficulties in learning the language to the required standard.

109. The complaint about the proximity of test centres to the residence of particular claimants is at bottom a financial challenge. The cost may, indeed, be problematic for some applicants. But so may the cost of application, now over £800, and the requirement that a spouse and any dependents will be adequately maintained without recourse to public funds, which might impair the ability of spouses to enjoy their family life in this country. Those have not been said to be disproportionate requirements. Given the structure of spouse visas, the cost of applying for one, and the requirement that a spouse and any dependents be adequately maintained without recourse to public funds, it is legitimate for the Home Secretary to judge, as she has done, that the cost of learning English to the required standard is one, in general, to be borne by the spouse and the spouse's sponsor. Again, if there is a problem it will

relate to the way the defendant deals with a particular case, whether by the exceptional compassionate circumstances exception or otherwise.

110. As to the question of how long it would take a person to learn English to the standard required for the test, this will, of course, depend on the aptitude and skills of the applicant. There is conflicting evidence about the number of hours tuition needed to obtain the CEFR A1 Level qualification. Mrs Sayeed recognised (first statement, paragraph 18, second statement, paragraph 7) that the length of tuition will vary depending on the learner, but stated that it is judged that about 40 – 50 hours tuition will be required for most. In her second statement she exhibited extracts from the websites of three course providers which respectively give figures of 36 hours, 40-50 hours, and, in the case of the College of English Language (India), a "minimum of 40 hours of classroom interaction" . This is contested. The claimants (Dr Wray, second report, paragraphs 40, 43, 61 – 63; skeleton argument, paragraphs 107, 139(m)) maintain that a foreign spouse would require up to 100 hours in order to attain the required level in a foreign country where it is usually difficult to access appropriate courses. In the context of a challenge to the rule, one has to look to the generality of the position. The defendant's assessment of the average number of hours tuition required is borne out by the information from the three course providers. It is significant that one of them is a provider in a foreign country.

111. An applicant who is illiterate or semi-literate is clearly likely to need more time to achieve the required standard. If he or she cannot do so, the question will be whether he or she qualifies under the "exceptional compassionate circumstances exception". If the defendant does not show flexibility in such cases, she may find that an individual decision requiring such a person to take the test is, on the particular facts, incompatible with the Article 8 rights of that person or his or her spouse. But again, this is not a ground for impugning the rule itself.

112. I have referred to the exemptions from the pre-entry English language requirement. I deal with the exception based on nationality when considering Article 14. It was contended that eligibility for the exceptions for disability preventing an applicant from meeting the requirement and for exceptional compassionate circumstances were set at a very high threshold. It was argued that such a threshold cannot satisfy Article 8 where the test is "proportionality" not "exceptionality". It is said, for example (see Dr Wray's report, part 4, paragraph 66 and third statement, paragraph 4) that the difficulties of providing medical evidence in third world countries make the requirement that it be provided in the case of disability disproportionate. I reject the suggestion that difficulties of obtaining medical evidence in certain countries means that the United Kingdom cannot have a rule bounded by a medical exception which requires proof. How else is the defendant to guard against fraudulent applications or to assess whether the disability would prevent the person from learning English to the required standard? See the reference in Mrs Sayeed's third statement, paragraph 20 to applicants who produced "non-genuine" certificates. It was also submitted in relation to both disability and the exceptional compassionate circumstances exception that the difficulty for an applicant to know in advance the probability of an exception being granted and the need to first apply and incur the substantial visa application fee is a factor indicating disproportionality. I reject this submission for the reason given at [114].

113. Reliance was also placed on the refusal of the Strasbourg court in *O'Donoghue v United Kingdom* [2011] 53 EHRR 1 at [89] to regard a similar exception on compassionate grounds as justifying the measure under consideration because it did not remove the impairment of the essence of the right, in that case the right to marry. The position in that case and in *R (Baiai)* v. *Secretary of State* [2009] 1 AC 297 which was also relied on by the claimants, was, however, entirely different. Article 12 confers an unqualified right with no limiting provision equivalent to that in Article 8 (and Articles 9, 10 and 11). The rules under consideration were over-inclusive in catching genuine marriages within a regime aimed at controlling sham marriages. As was observed in *O'Donoghue*'s case, the discretion appeared to have been based entirely on the personal circumstances of the applicants and not on the genuineness of the proposed marriages. In the present case the rule is not over-inclusive in that sense, in that anyone with knowledge of English to the required standard will satisfy it. The exceptions do not thus relate to those caught by an over-inclusive rule whose rationale is not applicable to them, but to those who cannot meet what is a legitimate aim.

114. It is neither possible nor necessary for an exception based on exceptional compassionate circumstances to seek to predict and set out with any precision when it might apply, because the circumstances of individual cases vary widely, and a range of circumstances may need to be considered together. I accept Mr Eadie's submission that the existence of the exceptions positively supports the proportionality of the new rule.

115. I have concluded that, in the light of all the material before me, considering the matter purely in terms of Article 8(2) and leaving aside the issue of discrimination, the rule providing for a pre-entry English language requirement is not a disproportionate interference with family life and is justified. It is rationally connected to its aims, which are legitimate and, which the Home Secretary and her predecessor regarded as important aims. It makes due allowance for the generality of exceptional cases. The fact that it may, in an individual case, be possible to argue that the operation of the exceptions in the way envisaged in the evidence adduced on behalf of the Home Secretary is a disproportionate infringement of that individual's Article 8 rights, does not render the rule itself disproportionate. If the rule itself is not a disproportionate interference with family life where it results in an inability to enter the United Kingdom absent the circumstances of a particular case, it follows that in the generality of cases, and subject to particular circumstances which can only be identified on a case-by-case basis, the lesser interference of delaying entering the United Kingdom cannot lead to a different answer.

(vii) Article 14

116. It is not in issue that the existence of the category of applicants who are nationals of one of the named countries and are not required to take the pre-entry language test means there is a difference in their treatment and the treatment of those applicants who are nationals of other countries and have to take the test (unless exempted on another ground).

117. The question is whether it is discrimination based on a criterion that qualifies as a "status" for the purposes of Article 14 and, if so, whether it has an objective and

reasonable justification, that is, whether it pursues a legitimate aim and whether there is a reasonable relationship of proportionality between the means employed and that aim or aims: *Stec v UK* [2006] ECHR 1162, at [51] (Grand Chamber of the ECtHR). The claimants and the interveners submitted that the pre-entry language requirement unjustifiably discriminates on the basis of four criteria that qualify as a "status" for the purpose of Article 14: nationality, ethnic origins, sex, and disability.

118. There have been different formulations of the approach to Article 14 in the English courts. The four part test in *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617 at [20] was replaced by a single-question approach in *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173, particularly at [3] and [31] and subsequent English authorities such as *R (British Gurkha Welfare Society) v Ministry of Defence* [2010] EWCA Civ 1098 at [10]. The single question is: "Is there enough of a difference between X and Y to justify different treatment?" But the Strasbourg court in the *Carson* case, Application. No. 42184/05, (2010) 51 EHRR 13 in effect asked three questions when considering Article 14. These were: whether the facts underlying the complaint fell within the scope of one or more of the substantive Convention provisions (at [63]-[65]); if so, whether the measure complained of provides for a difference of treatment based on a criterion that falls within the phrase "or other status" in Article 14 (at [66]-[71]); and, if so, whether the applicants are in a relevantly similar position to those who the measure of treats more beneficially (at [72]-[89]).

119. The Strasbourg court did not consider that Ms Carson and the other applicants, persons resident in certain countries who were excluded from an uprating of pensions by the measure challenged, were in a relevantly similar position to people resident in the UK or in countries with which the UK had a reciprocal arrangement whose pensions were uprated. It did not therefore have to consider justification. As Mr Eadie's skeleton argument stated (paragraphs 71-72), had this been necessary, it would have been necessary to ask itself a fourth question, discernible from its reasoning at [61] of the judgment, that is whether the measure was justified. The court's overall approach is in fact similar to that in *Michalak's* case.

120. There is no material difference between the parties' formulations of this stage of the enquiry. Mr Eadie's is: "did the difference in treatment have an objective and reasonable justification: in other words, did it pursue a legitimate aim and did the differential treatment bear a reasonable relationship of proportionality to the aim sought to be achieved". Mr Gill's and Mr de Mello's formulation (skeleton argument, paragraph 128(3)) asks "whether the difference of treatment is objectively and proportionately justified by factors untainted by discrimination". Both formulations reflect the decisions. In the *Belgian Linguistic Case (No.2)* 1 EHRR 252, the ECtHR stated that the justification for a measure must be assessed in relation to the aim and effects of the measure and that a difference in treatment must have a reasonable and objective basis. They also reflect that, in the words of Lord Bingham in *A & Ors v Secretary of SSHD* ("the *Belmarsh* case") [2005] 2 AC 68 at [67]) "[w]hat has to be justified" under Article 14 "is not the measure in issue but the difference in treatment between one person or group and another".

121. It is also clear that states enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (*Stec v UK* [2006] ECHR 1162, at [61]) but that the scope of this margin varies according to "the circumstances, the subject-matter and the background". Where a difference in treatment is based exclusively on the ground of nationality, race or sex, as a general rule, "very weighty reasons" would have to be put forward before the Court could regard it as compatible with the Convention: for examples, see *Gaygusuz v Austria* [1996] EHRR 36 (nationality); *Stec v UK* [2006] ECHR 1162, at [52] (sex); *Timishev v Russia* (2007) 47 EHRR 37 at [56] and [58] (race). But in the case of general measures of economic or social strategy the margin is broader. In the case of decisions of the Strasbourg court this is because (see *Stec v UK* at [52]) "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". The position of a national court differs, but it too will (see [60]) treat "with appropriate respect" the views taken by the branch of government (in this case the Home Secretary) whose primary responsibility it is to make the judgments in question.

122. The claimants and the interveners submitted (skeleton argument, paragraph 132(a)) that the pre-entry language requirement directly discriminates on grounds of nationality and race because the spouses and partners of the exempt group are treated more favourably than those in the non-exempt group solely on the grounds of nationality and language, which are factors closely linked to their race and ethnic origins. They also relied on the different treatment of the spouses and partners of British citizens or those settled in the United Kingdom and the spouses or partners of migrant workers or retired persons of independent means who are not required to take the test.

123. The claimants and interveners submitted there are no weighty reasons justifying the difference based on nationality in the treatment of the two categories. They did so primarily because of what they maintain is a lack of fit between the distinction between the two categories and any non-discriminatory purposes it might serve, for example in distinguishing between people who are and are not likely to have English language skills at the appropriate A1 level. Particular reliance is placed on three factors. First, nationals of Nigeria are not exempted from the test although English is the official language in Nigeria and (see Dr Wray's second report, paragraph 71) "the universal language of instruction throughout nearly all education". Secondly (see Dr Wray's second report, paragraphs 72 and 73), nationals of "India and Nigeria both perform better in the settlement test than [nationals of] exempt countries such as Antigua, Grenada and Jamaica". It is also said that the 70% pass rate in twelve designated states in the Caribbean area is "close to the worldwide average of 71%", and this performance does not justify exempting them from the pre-entry test. Thirdly, reliance is placed on the position in Canada (second report, paragraph 70) where 42% of the population have a non-English mother tongue and the majority of francophones living in Quebec are not bilingual in English and French.

124. Liberty's written submissions stated (page 6) that the pre-entry requirement is "both over-broad and under-inclusive in pursuit of its stated aims" because it applies "to an Indian national schooled in English to professional level, but not to a

francophone Canadian who does not have English as a second language". It maintained that the failure to tailor the discrimination on grounds of nationality tightly to any legitimate aim means that, as a suspect ground, it cannot be regarded as justifiable.

125. The claimants, supported by the interveners, also submitted that there is indirect discrimination on the ground of gender (in the language of Article 14, sex), disability, nationality and ethnic origins. In relation to gender, this is because a greater number of women will seek settlement as the partners of British citizens who originate, or whose families originate, from the Indian subcontinent: see page 6 of the October 2010 EIA. It is submitted that women are more likely to have difficulty in passing the test than men, *inter alia* because they have a shorter period in education and a lower adult literacy rate, in particular in Pakistan, but also in other parts of the subcontinent: see Dr Wray's second report, paragraphs 137 – 138.[4]

126. As to disability, it is submitted, on the basis of Dr Wray's second report, paragraph 66, that the pre-entry language test indirectly discriminates against them because of the inherent difficulties they face in accessing English language classes and taking the tests compared with able-bodied persons. It is argued that the exemption is disproportionate because it only applies to those who have a mental or physical impairment which makes it unreasonable to expect them to learn English, and (skeleton argument, paragraph 132(q)) "it is far too onerous for disabled persons to meet". It is also argued that there is no justifiable reason for not exempting all disabled persons from the requirement. It is also submitted (skeleton argument, paragraph 132(e) – (k)) that the pre-entry test indirectly discriminates against British citizens and UK settled sponsors from, or with ancestors from, the Indian subcontinent, Asia and the Middle East. It is said that many of them marry people from their or their ancestors' countries of origin, and other British citizens and persons settled in the United Kingdom are much less likely to feel the impact of the pre-entry language test. The test is also said to have a disadvantageous discriminatory impact on applicants from non-English speaking countries compared to those from English speaking countries, and it is maintained that the statistical data relating to Pakistan and Yemen shows that women are more likely to be discriminated against than men from those countries.

127. The submissions on Article 14 also relied on what I have termed the "Wilson" questions or issues which I considered earlier in this judgment. These included the number of hours tuition required to achieve A1 level, the requirement of many tests for reading and writing skills as well as speaking and listening, the evidence about the availability of tuition and teaching facilities, and their proximity to applicants, and difficulties in accessing information about the testing and about exemptions. The cost of tuition and testing and the need to travel is said (Dr Wray's second report, paragraph 61) to impact particularly heavily on female spouses and partners, applicants from countries where women have much lower earnings and where cultural norms inhibit them from travelling alone or being alone in any social situation. Reliance was also placed on what is said to be the inadequacy of the exemptions in addressing the problems which have also been discussed.

[4] This submission highlights the way the challenge is unrelated to the circumstances of these claimants, because in all three cases it is the sponsor who is a woman, and the foreign spouse who is a man.

128. I first deal with direct discrimination. I have concluded (at [82] – [84]) that the aim of requiring a minimum level of English from those seeking entry as spouses of British citizens and other persons settled in the United Kingdom is a legitimate aim. Those who can speak English will have no difficulty in meeting it. Non-English speakers are not in a relevantly similar position to English speakers and it is rational to exempt those who do speak English to the required standard from the test. A lack of English is not an immutable characteristic like race or gender. A distinction based on it should not be regarded in the same way as they are; that is, accorded a "specially protected status", "special vigilance and a vigorous reaction", and require "very weighty reasons" in order to be justified. In *Carson*'s case Lord Hoffmann (at [15]) stated that characteristics such as race, caste and gender "are seldom, if ever, acceptable grounds for differences in treatment". Indeed, direct discrimination on grounds of race has been said not to be capable of justification (*Timishev v Russia* at [58]) and the level of scrutiny of indirect discrimination will be intense: *R (Wilson) v Wychhaven DC* [2007] EWCA Civ 52 at [55] (but cf [105]) and *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293 at [81].

129. It was not suggested by Mr Eadie that a distinction based on the level of English language skill may not be a difference based on status because a lack of English or a particular level of English language skill is not an "immutable characteristic". He was right not to do so. Concentration on the question of whether a characteristic is a matter of choice can deflect attention from what is often the real question: whether the difference is capable of justification. Moreover, in *AL (Serbia)* [2008] UKHL 42, Baroness Hale (at [26]) observed that although the list of prohibited grounds in Article 14 generally concentrated on personal characteristics "which the complainant did not chose and either cannot or should not be expected to change", this was not (see *Carson*'s case) an invariable rule. In *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, Lord Neuberger (at [47]) considered a characteristic could amount to a status even if it was a matter of choice. The Strasbourg Court also appears to have accepted that Article 14 encompasses differences in treatment based on grounds that are within the claimant's control: see the cases cited in Simor and Emmerson's *Human Rights Practice* 14.023, note 4.

130. The claimants suggested (skeleton argument, paragraphs 7(b) and (c)) that the application of the exception based on nationality should be equated with requiring the possession of "a particular colour of skin" or "a particular level of intelligence" and is as offensive as such requirements. I reject this suggestion. The evidence about the exceptions based on nationality and academic qualifications from various countries shows that they were designed to reflect the fact that there was no purpose in applying a language requirement to categories of persons who (albeit with possibly rare exceptions) can be expected to meet the requirement without difficulty.

131. I have stated that it is rational to exempt those who speak English to the required standard from the test. But unless it is possible to find a surrogate to identify them, a policy-maker would be in a "catch 22" situation of, in effect, requiring those seeking exemption to pass a test to show they are entitled to the exemption. I accept Mr Eadie's submission that it would be absurd to suggest that a person should have to undergo a test to prove that he or she meets the language requirement in order that he

or she should be entitled to benefit from an exemption from the requirement to undergo a language test.

132. I also accept Mr Eadie's submission that in this context, it is administratively sensible and permissible to draw relatively "broad" or "bright" lines in terms of selecting those who can be considered as already sufficiently meeting the requirement to justify being exempted from the provision. What is necessary is that the particular "bright line" adopted be a rational one: see *Re G (Northern Ireland)* [2008] UKHL 38 at [13] and [16], and *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42 at [44] – [46]. In *Re G* the court in fact held that there was no rational basis for the bright line chosen, and in *AL (Serbia)* Baroness Hale stated (at [45]) that not all bright line criteria which are rational on pragmatic grounds are justified. She, however, stated that "bright lines, even if they produce what appear to be arbitrary distinctions between one case and another, are often necessary and can be justified".

133. Leaving aside the exemptions based on age, physical or mental impairment, and exceptional compassionate circumstances, the categories adopted for identifying those who are exempt are, those holding certain academic qualifications that were taught in English or obtained from institutions in English-speaking countries, and those who are nationals of the listed countries. Those countries are listed because they are considered to be "English-speaking countries": see Mrs Sayeed, first statement, paragraph 26. In my judgment, drawing a bright line which puts the nationals of English-speaking countries and those with educational qualifications that were taught in English or obtained from institutions in English-speaking countries in one category, and others in a different category, is, in the light of the aim of the test, rational.

134. The advantage given to those from English-speaking countries is an inevitable practical consequence of the use of English in the United Kingdom. The correlative of that is that those who do not have the requisite standard have to make the necessary effort and meet the associated costs. Some may find it more difficult than others to do so. This may be for a number of reasons, including poverty and lack of education. That, however, is also the case for some of the other requirements for a spouse visa; the requirements of adequate accommodation and ability for the parties to maintain themselves without recourse to public funds. It has, however, not been suggested that the accommodation and maintenance requirements are contrary to Article 8 when read together with Article 14. Nor has it been said that, since people from certain countries tend to have, on average, less financial means than those from other countries, or that, for example, women in some countries have less financial means, that those requirements discriminate on grounds of nationality or gender.

135. The "bright line" point is also the answer to the factors relied on for a lack of fit between the categories exempted and the non-discriminatory purpose of distinguishing between people who are and who are not likely to have English language skills at the appropriate level. I have referred to the problem of exempting a category of persons defined as "those who meet the language requirement in any event": see [131]. I consider that it is legitimate and non-discriminatory to exempt from the language requirement a category of persons, where the definition of the category is designed to catch a group of persons who can be expected in the vast majority of cases to meet the language requirement in any event.

136. Moreover, the evidence in relation to the factors relied on by the claimants and interveners is not all one-way. Dr Wray's second report accepts that, despite the status of English in Nigeria, given the plurality of local languages, the fact that many have few years of schooling, and the level of illiteracy, it is likely that some less well-educated people speak little or no English. Accordingly, even if many applicants will speak good English, more than a very small number of such applicants would be people who would not meet the language requirement, if it applied to them: Mrs Sayeed, second witness statement, paragraph 35.

137. Again, while residents of India and Nigeria may perform better in the settlement test than those from the exempt Caribbean countries, Mrs Sayeed's evidence (second statement, paragraph 36) is that on average migrants from English-speaking countries achieve higher pass rates for the KOL test on settlement. She also stated that being able to speak fluent English does not guarantee success in the test because of the requirement to demonstrate knowledge of "life in the UK". As far as Canada is concerned, Mrs Sayeed's third statement (paragraph 25) exhibited communications from an entry clearance officer in Ottawa which state that there is no evidence that Canadians applying for spouse visas are unable to speak English. The evidence indicates that those from Quebec who apply for spouse visas have a basic knowledge of English.

138. For these reasons, I have concluded that the exemptions based on nationality, like those based on academic qualifications from specified countries, are not direct discrimination based on nationality, because those who are exempt are not in a "relevantly similar situation" to those who are not exempt.

139. I turn to indirect discrimination. For the reasons in [140], I have not determined whether the new rule constitutes indirect discrimination on the ground of gender. In relation to the other categories, I have concluded that, while the rule has a disparate impact on some, that disparate impact arises from personal circumstances such as financial means, education or knowledge of English, and does not amount to discrimination contrary to Article 14.

140. As to gender discrimination, I have referred to the fact that this issue was first introduced in the claimants' skeleton argument just over a week before the hearing. Notwithstanding the post-hearing submissions and evidence, I accept Mr Eadie's submission that I should not determine this issue. The evidence adduced by the defendant after the hearing was in response to evidence filed by the claimants very shortly before the hearing and not on this issue. The post-hearing submissions mainly concerned the original grounds and the Supreme Court's decision in *Quila*'s case. The claimants had ample time to raise their grounds and, given the complexity of the gender discrimination issue, the defendant did not have sufficient time before the hearing to consider and marshall arguments and evidence in response to this ground. In the absence of such evidence, it is not possible to form a view as to whether disparate impact on women amounts to discrimination and, if so, whether any difference in treatment is justified and proportionate in the light of the legitimacy of the aim of the new rule, and the margin appropriately to be afforded to the Home Secretary in this area. It is, however, to be noted that it has not been argued that the post-entry test on settlement has a discriminatory impact on different genders, and it is

difficult to see why, if that is so, the application of the test at an earlier stage has such a discriminatory effect.

141. I turn to nationality and ethnic origins. There are persons of all nationalities and ethnic origins who speak English to the required level. The difficulties of those who do not and have difficulty meeting the requirement are the result not of their nationality or ethnic origin, but their existing level of English. The logic of the claimants' position is that any language requirement would be contrary to Article 14. That is manifestly not so. It is telling in this context (cf [89]) that it has not been argued that the post-entry language test unlawfully discriminates contrary to Article 14 because of such disparate impact. The other strands in the submissions on behalf of the claimants and by the interveners do not establish that the disparate effect is because of nationality or ethnic origin. The claimants themselves rely on the high performance of those from India and Nigeria in the settlement KOL test. In the light of the historic status of the English language in those and other former British colonies, educated people from those countries are likely to find it easier to comply with the requirement than people in many other countries with no such historical links to the language. The disparate impacts relied on, based on poverty, lack of educational opportunities, and rurality and remoteness are also not impacts on the ground of nationality.

142. If I am wrong on this conclusion, for the reasons I have given, I consider that the difference in treatment between the exempt and the non-exempt nationalities has an objective and reasonable justification. This is the pursuit of a legitimate aim of seeking to exempt from a requirement those who can be supposed in all but very rare cases to meet the requirement in any event and I accept the defendant's submission that the differential treatment bears a reasonable relationship of proportionality to the aim sought to be achieved.

143. I reject the argument that the new rule discriminates against people with disabilities, and that the exemption of only those whose disability makes it "unreasonable" to learn English sets the threshold too high. Some disabilities have no impact at all on a person's ability to comply with the English language requirement. Other disabilities will create hurdles, but those hurdles will differ in degree and depend on the circumstances of the particular individual. The factors that affect the extent of any difficulty will include age, education level, financial resources, intellectual ability and aptitude for learning, place of residence and general health. Insofar as those disparate impacts are related to the disability (and not all are), I consider that the exception, which is targeted at identifying those in respect of whom it is unreasonable to require them to learn English, is proportionate.

(viii) The other new grounds

144. Of the remaining new grounds, I have dealt with those alleging a failure to take account of the best interests of the children, and no benefits to the children of those who pass the English test, and discrimination on the ground of sex: see [74], [98] and [140]. That leaves consultation and common law irrationality.

145. It is unarguable that the Home Secretary failed to pay proper and due regard to the views of informed stakeholders in the consultation process. The Home Secretary

was not obliged to consult before making a change to the Immigration Rules: see, for example, *Bates v Lord Hailsham* [1972] 1 WLR 1373 and *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139 at [47]. But she did, and it is clear that she took into account the views of those consultees who opposed the introduction of the pre-entry language test: see the discussion at [39], [40] and [50], and Mrs Sayeed's first statement, paragraph 42. The complaint appears to be either that she did not accept the views of the majority of consultees (claimants' skeleton argument, paragraph 56) or that she accorded insufficient weight to those views. Neither gives rise to a ground of challenge, either based on procedural impropriety or one within the traditional *Wednesbury* principles of propriety of purpose, relevancy or unreasonableness.

146. As to the "irrationality" ground, earlier in this judgment (see [94]) I concluded that the identification of spouses on limited leave to remain as a key target group was not flawed on Convention grounds. Traditional common law *Wednesbury* unreasonableness or "irrationality" in the technical sense in which that word was used by Lord Diplock in the *GCHQ* case [1985] AC 374 may, as is seen from the different approaches in *Quila*'s case (see [60]), have separate roles. But in the case of a rationality challenge to the content of an Immigration Rule *R v Immigration Appeal Tribunal, ex p. Begum (Manshoora)* [1986] Imm AR 385 and *AM (Ethiopia) v Entry Clearance Officer* [2008] EWCA Civ 1082 at [65] have set a high threshold. In the circumstances of this case the common law irrationality challenge is unarguable because, for the reasons I gave earlier in this judgment (see [94]), there was a rational reason for concern with this group. In any event, the objectives of the amendment were broader.

(ix) The prematurity issue

147. In the light of my conclusions, it is not necessary to rule on the submission on behalf of the defendant that these applications are premature. In the case of Mr and Mrs Chapti's application this was stated to be because of the alternative remedy pending before the First Tier Tribunal, and in the case of Mrs Ali and Mrs Bibi, because their husbands have not yet made any application for entry clearance under paragraph 281, and no findings of fact have yet been made by an Entry Clearance Officer or by the Tribunal. It will, however, be evident (see [75], [108] – [109], [113], and [115]) that I considered that this objection has some force. This is particularly so in the case of Mr and Mrs Chapti, who instituted their judicial review proceedings after the First Tier Tribunal concluded that it had not been established that Mrs Chapti could adequately maintain her husband and son from her income, and that due to his age, lack of skill and English language ability, and employment history, his ability to gain employment in the UK was limited. The Chaptis' judicial review proceedings appear not only premature, but also to lack utility since, if the decision of the First Tier Tribunal is upheld, the reasons Mr Chapti will not be given a spouse visa are not because of his lack of knowledge of English. In the cases of Mrs Ali and Mrs Bibi, no facts have been found. In these circumstances, some of the submissions were based on assertion and had an abstract flavour.

VIII. Conclusions

148. In summary, my conclusions are:

(a) The new rule does not interfere with the Article 12 rights of the claimants: see [65];

(b) Article 8 is engaged in this case: the new rule impacted on the Article 8 rights of the claimants: see [71];

(c) The aims of the new rule, to promote integration and to protect public services, are legitimate aims within Article 8(2): see [84] – [85];

(d) Taking into account all the material before the court, in particular the exceptions to it, the new rule is not a disproportionate interference with family life and is justified: see [87] – [115]. The fact that it may, in an individual case, be possible to argue that the operation of the exceptions in the way envisaged in the evidence adduced on behalf of the Home Secretary is a disproportionate infringement of that individual's Article 8 rights, does not render the rule itself disproportionate;

(e) As to discrimination contrary to Article 14 when read with Article 8, the exemptions based on nationality are not direct discrimination based on nationality. This is because the "bright line" drawn between countries considered to be "English-speaking countries" and those which are not is (see [132]- [133]) a rational one, and accordingly those who are exempt are not in a relevantly similar situation to those who are not exempt: see [138];

(f) The new rule does not indirectly discriminate on the ground of nationality, ethnic origins or disability: see [141] – [143]. For the reasons given at [140], in the case of the allegation of indirect gender discrimination, I have made no determination.

149. Accordingly, the claimants' applications are dismissed.