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(1) Diego Andres Aguilar Quila & Amber Aguilar (2) Shakira Bibi & Suhyal Mohammed (Appellants) v Secretary of State for the home department (Respondent) & (1) Advice on individual rights in Europe (Aire Centre) (2) Southall Black Sisters & Henna Foundation (Interveners) (2011)

[2011] UKSC 45; [2012] 1 AC 621 : [2011] 3 WLR 836 : [2012] 1 All ER 1011 : [2012] 1 FLR 788 : [2011] 3 FCR 575 : [2012] HRLR 2 : [2011] UKHRR 1347 : 33 BHRC 381 : [2012] Imm AR 135 : [2011] INLR 698 : [2012] Fam Law 21 : (2011) 108(41) LSG 15 : (2011) 155(39) SJLB 31 : Times, October 20, 2011

12/10/2011

Barristers
Henry Setright KC
Michael Gration KC

Court
Supreme Court

Practice Areas
International Children Law

Summary
A refusal to grant a marriage visa to a foreign national, as a spouse of a person settled in the United Kingdom, where either party to the marriage was aged under 21, in accordance with the Immigration Rules r.277, breached the rights under the European Convention on Human Rights 1950 art.8 of those affected. There was insufficient evidence to establish that the interference with art.8 rights caused by the application of r.277 was justified.

Facts
The appellant secretary of state appealed against a decision ([2010] EWCA Civ 1482, [2011] 3 All E.R. 81) that her application of the Immigration Rules r.277 to the respondent foreign nationals (Q) had been unlawful as being in breach of their rights under the European Convention on Human Rights 1950 art.8.

Q were married to British citizens. They had applied for marriage visas, but the secretary of state refused those applications on the ground, pursuant to r.277, that Q and/or their spouses were aged under 21 when Q had arrived in the United Kingdom. The minimum age for the grant of a marriage visa had been raised from 18 to 21 in order to deter forced marriages. It was not suggested that Q's marriages were forced.

Held

(Lord Brown J.S.C. dissenting) (1) The court declined to follow the decision of the European Court of Human Rights in Abdulaziz v United Kingdom (A/94) (1985) 7 E.H.R.R. 471 that similar refusals of permission to remain had not infringed art.8; that was an old decision and later decisions were inconsistent with it, Abdulaziz not applied, Boultif v Switzerland (54273/00) [2001] 2 F.L.R. 1228 and Tuquabo-Tekle v Netherlands (60665/00) [2006] 1 F.L.R. 798 considered. In Abdulaziz the Strasbourg court had been exercised by the fact that the asserted obligation in that case had been positive; since then, that court had recognised that the distinction between positive and negative obligations should not, in the instant context, produce a different outcome. The area of engagement of art.8 had increased: the secretary of state's refusal to allow Q to reside in the UK with their British spouses had to be an interference with respect for their family life, Tuquabo-Tekle applied. The only sensible inquiry was whether the refusals had been justified (see para.43 of judgment; see also judgment of Lady Hale J.S.C. paras 67-72). (2) The rule had a legitimate aim, namely to protect the rights of those who might be forced into marriage. It had to be determined whether it was necessary; an assessment of the rule's proportionality therefore had to be undertaken. Questions arose as to the likelihood of the rule deterring forced marriages; on the available evidence, those questions remained unanswered. The secretary of state had failed to demonstrate that when she had introduced the rule, she had robust evidence of any substantial deterrent effect. Further, it seemed clear from the evidence that the number of unforced marriages which the rule obstructed from their intended development for up to three years vastly exceeded the number of forced marriages which it deterred. The secretary of state had not addressed that imbalance. She had failed to establish that the rule was no more than was necessary to accomplish her objective or that it struck a fair balance between the rights of parties to unforced marriages and the community's interest in preventing forced marriages, Huang v Secretary of State for the Home Department [2007] UKHL 11, [2007] 2 A.C. 167 applied. She had therefore failed to establish that the interference with Q's rights under art.8 was justified (paras 45-59; see also judgment of Lady Hale J.S.C. paras 73-77). (3) (Per Lady Hale J.S.C.) There was a further reason for holding the interference disproportionate. Although the means used was an interference with art.8 rights, the object was to interfere with art.12 rights: its aim was to prevent, deter or delay marriage to a person from abroad. The right to marry was not a qualified right: the state could only restrict it to a limited extent, and not in such a way as to impair its very essence. The delay on entry imposed by r.277 was not designed to detect and deter those marriages which might be forced: it was a blanket rule applying to all marriages, and imposed a delay on cohabitation in a place of the couple's choice which could act as a severe deterrent, R. (on the application of Baiai) v Secretary of State for the Home Department [2008] UKHL 53, [2009] 1 A.C. 287 considered. Those factors did not mean that there had been a violation of Q's right to marry, but they did lend weight to the conclusion that it was a disproportionate and unjustified interference with the right to respect for family life to use that interference to impede another and even more fundamental Convention right in an unacceptable way (paras 78-79; see also judgment of Lord Wilson J.S.C. para.57).

Permission

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