Neutral Citation Number: [2020] EWCA Civ 190

Case No: B4/2019/2369

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BIRMINGHAM CIVIL JUSTICE CENTRE
THE ORDER OF HHJ TUCKER
BM15F00007

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2020

Before :

THE PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE HADDON-CAVE

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Re K (Forced Marriage: Passport Order)

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- -

Deirdre Fottrell QC, Seema Kansal and **Marlene Cayoun** (instructed by **National Legal Service Solicitors**) for the **Appellant**
Jason Beer QC and **Alice Meredith** (instructed by **Staffordshire and West Midlands Police Joint Legal Department**) for the **Respondent**
Sarah Hannett (instructed by the **Government Legal Department)** for the **First Intervener** the **Secretary of State for Justice**
Henry Setright QC and **Jacqueline Renton** (instructed by **Dawson Cornwell**) for the **Second Intervener Southall Black Sisters**

Hearing date : 27th November 2019

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Approved Judgment

Sir Andrew McFarlane P :

1. In this appeal the court is required to consider the jurisdiction of the Family Court in respect of two issues related to Forced Marriage Protection Orders ['FMPO'] made under Family Law Act 1996, s 63A. The first relates to the court's jurisdiction where the subject of the order is an adult who does not lack mental capacity. The second relates to Passport Orders as part of a FMPO, and, in particular, whether there is jurisdiction to make an open-ended or indefinite Passport Order in that context.

2. The factual background to the application can be stated shortly. The Applicant, "K", is a single woman now aged 35. K does not lack mental capacity to make decisions with respect to marriage, and, in particular, whether she should be the subject of a Forced Marriage Protection Order. At the time of the original application in 2015, K lived in the family home together with her mother and various relatives. On 29 May 2015 and 3 June 2015, K contacted her local police force, West Midlands Police, alleging that her family were seeking to force her to marry against her will and that they had threatened to murder her if she refused to do so. These allegations were congruent with numerous calls made by a neighbour or neighbours to the police over the preceding ten months expressing concern for K.

3. On 5 June 2015 the police applied for and were granted a FMPO by HHJ Hindley QC at a without notice hearing.

4. In January 2016 HHJ Tucker conducted a three-day contested hearing. At that hearing the police submitted that the FMPO should continue. K, who had withdrawn the allegations that she had originally made to the police, sought the discharge of the FMPO. Various members of K's family were respondents and attended the hearing. In particular, the senior male member of the family, K's eldest brother ('the Fourth Respondent'), apparently presented particularly challenging behaviour in the courtroom. The family's case was that there was no truth in the original allegations which were a combination of lies and false accusations made up by the police and/or ill-intentioned neighbours.

5. On 21 January 2016, HHJ Tucker gave a short ex tempore judgment in which she concluded that K continued to require the protection of the court under the forced marriage legislation and that the 2015 FMPO would remain in force, subject to some detailed amendment.

6. Under the heading "Passports" the order made in January 2016 by HHJ Tucker was in the following terms:

> "10. The protected party's (K's) passport and other travel documentation shall be held until further order by the West Midlands Police.
>
> 11. The Respondents [named] are forbidden from applying for any new passport or any other travel documentation for K from the UK Passport Office or from any other foreign passport agency."

7. In the days immediately following the judge's order, K fled from the family home alleging that the Fourth Respondent had seriously assaulted her. The Fourth Respondent was arrested, held in custody, but subsequently the prosecution against him for breach of the FMPO was discontinued when K withdrew her allegation. Around that time K was, however, removed to safe accommodation in a refuge. In May 2016 K was rehoused by the local authority and she has continued to live separately from her family.

8. In December 2017 K's mother sadly died. Her body was flown to Pakistan and most, if not all, members of the maternal family travelled to Pakistan for the funeral with the exception of K, who was unable to travel because her passport was held by the police.

9. K applied on an urgent basis for the discharge of the FMPO, and, in particular the Passport Order. In the event, that application could not be heard in time to permit K to travel to Pakistan for the funeral and a more measured process was undertaken, including the instruction of a fresh expert witness, leading to a further two day hearing before HHJ Tucker in July 2018.

10. On 15 August 2018, HHJ Tucker distributed a draft judgment indicating her decision to refuse K's application to discharge the order but adjourning the final determination in order "to provide some time for K to consider this judgment and take steps to engage with professionals to consider the risk of travel and how that may be guarded against". The judge had accepted expert evidence that if K was seen to be in a position to protect herself during any visit to Pakistan, then the risk of forced marriage during foreign travel might, to some extent, be reduced.

11. At a final hearing on 4 December 2018, K confirmed that she had not taken, and did not intend to take, any steps to engage with professionals to consider the risks of foreign travel. The judge therefore confirmed her decision to refuse K's application to vary or discharge the FMPO for the reasons given in the judgment of 15 August 2018.

12. On 24 May 2019 Williams J granted permission for K to appeal and directed that the appeal should be transferred to the Court of Appeal rather than continuing, as it would otherwise do, at High Court level in the Family Division. The High Court has power, once permission to appeal is granted, to assign the appeal for hearing by the Court of Appeal under Family Procedure Rules 2010, r 30.13.

13. This court heard the appeal on 27 November 2019 and was greatly assisted by full written and oral submissions made, not only on behalf of K and the Police, but also on behalf of the Secretary of State for Justice and on behalf of a charity, the Southall Black Sisters, which has substantial experience in these matters and which had been given permission to intervene. At the conclusion of that hearing we reserved our judgments.

The Appeal

14. Although the significance of this appeal for K and for her family should not be underestimated, it is clear that the issues raised go beyond the particular facts of this case and are of general importance. In particular, this court has been asked to consider the following issues:

(a) whether the court has jurisdiction, and if so should that jurisdiction be exercised, where the individual said to be requiring protection is an adult who does not lack mental capacity to make any relevant decision, and who opposes the FMPO;

(b) whether the Family Court has jurisdiction, as part of a FMPO, to require the protected person's passport to be removed and retained by the authorities and, if so, whether that jurisdiction extends to making an open-ended or indefinite "Passport Order";

(c) what approach should a court take when determining issues such as this where there is apparent conflict between, on the one hand, a person's right to be protected by the State from inhuman or degrading treatment or punishment sufficient to engage Article 3 of the European Convention on Human Rights ("ECHR") and, on the other hand, that person's autonomy and right to respect for private and family life, including the right to travel, under Article 8.

15. The focus of this judgment will, therefore, primarily be upon the matters of principle that have been raised with the aim of addressing the overarching issues and offering guidance to courts which may, in the future, be faced with a similar application. It is plain, however, that this was a complex and difficult case in which, in addition to the involved legal issues which are now before this court, HHJ Tucker had the further significant burden of managing proceedings with all of the key family members in the courtroom, tensions running high and, in particular, where the Fourth Respondent persistently displayed challenging behaviour of a high order. Although, at the end of this judgment, I will hold that the appeal should be allowed, that conclusion is made simply to alter one narrow, but plainly important, aspect of the judge's order. It is not my intention to criticise the judge in any way. On the contrary, it is the clear view of each member of this court that HHJ Tucker is to be commended for the manner in which she dealt with this most difficult case and we pay tribute to her.

The Statutory Context

16. Jurisdiction to grant FMPOs is provided for in Family Law Act 1996, Part 4A "Forced Marriage", which was inserted into the 1996 Act by the Forced Marriage (Civil Protection) Act 2007, s 1.

17. Statutory provision with respect to forced marriage followed a developing line of authority within the High Court, Family Division, in which judges condemned the practice of forced marriage in the strongest of terms holding that it was "an abuse of human rights…a form of domestic violence that dehumanises people by denying them their right to choose how they live their lives" (*Re SK (An Adult) (Forced Marriage: Appropriate Relief*) [2004] EWHC 3202 (Fam) (Singer J)) and that it was "…utterly unacceptable…a gross abuse of human rights…intolerable…an abomination" (*NS v MI* [2007] 1FLR 444 (Munby J (as he then was)). Forced marriages were said to be "a scourge, which degrade the victim and can create untold human misery" (*Bedfordshire Police Constabulary v RU* [2014] 1All ER 1068 (Holman J)).

18. The following provisions within FLA 1996, Part 4A are of particular relevance to this Appeal:

63A

(1) The court may make an order for the purposes of protecting—

(a) a person from being forced into a marriage or from any attempt to be forced into a marriage; or

(b) a person who has been forced into a marriage.

(2) In deciding whether to exercise its powers under this section and, if so, in what manner, the court must have regard to all the circumstances including the need to secure the health, safety and well-being of the person to be protected.

(3) In ascertaining that person's well-being, the court must, in particular, have such regard to the person's wishes and feelings (so far as they are reasonably ascertainable) as the court considers appropriate in the light of the person's age and understanding.

(4) For the purposes of this Part a person ("A") is forced into a marriage if another person ("B") forces A to enter into a marriage (whether with B or another person) without A's free and full consent.

(5) For the purposes of subsection (4) it does not matter whether the conduct of B which forces A to enter into a marriage is directed against A, B or another person.

(6) In this Part—

"force" includes coerce by threats or other psychological means (and related expressions are to be read accordingly); and

"forced marriage protection order" means an order under this section.

63B

(1) A forced marriage protection order may contain—

(a) such prohibitions, restrictions or requirements; and

(b) such other terms;

as the court considers appropriate for the purposes of the order.

(2) The terms of such orders may, in particular, relate to—

(a) conduct outside England and Wales as well as (or instead of) conduct within England and Wales;

(b) respondents who are, or may become, involved in other respects as well as (or instead of) respondents who force or attempt to force, or may force or attempt to force, a person to enter into a marriage;

(c) other persons who are, or may become, involved in other respects as well as respondents of any kind.

(3) For the purposes of subsection (2) examples of involvement in other respects are—

(a) aiding, abetting, counselling, procuring, encouraging or assisting another person to force, or to attempt to force, a person to enter into a marriage; or

(b) conspiring to force, or to attempt to force, a person to enter into a marriage.

63CA

(1) A person who without reasonable excuse does anything that the person is prohibited from doing by a forced marriage protection order is guilty of an offence.

(2) In the case of a forced marriage protection order made by virtue of section 63D(1), a person can be guilty of an offence under this section only in respect of conduct engaged in at a time when the person was aware of the existence of the order.

(3) Where a person is convicted of an offence under this section in respect of any conduct, that conduct is not punishable as a contempt of court.

(4) A person cannot be convicted of an offence under this section in respect of any conduct which has been punished as a contempt of court.

(5) A person guilty of an offence under this section is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both;

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, or a fine, or both.

(6) A reference in any enactment to proceedings under this Part, or to an order under this Part, does not include a reference to proceedings for an offence under this section or to an order made in proceedings for such an offence.

> (7) "Enactment" includes an enactment contained in subordinate legislation within the meaning of the Interpretation Act 1978
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> 63F
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> A forced marriage protection order may be made for a specified period or until varied or discharged.

19. In addition FLA 1996, s 63G makes provision for a court to vary or discharge a FMPO on an application by a party to the proceedings, a person protected by the order, any person affected by the order or by the court even if no application for variation or discharge has been made.

20. Finally, by FLA 1996, s 63Q, the Secretary of State may from time to time publish guidance. The current statutory guidance was issued in June 2014: *"The Right to Choose: multi-agency statutory guidance for dealing with forced marriage".*

Key principles

21. A striking feature of the oral appeal hearing was the high degree of consistency between the submissions made on behalf of the four contributing parties, each of which sought to drill down and advise the court upon the underlying structure and philosophy of the legislation as well as offering guidance as to its implementation in individual cases. The level of cohesion between the various submissions was such that it is not necessary for me to take time in setting out each party's position in this judgment, as might normally be the case. Instead, I will simply highlight the most prominent features.

22. Forced marriage is a fundamental abuse of human rights, a form of domestic abuse and, since 2014, a criminal offence in England and Wales (FLA 1996, s 63CA).

23. Evidence filed on behalf of the Secretary of State demonstrates that forced marriage is not a problem confined to children or adults who lack capacity. Statistics from the Forced Marriage Unit ["FMU"] covering 2018 demonstrate that in over 40% of the cases in which the FMU gave advice or support, the person concerned was aged between 18 and 30. Family Court statistics for 2018 demonstrate that during that year 322 applications for a FMPO were made and 324 orders were granted. Of these, 72% of the persons protected were 17 years or under. In 2018, the FMU gave advice or support related to a possible forced marriage in 1764 cases, which was a significant increase on the average in previous years which was between 1200 and 1400 cases per year. The statistics demonstrate that one in five victims is male. The reasons for such an increase may be complicated and hard to define, but the statistics show, as the Secretary of State submitted, that, at the very least, forced marriage remains a pressing social problem.

24. The abusive nature of a forced marriage does not begin and end on the day of the marriage ceremony. Rather, the marriage forms the start of a potentially unending period in the victim's life where much of her daily experience will occur without their consent and against their will, or will otherwise be abusive. In particular, the consummation of the marriage, rather than being the positive experience, will be, by

definition, a rape. Life for an unwilling participant in a forced marriage is likely to be characterised by serial rape, deprivation of liberty and physical abuse experienced over an extended period. It may also lead to forced pregnancy and childbearing. The fate of some victims of forced marriage is even worse and may include murder, other "honour" crime or suicide.

25. Against that perspective it must be accepted that a forced marriage is likely to include behaviour sufficient to breach ECHR Article 3 which provides that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment."

26. The Southall Black Sisters ("SBS") rightly, therefore, submit:

> "Cases of forced marriage do not just involve private individuals, but they involve the State undertaking an active and positive role in the protecting of an individual from themselves and, normally their community. …When considering what protection should be put in place for a victim in what is near-universally by definition a family setting, the Family Court has to undertake a sensitive and careful balancing exercise. The issue in such cases is not *whether* there should be State intervention, but rather *what* that intervention should be, taking into account human rights considerations (in particular Article 3) and the victim's standpoint and views. Where the court's obligation to protect a victim does not conform - as in the instant case - with the victim's expressed wishes – the court must be particularly careful as to how it evaluates the evidence and reaches a conclusion as to what, if any, protective orders should be put in place. …Ultimately though, the court's primary focus is likely to be to prevent a victim being left unprotected and exposed to the risk of further harm, and a breach of their Article 3 rights." (original emphasis)

27. SBS's submissions describe their work, which involves treading a difficult path in ensuring sufficient protection for potential victims whilst, at the same time, maintaining the individual's autonomy by respecting their wishes and feelings and encouraging, rather than compelling, women to make choices that will keep them and any children safe. There is, submits SBS, "a fine line between protection and excessive intervention".

28. SBS regard FMPOs under FLA 1996, Part 4A as having been "hugely important in protecting and preventing forced marriage because the orders can be more finely tuned to fit an individual's circumstances and needs".

29. The Secretary of State submitted that Part 4A of the FLA 1996 pursues the legitimate aims of seeking to prevent forced marriages being entered into, and of providing assistance to those individuals who have been forced to marry. Five specific aspects were highlighted:

> 1) Preventing a breach of the right to marry under ECHR, Article 12 (see *R (Quila) v Secretary of State for the Home Department* [2011] 3 WLR 836);

> 2) Discharging the UK's positive obligation under ECHR Article 8 with regard to the right to respect for private life and the protection of the moral and physical integrity of individuals by enhancing or liberating the autonomy of a vulnerable adult;
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> 3) Discharging the UK's positive obligations under ECHR, Article 3 in cases where forced marriage may give rise to a real risk of behaviour sufficient to engage Article 3. In cases in which the Article 3 threshold has been crossed, the UK has an obligation to take reasonable steps to prevent a real risk of inhuman or degrading treatment at the hands of non-State actors, which includes treatment which may be imposed outside the jurisdiction;
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> 4) Discharging the UK's positive obligation under ECHR Article 5 with respect to deprivation of liberty;
>
> 5) In particularly serious cases, discharging the UK's positive obligations under ECHR Article 2.

30. All of the parties are agreed that the legislation is cast in the widest and most flexible terms. FLA 1996, s 64A simply gives the court jurisdiction to make an order for the purposes of protecting a person from being forced into a marriage, or from any attempt to do so, or protecting a person who has been forced into a marriage. The court must "have regard to all the circumstances including the need to secure the health, safety and wellbeing of the person to be protected" (s 63A(2)).

31. By FLA 1996, s 63A(3) there is a requirement that "in ascertaining that person's wellbeing, the court must, in particular, have regard to the person's wishes and feelings (so far as they are reasonably ascertainable) as the court considers appropriate in the light of the person's age and understanding."

32. In contrast to some other similar provisions, Parliament has neither imposed a threshold criteria nor a checklist of factors that the court is required to consider. Further, in the context of the present case, it is of note that the person's "wishes and feelings" are expressly positioned as part of "that person's wellbeing" rather than as a specific factor in their own right. Further, with regard to "wishes and feelings" the court is given a wide discretion to have regard to that factor "as the court considers appropriate in the light of the person's age and understanding".

33. The court was taken to extracts from the parliamentary debate as recorded in Hansard. The purpose of that reference was not to assist in interpretation, but merely to illustrate that the broad and flexible jurisdiction given to the court by the wording of the Statute reflects the tone and content of the debate.

34. The jurisdiction is for the purposes of protecting "a person" (s 63A(1)). The word "person" is not further defined. It is not limited by any reference to age. Importantly, there is no reference to the person's capacity to make decisions. The forced marriage legislation was introduced by the Forced Marriage (Civil Protection) Act 2007 only some two years after Parliament had introduced the Mental Capacity Act 2005. Had

Parliament wished to link or limit the court's jurisdiction to make FMPOs by reference to mental capacity it would clearly have been possible to do so.

35. It is, therefore, clear that the court has jurisdiction to make a FMPO to protect an adult who does not lack mental capacity and no submissions were made to the contrary before this court. Further, the express positioning within s 63A(3) of "wishes and feelings" as an aspect of "wellbeing" indicates that the wishes and feelings of an adult with full capacity who is the subject of an FMPO application fall to be taken into account, but are not in any manner an automatic trump card or determining factor.

36. That this is so is an illustration of the overall policy as indicated in the SBS submissions. In some cases, the State's duty to protect an individual will override that individual's stated wishes and feelings. In lay terms, the court, therefore, has jurisdiction, in a particular case, to protect a person from themselves. That this is so is a clear consequence both of the structure and content of the statutory provision, but also of the operation of the relevant articles of the ECHR where, again as demonstrated by the SBS submissions, in some cases the need to protect an individual under Article 3 may be in conflict with that individual's Article 8 rights to private and family life.

37. It therefore follows that, in cases where there is potential conflict between Article 3 and Article 8 rights, the court must strive for an outcome which takes account of and achieves a reasonable accommodation between the competing rights. In this context, I have deliberately chosen the word "accommodation" to reflect the court's approach. The required judicial analysis is not a true 'balancing' exercise in consequence of the imperative duty that arises from the absolute nature of Article 3 rights. Where the evidence establishes a reasonable possibility that conduct sufficient to breach Article 3 may occur, the court must at least do what is necessary to protect any potential victim from such a risk. The need to do so cannot be reduced below that necessary minimum even where the factors relating to the qualified rights protected by Article 8 are particularly weighty. Hence the need to find a word other than 'balance' to describe this process of analysis.

38. The need to accommodate the Article 3 and Article 8 rights is likely to be at the centre of most, if not all, FMPO cases and it was, therefore, understandably, the principal focus of the submissions made to this court. The facts of the present case, in which the judge's order imposes a permanent travel ban upon K leaving the UK, presents the conflict, between the need to protect the individual from serious harm against the individual's freedom to conduct their private life as they wish, in stark relief.

39. Once again, all parties before the court were in agreement that an assessment of proportionality must be undertaken. On one view, "proportionality" may seem to be an inappropriate concept when the court is considering an absolute Convention right such as Article 3. However, in cases where there has not yet been a forced marriage, the court will not be dealing with the certainty that future harm will take place but, rather, the assessment of the risk that it may do so. Where protective measures will necessarily limit the freedom of the protected person and others to enjoy other Convention rights, it will be necessary to evaluate, with a degree of precision, the extent of protection that is necessary in each individual case. In this regard, the exercise to be conducted in a FMPO application is broadly similar to that undertaken where the risk of future harm arises from the potential for Female Genital Mutilation

("FGM"). In that context, this court (Irwin, Moylan and Asplin LJJ) considered the imposition of a "worldwide travel ban" in an FGM case in *Re X (A Child: FGMPO) (Rev 2)* [2018] EWCA Civ 1825.

40. The Court of Appeal decision in *Re X*, set out in the leading judgment of Moylan LJ, is highly relevant to the central question before the court in this appeal, namely the accommodation that must be reached in each case between the need to protect an individual from harm, whilst at the same time respecting their other human rights, particularly those relating to their private and family life. The analysis given by Moylan LJ at paragraphs 23 to 33 is of particular relevance and assistance. Rather than setting that passage out in full, I would draw attention to the following principal points within it:

a) As with a FMPO under FLA 1996, Part 4A, a court's powers to make a FGM Protection Order under the Female Genital Mutilation Act 2003 are in very broad terms and the 2003 Act provides no real guidance as to the approach the court should take when determining whether and, if so, in what manner to exercise its powers;

b) Although Article 3 is an "absolute" right, the concept of "proportionality" is not irrelevant where the duty upon the State is to protect people from the harm which others may do to them, in distinction to the direct actions of the State's own agents to take life or seriously ill-treat people (*E v Chief Constable of the Royal Ulster Constabulary* [2009] 1 AC 536);

c) There is, thus, a distinction between the State's negative and positive obligations under Article 3 as described by Baroness Hale in *E v Chief Constable of the RUC* (paragraph 10):

> "…nevertheless, there must be some distinction between the scope of the State's duty not to take life or ill-treat people in a way which falls foul of Article 3, and its duty to protect people from the harm which others may do to them. In the one case, there is an absolute duty not to do it. In the other, there is a duty to do what is reasonable in all the circumstances to protect people from a real and immediate risk of harm. Both duties may be described as absolute but their content is different. So once again it may be a false dichotomy between the absolute negative duty and a qualified positive one…"

41. At paragraph 30, Moylan LJ expressed agreement with an observation made by Hayden J in *A Local Authority v M and N* [2018] EWCA 870 (Fam):

> "41…Whilst there can be no derogation from N's Article 3 rights, the interference with her Article 8 rights, and those of her siblings and family, must be limited to that which is necessary to protect her Article 3 rights. Of course, though this

> is relatively easy to state, it is difficult to apply on the facts of this case, and I suspect, in FGMPO applications generally."

I, too, agree that Hayden J's observation neatly encapsulates the approach to be taken and highlights the difficulty of the court's task in each individual case.

42. Moylan LJ concluded his observations on the legal framework as follow:

> "31. Before turning to the parties' submissions, I make the following observations. I would agree that, as referred to by the judge in this case, the rights engaged by both Article 3 and Article 8 of the European Convention on Human Rights will clearly be relevant to the exercise by the court of its powers to make an FGMPO. I would also agree that, when deciding how to exercise its powers, the court must balance a number of factors. The court will have to consider the degree of the risk of FGM (which, I would suggest, needs to be at least a real risk); the quality of available protective factors (which could include a broad range of matters including the court's assessment of the parents); and the nature and extent of the interference with family life which any proposed order would cause.
>
> 32. The need for specific analysis balancing these and other relevant factors extends to any additional prohibitions or other terms the judge may be considering including in the FGMPO. This is because each term included within the FGMPO must be separately justified. In this exercise, although the nature of the harm would, self-evidently, be a breach of Article 3, it is the court's assessment of the degree or level of the risk which is central to the issue of proportionality and to the question of whether a less intrusive measure, which nevertheless does not unacceptably compromise the objective of protecting the child, might be the proportionate answer.
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> 33. This reflects (and, in part, adopts) what Lord Reed JSC said, when dealing with proportionality, albeit in a very different context, in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700. I propose to quote only the last two elements he identified when setting out that its "attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit" (paragraph 74 of his judgment on the substantive appeal):
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> > "… it is necessary to determine … (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the

> former outweighs the latter … I have formulated the fourth criterion in greater detail than Lord Sumption JSC, but there is no difference of substance. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.”.”

43. None of the parties before this court took issue with Moylan LJ’s analysis in *Re X* which helpfully identifies the approach to be taken in FGMPO cases. For my part, I can see no reason to advocate a different course being taken when a court is considering protection from the risk of forced marriage. I would therefore hold that Moylan LJ’s observations in paragraphs 31 to 33 should be applied in FMPO applications without alteration, save for where that is needed to reflect the FMPO context as opposed to that applying to FGM.

44. Further, I, like Moylan LJ, would specifically draw attention to the approach that is to be adopted to an assessment of proportionality as described by Lord Reed JSC in *Bank Mellat v HM Treasury (2)* as set out in paragraph 33 of Moylan LJ’s judgment. All four of the elements in the four part test in *Bank Mellat* are important and, for completeness, the full test is:

> (1) whether the objective of the measure pursued is sufficiently important to justify the limitation of a fundamental right;
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> (2) whether it is rationally connected to the objective;
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> (3) whether a less intrusive measure could have been used without unacceptably compromising the objective; and
>
> (4) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

(See *Bank Mellat:* Lord Sumption at [20]; and especially on question (3), *per* Lord Reed at [70] to [71] and [75] to [76]).

FMPO Applications: A Routemap to Judgment

45. Drawing the key principles that have been identified together, I hope it will be of assistance to courts if I now set out a “routemap” in four stages to be followed when the court is considering making a FMPO in any particular case.

46. Stage One is for the court to establish the underlying facts based upon admissible evidence and by applying the civil standard of proof. The burden of proof will ordinarily be upon the applicant who asserts the facts that are said to justify the making of a FMPO.

47. Where an application for a FMPO is contested at an on notice hearing it will be necessary for the court to determine any relevant factual issues. In the course of her August 2018 judgment, HHJ Tucker referred to *Re A (Forced Marriage: Special Advocates)* [2010] EWHC 2438 (Fam). She observed that in *Re A* Sir Nicholas Wall P “emphasised the protective and injunctive nature of a FMPO and expressed the

view that it did not depend on a complex factual matrix so that the decision could be made without detailed investigation of the factual issues."

48. It is necessary to refer to the precise words used by Sir Nicholas Wall P at paragraph 90 of his judgment:

> "…The first is the nature of the relief given by the Act. It is protective - quasi injunctive – and does not depend upon a complex factual matrix. The person to be protected has for most of the proceedings not sought actively to disturb the order. If, therefore, the view is taken that there is a proper basis for the court's exercise of its jurisdiction under the Act an order under the Act can properly be made *ex parte*.
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> …
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> 93. This leaves the wider question as to whether or not special advocates are needed to resolve the issues of fact which may arise on any application to discharge."

49. It is plain that Sir Nicholas Wall's observations regarding the absence of a need to depend upon a complex factual matrix relate to the first without notice hearing of a FMPO application. At that stage, the court's primary role is protective and can be exercised without a detailed analysis of the underlying facts. Where, however, as here, the continuation of a FMPO is contested, it will be necessary for the court to undertake an ordinary fact-finding evaluation of any potentially relevant factual issues.

50. At Stage Two, based on the facts that have been found, the court should determine whether or not the purpose identified in FLA 1996, s 63A(1) is established, namely that there is a need to protect a person from being forced into a marriage or from any attempt to be forced into a marriage, or that a person has been forced into a marriage.

51. At Stage Three, based upon the facts that have been found, the court must then assess both the risks and the protective factors that relate to the particular circumstances of the individual who is said to be vulnerable to forced marriage. This is an important stage and the court may be assisted by drawing up a balance sheet of the positives and negatives within the circumstances of the particular family in so far as they may relate to the potential for forced marriage.

52. At the conclusion of Stage Three, the court must explicitly consider whether or not the facts as found are sufficient to establish a real and immediate risk of the subject of the application suffering inhuman or degrading treatment sufficient to cross the ECHR, Article 3, threshold.

53. At Stage Four, if the facts are sufficient to establish a risk that the subject will experience conduct sufficient to satisfy ECHR, Article 3, the court must then undertake the exercise of achieving an accommodation between the necessity of protecting the subject of the application from the risk of harm under Article 3 and the need to respect their family and private life under Article 8 and, within that, respect for their autonomy. This is not a strict "balancing" exercise as there is a necessity for

the court to establish the minimum measures necessary to meet the Article 3 risk that has been established under Stage Three.

54. In undertaking the fourth stage, the court should have in mind the high degree of flexibility which is afforded to the court by the open wording of FLA 1996, s 64A. In each case, the court should be encouraged to establish a bespoke order which pitches the intrusion on private and family life at the point which is necessary in order to meet the duty under Article 3, but no more. The length of the order, the breadth of the order and the elements within the order should vary from case-to-case to reflect the particular factual context; this is not a jurisdiction that should ordinarily attract a template approach.

55. In assessing the length of time that any provision within a FMPO is in force, the court should bear in mind that the circumstances within any family, and relating to any individual within such a family, may change. It is unlikely in all but the most serious and clear cases that the court will be able to see far enough into the future to make an open-ended order which will remain in force unless and until it is varied or terminated by a subsequent application. In other cases, the court should look as far as it can in assessing risk but no further. The court should first consider whether a finite order adequately meets the risk, with the consequence (if it does) that the applicant for the order will have to seek a further order at the end of the term if further protection is then needed. A date should be fixed on which the order, or a specific provision within it, is reviewed by the court.

Passport orders

56. The open and flexible wording of FLA 1996, s 63B(1), which permits the court to make an order containing such prohibitions, restrictions or other terms as the court considers appropriate for the purpose of protecting a person from forced marriage, plainly can include the imposition of a travel ban and/or the confiscation of a passport. No party to this appeal suggested otherwise and, indeed, the Family Procedure Rules 2010, Procedural Guide (at Section A9) states that a FMPO may include orders:

> "• prohibiting the removal of the person to be protected ["PTBP"] from the jurisdiction;
>
> • prohibiting the named respondent from applying for a passport or other travel documents for the PTBP;
>
> • for surrender of passports and order for the Identity and Passport Service to cancel any passport issued and not to issue any further or new passport without leave of the court."

57. The focus, therefore, is not so much upon the jurisdiction as a whole, but upon the manner in which it is exercised and, particularly, whether such orders could ever be justified on an open-ended basis.

58. Ms Deirdre Fottrell QC, acting for the Appellant, submits that making indefinite passport surrender orders against capacitous adults and against their wishes and feelings will be unlawful in all but the most extreme cases. Reference was made to

the approach described in cases other than those involving a FMPO application where the High Court exercises its jurisdiction in respect of passport surrender orders. In *Re M (Children) (Care Proceedings: Passport Orders)* [2017] EWCA Civ 69, the Court of Appeal (Sir James Munby P and Black LJ) considered an appeal where a father had been made subject to an indefinite passport surrender order at the conclusion of care proceedings. In the event, the circumstances had changed and by the time the appeal was heard it was agreed that the father's passport should be released. However, before leaving the case, the President made a number of preliminary observations "without expressing any definitive view". Within those observations the President considered that a passport order that continued after the conclusion of proceedings would only be likely to be justified "in an unusual and probably quite extreme case" and, secondly, "if such an order can properly be made and is made, it should usually be for a defined rather than…an indefinite period of time" (referring to *Re L (A Child)* [2016] EWCA Civ 173).

59. In the context of "radicalisation" cases, in *London Borough of Tower Hamlets v M* [2015] EWHC 869, Hayden J observed (at paragraph 13):

> "The removal of an individual's passport, even on a temporary basis, be that of an adult or child, is a very significant incursion into the individual's freedom and personal autonomy. It is never an order that can be made lightly."

60. *Re X (A Child: FGMPO)* [2018] EWCA Civ 1825, to which reference has already been made, concerned a travel restriction order made against a very young child which would run until the child's eighteenth birthday in 2032. The Court of Appeal allowed the father's appeal against the length of the travel prohibition on the basis that the trial judge had not given any separate consideration to that element of the order and there were no findings of fact relating specifically to risks arising from travel. The case was remitted for rehearing.

61. Relying on *Re X*, Ms Fottrell submits that a travel ban or a passport order should only be imposed following a rigorous assessment of the proportionality of the order, and of whether any less obtrusive or draconian measure can meet the degree of risk that has been identified. Secondly, by reference more widely to the general case law, Ms Fottrell submits that a passport surrender order against a capacitous adult should only ever be made on a time limited basis to achieve a specific aim.

Passport order: Conclusion

62. For the reasons that have already been given, it is plain that the jurisdiction to make a FMPO extends to the protection of adults who have capacity to make decisions for themselves, in particular in the context of marriage and foreign travel. The statistics demonstrate that the courts regularly make FMPOs to protect capacitous adults.

63. The flexibility and breadth of the jurisdiction established by FLA 1996, s 63B, to protect an individual whose circumstances meet s 63B is in the widest and most flexible terms.

64. The wishes and feelings of the individual who may be subject to an FMPO are relevant, but are to be assessed as part of the court's overall analysis of that person's

"wellbeing" and to the extent that the court considers it appropriate to have regard to that person's wishes and feelings. This is so whether or not the person has capacity to make decisions about marriage and travel.

65. It follows that where an adult, even if they are capacitous expresses wishes and feelings to pursue a course of action, the court has jurisdiction, where the facts found and the assessment of the Article 3 risk so justify, to make orders protecting that person from doing that which she wishes to do. In short, the court can make an order protecting a person from themselves. Where that is the case, the court should be plain that that is the course that it is taking and give adequate reasons.

66. In an appropriate case, in addition to removing the means to travel by making a passport order, the jurisdiction under FLA 1996, Part 4A, is sufficiently wide to make an express injunction against the person to be protected preventing them from leaving the jurisdiction. Indeed, it may be a protective act for the court to make explicit, as to do otherwise might render the person more vulnerable to pressure from the family if it was thought that that person retained the ability, subject to a passport, voluntarily to leave the country. However, making an express injunction against the person to be protected opens up, as a matter of law, the prospect of proceedings against that person were it subsequently to be said that they had breached the court order. It is, therefore, a step that a court should only take after a very careful analysis of the risks and the degree to which protection is necessary.

67. Whilst the breadth and flexibility of the court's jurisdiction applies to the making of a passport order just as it may apply to any other element within a FMPO, I agree with Ms Fottrell's submission that the authorities establish that an open-ended passport order or travel ban should only be imposed in the most exceptional of cases and where the court can look sufficiently far into the future to be satisfied that highly restrictive orders of that nature will be required indefinitely. In all other cases, the court should impose a time limit when making such orders. The time limit will vary from case-to-case and, like all other elements, be a bespoke provision imposing a restriction only in so far as that is justified on the facts as found. Unless the court can see with clarity that there will be no need for any continuing order after a particular date, for example when it is clear that the circumstances will change so that the risk is removed, the appropriate course will be for the court to list the matter for further review a short time before the passport and/or travel ban will otherwise expire.

The judge's judgments

68. The focus of this appeal is upon the judgment and orders made by HHJ Tucker in 2018. There is no standalone appeal against the earlier judgment of January 2016. In my view, both of these judgments must now be read together.

69. In the 2018 judgment the judge is explicit as to the factual background that she had found to be established in 2016. The judge found that K had been told that she would marry an individual known to the family and who was a brother of a young woman whom the Fourth Respondent wished to marry. The man in question had stated that he would only agree to that marriage if he could marry K. K had stated that she did not wish to marry him. The judge held that in the lead-up to the 2016 hearing K had reported serious threats of violence being made against her, including a threat that she would be burnt alive and that she would be cut up with a machete. The judge

accepted the police appraisal that K feared for her own safety. At paragraph 32 the judge recorded:

> "Had I considered it necessary to do so at the time, and in accordance with K's welfare, I would have explicitly stated that I considered it more likely than not that she was the victim of coercion and threats, the objective of which was to ensure her cooperation to marry/punish her for refusing to do so."

70. The judge also recorded that in 2016 she had concluded that the proposed marriage to the individual in Pakistan would be likely to entail travel to Pakistan. The judge stated that she was "not confident that [K] could maintain control of her passport within the family home and I was concerned that, if the family had her passport, she could be forced to travel to Pakistan without her consent. If she were to travel there it would be far more difficult to secure her safety."

71. On the basis of the factual context described, in the 2018 judgment the judge held (paragraph 12) that the case "raised issues pursuant to Article 3".

72. In the 2018 judgment, the judge made specific factual findings as to the actions of the family, particularly the Fourth Respondent, and the threats made to K in the immediate aftermath of the January 2016 hearing. As a result K was removed from the family home and had lived safely apart from her family since that time. The judge expressly found that K had "suffered harm because of her family's actions. That harm has been physical and has also consisted of serious emotional harm both before and after the FMPO was made".

73. On the basis of the more detailed factual findings contained in the judgment, the judge concluded (paragraph 62) that "there is in my view a real risk of honour based violence towards her", and that "honour based abuse" had already taken place. On that basis, the judge concluded that it was not appropriate to discharge the passport order.

Discussion

74. It is to be hoped that the guidance offered in this judgment as to the route courts should follow when analysing and determining an application for an FMPO will assist in future cases. That guidance was not available to HHJ Tucker in 2016 and 2018. I am, however, clear that the record of the judge's findings (Stage One) over the course of the two judgments taken as a whole are more than sufficient to establish that this case justified consideration within FLA 1996, Part 4A and that the level of risk was sufficient to engage ECHR Art 3 (Stages Two and Three). Given the attitude of K and her family members, particularly the Fourth Respondent, there were no protective measures to be identified within the family, either in 2016 or before the August 2018 judgment or at the final review in December 2018. The Article 3 risks therefore remained undiluted and any accommodation to meet the Article 8 rights of K and the other family members had to be found in order to do what was necessary to protect her from risk of very serious harm (Stage Four).

75. The step taken by HHJ Tucker in August 2018 in adjourning the case for a number of months in order to allow K the opportunity of accessing counselling and

demonstrating that she could be sufficiently robust to protect herself were she to travel to Pakistan was a proportionate and sensible decision. It is a step that should be considered by other judges in a similar case in the future.

76. When the case returned to court in December 2018, and it was clear to the judge that K had taken no steps whatsoever to improve her capacity to protect herself, the Article 3 risk which, on the judge's findings, had in the past included threats of death by burning or attacks with a machete, remained as it had been in 2016 and in August 2018. On that basis, the judge was fully justified in holding that it was necessary for the Passport Order to remain in force.

77. The only point upon which I differ from the approach taken by the judge is in relation to the indefinite or open-ended nature of the Passport Order. Family life is dynamic. In time, the acute focus upon the need for the family to achieve a marriage between this individual in Pakistan and K may diminish or even evaporate. A travel ban and a Passport Order are highly intrusive in terms of their impact upon the private life and freedom of movement of the individual concerned. The facts of this case were not so extreme as to justify an indefinite prohibition on travel out of the jurisdiction. The appropriate course was, therefore, to fix a future date for review. On the facts of this case, given the lack of change in circumstances during the nearly three year period between the two court hearings, the review period might reasonably have been pitched at four years. If My Lords agree, I would therefore allow the appeal to the very limited, but important, extent of providing for a review hearing, if possible before HHJ Tucker, in December 2022. For case management, the issue of review should be listed for a directions hearing in September 2022.

78. Before leaving this case I would offer one further word on case management. As I have already indicated, these proceedings would have presented a particularly difficult challenge to any judge. HHJ Tucker is to be praised for the manner in which she met those challenges and discharged her role. With hindsight, however, the decision to give an oral judgment to the full courtroom required the judge to temper what she said in that judgment to such an extent that she held back from stating any of the factual findings upon which she relied in making the order. In addition, she deliberately did not mention her finding as to the risk of serious honour violence and the necessary conclusion that this case met the ECHR, Art 3 threshold. It follows that neither the family, nor any reader of the 2016 judgment, would have understood what findings the judge had in fact made and how she had conducted the analysis leading to the conclusion that a FMPO in these terms was justified.

79. Courts facing similar difficulties in the future, would be better advised to issue a written judgment which fully explains the facts that have been found and the court's route to its decision. Any oral court hearing might then be short, yet all involved, and any subsequent readers of the judgment, would know how the court had reached its conclusion.

Conclusion

80. If My Lords agree, I would, therefore, allow the appeal to the limited extent that I have described by introducing the requirement for a review hearing in December 2022.

Lord Justice Peter Jackson

81. I agree.

Lord Justice Haddon-Cave

82. I also agree.