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Aguilar Quila and Amber Aguilar (2) Bibi and Mohammed (Appellants) V Secretary of State for The Home Department (Respondent) & (1) Advice on individual rights in Europe (Aire Centre) (2) Southall Black Sisters and Henna Foundation (Interveners) (2010

[2010] EWCA Civ 1482

21/12/2010

Court
Civil Division

□□□In conjoined appeals the appellants (Q and B) appealed against decisions ((2009) EWHC 3189 (Admin), (2010) 1 FCR 81) and ((2009) EWHC 2322) upholding the secretary of state's refusals to allow them to enter or remain in the United Kingdom as the spouse of a British citizen. Q and B were both foreign nationals who had married British citizens. B had applied for entry clearance and Q had applied for leave to remain in the UK, both applications being made on the basis that the applicant was the spouse of a British citizen. At all material times Q, B and their spouses were under 21. Though both marriages were voluntary, both applications were refused on the basis that the Immigration Rules r.277, which was designed to frustrate or discourage forced marriages, prevented the grant of leave to enter or remain as a spouse if either of the parties to the marriage was under 21 on the date of their arrival in the UK. Q and B submitted that r.277 was irrational and was a disproportionate inhibition on family and private life and the right to marry.
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□□□HELD: (1) While r.277 had little to do with preventing forced marriages, it was arguably capable of having an impact on their incidence. It was, therefore, neither a policy that lay outwith the lawful purposes of policy formation, nor one that either made no intrinsic sense or was incapable of contributing to its professed objective. Given that the spouses in the instant appeals were British citizens, the correct approach was to decide Q and B's cases on their own facts, leaving the secretary of state to consider the wider impact of the decision. The court was, therefore, concerned with the question of whether r.277 should have been disapplied in the instant cases rather than whether it should be struck down (see paras 28-29, 30-31 of judgment). (2) The question of whether the spouse of a UK national was entitled prima facie to the benefit of his spouse's right of abode without interference under the Immigration Rules was not concluded by any Strasbourg authority, Abdulaziz v United Kingdom (A/94) (1985) 7 EHRR 471 ECHR and Y v Russia (20113/07) (2010) 51 EHRR 21 ECHR considered. It had, however, been the subject of domestic authority, R (on the application of Baiai) v Secretary of State for the Home Department (2008) UKHL 53, (2009) 1 AC 287 considered. Rule 277 interfered with both the

right of an adult to marry and his right to respect for his family life as enshrined by the European Convention on Human Rights 1950 and as at common law. The right not merely to go through a ceremony of marriage but also to make a reality of it by living together was a fundamental right that the State was ordinarily required to respect. While the secretary of state was entitled to take measures that impeded that right, for example by excluding parties to forced marriages, and while he was entitled to place weight on the fact that neither party had a right of abode in the UK, if that was the case, he was not permitted to start with the proposition that as long as the entitlement could be exercised at least somewhere in the world, it could legitimately be stultified in the UK (paras 39-40, 45-49). Rule 277 exceeded what was necessary and proportionate to accomplish its legitimate aim of frustrating or discouraging forced marriages. It subjected all young couples to an irrebuttable presumption that their marriage was a forced one and it was only obliquely, partially and speculatively related to its underlying policy imperative (paras 52-53, 60).
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□□□In the circumstances the application of the Immigration Rules r.277 to two foreign nationals who had voluntarily married British citizens, the parties to both marriages each being under 21, was unlawful.
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