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CUREDI041UK021

Question(s) at stake:

Whether the petitioner was forced to enter into an arranged marriage and whether the marriage should be declared voidable on the ground of duress.

Outcome of the ruling:

The petitioner was forced to enter into a marriage against her will. The judge declared the marriage voidable and “granted the petitioner a decree nisi of nullity of marriage on the ground of duress” (para. 43).

Topic(s):

- Personal Status, Family and Inheritance

Keywords:

Tag(s):

Author(s):

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Country:

United Kingdom

Official citation:

NS v MI [2006] EWHC 1646 (Fam)

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ECLI:

No ECLI number / ECLI number unknown

Date:

05 July 2006

Jurisdiction / Court / Chamber:

High Court of Justice (Family Division)

Remedy / Procedural stage:

Decree of nullity

Previous stages:

- On 5 April 2006, an order was issued “declaring that the respondent had until 5 April 2006 to file and serve” his response to the petitioner’s case (para. 21).

- On 13 January 2006, an *ex parte* order was issued, which included the following: (1) leave for the petition to be served to the respondent in Pakistan; (2) an injunction, according to which the respondent was not allowed to disclose the petition to immediate and extended family members; (3) an order for the petitioner to leave her passport with her solicitor with the aim of preventing her removal from the jurisdiction.

No official citations of the previous stages are available.

Subsequent stages:

- No information found.

Branches / Areas of law:

Family law

Facts:

The petitioner was born in February 1986 to a family of Pakistani background. She was born and raised in the UK. The respondent was born in July 1986 in Pakistan. He was the petitioner’s “first cousin, his father the brother of the petitioner’s mother” (para. 16). The respondent and the petitioner had not met prior to the events leading to the current proceedings which are based on the petitioner’s following claims:

- The petitioner travelled to Pakistan in June 2002, soon after her 16th birthday. She believed it was a holiday trip as she had a return ticket back to the UK scheduled for 15 August 2002. She sought and received the explicit promises of her family that she was not travelling to Pakistan to be married off. Her family actively encouraged her to travel to Pakistan to relax after her exams.

- However, once in Pakistan, her family took away her passport and informed her that she was not allowed to travel back to the UK unless she married the respondent. The petitioner’s parents threatened to kill themselves if she were to refuse to enter into the marriage. The petitioner was “*in effect trapped in Pakistan*” (para. 19). Eight months later, the petitioner gave in to her family’s pressure and undertook a marriage ceremony with the respondent on 27 September 2003. Both the petitioner and the respondent were 17 years old at the time. After the ceremony, the petitioner moved in with the respondent’s parents for approximately a week. The marriage was not consummated.

- Having persuaded her mother to return her passport, the petitioner returned to the UK in April 2004. There, she submitted a marriage nullity petition, i.e., an application for marriage annulment, to the court on 16 January 2006, asserting that she entered this marriage by force. She argued that her “will was overborne due to the duress placed upon her by her family” (para. 18(h)). She had no reasonable alternative to enter ther forced marriage. She did not stay in touch with the respondent, having requested an Islamic divorce in Pakistan at the time of the proceedings. Having borne witness to her distress, her parents decided to support her application for a marriage annulment.

The respondent and the petitioner’s family were served notice of the current proceedings. The respondent served a signed acknowledgement of the service stating his intention to defend the case. However, he filed no submissions. None of the petitioner’s family was present in court on the day of the hearing. The petitioner gave oral evidence in open court. Her evidence was uncontested.

Ruling:

Main conclusions and general observations concerning forced marriage:

1. Forced marriages are different from arranged marriages. The latter are lawful and are to be supported and respected by the courts. By contrast, forced marriages are unacceptable. No "*social or cultural imperatives*" can justify them (*Re SA (Vulnerable Adult with Capacity: Marriage) [2005]*, *Re SK (An Adult) (Forced Marriage: Appropriate Relief) [2004], Re K, A local authority v N [2005]* and *Singh v Entry Clearance Officer, New Delhi [2004]* followed). (paras. 2-3)

2. Forced marriages are likely to involve the commission of criminal offences (e.g., assault, battery, harassment, blackmail, threats to kill, false imprisonment, kidnapping, child abduction, and child cruelty) and of civil offences such as trespass to the person. The consummation of a forced marriage would amount to rape. (paras. 13-14)

   Statutory damages would be available under the *Protection from Harassment Act 1997*. A recent example is an unreported case in which a Sikh woman was awarded £35,000 for what the judge described as *"four months of hell"* within a collapsed arranged marriage. (paras. 13-14)

3. There is a grey area between arranged and forced marriage. An arranged marriage may become forced, for example, due to the emotional pressure imposed by social expectations (*Re SK (An Adult) (Forced Marriage: Appropriate Relief)* [2004] applied). (para. 15)

4. In the case of forced marriage, the court must use *"every weapon in its protective arsenal [...] to protect the weak and helpless"*, especially in the context of a forced marriage where individuals at risk often need protection from their own families (*Re K, A local authority v N [2005]* and *Singh v Entry Clearance Officer, New Delhi [2004]* followed). (paras. 4, 8)

5. Children at risk of forced marriage can be made 'wards of court' to prevent them from entering a marriage against their will (*Re KR (Abduction: Forcible Removal by Parents) [1999]* and *Re K, A local authority v N [2005]* followed). When vulnerable adults are concerned, the courts develop the *"closely comparable adult inherent jurisdiction"* (*Re SK (An Adult) (Forced Marriage: Appropriate Relief) [2004],* see *CUREDI041UK022* for a separate analysis). (para. 5)

6. The court's *"protective jurisdiction is particularly important"* in forced marriage cases given the *"irreparable and severe physical and emotional consequences for its victims"* (paras 7-8). For this reason, *"prevention is better than cure"* (*Re MAB, X City Council v MB [2006*] and *Re SK (An Adult) (Forced Marriage: Appropriate Relief) [2004]* quoted). (paras 7-8)

7. The courts can intervene by way of issuing protective orders, for example, to:

- restrain the celebration of a marriage;
- prevent a person at risk from being taken abroad to be married off;
- prevent further attempts to force someone into a marriage;
- ensure a person's repatriation abroad where a forced marriage took place;
- prevent further attempts to force someone into marriage and protect them from the risk of victimization or retaliation.

  Such orders were issued in cases such as *M v B, A and S (By the Official Solicitor) [2005]*, *Re SA (Vulnerable Adult with Capacity: Marriage) [2005]*, *Re K, A local authority v N [2005]* and *Re MAB, X City Council v MB [2006]*, *Re KR (Abduction: Forcible Removal by Parents) [1999]* and R*e SK (An Adult) (Forced Marriage: Appropriate Relief)* [2004]. (paras. 6 and 12)

8. When a forced marriage has already taken place, the appropriate remedy is a nullity suit rather than a divorce. This is to avoid the stigma often attached to a divorcee (*P v R (Forced Marriage: Annulment: Procedure) [2003]* followed). (paras. 9-10)

Main conclusions concerning issues of consent, duress and marriage validity (paras. 25-38):

1. Section 12(c) of the Matrimonial Causes Act 1973 sets out two bases on which a marriage may be voidable: *"unsoundness of mind"* (i.e., lacking the capacity to marry) and entering into a marriage under *duress*. The latter nullifies the apparent consent a capacitated party may have given to enter into a marriage. (para. 26)

2. When assessing whether a marriage is voidable on grounds of duress, the correct test to be applied is the one set out by the Court of Appeal in *Hirani v Hirani [1982].* Namely, the relevant question to ask is *"whether the threats, pressure or whatever it is, is such as to destroy the reality of consent and overbears the will of the individual"* entering into a marriage (page 234 of the *Hirani v Hirani [1982]* judgment). (para. 27)

   The judge noted that the *Hirani* test had recently been applied in *P v R (Forced Marriage: Annulment: Procedure [2003]. R*eference was also made to the earlier case of *Scott (falsely called Sebright) v Sebright* [1886] in which a similar test to *Hirani* was applied and a nullity decree was issued. The judge sought to reinforce his reasoning by quoting *"well-known metaphor[s]"* used by:

- American writer cited in *Szechter (orse Karsov) v Szechter [1971] on page 297: "Where a formal consent is brought about by force, menace, or duress - a yielding of the lips, not of the mind - it is of no legal effect. This rule, applicable to all contracts, finds no exception in marriage."*

- Greek poet cited in *Re T (Adult: Refusal of Treatment)* [1993] on page 121*: "my tongue has sworn, but no oath binds my mind" (i.e although one gave consent with their mouth, "the mind as the seat of the mental faculties, perception, thought I is unsworn"*). (paras. 27-30)

Regarding the *Hirani* test, the judge provided several clarifications:

3. Although often the case, the agent of duress does not necessarily have to be the other party to the marriage (*Szechter (orse Karsov) v Szechter [1971]* followed). (para. 32)

4. There are many ways in which one can exercise duress or coercion over another. These can at once be *"very subtle"* and yet *"pervasive and powerful"* (*Hall v Hall [1868]* and *Allcard v Skinner [1887]* followed). (paras. 33-34)

   Particular attention needs to be paid to the relationship between the parties. For example, where the source of undue influence is a parent or a close relative, and *"where the arguments and persuasion are based upon personal affection or duty, religious beliefs, powerful social or cultural conventions, or asserted social, familial or domestic obligations […] very little pressure may suffice to bring about the desired result"* (*Re SA (Vulnerable Adult with Capacity: Marriage)* [2005] followed). (para. 34)

5. The test is a subjective rather than an objective one (*Scott (falsely called Sebright) v Sebright* [1886] applied). (para. 35)

6. The standard of proof is the ordinary civil standard of the balance of probability. The principle set out in *Re H and others (Minors) (Sexual Abuse: Standard of Proof) [1996]* is to be applied, especially where a nullity suit is undefended. According to it*, "the more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it."* (para. 36)

7. The court must *"guard against the risk of stereotyping"* and *"be alert to the possibility of forced marriage"*, whilst at the same time ensuring it does not interfere unjustifiably in the choices of families *"merely because they cleave [...] to cultural beliefs, more or less different from what is familiar to those who view life from a purely Euro-centric*

perspective" (*Re K, A local authority v N [2005]* quoted). (para. 37)

8. When a decree of marriage nullity is considered, the case must, in the interest of public policy, be heard in open court. However, when a witness is reluctant to give evidence in the presence of their family or community members, alternative arrangements similar to how vulnerable witnesses in forensic settings are treated would be necessary, for example, giving evidence behind a screen or via a video link. (para. 38)

Main findings concerning the petitioner's case (paras. 39-43):

1. The petitioner was accepted as a credible witness. Both the respondent and the petitioner's family were made aware of the proceedings. However, they chose not to defend the suit. On this basis, the judge inferred that they had no basis for challenging the petitioner's case. This confirmed the petitioner's credibility. (paras. 24, 39-40)

2. The petitioner's family persuaded her to travel to Pakistan under a false pretence. There, they kept her in a remote part of the country for many months against her wish. The petitioner was not subjected to physical violence. However, the *"continued emotional pressure and moral blackmail, applied over many months"* amounted to a level of duress that was sufficient to overborne her consent to the marriage. (para 41)

3. The petitioner was granted "a decree *nisi* of nullity on the ground of duress". (paras. 24, 41-42)

Main quotations on cultural or religious diversity:

- "Arranged marriages are perfectly lawful. As I emphasised in *Re SA (Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942 (Fam), [2006] 1 FLR 867, at para [26], such marriages are not, of course, in any way to be condemned. On the contrary, as Singer J said in *In re SK (An Adult) (Forced Marriage: Appropriate Relief)* [2004] EWHC 3202 (Fam), [2006] 1 WLR 81, at para [7], arranged marriages are to be supported as a conventional concept in many societies. And for that very reason they are, I emphasise, not merely to be supported but to be respected." (para. 2)

- "Forced marriages, in contrast, are utterly unacceptable. I repeat what I said in *Re K, A local authority v N* [2005] EWHC 2956 (Fam) at para [85]:

- '*Forced marriage is a gross abuse of human rights. It is a form of domestic violence that dehumanises people by denying them their right to choose how to live their lives. It is an appalling practice. As I said in Singh v Entry Clearance Officer, New Delhi [2004] EWCA Civ 1075, [2005] 1 FLR 308, at para [68]:*

- *'Forced marriages, whatever the social or cultural imperatives that may be said to justify what remains a distressingly widespread practice, are rightly considered to be as much beyond the pale as such barbarous practices as female genital mutilation and so-called 'honour killings'. No social or cultural imperative can extenuate and no pretended recourse to religious belief can possibly justify forced marriage'."* (para. 3)

- ○ "Forced marriage is intolerable. It is an abomination. And, as I also said in *Re K, A local authority v N* [2005] EWHC 2956 (Fam) at paras [87]-[88], the court must bend all its powers to prevent it from happening. The court must not hesitate to use every weapon in its protective arsenal if faced with what is, or appears to be, a case of forced marriage." (para. 4)
- ○ "The court's protective jurisdiction is also particularly important in this context because, sadly, it is precisely from those who ought to be their natural protectors - parents and other close relatives - that all too typically the victims of forced marriages need to be protected. The law must always be astute to protect the weak and helpless, not least in circumstances where, as often happens in such cases, the very people they need to be protected from are their own relatives." (para. 8)

- "It is important to bear in mind what Singer J said in In *re SK (An Adult) (Forced Marriage: Appropriate Relief)* [2004] EWHC 3202 (Fam), [2006] 1 WLR 81, at para [7]:

- *'I emphasise, as needs always to be emphasised, that there is a spectrum of forced marriage from physical force or fear of injury or death in their most literal form, through to the undue imposition of emotional pressure which is at the other end of the forced marriage range, and that a grey area then separates unacceptable forced marriage from marriages arranged traditionally which are in no way to be condemned, but rather supported as a conventional concept in many societies. Social expectations can of themselves impose emotional pressure and the grey area to which I have referred is where one may slip into the other: arranged may become forced but forced is always different from arranged'."* (para. 15)

- "As I remarked in *Re SA (Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942 (Fam), [2006] 1 FLR 867, at para [78], where the influence is that of a parent or other close and dominating relative, and where the arguments and persuasion are based upon personal affection or duty, religious beliefs, powerful social or cultural conventions, or asserted social, familial or domestic obligations, the influence may, as Butler-Sloss LJ put it in *Re T (Adult: Refusal of Treatment)* [1993] Fam 95 at page 120, be subtle, insidious, pervasive and powerful. In such cases, moreover, very little pressure may suffice to bring about the desired result." (para. 35)

- "The court must be alert to the possibility of forced marriage - something more prevalent than some would care to admit - and robust in its response to it. But we must always equally be careful not merely to distinguish been arranged marriage and forced marriage but also to guard against the risk of stereotyping. As I said in *Re K, A local authority v N* [2005] EWHC 2956 (Fam) at para [93]:

- '*We must guard against the risk of stereotyping. We must be careful to ensure that our understandable concern to protect vulnerable children (or, indeed, vulnerable young adults) does not lead us to interfere inappropriately - and if inappropriately then unjustly - with families merely because they cleave, as this family does, to mores, to cultural beliefs, more or less different from what is familiar to those who view life from a purely Euro-centric perspective'*." (para. 37)

Main legal texts quoted in the decision:

**UK Domestic Law **

- Family Proceedings Rules 1991
- Matrimonial Causes Act 1973
- Protection from Harassment Act 1997

**Legal texts cited in the commentary: **

- Anti-Social Behaviour, Crime and Policing Act 2014
- Forced Marriage (Civil Partnership) Act 2007

Cases cited in the decision:

UK cases:

Forced and arranged marriages

- *M v B, A and S (By the Official Solicitor)* [2005] EWHC 1681
- *P v R (Forced Marriage: Annulment: Procedure)* [2003] 1 FLR 661
- *Re KR (Abduction: Forcible Removal by Parents)* [1999] 2 FLR 542
- *Re K, A local authority v N* [2005] EWHC 2956
- *Re MAB, X City Council v MB* [2006] EWHC 168
- *Re SK (An Adult) (Forced Marriage: Appropriate Relief)* [2004] EWHC 3202
- *Re SA (Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942

Grounds for declaring a marriage voidable

- *Allcard v Skinner [1887]* 36 ChD 145

- *Hirani v Hirani [1982]* 4 FLR 232
- *Hall v Hall [1868]* LR 1 P&D 481
- *Szechter (orse Karsov) v Szechter [1971]* P 286
- *Re T (Adult: Refusal of Treatment) [1993]* Fam 95
- *Re H & others (Minors) (Sexual Abuse: Standard of Proof) [1996]* AC 563
- *Scott (falsely called Sebright) v Sebright [1886]* 12 PD 31
- *Sheffield City Council v E [2004]* EWHC 2808 (Fam)

Cases cited in the commentary:

FGM

- *Re B and G (Children) (No 2) [2015]* EWFC 3
- *Re CE (Female Genital Mutilation) [2016]* EWHC 1052 (Fam)

Commentary:

Annulment of a Forced Marriage on Grounds of Duress

Under the *Forced Marriage (Civil Partnership) Act 2007*, the courts in England and Wales have the power to issue Forced Marriage Protection Orders (FMPOs) to prevent forced marriages from being entered into by individuals at risk and to assist those who already live within a forced marriage arrangement. The courts enjoy significant discretion in awarding a protective order and the conditions that can be attached to it. Forced marriage is now a criminal offence pursuant to the *Anti-Social Behaviour, Crime and Policing Act 2014*.

Looking retrospectively, in light of the statutory acts now in place, the *NS* decision seems somewhat conventional and unsurprising. However, this was certainly not the case at the time. The judgement reads like a careful construction of an argument. The judge chose to quote at length a significant number of case law, and even poets and philosophers, in what reads like a careful building of an argument. He was looking to persuade his judicial peers that the protectionist approach he was setting out in *NS* was not only appropriate but, indeed, the only correct one. His efforts were successful.

Delivered a year prior to the 2007 Act, the *NS v MI* [2006] judgment is one of the earliest decisions in what has become a clear judicial trend: highly protectionist decisions of family courts in England and Wales concerning forced marriages. The judge's remark in *NS*, "the court must […] use every weapon in its protective arsenal" when faced with a case of forced marriage (para. 4), has since been quoted regularly in subsequent cases alongside many of his other remarks. The decision has not only had the effect of extending protection to potential victims of forced marriage. It also laid the foundations for the extension of an equally protectionist approach in other areas of law, such as female genital mutilation (see, for example, *Re B and G (Children) (No 2) [2015]* and *Re CE (Female Genital Mutilation) [2016]*).

In *NS*, it was held that the court's protective approach is particularly necessary in the context of forced marriages due to the negative effects of several factors usually at play. Firstly, the judge reasoned that "the law must always be astute to protect the weak and helpless", such as victims of forced marriage who "sadly" often require protection "precisely from those who ought to be their natural protectors - parents and other close relatives" (para. 8). Secondly, the judge referred to the UK Government's Consultation Paper entitled "Forced Marriage: A Wrong not a Right" (Home Office 2005) in noting that forcing someone into a marriage against their will "almost invariably involves the commission of very serious criminal offences" (para. 13) as well as civil torts against that individual. The result is "irreparable and severe physical and emotional consequences for its victims" (para. 7).

This led the judge to conclude that "prevention is better than cure" (para. 7) and that forced marriage is "a gross abuse of human rights", "an abomination", "utterly unacceptable", "intolerable", and a "barbarous practice" that no "social or cultural imperatives" can justify. Forced marriages were compared to "barbarous practices" such as "female genital mutilation and so-called 'honour killings'" (paras. 3–4).

Having made the above-mentioned remarks, the judge proceeded with a detailed analysis of how concepts such as consent and duress may operate within the context of forced marriage. The judge quoted at length both himself, other judges from earlier cases, as well as wider academic and artistic literature (see ruling section above for details). The result was the consolidation of the existing body of judicial cases on the subject, which was welcomed by practitioners and scholars alike (Clark and Richards 2008).

The *NS* case has given credence to the notion that psychological violence can in and of itself apply such pressure on an individual as to undermine one's ability to freely consent. This closed a previous lacuna left untouched by the case of *P v R*

(Forced Marriage: Annulment: Procedure) [2003], which was the leading authority on the subject prior to *NS*. Similar to *NS [2006],* in *P v R [2003]* a petition for marriage nullity was also granted on the grounds of duress. However, the court in *NS* distinguished the factual basis of the two cases in that, unlike in *P v R [2003]*, the petitioner in *NS v MI [2006]* was neither threatened with physical violence nor subjected to it.

Furthermore, the judge in *NS [2006]* clarified that the *Hirani* test of duress is a subjective rather than an objective one. It was held that in the context of forced marriage, particular attention needs to be paid to the relationship between the parties. Especially if the pressure is based on religious beliefs, concepts of duty, family honour and affection, cultural conventions, and social expectations, "very subtle" and "very little pressure may suffice to bring about the desired result" of forcing someone into a marriage (para. 34).

A striking feature of this case is that it was based on uncontested evidence. The petitioner's family were made aware of the proceedings and were invited to make submissions. They chose not to. The judge inferred that the reason for their silence must be that they had no evidence to dispute the petitioner's case. Therefore, their silence was taken to mean that they accepted the role the petitioner claimed they had played in forcing her to enter into a marriage against her will. This is at odds with the approach a criminal court or an immigration tribunal would likely have taken when faced with the same factual basis.

Lastly, the judge sought to balance his protectionist approach by warning against the risk of stereotyping families who choose to follow ways of life that are different to a "purely Euro-centric perspective" (para. 37), especially where the case is based on uncontested evidence. The judge was also careful to note that when a forced marriage has already taken place, a decree of nullity is a better-suited remedy than divorce given the community stigma often attached to a divorcee. By doing so, the judge demonstrated a nuanced understanding of cultural diversity, seeking to respect the right to family life whilst at the same time ensuring the protection of one's fundamental right of choosing whether and whom to marry.

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

Guidelines and reports cited in the judgement:

- Home Office 'Consultation Paper Executive Paper: Forced Marriage - A Wrong Not a Right' (Home Office 2005).

Literature cited in the judgment:

- Hutchinson, Anne-Marie, Harriet Hayward, and Gupta Teertha. 2006. "Forced Marriage Nullity Procedure in England and Wales". *International Family Law Journal* 1(1): 20-23.

Academic literature related to the topic:

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- Dauvergne, Catherine and Jenni Millbank. 2010. "Forced Marriage as a Harm in Domestic and International Law". *The Modern Law Review* 73 (1): 57–88.
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