Family Reunification in the UK

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Reviewers: I am sorry that this is still an unpolished draft, is too long and does not have a conclusion! For the next draft, I will reduce the length, insert more references, ensure that the argument is made consistently throughout and add a conclusion.

1. Introduction

The UK's law on family reunification is restrictive, complex, and difficult to access. It is the product of an accretion of laws and practices that can only be understood in the historical context in which they came about. Regulation has passed through several phases, each of which has left its mark. They include the UK's position as a colonial and then a decolonising power, the impact of European law and globalisation, and the turn since then towards political, social and legal closure. This chapter will therefore set the current law in its wider, historical context.

The chapter is divided into two main sections. The first is a historical overview of the various phases that have contributed to the law's current character. It starts with a discussion of the invisibility of family migration in imperial Britain, followed by a discussion of the period from 1962 until 1997, when the law was shaped by decolonisation and governments' wish to prevent the admission of racialised subjects and former subjects. The third phase began with the election of the Labour government in 1997 and was characterised by more openness, at least initially, and a managerial mindset. Finally, the period since 2010 has been characterised by policies of closure and a rejection of supranational legal norms which have affected the ability of family members to enter and progress through the immigration system.

The second section first sets out the main groups eligible for family reunification and briefly explains the regulation of family reunification within the UK's legal system. It then surveys the current law as it applies to spouses and partners, children and, finally, other relatives. The conclusion identifies some recurrent common themes and problems.

2. The historical context

The regulation of family migration has always been enmeshed in processes of nation building (Abrams?) and involves a process of ensuring those admitted to the figurative heart of the nation are considered worthy of the privilege. Such selectivity can have a profound impact on citizens' own sense of belonging and intimate citizenship (Bonjour and de Hart??). Family is a microcosm of the nation (Wray 2011:00) and the states have sought to control family formation and reunification in ways that reproduce imperial, racial, sexual and gender hierarchies (refs -Bonjour and De Hart 2013, 2021; Hajjat 2012??). Family reunification policies can therefore only be understood in their social context while path dependence ensures that the past bears heavily on the present.

2.1 The invisibility of family migration in imperial Britain: pre 1997

Under the British Empire, family migration was mostly invisible.[1] Until 1948, those born within the 'Her Majesty's dominions', meaning the British Empire and most of its former colonies, or the children of a father so born, were considered subjects of the Crown. There was no separate nationality status either for the UK and its colonies or for otherwise independent dominions.[2] There was a presumption of free movement within the Empire at least in principle, although there were attempts to impose local controls through administrative means (ref – Dummet and Nicol?). The movement of spouses and family members across the Empire was not therefore considered as migration across national borders but as internal movement.

Those who were not subjects were 'aliens'. Under the principle of 'conjugal unity', women were deemed to have the nationality of their husband and children's nationality often followed suit.[3] A British woman who married an alien lost her British nationality and an alien woman who married a subject was considered a subject. As the concept of the bi-national family did not exist, the idea of reunifying families across borders could not exist except in the limited sense that an alien who entered for work or other purposes might

[1] The information in this section is taken from a variety of sources including Wray 2011 00-00, Paul 1997, Hansen 2001, Dummett and Nicol, Layton Henry and something more recent??
[2] British Nationality and Status of Aliens Act 1914, s.1.
[3] British Nationality and Status of Aliens Act 1914, s.10

be accompanied or joined by dependants or if a child did not share the nationality of a stepparent.

Family reunification as a concept emerged as a consequence of the decolonisation process and successful feminist campaigning on married women's nationality, although this it did not become a contentious issue until some years later. The rule on married women's nationality had while it had existed in various forms since the 1840s, became a source of discontent and vigorous campaigning from the 1920s onwards when women's nationality began to matter practically as well as in principle, as a result of the introduction of systematic immigration controls and wider social changes.[4] British born women married to aliens became liable to refusal of entry and deportation, were unable to exercise voting rights after extension of the franchise in 1928, and, if married to enemy aliens, had their property confiscated or were interned during the first world war. Eventually, the British Nationality Act 1948 ended the removal of women's nationality on marriage, making bi-national families legally possible.

The single imperial identity also came under increasing strain during this period as former colonies increasingly wished to establish their own nationality status and, in 1946, Canada legislated to create its own fully independent citizenship. In response, the British Nationality Act 1948 acknowledged that independent Commonwealth countries would create their own citizenships. The primary distinction was now between Citizens of United Kingdom and Colonies and Citizens of Independent Commonwealth Countries. As colonies gained independence, they would move from the first to the second category. Both groups remained British subjects, but that status now derived from their citizenship status instead of an unmediated relationship with the Crown. There was no alteration to the principle of free movement within the Commonwealth.

When the 1948 Act was passed, it was not anticipated that the non-white citizens of the remaining colonies (including many Caribbean and African countries) or of newly independent countries such as India would use their subject status to enter the UK. While there had always been some movement into the UK from these countries, and this had

[4] Aliens Acts 1905, Aliens Restriction Acts 1914 and 1919

sometimes led to local controls (cite egs – HK in Liverpool? Somali sailors), it had not been problematized. This changed as labour market shortages led to the recruitment of thousands of workers from Commonwealth countries to help with post-war reconstruction. Resistance to large-scale non-white immigration was widespread at least in government and was underpinned by sometimes gross racist stereotypes. There was no distinction made at this stage between the admission of workers and family members as, legally, there was no difference in their situation. The solution however was not evident. There was no wish to prevent intra-Commonwealth free movement in general, only that which came from certain countries, and direct race discrimination was also considered unacceptable. There were attempts to discourage movement indirectly through administrative controls but, in the end, legislation was the only way to change the situation. The result was the Commonwealth Immigrants Act 1962, which opened a new era in post-colonial migration and family reunification.

2.2 The emergence of family migration in post-colonial Britain 1962-1997

A logical approach to controlling Commonwealth immigration would have been to impose controls on citizens of independent Commonwealth countries while continuing to allow the entry of those from colonies.[5] It would have reflected the usual practice whereby free admission is reserved to nationals. However, it would have ended the free movement of citizens from white Commonwealth countries while continuing the free admission of millions of non-white citizens. The decision therefore was to create a set of controls that depended less on nationality and more on racial difference but to do this in a covert way. The 1962 Act imposed restrictions on all Commonwealth citizens except those born in the United Kingdom or whose passports had been issued by the United Kingdom government. The significance of the second exemption was not immediately obvious but it ensured that those still living in the UK's (mainly non-white) colonies could not enter as their passports were issued by the colonial authorities and not the government. Meanwhile many white citizens in independent Commonwealth countries could claim citizenship by descent and were exempt from controls because their passports were issued by British High Commissions, that is, the government. Covert instructions to immigration officers ensured that white Commonwealth citizens without

[5] Sources for this section include Wray 2011, Sachdeva, Juss Menski Chowdhury, Lal and Wilson plus …

British nationality would be allowed to enter unhindered. The legislation was discriminatory in purpose and effect, and it imposed controls on subjects who were also citizens, but it was not easy to understand this from its face.

Non-white Commonwealth citizens were now subject to immigration controls and those already in the UK faced a difficult decision. Many, particularly from South Asia, did not intend to relocate permanently but to work for a few years and return home to be replaced by another family member. This form of circular migration was now impossible after the 1962 Act, and many decided to stay and bring over their family members as a consequence. Their admission had been assured by the 1962 Act, so they were not subject to the new controls. The result was a large increase in the numbers of family members entering the UK and the emergence from the mid-1960s of family migration as a political issue.

There is not space here to document the twists and turns in law and policy over the next decades as governments attempted to minimize the admission of family members without dismantling the racist structure of the law, but, taken together, they represented a process of delegitimization and exclusion of family members. Two egregious aspects are discussed here to give a flavour of how successive Labour and Conservative governments were determined to prevent unwanted family migration. The first was the primary purpose rule and the second was the application of harsh administrative practices in the country of origin.

The primary purpose rule first appeared in the Immigration Rules in the late 1970s and was refined over the following period. In its final form, it required an applicant for entry as a spouse to show that the marriage had not been entered primarily for the purpose of entering the UK. The cleverness of the primary purpose rule was that it could be met quite easily by most people in Western-style marriages where there was a prolonged romantic courtship but arranged marriages were much easier to refuse. When the parties had little prior relationship and the UK spouse was selected by family members, it was difficult to show a motive other than emigration. The result was that thousands of husbands, particularly from South Asia, were refused leading to long term separation, broken families, and heartache.

The primary purpose rule was used mainly against husbands at least until 1988 because, prior to then, wives and children had a statutory right to enter the UK under the 1962 Act, a right that was removed by the Immigration Act 1988. It was only possible to prevent their admission by denying that they were, in fact, wives or children. This became possible once entry certificates (visas in all but name) were introduced in 1970 [check date]. Applications therefore had to be made in the country of origin and decision-makers could develop a set of practices away from the public gaze that ensured the mass refusal of thousands of applicants on the spurious basis that they were not 'related as claimed'. These practices were mostly widely reported in South Asia but they were not confined to that region.

Methods included excessive delays, stretching into years, for the processing of applications and unrealistic demands for documentary proof of relationships in societies that were largely undocumented. Such evidence as was available or alternative records, such as remittances, voters' lists, or land deeds, were treated sceptically and given little weight. Interviews were carried out under hostile conditions and were often confrontational and intimidating. Officials asked for vast amounts of detail about the parties' lives, habits, and other characteristics. All family members including the UK resident were interviewed in this way and minor discrepancies in the answers were used to justify refusal on the grounds that the errors revealed a bogus application. Examples of discrepancies included how long the family had owned their buffalo, the location of a school, the full name of a relative, how many eggs laid by the family's chickens and the amount and the name of a party's barber and tailor. Unsurprisingly, once DNA testing was available, it was shown almost all parties were indeed 'related as claimed' and had been wrongfully refused.

Another common practice in this era was the misuse of medical evidence. X-rays were regularly taken, including on pregnant women, despite the obvious health risks and their nugatory evidential value particularly for adults, and the results used to maintain that applicants were not the age they claimed to be. Even more shocking was 'virginity testing', where young women were subjected to intimate examinations to see if they were still virgins and therefore 'genuine' fiancées. The misogyny and ignorance that underpinned

this practice barely need to be noted but two other points should be made. First, despite claims that they were an isolated occurrence, they were widespread. Secondly, virginity testing can only be understood as a form of sexual bullying. A negative virginity test could not be grounds for refusal as the practice was not officially acknowledged, so its only purpose was to intimidate and humiliate.

The era during which these practices took place lasted from the late 1960s to the mid-1990s, although they were not applied uniformly throughout. They were racist and dehumanising, showing complete disregard for the family life of applicants and any recognition of an obligation towards them as colonial subjects. The result was mistrust of the immigration system that has lasted decades within affected communities.

2.3 A more 'modern' approach to family migration? 1997-2010

In May 1997, a landslide Labour government was elected after eighteen years of Conservative government. Its election manifesto contained commitments to 'leading' in Europe and internationally, and to providing domestic access to human rights. The manifesto also promised removal of the primary purpose rule, which happened soon after the election while the Human Rights Act was enacted in 1998.[6] Particularly during its first years in office, the Labour government took a generally expansionist if rather instrumental approach to migration, in keeping with its globalist outlook. There was an emphasis on admitting skilled and entrepreneurial migrants, accompanied by attempts to micromanage administration leading to continuous and detailed regulatory change. This became more pronounced as the numbers of irregular migrants and asylum seekers grew over the period and as fears about terrorism and security increased.[7]

In that context, family migration pulled the government in different directions. Ethnic minorities were a significant electoral constituency and globalisation opened new opportunities for travel and therefore new family connections amongst the majority ethnic population. However, a liberal family migration policy permitted the entry of migrants who would not otherwise be allowed to enter or remain, while concerns about

[6] Labour Party manifesto 1997 available at: Labour Party Manifesto, 1997 Labour Party Manifesto (1997): http://www.labour-party.org.uk/manifestos/1997/.

[7] The information in this section is drawn from sources that include Wray 'New Labour and family Migration', Wray (forthcoming) plus …

integration and social cohesion meant that the focus on cultural norms did not disappear. Changes in regulation over the period reflected these conflicting pressures. 'Modern' family forms such as unmarried and same sex relationships achieved more recognition but the prohibition on the entry of more than one spouse in a polygamous relationship remained. The minimum age for entry and sponsorship of a spouse rose from 16 to 18 and more controversially in 2008, to 21 although it later reverted to 18 following a Supreme Court judgment.[8] The government planned to implement a pre-entry English language test for spouses but did not do so before it lost power. More security related themes also became evident, including measures that aimed to detect sham marriages, although these also ran into legal trouble (see the discussion at 3.3. below), the extension of the probationary period from one year to two years, and the introduction of a procedural requirement to make applications from abroad unless already lawfully resident in the UK. There were several legal challenges under the Human Rights Act to aspects of these policies, many of which achieved a degree of success. The government was, in effect, caught between its liberalising and securitising pressures.

The increases in entry by EU citizens, particularly following the 2004 enlargement, contributed to a febrile climate on immigration. There was a perception that the government did not understand or respect the public's concerns epitomised when, during the 2010 election campaign, Prime Minister Gordon Brown was overheard describing a member of the public as 'bigoted' for commenting on immigration.[9] The scene was set for a period of closure under the next government.

2.4 Splendid isolation? Family Migration since 2010

The 2010 general election resulted in a Conservative/Liberal Democrat coalition.[10] The Conservatives maintained control over key posts associated with immigration and human rights policy. The Conservative Party manifesto had promised to substantially reduce immigration and that commitment dominated immigration policy for many years. It was not however easy to achieve, particularly while the entry of EU nationals continued, and the government focused on attempting to reduce entry by students,

[8] Ref to Quila
[9] 'Gordon Brown calls Labour supporter a "bigoted woman"' *The Guardian* 28th April 2010 available at: http://www.guardian.co.uk/politics/2010/apr/28/gordon-brown-bigoted-woman.
[10] Refs for this section: Wray (forthcoming) plus

families and workers. In June 2010, one month after the general election, the government announced a pre-entry language test for spouses and partners that was implemented in the following October. A government consultation paper published in July 2011 contained several strands, all of which were directed at making family reunification more difficult.[11] Measures that were later implemented included the minimum income requirement (MIR), the removal of almost all rights of admission for elderly or dependent relatives, the extension of the probationary period for spouses and partners from two to five years, and limits on the scope of appeals under article 8, the right to respect for family life. This latter point reflected growing political resistance to the use of article 8. The 2012 rule changes were followed by measures in the Immigration Act 2014 that aimed to set limits on the exercise of judicial discretion in immigration and deportation related human rights claims.

These restrictions took place against the emergence of the immigration 'hostile environment' from 2013. This took the form of onerous internal border controls that made access to many day to day services such as rented accommodation, driving a car or banking services dependent on showing lawful immigration status, measures which also had an adverse impact on regular migrants and even citizens. They were a major factor in the *Windrush* scandal, which erupted in 2017 when it became apparent that long-term Commonwealth residents had been wrongfully denied services, including healthcare, detained and even expelled because they could not establish their status.

The Brexit referendum in 2016, and the government's response to it, set the UK on a longer-term path towards isolationism and increased hostility to perceived incursions on national sovereignty through supranational legal norms. This has had an impact on family reunification rights. The end of EU free movement rights means that UK/EU families are now subject to the domestic immigration rules whereas they could previously live together with the minimum of formality. British citizens in relationships with non-EU citizens no longer have access to a more accommodating system of family reunification via residence in another EU member state. EU citizens resident in the UK can no longer easily be joined by their EU family members. Resistance to European human rights norms

[11] Home Office, UK Border Agency *Family Migration: A Consultation* (July 2011).

has already been reflected in the 2012 rule and the 2014 statute changes. The Bill of Rights Bill, which was going through parliament at the time of writing, would reduce domestic access to human rights, including family life rights, still further. As the next section will show, family reunification rights are now narrow in scope, difficult to access and difficult to challenge.

3. The current law

3.1 Who is affected by family reunification laws?

There are five main groups of individuals who are affected by laws governing family reunification:

- Family members of British citizens and settled residents
- Family members of those entering on work or student visas
- Family members of refugees and the beneficiaries of humanitarian protection
- EU citizens resident in the UK and EU family members wanting to enter the UK
- Groups covered by ad hoc policy.

Of these, the largest is that comprising the family members of British citizens and settled residents who are a significant source of permanent migration to the UK. In 2020, out of 85,457 grants of settlement, 47,102 were to spouses, partners, children, and the other family members of citizens and settled residents. Their regulation has tended to function as the template for the other groups and it therefore forms the basis of the substantive analysis in this section of the chapter. However, conditions do sometimes differ for some groups. The pre-flight spouses, partners, and minor children of refugees, for example, do not have to meet financial, accommodation or English language requirements. The financial requirements for the dependants of those entering on work or student visas are structured differently and their visas will be time limited in the same way as their sponsors. British citizens who have EU family members are now governed by domestic law as are EU citizens who arrived after 31st December 2020 but EU citizens who entered before that date may still be able to rely on the stronger rights in EU law.

Broadly speaking, three categories of relative may be admitted: spouses/partners, children under 18, and adult dependent relatives. Of this, the biggest category is spouses and partners. In the year ending 31st March 2022, 29,939 visas were issued to the spouses

and partners of British citizens and settled residents out of a total of 42,141family visas.[12] Children are another important category, but numbers are lower because most children of British citizens are citizens by birth even if born outside the UK, as are the children of settled residents born in the UK. However, some children, for example, stepchildren, the children of recently naturalised citizens or children born outside the UK to settled residents, are not citizens and need permission to enter. In the year ending 31st March 2022, 5,755 visas were issued to such children. The admission of adult dependant relatives has always been tightly controlled and, since 2012, has been very difficult indeed. The parents, grandparents, adult siblings and adult children of citizens, residents and refugees are eligible, but the immigration statistics show that in each of the years 2018 to 2021, so not only during the coronavirus pandemic, fewer than 200 such relatives were admitted.

3.2 The structure of immigration control

The rules on family reunification are governed by a mix of legislation, rules of practice and policy. Primary legislation, in the form of Acts of Parliament, is the highest form of law in the UK. The UK has a dualist system of law so that obligations in international or European law, such as under the Refugee Convention or European Convention on Human Rights, have an impact on domestic law only to the extent provided by statute.[13]

In practice, most immigration decisions are made under rules of practice, known as the Immigration Rules.[14] They are described by the Immigration Act 1971 as setting out 'the practice to be followed in the administration of this Act' for regulating the entry into and stay in the United Kingdom of non-nationals, including those coming as 'dependants of persons lawfully in or entering the United Kingdom'.[15] The Immigration Rules are binding on the government but it can act more generously than the Rules require through

[12] These statistics and the others cited here are available at: https://www.gov.uk/government/statistics/immigration-statistics-year-ending-march-2022/why-do-people-come-to-the-uk-for-family-reasons.
[13] Full refs
[14] ref
[15] Immigration Act, s.1(4). The right of abode attaches to those holding British citizenship, but not subsidiary citizenships, such as British Overseas Citizen and British Overseas Territories Citizen, and, for historical reasons, to a few Commonwealth citizens.

granting 'leave outside the Immigration Rules' either in an individual instance or under a policy.

Immigration applications are decided by UKVisas and Immigration, which sits within the Home Office. The application process is slow, expensive, complex, and unaccountable:

- **Slow:** The minimum period between entry and settlement for most family migrants is now five years and can be ten years or even longer. During this period, applicants must continue to meet the conditions and pay huge fees while being excluded from access to welfare. Applications themselves take a long time to process, with standard processing times for a first spouse visa application close to six months, although applications for those joining or accompanying work migrants are decided more quickly.
- **Expensive:** Visas are very expensive, costing far more than the processing cost and must be paid on several occasions during the route to settlement. It seems that the fees are seen as a way to reduce the overall costs of the immigration system.[16] A substantial additional expense is the immigration health surcharge, payable by most applicants on entry and renewal, that is said to defray the cost of possible medical treatment which is free at the point of delivery in the UK and paid for through general taxation (which most migrants also pay).The table below illustrates the costs payable for just one typical applicant: a spouse joining a British citizen in the UK:

Process	When paid	Fee in year 2022-3
English language tuition and testing (A1 speaking and listening)	Before application	Variable
Medical tests (if required)	Before application	Variable

[16] Free Movement article?

Visa fee	On application	£1,538 (plus up to more than £1,000 for priority or premium service, biometrics appointment, upload of documents service or 'user pays' visa centre)*
Immigration health surcharge	On application	£1, 872
Further leave to remain	Every 2.5 years until eligible for indefinite leave to remain	£1,048
Immigration health surcharge	Every 2.5 years until eligible for indefinite leave to remain	£1,560
English language tuition and test (B1)	Before applying for indefinite leave to remain	Variable
Life in the UK test	Before applying for indefinite leave to remain	£50 (plus handbook)
Indefinite leave to remain	After between five and ten years or even longer	£2,404
Total		£8,472 fixed costs plus other expenses and lawyer's fees. In practice, the total is likely to be at least **£10,000**

* In theory, these additional fees are not essential but, in practice, paying them can be the only way to make the application and have it processed within a reasonable time scale. Out of country priority applications have not been possible since the start of the Ukraine crisis.

- **Complex:** The Immigration Rules are notoriously complex. The applicable requirements can often only be understood through extensive cross referral and by wading through complicated numbering systems, appendices, and definition sections. One contributory factor is that a Supreme Court decision in 2012 found that the government could not impose conditions that were not in the Immigration Rules; nothing in policy guidance was enforceable against applicants.[17] As a result, the Immigration Rules were expanded to ensure that all possible requirements

[17] *Alvi v SSHD* [2012] UKSC 33

were included. However, this complexity is also symptomatic of a wider mindset that values micromanagement above providing a user-friendly service. In recent years, there has been a simplification process, but this has not been applied to the family migration rules [check latest position].

- **Unaccountable:** The immigration service has a reputation for being unapproachable and unresponsive, although there have been anecdotal reports of some improvement in terms of flexibility. However, the administration of the service reflects political priorities, and these do not include transparency and ease of access for users. There is, for example, a fee payable simply to make a phone or email enquiry and these rarely elicit useful responses. If a decision has been wrongly made, it may be internally reviewed for errors (for a fee) although the quality of this process has been questioned.[18] Appeals are possible only on human rights or refugee protection grounds, usually, in the family reunification context, under article 8 of the European Convention on Human Rights, the right to respect for family and private life, which is binding on decision-makers under the Human Rights Act.[19] Appeals are heard by a dedicated Immigration and Asylum Chamber of the Tribunal Service. Legal or procedural errors may be reviewed by the High Court through judicial review. All judicial processes require resources and stamina that are not available to all. Success at appeal is quite high suggesting that the quality of initial decision-making is not always good.

3.3 Spouses and Partners

The spouse/partner route is the largest group of family migrants and has often been controversial. Spousal migration occupies a particular space in the immigration imaginary, as it is not only *immigration subie* i.e. immigration that the state is forced to accept, but it represents a conscious choice by the UK sponsor, putting their own loyalty into question. It reflects the fear that underpins much family migration policy, that family and state are in competition for an individual's loyalties, and the state may lose (Macklin 2022: 00). Concerns include sham marriages, forced marriages, and ensuring financial self-sufficiency of the family unit. In common with some other European states, the UK

[18] Chief Inspector report: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/674307/113_A_re-inspection_of_the_Administrative_Review_process.pdf

[19] Bill of Rights

has become preoccupied with restricting the admission of poorly educated or economically unproductive applicants as well as those seemed liable to reproduce oppressive family practices, generate inter-generational deprivation and enable ethnic segregation (Wray 2009; Bonjour and Duyvendak 2017; de Hart 2022). At the same time, family reunification involves the intimate interests of the sponsor so that refusal requires normative arguments that are different to the instrumental reasons applicable to work migrants (Carens 2013). Governments must therefore find reasons to exclude undesired migrants without appearing to dismiss the sponsor's interests.

These concerns underpin many of the criteria that spouses or partners must meet to enter or remain in the UK. The result has been over-inclusive policies that go further than their stated intentions (Wray 2022 plus …), reflecting the complex and sometimes semi-concealed agendas that may determine policy (Boswell 2007 – plus more recent?). These include conditions as to good character, age, the nature of the relationship, English language competency, and financial stability. Of these, the financial criteria, the English language test and the detection and prevention of sham marriages have provided particular opportunities to ensure that migrants considered undesirable can be excluded, while the probationary period tests the durability of the relationship over a sometimes very prolonged period.

The minimum income requirement

The minimum income requirement or MIR requires the sponsor to have an income of at least £18,600 per annum, more if non-citizen children are also sponsored. When it was introduced in 2012, the MIR could not be met by 47% of the adult population in the UK, with a much higher percentage for some groups (Wray et al 2015: 59). While wages have risen so that a full-time worker on the minimum wage can now meet the MIR, it continues to cause multiple problems due to its inflexibility, particularly in an economy where precarious and short-term working is commonplace. The migrant spouse or partner's earnings will count only if they are already legally working in the UK. Support by third parties will rarely count. The MIR must be earned for at least six months, and short-term unemployment or a temporary drop in earnings may mean that the clock starts again. British citizens working abroad who want to return to the UK with their families must

already earn the MIR, even if they are in a low-income country, and must also have a UK job offer at the MIR.

The MIR has led to significant numbers of refusals. In 2015, it was estimated to have caused around 12,500 fewer successful applications each year, while at least 15,000 children had been affected by separation from a parent since implementation (Wray et al 2015 125-7). Mothers gave birth alone, children faced prolonged, repeated, traumatic separations from a parent, and sponsors worked long hours, left children with grandparents to find work, or sold houses to acquire the necessary savings. Some families despaired of ever living together with serious consequences for mental health. Despite evidence of these harms and that the MIR does not reduce welfare dependency (and may even increase it), the Supreme Court found in 2017 that the MIR did not breach the right to respect for family life under article 8 ECHR, although its application might be disproportionate in individual cases.[20] Despite widespread public and political criticism, the MIR remains in place and the hardship continues (Charsley et al 2021). [Put in about it reflecting an individualistic neo-liberal relationship between individual and state].

The English language test

While the MIR is the most egregious of the onerous conditions placed on applicants and sponsors, it is not the only one to cause difficulties. The English language test is, on its face, a relatively undemanding criterion as it requires only that an applicant acquire competence in speaking and listening to A1 level CEFR (the lowest assessable level) before admission. It is difficult to deny the advantages of language competence when entering a country for residence and the measure, for that reason, is widely seen as 'benign' and an aid to integration.[21] Yet critical examination reveals its discriminatory, neo-liberal and colonial character. Unlike other European states that have introduced pre-entry language testing, the UK government expects applicants to obtain teaching materials, tuition, and tests from the private sector, relying on the market to ensure sufficient supply even though that led, at least in the early years of implementation, to widespread difficulties.[22] Although anecdotal evidence suggests that the position has now

[20] MM (Lebanon) v SSHD full ref
[21] Ali and bibi [00]
[22] Ref to my report

improved, the test continues to create difficulties for applicants, particularly those in low-income, rural countries for whom accessing suitable tuition and a testing centre can be challenging financially and logistically. The government has not aided applicants, as it easily could, by making tailored teaching materials and tests available online. Exemptions are available for those with high level academic qualifications taught in English and for nationals of some 'majority English speaking' states. It is significant that this list includes Canada, despite its significant Francophone population, but not countries such as Ghana or Nigeria, where English is an official language and very widely spoken. In the past, language tests have been manipulated to limit unwanted movement within the British Empire and the current language test, despite its innocuous character, seems to represent an updated model of this exclusionary and colonial practice (Bashford 2014 plus ?El-Enany).

Sham marriage

The third problematic aspect of the conditions for entry as a spouse or partner are those relating to sham marriages. While it is commonplace for states to take steps to prevent sham marriages, the government has used the elastic, subjective and inchoate concept of the sham marriage to control immigration through marriage more widely (Wray 2015). This is primarily visible at two points: before a marriage takes place and when immigration rights are claimed after marriage.

If a non-national without settled status wants to get married in the UK, they need government permission. The official objective is to prevent sham marriages, but an earlier version of this scheme clearly went much further as it routinely refused permission to all short-term and irregular migrants irrespective of the character of the relationship. One motive, revealed in parliamentary debate, was to limit the impact of human rights and EU law free movement rights consequent to marriage (Wray 2006: 00). In 2008, the House of Lords (the predecessor of the Supreme Court) found that, while the government had the right to investigate whether a marriage was sham, the scheme's over-inclusive character represented a breach of article 12 ECHR, the right to marry and found a family.[23]

[23] baiai

The government responded by creating a new statutory scheme that was not, at least on its surface, a blanket scheme.[24] Marriage registrars must refer all marriages involving migrants without permanent status for possible investigation. If it is suspected that a marriage is not genuine, the wedding may not proceed until an investigation has taken place. If it is found to be genuine, the marriage may proceed. However, decisions on whether to investigate are solely determined by immigration control factors and, even if a marriage is found to be genuine, the referral is an opportunity for enforcement action against an irregular migrant (Home Office 2021). The scheme is still deeply enmeshed with wider concerns about immigration control.

When an application for a visa or leave to remain based on marriage is made, the applicants must meet several criteria that aim to test whether it is based on a genuine relationship. The parties must have met in person, the relationship must be 'genuine and subsisting' and the parties must intend to live together permanently in the UK.[25] These conditions, or similar ones, have existed for many years, and have often been interpreted in ways that promote a culturally specific form of relationship, as the discussion earlier of the primary purpose rule demonstrated. After abolition of the primary purpose rule, the main requirement was to show that the relationship was subsisting and that the couple planned to live together in the UK. This was a single test, and evidence of the subsisting character of the relationship was strengthened by showing plans for the future. This assisted couples in an arranged marriage whose evidence of a premarital relationship might be slight. After 2012, however, the tests were separated so that both elements had to be shown separately and there was a freestanding obligation to show a 'genuine and subsisting' relationship. Thus, couples who did not represent a 'secular modern couple' might again be in difficulties. Guidance to decision-makers included a list of positive and negative factors that 'set traps for those who do not fit neatly into prescribed cultural practices' (Carver 2013: 273. They included indications that the marriage might not be consensual (even if this was not established), a small wedding, disagreement as to the 'core facts of the relationship', absence of a common language, lack of shared responsibilities and, a partner who needed care when the other was a medical

[24] Immigration Act 2014 ss 48-62.
[25] HC395, Appendix FM, para E-ECP.2.1.

professional. Immigration considerations, including previous admission or sponsorship as a spouse or unlawful residence or entry, were also relevant (Wray 2015: 159).

Perhaps because of the administrative burden involved in making such discretionary judgments, the guidance was later amended again to focus on documentary evidence rather than the character and context of the relationship. However, this still endorses greater scrutiny of relationships that do not fit a conventional template, particularly arranged marriages. There is an explicit hierarchy where concrete evidence of cohabitation (such as joint utility bills) is favoured over photographs, wedding invitations, message transcripts and evidence of visits and joint holidays. However, as cohabitation usually only begins after admission, applicants for entry must rely on the less favoured evidence and those in arranged or 'whirlwind' marriages will have less evidence of this kind, particularly if the wedding was modest. Thus, it is still relatively easy for a decision-maker to decide that applicants have not shown that the relationship is genuine if it does not conform to European ideals of a strong intimate pre-marital relationship, or if their commitment is otherwise considered insufficient. Such an impression is likely to be informed, consciously or otherwise, by beliefs about the increased likelihood of a sham marriage when certain nationalities are present or when gendered expectations as to age or wealth are inverted. In summary, measures that prevent sham marriages are widely seen as legitimate but, as this discussion has shown, they also do a lot of work in reinforcing general immigration control and cultural norms as to what constitutes a 'good' marriage.

The probationary period

Unlike other relatives, spouses and partners do not receive indefinite leave as soon as they are admitted but must go through a probationary period of at least five years, during which time the relationship must be sustained, and the parties must continue to meet all the conditions of entry (although the MIR is easier to meet as the earnings of both parties can be counted). Expensive renewal applications must be made every 2.5 years, the immigration health surcharge must also be paid, and the parties must not become reliant on public funds. If the relationship breaks down during the probationary period, the

migrant partner is usually expected to leave the UK.[26] The extension from two to five years therefore added to the stress facing bi-national couples at the start of their relationship.

However, some couples face a probationary period of up to ten years or even longer. This is because they cannot meet the Immigration Rules, but their claim succeeds either under specific exceptions in the Immigration Rules that are designed to provide for article 8 cases article 8 ECHR, or through an independent article 8 claim. These couples are put on what is called the 'ten-year route', and must wait ten years for settlement, facing prolonged uncertainty, paying for more applications and health surcharges, and remaining unable to access public funds. It is possible that some couples must wait longer than ten years as, if they start on the five-year route and then switch to the ten-year route after 2.5 years, the clock starts again. There seems to be little justification for this extended period: it is accepted that these are families with a legal right to live in the UK and they are often less able to afford the additional costs of a prolonged process as they were refused initially because they could not meet the MIR. The usual justification for the probationary period is to disincentivise sham marriages but, as with other measures, its impact goes much further.

3.4 Children

Children, i.e. young people under the age of 18, occupy a unique position within British immigration law. There is a statutory duty to have 'regard to the need to safeguard and promote the welfare of children' in the UK when making immigration decisions. This was enacted after the UK withdrew its immigration and nationality exemption to the Convention on the Rights of the Child in 2007.[27] The Supreme Court found in 2011, that it represents 'the spirit, if not the precise language' of the obligation in article 3 of the Convention to treat children's best interests as a primary consideration.[28] Decision-makers and judges must therefore pay attention to children's best interests in all immigration decisions, including those that affect them indirectly, for example, decisions as to the admission or expulsion of their parents. Although children's interests were

[26] There is an exemption in cases of domestic abuse or bereavement.
[27] Borders, Citizenship and Immigration Act 2009, s.55.
[28] *ZH (Tanzania) v SSHD* [2011] UKSC 4 [23].

primary not paramount, and might, on balance, be outweighed by the cumulative effect of other considerations, they must always be considered first. Decision-makers must identify a child's best interests, treat them as the single most important consideration and explain why, if that is the case, they nonetheless should be over-ridden.[29]

The section 55 duty applies only to children in the UK, but the article 8 jurisprudence of the European Court of Human Rights has reached similar conclusions and should be applied by visa officers when considering applications for admission even if the child is 'outside the jurisdiction' and therefore not, strictly speaking, covered by the Convention.[30] Children therefore benefit from specific legal rights that do not apply to adults. However, this has had only a limited impact in practice. As will be seen from the discussion below, children's interests still prevail only in certain circumstances.

Children outside the UK

Children outside the UK do not benefit from the statutory duty but are said by the government to be treated consistently with article 8 ECHR. Close examination shows this is questionable. Usually, immigration considerations arise because they do not have British citizenship but need to join or accompany a parent or carer who already lives in or is entering the UK. Occasionally they are British citizens and face no legal impediment to entry but are stranded with a parent or carer who is not a citizen and is not eligible to enter.

In the former case, where the child wants to join a parent or carer in the UK, admission is relatively straightforward provided both parents are living in or are entering the UK to live, or one parent lives in the UK and the other parent is dead. In those instances, the only significant criteria are to show that the child will be adequately maintained without further recourse to public funds and will live with the family in accommodation that is 'adequate'. The child receives indefinite leave to enter and can begin their integration into British society knowing that this will now be their home.[31]

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[29] *ZH (Tanzania)* [25]-[33]; see also Taylor (2016) and Eekelaar (2015).

[30] Jeunesse, Nunez plus art 1 ECHR and ref in Guidance to art 8 – IDI para 1 plus ?

[31] HC395, para 297. A child who has indefinite leave to enter or remain may be able to register as a British citizen before they are 18 or naturalise as an adult. Until that happens, they remain liable to deportation on conduct grounds and may lose their indefinite leave if they are absent from the UK for two years or longer.

The position is more complex if one parent is living in the UK and the other is living elsewhere, a commonplace occurrence given divorce or separation. In these cases, the UK based parent must show they have 'sole responsibility' for the child's care.[32] This does not mean having day to day care of the child, an impossible criterion when child and parent are separated, but the carer abroad must be another member of the UK parent's family and the UK parent must still have 'ultimate responsibility' for the child's upbringing and emotional and financial support.[33] Where the child resides outside the UK with the other parent, it is usually impossible to show 'sole responsibility' and, even if there are pressing educational, emotional, health or other reasons for the child to come to the UK, the application will be refused.[34] The inflexibility of the rule presupposes an individualistic nuclear family unit, discourages separated or divorced parents from the type of co-operation and shared care that family courts usually promote, and does not adequately consider the child's best interests.

If a child is refused under the sole responsibility rule, there is provision for entry if there are 'serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care'.[35] In principle, such an application may also be made by another relative, for example, a grandparent, aunt or uncle, or older sibling. However, this condition is not easy to meet. The Guidance says that a child can only enter on this basis when they cannot be adequately cared for by parents or relatives in their own country.[36] Circumstances must be exceptional compared to the ordinary circumstances of other children in their home country.[37] Again, such criteria do not acknowledge that it may be in the child's best interests to relocate. It is clear from the guidance that the aim is to ensure that children do not enter in order take advantage of access to education, healthcare and so on.[38] [Put in some relevant cases?]

[32] HC395, para 297.
[33] Guidance para 4.2
[34] Guidance para 4.1
[35] HC395, para 297
[36] Guidance, para 1.
[37] Guidance para 1.2 and 1.3.
[38] Guidance paras 1.2, 4.1.

If a British child is living outside the UK with a non-citizen parent carer the relevant immigration application is that of the parent. Following a Supreme Court decision in 2017, the government amended the Immigration Rules to say that, where the Rules cannot be met, the decision-maker must consider if there are exceptional circumstances which would make refusal a breach of article 8 of the European Convention on Human Rights, because of 'unjustifiably harsh consequences' for any party, including a child.[39] According to Guidance, relevant factors include age and nationality of the child (with British nationality being an important factor), current country of residence and connection with and length of residence there, family, physical, social, educational and health factors and the relationship with each parent, the residence of any siblings and the child's previous residence in the UK.[40] Absent from this list are the benefits for the child of the family being able to live together in the UK. It is assumed that the UK based parent can and should leave the UK to reunify the family even though this may be difficult for many reasons.[41] Yet again, children's best interests, while they are formally recognised, are effectively subordinated to those of immigration control.

Children in the UK

Family reunification questions may also arise where the child is in the UK. There is no provision in immigration law for child refugees to be joined by their family members. In principle, a claim could rely on article 8 ECHR, but they almost never succeed.[42] This section therefore focuses on children living in the UK as citizens or residents. Cases arise in two broad factual scenarios: the parent is in the UK but is not eligible to remain and may be expelled, or the parent is outside the UK and is seeking admission.

In the former instance, when the parent is already in the UK, the proposed expulsion may be due to the parent's conduct (deportation) or because they cannot meet the criteria of the Immigration Rules (removal). Both instances are governed by the s. 55 statutory duty to children and by article 8 ECHR but the way in which these obligations are exercised are regulated by a further statute, the Immigration Act 2014. The Act creates a presumption that the deportation of foreign criminals is in the public interest and that

[39] *MM (Lebanon)* full ref; HC395, Appendix FM para GEN3.2.
[40]
[41] Refer to cases plus eg Families Reunited
[42] Put in cases

the public interest increases in strength as the severity of offending increases. Where the parent has been sentenced to imprisonment, it is difficult to displace the presumption and very difficult indeed when the sentence was to four years or more.[43] The children of convicted criminals must often therefore endure separation from their parent. Where the issue is not criminal or other misconduct, but the inability to meet the requirements of immigration law, the public interest is less pressing and this is recognised in both the Immigration Rules and statute where, in brief, a parent may remain where there is a genuine and subsisting relationship with a child who is a British citizen or a child who has lived in the UK for seven years, and it would not be reasonable to expect the child to leave the United Kingdom.[44] There is therefore some limited recognition of children's needs when parents face expulsion but only when criminality is not in issue.

Where a parent is outside the UK, there is also some limited provision. Paradoxically, the position is more accommodating if the couple is separated or divorced than if they are in a relationship. A separated or divorced parent can apply to enter if they have sole parental responsibility for or direct access to the child, as agreed with the other parent or ordered by a UK court. The applicant must show that they are taking, and will continue to take, an active role in the child's upbringing and must also pass the English language test and show that there will be adequate accommodation in the same way as partners or spouses. They do not however have to meet the minimum income requirement (MIR) discussed earlier. As the MIR is a major cause of difficulty for many couples, this puts single parents at an advantage in the immigration process. The parent route is not open to those in a relationship and there have even been anecdotal reports of 'divorces of conveniences' to help overseas parents to come to the UK.

For couples with children who cannot meet the MIR or other requirements of the Immigration Rules, there is only the provision discussed earlier, that the decision-maker must consider whether there are exceptional circumstances which would make refusal a breach of article 8 of the European Convention on Human Rights, because of 'unjustifiably harsh consequences' for the child, a high threshold that is rarely met.[45] The guidance says

[43] Nationality, Immigration and Asylum Act 2002, ss 117A-D inserted by Immigration Act 2014 s.19.
[44] Nationality, Immigration and Asylum Act 2002, s 117B; HC395, Appendix FM, para EX.1.(a).
[45] HC395, Appendix FM para GEN3.2.

that the 'unjustifiably harsh' test must be understood in a context where it is normally proportionate under article 8 for admission to be refused where the parties understood that it would not be permitted under the Immigration Rules. The needs of the child, who had no say in decisions made by their parents, have largely disappeared.

To summarise, children have additional rights under immigration law, reflecting the British government's commitments in international and regional human rights law, but these make a visible difference only in a few scenarios, notably where both parents are resident in the UK or when a separated or divorced parent needs to enter for contact with their child. In other cases, children's interests are formally counted but, in practice, are easily subordinated to the demands of immigration control. Compared to the spouse/partner route, there seems to be fewer normative expectations, but the underpinning view is of family as an individualised, atomised entity. This is evident in the rules on sole responsibility but also, more generally, in the lack of recognition of a child's possible ties with wider family members, which rarely feature. While children may no longer be considered only as 'parcels that are easily movable across borders with their parents' (Bhabha 2009: 193), the benefits for them of a rich and stable family life are still not fully recognised because, it seems likely, of the consequences for immigration control of doing so.

3.5 Adult dependent relatives

The final group who may be eligible for family reunification are 'adult dependent relatives' or ADRs. The Immigration Rules only cover ADRs seeking admission from outside the UK to join citizens, settled relatives or refugees; there is no provision for an individual to enter the UK to care for an ADR.

The admission of ADRs has always been tightly controlled in the UK, as in other European states (Askola 2016), and the rules were made even more restrictive in 2012. The current Immigration Rules apply only to the parents, grandparents, siblings and adult children of the sponsor. There is no provision at all for other relatives, such as aunts and uncles, cousins, or others that many might reasonably consider to be their relatives. The ADR must, due to age, illness, or disability, require long-term personal care to perform everyday tasks and be unable, even with the practical and financial help of the sponsor,

to obtain the necessary care in the country of origin because it is unavailable or unaffordable.[46] If these difficult criteria are met, other conditions are relatively straightforward. The sponsor must show that the ADR can adequately maintained, accommodated, and cared for without recourse to public funds and that the sponsor will be responsible for these costs for a period of five years from admission. If successful, the ADR will be granted indefinite leave to enter the UK (unless the sponsor is themselves on a time limited visa). Applications cannot be made in-country, however; if, for example, an elderly relative comes to visit and clearly needs the sponsor's help, they must still return to the country of origin to make an application.

This latter rule causes practical difficulties, but the main problem is the very strict criteria for admission. The level of need required is such that eligible applicants may be too ill to travel. Further, the requirement that care be unavailable or unaffordable even with the sponsor's support excludes almost all applicants from the Global South where care is relatively cheap. The Rules are therefore doubly discriminatory. They usually only apply to those of migrant origin as only they will have close non-citizen family members abroad. Second, an applicant from, for example, Bangladesh will be disadvantaged compared to one from Canada as the former is less able to show that funding care is unaffordable. The rules on ADRs were challenged in the UK Courts as for incompatibility with article 8 ECHR but the claim failed, unsurprisingly given the Strasbourg Court's very restrictive approach to family life outside the nuclear family unit (Askola 2016; Draghici 2018).

The strict rules on the entry of ADRs, described by one Member of Parliament as 'a ban masquerading as a rule', have caused anguish, guilt and practical difficulties for families, as they have to arrange care across continents while managing their own family life and careers.[47] Where they have choices due to marketable skills, they may choose to relocate to a state that is more accommodating (JCWI 2014: 00). The rules also reveal an impoverished view of family life. Care is treated as fungible, as if there is no difference between care by a paid carer and care in the home of a close relative. The emphasis on extreme dependency by the ADR ignores the rich interdependencies and benefits that can flow from an intergenerational household (JCWI 2014 00-00). By confining admission

[46] HC395, Appendix FM, section EC-DR
[47] Sarah Teather MP, Column 261WH 'Family Migration Rules' (*Hansard*, 19 Jun 2013).

only to those in extreme need, the possible costs in terms of health and social care loom much larger. A grandparent who is eligible to enter at the age of 65, for example, may have many years ahead during which they can contribute to childcare, household maintenance or economically. In the past, there was a category in the Immigration Rules for retired persons of independent means so that grandparents or other older relatives could enter and stay if they had a reasonable income. That route has been abolished [check when]. Meanwhile, visit visas will be refused if it appears that the family member is using it as a means to enjoy near continuous residence in the UK or if there are fears that they will not leave at the end of the visa. It is therefore almost impossible for older generations to enjoy a close relationship with family members in the UK. Yet again, the needs of families and the contribution of incoming family members are secondary to the perceived needs of immigration control. This restrictive approach, which has caused much anguish to families (JCWI 2014), can be contrasted with the much wider range of relatives admitted under the Ukraine Family Scheme, put in place after the invasion of Ukraine in 2022.[48]

4. Conclusion

[Concluding remarks that identify the main themes of the chapter]

[48] https://www.gov.uk/guidance/apply-for-a-ukraine-family-scheme-visa#how-long-you-can-stay.