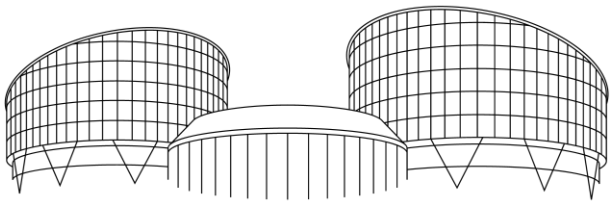

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

**CASE OF O'DONOGHUE AND OTHERS v.
THE UNITED KINGDOM**

(Application no. 34848/07)

JUDGMENT

STRASBOURG

14 December 2010

FINAL

14/03/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of O'Donoghue and Others v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Lech Garlicki, *President,*
Nicolas Bratza,
Ljiljana Mijović,
David Thór Björgvinsson,
Ján Šikuta,
Päivi Hirvelä,
Mihai Poalelungi, *judges,*
and Lawrence Early, *Section Registrar,*

Having deliberated in private on 23 November 2010,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 34848/07) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Nigerian national, Mr Osita Chris Iwu, and three dual British and Irish nationals, Ms Sinead O'Donoghue, Ashton Osita Iwu and Tiernan Robert O'Donoghue ("the applicants"), on 31 July 2007.

2. The applicants, who have been granted legal aid, were represented by the Aire Centre. The United Kingdom Government ("the Government") were represented by their Agent, Mr Derek Walton of the Foreign and Commonwealth Office.

3. On 13 November 2008 the Chamber of the Fourth Section of the Court decided to give notice of the application to the Government and to give the application priority in accordance with Rule 41 of the Rules of Court. The Court furthermore decided to inform the parties that it was considering the suitability of applying a pilot judgment procedure in the cases (see *Broniowski v. Poland* [GC], 31443/96, §§ 189-194 and the operative part, ECHR 2004-V, and *Hutten-Czapska v. Poland* [GC] no. 35014/97, ECHR 2006-... §§ 231-239 and the operative part) and requested the parties' observations on the matter. Having considered the parties' observations, the Chamber decided not to apply the pilot judgment procedure.

4. The parties requested an oral hearing. However, on 13 October 2009 the Court decided, under Rule 54 § 3 of the Rules of Court, not to hold a hearing on the admissibility and merits of the application.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

1. The Certificate of Approval Scheme

A. The first version of the scheme

5. In 2005 the Secretary of State for the Home Department introduced the first version of the Certificate of Approval Scheme ("the first version"). Section 19 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 provided a statutory basis for the scheme and further details were set out in the Immigration (Procedure for Marriage) Regulations 2005 (SI 2005/15) ("the 2005 Regulations") and the Immigration Directorate's Instructions ("IDIs").

6. The first version of the scheme required that in order to marry, persons subject to immigration control had to have either entry clearance expressly granted for the purpose of enabling them to marry in the United Kingdom or a Certificate of Approval. The definition of "persons subject to immigration control" excluded European Economic Area nationals and persons who had been granted Indefinite Leave to Remain.

7. In order to obtain a Certificate of Approval, a person subject to immigration control had to submit an application to the Secretary of State for the Home Department together with an application fee of GBP 295. If both parties to the proposed marriage were subject to immigration control, each party had to submit an application form and pay the required fee. The IDIs provided that in order to qualify for a Certificate of Approval, an applicant had to have been granted leave to enter or remain in the United Kingdom for a period of more than six months and he or she had to have at least three months of that leave remaining at the time of making the application.

8. The first version of the scheme did not apply to persons seeking to marry in accordance with the rites of the Church of England.

B. The High Court's Opinion on the first version of the scheme

9. On 10 April 2006 Mr Justice Silber delivered judgment in the case of *R (on the applications of Baiai and Others) v Secretary of State for the Home Department* [2006] EWHC 823 QB (Admin), in which he considered whether the first version of the scheme interfered with the Articles 12 and 14 rights of those who were subject to immigration control and who were in the United Kingdom lawfully.

10. He found that it was permissible, according to the Court's jurisprudence, to introduce legislation to prevent marriages entered into for the purpose of avoiding immigration control even though this legislation

might interfere with the right to marry. Furthermore, the legislative objective relied on by the Government of preventing sham marriages was sufficiently important to justify limiting an Article 12 right.

11. However, in the case of the first version of the scheme, the measures designed to meet the legislative objective were disproportionate as they were not rationally connected to it. First, all religious marriages other than those in the Church of England required a Certificate despite the fact that the evidence showed that sham marriages predominantly took place in registry offices. The treatment of religious marriages outside the Church of England was therefore a matter of concern as they were treated like registry office marriages even though evidence indicated that the same precautions which prevented sham marriages taking place in the Church of England were also present in other religious ceremonies. Secondly, there was no basis for the assumption that all religious marriages outside the Church of England were automatically to be treated as sham marriages, thus requiring a Certificate, while in contrast all marriages conducted according to the rites of the Church of England were to be regarded automatically as not being sham marriages and therefore did not require a Certificate. Thirdly, the first version of the scheme arbitrarily failed to take into account many factors which might be relevant in considering whether or not a proposed marriage was a sham, such as clear and corroborated evidence that the parties had enjoyed a loving relationship over a number of years, during which time they might have had children or bought a house together. It was difficult to understand how the scheme, which ignored factors such as these, could be "rationally connected" to the purported legislative aim of avoiding sham marriages. Fourthly, the first version of the scheme was not rationally connected to the legislative objective as it regarded the only relevant factors in determining whether a non-EU national could marry in the United Kingdom as his or her immigration status.

12. Mr Justice Silber therefore held that the first version of the scheme was not proportionate and constituted a substantial interference with Article 12 rights.

13. He also held that this version of the scheme was incompatible with Article 14 of the Convention as it was discriminatory on the grounds of religion and nationality. It constituted direct discrimination as it targeted individuals who were, because of their religious convictions or lack of them, unable or unwilling to marry pursuant to the rites of the Church of England. Meanwhile those who wished to marry in the Church of England were exempted from the scheme.

14. Furthermore, the fact that a fee was levied was also discriminatory as this was not required of those with the same characteristics wishing to marry in Church of England religious ceremonies.

15. In a separate judgment ([2006] EWHC 1454 (Admin)), Mr Justice Silber found that in the case of Mr Baiai, at the time an illegal

immigrant, the refusal of permission to marry did not constitute an interference with his rights under Article 12, as permitting him to marry an EEA national would effectively have permitted him to "queue jump" and would have undermined the effectiveness of immigration control.

16. The Secretary of State accepted Mr Justice Silber's findings that the first version of the scheme under section 19 of the 2004 Act was discriminatory and did not seek to challenge this conclusion on appeal. However, he was granted permission to appeal against Mr Justice Silber's findings in respect of Article 12 of the Convention. Mr Baiai was also granted permission to appeal.

C. The Court of Appeal's Opinion on the first version of the scheme

17. On 23 May 2007 the Court of Appeal delivered judgment in the case of *SSHD v. Baiai and Others* [2007] EWCA Civ 478. It agreed with Mr Justice Silber's finding that the first version of the scheme under section 19 of the 2004 Act was disproportionate and violated Articles 12 and 14 of the Convention. However, it disagreed with the conclusion reached in respect of Mr Baiai. The Court of Appeal held that the immigration status of Mr Baiai was irrelevant to the genuineness of his proposed marriage, which alone could properly determine whether he should be free to exercise his right to marry. It therefore dismissed the Secretary of State's appeal and allowed that of Mr Baiai. The Secretary of State was granted permission to appeal to the House of Lords.

D. The House of Lords' Opinion on the first version of the scheme

18. On 30 July 2008 the House of Lords handed down its opinion in the case of *R. (on the application of Baiai and others) v. Secretary of State for the Home Department* [2008] UKHL 53. It dismissed the appeal and ordered that section 19(3)(b) of the 2004 Act should be read as meaning "has the written permission of the Secretary of State to marry in the United Kingdom, such permission not to be withheld in the case of a qualified applicant seeking to enter into a marriage which is not one of convenience and the application for, and grant of, such permission not to be subject to conditions which unreasonably inhibit exercise of the applicant's right under Article 12 of the European Convention."

19. Lord Bingham observed that from the early days the Court had described the right to marry as "fundamental" and noted that Article 12, in contrast with Article 8, conferred a right and not a right to respect for specified areas of personal life.

20. Lord Bingham further observed that the scope afforded to national law was not unlimited and it had been emphasised that national laws governing the exercise of the right to marry should never injure or impair the substance of the right. In practice the Court had been firm in upholding the right to marry, finding in favour of applicants denied the exercise of that

right because they were serving prisoners (*Hamer v. the United Kingdom*, no. 7114/75, Commission decision of 13 December 1979, DR 24, p. 62), because of a mandatory delay imposed before entering into a fourth marriage (*F. v. Switzerland*, 18 December 1987, Series A no. 128), or because one applicant was the father-in-law of the other and they could only exercise their right to marry if they obtained a private Act of Parliament (*B. and L. v. the United Kingdom*, no. 36536/02, 13 September 2005).

21. Lord Bingham considered, *inter alia*, the Court's decisions in *Sanders v. Franc*e, no. 31401/96, Commission decision of 16 October 1996, DR 87 p. 160 and *Klip and Krüger v. the Netherlands* (1997) DR 91-A, p. 66. He concluded that:

> "A national authority may properly impose reasonable conditions on the right of a third-country national to marry in order to ascertain whether a proposed marriage is one of convenience and, if it is, to prevent it. This is because Article 12 exists to protect the right to enter into a genuine marriage, not to grant a right to secure an adventitious advantage by going through a form of marriage for ulterior reasons.
>
> ... ...
>
> [The authorities] establish ... that where a third-country national proposes to marry within the jurisdiction the member state may properly check whether the proposed marriage is one of convenience or not and seek information necessary for that purpose. The authorities give no support to the proposition that a significant restriction may be placed on all such marriages, or on a sub-class of such marriages, irrespective of whether they are marriages of convenience or genuine marriages and with no procedure to ascertain whether they are the one or the other."

22. In respect of the first version of the scheme, Lord Bingham held:

> "Apart from its discriminatory features, which the Secretary of State has said she will remove, I do not think section 19, read alone, is legally objectionable. It is open to a member state, consistently with article 12, to seek to prevent marriages of convenience. There is nothing in the text of section 19 which authorises or requires the withholding of permission to marry in the case of any marriage which is not a marriage of convenience. Indeed, the section makes no reference to marriages of convenience or sham marriages and gives no hint of the grounds on which permission may be granted or withheld. Section 19 could be operated, consistently with its terms and with article 12, in a manner which required persons subject to immigration control to give notice of a proposed marriage, enabled an appropriate authority to investigate whether the proposed marriage would be one of convenience and provided for the withholding of permission only in cases where it appeared that the proposed marriage would be one of convenience.
>
> Subject to one qualification, the 2005 Regulations are similarly, in my opinion, unobjectionable. They provide in some detail in Schedule 2 for the information to be given by an applicant for permission to marry, and considerable detail (more than is required in the Schedule) is clearly necessary if enquiry is to be made whether a proposed marriage will be one of convenience. My qualification relates to the prescribed fee. 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 which is in issue. A fee of £295

(£590 for a couple both subject to immigration control) could be expected to have that effect.

The Immigration Directorates' Instructions, promulgated (it is understood) without express parliamentary sanction, provide for the denial of permission to marry (save on compassionate grounds, relatively rarely allowed in practice) to all those who are in the country without leave, or whose grant of leave to enter or remain in the UK on the occasion in question did not total more than 6 months, or who did not have at least 3 months remaining at the time of making the application for permission. The vice of the scheme is that none of these conditions, although of course relevant to immigration status, has any relevance to the genuineness of a proposed marriage, which is the only relevant criterion for deciding whether permission should be given to an applicant who is qualified under national law to enter into a valid marriage. It may be that persons falling within the categories specified in the Instructions are more likely to enter into a marriage of convenience than others, and that may be a very material consideration when the genuineness of a proposed marriage is investigated. But the section 19 scheme does not provide for or envisage any investigation at all, because (as has been explained in the evidence) such investigation is too expensive and administratively burdensome. Thus, subject to the discretionary compassionate exception, the scheme imposes a blanket prohibition on exercise of the right to marry by all in the specified categories, irrespective of whether their proposed marriages are marriages of convenience or whether they are not. This is a disproportionate interference with exercise of the right to marry."

23. Baroness Hale of Richmond considered that:

"It is not disputed that the Government would be free to deny any immigration advantage to a party to a marriage which had been entered into solely for the purpose of obtaining that advantage. (Indeed, the respondents argue that that is already the case, as the claimed advantages apply only to real relationships.) But the scheme in issue here does something very different. The legislation enables the Government to prohibit in advance a great many marriages irrespective of whether or not they are genuine, irrespective of whether or not there is any immigration advantage to be obtained thereby, and without any right of appeal other than judicial review. This strikes at the very heart of the right to marry which is guaranteed to everyone of full age by article 12 of the European Convention on Human Rights."

24. She found that there were many objections to the scheme, other than its being discriminatory. In particular, she noted that:

"It covers anyone who is subject to immigration control, that is, anyone who is not an EEA national and requires leave to enter or remain in the United Kingdom (s. 19(4)). This covers all non-nationals unless they have already acquired the 'right of abode'. All of these people are required to give notice to the registrar in specified registration districts, irrespective of where they live or intend to get married; and both parties to the intended marriage must attend in person to deliver their notice (s. 19(2)). This is all irrespective of how long they have been living here, how close their relationship and how small or non-existent the immigration advantage there might be.

When they get to the registrar, there are only two categories of people who need go no further. The first is a person who has been given entry clearance expressly for the purpose of enabling him to marry in the United Kingdom (s 19(3)(a)). The second is a person who falls within a class specified in regulations (s 19(3)(c)). Regulation 6 of the Immigration (Procedure for Marriage) Regulations 2005 (SI 2005/15) specifies a

person 'who is settled in the United Kingdom' within the meaning of paragraph 6 of the Immigration Rules. This basically means someone who is ordinarily resident here, not in breach of the immigration laws, and without any restriction on the period for which he may remain. A very large number of people who have been here lawfully for a long time will still not be 'settled' here in this sense.

Everyone subject to immigration control who does not fall within those two exceptions cannot marry without the written permission of the Secretary of State to marry in the United Kingdom (s. 19(3)(b)). Application must be made in writing accompanied by the fee prescribed in the 2005 Regulations, which is now £295. If both parties require permission, therefore, they must pay £590 to apply for it. There is no power in the regulations to waive or reduce the fee no matter how meritorious the case. This is on top of the much more modest fees for the actual marriage, of £30 for each notice to marry, £40 for the ceremony, and £3.50 for the marriage certificate, making a total of £103.50. It must be a positive disincentive to couples whose desire to marry is deep and sincere and has nothing to do with their immigration status or where they intend to live once married.

None of these applicants will be able to find out from the Act or the Regulations how good their chances are of getting permission. On the face of it, the Government can adopt whatever policy it chooses without even laying it before Parliament for scrutiny. The current policy is contained in the published "Immigration Directorates' Instructions", chapter 1, section 15. This does not depend upon any reasonable assessment, either of the immigration advantage which the marriage might bring, or of the genuineness of the relationship. It depends upon a rule of thumb: permission will be granted if each person needing it has been granted leave to enter or remain in the UK for more than six months (calculated from when his present stay in the UK first began) and has at least three months of this remaining when he makes the application. Even within this category, permission will be refused if there is good reason to believe that either of the parties lacks capacity to marry in English law. Outside this category, permission will be refused unless "there are exceptionally compassionate features" making it unreasonable to expect them to travel, either to marry abroad or to apply for entry clearance from abroad. The examples given are pregnancy or some other condition making the person unfit to travel abroad. They do not include features suggesting that the marriage is genuine, because that is not the point.

This policy automatically excludes all asylum seekers because they do not have leave to enter. The policy states that they should not normally be permitted to marry until after their claims have been determined. But if an initial decision on an application or an appeal has been outstanding for 18 months (and we understand that time starts running afresh once an appeal has been lodged), or if they cannot be expected to travel abroad for compelling compassionate reasons, the permission may be granted. It is, of course, extremely unlikely that any genuine asylum seeker will be in a position to travel back to the country from which he has fled to escape a well-founded fear of persecution, nor would it be consistent with this country's obligations under the Refugee Convention to compel him to do so.

It is an indication of how over-inclusive the statutory scheme is that the great majority of applications for permission are granted. From 1 February 2005, when section 19 came into force, until 10 April 2006, when Silber J handed down his first judgment, 14,787 applications for permission to marry or enter a civil partnership were dealt with. 12,754 were granted, only 41 of these on exceptional or compassionate grounds, the rest because they met the leave criteria. 1,805 were

> refused. 228 were withdrawn or discontinued. We are told that this was quite deliberate. The Government simply decided to subject a large number of proposed marriages to the deterrent effect of scrutiny and to prohibit all those in the class which they thought most likely to contain the suspect unions. Making a serious attempt to distinguish between the "sham" and the genuine was considered too difficult and too expensive."

E. Amendments to the first version of the scheme

25. Following the judgments of Mr Justice Silber on 10 April 2006, the first version of the scheme was amended. Under the new procedure ("the second version"), applicants who had insufficient leave to enter or remain at the time of applying for a Certificate of Approval could be asked to submit further information in support of their applications to enable the Home Office to satisfy itself that the proposed marriage or civil partnership was genuine.

26. Further amendments followed the Court of Appeal judgment on 23 May 2007 ("the third version"). Under the third version of the scheme, applications from individuals who did not have valid leave to enter or remain, who had until this point been refused a Certificate of Approval unless there were exceptional compassionate circumstances, were to be treated in line with the guidance for those who had limited but insufficient leave to qualify for a Certificate.

27. With effect from 9 April 2009 the Government suspended the requirement to pay any fee. On 10 July 2010 a scheme for repaying fees to applicants who met a financial hardship test at the time of the application met with Ministerial approval.

28. On 27 July 2010 a proposal for a draft Asylum and Immigration (Treatment of Claimants etc.) Act 2004 (Remedial) Order 2010 was laid before Parliament. If the draft order is approved by both Houses of Parliament, it is expected to come into force early in 2011. Once in force, it will effectively abolish the Certificate of Approval scheme.

2. The circumstances of the applicants

29. The applicants were born in 1974, 1979, 2006 and 2000 respectively and live in Londonderry.

30. The first applicant has both Irish and British nationality. She is married to the second applicant, who is a Nigerian national of Biafran ethnic origin. The third applicant is the child of the first and second applicant and the fourth applicant is the first applicant's child from a previous relationship. Both the third and fourth applicants have British and Irish nationality.

31. The applicants are practising Roman Catholics.

32. The first and second applicants care for the third and fourth applicants and also for the first applicant's disabled parents. The first

applicant receives Invalid Carer's Allowance, Income Support, Child Benefit and Housing Benefit. The second applicant is not entitled to work.

3. The factual background to the application

33. The second applicant arrived in Northern Ireland in 2004 and claimed asylum in 2006. In November 2009 he was granted Discretionary Leave to Remain, which runs until November 2011.

34. The second applicant met the first applicant in November 2004 and they began living together in December 2005. In May 2006 the second applicant proposed to the first applicant and she accepted.

35. On 9 July 2007 the first and second applicants applied for a Certificate of Approval and requested to be exempted from the GBP 295 fee. They explained in detail that the first applicant survived on Invalid Carer's Allowance and Income Support and that the second applicant was destitute as a result of not being permitted to work. This explanation was attached to the application and a supporting letter from their Member of Parliament was sent.

36. On 18 July 2007 their application was returned to them with a letter stating the following:

> "If an applicant does not pay the specified fee, his or her application is invalid. The specified fee has not been paid in connection with your attempted application which you made by post on 9 July 2007. We do not consider that an exception to the requirement to pay the fee applies in this case, therefore your application is invalid and we are returning your documents."

37. In July 2008 a group of the applicants' friends contributed towards the fee required to make an application for a Certificate of Approval. The applicants subsequently made an application with the donated funds. On receiving the application form, a case worker asked the first and second applicants to submit further information about their relationship. They submitted two sworn affidavits. The case worker was satisfied with the information provided and the applicants were issued with a Certificate of Approval on 8 July 2008. They married on 18 October 2008.

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. The Certificate of Approval scheme

38. Section 19 (1) of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 ("the 2004 Act") imposed certain requirements before a person subject to immigration control was able to marry, otherwise than in accordance with the rites of the Church of England under Part II of the Marriage Act 1949.

39. Section 19 (3) of the 2004 Act stipulated, as relevant, that:

"(3) The superintendent registrar shall not enter in the marriage notice book notice of a marriage to which this section applies unless satisfied, by the provision of specified evidence, that the party subject to immigration control—

(a) has an entry clearance granted expressly for the purpose of enabling him to marry in the United Kingdom,

(b) has the written permission of the Secretary of State to marry in the United Kingdom...."

40. Section 19 (4) (a) of the 2004 Act provided that a person "subject to immigration control" was a person who was not a European Economic Area (EEA) national and who required leave to enter or remain in the United Kingdom.

41. Section 23 of the 2004 Act provided the following in relation to Northern Ireland:

"(1) This section applies to a marriage—

(a) which is intended to be solemnised in Northern Ireland, and

(b) a party to which is subject to immigration control.

(2) In relation to a marriage to which this section applies, the marriage notices—

(a) shall be given only to a prescribed registrar, and

(b) shall, in prescribed cases, be given by both parties together in person at a prescribed register office.

(3) The prescribed registrar shall not act under Article 4 or 7 of the Marriage (Northern Ireland) Order 2003 (S.I. 2003/413 (N.I.3)) (marriage notice book, list of intended marriages and marriage schedule) unless he is satisfied, by the provision of specified evidence, that the party subject to immigration control—

(a) has an entry clearance granted expressly for the purpose of enabling him to marry in the United Kingdom,

(b) has the written permission of the Secretary of State to marry in the United Kingdom, or ..."

42. Permission from the Secretary of State was granted by the issuing of a Certificate of Approval pursuant to the procedure provided for in the Immigration (Procedure for Marriage) Regulations 2005 (SI 2005/15) ("the 2005 Regulations").

43. Regulation 7 of the 2005 Regulations provided that:

"(1) A person seeking the permission of the Secretary of State to marry in the United Kingdom under section 19(3)(b), 21(3)(b) or 23(3)(b) of the 2004 Act shall—

(a) make an application in writing; and

(b) pay a fee on the submission of the application in accordance with regulation 8.

(2) The information set out in Schedule 2 is to be contained in or provided with the application."

44. Schedule 2 indicated that both parties to an intended marriage should state their name, date of birth, name at birth (if different), nationality, contact details, passport or travel document numbers, Home Office reference numbers (where applicable), details of their current immigration status (if applicable), the date on which their current leave was granted and the date on which that leave was to expire (where applicable), and details of any previous marriages and divorces.

45. The fee on application to the Secretary of State for the Home Department was initially fixed at GBP 135. It was increased to GBP 295 on 2 April 2007. There was no statutory right of appeal for an applicant who alleged that they could not afford to pay the fee. If the fee was not paid, the application for a Certificate was invalid and there was no discretion for the fee to be waived. The refusal of an application for a Certificate did not constitute an immigration decision and there was no statutory right of appeal against it.

46. In February 2005 the Immigration Directorate issued instructions on authority to marry. The Immigration Directorate's Instructions ("IDIs") stated that under the 2004 Act persons subject to immigration control who wished to marry in the United Kingdom had to first meet an additional qualifying condition before they could give notice of the marriage: they were required to have an entry clearance or be settled in the United Kingdom or have a Home Office Certificate of Approval. Chapter 1, section 15, para 3, of the IDIs ("Criteria for Granting a Certificate of Approval") provided that:

"In order to qualify for a certificate of approval, a person must have valid leave to enter or remain in the UK as follows. He must have been granted leave to enter or remain in the UK totalling more than 6 months on this occasion; and have at least 3 months of this leave remaining at the time of making the application."

47. The IDIs stated that a Certificate of Approval would be refused if there was good reason to believe that there was a legal impediment to the marriage, as on grounds of age, consanguinity or an existing marriage. A Certificate of Approval would normally be refused to a person not qualified to be granted one, but a Certificate could be granted on compassionate grounds.

2. The first amendment

48. The Certificate of Approval scheme was amended following the judgment of Mr Justice Silber. UKBA guidance stated that under the new procedures UKBA could write to persons who had insufficient leave to enter or remain at the time of applying for a Certificate of Approval, asking

that they submit further information in support of their application to enable UKBA to be satisfied that the proposed marriage or civil partnership was genuine. Any such letter would ask for information about:

- when, where and how the applicant and their fiancé(e)/proposed civil partner met;
- when the couple decided to marry or enter into a civil partnership;
- where the couple intended to live if permitted to marry or to enter into a civil partnership in the United Kingdom;
- arrangements for any religious ceremony, including the nature of the ceremony, the person conducting it and relevant contact details, arrangements for any reception or celebration, including details of the location, proof of booking and relevant contact;
- the applicant's relationship with his or her fiancé(e)/proposed civil partner if the couple was not living together (e.g. letters and photographs as evidence of the relationship);
- the applicant's life with his or her fiancé(e)/proposed civil partner if the couple was living together, including the address(es), how long they had lived together and documentary evidence in the form of correspondence addressed to both parties at the same address from utilities, government bodies, local authorities, financial institutions etc.;
- any children from the applicant and his or her fiancé(e)/proposed civil partner's present or previous relationships, including where they lived, the length of time any of them had lived with the applicant and his or her fiancé(e)/proposed civil partner, the names of their natural parents and details of who supported them;
- contact telephone numbers for the applicant and his or her fiancé(e)/proposed civil partner in case an officer wishes to contact either of you;
- and any additional information which the applicant would like to submit, and/or any additional supporting evidence or documentation which might help the application.

3. The second amendment

49. Following the Court of Appeal judgment, the Government further amended the scheme. UKBA guidance indicated that applications from individuals who did not have valid leave to enter or remain (illegal entrants, persons who had been refused leave to enter but granted temporary admission or temporary admission pending the outcome of an application for leave to enter, and those who had overstayed their leave to remain), who had previously been refused unless there were exceptional compassionate

circumstances for granting a Certificate of Approval, would be treated in line with the guidance for those who had limited, but insufficient, leave to qualify for a Certificate.

4. Subsequent developments

50. In March 2009 the AIRE Centre and the Joint Council for the Welfare of Immigrants brought judicial review proceedings in respect of the failure of the Home Office to comply with that part of the House of Lords judgment which related to the level of the fees being charged. The night before the ruling the Government agreed to suspend the fees with effect from 9 April 2009.

51. On 10 July 2010 a scheme for the repayment of the full fee to applicants who met a financial hardship test by making *ex gratia* payments received ministerial approval. In order to meet the test for real financial hardship, applicants would have to provide evidence that the payment of the fee led the couple to experience real financial hardship at the time of the application. The test would take into account whether both parties to the proposed marriage were on benefits, including asylum support, or whether they had income below a certain threshold.

52. In November 2009 the Government notified the Court of its intention to abolish the Certificate of Approval Scheme. On 27 July 2010 the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 (Remedial) Order 2010 was laid before Parliament and it is anticipated that it will come into force early in 2011.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 12 OF THE CONVENTION

53. The applicants complained that the existence of the Certificate of Approval scheme and its application to them violated their right to marry as provided in Article 12 of the Convention, which reads as follows:

> "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

54. The Government contested that argument.

A. Admissibility

55. The Government submitted that insofar as the applicants were complaining about the level of the fee charged, they had failed to exhaust

domestic remedies. Unlike the scheme itself, the fee level was the product of secondary legislation and it would therefore have been open to the applicants to pursue a remedy in respect of the level of the fees charged under the Certificate of Approval scheme before the national courts.

56. The applicants rejected this submission. They argued, *inter alia*, that the Government had not provided the Court with evidence of any remedy which existed, either in theory or in practice, at the relevant time which could have addressed the level of fees charged for Certificates of Approval.

57. The Court reiterates that the purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it (see, *inter alia*, *Civet v. France* [GC], no. 29340/95, § 41, ECHR 1999-VI). However, the Court recalls that the Convention only requires that applicants exhaust "effective remedies", which are capable of providing redress for their complaints (see *Akdivar and others v. Turkey* judgment of 16 September 1996, *Reports of Judgments and Decisions* 1998-II, §§ 65-66).

58. At the time the applicants introduced their complaints with the Court, the House of Lords' opinion in the lead case of *Baiai* was still pending. As the level of fees was itself a key aspect of that appeal, the Court considers that even if an effective remedy had existed at the domestic level the applicants cannot be reproached for not having mounted a separate challenge on the fees issue alone.

59. The Court therefore finds that the applicants have exhausted domestic remedies for the purposes of Article 35 of the Convention. Itfurther notes that this complaint is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

A. The applicants

60. The applicants alleged that the existence of the Certificate of Approval scheme and its application to them constituted a disproportionate interference with their right to marry and found a family.

61. The applicants submitted that they first formed the intention to marry in late 2005, when the first version of the scheme was still in operation. Under that scheme, individuals were to be automatically refused Certificates of Approval if they did not have a sufficient number of months' extant leave to enter or remain. As the second applicant did not have leave to remain, any application would have been refused at this stage.

62. The second version of the scheme had been introduced on 10 April 2006. Under this scheme persons with insufficient leave would not automatically be refused a Certificate but could be asked to provide further information about their relationship. However, as the second applicant still had no leave to remain in the United Kingdom, he would not have been eligible to qualify for a Certificate. He only became eligible to qualify for a Certificate after the third version of the scheme was introduced on 19 June 2007. However, the second applicant was still unable to obtain a Certificate of Approval as he could not pay the fee. Although he submitted an application, including detailed reasons why he was unable to pay, his application was rejected outright for non-payment. He was only able to obtain a certificate after his friends and family organised a "whip round".

63. The applicants accepted that States should be entitled to take the measures necessary to prevent sham marriages. However, they argued that as the impugned scheme applied to all those subject to immigration control irrespective of whether the marriage would have had any effect – actual or potential – on their immigration status, it was disingenuous to suggest that it had the legitimate aim of preventing sham marriages.

64. The applicants submitted that their relationship was not a sham and there was nothing about it which would give rise to any suspicion that it might be a sham. On the contrary, the first and second applicants had been cohabiting since 2005, they had a child together and they jointly parented the second applicant's child from a previous relationship.

65. The applicants further submitted that even if it was accepted that the scheme pursued a legitimate aim, it was disproportionate as it failed to take account of the different personal circumstances which could affect different individuals. In particular, they submitted that the level of the fee was too high and that the legislation made no provision for persons who could not pay the fee to be exempted. For the applicants, and for many others, the amount of the fee alone nullified the right to marry. The applicants submitted that in addition to the fee for the Certificate of Approval, couples wishing to marry had to pay a further GBP 103 for marriage formalities. In addition, if they wished to apply to UKBA for a change of immigration status, they would then have to pay a further sum of between GBP 465 and GBP 1020 (depending on the status sought and the service provided). The cumulative level of these fees was disproportionate and beyond the means of most of the immigrant population. The high fees charged for obtaining Certificates of Approval were therefore an inherent interference with the right to marry for the vast majority of those affected by the scheme, and not just "the poorest of the poor".

66. The applicants invited the Court to note that if, as the Government claimed, the scheme was really intended to reduce the incidence of sham marriages entered into for immigration purposes, this intention had to be predicated on the assumption that all those who were subject to the scheme's

provisions could obtain an immigration advantage through marriage. The level of fees charged to those who stood to gain no immigration advantage by marrying their chosen partner was *per se* excessive and objectionable irrespective of the financial hardship which they might suffer.

67. The applicants strongly disputed the Government's assertion that the House of Lords only found that the religious discrimination and the level of fees charged to be in violation of the Convention and that the statute and regulations were "otherwise unobjectionable". On the contrary, Lord Bingham clearly stated that the scheme could only be justified to the extent that it operated to prevent sham marriages. Likewise Baroness Hale identified a number of objections to the scheme. First, it covered all non-nationals unless they had acquired a right of abode, irrespective of how long they had been living in the United Kingdom, how close their relationship was and how small or non-existent the immigration advantage might be. Secondly, the decision whether or not to grant a Certificate of Approval did not depend upon any reasonable assessment, either of the immigration advantage which the marriage might bring, or of the genuineness of the relationship. Instead, it depended upon a rule of thumb: permission would be granted if each person needing it had been granted leave to enter or remain in the United Kingdom for more than six months and had at least three months of this remaining when he made the application. Thirdly, the policy automatically excluded all asylum seekers because they did not have leave to enter. Fourthly, it was an indication of how over-inclusive the statutory scheme was that the great majority of applications for permission were granted.

B. The Government

68. The Government did not accept that the first and second applicants had formed the intention to marry before the second applicant proposed in May 2006. The covering letter of 9 July 2007, under which the application for a Certificate of Approval was submitted, stated that the couple decided to marry in May 2006. Although the applicants had indicated in the affidavits supporting their application for a Certificate that they had previously discussed marriage, they both clearly stated that they only decided to become engaged in May 2006 and planned to marry in September 2007. There was no suggestion that they had intended to marry earlier but were unable to do so on account of the scheme. The Government therefore submitted that the applicants were only affected by the third version of the scheme. Under this version, aside from the payment of the fee, the requirement to obtain a Certificate of Approval did not prevent the applicants from marrying.

69. The Government did not accept that the Certificate of Approval scheme of itself constituted a violation of the applicants' rights. Instead, they submitted that the House of Lords had identified three problems with the

first version of the scheme: first, the manner in which the scheme was operated constituted a disproportionate interference with the right to marry under Article 12 of the Convention; secondly, the existence of a fixed fee at a level which a needy applicant might not be able to afford could impair the essence of the right to marry; thirdly, the exemption for marriages conducted in the Church of England made the scheme discriminatory in breach of Article 14 read together with Article 12. In all other respects, the House of Lords held that the 2004 Act and the 2005 Regulations were unobjectionable and could be operated compatibly with Convention rights.

70. The Government accepted the findings of the domestic courts. In particular, the Government accepted that in principle the fee was capable of infringing the Article 12 rights of a needy applicant.

71. The Government submitted, however, that by the time the applicants applied for a Certificate of Approval, the first scheme had been amended to distinguish between sham and genuine marriages and no longer constituted a disproportionate interference with the right to marry. The level of the fee had been the subject of active consideration by the Government. The fee was suspended with effect from 9 April 2009 and on 10 July 2010 the Government introduced a scheme whereby needy applicants could reclaim the money paid.

C. The third party interveners

i. The Equality and Human Rights Commission

72. The Equality and Human Rights Commission ("the Commission") expressed a number of concerns about the continued operation of the Certificate of Approval Scheme in the United Kingdom. First, it submitted that far from acting on the premise that all persons were to be permitted the right to marry under Article 12 unless they fell within some legitimate and proportionate exclusionary provision which did not deny the essence of the right, the scheme, even following modification, proceeded on the assumption that all those within the affected class were to be refused permission unless and until the Secretary of State positively took a decision to grant them the right to marry.

73. Secondly, although the Government in the course of the domestic proceedings had argued that the scheme was targeting "marriages of convenience", it accepted that it had made no attempt to distinguish between genuine marriages and marriages of convenience in devising the scheme.

74. Thirdly, the Commission referred to Article 1 of the EC Council Resolution 97/C382/01 of 4 December 1997 on measures to be adopted on the combating of marriages of convenience. Unlike the scheme, which adopted a blanket approach, the focus of the Resolution was almost entirely concerned with post-marital scrutiny of a marriage involving a foreign

national in order to determine whether permission should be granted on the basis of that marriage.

75. Fourthly, the scheme remained discriminatory and disproportionate because it subjected a large class of foreign nationals who were not of the Anglican faith to a presumption that any marriage that they entered into in the United Kingdom would automatically be a marriage of convenience unless and until they proved otherwise. There was nothing in the Convention jurisprudence which permitted such an approach.

76. Fifthly, the Commission submitted that the section 19 scheme was unnecessary and therefore disproportionate to the stated goal of preventing marriages of convenience. In particular, it submitted that the UnitedKingdom already had procedures for identifying sham marriages and preventing those who entered into them from obtaining any immigration benefit. Section 24 of the Immigration and Asylum Act 1999 imposed a duty on a registrar of marriages to report to the Secretary of State without delay any case in which he had reasonable grounds for suspecting that a marriage was not genuine. There was no reason why this power could not alert the Secretary of State either to take immediate action or to scrutinise with particular care any later application by a party to the marriage for leave to remain. In addition, paragraph 284 of the Immigration Rules HC 395 (as amended) contained a procedure for carrying out a full investigation into the genuineness of marriages involving foreign nationals who sought to rely on that marriage in order to secure permission to remain in the United Kingdom. The Government therefore had no need to introduce the section 19 scheme.

77. Sixthly, nearly three years after the scheme was declared to be discriminatory by the Administrative Court, the Secretary of State had failed to put any legislation before Parliament to remove the discriminatory elements.

78. Seventhly, the fee levied was disproportionate and excessively high. This had a particularly harsh impact on the affected group, many of whom had not been in the United Kingdom for a long time and had not had an opportunity to build up their financial resources. No mechanism existed for appealing against the level of the fee or for seeking a waiver.

79. Eighthly, the scheme lacked adequate procedural protection and remained over-inclusive and arbitrary.

80. Finally, the Commission submitted that the subsequent changes to the scheme were nothing more than cosmetic and did nothing to remove the fundamental objections to it.

ii. The Immigrant Council of Ireland – Independent Law Centre

81. The Immigrant Council of Ireland ("ICI") also submitted that section 19 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 disproportionately restricted the right to marry. The ICI emphasised that the

United Kingdom's immigration law already contained provisions on sham marriages. Consequently, parties to a marriage contracted solely for the purpose of circumventing immigration rules would not be able to rely on national laws or on Article 8 of the Convention to oblige the Government to grant or renew residence permits. Therefore, rather than interfere with the right to marry, the problem of sham marriages could have been fully dealt with by proportionate and transparent Article 8 compliant rules relating to the grant of permission to remain as a consequence of a marriage.

2. The Court's assessment

82. Article 12 secures the fundamental right of a man and woman to marry and found a family. The exercise of the right to marry gives rise to social, personal and legal consequences. It is subject to national laws of the Contracting States but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired (see *Rees v. the United Kingdom*, 17 October 1986, § 50, Series A no. 106; *F. v. Switzerland*, judgment of 18 December 1987, Series A no. 128, § 32; *B. and L. v. the United Kingdom*, no. 36536/02, § 34, 13 September 2005).

83. The Convention institutions have accepted that limitations on the right to marry laid down in the national laws may comprise formal rules concerning such matters as publicity and the solemnisation of marriage. They may also include substantive provisions based on generally recognised considerations of public interest, in particular concerning capacity, consent, prohibited degrees of affinity or the prevention of bigamy. In the context of immigration laws and for justified reasons, the States may be entitled to prevent marriages of convenience, entered solely for the purpose of securing an immigration advantage. However, the relevant laws – which must also meet the standards of accessibility and clarity required by the Convention – may not otherwise deprive a person or a category of persons of full legal capacity of the right to marry with the partners of their choice (see *Hamer v. the United Kingdom*, no. 7114/75, Comm. Rep. 13 December 1979, D.R. 24, pp. 12 et seq., §§ 55 et seq.; *Draper v. the United Kingdom*, no. 8186/78, Comm. Rep., 10 July 1980, D.R. 24, § 49; *Sanders v. France*, no. 31401/96, Com. Dec., 16 October 1996, D.R. no. 160, p. 163; *F. v. Switzerland* cited above; and *B. and L. v. the United Kingdom*, no. 36536/02, 13 September 2005, §§ 36 et seq.)

84. The fundamental nature of the right to marry is reinforced by the wording of Article 12. In contrast to Article 8 of the Convention, which sets forth the right to respect for private and family life, and with which the right "to marry and to found a family" has a close affinity, Article 12 does not include any permissible grounds for an interference by the State that can be imposed under paragraph 2 of Article 8 "in accordance with the law" and as being "necessary in a democratic society", for such purposes as, for

instance, "the protection of health or morals" or "the protection of the rights and freedoms of others". Accordingly, in examining a case under Article 12 the Court would not apply the tests of "necessity" or "pressing social need" which are used in the context of Article 8 but would have to determine whether, regard being had to the State's margin of appreciation, the impugned interference has been arbitrary or disproportionate (*Frasik v. Poland*, no. 22933/02, § 90, ECHR 2010-... (extracts)).

85. In the present case it is clear that from December 2005 the first and second applicants were living together in a longstanding and permanent relationship. Although they indicated in their application to the Court that they first formed the intention to marry in December 2005, in the affidavits supporting their application for a Certificate of Approval both applicants clearly stated that they decided to become engaged in May 2006 and that they hoped to marry in September 2007. The Court therefore considers that the first and second applicants formed the intention to marry in May 2006.

86. When the first and second applicants formed the intention to marry in May 2006 the second version of the Certificate of Approval scheme was in operation. As the second applicant had no leave to remain in the United Kingdom at that time, he did not qualify for a Certificate of Approval in the absence of exceptional circumstances. On 19 June 2007 the third version of the scheme extended the possibility of qualifying for a Certificate of Approval to those who were awaiting the outcome of an application for leave to remain. Although the second applicant potentially qualified for a Certificate from this date onwards, he could not afford the application fee which had been increased to GBP 295 on 2 April 2007. Nevertheless, he submitted an application to the Secretary of State for the Home Department on 9 July 2007 but that application was refused outright for non-payment of the fee. The first and second applicants only obtained a Certificate of Approval after their friends helped them to pay the fee. The couple married on 18 October 2008.

87. It is clear from the Court's case-law and from earlier Commission decisions that a Contracting State may properly impose reasonable conditions on the right of a third-country national to marry in order to ascertain whether the proposed marriage is one of convenience and, if necessary, to prevent it. Consequently, a Contracting States will not necessarily be acting in violation of Article 12 of the Convention if they subject marriages involving foreign nationals to scrutiny in order to establish whether or not they are marriages of convenience (see *Klip and Krüger v. the Netherlands*, *Sanders v. France*, both cited above, and *Frasik v. Poland*, cited above, § 89). Such scrutiny may be exercised by requiring foreign nationals to notify the authorities of an intended marriage and, if necessary, asking them to submit information relevant to their immigration status and to the genuineness of the marriage (*Klip and Krüger v. the Netherlands*). Moreover, a requirement that a non-national planning to

marry in a Contracting State should first obtain a certificate of capacity will not necessarily violate Article 12 of the Convention (*Sanders v. France*). Consequently, the Court agrees with the House of Lords that the requirement under section 19 of the 2004 Act that non-EEA nationals submit an application to the Secretary of State for the Home Department for a Certificate of Approval before being permitted to marry in the United Kingdom is not inherently objectionable.

88. However, the Court has a number of grave concerns, most of which apply to all three versions of the Certificate of Approval scheme. First, the Court observes that the decision whether or not to grant a Certificate of Approval was not, and continues not to be, based solely on the genuineness of the proposed marriage. Unlike the schemes with which the Commission was concerned in *Sanders* and *Klip and Krüger*, in the present case the first version of the scheme did not require applicants to submit any information about the strength or duration of their relationship as the scheme did not provide for or envisage any investigation into the genuineness of the proposed marriages. Rather, the IDIs suggested that the Secretary of State's decision on whether or not to grant a Certificate would be based solely on whether the applicant was in possession of sufficient leave and whether there was any legal impediment to marriage. The second version of the scheme provided that persons with insufficient leave could be required to submit information concerning the genuineness of their relationship, while the third version of the scheme extended this requirement to applicants with no valid leave to remain. However, under all three versions of the scheme applicants with "sufficient" leave to remain qualified for Certificates of Approval without any apparent requirement that they submit information concerning the genuineness of the proposed marriages.

89. Secondly, the Court is especially concerned that the first and second versions of the scheme imposed a blanket prohibition on the exercise of the right to marry on all persons in a specified category, regardless of whether the proposed marriage was one of convenience or not. Under the first version of the scheme, only those foreign nationals with sufficient leave to remain (that is, those who had been granted leave to enter or remain for a period totalling more than six months and who had at least three months of this leave remaining at the time of making the application) could qualify for a Certificate of Approval. Although the second version of the scheme extended eligibility to persons with insufficient leave, it continued to exclude persons who had no valid leave to enter. It was only the third version of the scheme which extended eligibility to persons like the second applicant who had no valid leave to enter. The Court recalls that it has previously, albeit in different circumstances, held that a general, automatic and indiscriminate restriction on a vitally important Convention right fell outside any acceptable margin of appreciation, however wide that margin was (*Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 82,

ECHR 2005-IX). Likewise, in the present case, the Court considers that there is no justification whatsoever for imposing a blanket prohibition on the right of persons falling within these categories to exercise their right to marry. Even if there was evidence to suggest that persons falling within these categories were more likely to enter into marriages of convenience for immigration purposes – and the Government have submitted no such evidence to the Court in the course of these proceedings – the Court finds that a blanket prohibition, without any attempt being made to investigate the genuineness of the proposed marriages, restricted the right to marry to such an extent that the very essence of the right was impaired. The existence of the exception on compassionate grounds did not remove the impairment of the essence of the right, as this was an exceptional procedure which was entirely at the discretion of the Secretary of State. Moreover, the Secretary of State's decision whether or not to exercise this discretion appears to have been based entirely on the personal circumstances of the applicants and not on the genuineness of the proposed marriages.

90. Thirdly, the Court agrees with the view expressed by Lord Bingham (set out at paragraph 22 above) that a fee fixed at a level which a needy applicant could not afford could impair the essence of the right to marry. It recalls that it has previously found, in the context of a complaint under Article 6 § 1 of the Convention, that depending on the circumstances of a case, including the applicant's ability to pay, the level of a fee may in itself be such as to restrict the enjoyment of a Convention right (see, for example, *Kreuz v. Poland*, no. 28249/95, § 60, ECHR 2001-VI). In view of the fact that many persons who are subject to immigration control will either be unable to work in the United Kingdom, such as the second applicant, or will fall into the lower income bracket, the Court also agrees that in the present case the fee of GBP 295 was sufficiently high to impair the right to marry. Moreover, the Court does not consider that the system of refunding fees to needy applicants, such as the second applicant, which was introduced in July 2010, constitutes an effective means of removing any impairment as the requirement to pay a fee, even if there is a possibility that it could be later refunded, may act as a powerful disincentive to marriage.

91. The foregoing considerations are sufficient to enable the Court to conclude that from May 2006, when the applicants formed the intention to marry, until they were issued with a Certificate of Approval on 8 July 2008, the very essence of the first and second applicants' right to marry was impaired. From May 2006 to 19 June 2007, the essence of the right was impaired because the second applicant was not eligible to be issued with a Certificate of Approval under the second version of the scheme. From 19 June 2007 to 8 July 2008 the essence of the right was impaired by level of the fee charged.

92. There has accordingly been a violation of Article 12 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 12

93. The applicants complained of a violation of Article 14 of the Convention read together with Article 12.

94. Article 14 of the Convention provides that:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination 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."

A. Admissibility

95. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

A. The applicants

96. The applicants argued that the first version of the scheme was inherently discriminatory from the outset as it did not – and continued to not – apply to those who chose to marry in the Church of England. Although in law persons of any religious adherence or none were entitled as of right to marry in their local Church of England, most adherents of other faiths, or no faith, would find it repugnant to do so. Moreover, there was no tenable justification for this difference in treatment. As Mr Justice Silber had noted in his judgment of April 2006, there was no evidence whatsoever to suggest that any other religious marriages, celebrated under the rights of other Christian denominations or faiths, were sham.

97. The applicants also asked the Court to take note of the fact that the inherently discriminatory aspect of the scheme was not removed, even though more than four years had passed since the declaration of incompatibility was first made. The applicants submitted that after the judgment of Mr Justice Silber the Government should at the very least have suspended the application of the scheme to all religious marriages.

98. In addition to discrimination on grounds of religion, the applicants submitted that the scheme was also discriminatory on grounds of nationality and poverty.

B. The Government

99. The Government conceded that, through being subjected to a regime that those wishing to marry in the Church of England would not have been subjected to, the applicants' rights under Article 14, read together with Article 12, had been breached. The Government therefore accepted that the Certificate of Approval scheme was discriminatory on the ground of religion. With regard to the failure to remove the discriminatory aspect of the scheme, the Government submitted that they did not act following the judgment of Mr Justice Silber because they were reluctant to rush to remedy the Article 14 incompatibility until a final judgment on the whole of the scheme was available. Following the House of Lords' judgment, they entered into discussions with a view to bringing the Church of England within the scheme. In spite of the discussions, however, no agreement could be reached. The Government now plan to abolish the Certificate of Approval scheme in 2011. In the meantime, as the scheme was contained in legislation passed by Parliament, it would be contrary to the rule of law and the separation of powers for the Home Office to instruct registrars not to comply with it.

100. The Government denied that the scheme involved any discrimination on the grounds of nationality or poverty. Any discrimination on the ground of nationality was justified by reference to the legitimate objective of immigration control. Moreover, insofar as the level of the fee was alleged to be too high, that issue ought to be considered under Article 12 and not under Article 14.

2. The Court's assessment

101. The Court has established in its case-law that only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of Article 14 (*Kjeldsen, Busk Madsen and Pedersen*, cited above, § 56). Moreover, in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (*D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007; *Burden v. the United Kingdom* [GC], no. 13378/05, § 60, ECHR 2008-). Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting

State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (*Burden,* cited above, § 60). However, the scope of this margin will vary according to the circumstances, the subject-matter and the background.

102. The Court agrees with the parties that the first version of the scheme was discriminatory on the ground of religion. The second applicant was in a relatively similar position to a person with no leave to remain who was willing and able to marry in the Church of England. However, a person without leave who was willing and able to marry according to the rites of the Church of England was free to marry unhindered. The second applicant, on the other hand, was both unwilling (on account of his religious beliefs) and unable (on account of his residence in Northern Ireland) to enter into such a marriage. Consequently, he was initially prohibited from marrying at all in the United Kingdom and, following the amendments to the scheme, he was only permitted to marry after submitting an application to the Secretary of State and paying a sizeable fee. There was therefore a clear difference in treatment between the second applicant and the person who was willing and able to marry in the Church of England. The Court agrees with Mr Justice Silber's conclusion that no reasons were adduced by the Government in the course of the domestic proceedings which were capable of providing an objective and reasonable justification for the difference in treatment.

103. The Court therefore finds that there has been a violation of the applicants' rights under Article 14 read together with Article 12.

104. The Court notes that Mr Justice Silber also found the first version of the scheme to be discriminatory on the ground of nationality. The applicant further submits that the scheme is discriminatory on the ground of poverty. The Government have contested both of these grounds before the Court.

105. In view of its findings in relation to discrimination on the ground of religion, the Court does not consider it necessary to reach a conclusion on whether the scheme was discriminatory on any other ground. However, in respect of the applicants' submission that the scheme was discriminatory on the ground of nationality, the Court would make two observations.

106. First, the Court recalls that EEA nationals and non-EEA nationals in possession of Indefinite Leave to Remain were expressly excluded from the Certificate of Approval scheme. It is therefore inclined to consider that any difference in treatment was on the ground of immigration status and not, in fact, on the ground of nationality.

107. Secondly, it recalls that the Government did not challenge Mr Justice Silber's finding that the scheme was discriminatory on the ground of nationality in their appeal to the Court of Appeal. Consequently, the challenge to this finding before the Court would potentially have raised

a question of estoppel (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, §§ 153 – 159, ECHR 2009-...).

III. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION READ ALONE AND TOGETHER WITH ARTICLE 14

108. The applicants complained that their rights under Article 9 of the Convention had been violated as the Certificate of Approval scheme prevented them from marrying unless they married in the Anglican Church. Relying on Article 14 of the Convention, read together with Article 9, they further complained that they were discriminated against in securing the enjoyment of this right.

109. The Government conceded that, through being subject to a regime to which those wishing to marry in the Church of England would not have been subject, the first and second applicant's rights under Article 14, taken together with Article 9, had been breached.

110. The Court sees the complaint under Article 9 as one which primarily raises a discrimination issue. There is no indication that the applicants were in any manner hindered in the exercise of their right to practise their religion. That being said, the facts of the case fall within the ambit of Article 9 and Article 14 of the Convention is therefore applicable. It therefore declares the complaint under Article 9 standing alone to be manifestly ill-founded and rejects it in accordance with Article 35 §§ 3 and 4 of the Convention. On the other hand, it declares the complaint under Article 14 read together with Article 9 to be admissible and, for the reasons conceded by the Government, it finds that there has been a violation of the applicants' Convention rights.

IV ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION READ ALONE AND TOGETHER WITH ARTICLE 14

111. The applicants complained that the existence of the Certificate of Approval scheme and its application to them disproportionately interfered with their right to respect for their private and family life. They further complained that they were discriminated against in securing the enjoyment of this right. They relied on Article 8 of the Convention read alone and together with Article 14.

112. The Court does not consider the applicants' complaints under Article 8 to be manifestly ill-founded within the meaning of Article 35 §§ 3 of the Convention. It further notes that it is not inadmissible on any other grounds and must, therefore, be declared admissible. However, having regard to its findings under Article 12 (see paragraphs 82 – 92 above), the Court considers that no separate issue arises under Article 8 of the Convention, either read alone or in conjunction with Article 14.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

113. The applicants alleged that the facts of the case also gave rise to a violation of Article 13 of the Convention.

114. The Court observes that the lead case of *R (on the applications of Baiai and Others) v Secretary of State for the Home Department*, which raised similar issues, clearly demonstrates that effective domestic remedies were available to challenge the incompatibility of the Certificate of Approval scheme. Consequently, it finds, in the light of all the material in its possession and in so far as the matters complained of are within its competence, that the complaint under Article 13 does not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

115. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

116. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

117. The applicants claimed GBP 295 in respect of pecuniary damage and GBP 12,000 in respect of non-pecuniary damage.

118. The claim for pecuniary loss represented the fee which they were required to pay in order to apply for a Certificate of Approval. The applicants submitted that they applied to the Secretary of State for the Home Department for a refund under the repayment scheme but had not received a reply.

119. The applicants claimed that they had suffered non-pecuniary damage under three distinct heads. First, there was the prolonged uncertainty as to whether they would ever be able to legitimise their relationship with each other and with their child. Secondly, there were the intense feelings of frustration which arose from knowing that the scheme had been declared incompatible with their Convention rights while continuing to have it applied to them. Thirdly, the applicants suffered acutely as a consequence of the unequal treatment which they received. This suffering was more acute because the applicants were Roman Catholics and,

as such, had long been the victims of religious discrimination in Northern Ireland.

120. In respect of the claim for pecuniary loss the Government submitted that the applicants would be eligible for repayment of the fee under the repayment scheme.

121. In respect of the claim for non-pecuniary damage, the Government denied that there was a clear causal link between any feelings of uncertainty and frustration and the violation. While such feelings would pertain to the making of any application of this kind, the Government disputed that the requirement to make such an application in itself amounted to a violation of the applicants' Convention rights.

122. The Government further submitted that any attempt to characterise the discrimination as particularly acute in the case of Northern Irish Catholics was wholly misconceived. First, any historical discrimination against Catholics in Northern Ireland was not relevant to the Certificate of Approval scheme or any violation arising from it. Secondly, as there was no Anglican Church in Northern Ireland, no church there was exempt from the scheme.

123. The Court recalls that in previous cases in which it has found a violation of Article 12 of the Convention, it has generally held that the finding of a violation amounted to adequate just satisfaction (see, for example, *F. v. Switzerland*, cited above, §§ 44 – 45; *B. and L. v. the United Kingdom*, cited above, §§ 45 – 47). Exceptionally, in the case of *Frasik v. Poland* (cited above), the applicant was awarded EUR 5,000 in respect of non-pecuniary damage.

124. In the present case the Court observes that there are two aggravating factors. First, the finding of a violation was coupled with the finding of a violation of Article 14 read together with both Articles 12 and Article 9. Secondly, the Court observes that from 10 April 2006 until the first and second applicants were granted a Certificate of Approval, the offending scheme was in operation despite a finding by the domestic courts that it breached both Article 12 and Article 14 of the Convention. The Court therefore awards the applicants EUR 8,500 jointly in respect of non-pecuniary damage.

125. The Court awards the applicants the sum of GBP 295 in respect of pecuniary loss, insofar as the sum has not been already paid.

B. Costs and expenses

126. The applicants also claimed GBP 28,044.50 for the costs and expenses incurred before the Court.

127. The Government contended that the hours claimed and the costs and expenses incurred were unreasonably high.

128. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and that they were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 16,000 for the proceedings before the Court.

C. Default interest

129. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints concerning Article 8 and Article 12 and concerning Article 14 of the Convention read together with Articles 8, 9 and 12 admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 12 of the Convention;

3. *Holds* that there has been a violation of Article 14 of the Convention read together with Article 12;

4. *Holds* that there has been a violation of Article 14 of the Convention read together with Article 9;

5. *Holds* that there is no need to examine the complaints under Article 8 of the Convention, read either alone or in conjunction with Article 14;

6. *Holds*
   (a) that the respondent State is to pay the applicants jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into British pounds, where appropriate, at the rate applicable at the date of settlement:
      (i) EUR 8,500 (eight thousand five hundred euros), plus any tax that may be chargeable, in respect of non pecuniary damage;
      (ii) GBP 295 (two hundred and ninety-five British pounds) in respect of pecuniary damage; and

(iii) EUR 16,000 (sixteen thousand euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 14 December 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Lech Garlicki
President