



Neutral Citation Number: [2022] EWHC 2591 (Admin)

Case No: CO/3501/21

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/10/2022

Before :

MRS JUSTICE LIEVEN

Between :

THE QUEEN
on the application of

AM

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

Ms Rebecca Chapman (instructed by **Islington Law Centre**) for the **Claimant**
Mr James Fletcher (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: **12 July 2022**

Approved Judgment

This judgment was handed down remotely at 10.30am on 14 October 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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Mrs Justice Lieven DBE :

1. This is an application for judicial review of one part of the Immigration Rules contained in Appendix FM, specifically the Domestic Violence Indefinite Leave to Remain (“DVILR”) section of the Rules.
2. The Claimant is a citizen of Pakistan. She has been a victim of domestic violence which culminated in what is described as transnational marriage abandonment (“TMA”), leading to her being stranded in Pakistan and separated from her 2 year old British child for 8 months. It is the absence of provision in the DVILR for such cases which is the matter challenged in this case.
3. The Claimant was represented by Ms Rebecca Chapman and the Defendant was represented by Mr James Fletcher.

The Facts

4. The Claimant is a national of Pakistan born in 1991. In 2017 she married IM, a British citizen, and she arrived in the UK in December 2017 on a spousal visa valid until August 2020. In December 2018 she gave birth to a daughter, X.
5. The Claimant says she has been subject to severe financial, physical, emotional and sexual domestic abuse. On 3 December 2021 Mrs Justice Theis sitting in the Family Division of the High Court made findings of very serious domestic abuse against the Father. What is set out below is the Claimant’s account of what happened to her. None of her evidence is disputed by the Defendant.
6. The violence inflicted by IM on his wife resulted in severe and long-lasting physical harm including the removal of one of her ovaries, and a diagnosis of achalasia type 2, which resulted in a weight loss of over 30 kilos.
7. In September 2020, having been hospitalised, the Claimant disclosed to her medical professionals, the police, social services, and the organisation Hestia the abuse she had been subjected to by her husband. Her case was heard at a Multi-Agency Risk Assessment Conference (“MARAC”) as it was regarded as a high risk case.
8. In December 2020, IM effectively forced the Claimant to travel to Pakistan, ostensibly on a holiday to resolve their marital difficulties. The Claimant initially refused and disclosed to social services her fears that she would be abandoned in Pakistan. However, IM threatened to harm the Claimant’s family in Pakistan if she refused to travel, leaving her with no choice but to agree. IM reassured social services that the family would return to the UK by March 2021.
9. On 9 January 2021, the family travelled to Pakistan. IM went to stay with his family, while the Claimant and her daughter stayed with the Claimant’s parents. Between 10 and 15 January 2021, the Claimant’s husband picked X up daily for a period of 2 hours. On 15 January 2021 IM did not return X back to the Claimant, who then did not see her daughter until they were reunited in the UK on 26 September 2021.
10. The Claimant sought help from UK based organisations to return to the UK and be reunited with her daughter. She also received death threats from her brother-in-law, as

a result of which she was forced to start moving between her parents' house and an aunt's house to avoid her husband's family knowing her exact whereabouts at any given time. On 15 February 2021, the Claimant was informed by the police that her husband had been detected at Heathrow Airport with X.

11. On 5 March 2021, the Claimant, relying on advice from a member of staff of the British Embassy in Pakistan and the Visa Application Centre in Karachi, applied for a replacement Biometric Residence Permit. On 10 March 2021, the application was refused on the basis that she did not have valid leave to return when she left the United Kingdom. The Claimant then instructed Islington Law Centre on 18 March 2021, which on 12 April 2021 submitted an urgent and detailed application for a fee waiver for the Claimant, enclosing evidence of her finances, the domestic abuse she was a victim of in the UK and her abandonment in Pakistan and separation from her daughter. They also informed the Defendant that the Claimant would need to be in the UK by 1 July 2021 to attend Family Court proceedings, and that the Secretary of State should facilitate and expedite her return to the UK.
12. The Defendant failed to respond or to grant a fee waiver. Consequently, the Claimant's solicitors applied for and were granted emergency funding by the Legal Aid Agency on 16 June 2021. An urgent application for judicial review of the delay in deciding the application for a fee waiver was lodged with the Upper Tribunal on 17 June 2021 and later the same day Upper Tribunal Judge Allen ordered that the Defendant reach a decision by 4pm on 24 June 2021. In a decision dated 22 June 2021, the Defendant granted the application for a fee waiver.
13. Thereafter, on 30 June 2021, the Claimant's solicitors made representations on her behalf in support of an application for Indefinite Leave to Enter on the basis of domestic abuse. No decision was received, but on 30 July 2021 the Claimant was issued with a visa for 6 months leave to enter outside the Rules, with no recourse to public funds.
14. The Claimant re-entered the UK on 20 August 2021. An interim Order was made by the Family Court on 2 August 2021 that X be returned to her mother's care. However, the fact that she had no recourse to public funds and no accommodation, precluded this from taking place until Sunday 26 September 2021 when Southall Black Sisters provided the Claimant and X with accommodation.
15. On 1 September 2021, the Claimant's solicitors sent the Defendant a pre-action protocol letter challenging the decision to only grant a limited visa for 6 months leave to enter with no recourse to public funds.
16. On 24 September the Family Court (Mrs Justice Theis) ordered that IM return X to the Claimant's care.
17. On 9 November the Defendant granted the Claimant 30 months further leave to remain. On 24 June 2022 the Defendant granted the Claimant Indefinite Leave to Remain ("ILR").
18. In the light of the fact that the Claimant has now lawfully returned to the UK and has been granted ILR, the Defendant submits that the claim is academic and the Court should dismiss on that basis. I will return to that issue in my conclusions below.

The Grounds

19. The Claimant advances five Grounds:
- a. That the DVILR provisions are unlawful because they are contrary to the underlying purpose of this part of the Immigration Rules;
 - b. That the DVILR unlawfully discriminate against victims of transnational marriage abandonment;
 - c. That the failure to grant Indefinite Leave to Enter is unlawful as being contrary to the Defendant's Leave Outside the Rules policy;
 - d. That the failure to grant Indefinite Leave to Enter is contrary to s.55 of the Borders, Citizenship and Immigration Act 2009;
 - e. That the failure to grant Indefinite Leave to Enter is contrary to Article 8 of the European Convention of Human Rights ("ECHR").

The Relevant Law

20. The provisions relating to victims of domestic abuse who are present in the UK are set out in Section DVILR of Appendix FM of the Immigration Rules, which provides:

"Victim of domestic abuse

Section DVILR: Indefinite leave to remain (settlement) as a victim of domestic abuse

DVILR.1.1. The requirements to be met for indefinite leave to remain in the UK as a victim of domestic abuse are that-

(a) the applicant must be in the UK;

(b) the applicant must have made a valid application for indefinite leave to remain as a victim of domestic abuse;

(c) the applicant must not fall for refusal under any of the grounds in Section S-ILR: Suitability-indefinite leave to remain; and

(d) the applicant must meet all of the requirements of Section E-DVILR: Eligibility for indefinite leave to remain as a victim of domestic abuse.

Section E-DVILR: Eligibility for indefinite leave to remain as a victim of domestic abuse

E-DVILR.1.1. To meet the eligibility requirements for indefinite leave to remain as a victim of domestic abuse all of the requirements of paragraphs E-DVILR.1.2. and 1.3. must be met.

E-DVILR.1.2. The applicant's first grant of limited leave under this Appendix must have been as a partner (other than a fiancé(e) or proposed

civil partner) of a British Citizen, a person present and settled in the UK, a person with refugee leave, or a person in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d), under paragraph D-ECP.1.1., D-LTRP.1.1., or D-LTRP.1.2. of this Appendix, or as a partner of a refugee granted under paragraph 352A, and any subsequent grant of limited leave must have been:

(a) granted as a partner (other than a fiancé(e) or proposed civil partner) of a British Citizen, a person present and settled in the UK, a person with refugee leave, or a person in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d), under paragraph D-ECP.1.1., D-LTRP.1.1. or D-LTRP.1.2. of this Appendix; or

(b) granted to enable access to public funds pending an application under DVILR and the preceding grant of leave was granted as a partner (other than a fiancé(e) or proposed civil partner) of a British Citizen, a person present and settled in the UK, a person with refugee leave, or a person in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d), under paragraph D-ECP.1.1., DLTRP.1.1. or D-LTRP.1.2. of this Appendix; or

(c) granted under paragraph D-DVILR.1.2.

E-DVILR.1.3. The applicant must provide evidence that during the last period of limited leave as a partner of a British Citizen, a person present and settled in the UK, a person with refugee leave, or a person in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d), under paragraph D-ECP.1.1., DLTRP.1.1 or D-LTRP.1.2 of this Appendix, or during their only period of leave under paragraph 352A, the applicant's relationship with their partner broke down permanently as a result of domestic abuse.

Section D-DVILR: Decision on application for indefinite leave to remain as a victim of domestic abuse

D-DVILR.1.1. If the applicant meets all of the requirements for indefinite leave to remain as a victim of domestic abuse the applicant will be granted indefinite leave to remain.

D-DVILR.1.2. If the applicant does not meet the requirements for indefinite leave to remain as a victim of domestic abuse only because paragraph S-ILR.1.5. or S-ILR.1.6. applies, the applicant will be granted further limited leave to remain for a period not exceeding 30 months.

D-DVILR.1.3. If the applicant does not meet the requirements for indefinite leave to remain as a victim of domestic abuse, or further limited leave to remain under paragraph D-DVILR.1.2. the application will be refused.”

21. The effect of these provisions is that if the applicant was the partner of a UK citizen or a person with settled status; is present in the UK; and is the victim of domestic abuse,

then they will (subject to the other criteria) be entitled to indefinite leave to remain. It is the Claimant's case that at least one reason for the apparent growth in TMA is an attempt by the perpetrators to evade the effect of the DVILR, because if the victim is not present in the UK they cannot take advantage of these provisions. The effect is to leave the abandoned spouse overseas with no legal right to return to the UK.

22. In the Scottish case of *A v SSHD* [2016] CSIH 38, the Inner Court found at [66] with regard to the underlying purpose of the DVILR provisions that:

“The aim of the measure in question is said to be that the spouses of those settled in the UK should be treated differently from the spouses of those without that status. The rationale for doing so is that the former are likely to have a reasonable expectation of settlement in the UK, and thus to have cut or loosened their ties with their country of origin in that expectation, whereas the spouses of the latter could have no such expectation, and would be less likely to cut or loosen those ties.”

The Secretary of State accepts that this is an accurate summary of the aims of the DVILR provisions.

23. The statutory obligations imposing a duty to promote the welfare of children in the UK are contained in Section 55 of the Borders, Citizenship and Immigration Act 2009, which provides inter alia that:

“(1) The Secretary of State must make arrangements for ensuring that—

(a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and

(b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.

(2) The functions referred to in subsection (1) are—

(a) any function of the Secretary of State in relation to immigration, asylum or nationality;

(b) any function conferred by or by virtue of the Immigration Acts on an immigration officer ...”

24. The Home Office policy guidance “*Leave to Remain Outside the Rules*” (27.2.18, version 1) provides at pages 6-7:

“Reasons to grant LOTR

Compelling compassionate factors are, broadly speaking, exceptional circumstances which mean that a refusal of entry clearance or leave to remain would result in unjustifiably harsh consequences for the applicant or their family, but which do not render refusal a breach of ECHR Article

8, *refugee convention or obligations*. An example might be where an applicant or relevant family member has experienced personal tragedy and there is a specific event to take place or action to be taken in the UK as a result, but which does not in itself render refusal an ECHR breach. Where the Immigration Rules are not met, and where there are no exceptional circumstances that warrant a grant of leave under Article 8, Article 3 medical or discretionary leave policies, there may be other factors that when taken into account along with the compelling compassionate grounds raised in an individual case, warrant a grant of LOTR. Factors, in the UK or overseas, can be raised in a LOTR application. The decision maker must consider whether the application raises compelling compassionate factors which mean that the Home Office should grant LOTR. Such factors may include:

- *emergency or unexpected events*
- *a crisis, disaster or accident that could not have been anticipated.*

LOTR will not be granted where it is considered reasonable to expect the applicant to leave the UK despite such factors. Factors, in the UK or overseas, can be raised in a LOTR application. These factors can arise in any application type.” (emphasis added)

25. The Home Office policy guidance with regard to “*Rights of Appeals*” provides that where applicants cannot find an appropriate form or believe that they cannot meet the requirements of the Immigration Rules, they must complete the form for the route which most closely matches their circumstances.
26. The President of the Family Division has produced a Practice Direction on *Child Arrangements and Contact Orders; Domestic Abuse and Harm* (PD12J), which at paragraph 2B includes “transnational marriage abandonment” as one example of domestic abuse. Although this is guidance not law, it is apparent that for the purposes of Family Court proceedings such abandonment should and would be treated as a form of domestic abuse.

The Evidence on Transnational Marriage Abandonment

27. The Claimant has produced a body of evidence in relation to the phenomenon of TMA. I note at this point that the Defendant has chosen to produce no evidence in this case, whether as to the scale of the problem of TMA or as to the justification for the lack of any provision in the Rules. The Defendant does not dispute any of the Claimant’s factual evidence.
28. In the light of the Defendant’s failure to produce any evidence, it is not possible to establish with any confidence the number of people affected, or in clear statistical terms the broad characteristics of the cases that exist. The only body which would hold this information is the Home Office, and although it was suggested by Mr Fletcher that it would be difficult to provide the factual data because it might be held by Entry Clearance Offices in various places, the Court does not even have a witness statement giving any evidence as to difficulties in data collection. Therefore, the only evidence upon which I can proceed is that from the Claimant.

29. Much of the information in this area has been collated by Southall Black Sisters (“SBS”), an NGO set up in 1979 to meet the needs of black and minority women. The Claimant relies on a letter from SBS to the Court dated 13 October 2021 written by Ms Patel, the then director of SBS. In that letter SBS refer to having handled around 70 cases of TMA over the last 5 years. Some of the women had children who were brought back to the UK by the perpetrators or their families, whilst some were abandoned with their children and some when pregnant. Although in principle the practice could involve male victims, SBS states that it is a gendered phenomenon where the victims appear always to be women, and the Court’s attention has not been drawn to any cases where the victims were men.
30. SBS states that that the two key identifying features of TMA are the deception by which the woman is deceived into leaving the UK and the deliberate infringement of the woman’s rights. TMA always occurs in the context of other forms of gender related harm and abuse, and the abandonment is often the final act of control by the perpetrator. SBS say that from their casework, the periods involved, in which the mothers are separated from their children, or excluded from the UK, range from 6 months to 8 years, with an average period of around 3 years. They state that many women abandoned do not have any, or sufficient, knowledge of their rights under UK immigration and family law and this acts as a major barrier to seeking redress. The perpetrators’ position as a British national or person settled in the UK gives them a significant advantage in terms of divorce, financial settlement and child arrangements.
31. SBS say that many of the women who come to them have contacted numerous different organisations over months and sometimes years and have often received inaccurate or conflicting information.
32. Both SBS and Ms Gbikpi, the Claimant’s solicitor from Islington Law Centre, say that a frequent problem is that even where a Family Division Judge in the High Court, who is considering Children Act 1989 proceedings, requests the Home Office to allow the woman into the UK to engage in legal proceedings, the Entry Clearance Officers frequently refuse them leave to enter. There can then be a protracted struggle to obtain entry clearance. These kind of difficulties are set out by reference to specific case examples by Ms Gbikpi and Ms Jahangir of Dawson Cornwall (a solicitors firm that specialises in international family law cases).
33. The Claimant’s witnesses refer to a number of individual cases of TMA. Although the specific facts necessarily vary, the core characteristics arise in all or virtually all the cases. The victims of the abandonment are women who have been the victims of domestic abuse, and the abandonment comes as the culmination of that abuse. In a very large proportion of cases the women are mothers of the perpetrator’s child or children, who are either separated from their mother and brought back to the UK, or who are also abandoned. In the latter situation the child cannot return to the UK unless s/he is separated from her/his mother. In all cases, the women have had significant difficulties being able to re-enter the UK, although the scale of that difficulty and the length of time involved varies considerably.
34. Ms Patel also refers to the involvement of SBS in the Destitution and Domestic Violence Concession by the Home Office in 2010, which put the DVILR protection into the Immigration Rules. She suggests that TMA was not previously a known phenomenon and it appears that the practice of abandoning spouses overseas may, at

least in part, be an attempt by perpetrators to avoid the protection given in the Rules for foreign spouses abused in the UK.

35. The Defendant does not dispute any of the Claimant's evidence. Mr Fletcher relies on the fact that the Home Office has been considering TMA and a policy response for some time, albeit such work has no fixed timetable, and he accepts it is unclear when (and necessarily if) it will come to any fruition. I note again that the Defendant has not filed any evidence as to this process of consideration, and the only evidential reference to it therefore comes from the Claimant's witnesses.

Is the case academic?

36. The first issue is whether the case is "academic" in the sense that the determination of the proceedings will make no substantive difference to the Claimant. Mr Fletcher argues that it is now academic because the Claimant has been granted ILR, and as such it would make no difference to her if the case succeeded. After some prompting by the Court, Ms Chapman accepted that it was academic in this sense, but submitted that the Court should continue to consider the case because of its wider significance.
37. The leading authority on whether the Court should continue to hear a case that had become academic is that of the House of Lords in R v Secretary of State for the Home Department ex p Salem [1999] 1 AC 450. At [456] Lord Slynn said that appeals "*which are academic between the parties should not be heard unless there is good reason in the public interest for doing so.*"
38. In R (Rusbridger) v Attorney General [2004] 1 AC 357 at [35] Lord Hutton said that it was not the function of the courts "*to decide hypothetical questions which do not impact on the parties before them.*"
39. In R (Zoolife) v Secretary of State for the Environment, Food and Rural Affairs [2007] EWHC 2995, cited with approval by the Court of Appeal in R (Heathrow Hub) v Secretary of State for Transport [2020] EWCA Civ 213, the Court set out two conditions for this test to be met at [209]:

"The first condition is ... that "a large number of similar cases exist or are anticipated" or at least other similar cases exist or are anticipated and the second condition is that the decision in the academic case will not be fact-sensitive".

40. Further nuance has been applied to these conditions. In R (DMA, AHK, BK and ELN) v Secretary of State for the Home Department [2020] EWHC 3416, Robin Knowles J was considering whether he should determine a challenge to the Secretary of State's decision not to provide the Claimant asylum seekers with accommodation. At [326] he considered the Secretary of State's argument that the claims were academic as the Claimants had by the time of the hearing been provided with suitable accommodation. At [329] to [331] he said:

"329. As will be apparent, in my judgment there is sufficient evidence to show the use of a system that (a) fails to meet the legal requirement of the duty, to provide accommodation within a reasonable time, measuring reasonable in the context of imminent breach of Article 3 , which (b)

apparently the Secretary of State and her officials did not know, and where (c) there is no proper monitoring.

330. In R (Razai) where cases illustrated "generic issues which, the Claimants say, demonstrate the unlawfulness" of a policy of the Secretary of State" Nichol J observed at [68]:

"If this occasion is not taken to consider them, there is a risk of further delay and potential injustice before another case can reach a final hearing."

Similarly, Johnson J faced with evidence that the issues in a challenge to the lawfulness of policy were recurring, said in R (Oleh Humnyntskyi and Others) at [198]:

"If they are not addressed in this case it is likely that other similar claims will be brought ... and the issues would soon need to be addressed in another case."

331. The present cases concern process rather than policy. However, I have no doubt that it would be wrong to decline to reach any conclusions where the material allows me to do so, as it does. Of course, in cases such as these where matters have moved on for the individual claimants it is important to proceed cautiously and to decide only what is appropriate and what is possible. But ultimately it has to be useful to all concerned, including to the Secretary of State and her officials, to know whether and where they are acting unlawfully. To take again the example in the case of AA, the Secretary of State accepts that there is no monitoring of the numbers of disabled applicants but does not accept that there needs to be. The Court cannot simply leave things there."

41. In my view Grounds One and Two in this case do satisfy the tests set out in *Salem* and the subsequent caselaw. They both involve challenges to the Respondent's failure to put in place an Immigration Rule to deal with the issue of TMA. In absolute terms the number of women who are impacted by TMA is not very high. It is not possible to determine any precise numbers, not least because the Secretary of State has chosen either not to collate the numbers, or not to put such material as she does have before the Court. The SBS letter refers to that organisation having dealt with approximately 70 cases over 5 years, but it is likely that the number is considerably higher than that given that SBS is simply one NGO. Therefore, one could conservatively estimate over 20 cases per annum, and it might be considerably more.
42. However, quite apart from the absolute numbers, the level of detriment caused to the women concerned (and often their children) must be relevant to the issue of whether it is appropriate for the court to determine the case. I am mindful of the duty of the Defendant under s.55 of the Borders Act, and the impact on the Article 8 rights of the mothers and children impacted by TMA.
43. Mr Fletcher argues that the cases are fact sensitive, and it is therefore not appropriate to determine AM's case given that other cases may be materially different. Inevitably each case will have its individual facts and those facts will have some relevance.

However, the key characteristics, as I have described them above, will arise in all or virtually all cases. Therefore, the parameters that would be addressed in any Rule or policy are ones that can be generally defined and considered.

44. He also submits that it is material that there are no other cases that have reached the court, and he suggests that this shows the issue is being appropriately dealt with. However, in my view this merely illustrates why it is important that the legal issues raised in this case are determined. The evidence strongly suggests that once a victim of TMA manages to get the right legal advice, and legal steps are taken on her behalf, then at some point the Secretary of State will grant her leave to enter. That seems to be the reason why no cases, where there has been a challenge to the Secretary of State's refusal of leave to enter, have reached the courts.
45. However, that does not overcome the problems set out by Ms Chapman, namely that it is very hard for the abandoned spouses to get the correct legal advice, to access funds to do so, and that there may be very considerable delay before they can do so. There is therefore considerable risk of injustice and hardship both to the women concerned, and their children, if this issue is not determined. There may also be a cohort of women who never do get the correct advice and are therefore hidden from any statistics as to the breadth of the problem. This case therefore falls within the principle set out by Nichol J in *Razai*: if this occasion before the Court is not taken there will be further delay and potentially injustice before the issue is determined.
46. However, Grounds Three, Four and Five all go to the specific facts of the Claimant's case and the failure to grant her leave to enter outside the Rules and ILR. These issues have now been dealt with by the grant of ILR. To the degree the Claimant's case raises issues that arise in many other similar cases, those issues are dealt within Grounds One and Two. Therefore, the final three grounds are genuinely academic and do not need to be dealt with by the Court.

Ground One

47. The Claimant's first Ground is that the DVILR section of the Immigration Rules is unlawful because by failing to make provision for TMA the Defendant has failed to meet the underlying purpose of the Rules. Ms Chapman submits that the underlying purpose of this part of the Immigration Rules is to protect women from domestic abuse and to allow foreign spouses to remain in the UK after their relationship has broken down on the grounds of domestic abuse. This is on the basis that such women would have had a legitimate expectation of staying in the UK if their relationships had not broken down.
48. She refers to the decision of the Scottish Court of Session (Lady Dorrian) in *Re A* at [80]:

“80. This is not in our view a case in which a policy choice on the critical question has in fact been made, with due consideration of the issues, looked at in the light of the government's policy both in relation to refugees and domestic violence. In the absence of any such choice or consideration, or any reasonable basis upon which a refugee could be equiparated to a worker/student, or the reasonable expectations of their spouses being as limited as those of the spouses of students/workers, and

having regard to the effect on the spouses of refugees, as well as the underlying aim of the domestic violence concession, we cannot say that the difference in treatment is proportionate. The position of those such as the claimer has simply not been brought into consideration. The effect on them is not an informed choice made by government upon due consideration, but appears to be an unintended by product of the changes introduced in 2005. We do not require to examine in depth the issue of the standard of review, because we are satisfied, even on the application of the higher test of whether the justification is manifestly without foundation, that the justification must be found wanting. We fully agree that policy choices of government are deserving of significant respect and we would not demur from the application of such a test. We note, however the words of Lord Dyson in R (MA) v Secretary of State for Work & Pensions [2014] PTSR 584 :

“60 I acknowledge that, despite the fact that we should (i) apply the manifestly without reasonable foundation test and (ii) exercise considerable caution before interfering with the scheme approved by Parliament, we are obliged to scrutinise carefully the reasons advanced by the Secretary of State in justification of his scheme: see the Humphreys case [2012] PTSR 1024 , para 22 and R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening) [2012] 1 AC 621 , paras 45, 46 and 61, per Lord Wilson JSC. That is particularly important since we are dealing with a vulnerable group (disabled persons) and the discrimination is closely connected with their disabilities.””

49. She referred to Practice Direction 12J (PD12J) produced by the President of the Family Division, which at paragraph 2B states that TMA is a form of domestic abuse.
50. She submits that the Defendant does not dispute that TMA is domestic abuse, and that the DVILR are intended to protect women from such abuse. She therefore argues that the failure to make provision for this form of abuse amounts to a failure to meet the purpose of the Rules.
51. The Defendant submits that such cases can be dealt with where necessary by the applicant raising exceptional circumstances, by the Defendant granting leave to enter outside the operation of the Rules and then by making a further application once she is in the UK. However, Ms Chapman argues that this leaves an applicant entirely reliant on the Defendant’s discretion and with no legal right upon which she can rely. Further, by having to rely on Leave Outside the Rules and the exercise of discretion, there are inevitably considerably greater delays, which exacerbate the applicants’ vulnerabilities. This was certainly the position in the present case, and all the other cases referred to in the Claimant’s evidence.
52. Further, she submits without any provision in the Rules any victim of TMA has no right to a fee waiver, which creates a further and often very significant barrier to being able to return to the UK.
53. Mr Fletcher does not dispute that TMA is a form of domestic abuse, or that the DVILR is in part to protect women from such abuse. However, he submits that the lack of

provision does not render the Rules unlawful, and that the Defendant protects victims of abuse by the use of her discretion to grant Leave Outside the Rules.

54. I accept Mr Fletcher's submissions on this Ground. The starting point is that any Claimant arguing on common law principles that the Immigration Rules are unlawful faces a difficult task, as explained by Lady Hale at [2] in *R (Bibi) v Secretary of State for the Home Department* [2015] 1 WLR 5055:

“The appellants argue that the Rule is an unjustifiable interference with the right to respect for private and family life, protected by article 8 of the European Convention on Human Rights (“ECHR”); or that it is unjustifiably discriminatory in securing the enjoyment of that right, contrary to article 14 of the ECHR ; or that it is irrational and therefore unlawful on common law principles. They have set themselves a difficult task. It may well be possible to show that the application of the Rule in an individual case is incompatible with the Convention rights of a British partner, as happened in the case of a different marriage rule in R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening) [2011] UKSC 45, [2012] 1 AC 621 . It is much harder to show that the Rule itself is inevitably unlawful, whether under the Human Rights Act 1998 or at common law, although this was possible in the case of yet another marriage rule, in R (Baiai) v Secretary of State for the Home Department (Joint Council for the Welfare of Immigrants intervening) (Nos 1 and 2) [2008] UKHL 53, [2009] AC 287 . It is not surprising, therefore, that Beatson J concluded that the fact that it might be possible to argue that the operation of the Rule was a disproportionate infringement of an individual's article 8 rights did not render the Rule itself disproportionate: [2011] EWHC 3370 (Admin), [2012] 2 All ER 653 (sub nom R (Chapti) v Secretary of State for the Home Department (Liberty intervening)), para 115. By a majority, the Court of Appeal reached the same conclusion: [2013] EWCA Civ 322, [2014] 1 WLR 208.”

55. Ms Chapman's argument is a species of a *Padfield* argument but does not rely on any statutory purpose. In *R (Padfield) v Minister of Agriculture* [1968] AC 997 the Secretary of State was found to have acted unlawfully because his decision fell outside the purpose of the statute he was purporting to act under. However here there is no suggestion that the protection of victims of domestic abuse is an express or implicit purpose of the Immigration Acts. Instead, Ms Chapman simply relies on a purpose extracted from the Rules themselves and in particular the DVILR, namely the protection of victims of domestic abuse. Ms Chapman does not point me to any authority for an analysis on this basis which would lead to the Rules being found to be unlawful.
56. However, even if this was a legitimate exercise which could in principle lead to illegality, it does not, in my view, do so in this case. The fact that the Defendant has chosen to give protection to victims of domestic abuse who are in the UK, including from spousal abandonment, in the DVILR, does not mean that a failure to give such protection in all respects is unlawful. There is no duty on the Secretary of State, whether in statute or the Rules, to make provision for all such victims and in all circumstances. That must be a matter for the Defendant, exercising her discretion when making the Rules, and not a matter of legal requirement.

57. There is therefore no error of law in not making a Rule to protect every situation or every individual's personal circumstances, even where they might fall within the broad purpose of one part of the Immigration Rules. Ms Chapman could point to no authority which would support such a broad application of the *Padfield* principle. I therefore dismiss this Ground.

Ground Two

58. Ms Chapman submits that the failure to make provision in the Immigration Rules for victims of TMA is in breach of Article 14 read with Article 8 of the European Convention on Human Rights ("ECHR") under the Human Rights Act 1998. She says that women who are the victims of spousal abandonment are given the protection of the DVLR if they are present in the UK when they are abandoned, but if they are tricked or persuaded by their abusive partners to travel to a third country (usually the country of origin) then they have no protection. She submits this is unlawful discrimination lacking in any rational justification.

59. The analytical framework to be applied by the Courts in cases concerning Article 14 has been set out in numerous cases, most recently by the Supreme Court in *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223. At [37] Lord Reed PSC said:

"37. The general approach adopted to article 14 by the European court has been stated in similar terms on many occasions, and was summarised by the Grand Chamber in the case of Carson v United Kingdom (2010) 51 EHRR 13, para 61 ("Carson"). For the sake of clarity, it is worth breaking down that paragraph into four propositions:

(1) "The court has established in its case law that only differences in treatment based on an identifiable characteristic, or 'status', are capable of amounting to discrimination within the meaning of article 14."

(2) "Moreover, in order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations."

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

(4) "The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background."

60. Mr Fletcher did not submit that the case did not fall within the ambit of Article 8. In my view this must be correct. AM's family life, and that of all women in her situation, is fundamentally impacted by their difficulties in re-entering the UK, caused at least in part by the absence of an applicable Immigration Rule. AM herself was separated from her daughter for some 8 months, and as I have explained above, the paradigm of these

cases is either that the woman is separated from her child(ren), or those children can themselves not return to the UK without their mother. It is therefore apparent that Article 8 is engaged by the lack of provision in the Rules for TMA.

61. The next issue is whether the difference of treatment is based on an “other status” within the meaning of Article 14. The status that Ms Chapman relies upon is that of the victims being outside the UK, as opposed to within it. That geographic location can in principle be accepted as a “status” is established from, amongst other cases, *Carson v UK* [2010] ECHR 338. That case concerned whether it was justified to treat Ms Carson differently for the purposes of State pension when she was resident in South Africa rather than in the UK.
62. In *R (A and B) v Secretary of State for Health* [2017] UKSC 41 the Supreme Court was considering a challenge to the failure to provide abortion services to women who were resident in Northern Ireland. The Supreme Court accepted that the fact of residence in Northern Ireland could give rise to a status within Article 14 and therefore the differential treatment from women in the rest of the UK, required justification. Lord Reed set out an analysis of the approach to “other status” on residence grounds at [46] to [49].
63. On the basis of that line of caselaw I accept that AM’s presence in Pakistan rather than the UK for the purposes of gaining protection from domestic abuse by spousal abandonment is a relevant status.
64. The next question is whether AM, having been abandoned in Pakistan, is in an analogous or relevantly similar situation to a spouse reliant on a spousal visa, who is abandoned in the UK, see [37(3)] of SC. In my view this issue has to be considered together with the next two stages of the analysis; whether the different treatment has an objective and reasonable justification and thus pursues a legitimate aim; and whether it is a proportionate means of achieving that aim. On the facts of this case the question of “Relevantly similar situation” and justification covers the same ground.
65. I note at this point in the analysis that the Defendant has not put forward any evidence as to her justification for not making any provision for victims of TMA. She is therefore solely reliant on Mr Fletcher’s submissions, which can rely upon matters on the face of the documents, but not on any witness evidence.
66. Most importantly, in contrast to many challenges to Immigration Rules, see for example *R (Britcits) v Secretary of State for the Home Department* [2017] EWCA Civ 368, the Defendant does not rely on the need for firm immigration policy or the need to protect the public purse. Presumably the reason the Defendant does not rely on these arguments is that she accepts that if these women are victims of TMA, and they meet the criteria of having been partners of UK citizens or those with settlement rights, then they should be granted ILR. They would have the same expectations of ultimate settlement in the UK as would those who fall within the DVILR. There is therefore no “in-principle” immigration control justification for not granting them ILR once they have satisfied the Defendant on the facts of their case. It is for that reason that in practice women in the position of AM are allowed to enter the UK pursuant to the Leave Outside the Rules policy, once they have received the correct advice and pursued their case. Therefore, this case falls into stark contrast with other challenges to the Immigration Rules,

because the Defendant accepts the merit of TMA cases but says she is not obliged to make any provision for them in the Rules.

67. As I understand Mr Fletcher's submissions, the justification for not making a Rule is twofold. Firstly, he submits that the Defendant is reviewing the policy position but has simply not yet reached a conclusion as to what changes, if any, to make to the Rules. The Detailed Grounds of Defence states: "*the Defendant is planning on reviewing the situation regarding transnational marriage abandonment. Time is required to undertake the review. The Respondent [Defendant] has already had two meetings with stakeholders and a commitment has been made to review the position.*"
68. Ms Chapman points out that there is no timeframe set on this review, and no information on how or in what form it will be carried forward. This is despite the fact that SBS and other organisations have been raising the issue since at least 2016. Mr Fletcher accepts that there is no timescale for the review.
69. Mr Fletcher's second submission is that the current situation allows the Defendant to consider each case individually on its own facts through the process of Leave Outside the Rules. Therefore, victims of TMA are not debarred from gaining entry to the UK, but simply have a different route to follow, albeit outside the Rules.
70. Ms Chapman relies on the witness statements of Ms Gbikpi, and the other solicitors who handle these cases, to show the very considerable problems that arise for these women in the absence of any provision in the Rules. In applying for Leave Outside the Rules they are entirely dependent on the exercise of discretion by the Defendant and have no legal entitlement to ILR. Routinely, Entry Clearance Officers refuse their applications and give no assistance on what route to follow. Even at the stage of making the application, it is not clear what form of application to make. The fee for an application varies from £100 to over £1500 depending on the precise application made, and very few, if any, of these women have those sums available. However, as there is no clear route to application, it has proved extremely difficult to persuade the Home Office to grant fee waivers.
71. In my view, this is the unusual case where the Defendant has failed to meet the requirements of Article 14. The comparator on which Ms Chapman relies, or the person in an analogous situation, is the victim of spousal abandonment in the UK who can rely on the DVILR. Such a person will have suffered the same form of domestic abuse, with the only difference being one is in the UK and one is not, at the time of the abandonment. The policy issues in terms of such women having an expectation of a right to settlement and the Defendant's wish to protect such victims of abuse, are the same. The difference, being presence or otherwise in the UK, leads directly to the broader issue of justification and whether the Defendant's failure to make Rules pursues a legitimate aim.
72. The Defendant's purported justification in this case is very different from that in the majority of such challenges. She expressly does not rely on the need for strong immigration control and accepts, as I understand it, that where the relevant elements are proved, victims of TMA should be granted ILR.
73. It could be argued that a person outside the UK is in a materially different position because of the greater difficulties in establishing the veracity of their case. However,

the Defendant does not rely on this point, and indeed in practice does grant leave to enter to abandoned spouses once they have managed to make applications in a format the Defendant is prepared to accept. Further, although there may be more difficulty processing such claims from a woman who has been abandoned overseas, there is also much greater detriment for such women. They are much more likely to have been separated from their children and the logistical problems of getting appropriate advice and help are much greater. Therefore, for the purposes of the issues that arise in this case, I accept that victims of TMA are in an analogous position to those in the UK covered by the DVILR.

74. The next question is whether the failure to make relevant Rules has a legitimate aim and is proportionate. There does not appear to be an “aim” in not making Rules, it is simply that the Defendant has not addressed her mind to the issue or has not yet formulated the proposed Review. The Defendant in such cases has a margin of appreciation, and indeed in a case seeking the formulation of a Rule, generally a wide margin. However, such a margin is not untrammelled where there is ongoing discriminatory treatment particularly where there are seriously detrimental consequences to the victims, at some point a rational justification must be advanced.
75. Here the two justifications do not in my view stand up to scrutiny. The first is that the Defendant needs more time for the review. However, the Defendant has been considering the matter, it appears, since 2016, when it was raised by SBS, but with no progress in either setting up a formal review or any other active step to removing the differential treatment in the Rules.
76. The second is that the cases can be dealt with outside the Rules. However, the evidence is very clear that such a process severely disadvantages the victims of TMA, in terms of lengthy delay, costs, and the probability that a cohort, of unknown number, may never manage to return to the UK. Further, by having to rely on Leave Outside the Rules, the victims are entirely dependent on the exercise of a discretion with no legal rights, and that discretion seems to be often poorly understood by Entry Clearance Officers.
77. This must then be seen in the context of the importance of the issues at stake. This goes directly to whether the Defendant’s failure to make Rules is proportionate and the margin accorded to the Defendant under [37(4)] of SC.
78. The women in these cases are the victims of a very serious form of domestic abuse, often involving serious physical and psychological harm. In many if not most cases they will either have been separated from their children or it will be impossible for their children to return to the UK, even where they are UK citizens, without leaving their mothers. The impact on the Article 8 family rights of the victims is therefore very great. The Defendant does not argue that such women should not ultimately be admitted to the UK or are an inappropriate call on UK resources.
79. In my view the justification advanced is therefore not proportionate to the interference with Article 8 rights, and the differential treatment between victims of spousal abandonment inside and outside the UK is not justified and therefore is in breach of Article 14 and of the Human Rights Act 1998
80. I will consider the form of the order after further submissions.