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Case No: FD19P00339 & FD19F05033

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/02/2020

Before:

HHJ MORADIFAR
(SITTING AS A DEPUTY HIGH COURT JUDGE)

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In the matter of:

Re A (A Child) (Inherent Jurisdiction: Parens Patriae, FMPO and Passport Orders)

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Ruth Kirby (instructed by Dawson Cornwell Solicitors) for the **mother**
Cliona Papazian (instructed by Freemans Solicitors) for the **father**

Hearing dates: 30 and 31 January, 17 and 27 February 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ MORADIFAR

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

HHJ MORADIFAR:

Introduction

1. A is a twelve-year-old girl who is the subject of two primary applications by her mother. These are an application to invoke the court's inherent jurisdiction to make her a ward of the court to secure her return to the UK by exercising the court's *parens patriae* jurisdiction and for a Forced Marriage Protection Order ('FMPO'). Ancillary to these applications, the mother invites the court to continue the existing Passport Orders against the father. A's father is the respondent to these applications and resists the applications on the basis that court's inherent jurisdiction is not engaged and the court has no jurisdiction to require the return of A to the UK. Furthermore, there is no evidence that would justify the making of a FMPO and that the existing orders retaining his passports should be set aside as the court's jurisdiction to make such an order was questionable and in any event an unnecessary interference with his liberty.

The law

2. The applications before the court are made by the mother. She must prove the facts that she seeks to rely on in support of her applications on the balance of probabilities. I am most grateful to counsel for the parties who have each provided me with detailed submissions on the relevant law. I will set out the relevant legal principle by reference to,
    i. The court's Inherent Jurisdiction and *parens patriae,*
    ii. FMPO, and
    iii. Passport Orders

Inherent Jurisdiction and *parens patriae*

3. Waite LJ defined the court's Inherent Jurisdiction in *Re M & N (Minors)* [1990] 1 All ER 205 (at 537) as follows:
    "*the prerogative jurisdiction has shown striking versatility throughout its long history in adapting its powers to the protective needs of children, encompassing all kinds of different situations. Although the jurisdiction is theoretically boundless, the courts have, nevertheless, found it necessary to set self-imposed limits upon its exercise, for the sake of clarity and consistency and of avoiding conflict between child welfare and other public advantages*."

4. The Master of the Rolls Lord Donaldson MR in *Re J (A Minor) (Wardship: Medical Treatment* [1991] (Fam) 33 (41D) observed that;

   'The parents owe the child a duty to give or to withhold consent in the best interests of the child and without regard to their own interests.

   The Court, when exercising the parens patriae jurisdiction, takes over the rights and duties of the parents, although this is not to say that the parents would be excluded from the decision making process. Nevertheless, in the end, responsibility for the decision, whether to give or withhold consent, is that of the Court alone".

5. The former President of the Family Division, Munby P in *Re M (Children) (Wardship: Jurisdiction and Powers)* [2015] EWHC 1433 (Fam) stated that:

   "32. This is not the occasion, and there is no need for me, to explore the range of circumstances in which it may be appropriate to make a child who is outside the jurisdiction a ward of court. I merely observe that cases such as this demonstrate the continuing need for a remedy which, despite its antiquity, has shown, is showing and must continue to show a remarkable adaptability to meet the ever emerging needs of an ever changing world. I add that the use of the jurisdiction in cases where the risk to a child is of harm of the type that would engage Articles 2 or 3 of the Convention – risk to life or risk of degrading or inhuman treatment – is surely unproblematic. So wardship is surely an appropriate remedy, even if the child has already left the jurisdiction, in cases where the fear is that a child has been taken abroad for the purposes of a forced marriage (as in Re KR and Re B) or so that she can be subjected to female genital mutilation or (as here) where the fear is that a child has been taken abroad to travel to a dangerous war-zone. There is no need for me to go any further, so I need not consider whether there are other kinds of situation where a child who is already abroad should be made a ward of court or whether wardship is an appropriate remedy where the risk to the child is of harm falling short of harm of the type that would engage Articles 2 or 3 of the Convention.

   33. In the Tower Hamlets case, Hayden J recognised (para 11) that the relief he was being asked to grant arose in circumstances without recent precedent, but rightly saw that as no obstacle. He said (paras 57-58), and I entirely agree:

"57 The family court system, particularly the Family Division, is, and always has been, in my view, in the vanguard of change in life and society. Where there are changes in medicine or in technology or cultural change, so often they resonate first within the family. Here, the type of harm I have been asked to evaluate is a different facet of vulnerability for children than that which the courts have had to deal with in the past.

58 What, however, is clear is that the conventional safeguarding principles will still afford the best protection."

34. For these reasons, I concluded, therefore, that I had jurisdiction to make the children wards of court, because they are British subjects, notwithstanding the fact that they were at the time out of the jurisdiction.

35. Having jurisdiction, it was plain that I must exercise it, for the children's future welfare demanded imperatively that I do so. And in exercising the jurisdiction, I sought to apply the well known words of Lord Eldon LC in Wellesley v Duke of Beaufort (1827) 2 Russ 1 , at 18:

"it has always been the principle of this court, not to risk the incurring of damage to children which it cannot repair, but rather to prevent the damage being done."

These words are as apposite today as they were over 180 years ago: see M v B, A and S (By the Official Solicitor) [2005] EWHC 1681 (Fam), [2006] 1 FLR 117 , para 108, and Re SA (Vulnerable Adult with Capacity: Marriage) [2005] EWHC 2942 (Fam), [2006] 1 FLR 867 , para 103."

6. Subsequently, in *Re B (A Child)* [2016] UKSC 4 the Supreme Court provided the most recent guidance on the *parens patriae* jurisdiction. Lady Hale and Lord Toulson at paragraphs 59 to 61 stated as follows:

"[59] Lord Wilson has listed a number of important issues to which that question would have given rise and which must wait for another day. It is, however, one thing to approach the use of the jurisdiction with great caution or circumspection. It is another thing to conclude that the circumstances justifying its use must always be "dire and exceptional" or "at the very extreme end of the spectrum". There are three main reasons for caution when deciding whether to exercise the jurisdiction: first, that to do so may conflict with the jurisdictional scheme applicable between the

countries in question; second, that it may result in conflicting decisions in those two countries; and third, that it may result in unenforceable orders. It is, to say the least, arguable that none of those objections has much force in this case: there is no applicable treaty between the UK and Pakistan; it is highly unlikely that the courts in Pakistan would entertain an application from the appellant; and it is possible that there are steps which an English court could take to persuade the respondent to obey the order.

[60] The basis of the jurisdiction, as was pointed out by Pearson LJ in *In re P (GE) (An Infant) [1965] Ch 568, at 587, is that "an infant of British nationality, whether he is in or outside this country, owes a duty of allegiance to the Sovereign and so is entitled to protection". The real question is whether the circumstances are such that this British child requires that protection. For our part we do not consider that the inherent jurisdiction is to be confined by a classification which limits its exercise to "cases which are at the extreme end of the spectrum", per McFarlane LJ in re N (Abduction: Appeal) [2012] EWCA Civ 1086; [2013] 1 FLR 457, para 29. The judgment was ex tempore and it was not necessary to lay down a rule of general application, if indeed that was intended. It may be that McFarlane LJ did not so intend, because he did not attempt to define what he meant or to explain why an inherent jurisdiction to protect a child's welfare should be confined to extreme cases. The judge observed that "niceties as to quite where the existing extremity of the jurisdiction under the inherent jurisdiction may be do not come into the equation in this case" (para 31).*

[61] There is strong reason to approach the exercise of the jurisdiction with great caution, because the very nature of the subject involves international problems for which there is an international legal framework (or frameworks) to which this country has subscribed. Exercising a nationality based inherent jurisdiction may run counter to the concept of comity, using that expression in the sense described by US Supreme Court Justice Breyer in his book The Court and the World (2015), pp 91-92:

"... the court must increasingly consider foreign and domestic law together, as if they constituted parts of a broadly interconnected legal web. In this sense, the old legal concept of 'comity' has assumed an expansive meaning. 'Comity' once referred simply to the need to ensure that domestic and foreign laws did not impose contradictory

duties upon the same individual; it used to prevent the laws of different nations from stepping on one another's toes. Today it means something more. In applying it, our court has increasingly sought interpretations of domestic law that would allow it to work in harmony with related foreign laws, so that together they can more effectively achieve common objectives."

[62] If a child has a habitual residence, questions of jurisdiction are governed by the framework of international and domestic law described by Lord Wilson in paras 27 to 29. Conversely, Lord Wilson has identified the problems which would arise in this case if B had no habitual residence. The very object of the international framework is to protect the best interests of the child, as the CJEU stressed in Mercredi. Considerations of comity cannot be divorced from that objective. If the court were to consider that the exercise of its inherent jurisdiction were necessary to avoid B's welfare being beyond all judicial oversight (to adopt Lord Wilson's expression in para 26), we do not see that its exercise would conflict with the principle of comity or should be trammelled by some a priori classification of cases according to their extremity."

This was further supported by Lord Wilson at paragraph 53 where he stated:

"*... I do, however, agree with Lady Hale and Lord Toulson when, in para 60 below, they reject the suggestion that the nationality-based jurisdiction falls for exercise only in cases "at the extreme end of the spectrum". I consider that, by asking, analogously, whether the circumstances were sufficiently "dire and exceptional" to justify exercise of the jurisdiction, Hogg J may have distracted herself from addressing the three main reasons for the court's usual inhibition about exercising it. In para 59 below Lady Hale and Lord Toulson identify those reasons and I agree that arguably none of them carries much force in the present case. To my mind the most problematic question arises out of the likelihood that, once B was present again in England pursuant to an order for her return, the appellant would have issued an application for orders relating to care of her or contact with her. The question would be whether in such circumstances an order for her return would improperly have subverted Parliament's intention in enacting the prohibitions comprised in ss 1(1)(d), 2(3) and 3(1) of the*

1986 Act. Or, in such circumstances, should the interests of the child prevail and indeed would Parliament have so intended?"

7. The court's Inherent Jurisdiction is not without limitations. This has been recently commented upon by MacDonald J in *A City Council v LS* [2019] 1384 (fam) where at paragraphs 35 and 36 he observed;

"*35.The jurisdiction of the High Court with respect to children derives from the Royal Prerogative, as parens patriae, to take care of those who are not able to take care of themselves (see Re L (An Infant) [1968] 1 All ER 20 at 24G). As I noted in HB v A Local Authority and Anor (Wardship: Costs Funding Order) [2017] EWHC 524 (Fam), its origins lie in the feudal period when, as an incidence of tenure, upon a tenant's death, the lord became guardian of the surviving infant heir's land and body (see Lowe, N. and White, R. Wards of Court 1986, 2nd edn). The inherent jurisdiction with respect to children is exercised by reference to the child's best interests, which are the court's paramount concern. Whilst under its inherent jurisdiction, the court may make any order or determine any issue in respect of a child and whilst, therefore, the jurisdiction of the court under the inherent jurisdiction is theoretically unlimited, there are, in fact, far-reaching limitations on the exercise of the jurisdiction (see Re X (A Minor)(Wardship: Restriction on Publication) [1975] All ER 697 at 706G). The boundaries of the inherent jurisdiction, whilst malleable and moveable in response to changing societal values, are not unconstrained.*

36. Prior to the implementation of the Children Act 1989, the most frequent example of the exercise by the High Court of its inherent jurisdiction over children was in wardship. However, wardship is only one manifestation of the inherent jurisdiction with respect to children. Subject to the distinguishing characteristics of wardship being that custody of the child is vested in the court and that, although day to day control is vested in the individual or local authority, no important step can be taken in the child's life without the court's consent, the jurisdiction in wardship and the inherent jurisdiction of the High Court are the same (see Re Z (a minor)(freedom of publication) [1997] Fam 1). In the circumstances, the inherent jurisdiction in respect of children can be invoked without the use of wardship (see Re W (A Minor)(Medical Treatment: Court's Jurisdiction) [1993] Fam 64). This is sometimes known, for convenience, as the 'residual' inherent jurisdiction of the High Court."

8. Examples where the court's Inherent Jurisdiction has been exercised include *Surry County Council v NR and RT* [2017] EWHC 153 (Fam) and a more recent decision by Knowles J in *London Borough of Waltham Forest v X, Y, Z and others (Inherent Jurisdiction)* [2019] EWHC 846 (Fam). In the latter, at the time of the local authority's applications the subject children were in Somaliland. Knowles J set out the applicable law as follows:

*"The **Law***

12. A useful summary of the jurisprudence is provided by a decision of MacDonald J in Surrey County Council v NR and RT (Wardship: Without Notice Return Order) [2017] EWHC 153 (Fam). Paragraphs 26-33 deal with the exercise of the inherent jurisdiction based on nationality. I summarise the salient points as follows:

a) The Supreme Court has affirmed that the inherent jurisdiction can be exercised with respect to a child who is a British national wherever s/he may be located (A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening) [2013] UKSC 60 at paragraph [60]);

b) In Re B (A Child) [2016] UKSC 4 the Supreme Court made a number of observations as to the circumstances in which the inherent jurisdiction based on nationality could be exercised. The use of the jurisdiction did not require the circumstances in an individual case always to be " dire and exceptional " or " at the very extreme end of the spectrum " [paragraph 59];

c) Re B set out three main reasons for caution when deciding whether to exercise the jurisdiction: first, that to do so may conflict with the jurisdictional scheme applicable between the countries in question; second, that it may result in conflicting decisions in those two countries; and third, that it may result in unenforceable orders [paragraph 59];

d) The real question which the court needed to ask itself was whether the circumstances were such that the British child concerned required the protection afforded by the inherent jurisdiction [Re B, paragraph 60];

e) There is a strong reason to approach the exercise of a nationality based jurisdiction with great caution because this may run counter to international legal frameworks to which this country has subscribed [Re B, paragraph 61];

f) The test for exercising the jurisdiction does not appear to be conclusively settled [Surrey County Council v NR and RT, paragraph 33];

g) A court may, albeit with great caution and circumspection exercise its inherent jurisdiction in respect of a British child who is outside the jurisdiction based on the nationality of that child where the court is satisfied on the evidence before it that the child concerned requires the court's protection [Surrey County Council v NR and RT, paragraph 33].

13. Sir James Munby, P (as he then was) declared in Re M (Wardship) [2015] EWHC 1433 (Fam) that the Crown's duty in relation to children extended, in the case of a child who was a British subject, to protect the child wherever he may be, whether in this country or abroad [paragraph 30]. In that case he invoked the inherent jurisdiction to make orders with respect to children who had purportedly been taken by their parents to Syria in circumstances where it was feared their lives were at risk. He commented:

"[32] ...I add that the use of the jurisdiction in cases where the risk to a child is of harm of the type that would engage Arts 2 or 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (European Convention) – risk to life or risk of degrading or other inhuman treatment – is surely unproblematic. So wardship is surely an appropriate remedy, even if the child has already left the jurisdiction, in cases where the fear is that a child has been taken abroad for the purposes of forced marriage (as in Re KR and Re B) or so that she can be subject to female genital mutilation or (as here) where the fear is that a child has been taken abroad to travel to a dangerous war zone…."

His observations clearly survive the decision of the Supreme Court in Re B (see above) which concerned itself with a child who was not at risk of the harms identified by Sir James Munby in Re M".

She continued in the same judgment by stating that;

"19. If this court does not exercise the inherent jurisdiction to make M and K wards of court, this may prove to be an impediment to their protection from forced marriage and female genital mutilation. The Forced Marriage Protection Unit has stated that orders making each girl a ward of court would assist it in demonstrating to any

relevant foreign authority that, notwithstanding any objection by the mother, the court had sanctioned the protection of the girls from their mother's actions and that such orders would facilitate the return of the girls to this jurisdiction. I note that it is beyond argument that, if M and K remain in Somaliland, there is a very high risk that each will be forced into marriage and that each may also become a victim of female genital mutilation. The latter harm is a harm which engages Art. 3 of the European Convention, namely the right to protection from torture or inhuman or degrading treatment. The very high risk of these harms in this case have persuaded me that I should exercise the nationality based inherent jurisdiction notwithstanding that it is eleven years since M lived in this jurisdiction and that K has never lived here.

20.I am thus satisfied that both M and K require the protection of the court and that the appropriate means of protecting them is to make them wards of court alongside making forced marriage and female genital mutilation protection orders. I consider it almost inevitable that their welfare will require their return to this jurisdiction where the local authority can put in place arrangements for their care and protection.

21.I am also satisfied that the exercise by the court of its inherent jurisdiction based on the girls' nationality does not risk creating a conflict of jurisdiction since Somaliland or Somalia itself are not signatories to any applicable treaty alongside/with the United Kingdom. Furthermore, it is unlikely that the courts in Somaliland or Somalia would entertain an application by a local authority for protective orders in respect of M and K which required their removal from both their mother's care and from that territory. Finally, it is possible that there are steps which an English court may be able to take which might persuade the mother to obey the court's orders. In that regard, I note that the mother still claims child benefit for both M and K. The Forced Marriage Unit has raised the possibility that, as leverage to persuade the mother to comply with this court's orders, the payment of this benefit might in due course be suspended."

9. The following core principles may be deduced from the aforementioned authorities;
    i. The court's Inherent Jurisdiction is versatile but not without limits.
    ii. The court's Inherent Jurisdiction may be exercised in respect of a child who is a British national and lives in another jurisdiction.
    iii. The court's jurisdiction in wardship and under its Inherent Jurisdiction are the same.

iv. The court's Inherent Jurisdiction may be invoked without wardship such as in cases of medical treatment.

v. When exercising its *parens patriae* jurisdiction, the court assumes the rights and duties of the parents. Whilst this does not extinguish the parents' parental responsibilities - who will be consulted about matters relating to parental responsibility - the ultimate welfare decisions rest with the court.

vi. The subject child's welfare is the court's paramount consideration.

vii. The *"real question"* that the court must address is whether, based on the evidence before the court, the British child concerned who is abroad requires the protection of the court.

viii. The use of the *parens patriae* jurisdiction must be approached with *"great caution or circumspection"* and it is not limited to cases that are *"dire and exceptional" or "at the very extreme end of the spectrum"*.

ix. Caution is necessary when exercising this jurisdiction to avoid;

    i. inconsistency or conflict with jurisdictional schemes applicable between the countries in question or international framework to which the country has subscribed, and

    ii. conflicting decisions in the two countries, and

    iii. making unenforceable orders.

x. The court's Inherent Jurisdiction may be exercised where it is necessary to avoid the welfare of the subject child being *"beyond all judicial oversight"* would not conflict with the principle of comity as it aims to facilitate a harmonious approach between countries to more effectively achieve common objectives that in this context is the protection of children.

FMPO

10. Most recently on 21 February 2020 the Court of Appeal by the leading judgment of the President of the Family Division, Sir Andrew McFarlane in ***Re K (Forced Marriage: Passport Order)*** [2020] EWCA Civ 190 has provided comprehensive guidance on the correct approach to an application for a FMPO. The President first set out the statutory framework as follows;

"...

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

63F

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".*

11. After considering the relevant authorities, he concluded that there are four stages that must be satisfied before a FMPO may be made. He described those stages in the following paragraphs;

"…

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.

...

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. "*

12. The *"first port of call"* in dealing with such an application is the provisions of Brussels IIa (per Lady Hale *A v A and another (children: habitual Residence) (Reunite International Child Abduction Centre and others intervening)* [2013] UKSC 60). Under its relevant provisions [section 2 Art. 8(1)] the courts of the member states have jurisdiction on matters of parental responsibility over a child who was habitually

resident in that member state when the court is seized of the case. As I have detailed below, this is clearly not applicable in this case.

13. However, the High Court of Justice retains its Inherent Jurisdiction to hear cases that do not meet the habitual residence test but concern British Nationals. Analogous examples of the use of this jurisdiction include protecting capacious vulnerable adults [see *Re SA (Proposed Plaintiff) (An Adult by way of her Litigation Friend)* [2004] EWHC 3202]. Holman J in *Al-Jeffery v Al-Jeffery* [2016] EWHC 2151 (Fam) and later Jackson J (as he then was) in *Re Clarke* [2016] EWCOP 46 by applying the rationale in *Al-Jeffery* used the analogous powers of the court in Wardship to exercise the court's Inherent Jurisdiction to protect vulnerable adults who were British nationals but not habitually resident in England and Wales.

Passport Orders

14. The Court of Appeal in *Re B (A Child) (Wrongful removal: Orders against Non-Parties)* [2014] EWCA Civ 843 [see also *Re L (A Child)* [2016] EWCA Civ 173] addressed the issues that arise with such orders by stating that:

"…

24. Judge Tyzack was commendably clear and frank in explaining why he was making the passport orders. It was to induce the maternal grandmother and L to "apply [their] mind[s] … to the essential task of putting persuasion / influence / pressure on [the mother] to return [B] to the jurisdiction", to "put pressure and influence on [her]". Was that a permissible basis upon which to make a passport order? In my judgment it was not. That follows from the decision of this court in Re B (Child Abduction: Wardship: Power to Detain) [1994] 2 FLR 479.

25. In Re B the father took the children to Algeria without the mother's consent. He returned to England without the children, who remained with the grandparents in Algiers. Singer J concluded that the father had deliberately sought to keep the children out of the jurisdiction for reasons unconnected with their welfare and doubted that the children would be returned voluntarily to England. It was common ground, however, that the father was not in contempt of court. Singer J ordered that the father be detained by the Tipstaff until the children were taken to

the British Embassy in Algiers. On the father's appeal this court discharged the order and directed the father's release.

26. *It will be appreciated that Singer J's purpose in Re B was precisely the same as Judge Tyzack's purpose in the present case, albeit that Singer J had recourse to the more drastic method of incarceration.*

27. *Explaining why Singer J's order was impermissible, Butler-Sloss LJ, as she then was, said this (page 483):*

> *"The purpose of a bench warrant is to bring the person detained to court and its purpose is effected as soon as he appears before the judge. At that moment he may or may not be in contempt of a court order. If he is not in contempt then in my view there is no power to detain him further. The direction of the court has been complied with and there is nothing before the court to enable the further power of detention to be invoked. If the person is prima facie guilty of contempt but the proceedings are part heard and are continuing, I can see no reason, in certain circumstances, not to detain him pending the conclusion of the case if the court is satisfied that he will not voluntarily attend on the next hearing day. The purpose is to secure the attendance of the alleged contemnor for the next court hearing. There is no precedent for detaining a party or a witness at the end of the hearing in order to compel another to comply with a court order (emphasis added)."*

She added:

> *"The heart-rending emotions of a child abduction case do not take it outside the proper exercise of the court's powers."*

28. *Hobhouse LJ, as he then was, gave judgment to the same effect (page 485):*

> *"... the purpose of detaining the father was to bring pressure to bear upon and influence the conduct of the grandparents in Algeria. They were being told, in effect, your son is being held in prison in London and he will not be released until you return the grandchildren. It was thus an exercise in coercion whereby an individual was being deprived of his liberty so as to coerce others*

into doing what the court wishes. In my judgment, however laudable the motives or worthy the objective, this is not a power which is part of the law of England; nor should it form part of any civilised system of law."

29. *The only point of difference between that case and this is that whereas in Re B the coercive method applied by the judge was incarceration, in this case it was a passport order. Now there are, of course, in certain respects very great differences between the two forms of order. In the one case the hapless witness is confined to a prison cell; in the other he is confined to the United Kingdom – islands, as Mostyn J pointed out in Young v Young [2012] EWHC 138 (Fam), [2012] 2 FLR 470, para 6, very much larger than the island to which the Mafioso in Guzzardi v Italy (Application No 7367/76) (1981) 3 EHRR 333 had been confined. Moreover, in the one case he is deprived of his liberty, thus engaging Article 5 of the Convention; in the other what is involved is no more than an interference with his liberty of movement and freedom to leave the country, engaging Article 2 of Protocol 4 (which, it may be noted, is not binding on the United Kingdom).*

30. *In B v B (Injunction: Restraint on Leaving Jurisdiction) [1997] 2 FLR 148, 154, Wilson J, referring to a submission put to him by counsel in that case, Mr Nicholas Mostyn, said:*

    "Mr Mostyn suggests that a restraint upon leaving England and Wales is wholly unlike imprisonment. I disagree."

31. *In Young v Young [2012] EWHC 138 (Fam), [2012] 2 FLR 470, para 6, Mostyn J, as by then he had become, commented in relation to Wilson J's observation that "that was decided before the advent of the Human Rights Act 1998 and without consideration of the Strasbourg jurisprudence." That no doubt is so, and was highly material in the context of the point Mostyn J was considering, namely the applicability of Article 5 in the case before him.*

32. *But Wilson J's words surely suggest, what a reading of his judgment as a whole indicates, that his observation was not directed to the Strasbourg distinction between a deprivation of liberty and an interference with liberty of movement, but*

rather to a different and for present purposes much more significant point; namely, that either form of coercive sanction is equally outside the proper ambit of the court's powers as a matter of domestic law. For immediately after the words I have just quoted, Wilson J cited these words of Hobhouse LJ in Re B, page 488:

> *"The use of ancillary powers which have the practical effect of restricting the liberty, or freedom of movement of an individual is recognised in the granting of injunctions, now under s 37 of the Supreme Court Act 1981 ... There is an obvious difference in kind between an injunction and the arrest or physical detention of an individual, but such orders are analogous and illustrate the proper use of an ancillary power although it prima facie infringes the personal rights of the individual involved.*
>
> *Where a power of arrest or detention has been recognised other than as part of a punitive jurisdiction, it is ancillary to the exercise of another power of the court and is legitimate because it is necessary to the implementation of the order of the court."*

33. In my judgment it is clear that, for this purpose, neither Hobhouse LJ nor Wilson J saw any material difference between a coercive order where the coercive method used is incarceration and a coercive order where the coercive method used is a passport order. Each is equally outside the proper ambit of the court's powers. Mr Williams referred in this context to sippenhaft. The point was well made: cf Re MCA; HM Customs and Excise Commissioners and Long v A and A; A v A (Long Intervening) [2002] EWHC 611 (Admin/Fam), [2002] 2 FLR 274, para 190."

15. In my judgment <u>*Re*</u> K(Ibid) and <u>*Re B*</u> are consistent in approach. In this context the combination of the two cases set out the relevant considerations which may be summarised as follows;

    i. The removal or restrictions placed upon the use of an individual's passport that have the net effect of restraining a person from leaving England and Wales is a *"deprivation of liberty and an interference with the liberty of movement"*.

ii. The removal or retention of an individual's passport cannot be a *"coercive measure"* so as to ensure compliance or future compliance of orders which is *"wrong in principle and fundamentally objectionable"*.

iii. Subject to iv. and v. below, any retention of a passport must be limited to a *"comparatively short period"*. Such a time limit must be bespoke for each case that is founded on the facts and needs of each case.

iv. Unless the court can identify with *"clarity"* that the need for such an order will cease after a particular date or event, the case must be listed for a short review hearing before the date on which the order will expire.

v. Open ended orders may only be made in the most exceptional cases where the court can look sufficiently far into the future to be satisfied that such an order is necessary.

Background

16. The mother is British and holds a UK passport. The father was born and lives between the UK and Algeria. He is a British and Algerian national and holds a corresponding passport for each jurisdiction. The parents married in England on 13 July 1990 and divorced on 9 April 1997. Throughout this period, they lived in England. The parties reconciled in 2000 or 2001. They have four children, X who is 27 years old, Y who is 25 and Z who is fifteen years old and A who is twelve years old.
17. The local authority was previously concerned about the welfare of the children. The parents were concerned that the local authority may issue proceedings in respect of A and Z. To avoid this, on 6 March 2008, the mother took A and Z children to Algeria where they resided at the Paternal Grandparents' home. At that time A was less than twelve months old and Z was 4 years old. Later the father joined them. On 15 April 2008, the local authority issued proceedings in relation to Y.
18. The mother returned to the UK without the children on 20 April 2008 and returned to Algeria on 24 April 2008 - one day after Y was made the subject of an Interim Care Order ('ICO'). The proceedings were transferred to the High court of Justice where Z and A were made wards of the court and orders were made preventing the father

travelling back to Algeria. It appears that the father did travel on his Algerian passport late in May of the same year. On 25 May 2008 the mother took Y to Algeria using X's passport and returned three days later.

19. During the proceedings, Y was returned to care of the mother on 29 October 2008. Unfortunately, Y's circumstances deteriorated such that on 24 November 2008 she was made the subject of a Secure Accommodation Order. The mother's passport was returned to her on 18 December 2008 pursuant to an order by Hedley J. Y was made the subject of a further ICO and the wardship orders in respect of Z and A were discharged. Mother travelled back to Algeria in March 2009. The mother alleges that the father was violent towards her after this and threw her out. She had no option but to return to the UK without the youngest two children. The mother returned to Algeria for about two weeks in November 2009.
20. The father has since remarried and has three children by his wife. The mother has not seen A and, until recently, Z since November 2009. Her contact has been limited to some infrequent contact via text and social media apps. The father asserts that the mother has had the means to contact the children and to visit them but has chosen not to. The mother complains that she has been prevented by the father from having a meaningful relationship with her children who have been retained in Algeria without her agreement.
21. In 2018 the parents began discussions about A and Z visiting the mother in the UK and agreed that both should obtain British passports. In January 2018, the father sent the mother an invitation to assist her with gaining a visa to enter Algeria. The father's ambition had been and continued to be to move his family to the UK. However, he was faced with difficulties with his wife's immigration issues. After obtaining their British passports, the father had a change of heart about A travelling to see her mother but allowed Z to come to the UK. Z came to the UK in August 2018. Regrettably, Z's reunification with his mother has been less than successful. His behaviour has been challenging and this has at points culminated in physical assaults upon his mother with the last being on the 22 November 2019. The father came to the UK within days of Z's arrival. Save for living with his mother initially and later a very short period living with his father in February or March 2019, Z has been voluntarily accommodated by the local authority.
22. Before arriving in the UK, Z established communications with his mother through text messaging and a social media app. In these messages he raised concerns about his

and A's ill-treatment at the hands of the father and his family. Some of these messages directed a good deal of anger and resentment at his mother. The mother has since been in contact with the Foreign and Commonwealth Office ('FCO'). Z's allegations about the father and his family continued after he arrived in the UK. He has alleged that he and his sister Z are regularly assaulted and experienced emotional cruelty. He has further alleged that his father and stepmother are planning to force A to marry. In July 2019, Z recorded a skype conversation between the father and his wife conducted in Algerian Arabic in which it is alleged that he and his wife discuss acts of violence being perpetrated on the children of that family.

23. On 25 June 2019, the mother issued her application seeking A's return to the UK. On 4 July 2019 the court made disclosure and Passport Orders. On his return to the UK on 28 September 2019, the father was stopped by Border Force agents. He was subsequently arrested by police acting on behalf of the Tipstaff. The father was remanded in custody overnight and subsequently released after being sentenced. On 14 October 2019, I gave directions for the filing of evidence by the parents and the instruction of an expert in Algerian Law. On 20 November 2019, the mother made an application for a FMPO. Following a one-day hearing, on 3 December 2019 the court made an interim FMPO in respect of A. The court also gave further directions requesting CAFCASS to speak with A. This subsequently proved to be impossible.

Evidence

24. In addition to reading the case papers that include the updated opinion of Dr Abdelaziz Lahouasnia who was the jointly instructed legal expert on Algerian law, I have heard the oral evidence of the parents. The mother was the first of the parents to give evidence. The mother confirmed her three statements to be true and accurate. She told me that she and the father made a joint decision to take A and Z to Algeria in 2008. This was to avoid any applications by the local authority in respect of these children. She accepted that she had lied in her first statement when she stated this was intended to be a holiday. She left with the children in March 2008 and the father joined them later. She came back to participate in the proceedings relating to Y and confirmed that the plans for Y to live with her sadly failed. When in Algeria, she resided at the paternal grandparent's home. In 2009, whilst in Algeria, the father was 'hitting' Z. She tried to stop him. The father punched her on the shoulder (pointed to her left shoulder) and 'threw her out'. She got in touch with the British Consulate who

found her a place in a refuge. She believed that she lived there for about two months. The Algerian police did not help her. During that time, she attended a court hearing when she was accompanied by a person from the refuge. She believed this may have been a hearing about her contact with the children. She was unable to follow the proceedings as it was conducted in Algerian.

25. During her last stay in Algeria which ended in November 2009, she saw the children on a few occasions. Usually the father brought them to the refuge. On two occasions she attempted to *"abduct the children"*. However, those attempts were discovered and ultimately failed. Having lost hope of gaining custody of the children, she returned to the UK. She continued to have some limited telephone contact with her children using calling cards in the absence of smart telephones.
26. The mother confirmed that she is reliant on benefits and has little means for travel. She readily accepted that between 2009 and 2018 she has travelled a great deal. These have included numerous visits to France where her friend resides, a three-week holiday in Brazil in 2019 and two further trips in the same year to the United Arab Emirates. The latter two where funded by her as Z had requested to go there. Her other trips abroad have been funded by her friend who lives in France. Whilst her friend has access to funds, he has not helped her with any proceedings in Algeria and he believes this to be an *"impossible task"*.
27. The mother accepted that she has had the father's telephone number that has not changed since 2009 and that they had telephone contact of at least two times per annum. She stated that he would not answer her telephone calls. She further accepted that she had the father's email address. She was forced to accept that, notwithstanding her assertion that she did not have an address for where the children lived, she did have the address for the paternal grandparents and indeed she had continued to send gifts and parcels for the children to that address. She accepted that she may have visited an address in Bainham (a district of Algiers) but had no knowledge of the address. Although this was not addressed in her written evidence, the mother stated that, in 2010, she had consulted with three Algerian lawyers to seek the return of her children. She was concerned about sending anything official to the grandparents' home as this may have *"tipped off"* the father. The mother was forced to accept that she chose not to return to Algeria and did not explore other possibilities of seeking the children's return in Algeria. However, the mother did express her worry that this

would not have been fruitful as she was on her own and he had the support of his whole family.

28. The mother distinguished between Z and A by stating that the father was unable to cope with Z and effectively *"dumped him"* in England. She confirmed that she had stated she was suffering with a serious health condition but not what the condition was as she did not want worry Z. She denied stating that her condition was terminal. Given the concerning reports by Z about how he and A were treated by the father and his family, she instructed Z to gather evidence about his father. She also confirmed that Z had complained and questioned why she had not visited and sought to take Z and A away from the father. The mother explained that Z is concerned for his sister and he is keen to protect her.
29. Z had told the mother about the recording of the father's conversation with his wife before playing it to her. The first transcript was prepared by Z translating and the mother typing the translation as Z translated it. She did not have a direct involvement with the making of the recording. Later they attended the Algerian Embassy where Z played the recording. They attended twice and the Embassy staff seemed unwilling to help. She could not give much detail about the exchanges at the Embassy as it was conducted in Algerian. The mother readily accepted that there were significant differences between the transcript produced by her and Z and the official transcript.
30. To the best of her recollection, Z told the mother about the issues of forced marriage sometime in 2019. He told her that he had overheard a conversation between his step mother and his father. She could not explain why he had waited so long to mention this given how concerned he is about his sister. The mother stated that Z is traumatised and he will not always remember everything and 'things' come to him with the passage of time. The mother denied that this allegation was fabricated. The mother accepted that under Algerian law such a marriage would not be permitted but explained that this will not necessarily stop it from occurring. She also accepted that, to the best of her knowledge, within the paternal family there are no issues of children marrying other than in accordance with the law.
31. The mother was also taken to task about the information that she shared with the FCO. She accepted that she had not mentioned the care proceedings but assumed that they would have that information. She accepted that she had raised the issue of forced marriage with the FCO in November 2018 prior to Z raising this issue in 2019. She could not explain why her application for a FMPO was not made until late 2019. The

mother stated that she was not aware that there was a 'forced marriage law' and A may be sent off to the country to marry a "*hill-billy".*

32. The mother was then taken to the photographs attached to her statement that purport to show the children's bruises caused by the assault perpetrated by the father and stepmother. She accepted that these may have been sent by the father to show A's eczema when he was asking for cream to be sent for them.
33. The father was the second and last witness to give evidence. He confirmed that his four statements are true and accurate. He explained that A goes to school and lives Bainham. His brother owns a property in Bainham and he lives in one of those properties. At other times they have also lived at the paternal grandparents' home including his written evidence. When pressed, his evidence was confused and hard to follow. Until he was in the witness box, the father had maintained in his statement that the children resided at the paternal grandparents' address. Ultimately, he concluded on this issue by stating that A lives and goes to school in Bainham.
34. He was taken to the photographs attached to the mother's statement. He stated that one photograph showed a bruise to Z's face. He was unable to say how this was caused but opined that this was most likely caused by fighting with his friend. He explained that Z and his friend had a lot of physical fights. He was also asked about Z's messages to his mother. He accepted that they sent from A's telephone. He denied that they were sent by Z as he does not speak English. He said that someone on the *"street"* may have sent them although was careful to say that no one had access to Z's telephone except Z. He also suggested that the messages may be fabricated. This was the first time he had seen the messages. The interpreter translated a section of the message that read 'google translate'. The father accepted that this may be how Z communicated in English.
35. Father denied being violent. He stated that he was a good father and a good husband. He denied that he had ever assaulted Y and could not explain why X and Y have chosen not to have a relationship with him. He also denied ever assaulting the mother. He stated that she travelled back to the UK to finalise the care proceedings in respect of the Y and he was unaware that there was a plan to place Y with the mother. He said that *"she is not a good mother".* In his opinion the mother wants the children so that she can claim 'child benefit'. Z was due to return after two weeks and now he cannot even *"face"* his son. He won't speak to his father. The father stated this as being the mother's fault or influence. He confirmed that in 2009 they did attend a

court in Algiers. The judge asked the person from the refuge to ask the mother to 'stop making trouble for the family'. He was clear that the mother left the children willingly. His contact with the mother was limited to sending emails and photographs.

36. The father was taken to the official translated transcript of the recorded conversation that is within the court bundle. He confirmed that this was a video conversation between him and his wife. In summary, the relevant parts of the transcript record the father to ask his wife to hit one of the younger children with a cable in front of him so that he can see, invite his wife to ask A to *'hit'* the children, state that he will ask his brother to hit the children, his children will *"pee their pants"* if he looks at them and finally suggest that he would heat a serving spoon on the hob and *"burn their backside with it"*. The father denied referring to a cable and stated that he would use a 'flip flop' to chastise the children. He also denied that he had ever carried out the threat of burning the children with a hot spoon. He stated that sometimes he would threaten the children by not buying 'them sweets'. He was pressed as to why he said during the conversation that the children would *"pee their pants"* if he looked at them. The father explained that, as the head of the family, he sets the rules that must be followed. He denied that such a reaction suggests that his children fear him. He explained this to be not a 'high degree' of fear but respect for their father. When questioned further about the mother's concerns that saw her go to the Algerian Embassy on two occasions, he dismissed those as *"nonsense"* and it seemed to him to be a *"set up"*.
37. The father was challenged about his approach and attitude to court orders. He was certain that he respected the court. He was pressed about his conduct that led to his arrest by not handing over his Algerian passport. The father stated that the police did not ask for his Algerian passport. He was further challenged about his lack of candour in providing information about A's school on 3 October 2019 when questioned before Newton J. He was certain that at that time he could not recall the name of the school or the address. He was unable to explain how he now has such a clear recollection of the same. He denied placing obstacles in the way of the mother or Cafcass to contact A. He confirmed that the mother had recently made trouble for him by making allegations that he had another child with another woman in the UK. He sent the mother an 'emoji of a fist' that he confirmed as intended to mean a *"punch in the face"*. Finally, the father denied making plans or having any intentions to marry A as

a child. He explained that this would not be possible in Algeria as it is illegal and that he was willing to give undertakings in similar terms to the existing FMPO.

Analysis

38. This is an unusual case where the subject child has been living in Algeria for nearly twelve years. It is common ground that she, together with her brother Z, where taken there by agreement of their parents to avoid possible state intervention in England. In her judgment dated 19 June 2009, HHJ Cox found that X had been physically and emotionally harmed by the father physically and verbally assaulting her. On one such occasion the assault took place outside the family home and was witnessed by X who called the police. On Christmas day 2007, the father assaulted Y by dragging her out of bed and tearing her pyjamas. On the same day he assaulted X by hitting her with a belt and placing his hands around her throat. The mother ensured that the father left the property but stopped Y from calling the police. There had been physical altercations between Y and her mother. Y had been beyond parental control. The judgment also records that the father had not participated in the proceedings but had been aware of the same.
39. The period between 2010 and 2018 presents as a period of no activity by the mother to secure the return of her children. It was not until 2017 and 2018 that the mother renewed her efforts to make further enquiries about the children's welfare and to seek their return to England. The mother's efforts have been out of concern that are based on the information that her son Z has provided her with. Z remains the primary source of this information. I note that whilst his text messages may have lost some detail and effect when translated, it does clearly portray Z as an angry young man who feels alone and unprotected from what he alleges to be the harm that he has suffered in his father's care. His anger and sense of injustice is directed at his mother for her inability to protect him.
40. Since his arrival in England, it has become clear that Z suffers with many difficulties that have seen him accommodated by the local authority. He has seriously assaulted his mother and has sought to distance himself from his father. I further note that he has been at the centre of the investigations and the evidence gathering process against his father. This has been encouraged and orchestrated by the mother who has attested to Z's attendance at the Algerian Consulate to raise concerns about his sister's welfare. I am aware that his command of English may have improved but it would

have been more limited when he sought to translate the recording of the conversation between the father and his wife. There are clear and important differences between his translation and the official translation. I also note that for entirely proper reasons Z's first-hand account has not been evidenced independently nor has he given any direct evidence to the court. For these reasons, I must approach his allegations against the father with caution and to carefully consider other evidence that may corroborate or disprove his allegations.

41. Until recently, there has been no independent evidence about A's welfare. The father has approached the English authorities with great suspicion. Despite his assertions that he has done all that he can to assist the British authorities, until very recently, no welfare information has been gathered. As the head of his family, I am very surprised that he could not make the necessary arrangements for such information to be independently gathered. It is noteworthy that, at the conclusion of his evidence, he did indeed make arrangements for A to be taken to the British Consulate on 16 February 2020 accompanied by her paternal uncle and step mother. Representatives of the FCO first saw A in company of the two adults and then on her own. In the letter from the FCO dated 18 February 2020, no safeguarding or welfare issues were identified. The letter concluded by stating that;

"The FCO's Social Work Adviser specialised in child safeguarding agreed with the consular staff who spoke with A *that the visit did not raise concerns about* A's *health or welfare."*

42. I am aware that the mother suffers with health issues and have taken this into account when assessing her evidence. I have little doubt that the mother was faced with very difficult choices in 2009 in circumstances where she had little means or language skills to pursue the return of her children. I have little doubt that any effort on her part to bring the children back to the UK was dampened by the possible state intervention that she had worked so hard to avoid. I found her evidence about the children's address and means to contact the father to lack candour. It wasn't until she was cross examined that she accepted that she lied in her first statement and that she had not explored all of the possible options to secure the return of the children. Some of her

email correspondence with the FCO also raises concerns about the accuracy and the veracity of information that she has provided.

43. However, following an eight-year period of resignation to her children living in Algeria, the mother's concerns about their welfare was heightened in 2017 or 2018. I found the mother's concerns to be genuinely held which were informed by what Z had stated to her. Whilst reliant on Z as accurately providing her with the relevant information, I did not find her to have been dishonest, inaccurate or to have embellished her concerns. The father's conduct in 2019 has led to a lack of independent information about A's welfare. The father's arrest and incarceration has only served to further corroborate the mother's fears and anxieties.
44. In some respect I found the father to be open and honest and in others less so. I found his evidence about the Passport Order and his subsequent arrest to be cavalier and displaying little concern about the court's findings against him. His explanation that the police had not asked for his Algerian passport was in my judgment misconceived. There is no doubt that there are significant cultural differences that must be considered when assessing the father's evidence. These include the use of phrases and expressions that he may literally translate from Egyptian into English. At times such translations can lead to misunderstandings or a wrong nuance being taken.
45. The father was very expressive and candid about his role in the family. I found his lack of concern for Z and the contents of his text messages to the mother revealing. He was dismissive of the contents of those messages. He sought to unrealistically explain his son's difficulties without displaying any curiosity about his welfare. I found his evidence about the recorded conversation honest but most concerning. He was given many opportunities to soften his views or to distance himself from the contents of that conversation. He resolutely refused to do so. The father displayed a most concerning lack of awareness of the impact of his threats on his children. He did not recognise anything wrong in encouraging A to physically chastise her younger siblings. Most concerning was his profound lack of any insight into the impact of the level of his children's fears of their father that would cause them to urinate when he looks at them. His explanation that this was out of respect and not fear did nothing to lessen my concerns about the environment of violence and fear that the children have become accustomed to living in. In this context, the father's evidence corroborated Z's allegations of ill-treatment. Having considered the totality of the evidence before

me, I find that A has lived and continues to live in a household where fear and violence has become an acceptable and integral part of her family life.

46. A has been living in Algeria since she was about a year old. Save for the first year of her life, she has no experience of living with her mother. Similarly, she will have no experience of living in the UK. Algeria is her home. To move her to the UK, even on a temporary basis might be unsettling for her and cause her harm. There is little evidence of her wishes and feelings on this issue. I note that, in 2018, the parents were in discussions about her visiting the mother in the UK and the father had plans to move his family to the UK.

47. The practical implications of requiring A to come to England are complex and present with difficulties. There is serious concern about each of the parents' ability to adequately care for A. I have set these out in the preceding paragraphs. Additionally, there is a real risk that she may react badly to her mother with whom she has not lived for nearly twelve years. There are no alternative family members who may be able to accommodate her. The only realistic option would be for her accommodation by the local authority. Such an accommodation will bring with it an added layer of concern and potential harm that must be carefully weighed in the balance of A's welfare considerations.

48. The evidence in support of the FMPO is less clear. The only evidence consists of an account of a conversation that Z overheard between the father and his wife. This account has been repeated to the mother who has repeated it before the court. It lacks the necessary detail that would allow it to be properly scrutinised. This is particularly important in circumstances where Z's translation of conversations has not proven to be reliable. Furthermore, the veracity of this evidence must be assessed in the context of the mother's acceptance that there is no evidence in the paternal family of anyone marrying outside of the domestic Algerian law. The evidence of the jointly instructed expert makes it clear that such a marriage would be illegal under the said domestic laws. I do not find that the evidence in support of the application for a FMPO meets the request standard of proof or that it is sufficiently reliable that would justify the continuation of the FMPO. Whilst the Court of Appeal's recent guidance in ***Re K*** does not explicitly refer to the exercise of the court's Inherent Jurisdiction in granting such injunctive relief, in my judgment the Court of Appeal's four stage test applies equally to the court's exercise of its Inherent Jurisdiction to grant such injunctive relief. Thus,

the application fails at the first stage of the four-stage test for lack of reliable evidence to inform the necessary findings.

49. Given this court's previous findings about the father's breaches of the Passport Orders and my observations about his cavalier approach to this issue, I am profoundly concerned that there is a real risk that the father will leave the jurisdiction at the first opportunity. In my judgment the continuation of the Passport Orders is necessary. However, I recognise that this places a serious restriction on his liberty and the continuation of this order must be for the minimum period.

Conclusion

50. For reasons that I have set out above A has suffered significant harm in the care of her father where she has lived and continues to live in a household where fear and violence has become an acceptable and integral part of her family life. Consequently, A's rights pursuant to Art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) have been breached. A is a British national and there can be no doubt that the court's Inherent Jurisdiction is engaged. A's welfare is my paramount consideration and having considered all of the welfare considerations, I have concluded that A does require the court's protection. In my judgment there are no applicable jurisdictional schemes that would conflict with my decision. Furthermore, there is no evidence before me that would suggest that there is any risk of a conflicting decision being taken in Algeria. The evidence of Dr Lahouasnia does not raise this as an issue. Finally, there is no suggestion that orders of this court may be unenforceable in Algeria. Accordingly, I will make A a ward of the court and exercise the *parens patriae* jurisdiction of the court by ordering her return to England forthwith. I am not making any determinations about the duration of A's visit to the UK. Such a determination will be made at subsequent hearings when further appropriate evidence will be available to the court.

51. For reasons that I have detailed above, I do not find that the evidence is sufficiently cogent or reliable that would justify any relevant findings in respect of the application for a FMPO. As such, I dismiss this application which, in my judgment, is unsustainable. However, the continuation of the Passport Orders is manifestly made out. It is necessary for this matter to be reviewed by the court following A's arrival in England. In my judgment it would be necessary and proportionate that the Passport

Orders should continue until 17.00 hours on the day of that hearing. The need for further continuation or dismissal of those orders will be reviewed at the next hearing.