EXPERT OPINION ON THE RIGHT TO FAMILY REUNIFICATION AND NON-DISCRIMINATION IN UK LAW

A submission by Dr Hélène Lambert and Professor Rebecca Wallace

Before the Supreme Court in Jerusalem

Sitting as the High Court of Justice

In the matter of:

1. **Adalah – the Legal Center for Arab Minority Rights in Israel**
2. **Ranit Tbilah, ID no. 026177259**
3. **Hatem Tbilah, ID no. 318104429**
4. **Asala Tbilah (minor aged 5.5), ID no. 322628413**
5. **Dima Tbilah (minor aged 4), ID no. 213772106**
6. **Mahmud Sabihat, ID no. 029217403**
7. **Ola Sabihat, ID no. 907526495**
8. **Ahmad Sabihat (minor aged 6), ID no. 212022974**
9. **Muhammad Sabihat (minor aged 6), ID no. 212022453**

Petitioners

- v. -

1. **The Minister of the Interior**
2. **The Legal Advisor to the Government**

Respondents

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of Ministers, and she advised the Governments of Moldova, Ukraine and Serbia-Montenegro on their draft asylum legislation. She also participated in the training of officials on behalf of the Council of Europe and UNHCR in Poland, Slovenia, Moldova, Romania and Serbia-Montenegro. She is a member of the International Law Association (British branch) and was the Chair for the Migration Section of the Society of Legal Scholars (2004-2007).

Selected publications

Books

The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union (Cambridge: Cambridge University Press, accepted for publication and forthcoming 2009) [co-edited with Prof. Guy S. Goodwin-Gill (Oxford)]

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'The European Court of Human Rights and the right of refugees and other persons in need of protection to family reunion', *International Journal of Refugee Law* 11(3), 1999, pp.427-450.

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Selected publications

Books

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Expert Opinion

The Right to Family Unification and Non-Discrimination in the Immigration Law of the United Kingdom

This opinion was written at the request of the Petitioners (*Adalah* – the Legal Center for Arab Minority Rights in Israel) in *Adalah and others v the Minister of the Interior and the Legal Advisor to the Government*, after reading the English translation of the Citizenship and Entry into Israel Law (Temporary provisions) 5763-2003 (CEIL03), Adalah's petition to the Israeli Supreme Court (H.C. 830/07) and the Supreme Court's decision of 14 May 2006 (H.C. 7052/03 *Adalah v Minister of the Interior*).

This case raises fundamental issues of human rights, in particular relating to the right to family life and the principle of non-discrimination. The CEIL03 was initially enacted on 31st July 2003. That CEIL03 was extended throughout 2004 and 2005 and a revised CEIL03 on 1st August 2005 was in turn extended until April 2007. On 28th March 2007 the Knesset enacted a revised CEIL03 for a further period of one year and four months until 31st July 2008.

I. THE RIGHT TO A FAMILY LIFE AS A FUNDAMENTAL RIGHT, UNIVERSALLY RECOGNIZED

1. The right to a family life is a universally recognized fundamental human right It is included in the Universal Declaration of Human Rights 1948 (UDHR48) Article 16(3), the International Covenant on Civil and Political Rights 1966 (ICCPR66) Article 23(1), and the European Convention on Human Rights 1950 (ECHR50) Article 8, all of which forbid arbitrary and unlawful interference with family life. In addition, the United Kingdom (UK) is a member of the European Union (EU), and its legislation and courts' decisions must also comply with EU law in cases involving family members of EU citizens. The UK Government has entered certain reservations to the ICCPR66 (specifically regarding the right to freedom of movement and voting rights) and to the Convention on the Rights of the Child 1989 (specifically in immigration matters). The UK has also opted out of most of the EU legislation adopted specifically in the area of immigration, in particular the EU Council Directive 2003/86/EC on the right to family reunification. Article 8 ECHR50, as incorporated in UK law through the Human Rights Act 1998 (HRA98), is thus by far the most important provision.

2. As reiterated by the European Court of Human Rights (ECtHR) in all cases involving the right to a family life of immigrants:

> "The present case concerns not only family life but also immigration, and the extent of a State's obligations to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest. As a matter of well-established international law and subject to its treaty obligations [such as in the areas of human rights or economic integration], a State has the right to control the entry of non-nationals into its territory".[1]

3. Section II of this Opinion discusses the UK's domestic rules on entry. The general rules on EU law concerning free movement of persons, including family members of EU citizens - as far as these rules may be relevant to the case at hand - are summarized in section III. Section IV looks more closely at considerations of Article 8 ECHR50 claims by public authorities. Section V discusses the issue of non-discrimination. Section VI provides a summary of the key issues regarding family unification in the immigration law of the UK.

II. UK DOMESTIC RULES ON ENTRY

4. A decision which affects a person's family life by its nature affects those with whom s/he enjoys family life. Therefore in any case where family life is considered to exist, there will be a single family life for the particular group of individuals concerned. This family life must be respected as a single entity, taking into account both the rights of the person seeking entry from abroad and those of

[1] *Gül v Switzerland*, ECtHR, judgment of 19 February 1996, para.38.

the other persons (family/sponsor in the UK) with whom s/he claims to enjoy family life.

A. REQUIREMENTS FOR LEAVE TO ENTER/ENTRY CLEARANCE OF SPOUSES (INCLUDING CIVIL PARTNERS)

5. There is no right *per se* in law (i.e., statutory right) for a British citizen or settled person to be joined in the UK by their spouse. Rather the spouse who is abroad must meet certain requirements laid down in the Immigration Rules, and if these are fulfilled, the spouse 'may' be admitted.[2] Thus, the requirements on entry into Britain (of a spouse) are not provided for in an Act of Parliament but in the Immigration Rules.[3] These in turn must be in compliance with the ECHR50 (and EU law in cases involving EU citizens)

6. Anyone who wants to come to the UK as the spouse of someone settled in the UK and who is subject to immigration control must obtain prior entry clearance (separate rules exist for family members of EU/EEA citizens – see section III below). This is so even if they do not come from a visa national country. Para.281 of the current Immigration Rules[4] provides that the applicant must be married to a person:

- Present and settled in the UK (para.281(i)(a))

The person present and settled in the UK is referred to as a 'sponsor'. Sponsors can therefore be British citizens, settled immigrants, or Commonwealth citizens with right of abode, as long as they are ordinarily resident in the UK. A marriage certificate is normally enough to prove formal validity of marriage. However, para.281(i)(b)(ii) continues that:

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

- Each of the parties have met (the impact of this provision is limited mainly to fiancées entering very traditional arranged marriages) (para.281(ii))

- Each of the parties intend to live permanently with each other as spouses or civil partners (para.281(iii))

This requirement is intended mainly to prevent marriages of convenience.

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[2] Note there are also specific rules regarding spouses and children of EU migrant workers. See section III below.

[3] HC 395. The Immigration Rules are the rules made under s 3(2) of the Immigration Act 1971. These constitute a statement of practice, as laid before Parliament by the Home Secretary, to be followed in regulating entry into, and stay of persons in, the UK. This is not the same as 'discretion'.

[4] These were last updated in June 2008 (HC 607). Available at: http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part8/

- Adequate accommodation without recourse to public funds (para.281(iv))

- Being able to maintain themselves without recourse to public funds (para.281(v))

- Recent Immigration Rules (HC 538) have introduced a new basis for entry, namely the spouse of a person with the right of abode or indefinite leave to remain in the UK who has been living abroad with that person as their spouse for at least four years (para.281(i)(b)(i)).

- In December 2007, the Home Office adopted a consultation paper "Marriage Visas: Pre-Entry English Requirement for Spouses" which, if adopted, would require to demonstrate sufficient knowledge of English before being allowed entry to the UK. This requirement would not apply to EU nationals and their dependants or to recognised refugees.

7. In most cases, leave to enter as a spouse is given initially for a period of two years (para.282), following which indefinite leave to remain may be obtained (para.287).

B. REQUIREMENTS FOR LEAVE TO ENTER/ENTRY CLEARANCE OF FIANCÉ(E)S

8. A fiancé(e) from abroad (engaged to be married to a settled person in the UK) may apply for leave to enter provided s/he is seeking leave to enter for marriage (or civil partnership) to a person settled in the UK (para.290(i)). The requirements are otherwise the same as for a spouse.

C. ENTRY INTO THE UK FOR OTHER ADULT RELATIVES

9. Provided they meet the requirements of para.317 of the Immigration Rules, other adult relatives may be permitted to enter and settle in the UK. The main requirements are their relationship to the sponsor,[5] financial dependency, and/or "exceptional compassionate circumstances".[6] In addition, the adult relative must be joining a person settled in the UK; must be adequately accommodated at the sponsor's home, together with any dependants without recourse to public funds; and has no other close relatives in his/her own country.

D. ENTRY INTO THE UK FOR CHILDREN

[5] E.g., widowed parents or grandparents aged 65 or over, and parents or grandparents travelling together of whom at least one is aged 65 or over.

[6] For parent or grandparents under the age of 65 or the son, daughter, sister, brother, uncle or aunt over the age of 18 if living alone outside the UK in the most exceptional compassionate circumstances and mainly dependent financially on relatives settled in the UK.

10. The principle of the welfare of the child is found in the Children Act 1989, s 1 (see also the Adoption and Children Act 2001 s 1). According to this principle, "the child's welfare shall be the court's paramount consideration" in all decisions taken concerning the raising of a child. However, the UK reserved the right not to recognize the duty to give primary consideration to the welfare of the child in immigration cases. Hence, the Court of Appeal held that the welfare of the child is not paramount in immigration matters.[7] Rather, this principle simply informs decisions on immigration and it must be balanced against other important interests in immigration cases (such as, financial support and non-reliance on public funds).[8]

11. The requirements to be met by a child seeking leave to enter the UK are:

- s/he must be seeking leave to enter to accompany or join a parent, parents or a relative settled in the UK;
- must be under the age of 18;
- is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit;
- can be adequately accommodated and maintained by the parents(s) or family relative;
- has a valid entry clearance. (para.297).

12. Similar rules have been introduced in 2008 for family members of what is known as *Tier 1 Migrants.*[9]

13. Appeals against refusal of entry clearance are set out in section 84 of the Nationality, Immigration and Asylum Act 2002 s 84(1)(c). The grounds of appeal are one or more of the following:

- the decision is not in accordance with the Immigration Rules;
- the decision is contrary to the UK Race Relations Act 1996 (c.74) (Discrimination by Public Authorities);
- the decision is contrary to the HRA98 section 6;
- the applicant is an EEA/EU national or a member of an EEA/EU national's family;
- the decision is otherwise not in accordance with the law;
- the discretion conferred by the Immigration Rules should have been exercised differently; and
- the applicant's removal would put the UK in breach of its obligations under the 1951 Refugee Convention or the HRA98.

E. GENERAL GROUNDS FOR REFUSAL OF ENTRY IN THE UK

[7] *R v Secretary of State for the Home Department, ex p Gangadeen* [1998] Imm AR 106.
[8] *R v Secrertary of State for the Home Department, ex p Ahmed and Patel* [1999] Imm AR 22.
[9] This is the term now used for highly skilled migrants who wish to work, or become self-employed in the UK, Part 6A para 245 A, Immigration Rules; the criteria for family members of *Tier 1 Migrants* are set out in para 319A-319K of the Immigration Rules.

14. In addition to the requirements above not being met, the Immigration Rules provide general grounds on the basis of which entry in the UK must be refused and others on the basis of which entry in the UK may be refused (para. 320). Mandatory grounds include: the applicant is currently the subject of a deportation order, failure to provide a valid national passport or other ID document, failure to provide a valid visa, the Secretary of State has personally directed that the exclusion of a person is conducive to public good (in extremely rare cases), and where false representations have been made or false documents have been submitted, or material facts have not been disclosed, in relation to the application. Discretionary grounds include: criminal conviction, and the belief of the immigration officer that exclusion is conducive to the public good, if, for example, in the light of the character, conduct or associations of the person seeking leave to enter it is undesirable to give him leave to enter. In such cases:

> "the immigration officer must specify what past or future action of the person makes his exclusion conducive to the public good. Vague generalisations […] will not suffice".[10]

To be sure, in all such cases, discretion must be exercised in a fair and reasonable manner, in light of the principles developed by the ECtHR under Article 8 ECHR50. This is because since the HRA98, considerations of 'conduciveness to the public good' are closely related to considerations of 'necessary in a democratic society' in Article 8 cases (see section IV below).

III. EU LAW ON FAMILY MEMBERS

15. UK immigration law has been, and continues to be, influenced by the UK's membership to the European Union (EU). Currently, most of the EU legislation adopted specifically in the area of immigration has not been opted in to by the UK (e.g., EU Council Directive 2003/86/EC on the right to family reunification). However, the general rules of EU law concerning free movement of persons of EU/EEA citizens (and their family members) apply to the UK.[11] These rules have only limited (if any) application to the case at hand, and so will be dealt with swiftly.

16. The position can be summarized as follows: non-EU/EEA nationals may benefit from EU free movement law as family members of EU/EEA migrant workers. To be sure, the (non-EU/EEA) family members of an EU/EEA citizen who has exercised his/her right of freedom of movement can benefit from the

[10] G. Clayton, *Immigration and Asylum Law*, 3rd Ed. 2008, at p.238, referring to the Immigration Directorate Instructions of June 2004.

[11] Note that in practice EU citizens have almost identical rights to EEA (European Economic Area) citizens (UK Immigration (European Economic Area Regulations 2006)). Geographically, this would include all 27 Member States of the EU, as well as Iceland, Liechtenstein, Norway and Switzerland (EEA).

rights of entry and residence in the EU.[12] The Member States may nonetheless refuse entry and residence on grounds of public policy, public security, or public health, but only following an individual examination of the particular case. The Member States may also refuse, terminate or withdraw any right conferred by the Directive 2004/38/EC in the case of abuse of rights or fraud, such as marriages of convenience. Finally, a non-EU spouse of an EU citizen who accompanies or joins that citizen can benefit from Directive 2004/38/EC, irrespective of when and where their marriage took place and how that spouse entered the host member state.[13]

IV. CONSIDERATIONS OF ARTICLE 8 ECHR50 FAMILY LIFE CLAIMS BY UK PUBLIC AUTHORITIES

17. Of greater importance to the issues involved in the case at hand are considerations of Article 8 ECHR50 by UK public authorities in claims involving family life. In UK domestic law, the HRA98 provides remedies for a breach of Article 8 ECHR50. In an immigration context, the breach of Article 8 ECHR50 gives ground for appealing against an immigration decision including a refusal of entry clearance of leave to remain (Nationality, Immigration and Asylum Act 2002, s 84(1)(c)).

18. Section 6(1) of the HRA98 makes it "unlawful for a public authority to act in a way which is incompatible with a Convention right".[14] And under s 7(1) of the HRA98, a person who claims that a public authority has acted unlawfully pursuant to s 6(1), may bring proceedings against the public authority in the appropriate court/tribunal or rely on Article 8 ECHR50 in legal proceedings.[15] In the latter case (Article 8 proceedings), UK courts and tribunals will take into account the judgments of the ECtHR. All immigration decisions in the UK must be in compliance with the HRA98, and therefore the ECHR50.

19. Article 8 reads as follows:

> 1. "Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country,

[12] EC Regulation 1612/68, as supplemented by Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

[13] Case C-127/08, *Metock and Others v Minister for Justice, Equality and Law Reform*, European Court of Justice, judgment of 25 July 2008.

[14] In the context of HRA98, a public authority includes the Secretary of State for the Home Department, immigration officers or UK border officers, and a court or tribunal.

[15] In Article 8 family life, it is recognized that all members of a family are victims. See, most recently, *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39, para.43.

for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

20. The right to respect for family life protects established family life and relationships from unjustified interference (e.g., refusal of leave to enter is claimed to be disproportionate by the person seeking entry). So, for a person's right to family life to be violated by an immigration decision, it is not enough that there be an interference with the right; such interference must also be disproportionate to the lawful and legitimate aim of maintaining immigration control or of protecting national security or other interests. This is a question of fact, which when considered on appeal before a UK court must comply with the step-by-step approach adopted by the ECtHR.

A. STEP 1: DOES THE PERSON SEEKING ENTRY INTO THE UK HAVE A FAMILY LIFE THERE?

21. The meaning of 'family life' for Article 8 purposes is that embraced by the UK Immigration Rules (with some minor differences which will not be mentioned within the scope of this Opinion). Essentially it covers the relationships between:

- husband/wife (or civil partners) – the key element being the intention to live permanently with each other and not the validity of the marriage;[16]
- unmarried and same sex partners, if the relationship is of sufficient substance and stability (co-habitation does not constitute a "sine qua non of family life between parents and minor children");[17]
- parent/child/adopted child – the key element being the close personal ties (which is presumed between a child and a natural parent as well as between a child and an adoptive parent);[18]
- grandparents/grandchildren, uncles/aunts, nephews/nieces, foster families – the key element here being the strength of the emotional ties;[19] and
- adult siblings, parents and foster parents/adult children – the key element here being the dependency, beyond normal emotional ties;[20]

22. Each case must be considered on its particular facts.

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[16] *Abdulaziz, Cabales and Balkandali v UK*, ECtHR, judgment of 28 May 1983, para.62.

[17] E.g., *Marckx v Belgium*, ECtHR, judgment of 13 June 1979; *Berrehab v the Netherlands*, ECtHR, judgment of 21 June 1988, para.21; and *Boughanemi v France*, ECtHR, judgment of 24 April 1996, para.35.

[18] Supra 1. See also, e.g., *Nasri v France*, ECtHR, judgment of 13 July 1995; *Ahmut v the Netherlands*, ECtHR, judgment of 28 November 1996; Court of Appeal, *Singh* [2004] EWCA Civ 1075. Adoption is covered in paras. 309A – 316 but will not be covered further within this Opinion.

[19] Supra 16; and *Nsona v the Netherlands*, ECtHR, judgment of 28 November 1996, para.144.

[20] Court of Appeal, *Kugathas* [2002] EWCA Civ 31.

B. STEP 2: ASSUMING THAT FAMILY LIFE DOES INDEED EXIST, WILL REFUSAL OF LEAVE TO ENTER THE UK INTERFERE WITH THAT FAMILY LIFE?

23. Article 8 does not guarantee a person or their family the right to choose to live in the UK if they are able to live with family elsewhere. Refusal of leave to enter will only interfere with family life if there are serious (insurmountable) obstacles to that family life continuing elsewhere, without the family being split up.[21] An insurmountable obstacle would exist, for instance, in the case of a person with refugee status or humanitarian protection status who, for safety reasons, is not able to return to his/her country of origin or nationality.[22] Also, if the 'sponsor' or family in the UK has no permanent right to reside in the UK, there may be no obstacle for continuing family life elsewhere. The approach of the ECtHR is particularly restrictive towards those seeking entry for the purpose of family creation, that is, the members of the family who have never lived together or have lived apart for a long time.

24. The case of *Abdulaziz,Cabales and Balkandali v UK* involved non-British wives granted indefinite leave to remain in the UK and seeking the right to be joined by their non-British husbands. The Immigration Rules (at the time) allowed automatic admission of wives of British men, but there were considerable obstacles to be overcome for the husbands of British women. The ECtHR found that "the applicants had entered upon family life" to a sufficient degree, but that they had "not shown that there were obstacles to establishing family life in their own or their husbands' home countries or that there were special reasons why that could not be expected of them".[23] The ECtHR in particular pointed to the fact that the case concerned the creation of family life, rather than the continuation of already existing family life, and to the absence of obstacles in establishing family life in their husbands' countries. It then added that the three wives knew at the time they entered into marriage that their husband had been admitted in the UK only for a limited period or, as in the case of Cabales, had not yet been given leave to enter.[24] Therefore, the British Immigration Rules at the time did not *per se* violate Article 8. Nonetheless, since the right sought by the applicants could only be exercised by men, a violation of Article 14 – non-discrimination- was found (see section V below).

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[21] Supra 1, para.38. First held in *Abdulaziz* supra 16, para.68. See generally, H. Lambert, *The Position of Aliens in relation to the European Convention of Human Rights*, Human Rights File No.8, Council of Europe Publishing (2007), 65-67. For an application of this principle in the UK, see Court of Appeal in *Mahmood* [2000] EWCA Civ 315, and the case of *Singh* supra 18.

[22] H. Lambert, "The European Court of Human Rights and the Right of Refugees and Other Persons in Need of Protection to Family Reunion", *International Journal of Refugee Law* 11(3) 1999, 427-450.

[23] Supra 16, paras.65 and 68.

[24] Ibid.

25. The ECtHR reached a similar conclusion in the case of *Gül v Switzerland*[25] (i.e., no interference) although recognising that "it would admittedly not be easy for [Mr and Mrs Gül] to return to Turkey" to live with their son, there existed "strictly speaking no obstacles preventing them from developing family life in Turkey".[26]

26. However, in *Sen v the Netherlands*,[27] the ECtHR held that there would be a major obstacle to the Sen's family (the parents and two of their three children) returning to Turkey because as a couple they had fully settled in the Netherlands, and the two children had been born in the Netherlands and had always lived there. As a result, to refuse entry to their third child, who had been born in Turkey and raised by an aunt, would be contrary to the right to respect for family life under Article 8.

27. In *Huang & Kashmiri v the Secretary of State for the Home Department*, the House of Lords explained that the key question is:

> "whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighting in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8" (underline added).[28]

28. Again each case must be considered on its particular facts.

C. STEP 3: ASSUMING THAT THERE IS AN INTERFERENCE WITH FAMILY LIFE, IS IT IN ACCORDANCE WITH THE LAW?

29. The decision to refuse leave to enter the UK will be in accordance with the law if it has a basis in law (e.g., the Immigration Rules and the Border and Immigration Agency's published policy) and that law is compatible with the rule of law, is accessible and is foreseeable, that is to say, "it must not be deprived of all guarantees against arbitrariness".[29] The ECtHR explained that:

> "a rule's effects are "foreseeable" if it is formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his conduct. In addition, there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by the Convention [ECHR50]. It

[25] Supra 1. See also, *Ahmut v the Netherlands*, supra 18.
[26] Supra 1, para. 42.
[27] *Sen v the Netherlands*, ECtHR, Judgment of 21 December 2001.
[28] *Huang & Kashmiri v the Secretary of State for the Home Department* [2007] UKHL 11 (HL), para.20.
[29] This requirement was successfully challenged by non-citizens in *Al-Nashif v Bulgaria*, ECtHR, judgment of 20 June 2002, and *Lupsa v Romania*, ECtHR, judgment of 8 June 2006. In both cases, the applicants had been deported on grounds of national security.

> would be contrary to the rule of law for the legal discretion granted to the executive in areas affecting fundamental rights to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference".[30]

30. Again, each case must be considered on its particular facts.

D. STEP 4: IS THE INTERFERENCE PURSUING ONE OF THE PERMISSIBLE AIMS LISTED IN ARTICLE 8(2) ECHR50?

31. The maintenance of an effective immigration control falls within the permissible aims under Article 8(2).[31] Other permissible aims include national security, the prevention of crime and disorder, and public safety. The question therefore is whether the interference (that is the refusal for leave to enter) is aimed at achieving one or more of these objectives.

32. Again, each case must be considered on its particular facts.

E. STEP 5: IS THE INTERFERENCE NECESSARY IN A DEMOCRATIC SOCIETY?

33. In other words, is the interference proportionate to the legitimate aim pursued?

34. The ECtHR recognizes that the "notion of respect" is not clear-cut; this is because

> "States enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention [ECHR50] with due regard to the needs and resources of the community and of individuals".[32]

As a result, regard must be had to

> "the balance struck between the competing interests of the individual and of the community as a whole".[33]

The conclusion reached will be specific to the particular facts of each individual case, and in the light of all relevant factors within that case.

35. In the case of *R v Secretary of State for the Home Department, ex p Daly*,[34] the House of Lords had found that proportionality might 'now' [i.e., post-

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[30] *Al-Nashif v Bulgaria*, supra 29, para.119. See also, *Liberty and Others v the United Kingdom*, ECtHR, judgment of 1 July 2008, para.62

[31] See supra 16.

[32] Supra 16, para.67.

[33] Supra 1, para.38.

enactment of the ECHR50 through the HRA98] require an assessment by the court of the relative weight of various factors in the decision-making process and the balance to be struck between them by the primary decision-maker. Thus in cases involving Article 8, the intensity of the review by the court:

> "is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued".[35]

This case is of some particular interest in the context of this Opinion because it involved the legitimacy of a blanket policy in terms of its effect on an individual prisoner's right to respect for his correspondence under Article 8(1) ECHR50. It was found that in such cases there were two questions to be asked. Firstly, whether the means used to limit the right are no more than is necessary to accomplish the objectives? Secondly, assuming that the means are indeed necessary, whether the complained of measure has an excessive or disproportionate effect on the interests of the affected persons?[36] These questions require consideration of whether the decision-maker has struck a fair balance between the competing interests given the facts of the case. It is generally recognised that the decision-maker is granted a certain margin of appreciation, as explicitly recognised by the ECtHR.[37] How wide this margin is depends on the nature of the right concerned.

36. The right to family life (enshrined in Article 8 ECHR50) is not an absolute right; it is a qualified right. In such cases, the decision-maker is afforded a wide margin of appreciation, and the courts will give a high degree of deference to the opinion of the decision-maker. If, in addition, the legitimate interest being pursued in such a case relates to national security rather than only the maintenance of immigration control, the decision-maker's discretionary area of judgment may be extremely wide indeed, almost absolute.[38]

37. Determining whose right to family life should be taken into account has been addressed in cases involving the removal of one family member. In the case *Kehinde* v *Secretary of State for the Home Department*,[39] stress was laid upon a narrow interpretation of s 65 of the Immigration and Asylum Act 1999 (now s 82 and 84 of the Nationality, Immigration and Asylum Act 2002). In that case it was held that:

> "In an appeal under section 65, therefore, there is no obligation to take into account claims made about the human rights of individuals other than the appellant or individuals who have not themselves been the subject of a decision which is under appeal. Such matters (save in so

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[34] *R v Secretary of State for the Home Department, ex p Daly* [2001] 2 WLR 1622 (HL).
[35] As per Lord Steyn, in *ex p Daly*, ibid, para.27.
[36] Ibid, para.27.
[37] Supra 1, para.38.
[38] *Secretary of State for the Home Department, ex p Rehman* [2001] UKHL 47.
[39] *Kehinde* v *Secretary of State for the Home Department* [2001] UKIAT 00010.

> far as they relate to the human rights of the appellant himself) are irrelevant to the matter under consideration."[40]

However in the case of *Beoku-Betts v Secretary of State for the Home Department*, a wider interpretation was favoured and the House of Lords expressed the view:

> ""there is only one family life", and that, assuming the appellant's proposed removal would be disproportionate looking at the family unit as a whole, then each affected family member is to be regarded as a victim, section 65 seems comfortably to accommodate the wider construction."[41]

38. Similar considerations of proportionality and justification exist in the context of national security and detention pending deportation. The ECtHR has explained that the person whose personal life has been interfered must be able to challenge (under national law), the claim of the Government that national security is at stake.[42] In the UK, the Special Immigration Appeals Commission (SIAC) was set up for that purpose. In all such cases, the courts require that the Government provides a proper explanation of why national security is at stake, although the courts recognise that the Government is the primary decision taker and it is the Government who is in possession of all the evidence (all or much of which is only available to the special tribunal or not disclosed).[43]

39. Under the UK Anti-Terrorism, Crime and Security Act 2001 (ATCS01) Part 4 the Home Secretary may detain foreign nationals suspected of involvement in terrorism on the grounds they are a risk to national security. The indefinite detention of such foreign nationals required the UK to derogate from Article 5 of the ECHR50.[44] The need for such derogation was because immigration detention powers are restricted to the period required for deportation.

40. The Home Secretary's competence under Part 4 of the ATCS01 came before the UK House of Lords in *A and others v Secretary of State for the Home Department*.[45] One point of issue before the court was the detention of non-nationals who were detained because of their risk to national security but who could not be deported as their safety could not be guaranteed. The other issue confronting the court was whether derogation from Article 5 (1) of ECHR50 was justified owing to an ongoing public emergency. The case, initially, came before the SIAC and it had concluded that a public emergency existed and the derogation from the ECHR50 was legitimate. However the SIAC found the orders

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[40] Ibid, para.24.
[41] Supra 15, para.43.
[42] *Al-Nashif v Bulgaria*, supra 29. Note that the formal grounds for 'national security deportation' are that deportation is conducive to the public good (s.3(5)(a) Immigration Act 1971).
[43] *A and others v Secretary of State for the Home Department* [2004] UKHL, 56, at para.177, per Lord Rodger.
[44] This, the UK, did by the Human Rights Act 1998 (Designated Derogation) Order 2001 (SI 2001/3644).
[45] Supra 43.

making the derogation, as well as the relevant provision of the ATCS01, were incompatible with Articles 5 and 14 ECHR50, the reason being that such detentions were discriminatory because British suspects of terrorism could not be detained in the same way.

41. The House of Lords held that although there was not a specific terrorist threat this did not invalidate the judgement that there was a real risk of a terrorist attack at some point in the future. However, the House of Lords maintained that the Court could still consider the proportionality of measures taken by the executive to restrict the rights of individuals. The House of Lords was of the view that the measure taken under the ATCS01 was "illogical, disproportionate to the threat faced…and not justifiable".[46]

42. In summary, the appreciation of whether the right to respect for one's family life in the UK is in compliance with Article 8 ECHR50 must be considered on a case-by-case basis. There cannot therefore be a blanket policy, even when the legitimate interest to be protected is national security. In addition, the measure must be "in accordance with the law" and its effect must be proportionate to the legitimate pursed.

V. NON-DISCRIMINATION

43. The UK is also bound by Article 14 ECHR50. This provision requires that each of the rights and freedoms guaranteed in the ECHR50:

> "be secured without discrimination [*sans distinction aucune*] on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

Although the scope of application of Article 14 ECHR50 is limited to the way in which states guarantee the rights and freedoms defined in the ECHR50 (e.g., the right to a family life), and not any other rights, it does not require an actual violation of a substantive provision.[47]

44. Article 14 is there to ensure that the provisions of the ECHR50 are principally applicable without any distinction between nationals and non-nationals within any given contracting state; nationality *per se* is generally not a permissible ground for different treatment. However, Article 14 does not require absolute equality or

[46] This was because Part 4 of ATCS01 applied only to non-nationals; permitted non-nationals to leave the UK; did not assess the threat from British nationals; and could also apply to those who did not present a threat.

[47] Note that the UK is not a party to additional Protocol No.12 to the ECHR50. This Protocol entered into force on 1 April 2005; it broadens the scope of the application of Article 14 by providing a complete autonomous application of the principle of non-discrimination "to any right set forth by law". It was highlighted by the House of Lords in *A and others,* supra 44*,* that there had been no derogation from Article 14 ECHR50.

identity in treatment in every situation, and factual inequalities may exceptionally call for legal inequalities in the form of special measures. In such cases, this may only be done pursuant to an explicit provision in the ECHR50 allowing for such a differentiation (e.g., Article 15 - derogation in time of emergency; Article 16 - restrictions on the political activity of aliens; Article 8(2) – limitations on the right to respect for family life etc.). For the purpose of the ECHR50, a difference of treatment is discriminatory if it "has no objective and reasonable justification", that is to say, "if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised".[48] The ECtHR further recognises that the "Contracting States enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment".[49] Thus, the ECtHR does not require the identification of an exact comparator between situations. Rather the emphasis is in a difference in treatment (in otherwise similar situations), and whether such difference "can withstand scrutiny",[50] that is to say, whether it pursues a legitimate aim and whether the means chosen to achieve the aim are proportionate.

45. The ECtHR generally accepts the explanation of the state in question regarding the aim pursued by the differential treatment. For instance, in the above case of *Abdulaziz*, the Government referred to the aims of protecting the domestic labour market at a time of high unemployment and 'advancing public tranquility'[51].

46. A measure is proportionate if it strikes a fair balance between the rights and freedoms of an individual, and the general interest (see discussion above on Article 8). The ECtHR recognises a certain margin of appreciation of states, the scope of which will depend on the circumstances, the subject-matter and the background of each particular case. The ECtHR requires that "very weighty reasons" be advanced if a difference in treatment is to be justified on grounds of race, colour or ethnic origin. In such cases, the notion of objective and reasonable justification must be interpreted as strictly as possible.[52] The ECtHR also recognises that "very convincing and weighty" reasons are required to justify a difference in treatment based on sex, sexual orientation, birth or adopted status, or nationality.[53] As explained by Baroness Hale in the recent judgment of the House of Lords in *AL (Serbia) v Secretary of State for the Home Department*,

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[48] E.g., *Belgian Linguistic Case* (merits), ECtHR, 1968, para.34; *Marckx v Belgium*, supra 17; and *Abdulaziz* supra 16, para.72.

[49] E.g., *Stec v UK*, judgment of 12 April 2006, (2006) 43 EHRR 1017, para.51.

[50] *AL (Serbia) and R (Rudi) v Secretary of State for the Home Department*, House of Lords, judgment of 25 June 2008 [2008] UKHL 42, para.24.

[51] Supra 16, para. 81.

[52] Baroness Hale in *AL (Serbia)*, supra 50, para. 29, referring to *DH v Czech Republic* [2007] ECHR 922, judgment of 13 November 2007, para.196. See also, *Timishev v Russia* (ethnic origin and race), ECtHR, judgment of 13 December 2005, discussed below.

[53] E.g., *Abdulaziz*, supra 16, para.78 (regarding sex) and *Gaygusuz v Austria* (regarding nationality), judgment of 16 September 1996.

"some grounds of distinction are so offensive to "our notions of respect due to the individual" that they are seldom if ever acceptable grounds for differences in treatment".[54] She further explains "it is the discriminatory effect of the measure that must be justified, not the measure itself".[55]

47. In the case of *Abdulaziz*, discussed above at para. 24, the ECtHR found that the distinction between men and women introduced, by the then Immigration Rules, which denied the applicants (non-national wives granted indefinite leave to remain in the UK) the right to be joined in the UK by their non-nationals husbands, was disproportionate to the aims pursued. Hence the applicants had been victims of discrimination on the ground of sex. Also in *Timishev v Russia*, the ECtHR considered that:

> "no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin [in this case person of Chechen and non-Chechen ethnic origin] is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for difference cultures".[56]

In that case *Timishev*, the applicant was denied registration of his permanent residence in Nalchik on account of his previously having been a resident of the Chechen Republic. The ECtHR highlighted that:

> "Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds."[57]

The ECtHR in concluding that "discrimination on account of one's actual or perceived ethnicity is a form of racial discrimination"[58] found that:

> "since the applicant's right of liberty of movement was restricted solely on the ground of his ethnic origin, that difference in treatment constituted racial discrimination within the meaning of Article 14".[59]

48. In summary, the ECtHR does not require identical position between different cases, rather it looks at "whether the applicant and the people who are treated differently are in an 'analogous' situation". This, according to the ECtHR, depends on "whether there is an objective and reasonable justification". Thus, unless there are very obvious relevant differences between two situations, one

[54] Baroness Hale in *AL (Serbia)*, supra 50, para. 30.
[55] Ibid, para 37, referring to Lord Bingham in *A and others*, supra 44, para.68.
[56] *Timishev*, supra 52, para.58.
[57] *Ibid* at para 55
[58] Supra 52, para. 56.
[59] Ibid, para.59.

should concentrate on the reasons for the difference in treatment and whether they amount to an objective and reasonable justification.[60] Ethnic origin, race, nationality and birth status are among the criteria that are specially protected by the ECtHR (and therefore the UK courts). In such cases, "very weighty" and convincing reasons must be put forward to justify the discriminatory effect of the measure – not simply the measure itself.

VI. CONCLUSION

49. It is apparent from the foregoing survey of UK immigration rules (and ECHR50 rules) that certain 'safeguard' mechanisms can be accommodated within the rules, e.g., requirements regarding marriage, accommodation, maintenance/sufficient funds, and language. It is equally obvious that it is unnecessary to have a blanket policy. Not only is it unnecessary, it is judicially not acceptable to leave an unfettered discretion to the executive and public authorities! As evidenced the House of Lords has unequivocally stated that any measures applied must be justified and proportionate.

50. The jurisprudence of the ECtHR on family unification is instructive and in point for the present case. The interpretation of the existence of 'family life', 'in accordance with the law', proportionate and justified can be utilised to provide persuasive arguments in favour of *Adalah and others*. Admittedly other principles of ECtHR may not mitigate in *Adalah and other's* favour, *viz* that no insurmountable obstacle exists to that family life continuing elsewhere. However that said what the jurisprudence highlights is that the application of restrictive measures in any one case should be a balancing act giving cognisance to the factual circumstances of all persons involved, e.g., see *Beoku-Betts v Secretary of State for the Home Department*.

51. Regarding non-discrimination, nationality or ethnic origins *per se* is not a permissible ground for different treatment under the ECHR50, unless such difference falls within the parameters of Article 8 (e.g., in accordance with the law, proportionate and justified). The discriminatory effect of the measure itself must be objectively and reasonably justified. ECtHR jurisprudence demonstrates that difference of treatment on grounds of race, ethnic origin, sex, or nationality is difficult to justify and any such argument premised on such grounds would be difficult to sustain.

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Professor Rebecca Wallace

London, 12 September 2008.

[60] Ibid.