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

The Court's Powers to Protect Mentally-Able Adults at Risk of Forced Marriage

Question(s) at stake:

What powers do the courts of England and Wales have concerning mentally-able adults at risk of forced marriage and how should those powers be exercised?

Outcome of the ruling:

The courts' inherent jurisdiction gives them the power to protect mentally-able adults, including those abroad, whose ability to consent to a marriage is interfered with.

In relation to SK, the UK Foreign and Commonwealth Office's application for injunctive relief was granted. Orders were given to "ascertain whether or not she [had] been able to exercise her free will when making decisions concerning her civil status and her country of residence" (para. 9).

Topic(s):

- Personal Status, Family and Inheritance

Keywords:

- Arranged marriage
- Forced marriage
- Proportionality
- Right to marry and to found a family

Tag(s):

Author(s):

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Country:

United Kingdom

Official citation:

RE SK (An Adult) (Forced Marriage: Approproate Relief) [2004] EWHC 3202 (Fam)

Link to the decision:

https://www.bailii.org/ew/cases/EWHC/Fam/2004/3202.html

ECLI:

No ECLI number / ECLI number unknown

Date:

10 December 2004

Jurisdiction / Court / Chamber:

High Court of Justice (Family Division)

Remedy / Procedural stage:

Declaratory Relief

Previous stages:

- N/A

Subsequent stages:

- No information found.

Branches / Areas of law:

Family law

Facts:

SK was a young adult female British citizen of Bangladeshi descent. She was raised and lived in the United Kingdom. At the time of the proceedings, SK was in Bangladesh where the UK Foreign and Commonwealth Office (FCO) believed she was at risk of forced marriage.

The FCO sought, under the court's inherent jurisdiction, an order to assist SK to "contact the British High Commission in Dhaka, Bangladesh" to determine whether she was being detained by her relatives or their friends in Bangladesh against her will and whether she had entered, or was about to enter, a marriage forcibly (para. 17).

The FCO argued that it had obtained information from a variety of sources that suggested there was a well-founded concern that SK was likely to be at risk of harm by way of a forced marriage abroad.

The hearing was held in private and no details of the evidence the FCO may have had were made publicly available. The hearing was without notice and neither SK nor her parents, the proposed defendants, had any knowledge of it. Therefore, the FCO's evidence was untested.

Ruling:

Main conclusions concerning the courts' powers in relation to mentally-able adults believed to be at risk of forced marriage:

1. Forced marriage amounts to "gross interference" with an individual's human rights and may involve criminal offences against them. (para. 4)
2. A forced marriage would be a voidable marriage given that one's capacity to consent to it would have been "overborne by fear, duress or threat". (para. 4)

   Following *P v R (Forced Marriage: Annulment: Procedure) [2003],* when a forced marriage has occurred, a decree of nullity is to be granted rather than a divorce decree. This is to avoid the stigma usually attached to a divorcee. (para. 14)

3. Forced marriages are distinct from arranged marriages. Consent is the key differentiating factor between the two: unlike arranged marriages, forced marriages are entered under duress. The former is to be condemned as an unacceptable violation of an individual's integrity. The latter is to be "supported as a conventional concept in many societies". (para. 7)

4. Preventive measures and remedies are available through the courts in case a minor is at risk of forced marriage. A child can be made a ward of court for these purposes. (paras. 5, 8)

5. "An adult cannot be made a ward of court" unless mentally incapacitated. However, when a mentally-able adult "is deprived of the capacity to make relevant decision" – such as the decision to marry someone or to marry at all – the inherent jurisdiction of the High Court can be relied upon to provide a remedy. Such decisions are to be made based on the adult's best interests, which are to be objectively assessed by the courts. (paras. 8–9)

   The courts have the power to issue orders designed to ascertain whether an individual believed to be at risk of forced marriage can exercise their free will concerning their civil status and country of residence. When evidence indicates a risk of forced marriage, such orders justify the courts' interference with an individual's right to private life and, given the seriousness of the risk involved, are proportionate with the aim sought. (paras. 9, 12)

   The judge held that "resemblances are to be discerned" between adults at risk of forced marriage and individuals described as "incompetent adults" such as those "deprived of the capacity for autonomy by the after-effects of a stroke" (*Re S (Hospital patient: court's jurisdiction) [1996]* and *A v Health Authority and Others [2002]* applied by analogy). (para. 8)

   The judge reasoned by analogy to the Islamic Republic of Pakistan's "ancient writ of habeas corpus*"*, which continued to have a contemporary use in Pakistan and the Azad Kashmir region. According to it, the court can order

the attendance of adults and children in court to establish their true wishes regarding a proposed marriage. The judge maintained that it have had contemporary use in Pakistan and the Azad Kashmir region. (para. 17)

Main findings concerning SK:

1. The judge granted the injunctive relief sought by the FCO. Directions were given to establish SK's exact whereabouts in Bangladesh and to arrange "for her to be placed in contact with the British High Commission in Dhaka" to establish whether SK was at risk of forced marriage and, if so, what her true wishes were about her civil status and country of residency. (paras. 10, 12 and 17)
2. Should they be deemed necessary, future orders may include injunctions to prevent relevant individuals from causing or permitting SK to undergo a marriage ceremony against her will. Injunctive relief may also be provided to restrain relevant individuals from threatening, harassing, or using violence against SK. Moreover, the judge reasons that such was the strength of his anxiety concerning SK that powers of arrest could also be issued to bring relevant individuals before the court. (para. 11)

Main quotations on cultural or religious diversity:

- "The communities within which forced marriage can take place are numerous and they are by no means restricted to communities of one faith, or to communities in or from any one part of the world. I certainly have had [the] experience of forced marriage cases involving various religions other than Islam and with connections elsewhere than in South-East Asia. However it is certainly to be noted and applauded that responsible Muslim bodies within England and Wales recognise and broadcast that forced marriage is un-Islamic, finds not the slightest vindication in the Koran, and is as unacceptable in Islam as to all other true religions." (para. 6)

- “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 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. 7)

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 (hereafter ECHR)

UK Domestic law

- Family Law Act 1996
- Forced Marriage (Civil Protection) Act 2007

Cases cited in the decision:

UK cases

On forced marriage:

- *P v R (Forced Marriage: Annulment: Procedure) [2003]* 1 FLR 661

On the court’s declaratory power in relation to ‘incompetent adults’:

- *A v A Health Authority and Others; J and Linked Applications [2002]* EWHC 18 (Fam/Admin)

- *Re J; The Queen on the Application of S v Secretary of State for the Home Department [2002]* 1 FLR 845
- *Re S (Hospital patient: court's jurisdiction) [1996]* Fam 1

Cases referred to in the commentary:

- *DL v Local Authority and Others [2012]* EWCA Civ 253
- *NS v MI [2006]* All ER (D) 48
- *Re KR (Abduction: Forcible Removal by Parents) [1999]* 2 FLR 542
- *Re SA (Vulnerable adult with capacity: Marriage) [2005]* EWHC 2942

Commentary

The Court's Powers to Protect Mentally-Able Adults at Risk of Forced Marriage

The case of *SK* [2004] was a landmark decision concerning the powers of the courts in England and Wales concerning adults at risk of forced marriage. In the judge's own words, this was a "novel" case "of a type which has been anticipated by commentators and practitioners who work in the field of forced marriage" (para. 1).

Before *SK* [2004], case law had established that minors and adults who lack mental capacity and are believed to be at risk of forced marriage could be made a ward of court. This means that the courts would place them under the protection of a legal guardian, thereby ensuring their safety and prioritizing their best interests (see, for example, *Re KR (Abduction: Forcible Removal by Parents)* [1999] 2 FLR 542). By contrast, there was no legislation in place concerning adults with full mental capacity believed to be at risk of forced marriage, neither by way of statutory acts nor through case law. Therefore, the case of *SK [2004]* invited the High Court to clarify whether the courts had any powers in relation to mentally-able adults at risk of forced marriage and, if so, how they are to be exercised.

To answer this question and to fill the existing lacuna in legislation, the Court in *SK* took an unconventional approach. Namely, it held that its inherent jurisdiction can be extended to protect mentally-able adults whose ability to consent to a

marriage is interfered with, including when the adult is abroad. “Inherent jurisdiction” is a doctrine within English common law holding that a higher court has jurisdiction to handle any matter that comes before it unless explicitly stated otherwise by statutory rules. It is a non-statutory power exercised by the judiciary on behalf of the British Crown to protect its subjects from harm, especially the most vulnerable ones. The judge reasoned by analogy to the Islamic Republic of Pakistan’s ancient writ of *habeas corpus*. Such a reference is unusual, which indicates that in the absence of guidance within the domestic legal framework, the judge looked for guidance from other jurisdictions.

In practice, the courts had used their inherent jurisdiction on only a handful of exceptional occasions. For example, in *SK*, the judge referred to the case of *Re S (Hospital Patient: Court’s Jurisdiction) [1996],* in which the court used its inherent jurisdiction to protect an adult who had lost autonomy following a stroke. It was argued in *Re S [1996]* that the court can use its inherent jurisdiction to protect mentally-able adults who cannot make relevant decisions since failure to protect them when needed would have irrevocable consequences for their lives.

Reasoning by analogy to the decision in *Re S [1996]*, the judge in *SK* held that a forced marriage, although declared voidable on grounds of duress, would “nonetheless [be] one which might engender irreparable and severe physical and emotional consequences for its victims” (para. 4). The judge went on to characterize forced marriage as a “gross transgression of an individual’s integrity” and human rights (para. 5). He quoted a press release from 27 October 2004 on the establishment of the Foreign Office Forced Marriage Unit, in which the Home Office referred to forced marriage as a “form of domestic violence that dehumanises people by denying them their right to choose how to live their lives” (para. 5). Therefore, in ruling that SK “should not be the subject of duress or force or be deprived of the ability to make her own decision” (para. 3), the judge concluded that the courts’ inherent jurisdiction “is a sufficiently flexible remedy to evolve in accordance with social needs and social values*”* (para. 8).

The decision in *SK [2004]* paved the way for an increasingly protectionist approach by the courts concerning vulnerable adults. For example, in *Re SA*

[2005], the court quoted *SK [2004]* at length to rule that its inherent jurisdiction could be used to prevent the family of a mentally-able adult suffering from sensory neural loss from influencing her decision regarding an arranged marriage. In *DL v Local Authority and Others [2012]*, the Court of Appeal used its inherent jurisdiction to issue injunctive orders restraining a controlling son from influencing his elderly parents.

Additionally, the case of *SK* became a leading authority and a highly quoted judgement amongst forced marriage scholars and practitioners due to the judge's nuanced discussion of the topic. Firstly, a differentiation was made between arranged and forced marriage. The latter is an unacceptable interference with an individual's capacity to control their "own life and destiny" (para. 3) whereas the former is a "conventional concept in many societies" to be supported rather than condemned by the courts (para. 7). The judge warned whereas "forced is always different from arranged", social expectations may impose emotional pressure on an individual to such extent that an "arranged [marriage] may become forced" (para. 7).

Secondly, the judge was praised in subsequent case law (see, for example, *CUREDI041UK021,* on the case *NS v MI [2006]*) for emphasizing that forced marriage is not gender-specific. "It must never be forgotten that many victims are in fact young men", warned the judge (para. 16). He quoted statistical data provided by the UK High Commission in Islamabad, Bangladesh, according to which in the year 2004 alone, 105 cases of forced marriage were registered, 20% of those seeking assistance against being coerced into marriage were male. It was important for the judge to highlight what scholars and practitioners continue to call an overlooked and under-researched area (Dutt 2019; FCO 2009, 2013).

Thirdly, the judge cautioned that forced marriage transgresses racial, religious, and ethical divides. He went on to praise Muslim bodies in the UK for clarifying that *"forced marriage is un-Islamic, finds not the slightest vindication in the Koran, and is as unacceptable in Islam as to all other true religions"* (para. 6). Lastly, the judge referred to forced marriage as a form of domestic violence, a view that scholars had long been advocating for (Chantler 2012; Dauvergne and

Millbank 2010; Siddiqui 2005)

In what was deemed a proportionate response given “the potential urgency of the situation and the seriousness of the risk” involved (para. 12), the judge granted the injunctive relief sought by the FCO. The judge held that the court’s actions were justified, even though little to no evidence was provided to back the claim since there was reason to believe that an individual may have been at risk of forced marriage. This is even more stark in the context of this case’s factual basis, given that neither the proposed plaintiff nor her family was aware of the proceedings taking place on their behalf and for their alleged benefit.

The case of *SK* highlights the highly protectionist approach family courts in England and Wales are willing to take on behalf of its citizens believed to be at risk of forced marriage and “the importance these courts place on the right of the individual to exercise choice in this most intimate area of decision-making” (para. 16).

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

Guidelines and reports cited in the commentary:

- FCO. 2009. *Multi-agency practice guidelines: Handling cases of forced marriage*. London: Foreign and Commonwealth Office, available at < https://www.gov.uk/guidance/forced-marriage> accessed 6 March 2022.
- FCO. 2013. *The Right to Choose: Multi-Agency Statutory Guidance for Dealing with Forced Marriage.* London: Foreign and Commonwealth Office, available at <https://www.gov.uk/government/publications/the-right-to-choose-multi-agency-statutory-guidance> accessed 6 March 2022.

Academic literature related to the topic:

- Chantler, Khatidja. 2012. “Recognition of and Intervention in Forced Marriage as a Form of Violence and Abuse”. *Trauma, Violence, & Abuse* 13 (3): 176–183.

- Dutt, Ayurshi. 2019. "'Seeing the Unseen': Male Victims of Forced Marriages". In Mohammad Idriss (ed), *Men, Masculinities and Honour-Based Abuse*, 24–44. Abingdon: Routledge.
- Dauvergne, Catherine and Jenni Millbank. 2010. "Forced Marriage as a Harm in Domestic and International Law". *The Modern Law Review* 73 (1): 57–88.
- Siddiqui, Hannana. 2005. "'There Is No "Honour" in Domestic Violence, Only Shame!' Women's Struggles against 'Honour' Crimes in the UK". In Lynn Welchman and Sara Hossain (eds), *'Honour': Crimes, Paradigms and Violence against Women*, 263–281. London: Zed Books Ltd.

Additional suggested literature on 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.
- 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.
- Gaffney-Rhys, Ruth. 2014. "The Development of the Law Relating to Forced Marriage: Does the Law Reflect the Interests of the Victim?". *Crime Prevention and Community Safety* 16 (4): 269–293.

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