**Michaelmas Term**
**[2015] UKSC 68**
*On appeal from: [2013] EWCA Civ 322*

# JUDGMENT

# R (on the application of Ali) (Appellant) *v* Secretary of State for the Home Department (Respondent)

# R (on the application of Bibi) (Appellant) *v* Secretary of State for the Home Department (Respondent)

**before**

**Lord Neuberger, President**
**Lady Hale, Deputy President**
**Lord Wilson**
**Lord Hughes**
**Lord Hodge**

## JUDGMENT GIVEN ON

## 18 November 2015

**Heard on 25 and 26 February 2015**

*Appellant (Bibi)*
Manjit Singh Gill QC
Tony Muman
(Instructed by J M Wilson Solicitors LLP)

*Respondent*
James Eadie QC
Christopher Staker
(Instructed by The Government Legal Department)

*Appellant (Ali)*
Ramby De Mello
Abid Mahmood
(Instructed by Fountain Solicitors)

*Intervener (Liberty)*
Karon Monaghan QC
Aileen McColgan
(Instructed by Liberty)

**LADY HALE: (with whom Lord Wilson agrees)**

1. On 29 November 2010 the Immigration Rules were amended so as to require a foreign spouse or partner of a British citizen or a person settled in this country to pass a test of competence in the English language before coming to live here ("the Rule"). Clearly, for a variety of reasons, some people would find this much harder to do than others. These included many people from India, Pakistan, and Bangladesh, three of the four countries from which the greatest numbers of foreign spouses and partners are drawn (the fourth is the USA). Hence the proposed Rule caused particular concern among those communities in this country where marriage to partners from those countries is most common. They saw it as a discriminatory measure which aimed to limit spousal migration from those and similar countries. These proceedings were launched in November 2010, before the Rule came into force, in order to challenge the validity of the rule itself.

2. The appellants argue that the Rule is an unjustifiable interference with the right to respect for private and family life, protected by article 8 of the European Convention on Human Rights ("ECHR"); or that it is unjustifiably discriminatory in securing the enjoyment of that right, contrary to article 14 of the ECHR; or that it is irrational and therefore unlawful on common law principles. They have set themselves a difficult task. It may well be possible to show that the application of the Rule in an individual case is incompatible with the Convention rights of a British partner, as happened in the case of a different marriage rule in *R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening)* [2011] UKSC 45, [2012] 1 AC 621. It is much harder to show that the Rule itself is inevitably unlawful, whether under the Human Rights Act 1998 or at common law, although this was possible in the case of yet another marriage rule, in *R (Baiai) v Secretary of State for the Home Department (Joint Council for the Welfare of Immigrants intervening) (Nos 1 and 2)* [2008] UKHL 53, [2009] AC 287. It is not surprising, therefore, that Beatson J concluded that the fact that it might be possible to argue that the operation of the Rule was a disproportionate infringement of an individual's article 8 rights did not render the Rule itself disproportionate: [2011] EWHC 3370 (Admin), [2012] 2 All ER 653 (sub nom *R (Chapti) v Secretary of State for the Home Department (Liberty intervening)),* para 115. By a majority, the Court of Appeal reached the same conclusion: [2013] EWCA Civ 322, [2014] 1 WLR 208.

3. A further difficulty is that things have not stood still since the proceedings were launched in November 2010, since Beatson J reached his decision in December 2011, and since the Court of Appeal reached their decision in April 2013. The Rule itself has stayed much the same, but it has been restated in a new Appendix FM to

the Immigration Rules which seeks to deal compendiously with family relationships. More importantly, the guidance to those operating it on the ground has developed as time has gone on. And perhaps most important of all, the facts relating to the accessibility of the required tests were difficult to ascertain and are also subject to change. The discussion of the evidence and arguments, on the one hand by Dr Helena Wray and her colleagues for the appellants, and on the other hand by Mrs Helen Sayeed for the Secretary of State, has to be applied to the situation as it now is rather than as it was in 2011.

*The development of the Rule*

4. The Rule may be set against a background of immigration controls which have traditionally differentiated between so-called "primary" migration, of breadwinners coming here for economic reasons, and "secondary" migration, of spouses, partners and other family members coming to join the breadwinners here. All are expected not to place an undue burden upon the state and its resources. Controls relating to the former look to the work or business from which the migrant intends to support himself; controls relating to the latter look to whether the family has the resources to support itself. A second background feature is that control over the entry of nationals from the European Economic Area and their families is governed by European Union law. The Rule is not concerned with them, even though English will not be the first language for the great majority.

5. Spouses, partners and intending partners are first given limited leave to enter for a probationary period. Until 2012, this was two years, but it has now been raised to at least the five years which is required of other migrants. At the end of this period, they can apply for indefinite leave to remain ("ILR"). In 2005, applicants for British citizenship were for the first time required to demonstrate "sufficient knowledge of the English language and about life in the United Kingdom" ("KOLL"). In 2007, this post entry requirement was extended to applicants for ILR, including spouses and partners. This can be satisfied by taking the "Life in the UK" test ("LUK"), which requires a considerable level of competence in the English language. An alternative for non-native English speakers was to take a course in English for Speakers of Other Languages ("ESOL"), taught with specified citizenship materials. Since October 2013, however, all applicants for ILR have been required to meet the same specific English language requirement and pass the LUK test.

6. Such data as we have suggest that the number of spouses and partners failing the settlement test was never high and declined sharply after the first year of its introduction (Equality Impact Assessment, 2010). This is based on the numbers who had to apply for further limited leave to remain because they had failed the test, which are very small when compared with the numbers granted ILR after entering through the family route. The data indicated that a higher proportion of spouses or

partners took the ESOL rather than the LUK route to satisfying the requirement. The Secretary of State suggests that this could mean that even after two years in the UK they had not acquired sufficient English to enable them to pass the LUK test. However, migrants coming from non-English-speaking countries are advised to take an ESOL course before attempting a settlement test. So this figure could simply reflect the fact that a higher proportion of spouses and partners come from non-English speaking countries. Having taken an ESOL course with the required citizenship materials, there would be no point in their taking the LUK test instead.

7. In 2007, the Government first floated the idea of requiring a pre-entry test for foreign spouses and partners, in *Securing the UK Border: Our vision and strategy for the future* (March 2007). In the chapter on "Wider, tougher checks abroad", under the heading "Targeting areas of abuse", this made suggestions about "Marriage to partners from overseas – protection for the vulnerable and the skills to integrate" (para 3.22). Alongside suggestions aimed at deterring or preventing forced marriages was a proposal to examine the case for introducing a new requirement to pass some form of English test before arrival. This was soon followed by a consultation paper, *Marriage Visas: Pre-Entry English Requirement for Spouses* (December, 2007), published alongside a separate consultation paper, *Marriage to Partners from Overseas*, which dealt with proposals to combat forced marriages (the subject of this court's decision in *Aguilar Quila*). The key objectives of introducing a pre-entry English requirement for spouses were said to be (para 1.11):

- To assist the spouse's integration into British society at an early stage;
- To improve employment chances for those who have access to the labour market;
- To raise awareness of the importance of language and to prepare for the tests they will need to pass for settlement.

8. In July 2008, the Government published *Marriage Visas: The Way Forward*, which dealt with the mainly negative response to both consultation papers. Opponents cited the difficulties of accessing English language lessons overseas, the interference with the right to respect for family life and individual human rights, and the view that English was best learned in the United Kingdom (paras 2.14-2.16). Nevertheless, the Government had decided upon the "medium term goal" of introducing an English test for spouses before they arrived here. The three stated objectives remained the same (paras 1.4, 2.2); although respondents who favoured the proposal also suggested that it would reduce the cost of translation services in the UK and bring potential benefits to spouses of improved employment

opportunities, freeing them from being tied to home and family (para 2.17). But the Government decided that it would move towards this goal over a period of time (para 2.3):

> "This is simply because there is not currently sufficient access to English language classes overseas, especially in rural areas, and to introduce the requirement in a dogmatic way immediately would simply keep British citizens apart from their loved ones, breaking up families."

In the meantime, as part of the visa application process, foreign spouses would be required to enter into an agreement to learn English, showing before arrival how they planned to so do and after arrival how they were doing so.

9. A year later, however, it was decided to implement the new policy in the summer of 2011. An Equality Impact Assessment, published in July 2009, explained that the cross-Whitehall group working on the policy felt that announcing an implementation date would generate a supply of sufficient English tuition to meet demand, but it would take between 18 to 24 months to develop sufficient capacity (p 12). An Impact Assessment (of the proposed pre-entry language requirements for economic as well as spousal migrants), also published in July 2009, explained that it had been decided that spouses would only have to demonstrate that they could speak (not necessarily read or write) English to level A1 of the Common European Framework of Reference for Languages (the "CEFR"). This was considered to require 40 to 50 hours' tuition for most learners. Level A1 requires that the user:

> "Can understand and use familiar everyday expressions and very basic phrases aimed at the satisfaction of needs of a concrete type. Can introduce him/herself and others and can ask and answer questions about personal details such as where he/she lives, people he/she knows and things he/she has. Can interact in a simply way provided the other person talks slowly and clearly and is prepared to help."

10. After the coalition Government took office in May 2010, however, the timetable was advanced. On 9 June, the Home Secretary announced that the pre-entry test requirement would come into effect in the autumn: this "will help promote the economic well-being of the UK, for example by encouraging integration and protecting public services. It will also assist in removing cultural barriers, broaden opportunities for migrants and help to ensure that they are equipped to play a full part in British life". On 26 July, the Minister of State for Immigration announced that the requirement would come into effect on 29 November. He confirmed that

spouses and partners would have to show English language ability in speaking and listening at level A1 of the CEFR, by passing an acceptable test with an approved test provider.

11. The Rule applies to non-European spouses, civil partners, unmarried opposite and same sex partners, fiancé(e)s and proposed civil partners (collectively "spouses and partners") wishing to live here with a British citizen or a non-European national settled in the UK. This was originally done by amendment to paragraphs 281, 284, 290, 293, 295A and 295D of the Immigration Rules: Statement of Changes to Immigration Rules, 1 October 2010 (Cm 7944). In 2011 the Rule was extended to spouses and partners of refugees and people granted humanitarian protection in the UK, covered by paras 319L and 319O: 16 March 2011 (HC 863). However, applications for leave to enter or remain made on or after 9 July 2012 are now governed by Appendix FM to the Immigration Rules. Since 1 December 2013, the English language requirement has also been imposed upon specified partners of members of the Armed Forces, under the Appendix Armed Forces. It is therefore convenient to recite the Rule as contained in Appendix FM rather than the earlier version considered in the courts below.

12. Appendix FM provides that applicants for entry clearance or limited leave to remain as a partner must satisfy the English language requirement as follows (paras E-ECP 4.1 and E-LTRP 4.1):

> "The applicant must provide specified evidence that they –
>
> > (a) are a national of a majority English-speaking country listed in paragraph GEN 1.6;
> >
> > (b) have passed an English language test in speaking and listening at a minimum of level A1 of the Common European Framework of Reference for Languages with a provider approved by the Secretary of State;
> >
> > (c) have an academic qualification recognised by UK NARIC [the National Recognition Information Centre] to be equivalent to the standard of a Bachelor's or Master's degree or PhD in the UK, which was taught in English; or
> >
> > (d) are exempt from the English language requirement under para E-ECP 4.2."

13. The majority English speaking countries listed in paragraph GEN 1.6 are 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; and the United States of America.

14. The exemptions in paras E-ECP 4.2 and E-LTRP 4.2 apply if at the date of application -

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

The words in square brackets in (c) do not apply, for obvious reasons, to partners who are applying for limited leave to remain here as a partner.

15. These requirements are in essence the same as those imposed by the amendment to para 281 (for spouses) and the other relevant paragraphs of the Rules, save that these made an exception where "there are exceptional compassionate circumstances that would prevent the applicant from meeting the requirement" (para 281(1)(a)(ii)(c)). "Compassionate" has now been dropped.

16. The courts below did not consider the guidance given to entry clearance staff as to how the Rule should be operated. The internal guidance on the English language requirement (SET 17 updated 15 February 2011) stated as follows (para SET 17.9):

> "Discretion should be exercised only in cases where there are the most exceptional, compelling and compassionate circumstances specifically relating to the ability of the applicant to meet the language requirement, circumstances should be assessed on a case-by-case basis. The expectation is that use of the exceptional compassionate circumstances exemption will be rare. *Financial reasons will not be acceptable*." (emphasis supplied)

However, at that stage, if the applicant partner was a long term resident of a country with no test centre, he or she was automatically exempted under this criterion. This exemption was withdrawn as from 24 July 2014.

17. The current guidance on the "consideration of exceptional circumstances", in the Immigration Directorate Instruction, *English Language Requirement - Family Members under Part 8, Appendix FM and Appendix Armed Forces,* April 2015, para 7.1, contains the following passages:

> "Each application for an exemption on the basis of exceptional circumstances will be considered on its merits on a case-by-case basis. …
>
> Evidence of the nature and impact of the exceptional circumstances must be clearly provided, eg of previous efforts to access learning materials or to travel overseas to take an approved test and the obstacles to doing so. This must include evidence provided by an independent source (eg an appropriately qualified medical practitioner) or capable of being verified by the decision maker.
>
> Examples of situations in which, subject to the necessary supporting evidence, the decision maker might conclude that there were exceptional circumstances, might include where the applicant -
>
> - Is a long term resident of a country in international or internal armed conflict, or where there is or has been a humanitarian disaster, including in light of the infrastructure affected.
>
> - Has been hospitalised for several months immediately prior to the date of application.
>
> - Is the full-time carer of a disabled child also applying to come to the UK.
>
> - Is a long term resident of a country with no approved A1 test provision and it is not practicable or

reasonable for the applicant to travel to another country to take a test …

*Lack of or limited literacy or education will not be accepted as exceptional circumstances.*" (emphasis supplied)

18. Further guidance is given on countries with no approved A1 test provision in para 7.2:

"From 24 July 2014, applicants who are resident in a country with no approved A1 English language test are expected to travel to another country to take such a test. … Only where they can demonstrate in their visa application that it is not practicable or reasonable for them to do so will they be exempt from the requirement prior to entry to the UK. …

Reasons why it is not practicable or reasonable for an applicant to take an approved A1 test in another country will normally require more than inconvenience or reluctance to travel overseas. Subject to supporting evidence, such reasons might exist where for example:

- Exit visa requirements or restrictions make it very difficult for the applicant to travel overseas.

- The applicant faces insuperable problems in meeting immigration requirements to visit a country with an approved test centre.

- The applicant faces unreasonable additional travel or accommodation costs to visit a country with an approved test centre. Some applicants as a partner ... already incur travel and accommodation costs to attend an approved test centre in their own country or to give their biometrics at a Visa Application Centre. In addition, all applicants for a settlement visa as a partner … are required to meet a financial requirement and it is reasonable to expect that they (or their sponsor …) will generally be able to afford

> reasonable costs incurred in making their application.
>
> - Other exceptional circumstances prevent the applicant taking an approved A1 test in another country."

19. For completeness, it is necessary also to note the circumstances in which entry clearance may be given even though the application does not meet the requirements of the Immigration Rules. The Immigration Directorate Instruction Family Migration, Appendix FM section 1.0a, *Family Life (as a Partner or Parent): 5-year Routes* (August 2015) deals with "Exceptional Circumstances or Compassionate Factors" in section 14. Entry clearance officers must in every case go on to consider whether there may be either exceptional circumstances which would make the refusal of entry clearance a breach of article 8 "because [it] would result in unjustifiably harsh consequences for the applicant or their family" or "compassionate factors – that is compelling compassionate reasons" which might mean that refusal would result in unjustifiably harsh consequences even if it did not constitute a breach of article 8. Entry clearance officers cannot themselves grant entry clearance outside the Rules, but if they consider the case might meet the "very high threshold" they must refer it to the Referred Casework Unit in London. The threshold is very high because the Home Office considers that the appropriate balance between individual rights and the public interest has been clearly spelled out in the Rules (now underpinned by section 19 of the Immigration Act 2014).

20. Under the heading "How to consider exceptional circumstances", the Instructions state:

> "'Exceptional' does not mean 'unusual' or 'unique'. Whilst all cases are to some extent unique, those unique factors do not generally render them exceptional. For example, a case is not exceptional just because the criteria set out in the Immigration Rules have been missed by a small margin. Instead 'exceptional' means circumstances in which refusal would result in unjustifiably harsh consequences for the individual or their family such that refusal would not be proportionate under article 8. The fact that refusal may, for example, result in the continued separation of family members does not of itself constitute exceptional circumstances where the family have chosen to separate themselves. Cases that raise exceptional circumstances to warrant a grant of entry clearance outside the Rules are likely to be rare. …

> In determining whether there are exceptional circumstances, the decision maker must consider all relevant factors raised by the applicant and weigh them against the public interest under article 8. Examples of relevant factors include:
>
> - The best interests of any child in the UK affected by the decision. …
>
> - The nature of the family relationships involved, such as the length of the applicant's marriage and how frequently they have contact with their children if they do not live with them ...
>
> - The likely impact on the applicant, their partner and/or child if the application is refused.
>
> - *Whether there are any factors which might increase the public interest in refusal, for example, ... the fact that they do not speak English* ... (emphasis supplied)
>
> - Cumulative factors should be considered. Cumulative factors weighing in favour of the applicant should be balanced against cumulative factors weighing in the public interest in deciding whether refusal would be unjustifiably harsh for the applicant or their family."

*The tests*

21. The research conducted on behalf of the appellants in 2011 showed that it was then by no means easy to find out which tests were offered and in which places. One problem was that tests at the very basic A1 level, and limited to speaking and listening, were not always available, whereas there might be tests at a higher level or including reading and writing skills. All the websites giving the relevant information were in English. These may, of course, have been "teething troubles", given that the proceedings were launched before the Rule had come into force. The most recent information from the Secretary of State was that, as from 6 April 2015, the approved A1 test for partners overseas will be the International English Language Testing System ("IELTS") Skills for Life test offered by the IELTS consortium (the University of Cambridge English Language Assessment, the British Council and IDP Education Ltd). The British Council website provides some useful

information. It explains that the IELTS Life Skills test is a new test for people who need to prove their speaking and listening skills at A1 or B1 level on the CEFR. A secure English language test (SELT) can be taken at around 100 test centres around the world. There is a link to the United Kingdom Visa Information website which gives their locations. The test involves a face to face conversation lasting 16 to 18 minutes with the examiner and another candidate. It cannot be taken on line or over the telephone. There are now listening test samples on the IELTS website.

*These cases*

22. This case has proceeded on the basis of assumed facts (the Secretary of State not being in a position to agree them all) in order to test the lawfulness or otherwise of the pre-entry language requirement, as set out in the Rules and Guidance quoted above. There are two appellants, both women who are British citizens married to foreigners. Their husbands have not applied for entry clearance because they believe themselves unable to satisfy the pre-entry language requirement and accordingly the not inconsiderable fee for making an application would be wasted.

23. Saiqa Bibi is a British Citizen who was born in Coventry and lives with her family in the West Midlands. In April 2009, she married Mohammed Jehangir, a citizen of Pakistan. They have one child, a son born in 2010, who lives with his mother. The couple keep in touch with one another by telephone and occasional visits to Pakistan. They would like to live here together as a family. Mr Jehangir was educated to matriculation level in Pakistan but in Urdu. He neither speaks nor writes any English. There is no English tuition of the level required available locally to where he lives and to obtain it he would have to make a round trip of some four hours, to Mirpur or Islamabad. This is not practicable on a daily basis, so he would have to relocate for several months to Rawalpindi, which is not affordable.

24. Mrs Saffana Ali is also a British citizen. She spent approximately two and a half years, from 2006 to 2008, visiting the Yemen, where she met and formed a relationship with her husband Mr Ali. When she returned to this country in 2008 they kept in touch over the telephone and decided to get married. She returned to the Yemen in May 2010 and they married there in July 2010. Mr Ali does not speak any English. He has not had any formal education and is illiterate and unfamiliar with the Roman alphabet. There is no test centre in the Yemen. Because her husband is unable to come and live with her here, Mrs Ali has remained with him in the Yemen, but she would like them to be able to live together here, where she has lived since a child and has family and friends.

*Article 8*

25. "Everyone has the right to respect for his private and family life, his home and his correspondence": article 8(1), ECHR. In *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471, the European Court of Human Rights observed that "Whatever else the word 'family' may mean, it must at any rate include the relationship that arises from a lawful and genuine marriage … even if a family life … has not yet been fully established". Not only that, "'family life', in the case of a married couple, normally comprises cohabitation. The latter proposition is reinforced by the existence of article 12, for it is scarcely conceivable that the right to found a family should not encompass the right to live together" (para 62). Hence, as this court held in *Aguilar Quila*, married couples have a right to live together.

26. However, in *Abdulaziz*, the European Court also held that article 8 did not impose a "general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country" (para 68). That statement was repeated by the Grand Chamber in the most recent case of *Jeunesse v The Netherlands* (2015) 60 EHRR 789 (para 107), which draws together the applicable principles. The jurisprudence of the court draws a distinction between cases where migrants who have been lawfully settled in a country for a long time face deportation or expulsion and cases where an alien is seeking admission to a host country. The former entails the possible breach of the negative obligation in article 8(2): "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society …". The latter entails the possible failure of the state to comply with a positive obligation to permit the enjoyment of family life in that country. It concerns not only family life but also immigration (paras 104, 105).

27. Nevertheless, although the criteria developed in the first context cannot be transposed automatically into the second, "the applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the state enjoys a certain margin of appreciation" (para 106). In cases involving family life and immigration, factors to be taken into account are "the extent to which family life would effectively be ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of the alien concerned and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion" (para 107). If family life was created when the people involved were aware that the persistence of family life within the host state would be precarious, "it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8" (para 108). However, where children are involved,

their best interests must be taken into account: "Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight" (para 109).

28. In *Jeunesse*, the Grand Chamber found that, although the applicant had married and had three children while her immigration status in the Netherlands was precarious, there were exceptional circumstances such that a fair balance had not been struck between the competing interests involved: the husband and three children were all citizens of the Netherlands with the right to enjoy family life there; the applicant had lost her Dutch nationality when Suriname became independent and not through her own choice; she had been living in the Netherlands for 16 years and had no criminal record; although there were no "insurmountable obstacles" to the whole family settling in Suriname, they would experience a degree of hardship if forced to do so; and the Dutch authorities had paid insufficient attention to the problems the children would face in either having their whole lives disrupted by a move to Suriname or being separated from their primary carer. In the circumstances, it was "questionable whether general immigration policy considerations of themselves can be regarded as sufficient justification for refusing the applicant residence in the Netherlands" (para 121).

29. Although Strasbourg analyses these cases in terms of a "fair balance", in this country we have, at least since the decisions in *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167 and *Aguilar Quila*, spelled out the principles in conventional proportionality terms. As Lord Wilson put it in *Aguilar Quila*, para 45, following Lord Bingham in *Huang*, para 19, four questions generally arise:

> "(a) is the legislative objective sufficiently important to justify limiting a fundamental right?;
>
> (b) are the measures which have been designed to meet it rationally connected to it?;
>
> (c) are they no more than are necessary to accomplish it?; and
>
> (d) do they strike a fair balance between the rights of the individual and the interests of the community?"

*(a) Legitimate aim*

30. It is important to appreciate that, although the context of this case is immigration, the Government has never suggested that the aim of the Rule is to limit immigration by spouses and other partners of people settled here. It does not operate, and is not intended to operate, as a cap on the number of partners admitted. It has long been taken for granted that the wives of British citizens have the right to join their husbands here – traditionally, wives were expected to assume their husbands' nationality and domicile on marriage, and indeed there may still be countries in the world where women lose their nationality of origin on marrying a foreigner. British immigration law originally reflected this right, but was obliged, following the *Abdulaziz* case, to afford it also to the husbands of British citizen wives. The same right was later extended to unmarried couples who had been living together in a relationship akin to marriage for some time and then to civil partners and same sex couples living together in a relationship akin to civil partnership.

31. All of this reflects the importance attached to family relationships in modern international human rights law. The Universal Declaration of Human Rights of 1948 proclaimed that "The family is the natural and fundamental group unit of society and is entitled to protection by society and the state" (article 16.3). The International Covenant on Civil and Political Rights of 1966 translated this into a binding obligation in exactly the same words (article 23). Both of these documents proclaimed that the rights they provided must be respected without discrimination on grounds such as race and sex (article 2 in each case). The Human Rights Committee, in General Comment No 19 (1990), explained that different States might have different concepts of the family, but whatever their concept, it must be afforded the protection required. The International Covenant on Economic and Social Rights goes even further, in providing that "The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society" (article 10.1).

32. Appendix FM to the Immigration Rules does impose some limits on the right of partners to come here. For example, they must fulfil certain suitability requirements, mainly relating to the lack of criminal convictions; the couple must both be at least 18 and their relationship must be genuine and subsisting; and they must be able to support and house themselves from their own resources. In general, these are aimed at the protection of society from harmful behaviour, the prevention of abuse, and the protection of public funds. It is accepted that partners who come here will make use of those public services, such as education and the National Health Service, which are available to all.

33. So what, then, are the aims of the English language requirement? As originally stated, they were three: (i) to assist the partners' integration into British

society at an early stage; (ii) to improve their employment chances, given that they have access to the labour market as soon as they arrive; (iii) to raise awareness of the importance of language and to prepare for the tests they will need to pass for settlement. Following the consultation, three further aims emerged: (iv) to save translation costs; (v) to benefit any children the couple might have; and (vi) to reduce the vulnerability of newly arrived spouses, especially women.

34. In article 8 terms, these probably fall under the rubric of "the interests of … the economic well-being of the country" or, just conceivably, "the protection of the rights and freedoms of others". Some may think, however, that they are not as important as the prevention of disorder or crime, which is the main aim of the suitability requirements, or the protection of the public purse, which is the main aim of the financial requirements. The appellants have filed extensive evidence in support of their arguments in response to the rather less extensive evidence filed on behalf of the government. Some of that evidence and argument is summarised and commented upon below.

35. As to (ii), it is true that partners are permitted to join the labour market as soon as they arrive, and if they choose to do so, basic English language skills will no doubt help them to get a job outside their own community. It may well be that most husbands coming to join their wives here do intend to join the labour market, but the same may not be true of most wives. There is evidence that language skills are associated with higher earnings (but this may not be the only reason for persistent wage differentials between different cultural groups). But, valid though the aim is for those who do intend immediately to join the labour market, partners are not required or even expected to do so – that is not the reason why they are admitted.

36. As to (iii), the basic pre-entry level might be some help in preparing for the settlement test, but in the opinion of Dr Geoffrey Jordan, the language expert who contributed to Dr Wray's report for the appellants, "the pre-entry test is of almost no value in getting the learner off to 'a flying start'". It will pale into insignificance compared with the opportunities of learning the language over the (now) five years that the partner will have to be here before taking the settlement test. The need to pass the test before being allowed to stay here indefinitely should be sufficient incentive even for those who, perhaps for cultural reasons, might otherwise not be inclined or encouraged to do so. Of course, this would not be an incentive for those who are prepared to remain here without ILR and rely on their article 8 rights to resist removal.

37. As to (iv), this was not among the original aims, and no-one has been able to put any sort of financial value upon it. There are, as Mrs Helen Sayeed, for the Government, says, "plenty of data … suggesting there is significant reliance on translation support services" (WS No 2, para 10). However, given the substantial

burden of translation caused by the people who are already here, no-one has shown what, if any, extra burden is occasioned by allowing partners to come here without any pre-entry language requirement or how much help that requirement is in reducing the need for translation when communication really matters.

38. As to (v), there is some evidence that children whose first language is not English do less well at school, but a pre-entry language requirement will not ensure that English is spoken at home. Children already here have ample opportunities for learning the language outside the home; children coming here with the foreign partner (which, as Mrs Sayeed says, is less likely because many of those seeking marriage visas are newly married) will have similar opportunities; children are usually much quicker at picking up another language than are adults and are often a valuable source of learning for their parents, rather than the other way around. More important, for children such as Saiqa Bibi's son, the choice is not between having a parent here with or without basic English language skills but between having a parent here and not having a parent here at all; separation is likely to be far more damaging to the child than living with a parent who has yet to acquire any English.

39. As to (vi), the Government does not assert that this is a "key rationale", although "if it has any impact it would likely be a positive one given the migrant's better position to seek help/advice" (Helen Sayeed, WS 2, para 16). Pragna Patel, of Southall Black Sisters, the best-known organisation working with migrant women suffering domestic abuse, does not see a pre-entry test as being of significant benefit to them: language is the least of the problems they face in obtaining access to advice and services. Nevertheless, it is likely that even basic language skills will be of some benefit to vulnerable women who come here as spouses.

40. All the stated aims are, in reality, aspects of the first, which is to assist the partner's integration into British society at an early stage. This is undoubtedly an important aim. In 2006, the Secretary of State for Communities and Local Government established an independent Commission on Integration and Cohesion. Their Report, *Our Shared Future*, was published in 2007. According to the Commission, "cohesion is principally the process that must happen in all communities to ensure different groups of people get on well together; while integration is principally the process that ensures new residents and existing residents adapt to one another" (para 3.2). Research done for the Commission by Ipsos MORI, *Public Attitudes towards Cohesion and Integration*, 15 June 2007, found that interaction with people from different backgrounds was seen as fundamental to fostering a better sense of community and cohesion. Inability to speak English was seen as the biggest barrier to "being English". The Commission saw "a shared language as being fundamental to integration and cohesion – for settled communities, new communities, and future generations of migrants" (para 5.35). Improving the availability of ESOL classes and reducing the amount of

automatic translation of official information into other languages were among their key recommendations.

41. It is not difficult to see the benefits to integration of even a basic level of English language skills. It must be beneficial for a newly arrived partner to be able to go into a shop and buy groceries and other necessities, to say "hello" to the neighbours, to navigate public transport, to inter-act at a simple level with bureaucrats and health care professionals. Integration is a two way process. It must be beneficial for others to see that the people living in our midst and intending to stay here are able and willing to join in and play a part in everyday social interactions, rather than keeping themselves separate and apart. All of this is, to use the term used by Maurice Kay LJ, "benign".

42. The question for us, however, is how important a pre-entry test is in achieving these benign aims. What value does it add to the post-entry settlement test? There has been some suggestion that foreign spouses were not achieving the same standard as other applicants for ILR. This was because more of them were choosing the ESOL route than the LUK route to demonstrate the required knowledge of language and life in the UK. But, as already explained, taking an ESOL course is recommended for those whose first language is not English. Given that most foreign partners come from countries where the first language is not English, it is scarcely surprising that they should take such a course and, having taken it, choose this route to qualify. Now that all candidates are to be expected to take the same tests, no doubt most will still take an ESOL course in order to gain the required skills.

43. More importantly, the expert evidence filed on behalf of the appellants suggests that the very basic level of language required by the pre-entry tests will not be of much help to them. The best and quickest way to learn the language is by practice and immersion while here rather than in a foreign classroom. As the appellants' language expert, Dr Geoffrey Jordan, put it

> "Learning a second language is not like learning Geography or Law: it is more akin to learning to swim, drive or use a computer. To be a competent user of English as a second language requires that declarative knowledge (*I know about this)* becomes procedural knowledge (*I can do this*), and it is thus, essentially, a question of practice."

44. It is also worth bearing in mind, as Dr Katherine Charsley explained in her evidence for the appellants, that there are several dimensions to integration – economic, social, cultural and civic – and that there are many processes of integration as well as language. It is also a two-way process. She suggests that

"migrant-side attempts to integrate may mean little or even have negative effects if the response of the 'host' population is not inclusive". Further, she cites the Commission's suggestion that perceptions of inequality may undermine integration. "Measures that are perceived as discriminatory and exclusionary are likely to be counter-productive to integration by producing ill-feeling, and undermining equality of opportunity and participation."

45. The evidence therefore leads to the conclusion that the Rule does have a legitimate aim (or a series of aims all linked to the promotion of integration and with it the larger aim of community cohesion) and that the aim is sufficiently important to justify interfering with the fundamental right to respect for the family life of British citizens or persons settled here who wish to be joined here by partners from overseas. Nevertheless, the aim is not as important as the other aims to which the pre-entry qualifications of foreign partners are addressed and the aim of a pre-entry language requirement is not as important as the aim of ensuring that all migrants learn English once they are here.

*(b) A rational connection*

46. In this case it is not difficult to see a rational connection between the measure and the aim it seeks to achieve. I would not base this, as Beatson J did, on the suggestion that spouses and other partners are a "key target group" whose language skills after entry are not as good as those of other migrants. That is debateable. But a pre-entry language requirement is also imposed upon economic migrants. While it may be doubted that requiring a very basic level of spoken English before entry makes a great contribution to the overall aim of promoting integration, it cannot be said that it makes no contribution towards it at all.

*(c) A less intrusive means*

47. Sir David Keene dissented in the Court of Appeal. He concluded that the pre-entry test had not been shown by any substantial empirical evidence to be no more than is necessary to achieve the legitimate aim (para 59). The post-entry test was achieving its object. The numbers of spousal migrants who had to seek further limited leave to remain because they had failed the test fell from 3,245 in 2007 (when it was first introduced), to 995 in 2008, to 470 in 2009. This was in any event a tiny proportion of the spousal migrants who achieved settlement in 2009. Of course, it is possible that some spousal migrants, having been granted entry clearance or leave to remain, never apply for ILR and so manage to avoid having to show that they know anything about the life and language of the UK. It is not currently possible to know how many people with expired visas have left the country and accordingly how many have not. It is known that there is a large number of over-stayers but it

seems inherently unlikely that many of these are spousal migrants. In the opinion of Dr Helena Wray, they have a regular path to settlement; they live amongst the settled community, often working or bringing up a family, so that it would be hard for them to "go to ground"; and they have the possibility of further limited leave to remain while taking or retaking the test.

48. Thus the aim of integration through shared language skills is principally achieved through the post-entry ILR language requirement, which involves virtually no interference with the right to respect for family life. Nevertheless, the longer a spousal migrant is here without acquiring the required language skills, the harder it will be to oblige them to leave. There is therefore some benefit to integration and cohesion in requiring a very basic level of language at the outset. In reality, this point merely serves to reinforce the point made earlier, that the aim of the pre-entry test is benign but comparatively modest. The real question is whether a fair balance has been struck.

*(d) A fair balance?*

49. We do not have reliable figures on the impact which the pre-entry requirement has had on the numbers of applications by partners for entry clearance. Indeed, this is one of the complaints made by the appellants - the figures are in the hands of the Secretary of State and she should have been making a systematic study of the effect of the new Rule. The global figures do suggest that there was an upsurge in applications in 2010 before the Rule came into force and a dramatic falling off in 2011. Numbers were up in 2012 but had still not recovered to their 2009 level. The refusal rate was also far higher in the first half of 2012 than it had been in 2009 (the second half of 2012 will also have been affected by the increase in the household income requirements). The lack of systematic information makes it difficult to work out the extent of the interference with the article 8 right at a global level, although it seems clear that there has been some effect.

50. However, it is not so difficult to work out the extent of the interference at an individual level. There will be some applicant partners who already have some command of English; there will be others who can arrange access to appropriate tuition without much difficulty; and among these there will be some who will not find it difficult to attend a test centre. For them the language requirement will not present such an obstacle that it can be termed an unjustified interference with their partners' article 8 rights.

51. There will, however, be many applicants who do not already have some command of the English language. Many of these will find it hard to arrange access to appropriate tuition. Dr Jordan's evidence is that "success in learning English as a

second language in a foreign country is affected by factors such as age, education, economic and social position, cultural values, motivation, and quality of instruction". He points out that most people living in under-developed countries are at a severe disadvantage "due to their lack of contact with English, their low educational level and lack of study skills, their lack of intrinsic motivation, their lack of economic resources, their sometimes very different cultural values and their inability to avail themselves of any worthwhile English language instruction". In his opinion, the grammar-based methods of teaching English which are still prevalent in many parts of the world, including the Indian sub-continent, are not well-suited to acquiring the oral communication skills required by the test. It was the lack of suitable tuition which led the Government originally to delay the introduction of the new requirement (see para 8 above). But the Government has since taken the view that their only responsibility is for the test. But the accessibility of such tuition is relevant to the question of fair balance. For example, people living in remote rural areas may experience serious difficulties in gaining access to suitable tuition, which may only be obtainable at unreasonable cost. There may also be some for whom getting to a test centre for the required 16 to 18 minutes' face-to-face conversation will be impossible or prohibitively expensive.

52. The interference with the article 8 rights of the British partners of the people who face these obstacles is substantial. They are faced with indefinite separation, either from their chosen partner in life, or from their own country, their family, friends and employment here. It is worth recalling that the interference in *Aguilar Quila*, which was termed "colossal", was merely temporary, whereas the interference here may be permanent.

53. The problem lies not so much in the Rule itself, but in the present Guidance, which offers little hope, either through the "exceptional circumstances" exception to the English language requirement (see paras 17, 18 above), or through the even fainter possibility of entry clearance outside the Rules (see para 20 above). Only a tiny number achieve leave to enter through these routes. This is not surprising given the way in which the Guidance is drafted. The impracticability of acquiring the necessary tuition and practice or of accessing a test centre is not enough. Financial impediments are not enough. Furthermore, all applications for an exception to be made will be considered on a case by case basis. This means that the considerable expense of making an application has to be risked, even though, on the current Guidance, the chances of success are remote.

54. It is not enough to say (see para 7.2 of the Guidance at para 18 above) that partners are expected to be self-sufficient without recourse to public funds when they come to this country and can therefore be expected to find the resources to meet this requirement. It is one thing to expect that people coming here will not be dependent upon public funds for their support. It is quite another thing to make it a condition of coming here that the applicant or sponsor expend what for him or her

may be unaffordable sums in achieving and demonstrating a very basic level of English. Given the comparatively modest benefits of the pre-entry requirement, when set against the very substantial practical problems which some will face in meeting it, the only conclusion is that there are likely to be a significant number of cases in which the present practice does not strike a fair balance as required by article 8.

55. This does not mean that the Rule itself has to be struck down. There will be some cases in which the interference is not too great. The appropriate solution would be to recast the Guidance, to cater for those cases where it is simply impracticable for a person to learn English, or to take the test, in the country of origin, whether because the facilities are non-existent or inaccessible because of the distance and expense involved. The guidance should be sufficiently precise, so that anyone for whom it is genuinely impracticable to meet the requirement can predictably be granted an exemption. As was originally proposed, those granted an exemption could be required to undertake, as a condition of entry, to demonstrate the required language skills within a comparatively short period after entry to the UK.

*Article 14*

56. The appellants also complain that the requirement discriminates against some people in the enjoyment of their article 8 rights on grounds of nationality and may also be discriminatory on grounds of race or ethnicity. On its face, it is directly discriminatory on grounds of nationality. Nationals of the listed countries (see para 13 above) are exempt. I would not, therefore, agree with Beatson J that it is not directly discriminatory because nationals of Anglo-phone countries are not similarly situated to nationals of other countries. I agree with Ms Karon Monaghan QC, for Liberty, that it is not possible to use the protected characteristic as a basis for holding that their situations are relevantly different. They are all in the same situation of wanting to come to this country to join their partners who are settled here.

57. However, direct discrimination, even on grounds of nationality, is capable of justification under article 14. In the context of immigration, nationality is not a particularly "suspect" classification. The appellants complain that the exemptions are irrational. Canadians, for example, are exempt, even though there are many Franco-phone Canadians for whom English is not the first language and some for whom it is not even a second language. Nigerians, on the other hand, are not exempt even though English is the medium of instruction in all Nigerian secondary and most Nigerian primary schools. The Anglo-phone Caribbean countries are exempt, even though their success rate in the LUK test for ILR is only average.

58. However, in the context of a language requirement, being a national of an Anglo-phone country is a reasonable proxy for a sufficient familiarity with the English language to be able to begin to integrate with the local community immediately on arrival. This is a context in which a bright line rule makes sense. If the discrimination were not held justifiable, it would not follow that the English language requirement should be abolished. As with any discriminatory rule of this sort, the choice of cure can either be to level up or to level down. The Government could choose either to abolish the requirement altogether or to apply it to everyone, including partners from the exempt countries.

59. The discrimination argument therefore adds nothing to the article 8 argument, which for the reasons already explained, may lead to the conclusion that Convention rights have been violated in a significant number of cases.

*Conclusion*

60. I would not strike down the Rule or declare it invalid. It will not be an unjustified interference with article 8 rights in all cases. It is capable of being operated in a manner which is compatible with the convention rights. Hence the appellants must be denied the remedy they seek. However, the operation of the Rule, in the light of the present Guidance, is likely to be incompatible with the convention rights of a significant number of sponsors. There may well be some benefit, therefore, both to individuals and to those administering the Rule, in declaring that its application will be incompatible with the Convention rights of a UK citizen or person settled here, in cases where it is impracticable without incurring unreasonable expense for his or her partner to gain access to the necessary tuition or to take the test. But this was not the remedy sought by the appellants and we have received no submissions on it. I would therefore invite such submissions before finally deciding the outcome of this appeal.

**LORD HODGE: (with whom Lord Hughes agrees)**

61. I agree with Lady Hale (a) that there is no basis for striking down rule E-ECP 4.1 in Appendix FM to the Immigration Rules and (b) that the guidance, because of the narrowness of the exceptional circumstances for which it allows, may result in a significant number of cases in which people's article 8 rights will be breached. To avoid that unfortunate outcome, the Government may need to take further steps toward providing opportunities for spouses and partners to meet the requirement or may need to amend its guidance. But I am not persuaded that the court should issue the declaration that she proposes and the range of her criticism of the guidance exceeds my concerns. I therefore set out my views briefly.

62. In para 33 of her judgment Lady Hale summarises the six reasons which the Government have advanced for the introduction of a pre-entry English language requirement. They are: (i) to assist the partners' integration into United Kingdom society at an early stage; (ii) to improve their employment chances as they have access to the labour market as soon as they arrive; (iii) to raise awareness of the importance of language and to prepare for the tests they will need to pass for settlement in this country; (iv) to save translation costs; (v) to benefit any children the couple may have; and (vi) to reduce the vulnerability of newly arrived spouses, especially women.

63. The appellants led evidence which sought to call into question the extent to which the proposed English language test could achieve those benign aims. Because the IELTS English language test is at a basic A1 level, the appellants argued with some force that its contribution to several of the listed aims may be modest. That may well be so. But like the majority of the Court of Appeal (Maurice Kay LJ (at para 30) and Toulson LJ (at para 52)) I consider that this court's role does not extend to overruling the predictive judgment of the executive branch of government on an issue of social policy at a stage when empirical evidence of the consequences of the policy is unobtainable. In my view the law gives the executive branch a wide margin of appreciation in its assessment of the consequences of its social policy in this sphere.

64. In each of the appeals a female UK citizen has gone overseas and found a spouse from within a community with which she has a connection. Often it may be a male UK citizen who seeks to find a spouse or partner from within his community overseas, and in such cases the sixth purpose listed above may be an important good: the benefit which flows from language competence is not only improved access to advice in event of mistreatment but, more generally, the ability to lead one's life with a degree of independence and autonomy.

65. In any event, it appears to me that the core aim of the policy is the first listed purpose, namely to assist the early integration of the incoming partner into UK society. Aims (ii) (employment), (iii) (raising awareness of integration) and (vi) (reducing vulnerability) are closely connected with this core aim. Together, they are not to be undervalued. It is in the general interest of all in this country that those who join its community become real participants in it, and are seen to do so. I would also not underestimate the value of establishing a minimum language familiarity before entry, since that will help to instil the need for integration. The monitoring of language proficiency subsequently can be difficult; it may be scarcely practicable, as well as harsh, to contemplate removal in the event of failure to achieve it, particularly once a family of children is established. But the debate about the efficacy of the policy to achieve those other aims is water swirling around the rock of the policy of promoting integration and thereby social cohesion within our society. The pre-entry test is the first stage of the process of integration.

66. Further, as Lady Hale has shown (para 26), the Strasbourg court has in several cases pointed out that there is no general obligation on a state to facilitate or allow a couple who are married to live within it. This court has made similar observations: *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166, para 19 per Lady Hale; *R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening)* [2012] 1 AC 621, para 42 per Lord Wilson. Mixed nationality couples have no right to set up home in whichever country they choose. International instruments which seek to protect family life need to be read against that background. Nonetheless, the article 12 ECHR right to marry is a strong right (*R (Baiai) v Home Secretary* [2009] 1 AC 287, para 13 per Lord Bingham), and article 8 ECHR confers a right to respect for the resulting family, which is the fundamental social unit. That protection involves, as Lord Wilson stated in *Aguilar Quila* (above) at para 42, a fact-specific investigation whether the state's obstruction of a married couple's choice to reside in it is justified under para 2 of article 8.

67. It may well be that, as Lady Hale says (para 34 above), the principal article 8(2) purpose which is relevant is "the interests of the economic well-being of the country". But the value of social and cultural cohesion, and the reduction of isolation and mistrust, bear also on the rights and freedoms of others already living here.

68. Of the four questions which Lord Wilson posed in *Aguilar Quila* at para 45, which Lady Hale sets out at para 29 of her judgment, I agree with her conclusions (a) that the legislative objective of integration and social cohesion is sufficiently important to justify limiting a fundamental right, (b) that the measures are rationally connected to that objective and (c) that they are no more than are necessary to accomplish it. The problem which the operation of the policy faces is the fourth question – "do [the measures] strike a fair balance between the rights of the individual and the interests of the community?".

69. For the reasons which I discuss below, I think that there may be a number of cases in which the operation of the Rule in terms of the current guidance will not strike a fair balance. But there may also be many cases in which it will. The court would not entitled to strike down the Rule unless satisfied that it was incapable of being operated in a proportionate way and so was inherently unjustified in all or nearly all cases: *R (MM (Lebanon)) v Secretary of State for the Home Department* [2015] 1 WLR 1073, paras 133 and 134 per Aikens LJ. As a result, the appellants fail to show that the rule itself is an unjustifiable interference with article 8 rights.

70. The principal problem which the operation of the rule is likely to confront relates to the availability and accessibility of English language tuition and testing overseas. Beatson J focussed on this matter in the seventh question which he posed for himself in para 81 of his judgment in this case in which he asked:

> "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?"

In his discussion of the answer to this question (at paras 104 to 109 of his judgment) he recognised that the operation of the policy might give rise to questions of disproportionate interference in individual cases, depending on (a) whether the Home Secretary granted further exemptions to countries where there was no test centre and (b) how her officials dealt with particular cases.

71. At paras 17 to 20 of her judgment Lady Hale sets out the current guidance given to officials on how they should consider exceptional circumstances under E-ECP 4.2(c) in Appendix FM of the Immigration Rules. From the emphasis which she has supplied to certain passages in that guidance, it is clear that she takes issue with (a) the exclusion from exceptional circumstances of the lack of or limited literacy or education, and (b) the assertion that it is reasonable to expect the applicants or their sponsor to be able to afford reasonable costs incurred in making their application.

72. I would not impugn either of those requirements in themselves. It is not, at least yet, demonstrated that limited literacy or education makes it unreasonable to expect an applicant to learn rudimentary English, or that the methods of teaching are not adjusted to such limitations, although it is likely to be true that classroom or traditionally grammatical methods are not.

73. To my mind the principal problem which the evidence adduced by the appellants suggests is that within certain states, with which many UK citizens have a close connection, there are areas, including rural areas, from which it may not be reasonably practicable for the incoming spouse or partner to obtain the needed tuition without incurring inordinate cost, for example by having to travel long distances repeatedly or to reside for a prolonged period in an urban centre in order to complete the relevant language course. Dr Geoffrey Jordan suggested in Dr Helena Wray's second report that preparation for the A1 test could involve 90 hours of tuition (para 40). In principle, it is not unreasonable to expect some level of expenditure by the spouse/partner who aspires to live in this country or by the presently resident sponsoring party; the potential financial benefits of life in the UK are significant. But in a particular case the potential cost may be shown to be inordinate, undermining the fair balance which article 8 requires. Dr Jordan also stated that some testing centres offered the A1 speaking and listening test but required English reading skills in order to take it and others offered the test only when it was combined with tests involving reading skills. If that is still the case and

it creates a significantly higher hurdle than the A1 test which the UK Government requires, that also might affect the fair balance in an individual case. It is impossible at the moment to predict what level of provision of testing centres will be made, or what identification of sources of tuition. Travel to a major city is likely to be an inevitable part of obtaining entry clearance or of eventual travel to the UK in any event. But the central issue is the accessibility of both tuition providers and approved testing centres which offer the stipulated test without additional language requirements. This will no doubt call for examination on the facts of specific cases.

74. In my view in order to ensure a fair balance the Government should consider amending the guidance to allow officials to consider whether it is reasonably practicable for the incoming spouse to obtain the needed tuition and sit the test without incurring inordinate costs.

75. I agree with Lady Hale's approach to the article 14 case in para 58 of her judgment and I agree with the Court of Appeal (para 47) and Beatson J (para 145) that the common law challenge fails.

76. I have concerns about making any declaration of incompatibility as (i) circumstances on the ground in the countries in which incoming spouses or partners reside are likely to be changing over time, (ii) I see little benefit in a generally worded declaration which gives no guidance on what makes it unreasonable to expect the incoming partner to comply with the Rule, and (iii) I am not persuaded that it is appropriate to extend declarations of incompatibility to circumstances outside the scope of section 4 of the Human Rights Act 1998. But I am content with Lady Hale's proposal that we should invite submissions from the parties before reaching a concluded view on this suggestion and making our final determination.

**LORD NEUBERGER:**

77. I have had the benefit of reading in draft the judgments of Lady Hale and Lord Hodge. I agree that these two appeals should be dismissed because rule E-ECP 4.1 in Appendix FM to the Immigration Rules ("the Rule"), set out in paras 12-13 above, is lawful. However, I also agree with them that the guidance ("the Guidance") contained in para SET 17.9 (updated 15 February 2011) as expanded in the Immigration Directorate Instruction, set out in paras 16-20 above, seems to be bound to result in article 8 rights being infringed on a number of occasions.

78. The Rule imposes what may be called a pre-entry English requirement for spousal migrants – ie it requires "a foreign spouse or partner of a British citizen or person settled in the United Kingdom to produce a test certificate of knowledge of

the English language to a prescribed standard prior to entering the United Kingdom", as Maurice Kay LJ described it below - [2014] 1 WLR 208, para 1. As he went on to explain, "[p]reviously such persons were only required to demonstrate such knowledge two years after entering the United Kingdom", and only then could they obtain indefinite leave to remain ("ILR").

79. In these proceedings, the appellants contend that the Rule infringes article 8 and that it therefore should be struck down. There is no doubt that it interferes with article 8 rights, and it therefore has to satisfy the familiar four tests, or "Requirements", which are set out by Lady Hale in para 29 above - namely, legitimate aim, rational connection, less intrusive means and proportionality.

80. The aims of, or reasons for, the Rule are set out in summary form by Lady Hale at para 33 and by Lord Hodge at para 62. Opinions may no doubt differ as to the relative or absolute importance of each of these six aims, although I agree with Lady Hale and Lord Hodge in thinking that the first, assisting integration into British society at an early stage, is plainly the most important. However, improving employment prospects, benefitting children, and reducing vulnerability (especially of women) all seem to me to be very worthwhile aims, one or more of which could, in some individual cases, turn out to be more significant than the first aim. Accordingly, there can be no doubt but that these aims are plainly legitimate; indeed, they are the sort of aims which one would expect a government to have.

81. The first Requirement, however, is not merely that the aims are legitimate, but that they justify interfering with, or limiting, a Convention right. In this case, the Rule interferes with the article 8 rights of men and women in this country whose partners abroad may be impeded in their attempts to join them in the United Kingdom. Although article 8.1 is very wide in its reach, article 8.2 of course makes it clear that it is not an absolute right, and it does not impose a duty on a state to facilitate, or even to allow, a married couple to live together. The limits on article 8.1 rights in this connection were helpfully summarised by Lady Hale in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166, para 19.

82. Particularly bearing that factor in mind, it seems to me that, at any rate if taken at face value, the six aims represent a set of reasons which easily serve to enable the Rule to satisfy the first Requirement, as they are sufficiently important to justify the interference with article 8 rights in question.

83. However, the evidence adduced on behalf of the appellants may be said to call into question whether the first Requirement is satisfied. I shall consider that evidence when dealing with the fourth Requirement, proportionality. However, for the purposes of the first Requirement, I am very dubious whether the evidence can,

even on a quick reading, assist the appellants. The evidence does not suggest that implementation of the Rule will achieve its purpose in only a negligible number of cases; indeed, it would be surprising if any expert was prepared to say that in the light of the available information. Once it is accepted, as I think it must be, that the Rule is likely to achieve its purpose in a significant number of cases, I believe it must follow that the first Requirement is satisfied.

84. As to the second Requirement, it is not in my judgment realistically possible to argue against the proposition that there is a rational connection between the six aims and the Rule.

85. So far as the third Requirement is concerned, it was contended by the appellants that the Rule had not been shown to be the least intrusive way of achieving the six aims, or, to put it another way, it had not been established as being no more than necessary to achieve the six aims. In this connection, it is worth bearing in mind that the approach of a court to the third Requirement should not be absolutist. Indeed, it has been authoritatively said that the question it involves may be better framed as was "the limitation of the protected right … one that it was reasonable for the legislature to impose" to achieve the legitimate aim, bearing in mind any alternative methods of achieving that aim – per Lord Reed in *Bank Mellat v HM Treasury (No 2)* [2014] 1 AC 700, 791, para 75, citing Dickson CJ in *R v Edwards Books and Art Ltd* [1986] 2 SCR 713, 781-782.

86. The appellants' case, which was accepted by Sir David Keene in his dissenting judgment in the Court of Appeal, [2014] 1 WLR 208, paras 55-59, was based on the pre-existing system. He considered that the evidence showed that that system, which involved relatively little interference with article 8 rights, was working satisfactorily, and therefore there was no need for the far more intrusive Rule. The figures provided by the Home Department, which Sir David cited in support of this view, showed that the numbers of spouses who failed the English test under the pre-existing system were 3,245 in 2007, 995 in 2008, and 470 in 2009.

87. I am not convinced that these figures assist the contention that the third Requirement is not satisfied. However, at least in relation to this appeal, that is an arid point which it is unnecessary to decide, because they clearly are relevant to the fourth Requirement (which Sir David also relied on in paras 55-59 of his judgment). At any rate, subject to that concern, it appears to me that the third Requirement is clearly satisfied. If there is to be a Regulation ensuring that would-be spousal migrants ("applicants") attain a specified level of English before coming to the UK, no less an intrusive alternative to the Rule has been suggested.

88. That then leaves the final Requirement, proportionality. In addition to the evidence of figures provided by the Home Department and summarised at the end of para 86 above, the appellants rely on other evidence to which I have already alluded. As Lady Hale explains in paras 43, 44 and 47 of her judgment, the appellants have collated detailed expert assessments, including facts and opinions, from Dr Jordan, Dr Wray and Dr Charsley. In their view, there is real reason to doubt the likely efficacy of the Rule in achieving each of the six aims. They also explain that there will be a number of cases where application of the Rule in accordance with the Guidance is very likely to render it impossibly hard, in practical terms, for a person to attain the necessary proficiency in English or to take the test to prove that he or she has done so.

89. This evidence does give rise to some concern, but I do not consider that it justifies the conclusion that the Rule infringes article 8.

90. So far as the numbers of spousal migrants who fail the post-entry test are concerned, it is fair to say that the figures set out at the end of para 86 are relatively small. However, those figures do not take into account the possibility that, once in the UK, some spousal migrants may never apply for ILR, and therefore have not been taken into account. Further, the Home Department's 2009 Equality Impact Assessment identified foreign spouses as "the largest group who do not pass the English test after two years".

91. It is therefore apparent that a significant proportion of spousal migrants who entered the UK each year did not learn English to the requisite standard during the two years following their arrival, but it is not possible to identify the precise proportion. That means that, each year, there was a significant, but unspecified, number of spousal migrants who (i) remained in the UK not speaking English, (ii) were deported after having lived here for more than two years, or (iii) learned English later. Both the available evidence and common sense lend support for the notion that category (ii) and, albeit more speculatively, category (iii), includes many fewer people than category (i). Even spousal migrants who, under the pre-existing system, learned English after arriving were, at least on the Department's not unreasonable assessment, in a weaker position than they would be under the Rule, because the effect of the Rule is that spousal migrants learn English before arriving here and are therefore able to "hit the ground running".

92. As for the experts, they were not saying that the implementation of the Rule could do nothing to achieve the stated aims: they are sceptical whether it will do so to any significant extent, and they are concerned that it may, in some respects, be counter-productive. They also consider that there will be many people for whom the possibility of learning English, or taking the relevant test, in their home country would be impossible or near-impossible.

93. The likelihood of, and the extent to which, the six aims will be achieved by implementing the Rule is, in the end, a matter of judgment, on which it is virtually inevitable that reasonable people who have carefully considered the matter, whether or not with any particular expertise, will differ. Similarly, it is very hard to assess how many people would be put in difficulties by having to comply with the Rule, and how great or insurmountable those difficulties might be. There is no reliable, objective, quantitative evidence available on any of those issues.

94. Accordingly, it is unsurprising, that the appellants are able to rely on opinion evidence, which is based on experience and judgment. Given that it is not inherently improbable and that it comes from properly qualified and experienced experts, this evidence is worthy of respect. However, any court should be very slow indeed before relying on such evidence as the sole or main justification for invalidating government policy, particularly when the policy concerns a sensitive social issue, and the main aim of the policy is fairly described as "benign", as Lady Hale says in para 41 above.

95. As to the concerns about hardship or impossibility, when considering individual cases a great deal may depend on how the Rule is operated. However, the instant claims have been launched and argued on the basis of challenging the Rule *in limine*, and not how it is operated, let alone how it would have been applied in these two cases.

96. It is true that it appears quite possible that the effect of implementing the Rule may not be particularly substantial. However, the court should accord to the executive a wide measure of discretion when deciding on the likely value of a policy such as that embodied in the Rule. Furthermore, the Home Department carried out two substantial Impact Assessments and two substantial Equality Impact Assessments before deciding to introduce the Rule, albeit that those assessments were not directed to the issue raised in these two cases, namely the impact on article 8 rights of people in this country.

97. As Toulson LJ said in para 51 in the Court of Appeal, there is "an inevitable degree of crystal ball gazing", when it comes to an experimental scheme such as that embodied in the Rule. In such a case, one must be wary of complaining about the lack of a quantitative or precise assessment of the extent of the likely benefits, and it is fair to add that no such complaint has been advanced. Where, as here, such an assessment is not a practical possibility, to insist on one would have two possible consequences, each of which would be unfortunate. First, it could lead to the abandonment of experimental policies, however well thought out they may be and however successfully they may have turned out. Alternatively, it could encourage artificial or bogus cost-benefit and other quantitative analyses, which are already by no means unknown, and which devalue properly based quantitative analyses.

98. I agree therefore that (a) the Rule has a legitimate purpose, namely the six aims referred to above, which is sufficiently important to justify interfering with the lives of persons in the UK who wish to be united here with partners who are currently abroad, (b) there is plainly a rational connection between the Rule and its aims, (c) the provisions of the Rule are no more than is necessary to accomplish its aims, and (d) bearing in mind the wide measure of discretion which should be accorded to the executive in a case such as this and the research that was done in anticipation, the Rule strikes a fair balance between the rights of individuals and the interests of the community.

99. I also agree that the challenge to the Rule based on article 14 also fails for the reasons given by Lady Hale.

100. Accordingly, for the reasons more fully given by Lady Hale and Lord Hodge (whose judgments have nuanced differences in their approaches, but whose essential reasoning appears to be the same), and in agreement with the conclusion reached by Maurice Kay and Toulson LJJ, I would dismiss these appeals.

101. However, I have concerns about the Guidance. It does appear virtually certain that there will be a significant number of cases where application of the Guidance will lead to infringement of article 8 rights. By way of example, it may be impossible, in any practical sense, for a potential applicant to obtain access to a tuition and/or to a test centre. In particular, it appears that, in some countries, a person in a remote rural home either would have to travel repeatedly to and from a tuition centre many hundreds of miles away, or would have to find the money to rent a place to live near the tuition centre. Depending on the circumstances of the potential applicant, this may well render reliance on the Rule disproportionate. And, as Lady Hale points out, reliance on the absolute exclusion in the Guidance of "[l]ack of or limited literacy or education" from the category of "exceptional circumstances", and the broad statement that "it is reasonable to expect that [applicants] (or their sponsor …) will generally be able to afford reasonable costs incurred in making their application" could easily lead to inappropriate outcomes in individual cases.

102. Accordingly, I share Lady Hale's concerns expressed in para 53, and it is also right to say that I also agree with what Lord Hodge says in para 73.

103. In those circumstances, I see considerable attraction in granting declaratory relief to reflect the concerns we have about the application of the Guidance. This is an important and sensitive topic, and it could be unfortunate if there was no formal record of this court's concern about the application of the Guidance. That is particularly true given the public expenditure which has been devoted to these

proceedings, coupled with the fact that a declaration may avoid the expenditure of further costs on subsequent proceedings involving a challenge to the Guidance. And a formal declaration now would avoid any further delay involved in establishing the correct approach to be adopted to applicants.

104. However, it would be wrong to contemplate making, or even to speculate about the possible terms of, a declaration without first giving the parties the opportunity of making written submissions on the appropriateness of such a course and the terms of any potential declaration. While I am sympathetic to the notion of granting a declaration, it is only fair to add that it would be an unusual course to take (given that it has only been the Rule which was under attack in these proceedings), and to acknowledge that the Secretary of State may well persuade us that, if it was drafted so as to reflect our views at this stage, any declaration would be too unspecific to be helpful or would be otherwise inappropriate.