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MONEY OVER LOVE?

A critical analysis of the United Kingdom's Minimum Income Requirement policy for Non-EEA family route visa applications

Author: Hugo Bittencourt de Oliveira
Supervisor: Prof. Jeffrey Kenner

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Student Name: Hugo Bittencourt de Oliveira

Second Semester University: University of Nottingham

Name of Supervisor: Prof. Jeffrey Kenner

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(Hugo Bittencourt de Oliveira)

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ABSTRACT

This thesis investigated how the Minimum Income Requirement policy, established in 2012 in the United Kingdom, has directly and negatively impacted Human Rights. This is particularly relevant when considering the right to respect for private and family life; the right to marry; and the prohibition of discrimination within the Council of Europe system. The research was conducted by applying Doctrinal Legal Research methodology complemented by reform-oriented research (Law Reform). This allowed me to interpret domestic and international legal instruments which the United Kingdom is bound to and, then, analyse whether the Minimum Income Requirement policy is conflicting with Human Rights standards or not. Besides the legal aspect, the thesis also presents how social and political factors play a role in the context of the policy in question as an immigration tool utilised by the British Government to preclude migrants from entering the United Kingdom.

CONTENTS

LIST OF ABBREVIATIONS AND ACRONYMS

CoE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
MAC	Migration Advisory Committee
MIR	Minimum Income Requirement
NMW	National Minimum Wage
Non-EEA	Non-European Economic Area
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UNCRC	United Nations Convention on the Rights of the Child
UK	United Kingdom
UKSC	United Kingdom Supreme Court

CHAPTER 1: ORIENTATION TO THE STUDY

1.1. Introduction

The thesis intends to analyse and explore the human rights issues relating to the Minimum Income Requirement (MIR) policy as part of the immigration law framework in the United Kingdom (UK). Focusing on non-EEA citizens who are applying to join their partner/spouse in the country, the research will conduct an assessment of the implications such policy leads to when considering international human rights law and, more specifically, European standards.[1] This is due to the fact that the UK is a Member State of the Council of Europe (CoE), and has ratified the European Convention on Human Rights (ECHR), which was incorporated into national law through the Human Rights Act 1998.[2] This status will be maintained regardless of whether or not the UK remains a member of the European Union (EU) after 31 October 2019.

Furthermore, the rulings of the European Court of Human Rights (ECtHR), often referred to as 'Strasbourg Court', are constantly reaffirming consolidated interpretations of the ECHR when applied to real cases as well as establishing advanced and ground-breaking visions on human rights law when new situations are brought before it as well as modifications to similar cases previously judged. Since the Court conducts its work on an individual case basis, here I stress the importance of pushing boundaries and taking into consideration societal changes in its rulings. This is closely related to the idea that the Universal Declaration of Human Rights (UDHR) as well as the ECHR are "living instruments", as they adapt to the current challenges and changes taking place in society.

Therefore, the Strasbourg Court has a considerable share in the responsibility of standards setting in Europe. In this sense, and considering the UK is under the Court's contentious jurisdiction, the thesis will analyse the standards in regards

[1] In the context of this research, European standards shall be understood as specific to those established by the Council of Europe. *See* section 1.4., *Limitations of the study*.
[2] The Human Rights Act 1998 sets out that it aims to "give further effect to rights and freedoms guaranteed under the European Convention on Human Rights; to make provision with respect to holders of certain judicial offices who become judges of the European Court of Human Rights; and for connected purposes."

to Article 8, the right to respect for private and family life; Article 12, concerning the right to marry; and Article 14, the prohibition of discrimination of the ECHR, as well as certain rights of the child, in order to assess if the MIR has led to situations where human rights breaches arise.

1.2. Structure of the dissertation

In the following chapter I shall be exposing the political background and context in which the MIR developed. Then, I present the legal framework of the MIR within the British immigration law – Immigration Rules – while also explaining the Government's motives for introducing such a policy and how they decided to do so. Here I criticise such motives presented by the Government, because the questionable criteria utilised by the Migration Advisory Committee (MAC) to establish the MIR threshold combined with the hostile immigration policies introduced by the Government indicate that the genuine objectives are not only to protect the UK from financial burdens migrants might become, but rather a conscious decision to stop migration into the country as migrants are perceived as second-class citizens. This, in turn, is conflicting with international human rights law standards.

In the third chapter I shall explain how the law defines the MIR as well as what preconditions are necessary to be satisfied in order to meet it; which sources can be utilised to satisfy it; and finally, when an individual is not able to fulfil it via the traditional method, which alternative approach could potentially be applied instead. In the final section I shall present criticisms towards the MIR and subsequently argue that such policy is not compatible with certain human rights.

In the fourth chapter I conduct an assessment of the standards of Articles 8, 12 and 14 of the ECHR as well as certain rights of the child in order to establish the bare minimum expected from a Member State of the Council of Europe. In this context, I shall consider case-law of the ECtHR as well as scholarly interpretations and other relevant sources.

In the fifth chapter I shall analyse British case-law which has addressed the MIR at the domestic level. Considering the ECHR has been enshrined in UK law under

the Human Rights Act 1998, it is essential to investigate if British courts have been complying with human rights law when judging such cases. I present how the MIR is of a high degree of complexity and, therefore, engenders distinct opinions and perspectives on the matter. This is noticeable when considering that contrasting judgements within the British judicial system have been ruled, where some argue that the MIR is compliant with human rights whereas others present opposing arguments and demonstrate how it violates certain human rights.

In the sixth chapter I demonstrate how the MIR will be affected by Brexit while also suggesting the developments this might lead to. This is because, considering the high likelihood of Brexit becoming a reality, at the end of the transitional period, the MIR shall be applied not only to non-EEA nationals but rather to all non-British citizens applying for a visa under the family route, including EEA nationals. Then, I propose recommendations and modifications that should be applied to the policy as well as the law in order to ensure a higher degree of compliance with international human rights law.

In the final chapter I present my reflections on the facts, statistics, arguments, and assessments discussed throughout this thesis with an intent to conclude to what extent the MIR is in conflict with human rights at the time of writing.

1.3. Research Methodology

In order to develop the thesis, I shall employ a Doctrinal Legal Research methodology, which, at a later stage of the study, will be complemented by reform-oriented research (Law Reform). This shall allow me to focus on the interpretation of legal documents and their norms as well as the judicial decisions concerning the matter. In this sense, it is possible to mention, for instance, the analysis of the Immigration Rules (1994); the European Convention on Human Rights (1953); the Human Rights Act (1988); and rulings from the High and Supreme Courts of the UK as well as the ECtHR.

Moreover, the incorporation of qualitative data methods and/or utilisation of existing quantitative statistics, such as reports from the Home Office and academic research, will be necessary to clarify determined contexts relevant to

the inquiry. This includes, for instance, statistics, numbers and graphs which shall support the development of arguments throughout the thesis.

Having completed this first stage, I shall then draw my own conclusions on the current local situation and its developments. This, in turn, shall inform recommendations for law and policy reforms.

1.4. Limitations of the study

This thesis shall discuss issues relating to human rights when considering the MIR. There are several human rights which are potentially affected by such immigration policy. Nevertheless, working within the framework of a thesis, and thus accounting for the timescale and length, I shall focus on the principle rights which are directly and negatively affected as detailed in Chapter 4. Therefore, this thesis does not intend to exhaust all the debate surrounding human rights breaches provoked by the MIR.

Furthermore, this thesis shall consider the Council of Europe - and consequently, to some extent, the United Nations - standards and shall not discuss European Union law and the implications it might have concerning the MIR. There are three main reasons for this.

Firstly, Directive 2004/38/EC regulates the right of European Union citizens as well as their family members to freely move and/or reside within the Member States' territory, which is provided by Article 21(1) of the Treaty on the Functioning of the European Union (TFEU). Article 3 of such Directive states that it 'shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them'. In this scenario, one could build the debate that such provision is discriminatory against British people in the context of the MIR, because it permits nationals of all other EU Member States to bring their partner/spouse to the UK without having to fulfil the MIR requirement, whereas such restriction is applied to British people in their own country. Despite recognising the principle of EU law primacy, such an EU

Directive would not corroborate to the arguments that the MIR policy does not comply with human rights.

Secondly, and subsequently, the MIR, at the time of writing, is a requirement applied only to non-EEA nationals, which in turn indicates EU law is perhaps a less fruitful source for debate on this topic. In this sense, the Council of Europe standards shall be prioritised in this research.

Lastly, the Council of Europe is in its core a human rights organisation, whereas the EU, despite its commitment to support and promote human rights, is not a human rights organisation *per se*. Considering that this thesis aims to develop a human rights perspective on the subject, it seems appropriate to focus on the former rather than on the latter. Therefore, EU law shall not be discussed in the context of potential human rights breaches. Notwithstanding, it shall be utilised further on in this thesis when I consider Brexit implications on the MIR due to the nature of the exit of the UK from the EU.

CHAPTER 2: CONTEXT OF THE RESEARCH

2.1. Background

Under a new array of immigration rules introduced by the Government in 2012 and which is referred to as 'the hostile environment policy', the UK has displayed to the world its open political agenda aiming at decreasing the number of immigrants in the country. This can objectively be seen, for instance, when considering Brexit and the stimuli fueled by the Government in this anti-migrants propaganda which encourages division of British people from other peoples, including EU member states, and has become commonly reported in the media post EU referendum. The aforementioned policy envisioned to create an environment so difficult for undocumented people to live in the country that it would leave them with no options but to leave, whilst also denying them basic human needs, as, for instance, access to housing and healthcare; and, therefore, orchestrating for these people to have miserable lives.[3] In order to achieve this, the Government 'requires employers, landlords, private sector workers, NHS staff and other public servants to check a person's immigration status before they can offer them a job, housing, healthcare or other support'[4], which if not respected can lead to fines and criminal sanctions. In this sense, Theresa May, who at the time was Home Secretary and, therefore, representative of the Conservative–Liberal Democrat Coalition Government, stated their aim 'was to create here in Britain a really hostile environment for illegal migration'.[5]

In this context, in July 2012, Theresa May instituted a new minimum income requirement (MIR) for non-European Economic Area (non-EEA) applicants joining their family members in the UK, which includes the focus of this research: spouses and partners. The spouse or partner in the UK must be a British citizen

[3] Global Justice Now, *The hostile environment for immigrants: How Theresa May has created an underclass in the UK* (Global Justice Now 2018) 1 < https://www.globaljustice.org.uk/sites/default/files/files/resources/hostile_environment_briefing_feb_2018_web.pdf > accessed 18 February 2019.

[4] Liberty (ed) and others, *A guide to the hostile environment: The border controls dividing our communities – and how we can bring them down* (Liberty (ed) and others 2018) 5.

[5] Jessica Elgot, 'Theresa May's 'hostile environment' at heart of Windrush scandal' *The Guardian* (London, 17 April 2018) < https://www.theguardian.com/uk-news/2018/apr/17/theresa-mays-hostile-environment-policy-at-heart-of-windrush-scandal > accessed 20 February 2019.

or individuals who have Indefinite Leave, Refugee Status or Humanitarian Protection in the country.

The new set of rules increased the minimum income threshold considerably. Prior to 9 July 2012, the sponsor was to 'demonstrate ability to adequately accommodate and maintain the applicant without recourse to public funds'[6], but the Immigration Rules did not explicitly define a minimum income number expected to be met. Nevertheless, the British or settled resident sponsor was required to prove that 'their net income after deduction of housing costs was not less than the equivalent amount they would receive in Income Support'.[7] The Government's Migration Advisory Committee assessed that this income would be equal to an amount of £5,500 per year, after taxes, and excluding the costs of housing.[8]

Moreover, the sources of income were of a broader range, which included the sponsor and/or applicant's employment overseas and employment prospects in the UK; financial support from third parties such as family members; as well as evidence of sufficient independent means.[9]

In this sense, Melaine Gower explains that:

> The Government considers that the previous rules for family members were vulnerable to abuse, didn't encourage migrants to integrate, and placed a burden on UK taxpayers. It has also referred to its desire to reduce net migration levels as a reason for changing them.[10]

These conditions were significantly modified with the new rules in order to hamper the migration wave to the UK. Currently established with a defined sum of £18,600, the MIR is usually to be satisfied by the British citizen or settled resident despite the fact that approximately 40% of the UK adult population does not meet

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[6] Melanie Gower & Terry McGuinness, *The financial ('minimum income') requirement for partner visas* (House of Commons Library Briefing Paper SN06724 CBP-6724, 2017) 6.
[7] Melanie Gower, 'Changes to Immigration Rules for Family Members' (2013) SN/HA/6353, 9 September, House of Commons Library, 5.
[8] Migration Advisory Committee, *Review of the minimum income requirement for sponsorship under the family migration route* (Migration Advisory Committee 2011) 74-75.
[9] Gower & McGuinness (n 6) 6.
[10] Gower (n 7) 1.

such a requirement.[11] The threshold is higher if non-EEA dependent children are also to be sponsored in addition to the partner or spouse.

2.2. Implementation of the Minimum Income Requirement (MIR)

The minimum income requirement was instituted in the immigration law framework through the Statement of Changes in the Immigration Rules on 13 June 2012 and came into effect 'to applications made on or after 9 July 2012 as set out in paragraph 91 of this Statement of Changes'.[12]

Prior to introducing these modifications, the Government launched on 13 July 2011 a public consultation concerning family migration, which was concluded on 6 October 2011. Such a consultation proposed to focus 'on preventing and tackling abuse, promoting integration and reducing burdens on the taxpayer'[13] in order to 'deliver better migration, which is fair to applicants, local communities and the taxpayer'.[14] Among the key points, it is possible to highlight the introduction of a new minimum income threshold.

Moreover, the Government instructed its Migration Advisory Committee of independent experts to advise on the implementation of such a financial requirement. This should be done by considering the following question: 'What should the minimum income threshold be for sponsoring spouses/partners and dependents in order to ensure that the sponsor can support his/her spouse or civil or other partner and any dependents independently without them becoming a burden on the State?'.[15] Furthermore, the Government affirmed that it believes that 'the level [of the income threshold] should be higher than that of the safety net of Income Support, which is how the courts have interpreted the current maintenance requirement under the Immigration Rules'.[16] A further investigation must be conducted in order to fully understand the Government's objective in this

[11] Madeleine Sumption and Carlos Vargas-Silva, 'The Minimum Income Requirement for Non-EEA Family Members in the UK' (2016) Migration Observatory report, COMPAS, 2.
[12] Statement of Changes in Immigration Rules HC Bill (2012-13) [194] 2.
[13] Home Office, *Family Migration: A Consultation* (UK Border Agency 2011) 6.
[14] Ibid.
[15] Migration Advisory Committee (n 8) 6.
[16] Ibid.

context, especially in regards to the classification of immigrants as a potential 'burden on the State'.

Additionally, the MAC stated that the 'issue of family migration is complex with economic, legal, moral and social dimensions'[17], but that the question presented to them is of an economic nature and therefore their advice would be conducted on that basis, and more general issues would be addressed when appropriate. It seems, however, arbitrary to disregard dimensions that the MAC itself considers relevant only to give a main focus on the economic aspect. Indeed, the latter is of a great importance; nevertheless, if other factors can influence the economic dimension, they should not be taken into account only when seen as 'appropriate' by the MAC, but rather as components of the whole picture given the complexity of the situation. However, who decides what is to be considered 'appropriate' or not? This judgment could lead to arbitrary decisions which could have compromised the legitimacy of this advisory report.

2.3. Motives for introducing the Minimum Income Requirement (MIR)

The Coalition Government's main reason for introducing the MIR is that they understood, as stated by Theresa May, that the sponsor as well as the applicant-partner should be able to support themselves financially and enable the latter to fully enjoy and participate in society without becoming a burden on the general taxpayer.[18]

In this sense, the Home Office explained that:

> British citizens and those settled in the UK can enter into a genuine relationship with whomever they choose, but if they also choose to establish their family life in the UK, they must do so on a basis that does not constitute a burden on the taxpayer and that ensures the migrant is able to integrate in British society.[19]

When affirming they 'anticipate that net migration will fall from the hundreds of thousands to the tens of thousands'[20], it is evident their objective is to decrease

[17] Ibid 7.
[18] HC Deb 11 June 2012, cols 48-50.
[19] Home Office, *Impact Assessment: Changes to family migration rules* (IA No. HO0065, 2012) 9.
[20] Ibid.

the immigration flow into the UK by making the visa process more arduous and difficult to satisfy, which is also politically motivated, considering that reduction in migration was one of their manifesto pledges. Here it seems necessary, then, to investigate further and question why there is such a negative approach towards migrants and how such political discourse has entered the public sphere and helped propel a party into government on such pledges. For centuries the British Empire was one of the biggest colonisers in the world, which not only meant there were British people migrating to other countries but also that they share responsibility in certain current issues of countries which have been colonised in the past. Therefore, closing their doors to migrants whilst also indirectly corroborating a negative stigma around them is problematic in regards to History as well as the resurface of tensions among cultural groups within the UK. This can be seen, for instance, when considering the Windrush scandal.

The Windrush generation is a group of Commonwealth nationals, mainly from the Caribbean region, who were actively encouraged to emigrate to help with the rebuilding effort after the Second World War and whose permission to reside in the country were guaranteed by the Immigration Act of 1971. Approximately 600,000 people arrived in the UK between 1948 and 1973 with the right to remain indefinitely. However, many of these citizens did not hold any documentation which confirmed their legal immigration status. When the hostile environment policy was introduced, the Windrush generation was heavily targeted, leading to people being denied access to public services and legal rights as well as being threatened with deportation and being detained and wrongly deported in certain cases.[21] As an example of extreme severity, Mr Junior Green, who had lived in the UK for 60 years, was not allowed to return to the country after having travelled to Jamaica to see his mother, even though he holds documents which prove his status. Mr Green's mother was repatriated to the UK and passed away, and he was denied permission to return and attend her funeral.[22]

Although the hostile environment policy does not directly interfere with the MIR, since applicants joining their partner or spouse are usually not within British

[21] Committee of Public Accounts, *Windrush generation and the Home Office* (HC 2017-19, 82) 4.
[22] BBC News, 'Windrush generation: 'I'm an Englishman'' (BBC News, April 2018) < https://www.bbc.co.uk/news/uk-43794366 > accessed 21 February 2019.

territory yet, and therefore are unlikely to fall under the category of 'undocumented migrant', it is essential to consider this was the context in which the MIR was introduced. The Windrush scandal serves as an example of the Government's anti-migrant agenda and how they are attempting to control immigration via legal means in order to avoid retaliation. If the hostile environment has led to many rights violations, it is reasonable to assume the MIR might also have generated situations conflicting with human rights and the Government's intentions go beyond the reasons they officially state.

2.4. Setting the £18,600 threshold

The MAC was the body responsible for assessing factors in order to establish the minimum income threshold. According to their report, and as previously discussed, they solely considered the pure economic dimension, and thus disregarded 'other economic or non-economic objectives, such as the wellbeing of UK citizens or settled residents applying for family unification or that of their children'.[23]

For this reason, their only focus was on defining what falls under a 'burden on the State'. This is because the Government did not clearly establish what can be considered a 'burden' for them. Thus, it rested to the MAC to define the scope of such a term, of which they established three approaches[24] that could potentially serve as a base to calculate the levels of the minimum income. The first one uses 'certain levels of pay', such as the Minimum Wage and median wage, to set the standard. The second one considers a threshold linked to the 'benefits system', which in turn asseses if the individual's net contribution is positive or negative after deducting tax payments from the 'cost of providing benefits and services to them'.[25] The last one considers the 'net fiscal impact' of the sponsor's family to set the threshold, which signifies it will be analysed if the person is at the receiving end of 'any means-tested welfare benefits'.[26] The MAC exposes in its report that all of these approaches suggested to determine what reflects as a 'burden on the

[23] Sumption and Vargas-Silva (n 11) 5.
[24] Migration Advisory Committee (n 8) 47-48.
[25] Sumption and Vargas-Silva (n 11) 5.
[26] Ibid.

State' have weaknesses and strengths, but none are flawless, and all bring different obstacles related to 'assumptions' and 'required data'. There is no approach which is better than the others to gauge the threshold.

The final recommendation suggested a minimum gross income threshold of between £18,600 and £25,700 per year.[27] This range is due to different results obtained when using the different approaches aforementioned. The lowest number of £18,600 was established by MAC utilising the approach which assesses 'whether a person is eligible for means-tested benefits, regardless of the amount to which they are entitled'.[28] This took into account mainly the eligibility for housing benefit and tax credits. Moreover, they foresaw that approximately 45% of applicants would not satisfy the lowest threshold and 64% would not meet the upper bound of the range.[29]

2.5. Criticism

It is reasonable to expect that a country, when exercising its sovereignty, takes measures to ensure it functions at its best capacity whilst promoting progress and well-being to its people. This power, however, is not unlimited. As the world learnt from the horrors experienced throughout the Second World War, certain limitations to States' power are necessary. Human rights law was, then, developed with a sense that there are certain aspects of human life and rights that must be protected from States' potential discretion. Thus, today it is understood that States have the responsibilities to respect, protect and fulfil human rights.

Taking this into consideration, I draw attention to two relevant points. Firstly, it is problematic that the MAC acknowledges issues of family migration are so complex that they are composed of economic, moral, legal and social dimensions, however, the criteria they utilised to set the minimum requirement threshold was mainly based on the economic aspect. This approach is rather questionable because the decision to choose the economic criterion over all the

[27] Approximately €21,498 and €29,704 respectively as of 25 April 2019. Exchange rate: £1: €1,16.
[28] Ibid.
[29] Migration Advisory Committee (n 8) 75.

other dimensions dehumanises immigrants and their British or settled partners; when choosing to prioritise money over the lives of people, these immigrants are being treated as second-class citizens. Thus, an assessment which equally considers all these dimensions would provide a criterion more in accordance with human rights standards than the current one.

Corroborating this argument, Ala Sirriyeh states that:

> (…) the dimension of class has also been significant in the formulation and operation of hierarchy and exclusion through family migration policies and has become more explicit and evident in policies in recent years.[30]

Moreover, she also affirms that:

> Given the rise in the income threshold requirements, a key focus in this debate has been on the economic dimension of class and the exclusion of those on low incomes. However, this policy also encompasses issues of social and cultural dimensions of class and, importantly in this instance, judgements about morality, respectability and lifestyle (…) that determine people's location within or outside boundaries of citizenship and inclusion and that map on to income disparities.[31]

Secondly, the UK's main reason for introducing the MIR is to avoid immigrants becoming a burden on the taxpayer. While it is understandable that the UK might argue they are attempting to protect British people, it is essential to take into consideration immigrants' rights and necessities as well. Here I do not argue that the respect and protection of social, legal and moral aspects of immigrants' lives should always prevail over British people's economic interests. Nevertheless, I do argue that the opposite should also not be the rule. The prevalence of British taxpayers' economic interests over immigrants' interests should not be established as the grounding law. Instead, a balance between these rights and needs must be upheld. Categorising immigrants as burden on taxpayers stigmatises and encourages this group of people to be treated as second-class citizens, which in turn implies they will enjoy less rights and freedoms.

[30] Ala Sirriyeh, 'All you need is love and £18,600': Class and the new UK family migration rules' (2015) 35(2) Critical Social Policy 229, 229.
[31] Ibid 230.

It is for this reason that Sirriyeh explains how these second-class citizens, the 'undeserving', are disregarded:

> In the justification of the new family migration rules the government's rationale for the new rules has focused on the protection of the welfare system from the 'undeserving' and preserving the economic interests of the UK.[32]

From a human rights perspective, these two points presented are conflicting with the notions of human dignity to all and equality in rights presented in Article 1 of the Universal Declaration of Human Rights[33] (1948), which serves as the ground for all subsequent human rights established in diverse international legal instruments, including the ECHR.

Moreover, it is problematic that these conflicting issues are being promoted by a Nation-State which has committed itself to the respect, protection and fulfilment of human rights. This whole scenario suggests that the UK is not unconsciously building an anti-immigrant country, but purposefully doing so by neglecting human rights standards and attempting to justify its decisions on limiting rights of certain groups of people by considering them just and lawful. This argument shall be discussed more into depth in Chapter 4.

[32] Ibid 238.
[33] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

CHAPTER 3: THE MINIMUM INCOME REQUIREMENT (MIR)

3.1. The MIR

The financial requirements for non-European Economic Area applicants to join their spouses or civil partners in the United Kingdom is to be found under Appendix FM of the Immigration Rules. In order to be granted entry clearance or leave to remain, section E-ECP.3.1 states that:

> The applicant must provide specified evidence, from the sources listed in paragraph E-ECP.3.2., of-
>
> (a) a specified gross annual income of at least-
>
> (i) £18,600;
>
> (ii) an additional £3,800 for the first child; and
>
> (iii) an additional £2,400 for each additional child; alone or in combination with.[34]

Therefore, it lays on the sponsor to prove they can support their partner by earning a minimum salary of £18,600 before taxes. This number, however, rises when dependent children of the applicant or their partner are also applying for leave to remain or to enter, or are already in the British territory under leave as a dependent. Thus, the Home Office defined the minimum income requirement as £18,600 for the partner with no children; £22,400 for the partner in addition to one child; £24,800 for the partner in addition to two children; £27,200 for the partner in addition to three children, and so on. This must also be satisfied for each visa renewal intended by the non-EEA national as well as when applying for Indefinite Leave to Remain.

For the purpose of conceptualisation, section E-ECP.3.1 (c) defines “child” as a ‘dependent child of the applicant or the applicant’s partner who is’:

> (a) under the age of 18 years, or who was under the age of 18 years when they were first granted entry under this route;

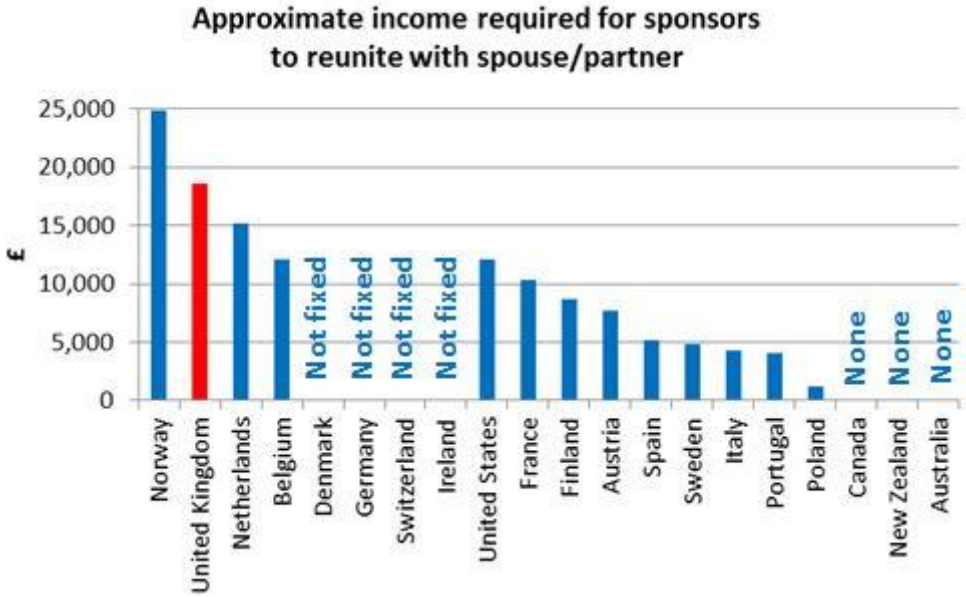
[34] Immigration Rules 1994, Appendix FM, s E-ECP.3.1.

(b) applying for entry clearance as a dependant of the applicant or the applicant's partner, or is in the UK with leave as their dependant;

(c) not a British Citizen or settled in the UK; and

(d) not an EEA national with a right to be admitted to or reside in the UK under the Immigration (EEA) Regulations 2006.[35]

In this sense, when compared to 20 other countries, the UK has now set the second highest threshold amongst all the Western European countries, only staying behind Norway, as observed in Thomas Huddleston's research conducted through the Migration Policy Group.[36] The table of contents is as follows[37]:



3.2. Sources to satisfy the financial requirement

Furthermore, when it comes to sources of income, the new rules have narrowed down the possibilities and currently only the sources foreseen by the Immigration Rules are to be considered. These include, as introduced by section E-ECP.3.2 of Appendix FM, 'income of the partner from specified employment or self-employment, which, in respect of a partner returning to the UK with the applicant, can include specified employment or self-employment overseas and in the UK';

[35] Ibid (c).
[36] Thomas Huddleston, 'Can't Buy Me Love' (Migrant Integration Policy Index, 6 July 2012) < http://www.mipex.eu/blog/?p=1321 > accessed on 26 April 2019.
[37] Ibid.

‘specified pension income of the applicant and partner’; ‘any specified maternity allowance or bereavement benefit received by the partner in the UK or any specified payment relating to service in HM Forces received by the applicant or partner’; ‘other specified income of the applicant and partner’; and ‘specified savings of the applicant and partner’. It is possible to combine certain sources in order to meet the threshold, however, not all combinations are allowed. For instance, it is permitted to combine cash savings with income from salaried and non-salaried employment in determined circumstances, however, it is not possible to combine cash savings with income coming from self-employment.[38]

Therefore, it is evident the new format of the rules does not allow the applicant’s employment income from overseas or offers of employment in the UK, as well as support coming from third parties, to be taken into consideration.[39] The law also prohibits, as a source of income, the use of loans and credit facilities, income-related benefits, child benefit, universal credit, unemployability allowance, among others.[40] This demonstrates a considerable restriction on a process that is already demanding and difficult to be satisfied, which is reflected in the UK ranking as the least generous when it comes to family unification policy making among 38 other high-income countries according to a comparison study conducted in 2015 by the Migration Policy Group.[41]

3.3. Alternative methods of satisfying the MIR

In case the sponsor cannot meet the financial requirement through the general method specified in section E-ECP.3.1. (a), the law allows alternatives such as savings, pension income and income from property rental. Nevertheless, the rules are rigorous. Section E-ECP.3.1. (b) explicitly foresees the possibility of utilising savings to satisfy the MIR. It states the sponsor must prove specified savings of £16,000 plus ‘savings of an amount equivalent to 2.5 times the amount which is the difference between the gross annual income from the sources listed in paragraph E-ECP.3.2.(a)-(d) and the total amount required under paragraph

[38] Gower & McGuiness (n 6) 10.
[39] Ibid 6.
[40] Home Office, *Immigration Directorate Instruction Family Migration: Appendix FM Section 1.7, Appendix Armed Forces, Financial Requirement* (Home Office August 2017) 18-19.
[41] Sumption and Vargas-Silva (n 11) 4.

E-ECP.3.1.(a)'.[42] Therefore, if the sponsor would like to combine the savings with another source of income, it is necessary to provide they have £16,000 in addition to 2.5 times the difference between their income and the minimum income expected to be met. This indicates the first £16,000 of the cash savings are not taken into consideration, which is due to the fact that this is the position where people usually start being eligible for income-related benefits.[43]

In this sense, the Home Office explains that:

> At the entry clearance/initial leave to remain stage and the further leave stage, the amount of cash savings above £16,000 must be divided by 2.5 (to reflect the 2.5 year or 30-month period before the applicant will have to make a further application) to give the amount which can be used in meeting the financial requirement. The following equation is to be used:
>
> (x minus 16,000) divided by 2.5 = y
>
> Where x is the total amount of cash savings held by the applicant, their partner, or both jointly for at least the 6 months prior to the date of application and under their control; [a]nd y is the amount which can be used towards the financial requirement.[44]

In case the partner is applying for the Indefinite Leave to Remain, the whole amount above £16,000 is allowed to be used, and therefore would follow a different equation: (x minus 16,000) = y.[45]

If £18,600 is the financial threshold to be satisfied and cash savings are to be used to meet such requirement, the following table[46] provided by the Home Office translates the previously exposed equations into real examples and numbers.

[42] Immigration Rules 1994, Appendix FM, s E-ECC.2.1 (b) (ii).
[43] Gower & McGuiness (n 6) 11.
[44] Home Office (n 40) 49.
[45] Ibid.
[46] Table extracted from Home Office (n 40) 49.

Total Savings held	Entry Clearance/Leave to Remain		Indefinite Leave to Remain	
	Amount which can be used	**Income needed from other sources** (that can be combined with cash savings)	**Amount which can be used**	**Income needed from other sources** (that can be combined with cash savings)
£62,500	(62500 – 16000) ÷ 2.5 = **£18,600**	None	(62500– 16000) = **£46,500**	None
£40,500	(40500 – 16000) ÷ by 2.5 = **£9,800**	£8,800	(40500 – 16000) = **£24,500**	None
£33,000	(33000 – 16000) ÷ 2.5 = **£6,800**	£11,800	(33000 – 16000) = **£17,000**	£1,600
£25,000	(25000 – 16000) ÷ 2.5 = **£3,600**	£15,000	(25000 – 16000) = **£9,000**	£9,600
£17,500	(17500 – 16000) ÷ 2.5 = **£600**	£18,000	(17500 – 16000) = **£1,500**	£17,100
£16,500	(16500 – 16000) ÷ 2.5 = **£200**	£18,400	(16500 – 16000) = **£500**	£18,100

Therefore, it is possible to affirm that in a potential case where a sponsor would like to rely only on savings, they would have to hold £62,500.

In any circumstances, it is necessary to prove the savings are held by either the partner or the applicant, or both, 'for at least 6 months and under their control'.[47]

3.4. Criticism

The establishment of the MIR threshold at £18,600 is conflicting with international human rights law. This is because, as previously mentioned, according to The Migration Observatory report, 40% of the adult British population working as part-time or full-time employees in 2015 earned less than the MIR threshold. Thus, it is reasonable to state that approximately 40% of adult British citizens would not meet the financial requirement and, therefore, would not be allowed to bring their family members, especially partners and/or children, to live with them in the UK.

[47] Ibid 17.

Furthermore, the Children's Commissioner for England has estimated that, since 2012, 15,000 children have been growing up separately from at least one of their parents due to the inability of their British parent to fulfil the financial requirements implemented with the new Immigration Rules introduced in 2012.[48] These families are known as 'Skype families' because the only form of interaction they have access to is via Skype calls due to the geographic distance visa limitations impose upon them.

It is clear that such a policy has led to severely negative consequences to thousands of people by precluding them from fully enjoying their lives with their families or even constituting one. This is even more impactful when we consider vulnerable groups and minorities which, in normal circumstances, would already be in a position of disadvantage when compared to the rest of society.

In this sense, Gower states that:

> Critics argue that the changes will exacerbate migrants' difficulties in integrating, and that the financial requirement for spouse/partner applications will have a disproportionate impact on certain groups of sponsors, such as women, ethnic minorities and low-earners.[49]

Furthermore, Gower & McGuiness affirm that:

> It is acknowledged that in some cases, the financial requirement represents a significant and possibly permanent obstacle to a couple living together in the UK, and that some demographic groups are particularly affected by it due to differences in earnings. (…) The threshold for falling within the provisions for cases raising human rights issues is very high.[50]

Counter-arguing the Home Office's rationale, Huddleston explains that:

> A high income threshold does not effectively promote long-term economic participation, education, language learning, or fighting forced marriages. Instead, such requirements have a disproportionate impact on limiting the number of

[48] Children's Commissioner, *Skype families: The effects on children of being separated from a mum or dad because of recent Immigration Rules* (Children's Commissioner, 2015) 2.
[49] Gower (n 7) 1.
[50] Gower & McGuiness (n 6) 3.

> family reunions, especially for low-income and vulnerable groups. For many, family life becomes harder or impossible through 'enforced separation'.[51]

Therefore, the MIR appears to be conflicting with international human rights standards. This is especially evident when we consider the right to respect for private and family life; the right to marry; prohibition of discrimination; as well as provisions related to children rights. In this sense, the MIR policy is potentially preventing British nationals and settled residents as well as their non-EEA partners or spouses and children to exercise those rights. This is problematic because the immigration system should not be compromising the basic human rights of migrants, but rather protecting them.[52]

The following chapter shall discuss the Council of Europe standards relating to these rights in order to support the argument that the UK has not been complying with its State's obligations concerning human rights when considering the MIR policy.

[51] Huddleston (n 36).
[52] David Robinson, 'Migration policy under the coalition government' (2013) 7(2) People, Place and Policy 73, 79-80.

CHAPTER 4: HUMAN RIGHTS AND THE EUROPEAN STANDARDS

4.1. The ECHR and the ECtHR

The Council of Europe is an international organisation created after the end of the Second World War in 1949. Currently composed of 47 Member States, its aim is 'to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress'.[53] From interpreting Article 3 of the Statue of the Council of Europe, it is evident that such an organisation is based on the promotion of three main values, namely human rights, democracy and the rule of law.

One of the main activities conducted by the CoE is standard setting. By having drafted over 200 treaties, such a task is essential because it builds stronger ties between the Member States by encouraging them to harmonise their legal norms and systems. This corroborates the homogenisation of human rights at the European level as well as the establishment of bare minimum standards applicable to all.

In this context, the most relevant legal instrument for this thesis is the Convention for the Protection of Human Rights and Fundamental Freedom, widely known as the European Convention on Human Rights of 1950. Such treaty is remarkable for being the first instrument to make some of rights established by the Universal Declaration of Human Rights legally binding by giving them effect.

One of the main innovations of the ECHR was to establish a supranational court to examine alleged breaches of its provisions and ensure the rights are being complied with from the side of the Member States by enforcing them through court decisions. If a Member State is found guilty of violating rights guaranteed by the ECHR, they are legally obliged to remedy the situation. The Member States are endowed, however, with margin of appreciation, and therefore it is of their discretion through what means the violation will be remedied. Furthermore,

[53] Statute of the Council of Europe (SCE 1949) art 1(a).

the ECtHR shall afford just satisfaction to the victims through compensations which may encompass both moral and material damages and are to be paid by the Member State found guilty of the respective violation(s).

In this sense, Vaughne Miller explains that:

> The European Convention on Human Rights requires states parties - Council of Europe Member States - to comply with rulings of the European Court of Human Rights and to implement judgments by amending national laws and/or practices where a breach of the Convention has been identified.[54]

The UK is a member of the Council of Europe and has signed and ratified the ECHR. Initially, the Member States were free to decide if they would like to accept or not the ECtHR's jurisdiction as well as the right for individuals to submit petitions to the same Court. This was to be done by accepting optional clauses. When the UK ratified the ECHR in 1951, it did not accept either of them. This, however, changed in 1966, when they accepted both optional clauses, and renewed them for years. In 1994, Protocol 11 made the right of individuals to submit petitions compulsory.[55] Today the ECtHR's jurisdiction is also mandatory to all Member States in accordance with Article 32 of the ECHR, as follows:

> 1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34 and 37.
>
> 2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.[56]

Considering this, the following section shall discuss specific rights guaranteed by the ECHR and how they are at risk of being breached by the MIR policy.

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[54] Vaughne Miller, 'The European Convention on Human Rights and the Court of Human Rights: issues and reforms' (2011) SN/IA/5936, 14 April 2011, House of Commons Library, 1.
[55] Ibid 3.
[56] European Convention on Human Rights, as amended by Protocols Nos. 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR) art 32.

4.2. The Right to Marry

The Right to Marry is derived from Article 16 UDHR and is established in the ECHR in its Article 12, as follows: 'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right'.[57]

Unlike many other legal instruments which followed and were inspired by the UDHR's provision, the ECHR did not provide more detailed text and content in regards to the right to marry. In fact, it is constituted of twenty-words, a considerably lower number when compared to the Declaration's seventy-seven-word text.

From a philosophical perspective, such a right has always generated diverting opinions on what marriage actually means and how it should be interpreted. Immanuel Kant attributed a purely contractual account to marriage.[58] From a very graphic perception, he argues marriage is a contract which grants both contracting parties the right to use each other's 'sexual attributes', i.e., their genitalia. In this sense, he states that:

> Sexual union in accordance with principle is marriage (matrimonium), that is, the union of two persons of different sexes for lifelong possession of each other's sexual attributes.[59]
>
> (…)
>
> A marriage contract is consummated only by conjugal sexual intercourse (copula carnalis). A contract made between two persons of opposite sex, either with a tacit understanding to refrain from sexual intercourse or with awareness that one or both are incapable of it, is a simulated contract, which institutes no marriage and can also be dissolved by either of them who pleases. But if incapacity appears only afterwards, that right cannot be forfeited through this accident for which no one is at fault.[60]

[57] European Convention on Human Rights, as amended by Protocols Nos. 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR) art 12.
[58] Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor tr, Cambridge University Press 1991) 96-98.
[59] Ibid 96.
[60] Ibid 98.

G. W. F. Hegel, in turn, criticised Kant's perception and argued that marriage is an ethical relationship between a husband and a wife based on ethical love, and that family is the foundation for an ideal society.[61]

He explains that:

> Formerly, especially under most systems of natural law, it was considered only in its physical aspect or natural character. It was accordingly regarded only as a sexual relationship, and its other determinations remained completely inaccessible. But it is equally crude to interpret marriage merely as a civil contract, a notion [Vorstelltmg] which is still to be found even in Kant. On this interpretation, marriage gives contractual form to the arbitrary relations between individuals, and is thus debased to a contract entitling the parties concerned to use one another.[62]

Then, he argues that Kant's attempt to reduce marriage to a contract 'can only be described as disgraceful'[63], because:

> (…) marriage is not a contractual relationship as far as its essential basis is concerned. For the precise nature of marriage is to begin from the point of view of contract - i.e. that of individual personality as a self-sufficient unit - *in order to supersede it* (…). That identification of personalities whereby the family is a *single person* and its members are its accidents (although substance is essentially the relationship of accidents to itself (…)) is the ethical spirit.[64] [They] consent to constitute a *single person* and to give up their natural and individual personalities within this union. In this respect, their union is a self-limitation (…).[65]

Thus, Hengel argues that marriage is founded on ethical love, because it 'consists in the consciousness of this union as a substantial end, and hence in love, trust, and the sharing of the whole of individual existence'.[66] In this sense, he counterargues Kant's account by affirming that 'marriage should not be disrupted by passion, for the latter is subordinate to it'.[67]

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[61] GWF Hegel, *Elements of the Philosophy of Right* (Allen W. Wood ed, H. B. Nisbet tr, Cambridge University Press 1991) 199-210.
[62] Ibid 201.
[63] Ibid 105.
[64] Ibid 203.
[65] Ibid 201.
[66] Ibid 202.
[67] Ibid 203.

This whole debate serves as indication that interpreting the right to marry is a complex task, and therefore it is a challenging activity for the ECtHR to carry out. Which approach would be more suitable to define the scope of such a right? Based on which philosophical conceptualisations should the Court build their understanding? Thus, should such a right be interpreted from a conservative perspective which supports more traditional views on marriage and family? Or should it be approached from more recent and liberal perceptions which ultimately understand marriage as a juridical construct that two human beings can utilise as a tool to establish the terms and conditions under which both of them would like to live?[68]

In this sense, Van der Sloot states that:

> The question of interpretation is complicated by the numerous aspects, legal and nonlegal, that are aligned to the concepts of marriage and family. Marriage may be regarded as the religious manifestation of the divine bond between man and woman, but it also has more earthly consequences related to taxes and inheritance law. Marriage may be seen as a ceremonial expression of deeply felt love, but it can also be entered into for convenience or for the sake of obtaining a residence permit. Marriage may be concluded between husband and wife, but it may also involve two persons of the same sex who wish to found a family through the means of adoption. (…) The interpretation of Article 12 ECHR, therefore, always strikes a balance between a factual and a fictional, a biological and a legal, a historical and an evolutionary interpretation.[69]

The ECtHR has over the years changed its view on Article 12, and especially from 2000 onwards has been gradually adopting a more progressive interpretation of it in its rulings.[70]

[68] Bart van der Sloot, 'Between fact and fiction Child and Family Law: An analysis of the case law on article 12 ECHR' (2014) 2014(4) Child and Family Law Quarterly 397.
[69] Ibid.
[70] Ibid.

4.2.1. Analysis

Although the law does not explicitly mention it, the ECtHR has established in its case-law that it is 'clear that Article 12 (art. 12) is mainly concerned to protect marriage as the basis of the family'.[71] This can also be specifically observed in the case *B. and L. v. the United Kingdom*, when the Court affirmed that the right to marry 'secures the fundamental right of a man and woman to marry and to found a family'.[72] Therefore, it is evident that for the Court, the condition for the constitution of a marriage is the existence of a family.[73] Thus, according to a dissenting opinion, we could interpret it as the right to marry and found a family.[74] For this reason, Article 12 is often associated with Article 8 – right to respect for private and family life – and regularly applications submitted to the ECtHR invoke such rights in combination.[75]

In terms of limitation of the right, Article 12, unlike Article 8, does not contain a limitation clause in its text which establishes the grounds for interference with the right in question.[76] Notwithstanding, this does not indicate that the right to marry is an absolute right.[77] This rather signifies that the Court – unlike in the case of Article 8, where the tests of 'necessity' or 'pressing social needs' – shall have the responsibility to assess the extension of the margin of appreciation applied by the State in the concrete case and determine if it was proportionate and just or if it was disproportionate or arbitrary.[78] The first time the principle of margin of appreciation was mentioned, and consequently established, by the ECtHR was in *Handyside v. the United Kingdom*. In this context, the Court addressed a matter concerning Article 10; nevertheless, the principle applies equally to all rights discussed in this chapter. The Court determined that:

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[71] *Rees v. the United Kingdom* (1986) Series A no 106, para 49; *Cossey v. the United Kingdom* (1990) Series A no 184, para 43.
[72] *B. and L. v. the United Kingdom* App no 36536/02 (ECtHR, 13 December 2005), para 34.
[73] Here one could argue such view is problematic from a LGBTQI rights angle; nevertheless, this discussion shall not be developed in this thesis.
[74] *W. v. the United Kingdom*, App no 11095/84 (Commission Decision, 7 March 1989), partially dissenting opinion of Mr Schermers.
[75] William A Schabas, *The European Convention on Human Rights: a commentary* (Oxford University Press 2015) 534.
[76] Ibid 533.
[77] Ibid.
[78] *Frasik v. Poland* ECHR 2010-I (extracts), para 90.

> By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the (…) "necessity" of a "restriction" or "penalty" (…). it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context. Consequently, Article 10 (2) leaves to the contracting states a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.[79]

Notwithstanding, the ECtHR determined that such a principle does not confer to the States 'an unlimited power of appreciation'[80], which can be observed in the decision as to the admissibility of the case *R. and F. v. the United Kingdom*:

> The matter of conditions for marriage in national law cannot, however, be left entirely to Contracting States as being within their margin of appreciation. This would be tantamount to finding that the range of options open to a Contracting State included an effective bar on any exercise of the right to marry. The margin of appreciation cannot extend so far. Any limitations introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired.[81]

Therefore, indeed, States are endowed with a margin of appreciation. Nonetheless, such a power does not imply any kind of limitation can be applied to the right to marry. As the Court clarifies in the aforementioned judgement, the limitations cannot be so vast and restrictive to the point that it can weaken or damage the very essence of the right.

Furthermore, the Court has also discussed the specific situation of the right to marry and its limitations within the immigration law framework, as follows:

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[79] *Handyside v. the United Kingdom* (1976) Series A no 24, para 48.
[80] Ursula Kilkelly, *The right to respect for private and family life: a guide to the implementation of Article 8 of the European Convention on Human Rights* (Council of Europe, 2001) Human rights handbooks No 1, 7.
[81] *R. and F. v. the United Kingdom*, App no 35748/05, Decision as to the admissibility of App no 35748/05 (ECtHR, 28 November 2006).

> The Convention institutions have accepted that limitations on the right to marry laid down in the national laws may comprise formal rules concerning such matters as publicity and the solemnisation of marriage. They may also include substantive provisions based on generally recognised considerations of public interest, in particular concerning capacity, consent, prohibited degrees of affinity or the prevention of bigamy. In the context of immigration laws and for justified reasons, the States may be entitled to prevent marriages of convenience, entered solely for the purpose of securing an immigration advantage. However, the relevant laws – which must also meet the standards of accessibility and clarity required by the Convention – may not otherwise deprive a person or a category of persons of full legal capacity of the right to marry with the partners of their choice.[82]

In this sense, the Court understands that immigration laws can limit the right to marry to avoid fraud within immigration control due to individuals attempting to get married in order to solely benefit from the immigration status acquired with it. Nevertheless, then, as long as the relationship is genuine and the individuals in it have full capacity, the immigration laws should not deprive them from the right to marry the partner they choose to.

In this section I presented the ECtHR's interpretation of the right to marry as well as the limitations which can be introduced to it through the margin of appreciation of the States. In the following section I shall apply the Court's views to the context of the MIR.

4.2.2. The right to marry and the MIR

British immigration law provides different categories of visas which shall be applicable to different people with distinct purposes for entering the UK. In this sense, depending on the motives for someone wanting to enter British territory, they will have to apply for a certain category and type of visa and fulfil the requirements specific to that visa.

[82] *Jaremowicz v. Poland*, App no 24023/03 (ECtHR, 5 January 2010) para 49.

One of the visa categories available within the British immigration system is the 'family visas'[83] category. In this sense, the UK Government website explains that individuals may apply for such category when they would like to join and live with their: spouse or partner; fiancé, fiancée or proposed civil partner; child; parent; and relative who'll provide long-term care for them.[84]

The right to marry and the MIR interlink with one another when we consider that all family visas are tied to the provisions of the Appendix FM of the Immigration Rules. Thus, all family visas require the financial requirements to be met, which in turn includes the MIR.

This is because the 'fiancé, fiancée or proposed civil partner' is designed for those couples who would like to be reunited and get married in the UK. In this sense, such visa allows the applicant to enter and live in the country for a maximum of 6 months, with the condition that the applicant and their sponsor get married within that time frame. Then, by proving they have married each other, the applicant can apply for a temporary residency permit valid for two and a half years which can be renewed for another two and a half years upon the condition the couple is still married and living together. At the end of this second phase, and upon the same conditions, the non-EEA partner may apply for a permanent residency permit.

Considering these circumstances, non-EEA nationals who would like to join their British national or settled resident partner in the UK to exercise their right to marry through the fiancé, fiancée or proposed civil partner visas must meet the MIR.

As discussed throughout this thesis, the MIR has extremely limiting conditions which cannot be satisfied by a high number of individuals, especially vulnerable groups and minorities. As the statistics indicate, a very large portion of the working British population would not be able to meet the MIR.

The interpretation of the ECtHR on the right to marry, as previously discussed, is that any form of limitation imposed must not lead to restrictions that reduce such a right to the point where its most basic essence is impaired. Considering the

[83] UK Government, 'Family visas: apply, extend or switch' (GOV.UK) < https://www.gov.uk/uk-family-visa > accessed on 30 April 2019.
[84] Ibid.

financial requirement imposed by the MIR on fiancé, fiancée and proposed civil partner visas, it is arguable that the UK's margin of appreciation is surpassing the realm of proportionality and directly damaging the core essence and objective of the right to marry.

Furthermore, when the Court confirms that in the context of immigration laws, such laws must 'meet the standards of accessibility and clarity required by the Convention', and therefore must not deprive an individual or group of people of their right to marry the person they choose, it is clear the MIR – as it is currently disposed – does not fit such interpretation and conflicts with the convention's provision. When the UK decides to restrict those who can marry or not their British national or settled resident partner based on the MIR, it dictates that only those belonging of a certain financial "band" are entitled to exercise Article 12. I argue, then, that this scenario is not compatible with the values and objectives of such legal instrument as a whole as well as with the interpretation attributed by the ECtHR to the legal text of the substantial right in question. In no circumstances the Court has suggested that an individual's financial situation is a basic requirement to uphold the essence of the right to marry. For this reason, the MIR policy appears to be unreasonable and disproportionate, falling outside the scope of the UK's margin of appreciation.

4.3. The Right to Respect for Private and Family Life

The ECHR right to respect for private and family life is established in Article 8:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[85]

[85] European Convention on Human Rights, as amended by Protocols Nos. 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR) art 8.

One may argue that such a provision has as its ancestor the fourth amendment of the United States' Constitution[86], which affirms that '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated'. Accordingly, the UDHR posteriorly established in Article 12 that 'no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks'. These indicate an evolution of such a legal conception which has culminated in the text of the ECHR.

4.3.1. Analysis

Article 8 is one of the provisions of the ECHR with the broadest scopes as it encompasses a constantly growing number of issues and it extends its realm of protection to the interests of individuals which are not covered by other provisions of the Convention.

The Article in question is composed of two parts. The first part – paragraph 1 – establishes the specific rights which are to be guaranteed to the individual by the State, i.e., the right to respect for private life, family life, home and correspondence. The second part – paragraph 2 – determines that the rights specified in paragraph 1 are not absolute, and therefore there are circumstances in which the interference with the rights in question by public authorities may be acceptable. These circumstances are expressively provided: those which are in accordance with the law and necessary in a democratic society in pursuit of one or more of the legitimate aims listed in paragraph 2. Then, no other situations shall be considered acceptable limitations by the State of an individual's right presented in Article 8. In this sense, the ECtHR 'has defined the scope of Article 8 broadly, even when a specific right is not set out in the Article', but 'its scope is not limitless'.[87]

[86] Schabas (n 75) 358.
[87] Council of Europe, European Court of Human Rights, 'Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence', Strasbourg: Council of Europe, 2018, 7.

The main object of Article 8 is to protect individuals from having their private and family life, home, and correspondence arbitrarily interfered by the public authorities.[88] When considering the State, this obligation would be of a negative essence (obligation to respect) as the State must refrain from interfering with such a right. However, the right also implicates a positive dimension in regards to the obligations. This is because the State must also ensure that Article 8 is protected between private parties, from one another.[89] Thus, the State must not only respect the right by not interfering with it, it must also adopt measures to protect individuals from having such right violated by third parties. In this sense, the Court has confirmed that:

> Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. The boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar.[90]

In this sense, positive and negative obligations under Article 8 are distinct from one another, but are similar in nature. This signifies that it is not always clear if the interference has occurred due to a denial of a right – negative obligation – or a failure of the Contracting State to provide the necessary legal framework – positive obligation. Additionally, there are situations in which the ECtHR understands it is not necessary to decide on which bases the issues shall be studied.[91]

Thus, '[w]hether private and family life is approached from a positive or negative perspective'[92], regard must be had to the 'fair balance that has to be struck between the general interest of the community and the interests of the individual

[88] *Kroon and others v. the Netherlands* (1994) Series A no 297-C, para 31.
[89] Council of Europe (n 87) 8.
[90] *Evans v. the United Kingdom* ECHR 2007-I, para 75.
[91] Schabas (n 75) 368.
[92] Ibid.

... In striking this balance the aims mentioned in the second paragraph of Article 8 (art. 8) may be of a certain relevance'.[93]

In the cases where a negative obligation is concerned, the Court must assess if the interference was in accordance with the requirements established in paragraph 2 of Article 8, i.e., in accordance with the law, in pursuit of a legitimate aim, and necessary in a democratic society. In the cases where a positive obligation is concerned, the ECtHR takes into account whether the relevance of the interests at risk demand the imposition of the positive obligation pursued by the individual.[94] Thus, the ECtHR clarifies that:

> The notion of "respect" is not clear cut, especially as far as positive obligations are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case (….) [n]onetheless, certain factors have been considered relevant for the assessment of the content of those positive obligations on States. Some of them relate to the applicant. They concern the importance of the interest at stake and whether "fundamental values" or "essential aspects" of private life are in issue (…), or the impact on an applicant of a discordance between the social reality and the law, the coherence of the administrative and legal practices within the domestic system being regarded as an important factor in the assessment carried out under Article 8 (…). Other factors relate to the impact of the alleged positive obligation at stake on the State concerned. The question here is whether the alleged obligation is narrow and precise or broad and indeterminate.[95]

In both circumstances of positive and negative obligations, the State enjoys its margin of appreciation. As the margin of appreciation is not limitless in the case of the right to marry, this is also true when considering the right to respect for private and family life. Indeed, such statement is valid to all rights. In this sense, Ursula Kilkelly explains that:

> (…) the Court went on to state that the doctrine does not give the contracting states an unlimited power of appreciation and to reiterate that it, the Court, is

[93] *Gaskin v. the United Kingdom* (1989) Series A no 160, para 42.
[94] Council of Europe (n 87) 8.
[95] *Hämäläinen v. Finland* ECHR 2014-IV, para 66.

> responsible for ensuring the state's observance of Convention obligations. For the purposes of Article 8, therefore, it is the role of the Court to give the final ruling on whether an interference with a Convention right can be justified under Article 8 para. 2 and the domestic margin of appreciation thus goes "hand in hand" with a European supervision.[96]

Following this logic, in cases when negative obligations are to be considered, how does the Court assess whether the interference performed by the State in regards to Article 8 is justified or not? In this sense, Kilkelly explains that:

> In order to be consistent with the Convention any interference with the rights protected by Article 8 para. 1 must fulfil all of the criteria listed in para. 2 of the provision. In particular, the interference must be in accordance with law, it must pursue one of the legitimate aims listed in the second paragraph and it must be necessary in a democratic society or proportionate to the pursuit of that aim.[97]

The first condition – 'in accordance with the law' – is composed of both a technical or formal dimension, and a substantive dimension.[98] It must not only be in compliance with domestic law, but is also connected to the quality of the law, which in turn must be compatible with the rule of law.[99] In this sense, the interference must be authorised by a law of the national legal system whilst also being foreseeable and accessible.[100] Accordingly, it is possible to affirm that:

> In order to be "in accordance with law" the interference complained of must have a legal basis and the law in question must be sufficiently precise and contain a measure of protection against arbitrariness by public authorities.

Thus, the law must be 'sufficiently foreseeable to enable individuals to act in accordance with the law, and it must demarcate clearly the scope of discretion for public authorities'.[101]

The ECtHR, in turn, confirmed that:

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[96] Kilkelly (n 80) 7.
[97] Ibid 25.
[98] Schabas (n 75) 402.
[99] *Halford v. the United Kingdom* ECHR 1997-III, para 49.
[100] Schabas (n 75) 402.
[101] Council of Europe (n 87) 9.

> The expression “in accordance with the law” requires, firstly, that the impugned measure should have some basis in domestic law. Secondly, it refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law. The phrase thus implies, *inter alia*, that domestic law must be sufficiently foreseeable in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which the authorities are entitled to resort to measures affecting their rights under the Convention.[102]

The second condition – ‘legitimate aim’ – concerns the possibility of interference ‘in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others’, as stated by Article 8(2). In regards to this, the Court has explicitly stated that its ‘practice is to be quite succinct when it verifies the existence of a legitimate aim within the meaning of the second paragraphs of Articles 8 to 11 of the Convention’.[103] It is the Contracting State’s responsibility to demonstrate that the interference pursued a legitimate aim.[104]

Furthermore, the list provided by paragraph 2 is long and broad, which consequently covers most of the activities conducted by the States, whether they are ‘oppressive or benign’; thus, the ECtHR has tended to adopt a broad and liberal approach when interpreting and applying the terms, which has led to situations where more than one of the aims is applied to the same kind of interference.[105] For this reason, very rarely the Court will reject the legitimate aim presented by the State, even when this may be disputed by the individual-applicant.[106]

The third condition – ‘necessary in a democratic society’ – is assessed by balancing the interests of the Contracting State against the individual’s right.[107]

[102] *Fernández Martínez v. Spain* ECHR 2014-III (extracts), para 117.
[103] *S.A.S. v. France* ECHR 2014-III, para 114.
[104] *Mozer v. the Republic of Moldova and Russia* ECHR 2016, para 194.
[105] Schabas (n 75) 404.
[106] Kilkelly (n 80) 30.
[107] Council of Europe (n 87) 11.

The Court has determined that the term ‘necessary’, in this context, is not endowed with the flexibility that other expressions, such as ‘useful’, ‘reasonable’, or ‘desirable’, do, but rather implies that there is a ‘pressing social need’ for the execution of the interference. Furthermore, the national authorities are the ones responsible for making the initial assessment to verify whether there is a pressing social need in each of the cases, which in turn indicates that they enjoy their margin of appreciation, but their decision is still subject to the ECtHR’s review. Moreover, the Court has also affirmed that a restriction on one the rights provided by the ECHR shall not be considered as ‘necessary in a democratic society’, apart from the situation where it is proportionate to the legitimate aim pursued.[108] In this sense, the Court underlies the important connection between ‘necessity’ and ‘democratic society’, especially when considering the hallmarks of the latter include pluralism, tolerance and broadmindedness.[109]

Thus, when determining whether the measures adopted by the State were, indeed, necessary to a democratic society, the Court shall ‘consider whether, in the light of the case as a whole, the reasons adduced to justify them were relevant and sufficient and whether the measures were proportionate to the legitimate aims pursued’.[110]

Therefore, it is evident the principle of proportionality plays a crucial role in the Court’s task to assess if the interference complies with this third condition by balancing the interests of the Contracting State and the rights of the individual. In this sense, Schabas clarifies that:

> The interference must also respond to an assessment of its proportionality, something that necessitates balancing the right of the individual against the interest of the State and the society that it represents. Where the Court is considering the positive dimension of the right in question, in other words, the obligation upon the State to take measures to ensure enforcement of the right, it must usually consider the rights of others in the balance as well. If other less

[108] *Dudgeon v. the United Kingdom* (1981) Series A no 45, paras 51-53.
[109] *Smith and Grady v. the United Kingdom* ECHR 1999-VI, para 87.
[110] *Z v. Finland* ECHR 1997-I, para 94.

> severe measures could have fulfilled the same objective, there will be a problem with proportionality.[111]

Accordingly, the ECtHR must, firstly, assess the legislative choices underlying the general measures adopted by the State. The judicial and parliamentary review of the necessity of the measures conducted by the government is of high importance, including the assessment of the margin of appreciation operation scope.[112] Thus, the Court recalls that:

> The procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, the Court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8.[113]

For this reason, the Court reminds us that 'inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'.[114]

Thus, the State shall enjoy its margin of appreciation, however, as previously discussed, this principle is not limitless. Such a principle shall vary depending on 'the circumstances, the subject matter and its background'.[115] Once more, as established in the case of *Smith and Grady v. the United Kingdom*, although the initial evaluation is of the Contracting State, the final assessment to verify whether the motives for interfering with the right to respect for private and family life are relevant and sufficient remains to the ECtHR.

4.3.2. The right to respect for private and family life and the MIR

The right to respect for private and family life can be divided into four different interests, namely: private life, family life, home, and correspondence. The MIR

[111] Schabas (n 75) 406.
[112] Council of Europe (n 87) 11.
[113] *A.-M.V. v. Finland*, App no 53251/13 (ECtHR, 23 March 2017), para 84.
[114] *Soering v. the United Kingdom* (1989) Series A no 161, para 89.
[115] Kilkelly (n 80) 32.

becomes especially relevant to Article 8 when we consider the second interest: the right to family life. This is because the right to family life is evidently broad and encompasses, for instance, all the visas which fall under the 'family visa' category.[116] Indeed, not only does it comprise of the situation where 'fiancé, fiancée and proposed civil partner' would like to join their British national or settled resident partner, but, in fact, it covers all the circumstances in which a family member may be eligible to apply for the visa adequate to their condition. These are, then, spouse or partner; fiancé, fiancée or proposed civil partner; child; parent; and relative who will provide long-term care for the sponsor. Considering all the family visas are bound to the provisions of the Appendix FM of the Immigration Rules, and subsequently the financial requirement, this determines that the MIR requirement must be satisfied in all of the family visa situations presented above.

In this sense, it is indisputable that a potential complaint in regards to the MIR policy falls within the scope of Article 8(1), and more specifically in regards to 'family life'. Thus, the first phase of the test – which intends to assess the applicability of Article 8 – is fulfiled. The second phase involves addressing if there has been an interference with such an Article, and if so, was it justified in accordance with the conditions established by paragraph 2?

When imposing financial restrictions to family members intending to be reunited and to live together, and such criteria cannot be met by all people, it is conspicuous that the UK has interfered with these individuals' right to family life. It is, then, necessary to verify if such an interference meets the required conditions to be considered just.

Firstly, is the MIR policy in 'accordance with the law'? Considering the provisions regulating the MIR are established in and foreseen by the Appendix FM of the Immigration Rules – as discussed throughout Chapters 2 and 3 – it is evident it possesses a legal basis, and the specific provisions are precise and seem to provide measures to protect the individual against arbitrariness. In this sense, the

[116] UK Government, 'Family visas: apply, extend or switch' (GOV.UK) < https://www.gov.uk/uk-family-visa > accessed on 30 April 2019.

foreseeability requirement is also met. Therefore, it appears the first condition has successfully been satisfied.

Secondly, does the MIR pursue a ‘legitimate aim’? As discussed in section 4.3.1., a ‘legitimate aim’ has been attributed with many broad terms, which in turn covers most of the UK Government’s activities. The legal text includes ‘interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others’. Considering the official motives the UK has presented to introduce the MIR – despite the potential underlying rationale previously discussed – it appears that the second condition has also been satisfied. This is because the UK Government’s attempt to protect the British general taxpayer seems to match the ‘economic well-being of the country’ interest.

Lastly, is the MIR ‘necessary in a democratic society’? This discussion is inherently a more complex one when assessing such a condition. Firstly, I question how the establishment of the MIR corroborates to the maintenance of a democratic society in the UK, especially when considering that the right at stake is the one that guarantees family reunification. It is evident that the family is an essential and integral aspect of most, if not all, human beings, and plays a fundamental role in their development within society. Thus, it is hard to imagine how a policy which deprives individuals from enjoying a sharing life with their family members is ‘necessary’. The UK government response to this criticism would be that such a necessity takes place when the financial burden on the taxpayer is taken into account. Then, I argue, we are faced with a moral discussion: is money, then, more valuable and necessary than family reunification, i.e., does money possess more of a pressing social need than family members being able to share their lives with one another and build relationships which are the foundations of society?

Furthermore, the UK’s anti-migrant political agenda has constantly been displayed to the world in the past few years. It is not a secret, as Theresa May herself stated when in the position of Home Secretary, that the country intends to reduce the number of immigrants by hundreds of thousands. Therefore, I argue

that the motive to introduce the MIR is not solely financial, but also socio-cultural. In the context of the Hostile Environment Policy, the Windrush scandal and the introduction of Appendix FM of the Immigration Rules, it is evident that the UK's fight is against all those who are not perceived to be British, not only in terms of immigration status, but also in regards to social and cultural belonging. Brexit is an indication that the UK is resisting to the gradual globalisation process the world is going through. Even at a regional level, the UK is not capable of truly embracing the European values and characteristics to be fully integrated as an EU country, which so strongly fueled the Brexit movement. The British government has one objective, and that is to preserve the traditional and long-lasting British culture and values. In this sense, immigrants are not welcome, because they present an impediment to the maintenance of such *status quo*. Immigrants represent change in the ways that a particular society thinks and behaves. These are features that the UK Government does not perceive as favourable to British society, which is ultimately the trigger for the current excessively anti-migrant efforts and policies observed in the country. This is because immigrants have been otherised as a challenge to the norms of British socio-cultural practice, beliefs and values. Perhaps European values and British values are essentially the same, as both include the respect for democracy, the rule of law, equality, human dignity and human rights - but the fact that the British political class has tried to distinguish the two is demonstrative of a perception or conceited effort to disassociate them based on the ruling elite's assured perception of 'Britishness' as superior to that which is European.

As discussed in the previous section, the ECtHR has determined that the hallmarks of a democratic society include pluralism, tolerance and broadmindedness. In this sense, immigrants are potential contributors to pluralism within a country such as the UK, because their distinct backgrounds corroborate to the building of a diverse society, which they have done historically, as one of the characteristics of British society is its diversity - in part due to its colonial past. Moreover, it does not appear that the MIR policy resonates tolerance and broadmindedness. In fact, the UK's approach is endowed with the opposite characteristics: isolation of British society from the rest of Europe, as

well as the world; and refusal of all those who are not “truly” belonging to such a society.

Furthermore, it is necessary to employ the proportionality test as a final step in the assessment of the ‘necessary in a democratic society’ condition. This principle, when applied to the context of this section, recognises that the exercise of an individual’s right to family life must be checked against the broader public interest, i.e., there must be a balancing between such right and the interests of the State.

It is evident that a considerable number of families will struggle to meet the MIR when we consider the threshold is set at 138% of the minimum wage.[117] The scenario is even more challenging for those who have children, because the threshold is increased to every child belonging to the family, as explained in section 3.1. Families who have been living outside the UK and intend to return to the country are not likely to return on a high-income established job in the first instance. The pay gap between different regions of the country is also not taken into consideration. In this sense, ‘a substantial number of families wishing to return to the UK are unfairly disadvantaged from the outset against their higher earning peers’.[118]

A research conducted by the Children’s Commissioner for England in 2015 has detected that:

> (…) a significant number of families who met whilst living abroad have been prevented from living together in the UK. Some have been separated, with the sponsor staying in or returning to the UK in order to try to satisfy income requirements. Others have been prevented from returning to the UK as a family.[119]

This research presents that the new policy aimed to, firstly, reduce reliance on welfare benefits by these families – and thus ensure that they do not become a burden on the general taxpayer – and, secondly, to encourage the non-EEA

[117] Children’s Commissioner, *Skype families: The effects on children of being separated from a mum or dad because of recent Immigration Rules* (Children’s Commissioner, 2015) 5.
[118] Ibid.
[119] Ibid 3.

partner to be integrated into society. However, the reality is that such a reliance has not reduced. Furthermore, in certain cases, the policy itself is the factor which triggers the necessity of some families to rely on benefits, because they "become" single parents. Moreover, there is no evidence which indicates that the non-EEA partners' integration has been enhanced, but there is evidence which indicates it has been reduced.[120]

In this research, they collected data and personal stories of 100 families - who have been negatively affected by the MIR - through surveys and interviews. These so-called 'Skype families' presented the various barriers such a policy has instituted in their enjoyment of their right to family.

A mother of two children aged 6 and 9 years described how the MIR can lead to an outcome opposite to that expected by the government:

> I can only work part-time, as I need to be able to do school runs at the beginning and end of each day. I don't feel able to use childcare as my children's lives have been through enough upheaval already with the move and their Dad. So I am on a low wage and claiming benefits. I wouldn't need to claim benefits if my husband was here – we could both work, one of us fulltime, and earn plenty to live off.[121]

Accordingly, a father of a daughter aged 3 years and a son aged 4 weeks corroborates to this incoherence:

> They said they want to make sure that the foreign partner would integrate in the British society. As far as I am concerned, if my wife has got British children and a British husband, she already is integrated in the British society ... You cannot say to someone who is so deeply integrated into British society that she has got children, you cannot say to that person, do not come in here. She is already integrated. Already.[122]

A mother of a son aged 12 years also shared her struggle:

> If my husband could join me in the UK I would be out of housing benefit and council tax benefit, working tax credit. I wouldn't be eligible anymore. If anything,

[120] Ibid 5.
[121] Ibid 7.
[122] Ibid.

> we would be putting more in because I could get more hours in and maybe take a second job. At the moment I can't leave my son alone that much, he's only 12 I don't want him to have to be without us both. If my husband was here we could share childcare.[123]

A mother of two sons aged 4 years explained the unfeasibility such a policy imposes on the family:

> My husband and I are separating in part because we can't take the stress anymore. I have an elderly mother in England who needs me to be there. My children will hopefully see daddy once a month now if he continues living in Ireland, if he returns to America it will likely be once a year.[124]

A British mother of two daughters aged 18 and 6 months clarified the unlikelihood of an individual with children meeting the MIR:

> There is no way anyone with two children can earn that amount. I mean, even when I was working 42 hours a week, I didn't earn that amount. [There are] not that many people [who] earn that amount really unless you are really high up in whatever you do. I worked in a law court and I never earned that much money.[125]

Thus, the families demonstrate to us that the inflexibility and the level of the requirements established are prohibitive. As the sponsor's income at the time of application is potentially the only income considered – and this is based on the fact that the families themselves state that the rules on savings are extremely onerous and the threshold levels are considerably high and difficult to meet – the MIR appears to be a policy exceptionally difficult to be satisfied as well as an expensive procedure. The research concluded that the 'the cost for a single applicant to move from application to settlement is likely to exceed £6,000', and that number escalates if there are additional applicants such as children.[126]

Considering this whole scenario, does the MIR pass the proportionality test? Firstly, the MIR has generated several negative consequences in the lives of thousands of families which are leading to irreparable harm, such as families

[123] Ibid 5.
[124] Ibid 4.
[125] Ibid 5.
[126] Ibid.

being completely torn apart. Secondly, the research indicates that the results intended by the Government with such a policy are questionable, as at its best conclusion, no improvement in regards to integration of the non-EEA partner and children has been observed, but the opposite has been identified. Thus, it is hard to support the argument that the policy in question is proportionate to its legitimate aim. Imposing financial requirements which imply repercussions as harsh as the ones experienced by the families in this research should, at least, be achieving outstanding results to compensate such an interference with Article 8. This, however, does not appear to be the case.

This issue of proportionality becomes even more problematic when considering families in which children are involved. The following section shall discuss the impact of such a policy on children and how it conflicts with their rights.

4.3.2.1. Rights of the child

The Council of Europe is yet to adopt a legal instrument specifically designed to protect the rights of the child. Notwithstanding, this does not imply that there are no standards in regards to the rights of such a group. In this sense, the Council of Europe has stated that:

> Children in Council of Europe member States are entitled to enjoy the full range of human rights safeguarded by the European Convention on Human Rights, the United Nations Convention on the Rights of the Child (UNCRC) and other international human rights instruments. These include civil, political, economic, social and cultural rights.[127]

The UK has signed and ratified the United Nations Convention on the Rights of the Child (UNCRC). Therefore, they must take into consideration the provisions of such a legal instrument when creating new domestic legislation and policies which might affect children. Article 3 of the UNCRC establishes the principle of best interest of the child as a primary consideration whilst also determining the conditions for protection and care of the child. The legal text is as follows:

[127] Council of Europe, 'Council of Europe Strategy for the Rights of the Child (2016-2021)', Strasbourg: Council of Europe, 2016, 4 para 4.

> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
>
> 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.[128]

Within British domestic law, such an overriding obligation has been instituted in a statutory footing by section 55 of the Borders, Citizenship and Immigration Act 2009.[129] Accordingly, the Children's Commissioner states that:

> The s.55 duty applies to all children in the UK irrespective of immigration status and should be applied to children who are abroad but who are impacted by an immigration decision to refuse them or their parent leave to enter the UK.[130]

In this sense, has the MIR policy been taking into account the principle of best interest of the child as well as the protection necessary for their well-being? Paragraph 2 explicitly states that the rights and duties of the parents, legal guardians or individuals responsible for the children must also be considered when assessing their best interest. The research conducted by the Children's Commissioner suggests that the MIR policy has not effectively taken these standards into consideration.

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[128] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 3.
[129] Home Office, *EVERY CHILD MATTERS, CHANGE FOR CHILDREN: Statutory guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children* (UK Border Agency 2009).
[130] Children's Commissioner, *Skype families: The effects on children of being separated from a mum or dad because of recent Immigration Rules* (Children's Commissioner, 2015) 6.

A mother of a son aged 7 explained how the separation has had a negative psychological impact on her child:

> He struggles, completely, he really struggles, it's horrible. He has got anxiety...he gets knots in his tummy and he worries, yeah. We had him at the doctor a few times about stomach ache and the doctor said it was anxiety. Just not knowing, no stability, not knowing what's happening... And seeing a child crying all the time... because they are anxious, that's horrendous. He is 7, he should never feel that way, he should be a child, and they are taking that away.[131]

A mother of a son aged 6 described how this deteriorates parental relationships:

> [My son] went from a bubbly little boy to very reserved in the first few months of the separation, he was angry at us both but couldn't understand why Dad won't want to live with him. He would go from angry kicking out to long periods of cry and thought Dad didn't love him. They are still working at rebuilding their relationship and trust.[132]

A mother of an 11-year-old son expressed the struggle her son has encountered to cope with the situation:

> I recently had to go to his school because he went through a period of anger which partly... understand he's coming up to teenage years, but... he had a few anger issues and [talked] about wanting to smash things and not really hurting himself but wanting to break and smash stuff. He did also mention not wanting to live anymore and he did go through a period of "why am I even bothering anymore?" The doctor talked about the situation and asked him why he thought he was having those feelings and he said to her, "it's because of my dad, because I can't see my dad". The doctor says we need to give him the tools to cope with his feelings as she knows we can't fix it.[133]

The Children Act 1989 ensures the protection and safeguarding of children and their welfare by attributing duties and responsibilities to parents, British courts,

[131] Ibid 4.
[132] Ibid.
[133] Ibid.

local authorities as well as other institutions. For this reason, Judge Peter Herbert OBE of the Immigration Tribunal has affirmed that:

> It is simply not tenable to suggest that children, a six year old and a two year old could possibly maintain a parental relationship with a father or mother for that matter simply by the odd visit or by modern means of communication such as Skype, emails or telephone calls. Contact such as this is wholly inconsistent in any normal family situation with the principles of Section 1 of the Children's Act 1989 applying the Welfare Checklist. Such a lack of contact with a natural father, in the absence of any other reason harmful to the children, is wholly inconsistent with their emotional well-being. Whilst this is not the determinant factor, it is a primary factor to consider the effect of the continued separation on the Appellant and the impact it has on his children.[134]

Accordingly, Judge Kamara, of the same tribunal, argues:

> In assessing the public interest under Article 8(2) (…) I have had regard to the UN Convention on the Right of the Child, with specific reference to Article 3 which refers to the best inserts of the child being a primary consideration. Taking into account the public interest factors and after carrying out a balancing exercise, I find that the proposed interference in the appellants' family life with the sponsor is a disproportionate response in all circumstances.[135]

It is indisputable that the MIR has generated a negative impact on the lives of children whose parents or legal guardians are found in this legal trap. Considering the UK's obligations in regards to the rights of the child, and more specifically Article 3 of the UNCRC, it is reasonable to argue that the British government has been failing in safeguarding these children's rights. In this sense, a policy which leads to approximately 15,000 children growing up separated from one of their parents[136] cannot be regarded as a policy which *primarily* considers the principle of best interest of the child as well as their mental and physical well-being. Furthermore, it does not take into consideration the rights and duties of their

[134] Immigration Tribunal Judge Peter Herbert OBE (as cited in Children's Commissioner, *Skype families: The effects on children of being separated from a mum or dad because of recent Immigration Rules* (Children's Commissioner, 2015) 7).
[135] Immigration Tribunal Judge Therese Binta Kamara (as cited in Children's Commissioner, *Family Friendly? The impact on children of the Family Migration Rules: A review of the financial requirements* (Children's Commissioner, 2015) 102).
[136] Children's Commissioner (n 48) 2.

parents or legal guardians when addressing such a principle, as established in paragraph 2, because otherwise such alarming numbers would not have been observed, as the care and protection necessaries for the child involve having healthy and present relationships with their parents. In practice, indeed, such ideal circumstances are not always possible, as there are advents in life which are irreversible, such as death. The measures adopted by the UK, nonetheless, are not. For this reason, deliberately imposing upon children that they grow up into society without the presence of one of their living parents cannot be regarded as a policy which is in compliance with the provisions of the UNCRC.

Thus, when considering families constituted of not only the two adult partners, but also children, the assessment of the proportionality test concerning the 'necessary in a democratic society' condition becomes even more complex. Notwithstanding, it evidences how disproportionate the results of the measures adopted by the UK with the MIR policy are to the legitimate aim pursued. In this sense, it appears that the policy in question fails to answer the proportionality test, and, subsequently, the condition of being necessary in a democratic society.

The conditions previously discussed to justify an interference by the State with the right to private and family life of an individual are cumulative. This signifies that all of the three conditions must be met in order to find just an interference with the right in question. Thus, the satisfaction of only one or two of the conditions is not sufficient. It is for this reason that I argue the MIR is conflicting with Article 8 ECHR.

4.4. Prohibition of Discrimination

The provision on Prohibition of Discrimination is the only substantive right established in the UN Charter, which is to be found on Article 1(3) and sets out that one of the purposes of such an international organisation is to promote and encourage 'respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. Subsequently, the UDHR also determines the importance of equality and non-discrimination and institutes through its Article 2 that '[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex,

language, religion, political or other opinion, national or social origin, property, birth or other status'. The main developments from the former to the latter are the following: firstly, the UDHR adopted a non-exhaustive approach by inserting the term 'such as'; and secondly, various prohibited grounds were included to the concise list of Article 1(3) of the Charter.[137] Moreover, the UDHR also explicitly establishes equality and non-discrimination in its Article 7 by affirming that:

> All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.[138]

Other legal instruments which followed the UN Charter and the UDHR also set out standards in regards to prohibition of discrimination, such as the following UN treaties: International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities.

The ECHR, in turn, presents its provision on prohibition of discrimination in Article 14:

> 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.[139]

4.4.1. Analysis

The analysis of Article 14 shall be developed in two phases. Firstly, I shall determine the scope of application of the prohibition of discrimination. Subsequently, I shall present how the term 'discrimination' is currently interpreted under the Council of Europe system.

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[137] Schabas (n 75) 555.
[138] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 7.
[139] European Convention on Human Rights, as amended by Protocols Nos. 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR) art 14.

4.4.1.1. Scope of application

The prohibition of discrimination has a limited scope of application. This is because Article 14 shall only be pleaded in combination with some other substantive right established in the ECHR.[140] This comes by logic, as when an individual pledges to having been discriminated against, the natural question which follows is: on which grounds? In this sense, Schabas explains that:

> (…) while discrimination on one of the prohibited grounds with respect to the right to private and family life may amount to a breach of the Convention, the same would not be the case with respect to nationality because there is no right to nationality in the Convention.[141]

Therefore, such a right is constituted of a subsidiary nature and does not exist independently in the sense that it is applicable only to the 'enjoyment of the rights and freedoms set forth' in the ECHR. Thus, this indicates that:

> Whenever the ECtHR considers an alleged violation of Article 14, this is always done in conjunction with a substantive right. An applicant will often allege a violation of a substantive right, and in addition, a violation of a substantive right in conjunction with Article 14. That is, that the interference with their rights was, in addition to failing to meet the standards required in the substantive right, also discriminatory, in that those in a comparable situation did not face a similar disadvantage.[142]

This, however, does not signify such a right is not autonomous. This is because it is not necessary that the other substantive right to which Article 14 is connected is violated in order to apply the prohibition of discrimination. The only condition necessary is that the substantive right is established within the Convention law.[143]

This can be observed, for instance, in the case *Sommerfeld v. Germany*, where the ECtHR ruled there had been no violation of Article 8 on its own, but that there

[140] Schabas (n 75) 556.
[141] Ibid.
[142] European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European non-discrimination law* (Publications Office of the European Union 2018) 29.
[143] Schabas (n 75) 562.

had been a violation of Article 14 in combination with Article 8. In this sense, the Court confirms that:

> Article 14 only complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to that extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (…) The Court finds that the facts of the instant case fall within the scope of Article 8 of the Convention (…) and that, accordingly, Article 14 is applicable.[144]

Furthermore, the ECtHR has also understood that an individual's complaint of discrimination can fall within the scope of a determined right even in situations where the matter in question is not concerned with a certain entitlement guaranteed by the Convention. In given circumstances, the Court finds sufficient that the facts of the case are generally related to issues which the ECHR protects.[145]

Then, the ECtHR has stated that:

> The prohibition of discrimination in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and Protocols require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention article, for which the State has voluntarily decided to provide.[146]

This can be observed, for instance, in the case *Zarb Adami v. Malta*, where the applicant complained of discrimination on the grounds of sex, because the number of men being convoked for jury service was high enough to be considered disproportionate. Accordingly, the Court ruled that even though 'normal civil obligations' are not encompassed by the prohibition of 'forced or compulsory labour' found in Article 4, the facts of the case in question did fall within the scope of the right, because such civic obligations can potentially become 'abnormal' if

[144] *Sommerfeld v. Germany* ECHR 2003-VIII (extracts), para 84.
[145] European Union Agency for Fundamental Rights and Council of Europe (n 140) 30.
[146] *Andrle v. the Czech Republic,* App no 6268/08 (ECtHR, 17 February 2011), para 28.

the ‘the choice of the groups or individuals bound to perform it is governed by discriminatory factors’.[147]

Considering the limitation of the application of Article 14, a non-discrimination clause with a broader and more general scope of application was posteriorly introduced through Protocol No. 12 of the ECHR. This protocol is broader because not only does it include prohibition of discrimination in regards to the enjoyment of rights and freedoms of the ECHR, but it also prohibits discrimination ‘by any public authority’. In this sense, the legal text of Article 1 is:

> 1 The enjoyment of any right set forth by law 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.
>
> 2 No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.[148]

The Explanatory Report on the Protocol in question has clarified that such a prohibition of discrimination established in Article 1 shall be interpreted as discrimination concerning the following circumstances:

i. in the enjoyment of any right specifically granted to an individual under national law;
ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
iii. by a public authority in the exercise of discretionary power (for example, granting certain subsidies);
iv. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).[149]

[147] *Zarb Adami v. Malta* ECHR 2006-VIII.
[148] Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 04 November 2000, entered into force 01 April 2005) ETS 177 art 1.
[149] Council of Europe, *Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms* (Council of Europe 2000) para 22.

The challenge, here, lies on the fact that the number of ratifications of such a protocol is rather low, and therefore the application of the clause is not to be applied to many of the States Parties.[150]

4.4.1.2. Interpretation of 'discrimination'

The ECtHR defines discrimination as the act of treating individuals who are in 'relevantly similar situations' differently 'without an objective and reasonable justification'.[151] In this sense, the individuals do not need to be in the same exact situation, but rather 'relevantly similar'. Therefore, not all differences in treatment will lead to a breach of Article 14, as the 'justification provided to account for a distinction must be assessed with regard to principles that normally prevail in democratic societies'[152], i.e., if it does not have a legitimate aim. Moreover, a difference in treatment also does not constitute a violation of Article 14 when it has a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'.[153]

Discrimination can be considered of two kinds: direct and indirect. Direct discrimination occurs when an individual is treated less favourably than other people due to a protected characteristic – such as sexual orientation, age, disability, race, religion, sex, among others –; or when an individual is perceived as having certain protected characteristic and then is discriminated against because of such perception even though they do not have the respective characteristic – which is referred to as discrimination by perception; or when someone is treated less favourably because a colleague, friend, family member or associate of theirs has a protected characteristic – which is known as discrimination by association.[154]

Corroborating this definition, Sara Hajian and Josep Domingo-Ferrer affirm that '[d]irect discrimination consists of rules or procedures that explicitly mention

[150] Schabas (n 75) 556.
[151] *Willis v. the United Kingdom* ECHR 2002-IV, para 48.
[152] Schabas (n 75) 564.
[153] *Lithgow and Others v. the United Kingdom* (1986) Series A no 102, para 177.
[154] Advisory, Conciliation and Arbitration Service, *What's the difference? Direct and indirect discrimination* (Advisory, Conciliation and Arbitration Service 2013).

minority or disadvantaged groups based on sensitive discriminatory attributes related to group membership'.[155]

Accordingly, Oran Doyle states that '[d]irect discrimination is taken to occur where a measure on its face distinguishes between class A and class B: this is direct discrimination on the grounds of the AB difference and is only illegal if the ground AB is (presumptively) proscribed'.[156]

Indirect discrimination occurs when a policy, procedure or practice neutrally applies to all individuals, but it leads to the disadvantaged of a group of people who possess a common protected characteristic.[157] In this sense, Hajian and Domingo-Ferrer clarify that it 'consists of rules or procedures that, while not explicitly mentioning discriminatory attributes, intentionally or unintentionally could generate discriminatory decisions'.[158] Following this notion, Doyle argues:

> 'Indirect discrimination' connotes a measure that does not on its face distinguish between class A and class B but which, for some related reason, is nevertheless considered troubling. In functional terms, the concept of indirect discrimination allows the law to treat a discrimination on a non-proscribed ground as a discrimination on a proscribed ground. This broadens significantly the reach of anti-discrimination law.[159]

The European Union's Racial Equality Directive provides their conceptualisation of the term in question:

> [I]ndirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.[160]

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[155] Sara Hajian and Josep Domingo-Ferrer, 'A Methodology for Direct and Indirect Discrimination Prevention in Data Mining' (2013) 25(7) IEEE Computer Society 1445, 1445.
[156] Oran Doyle, 'Direct Discrimination, Indirect Discrimination and Autonomy' (2007) 27(3) Oxford Journal of Legal Studies 537, 537-538.
[157] Advisory, Conciliation and Arbitration Service (n 154).
[158] Hajian and Domingo-Ferrer (n 155) 1445.
[159] Doyle (n 156) 538.
[160] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 art 2(2)(b).

Thus, indirect discrimination is not mandatorily unlawful. For instance, when considering the UK's Equality Act of 2010, indirect discrimination is possible when an employer is able to demonstrate that there is an 'objective justification' for such a discrimination and it implies proving 'proportionate means of achieving a legitimate aim'.[161]

The ECtHR firstly considered a matter regarding indirect discrimination in the case of *Thlimmenos v. Greece*. In this case, a Jehovah's Witness complained for being denied the appointment as chartered accountant after having coming second among 60 candidates in a public examination due to the fact that he had previously been convicted of insubordination in the armed forces for refusing to wear military uniforms, and, therefore, displaying anti-militarist beliefs.[162] The Court affirmed that 'such difference of treatment does not generally come within the scope of Article 14 in so far as it relates to access to a particular profession, the right to freedom of profession not being guaranteed by the Convention'.[163] However, the complaint pledged by the applicant was not concerning the 'distinction that the rules governing access to the profession make between convicted persons and others', but rather about 'the fact that in the application of the relevant law no distinction is made between persons convicted of offences committed exclusively because of their religious beliefs and persons convicted of other offences'.[164]

In this sense, the ECtHR ruled that there had been a violation of Article 14 in combination with Article 9 and explained its rationale:

> In the present case the Court considers that 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 of the Convention. That State did so by failing to introduce appropriate exceptions to the rule barring persons convicted of a serious crime from the profession of chartered accountants.[165]

[161] Lorna Adams and others, *Recruitment in Britain: Examining employers' practices and attitudes to employing UK-born and foreign-born workers* (Equality and Human Rights Commission 2016) 87, 92.
[162] *Thlimmenos v. Greece* (2000) ECHR 2000-IV.
[163] Ibid, para 41.
[164] Ibid, para 42.
[165] Ibid, para 48.

4.4.2. The Prohibition of Discrimination and the MIR

In regards to the MIR, the discrimination which shall be considered is the so-called 'indirect discrimination'. Indeed, immigration policies can be related to both direct and indirect discrimination. In the case of the former, this can be observed in issues related to citizenship when we consider that States may establish mutual agreements to generate immigration benefits to each other. For instance, Australian nationals are eligible for a work visa which allows them to work in the UK for a period of 2 years – Youth Mobility work visa – but such benefit is not applicable to USA nationals, for example. Accordingly, all nationals from a European Union Member-State have the right to free movement in all EU territory, which includes the UK, but most non-EU nationals do not.[166]

However, the MIR is a policy which instituted various criteria which must be met in order for individuals to be eligible to enter or remain the UK. Even though the requirements are equally applied to all applicants, some will more easily satisfy them than others. In this sense, Sumption and Vargas-Silva explain that:

> This form of discrimination is found throughout the immigration system, which sets many different criteria for eligibility to enter or remain in a country that some groups of potential applicants are more likely to be able to meet than others.[167]

Hampshire explains that immigration policies are constituted of distinct objectives, however, they sometimes are not compatible with one another. These can include, for instance, the protection of individuals' rights, such as the right to family life, economic growth, and the promotion of national identity.[168] In this sense, the concern of policymakers in regards to the risk of discrimination deriving from income-based eligibility criteria in the creation of labour migration policies might be of a lesser degree than when creating family migration policies. This is because the former is mainly of an economic-purpose nature, whereas the latter also considers the promotion of the right to family of the individual and

[166] Madeleine Sumption and Carlos Vargas-Silva, 'Love Is Not all you Need: Income Requirement for Visa Sponsorship of Foreign Family Members' (2018) Journal of Economics, Race, and Policy 62, 63.
[167] Ibid.
[168] James Hampshire, *The Politics of Migration: Contradictions of the Liberal State* (Polity Press 2013).

preservation of family integrity. Moreover, another distinguishing aspect of family migration is the fact that policies around it engender consequences not only to the migrants, but also to the nationals of the host-country who intend to live their lives alongside their family members.[169] In the case of the MIR, these would be the British nationals or settled residents sponsoring their non-EEA family members.

The MIR imposes a financial requirement which disadvantages certain groups of people and, thus, engenders severe negative consequences in their lives. Women and ethnic groups, for instance, are less likely to meet the threshold stipulated by the MIR when compared to the white-male British worker.

In the case of women, the UK's median gender pay gap when considering both full-time and part-time employees in 2018 was of 17.9%.[170] Additionally, approximately one-third of all sponsors of migrants are women.[171] In cases where a British woman is also a mother, the likelihood of employment for this woman reduces from 82% to 37%, which represents a 45% decrease.[172] Furthermore, the statistics indicate that women, more than men, are traditionally the parent responsible for staying home to care for children.[173] All these statistics represent the gender disadvantages women are expected to overcome in order to fulfil the MIR when in the position of sponsors. The MIR does not account for all these obstacles, including the fact that home-stay mothers do perform a full-time job in the role of a caregiver, despite of being remunerated or not. For this reason, Paloma Allegra Kennedy argues that:

> (…) amendments recently made to the UK's Immigration Rules discriminate against stay-at-home parents and predominately women who have historically filled this role. UK women will be largely unsuccessful in their pursuit of familial

[169] Sumption and Vargas-Silva (n 166) 63.
[170] Roger Smith, *Gender pay gap in the UK: 2018* (Office for National Statistics 2018) 3.
[171] Paloma Allegra Kennedy, 'Exiled and Broken: New Amendments to UK' s Discriminatory Immigration Rules Make "Homemaking" Impossible for UK Women' (2016) 15(1) Washington University Global Studies Law Review 191, 207.
[172] Janet Gornick and others, 'Public Policies and the Employment of Mothers: A Cross-National Study' (1998) 79(1) Social Science Quarterly 35, 45.
[173] Joseph Chamie, *Despite Growing Gender Equality, More Women Stay at Home Than Men* (Yale University 25 January 2018) < https://yaleglobal.yale.edu/content/despite-growing-gender-equality-more-women-stay-home-men > accessed 5 May 2019.

> sponsorship without greater flexibility in the qualifying Amendments. (…) the MIR alone strips UK women of their right to provide for their family by working in the home. Moreover, the act of becoming employed may not be their only hurdle. With a steep gender pay gap and a significant decrease in the ability to find work after having children, UK women – especially mothers – will likely find the sponsorship requirements too cumbersome. At this time and for the foreseeable future, the Immigration Rules will continue to single-out stay-out-home wives and mothers who have chosen a transnational lifestyle, who live in rural areas, who receive financial support in unique ways, and who cannot otherwise make ends meet without the collective income of two partners.[174]

Furthermore, Sumption and Vargas-Silva conducted a data analysis on the intersection of the MIR and discrimination.[175] Their research suggests that from the period of 2012 to 2017, 61.9% of UK citizens did not earn enough to satisfy the MIR threshold, of which 41.7% were in work. Moreover, it also indicates that 'there is substantial variation in the share of individuals who cannot meet the income threshold across genders and ethnicity groups'.[176] This can be observed in Table 2 of their research.[177]

In relation to the gender gap, the numbers demonstrate that 73% of women cannot meet the threshold, which is disproportionately high when compared to 49% of men. This represents a 24-percentage-points gap. When considering ethnic groups, some were comparable to the white majority of the British population, however, others are in a less favourable situation. For instance, 61% of ethnic Indian British citizens are not able to satisfy the MIR, which is similar to the percentage of White British citizens in the same position. This, however, is significantly different when considering the ethnic Pakistani British population, of which 83% cannot meet the MIR threshold. This is relevant to the extent that these groups are two of the major minority ethnic groups in the country according to UK Office for National Statistics.

[174] Kennedy (n 171) 212-13.
[175] Sumption and Vargas-Silva (n 166) 66.
[176] Ibid 67.
[177] *See* Appendix 1.

Their analysis indicates that British women who are in the workplace are 30% less likely to earn a salary sufficient to meet the MIR – and therefore sponsor a non-EEA partner – than men. Accordingly, British ethnic minorities are 7% less likely to earn a salary sufficient enough when compared to the White British population.[178] The analysis further suggests that in order to establish an MIR policy which does not discriminate in respect to gender it would be needed to set the income threshold at £15,550 for British women and £24,600 for British men.[179] Such numbers were established by 'calculating illustrative gender-specific income thresholds which result in the same threshold to average income ratio across genders and that are as restrictive as the original policy'.[180] They explain that the purpose of projecting these numbers is not to advocate for their implementation, because that in itself would reinforce discrimination, but rather to emphasise the level of adjustments which would have to be made in order to dissipate the significant gender gap.[181]

In this sense, Sumption and Vargas-Silva argue:

> The UK's family income threshold had three discernible policy objectives: to reduce the number of family migrants coming to the country, to limit the entry of family members who were expected to have negative fiscal impacts, and to limit the entry of low-income people whom they considered would have more difficulty integrating. Among the consequences of this policy have been substantial differences in the ability of groups of UK residents to live with their partner in the country. Our analysis shows that of the major demographic groups, women are disadvantaged most by the policy, followed by ethnic minorities.[182]

Thus, it is evident that the MIR policy has developed a significant number of issues in regards to Article 14 of the ECHR, and more specifically to indirect discrimination. The policy did not intend to explicitly discriminate against certain groups of society. Nevertheless, the measures and criteria adopted for its implementation have provoked disadvantages for particular individuals, especially women and ethnic groups. The evidence demonstrates that these

[178] *See* Appendix 2.
[179] *See* Appendix 3.
[180] Sumption and Vargas-Silva (n 166) 63.
[181] Ibid 63-64.
[182] Ibid 73.

groups are discriminated against on the grounds of socio-economic status. In this sense, an income threshold which is substantially higher than the minimum wage and does not acknowledge nor account for the social and economic gaps between groups of society does not appear to be proportionate nor reasonable.

When referring to the scope of application of Article 14 ECHR, a violation of the prohibition of discrimination is only possible when in conjunction with other substantive rights of the ECHR due to its subsidiary nature. In the context of the MIR, Article 14 can be combined with several provisions of the Convention, especially the two rights previously discussed in this thesis: the right to marry (Article 12) and the right to private and family life (Article 8). In this sense, even in a hypothetical situation where no breaches are found in regards to Articles 8 and 12 themselves, the prohibition of discrimination shall still persevere due to the autonomy of Article 14, which has been already confirmed by the ECtHR, for instance, in the case *Sommerfeld v. Germany*. In this sense, there is no causal relationship between violations being found in regards to the substantial rights themselves and violations of the prohibition of discrimination.

CHAPTER 5: UNITED KINGDOM'S CASE LAW

The ECHR has been enshrined into British domestic law through the Human Rights Act 1998. As discussed in this thesis, the Brexit movement is a reflection of the anti-migrant political agenda of the UK Government. As Home Secretary, Theresa May declared, before the EU referendum took place, that the UK should leave the ECHR as well as the jurisdiction of the ECtHR. Her statement is as follows:

> The ECHR can bind the hands of parliament, adds nothing to our prosperity, makes us less secure by preventing the deportation of dangerous foreign nationals – and does nothing to change the attitudes of governments like Russia's when it comes to human rights. (…) So regardless of the EU referendum, my view is this: if we want to reform human rights laws in this country, it isn't the EU we should leave but the ECHR and the jurisdiction of its court.[183]

More recently, May made public she would consider axing the Human Rights Act 1998 after the Brexit process has been concluded, despite promising she is 'committed' to the protection of its rights and content.[184]

This political rhetoric is relevant to this section because it demonstrates the level of commitment of the UK to its State's obligations in regards to human rights. It is evident the country has been reluctant when it comes to respecting, protecting and fulfilling human rights because this would negatively impact British national interests – especially when considering immigration matters – and therefore the State's sovereignty must be preserved to the detriment of human rights. In regards to the MIR, case law demonstrates that national interests and State sovereignty have been upheld as the fundamental arguments for the limitation of certain rights.

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[183] Anushka Asthana and Rowena Mason, 'UK must leave European convention on human rights, says Theresa May' *The Guardian* (London, 25 April 2016) < https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum > accessed 6 May 2019.

[184] Rob Merrick, 'Theresa May to consider axeing Human Rights Act after Brexit, minister reveals' *Independent* (London, 18 January 2019) < https://www.independent.co.uk/news/uk/politics/theresa-may-human-rights-act-repeal-brexit-echr-commons-parliament-conservatives-a8734886.html > accessed 6 May 2019.

Cases challenging the MIR have been brought before all instances of Courts in the UK, and five cases have been judged by the Supreme Court (UKSC) in the same decision, where one of them (SS) has presented 'findings of fact in legal proceedings' whereas the other four (MM, AF, AM, and SJ) 'have been dealt with on the basis of assumed facts'.[185]

MM is a 37-year-old Lebanese national who entered the UK in 2001 and was granted refugee status with a limited leave to remain until the sixth month of 2017. He lived with his sister, EM, who possessed discretionary leave to remain. EM has a son, AF, who sees his uncle, MM, as a father figure and was 16 years-old when the proceedings began. MM met a Lebanese woman in Syria and got engaged to her. The couple spent a 5-month period of time together (from September 2012 to January 2013) in Cyprus. The couple was married by proxy in 2013 in Lebanon. MM, at the time of the judgment, was working as a quality inspector for three distinct agencies whilst also reading for a PhD at the University of Wolverhampton. His gross annual salary was approximately £15,600. MM's wife holds a BSc in nutrition and performed a job as a pharmacist in Lebanon. She is fluent in English language and the inquiries suggested she would have had high chances of finding skilled employment in the UK. The couple could not live together in their country of origin because, as a refugee, MM had a well-founded fear of persecution in Lebanon. Furthermore, they could not live in the UK because they did not meet the MIR. There were no other countries where they had the right to reside, as they met in Cyprus on a short-term visitors' visa. MM claimed 'that their inability to live together in this country is an unjustified interference with his Article 8 right to respect for his family life'.[186]

Furthermore, AF was added as an interested party in the case of MM due to the negative impact upon him of MM's complications when attempting to attain family unit in the UK. He argued that this did not only violate his ECHR rights but also breached 'the Secretary of State's duty, in section 55 of the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act"), to have regard to the need to

[185] *Re MM v Secretary of State for the Home Department* [2017] UKSC 10, [2017] 1 WLR 771, [27].
[186] Ibid [28]-[29].

safeguard and promote the welfare of children when making decisions which affect them'.[187]

AM is a British national belonging to the Pakistani ethnic group and has lived in the UK since 1972. He married a Pakistani woman who lives in Kashmir in 1992, but the marriage was not registered until 2006. The couple has five children of British nationality, of which four have lived in the UK since 2001 and one, the youngest, lives with the mother in her region. AM has been on benefits since 2006 when he stopped working. Under the previous Rules, his wife was not granted leave to enter due to his unemployed situation. AM believes that the likelihood of employment would have been considerably improved if his wife had been granted leave to remain and could have looked after their children. Moreover, he argued there are family members who could have provided them with support until they were self-sufficient. In this sense, his complaint is in regards to the application of the MIR onto parents whose children are settled in the UK and are attempting to enter or remain as partners or spouses. Furthermore, he also criticised the contrast there is between the rules which 'regulate parents seeking to enter or remain as spouses or partners and those governing parents seeking to enter or remain as lone parents or separated parents having contact with their children'.[188] The Court of Appeal did not grant him permission to appeal on this ground.

SJ is a British citizen also part of the Pakistani ethnic group. She lived in the city of Birmingham with her family. She did not hold any qualifications and, when it comes to employment, she had an 'intermittent employment history with no prospect of employment at the required level of earnings'.[189] In 2012 SJ married a man from Pakistan who lived and workd as a civil servant in his country of origin. In 2013 SJ sponsored his application to enter and live in the UK as a spouse, however, the application was refused on the grounds that the MIR and accommodation requirements had not been satisfied. She argued that not only is the MIR a breach of her ECHR rights in respect to Articles 8 and 12, 'but also that it is indirectly discriminatory against women, and in particular British Asian

[187] Ibid [30].
[188] Ibid [31].
[189] Ibid [32].

women, who suffer from significantly lower rates of pay and employment than others.[190]

SS is a Democratic Republic of Congo citizen and resident. She is married to NT, who is equally a citizen of the same country. NT was granted refugee status in the UK and posteriorly became a British citizen by naturalisation. They met each other when NT was visiting his country of origin. They married in September of 2012. In November of the same year SS applied for entry clearance under Appendix FM, which was not granted by the Entre Clearance Officer due to incapability of meeting the MIR and supplying them with the correct documents. She appealed such a refusal to the First-tier Tribunal, which in turn found that the evidence demonstrated the sponsor's gross annual income for the tax year 2011/2012 was £16,194. New evidence demonstrated that his annual earnings were approximately £17,000. The couple did not meet the MIR, but they were granted the appeal on the grounds of Article 8. The couple would not be able to live in their country of origin. The applicant's income (£13,600) was substantially higher than the minimum wage. The couple would have been able to live solely on his earnings without 'placing additional strain on the public purse'. After her application was refused, SS suffered from a miscarriage, which caused her serious trauma and distress due to the fact that NT would not be able to visit her because of the fear of losing his job. In this sense, '[s]he needed' to be admitted to the United Kingdom 'so that she can take solace with her husband and begin to form family life with him here'.[191]

Considering these cases, the UKSC stated that:

> The initial challenges brought by MM, AF, AM and SJ were to the Rules introducing the MIR. Orders were sought quashing the Rules, declaring them incompatible with the Convention rights, and unreasonable and ultra vires at common law.[192]

[190] Ibid [32].
[191] Ibid [35].
[192] Ibid [77].

In regards to the acceptability in principle of the MIR, the UKSC provides us with their understanding:

> There can be no doubt that the MIR has caused, and will continue to cause, significant hardship to many thousands of couples who have good reasons for wanting to make their lives together in this country, and to their children. There are several types of family, not illustrated in the cases before us, upon whom the MIR will have a particularly harsh effect. These include British citizens who have been living and working abroad, have married or formed stable relationships there, and now wish to return to their home country. (…) They also include couples who formed their relationships before the changes in the Rules were introduced and who had every expectation that the foreign partner would be allowed to come here. Of particular concern is the impact upon the children of these couples, many or even most of whom will be British citizens themselves. (…) But the fact that a rule causes hardship to many, including some who are in no way to blame for the situation in which they now find themselves, does not mean that it is incompatible with the Convention rights or otherwise unlawful at common law. As far as the Convention rights are concerned, the arguments have concentrated on article 8, the right to respect for private and family life, either alone or in conjunction with article 14, the right to enjoy the Convention rights without discrimination, rather than on article 12, the right to marry and found a family.[193]

In this sense, the UKSC affirmed that the MIR does not prevent a couple from getting married; however, they acknowledge that such a policy presents a major obstacle to their enjoyment of family life together. They also confirmed that the policy in question may create a permanent impediment to several couples whose sponsor would never be able to earn a salary above the financial threshold required and to those couples that would not be able to amass savings sufficiently high to compensate for the shortfall. Furthermore, the UKSC explained that female sponsors are disproportionately affected due to the everlasting gender pay gap, even though they can constitute as many as one third of the total number of sponsors. Such a pay gap also affects sponsors belonging to certain ethnic groups whose earnings, historically, tend to be lower, as well as those sponsors

[193] Ibid [80]-[81].

who live in regions of the UK where salaries are depressed. Then, the UKSC stated that the case presented before them is undoubtedly composed of an immigration dimension, as the MIR is a component of an overall strategy whose objective is to reduce net migration. In this context, they argue that the MIR's particular aims are, without a doubt, entirely legitimate, as it intends to ensure that the couple does not have recourse to welfare benefits and possesses enough resources and the financial means to be able to fully participate in British life. The UKSC contends that the aims in question are sufficient to justify the interference with Article 8. They reject that there is no rational connection between such legitimates aims and the specific income threshold established, as they argue that the assessment conducted by the MAC is of an economic rationality model. They state that although certain assumptions had to be made, MAC's work was meticulous in identifying and rationalising such assumptions; and that allowed them to determine the income threshold figure above which the couple would not rely on any welfare benefits, which includes housing and tax credits benefits. The UKSC understood that the aims presented by the Government are legitimate and 'it is also not possible to say that a lesser threshold, and thus a less intrusive measure, should have been adopted', even though it 'may, of course, have a disproportionate effect in the particular circumstances of an individual case, but that is not the claim currently before us'; then, for this reason, they concluded that 'the challenge to the acceptability in principle of the MIR must fail'.[194]

When considering the treatment of children, the UKSC clarifies their position:

> We have already explained how the internationally accepted principle requiring primary attention to be given to the best interests of affected children is given clear effect in domestic law and policy. The same principle is restated as part of the considerations relevant to the article 8 assessment in Jeunesse (…), requiring national decision-makers to: "… advert to and assess evidence in respect of the practicality, feasibility and proportionality [of any such removal of a nonnational parent] in order to give effective protection and sufficient weight to the best interests of the children directly affected by it".[195]

[194] Ibid [81]-[83].
[195] Ibid [89].

In the context of the Appendix FM, paragraph GEN.1.1 determines that it takes into consideration the duties of the Secretary of State in regards to children. The UKSC understood that the instructions - Borders, Citizenship and Immigration Act 2009 – did not sufficiently fill the gap present in the Immigration Rules, because instead of considering the best interests of children as a priority, they established a 'highly prescriptive criterion requiring "factors … that can only be alleviated by the presence of the applicant in the UK", such as support during a major medical procedure, or "prevention of abandonment where there is no other family member …"'.[196] Moreover, even though section 55 is directed to children already in the UK, the Secretary of State has acknowledged that such understanding should also be applied to the welfare of children outside the UK. For this reason, the UKSC affirmed that the guidance is defective when we consider this point and ought to be amended following the Strasbourg Court's principles. Furthermore, the UKSC also affirmed that the provision in GEN.1.1 stating that the duty had already been taken into consideration in the Immigration Rules is 'wrong in law'.[197] They explain that:

> Nor is the gap filled by GEN.1.10-11 which refer to the separate consideration under article 8, but not section 55. This is not simply a defect of form, nor a gap which can be adequately filled by the instructions. The duty imposed by section 55 of the 2009 Act stands on its own feet as a statutory requirement apart from the HRA or the Convention. It applies to the performance of any of Secretary of State's functions including the making of the rules. While the detailed guidance may be given by instructions, it should be clear from the rules themselves that the statutory duty has been properly taken into account.[198]

In this sense, the UKSC declared that the rules are unlawful and fail to give effect to Secretary of State's duties in regards to children's welfare under section 55 of the Borders, Citizenship and Immigration Act 2009. However, they understood such failure was not sufficient to challenge the validity of the rules.[199]

[196] Ibid [90]-[91].
[197] Ibid [91]-[92].
[198] Ibid [92].
[199] Ibid [92], [109].

Therefore, according to the UKSC, the MIR policy does not breach Articles 8, 12, and 14 ECHR. This is because, in their view, such policy was necessary to ensure families would not be in a position where they could depend on welfare benefits, and, therefore, it's a justified interference because its aims are legitimate. The discussion, then, touches upon the scope of the margin of appreciation of the UK, which according to the Supreme Court is wider than the one determined in Chapter 4 of this thesis. When considering the treatment of children, they acknowledge the rules fail to give effect to the duty of the Secretary of State in regards to section 55 of the Borders, Citizenship and Immigration Act 2009 and declare they should be amended. However, they do not understand this is a reason sufficiently strong to challenge the validity of the Immigration Rules.

The UKSC's understanding, however, is not shared by all, and such disparity can be observed in lower instances of the British judicial system. The judgement of Mr Justice Blake in respect of the case of MM, Abdul Majid and Shabana Javed at the High Court supports the arguments I have developed in Chapter 4, especially in regards to the disproportionate effects the MIR leads to, which, in turn, fails to comply with the 'legitimate aim' requirement of Article 8. In this sense, Blake J initiates its judgement by affirming that:

> (…) the substantial changes to the maintenance requirements of the rules represent a significant interference with the ability of a couple in a genuine relationship to live together in the United Kingdom and bring up a family here, if the income of the sponsor does not meet the minimum threshold as required by the rules. There is no doubt that their application in an individual case is an interference with the right to respect for family life. The question is whether the interference is for a legitimate aim, proportionate to the aim and justified. (…) The burden of justification rests on the respondent to show that any interference is necessary and proportionate to the legitimate aim.[200]

When considering the justification for interfering with the rights in question, Blake J clarifies that:

[200] *Re MM v Secretary of State for the Home Department* [2013] EWHC 1900 (Admin), [2014] 1 WLR 2306, [86], [88].

> In the context of justification of this interference I respectfully agree with the observations of Lord Justice Sedley in Quila in the Court of Appeal, that in the case of British citizen sponsors, we are dealing with a combination of factors: a fundamental domestic law right for the sponsor to reside in the United Kingdom without let or hindrance, a right for such sponsors to both marry and found a family, and a right to respect for the family and private life created as a result of the exercise of the two previous rights.[201]

In this sense, the judge argues that even though there may be valid reasons in favour of some of the individual requirements taken in isolation, he concludes that 'when applied to either recognised refugees or British citizens the combination of more than one of the following five features of the rules to be so onerous in effect as to be an unjustified and disproportionate interference with a genuine spousal relationship'.[202] This can be particularly observed in the case where the MIR is combined with one or more of the other requirements he discusses subsequently. He states that the 'consequences are so excessive in impact as to be beyond a reasonable means of giving effect to the legitimate aim'.[203] He then presents the five features he mentioned:

> i. The setting of the minimum income level to be provided by the sponsor at above the £13,400 level identified by the Migration Advisory Committee as the lowest maintenance threshold under the benefits and net fiscal approach (Conclusion 5.3). Such a level would be close to the adult minimum wage for a 40 hour week. Further the claimants have shown through by their experts that of the 422 occupations listed in the 2011 UK Earnings Index, only 301 were above the £18,600 threshold.
>
> ii. The requirement of £16,000 before savings can be said to contribute to rectify an income shortfall.
>
> iii. The use of a 30 month period for forward income projection, as opposed to a twelve month period that could be applied in a borderline case of ability to maintain.

[201] Ibid [103].
[202] Ibid [123].
[203] Ibid.

iv. The disregard of even credible and reliable evidence of undertakings of third party support effected by deed and supported by evidence of ability to fund.

v. The disregard of the spouse's own earning capacity during the thirty month period of initial entry.[204]

Furthermore, Blake J states that he recognises that the sum of £18,600 was the lower of the two options suggested by the MAC in their report and that this figure was established as the level at which a household composed of two people would be completely ineligible for housing benefit. He accepts that the policy aimed to identify a sum above mere subsistence, and which would not allow these people recourse to any form of benefit. He also recognises that the Parliament must have been aware of the MIR figure when demonstrating their contentment with the policy of the Secretary of State. However, he argues that by setting a figure significantly higher than the at the time £13,400 gross annual wage, the policy practically excludes young people and those thousands of people who earn low wages, even when in full time employment, from the possibility to be joined by their non-EEA partners, unless they have won the lottery or are lucky enough to belong to wealthy families. Thus, he argues that the MIR disrespects the rights of British citizens and refugees to live with their partners and found a family. In this sense, Blake J disputes that '[t]he executive can hardly be heard to say that the minimum adult wage is a manifestly inadequate sum to provide a basic standard of living over the subsistence threshold for a household without dependent children'.[205] Additionally, he contends that 'the legitimate aim could not be to prevent whatever income related benefits a British citizen might be entitled to in their own right but only the additional costs arising by the admission of the foreign spouse'.[206] Thus, he argues that the non-EEA partner is precluded from claiming these forms of benefits until they have waited the five-year period to obtain indefinite leave to remain, and to establish an income sum which deprives both partners of the possibility to claim housing benefit until the end of the five-year period is 'thus more austere than it needs to be to preclude unjustified recourse to public funds either during the five year period or at the end of it'.[207] In this

[204] Ibid [124].
[205] Ibid [126].
[206] Ibid [127].
[207] Ibid.

sense, he states that the sponsor-partner and the non-EEA partner may not have housing costs at all or even costs significantly lower than the figure adopted by the MAC.[208]

The judge further argues that the parliamentary approval of immigration policy and primary legislation are distinct to one another in nature. For this reason, it is possible that the Parliament may not succeed when attempting to 'achieve the right balance between the political interests of the majority and the human rights of a minority'.[209]

Blake J's final argument is as follows:

> The respondent's justification for the new rule is transparency and improvement of ease of assessment. Those are no doubt reasonable aims, but not if transparency comes at too high a price in terms of family re-union. Moreover, the aim of transparency is positively undermined by the exceptional circumstance policy to which regard is had at [153] and following below. The comparison between the Points Based System and its ever more complex precise code of requirements is inappropriate with regard to measures designed to regulate the admission of dependants and shape the way respect for family life is regulated. There is no human or constitutional right for a foreign national to study or work in the United Kingdom, and thus this is an area where the Secretary of State has a very wide discretion as to how to manage immigration. The contrast with permitting spouses and children of British citizens and refugees is notable. Both have rights to reside and rights to family life that the state must respect. The essence of the right cannot be impaired by measures designed to give effect to them and ensure that the consequence is not an undue burden on the tax payer.[210]

He concludes by affirming that:

> In summary, I accept that there is a legitimate aim that the families of migrants should be encouraged by the terms of admission to integrate, not live at or near the subsistence level and not be perceived to be a long term drain on the public

[208] Ibid [125]-[127].
[209] Ibid [129].
[210] Ibid [139].

> purse in the form of increased access to state benefits. A subordinate aspect of such an aim is transparency and clarity although administrative convenience cannot be an end in itself or justify the separation of spouses. However the combination of features identified above amount together to a disproportionate interference with the rights of British citizen sponsors and refugees to enjoy respect for family life. In terms of the Strasbourg approach they do not represent a fair balance between the competing interests and fall outside the margin of appreciation or discretionary area of judgment available in policy making in this sphere of administration. I accept that a wider margin of appreciation is likely to be relevant to foreign sponsors who are voluntary migrants but not British citizens or refugees. (…) the rights are of such fundamental importance and the effect of the five aspects on which I have focused attention are so intrusive, that I conclude that taken together they are more than is necessary to promote the legitimate aim. The substance of this claim is both the human rights of the sponsor claimants to enjoy respect for family life and the constitutional right of the British citizen to reside in the country of nationality without let or hindrance. From this perspective the application of the combination of the five factors to people in the position of these claimants is not merely disproportionate as a matter of human rights law but also an irrational and unjustified restriction on rights under the law relating to recognised refugees and the constitutional rights of British citizens.[211]

Thus, it is evident that the MIR is of a degree of complexity sufficiently high to generate different understandings within the British judicial system. The decision of Mr Justice Blake was overturned in appeal; nevertheless, it indicates the arguments developed in Chapter 4 have solid and valid foundations. On the other hand, it is not surprising that such a decision was reversed, which posteriorly confirmed by the UKSC. The UK has been reluctant in complying with its obligations in regards to human rights, and more specifically the ECHR, as observable from Theresa May's statements presented in the beginning of this Chapter. The Supreme Court's ruling demonstrates the UK's national interests and sovereignty are a priority when compared to human rights, and therefore it is only consequential that the MIR policy has been so rigidly upheld.

[211] Ibid [142], [144].

In this sense, this is achieved by ascribing to the UK's margin of appreciation a wide scope which appears to be incompatible with the European standards previously discussed in this thesis. The broadening of such a scope, in turn, enables the country to justify the 'legitimate aim' condition and, theoretically, pass the proportionality test. This thesis, however, argues that the results and consequences of the MIR policy are sufficiently harmful to individuals' lives that it becomes disproportionate to its legitimate aim, and therefore must not be regarded as lawful and just. The ECtHR is yet to receive a complaint concerning the MIR and breaches of ECHR provisions. Nevertheless, considering the analysis of the Council of Europe standards presented previously, I argue that the outcome of the ruling shall be different from the one observed at the highest instance at British domestic level.

CHAPTER 6: FUTURE DEVELOPMENTS

6.1. Post-Brexit

At the time of writing, the Brexit process is yet to come to a resolution. The UK and the EU have not concluded their negotiations on possible agreements and decisions on which rules shall continue to apply to the UK and which rules shall not. At this point of the process, the exit of the UK from the EU is highly likely to occur by 31 October 2019 if no further extension is agreed, and therefore this thesis shall consider the impact Brexit will have on the MIR.

Currently, EU Law grants the right to free movement and residence to all EU nationals and their family members within the Member States' territory. This can be observed through Directive 2004/38/EC, which establishes in its Article 1 that:

> This Directive lays down:
>
> (a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;
>
> (b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;
>
> (c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.[212]

Therefore, the MIR is not applicable to EEA nationals and their family members who would like to move and reside in the UK together. The *status quo*, however, will not remain the same at the end of the transitional period ('Implementation Period') of Brexit on 31 December 2020, which is extendible to 31 December 2022. This is because the UK has already determined that once the country is no longer part of the EU, the Immigrations Rules and new immigration system shall apply equally to all those individuals who are not British, regardless of their status being EU or non-EU national.

[212] European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation [2004] OJ L 158/77, art 1.

In this sense, the Secretary of State for the Home Department, in his 'The UK's future skills-based immigration system' White Paper presented to the Parliament, affirms that:

> As the UK leaves the European Union (EU) and we bring free movement to an end, different rules to the current ones must apply to migration here by EU citizens. We will take full control of migration by bringing all of it under UK law and institute a new border and immigration system, to serve the UK public and the economy, and to enable those who come to the UK to integrate and make a positive contribution. (…) The UK's future border and immigration system will have the same core objectives as now. (…) However, there will be a key difference from now. There will no longer be one immigration system for non-Europeans, and another for EU citizens1. The future system will apply in the same way to all nationalities – EU and non-EU citizens alike – except where there are objective grounds to differentiate. This could, for example, be in the context of a trade agreement, or on the basis of risk.[213]

The new system shall prioritise skilled migrants through a skilled-based migration policy, as the country intends to 'ensure the UK remains a hub for international talent from the EU and the rest of the world, which attracts people to work in our vibrant and diverse communities in jobs that drive up productivity and wages, and deliver essential services'.[214] This appears to be problematic from a discrimination angle, as certain jobs, degrees, studies, and backgrounds might be considered more 'skilled' than others, and therefore the establishment of what kinds of skills individuals must have in order to pass such a test seems to be dangerous to the notion of equality. This could leave room for arbitrary decisions, as the UK itself would be the one defining what is to be considered 'skilled' and what is not. Nevertheless, this falls outside the scope of this thesis, and thus will not be discussed further.

Concerning the family visa route, at the end of the Implementation Period, the conditions and requirements established by the Appendix FM of the Immigration Rules – and subsequently the MIR – shall equally apply to all. This is in regards to both the side of the sponsors – whether they are British, settled EU or settled

[213] Home Office, *The UK's future skills-based immigration system* (Cm 9722, 2018) 8.
[214] Ibid 9.

non-EU citizens who would like to bring their non-EEA family members to join them in the UK – and to the side of the applicants, regardless of where they are from outside the UK. The exception to these circumstances would be the scenario where the UK and another country individually sign mutual agreements to facilitate migration between the respective countries. Nonetheless, the general rule shall be to apply the Immigration Rules to all equally. In this sense, EU citizens who are currently residents in the UK and apply for the EU Settlement Scheme to remain in the UK will also have to fulfil the MIR at the end of the transitional period in the hypothetical situation where they would like to bring non-EEA family members to join them in the country, as they would hold the status of settled residents.

Accordingly, the Home Office has declared that:

> EU exit will enable the UK to put in place fair and consistent rules for family migration for everyone. The UK's current family Immigration Rules are designed to minimise burdens on the taxpayer, tackle immigration abuse and promote integration in our communities – reflecting the view of UK Government and Parliament of the public interest in controlling immigration in the national interest. Under our future system, EU citizens will be subject to UK immigration laws. All individuals, including EU citizens, who are settled in the UK and want to bring family members to live with them, will need to meet the UK's family Immigration Rules, or come here under another immigration category to work or study.[215]

In this sense, they provide us with an example case study:

> A British citizen meets and marries their EU citizen partner whilst working outside the UK. As a couple, they decide that they want to continue their family life in the UK. The EU citizen considers various work and study options to enter and remain in the UK in their own right, but chooses to enter as a dependent spouse/partner. The EU citizen makes an application with their British citizen partner acting as sponsor, subject to meeting the necessary criteria, including financial independence (i.e. sponsor earning at least £18,600 per year).[216]

[215] Ibid paras 8.1-8.2.
[216] Ibid 66.

On one hand, this new immigration system will corroborate the notion of equality before the law when considering British against EU nationals. As currently the MIR applies to British people but not to EU citizens when in the position of sponsors, one could argue that EU Law would be discriminating against the British citizens. In this sense, if the MIR policy shall have an *erga omnes* nature at the end of the Implementation Period, then this matter becomes irrelevant. On the other hand, this signifies that all the human rights issues discussed in Chapter 4 will start to negatively impact a substantially higher number of individuals. For this reason, this is a crucial moment for fueling debates which encourage changes to the Immigration Rules, and more specifically to the Appendix FM.

6.2. Recommendations and Law Reform

This thesis has exposed how the MIR policy has led to problematic issues. In an ideal scenario, in order to full comply with its State's obligation in regards to human rights, the UK would abolish such a policy, as financial requirements should not compel individuals to be in a situation where they live apart from their family members when they do not want to. This is because the family unit is of such relevance and importance in an individual's life that imposing a system which only allows a limited number of people to fully enjoy such need cannot be regarded as humane. This issue becomes more contestable when the criteria which serves as the base to perform this "selection of individuals" are financial requirements. In this context, the UK government's message to its population can only be understood as one: that in these circumstances you are only entitled to a family if you belong to a specific "socio-economic band".

Notwithstanding, in reality, it is unlikely that the complete banishment of the MIR will occur due to the UK's national interests and reassertion of their own State's sovereignty. This is evidently more prevalent in the context of Brexit, as the UK attempts to reaffirm its independence from the EU and its Member States. Therefore, I shall present four recommendations to amend the Immigration Rules in a pursuit to make the MIR policy more compliant with international human rights law.

Firstly, the financial requirement should take into consideration other factors which influence the economic situation of the family. As discussed in section 4.4.2., certain determining social aspects of individuals' lives can directly impact their income, as it occurs, for instance, to women, who generally earn less than men due to gender pay gap. Thus, the MIR should establish a mechanism of assessment which is not only objectively looking for salary sums, but which also encompasses an analysis of the socio-cultural background of all the individuals relevant to the application.

Secondly, the threshold stipulated by the MIR for the sponsor to meet alone should not be higher than the amount established at £13,400 by the MAC as the bare minimum to satisfy the benefits and net fiscal approach, i.e., the family would not become a 'burden on the state' and on the taxpayer.[217] Such an amount would be sufficiently close to the adult minimum wage on a 40 hour week job. This would be a compromise between the UK government's aim to protect its economic interests whilst establishing a lower threshold which enables more individuals to meet the MIR than the one can currently in place.

Thirdly, for each application, the MIR policy should take into consideration the earning capacity of the partner of the sponsor once they have been granted the relevant documentation and authorisation to work in the UK. This would approximate the MIR to the reality, where usually a family composed by two adults who can work can generate a more balanced share of financial responsibilities to ensure an adequate life for the whole family, rather than placing all the financial burden solely on the sponsor. This could be conducted through a method of assessment that estimates the earning potential of the applicant, which could be supported, for instance, by a job offer for employment commencing after the entry of the non-EEA partner in the UK.

Lastly, the UK has National Minimum Wage (NMW) rates equally applicable in its whole territory.[218] However, different regions in the country entail different living costs, which consequently alters the average salaries of the jobs offered in those places. For this reason, a place such as London will have more employment with

[217] Migration Advisory Committee (n 8) para 5.3.
[218] *See* Appendix 4.

higher salaries and less jobs with lower salaries.[219] The current MIR threshold, however, does not take into consideration such differences, but contrarily is stipulated based on a national average calculation. This might not affect so intensively an individual employed in a city with higher salary jobs, but it severely hinders the likelihood of those adult workers who live in a city where wages are considerably lower to meet the MIR. The policy would adopt a more humane look upon the issue if, in addition to the previous recommendations, it considered the income regional gaps.

These recommendations for law reform attempt to enhance the enjoyment of human rights by the applicants as well as the sponsors who are aiming to fulfil the MIR under the family migration route, especially in regards to their right to marry, right to private and family life, and prohibition of discrimination established in the ECHR and enshrined into UK domestic law by the Human Rights Act 1998. They would require dedication, financial investment in research and implementation of new systems and methods of assessing applications. They would also depend on the will of the UK to commit to its obligations as a State to respect, protect and fulfil human rights.

[219] *See* Appendix 5.

CHAPTER 7: CONCLUSION

In 2012, the UK introduced a new set of requirements for the family migration route. Appendix FM of the Immigration Rules established, among other non-financial requirements, the Minimum Income Requirement. The general rule requires that in case a British national or settled resident would like to bring family members to join them in the UK to live and reside, the British national or settled resident must be the sponsor of the applicant and prove they earn an annual gross salary of at least £18,600 as the main form of satisfying the MIR. This thesis focused on the particular case when the applicant is the partner/spouse of the sponsor. It also briefly discussed the impact the MIR has on children when they are involved in the situation.

The motives officially presented by the Government for introducing the MIR policy are to prevent a burden on the State and on the taxpayer whilst also promoting integration of the non-EEA family members. In the context of the Hostile Environment Policy and Brexit, it is evident that the financial aspect is not the only determining factor for establishing the MIR and, more specifically, a threshold considerably difficult to be met. British politics have been indicating over this decade that immigrants are not perceived as positive assets to the country. The stigma encouraged by the Government's actions is that immigrants are unable to contribute to the country as much as any other British citizen would. Instead, as Theresa May stated herself, their main objective in terms of immigration is to reduce by hundreds of thousands the number of immigrants.

It is not surprising, then, that Brexit is becoming an inevitable reality by the day. The EU has as one of its core-aims the promotion of the European values, which includes the respect for human rights and human dignity, as well as for democracy, the rule of law, freedom, and equality. The UK, in turn, remains certain that their own national interests and British culture and values are different and more valuable than sharing common values and belonging to a unique political and economic union that reinforces the idea of unity rather than division. This serves as indication that the anti-migrant political agenda of the UK is not only towards those coming from developing, poor, or in-conflict countries, but that, in fact, their fight is against all individuals who are not perceived as British.

The UK has signed and ratified the ECHR and is currently under the contentious jurisdiction of the ECtHR. The provisions of the ECHR were incorporated into domestic British law through the Human Rights Act 1998. When considering the right to private and family life (Article 8), right to marry (Article 12) and prohibition of discrimination (Article 14), it is evident that the MIR has engendered a substantial number of negative consequences which are conflicting with those provisions of the ECHR. The statistics indicate that a considerable portion of the British population is not able to meet the MIR and thousands of families, including children, are living their lives separated and, sometimes, being torn apart due to the geographical distance such policy imposes on those applying for family visas. An interpretation of the Articles in question based on the European standards of the Council of Europe served as a foundation to the development of the argument that the MIR policy does not meet the human rights standards expected from the UK.

This thesis presented how, in practice, the lives of individuals have been negatively affected to the extent that the only alternative remaining was for them to challenge such a policy within the judicial system. In this sense, several cases were analysed and judged. Appeals, refusals and grants of different rights can be observed in distinct instances. These claims concerned the same rights discussed in Chapter 4 of this thesis. In 2017 the UK Supreme Court acknowledged that the MIR causes hardship to many thousands of families who intend to live together in the UK. However, in their interpretation, the MIR is not incompatible with the ECHR rights or unlawful at common law, because such a policy is necessary to ensure families would not be in a position where they depend on welfare benefits. In this sense, the Court upheld that the interference with Article 8, for instance, is justified.

This understanding, nonetheless, is not unanimous within the British judicial system. At the High Court instance, Mr Justice Blake, when judging the case of MM, Abdul Majid and Shabana Javed, presented arguments which are similar to the ones developed in this thesis. The main argument is that the MIR would be lawful in respect to Article 8 if it satisfied all the conditions for interference established by its paragraph 2, namely be ‘in accordance with the law’, pursue a

‘legitimate aim’ and be ‘necessary in a democratic society’. However, the questionable practical results it has achieved in combination with the disproportionate consequences it has created to individuals does not appear to pass the proportionality test of the ‘legitimate aim’ condition, and therefore such an interference with individuals’ right cannot be regarded as justified.

In the case of families composed not only by the two adult partners, but also by children, the circumstances become even more delicate, as the rights of the child must also be taken into consideration. The thesis presented a sample of the harsh effects the MIR is imposing upon children without safeguarding their prerogatives, especially the best interest of the child. In this sense, the disproportionality of the results of the MIR to its legitimate aim becomes even more substantial, which in turn makes the policy even less justifiable.

Indeed, this is a matter of a high degree of complexity, and therefore there are no straight and easy answers as to how to solve it in a manner that satisfies and protects all interested parties. The UK Government’s priority is evidently to safeguard national interests, and especially the ones of an economic nature when considering the MIR, as well as their State’s sovereignty. Their justification for limiting individuals’ human rights in the context of the policy in question relies on the argument that such an interference is justified due to the applicability of their margin of appreciation in the pursuit of a necessary and legitimate aim, which, in their understanding, is a fair balance between the competing interests of the State and the individuals’. This thesis counter-argues this by contending that their perspective is based on the broadening of the UK’s margin of appreciation scope which does not appear to match the European standards. In fact, it surpasses the boundaries of such a margin of appreciation, because when considering the harmful results and inhumane consequences such policy has been causing in individuals’ lives, one argues that the fulfilment of the ‘legitimate aim’ condition becomes impossible. This is due to the fact that such flagrant consequences are disproportionate to the UK’s legitimate aim, and therefore the country fails to pass the proportionality test. For this reason, under the human rights model, this policy must not be regarded as lawful nor just.

At the time of writing, the ECtHR has not been confronted with complaints concerning the MIR policy yet. Nevertheless, the argumentation developed in this thesis is based on interpretations of rights within the framework of the Council of Europe. The analysis of Articles 8, 12 and 14 of the ECHR indicates that the MIR conflicts with the standards established by the Convention and the ECtHR. As human beings, family plays a fundamental role in the individual process of becoming a member of society. In this sense, an immigration policy which filters those who are allowed to enjoy such a crucial component of the human life is problematic in itself. From a human rights perspective, this worsens when considering that the method utilised to distinguish one individual from the other is based on a financial criterion. Furthermore, not only are the criteria financial, but the threshold is considerably higher than the minimum wage, which is purposefully defined as such to doom a portion of the population to failure. In this sense, the MIR establishes that only individuals who are privileged enough to belong to a certain income threshold are entitled to have a family life based in the UK by fully enjoying their rights. Under international human rights law, this cannot be regarded as lawful.

Therefore, when the times comes that the ECtHR judges a case in which the MIR is responsible for the breach ECHR provisions, one expects that the ruling of the respective Court will be in accordance with this interpretation of the rights in question, especially in regards to the right to private and family life. The most preferable outcome for those whom this policy primarily affects would be, then, different from the decision of the UKSC. It is of the utmost importance that States do not prioritise money to the detriment of human rights of individuals and reaffirm their commitment to respecting, protecting and fulfiling them. If States start to deviate from such obligations, society as a whole risks losing the standards achieved by international human rights law which have so slowly been built over the past 70 years.

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APPENDICES

Appendix 1: Table providing statistics of different groups in relation to the satisfaction or the MIR.[220]

Table 2 Share not meeting the thresholds by key characteristics and descriptive statistics of key independent variables

Variable	Not meeting actual threshold (%)		Not meeting MW threshold (%)		Descriptive statistics			
					All		In work	
	All (1)	In work (2)	All (3)	In work (4)	Mean (5)	SD (6)	Mean (7)	SD (8)
All	61.9%	41.7%	51.5%	25.7%				
Female	72.6%	55.6%	61.5%	37.7%	0.5562	0.4968	0.5269	0.4993
Male	48.6%	26.2%	39.0%	12.4%	0.4438	0.4968	0.4731	0.4993
White British	61.3%	41.7%	50.6%	25.6%	0.8987	0.3018	0.9144	0.2798
Non-White British	67.7%	41.5%	60.0%	27.5%	0.1013	0.3018	0.0856	0.2798
Indian	60.9%	37.5%	52.1%	23.5%	0.0205	0.1416	0.0196	0.1388
Black	64.1%	38.9%	55.7%	24.8%	0.0200	0.1401	0.0181	0.1331
Pakistani	83.2%	54.3%	76.7%	36.6%	0.0156	0.1241	0.0088	0.0934
Other ethnics	67.1%	41.8%	59.7%	28.7%	0.0452	0.2077	0.0391	0.1939
Higher degree	40.9%	24.4%	32.9%	14.1%	0.3523	0.4777	0.4217	0.4938
A levels	65.2%	48.0%	52.5%	29.0%	0.2324	0.4223	0.2382	0.4260
GCSE	72.4%	56.7%	59.2%	35.9%	0.2277	0.4194	0.2224	0.4158
Other/No edu	84.7%	62.6%	76.1%	41.6%	0.1876	0.3904	0.1178	0.3223
Scotland	62.6%	41.4%	51.9%	24.5%	0.0898	0.2860	0.0878	0.2830
Wales	67.6%	46.6%	56.3%	27.9%	0.0510	0.2199	0.0473	0.2124
South West	62.5%	45.1%	51.1%	28.5%	0.0893	0.2852	0.0935	0.2912
South East	55.8%	36.8%	46.5%	23.5%	0.1357	0.3424	0.1453	0.3524
London	56.2%	28.6%	50.3%	18.9%	0.0905	0.2870	0.0850	0.2789
East	58.3%	38.4%	49.0%	24.5%	0.0953	0.2937	0.0987	0.2982
West Midlands	65.3%	44.0%	54.5%	26.6%	0.0843	0.2779	0.0799	0.2712
East Midlands	62.6%	43.7%	51.3%	26.6%	0.0823	0.2748	0.0837	0.2769
Yorkshire	64.7%	46.4%	53.1%	28.9%	0.1032	0.3042	0.1042	0.3056
North West	64.8%	45.1%	53.1%	27.0%	0.1273	0.3334	0.1253	0.3311
North East	68.1%	49.1%	55.7%	29.1%	0.0512	0.2203	0.0490	0.2160
Age					42.92	13.79	41.79	12.18
Observations					194,071	194,071	126,717	126,717

Estimated using UK LFS End User Licence data for 2012–2017. Please see the Data Appendix for definition of variables. The sample only includes UK citizens

[220] Extracted from Madeleine Sumption and Carlos Vargas-Silva, 'Love Is Not all you Need: Income Requirement for Visa Sponsorship of Foreign Family Members' (2018) Journal of Economics, Race, and Policy 62, 68.

Appendix 2: Regression results for those in work (excludes self-employed).[221]

Table 4 Regression results for those in work (excludes self-employed)

Independent variable	(1)	(2)	(3)	(4)	(5)	(6)
	Dependent variable					
	Not meet actual threshold			Not meet minimum wage threshold		
	Gender (base male)					
Female	0.3024*** (0.0025)	0.3028*** (0.0025)	0.3155*** (0.0026)	0.2593*** (0.0023)	0.2596*** (0.0023)	0.2695*** (0.0024)
	Ethnicity (base White British)					
Indian		0.0432*** (0.0090)	0.1190*** (0.0128)		0.0300*** (0.0083)	0.0865*** (0.0118)
Black		0.0407*** (0.0095)	0.1444*** (0.0147)		0.0228*** (0.0087)	0.0819*** (0.0135)
Pakistani		0.1488*** (0.0133)	0.1961*** (0.0178)		0.1305*** (0.0121)	0.1512*** (0.0164)
Other ethnics		0.0689*** (0.0065)	0.1470*** (0.0093)		0.0702*** (0.0060)	0.1445*** (0.0085)
Non-White	0.0661*** (0.0047)			0.0580*** (0.0043)		
Female × Indian			−0.1474*** (0.0177)			−0.1098*** (0.0163)
Female × Black			−0.1749*** (0.0188)			−0.1000*** (0.0173)
Female × Pakistani			−0.1015*** (0.0263)			−0.0439* (0.0242)
Female × other ethnics			−0.1503*** (0.0127)			−0.1428*** (0.0117)
R^2	0.2177	0.2181	0.2199	0.1563	0.1567	0.1582
Observations	126,717	126,717	126,717	126,717	126,717	126,717

Estimations from linear probability models in which the dependent variable is a dummy equal to one if the individual does not earn enough to sponsor a visa for a spouse. Estimated using UK LFS End User Licence data for 2012–2017. Estimations include controls for education, region of residence, and age. Please see the Data Appendix for definition of variables. The sample only includes UK citizens in work (excludes self-employed)

[221] Extracted from Madeleine Sumption and Carlos Vargas-Silva, 'Love Is Not all you Need: Income Requirement for Visa Sponsorship of Foreign Family Members' (2018) Journal of Economics, Race, and Policy 62, 71.

Appendix 3: Table of gender differentiated threshold for those in work.[222]

Table 5 Gender differentiated threshold for those in work

	Neutral	Actual	Difference
T_f	£15,550	£18,600	− £3050
T_m	£24,600	£18,600	+ £6000
$\frac{\tau_f F}{\sum_{i=1}^{F} y_{fi}}$	0.76	0.91	− 0.15
$\frac{\tau_m M}{\sum_{i=1}^{M} y_{mi}}$	0.76	0.57	+ 0.19
$\frac{\sum_{i=1}^{F} T_{fi}}{F}$	0.45	0.56	− 0.11
$\frac{\sum_{i=1}^{M} T_{mi}}{M}$	0.43	0.26	+ 0.17
$\frac{\sum_{i=1}^{F} T_{fi} + \sum_{i=1}^{M} T_{mi}}{F+M}$	0.44	0.44	0

A 'neutral' threshold is one which restricts 44% of the UK workforce from being a sponsor and threshold to income ratio is the same across genders. See Eqs. 3 to 5 of the paper and related discussion for further details. Estimated using UK LFS End User Licence data for 2012–2017

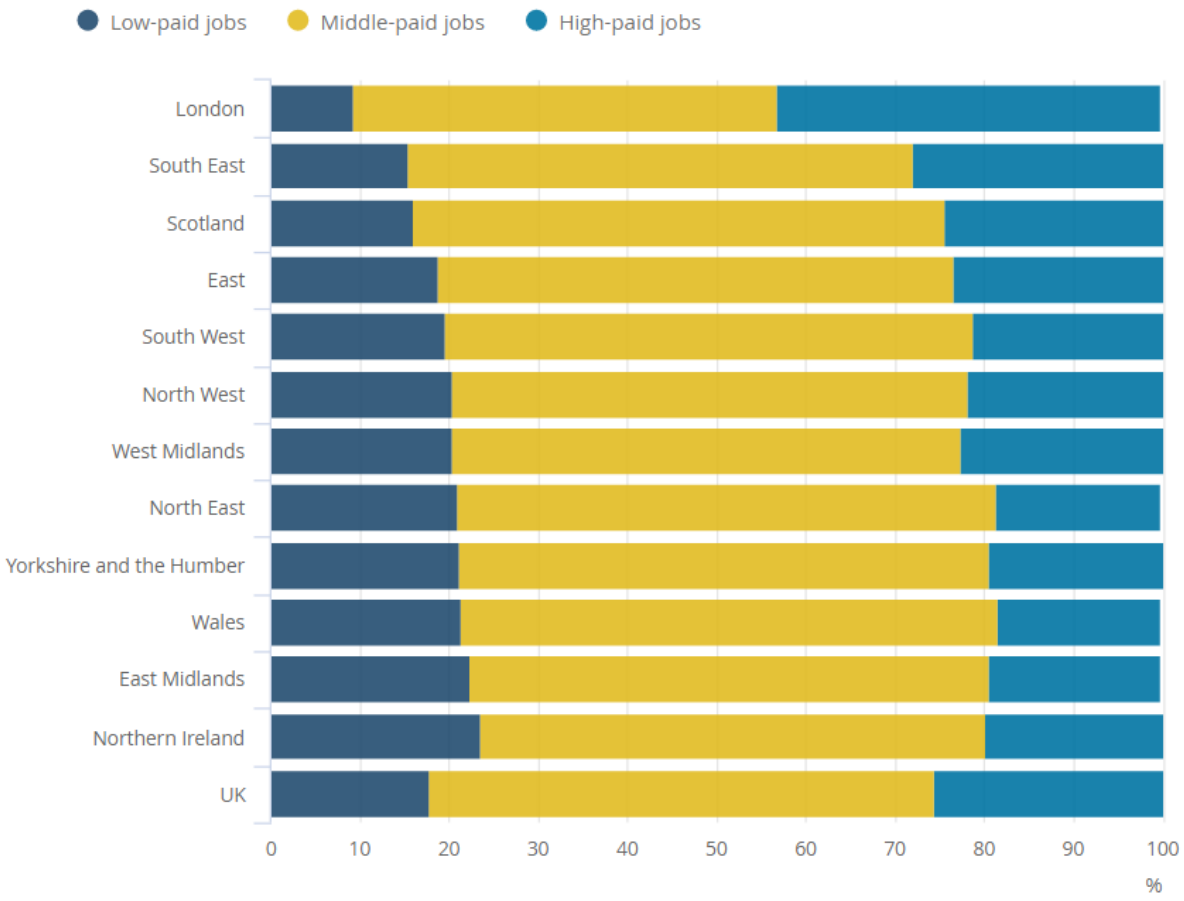
[222] Extracted from Madeleine Sumption and Carlos Vargas-Silva, 'Love Is Not all you Need: Income Requirement for Visa Sponsorship of Foreign Family Members' (2018) Journal of Economics, Race, and Policy 62, 72.

Appendix 4: Table of Minimum Wage Rates from 1 April 2019.[223]

YEAR	25 AND OVER	21 TO 24	18 TO 20	UNDER 18	APPRENTICE
2019	£8.21	£7.70	£6.15	£4.35	£3.90
2018	£7.83	£7.38	£5.90	£4.20	£3.70
2017	£7.50	£7.05	£5.60	£4.05	£3.50
2016	£7.20	£6.95	£5.55	£4.00	£3.40
2015	£6.70	£6.70	£5.30	£3.87	£3.30
2014	£6.50	£6.50	£5.13	£3.79	£2.73
2013	£6.31	£6.31	£5.03	£3.72	£2.68
2012	£6.19	£6.19	£4.98	£3.68	£2.65
2011	£6.08	£6.08	£4.98	£3.68	£2.60
2010	£5.93	£5.93	£4.92	£3.64	£2.50

[223] Extracted from Minimum Wage, 'National Minimum Wage Rates' (Minimum Wage) < http://www.minimum-wage.co.uk/ > accessed 8 May 2019.

Appendix 5: Table of Proportion of low-paid and high-paid employee jobs, by regions and countries, UK, April 2018.[224]



[224] Extracted from Roger Smith, *Gender pay gap in the UK: 2018* (Office for National Statistics 2018) 5.