Neutral Citation Number: [2008] EWCA Civ 1082

Case Nos: C5/2007/2433, C5/2007/2827,
C5/2007/2717, C5/2007/2527 & C5/2007/2932

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION APPEAL TRIBUNAL

Date: 16/10/2008

Before :

LORD JUSTICE PILL
LORD JUSTICE LAWS
and
LORD JUSTICE CARNWATH

- -

Between :

AM (ETHIOPIA) **SA (SOMALIA)** **MB (PAKISTAN)** **VS (SRI LANKA)** **MI (SOMALIA) & ANR**	**Appellants**
- and -	
ENTRY CLEARANCE OFFICER	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Mr Manjit Gill QC and Mr James Collins (instructed by Sheikh & Co) for the 1st Appellant
Mr Philip Nathan and Ms Sophie Weller (instructed by **Hersi & Co**) for the 2nd Appellant
Mr Ramby De Mello and Mr Tony Muman (instructed by J M Wilson) for the 3rd Appellant
Mr Manjit Gill QC and Mr Danny Bazini (instructed by Kingston and Richmond Law Centre (SWLLC)) for the **4th Appellant**
Mr Rory O'Ryan (instructed by A S Law) for the 5th Appellant
Mr Jonathan Hall and Ms Amy Mannion (instructed by The Treasury Solicitor) for the Home Department

Hearing dates: 9 & 10 July 2008

- -

Judgment

Lord Justice Laws:

INTRODUCTION: THE IMMIGRATION RULES

1. Paragraphs 281, 297 and 317 of the current Immigration Rules made by the Secretary of State under s.3(2) of the Immigration Act 1971 and contained in HC395 as amended contain provisions under which (I summarise) the person seeking entry to the United Kingdom must show that he will be maintained or supported here without recourse to public funds. The primary issue for decision in these conjoined appeals is the extent to which, if at all, such maintenance or support may be supplied by a third party, that is a person other than the immigrant himself or his immigration sponsor. "Sponsor" is here a term of art, defined in the interpretation provisions of the Rules. I give the definition below.

2. Before explaining the circumstances of the five cases before us it is convenient to set out the relevant provisions of the Rules with which we are directly concerned. They deal with persons seeking entry to the United Kingdom to join various classes of family members already settled here (or being admitted for settlement on the same occasion). Rule 281 is headed:

> "Requirements for leave to enter the United Kingdom with a view to settlement as the spouse or civil partner of a person present and settled in the United Kingdom or being admitted on the same occasion for settlement".

The requirements to be met by such a prospective entrant include requirements that:

> "(iv) there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively;
>
> and
>
> (v) the parties will be able to maintain themselves and any dependants adequately without recourse to public funds".

3. Rule 297 is headed:

> "Requirements for indefinite leave to enter the United Kingdom as the child of a parent, parents, or a relative present and settled or being admitted for settlement in the United Kingdom".

In this case the relevant requirements are that the entrant

> "(iv) can, and will, be accommodated adequately by the parent, parents or relative the child is seeking to join, without recourse to public funds in accommodation which the parent, parents or relative the child is seeking to join, own or occupy exclusively;
>
> (v) can, and will, be maintained adequately by the parent, parents or relative the child is seeking to join, without recourse to public funds…".

Rule 317 is headed "parents, grandparents and other dependent relatives or persons present and settled in the United Kingdom." Here the relevant requirements are that the entrant

> "(iii) is financially wholly or mainly dependent on the relative present and settled in the United Kingdom;
>
> (iv) can, and will, be accommodated adequately, together with any dependants without recourse to public funds, in accommodation which the sponsor owns or occupies exclusively;
>
> (iva) can, and will, be maintained adequately, together with any dependants, without recourse to public funds…"

4. I should also set out the material provisions concerning sponsors, beginning with Rule 6 (the interpretation paragraph) which defines "sponsor" thus:

> "'sponsor' means the person in relation to whom an applicant is seeking leave to enter or remain as their spouse, fiancé, civil partner, proposed civil partner, unmarried partner, same-sex partner or dependent relative, as the case may be, under paragraphs 277 to 295O or 317 to 319."

It is to be noted that this definition of "sponsor" does not include the parent or other relative mentioned in Rule 297(v). No significance was attached to this in the course of argument, and I would attach none. I should next cite Rule 6A:

> "For the purpose of these Rules, a person is not to be regarded as having (or potentially having) recourse to public funds merely because he is (or will be) reliant in whole or in part on public funds provided to his sponsor, unless, as a result of his presence in the United Kingdom, the sponsor is (or would be) entitled to increased or additional public funds."

And Rule 35:

> "A sponsor of a person seeking leave to enter or variation of leave to enter or remain in the United Kingdom may be asked to give an undertaking in writing to be responsible for that person's maintenance and accommodation for the period of any leave granted, including any further variation. Under the Social Security Administration Act 1992 and the Social Security Administration (Northern Ireland) Act 1992, the Department of Social Security or, as the case may be, the Department of Health and Social Services in Northern Ireland, may seek to recover from the person giving such an undertaking any income support paid to meet the needs of the person in respect of whom the undertaking has been given. Under the Immigration and Asylum Act 1999 the Home Office may seek to recover from the person giving such an undertaking amounts attributable to

> any support provided under section 95 of the Immigration and Asylum Act 1999 (support for asylum seekers) to, or in respect of, the person in respect of whom the undertaking has been given. Failure by the sponsor to maintain that person in accordance with the undertaking, may also be an offence under section 105 of the Social Security Administration Act 1992 and/or under section 108 of the Immigration and Asylum Act 1999 if, as a consequence, asylum support and/or income support is provided to, or in respect of, that person."

5. Two further Rules are of some importance in considering the role of the sponsor in the scheme of immigration control. Rule 320 appears under the heading "General grounds for the refusal of entry clearance, leave to enter or variation of leave to enter or remain in the United Kingdom". One of the "[g]rounds on which entry clearance or leave to enter the United Kingdom should normally be refused" is set out at sub-paragraph 14:

> "refusal by a sponsor of a person seeking leave to enter the United Kingdom to give, if requested to do so, an undertaking in writing to be responsible for that person's maintenance and accommodation for the period of any leave granted".

Rule 322 sets out "[g]rounds on which leave to remain in the United Kingdom should normally be refused". They include this provision, which mirrors Rule 320(14):

> "(6) refusal by a sponsor of the person concerned to give, if requested to do so, an undertaking in writing to be responsible for his maintenance and accommodation in the United Kingdom or failure to honour such an undertaking once given".

OUTLINE FACTS

6. What follows is an outline of the facts in each of the five appeals. It will be necessary to add further details when I address some of the individual arguments canvassed before us.

AM

7. AM is a 76 year old Somalian national presently resident in Ethiopia. He seeks to join his wife, who is a British citizen, and their five children in the United Kingdom. He applied for entry clearance in May 2003. His application was not decided until 30 November 2005 when it was refused. He appealed, claiming so far as relevant that he satisfied Rule 281(v). He also relied on Article 8 of the European Convention on Human Rights ("ECHR"), which of course guarantees respect for private and family life. On 13 September 2006 his appeal was allowed by Immigration Judge Gibb who held that on the facts his case indeed fell within Rule 281(v). The Immigration Judge did not deal with the Article 8 claim.

8. The Secretary of State sought a reconsideration, which was ordered on 26 September 2006. On 7 September 2007 the Asylum and Immigration Tribunal ("the AIT") (Hodge J and Senior Immigration Judge Gill) dismissed the appeal under Rule 281(v).

The appellant had relied on financial support provided by a daughter, Fatuma Mahad, and also from a cousin, Basil Ali. The AIT held that such third party support could not be relied on for the purpose of Rule 281(v). They held also that IJ Gibb had been in error in taking into account in the appellant's favour money provided by the appellant's wife out of disability living allowance ("DLA") received by her. They held, finally, that there was no violation of ECHR Article 8.

9. Permission to appeal to this court was granted by Sir Henry Brooke on 17 January 2008.

VS

10. VS is a citizen of Sri Lanka, born on 12 March 1941. On 24 July 2006 he applied to the Entry Clearance Officer for leave to enter the United Kingdom to join his son here, claiming that his case fell within Rule 317. His application was refused. His appeal was heard by IJ Mayall and dismissed by him after a hearing on 1 February 2007. The IJ accepted the evidence of the appellant's son and that of a friend, Mr Arunan: Mr Arunan was providing £100 per month which was sent by the son to support his father. The son himself is disabled and in receipt of DLA. The IJ was satisfied that if the appellant came to the United Kingdom, he would be accommodated and maintained without recourse to public funds (Rule 317(iv) and (iva)), but held that he could not satisfy Rule 317(iii) because he was not dependent on his son but on Mr Arunan, for whose funds the son was no more than a conduit. The IJ also held that the refusal of entry involved no violation of Article 8. Reconsideration was ordered on 10 April 2007. On 26 June 2007 the AIT (Hodge J and Deputy President Arfon-Jones) upheld IJ Mayall on the issue as to Rule 317(iii).

11. Permission to appeal to this court was refused on the papers by Buxton LJ on 13 December 2007, but granted by Sedley LJ at an oral hearing on 25 February 2008 on the single ground that the AIT was arguably wrong in its construction of Rule 317(iii). The Secretary of State has put in a respondent's notice asserting that IJ Mayall's conclusion on Rule 317(iva) was incorrect. Mr Manjit Gill QC for VS objected to the application made by Mr Hall, for the Secretary of State, for leave to rely on this respondent's notice, on the ground that VS' fulfilment of Rule 317(iva) had been a matter of concession by the Secretary of State before the AIT, and we should not permit the concession to be withdrawn. We allowed Mr Hall's application.

MB

12. MB is a citizen of Pakistan born in March 1987. He sought entry clearance to come to the United Kingdom as the child of a parent settled here, pursuant to Rule 297. That was refused on 1 November 2004. His appeal was allowed on 28 July 2006 by IJ Hemingway. The IJ rejected certain evidence as to the availability of funds from a third party, but held that the appellant satisfied Rule 297(v) by virtue of the financial position of his mother and her second husband. He held that their joint income was £263-20 per week, made up of income support, DLA (the husband is severely disabled) and other benefits. The IJ found that out of this sum there would be something in the region of £60 per week available for the support of MB.

13. On reconsideration at the behest of the Secretary of State, SIJ Batiste on 22 June 2007 reversed the decision of IJ Hemingway on the basis that income support and DLA

could not be taken into account as providing maintenance for the purpose of Rule 297(v).

14. Permission to appeal to this court was granted by Sir Henry Brooke on 1 February 2008.

SA/AW

15. SA is a citizen of Somalia born on 9 October 1976. AW is her daughter born on 1 January 2001. They sought entry clearance to join SA's husband (AW's father) who is settled in the United Kingdom. The governing Rule is 281: the infant daughter's claim was not considered separately under Rule 297, as I understand it because her application was treated as dependent on her mother's. The applications were refused on 23 August 2006. IJ Sweet dismissed their appeals on 16 March 2007, holding amongst other things that it was unlikely that the appellants would be able to reside in the United Kingdom without recourse to public funds. In particular he was not satisfied that two third parties who were put forward were actually willing to provide the funds said to have been promised. On reconsideration on 28 September 2007 IJ Kimnell, like IJ Sweet earlier, was not persuaded that the two third parties were actually willing to commit themselves to the promised payments for an indefinite period. However, he also held that in any event third party support could not be deployed to satisfy Rule 281(v). So the appeals were dismissed.

16. Permission to appeal was granted by Sir Henry Brooke on 1 February 2008.

KA/MI

17. KA, a citizen of Somalia born in 1935, is the grandmother of MI born on 1 January 1998. They sought entry clearance to joint Anab Ahmed, KA's daughter and MI's aunt. Anab Ahmed had been granted refugee status in the United Kingdom. KA's application was governed by Rule 317, MI's by Rule 297. Their applications were refused on 17 and 18 July 2006 respectively. On 2 April 2007 their appeals were allowed by IJ Bolger in separate determinations. He found that KA and MI were or would be supported by funds which largely came from a third party, Ayan, who is Anab Ahmed's daughter and therefore also a granddaughter of KA. On reconsideration on 24 September 2007 SIJ Moulden reversed IJ Bolger, holding that third party support could not satisfy the relevant requirements of the Rules 297 and 317.

18. Permission to appeal was granted by Sedley LJ on 13 February 2008. The Secretary of State has put in a respondent's notice asserting that IJ Bolger's investigation of the sufficiency of funds available from Ayan was wholly inadequate and his conclusion perverse. But there is another substantial issue, whether Ayan may or should be considered as a sponsor, or a joint sponsor, of KA and MI for the purpose of the Rules.

19. It can be seen from this narrative that Rule 281 is engaged in the cases of *AM* and *SA/AW*; Rule 297 in *MB* and *KA/MI*; and Rule 317 in *VS* and *KA/MI*.

20. It is to be noted that in four of the cases (*AM*, *VS*, *SA/AW*, *KA/MI*) there were questions whether the Rules contemplated or allowed for support or maintenance

coming from the private resources of third parties; and as I stated at the outset, this is the primary issue in these appeals. But in *AM* and *MB* there was also a separate issue as to whether the use of State benefits in the hands of the sponsor, notably DLA, might properly supply the requirements of support or maintenance. There are two decisions of this court which respectively bear on these issues, and do so directly. It is convenient to introduce these authorities now, before confronting in any detail the individual arguments canvassed in the five appeals.

MW (LIBERIA) [2007] EWCA Civ 1376

21. *MW (Liberia)* [2007] EWCA Civ 1376 goes to the first, or primary issue. The court had to construe Rule 297(v). The appellant sought to join her mother who was settled here. The mother was on benefit. There was evidence of money available from third party family friends for the support of the appellant. The question was whether that resource could constitute maintenance "by the parent, parents or relative the child is seeking to join" within the meaning of Rule 297(v). Tuckey LJ gave the leading judgment, with which Lawrence Collins and Rimer LJJ agreed. He noted that the Rule had been amended in October 2000. Rule 297(iv) and (v) replaced a single earlier provision which had required that the entrant "(iv) can and will be maintained and accommodated adequately without recourse to public funds in accommodation which the parent owns or occupies exclusively". At paragraph 10 Tuckey LJ considered that it was

> "clear… that when the rule was in this earlier form the maintenance requirement could be met if it could be shown that adequate third party financial support was available because it did not say anything about who was to maintain the child ".

Tuckey LJ cited the Administrative Court's decision in *Arman Ali* [2000] INLR 89, where Collins J had so construed the unamended Rule.

22. As for Rule 297 in its present form, Tuckey LJ noted (paragraph 11) the submission of Mr Manjit Gill QC (who has appeared before us on behalf of AM as well as VS) that if on its ordinary construction Rule 297(v) did not encompass third party support, it was repugnant to ECHR Article 8 and should be read down so as to permit such support. Tuckey LJ's judgment proceeded as follows:

> "13. I think what the rule says is clear: the child is required to be maintained by the parent or relative she is seeking to join without recourse to public funds. If she is to be maintained by anyone else the requirement is not met. Securing maintenance from some third party is not 'maintenance by the parent'. So if the third party financial support is going directly to the child it obviously does not count. But what if the support is being or is to be given by the third parties to the parent to enable the child to be maintained, as will usually be the case? Can it then be said that the parent is maintaining the child? I think the simple answer to this question is no. In reality it is the third parties who are doing so. The parent is unable to do so without recourse to public funds and is merely acting as a conduit between the donor and the child. This will be the case wherever

the applicant is relying on support of the kind on offer in this case which was of voluntary and genuine gifts to the parent by a number of people. It is not possible to characterise monies received in this way as income or assets of the parent. Nor could it be because in a case such as this, if it was, it would have to be declared to the Benefits Agency. The risk if not the reality that it would not be declared would involve recourse to public funds.

14. Neither party to this appeal supported the IJ's 'necessary formality' test but I can see that money received by a parent under a deed of covenant or court order for maintenance might qualify if it could be shown that the legal obligation to pay it was being or was likely to be met. But I do not think I should attempt to explore or define, the boundaries of the rule. My decision is confined to arrangements of the kind in question in this case.

15. What I have said accords with the view taken by the AIT in *AA*, a distinguished Tribunal presided over by its President, Hodge J. At paragraph 30 he said:

> 'We are satisfied that the use of the definite article limits the class of persons who can provide the maintenance. We regard the formulation as pointing clearly to a requirement that where a child is joining a parent under paragraph 297 it is that parent who must maintain that child. Third party support by relatives or otherwise cannot satisfy the rule as it now is.'

The President applied the same reasoning to his later decisions in *AM* (third party support not permitted Rule 281(v)) *Ethiopia* [2007] UKAIT 00058 and *VS (para 317(iii) – no third party support) Sri Lanka* [2007] UKAIT 00069, where the rules concerned contained similar provisions to Rule 297(v) for spouses and dependant relatives applying for leave to enter. At para. 22 in *AM* the President said:

> 'We are aware of the view, widely supported by those representing appellants, that because the rules are silent on whether third party support is permissible, it must necessarily be so. We take the opposite view. The issue of maintenance is of importance in many of the immigration rules. Had it been intended that third party support should satisfy a maintenance requirement we would expect the rules to say so and to set out the way in which such maintenance might satisfy the requirement.'

I agree."

AM and *VS* are, of course, two of the cases now on appeal before us.

23. At paragraph 16 Tuckey LJ dismissed Mr Gill's suggestion that Article 8 compelled a different construction of the Rule, and also noted that

> "[t]hird party arrangements of the kind in question in this case are necessarily more precarious and, as the Tribunal said in *AA*, more difficult to verify. Furthermore the rules do not provide for undertakings to be taken from third parties. These are policy reasons which I think justified the amendment. Mr Gill's submissions that the rule was unlawful, unreasonable or *ultra vires* the statute fail for the same reasons."

24. Plainly *MW* is binding authority for the proposition that at least in some circumstances an immigrant who is supported by a third party cannot thereby show that he needs no recourse to public funds. However the case was only concerned with Rule 297(v). We have heard argument as to the reach of the decision, not only upon the obvious question whether the court's conclusion must or may be read across to Rules 281 and 317, but also as to the kinds of case within Rule 297(v) itself which the decision must be taken to cover. Mr Gill submitted that the legal position was only "slightly qualified" by *MW*. To all this I must return.

MK (SOMALIA) [2007] EWCA Civ 1521

25. The other decision of this court concerns the use of DLA in the hands of the sponsor to supply the immigrant's need of support or maintenance. In *MK (Somalia)* [2007] EWCA Civ 1521 the sponsor was the appellant's wife. She was deaf and dumb. The case fell to be decided under the provisions of Rule 281. The question was whether the appellant could rely on DLA paid to the sponsor as satisfying the requirement of maintenance for the purposes of Rule 281(v). It was accepted for the appellant that income support received by the sponsor would not qualify for the purpose of the sub-paragraph because (paragraph 5) "it is assessed on the basis that it is the bare minimum required to support the person to whom it is paid". But it was common ground that DLA was not means-tested, and there was no kind of control over how its recipient might spend it. By a majority (Sedley and Rimer LJJ, Pill LJ dissenting) this court concluded that DLA in the hands of the sponsor might be deployed to fulfil Rule 281(v). Sedley LJ said this:

> "19. The short and in my opinion conclusive answer is that although DLA is calculated by reference to the claimant's need for care and for assistance with mobility, it is unrelated to her means and once in her hands is legally hers to spend or save as she chooses. This is because sections 72 and 73 of the [Social Security Contributions and Benefits Act 1992] are directed to enabling but not to requiring the claimant to pay for assistance. If therefore she spends the allowance on the maintenance of her entrant spouse, and if, as is arithmetically the case here, it is to be regarded as adequate for his maintenance, he is as a matter not only of fact but of law being maintained without recourse to public funds. The money used for his upkeep is as much the sponsor's money as a civil servant's salary, notwithstanding the origin of both in the public purse. Equally, if the sponsor

> chooses to bank it or spend it on something else, she is doing nothing unlawful or improper, for it is still her money; so too if a family member or friend provides the necessary care and help without payment."

THE ISSUES SUMMARISED

Third Party Support

26. The principal issue before us, as I indicated at the outset, is whether maintenance or support for a prospective entrant may for the purposes of the Rules be supplied by a third party. The question arises primarily in the context of Rules 281 and 317, although as I shall show (and notwithstanding the authority of *MW (Liberia)*) some points have been canvassed on Rule 297. In *AM* and *SA/AW* the question is whether third party support may be prayed in aid in order to satisfy Rule 281(v). (If it may, the Secretary of State accepts that *SA/AW* should be remitted for the evidence of the two third party sponsors, to whom I referred in outlining the facts, to be tested: the appellants complain that the AIT gave them no opportunity to explain their willingness to provide support.) In *VS* and *KA/MI* the question is whether such support may be deployed in order to satisfy Rule 317(iii) and/or (iva).

AM and MB – DLA

27. This court's decision in *MK (Somalia)* has led the Secretary of State (clearly rightly) to concede that the AIT was wrong in *AM* and *MB* to exclude the sponsor's or the parent's DLA as a possible source of support within the Rules, and that accordingly those appeals should be allowed so that the error might be corrected. There remains an issue whether they should be allowed outright, or remitted to the AIT for further findings to be made as to the adequacy of the support provided in each case by the sponsor's DLA. I should notice that *MB* is the only case before us in which the question of privately funded support from third parties does not arise: as I have indicated, the only funds available to the appellant's mother and her husband consisted in State benefits. The benefits in hand included, but were not limited to, DLA; in particular the sponsor was, and presumably still is, also in receipt of income support. This gives rise to the next issue.

MB – Income Support

28. On behalf of MB Mr de Mello also submitted that the income support paid to the parent (as well as the DLA) could properly be taken into account for the purpose of Rule 297(v). Although *MK (Somalia)* proceeded on the opposite basis, Mr de Mello submitted that that was no more than a concession by the appellant, and it is open to the court on these appeals to take its own view of the question.

ECHR Article 8 – AM

29. In *MB* the Secretary of State accepts that the case must be remitted to the AIT for an Article 8 claim advanced by the appellant to be properly considered. But there is a substantive Article 8 issue in *AM*: whether or not the AIT on reconsideration was right to hold that there was no violation of the Article.

KA/MI – Who was the Sponsor (or Sponsors)?

30. In *KA/MI* there is a discrete question (not without some general importance) whether Ayan, who it will be remembered is a granddaughter of KA and is said to provide support for KA and MI, should properly be regarded as the appellants' sponsor, or joint sponsor with KA's daughter Anab Ahmed.

KA/MI – IJ Bolger's Findings

31. There is also, as I indicated in summarising the facts, an issue whether IJ Bolger's assessment of the funds available from Ayan was legally adequate.

THE ISSUES CONSIDERED

Third Party Support

32. Mr Gill for AM and VS advanced the greater part of the argument for the appellants on this first and principal issue. In addition he adopted a substantial part of the skeleton argument which had been prepared by Mr de Mello on behalf of MB (to whose case the submissions in question were largely inapt). Mr O'Ryan for KA and MI and Mr Nathan for SA and AW added further contributions.

(1) Preliminary Arguments for Third Party Support

33. Mr Gill advanced certain general submissions on the construction of the Rules which I should confront at the outset. He said that the Rules are to be interpreted according to their ordinary meaning having regard to their purpose, which is (in the case of Rules 281, 297 and 317) to promote family life while ensuring that no additional burden falls on the State: so much is demonstrated by the terms of Rule 6A, which Mr Gill described as the "central provision" for a proper understanding of the aim of the Rules. In light of this asserted purpose, Mr Gill proceeded to submit that for the Rules to preclude reliance on third party support would not promote any legitimate aim, such as the economic interests of the State, because such interests would be served, not undermined, by allowing for such support.

34. More ambitiously, Mr Gill advanced an argument that unless the Rules – and the reference is in terms to Rules 281(v) and 317(iii) – are construed so as to allow for third party support, they are *ultra vires* the enabling power (s.3(2) of the Immigration Act 1971) as being unreasonable and disproportionate, and repugnant to ECHR Article 8.

35. In my judgment these wide-ranging submissions betray a misconceived appreciation of the nature of the Immigration Rules. Mr Gill argues for a purposive construction of the Rules, and identifies the relevant purpose as the promotion of family life, albeit without the imposition of additional economic burdens on the State. He submits that this construction is the price both of the Rules' reasonableness at common law and their compatibility with the Convention rights. Such an argument was rejected by this court in *MW (Liberia)*: see paragraph 16, to which I have referred. But there is other learning on the subject. As I have said Tuckey LJ at paragraph 10 in *MW (Liberia)* referred to the decision of Collins J in the Administrative Court in *Arman Ali* [2000] INLR 89. In that case Collins J was concerned to construe one of the provisions in

the Rules requiring the availability of adequate accommodation for the applicant without recourse to public funds. He adopted an approach which is very much in line with Mr Gill's first argument before us. He said (102B):

> "In any event, apart from the Convention, I would have assumed that Parliament did not intend to create any greater impediment than necessary to the ability of those settled in this country to enjoy family life here. It is therefore in my view appropriate to apply a purposive construction to the Rules, particularly as they are not to be construed strictly as if they were statutory provisions but sensibly in accordance with their natural meaning and purpose, bearing in mind that they are not intended to enact a precise code but frequently give only a broad indication of how discretion is to be exercised..."

As for the ECHR (Mr Gill's second argument, as I have recorded it), just above this passage Collins J said this:

> "Even if there has been an interference with respect for family life, there has not necessarily been a breach of Article 8. The interference may be justified under Article 8(2), but it must be proportionate to the legitimate aim concerned, which in this case is the maintenance of the economic well-being of the state: see *Beldjoudi v France* (1992) 14 EHRR 801. Thus it is, as it seems to me, justifiable to avoid any recourse to public funds. But the barrier must not be greater than necessary. Accordingly, the Rules would not in my view be in accordance with Article 8 if they were construed so as to exclude a spouse when his or her admission would not affect the economic well-being of the country because there would be no recourse to public funds or any other detriment caused by it."

36. The first of these passages was the subject of comment by this court in *MB (Somalia)* [2008] EWCA Civ 102. At paragraph 24 Dyson LJ said this:

> "There is a difficulty with the observations of Collins J in *Arman Ali.* The purposive construction to which he refers [sc. in the first passage set out above] is a construction which avoids imposing a 'greater impediment than necessary to the ability of those settled in this country to enjoy family life here'. It seems to me that this fails to recognise that, although they are subject to a negative resolution by either House of Parliament, the rules are laid down by the Secretary of State 'as to the practice to be followed in the administration of this Act': see section 3(2) of the Immigration Act 1971. They are statements of policy: see *MO (Nigeria) v Secretary of State for the Home Department* [2007] UKAIT 00057 para 14. To say that a rule should not be construed as imposing a greater impediment to family life than is necessary simply begs the question whether an impediment is necessary. Whether it is necessary involves

> the policy questions to which I have referred and which are for the Secretary of State to determine."

At paragraph 59 I said:

> "Like Dyson LJ (paragraph 24) I disagree with Collins J's insistence on a purposive construction of the Immigration Rule, if it is thought that such an approach would produce a result in any way different from the application of the Rule's ordinary language. As Dyson LJ indicates, the purpose of the Rules generally is to state the Secretary of State's policy with regard to immigration. The Secretary of State is thus concerned to articulate the balance to be struck, as a matter of policy, between the requirements of immigration control on the one hand and on the other the claims of aliens, or classes of aliens, to enter the United Kingdom on this or that particular basis. Subject to the public law imperatives of reason and fair procedure, and the statutory imperatives of the Human Rights Act 1998, there can be no *a priori* bias which tilts the policy in a liberal, or a restrictive direction. The policy's direction is entirely for the Secretary of State, subject to Parliament's approval by the negative procedure provided for by the legislation. It follows that the purpose of the Rule (barring a verbal mistake or an eccentric use of language) is necessarily satisfied by the ordinary meaning of its words. Any other conclusion must constitute a qualification by the court, on merits grounds, of the Secretary of State's policy; and that would be unprincipled."

37. Their Lordships' House stated in *Huang* [2007] 2 AC 167 at paragraph 6:

> "In this country, successive administrations over the years have endeavoured, in Immigration Rules and administrative directions revised and updated from time to time, to identify those to whom, on grounds such as kinship and family relationship and dependence, leave to enter or remain should be granted. Such rules, to be administratively workable, require that a line be drawn somewhere."

38. It is thus in the nature of the Immigration Rules that they include no over-arching implicit purposes. Their only purpose is to articulate the Secretary of State's specific policies with regard to immigration control from time to time, as to which there are no presumptions, liberal or restrictive. The whole of their meaning is, so to speak, worn on their sleeve. Mr Gill's plea for a construction which gives added value to family life assumes, or asserts, an internal force or impetus which the Rules entirely lack. There is no material basis for the suggestion that Mr Gill's favoured construction must be adopted to save the *vires* of the relevant Rules. Indeed in light of *MW (Liberia)* I do not consider that he was entitled to advance such a submission.

39. The linked argument that third party support must be admitted for compliance with ECHR Article 8 is likewise without merit, and for a shorter reason. It is well

established that a prospective immigrant may have no claim to enter or remain under the Rules, and yet may succeed under Article 8: see for example *Huang* paragraph 6, and also paragraph 17: "It is a premise of the statutory scheme enacted by Parliament that an applicant may fail to qualify under the Rules and yet may have a valid claim by virtue of article 8". Mr Gill, however, must assert a contrary premise: he must say that the prospective immigrant's Article 8 rights have to be systematically protected by the Rules, since to the extent that they are not so protected there will on his argument be a violation of the Article. But this premise is plainly false. The immigrant's Article 8 rights will be (must be) protected by the Secretary of State and the court whether or not that is done through the medium of the Immigration Rules. It follows that the Rules are not of themselves required to guarantee compliance with the Article.

40. For these reasons I would with respect disapprove the second passage which I have set out above from Collins J's judgment in *Arman Ali*, so far as it was intended to found the construction of the Rule upon Article 8.

41. There was a further argument canvassed before us with regard to Article 8 and the Rules. Mr Hall submitted that since, strictly speaking, the Rules are neither main nor subordinate legislation (see *Odelola* [2008] EWCA Civ 308 paragraphs 12 – 14, 23), the requirements of the Human Rights Act 1998 as to conformity of statutory provisions with the Convention have no application. I think this is true but barren. Whether or not the Rules support the Convention rights, the Secretary of State and the courts are as I have said themselves bound in any event to do so.

(2) The Language of the Rules – the Arguments Described

42. I turn then to deal with the issue of third party support by reference to the ordinary meaning of the words of the relevant Rules.

43. The first point to consider is the amendment to Rule 297, which was made on 2 October 2000 and was referred to by Tuckey LJ in *MW (Liberia).* The subject-matter of the amended Rule 297 (iv) and (v) was, as I stated earlier, previously expressed in a single sub-paragraph (iv), which provided that a person seeking entry as the child of a parent or other relative settled here

> "can, and will, be maintained and accommodated adequately without recourse to public funds in accommodation which the parent, parents or relative own or occupy exclusively".

44. The appellants point to the fact that at paragraph 10 of his judgment in *MW (Liberia)* Tuckey LJ evidently considered that third party support was admissible under the unamended Rule: unlike the amended version (297(v)), it did not stipulate that the child's maintenance had to be provided *by the parent.* It is then submitted that certain features of Rules 281 and 317 bear a distinct affinity to the unamended Rule 297(iv), and neither of them was amended in October 2000. It is to be inferred, so the argument runs, that under these Rules, no less than under the unamended 297(iv), third party support is admissible. In particular Rule 317(iva) requires that the entrant "can, and will, be maintained adequately, together with any dependants, without recourse to public funds…": there is no express requirement that the sponsor provide the maintenance, no analogue to the inclusion of *by the parent* in 297(v). Rule 281,

dealing with persons seeking entry "as the spouse or civil partner of a person present and settled in the United Kingdom or being admitted on the same occasion for settlement", is arranged rather differently, but the terms of 281(v) – "the parties will be able to maintain themselves and any dependants adequately without recourse to public funds" – might also be said to favour an argument that maintenance is not limited to the resource of the entrant or the sponsor, and third party support is within the contemplation of the Rule.

45. Mr Gill further submits that 281(iv) clearly allows "the parties" to live in accommodation owned and thus provided by a third party, as has been held by the AIT: *AB* [2008] UKAIT 00018.

46. On this part of the case Mr O'Ryan for KA and MI laid some emphasis on the fact that the term "sponsor" itself appears only once, at 317(iv)), in any of the three rules under consideration. Mr Nathan for SA and AW submitted that there was a specific *rationale* for the exclusion of third party support in the amended Rule 297(v), namely the protection of children. Mr Nathan suggests that this approach is supported by a document received by him on 15 May 2008 from the Migration Strategic Directorate of the Home Office in response to an application he had made pursuant to the Freedom of Information Act, seeking an answer to the question, *For what reason or reasons were paragraphs 297(iv) and (v) of the Immigration Rules amended... on 2 October 2000?* The document states:

> "Taken literally, the rules prior to 2 October 2000 state that <u>any</u> person can maintain and accommodate the child as long as it is in accommodation owned or exclusively occupied by the parent(s) or relative settled in the United Kingdom. The rule change of 2 October 2000 makes it clear that the maintenance and accommodation of the child must be undertaken by the parent(s) or relative the child is joining.
>
> This is consistent with the intention and spirit of the category; that the child is coming to the United Kingdom to join and live with their [*sic*] parent(s) or relative, not simply coming to the United Kingdom on the basis of their parent(s) or relative's settled status and then not living with them as a family."

47. This document was submitted to the court after the hearing of the appeals, and we have brief written observations from Mr Nathan, Mr Gill and Mr Hall dealing with it. Mr Gill supports Mr Nathan in submitting that the document advances the appellants' position, but does so faintly. He accepts in terms (paragraph 4) that the Home Office document "does not resolve the issue currently before the court", and this is in effect also Mr Hall's position.

48. I have to say that Mr Gill betrays an evident reluctance to concede that even the amended Rule 297(v) rules out third party support. He suggests at paragraph 9 of his note on the Home Office document that *MW (Liberia)* was wrongly decided – which is, of course, not a submission open to him. In his supplementary skeleton argument (paragraph 32) he advances criticisms of that decision which pay scant regard to its binding effect. Before us he submitted that it was "pretty close to *per incuriam*". This was of no more help to the court than it was to his clients.

49. Mr Gill advanced another submission on the language of the Rules, one which does not depend on any contrast between the amended and unamended versions of Rule 297, nor on any assimilation of Rules 281 and 317 with the latter. He referred to Rules 201, 224, 232 and 263. The first three of these were contained in the section of the Rules dealing with persons seeking entry as businessmen and certain other economic capacities. (All three were in fact deleted from the Rules by HC 607 on 30 June 2008; but this does not I think affect the point Mr Gill seeks to make, which I will explain directly.) Rule 263 is concerned with persons seeking leave to enter the United Kingdom as a retired person of independent means.

50. Mr Gill drew attention to the fact that these Rules, dealing with certain classes of economic migrants, at various points contain provisions requiring in terms that the entrant have money of his own. Thus Rule 201(ii) imposed a requirement that a person seeking leave to enter the United Kingdom to establish himself in business must have

> "not less than £200,000 of his own money under his control and disposable in the United Kingdom which is held in his own name and not by a trust or other investment vehicle and which he will be investing in the business in the United Kingdom".

As a further example, Rule 232 provides that a person seeking leave to enter the United Kingdom as a writer, composer or artist

> "will be able to maintain and accommodate himself and any dependants from his own resources without working except as a writer, composer or artist and without recourse to public funds".

Mr Gill submits that the language of these Rules is to be contrasted with that of Rules 281, 297 and 317. For the classes of economic migrants dealt with in Rule 201 and the others, there is a clear and express requirement that the entrant must have sufficient resources of his own. The Rules concerning family members do not; nor, save perhaps in the case of the amended 297(v), do they impose a requirement ruling out third party support which is anything like so tight or specific.

51. Mr Gill has a further point, adopted as it happens from Mr de Mello's skeleton argument, to the effect that assistance is to be had from the decision of the European Court of Justice in Case C-408/03 *Commission v Belgium.* Mr de Mello's submission was that this authority supported the proposition that "[u]ndertakings and funds paid by third parties to EU citizens to ensure they do not become a burden on public funds are also acceptable as proof of sufficiency of resources of the EU citizen" (skeleton argument in *MB*, paragraph 47).

52. All these considerations taken together, it is said, point firmly to the conclusion that Rules 281 and 317 allow for third party support, even if, by force of this court's decision in *MW (Liberia)*, 297(v) does not.

(3) The Language of the Rules – the Arguments Addressed

53. I should say first that we were provided by Mr Hall with a chronological list of cases in which the issue had been considered, and by Mr Gill with a note setting out what he said was the effect of various decisions. I mean no disrespect to counsel's industry if these informative materials are not acknowledged as such in what follows. I have sought to elucidate the principles bearing on the various arguments.

54. I have earlier referred to the decision of this court in *Odelola* [2008] EWCA Civ 308 as showing that the Immigration Rules are, strictly speaking, neither main nor subordinate legislation. At paragraph 12 Buxton LJ summarises earlier authority as to the status of the Rules. The learning there collected yields a particular insight, closely connected with the Rules' status, into the proper means of their interpretation. There is emphasis on their being "a practical guide for the immigration officers", and "a curious amalgam of information and description of executive procedures" (*Hosenball* [1977] 1 WLR 766 *per* Geoffrey Lane LJ as he then was at 785D and Cumming-Bruce LJ at 788F respectively). In paragraph 12 of *Odelola* Buxton LJ then proceeded as follows:

> "These rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument. They must be construed sensibly according to the natural meaning of the language that is employed. The rules give guidance to the various officers concerned and contain statements of general policy regarding the operation of the relevant immigration legislation: *per* Lord Roskill, for a unanimous House of Lords, in *R v IAT ex p Alexander* [1982] 1 WLR 1076 at p 1080G.
>
> ...
>
> Immigration rules made under section 3(2) of the Act are quite unlike ordinary delegated legislation: see the observations of Lord Denning MR, Geoffrey Lane and Cumming-Bruce LJJ in *R v Secretary of State for Home Affairs ex p Hosenball* [1977] 1 WLR 766, 780-781, 785 and 788. The rules do not purport to enact a precise code having statutory force. They are discursive in style, in part merely explanatory and, on their face, frequently offer no more than broad guidance as to how discretion is to be exercised in different typical situations: per Lord Bridge in *R v IAT ex p Bakhtaur Singh* [1986] 1 WLR 910, 917-918."

55. The nature of the Rules as policy guidance and not law promotes the need for a broad approach to their construction. Their discursive style, apt no doubt for an "amalgam of information and description of executive procedures", precludes the legalistic method. Such a method proceeds on the footing that every phrase is tightly considered; similarities and differences between one passage and another in comparable contexts assume special importance; and at the same time, as often as not, an over-arching policy may be taken to inform the whole. Considerations of this kind have produced, in the context of statutory interpretation, the now familiar tension between literal and purposive construction. It is a tension, however, which has little if any part to play in the interpretation of the Immigration Rules. A literal method is

inapt because of the loose and discursive style in which the Rules are drafted; a purposive method is inapt because there is no over-arching policy. As I have said, the Rules' only purpose is to articulate the Secretary of State's specific policies with regard to immigration control from time to time, as to which there are no presumptions, liberal or restrictive. What remains, then, is the approach commended by Lord Roskill in *Alexander* [1982] 1 WLR 1076 at p 1080G:

> "[The Rules] must be construed sensibly according to the natural meaning of the language which is employed. [They] give guidance to the various officers concerned and contain statements of general policy regarding the operation of the relevant immigration legislation."

56. Adopting this approach I have no doubt that Rules 281, 297 and 317 disallow reliance on third party support. First, they are all concerned, as I have shown, with persons seeking entry to the United Kingdom to join various classes of family members already settled here, or being admitted for settlement on the same occasion. The part played by the sponsor (or the parent in the case of Rule 297) is therefore of the first importance. As the Rule 6 definition shows, for the purposes of Rules 281 and 317 the sponsor is the family member whom the entrant is seeking to join, and the parent is plainly in the same position in Rule 297. It is of no significance (*pace* Mr O'Ryan's argument) that the word "sponsor" appears once only in this set of Rules: 281 and 317 refer in terms to a person or persons plainly within the definition. The involvement of the sponsor is integral to the scheme of the Rules. It reflects what the document from the Migration Strategic Directorate, albeit dealing with Rule 297, called the "intention and spirit" of the entry category addressed in each Rule. In my judgment Rules 281 (spouses) and 317 (parents, grandparents and other dependent relatives) contemplate, no less than does 297, that the entrant will live with the sponsor as or as part of a family unit. In Rule 6 "sponsor" is defined by reference to the relationship which the entrant bears to him or her: "spouse, fiancé, civil partner, proposed civil partner, unmarried partner, same-sex partner or dependent relative". The sponsor, or the sponsor and the entrant between them, is/are to be the source of the entrant's maintenance and support, both because such a requirement will tend to give concrete effect to the family unit in question (this was the reason given for the rule change to 297 by the Migration Strategic Directorate), and also, no doubt, for the reason given by Tuckey LJ at paragraph 16 in *MW (Liberia)*: "[t]hird party arrangements of the kind in question in this case are necessarily more precarious and, as the Tribunal said in *AA*, more difficult to verify".

57. This approach is in my judgment supported in the case of Rules 281 and 317 by the arrangements contemplated in the Rules for the provision of undertakings by sponsors, backed by rights of recovery under the social security legislation and criminal sanctions: see Rule 35; note also Rules 320(14) and 322(6).

58. Given what I consider to be the right approach, as I have described it, to the task of interpreting the Rules I regard such differences of language as there are within Rules 281, 297 and 317, and between those Rules and the Rules concerning economic migrants to which Mr Gill referred, as insignificant in relation to the third party support issue. I note in particular that the latter set of Rules contains no analogue to the position of the sponsor in the former. I would uphold the Secretary of State's

respondent's notice in *VS*: I would not accept that Rule 317(iva) allows for third party support.

59. Nor, as it seems to me, are the appellants assisted by the amendment of Rule 297(v). It is true that in *MW (Liberia)* Tuckey LJ expressed the view (paragraph 10) that the unamended version of Rule 297 would have allowed for third party support. I doubt, with respect, whether that had been the Secretary of State's intention in making the Rule. The Migration Strategic Directorate did not indicate that the purpose of the rule change was to *introduce* a prohibition of third party support; on the contrary, the document's text (which I will not repeat) tends rather to suggest that the amendment was made to clarify what was always intended to be the position.

60. Otherwise, *MW (Liberia)* plainly favours the Secretary of State's case. The court held that third party support is not admissible for the purpose of compliance with Rule 297(v). We are of course bound by that conclusion. It seems to me idle to suggest, as Mr Gill did, that the legal position was only "slightly qualified" by *MW*. The scope of the judgment in that case is not materially affected by Tuckey LJ's provisional acceptance (paragraph 14) that "money received by a parent under a deed of covenant or court order for maintenance might qualify". Money received by a sponsor through such a route is as much his own as is salary paid by his employer.

61. In my view, therefore, following *MW (Liberia)* and subject only to re-consideration in their Lordships' House, no case of substance can be made to the effect that third party support may qualify for the purposes of Rule 297(v). The appellants must therefore establish a distinction of principle between that Rule on the one hand and 281 and 317 on the other. In my judgment they cannot do so. It is not shown that the Secretary of State intended to treat one category of family entrant cases in a radically different manner from the others, and it is inherently unlikely that he proposed to do so. That conclusion is in my view not in the least undermined because (as I would for present purposes accept) Rule 281(iv) allows "the parties" to live in accommodation owned and thus provided by a third party.

62. *MW (Liberia)* offers further assistance to the Secretary of State upon the interpretation of Rules 281 and 317. It will be recalled that at paragraph 15 Tuckey LJ referred to the AIT's decisions in two of the cases now before us, *AM* and *VS* – cases under Rules 281(v) and 317(iii) respectively. In the AIT the President held that third party support could not be prayed in aid for the purpose of those Rules. As I have shown Tuckey LJ agreed in terms with his reasoning and conclusion. We have heard submissions as to the reach of the *ratio decidendi* in *MW*. I agree in any event with Tuckey LJ's endorsement of the President's reasoning as it was applied in *AM* and *VS*; but I also consider that endorsement to be part of the *ratio* of *MW* because (a) in effect it forms part of the rationale for Tuckey LJ's conclusion on Rule 297(v), and (b) if Tuckey LJ considered there were stand-alone reasons for excluding third support in cases under 297(v) he would surely have said so. In fact there are none. In particular no such reason is in my view supplied by Mr Nathan's appeal to the protection of children as the basis for the October 2000 amendment.

63. Next, it seems to me that Mr Gill's reliance on the decision of the European Court of Justice in Case C-408/03 *Commission v Belgium* is entirely misplaced. The case was concerned with the right of free movement of persons between EU Member States. It is with respect wholly unsurprising that the Court of Justice adopted, as it did, a broad

interpretation of a Directive (90/364) requiring that a national of an EU Member State seeking to reside in another Member State should "have sufficient resources to avoid becoming a burden on the social assistance system of that State during [his] period of residence". The right of free movement amounts in the context of the EU treaty to precisely the kind of over-arching legislative policy which, as I have sought to show, is altogether absent from the Immigration Rules. *Commission v Belgium* tells us nothing about how the latter should be interpreted.

64. Lastly I should briefly address a further argument advanced by Mr Gill, namely that if third party support is ruled out many families will be unreasonably excluded from the potential application of the family entrant Rules (supplementary skeleton argument paragraphs 37 ff). One example he put forward was that of a person or persons whose resources consist in public funds which could be used to support an incoming family member. In this context Mr Gill urges (supplementary skeleton, footnote 12) the very case advanced by Mr de Mello in *MB*, that income support paid to a sponsor may properly be deployed for the maintenance of the entrant within Rules 281, 297 and 317; and I shall come to that under a separate head. Mr Gill gives other examples, such as that of potential sponsors who receive assistance from a charity or church support group, or the case of an extended family where there are sources of support from relations outside the nucleus of spouses and children.

65. I cannot accept Mr Gill's submission. The general argument which he advances amounts to an invitation to the court to re-write the Rules. That is of course an impermissible exercise. And Mr Gill cannot, in my view, mount a viable *Wednesbury* challenge ([1948] 1 KB 223) to the effect that if third party support is excluded the Rules are perverse or irrational. The circumstances in which the courts will allow such an assault on the content of an Immigration Rule are extremely rare. So much is shown by the reasoning of Simon Brown J as he then was in *Ex parte Manshoora Begum* [1986] IAR 385. And I have already cited the dictum of the House of Lords in *Huang* that Rules which identify those to whom, on various grounds, leave to enter is to be granted "to be administratively workable, require that a line be drawn somewhere".

66. Accordingly, for all the reasons I have given, I would hold that third party support cannot be prayed in aid by a prospective entrant to the United Kingdom under any of the three Rules 281, 297 and 317.

AM and MB – DLA

67. As will be recalled the issue is whether, given the Secretary of State's acceptance in light of *MK (Somalia)* that the AIT was wrong to exclude the sponsor's or the parent's DLA as a possible source of support within the Rules, the appeal in either of these cases should be allowed outright on that short ground or remitted for further findings of fact to be made.

(1) AM

68. AM's wife received £80-40 per week DLA from 14 April 2004. She also had other State benefits, including income support. IJ Gibb accepted that she sent US$200 – 300 to the appellant and their son in Ethiopia. As I have indicated support was also available from a daughter (who was in well-paid employment) and a cousin.

69. We have to proceed on the premise that the third party support from the daughter and the cousin have to be left out of account, as do the sponsor's benefits other than DLA. (I understood Mr Gill to adopt Mr de Mello's argument on income support: I deal with this, and reject it, below.) Mr Gill's difficulty is that IJ Gibb made no free-standing finding as to the adequacy of the wife's DLA for the support of the appellant. He stated, erroneously, that "the correct approach is to look at the resources of the family as a whole" (paragraph 20). Then at paragraph 21:

> "Because of the relative generosity of [DLA], and the main sponsor's established modest expenditure, I find that the main sponsor is in a position to support her husband without additional recourse to public funds... Looking at the resources of the family as a whole the first appellant can be supported financially."

70. IJ Gibb's findings in my judgment cannot support a conclusion that the sponsor's DLA alone would be available and suffice to provide for the appellant's support. In my judgment the case must be remitted to the AIT for further findings to be made.

(2) MB

71. As I have said IJ Hemingway held – indeed, it was undisputed – that the family income was £263-20 per week. This was made up of benefits in the mother's hands consisting in £99-85 DLA, £44-35 invalid care allowance, £60-35 severe disablement allowance and £58-65 income support. There was a schedule of outgoings. This appeared to show that "as at the date of decision" (presumably the Secretary of State's decision to refuse leave to enter) the weekly household expenditure was £166-50. IJ Hemingway made certain observations about this. He said (paragraph 66):

> "The figure of £35 per week, said to be for housekeeping, does... seem a little low. Further, there appears to be nothing in the schedule which relates specifically to the needs [the husband] would have because of his disabilities. In this context, of course, his disabilities are consistently described as being severe. The fact that he is receiving the maximum amount of [DLA] to which an individual is entitled would... tend to support the proposition that he severely disabled. I did ask about this as a point of clarification. I was told, in effect, that there were no particular additional expenses."

Earlier in his determination (paragraph 33) IJ Hemingway had described the husband's disabilities. He was bedridden, suffering from learning difficulties, epilepsy, trauma neuroses, blindness in his right eye, double incontinence and feeding problems.

72. At paragraph 67, after referring to the outgoings figure of £166-50, IJ Hemingway stated:

> "I think it reasonable to suppose that the household expenses are somewhat greater than that. I think it reasonable to suppose that there will be some additional cost in relation to [the

> husband] and which are [*sic*] attributable to his disability. Nevertheless, the gap between income and expenditure is a significant one. I do not think it will be closed by the points I make. I think it reasonable, in the circumstances, to conclude that there would be available to the household, after payment of outgoings, a figure which may fluctuate to some extent but would be in the region of £60 per week. This represents the excess of income when outgoings are deducted."

And so the IJ concluded that MB would be maintained adequately by his mother without recourse to public funds, within the meaning of Rule 297(v).

73. Before SIJ Batiste at the reconsideration hearing the Home Office Presenting Officer submitted that IJ Hemingway failed to give adequate reasons for his finding that MB could be adequately maintained out of the household income. In fact SIJ Batiste reversed the decision of IJ Hemingway on the ground that it was not in accordance with the approach of the Tribunal in *KA (Pakistan)* [2006] UKAIT 00065, which I cite below. Mr Hall accepts that this conclusion encompasses a ruling that DLA may never be taken into account; hence his concession, in light of *MK (Somalia)*, that SIJ Batiste's determination cannot stand. He is however entitled to submit (despite a protest at paragraph 19 of Mr de Mello's skeleton) that IJ Hemingway's conclusion on maintenance without recourse to public funds is no less vulnerable.

74. In my judgment IJ Hemingway's findings on the issue of maintenance were as a matter of law wholly inadequate. He was faced with an alleged housekeeping figure of £35 per week: he said only that it seemed "a little low". It was stated that "there were no particular additional expenses" for the support of the mother's very gravely disabled husband: the IJ said only that it was reasonable to suppose that there would be "some additional cost". These assertions on behalf of the appellant were to say the least surprising. In this court I do not of course suggest that they were false; but they needed to be tested rigorously and, if they were to be accepted, clear reasons given. That was not done. Moreover, Mr Hall is I think justified in submitting that IJ Hemingway's finding that something like £60 per week would be left over for the maintenance of MB was nothing but a guess.

75. In these circumstances it is in my judgment plain that further enquiry needs to be undertaken as to the adequacy of the DLA in MB's case.

MB – Income Support

76. The issue here is whether income support paid to MB's mother (as well as the DLA) should properly be taken into account for the purpose of Rule 297(v). I should first note that this issue is distinct from the principal question as to third party support; income support paid to a sponsor (or parent) was ruled out by concession in *MK (Somalia)* not because its source was a third party but because "it is assessed on the basis that it is the bare minimum required to support the person to whom it is paid" (*per* Pill LJ at paragraph 5).

77. Mr de Mello submits that for the purposes of the issue there is no substantial difference between income support and DLA. Both are non-contributory benefits whose amounts are fixed by regulation. Moreover one person, or family, may live

more (or less) frugally than another; a family's needs and wants are relative and not absolute. The State does not dictate the manner in which the benefit is to be spent. Indeed the objective of income support has been stated as being "to encourage self-reliance by providing a system of support which, so far as possible, leaves claimants free to manage their own financial affairs" (*Reform of Social Security Programme for Change* vol. 2 Cmnd 9518, paragraph 2.70(4)).

78. On this issue I can do no better than cite the decision of the AIT (presided over by Mr Ockelton, Deputy President) in *KA (Pakistan)* [2006] UKAIT 00065. In that case the sponsor (husband and father of the prospective entrants) lived very frugally. The issue for reconsideration by the AIT was (paragraph 4 of the determination) whether the Immigration Judge who first decided the appeal had failed to consider whether the Appellants would be *adequately* maintained on almost £100 per week less than the income support level (AIT's emphasis). The AIT said this:

> "6. We do not accept that submission. Although it may be said that there is an element of imprecision in the relevant Immigration Rules, the requirement that the maintenance be 'adequate' cannot properly be ignored. To our mind the use of that word imposes an objective standard. It is not sufficient that maintenance and accommodation be available at a standard which the parties and their family are prepared to tolerate: the maintenance and accommodation must be at a level which can properly be called adequate.
>
> 7. There is a good reason for using the levels of income support as a test. The reason is that income support is the level of income provided by the United Kingdom government to those who have no other source of income. It follows from that that the Respondent could not properly argue that a family who have as much as they would have on income support is not adequately maintained.
>
> 8. It perhaps does not necessarily follow that in order to be adequately maintained one has to have resources at least equivalent to those which would be available to a family on income support. But there are very good reasons for taking that view. A family of British (or EU) citizens resident in this country will not have less than that level. It is extremely undesirable that the Rules should be interpreted in such a way as to envisage immigrant families existing (and hence being required to exist, because social security benefits are not available to them) on resources less than those which would be available through the social security system to citizen families. To do so is to encourage the view that immigrant families need less, or can be expected to live on less, and in certain areas of the country would be prone to create whole communities living at a lower standard than even the poorest of British citizens... Similar considerations apply to the different benefit structure when there is a disabled person in the family, as *Munibun Nisa v ECO Islamabad* [2002] UKIAT 01369 shows. There have

> been one or two cases which have indicated that a frugal life style can be taken into account in deciding whether maintenance would be 'adequate', but in our view those cases should not be followed. In particular, we doubt whether it would ever b8 right to say that children could be maintained 'adequately' at less than the level which would be available to the family on income support, merely because one of their parents asserts that the family will live frugally. The purpose of the requirement of adequacy is to ensure that a proper standard, appropriate to a family living in a not inexpensive western society, is available to those who seek to live here."

79. In my judgment this reasoning is entirely convincing and refutes Mr de Mello's submission on this part of the case.

80. In these circumstances, if my Lords agree, the appeal in *MB* should be allowed and remit the matter to the AIT upon two points: (1) for the appellant's Article 8 claim to be considered (as Mr Hall accepts it should), and (2) for the AIT to make findings as to whether the appellant may be adequately maintained without recourse to public funds by means only of the DLA which is in payment.

ECHR Article 8 – AM

81. In *AM*, as I have said, the AIT (Hodge J and Senior Immigration Judge Gill) held in the reconsideration determination of 7 September 2007 that the refusal of entry clearance involved no violation of ECHR Article 8. Complaint is made of that conclusion by way of a free-standing ground of appeal. IJ Gibb in the first appeal decision did not decide the Article 8 claim, although he observed (paragraph 23) that there were "strong compassionate factors..., and there would be strong Article 8 grounds, given the overall circumstances". The AIT's treatment of the Article 8 issue on reconsideration (paragraphs 34 – 56) is very full. They held (paragraph 43) that family life within Article 8(1) was established: there was a subsisting marriage between AM and his wife, and they intended to live together permanently. They held also (paragraph 44) that if the refusal of entry clearance were maintained it was more likely than not that the sponsor (wife) would be unable to live with AM in Ethiopia; and this was a consequence of sufficient gravity to engage Article 8. None of this, as I understand it, is in contention.

82. At paragraph 46 the AIT turned to "the main issue of proportionality". They referred to the House of Lords' decision in *Huang*, and also *Razgar* [2004] UKHL 27. At paragraph 52 they observed that the only reason why AM's appeal under the Rules fell to be dismissed was because third party support was not permitted. But they added:

> "However, the fact that the appellant 'nearly qualified' under the Rules or 'just missed' qualifying under the Rules does not mean that his is one of the small minority of cases entitled to succeed under Article 8."

The AIT next addressed the delay in the decision-making process:

> "53. Whilst the respondent's delay of 2½ years in reaching a decision in this case is a relevant factor, it must have very substantial effects if it is to influence the outcome – see paragraph 24(v) of the Court of Appeal's judgment in *HB (Ethiopia) and others v Secretary of State for the Home Department* [2006] EWCA Civ 1713 – because the appellant does not have a potential substantive right of entry under the Rules or any policy. Since he was not entitled to succeed under the Rules, the delay will have deprived him of nothing, other than that his Article 8 claim would have been determined earlier. This guidance in *HB (Ethiopia)* survives notwithstanding the reliance in the case on the Court of Appeal's guidance on the issue of proportionality in *Huang*."

This court's decision in *HB (Ethiopia)* was appealed to the House of Lords (*sub nom. EB (Kosovo)* [2008] UKHL 41). I shall have to return to what was said by their Lordships. I note at this stage that at paragraph 1 Lord Bingham identified "the question at the heart of this appeal: what (if any) bearing does delay by the decision-making authorities have on a non-national's rights under article 8?"

83. The substance of the AIT's conclusion on the question of proportionality and Article 8 is given in paragraph 55 as follows:

> "Turning to the other specific facts of this case, the appellant and his family have been separated by war and they have suffered, both physically and psychologically. At the date of the decision, the appellant was already of advanced years. The accepted evidence is that he was in poor health... The respondent's delay is a relevant factor. The appellant and his son live in poor accommodation, although this factor can only carry little weight. In any event, they receive by way of financial support from the sponsor, her daughter and a cousin a sum between £700 and something over a £1100 a month – which is a not inconsiderable sum. The appellant lives with and has support from his son in Ethiopia. There is telephone contact between the appellant and his wife. The refusal of entry clearance means that he will not, at present, be able to join his wife in the UK. He did not (and presumably still does not) have any legal status in Ethiopia, the consequence of which may be that he and the sponsor are not able at present to enjoy family life by being together on any permanent basis in Ethiopia. On the other hand, the circumstances appertaining as the date of the decision were that the sponsor was able to travel. She was not then in receipt of disability living allowance and... she had travelled to Kenya and the United Arab Emirates in 2004 before the date of the decision but had not gone to Ethiopia to see her husband. On the findings of the immigration judge, the circumstances appertaining as at the date of the decision were that, notwithstanding the physical separation, the appellant was enjoying family life with his family in the United Kingdom of

> sufficient quality as to engage Article 8(1). In other words, he is not without any family life with them at all. In addition, he was receiving the support and comfort of his son, albeit that he was separated from the rest of his family in the United Kingdom. That fact must help to ameliorate the difficulty experienced by the appellant, the sponsor and the remaining family members in the United Kingdom of continuing separation from the appellant, as must the knowledge that the remaining son / sibling would not be left alone in Ethiopia. We also have regard to the considerations we have described above in favour of the decision – importantly, the maintenance of immigration control which is 'workable, predictable, consistent, fair and effective so as to ensure that it is not perceived as unduly porous'. We accord considerable weight to the consideration in favour of the decision of the entry clearance officer being upheld."

And so the AIT concluded that the refusal of entry clearance to AM was proportionate to the legitimate aim of fair immigration control.

84. In his supplementary skeleton argument Mr Gill takes a number of points on the AIT's reasoning. He submits in particular that the AIT failed to give proper effect to the decision of the House of Lords in *Huang*. This argument assaults the observation of the AIT at paragraph 47 that "[i]t is not the case... that applicants will find it easier to succeed under Article 8 than was previously the case". Even if (which may perhaps be doubted) the AIT's comment is incorrect or inaccurate, Mr Gill is not assisted unless it can be shown that their conclusion was wrong on the facts of this case, and I will address that question shortly.

85. Mr Gill also submitted that the AIT failed to consider, as they should have done given the decision of the House of Lords in *Beoku-Betts* [2008] UKHL 39, the impact of the entry clearance decision on other family members. I think this criticism does no justice to the broad scope of the AIT's reasoning at paragraph 55. (I should notice, out of fairness to the AIT, that their Lordships' opinions in *Beoku-Betts*, in common with those in *EB (Kosovo)* to which I shall come directly, were delivered some months after the AIT's determination.)

86. The principal direction of Mr Gill's argument at the hearing before us went to the AIT's treatment of the Home Office delay in arriving at a decision. He placed critical reliance on *EB (Kosovo)* in the House of Lords on appeal, as I have said, from the judgment of this court in *HB (Ethiopia)* to which the AIT referred at paragraph 53. Specifically, he relied on Lord Bingham's observations about such administrative delays. These have a somewhat different focus from that of Buxton LJ's statement in this court (*HB (Ethiopia)* paragraph 24(v), cross-referring to paragraph 25 of my judgment in *Strbac* [2005] IAR 504) that

> "[w]here the applicant has no potential rights under specifically immigration law, and therefore has to rely on his rights under article 8(1), delay in dealing with a previous claim for asylum will be a relevant factor under article 8(2), but it must have very substantial effects if it is to influence the outcome".

Lord Bingham said this:

> "14. ... [Delay in the decision-making process] may, depending on the facts, be relevant in any one of three ways. First, the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier...
>
> 15. Delay may be relevant in a second, less obvious, way. An immigrant without leave to enter or remain is in a very precarious situation, liable to be removed at any time. Any relationship into which such an applicant enters is likely to be, initially, tentative, being entered into under the shadow of severance by administrative order. This is the more true where the other party to the relationship is aware of the applicant's precarious position. This has been treated as relevant to the quality of the relationship... But if months pass without a decision to remove being made, and months become years, and year succeeds year, it is to be expected that this sense of impermanence will fade and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so. This result depends on no legal doctrine but on an understanding of how, in some cases, minds may work and it may affect the proportionality of removal.
>
> 16. Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes..."

87. Mr Gill's argument did not condescend to any detailed consideration of these individual factors. He submitted, more simply, that since *EB (Kosovo)* the effect of administrative delay in Article 8 cases is not so restricted as was suggested by this court in *HB (Ethiopia)* and earlier cases, and the AIT should have given the delay in this case significantly greater weight than they did. In contrast Mr Hall specifically addressed the three factors described by Lord Bingham.

88. Thus Mr Hall submitted that Lord Bingham's first two factors identified at paragraphs 14 and 15 have no application to an entry clearance case such as this because they are necessarily concerned with the position of an entrant already in the United Kingdom, facing the prospect of being removed or deported. This is clearly right. Mr Hall accepts, correctly, that Article 8 may be prayed in aid as readily by a person seeking entry as by a person seeking to avoid removal; plainly, however, by definition the passage of time cannot have the same effects in the former case as in the latter. As to Lord Bingham's third factor specified at paragraph 16 in *EB (Kosovo)* – the effect of delay on the requirements of firm and fair immigration control where a "dysfunctional system... yields unpredictable, inconsistent and unfair outcomes" – Mr Hall submits that there is nothing in the nature of an arbitrary outcome said to arise from the delay in this case. That too seems to me to be right.

89. In the result I conclude that the AIT's reasoning on AM's Article 8 claim is not undermined by any of the submissions advanced by Mr Gill, and I would reject this ground of appeal.

KA/MI – Who was the Sponsor (or Sponsors)?

90. It will be recalled that KA is MI's grandmother, and that Ayan, another grandchild of KA, was said to provide support for KA and MI. This was held by SIJ Moulden on reconsideration to be third party support and thus ineffective under the applicable Rules. However it was also submitted before SIJ Moulden that Ayan was in truth the sponsor under the Rules, or that she and Anab Ahmed, who is KA's daughter, MI's aunt and Ayan's mother, were joint sponsors. Those submissions were rejected, but are now renewed before us.

91. We have KA's entry clearance application form. Section 4 is headed "Your Sponsor". There are boxes for various heads of information to be given concerning the sponsor, including his/her date and place of birth, address and passport details. KA's form names her daughter Anab Ahmed as the sponsor. It refers to the granddaughter Ayan, stating (box 4.15) that she "will provide third party support" and (box 6.17) that she "will provide all living expenses". We are told that MI's application form merely cross-referred to that for KA.

92. Until the hearing before SIJ Moulden it had not been suggested that the sponsor of either appellant was anyone other than Anab Ahmed alone. The Senior Home Office Presenting Officer submitted to SIJ Moulden that there could not be joint sponsorship because of an amendment to Rule 6 by which the term "the person" had been substituted for "a person". I am not persuaded by this. I have earlier explained why in my view the interpretation of the Immigration Rules must accord less force to linguistic nuance than it may possess in the context of statutory construction. Plainly where the sponsor is a spouse, fiancé or civil partner there can only be one. But I do not see why a person may not seek entry to join more than one person, such as brothers or sisters, or it may be other relations, as their dependent relative: and in that case the brothers or sisters – plural – may jointly be named as sponsors.

93. But that was not done here, any more than Ayan was named as the sole sponsor. Indeed Ayan was referred to in terms as a source of third party support. In my judgment the identification of the sponsor(s) by the applicant, in his or her application for entry clearance, is of the first importance. The reason is in no sense an appeal to pedantic technicality. It is clear that the Rules contemplate the possibility of a request being made of the sponsor for a Rule 35 undertaking before entry clearance is granted: see Rule 320, referred to above. Quite apart from an undertaking, it may no doubt be thought necessary or desirable to carry out checks on the standing of the sponsor in this country before the grant of entry clearance. All this, as it seems to me, is inherent in the mechanics of the scheme. It is unworkable unless the entry clearance officer or other relevant authorities are able to rely on the identification of the sponsor put forward by an applicant in his application.

94. For these reasons the sponsor in *KA/MI* was, and was only, the person named as such, KA's daughter Anab Ahmed.

KA/MI – IJ Bolger's Findings

95. In *KA/MI*, as I have stated, IJ Bolger, who first heard the appellants' appeals, found that KA and MI were or would be supported by funds supplied by Ayan. The Secretary of State has put in a respondent's notice asserting that IJ Bolger's investigation of the sufficiency of funds available from Ayan was wholly inadequate and his conclusion perverse. If my Lords agree with my conclusions (a) that third party support is inadmissible for the purposes of Rules 281, 197 and 317 and (b) that Ayan cannot be regarded as a sponsor, this point is moot, since no amount of support coming from Ayan could in those circumstances assist the appellants' claim to enter the United Kingdom. But in case those conclusions are wrong, and out of respect for counsel's submissions, I will address the issue briefly.

96. The evidence before IJ Bolger (see paragraphs 23-28 of his determination) was that Ayan had a net monthly income of £620 from her employment, that her bank balance was usually overdrawn by more than £1,000 (she had an overdraft limit of £1,600), and that she would be required to fund the Appellants to the tune of £400 per month. The IJ concluded:

> "28. ... I am certainly persuaded of Ayan's commitment and, although it is clear that she would have to adjust her lifestyle radically in order to fulfil that commitment, I am satisfied, having seen and heard her give evidence... that she would be prepared to do so, even if it would be difficult for her and I bear in mind the background of Ayan's culture and what has happened to her family, as motivating her."

Mr Hall submits that the finding that Ayan could support KA and MI was not open to a reasonable decision-maker on the evidence, so that IJ Bolger's conclusion is perverse and so constitutes an error of law.

97. I think Mr Hall was wrong to put the case (as he did, partly at least, in his oral submissions) on the footing that the Immigration Judge placed too much weight on Ayan's commitment rather than the funds available to her – an approach which at once drew the response from my Lord Carnwath LJ that if it was a matter of weight only, it was not a matter of law. However, I would accept that IJ Bolger's conclusion on this part of the case cannot stand. He has held in effect that Ayan would be able to forego something approaching two-thirds of her income of £620 per month to support KA and MI (on the basis that they would require £400 per month or thereabouts), although as matters stand she is generally overdrawn to the tune of £1,000 or so. This is to say the least a remarkable conclusion. It appears quite insupportable. Accordingly, in my judgment, it cannot stand absent some reasoning which shows how it may be supported. But there is none, other than the Immigration Judge's emphasis on Ayan's commitment.

98. Finally on *KA/MI* I should say that certain further points were aired as to the provision of accommodation. However in light of all the conclusions I have reached they have no free-standing force, and I do not think it necessary to address them.

CONCLUSION

99. For all the reasons I have given I would allow the appeals in *AM* and *MB* and remit them to the AIT for further findings to be made as regards the adequacy of the sponsor's DLA as a possible source of support, and in *MB* for the appellant's Article 8 claim to be considered. Otherwise I would dismiss the appeals. If my Lords agree, we should no doubt seek counsel's assistance as to the terms of the orders we should make.

Lord Justice Carnwath:

100. I gratefully adopt the comprehensive statement of the relevant law, the facts and the issues given in the judgment of Laws LJ. Of the six issues identified by him in paragraphs 26 ff, I need only comment on two: that of "third party support"; and (in respect of *KA/MI*) the identity of the sponsor. On the other issues I am fully in agreement with his judgment.

101. The third party support issue is one of interpretation of the relevant rules. The cases referred to by Laws LJ establish, at least in this court, that the answers are to be found in the ordinary language of the rules, without distortion by a reference to any supposed over-arching objective, such as the promotion of family life (*MB (Somalia)* [2008] EWCA Civ 102); and, more particularly, that, where a maintenance requirement is expressed in terms which identify a particular "maintainer", third party support is not good enough.

102. The latter proposition is established by *MW(Liberia)* [2007] EWCA Civ 1376, specifically in respect of rule 297(v), which sets a requirement that the entrant will be "maintained adequately *by the parent, parents, or relative* each child is seeking to join".. That reasoning seems to me equally applicable to rule 281, in which the requirement is that "*the parties* will be able to maintain themselves and any dependants adequately…." In context the term "parties" seems to me clearly to refer to those mentioned in the first part of the rule, that is the spouses or civil partners who are the subject of the concession. Accordingly, maintenance by other parties is not good enough.

103. I confess to some regret (and a sense of artificiality) that it is necessary to rule out even support by other family members (such as the daughter or cousin in *AM*), but, in the light of the authorities, that is the unavoidable effect of the rule.

104. However, I respectfully differ from Laws LJ in respect of rule 317, which is not expressed in the same form. The requirements are that the entrant -

> "(iii) is financially wholly or mainly dependent on the relative present and settled in the United Kingdom;
>
> (iv) can, and will, be accommodated adequately, together with any dependants without recourse to public funds, in accommodation which the sponsor owns or occupies exclusively;

> (iva) can, and will, be maintained adequately, together with any dependants, without recourse to public funds…"

Reading these requirements in their ordinary meaning, it appears that once "financial dependency" on the sponsor has been established, then the source of the funds for maintenance once the entrant has arrived is not an issue. In line with the approach of the authorities already cited, I see no warrant for introducing into rule 317(iva) a requirement that the maintenance must be provided by the sponsor or any other specified individual. This view is reinforced by the fact that the sponsor is specifically referred to in rule 297 (4), but in a different context.

105. As I understand it, the two principal arguments which are deployed against this view are, first, that it is inconsistent with the central role played by the "sponsor" in the scheme of the rules (Laws LJ para 56); and, secondly, that there is binding or at least persuasive authority to contrary effect in the judgment of Tuckey LJ in *MW (Liberia)* (Laws LJ para 62).

106. As for the first of those points, it seems to me with respect inconsistent with the "ordinary language" approach to which we are constrained by *MB (Somalia).* As I have noted, the "sponsor" has a specific part to play in rule 317, which does not impinge on the maintenance requirement. It is not open to us to reinterpret the language of that rule by reference to some supposed wider scheme. In any event, I am not convinced that the "sponsor" is central to the scheme as a whole, in the way suggested. The rules referred to by Laws LJ, dealing with possibility of securing undertakings from the sponsor, indicate an important role for the sponsor, but one which is only brought into play if the Secretary of State chooses to do so. Again, in accordance with the ordinary language, I see no reason to expand that role so as to influence the interpretation of the rules more generally, even in circumstances where (as here) no undertaking has been required.

107. The second of the points turns on the reading of one part of Tuckey LJ's judgment. In paragraph 15, having stated his agreement with the reasoning of Hodge J as President of AIT in relation to interpretation of paragraph 297, he went on to approve his application of "the same reasoning" to "the similar provisions" of both rule 281 and rule 317 in two later cases (both now before us on appeal). In so far as that passage refers to rule 317, I find it difficult with respect to treat it as part of the ratio of the judgement. First, there was no discussion of the differences between the language of the two provisions, which were treated as "similar". Secondly, as applied to rule 317, the reasoning seems to me to be inconsistent with the reasoning in the earlier part of the judgment, relating to rule 297 in its earlier form, which did not specify the maintainer, and accordingly, in Tuckey LJ's view did not exclude third party support (para 10; see Laws LJ para 21)..

108. It is true that Tuckey LJ cited with approval Hodge J's own reason for excluding third party support even in rule 317. He had rejected the view that, where a rule was silent on the source of the funds third party support must be permissible; he said:

> "We take the opposite view. The issue of maintenance is of importance in many of the immigration rules. Had it been intended that third party support should satisfy a maintenance requirement we would expect the rules to say so and to set out

> the way in which such maintenance might satisfy the requirement.'"

With respect, however, this again seems to me to be inconsistent with the ordinary language rule. Where some rules do, and some do not, specify the identity of the maintainer, there is no warrant for reinterpreting them in the light of some supposed more general policy based on the importance of the issue of maintenance. Again, with respect, I find Tuckey LJ's approval difficult to reconcile with his comments on the unamended rule 297.

109. The two cases before us in which the rule 317 is in issue are those relating to VS and KA/MI. In VS the claim was rejected on the separate ground that the proposed entrant was not "financially dependent" for his son but on the son's friend Mr Aruna, who actually provided the money, the son being a mere "conduit". As a finding of fact, this seems to me unimpeachable, and to conclude the case against the appellant. Mr Gill sought to base an argument on the suggestion that, but for the son's involvement, Mr Aruna would not have advanced the money. As he puts it in his skeleton:

> "If the disappearance of the sponsor from the scene would mean an end to the provision of funds, then it can be said that the appellant is financially dependent on the sponsor".

Whether or not this is right as a matter of law, it is pure speculation as a matter of fact. I can find no finding or evidence of what would have happened if the son had "disappeared from the scene".

110. The only other case in which rule 317 arises is that of KA who was seeking entry as the dependent of her daughter Anab Ahmed. This was linked with the case of her 10-year granddaughter MI. Although she was relying on rule 297; it seems to have been sensibly accepted (no doubt for humanitarian reasons, if no other) that in practice the two cases should stand or fall together (see SIJ Moulden's decision para 7(. Although Anab Ahmed was named as the sponsor, the funds were largely to be provided by her daughter, Ayan.

111. The main problem in the case was the lack of any convincing evidence that either of them would in practice be able to provide adequate support. Although IJ Bulger found that Ayan would do so, I agree with Laws LJ that the evidentiary foundation for that conclusion is missing, and that it will need to be revisited if the claim does not fail on other grounds. However, that issue was never reached in SIJ Moulden's decision, because he held that support by someone other than the sponsor was not relevant, and that in law joint sponsorship was not possible. Laws LJ would hold that joint sponsorship is a possibility in law, but that this of no assistance in this case, because the parties are bound by the original identification of Anab Ahmed as the sole sponsor.

112. For my part I agree with Laws LJ that joint sponsorship is permissible in law. That having been accepted, however, if it can shown that the family is in truth able to provide the necessary support, I would regard it as unnecessarily formalistic to hold that the claim should stand or fall on whether they have ticked the right box in the application form. I see no reason in law or practice, in what is designed to be a

reasonably benevolent and inquisitorial regime, why the system should not be flexible enough for the parties to be helped to get that right, whether before the original decision-maker or the tribunal. I would not accept that the claim should fail on that purely technical ground.

113. On the view I take of rule 317, accordingly, there are two separate questions: first, whether the grandmother was at least mainly financially dependent on one or both potential sponsors; secondly, whether she would be maintained adequately in this country without recourse to public funds. On the second issue, as I have said, IJ Bulger's finding in the appellant's favour cannot stand. On the first point, the position is less clear. IJ Bulger decided the point in the appellant's favour; and there does not seem to have been any challenge to that position, the argument apparently turning solely on whether it was permissible to take account of Ayan's contribution (see SIJ Moulden para 5, 32). However, since the two issues are closely linked, and it is not entirely clear how the argument developed, I would remit both for redetermination by the AIT.

114. In conclusion I agree with Laws LJ on the disposal of these appeals, albeit for slightly different reasons, save that I would allow the appeals in *KA/MI* (treating them as standing or falling together), and remit the cases for redetermination.

Lord Justice Pill:

115. As does Carnwath LJ, I gratefully adopt the statement of facts and issues contained in the judgment of Laws LJ. I agree with the order he proposes and, save as appears below, with his reasoning. I deal expressly with the two issues on which Laws LJ and Carnwath LJ have disagreed, the issue of third party support and the identity of the sponsor in KA/MI, and I consider the relevance of disability living allowance.

Third Party Support

116. I agree with Laws LJ that, in relation to third party support, Rule 317 (parent etc seeking entry) has the same effect as Rule 281 (spouse or civil partner seeking entry) and Rule 297 (child seeking entry). Each Rule requires provision for maintenance "without recourse to public funds". Carnwath LJ distinguishes the effect of Rule 317 from the other rules in this respect because of the absence in Rule 317(iva) of an express requirement that maintenance be provided by the sponsor. That is contrasted with Rule 281(v), where the parties are required to "maintain themselves and any dependents", and Rule 297(v) where the person or persons required to maintain are specified.

117. I agree with Laws LJ, as I think does Carnwath LJ, that there is no over-arching policy to guide construction of the Rules. In considering the effect of a particular Rule, it is, however, necessary to consider it in the context of the Rules as a whole, in this case Rules dealing with persons seeking entry to the United Kingdom to join categories of family members already settled here (or being admitted for settlement on the same occasion). I agree with the reasoning of Laws LJ in paragraphs 56, 57 and 61 of his judgment. It is inherently unlikely that the Secretary of State intended to treat one category of family entrants in a radically different manner from the others categories. The effect of Rule 297 is determined by *MW (Liberia).* The wording of Rule 317(iva) (parent seeking entry) must be considered in the context of a scheme

which, as Laws LJ states, a sponsor is defined in Rule 6 by reference to the relationship which the prospective entrant bears to him or her and sponsors may, under Rule 35, be required to give undertakings. All three Rules give prominence to the position and function of the sponsoring relative.

118. Rule 317 expressly provides not only that the entrant must be wholly or mainly dependent on the relative present and settled in the United Kingdom but accommodation must be provided "which the sponsor owns or occupies exclusively". The role of the sponsor is maintained. In the context of the wording of the Rule as a whole, and its place in the scheme described, I do not consider that the absence of further words in Rule 317(iva) imports an intention that the maintenance is permitted to come from a third party. I find it impossible to conclude that the absence of further definition permits a departure from the approach provided in the case of other relationships. Had a blatant inconsistency between the treatment of one class of relatives and another been intended I would have expected a basis for the difference to have been expressed.

119. On this issue, I also express agreement with Laws LJ's conclusion, at paragraph 39, that the Rules are not of themselves required to guarantee compliance with Article 8 of the Convention. The Secretary of State is bound by the Convention whether or not there are appropriate provisions in the Rules. I do, however, consider it highly desirable that Rules are framed in such a way that they comply with Convention rights. They should be drafted accordingly. Where Rules purport to cover particular situations, it does no service to the coherence of a legal system if a claimant has to go outside the Rules to assert a Convention right arising from the situation.

AM and MB – Disability Living Allowance ("DLA")

120. I agree with Laws LJ that these cases should be remitted to the AIT. In *MK (Somalia) v Entry Clearance Officer* [2007] EWCA Civ 1521 this court held, by a majority, that DLA paid to the sponsor may be taken into account when considering the requirement, under Rule 281(v) that "the parties will be able to maintain themselves and any dependents adequately". Laws LJ, at paragraph 25, has cited the judgment of Sedley LJ. Rimer LJ, at paragraph 25, posed the question:

> "Why such a single person should not, if she chooses, pay her disability living allowance to her spouse and carer?"

He answered the question in the affirmative, the person seeking entry in that case being the proposed carer.

121. The question then arose in *MK* as to whether there should be a remission. By a majority, Sedley LJ dissenting, the court held that remission was necessary. Sedley LJ wished to allow the appeal outright. I stated, at paragraph 31:

> "They are only able to maintain themselves, within the meaning of the paragraph, if the sponsor devotes DLA to paying the appellant. It is only on that assumption that the provisions of the paragraph are in my judgment met".

122. Rimer LJ agreed that remission was required. Rimer LJ stated, at paragraph 33:

> "Although I was in agreement with Sedley LJ in the decision allowing the appeal, I nevertheless agree with Pill LJ that remission is required in this case. As it seems to me, the matter cannot at this stage be resolved by reference to these particular words of Rule 281(v) [will be able to] to which Sedley LJ refers. There needs to be a finding of fact by the Tribunal as to whether the arrangement proposed between the appellant and the sponsor will be one under which it can be concluded that the parties will all be able to maintain themselves, and, accordingly, for the reasons given by Pill LJ, I too would propose that the matter be remitted to the Tribunal."

123. What is required on a remission in AM and DLA is, in my judgment, not merely an investigation "as regards the adequacy of the sponsor's DLA as a possible source of support" but an investigation of the use to which in fact the DLA is likely in fact to be put, including, of course, consideration of the holder's intentions. It cannot be assumed that money paid because of the sponsor's disability will be used to maintain the entrant.

124. The predicament of the sponsor, in MB, described by Laws LJ as "very gravely disabled" illustrates the point. The AIT in its decision of 22 June 2007 described his state of health:

> "The husband is paralysed, bed-ridden and suffers from learning difficulties, epilepsy, trauma neurosis, blindness in the right eye, double incontinence, feeding problems and is using the PEG feeding system".

Such disabilities would appear to require a degree of care which would be expensive. Investigation is necessary as to whether money paid to the sponsor because of those disabilities will in fact be used to maintain the entrant. It should not be assumed that it will be used for that purpose.

125. Sedley LJ in *MK* appears to have accepted the need for such analysis stating, at paragraph 19:

> "If therefore she spends the allowance on the maintenance of her entrant spouse, and if, as is arithmetically the case here, it is to be regarded as adequate for his maintenance, he is as a matter not only of fact but of law being maintained without recourse to public funds."

Thus it is only "if" she spends the money for that purpose that DLA may be taken into account. Laws LJ appears to take the same view by requiring, at paragraph 70, DLA to be "available" for the appellant's support. I have developed the point because Laws LJ, in his conclusion, at paragraph 99, uses only the word "adequacy" in relation to the sponsor's DLA as a possible source of support.

KA/MI - Sponsorship

126. I agree with Laws LJ that Anab Ahmed should be regarded as the sole sponsor in these cases. I agree with the reasoning at paragraphs 90 to 93 of his judgment. Under the scheme provided by the Rules, the identification of the sponsor cannot, in my view, be regarded as a mere technicality.

127. I see the merits of joint sponsorship as a means of giving a proposed entrant the opportunity to rely on the joint incomes of two members of his family. I would, however, reserve the question whether joint sponsorship is permissible under the Rules for a case where the issue arises. Whether joint sponsorship is permissible and, if so, the procedure by which it may operate, should, in my view, be more fully considered.