Neutral Citation Number: [2009] EWCA Civ 634

Case No: C5/2008/0932

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM & IMMIGRATION TRIBUNAL
Ref No: 0A161922007

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/07/2009

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE MAURICE KAY
and
LORD JUSTICE ELIAS

- -

Between :

AM(SOMALIA)	**Appellant**
- 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 Michael Fordham QC and **Ms Joanna Stevens** (instructed by **Law for All**) for the **Appellant**
Miss Lisa Giovannetti and Mr Jonathan Hall (instructed by **Treasury Solicitor**) for the **Respondent**

Hearing date : 25 March 2009

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Judgment

Lord Justice Maurice Kay :

1. The appellant, Abdi-Malik Ahmed Muhumed (anonymity is unnecessary in this case) is a citizen of Somalia. In July 2004, he married Layla Guled Elmi in Somalia. She is a British citizen. She lives in London. I shall refer to her as "the sponsor". She is a trained accountant but is not in employment. She is disabled and the state benefits upon which she relies include disability living allowance. It is now common ground that the marriage is genuine. However, the sponsor returned to this country soon after the wedding and, between then and the date of the Immigration Judge's hearing, the parties had only been together for a month in Ethiopia in 2005 and a month in Somalia in 2006. On 28 January 2007, the appellant applied to the Entry Clearance Officer at Addis Ababa (there is no facility in Somalia). The application was for settlement in the United Kingdom as the spouse of the sponsor. On 1 March 2007 his application was refused. It is clear from the decision letter that the Entry Clearance Officer was not impressed by the application. The appellant appealed to the Asylum and Immigration Tribunal. The sponsor gave evidence. The Immigration Judge was satisfied as to the genuineness of the marriage and accepted the sponsor's evidence about her disability. Her evidence was that, if the appellant were to be granted settlement, they would live together in her tenanted flat and that, although she is dependent upon public funds, her cousin, Amina Yassin Mohammed, had started to provide additional financial support to the tune of £200 per month and she would continue to provide support if the appellant were to be granted settlement, at least until he found employment. The Immigration Judge accepted that evidence.

The decision of the AIT

2. Settlement by the spouse of a person already settled in this country is governed by paragraph 281 of the Immigration Rules. The Immigration Judge held that the appellant satisfied all but one of the conditions. The one he did not satisfy was paragraph 281(v):

> "the parties will be able to maintain themselves and any dependants adequately without recourse to public funds."

3. The Immigration Judge disregarded the third party support from the sponsor's cousin by reference to the AIT decision in *AM(Ethiopia)* [2007] UKAIT 0058, which has since been upheld by the Court of Appeal, [2008] EWCA Civ 1082. As we are bound by that authority, the appellant has not sought to challenge this part of the decision of the AIT before us. However, it was made clear that he wished to reserve his position on Article 8, as well as on the construction of paragraph 281, pending an appeal to the House of Lords in, amongst other matters, *AM(Ethiopia).*

4. The Immigration Judge also considered the appeal on human rights grounds. He did so only by reference to Article 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). His decision on Article 8 is contained in these paragraphs:

> "20. I accept that family life exists between the appellant and the sponsor, and that the respondent's decision constitutes an interference with the appellant's right to respect for his family life. However, the sponsor is

> free to join her husband in Hargeisa, in Somaliland, at any time she wants. There are certainly no insurmountable obstacles to the parties enjoying their family life in Somaliland. [Counsel] has drawn my attention to the medical reports concerning the sponsor's health, but the sponsor has been able to spend a month in Somaliland in 2004 and 2006 and a month in Ethiopia in 2005. I bear in mind also that the sponsor has her mother here in the UK, and other members of her family. However, in my view the consequences of the respondent's decision are not sufficiently grave as to engage Article 8 at all.
>
> 21. However, if I am wrong about that, then the issue is whether the respondent's decision is proportionate to the legitimate aim pursued, namely the maintenance of an effective policy of immigration control. Balancing the public interest in the respondent being able to pursue his legitimate policy, against the appellant's rights under Article 8, I am satisfied that the respondent's decision is proportionate to the legitimate aim pursued, and is therefore justified under Article 8(2)."

5. The present appeal relates to the human rights case, but it is now put in a different and rather more sophisticated way. Initially, the appellant sought reconsideration by the AIT and, upon refusal, applied to the High Court by way of statutory review. On 14 April 2008, Dobbs J decided that the appropriate course was to refer the case to the Court of Appeal pursuant to section 103C(i) of the Nationality, Immigration and Asylum Act 2002. At that time, third party funding under the Immigration Rules was still a live issue, although it has now fallen away following *AM(Ethiopia)*. However, Dobbs J also considered, with justification, that the alternative human rights issue merited consideration in this Court.

The ground of appeal

6. The way in which the case for the appellant has been reformulated in this Court gives rise to a single issue, which is helpfully articulated in his skeleton argument in these terms:

> "Whether paragraph 281(v) is incompatible with Article 14 of the ECHR taken together with Article 8 (and thereby must be disapplied or read down), given its failure to make provision for people with disabilities by either: (1) excusing them from the maintenance requirement, or at least (2) allowing third party maintenance."

7. Thus the issue is one of disability discrimination. The submission is that it is unlawful to apply paragraph 281(v) to the appellant and the sponsor because to do so would amount to unlawful discrimination, contrary to Article 14 taken together with Article 8, on the grounds of the sponsor's disability. The reference to "third party

maintenance" is not inconsistent with *AM(Ethiopia)*, which is accepted as an authority of general application in relation to paragraph 281(v). What is said is that its approach must be relaxed in a case such as this so as to avoid unlawful disability discrimination and that, exceptionally, third party maintenance is a permissible adjunct to public funds.

The legal framework

8. Although our domestic legislation on disability discrimination (which does not apply to this case) is complex, the architecture of Convention law is not. Article 14 states:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

9. Its scope is limited to discrimination in the enjoyment of "the rights and freedoms set forth in this Convention". They include the right to respect for family life enshrined in Article 8. It is common ground on this appeal that (1) the decision whether or not to permit the appellant to join the sponsor in this country falls "within the ambit of Article 8" and (2) disability, although not expressly referred to in Article 14, is capable of falling within the catchment of "or other status".

10. For a long time, the Article 14 cases that came before the Strasbourg Court were ones concerning different treatment of persons in substantially the same position. However in *Thlimmenos v Greece* (2001) 31 EHHR 15, the Grand Chamber said (at paragraph 44):

> "The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification … However, the Court considers that this is not the only facet of the prohibition of discrimination. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."

11. The issue on this appeal relates to the words I have emphasised. Although there is some overlap between the form of discrimination there described and the domestic concept of indirect discrimination, I agree with Elias LJ that the two concepts are not identical.

12. It is common ground that:

> "For the purposes of Article 14, a difference in treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or

> if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised." (*Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471, at paragraph 72).

At this point, the common ground comes to an end. I propose to consider the disputed areas under a series of headings.

Is this a case of discrimination on the ground of disability?

13. Although the respondent accepts that disability is capable of being a protected status under Article 14, Miss Giovannetti submits that this is simply not a case in which, in the language of *Thlimmenos*, there is a failure to treat differently "persons whose situations are significantly different". Her argument overlaps with points she also seeks to make in relation to the logically subsequent issue of justification. This is not surprising. Although in *Michalak v London Borough of Wandsworth* [2002] EWCA Civ 271, [2003] 1 WLR 617, this Court may have been thought to have propounded a rather formulaic approach to Article 14, this now has to be seen in the light of *Ghaidan v Godin Mendoza* [2004] UKHL 30, [2004] 2 AC 557, in which Baroness Hale referred to "a considerable overlap" between the questions of whether the situations to be compared were truly analogous, whether the difference in treatment was based on a proscribed ground and whether it had an objective justification. She warned against "a rigidly formulaic approach" (paragraph 134).

14. Miss Giovannetti submits that the present case is not one of "persons whose situations are significantly different" because there is no relevant difference between, on the one hand, the appellant and the sponsor, and, on the other hand, any other married couple, one of whom is unable to generate any significant income, for whatever reason, and the other of whom does not currently have a job and is without means. For example, a sponsor may have no real earning capacity because of an inability to speak English, educational disadvantages, family responsibilities or social, religious or cultural reasons. It seems that a similar submission was accepted by the Asylum and Immigration Tribunal in *NM(Disability Discrimination) Iraq* [2008] UKAIT 00026. In my judgment, however, the submission is not correct. Although the consequences may be the same in those other situations, the fact remains that disability is an established proscribed ground both in domestic law by reason of the Disability Discrimination Act 1995 and in the wider international context. Different treatment of persons in analogous situations and same treatment of persons in significantly different situations are both *prima facie* discriminatory under Article 14 where it is disability that is the reason for the different treatment or the feature that makes the situations significantly different. The real and more difficult issue in the present case is justification.

Justification: Is this a "weighty reasons" case?

15. On behalf of the appellant, Mr Michael Fordham QC submits that, in a case such as this, it is incumbent upon the respondent to establish justification by reference to "very weighty reasons". He points to numerous cases in which the Strasbourg Court has required particularly weighty reasons in order to justify discrimination on certain proscribed grounds such as race, sex, illegitimate birth, nationality, sexual orientation and the status of being adopted. He further observes that these "suspect" grounds all

relate to characteristics that are immutable or changeable only at unacceptable cost to personal identity and that groups suffering discrimination on these grounds have often been at historical disadvantage. It is not necessary to burden this judgment with references to all the cases set out in Mr Fordham's skeleton argument. I accept the principle. I also accept that, although there is no Strasbourg case on the point, disability discrimination may fall within the "suspect" group because of its recognition not only in our domestic law but also in numerous international instruments including the UN Declaration of the Rights of Disabled Persons 1975, the Vienna Declaration and Programme of Action 1993, the Standard Rules on the Equalization of Opportunities for Persons with Disabilities adopted by the UN General Assembly in 1993, the Employment Equality Directive 2000/78/EC/, the EU Charter on Fundamental Rights (Article 21) and the UN Convention on the Rights of Persons with Disabilities 2007.

16. It may well be that where a state treats a disabled person differently by reason of his disability – in domestic terms, a case of direct discrimination - it may be necessary for any justification in relation to Article 14 to be supported by particularly weighty reasons. However, as Miss Giovanetti points out, there is no Strasbourg authority which has applied that approach to justification of the equal application of a uniform rule or where an individual is contending for a right to more favourable treatment. In my judgment, it would not be appropriate for us to initiate such an approach. I reach this conclusion with some relief because, although I would of course respect the "weighty reasons" approach if I were persuaded that it is applicable, I am bound to say that, in my view, it is potentially productive of the same kind of sterile debate that bedevilled the concept of a heightened standard of proof in some civil cases in our domestic law.

Justification: Does the application of paragraph 281(v) of the Immigration Rules pursue a legitimate aim and is there a reasonable relationship of proportionality between the means employed and the aim sought to be realised?

17. I have formulated this question in the language of the Strasbourg Court in *Abdulaziz, Cabales and Balkandali* (see paragraph 11, above). In so doing, I have referred to the application of paragraph 281(v) because it is

> "the discriminatory effect of the measure which must be justified, not the measure itself." (*AL(Serbia) v Secretary of State for the Home Department* [2008] UKHL 42, [2008] 1 WLR 1434, per Baroness Hale, at paragraph 38, emphasis added).

18. Before considering the particular circumstances of this case, it is necessary to refer to some other matters of legal principle.

19. It is axiomatic that:

> "a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group." (*DH v Czech Republic* (2008) 47 EHRR 3, at paragraph 175.)

20. Moreover, the lack of proportionality may be found in the failure to introduce appropriate exceptions to the general policy or measure: *Thlimmenos*, at paragraph 48. In domestic jurisprudence, that resonates with the question whether

> "the means used to impair the right or freedom are no more than is necessary to accomplish the objective." (*R(Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532, per Lord Steyn, at paragraph 27).

21. It is within this legal context that Mr Fordham submits that the effect of paragraph 281(v) is disproportionate because of a failure to exclude its discriminatory effect on the disabled, either by a general exemption or by an exceptional tolerance of third party maintenance. By way of illustration, he invites comparison with the facts of *Thlimmenos*.

22. The applicant passed an examination for appointment as a chartered accountant but he was rejected because he had been convicted of a felony, namely refusal to serve in the armed forces. He was a Jehovah's Witness and pacifist. He claimed that his rejection breached his rights under Article 14 coupled with Article 9. His complaint was that the Greek legislation failed to distinguish between persons convicted of offences exclusively because of their religious beliefs and persons convicted in other circumstances. The Court concluded that, although a state has a legitimate interest in excluding some offenders from the profession of chartered accountant, a conviction arising out of religious belief does not imply dishonesty or moral turpitude likely to undermine the offender's ability to exercise the profession. The applicant had been properly convicted and sentenced to imprisonment. The Court stated (at paragraph 46-47):

> "In these circumstances, the Court considers that imposing a further sanction on the applicant was disproportionate. It follows that the applicant's exclusion from the profession of chartered accountants did not pursue a legitimate aim. As a result, the Court finds that there existed no objective and reasonable justification for not treating the applicant differently from other persons convicted of a felony.
>
> … it was the State having enacted the relevant legislation which violated the applicant's right not to be discriminated against in the enjoyment of his right under Article 9. That the State did so <u>by failing to introduce appropriate exceptions</u> to the rule barring persons convicted of a felony from the profession of chartered accountants."

23. By analogy, submits Mr Fordham, proportionality in the present case requires a general disability exemption or an exception permitting third party maintenance.

24. In order to assess these submissions, it is first necessary to refer in more detail to the factual matrix and then to consider the statutory context. Whilst it may be possible for the spouse of a disabled sponsor to secure an offer of employment prior to entry into the United Kingdom, and thereby to satisfy paragraph 281(v), I accept that there may be practical difficulties and that the spouse of a disabled sponsor will often be at

a disadvantage as against the spouse of an employed or readily employable able-bodied sponsor who has the capacity to provide at least temporary support from personal resources. I also accept that applicant spouses of disabled sponsors represent a relatively small subset of the totality of applicants. Moreover, it is likely that any additional recourse to public funds would be for no more than two years. This is because those admitted under paragraph 281 are usually admitted for up to two years, at the conclusion of which they have to apply for indefinite leave to remain under paragraph 287, one of the requirements of which is the ability to maintain oneself without recourse to public funds (paragraph 287(v)). There is therefore an incentive to obtain employment within the two years. As regards the initial cost of recourse to public funds, the difference between the benefits currently paid to the sponsor and the enhanced "couple rate" is £33.65 per week. All this leads Mr Fordham to submit that the limited additional cost to public funds is a small price to pay for recognising the dignity and worth of disabled persons and their spouses and for putting them on the basis of equality with the able-bodied. Miss Giovannetti, on the other hand, points to the sheer variability of individual cases – uncertainty as to the duration of unemployment of the incoming spouse, the wide range of disability both as to type and duration and the fact that the disabled are sometimes able to work. She submits that such factors would necessitate potentially burdensome administrative provisions involving periodic assessment. Moreover, whilst an entry clearance officer is obliged to reject an application if the applicant does not satisfy paragraph 281(v), that is not necessarily an absolute bar to entry because, where there are exceptional compassionate circumstances, the case can be referred to the Home Office for the exercise of discretion.

25. Miss Giovannetti also refers to the wider statutory context. She submits that this is an area of general social policy and cites the speech of Lord Neuberger in *Regina (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, [2008] 3 WLR 1023, which concerned the withdrawal of a disability premium benefit upon the homelessness of the disabled person. He said (at paragraphs 56-57):

> "This is an area where the court should be very slow to substitute its view for that of the executive …
>
> The fact that there are grounds for criticising, or disagreeing with, these views does not mean that they must be rejected. Equally, the fact that the line may have been drawn imperfectly does not mean that the policy cannot be justified. Of course, there will come a point where the justification for a policy is so weak, or the line has been drawn in such an arbitrary position, that, even with the broad margin of appreciation accorded to the state, the court will conclude that the policy is unjustifiable. However, this is not such a case, in my judgment."

26. Needless to say, in the present case Mr Fordham and Miss Giovannetti seek to position themselves on different sides of that line. That lines have to be drawn is inherent in control mechanisms of this kind. As Lord Bingham said in *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [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."

27. The final authority to which I should refer is *AM(Ethiopia)*, above, paragraph 3, not least because its concern was with paragraph 281(v) and third party maintenance. Laws LJ said (at paragraph 56), in a passage expressly adopted by Pill LJ (at paragraph 117):

> "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)*, [2007] EWCA Civ 1376: '[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'."

28. With all this in mind, how is the balance to be struck in the present case between the rights of the individual and the interests of society in firm and fair immigration control?

29. It is common ground that there is nothing disproportionate in a general rule or policy which makes self-sufficiency a requirement of entry. The first question is whether it is disproportionate not to exclude the disabled. In my judgment, it is not. Unlike the categories of "suspect" grounds to which I referred in paragraph 15, disability is a relative concept. It may be severe or moderate, permanent or temporary. It affects the affluent as well as the indigent. It may or may not affect earning capacity. To some extent, these variables are illustrated by the present case. At some point the sponsor was offered a job with a building society but she did not take it up because of the condition of her back. By the time of the entry clearance application, she was receiving income support and disability living allowance. The latter is a benefit for which there may be entitlement whether or not the disabled person is in work. However, as the AIT did not address the Article 14 point raised, there was no finding as to whether the reason that the sponsor was receiving income support was because she had been assessed as incapable of work due to her disability. The argument before this Court proceeded on the premise that the sponsor was incapable of work due to a disability but on the basis that, if the legal issues were decided in the Appellant's favour, the case might have to be remitted to the AIT to determine this factual issue. The medical evidence before the AIT and before us is modest, being simply a letter from the sponsor's general practitioner which lists the medical history over a period of 15 years without much detail as to present condition or prognosis. However, the sponsor was able to travel to Somaliland for a month in 2004 and 2006 and to Ethiopia for a month in 2005. There is no challenge to the finding of fact that "there are certainly no insurmountable obstacles to the parties enjoying their family

life in Somaliland." There will be disabled sponsors who are far more and far less disabled than the sponsor in this case. All this convinces me that it is reasonable and proportionate to have a criterion of self-sufficiency without a general exemption for the disabled. It will produce cases of hardship but that in itself does not render it disproportionate, particularly where provision is made for exceptional compassionate circumstances.

30. The final question is whether the disregard of third party maintenance is proportionate in a case of disability such as this. In my view it is. I say this partly for the same reasons to which I have just referred in relation to a general exemption, but also by reference to what Tuckey LJ said in *MW(Liberia)*, as endorsed by Laws and Pill LJJ in *AM(Ethiopia)* (see paragraph 27, above) about precariousness and verifiability.

Conclusion

31. It follows from what I have said that, although the AIT did not address Article 14, its omission to do so did not amount to a material error of law because Article 14 does not avail the appellant in this case. Accordingly, I would dismiss the appeal.

Lord Justice Elias:

32. Maurice Kay LJ has succinctly set out the facts and I gratefully adopt them. The principal issue in the case is whether Article 14 was infringed on the grounds that the Secretary of State failed to exempt the appellant and his spouse, who was so seriously disabled that she could not work, from the requirement in paragraph 281(v) of the Immigration Rules that in order for the appellant to be granted leave to enter the UK, the couple should be able to maintain themselves (and any dependants) without having recourse to public funds. The alternative ground was that Article 14 was infringed in failing to permit the couple to be able to rely upon the promise of funding from a third party, a cousin of the spouse. This argument also involves the submission that a special exception ought to have been made for this couple, and those similarly placed, because the Court of Appeal has held, in a decision currently being challenged in the House of Lords, that Rule 281(v) requires that the parties must be able to maintain themselves from their own resources: see *AM (3rd party support not permitted R 281(v)) Ethiopia [2007]UK AIT 00058*.

33. I agree with Maurice Kay LJ's conclusion that the appeal should be rejected, broadly for the reasons he gives. However, the case raises points of some novelty concerning the application of Article 14, and in particular the relationship between the concept of indirect discrimination and the notion that different cases should be treated differently. They were sometimes treated in argument as though they were interchangeable concepts, but I do not believe that they are. There does not, however, appear to be any decision of the European Court of Human Rights ("ECHR") which discusses this issue. Accordingly, I wish to give a short judgment of my own.

The scope of Article 14

34. Like cases should be treated alike, and different cases treated differently. This is perhaps the most fundamental principle of justice. If defendant A is sentenced to a harsher sentence than equally culpable defendant B that is universally perceived to be unfair. Conversely, if A is sentenced to the same sentence as more culpable defendant

B, that is also unfair. The sentences themselves may be harsh or lenient, but that is not the source of this particular injustice or unfairness. It is the unjust differentiation in the first case, and the unjust failure to make a differentiation in the second, which constitutes the unfairness. This is so whatever the reason for making, or failing to make, the differentiation.

35. Article 14 renders only certain forms of unfairness of this nature unlawful. There are two conditions which must be satisfied before that Article comes into play, as is clear from its terms:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

36. First, the discrimination must be with respect to the enjoyment of Convention rights; to use the language of the ECHR, it must be "within the ambit" of a Convention right. Second, the reason for the differentiation, or the failure to differentiate, must be one of the specific grounds identified in the Article, or it must fall within the scope of the generic term "other status". The concept of status is a broad one, but as the ECHR has said on a number of occasions, it must relate to a "personal characteristic", which may, however, also include social characterisations including some acquired by a voluntary act, such as the status of being a trade unionist (*National Union of Belgian Police v Belgium* (1975) 1 EHRR 578 or a professional: *Van der Mussele v Belgium* (1984) 6 EHRR 163. It is common ground in this case that being disabled falls within the concept of "status" within the meaning of the Article, and that the claim falls within the ambit of Article 8.

37. In practice, the overwhelming majority of cases that have come before the court are situations where it is alleged that like cases have not been treated alike. Typically the argument is that the scope of a right or benefit has been too narrowly circumscribed (see, for recent examples in domestic law, *AL (Serbia) v Home Secretary* [2008] UKHL 42; [2008]1 WLR 1434), but sometimes it is that a specific exception has been created which is unjustified (as in *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63; [2008] 3 WLR 1023).

38. However, the ECHR has also recognised in *Thlimmenos* v *Greece* (2001) 31 EHRR 15 para 44 that the Article can be invoked where "states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."

39. The jurisprudence of the ECHR has also recently recognised the concept of what it termed "indirect discrimination" in *DH v Czech Republic* (2008) 47EHRR 3, having initially been unwilling to do so (see Clayton and Tomlinson, The Law of Human Rights, 2nd edition, para.17.158). In *DH* the applicants were Roma who alleged that Roma children were subject to discrimination because they were disproportionately placed in special schools which, although designed to assist the socially and educationally disadvantaged, in practice were often poor relations to the schools available to other children. The allegation was that the way in which the system operated had led to a de facto racial segregation. The ECHR considered statistics

strongly supporting the appellants' case. It is important to note, however, that the claim was not that Roma should be selected for special treatment (although somewhat confusingly, in its analysis of justification the court held that they should). The submission, accepted by the Court, was that Roma children had in practice been subject to different and less favourable treatment by virtue of their Roma origins. In effect, there had been stereotyping; it was assumed by many of those applying the system that Roma were less able and in need of special education measures. The Court described the principle in the following way (para. 184):

> "..the court has already accepted in previous cases that a difference in treatment may take a the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group….[S]uch a situation may amount to "indirect discrimination" which does not necessarily require a discriminatory intent."

40. The principle so stated broadly reflects the concept of indirect discrimination as developed in domestic and EU law. I confess, however, that I find it difficult properly to analyse *DH* itself in terms of indirect discrimination; the allegation was that there was covert, if unintended, discrimination against Roma because of certain assumptions made about the abilities of Roma children. Stereotyping of that nature is direct rather than indirect discrimination as the House of Lords recognised in another Roma case, *R (on the application of the European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] 2 AC 1. The fact that statistical evidence is relied upon to establish the case does not of itself render the claim one of indirect discrimination. Be that as it may, the formula adopted by the court in DH is capable of encompassing traditional concepts of indirect discrimination as that concept has been applied in EU law, and it has been repeated in subsequent cases: see, for a recent example, *Opuz v Turkey* (App. No. 33401/02).

41. In what I will call its traditional form, indirect discrimination recognises that a rule (by which I include a practice or policy) might in practice adversely affect a particular group notwithstanding that it is neutral in form. The classic example is a requirement to work full time, which adversely impacts on women because of child care responsibilities. Although it may appear that like cases are being treated alike because the same rule (the need to be able to work full time) applies without discrimination or differentiation, in fact they are not. A barrier is being placed in the way of one group (women) which does not apply to the same extent to the other (men) because in practice it is more likely to be women than men who have child care responsibilities and are therefore prejudiced by the requirement.

42. Usually the applicant wishes the rule creating the barrier to be disapplied because of its adverse effect. In these circumstances, unless the rule can be justified, it cannot be relied upon. The unjustified adverse effect will constitute unlawful discrimination. But it is important to note that the purpose of the concept is to ensure that in practice as well as in theory, like cases are treated alike. The applicant in such cases is claiming that he or she wants to be treated in the same way as others, but that the rule adopted prevents that and has no good reason for so doing.

43. Furthermore, in some cases, once the rule is found to operate in an indirectly discriminatory way, it may be impossible lawfully to apply the rule at all. To continue with the example of a requirement of full time work, if the rule is found disproportionately to impact on women without justification, then it is unlawful to apply it to women. However, it is difficult to see how it can thereafter be applied to that small minority of men with childcare responsibilities who are also prejudiced by the rule, since following the dis-application of the rule to women, they will now be able to claim direct discrimination on grounds of sex in circumstances where it has already been held that the rule was not justified. In such circumstances, the apparently neutral rule applying to all should not be applied at all.

44. This traditional concept of indirect discrimination is not the same concept as treating different cases differently. In the latter, the core of the applicant's complaint is not that a rule is imposing a barrier and cannot be justified; rather, the complaint is that even accepting that the rule can be justified in its application to others, it ought not to be applied to the applicant because his or her situation is materially different, and that difference ought to be recognised by the adoption of a different rule, which may take the form of an exemption from the general rule. The complaint is not that the single rule adopted is inappropriate because discriminatory and unjustified; it is that it is the circumstances require that there should be more than one rule.

45. However, as with the concept of treating like cases alike, the concept of treating different cases differently may also be the subject of a form of indirect discrimination claim. It may be argued that a rule applied equally in fact fails to have regard to a characteristic related to status, and that persons with that particular characteristic should be subject to a special rule to counter the disadvantage which that characteristic creates. The test for determining whether the applicant is adversely affected by the rule because of some such characteristic is the same as in traditional indirect discrimination claims. *Thlimmenos* itself is such a case. The rule in issue in that case automatically disqualified from the profession of chartered accountant those who had committed a felony. This included the offence of refusing to serve in the armed forces although the claimant refused out of respect for his religious convictions (he was a Jehovah's Witness and a pacifist). It was not suggested that all those with religious beliefs should be subject to a different rule; his contention was that pacifism was a characteristic of some persons with religious beliefs, that religion is one of the grounds specifically identified in Article 14, and those holding that belief should have been exempted from the rule in order to comply with the Article. The ECHR agreed. The moral culpability of those who refused to serve in the army because of their religious beliefs was different to that of others committing that offence, and there was no objective and reasonable basis on which it was legitimate to fail to draw the distinction between them.

46. The traditional concept of indirect discrimination is related to the concept that different cases should be treated differently to this extent: in both the applicant is saying that he or she is adversely affected by a rule which is framed to apply equally but which in fact fails to have regard to a material feature of his or her situation. In the case of traditional indirect discrimination, however, the complaint is that the alleged discriminator could be expected to adopt a different rule which does not have that effect and that it is unreasonable for him not to do so. By contrast, in the case where it is alleged that different cases should be treated differently, it is accepted that

the rule itself may serve a legitimate function and be capable of justification in most circumstances but it is contended that a different rule should be adopted for the claimant and those in a similar situation, specifically ameliorating the effect resulting from their special features or characteristics.

47. There will be many circumstances where the concept of treating different cases differently is unlikely to be applicable. As Lord Hoffmann pointed out in *R (Carson) v Works and Pensions Secretary* [2005] UKHL 37; [2006] 1 AC 173 some grounds of discrimination are rooted in the concept of human respect. Characteristics such as race, sex and sexual orientation are immutable and will rarely justify a difference in treatment (although they might, for example to correct historical disadvantage); nor, therefore, would they constitute grounds on which someone could claim the right to be treated differently. Other characteristics, such as ability, wealth and occupation, may well constitute grounds for drawing distinctions notwithstanding that they could fall within the concept of status in Article 14. There can be a rational justification on policy grounds for conferring benefits or rights on those with a status falling within these categories and refusing it to those who do not share that status.

48. The importance of drawing a clear distinction between the different forms of discrimination is both that in traditional indirect discrimination cases the effect of a successful challenge may mean that the rule cannot lawfully be applied at all (see para 12 above), and that the application of the principle of justification depends upon the form which the alleged discrimination takes. Where the issue is direct discrimination on the basis that like cases have not been treated alike on one of the Article 14 grounds, the issue is not whether the rule or policy itself is justified, but rather whether the difference in treatment can be justified (although the justification of the rule is likely to be highly relevant when answering that question). Lord Bingham of Cornhill made this point in *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68 in which the House of Lords held that a law permitting the detention of non-national but not national suspected terrorists infringed Article 14. His Lordship observed (para 68) that "what has to be justified is not the measure in issue but the difference in treatment between one person or group and another." The principle of detaining suspected terrorists may have been lawful, but the application of that principle to non-nationals alone was not.

49. As regards establishing justification, the ECHR has observed on many occasions that:

> "Such a difference in treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. "

(see *Burden v United Kingdom (Application no.13378/05*) para 60.)

50. Where there has been a deliberate decision to exclude a group from the legislation as in the *RJM* case (disability premium on income support removed from those disabled who are homeless), it is that decision that will need to be justified. Where there has been no such deliberate exclusion, then although it is still necessary to justify the difference in treatment, in practice that will have to be done by focusing on the rationale of the rule adopted and the means for achieving that objective, and

explaining why, in the light of those considerations, it was justified not to apply the rule to the group in question.

51. Similarly, where there is one rule applied to a range of cases and the question is whether different cases should be treated differently, the issue is whether the failure or refusal to draw the distinction can be justified. This will be so whether the ground of on which it is alleged that a difference should have been drawn is one of the "status" concepts within Article 14 (direct discrimination)or whether it is a characteristic disproportionately linked (but not universally so) to one of those concepts (a form of indirect discrimination). As I have said, this contrasts with the traditional form of indirect discrimination where it is the rule itself which requires justification.

Applying the principles

52. I turn to consider the issues arising in this case. As I have said, it is accepted that being disabled is a relevant status under Article 14 and that the treatment in issue falls within the ambit of Article 8 because the rule affects the enjoyment of family life.

Is there discrimination?

53. Mr Fordham QC, counsel for the appellant, submits that there is obviously discrimination here falling within the terms of Article 14. He contended that the case was analogous to *Thlimmenos*. There was a characteristic, namely inability to work, which resulted from the wife's disability and was the reason why rule 281(v) could not be complied with.

54. The first point in issue was whether there was even prima facie discrimination at all, so as to require that the burden shifted to the Secretary of State to establish justification. Mr Fordham submits that there was and puts the point in two ways. First, the disabled as a group will be adversely affected, albeit that it is only a proportion of the disabled who would be unable to earn money by working. This is obvious and no statistics to establish it are necessary. Second, and in any event, immigration rule 281(v) had an adverse effect on this particular applicant and his disabled spouse, and that effect is the result of a characteristic, namely the inability to work, which is specifically related to her disability. Either way, Article 14 is necessarily engaged.

55. The Secretary of State submits that this is not a self evident case of indirect discrimination at all. There will be various categories or persons who will similarly be unable to work, for reasons wholly unconnected with disability. For example, there are the elderly who will in practice find it difficult to obtain employment; women with young children who may be unable to work because of the cost of child care; and those who speak little or no English and are therefore in practice excluded, or at least severely restricted, from access to the job market. It is far from obvious that the proportion of the non-disabled who can comply with the requirement of being self sufficient will be larger than the proportion of the disabled. Both able bodied and the disabled will be affected by the rule to some degree.

56. Like Maurice Kay LJ, I reject this submission. It may well be that others are affected in not dissimilar ways, in which case they could also bring their cases within one of the prescribed grounds identified in the Article. But that merely shows that there may

be indirect discrimination against them too; it does not show that the appellant is not adversely affected because of a reason connected with his wife's disability. I do, however, accept that the fact that there may be others adversely affected in ways falling, or arguably falling, within the scope of the Article is highly material to the question of justification. I return to that below.

Justification

57. It follows that in my judgment rule 281(v) has to be justified. I would make the following preliminary observations with respect to the issue of justification.

58. First, this is not a case of direct discrimination on grounds of disability. The disabled as a group are not all adversely affected by this rule. They are only affected if they cannot work as a consequence of their disability, if their partner cannot work either, and if they do not otherwise have sufficient resources to look after themselves without resort to state benefits. So the extent to which the disabled and their partners are disadvantaged is relatively limited.

59. Second, the case concerns the application of a policy, namely control of immigration, which is very much a matter for the executive. As it was put in the *Burden* case,

> "The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment, and this margin is usually wide when it comes to general measures of economic or social strategy."

This is an observation on the margin of appreciation which is not strictly applicable in the domestic courts, but the House of Lords has adopted a similar approach in the context of the relationship between the legislature or executive and the judiciary: see e.g. the observations of Lord Hoffmann in *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37; [2006] 1 AC 173 para 16.

60. Third, it is necessary for the appellant to show not simply that it would not be unlawful if the state were to draw this distinction, but that it is unfair and unlawful for the state not to do so.

61. In my judgment, for these reasons in particular I categorically reject Mr Fordham's submission that the court should require "weighty reasons" before this disability related discrimination can be justified. Like Maurice Kay LJ, I would accept that any rule which differentiated benefits or rights specifically by reason of disability would require weighty reasons; prima facie it is hard to see how it could be justified and there would need to be very good reason to explain why it was being adopted. But it would be absurd to apply the same requirement to cases of indirect discrimination, particularly in circumstances where there is equality of treatment and the contention is that there should not be. The range of characteristics linked to one of the identified forms of status is potentially very wide indeed, and it would severely inhibit a state's power to legislate if it had to provide weighty reasons for adopting policies which adversely impacted on groups not by reason of status alone, but for reasons connected

to it. Furthermore, the need for weighty reasons is in any event less prominent where questions of social policy are in issue. For example, in *Stec v United Kingdom* [2006] ECHR 1162 para 52 the Grand Chamber held, in a case involving alleged sex discrimination in the field of welfare benefits, that the wide margin of appreciation given to the State in the field of social policy effectively countered the usual requirement that weighty reasons should be given for sex discrimination.

62. The proportionality review applicable in this case is, therefore, the usual one.

Making an exception to rule 281(v)

63. The only issue is whether there is a justification for not making an exception, by way of excluding from the scope of para. 281(v), for spouses who are disabled to the extent that they are unable to work. It was not suggested, or at least not with any vigour, that this was a case of traditional indirect discrimination. In any event, if and in so far as it was, the complaint must fail. There can, in my view, be no doubt at all that the rule which permits partners to be together only if they are not a drain on the public purse is manifestly justified.

64. Mr Fordham submits that precisely because the number of potential beneficiaries of an exemption from the rule will be relatively small, the additional cost will be limited. The Article 8 rights of the disabled demand that the state supports this group and therefore the failure to make an exception to rule 281(v) is plainly disproportionate.

65. I reject this argument, essentially for the following reasons, which are in large part interrelated. First, this is an area of social policy concerning control of who should be allowed to enter into this country and in what circumstances. As I have noted, the courts are particularly reluctant to interfere in such areas.

66. Second, as Maurice Kay LJ has pointed out, the courts have frequently recognised that "bright line" rules are generally acceptable in such cases notwithstanding that they might produce some hardship.

67. Third, the practical effect of making the exception involves public expenditure. In my judgment the courts will be particularly slow to require special treatment for a group where it affects the distribution of national resources, even if it be the case that the sums will be relatively small.

68. Fourth, and in my view importantly - and this is likely to be true of most indirect discrimination claims of this nature - it is difficult to foresee what other potential claims of a similar kind there may be. As I have indicated, some individuals may find it difficult to find work because their English is poor, which is capable of being a characteristic related to race; or because they have responsibility for children, which is related to sex; or because they are old, which is age related. Indeed, given the wide potential category of personal characteristics which might fall under the concept of "status" in Article 14, there is potentially a broad range of cases where persons would be adversely affected by the application of a rule because of some characteristic related to that status. This does not merely create a difficulty in foreseeing the potential range of claimants urging special treatment, but it also makes the potential cost very difficult to predict. These uncertainties reinforce the justification for a bright line rule.

69. Fifth, as Ms Giovannetti, counsel for the Secretary of State, emphasised, there would be additional administrative costs in having to identify whether a particular case falls within or outwith the exception - a particular difficulty given that the concept of disability itself is imprecise - and such cases would have to be periodically reviewed. Indeed, administrative burdens will almost inevitably be created once one departs from a bright line rule because of the need to draw the distinctions which a more nuanced rule will create.

70. Sixth, as I have said, this is a not a case of direct or planned discrimination; as Lord Hope observed in *AL (Serbia)*, para 10, the absence of targeting will be an important factor when determining whether potential discrimination is justified.

71. Finally, a factor lending some additional support to this conclusion is the fact that the Secretary of State is empowered in particularly compassionate cases to exercise a discretion in favour of entry. This was a factor which helped to render the rule proportionate in the *AL (Serbia*) case: see the observations of Lord Bingham of Cornhill at paragraph 3.

72. For these reasons, therefore, I am satisfied that the failure to adopt a special rule for those whose spouse in this country cannot work by reason of disability is fully justified. The rule is lawful notwithstanding its discriminatory impact.

Third party funding

73. The argument that an exception should be made permitting reliance on third party funding is more problematic. The considerations which are related to state funding do not all apply either at all, or at least with the same force, with respect to this alternative argument. This exception would not, at least if funding were actually provided as promised, involve the expenditure of public funds. But what Tuckey LJ in *MW (Liberia)* [2007] EWCA Civ 1376 para 16 referred to as the "precariousness" of such funding, and the difficulty of ensuring that it is genuine, in my view justifies the refusal to draw the distinction. By definition the third party will not have transferred resources to the applicant or his or her spouse. There is still a very real risk that state funds will be required to maintain such persons, and potentially significant administrative costs will be involved in testing the reliability of third party promises.

74. In addition, there is again the real risk that the exception would have to be extended to others similarly affected for a reason connected to status. Indeed, I suspect that in so far as this argument has merit, is not really an Article 14 argument at all. If the submission is good then I would have thought that it would constitute a reason why it would never be proportionate to allow an interference with the Article 8 right to family life if the couple could live together and contend that the promise of third party resources should exclude them from the rule. However, the case was not advanced on that basis, and in any event I believe that the interference with family life could still be justified because of the likelihood that promises would prove illusory.

Disposal

75. In my judgment, it was not disproportionate and a breach of Article 14 to fail to exclude from the scope of Immigration rule 281(v) those whose spouses or partners in

this country were so disabled as to be unable to earn a living. Accordingly, the appeal fails.

Lord Justice Mummery:

76. I agree with both judgments.