Max Planck Institute
for Social Anthropology
Department 'Law & Anthropology'

Forced Marriage Protection Orders: A Balancing Act Between Safeguarding Against the Risk of Forced Marriage and Other Fundamental Rights under the ECHR

Question(s) at stake:

1) Whether the Family Court has jurisdiction to make a Forced Marriage Protection Order (FMPO*) where the person requiring protection is an adult with mental capacity to make relevant decisions and opposing the FMPO, and whether an indefinite 'passport order' could be made as part of the FMPO. 2) What approach shall the Family Court take when balancing the right to be protected under Article 3 and right to private and family life under Article 8 of the ECHR.

Outcome of the ruling:

The Court of Appeal held that, in accordance with Section 4A of the Family Law Act 1996, the courts have the power to issue Forced Marriage Protection Orders (FMPO) for adults who have full mental capacity and oppose the FMPO, which includes the power to impose a travel ban or confiscate identity documents.

However, the court should impose a time limit on any Passport Orders it issues and set a review date when the order is due to expire. Given its highly restrictive nature and interference with an individual's rights under Article 8 of the ECHR, imposing an open-ended Passport Order would only be justified in exceptional factual circumstances.

Where the need to protect an individual from a real risk of serious harm contrary to their rights under Article 3 of ECHR conflicts with the individual's rights under Article 8 of ECHR to private and family life, there is a duty to protect a person's absolute rights under Article 3. For this reason, a balancing exercise between the two rights would not be possible. However, the courts should assess proportionality and aim for an outcome that achieves a reasonable

accommodation of competing rights.

In light of the above, the appeal was allowed. The Court of Appeal held that K's case justified the issuing of an FMPO because K was at risk of serious honour violence in breach of her rights under ECHR Article 3. However, an indefinite travel ban disproportionately affected K's rights under ECHR Article 8. A review of the FMPO and Passport Order was set for September 2022.

Topic(s):

- Crime and Punishment under State Law

Keywords:

- Domestic violence
- Forced marriage
- Honour crimes
- Proportionality
- Right to marry and to found a family
- Right to respect for private life

Tag(s):

- Forced marriage protection order

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Country:

United Kingdom

Official citation:

Re K (Forced Marriage: Passport Order) 2020 EWCA Civ 190

Link to the decision:

https://www.bailii.org/ew/cases/EWCA/Civ/2020/190.html

ECLI:

No ECLI number / ECLI number unknown

Date:

21 February 2020

Jurisdiction / Court / Chamber:

Court of Appeal (Civil Division)

Remedy / Procedural stage:

Forced Marriage Protection Order/On Appeal from Birmingham Civil Justice Centre

Previous stages:

- On 24 May 2019, permission was granted for K to appeal against the refusal for her Forced Marriage Protection Order (FMPO) to be discharged or varied.
- On 4 December 2018, in the Family Division of the High Court, HHJ (Her Honour Judge) Tucker confirmed the decision to reject K's application to discharge or vary the FMPO.
- On 15 August 2018, HHJ Tucker refused K's application but adjourned the final determination.
- In December 2017, K applied for the discharge, or vary the terms of, the FMPO.
- On 21 January 2016, HHJ Tucker ruled that the FMPO for K was to remain in force.
- "In January 2016, HHJ Tucker conducted a three-day contested hearing" on the case (para. 4).
- "On 5 June 2015, the police applied for and were granted a FMPO" without a notice hearing (para. 3).

No official citations of the previous stages are available

Subsequent stages:

- No information found.

Branches / Areas of law:

Family Law

Facts:

The applicant, K, is a 35-year-old single woman. K contacted the police on 29 May and 3 June 2015 alleging that her family was forcing her to marry, threatening that “she would be burnt alive and that she would be cut up with a machete” should be refuse to comply (para. 69). K was living with her family at the time. K’s neighbours made repeated calls to the police throughout the proceeding ten months reporting their concerns regarding K.

The police successfully applied for a Forced Marriage Protection Order (FMPO) without a notice hearing on 5 June 2015. An FMPO is a legal means of safeguarding individuals believed to be at risk of forced marriage, and assisting those who had already entered a marriage against their will. Any person at risk, a family member, a charity, the police, or a local authority can apply for an FMPO. When issued, the court may attach conditions such as passport confiscation to prevent the person at risk from travelling abroad as well as arrest orders in case of threats or violence (HM Government 2014).

A three-day hearing followed in January 2016. At the hearing, the police argued that the FMPO should continue to be in force. By contrast, K withdrew all her allegations and sought the discharge of the FMGO. K’s family members who attended the hearing argued that allegations made against them were false and based on made-up accusations levelled by the police and ill-intentioned neighbours. A “senior male member of the family, K’s eldest brother”, was reported to have “persistently displayed challenging behaviour of a high order” in the courtroom (paras. 4, 15).

In a judgement delivered on 21 January 2016, HHJ Tucker ruled that K was still in need of protection from a potential forced marriage. It was held that the Forced

Marriage Protection Order (FMPO) issued earlier was to remain in force. The order imposed the following:

“The protected party’s (K’s) passport and other travel documentation shall be held until further order by the West Midlands Police.

The Respondents [named] are forbidden from applying for any new passport or any other travel documentation for K from the UK Passport Office or from any other foreign passport agency” (para. 6).

Shortly after the judgement, K fled her family home alleging that she was seriously assaulted by the fourth respondent, her eldest brother. He was arrested and placed in custody for breaching the FMPO. His prosecution was brought to a halt when K withdrew the claims she made against her family. The local authority rehoursed K to a refuge accommodation in May 2016. She would henceforth live apart from her family.

K’s mother passed away in December 2017. However, she could not attent the funeral taking place in Pakistan as the police has her identity documents. However, a hearing for K’s request to discharge the FMPO and/or the Passport Order on an urgent basis could not take place in time for K to attend her mother’s funeral.

Following a two-day hearing in July 2018, HHJ Tucker refused K’s application to discharge the FMPO, “adjourning the final determination in order ‘to provide some time for K to consider this judgment and take steps to engage with professionals to consider the risk of travel and how that may be guarded against’” (para. 10). This is because the judge accepted the expert evidence according to which the risk of forced marriage during foreign travel could be reduced if K was deemed capable of protecting herself in Pakistan. However, at the “final hearing on 4 December 2018, K confirmed that she had not taken any steps to engage with professionals to consider the risks of foreign travel” and that she did not intend to do so in the future (para. 11). For this reason, K’s application to discharge or alter the terms of the FMPO was refused.

On 24 May 2019, permission was granted for K to appeal against the refusal for her FMPO to be discharged or varied.

The current appeal

The respondent argued that Part 4A of the Family Law Act (FLA) 1996 gives the court the jurisdiction to make an FMPO to prevent forced marriages from occurring and to aid those already forced into a marriage. The respondent highlighted that the provisions contained in Part 4A of the FLA 1996 are legitimate because they seek to protect the right to marry under Article 12 of ECHR. They discharge the UK's positive obligations under the ECHR's Article 8 (i.e., right to respect for private life) and Article 5 (i.e., right to liberty and security). Especially in serious cases, when a forced marriage entails a real risk of harm sufficiently high to engage Article 3 of the ECHR, "the UK has an obligation to take reasonable steps to prevent a real risk of inhuman or degrading treatment at the hands of non-State actors, which includes treatment which may be imposed outside the jurisdiction" (para. 29).

Furthermore, the respondent noted that, according to s. 63 A(1) of the FLA 1996, the court may issue an FMPO to protect "a person" from forced marriage. No reference to age or capacity to make decisions is made in the Act. This indicates that the court has jurisdiction to issue an FMPO to children, vulnerable adults, as well as adults with full mental capacity such as K.

On the other hand, the appellant posited that in refusing to discharge or change the terms of the original FMPO, HHJ Tucker failed to balance the appellant's rights under ECHR Article 8 and Article 3. Namely, K argued that an open-ended passport order and travel ban are disproportionate to the aim of the order. Such conditions should only be attached to an FMPO after a rigorous assessment of the order's proportionality and should not be imposed when "any less obtrusive or draconian measure can meet the degree of risk that has been identified" (para. 61). Moreover when it concerns an adult with full mental capacity, such as K, a passport order "should only ever be made on a time limited basis to achieve a specific aim" (para. 61).

Ruling:

Regarding FMPOs

- Forced marriage is a criminal offence in England and Wales under Section 63 of the Family Law Act (FLA) 1996. (para. 22)
- Forced marriage is a “fundamental abuse of human rights” and “a form of domestic abuse”. The consummation of forced marriage, by definition, constitutes rape. The consequences of living in a forced marriage may include serial rape, deprivation of liberty, physical abuse, forced pregnancy, and childbearing. In the most severe cases, it may include murder, “honour-based” crimes, or suicide. (paras. 22, 24)
- Section 64A of the FLA 1996 gives the court the jurisdiction to make an FMPO to protect individuals at risk of forced marriage and to assist those who had already entered into a forced marriage. (para. 30)
- In considering an order, the court must “have regard to all the circumstances including the need to secure the health, safety and wellbeing of the person to be protected” (s. 63A(2)). Additionally, “in ascertaining that person’s wellbeing, the court must, in particular, have regard to the person’s wishes and feelings (so far as they are reasonably ascertainable) as the court considers appropriate in the light of the person’s age and understanding” (s. 63A(3)). (paras. 30-31)
- The state’s duty to protect an person from the risk of forced marriage may override that individual’s stated wishes and feelings. “In lay terms, the court, therefore, has jurisdiction, in a particular case, to protect a person from themselves”. (para. 36)

Assessment of proportionality: Articles 3 and 8 of the ECHR

- Forced marriage is likely to include treatment amounting to a breach of an individual’s rights under Article 3 of ECHR. (para. 25)

- Where the need to protect an individual from a real risk of serious harm contrary to their rights under Article 3 of the ECHR conflicts with that individual's rights under Article 8 of the ECHR to private and family life, there is a duty to protect a person's absolute rights under Article 3. For this reason, whilst a "true 'balancing' exercise" would not be possible, "the court must strive for an outcome which takes account of and achieves a reasonable accommodation between the competing rights". *(*paras. 36–37)

- The need to accommodate Articles 3 and 8 is likely to be crucial points of debate in most FMPO cases. In such cases, a proportionality assessment is required: "Where protective measures will necessarily limit the freedom of the protected person and others to enjoy other Convention rights, it will be necessary to evaluate, with a degree of precision, the extent of protection that is necessary in each individual case". (paras. 38–39)

  The Court of Appeal reasoned that the proportionality assessment required for an FMPO application is broadly similar to the one undertaken in a Female Genital Mutilation Protection Order (FGMPO). This is because both exercises require an assessment of the risk of future harm (*Re X (A Child: FGMPO) (Rev 2)* [2018] and *Local Authority v M and N* [2018] considered). (para. 39)

  In such cases, the full test of proportionality is set out by Moylan LJ in *Bank Mellat v HM Treasury (2)* [2014:

  "(1) whether the objective of the measure pursued is sufficiently important to justify the limitation of a fundamental right;

  (2) whether it is rationally connected to the objective;

  (3) whether a less intrusive measure could have been used without unacceptably compromising the objective; and

  (4) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community**". (para. 44)**

FMPO applications: A 'routemap' to judgement

The Court of Appeal set out a four-stage "routemap" for the courts to follow "when considering making a FMPO in any particular case" (para. 45):

- **Stage One: the courts should "undertake an ordinary fact-finding evaluation of any potentially relevant factual issues" (para. 49), applying the civil standard of proof. Given the protective and quasi-injunctive nature of an FMPO, a decision can be made without a detailed investigation into the factual issues at stake (in line with** *Re A (Forced Marriage: Special Advocates)* [2010]**). (paras. 47–49)**
- **Stage Two: the courts should establish whether a person is at risk of forced marriage or had already eneterd into one, as per FLA 1996 Section 63 A (1). (para. 50)**
- **Stage Three: the courts should assess the risks as well as any protective factors related to the factual basis of the case. The courts 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". (paras. 51–52)**
- **Stage Four: should the facts indicate a risk sufficient to trigger Article 3 of the ECHR, the courts must "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". The "minimum measures necessary to meet the Article 3 risk" should be established. (paras. 53–54)**
- **"In assessing the length of time that any provision within an FMPO is in force, the court should bear in mind that the circumstances**

within any family […] may change" (para. 55). As such, the courts should first consider whether a finite order meets the established risks, in which case a date should be fixed for reviewing the order. (para. 55)

- *FLA 1996, s. 4A* gived the court jurisdiction to protect a person in need regardless of their age and mental capacity.
- Therefore, "the jurisdiction to make a FMPO extends to the protection of adults who have capacity to make decisions for themselves, in particular in the context of marriage and foreign travel" (para. 62). The courts have jurisdiction to issue a FMPO including against the wishes of capatious adults, provided the court identifies a risk of harm contrary to ECHR, Article 3. (paras. 34, 62**–**66)

Passport Orders

- **An FMPO can include a travel ban or confiscation of identity documents under** Family Procedure Rules 2010, Procedural Guide s. A9. (para. 56)
- **The court should impose a time limit on any passport orders it issues and set a review date when the order is due to expire. "[A]n open-ended passport order or travel ban should only be imposed in the most e**xceptional of cases and where the court can look sufficiently far into the future to be satisfied that highly restrictive orders of that nature will be required indefinitely" (*Re M (Children) (Care Proceedings: Passport Orders)* [2017] followed). (paras. 58**–**67)

Regarding K's appeal

The Court of Appeal accepted HHJ Tucker's factual finding that K "feared for her own safety" following her refusal to enter into a marriage with a person her family had chosen for her. K, according to the Court, had suffered physical and serious emotional harm "because of her family's actions […] both before and after the

FMPO was made" (paras. 69–72). The Court also accepted HHJ Tucker's conclusion that there was "a real risk of honour based [sic] violence" towards K and that "honour based [sic] abuse had already taken place". (para. 73)

In light of the above, the Court of Appeal held that K's case justified consideration within Part 64A of the FLA 1996. The risk of serious honour-related violence K was exposed to before the FMPO and her relocation to a safe accommodation were sufficient to engage her rights under Article 3 of the ECHR. (paras. 74-78)

However, an indefinite Passport Order, a de facto travel ban, was a measure which disproportionately affected K's rights under Article 8 of the ECHR. For this reason, the appeal allowed the FMPO and Passport Order to be reviewed in September 2022. (paras. 77, 80)

Main quotations on cultural or religious diversity:

- "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))." (para. 17)
- "Forced marriage is a fundamental abuse of human rights, a form of domestic abuse and, since 2014, a criminal offence in England and Wales (FLA 1996, s 63CA)." (para. 22)
- "The abusive nature of a forced marriage does not begin and end on the day of the marriage ceremony. Rather, the marriage forms the start of a

potentially unending period in the victim's life where much of her daily experience will occur without their consent and against their will, or will otherwise be abusive. In particular, the consummation of the marriage, rather than being the positive experience, will be, by definition, a rape. Life for an unwilling participant in a forced marriage is likely to be characterised by serial rape, deprivation of liberty and physical abuse experienced over an extended period. It may also lead to forced pregnancy and childbearing. The fate of some victims of forced marriage is even worse and may include murder, other 'honour' crime or suicide." (para. 24)

- "Against that perspective it must be accepted that a forced marriage is likely to include behaviour sufficient to breach ECHR Article 3 which provides that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment'". (para. 25)
- "[T]his case justified consideration within FLA 1996, Part 4A and that the level of risk was sufficient to engage ECHR Art 3 (Stages Two and Three). Given the attitude of K and her family members, particularly the Fourth Respondent, there were no protective measures to be identified within the family." (para. 74)
- "K had taken no steps whatsoever to improve her capacity to protect herself, the Article 3 risk which, on the judge's findings, had in the past included threats of death by burning or attacks with a machete." (para. 76)

Main legal texts quoted in the decision:

International law

- European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR)

UK law

- Family Law Act 1996

- Forced Marriage (Civil Protection) Act 2007
- Family Procedure Rules 2010

Cases cited in the decision:

UK cases

Forced Marriage Protection Orders (FMPOs):

- *Bedfordshire Police Constabulary v RU* [2014] 1All ER 1068
- *NS v MI* [2007] 1FLR 444
- *Re A (Forced Marriage: Special Advocates)* [2010] EWHC 2438
- *Re M (Children) (Care Proceedings: Passport Orders)* [2017] EWCA Civ 69
- *Re SK (An Adult) (Forced Marriage: Appropriate Relief*) [2004] EWHC 3202

Female Genital Mutilation Protection Orders (FGMPOs):

- *A Local Authority v M and N* [2018] EWCA 870
- *Re X (A Child: FGMPO) (Rev 2)* [2018] EWCA Civ 1825

Assessment of Proportionality, ECRC rights:

- *Bank Mellat v HM Treasury (No 2)* [2014] AC 700
- *E v Chief Constable of the Royal Ulster Constabulary* [2009] 1 AC 536

Commentary

Forced Marriage Protection Orders: A Balancing Act Between Safeguarding Against the Risk of Forced Marriage and Other Fundamental Rights under the ECHR

Forced marriage breaches fundamental human rights, such as those under Article 12 of the European Convention on Human Rights (ECHR). Within the United Kingdom, forcing someone to marry is a criminal offence under the Anti-Social Behaviour, Crime and Policing Act 2014 and is punishable by up to seven years in prison. This includes using deception and coercion to force someone into marriage within the UK, taking someone overseas to force them to marry, and marrying a person who lacks the mental capacity to consent to a marriage. According to Section 12(1)(c) of the Matrimonial Causes Act 1973, a marriage can

be declared void where “either party to the marriage did not validly consent to it, whether in consequence to duress, mistake, unsoundness of mind or otherwise”.

The Forced Marriage (Civil Protection) Act 2007 introduced the power of the courts to issue Forced Marriage Protection Orders Orders (FMPO) by inserting Section 4A into the Family Law Act (FLA) 1996. The main purpose of an FMPO would be to protect a person from entering a marriage without giving ‘free and full consent’ (FLA 1996, Part 4A, s. 63A(4)) and to offer assistance to those who already live within a forced marriage. An FMPO may contain prohibitions, restrictions, or requirements the court sees fit for the order. For instance, they may include orders to stop intimidating behaviour, orders to locate a person at risk, orders of arrest in case of violence or threats of violent acts, as well as conditions such as surrendering a passport to prevent the person at risk from travelling abroad. Failure to comply with the terms of an FMPO is a criminal offence punishable by imprisonment of up to five years.

Re K (Forced Marriage: Passport Order) [2020] is part of a growing body of judicial decisions on forced marriage, especially the legality of imposing FMPOs. Notable examples of earlier case law in this regard include:

- *A v SM and HB* **(**Forced Marriage Protection Orders) [2012]* EWHC 435: Here, an FMPO was issued but without a time limit and an urgent hearing for the consideration of interim care orders of five young children was listed;
- *Re P (Forced Marriage) [2011]* EWHC 3467: Here, a marriage entered into in Pakistan was declared as not recognizable under English law because no proper and free consent was given by one of the parties. The judge acknowledged that such cases are particularly difficult for the respective families who may perceive their honour to be at stake;
- *Re SA (Vulnerable Adult with Capacity: Marriage) [2005]* EWHC 2942: The Court accepted a local authority’s request for an order that would ensure SA, an adult with reduced physical and mental capacity, would be properly informed about a certain form of marriage before entering into it. The court

highlighted the principle that it should seek to prevent physical and/or psychological damage to vulnerable adults in the same manner as it should do concerning children.

- *A Chief Constable v YK, RB, ZS, SI, AK and MH [2010*] EWHC 2438: Here, the Court issued an FMPO forbidding the parents and extended family of an adolescent girl to initiate and/or allow her to marry, through a formal or informal ceremony, within the UK or abroad. The source of information as to why an FMPO was needed was not discloused to the deffendants. The court held that in forced marriage cases this is justified because revealing such sensitive information is likely to place the person sourcing the relevant information at risk of honour-based violence and serious harm.
- *Re SK (An Adult) (Forced Marriage: Appropriate Relief) [2004] EWHC 3202: The Court held that it is within a court's jurisdiction to make an order designed to find the whereabouts of SK, an adult British citizen abroad, who s believed to be at risk of forced marriage. By contrast, the Court's power to intervene does not extend to a case of arranged marriage, a cultural tradition that the state ought to respect.*

The case of *Re K (Forced Marriage: Passport Order) [2020]* advanced the existing Family Law cases on forced marriage by ruling that the courts have the power to make FMPOs not only concerning children and vulnerable adults but also concerning adults with full mental capacity, even where the order would be against their expressed wishes. The Court of Appeal set out an important precedent for subsequent cases by providing a roadmap for future cases when the courts are asked to consider whether to make an FMPO. Moreover, the Court gave guidance on how to accommodate competing rights under Articles 3 and 8 of the ECHR, highlighting the four-step proportionality test set out in Moylan LJ in *Bank Mellat v HM Treasury (2)* [2014].

The Court cited at length numerous earlier decisions (see ruling section) and available statistics to note that forced marriage was a breach of fundamental human rights with severe consequences for the individuals involved, most of

whom are adults with full mental capacity (FCDO and HO 2020). In this regard, the Court asked for future judicial decisions to ensure the inclusion, where relevant, of an assessment of the future risk of harm from honour-based violence similar to determinations concerned with applications for Female Genital Mutilations Protection Orders.

Literature related to the main issue(s) at stake:

Guidelines and reports cited in the judgement:

- HM Government. 2008. *The Right to Choose: Multi-Agency Statutory Guidance for Dealing with Forced Marriage*. London: Forced Marriage Unit of the Foreign & Commonwealth Office, available at <https://www.gov.uk/government/publications/the-right-to-choose-multi-agency-statutory-guidance> accessed 3 August 2021.
- FCDO and HO. 2020. *Forced Marriage Unit Statistics.* London: Foreign, Commonwealth and Development Office and Home Office, available at < https://www.gov.uk/government/collections/forced-marriage-unit-statistics> accessed 10 August 2021.

Academic literature related to the topic:

- Clark, Brigitte and Claudina Richards. 2008. “The Prevention and Prohibition of Forced Marriages: A Comparative Approach”. *The International and Comparative Law Quarterly* 57 (3): 501–528.
- Dauvergne, Catherine and Jenni Millbank. 2010. “Forced Marriage as a Harm in Domestic and International Law”. *The Modern Law Review* 73 (1): 57–88.
- Enright, Máiréad. 2009. “Choice, Culture and the Politics of Belonging: The Emerging Law of Forced and Arranged Marriage”. *The Modern Law Review* 72 (3): 331–359.
- Gangoli, Geetanjali and Khatidja Chantler. 2009. “Protecting Victims of Forced Marriage: Is Age a Protective Factor?”. *Feminist Legal Studies* 17 (3): 267–288.

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Last edited on 11.08.2021

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Suggested citation of this case-law comment:

Mirzac, Iulia (2023): Forced Marriage Protection Orders: A Balancing Act Between Safeguarding Against the Risk of Forced Marriage and Other Fundamental Rights under the ECHR, Department of Law and Anthropology, Max Planck Institute for Social Anthropology, Halle (Saale), Germany, CUREDI041UK020, https://doi.org/10.48509/CUREDI041UK020.