In *Al-Jedda*, the question of jurisdiction was similarly resolved on the basis of such personal "authority and control" (*Al-Jedda*, at [85]), but a further complicating element arose. The Security Council had authorized the MNF-I to operate in Iraq and detain people for imperative reasons of security. According to the British Government, this was an "obligation" to detain, not a discretionary power, and as such it displaced Article 5 ECHR by virtue of Articles 103 and 25 of the UN Charter, which establish the hierarchic superiority of Charter obligations (and Security Council resolutions) over other rules of international law (*Al-Jedda*, at [87]–[92]). However, according to the ECtHR, and contrary to what the majority of the House of Lords had held in 2007, there was no such conflict of norms: internment was indeed one of the available options, but "in the absence of clear provision to the contrary, the presumption must be that the Security Council intended states within the [MNF-I] to contribute towards the maintenance of security in Iraq while complying with their obligations under international human rights law" (at [105]). These obligations included Article 5 ECHR, which the UK had thus violated.

In his concurring opinion in *Al-Skeini*, Judge Bonello stigmatized the British Government's approach to extra-territorial human rights obligations: "In substance the United Kingdom is arguing, sadly, I believe, that it ratified the Convention with the deliberate intent of regulating the conduct of its armed forces according to latitude: gentlemen at home, hoodlums elsewhere." In July 2011, the contrary message from Strasbourg appeared clear: European States must comply with their human rights obligations everywhere they actually exercise power over persons or territory.

FRANCESCO MESSINEO

AND THEY CALL IT PUPPY LOVE: YOUNG LOVE, FORCED MARRIAGE AND IMMIGRATION RULES

IN *R. (Quila and another) v Secretary of State for the Home Department* [2011] UKSC 45, [2011] 3 W.L.R. 836, the Supreme Court faced an immigration rule that pitted the prevention of forced marriages against young couples in genuine marriages who wished to live in the country together. A forced marriage can be defined as a marriage into which one party is coerced to enter without full and free consent, including through threats or other psychological means. In 2008, as part of the Government's efforts to prevent forced marriages, the Home Secretary amended para. 277 of the Immigration Rules so as to raise the age for a UK national to sponsor a foreign spouse or civil partner seeking admission to the country and for the incoming

applicant from 18 to 21. The Home Secretary was clear that that the amendment to the Immigration Rules was to deter forced marriages, not to control immigration, as most such marriages occur between the ages of 18 and 20.

Diego Aquilar, a Chilean national, and Amber Aguilar, a British national, met and fell in love. They were married in the UK in November 2008. He was 18 and she was 17. After she turned 18, they reapplied for a marriage visa. The second respondent, Bibi, is a Pakistani national who applied for a visa to join her husband, Mohammad, a British citizen, following a fully consensual arranged marriage in Pakistan. Both parties were aged below 21. The course of young love in these cases did not run smoothly: the Home Secretary refused both respondents' applications because they did not meet the new minimum age requirement. The respondents' claims for judicial review were rejected in the High Court, but successful in the Court of Appeal.

The Supreme Court held that refusing marriage visas to foreign nationals applying to enter the UK to settle with their British spouses was an interference with their Article 8 ECHR right to respect for family life of genuine couples who were forced to live apart or outside the UK until both turned 21. The majority declined to follow *Abdulaziz v United Kingdom* (application no. 9214/80) (1985) 7 E.H.R.R. 471 where the Strasbourg Court declared that the state had no positive obligation to respect the couple's choice of country of matrimonial residence. Lord Wilson, giving the leading judgment in *Quila*, concluded that the distinction between a state's positive obligation to allow applicants to reunite with their British spouses and its negative obligation not to expel a foreign national was "elusive" and should be abandoned (at [43]).

The crux, then, was whether the interference was justified under Article 8(2). The majority concluded that it was not. Lord Wilson found a lack of "robust evidence" that the amendment deterred forced marriages (at [50]); the number of genuine marriages it obstructed vastly exceeded the number of forced marriages it deterred (at [58]). The blanket ban failed the proportionality test; although the amendment was rationally connected to the legitimate aim of deterring forced marriage, the Government had failed to show that the measure was no more than was necessary to accomplish its objective and that it struck a fair balance between the rights of parties in unforced marriages and the community interest in preventing forced marriage. Lord Wilson concluded that the measure "was a sledge-hammer and [the Home Secretary] has not attempted to identify the size of the nut" (ibid.).

The difficulty with the majority's proportionality assessment is that it appears blunt. The majority clearly attaches greater weight to the

impact on innocent couples in genuine marriages compared to the uncertain numbers of individuals forced into marriage. But the difficulties in obtaining accurate evidence on forced marriages make assessment based on the available evidence of the rule's efficacy misleading. Forced marriage is notoriously underreported due to its sensitive nature and its extent is "impossible to gauge", as Lord Brown recognised in his dissent (at [87]). Secondly, even if it were possible to measure or estimate the forced marriages deterred, an assessment based on such evidence appears to miss the point. Lord Wilson and Lady Hale both emphasised that the genuine marriages affected by the rule significantly exceed the forced marriages deterred (at [58] and [74]), but the actual numbers establish little. The balancing required ultimately involves a judgement on the *value* attached to preventing forced marriages compared to the disruption to genuine couples wishing to live together in the country. Lord Brown cogently enquired: "What value … is to be attached to preventing a single forced marriage? What cost should each disappointed couple be regarded as paying?" (at [91]). The majority's emphasis on the greater numbers of genuine marriages impacted appears to ignore the potentially much more serious infringement of the rights of individuals forced into marriage compared with the effects of a temporary restriction on entry that genuine couples suffer.

The question of balancing the rights of these two groups raises the respective roles of the court and executive in making these decisions. Lord Brown was evidently of the view that the judgment of how to balance the relative impact on either group is one for elected politicians, not judges (at [91]). But the courts have a clear duty to protect individuals' Convention rights by applying the proportionality test. Allowing the Government a very substantial area of discretion appears at odds with the greater intensity of review that the courts are expected to use in scrutinising rights infringements in the post-Human Rights Act 1998 climate (see [46]). Blanket rules evidently require strong justification to be found proportionate; however, such proportionality analysis requires careful application. In this case, it is arguable that the enormity of suffering involved in forced marriages justified the overall benefit of a measure that potentially deterred such incidences although temporarily affecting a greater number of genuine couples. The problem with the majority's judgment lies less in any perceived trespass to democratic legitimacy but in its readiness to find the measure disproportionate based on its more obvious impact on genuine couples despite the difficulties in determining the deterrent effect of the rule and the potentially greater violation of rights involved in forced marriages.

Following the Supreme Court's judgment that the rule was unlawful, the Government reverted the minimum age for sponsorship of

foreign nationals to 18 and launched a consultation on whether to create a specific criminal offence of forcing someone into marriage. The reopening of this dialogue on specific methods to combat forced marriage is welcome. The Government must ensure that more general policies are legitimate and proportionate in combating forced marriage; equally, the courts need to give careful consideration to the complex issues surrounding forced marriage in assessing the proportionality of such policies.

YVONNE TEW

THE RIGHT TO KNOW THE CASE AGAINST YOU IN CIVIL CLAIMS

IN Kafka's *The Trial* the main character is executed without ever knowing of what he has been accused. In English law, the right to a fair trial is a well-established constitutional right. Amongst the fundamental principles of the civil process, it is established, first, that proceedings should be held in public; and second, that each party must disclose their evidence to their opponents. However, there are two processes by which evidence may be withheld. Public interest immunity ("PII") enables the court to consider whether evidence should be withheld, on the ground that the public interest in withholding the evidence outweighs the public interest in the administration of justice. PII is a common law process, which derives from Crown privilege. Closed material procedure ("CMP") allows a litigant to submit evidence, without disclosing the material to the other party. Parliament has legislated to authorise the use of CMP in certain contexts e.g. employment cases and cases relating to allegations of involvement in terrorism. In some cases a special advocate may be appointed to represent the interests of the party that is kept in the dark. The special advocate will have access to the material but will not be able to discuss it with his or her client. Thus, PII differs from CMP, because under PII undisclosed evidence cannot be adduced during the proceedings, whereas under CMP a party can rely upon evidence that has not been disclosed to the other side.

Two recent Supreme Court decisions concerned the use of these processes. Unlike the proceedings in *The Trial*, life was not at stake, yet even in civil claims use of these processes should raise significant concerns, particularly as these cases typically involve those who are most vulnerable.

In *Al Rawi v The Security Service* [2011] UKSC 34, [2011] 3 W.L.R. 388 the claimants alleged that the defendants had caused or contributed to their detention in Guantanamo Bay. The defendants