



12 October 2011

PRESS SUMMARY

R (on the application of Quila and another) (FC) (Respondents) v Secretary of State for the Home Department (Appellant); R (on the application of Bibi and another) (FC) (Respondents) v Secretary of State for the Home Department (Appellant) [2011] UKSC 45

On appeal from [2010] EWCA Civ 1482; [2009] EWHC Admin 3189

JUSTICES: Lord Phillips (President); Lady Hale; Lord Brown; Lord Clarke; Lord Wilson.

BACKGROUND TO THE APPEALS

The issue is whether the ban on the entry for settlement of foreign spouses or civil partners unless both parties are aged 21 or over, contained in paragraph 277 of the Immigration Rules, was a lawful way of deterring or preventing forced marriages.

Paragraph 277 of the Immigration Rules [‘Paragraph 277’] was amended with effect from 27 November 2008 to raise the minimum age for a person either to be granted a visa for the purposes of settling in the United Kingdom as a spouse or to sponsor another for the purposes of obtaining such a visa from 18 to 21. The purpose of the amendment was not to control immigration but to deter forced marriages. A forced marriage is a marriage into which at least one party enters without her or his free and full consent through force or duress, including coercion by threats or other psychological means.

Mr Quila, a Chilean national, entered into a fully consensual marriage with Ms Jeffery, a British citizen. Mr Aguilar Quila applied for a marriage visa before the amendment took effect, but his application was refused as his wife was only 17 and a sponsoring spouse had to be 18. By the time that Ms Jeffrey had turned 18 the amendment was in force and the Home Office refused to waive it. Consequently, Mr Quila and his wife were forced to leave the UK initially to live in Chile (his wife having had to relinquish a place to study languages at Royal Holloway, University of London) and subsequently to live in Ireland. Bibi (as she invited the Court to describe her) is a Pakistani national who applied to join her husband, Mohammed, a British citizen, in the UK. Bibi and Mohammed had an arranged marriage in Pakistan in October 2008, to which each of them freely consented. Their application was refused as both parties were under 21.

The Respondents’ claims for judicial review of the decisions were both rejected in the High Court. The Respondents successfully appealed to the Court of Appeal, which declared that the application of Paragraph 277 so as to refuse them marriage visas was in breach of their rights under Article 8 of the European Convention on Human Rights and Fundamental Freedoms 1950 [‘the ECHR’]. The Secretary of State has appealed to the Supreme Court.

JUDGMENT

The Supreme Court, by a 4-1 majority, dismisses the Secretary of State’s appeal on the grounds that the refusal to grant marriage visas to the Respondents was an infringement of their rights under Article 8 ECHR. Lord Wilson gives the leading judgment; Lady Hale gives a concurring judgment. Lord Phillips and Lord Clarke agree with Lord Wilson and Lady Hale. Lord Brown gives a dissenting judgment.

REASONS FOR THE JUDGMENT

Article 8 ECHR was engaged [43; 72]. Applying *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, the relevant question was whether there had been an interference by a public authority with the exercise of a person’s right to respect for his private or family life and if so, whether it had had consequences of sufficient gravity to engage the operation of the article [30]. Unconstrained by authority,

Lord Wilson would have considered it a colossal interference to require for up to three years either that the spouses should live separately or that a British citizen should leave the UK for up to three years [32]. The ECtHR in *Abdulaziz v United Kingdom* (1985) 7 EHRR 471 has, however, held that there was no lack of respect for family life in denying entry to foreign spouses. There was no positive obligation on the State to respect a couple's choice of country of matrimonial residence [35 - 36]. Lord Wilson holds that *Abdulaziz* should not be followed in this respect; there was dissent at the time and no clear and consistent subsequent jurisprudence from the ECtHR as four more recent decisions [38 - 41] were inconsistent with the decision [43]. The ECtHR has since recognized that the distinction between positive and negative obligations should not generate different outcomes [43].

The Secretary of State has failed to establish that the interference with the Respondents' rights to a family life was justified under Article 8(2) ECHR. Paragraph 277 has a legitimate aim, namely the protection of the rights and freedoms of those who might be forced into marriage [45] and is rationally connected to that objective, but its efficacy is highly debatable [58]. A number of questions remain unanswered including how prevalent the motive of applying for UK citizenship is in the genesis of forced marriages; whether the forced marriage would have occurred in any event and thus the rule increase the control of victims abroad and whether the amendment might precipitate a swift pregnancy in order to found an application for a discretionary grant of a visa [49]. The Secretary of State has failed to adduce any robust evidence that the amendment would have any substantial deterrent effect [50; 75]. By contrast, the number of forced marriages amongst those refused a marriage visa had not been quantified [53]. The only conclusion that could be drawn was that the amendment would keep a very substantial number of bona fide young couples apart or forced to live outside the UK [54], vastly exceeding the number of forced marriages that would be deterred [58; 74]. The measure was similar to the blanket prohibition on persons subject to immigration control marrying without the Secretary of State's written permission found to be unlawful in *R (Baiai) v Secretary of State for the Home Department* [2008] UKHL 53 [57, 78 - 79]. The Secretary of State has failed to exercise her judgement on this imbalance and thus failed to establish both that the measure is no more than is necessary to accomplish the objective of deterring forced marriage and that it strikes a fair balance between the rights of parties to unforced marriages and the interests of the community in preventing forced marriage. On any view, the measure was a sledgehammer but the Secretary of State has not attempted to identify the size of the nut [58].

Lady Hale holds that the debate on *Abdulaziz* is something of a red herring as the Secretary of State could not simultaneously state that the measure was not for the purpose of controlling immigration and rely upon jurisprudence wholly premised on the State's right to control immigration [72]. She further holds that the restriction was automatic and indiscriminate [74]; failed to detect forced marriages and imposed a delay on cohabitation in the country of choice, which was a deterrent that could impair the essence of the right to marry under Article 12 ECHR [78 -79].

Whilst the judgment is essentially individual, it is hard to conceive that the Secretary of State could avoid infringement of Article 8 ECHR when applying Paragraph 277 to an unforced marriage [59; 80].

Lord Brown, dissenting, holds the extent of forced marriage is impossible to quantify so the deterrent effect of Paragraph 277 could never be satisfactorily determined [87]. The judgement of how to balance the enormity of suffering within forced marriages with the disruption to innocent couples was one for elected politicians, not for judges [91]. The measure was not an automatic indiscriminate restriction [92]; would be disapplied in exceptional circumstances [93] and similar rules applied in other European countries [85]. To disapply the rule would exceed ECtHR jurisprudence and in such a sensitive context, government policy should not be frustrated except in the clearest cases [97].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

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