

# ILPA information sheet

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## Marriage Judgment 2

22<sup>nd</sup> December 2010

On 21 December 2010, the Court of Appeal gave judgment in *Quila and Aguilar & Ors v Secretary of State for the Home Department* [2010] EWCA Civ 1482. This judgment overturns the judgment of the High Court, to which the December 2009 “Marriage Age Judgment” information sheet refers.

These judgments relate to the change in the Immigration Rules, in November 2008, raising the age that is required under the Rules for both partners in a marriage or civil partnership where one partner is seeking to rely on the relationship in order to come to or stay in the UK. The age was raised from 18 years to 21 years. This information sheet provides information about the Court of Appeal judgment upholding a challenge to the raised age requirement in the cases before the Court.

### **The December 2009 information sheet provides background information**

It explains which groups have not been affected by the November 2008 change. In addition to the two groups set out in that earlier information sheet, in April 2010 the Government added another group of people not affected by the raised age requirement. From 6 April 2010, in addition to European Economic Area (EEA) nationals (and their family members) and migrants under the Points Based System (see earlier information sheet), relationships where one party is a serving member of the British armed forces have also been exempted from the raised age requirement.

It also briefly explains the age requirement in the Immigration Rules and sets out the reasons the previous Government gave for raising the age requirement. In short, the reasons were that raising the age requirement would prevent or address forced marriages between a British citizen or someone settled in the UK and a foreign national. It was said that raising the age requirement for both partners before the foreign national could join the British citizen (or settled person) in the UK would provide time for a victim (or potential victim) of a forced marriage to mature and finish education. It was said that this would mean that person was more likely to resist being forced into marriage. ILPA did not, and does not, consider these to be good reasons for raising the age requirement. This is also explained in the earlier information sheet.

Finally, it gives a short explanation of the December 2009 decision of the High Court. As indicated above, this month’s Court of Appeal judgment overturns the High Court’s judgment.

### **The Court of Appeal judgment**

The Court of Appeal was concerned with two marriages. It was accepted that neither of these marriages was a forced marriage. One of these marriages was the one with which the High Court was concerned in December 2009. The circumstances of that case are briefly set out in the December 2009 information sheet. The other marriage concerned a Pakistani woman married to a British citizen living in the UK. Both were under the age of 21 years when her application to join

her husband was made in December 2008 (less than a week after the age requirement was raised). At the time the matter came before the Court of Appeal, one of the two couples was living in Ireland (as they were still not permitted to be together in the UK). The other couple were still apart.

The Court of Appeal considered three challenges to the requirement that both parties be aged 21 years (rather than the previous 18 years). It was argued that:

- raising the age requirement was irrational – that this was not capable of preventing forced marriages as was intended and was certain to have harmful effects for other entirely legitimate marriages
- raising the age requirement was disproportionate – that this did incalculable (i.e. great) harm to very many legitimate couples without any significant impact on forced marriages
- the exception for members for the British armed forces ( see above) made the requirement discriminatory – that there was no logical reason for this exception

The three judges of the Court of Appeal each agreed that the appeal should be allowed. They ruled that in the cases before them, the age requirement (of 21 years) was unlawful. One of the three judges reached that conclusion for slightly different reasons to the other two. However, essentially all three concluded that current requirement (of 21 years) was disproportionate because of its impact on marriages (such as the two before the Court of Appeal) that were entirely legitimate.

The Court of Appeal decided not to strike down the 21 years age requirement (this would have removed the age requirement in all cases). The key reason for this was that the judges accepted there could be a different result if neither partner to the relationship was British (i.e. where a foreign national was seeking to join or stay with another foreign national, who has indefinite leave to remain in the UK). This related to the absolute right of a British citizen to be in the UK. The judges decided that the Home Office would have to reconsider how to amend the Immigration Rules – whether to revert to the 18 years age requirement or introduce something less blunt than the current requirement.

### **Final comment**

In this judgment the Court of Appeal considered proportionality and Article 8 (the right to respect for private and family life). (On Article 8, see the August 2008 “Article 8” information sheet.)

The Government is currently consulting on proposals to make sweeping changes and cuts to Legal Aid (see the “Legal Aid 8” information sheet). The Government proposals and consultation document suggest that Article 8 cases are relatively straightforward. It also suggests that these cases are about little more than lifestyle choices about where people prefer to live. ILPA does not accept either point. These cases, and any assessment of proportionality, regularly involve complex evidential requirements and legal analysis, and are concerned with fundamental rights and often long term or permanent family separation. The Court of Appeal’s judgment reveals just how complicated it can be to make a proportionality assessment (as required in these cases). The Government lawyers had assessed the proportionality of raising the age requirement. The Court of Appeal described their assessment as “*both inadequate and muddled*”. If Government lawyers find this difficult, it must be assumed that lay people are unlikely to be able deal with such matters without any legal assistance. The Court of Appeal also highlight that these cases concern fundamental rights, not mere lifestyle choices.

### **Note**

The Government has already indicated that it will seek permission to appeal to the Supreme Court. It is likely, therefore, that the 21 years age requirement will remain for some time. However, if this requirement affects you, you should seek legal advice. It may be that the Court of Appeal judgment can help, or that the Home Office should exercise discretion to waive the requirement in your case.