Michaelmas Term
[2011] UKSC 45
On appeal from: [2010] EWCA Civ 1482; [2009] EWHC Admin 3189

JUDGMENT

R (on the application of Quila and another) (FC) (Respondents) *v* Secretary of State for the Home Department (Appellant)

R (on the application of Bibi and another) (FC) (Respondents) *v* Secretary of State for the Home Department (Appellant)

before

Lord Phillips, President
Lady Hale
Lord Brown
Lord Clarke
Lord Wilson

JUDGMENT GIVEN ON

12 October 2011

Heard on 8 and 9 June 2011

Appellant
Angus McCullough QC
Andrea Lindsay Strugo
(Instructed by Treasury Solicitors)

Respondent (Quila)
Richard Drabble QC
Christopher Jacobs
(Instructed by Joint Council for the Welfare of Immigrants)

Appellant
Angus McCullough QC
Andrea Lindsay Strugo
(Instructed by Treasury Solicitors)

Respondent (Bibi)
Al Mustakim
Lina Mattsson
(Instructed by Davies Blunden and Evans Solicitors)

Intervener (The AIRE Centre)

Karon Monaghan QC
Shahram Taghavi
Eric Fripp
(Instructed by Bates Wells & Braithwaite LLP)

Intervener (Southall Black Sisters and the Henna Foundation)
Henry Setright QC
Michael Gration

(Instructed by Dawson Cornwell)

Intervener (The Asian Community Action Group, Sheffield)
Satvinder Juss

(Instructed by Riaz Khan & Co)

LORD WILSON

A. INTRODUCTION

1. These two appeals relate to one of the rules currently in force by which the appellant, the Secretary of State for the Home Department, determines an application for a visa to enter or remain in the United Kingdom made by the spouse of a person who is present and settled in the UK ("a marriage visa").

2. The Secretary of State appeals against the order of the Court of Appeal dated 21 December 2010 (Sedley, Pitchford and Gross LJJ) [2010] EWCA Civ 1482, [2011] 3 All ER 81) by which it declared that her application of the rule so as to refuse marriage visas to the two effective respondents was unlawful as being – so the majority concluded – in breach of their rights under article 8 of the European Convention on Human Rights and Fundamental Freedoms 1950 ("the ECHR"). In effect pursuant to supplementary orders made by the Court of Appeal the Secretary of State has now granted marriage visas to each of the two respondents. But her appeals to this court, although academic for them, retain a general importance which has justified their continued prosecution.

3. The rule is rule 277 of the Immigration Rules 1994 (HC395). The version of the rule which, as substituted by HC1113, came into force on 27 November 2008 was as follows:

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

That rule therefore governed "a spouse or civil partner". There were parallel rules which governed "a fiancé(e) or proposed civil partner" (rule 289AA) and "an unmarried or same-sex partner" (rule 295AA).

4. A "sponsor" is defined by rule 6 as "the person in relation to whom an applicant is seeking leave to enter or remain as their spouse (etc)". Thus, for present purposes, the "sponsor" is the spouse who is present and settled in the UK,

for example (as in each of the cases before the court) a British citizen present and ordinarily resident in the UK. The "applicant" is the other spouse.

5. Prior to 27 November 2008 rule 277 – like the parallel rules – was in the same terms save only that its reference to age was "under 18" rather than "under 21". Such had been the rule since December 2004, when the minimum age for the applicant had been raised from 16 to 18 so as to become the same as the minimum age for the sponsor, which had been raised to the same extent in April 2003.

6. With effect from 6 April 2010 rule 277 – like the parallel rules – was amended in a small and largely irrelevant respect. After the words "under 21" were inserted, in parenthesis, the words "or aged under 18 if either party is a serving member of HM Forces".

7. The appeals require focus upon the Secretary of State's purpose in amending rule 277 so as to provide that, with effect from 27 November 2008, a marriage visa should not – in the absence of exceptional, compassionate circumstances which would attract the exercise of her discretion outside the ambit of the rules – be granted until both the sponsor and the applicant had attained the age of 21.

8. The Secretary of State's purpose is clear. It was not to control immigration. It was to deter forced marriages. At the heart of the appeals is her analysis of the nexus between entry into a forced marriage and the increase in the minimum ages requisite for the grant of a marriage visa. No one could contend that the nexus is very obvious.

B. FORCED MARRIAGE

9. A forced marriage is a marriage into which one party enters not only without her or his free and full consent but also as a result of force including coercion by threats or by other psychological means: section 63A(4) and (6) of the Family Law Act 1996, inserted into it by section 1 of the Forced Marriage (Civil Protection) Act 2007 ("the Act of 2007"). The forcing of a person into marriage is a gross and abhorrent violation of her or his rights under, for example, article 16(2) of the Universal Declaration of Human Rights 1948, article 23(3) of the International Covenant on Civil and Political Rights 1966 and article 12 of the ECHR. A forced marriage is entirely different from an arranged marriage in which, in conformity with their cultural expectations, two persons consent to marry each other pursuant to an arrangement negotiated between their respective families. The prevalence of forced marriage within sections of our community in the UK has

come increasingly to the attention of a shocked public during, say, the last 12 years as victims of it, or witnesses to it, have at last and less infrequently summoned the courage to report it. In 1999 the Home Office established a Forced Marriage Working Group, which published its findings in 2000. Parliament has responded actively to revelation of the problem by enactment of the Act of 2007, which provides the court with a flexible jurisdiction to make orders protective of a person who may be, or has been, forced into marriage. Under renewed discussion is whether there is any value in also making the act of forcing a person into marriage into a specific criminal offence. The other main instrument of the state's response to the revelation of the problem has been the creation in 2005 by the Home Office and the Foreign and Commonwealth Office of the Forced Marriage Unit ("the FMU").

10. In November 2008 the Secretary of State published guidance under section 63Q of the Family Law Act 1996, as inserted by the Act of 2007. It was for the benefit of those exercising public functions potentially relevant to instances of forced marriage. In the guidance the Secretary of State addressed the motives of those who forced a person to marry in the following terms:

> "36 Some of the key motives that have been identified are:
>
> - Controlling unwanted sexuality (including perceived promiscuity, or being lesbian, gay, bisexual or transgender) – particularly the behaviour and sexuality of women.
>
> - Controlling unwanted behaviour, for example, alcohol and drug use, wearing make-up or behaving in a 'westernised manner'.
>
> - Preventing 'unsuitable' relationships, e.g. outside the ethnic, cultural, religious or caste group.
>
> - Protecting 'family honour' or 'izzat'.
>
> - Responding to peer group or family pressure.
>
> - Attempting to strengthen family links.

- Achieving financial gain.

- Ensuring land, property and wealth remain within the family.

- Protecting perceived cultural ideals.

- Protecting perceived religious ideals which are misguided.

- Ensuring care for a child or vulnerable adult with special needs when parents or existing carers are unable to fulfil that role.

- Assisting claims for UK residence and citizenship.

- Long-standing family commitments."

Thus "Assisting claims for UK residence and citizenship" was one of 13 suggested motives.

11. Data included in the guidance or otherwise provided by the FMU suggest the following:

(a) most persons forced into marriage in the UK are female;

(b) for example 86% of the 815 possible cases of forced marriage considered by the FMU between September 2009 and February 2010 related to female victims;

(c) most victims are aged between 13 and 29;

(d) more particularly, of the 145 cases in 2005 in which the FMU provided direct support (as opposed to general or preliminary advice) to victims or potential victims of forced marriage, 44, i.e. 30%, related to victims aged between 18 and

20; in 2006 the number of victims of that age was again 44 albeit out of 167 cases, i.e. 26%; and in 2007 the number was 69 out of 212 cases, i.e. 33%;

(e) it is usually the parents (or one of them) of the victim who apply the force;

(f) most victims are members of South Asian families; and

(g) for example, of the cases in which the FMU gave general or preliminary advice in 2008, 2009 and 2010, over 70% related to families of Pakistani, Bangladeshi or (to a much lesser extent) Indian origin.

C. THE FACTS

12. **Mr Aguilar Quila**, the first respondent, is a national of Chile who was born on 12 July 1990. His wife, Ms Amber Aguilar, is a British citizen who was born on 25 April 1991 and who until 2009 lived in England. They began a relationship in 2006 when, with his parents, the first respondent was living temporarily in London. Later, on 17 August 2008, he returned to the UK on a student visa which was expressed to expire on 3 August 2009. In September 2008 they became engaged and on 22 November 2008 they were married. The Secretary of State acknowledges that they married because they were in love. By then they were aware of the imminent change in the rule; but even under the old rule the first respondent was not then entitled to a marriage visa because, although he had attained the age of 18, his wife would not attain it until 25 April 2009.

13. On 23 November 2008 the first respondent sought a marriage visa on the basis of exceptional, compassionate circumstances. The Secretary of State responded to the effect that the first respondent's wife had not attained the age of 18 and that there were no such exceptional, compassionate circumstances as would justify a discretionary grant. On 1 May 2009, acting by the Joint Council for the Welfare of Immigrants, the first respondent sought a fresh decision on the basis that his wife had by then attained the age of 18 and by reference to fresh material which was said to call for the exercise of the Secretary of State's discretion. But she responded to the effect that, because of the serious nature of forced marriages, the minimum age of both parties had been raised to 21; that by then the first respondent's case fell to be determined – and inevitably refused – by reference to that new minimum age; and that, as before, there was no basis for a discretionary grant. She reminded the first respondent that, by virtue of the fact that he had leave to remain in the UK until 3 August 2009 and of the terms of section 82(2)(d) of the Nationality, Immigration and Asylum Act 2002, he had no right of appeal against her decision.

14. Thus, on 31 July 2009, the first respondent, accompanied by his wife, duly returned to Chile. But by then he had issued the claim for judicial review, which was to be dismissed by Burnett J in the Queen's Bench Division, Administrative Court, on 7 December 2009 but was to be the subject of the successful appeal to the Court of Appeal.

15. The exceptional, compassionate circumstances which the first respondent had pressed unavailingly on the Secretary of State related in particular to the position of his wife. He stated that it would be intolerable for them not to live together for the following three years but that the effect on her of removal to Chile for such a period would be highly detrimental. He explained that both her parents were teachers; that she wanted to become a teacher of modern languages; that it would take five years for her so to qualify – in the attainment of an undergraduate degree for four years and of a Post Graduate Certificate of Education for the fifth year; that she had been offered a place at Royal Holloway, University of London, to study French and Spanish for four years beginning in October 2009, provided that (as later she duly did) she were to attain the requisite grades at A level; and that life in Chile for three years would set back the plans for her career to a grossly unfair and - in that the marriage was not forced – to a wholly unnecessary extent.

16. In August 2010 the first respondent and his wife, who had been staying with his family in cramped conditions in Santiago, moved to Ireland, where she embarked on a course at University College, Dublin. The paradox that the first respondent and his wife were entitled to live in Ireland but not in the UK arose from the fact that, as an EEA citizen exercising treaty rights to live in an EU state, the first respondent's wife had a right to live there with him. In February 2011 the Secretary of State granted the marriage visa to the first respondent with the result that, with his wife, he moved back to the UK.

17. **Bibi** (as she invites the court to describe her), the effective second respondent, is a citizen of Pakistan who was born on 7 July 1990 and has always lived there. Her husband, Mohammed (as he invites the court to describe him), is a British citizen who was born on 8 April 1990 and who, save for some weeks in 2008, has always lived in England. They were married in Pakistan on 30 October 2008. It was a marriage which, in accordance with their cultural traditions, their two sets of parents had arranged. They allege – and the Secretary of State does not dispute – that each of them freely consented to the marriage and that they had been engaged since October 2007, whereupon they had begun to speak occasionally on the telephone. They had first met in Pakistan about a week prior to the marriage. On 1 December 2008 the second respondent, with the help of her father-in-law, applied to the Entry Clearance Officer ("the ECO") in Islamabad, for a marriage visa. But the ECO had already told the father-in-law that, unless she were to apply prior to 27 November 2008 (which was to prove impracticable for her), her application would be rejected on the basis that, although both she and her husband

had attained the age of 18, neither had attained the age of 21. On 19 January 2009 the ECO duly refused the application on that ground.

18. Following the marriage the second respondent and her husband appear to have cohabited briefly in Pakistan – perhaps only for some weeks – whereupon he returned to England. In April 2009, together with her husband, she applied to the Administrative Court for permission to apply for judicial review of the ECO's refusal. It was against His Honour Judge Pearl's refusal of permission on 5 August 2009 that she brought her successful appeal to the Court of Appeal. In May 2011 the Secretary of State granted the marriage visa to her, with the result, I presume, that she has joined her husband in the UK.

D. THE GENESIS OF THE AMENDMENT TO RULE 277

19. On 22 September 2003 the Council of the European Union adopted Directive 2003/86/EC. Its purpose was to determine the conditions under which third country nationals, i.e. not citizens of the EU, who were residing lawfully in an EU state could, by sponsorship, secure entry to it for their spouses and other family members. It did not address, even implicitly, how an EU state should respond to such requests when made by one of its own citizens or by a citizen of another EU state. Article 4(5) provided:

> "In order to ensure better integration and to prevent forced marriages Member States may require the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years, before the spouse is able to join him/her."

20. The UK, Ireland and Denmark were not bound by the directive. As it happens, Denmark had already in 2002 raised to 24 the minimum ages both for the applicant and for the sponsor, and indeed in effect for all sponsors permanently resident in Denmark: see now section 9(1)(i) of the Aliens (Consolidation) Act 2009. At the time when the ages were raised, it was argued not only that the change would promote better integration of foreign spouses into Danish society but also that it would contain forced marriage. But subsequent research in Denmark did not confirm that the reform had reduced forced marriage; and it highlighted negative – and socially alienating – effects on the reasonable aspirations of young spouses whose marriages were not forced.

21. In about 2004, in the wake of the directive, several other EU states, such as Germany and the Netherlands, raised their minimum ages to 21 and, again at least in the case of some such states, not merely in the case of the limited category of

potential sponsors who had been the subject of the directive. I will assume that such states made the change in the hope of achieving each of the goals described in the article: but there is no evidence as to whether their hope has proved to be justified in either respect.

22. In the above circumstances it was entirely appropriate that the Secretary of State should examine whether the minimum ages for a marriage visa should be raised to 21 or 24 in the UK. In 2006 she commissioned Professor Hester and a team at Bristol University to prepare a report on the merits of any such change.

23. But Professor Hester's report, dated 15 February 2007, was expressly negative. Her first recommendation was that "[t]he age of sponsorship/entry should not be raised either to 21 or 24". She said that the predominant view across all aspects of the research was that any such increase would be detrimental and, in particular, "discriminatory on racial and ethnic grounds and with regard to arranged and love marriages".

24. The Secretary of State did not publish Professor Hester's report; and it was later published independently. It was the view of the Secretary of State and of two external peer-reviewers that, while the methodology used for the research had been sound, the report was marred by unsubstantiated statements, unclear terminology and sampling bias, and thus that its findings should be treated with considerable caution. In these proceedings there has been no debate about the validity of these criticisms.

25. In December 2007 the Secretary of State issued a consultation paper entitled "Marriage to Partners From Overseas". The main questions were whether, in order to reduce the incidence of forced marriage, the minimum ages for a marriage visa should be increased to 21. A subsidiary question was whether a person should be required to declare her intention to be a sponsor prior to departure from the UK in order to contract a marriage abroad.

26. On 13 June 2008 the Home Affairs Select Committee of the House of Commons published a report entitled "Domestic Violence, Forced Marriage and 'Honour'-Based Violence". It was a magisterial report upon various types of domestic abuse in the UK and it extended far beyond the subject of forced marriage. But the report included a section on the question which the Secretary of State had put out for consultation. It noted that the use of visa application rules in order to tackle forced marriage was controversial. It concluded as follows:

"110. The testimony we heard from forced marriage survivors suggests that the desire to procure a marriage visa for a spouse can be an important factor in forced marriage. When we asked for their views on this issue, survivors told us that raising the age of sponsorship for marriage visas from 18 to 21 could better equip victims to refuse an unwanted marriage. However, associated with such a change is a significant risk that young people would be kept abroad for sustained periods between a marriage and being able to return to the UK with their spouse.

111. We have not seen sufficient evidence to determine whether or not raising the age of sponsorship would have a deterrent effect on forced marriage. Given the potential risks involved, we urge the Government to ensure that any changes it proposes to its policy on visa application procedures in respect of sponsorship are based on further research and conclusive evidence as to the effect of those changes. This evidence must demonstrate that any changes will not inadvertently discriminate against any particular ethnic groups."

27. In July 2008, in the light, inter alia, of the responses to the consultation, the Secretary of State issued her proposals for reform in a report entitled "Marriage Visas: The Way Forward". Although there were proposed provisions which would equip applicants for marriage visas with greater knowledge of English, its main proposal was to increase the minimum ages from 18 to 21. The report stated as follows:

"3.4 We believe that there will be a number of benefits involved in raising the age, these include:

- It will provide an opportunity for individuals to develop maturity and life skills which may allow them to resist the pressure of being forced into a marriage.

- It will provide an opportunity to complete education and training.

- It will delay sponsorship and therefore time spent with (sometimes abusive) spouse if the sponsor returns to the UK.

- It will allow the victim an opportunity to seek help/advice before sponsorship and extra time to make a decision about whether to sponsor.

CONSULTATION RESPONSES

3.5 Supporters of the increased sponsorship age felt the proposal:

- provided an opportunity for individuals to develop maturity and life skills.

- removed young people from parental pressure to marry.

- gave them an opportunity to complete education and training.

Opponents raised a variety of reasons against the proposal, stating that it:

- could be perceived as discrimination based on cultural differences.

- was detrimental to the human rights of young people.

- would not prevent forced marriage since this affects people of all ages.

- would penalise those with genuine marriage intentions."

Then the report quoted the urgent request recently made by the Home Affairs Select Committee that no increase in the minimum ages be made without conclusive evidence that it would deter forced marriage and not be discriminatory. The report's response was as follows:

> "3.8 We believe there is such conclusive evidence because reports of forced marriage peak sharply at ages *18 and above*. By age 21, reports of forced marriage begin to decline sharply."

There was then a reference, in tabular form, to the statistics provided by the FMU about the age of victims of forced marriage, to which I have referred in para 11(d) above. But the response at para 3.8 above to the Select Committee's call for conclusive evidence was wholly inadequate: for the call had been for evidence not about the age of victims of forced marriage but about whether an increase in the minimum ages for a marriage visa would deter it.

28. The relevant section of the report concluded as follows:

> "3.14 We have carefully considered the issues raised by the Home Affairs Select Committee and the respondents to the consultation. We have paid particular attention to whether an increase in age from 18-21 would be proportionate given concerns that raising the age would penalise a number of genuine couples and discriminates against specific religious communities where the average age of marriage is likely to be lower including such communities where forced marriage is uncommon.
>
> 3.15 The committee was also concerned that there is a significant risk that young people would be kept abroad for sustained periods between a marriage and being able to return to the UK with their spouse. However, this has not been the general pattern of movement observed by the Forced Marriage Unit who indicated that sponsors generally return to the UK until they reach the sponsorship age."

There was no attempt in the document to explain why the Secretary of State had concluded that the increase would indeed be proportionate in the light of its effect on those who entered into marriages which were not forced and of whom at least one was aged between 18 and 21. There was no attempt even to address the size of that constituency.

29. In an annexe to the report there was an analysis of the responses to the consultation. It was to the effect that, of the 89 relevant respondents, 45 had supported the increase, 41 had opposed it and three had expressed mixed views. Of the 45 in support, most had suggested that an increasing level of maturity and

education during the three years would help a potential sponsor to resist being forced to marry but four of them had nevertheless doubted whether the increase would achieve its stated aim. Of the 41 in opposition, many had suggested that it would be discriminatory towards ethnic communities in which marriage at a young age was the cultural norm and would impact unfairly on the parties to marriages in which at least one of them was aged between 18 and 21 in that most of such marriages were not forced. In general the analysis of responses in the annexe was fairly summarised in para 3.5 of the document, set out at para 27 above.

E. THE ENGAGEMENT OF ARTICLE 8, ECHR

30. In *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368, Lord Bingham suggested, at para 17, that the engagement of article 8 depended upon an affirmative answer to two questions, namely whether there had been or would be an interference by a public authority with the exercise of a person's right to respect for his private or family life and, if so, whether it had had, or would have, consequences of such gravity as potentially to engage the operation of the article. Having analysed the authority, namely *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112, which, at para 18, Lord Bingham had cited by way of justification of the terms in which he had cast his second question, the Court of Appeal in *AG (Eritrea) v Secretary of State for the Home Department* [2007] EWCA Civ 801, [2008] 2 All ER 28, observed, at para 28, that the threshold requirement referable to the nature of the consequences was "not a specially high one".

31. Mr McCullough QC, on behalf of the Secretary of State, concedes that family life arose upon the marriage of each of the respondents to their sponsors notwithstanding that, at the date of the refusals of the marriage visas, it had scarcely been established in the case of the second respondent and was relatively undeveloped in the case of the first respondent. Counsel correctly suggests, however, that the more exiguous is the family life, the more substantial are the requisite consequences.

32. These were two British citizens who had lived throughout their lives in the UK and who, aged 17 and 18 respectively, had just embarked upon a consensual marriage. The refusal to grant marriage visas either condemned both sets of spouses to live separately for approximately three years or condemned the British citizens in each case to suspend plans for their continued life, education and work in the UK and to live with their spouses for those years in Chile and Pakistan respectively. Unconstrained by authority, one could not describe the subjection of the two sets of spouses to that choice as being other than a colossal interference with the rights of the respondents to respect for their family life, however exiguous the latter might be.

33. But central to this appeal is Mr McCullough's reliance in this regard on the decision of the ECtHR in *Abdulaziz v United Kingdom* (1985) 7 EHRR 471. Three women, all lawfully settled in the UK, had married third-country nationals but – at any rate at first – the Secretary of State had refused permission for their husbands to remain with them, or join them, in the UK. In the second and third cases, as a result of a relaxation of the Immigration Rules, adequate permissions had ultimately been granted and had rendered the applications largely academic. In the present proceedings the Court of Appeal distinguished the court's decision in *Abdulaziz* on the ground that the three women were not British citizens but women of other nationalities with, therefore, a right of abode elsewhere. But in the first case the woman had been deprived of her Malawi citizenship and, at the date of the refusal, was stateless; she almost certainly had no right of abode in Malawi. In the second case the woman had become a British citizen albeit following the date of the refusal. And in the third case the woman, albeit not a British citizen until later, was a citizen of the United Kingdom and Colonies at the date of the refusal. In these circumstances it is accepted on behalf of the respondents that the ground of distinction favoured by the Court of Appeal is untenable.

34. The decision of the ECtHR in *Abdulaziz* was that the refusals of permission had not infringed the rights of the women and of their husbands to respect for their family life under article 8 but that, in that the ground for the refusals had been a rule which had afforded a different and unjustified treatment of male, as opposed to female, spouses of persons lawfully settled in the UK, the women had suffered discrimination on the ground of sex in violation of their rights under article 14, taken together with article 8, of the Convention.

35. The importance of the decision for present purposes is the route by which the court came to reject the complaint under article 8 alone. The majority held that article 8 was not engaged; two judges, however, concurred in the conclusion in relation to article 8 only on the basis that, although the article had been engaged, the interference with respect for the family life of the applicants had been justified under article 8(2). In para 66 to para 68 of their judgment the majority stressed that:

(a) the suggested obligation of the state was a positive one – i.e. to take active steps to admit the husbands – and "especially as far as … positive obligations are concerned, the notion of 'respect' is not clear cut";

(b) immigration control was an area in respect of which states enjoyed a wide margin of appreciation;

(c) the rights of the husbands to enter, or remain in, the UK under the rules were known to be precarious when the marriages were contracted; and

(d) the extent of a state's obligation to admit spouses of settled immigrants depended upon the circumstances of each case and the women had not shown that they could not establish family life "in their own or their husbands' home countries".

36. The majority also said, at para 68:

> "The duty imposed by article 8 cannot be considered as extending to a general obligation on the part of a contracting state to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country."

The above proposition has recently been cited with approval both in the ECtHR (see *Y v Russia* (2008) 51 EHRR 21, at para 103) and in this court (see *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 WLR 148, at para 19, per Baroness Hale).

37. Four decisions of the ECtHR subsequent to *Abdulaziz* deserve attention.

38. First, *Gül v Switzerland* (1996) 22 EHRR 93. A Turkish father, who had been permitted on humanitarian grounds to reside with his wife in Switzerland, failed to establish that, by refusing to allow their seven-year-old son to join them in Switzerland, the state had interfered with respect for his family life. Although, therefore, the court applied the decision in *Abdulaziz*, it stressed, at para 41, that the father and his wife had no permanent right of abode in Switzerland. In a powerful dissenting opinion two judges explained why in their opinion the state had not only interfered with the applicant's right under article 8 but, by reference to the terms of its paragraph two, had violated it. In effect they pointed out, at para 7 and para 8, that in *Abdulaziz* stress had been laid on the fact that the disputed obligation was positive (to allow the husbands to reside in the UK); that the disputed obligation in the present case was similar (to allow the son to reside in Switzerland); that, where the challenge was to the state's removal of a person, the disputed obligation was negative (not to remove him); that it would be illogical if this elusive difference were to affect whether there had been interference with rights under article 8; and that indeed, since the decision in *Abdulaziz* in 1985, the difference in the court's treatment of positive and negative obligations had dwindled away.

39. Second, *Boultif v Switzerland* (2001) 33 EHRR 1179. An Algerian citizen married a Swiss citizen and was permitted to reside in Switzerland. Following his conviction for a robbery the state refused to extend his residence permit and he was removed from Switzerland. The court found that his right under article 8 had been infringed. The court, at para 40, summarily addressed the initial question whether the state had interfered with his right as follows:

> "In the present case, the applicant, an Algerian citizen, is married to a Swiss citizen. Thus, the refusal to renew the applicant's residence permit in Switzerland interfered with the applicant's right to respect for his family life …"

The question whether the couple could reasonably live together in Algeria was answered, negatively, at para 53, only in the course of the court's enquiry into whether the interference was justified.

40. Third, *Tuquabo-Tekle v The Netherlands* [2006] 1 FLR 798. A mother, father and their three sons were of Eritrean ethnicity but lived in the Netherlands and had acquired Dutch citizenship. When leaving Eritrea in 1989, the mother had left behind a daughter, then aged eight. When she was aged 15, an application was made for her to be allowed to enter the Netherlands in order to live with the family; but it was refused. The court held that, by the refusal, the state had violated the rights under article 8 of all six of its members. The court observed, at para 41 and para 42, that the asserted obligation of the state was positive, that "the boundaries between the state's positive and negative obligations under this provision do not lend themselves to precise definition" and that "the applicable principles are, nonetheless, similar". The minority view in *Gül* had become that of the majority. The court did not tarry to consider interference: it moved straight to justification.

41. And fourth, *Rodrigues da Silva, Hoogkamer v Netherlands* (2006) 44 EHRR 729. A Brazilian citizen lived, albeit unlawfully, in the Netherlands. She gave birth to a daughter who lived with the father but with whom she had contact. The court held that the state's refusal to grant a residence permit to the mother had violated her right and that of the daughter under article 8. The court acknowledged, at para 38, that, in that the state had never granted a residence permit to the mother, its breach was of a positive, rather than of a negative, obligation.

42. The difficulty for the respondents which arises out of the case of *Abdulaziz* lies less in the proposition at para 68 of the judgment, set out in para 36 above, and more in the actual decision of the majority. The proposition is only to the effect that article 8 imposes no general obligation on a state to facilitate the choice made

by a married couple to reside in it. On analysis, the proposition is unexceptionable: it invites, instead, a fact-specific investigation, which logically falls within the realms of whether the state's obstruction of that choice is justified under paragraph 2. But the actual decision enables Mr McCullough to ask: inasmuch as there was not even an interference with the rights under article 8 of the three women in *Abdulaziz* in refusing to allow their husbands to join them, or remain with them, how can the analogous decisions of the state in the present cases generate a different conclusion?

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

F. JUSTIFICATION UNDER ARTICLE 8(2)

44. The burden is upon the Secretary of State to establish that the interference with the rights of the applicants under article 8, wrought by the amendment to rule 277 effective from 27 November 2008 ("the amendment"), was justified under paragraph 2 of the article: see *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66, [2004] 2 AC 42, para 37. But in an evaluation which transcends matters of fact it is not in my view apt to describe the requisite standard of proof as being, for example, on the balance of probabilities.

45. The amendment had a legitimate aim: it was "for the protection of the rights and freedoms of others", namely those who might otherwise be forced into marriage. It was "in accordance with the law." But was it "necessary in a democratic society"? It is within this question that an assessment of the

amendment's proportionality must be undertaken. In *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, Lord Bingham suggested, at para 19, that in such a context four questions generally arise, namely:

a) is the legislative objective sufficiently important to justify limiting a fundamental right?

b) are the measures which have been designed to meet it rationally connected to it?

c) are they no more than are necessary to accomplish it?

d) do they strike a fair balance between the rights of the individual and the interests of the community?

In the present case the requisite enquiry may touch on question (b) but the main focus is on questions (c) and (d).

46. But what is the nature of the court's enquiry? In *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 Lord Bingham said, at para 30:

> "it is clear that the court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting… There is no shift to a merits review, but the intensity of review is greater than was previously appropriate, and greater even than the heightened scrutiny test… The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time... Proportionality must be judged objectively, by the court…"

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

of the Immigration Act 1971, it would go too far to say that any changes ultimately made had the imprimatur of democratic approval such as would be relevant in particular to any answer to question (d) set out in para 45 above.

47. In the present appeals the questions identified above fall upon two sides. One side asks whether, and if so to what extent, the amendment is likely to have deterred, and to continue to deter, *forced* marriages. The other side asks how many parties to *unforced* marriages are likely to be condemned by the amendment to suffer the interference with their rights exemplified in the two cases before the court.

48. The Secretary of State's contention that the amendment is likely to deter *forced* marriages remains based upon the four bullet points included in para 34 of her report entitled "Marriage Visas: The Way Forward", set out in para 27 above. Her main suggestion is that the passage of up to three years should strengthen the ability of either the intended or the actual victim of a forced marriage to resist either entry into it or her later act of sponsorship which, were she to have remained living in the UK, would enable the spouses to cohabit here. The suggestion is tenable. But ten other questions arise and, since they are but questions, there is no need for me to identify in the materials and submissions presented to the court the source from which they come. In what follows I will, for convenience, take the victim of a forced marriage to be a girl present and settled in the UK whose parents force her to marry a man resident abroad without a pre-existing right of abode in the UK.

49. The ten questions are as follows:

a) Of the 13 motives for forcing a marriage suggested in para 36 of the guidance published by the Secretary of State in November 2008, set out in para 10 above, how prevalent in the genesis of forced marriages is that of "Assisting claims for UK residence and citizenship"?

b) From the fact that a forced marriage has precipitated an application for a marriage visa does it follow that the motive behind it was immediately to secure the visa and that, were it not immediately available, the marriage would not have occurred?

c) Even if by virtue of the amendment, the ages of the girl and/or of the man were such as to preclude the grant of a marriage

visa for up to three years, might the parents nevertheless force the girl into the marriage in order, for example, to prevent her from entering into a consensual marriage which they regarded as unsuitable?

d) Even if the effect of the amendment were to preclude the immediate grant of a marriage visa, might the girl nevertheless be forced to marry the man abroad and thereupon be kept under control abroad until their ages were such as to enable her successfully to sponsor his application for a visa?

e) In the example at (d) might the girl kept under control abroad there have a lesser opportunity to escape from the forced marriage than if the rules had enabled her to set up home with the man in the UK immediately following the marriage?

f) Alternatively to the example at (d), might the girl be brought to the UK following the forced marriage and be kept under control in the UK until their respective ages were such as to enable her successfully to sponsor the man's application for a visa?

g) Even if the preclusion of the grant of a marriage visa for up to three years were to deter her parents from forcing the girl to marry at that stage, might the result be an increased intensity of control on their part over her for that period – whether by moving her abroad or by continuing to keep her in the UK – and, in either event, would her increasing maturity be likely to enable her to combat it?

h) How readily could one or more false certificates of birth be obtained which would deceive the immigration authorities into accepting that the girl and the man were both aged over 21?

i) Might the effect of the amendment be to precipitate a swift pregnancy in the girl, following the forced marriage and an act or acts of rape, such as might found an application for a discretionary grant of a marriage visa by reference to exceptional, compassionate circumstances?

j) Even if the effect of the amendment were to deter her parents from forcing the girl to marry a man resident abroad without a pre-existing right of abode in the UK, might they instead force her to marry a man with UK or EU citizenship or some other pre-existing right of abode in the UK?

50. The ten questions are not easily answered. Professor Hester and her team attempted to address most, if not all, of them but, for reasons good or bad, the Secretary of State did not accept her report. In June 2008 the Home Affairs Select Committee urged the Secretary of State not to introduce the amendment until, following further research, there was conclusive evidence about its effect. But she proceeded to introduce it. The questions remain unanswered. The Secretary of State has failed to demonstrate that, when she introduced it, she had robust evidence of any substantial deterrent effect of the amendment upon *forced* marriages.

51. I turn to *unforced* marriages. What was the likely scale of the inevitably detrimental effect of the amendment on unforced marriages. A subsidiary question, raised by the Home Affairs Select Committee in June 2008, was whether the detrimental effect was likely to be visited disproportionately upon members of communities with a tradition of marriage at a young age.

52. In this regard the evidence of the Secretary of State in these proceedings was provided by Ms Smith, Deputy Director of Immigration Policy. She said:

> "17. The question of proportionality in terms of the impact upon couples intending to enter a marriage that was not forced where one or both of the couple are aged under 21 was considered carefully when drafting the policy.
>
> …
>
> 20. …the numbers affected by the rule change constituted a very small proportion of those applying for marriage visas for the UK. In 2006, for example, 7% (3,420) of spouses granted leave to enter the UK were aged between 18 and 20 and 2.5% (520) of people granted leave to remain in the UK as a spouse were within this age group. In 2007, 2.7% (1,245) of spouses granted leave to enter and 2.6% (700) of spouses granted leave to remain in the UK as a spouse were aged 18 to 20…

> 21. We concluded that as the policy would affect less than 3% of those granted both leave to enter and leave to remain in the UK as a spouse in 2007, and as the evidence demonstrated that the rates of forced marriage were highest amongst those aged 17-20 in 2005-2008, the policy would represent a proportionate response to the issue of forced marriage, and the importance of protecting the rights and freedoms of vulnerable persons who might be forced into marriage would outweigh the significance of any adverse impact on particular communities or age groups…"

53. But it establishes nothing to note first that 3,940 and 1,945 marriage visas were granted in 2006 and 2007 respectively to those aged between 18 and 20; second that at any rate the figure for 2007 was less than 3% of all marriage visas granted in that year (therefore presumably amounting to about 65,000); and that the rates of forced marriage were highest (ie about 30% - see para 11(d) above) among those aged between 17 or 18 and 20. To deny marriage visas to 3,940 or even only to 1,945 applicants in a year is, irrespective of percentages, to deny them in a vast number of cases. The relevant question relates to the likely size of forced marriages within these numbers.

54. The evidence does not begin to provide an answer to this question. By referring back to para 11(d) above, we can compare the number of cases in 2006 in which the FMU provided support to victims or potential victims of forced marriage aged between 18 and 20, namely 44, with the number of visas granted to that age-group, in that year, namely 3,940; for 2007, the comparison is of 69 with 1,945; and, albeit only partly visible in what I have set out above, the evidence suggests a comparison for 2005 of 44 with 3,065. But the above exercise is hardly worth the undertaking. For on the one hand the FMU's figures relate to all forced marriages, irrespective of whether the spouse may reside in the UK only pursuant to a marriage visa. On the other hand – and no doubt much more importantly – the FMU's figures understandably represent only a proportion of all intended forced marriages. So double them? Or treble them? Or multiply them by ten? The only conclusion soundly available on the evidence before the court – not challenged by the Secretary of State save in relation to the emotive word "exile" – is, in the words of Sedley LJ in the Court of Appeal, that "rule 277 is predictably keeping a very substantial majority of bona fide young couples either apart or in exile" and that it has a "drastic effect… on thousands of young adults who have entered into bona fide marriages". As the Secretary of State acknowledges, the amendment is, in the words of Gross LJ, "a blunt instrument".

55. On 10 May 2011 the Home Affairs Select Committee of the House of Commons published a report, entitled "Forced Marriage", by which it reviewed developments in relation to the matters which it had addressed in its report published on 13 June 2008. In a short section it noted the amendment introduced

by the Secretary of State and the decision of the Court of Appeal in these proceedings. It then summarised evidence which it had received both from Karma Nirvana, a respected organisation providing support to victims or potential victims of forced marriage, and from Southall Black Sisters, an intervener in these appeals and an equally respected organisation dedicated to the protection of black and Asian women from abuse of all types including forced marriage. The committee stated:

> "16. Karma Nirvana supported the change in the Immigration Rules on the grounds that:
>
> > We at Karma Nirvana have received feedback from victims that they have been helped by the rule. On the helpline we receive a number of calls from potential victims (and professionals on their behalf) under the age of 21 years asking about their 'legal' position. Most, if not all, seem quite relieved to find that they have extra 'breathing space' in which to make up their minds.
>
> 17. However, Southall Black Sisters disagreed that the change has had a positive effect, stating that 'it does not in reality protect victims from forced marriage, but simply increases pressure on them to remain within an abusive situation, and discriminates against migrant communities'. In evidence to our predecessor Committee in March 2010, Nazir Afzal of the Crown Prosecution Service, had mixed views:
>
> > I have spoken to several members of the third sector and police officers… and they tell me that it has had a very positive effect in terms of the people who would ordinarily have been forced into marriage at an earlier age… several hundred women have not been forced into marriage because they have been given the opportunity to wait until beyond 21… It has sent out a message to some families and to some communities that they need to be taking this a little bit more seriously than they have done. However, there has been an increase in relation to fraud involving birth certificates obtained abroad for individuals who are trying to pretend that they are 21 when they are not.

> 18. We have received mixed evidence about the impact of the change in the Immigration Rules in 2008 to require sponsors of marriage visas and their incoming spouses to be over the age of 21. We recognise that the change may be seen as discriminatory and has the potential for young people to be held in abusive situations for longer; however, it has undoubtedly helped a number of young people to resist forced marriage."

56. The Secretary of State suggests that the Select Committee's recent report, not available to the Court of Appeal, remedies any deficiencies in her case in relation to the proportionality of the amendment and thus to the justification for her interference with the rights of the respondents. I disagree. Although its reference to discrimination against migrant communities is, by implication, a reference to unforced marriages within those communities, the Select Committee's report is, as its title suggests, upon forced marriage; and the focus of the conflicting evidence which it surveyed related to whether the amendment had succeeded in deterring it. The committee did not also weigh its effect on unforced marriages in the manner mandated of the court by article 8(2).

57. There is a helpful parallel with the decision in *R (Baiai) v Secretary of State for the Home Department* [2008] UKHL 53, [2009] AC 287. In order to prevent marriages of convenience in the UK the Secretary of State introduced a scheme under which certain persons subject to immigration control required her written permission to marry and would not receive it unless they were present in the UK pursuant to a grant of leave for more than six months of which at least three months was unexpired. The House of Lords held that, notwithstanding that the right to marry under article 12 was not qualified in the way in which article 8(2) qualified the right in article 8(1), the state could take reasonable steps to prevent marriages of convenience; but that the scheme represented a disproportionate interference with the right to marry. It was, said Lord Bingham at para 31, "a blanket prohibition on exercise of the right to marry by all in the specified categories, irrespective of whether their proposed marriages are marriages of convenience". The scheme, said Lady Hale at para 43, was "over–inclusive" and "[m]aking a serious attempt to distinguish between the 'sham' and the genuine was considered too difficult and too expensive". On 14 December 2010, in *O'Donoghue v United Kingdom* (Application No 34848/07), the ECtHR approved the decision in *Baiai* and extended it to two later versions of the Secretary of State's scheme. Furthermore, in *Thlimmenos v Greece* (2000) 31 EHRR 411 it held that the application of a rule that a felon could not become a chartered accountant infringed the rights under article 14, taken in conjunction with article 9, of a pacifist convicted of the felony of refusing to perform military service. The court observed, at para 47, that it was legitimate to exclude some felons from entitlement to become chartered accountants but that there was no objective and reasonable justification for having treated the applicant in that way.

58. I would, in conclusion, acknowledge that the amendment is rationally connected to the objective of deterring forced marriages. So the Secretary of State provides a satisfactory answer to question (b) set out in para 45 above. But the number of forced marriages which it deters is highly debatable. What seems clear is that the number of unforced marriages which it obstructs from their intended development for up to three years vastly exceeds the number of forced marriages which it deters. Neither in the material which she published prior to the introduction of the amendment in 2008 nor in her evidence in these proceedings has the Secretary of State addressed this imbalance – still less sought to identify the scale of it. Even had it been correct to say that the scale of the imbalance was a matter of judgement for the Secretary of State rather than for the courts, it is not a judgement which, on the evidence before the court, she has ever made. She clearly fails to establish, in the words of question (c), that the amendment is no more than is necessary to accomplish her objective and, in the words of question (d), that it strikes a fair balance between the rights of the parties to unforced marriages and the interests of the community in preventing forced marriages. On any view it is a sledge-hammer but she has not attempted to indentify the size of the nut. At all events she fails to establish that the interference with the rights of the respondents under article 8 is justified.

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

LADY HALE

60. I agree that the Secretary of State has infringed the article 8 rights of the parties to each of the marriages with which we are concerned and that these appeals should therefore be dismissed. Lord Wilson has dealt comprehensively with the relevant evidence, information and arguments and I add these few comments only because we are not all of the same mind.

61. The issue, as Mr Drabble reminded us at the outset of his submissions, is whether the Secretary of State has acted incompatibly with the Convention rights of these particular young people. By reason of section 6(1) of the Human Rights Act 1998, it is unlawful for her to do so. This is subject to section 6(2), where a

public authority is acting, to put it loosely, in compliance with primary legislation which cannot be read or given effect in any other way. That is not this case. The Secretary of State has acted in compliance with her own Immigration Rules, which do not even have the status of delegated legislation: see *Odelola v Secretary of State for the Home Department* [2009] UKHL 25, [2009] 1 WLR 1230. She does have a choice and it is her duty to act compatibly with the Convention rights of the people with whom she is concerned. Of course, where delicate and difficult judgments are involved in deciding whether or not she has done so, this Court will treat with appropriate respect the views taken by those whose primary responsibility it is to make the judgments in question. But those views cannot be decisive. Ultimately, it is for the court to decide whether or not the Convention rights have been breached: *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100; *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420.

62. The immigration rules in question, paragraph 277 (which applies to spouses and civil partners) and its counterpart in paragraph 289AA (which applies to fiancé(e)s and proposed civil partners), make an exception to the general rules governing the admission of spouses and fiancé(e)s, civil partners and proposed civil partners, of people who are present and settled or being admitted for settlement here. Those rules (paragraphs 281 and 290) require principally that the parties have met and intend to live permanently with each other as spouses or civil partners; there are also requirements as to self-sufficiency and knowledge of the English language. These requirements have a discernible connection with immigration control. The rules reflect a general policy that, subject to such conditions, spouses, partners and fiancé(e)s should be able to join their spouses, partners and fiancé(e)s who are settled here.

63. The exception with which we are concerned prohibits the grant of a "marriage visa" (strictly, entry clearance, leave to enter, leave to remain or variation of leave on marriage grounds) unless both parties to the marriage or civil partnership will be aged 21 or over on the date of the applicant's arrival in the United Kingdom or the grant of leave to enter, leave to remain or variation of leave, as the case may be. We happen to be concerned with the extension of that exception from those below 18 to those below 21. No-one challenged its introduction for 16 and 17 year-olds, so we cannot speculate about them. The crucial point is that, as the Secretary of State assures us, and the other parties accept, the purpose of this exception has nothing to do with immigration control. Its sole purpose is to deter or prevent forced marriages.

64. Forced marriage can be defined in a number of different ways. There is a definition in section 63A(4) and (6) of the Family Law Act 1996 for the purpose of the power to grant civil protection orders, which was inserted into the 1996 Act by the Forced Marriage (Civil Protection) Act 2007: see para 68 earlier. In 2000 a

Home Office Working Group, in *A Choice by Right*, defined forced marriage as "a marriage conducted without the valid consent of both parties where duress is a factor" (p 6). But the Group took a broad view of what constituted duress. They pointed out that, for the purpose of rendering a marriage voidable under section 12(c) of the Matrimonial Causes Act 1973, the Court of Appeal in *Hirani v Hirani* (1984) 4 FLR 232 had defined the test for duress as "whether the mind of the applicant (the victim) has in fact been overborne, howsoever that was caused" (p 7). They went on to explain that "There is a spectrum of behaviours behind the term forced marriage, ranging from emotional pressure, exerted by close family members and the extended family, to the more extreme cases, which can involve threatening behaviour, abduction, imprisonment, physical violence, rape and in some cases murder" (p 11). More recently, *The Right to Choose: Multi-agency statutory guidance for dealing with forced marriage* (2008), takes a similar broad view, defining a forced marriage as one "in which one or both spouses do not (or, in the case of some vulnerable adults, cannot) consent to the marriage and duress is involved". The duress in question is not limited to physical duress, but may involve emotional, psychological, financial or sexual duress. An example given of emotional duress is making the individual feel as though she is bringing shame upon her family by not entering into the marriage. Hence both the definitions of a forced marriage referred to above give a wider meaning to duress than its traditional definition in the criminal law, which is limited to threats of physical harm (*Archbold, Criminal Pleading Evidence and Practice 2011*, para 17.120). But most forced marriages will be legally valid unless or until they can be avoided or dissolved.

65. Forced marriages, even in the wider sense set out in these definitions, are quite different from arranged marriages, in which "the families of both spouses take a leading role in arranging the marriage, but the choice whether to solemnise the arrangement remains with the spouses and can be exercised at any time" (*A Choice by Right*, p 10). In various forms this has been a common and perfectly acceptable practice in many, even most, societies throughout history. The idea that young (and not so young) people should find and choose their partners without either the help or approval of their families is a comparatively modern one. But clearly the dividing line between an arranged and a forced marriage may be difficult to draw, particularly in communities where there is a strong cultural tradition that it is for the parents to control their children's marriages. But anyone who has read Jasvinder Sanghera's powerful novel based on her own experiences, *Shame* (Hodder and Staughton, 2007), can be in no doubt that the difference is real and the consequences of forcing anyone into a marriage which she does not want are grave indeed, not only for the victims but often also for their families. As the Working Group pointed out, the perpetrators' aim may be to strengthen the family and protect their culture, but it may have the reverse effect of turning their children against their background because of their experiences (*A Choice by Right*, p 20).

66. In today's world, it is recognised that everyone has the right to decide whether or not to enter a particular marriage. Article 23(3) of the International Covenant on Civil and Political Rights (ICCPR), in an exact echo of article 16(2) of the Universal Declaration of Human Rights, requires that "No marriage shall be entered into without the full and free consent of the intending spouses": see also article 1 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, article 10(1) of the International Covenant on Economic, Social and Cultural Rights (ICESC), article 16(1)(b) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). "Full and free" means that the marriage should be entered into without improper pressure of any kind. Equally, it is recognised that anyone of marriageable age is free to marry whom they choose: see article 16(1) of the Universal Declaration, article 23(2) of the ICCPR, article 16(1)(a) of CEDAW, and of course article 12 of the ECHR. The right to marry is just as important as the right not to marry.

67. Married couples also have the right to live together. This is inherent in the right to found a family, which is coupled with the right to marry in the Universal Declaration, the ICCPR and the ECHR. But the ECHR goes further, because article 8 protects the right to respect for family life. "Family life" arises virtually automatically upon a genuine marriage. In *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471, at para 62, 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, such as that contracted by Mr and Mrs Abdulaziz and Mr and Mrs Balkandali, even if a family life of the kind referred to by the Government has not yet been fully established". The Court also decided, at para 63, that "family life" had been established between Mr and Mrs Cabales, even though there was a question mark over the formal validity of their marriage, because they had gone through a ceremony of marriage, believed themselves to be married and genuinely wished to cohabit and lead a normal family life. Hence all three marriages were "sufficient to attract such respect as may be due under article 8".

68. Most significantly for our purposes, the Court held at para 62 that "the expression 'family life' in the case of a married couple, normally comprises cohabitation. The latter proposition is reinforced by the existence of article 12, for it is scarcely conceivable that the right to found a family should not encompass the right to live together." However, in the context of immigration control, the court went on to hold, at para 68, that "The duty imposed by article 8 cannot be considered as extending to a general obligation on the part of a contracting state to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country". In all three cases, the marriage had been contracted after the UK spouse had become settled here as a single person, at a time when they must have known that there was no right for the non-UK spouse to join them here, and it had not been shown that there

were obstacles to establishing family life in their husbands' countries or the countries from which they had originally come, or that there were special reasons why this should not be expected of them. The majority therefore held that there was no "lack of respect" for family life and thus no breach of article 8. A minority held that there was a lack of respect, but that it was justified under article 8(2) in the interests of the economic well-being of the country.

69. Although it has not wholly disappeared, subsequent developments have eroded the distinction between the "negative" obligation, not to interfere in family life by expelling one member of the family, and the "positive" obligation, to respect family life by allowing family reunion to take place. Many later cases have repeated the principle stated in *Gül v Switzerland* (1996) 22 EHRR 93, at para 38, that "the boundaries between the state's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, none the less, 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". The language of "fair balance" is much more compatible with a search for justification under article 8(2) than with identifying a "lack of respect" under article 8(1).

70. Nevertheless, the Court continues to state that, in expulsion cases, the question is whether the interference with the family life established in the host country can be justified, whereas in reunion cases, the question is whether the host country should be obliged to allow the family to settle there: for a recent example, see *Haghighi v Netherlands* (2009) 49 EHRR SE8. The factors applicable in deciding whether an expulsion can be justified under article 8(2) have been laid down in the Chamber decision in *Boultif v Switzerland* (2001) 33 EHRR 1179, approved and augmented in the Grand Chamber in *Üner v Netherlands* (2006) 45 EHRR 421. A similar but not identical set of factors has been referred to when deciding whether a failure to grant a permit for family reunion violates article 8, in cases such as *Sen v Netherlands* (2001) 36 EHRR 81, *Tuquabo-Tekle v Netherlands* [2006] 1 FLR 798, *Rodrigues da Silva v Netherlands* (2006) 44 EHRR 729 and *Y v Russia* (2008) 51 EHRR 531.

71. However, the reunion cases do draw upon the distinction, which they attribute to *Abdulaziz*, between cases where family life was established in another country, which the parents left to come to the host country, and now wish to bring a "left behind" child to the host country, and cases, like *Abdulaziz* itself, where a couple marry when one is settled in the host country and wish to establish a home there. In the former type of case, apart from *Gül* itself, the Court has often found a violation in failing to allow the "left behind" member to join the family in the host country. In *Y v Russia*, on the other hand, the Court found no violation in refusing to allow a failed asylum seeker from China to remain with his Russian wife in

Russia. Significantly, however, he had made no attempt to obtain a residence permit as the husband of a Russian national (to which it appears that he would prima facie have been entitled under Russian law) so it was an open question whether he could have done so or whether his wife could join him in China. Even more significantly, perhaps, while drawing its statement of principle, in para 103, virtually word for word from para 39 of *Rodrigues da Silva*, the Court referred to *Boultif* in one of its footnotes. It would appear, therefore, that although all these cases depend upon their particular facts and circumstances, the approach is now similar in all types of case. The Court's approach is much more compatible with an analysis in terms of justification under article 8(2) than with an analysis of the extent to which respect is due under article 8(1): and in *Omoregie v Norway* [2009] Imm AR 170, the Court expressly analysed a reunion case in article 8(2) terms.

72. It would seem, therefore, that we can safely consign the "no lack of respect" aspect of *Abdulaziz* to history. But in this case that debate seems to me to be something of a red herring. In *Abdulaziz* itself it was clearly established that "family life" exists between husband and wife by virtue of their marriage and that "family life" normally comprises cohabitation. Absent the immigration dimension, there can be no doubt that forcing a married couple to choose either to live separately for some years or to suspend their plans to live in one place and go to live where neither of them wishes to live, is, as Lord Wilson puts it at para 32, "a colossal interference" with their right to respect for family life. And in this case, the immigration dimension can be ignored. This measure has not been adopted as a measure of immigration control. The United Kingdom has no objection to admitting genuine spouses who fulfil certain self-sufficiency and language requirements to this country. The Secretary of State cannot at one and the same time say that she is not doing this for the purpose of controlling immigration and rely upon jurisprudence which is wholly premised on the state's right to control immigration. So the only question is whether this "colossal interference" can be justified under article 8(2).

73. The justification claimed is that this measure will prevent, deter or delay forced marriages. This is undoubtedly a legitimate aim, in article 8(2) terms, "for the protection of the rights and freedoms of others". The action taken was undoubtedly "in accordance with the law". The sole question is whether it was "necessary in a democratic society", in other words, whether it was a proportionate response to a pressing social need. As Lord Wilson has shown, there are many reasons to conclude that it was not.

74. First and foremost, although nobody knows the figures, it is clear that the rule will interfere with many more entirely voluntary marriages than it will prevent, deter or delay forced marriages. The scale and severity of the impact upon these unforced marriages has scarcely been considered. Nicola Smith, in her first witness statement on behalf of the Secretary of State, says that it was considered

carefully, but the reasoning was that, as only a small proportion of foreign spouses are from this age group, the impact was proportionate. No-one has said: "We know that many innocent young people will be caught by this rule but we think that the impact upon them will not be so great while the protection given to victims of forced marriage will be so much greater". There are, of course, circumstances in which the imposition of a "blanket" rule can be justified. The best known example is the ban on assisting suicide, upheld by the Strasbourg Court even though not every would-be suicide was vulnerable and in need of its protection: see *Pretty v United Kingdom* (2002) 35 EHRR 1. But even then, an important factor in the Court's decision was the prosecutor's discretion: "It does not appear to be arbitrary … to reflect the importance of the right to life, by prohibiting assisted suicide while providing for a system of enforcement and adjudication which allows due regard to be given in each particular case to the public interest in bringing a prosecution . . ." (para 76). We know from cases such as *Hirst v United Kingdom (No 2)* (2005) 42 EHRR 849, para 82, that a general, automatic, indiscriminate restriction (their word) on a vitally important Convention right falls outside any acceptable margin of appreciation. We are, of course, concerned with a restriction rather than a perpetual ban, but it is none the less general, automatic and indiscriminate. In this case, it is understood that individualised decisions may create their own problems, because taking steps to determine whether or not the marriage is forced may exacerbate the risks to the reluctant spouse. But, as the House of Commons Home Affairs Committee has pointed out, the Government has a mechanism to help reluctant sponsors: *Domestic Violence, Forced Marriages and "Honour"-based Violence*, 6th Report of Session 2007-08, HC 263-I, paras 112–114.

75. Secondly, it is entirely unclear whether the rule does have the desired effect upon the marriages which it is designed to prevent or deter. Karma Nirvana gave evidence that some girls ringing their helpline have found it helpful to be able to say to their families that they will not be able to sponsor an immigrant spouse until they are both 21: House of Commons Home Affairs Committee, *Forced Marriage*, 8th Report of Session 2010-12, HC 880, para 16. But there is also evidence that the desire to obtain a visa is not the predominant motive for forcing a child into marriage. It is only the 12th of the list of 13 motives given in the statutory guidance: see para 10 earlier. We have no idea how many forced marriages with non-resident spouses have been deterred. We have no idea how many forced marriages with resident spouses have been substituted for those which have been deterred. We do know that the rule can have no effect at all upon the forced marriages which take place within this country or within the European Union.

76. Thirdly, we also know that if the rule is not effective in preventing a forced marriage it may do a great deal more harm than good. A young woman may be sent abroad and forced to marry against her will and kept there until she can sponsor her husband to come here. During this time she may be raped many times,

bear children she does not want to have and be deprived of the education and life which she would otherwise have had here. Even if she is allowed to come home, she will not be able to escape from the marriage. She will be obliged to stay married so that she can sponsor her husband to come here. The rule will have made her life more difficult. The cases coming before the Family Division of the High Court, although only the tip of the iceberg, provide ample illustration of the difficulties of rescuing a young person who has been trapped into marriage abroad: see, for example, *In re KR (Abduction: Forcible Removal by Parents)* [1999] 2 FLR 542.

77. Hence it is scarcely surprising that the views of knowledgeable people and organisations are so divided. While Karma Nirvana support the change, Southall Black Sisters and the Henna Foundation do not. In 2008, the Home Affairs Committee concluded, at para 111, that there was not sufficient evidence to determine whether it would have the desired deterrent effect. Given the potential risks involved, it urged that the age should not be raised without further research and conclusive evidence. There certainly was no conclusive evidence when the change was made. The Department had previously commissioned research from Bristol and Manchester Universities, which found that the change would be unlikely to prevent forced marriages, and indeed might increase the risk of negative actions associated with the increased age (Hester and others, *Forced Marriage: the risk factors and the effect of raising the minimum age for a sponsor, and of leave to enter the United Kingdom as a spouse or fiancé(e)*, 2007, chapter 3). The Department concluded that, because of methodological difficulties, these findings should be treated with caution and not regarded as representative. They went on to publish their own consultation paper, *Marriage to Partners from Overseas* (December, 2007). Six months later, they published their conclusions, in *Marriage Visas: The Way Forward* (July, 2008). Clearly, those who choose to respond to consultation papers are even less representative than the organisations, individuals and focus groups who were chosen for the purpose of the academic research. Even so, the response was hardly a ringing endorsement: 15 of the 29 individual respondents supported the change, the organisations were evenly divided between supporters and opponents and three organisations had mixed views. None of this amounts to the conclusive evidence for which the Home Affairs Committee called in 2008. None of it amounts to a sufficient case to conclude that the good done to the few can justify the harm done to the many, especially when there are so many other means available to achieve the desired result.

78. There is a further reason for holding the interference disproportionate. Although the means used is an interference with article 8 rights, the object is to interfere with article 12 rights. The aim is to prevent, deter or delay marriage to a person from abroad. The right to marry is a fundamental right. It does not include the right to marry in any particular place, at least if it is possible to marry

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

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

80. Like Lord Wilson, therefore, I would hold that the Secretary of State has acted incompatibly with the Convention rights of these two couples. I also agree with him that, although we are only concerned with these young people, it is difficult to see how she could avoid infringing article 8 whenever she applied the rule to an unforced marriage.

LORD BROWN

81. Forced marriages are an appalling evil. Most commonly the victims are young women and all too often such marriages occur within the immigrant community. One reason for this, amongst several identified by the National Centre for Social Research (NCSR) in their July 2009 report, is that:

> "FM can be a way of ensuring land, property and wealth remain within a family. It may take place because of a long-standing family commitment or to appease an aggrieved family member. This is often associated with assisting a claim for UK residency and citizenship." (para 2.1)

82. One way of seeking to combat this aspect at least of the problem of forced marriages has been by raising the age at which a UK national or settled resident can sponsor a fiancée or spouse seeking admission to this country (and also the age at which a fiancée or spouse may gain entry). In April 2003 the age for sponsorship was raised from 16 to 18 and in December 2004 the age for those seeking entry was similarly raised. As stated in the July 2008 Home Office UK Border Agency Report (proposing a further such increase from 18 to 21) *Marriage Visas: The Way Forward*: "These measures were introduced to help tackle the problem of forced marriage with the aim of giving young people extra time to mature which would help them to resist inappropriate family pressure to marry." (para 3.1)

83. The proposed further increase from 18 to 21 was implemented by the amendment of paragraph 277 of the Immigration Rules (HC 395) with effect from 27 November 2008. It is this increase which by order made on 21 December 2010 the Court of Appeal declared to be unlawful, at least where, as in the present cases, one party to the (actual or proposed) marriage is a UK national. The essential ground on which the Court of Appeal held the increase to be unlawful was that its interference with the respondents' article 8(1) rights was unjustified and disproportionate (indeed, in Gross LJ's view, "irrational or unreasonable in the traditional, common law, *Wednesbury* sense"). It is my misfortune to disagree with what I understand will be the decision of the majority of the court on this further appeal to uphold the Court of Appeal's conclusion.

84. The Court of Appeal did not have, as this Court has had, the advantage of the May 2011 report (with evidence annexed) of the House of Commons Home Affairs Committee on Forced Marriage. This report, having noted the Court of Appeal's ruling in the present case and that "this matter is still currently before the courts" continues:

> "16. Karma Nirvana [the largest NGO concerned with the victims of forced marriage and an organisation of unchallenged repute] supported the change in the Immigration Rules on the grounds that: 'We at Karma Nirvana have received feedback from victims that they have been helped by the rule. On the helpline we receive a number of calls from potential victims (and professionals on their behalf) under the age of 21 years asking about their 'legal' position.

> Most, if not all, seem quite relieved to find that they have extra 'breathing space' in which to make up their minds.
>
> 17. However, Southall Black Sisters disagreed that the change has had a positive effect, stating that 'it does not in reality protect victims from forced marriage, but simply increases pressures on them to remain within an abusive situation and discriminates against migrant communities.'
>
> In evidence to our predecessor Committee in March 2010, Nazir Afzal of the Crime Prosecution Service, had mixed views:
>
> 'I have spoken to several members of the third sector and police officers . . . and they tell me that it has had a very positive effect in terms of the people who would ordinarily have been forced into marriage at an earlier age . . . several hundred women have not been forced into marriage because they have been given the opportunity to wait until beyond 21 . . . It has sent out a message to some families and to some communities that they need to be taking this a little bit more seriously than they have done. However, there has been an increase in relation to fraud involving birth certificates obtained abroad for individuals who are trying to pretend that they are 21 when they are not.'
>
> 18. We have received mixed evidence about the impact of the change in the Immigration Rules in 2008 to require sponsors of marriage visas and their incoming spouses to be over the age of 21. We recognise that the change may be seen as discriminatory and has the potential for young people to be held in abusive situations for longer; however, it has undoubtedly helped a number of young people to resist forced marriage."

The overall balance of this latest report, as it seems to me, is in favour of the rule change. True, Southall Black Sisters (one of the interveners before this court) are against it. But their view is more than offset by that of Karma Nirvana and Mr Afzal's only concern appears to be in respect of forged birth certificates.

85. There is furthermore before this court information about the practice of other EU countries which impose minimum ages for marriage visas. Germany, Austria and the Netherlands impose an age requirement of 21 for both parties (including their own citizens) precisely as the UK does. Belgium is planning to

have the identical rule (although at present it does not apply to Belgian citizens or EU nationals). Denmark has the same rule except that it imposes a minimum age requirement of 24 rather than 21. In addition our attention is drawn to Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification which, with regard to third country national sponsors, provides (by article 4(5)):

> "In order to ensure better integration *and to prevent forced marriages* Member States may require the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years, before the spouse is able to join him/her". (emphasis added)

The October 2008 Report from the Commission to the European Parliament and the Council on the application of that Directive stated in respect of article 4(5):

> "Most Member States made use of this optional clause, arguing that it can help prevent forced marriages."

86. Now it is of course obvious that this rule has significant disruptive effects on many young couples whose actual or proposed marriages are entirely voluntary - indeed, the very substantial majority of those affected. Predictably these couples, whether or not they marry, will be kept apart or have to live abroad. As, moreover, is recognised in a recent statement (dated 9 June 2011) from Suzelle Dickson, the Joint Head of the Forced Marriage Unit (FMU):

> "The FMU is aware of a concern that the increase in the minimum age for obtaining a marriage visa would lead to young people being kept abroad against their will for an extended period following the marriage until reaching the age for sponsorship.

She adds, however:

> From the FMU's experience the majority of reluctant sponsors return to the UK soon after the marriage although there are no statistics or data held in relation to this. This is generally so that the sponsor can establish themselves financially, gaining employment so that they can support the visa application."

87. It is also perfectly true that, certainly at the time this measure was introduced in November 2008, there had been little in the way of research to indicate just how far the rule would help in combating forced marriages. As,

indeed, the 2011 Home Affairs Committee Report noted (at para 14), their predecessor committee in May 2008 had concluded:

> "We have not seen sufficient evidence to determine whether or not raising the age of sponsorship would have a deterrent effect on forced marriage. Given the potential risks involved, we urge the government to ensure that any changes it proposes to its policy on visa application procedures in respect of sponsorship are based on further research and conclusive evidence as to the effect of those changes."

The unfortunate fact is, however, that, by the same token that the full extent of the problem of forced marriage is impossible to gauge – as stated in the NCSR July 2009 report (para 3), "it is likely that there are a large number of victims who have not come to the attention of any agencies or professionals", described as "hidden" cases – so too research is problematic and "conclusive evidence" impossible to come by. The reason forced marriages are hard to detect is, of course, that victims inevitably risk yet further serious harm and suffering if they reveal the true facts. Lord Wilson (at para 49 of his judgment) poses ten questions – all, I readily accept, perfectly good questions – which (at para 50) he recognises "are not easily answered" and "remain unanswered." The unfortunate fact is, however, that these questions can never be satisfactorily answered and that a judgment call is therefore required. This is a matter to which I return at para 91 below. Or is it to be said that the whole matter is all just too difficult and uncertain and that the Secretary of State is therefore disabled from taking the course adopted by those other EU countries which share her view on the best way forward (although not apparently from increasing the sponsoring age from 16 to 18 as was earlier done)?

88. For my part, therefore, I would be less critical than the majority of the Secretary of State's view – the Hester Research Report having been analysed by Immigration Research and Statistics and two external peer-reviewers as not of sufficient quality to be published by the Home Office – that, "public consultation [having] found that a small majority of respondents were in favour . . . , raising the marriage visa age would represent a robust and publicly endorsed approach to the problem of forced marriage." (para 33 of Nicola Smith's witness statement for the appellant dated 30 October 2009).

89. Altogether more important than this, however, as it seems to me, is that this court's duty is to decide the appeal, not by a reference to the sufficiency or otherwise of the research carried out by the Home Office before the new rule was introduced, but rather by reference to the proportionality as perceived today between the impact of the rule change on such "innocent" young couples as are adversely affected by it and the overall benefit of the rule in terms of combating

forced marriage. As Lord Bingham of Cornhill said in *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, 116, para 31: "what matters in any case is the practical outcome, not the quality of the decision-making process that led to it."

90. In the light of all the material now before this court, most notably the May 2011 Home Affairs Committee Report and Karma Nirvana's evidence before it, the evidence of other EU countries imposing similar minimum age requirements for sponsoring marriages, the 2003 EC Directive (and the 2008 Council Report on its application) recognising that such requirements are widely regarded as helping to prevent forced marriages, the original, never disputed, increase in the age requirement for sponsorship from 16 to 18 with that aim in mind, together with such (admittedly, albeit to my mind inevitably, limited) Home Office statistical evidence as suggests the benefit of a further such increase from 18 to 21, I find it hard to see how this court can properly strike down the rule as incompatible with article 8.

91. The extent to which the rule will help combat forced marriage and the countervailing extent to which it will disrupt the lives of innocent couples adversely affected by it is largely a matter of judgment. Unless demonstrably wrong, this judgment should be rather for government than for the courts. Still more obviously, the comparison between the enormity of suffering within forced marriages on the one hand and the disruption to innocent couples within the 18-21 age group whose desire to live together in this country is temporarily thwarted by the rule change, is essentially one for elected politicians, not for judges. Lady Hale suggests (at para 66 of her judgment) that: "The right to marry is just as important as the right not to marry." But she cannot possibly mean by this that the postponement by up to three years of a couple's wish to live together as man and wife in this country involves just as great a violation of human rights as a forced marriage. What value, then, is to be attached to preventing a single forced marriage? What cost should each disappointed couple be regarded as paying? Really these questions are questions of policy and should be for government rather than us. Of course, the ultimate decision on article 8(2) proportionality must be for the courts but in this particular context the courts should to my mind accord government a very substantial area of discretionary judgment. *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 (to which Lord Wilson refers at para 46 of his judgment) was a very different sort of case from the present, concerning as it did the article 8 claims of two particular individuals on their own special facts. No one was seeking there, as here, actually to strike down an immigration rule. Certainly, at paragraph 16 of the committee's opinion (given by Lord Bingham) in *Huang*, we deprecated the use of the term "deference" to describe the weight to be given to certain factors considered important by the Secretary of State. But we expressly recognised the need to accord "appropriate weight to the judgment of a person with responsibility for a given subject matter

and access to special sources of knowledge and advice." That is precisely what I am suggesting should be done here: it is the Secretary of State who has the responsibility for combating forced marriages in the context of immigration and who should be recognised as having access to special sources of knowledge and advice in that regard.

92. Lady Hale (at para 74 of her judgment) says that: "We know from cases such as *Hirst v United Kingdom (No 2)* (2005) 42 EHRR 849, para 82, that a general, automatic, indiscriminate restriction on a vitally important Convention right falls outside any acceptable margin of appreciation." I confess to the greatest difficulty in understanding the suggested relevance of *Hirst* in the present context. Were the UK government now to legislate to accord the vote, say, to all prisoners serving less than four year terms of imprisonment, could it then seriously be argued that the rule (denying the vote to those serving four years or more) would still fall foul of some principle against "a general, automatic, indiscriminate restriction?" I suggest not and that that would be the real parallel with the rule in the present case (just as with the previous rule postponing sponsorship from 16 to 18 as to which Lady Hale says nothing as, indeed, she says nothing about the similar rules adopted in other Council of Europe states).

93. In any event, it is not as if the Secretary of State makes no exception whatever to the operation of the rule. Obviously, given the difficulty of discovering which marriages (or proposed marriages) *are* forced, exceptions cannot be too readily made if the rule is to have its intended effect. But, in exceptional compassionate circumstances (perhaps, for example, where children are involved or the woman is pregnant) or where, indeed, on the particular facts of an individual case article 8 would otherwise be breached (the demonstrable disadvantage to a particular couple plainly outweighing the public interest in maintaining a general rule for the benefit of the wider community, a category of exception likely to overlap with the first), the rule will be disapplied. Such exceptions, one may note, are broadly mirrored in the Danish legislation (helpfully supplied to us following the hearing by Mr Setright QC acting on behalf of the second interveners) which, by section 9c(i) of the Aliens (Consolidation) Act 2009, provides for a resident permit to be issued to an alien under 24 upon the fulfilment of certain specified conditions "if exceptional reasons make it appropriate, including regard for family unity".

94. Similarly the exception to rule 277 constituted by its further amendment with effect from 6 April 2010 to reduce the minimum age to 18 "if either party is a serving member of HM Forces", so far from "mak[ing] all but untenable the Home Secretary's contention that an all-embracing rule, making no distinction of persons, is necessary if the objective is to be met" (Sedley LJ's judgment at para 57), is to my mind convincingly explained in Nicola Smith's third witness statement (before the Court of Appeal) dated 14 October 2010:

> "The change reflects the unique circumstances in which military personnel operate. Additional support provided by the Armed Forces to families during deployments is more efficiently delivered if they live close to the Service person's duty station. This support gives a Service person a degree of reassurance when they are deployed on operations and is considered to have a positive effect on families at home. It is the Ministry of Defence's view that military personnel will be more operationally effective when deploying to difficult environments if they have increased certainty that their spouse or partner will not be excluded from the UK."

95. Mr Al Mustakim on behalf of the respondents in the second appeal and all the interveners (although conspicuously not Mr Drabble QC for the respondents in the first appeal) seek to rely on the decision of the House of Lords in *R (Baiai) v Secretary of State for the Home Department* [2009] AC 287 in support of an argument under article 12 of the Convention. As Sedley LJ records (para 47 of his judgment), Mr Al Mustakim and the AIRE Centre placed the right to marry at the centre of their arguments and, indeed, Mr Satvinder Juss for the third intervener contends before us (para 1 of his written case) that *Baiai* "is dispositive of this appeal". In my judgment, however, the differences between the two cases are altogether more striking than their similarities and reliance here on the decision in *Baiai* is entirely misplaced.

96. *Baiai* involved a direct contravention of the first limb of article 12, the right to marry. Here by contrast the case cannot be put higher than an interference with the right to found a family. As stated in Clayton and Tomlinson's *The Law of Human Rights*, 2nd ed, (2009) para 13.114: "a claim that legal restrictions preclude a couple from marrying will come under article 12 whereas complaints concerning the state's failure to provide the material circumstances which make marriage effective will engage article 8". Secondly, the legitimate aim advanced for the blanket prohibition in *Baiai* was the combating of marriages of convenience, ie marriages designed to defeat immigration control. Here by contrast the aim is to combat forced marriages, obviously a more compelling objective. Thirdly, the justification advanced for adopting a blanket prohibition rather than investigating each application individually has been very different in the two cases. It is one thing to stigmatize a rule as "insufficiently precisely targeted" (Ms Monaghan QC's characterisation of the respective policies at para 20 of her written argument for the AIRE Centre) if the only reason put forward for not considering cases individually is that "such investigation is too expensive and administratively burdensome" (para 31 of Lord Bingham of Cornhill's judgment in *Baiai*); quite another to do so given, as here, the impossibility (explicitly recognised by Mr Setright in argument) of satisfactorily investigating individual applications in the context of forced marriages.

97. It is now an established principle of our law that the Convention should not be interpreted and applied more generously in favour of an applicant than the Strasbourg jurisprudence clearly warrants. If this court now concurs in striking down rule 277 on article 8 grounds, there is nothing the Secretary of State can do by way of an appeal to Strasbourg to reinstate it. Are we really to say that the position is plain and that Germany, Austria, the Netherlands, Belgium, Denmark and other such Council of Europe states with similar rules must also necessarily be in breach of article 8? What if the equivalent rule is later challenged elsewhere in Europe and eventually upheld in Strasbourg? Article 8 is a difficult provision which has already led to some highly contentious, not to say debateable, decisions. Upon that I am sure we would all agree. In a sensitive context such as that of forced marriages it would seem to me not merely impermissible but positively unwise for the courts yet again to frustrate government policy except in the clearest of cases. To my mind this cannot possibly be regarded as such a case. I would allow these appeals.

LORD PHILLIPS AND LORD CLARKE

98. We agree that these appeals should be dismissed for the reasons given by Lord Wilson and Lady Hale.