NOTES

A HOUSE DIVIDED: THE HUMAN RIGHTS BURDEN OF BRITAIN'S FAMILY MIGRATION FINANCIAL REQUIREMENTS

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I. INTRODUCTION

In July 2012 the United Kingdom promulgated a new immigration rule requiring legal residents wishing to sponsor the entry of a foreign spouse to provide proof of access to an annual gross income of £18,600 (approximately $24,800), and additional savings of £16,000 (approximately $21,300).[1] Such a rule raises questions about how and when domestic immigration policies intersect and come into conflict with the European Convention on Human Rights (ECHR or the Convention).[2] An inability to meet these income requirements has resulted in the separation of families, many with small children.[3]

In June 2013 the BBC reported the story of Douglas Shillinglaw and his family.[4] Because he cannot meet the new financial requirements, Mr. Shillinglaw is unable to reunite with his five-month-old son, his Nigerian wife, and his wife's six-year-old son from a previous relationship.[5] Mr. Shillinglaw is self-employed, and although he claims he has no problems paying his bills and mortgage, he is unable to sufficiently demonstrate to the Home Department he will be able to meet the financial income requirements.[6] Mr. Shillinglaw also commented that the rules do not take into consideration the fact that he has family in the U.K. who would step in and help care for his wife and their children should anything happen to him.[7]

Further, *MM v. Secretary of the Home Department*, a case decided in July 2013, presents the stories of three lawful U.K. residents who are unable to sponsor visas for foreign family members due to a lack of sufficient income. The *MM* plaintiffs each presented the Court with slightly different circumstances rendering them incapable of meeting the £18,600 per-year-income requirement. The first plaintiff, MM, is a Lebanese refugee working

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[1] Immigration Rules, Appendix FM, §§ E-ECP.3.1(a)–(b) (U.K.).

[2] *See* MM v. Sec. of State for the Home Dep't [2013] EWHC (Admin.) 1900, [65]–[85] (Eng.) (providing a discussion of domestic and Human Rights Court cases challenging immigration rules on the basis of their violating the European Convention on Human Rights' guarantee of respect for private and family life) [hereinafter MM].

[3] *Id*. at [2]–[21] (describing three families unable to live together in the U.K. as a result of the U.K. resident being unable to meet financial minimums).

[4] *UK's New Visa Rules 'Causing Anguish' for Families*, BBC NEWS (June 10, 2013), http://www.bbc.com/news/uk-22833136; *see also UK Spouse Immigration Rules 'Unjustified,' High Court Says*, BBC NEWS (July 5, 2013), http://www.bbc.com/news/uk-23198144.

[5] *See UK's New Visa Rules 'Causing Anguish' for Families*, *supra* note 4.

[6] *Id.* ("Self-employed income is different from employed income. I have got enough money to pay my mortgage and bills, and that should be enough.").

[7] *Id.* ("And should anything happen to me I have a family who will take care of them. My family are wholeheartedly behind what I am doing.").

toward his Ph.D. at a British university.[8] He is thirty-four and married to a Lebanese national who has a Bachelor of Science degree in nutrition and works in Lebanon as a pharmacist.[9] Further, MM's wife is fluent in English.[10] Despite both MM and his wife clearly being qualified for a number of well-paying jobs, MM cannot meet the threshold requirement. MM takes particular issue with the rules for two reasons: (1) he cannot cite to his wife's potential earning capacity to help meet the required threshold, and (2) he cannot rely on familial support, even when that support is documented by a covenant deed.[11]

The second *MM* plaintiff is Abdul Majid, a British citizen who has lived in the U.K. since 1972.[12] Mr. Majid's wife, whom he married in 1991, lives in Pakistan.[13] The couple has five children, four of whom have lived in the U.K. since 2001.[14] Although Mr. Majid's wife has been admitted to the U.K. for limited stays over the course of their marriage, she has now been indefinitely denied entry because of her husband's lack of income.[15] Mr. Majid's chief complaint with the rules is that they separate his wife from the couple's children.[16]

The third and final complainant in *MM* is Shabana Javed. Mrs. Javed is a British citizen who has limited work skills and who has been unable to find work above the £18,600 threshold. Because she cannot find work that pays above the threshold, she cannot sponsor the entry of her husband, who currently works as a civil servant in Pakistan.[17] Mrs. Javed has the same complaints as MM, but, in addition, argues the rules unjustifiably discriminate against British-Asian women.[18]

Circumstances like those of Mr. Shillinglaw and the plaintiffs in *MM* implicate and demand the analysis of the convergence of domestic immigration law and the ECHR. The U.K. adopted the ECHR in 1998 when Parliament voted to pass the Human Rights Act.[19] Due to this domestic

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[8] *MM*, [2013] EWHC (Admin.) 1900, [4].
[9] *Id.*
[10] *Id.*
[11] *Id.* at [7]–[8].
[12] *Id.* at [13].
[13] *Id.*
[14] *Id.*
[15] *Id.* at [14].
[16] *Id.* at [16].
[17] *Id.* at [17]–[19].
[18] *Id.* at [20]–[21] (explaining "socio-economic data demonstrates that this segment of society [British Asian women] suggests from significantly lower rates of pay or employment than others, notably men").
[19] Human Rights Act, 1998, c. 42, sched. 1 (Eng.).

legislation, the U.K. is bound to respect the rights contained in the ECHR, which the Human Rights Act mirrors. Therefore, if a U.K. immigration rule violates a right guaranteed to U.K. citizens by way of the Human Rights Act of 1998, it can be struck down "by the Administrative Court exercising its supervisory function in judicial review proceedings."[20]

The interplay between this particular immigration rule and the Human Rights Act (the Act) is especially significant because the rule's legality is being challenged under Article 8 of the Act.[21] Article 8 of the Act guarantees a right to respect for family and private life.[22] It further states:

> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[23]

In recent years the European Court of Human Rights (the Strasbourg Court) has broadened the scope of the protection provided to nuclear families by Article 8 of the ECHR.[24] Therefore, given the fact immigration rules are tightening in the U.K. while the Strasbourg Court is concurrently redefining what protections the ECHR guarantees, the question arises: where do British courts and legislators go from here? Is this rule requiring lawful U.K. residents to produce proof of significant annual income and personal savings assets truly necessary to ensure British taxpayers are not burdened by immigration? And what duties does the British government owe to non-citizens related to lawful U.K. residents in light of the Strasbourg Court's expanding interpretation of Article 8? The answers to these questions will impact not only families currently separated because of the financial requirements, but will also impact the future of immigration regulation in Europe as a whole.

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[20] MM v. Sec. of State for the Home Dep't, [2013] EWHC (Admin.) 1900 [40] (Eng.).

[21] *Id.*

[22] Human Rights Act, *supra* note 19, art. 8 ("Everyone has the right to respect for his private and family life, his home and his correspondence.").

[23] European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, art. 8, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

[24] Daniel Thym, *Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?*, 57 INT'L & COMP. L.Q. 87, 88 (2008).

This Note will focus on the recent *MM* decision and use this opinion as the basis for analyzing the intersection of the ECHR and domestic immigration law.[25] Additionally, there will be a thorough discussion of recent decisions by the Strasbourg Court analyzing the extent to which Article 8 provides an avenue of attack against immigration laws restricting the ability of families to reunite and live together in European countries.

First, this Note provides a discussion and overview of both the current state of European law, i.e., case law coming from the Strasbourg Court on the subject of Article 8, and of current U.K. case law interpreting and applying Article 8. Second, this Note explains how the current financial requirement works and provides an overview of the government's stated intentions for enacting the new financial requirement. Third, this Note analyzes the proportionality of the current financial requirements. Finally, this Note argues that European legislatures, domestic courts, and the Strasbourg Court should protect the recently developed expansive view of Article 8 protection for families. Further, because immigration policy addressing family life and reunification can so easily run afoul of rights guaranteed in the ECHR, this Note advocates for immigration rules and policies allowing for a more individualized, case-by-case assessment of whether a lawful resident should be allowed to sponsor the entry of a foreign family member.

II. EUROPEAN COURT OF HUMAN RIGHTS IMMIGRATION AND HUMAN RIGHTS CASE LAW

The modern British immigration system, as opposed to the system of immigration that existed during the time of the British Empire, began with the passage of the 1971 Immigration Act.[26] The 1971 Immigration Act established categories of Commonwealth patrials and non-patrials.[27] In other words, the U.K. recognized traditional citizen and non-citizen distinctions, and placed immigration rules and burdens on those individuals falling into the non-citizen category.[28] Non-patrials, or non-citizens could not enter the U.K. without leave.[29] Thus began the British system of complex immigration rules governing who can and cannot enter the country, and who

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[25] MM v. Sec. of State for the Home Dep't, [2013] EWHC (Admin.) 1900 (Eng.).

[26] Abdulaziz, Cabales, and Balkandali v. United Kingdom, 7 Eur. Ct. H.R. 471, 474 (1985).

[27] *Id.*

[28] VAUGHAN BEVAN, THE DEVELOPMENT OF BRITISH IMMIGRATION LAW 114 (1986) ("[P]atriality was used to describe those who were free from immigration control.").

[29] *Abdulaziz*, 7 Eur. Ct. H.R. at 474.

can and cannot act as an entry sponsor for non-citizens living abroad. From early on, many U.K. immigration rules did not apply equally to all foreign citizens.[30] This remains true today. Individuals who are citizens of other European Union countries, for example, do not have to meet work permit requirements in order to enter the U.K. for long periods of time.[31] All other non-European Union nationals, however, do have to meet the requirements set out in the immigration rules.[32]

These "rules," are subject to judicial review because they work in practice as delegated legislation creating legal rights and obligations.[33] A British court will be able to review these rules using a proportionality test.[34] Thus, if a court holds that the rules present a disproportionate infringement on human rights when viewed in light of the government's stated policy goal (i.e., ensuring U.K. citizens and residents sponsoring the immigration of a foreign national family member do not strain U.K. welfare programs), a court may declare them incompatible with the ECHR as domesticated via the Human Rights Act.[35] With that background of U.K. immigration law and rules in mind, the discussion will now turn to the attempts of U.K. citizens and residents to challenge immigration rules as violating the ECHR.

Beginning in the 1980s, European residents began challenging immigration rules and decisions on the theory that they violated the ECHR.[36] In *Abdulazziz*, the plaintiffs brought suit against the U.K. because the then-existing immigration rules made it impossible for them, as lawful U.K. residents born outside the U.K. or born to parents not born in the U.K., to sponsor the entry of their husbands into the country.[37] The Strasbourg Court handed down a detailed opinion drawing a number of important conclusions

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[30] *See* BEVAN, *supra* note 28.

[31] *Id.* at 47.

[32] *Id.*

[33] COLIN TURPIN & ADAM TOMPKINS, BRITISH GOVERNMENT AND THE CONSTITUTION: TEXT AND MATERIALS 170–71 (7th ed. 2006) (discussing Secretary of State for the Home Department v. Pankina, [2010] 3 WLR 1526).

[34] *Id.* at 285–86 (discussing U.K. courts' ability to review legislation challenged using the Human Rights Act, and explaining that Section 6 establishes "it is unlawful for a public authority to act in a way which is incompatible with a Convention right").

[35] *Id.* at 85 (discussing Secretary of State for the Home Department v. JJ, [2007] UKHL 45, [2008] 1 AC 385 and Secretary of State for the Home Department v. MB, [2007] UKHL 46, [2008] 1 AC 440 which held control orders issued pursuant to primary legislation direction were excessive; and, therefore, thus disproportionate and contrary to the Human Rights Act).

[36] *See* Abdulaziz, Cabales, and Balkandali v. United Kingdom, 7 Eur. Ct. H.R. 471, 474 (1985) (alleging decisions by immigration officials made under then current rules violated plaintiffs' rights under Articles 3, 8, 13, and 14 of the ECHR).

[37] *Id.* at 486–92.

that aid in the understanding of how the ECHR interacts with domestic immigration law.

First, the Strasbourg Court recognized that nothing in the ECHR applies to non-citizens' right to enter or remain in a participating country.[38] The Convention only requires participating countries to respect the human rights described therein, and enact immigration protocols and laws that are in accord with the Convention and that do not violate any of those prescribed human rights.[39] The Court reasoned that, because the complainants were lawful residents "being deprived or threatened with deprivation of the society of their spouses," any domestic rules used to evaluate their applications to act as sponsors must be in accord with the Convention.[40]

Second, the Court gave an early look into what was meant by "family life" as used in Article 8 of the Convention.[41] The Court acknowledged that multiple definitions and interpretations of the word "family" may exist, but a proper definition must "include the relationship that arises from a lawful and genuine marriage . . . even if the family life of the kind referred to by the [U.K.] government has not yet been fully established."[42] Therefore, "family" under the ECHR does not necessarily have to conform to the definition given under domestic immigration law, but instead has a definition unique to its use in the Convention.

Third, the *Abdulaziz* decision notes that Article 8's prohibition on public officials' arbitrary interference with one's family life may include "positive obligations inherent in an effective respect for family life."[43] While there may in fact be positive obligations involved in respecting an individual's family life, the Court did not find that such obligations included respecting someone's right to sponsor a spouse married only after the resident-applicant moved to the U.K.[44]

Fourth, despite finding Article 8 did not invalidate the rules at issue in *Abdulaziz*, the Court did hold the rules violated the Convention when read in combination with Article 14. Article 14 of the Convention requires all other rights listed in the Convention be secured without discrimination on the basis of sex, race, color, or religion.[45] Because under the then-existing rules it was

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[38] *Id.* at 496.
[39] *Id.*
[40] *Id.* at 495.
[41] *Id.* at 495–96.
[42] *Id.* at 496.
[43] *Id.* (internal quotations omitted).
[44] *Id.* at 497–98.
[45] ECHR, *supra* note 23, art. 14.

significantly easier for a husband to sponsor a wife than for a wife to sponsor a husband, the rules effectively denied women their right to respect for family life more so than men.[46] Finding such discrimination embedded in the rules, the Court found the U.K. immigration rule violated the plaintiffs' Article 8 right to respect for family life when viewed through the lens of Article 14's prohibition on discrimination.[47] Because the Court in *Abdulaziz* (1) recognizes a lawful resident can challenge an immigration rule on Article 8 grounds; (2) provides a glimpse at what "family life" means in the context of the Convention; (3) recognizes domestic government might have positive obligations to respect family life; and (4) invalidates a domestic immigration rule for reasons related to Article 8 of the Convention, the Court's decision is crucial in understanding how the Strasbourg Court analyzes immigration rules in light of the Convention.

The Strasbourg Court again addressed British immigration rules and whether—and how—they interfere with rights guaranteed by the Convention in *O'Donoghue v. United Kingdom*.[48] This decision built upon the reasoning of *R v. Secretary of State for the Home Department*, a decision rendered by a domestic U.K. court.[49] In *O'Donoghue*, the Strasbourg Court was asked to determine if a British immigration rule requiring all individuals subject to immigration control to obtain a certificate of approval before marrying, and further requiring each applicant, i.e., both members of a couple, to pay a fee of £295.[50] The applicants alleged this violated their right to marry and found a family.[51] While the government supported this rule by claiming it was necessary to prevent sham marriages entered into for immigration benefits, the Strasbourg Court found the rule disproportionately burdened certain couples wishing to marry, regardless of the genuineness of the proposed marriages.[52] The Strasbourg Court took further issue with the certificate of approval process because officials made application decisions without any investigation into the genuineness of the proposed marriage.[53] Because the rule worked as a powerful disincentive to marriage and did not include a requirement of investigation to further its goal of preventing sham marriages aimed at obtaining a more favorable immigration status, the Strasbourg Court

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[46] Abdulaziz, Cabales, and Balkandali v. United Kingdom, 7 Eur. Ct. H.R. 471, 503 (1985).
[47] *Id.*
[48] O'Donoghue v. United Kingdom, (2010) 53 EHRR 1.
[49] *Id.*; R (on the applications of Balai and Others) v. Sec. of State for the Home Dep't, [2008] UKHL 53.
[50] O'Donoghue v. United Kingdom, (2010) 53 EHRR at [24].
[51] *Id.* at [60].
[52] *Id.* at [89].
[53] *Id.*

held that the rule violated the applicants' Article 12 guaranteed right to marry.[54]

The Strasbourg Court again addressed an immigration rule's validity under the ECHR in *Boultif v. Switzerland*.[55] The plaintiff in this case, an Algerian national married to a Swiss citizen, was expelled from Switzerland after the Swiss government denied his application to renew his residence permit because he had been convicted of illegal weapons possession.[56] The plaintiff's wife objected to being forced to follow her husband to Algeria.[57] The government's position, and that taken by the Swiss courts that reviewed the plaintiff's appeals to the denial of his residence renewal, was that the expulsion was necessary to preserve public order and safety.[58] While the Strasbourg Court recognized ensuring public safety to be a legitimate government interest, they found that responding to a concern about public safety posed by a one-time offender did not properly balance the relevant interests, and amounted to a violation of plaintiff's Article 8 right to respect for family life.[59] The Strasbourg Court notably began its discussion of whether or not there had, in fact, been a violation of Article 8 by explaining that when determining whether or not an immigration law has violated the ECHR, the Court is to balance the interest of the individual right on the one hand and the prevention of the identified societal harm, or furtherance of societal benefit, on the other.[60] Thus, the Strasbourg Court made clear that infringing on an individual right guaranteed by the ECHR is only tolerated when the contracting government can show that the infringement is outweighed by, and proportionate to, a legitimate government interest.

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[54] *Id.* at [91]–[92].

[55] Boultif v. Switzerland, [2001] ECHR 497.

[56] *Id.* at [6]–[14].

[57] *Id.* at [16] ("[T]he applicant's wife complained of being expected to follow her husband to Algeria. While admitting that she spoke French, she claimed that she would have no work in Algeria and no money. She found it most shocking that a married couple was being separated.").

[58] *Id.* at [34] ("Given the offences which the applicant had committed in Switzerland, there could be no doubt that the refusal not to renew the residence permit was called for in the interests of public safety, for the prevention of disorder or crime and for the protection of the rights and freedoms of others, within the meaning of Article 8 § 2 of the Convention.").

[59] *Id.* at [47]–[56] ("The Court is therefore of the opinion that the interference was not proportionate to the aim pursued.").

[60] *Id.* at [47] ("Accordingly, the Court's task consists in ascertaining whether in the circumstances the refusal to renew the applicant's residence permit struck a fair balance between the relevant interests, namely the applicant's right to respect for his family life, on the one hand, and the prevention of disorder or crime, on the other.").

III. DOMESTIC IMMIGRATION HUMAN RIGHTS CASE LAW

When reviewing the validity of an immigration rule in light of human rights set forth in the Convention, both common law domestic courts and the Strasbourg Court must determine whether a given immigration rule's infringement on individuals' right to family life is justified by the stated government interest. The U.K. Supreme Court addressed the proportionality of an immigration rule most recently in *Quila v. Secretary of State for the Home Department*.[61] In *Quila*, the Court was faced with determining whether rules designed to prevent forced marriages interfered with a person's right to enjoy his or her family life as granted in Article 8 of the Human Rights Act of 1998.[62] The rule at issue in *Quila* prevented British citizens under the age of twenty-one from sponsoring the entry of his or her spouse's entry into the country.[63] The government's stated purpose for this rule was to prevent forced marriages.[64] At issue before the Court was whether the ban on sponsoring a spouse's entry based purely on age was a legally proper way to deal with the problem of forced marriage.[65] The Court recognized that the Home Office was justified in trying everything possible to prevent or inhibit forced marriages, but held the rule arbitrarily infringed on the right of citizens under age twenty-one to found a family life.[66] The government cited statistics demonstrating that 28% of all cases of forced marriages between 2005 and 2008 involved eighteen to twenty-year-olds, and argued the older the individual, the better equipped he or she is likely to be to resist pressure to enter a forced marriage.[67] The critical question was why the need to protect these vulnerable age groups from being forced into marriages required a rule that interfered with the fundamental right of a far greater number of people—namely, all eighteen to twenty-year-olds voluntarily choosing to marry.[68] The Court reasoned that because the number of innocent applicants unfairly being forced to delay marriage, or cohabitation after marriage, for up to three years was vastly more than the number of forced marriages the rule would theoretically prevent or inhibit, the rule was

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[61] Quila v. Sec. State for the Home Dep't, [2011] UKSC 45, 1 A.C. 621 [50].
[62] *Id.* at [1]–[2].
[63] *Id.* at [7]–[8].
[64] *Id.*
[65] *Id.* at [1].
[66] *Id.* at [4].
[67] *Id.* at [10].
[68] *Id.* at [62].

a disproportionate infringement on the right to found a family life.[69] The Court wrote, for the State to make exile for one of the spouses the price of exercising the right to marry and embark on family life requires powerful justification.[70]

The U.K. Supreme Court found the government did not meet its burden of proving that the possibility of frustrating a small number of forced marriages justified intruding on the guaranteed right to make a reality of living together as a married couple. *Quila* is important because it shows that domestic British courts, in reviewing immigration rules and their conflicts with Article 8 rights, are not merely inquiring into whether or not there is some rational link between the public interest and a given immigration rule supporting an intrusion on individual rights. Instead, British courts must investigate whether or not an immigration rule's interference with an individual's right to family life is proportional to the public interest. If the public interest is marginal, or the interest is only furthered by the immigration rule marginally, and the infringement on an individual's right to family life is substantial, the rule cannot be maintained.

The case of *R*, which was heard in domestic court, dealt with an immigration rule requiring marriage certificates of approval for individuals who were subject to immigration control.[71] The House of Lords, sitting as the highest U.K. Court at the time, found the law was discriminatory and disproportionately interfered with the right to marry.[72] Lord Bingham noted that countries have every right to establish rules and policies aimed at preventing marriages of convenience, but this ability to regulate is not without limits.[73] Specifically, the Court noted tying one's ability to marry to one's ability to pay a pre-determined fee was in direct conflict with Article 12 as it may "impair the essence of the right to marry."[74] Read together, domestic cases like *Quila* and *R* and Strasbourg cases like *Abdulaziz*, *O'Donoghue*, and *Boultif* establish important principles of analysis for immigration rules promulgated by parties to the ECHR. Both domestic courts and the Strasbourg Court are open to applicants' appeals of immigration rules on human rights grounds, and in recent years—especially

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[69] *Id.* at [58]–[62] ("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.").

[70] *Id.* at [54].

[71] R (on the applications of Balai and Others) v. Sec. of State for the Home Dep't, [2008] UKHL 53.

[72] *Id.* at [32].

[73] *Id.* at [29].

[74] *Id.* at [30].

the last five to ten years—have been using human rights doctrine to aggressively check the power of immigration rules harshly impacting immigrant families who wish to live and marry in the U.K.

IV. CURRENT IMMIGRATION RULES: FINANCIAL REQUIREMENTS FOR SPONSORING A FOREIGN FAMILY MEMBER'S ENTRY INTO THE UNITED KINGDOM

MM concerns current financial requirements placed on U.K. residents seeking to sponsor the entry of a foreign spouse, or the entry of a foreign spouse and children.[75] The intent of the government in passing these rules in July 2012 is presented in a detailed statement issued by the Home Office when the rule was promulgated.[76] The stated purpose of these financial requirements is to ensure relationships benefitting from immigration are not false, and to limit the impact of immigrants on taxpayers.[77] The Statement of Intent introduces and explains the financial requirements in a list of particular methods to be used in the government's attempts to curtail the effects of immigration on the welfare system.[78] Second, the Statement of Intent clearly establishes the income minimums that will apply to all residents seeking to apply to sponsor a family member's visa.[79]

Moreover, the Statement of Intent specifically addresses Article 8 and how it interacts with the new immigration rules.[80] These new immigration rules, according to the Home Office, are meant to create a system where candidates are judged based on predetermined and easily identifiable characteristics.[81] Further, the new rules are meant to combine case law discussing Article 8 with immigration policy so that the Border Agency is

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[75] *See supra* Part I.

[76] HOME OFFICE, STATEMENT OF INTENT: FAMILY MIGRATION (2012), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257359/soi-fam-mig.pdf.

[77] *Id.* at [16] ("[O]ur approach under the new Immigration Rules will ensure that there is a clear focus on whether the relationship is genuine, that the sponsor can properly support their partner and any dependants financially. . . .").

[78] *Id.* at [17] ("In particular, we will set a minimum income threshold of £18,600 to sponsor the settlement in the UK of a non-EEA partner. . . . The relevant minimum income threshold will apply at every application stage: entry clearance/leave to remain, further leave to remain and indefinite leave to remain (settlement).").

[79] *Id.*

[80] *Id.* at [28]–[69].

[81] *Id.* at [31].

able to evaluate applications in light of existing Article 8 case law.[82] According to the Home Office, the new immigration rules, including the income minimums required for sponsorship, are proportionate and serve the public interest by ensuring immigrants do not threaten the economic well-being of the U.K.[83] The Home Office stresses the new rules' focus on balancing the demands of Article 8, as established by both the Strasbourg Court and domestic courts, with the demands of running an economically viable country.[84]

While the Statement of Intent declares that only cases with extreme circumstances will need to be adjudicated before the court, just one year after the rules went into effect an administrative court was forced to review the proportionality of the newly enacted income minimums required to sponsor the entry of a foreign family member.[85] Thus, while the Statement of Intent is clearly well-intentioned and means to show that the government has in fact recognized the convergence of Article 8 and immigration rules, the recent litigation in this area indicates the government's good faith attempts at curing defects in the immigration rules may have interfered with individuals' human rights.

V. CURRENT RULES AND EXISTING CASE LAW

The Statement of Intent accompanying the July 2012 immigration rules explains that the financial requirement rule aims to create a regime in which individuals applying to sponsor a family member must meet the "clear, transparent requirements on the face of the rules."[86] The U.K. government states these clear, transparent requirements are necessary to solve the public policy vacuum that was facing immigration courts prior to the challenges.[87] The problem was that courts were charged with the task of determining whether or not a given immigration rule applied to a specific set of facts, was disproportionate in light of the rights protected by Article 8, but were not

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[82] *Id.* ("The new Immigration Rules will unify consideration under the rules and Article 8, by defining the basis on which a person can enter or remain in the UK on the basis of their family or private life.").

[83] *Id.*

[84] *Id.* at [33] ("The requirements of the new Immigration Rules will themselves reflect the Government's and Parliament's view of how, as a matter of public policy, the balance should be struck between the right to respect for private and family life and the public interest in safeguarding the economic well-being of the UK by controlling immigration. . . .").

[85] *See MM*, [2013] EWHC (Admin.) 1900.

[86] HOME OFFICE, *supra* note 76, ¶ [31].

[87] *Id.* ¶ [36].

given any information about what public interests weighed in favor of infringing on an individual's right to family life.[88] The changes in the rules represent the government's attempt to give direction to courts analyzing whether a rule violates Article 8 by presenting judges with rules designed to strike the appropriate balance between individual rights and public policy concerns.[89] So, while the old rules tasked courts with determining whether a specific application of a specific rule ran afoul of Article 8, the new scheme tasks courts with determining whether a given rule itself runs afoul of Article 8.[90]

Not only have the immigration rules' substantive content changed, but perhaps more importantly, the way in which courts approach cases where immigration rules are challenged has likewise been modified. As the government explains in its Statement of Intent, if a court finds the application of a rule infringes on an individual's right to private and family life in a manner disproportionate to the public interest, the whole rule is in jeopardy and may be struck down as a violation of Article 8.[91]

Abdulaziz, *O'Donoghue*, and *Boultif* are cases in which the Strasbourg Court held domestic immigration laws violated in whole or part Article 8 of the ECHR. Based on this case law, the financial requirements currently burdening British citizens hoping to live in the U.K. with a foreign national spouse are likewise violations of Article 8's guaranteed right to respect for private and family life. Because the Strasbourg Court recognized "family life" as it's used in the Convention, the term includes, at a minimum, the relationship formed by a genuine marriage.[92] The government of a party state, like the U.K., has a positive duty to not arbitrarily interfere with a lawful resident's ability to enter into a genuine marriage.[93] Under *Abdulaziz*, party has an inherent obligation to respect lawful residents' right to found a family via genuine marriage.[94] Thus, the current financial threshold applicants must meet in order to sponsor a spouse's entry into the country at some level infringes on their Article 8 rights. The relevant question then becomes, is this infringement justified by and proportional to the public policy it claims to further? If the answer is no, and the harm caused by the

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[88] *Id.* ¶ [37].
[89] *Id.* ¶ [38].
[90] *Id.* ¶ [39].
[91] *Id.* ¶¶ [38]–[40].
[92] *See* Abdulaziz, Cabales, and Balkandali v. United Kingdom, 7 Eur. Ct. H.R. 471, 495–96 (1985).
[93] *Id.*
[94] *Id.*

interference with the right to found a family is far greater than the good that will be achieved by the rule, the rule cannot stand.

The Strasbourg Court's opinion in *O'Donoghue* sheds even more light on the conflict between the current financial threshold and the ECHR. Because the rule at issue in *O'Donoghue* imposed a fee on immigrants seeking to get married, the Strasbourg Court held the rule created an impediment to marriage, a right guaranteed by Article 12.[95] Further, because marriage is a relationship which forms family life, the rule also failed to respect family life, as mandated by Article 8.[96] The purpose of the rule, according to the government, was to deter marriages entered into solely for immigration benefits.[97] The government reasoned that the fee would weed out those marrying for convenience, and only those who truly wished to marry would bother to proceed with marriage and pay the fee.[98] Because the rule imposed a financial burden on all immigrants trying to marry without any investigation into whether or not the marriage was in fact genuine or a sham, the Strasbourg Court found the rule disproportionate.[99] The interference with marriage and family life was not proportional to the public interest of preventing sham marriages.[100] *O'Donoghue* shows that the Strasbourg Court views rules that financially burden immigrants as suspect. Without sufficient justification from the government showing what legitimate aim the burden will actually further, a rule using a financial burden as a tool to effectuate public policy goals unduly burdens individuals when it interferes with a right guaranteed by the ECHR.

The income threshold at issue in this Note is likewise a financial burden placed indiscriminately on all immigrants and immigrant spouses, and is therefore suspect. The rule is only a valid intrusion on the right of individuals to live together as a family if the threshold is truly going to further a public policy goal, and will further that goal without burdening British citizens and lawful residents who pay into the welfare system. The current financial minimums exist for two reasons. First, the government wants to prevent individuals benefitting from sham marriages. Second, the government does not want immigration to lead to an increase in the number of people asking for public assistance. The government must be able to show that the threshold is set so that it captures those who are entering sham

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[95] *See* O'Donoghue v. United Kingdom, (2010) 53 EHRR 1; ECHR, *supra* note 23, arts. 8, 12.
[96] *See* O'Donoghue v. United Kingdom, (2010) 53 EHRR 1; ECHR, *supra* note 23, art. 8.
[97] *See* O'Donoghue v. United Kingdom, (2010) 53 EHRR 1.
[98] *Id.*
[99] *Id.* at [88].
[100] *Id.* at [73].

marriages or would be asking for public funds, while also allowing individuals in genuine marriages who will not need public assistance to sponsor the entry of spouses and other family members.

Finally, the Strasbourg Court's decision in *Boultif* underscores the recent focus on proportionality. The Swiss government breached its duty of respect for family life by expelling Mr. Boultif from Switzerland following a conviction for illegal weapons possession and aggravated assault, despite the fact this meant his wife, a Swiss citizen, would be forced to follow him to his native Algeria.[101] Because Mr. Boultif had not had any other legal issues, he was released from prison early because of exemplary behavior and had job prospects in Switzerland that the Court found satisfactory. Despite this, the burden of forcing Mr. Boultif's Swiss wife to move to a foreign country in order to preserve her family was severe.[102] Because of the discrepancy between the infringement on individual rights and the potential public benefit of that infringement, the Court held the rule disproportionate.[103]

Boultif shows that the main consideration when determining whether or not a given immigration rule violates Article 8 is to balance the harm to the individual right with the benefit the interference will produce. Applying this test to the financial minimums at issue here, the government must be able to prove that the financial minimum requirements will actually prevent an increase in families with immigrant members calling on public welfare assistance or inhibit more sham marriages than genuine marriages. If the financial minimums will not prevent these feared increases or stop an increase already observed, then there is no justification for infringing on lawful residents' and citizens' right to marry and found a family with the person of their choosing.

Additionally, domestic case law also supports the conclusion that the current financial requirements for sponsoring a foreign national spouse unjustifiably interfere with British citizens' right to respect for family life. In *Quila*, the British Supreme Court held invalid an immigration rule prohibiting British citizens under age twenty-one from sponsoring a spouse's entry into the country because it arbitrarily infringed on rights guaranteed by the Human Rights Act.[104] The *Quila* Court noted that the government interest in preventing forced marriages was valid.[105] Likewise, preventing an increase in immigrant families seeking welfare assistance—the government

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[101] *See* Boultif v. Switzerland, [2001] ECHR 497.
[102] *Id.*
[103] *Id.*
[104] Quila v. Sec. State for the Home Dep't, [2011] UKSC 45, 1 A.C. 621.
[105] *Id.* at [45].

interest lying behind the financial requirements—is also valid.[106] However, also like the immigration rule at issue in *Quila*, the financial requirements at issue here arguably burden far more individuals who will not end up seeking government assistance than those individuals who would seek assistance if admitted into the country.[107] Further, the *Quila* Court took issue with the fact that the rule was applied with no investigation into the genuineness of these young people's marriages. Similarly, the financial requirement rule is extremely exclusionary and provides for no investigation into the actual financial situation of an applicant. For example, there is no allowance for family financial assistance that might help an applicant meet the threshold requirement.

Both the law at issue in *Quila* and the instant financial requirement rule use raw numbers to make decisions impacting a person's right to found a family. While lines must be drawn when operating a large and complex bureaucratic immigration system, *Quila* points out that these numerical lines must be narrowly tailored to the government interest being pursued so as not to overtly infringe on guaranteed human rights. Rules infringing on these rights must be carefully applied so as not to burden individuals who are not contributing to the problem the rule itself is seeking to rectify.

The current financial requirements are arguably worse infringements on the right to found a family than was the age limit placed on marriages in *Quila*. First, the *Quila* rule's burden and the financial requirement burden are not nearly the same. It is a fact of life that everyone ages. An eighteen-year-old impacted by the *Quila* rule would be able, after waiting a few years, to sponsor the entry of his or her spouse. While the court properly found that mandating that waiting period was disproportionate to the government's end goal, the burden on an individual's right was not permanent. The financial rule at issue here, however, is much more likely to be permanent. Some individuals may never have a job paying a yearly income over £18,600. And while there is a provision allowing for personal savings to make up for lack of yearly income, it could take well over three years for a lower-income individual to save the required £16,000 necessary to overcome falling below

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[106] *See MM*, [2013] EWHC (Admin.) 1900, [110] ("The Secretary of State is entitle to conclude the economic and social welfare of the whole community is promoted by measures that require spouses to be maintained at a somewhat higher level than the bare subsistence level set under previous interpretations of the rules.").

[107] *See UK's New Visa Rules 'Causing Anguish' for Families*, *supra* note 4.

the income threshold.[108] The burden struck down in *Quila* is clearly less intense than the burden imposed by the current financial requirements.

In addition to the *Quila* decision, the House of Lords decision in the case of *R* supports the conclusion that the current financial requirements for spousal sponsorship are invalid infringements on the right to respect for family life. While the Supreme Court held the *R* law invalid under Article 12, which guarantees the right to marry, and not Article 8, the right to respect for family life, the decision is still illustrative of how a domestic court should analyze a human rights challenge to an immigration rule. As the court in *R* noted, "[t]he Strasbourg authorities have not in practice upheld the right to found a family with the same firmness they have shown in upholding the right to marry."[109] Thus, where the right to respect for family life is at issue, U.K. courts recognize the most strenuous review is required.

In *R*, the House of Lords inquired into whether requiring a couple subject to immigration control (whether one party or both) to pay a fee in order to obtain a marriage certificate violated an individual's right to marry. The Court held this fee was unnecessary for furthering the state's goal of preventing marriages of convenience.[110] Just as that Court held a financial limit unrelated to the government's interest in enacting an immigration rule was an invalid infringement on the right to marry, the financial requirements at issue here must be held invalid if they are not *directly* related to the government's goal of preventing new immigrants burdening the welfare system. A financial burden cannot be placed on an individual for no reason. There must a legitimate purpose for the burden.

VI. PROPORTIONALITY OF CURRENT FINANCIAL MINIMUMS

An expanding definition of family life means British immigration laws must be cognizant of the myriad forms a family's life may take. Because the duty to recognize respect for family life is an important human right, the British government must also take care to craft immigration rules that further

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[108] *See* Immigration Rules, *supra* note 1 (explaining an applicant who does not meet the standard £18,600 gross annual income requirement may, in the alternative, meet the requirement by showing "specified saving of £16,000; and additional savings of an amount equivalent to 2.5 times the amount which is the difference between the gross annual income from the gross annual income listed in paragraph E-ECP .3.2.(a)-(d) and the total amount required under paragraph E-ECP.3.1(a) [i.e. £18,600]").

[109] R (on the applications of Balai and Others) v. Sec. of State for the Home Dep't, [2008] UKHL 53, [15].

[110] *Id.* at [30] ("It is plain that a fee fixed at a level which a needy applicant cannot afford may impair the essence of the right to marry.").

public policy goals that only infringe on individuals' right to found a family in an amount proportional to the public policy interest being pursued, such as ensuring new immigrants do not place an added burden on taxpayer funded welfare assistance programs. There must be safeguards in immigration rules allowing for British families of all types to live in the U.K. This means an immigration rule setting a strict financial requirement is over-inclusive.

Under the framework presented by the U.K. government in their 2012 Statement of Intent, all immigration rules should be proportional to the public policy objectives identified by the government.[111] Here, that means that the financial minimums must be proportional to the goal of ensuring that immigrants joining British family members in the U.K. are not doing so at the expense of British taxpayers. Because the financial minimums currently required do not vary based on any case-specific circumstances, the rule is arguably over broad and not proportional. The Statement of Intent explains the financial minimum requirement was set at £18,600 because that is the average income at which a couple is no longer eligible for government assistance.[112] While immigration caseworkers do have the ability to make further inquiries or request further information if the threshold requirement appears to be met,[113] they "have no discretion or flexibility with regard to the level of the financial requirement."[114] It is also noteworthy that the paragraph explaining a caseworker's discretion to request further information focuses exclusively on situations in which the caseworker is suspicious the applicant has somehow appeared to meet the requirement, but in fact has not.[115] The government, by the structure of its Statement of Intent, appears to be working under the assumption that applicants will attempt to forge the

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[111] HOME OFFICE, *supra* note 76.

[112] R (on the application of Balai and Others) v. Sec. of State for the Home Dep't, [2008] UKHL 53, [15].

[113] *Id.* at [83(d)].

[114] *Id.* at [83(c)] ("[A] minimum gross annual income of £18,600 (or the relevant higher figure where a child or children are also being sponsored) is the threshold to be met in all cases through income (and/or the application of cash savings as below). It is a matter of public policy to introduce a financial requirement based on an income threshold for this form of sponsorship, and a threshold means a threshold: it must be clear and consistent in all cases.").

[115] *Id.* at [83(d)] ("Entry clearance officers and other caseworkers will be able to refuse the current application (or that at the next leave stage) if they have evidence that the applicant or sponsor has deceived them as to the level and/or source of income, has tried to do so, or has withheld relevant information, e.g., that the cash savings relied upon are a loan. Entry clearance officers and other caseworkers will also be able to refuse an application if they are told by the applicant, or establish, that the applicant's or sponsor's circumstances have changed materially since the point of application, such that the applicant does not meet the requirements.").

record of their financial status. Given that a caseworker has no discretion to investigate applications falling just under the threshold, it is unsurprising there would be those who might stretch the truth of their financial situation in an attempt to sponsor the entry of a spouse.

The current financial minimum requirement rule does not allow all British citizens to exercise their right to found a family, denies that right in an arbitrary manner, and is thus a violation of Article 8 of the ECHR. As the Strasbourg Court noted in *MM*, "it would be difficult to exercise . . . the right to found a family if there are serious obstacles to matrimonial cohabitation."[116] The current rule applies indiscriminately and leaves little to no room for Home Department officials to inquire into an applicant's financial status. Decisions of both British and European courts show a preference for a more individualized review of immigration cases.[117] The current financial requirements for sponsoring a spouse's entry into the U.K. leave no room for discretion, which can be a useful device for successfully protecting human rights while also furthering government policy goals. While the stated government interests are unquestionably valid, the government bears the burden of proving those goals are being furthered with narrowly tailored policies. Going forward, European courts should continue to require parties to the ECHR to carefully draft immigration legislation impacting families' ability to live together, and review such legislation with a sharp eye. While these courts have not said this explicitly, it is reasonable to infer they are moving toward a doctrine of least restrictive means.

VII. CRITICISM OF *MM V. SECRETARY OF STATE FOR HOME DEPARTMENT*

As addressed above, the case of *MM* is meant to serve as the basis for a discussion about the current conflicts between British immigration laws and the ECHR. Now that the framework for analyzing immigration rules and the Human Rights Act has been presented, the *MM* decision can be properly evaluated. The 2012 immigration rules, including the financial requirements at issue in *MM* and at issue in this Note, were drafted with Article 8 case law in mind.[118] The administrative court that heard *MM* held the financial

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[116] *MM*, [2013] EWHC (Admin.) 1900, [101].

[117] Abdulaziz, Cabales, and Balkandali v. United Kingdom, 7 Eur. Ct. H.R. 471, 474 (1985); Boultif v. Switzerland, [2001] ECHR 497; R (on the applications of Balai and Others) v. Sec. of State for the Home Dep't, [2008] UKHL 53.

[118] HOME OFFICE, *supra* note 76, ¶ [31] ("The new Immigration Rules will unify consideration under the rules and Article 8, by defining the basis on which a person can enter or remain in the U.K. on the basis of their family or private life.").

requirements to be valid, but also recognized the merit of the plaintiffs' claim.[119] While the court notes that the government is pursuing legitimate goals by using financial requirements to limit the number of immigrants seeking taxpayer-funded welfare, the court's decision can be criticized for incorrectly analyzing the financial requirements' burdens and benefits.

First, the court determined that the law is not using the least restrictive means possible.[120] As explained, this is the standard currently governing any party state's immigration rules interfering with an individual's right to form a family of his or her choosing, or I would argue, interfering with any right guaranteed by the ECHR. Discussing the financial requirements for supporting a foreign national spouse, the court concluded: "[T]aken together they [the financial requirements] are more than is necessary to promote the legitimate aim."[121] For instance, Justice Blake, writing for the court, admonishes the Secretary of State for using such an inflexible rule when the right of a lawful citizen to live in their home country with their spouse is at stake.[122] The court suggests using a twelve-month review process in order to ensure the financial standing an applicant claimed on his or her application is reflected in reality.[123] Additionally, the opinion points out that the £18,600 is well above the annual gross income someone would earn working for minimum wage forty hours per week.[124] The court notes the alternative method available for proving financial stability—using personal savings—is a substantial burden, and in most cases will require an individual show savings in excess of the standard £18,600 requirement.[125]

Second, the court explains in detail that the current financial requirement is disproportionate to the government's stated aims.[126] The Statement of

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[119] *MM*, [2013] EWHC (Admin.) 1900, [154]–[155].

[120] *Id.* at [147] ("There are a variety of less intrusive responses available.").

[121] *Id.* at [144].

[122] *Id.* at [140] ("The aim of transparency cannot justify an agglomeration of measures that cumulatively very severely restrict the ability of many law abiding and decent citizens of this nation who happen not to earn substantial incomes in their employment from living with their spouses in the land of their nationality.").

[123] *Id.* ("[C]hecks after twelve months may well be proportionate and informative as that would afford a reasonable opportunity for the spouse with skills to have attended selection interviews and demonstrated requisite skills.").

[124] *Id.* at [124] (explaining an income of £13,600 is the average income of someone working a 40 hour work week at minimum wage in the U.K.).

[125] *Id.* at [107] ("The alternative mode of proof by saving requires the sponsor to meet the income shortfall by savings over £16,000. . . . Thus, MM states he has a shortfall in income of £3,000 per annum. He would need to supplement that income by savings £16,000 plus £3,000 X 2.5 = £23,500 to be able to sponsor his wife's admission.").

[126] *Id.* at [142] ("[T]he combination of features . . . amount together to a disproportionate interference with the rights of British citizen sponsors and refugees to enjoy respect for family

Intent for the financial requirements at issue explicitly gives the court the power to evaluate the proportionality of the new immigration rules.[127] The court notes that an administrative court may not be the proper place for "a full blown merits review of policies," but that does not preclude the court from finding rules disproportionate and thus invalid under both domestic and European Union case law.[128] The court recognizes that requiring a financial minimum of £18,600 is excessive and unattainable for many citizens and refugees who may wish to live in the U.K. with their spouse.[129] The U.K. Earnings Index listed 422 occupations in its 2011 edition, and only 301 of these occupations earned a yearly salary of or above £18,600.[130] If the current rule had been in use in 2009, forty-five percent of the sponsors who applied would have been denied.[131]

However, the opinion fails to do what earlier domestic and Strasbourg Court precedent allow courts to do–strike laws down as invalid when they are disproportionate. Instead, the *MM* Court expressly refused to quash the financial requirements Plaintiffs claimed violated their right to respect for family life.[132] The Court reasoned that the Secretary of State for the Home Department—and not the Court—should determine what financial thresholds best further the government's interest in controlling immigration.[133]

Rather than leaving British courts to handle appeals when applicants wish to contest the Border Agency's decision, the rules should be structured so that Home Department officials have the ability to assess whether or not denying an applicant's request to sponsor rises to the level of an Article 8 violation. As currently written, the rules do not give any discretion to the officials actually reviewing applications to make exceptions or inquire into the reasons why a given applicant may be unable to meet the financial requirements.[134] While the rules claim to encapsulate Article 8 standards, to have balanced, on the front end, individual human rights against the interests

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life. In terms of the Strasbourg approach they do not represent a fair balance between the competing interests and fall outside the margin of appreciations or discretionary area of judgment available in policy making in this sphere of administration.").

[127] HOME OFFICE, *supra* note 76, ¶ [39] ("Where the rules have explicitly taken into account proportionality, the role of the Courts should shift from reviewing the proportionality of individual administrative decisions to reviewing the proportionality of the rules.").

[128] *MM*, [2013] EWHC (Admin.) 1900, [143].

[129] *Id.* at [154]–[155].

[130] *Id.* at [124].

[131] *Id.* at [107].

[132] *Id.* at [120]–[121].

[133] *Id.* at [148] ("It will be for the Secretary of State if she sees fit to make such adjustments to the rules as will meet the observations in this judgment.").

[134] HOME OFFICE, *supra* note 76.

of the state, the case of *MM* shows that many people who have a right live in the U.K. with a spouse will be denied under the current rules. For example, one of the plaintiffs in *MM*, Shabana Javed, is a British citizen whose local job center only offers jobs paying salaries less than £18,000.[135] Ms. Javed lives in what she describes as an "economically and socially deprived" area of Birmingham, England.[136] The rules provide no exceptions for someone like Ms. Javed who has limited living expenses because of family support and whose husband, given his qualifications, would have a better chance than Ms. Javed at finding employment.[137] The Court's refusal to quash the rules because some applications decided under the current rules will be compatible with Article 8 cannot be reconciled with the precedent of *Quila*, *R*, *O'Donoghue* and other cases discussed within this Note. Justice Bradley recognizes, "national economic and social data demonstrate that complying with these new measures will be particularly difficult for many members of the ethnic minority communities and female sponsors where income levels have been consistently lower than national averages . . ." and further notes, "[t]he income figure is set at a level to make provision for a national average for rented accommodation or mortgage repayment, even though house prices and rental costs vary dramatically throughout the country."[138] A rule that has the known potential to violate an individual's right to family life cannot be sustained.

VIII. CONCLUSION

In *Abdulaziz*, the Strasbourg Court made this comment on Article 8 and the duties it imposes on states bound the terms of the ECHR: "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."[139] This is a perfectly reasonable statement, and one that makes practical sense for any country with a modern immigration system. Of course country *A* does not owe an unlimited, general duty to a couple from country *B* who wishes to live in

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[135] *MM*, [2013] EWHC (Admin.) 1900, [18].
[136] *Id.* at [17].
[137] *Id.* at [17]–[19] (explaining Ms. Javed's husband is a civil servant in Pakistan, while she has extremely limited qualifications).
[138] *MM*, [2013] EWHC (Admin.) 1900, [107].
[139] Ab dulaziz, Cabales, and Balkandali v. United Kingdom, 7 Eur. Ct. H.R. 471, [68] (1985).

country *A*. For practical reasons, there must be limits on when and who may enter a country.

These limits, however, must not offend guaranteed human rights. Additionally, rules promulgated to make entry clearance decisions both efficient and uniform are obviously desirable when running a large bureaucratic institution, such as the British immigration system, for example.

Nevertheless, this goal does not justify using overly exclusionary financial requirements as an entrance test. The £18,600 financial threshold British citizens must meet in order to sponsor a spouse's entry is unnecessarily harsh. While any immigration application decision resulting in an entry denial is going to cause someone anguish, the current financial threshold places an undue burden on undeserving citizens—a result prohibited by Article 8 of the ECHR. An exclusionary rule that will overly burden the young (who are often students), citizens living in areas with lower costs of living, and Britons living in ethnic minority communities[140] cannot stand. Such a rule is not narrowly tailored to the government's stated means: prevention of further burdening the country's welfare system. By not using the least restrictive means necessary, the rule stands in the way of a person's right to found a family, and does so, for many people, without a legitimate aim.

The decision to deny an application for sponsoring a foreign national spouse based on the income level of the spouse living in the U.K. requires an individualized review of the type advocated for in the British Supreme Court in *Quila*. Inquiry into the sufficiency of financial resources would serve a dual purpose. First, it would prevent the exclusion of foreign spouses who do not, in fact, place any additional burden on British taxpayers. Second, it would accurately further the government's stated interests by preventing the entry of spouses who would run a high risk of seeking welfare assistance. While the court in *MM* claimed it would be "inappropriate" to strike down the financial rules,[141] under existing case law this decision was wrong. The court, exercising judicial review, should have followed the precedent recognized in the opinion and held the rules as written are inherently disproportionate and thus violate the European Convention on Human Rights.

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[140] *MM*, [2013] EWHC (Admin.) 1900, [107].

[141] *Id.* at [154] ("For the reasons set out above I conclude that it is not appropriate to strike down the financial requirements of the rules under challenge or indeed to seek to encapsulate the nuances of this judgment in a formal declaration").