Briefing Paper 8.56

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Forced Marriage and the Supreme Court

The important case of *Quila v. Secretary of State for the Home Department* [2011] UKSC 45 was decided by the Supreme Court on 12 October 2011. It was brought by two appellants who were refused leave to enter as spouses on grounds of their being under the age of 21 in accordance with Rule 277 of the Immigration Rules:

> "Nothing in these Rules shall be construed as permitting a person to be granted entry clearance, leave to enter, leave to remain or variation of leave as a sponsor or civil partner of another if either the applicant or the sponsor will be aged under 21 …on the date of arrival in the United Kingdom or (as the case may be) on the date on which the leave to remain or variation of leave would be granted."

The minimum age was raised from 18 to 21 by an amending rule which came into force in November 2008. The purpose of the amendment was described by the Supreme Court as being not to impose further controls on immigration but to deter forced marriage. Paragraph 9 of the Court's judgement summarises the importance currently attached to the subject:

> "A forced marriage is a marriage into which one party enters not only without his or her free and full consent but also as a result of force including coercion by threats or by other psychological means….. The forcing of a person into marriage is a gross and abhorrent violation of his or her rights under…. Article 12 of the European Convention on Human Rights [ECHR]. A forced marriage is entirely different from an arranged marriage in which, in conformity with their cultural expectations, two persons consent to marry each other pursuant to an arrangement negotiated between their respective families. The prevalence of forced marriage within sections of our community in the UK has come increasingly to the attention of a shocked public during, say, the last 12 years as victims of it, or witnesses to it, have at last and less infrequently summoned the courage to report it."

The same paragraph goes on to mention the passing in 2007 of the Forced Marriage (Civil Protection) Act and of the establishment by the Home Office and Foreign and Commonwealth Office of the Forced Marriage Unit for the purpose of monitoring reports of forced marriages and helping victims.

2 A Directive issued by the Council of the European Union in 2003 provided:

> "In order to ensure better integration **and to prevent forced marriage** [emphasis supplied] Member States may require the sponsor and his/her spouse to be of a minimum age, **and at maximum 21 years** [emphasis supplied] before the spouse is able to join him/her."

This Directive did not bind the governments of the UK, Ireland or Denmark. However, pursuant to it certain other Member States, including Germany and the Netherlands, raised their minimum ages to 21. There was no evidence given to the Court that this action had contributed to the achievement of better integration or the prevention of forced

marriage, but equally there was no evidence that it had failed to achieve either of these objectives.

Article 8 of the ECHR

3 Article 8 states:

> "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 wellbeing 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."

The Court concluded that the raising of the minimum age from 18 to 21 amounted to an interference with the right to family life in that in the two cases before it the couples concerned would be denied significant periods of living together in the United Kingdom as married couples. The Court then had to consider whether that interference could be justified within the meaning of Article 8.2. The professed justification was the deterrence of the social evil of forced marriages, and there was some evidence that the raising of the minimum age did help to achieve that. However, the raising of the minimum age also meant deferment of marriage and of living together in the United Kingdom for many young couples in whose cases there was no question that the marriages were consensual. Evidence was provided by the Home Office that if the increase had taken effect in 2007 only 3% of applicants for spouse visas in that year would have been affected by it. However, this evidence did not impress the Court as the 3% in 2007 would have meant denying visas to 1945 applicants. There was no clear evidence as to how many of these applicants might have been parties to forced marriages. The conclusion was that however many there might have been, it was clear that a substantial majority of applicants who had entered into bona fide marriages would have been kept apart or in exile.

4 The conclusion of the majority judgement of the Court, delivered by Lord Wilson, was that although the raising of the minimum age was rationally connected to the objective of deterring forced marriages "the number of unforced marriages which it obstructs from their intended development for up to three years vastly exceeds the number of forced marriages which it deters". (Paragraph 58 of the judgement.) The raising of the minimum age was therefore disproportionate in its effects in relation to the evil of forced marriage and the interference with the rights conferred by Article 8.1 could not be justified by reference to Article 8.2. The appeal by the Home Secretary against a previous decision of the Court of Appeal to the same effect was dismissed.

A dissenting judgement

5 This was a majority decision of the Supreme Court, four out of five justices. A dissenting judgement was delivered by Lord Brown. He referred to evidence which had been considered by the House of Commons Home Affairs Committee in its report in May 2011, evidence which had not been available to the Court of Appeal. Evidence had been given by two voluntary organisations and by an official of the Crown Prosecution Service. The latter and one of the two organisations favoured the amendment, but the other voluntary organisation was opposed. Lord Brown said that in his view it was impossible to come by conclusive evidence as to the total extent of the problem of forced marriage. In the nature of things it was likely that there were large numbers of victims who had not come to the attention of the authorities or of any voluntary agencies which concerned themselves with the problem.

6 Lord Brown in paragraph 89 of the judgement defined the duty of the Supreme Court in considering the appeal as being :

> "…to decide…not by reference to the sufficiency or otherwise of the research carried out by the Home Office before the new rule was introduced, but rather by reference to the proportionality as perceived today between the impact of the rule change on such "innocent" young couples as are adversely affected by it and the overall benefit of the rule in terms of combating forced marriage."

7 In a powerful passage in paragraph 91 Lord Brown makes it clear how strongly he disagrees with his fellow

justices:

> "The extent to which the rule will help combat forced marriage and the countervailing extent to which it will disrupt the lives of innocent couples adversely affected by it is largely a matter of judgement. **Unless demonstrably wrong, this judgement should rather be for government than for the courts. Still more obviously, the comparison between the enormity of suffering within forced marriages on the one hand and the disruption to innocent couples within the 18-21 age group whose desire to live together in this country is temporarily thwarted by the rule change, is essentially one for elected politicians, not for judges.** " [Emphasis supplied.]

Then again in paragraph 97:

> **"In a sensitive context such as that of forced marriages it would seem to me not merely impermissible but positively unwise for the courts yet again to frustrate government policy except in the clearest of cases. To my mind this cannot possibly be regarded as such a case."** [Emphasis supplied.]

The passages quoted show a degree of enlightenment and of understanding of the practical problems of enforcing effective immigration control which up to now have not often been demonstrated by senior judges.

Conclusions

8 The Supreme Court has struck down an amendment to the Immigration Rules which was made with the intention of dealing with the social evil of forced marriage and which would also have made it easier to control family immigration. The strongly dissenting judgement of Lord Brown makes it clear that the Court could, following the same reasoning, have decided that the amendment was compatible with Article 8 of the ECHR but chose otherwise. The Supreme Court justices were aware that the application of the EU Directive mentioned in paragraph 2, containing the specific objective of preventing forced marriages, had had the result that several Member States had raised the minimum age for marriage visas to 21 as envisaged by the wording of the Directive. There was no suggestion that this action on the part of the Member States in question had in any way been impugned as being incompatible with Article 8. In the case of Denmark, which like the UK was not subject to the Directive, the minimum age had been raised to 24. All EU Member States are signatories to the ECHR and there is no logic in the United Kingdom's having a more rigorous application of Article 8 in this particular context than that adopted by other Member States.

9 There is no appeal beyond a judgement of the Supreme Court and the government will have to accommodate its administration of the Immigration Rules to this judgement. The possibility has recently been canvassed of making it a criminal offence for parents and others to force young people into marriage. There are also possibilities of increasing the restrictions on the issue of marriage visas so as to make it more difficult for such visas to be obtained in cases where there has been forced marriage. We intend to issue a separate legal briefing paper on the subject.

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