

Forced marriage protection orders: assisting non-British victims who are not present in the UK

A forced marriage protection order (FMPO), which can be made to protect a person from being forced into a marriage or a person who has been forced to marry (s 63A(1) Family Law Act 1996 (FLA)), is the principal mechanism to prevent force marriages from taking place and to assist those who have been forced to wed. In *Re P (Appeal: Forced Marriage Protection Order: Jurisdiction)* [2023] EWHC 195 (Fam), the High Court Family Division considered whether to grant permission to appeal the dismissal of an application for an FMPO because the appellant (a victim of forced marriage) was not a British citizen, not habitually resident, nor physically present in the UK. The appeal thus raised an important point of public policy, as it concerned the jurisdiction of the English courts to make an FMPO in such circumstances. This article discusses the judgment, its impact and considers other remedies that may be available.

Facts

The parties to the case are P, a 27-year-old woman who is a US citizen of Pakistani descent and Q, a 40-year-old man with dual Pakistani and British nationality, living in the UK. In April 2014, when P was approximately 18 years old, her mother informed her and her siblings that they would travel to Pakistan to visit their father's grave and would stay with Q's family. Having arrived, P travelled to her mother's ancestral home and was told that she was to marry Q, a cousin that she had never met. P was frightened of her mother, as she had previously been abusive. She threatened to lock P in her bedroom, until the marriage ceremony, if she was not compliant and as P had no money or access to a telephone, she could not seek help. When the imam asked her if she consented to marriage, she said that 'she did because she was afraid of what might happen to her if she did not consent' (para 8). Following the marriage ceremony, P accompanied Q to his family home and despite P saying that she did not consent to having sex, Q forced her to do so and raped her every night until he left for the UK on 6th June 2014. P stayed in Q's family home: she was unable to return to the USA as her mother retained her passport and members of Q's family threatened her with 'serious repercussions' if she did anything to dishonour the family (para 9).

Q instructed P to come to the UK and told her to say that she was visiting a cousin, rather than her husband. P arrived on 18th July and when questioned by the Border Force admitted her marriage to Q. She was denied entry, but permitted to stay with Q until she was required to return to the USA on 21st July. Q raped P each night and soon after P discovered that she was pregnant, which resulted in pressure to reconcile. In November 2014 (and again in January 2015) P informed Q that she wanted to divorce and have no further contact.

In 2018 P applied for an annulment in the USA but the petition was dismissed because neither party was present at the hearing. This was because the date of the hearing had been changed without the parties being informed (although Q had never acknowledged service of the petition). Around this time, Q attempted to contact P, which exacerbated her symptoms of post-traumatic stress disorder. Q telephoned

her from several UK numbers; attempted to connect with her on social media and followed her friends, colleagues and employer on Instagram. P attempted to obtain protection from the US justice system, but the police would not take action because Q resides in the UK. In October 2022 P therefore issued proceedings in England and Wales for an FMPO. The judge accepted that P had been forced to marry Q but dismissed the application because she 'did not have jurisdiction to hear it' as 'the applicant either needs to be in this jurisdiction or a citizen' (cited in para 14). P sought permission to appeal, and as the case raised significant issues, it was referred to the High Court. If permission was granted, the appeal hearing would immediately follow. Q was served with notice but did not respond to this or any other attempt to contact him. He therefore played no part in the proceedings.

P appealed on three grounds: that the judge was wrong to dismiss the application because P was not physically present in England nor a British national; that the judge had erred in concluding that she could not make the order even though the respondent was British and physically present in the UK and finally, that a serious procedural irregularity occurred as the judge had conferred with another in chambers and presented Counsel with a 'fait accompli' (para 16). Mrs Justice Knowles allowed the appeal on the first two grounds, the rationale for which is discussed below.

Rationale

First, Knowles J explained that when a court is deciding whether to grant an FMPO, it 'must have regard to all the circumstances including the need to secure the health, safety and well-being of the person to be protected' (s 63A(2) FLA). As indicated by Sir Nicholas Wall P in *Chief Constable and AA v YK and others* [2010] EWHC 2438 (Fam), the Act was 'very widely drawn' (*Re P*, para 28) and contains no criteria beyond s 63A(2). Knowles J also cited *Re K (Forced Marriage: Passport Order)* [2020] EWCA Civ 190, in which the Court of Appeal confirmed that 'the legislation is cast in the widest and most flexible terms' and declared that 'Parliament has neither imposed a threshold criteria nor a checklist of factors that the court is required to consider' (*Re P* para 29). Knowles J thus accepted the submission made by Counsel for the applicant (at para 18) that 'had Parliament wished to limit the court's jurisdiction by reference to physical presence, habitual residence and/or citizenship, it would and could have done so' (para 36).

Second, the FLA expressly covers conduct outside England and Wales (s 63B(2)(a)) and an order can apply to persons who may become involved in a forced marriage (s 62B(2)(b) and (c)). This, by necessity, includes people who are not resident in the UK and are not British citizens. According to Knowles J, 'if respondents are not required to be habitually resident or British nationals, it is difficult to see why these criteria should apply to applicants' (para 37).

Third, the court referred to s 121 of the Anti-social Behaviour, Crime and Policing Act 2014 (ASBCPA), which makes it a criminal offence to force a person into marriage inside or outside of England and Wales. An offence is committed if, at the time of the conduct, either the victim or perpetrator is: physically in England and Wales or; habitually resident in England and Wales or a U.K. national (s 121(7)). Counsel for the applicant argued that, by analogy, the FLA 'encompassed protection for a foreign

national and non-resident applicant' if at the time of the acts, the respondent was habitually resident in this jurisdiction or a British citizen (para 19). Knowles J agreed and declared it 'inconceivable' that Parliament intended the FLA to be more restrictive than the ASBCPA (para 38).

Knowles J also accepted the submission from Counsel for the applicant, that the FLA would 'fail to meet its objectives' if an applicant had to be a British national or physically present here, to obtain civil protection (para 39). In such cases, the victim would have to resort to criminal proceedings, which would be incompatible with UK's international treaty obligations (para 40). The judgment refers to *Re K*, which cites several provisions of the ECHR which are or may be applicable in forced marriage cases i.e. Art 3, which prohibits torture and inhuman treatment; Art 5, on the right to liberty; Art 8 on the right to private and family life, Art 12 on the right to marry and in extreme cases, Art.2 on the right to life (para 33). Interpreting the FLA to protect non-British citizens who are not resident in the U.K. is in accordance with s 3 of the Human Rights Act 1998 as it gives effect to the legislation in a way that is compatible with ECHR rights (para 41). Reference was also made to the UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages 1962, Art 1(1) of which provides that 'no marriage shall be entered into without the free and full consent of both parties' and the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention), both of which have been ratified by the UK. The latter contains several relevant articles e.g. Art 29(1) which requires state parties to provide adequate civil remedies against the perpetrator and Art 53 which obligates state parties to ensure that protection orders are available. It should be noted that the UK has also ratified the International Covenant on Civil and Political Rights 1966 (UN), the International Covenant on Social, Economic and Cultural Rights 1966 (UN) and the Convention on the Elimination of all Forms of Discrimination Against Women 1979 (UN), all of which make it clear that marriage shall only be entered into with the free and full consent of the intending parties.

Finally, Knowles J explained that her interpretation of the FLA is not inconsistent with *Al-Jeffrey v Al-Jeffrey* [2016] EWHC 2151 (Fam) and *KBH and Others (Forced Marriage Protection Order: Non-resident British Citizen)* [2018] EWHC 2611 (Fam), which were decided on different grounds and is consistent with the spirit of *Re K* and *AA v YK*, which emphasise the broad and flexible nature of FMPOs (para 40). She then declared that the court 'is likely to exercise its jurisdiction... where, for example, either the applicant or a respondent have a connection with this jurisdiction, being either physically present here or habitually resident here or a British national' but stressed that this does not constitute a 'threshold filter' (para 42).

Having allowed the appeal, the High Court proceeded to consider whether to grant an FMPO to protect P. It was established, on the balance of probabilities, that P had been forced to marry Q and was repeatedly raped by him. Knowles J concluded that although Q's involvement in the acts by which P was forced to marry was unclear, 'given the close proximity of P and Q', Q 'was likely to have known that P was being compelled to marry him and was complicit in that course of conduct' (para 47). The judge was therefore satisfied that P was forced to marry by Q and members of their

families. Since the original application, Q had continued to harass P: she thus required protection from Q's ongoing intimidation. An order was consequently made to prevent contact between Q and P (except via legal advisors) and to 'prevent harassment, pestering, intimidation and similar behaviour, whether directly or via Q's family, including via social media and other methods of communication' (para 48). The FMPO will remain in force unless and until varied or discharged by the court, because unless restrained by a court order, Q is likely to continue to pester P, which will seriously affect her well-being (para 49).

Discussion

The decision in *Re P*, to interpret the FLA in a flexible, far-reaching manner, which acknowledges the UK's international obligations, is significant as it ensures that FMPOs assist as many persons as possible. As Knowles J indicated, the judgment makes an important statement, namely that victims overseas who are forced to marry a British national or person resident in the UK may be able to benefit from FMPOs (para 43). This is necessary because 'in the world of global social media, it is possible for perpetrators to continue their abuse online with easy access to their victim, wherever their victim is based' (para 43) and victims may be unable to obtain redress in the jurisdiction that they reside in, as P herself discovered. The decision also sends a message to British citizens and persons resident in the UK, that 'they cannot force a person into marriage and escape legal sanction for their behaviour in the family court merely because their victim is neither habitually resident, nor a British national' (para 43). However, there are limits to the jurisdiction of the English courts: it is clear that some connection to the UK is required.

In certain respects, the facts of *Re P* are not uncommon. Data from the Forced Marriage Unit reveals that most (potential) victims are young females, like P (FMU, 2022). In 2021, the FMU provided advice and assistance in 337 cases, 251 of which involved females.¹ 35% of cases concerned persons under the age of eighteen and 36% related to 18–25-year-olds. Family Court statistics confirm that young people are predominantly affected by forced marriage: in 2022 74% of applications for FMPOs concerned children, but there is no further breakdown based on age (2023). Only 13 applications (4.9%) were submitted by the person to be protected by the order which means that P's application is in the minority. The case is also unusual because the FMPO applied to Q, the person P was forced to marry, whereas most applications are directed at the (potential) victim's parents or other relatives, who typically organise the marriage. As indicated earlier, the terms of an FMPO can relate to persons who become involved in a forced marriage. This may be 'respondents who are or may become involved in other respects as well as (or instead of) respondents who forced or attempt to force, a person to enter a marriage' (s 62B(2)(b)) and 'other persons who are or may become, involved in other respects as well as respondents of any kind' (s 62B(2)(c)). These provisions are further evidence of the wide reach of FMPOs, as discussed earlier. Section 62B(3) gives examples of involvement i.e. aiding, abetting, counselling, procuring, encouraging or assisting a person to force or attempt to force a person to enter a marriage, and

¹ 316 cases related to forced marriage, 18 cases related to FGM and 3 related to both

conspiring to do so. Although the extent of Q's participation is unclear, Knowles J was satisfied that he was likely to have known that P was being forced into marriage and was therefore complicit in the process. This may be regarded by some, as a broad interpretation of 'involvement', but as the Court of Appeal indicated in *Re K* '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' (*Re K* para 24). Q repeatedly raped P and has harassed her to return to him since she left the UK in 2014. Even if his involvement in the process of causing P to marry against her will was limited, he can certainly be regarded as becoming 'involved in other respects' under s 63B(2)(c). But whether his involvement would be sufficient for criminal charges under the ASBCPA is questionable, as s 121(1)(a) requires 'violence, threats or any other form of coercion for the purpose of causing another person to enter into a marriage.' Q has used violence and coercion for the purpose of causing P to *return to* the forced marriage but may not have engaged in such behaviour in order to cause P to *enter* the marriage in the first place. It is possible that Q could be guilty of encouraging or assisting the offence (ss 44-46 Serious Crime Act 2007) and he can, of course, be prosecuted for rape under s 1 of the Sexual Offences Act 2003, which is punishable with life imprisonment. The maximum prison sentence under ASBCPA is seven years (s 121(9)(b)).

Based on s 63B(2), the terms of the FMPO can relate to Q's family who have threatened P and pressurised her mother to convince P to return to Q, because he believes that living as a single parent is 'dishonourable' (para 46). Breach of an FMPO is a criminal offence under s 63CA FLA, but the practical effectiveness of the provisions in relation to Q's family in Pakistan, who may not be aware of the existence of the order, is likely to be limited. Research demonstrates that persons overseas are 'less likely to be apprehended or subject to enforcement sanctions' (Noack-Lundberg et al, 2021, Understanding forced marriage protection orders in the UK, JSWFL Vol 43(4) p385).

Nullity

As indicated earlier, P's nullity petition was dismissed by the US courts: it is therefore possible that she remains married to Q and uncertain whether she can resubmit her application. Given that P has obtained an FMPO from the English courts, could she also apply for a nullity order? Section 12(1)(c) of the Matrimonial Causes Act 1973 (MCA) provides that a marriage is voidable on the ground of lack of consent due to duress (*Hirani v Hirani* [1983] 4 FLR 232) and an application can be made to the English courts on the basis that the respondent (Q) is habitually resident in the jurisdiction (see Form D8N). However, proceedings must be instituted within 3 years of the marriage (s 13(2) MCA) which means that P would be statute barred. The case provides support for the argument that s 13(4) MCA, which enables the court to allow an application to be submitted after 3 years have expired if the applicant was suffering from a mental disorder, should be amended to include victims of forced marriage (See Gaffney-Rhys, 'The Legal Status of Forced Marriages: Void, Voidable or Non-existent?' [2010] IFL 336). In *B v I* [2010] 1 FLR 1721, B, a victim of forced marriage was timed out under s 13(2) and did not wish to petition for divorce due to

the stigma attached to divorced women in her community (see also In *P v R (Forced Marriage: Annulment: Procedure)* [2003] 1 FLR 661). The court granted a declaration 'that there never was a marriage.... which is capable of recognition in this jurisdiction' (para 18) which provided B, who was a British citizen and habitually resident in England and Wales, with the relief she required. However, it might not be sufficient for P who is living in the USA. P could apply for divorce in England and Wales, based on Q's habitual residence (see Form D8), but it is likely to be simpler to petition in the USA.

Other Assistance

The facts of *Re P* indicate that P was questioned at length by Border Force officials when she arrived in the UK (para 10). The UK has a positive obligation to prevent a breach of Art 3, 5 and 8 of the ECHR (as indicated in *Re K*), which means that the Border Force, which is part of the Home Office, has a responsibility to assist victims of forced marriage. It is unclear whether P revealed or implied that she had been forced into a marriage and whether staff had received training on the matter. The most recent version of the 'Multi-agency statutory guidance for dealing with forced marriage and multi-agency practice guidelines: Handling cases of forced marriage' (2023) contains specific guidance for airport personnel (section 15), but previous versions did not. The 2023 guidance includes a section on victims returning to the UK, which provides a non-exhaustive list of physical and behavioural indicators of forced marriage (section 15.3). It points out that victims are often female, aged 15-25 and may appear anxious or afraid (section 15.3). It also indicates that the 'highest number of forced marriage cases reported within the UK have heritage links to Pakistan, Bangladesh, Somalia, Afghanistan, Iraq and Romania' (section 15.1). If P had arrived in the UK in 2023, rather than 2014, airport personnel would hopefully have been able to recognise the signs of forced marriage and would have followed the guidance in terms of communicating with the victim e.g. assuring her that staff are available to provide help and support. Airport personnel should now be aware of the 'one chance rule' i.e. 'they may only have one opportunity to speak to a victim or potential victim and may possibly only have one chance to save a life.... If the victim is allowed to leave without the appropriate support and advice being offered, that one chance might be wasted' (section 3). The opportunity to assist P in July 2014 was clearly missed. Had P been identified as a victim of forced marriage, she could have been provided with temporary accommodation, rather than having to stay with Q pending her return to the USA and may have been able to apply for an FMPO while physically present in England and Wales.

Conclusion

The decision of the High Court Family Division in *Re P* to grant an FMPO to a non-British citizen who is neither habitually resident nor physically present in the UK demonstrates the flexible, wide-reaching nature of FMPOs and the proactive approach that some judges take to protect victims of forced marriage. The interpretation of the FLA, in terms of jurisdiction to make an FMPO, is consistent with the application of the ASBCPA and in accordance with the Human Rights Act 1998. The case is also significant because it sheds light on the meaning of 'involvement' in

a forced marriage for the purpose of the FLA; illustrates the ongoing abuse experienced by victims, both physically and psychologically and considers this in the context of global social media. But it also raises questions about the availability of nullity orders and the level of involvement required for the criminal offence under ASBCPA.