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

The Court's Power to Protect a Dual Pakistani-British Minor at Risk of Forced Marriage Abroad

Question(s) at stake:

Whether it fell within the court's jurisdiction to make a minor with both Pakistani and British nationality a ward of court to enable her to travel to the UK from Pakistan, where she was believed to be at risk of being forced into a marriage.

Outcome of the ruling:

Given the exceptional circumstances of the case and the risk of harm posed by forced marriage, the court's inherent jurisdiction and the parens patriae principles were extended to protect a British minor abroad by way of making her a ward of court.

Topic(s):

- Personal Status, Family and Inheritance

Keywords:

- Best interests of the child
- Forced marriage
- Right to marry and to found a family

Tag(s):

Author(s):

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Country:

United Kingdom

Official citation:

RB v FB and MA (Forced Marriage: Wardship: Jurisdiction) [2008] EWHC 1436 (Fam)

Link to the decision:

https://www.bailii.org/ew/cases/EWHC/Fam/2008/1436.html

ECLI:

No ECLI number / ECLI number unknown

Date:

15 April 2008

Jurisdiction / Court / Chamber:

High Court of Justice (Family Division)

Remedy / Procedural stage:

Discharging wardship

Previous stages:

- On 9 April 2008, the minor travelled from Pakistan to the UK.
- On 4 April 2008, the minor was made a ward of court.

No official citations of the previous stages are available.

Subsequent stages:

- No information found.

Branches / Areas of law:

Family Law

Facts:

The case concerns a female 15-year-old who holds both Pakistani and British citizenship. She was born and raised in Pakistan. Her father was a British citizen who passed away in 2003. Her paternal half-brother resided in Scotland. She had a British passport but had never visited the UK before the current proceedings. Her mother, a Pakistani citizen, was orphaned as a child and lived under the guardianship of Mr S.

On 31 March 2008, the 15-year-old girl contacted the British High Commission in Islamabad claiming that her mother had been forcing her to marry the son of Mr S. The two of them had never met. The girl's understanding was that he was much older than her and that he was an alcoholic. The marriage ceremony was arranged to take place on 10 April 2008 despite her signalling to her mother that she did not wish to go ahead with the marriage. This was a marriage arranged by her mother and Mr S.

On 31 March 2008, the minor asked the British High Commission in Islamabad to help her leave Pakistan and travel to the UK where her half-brother was offering her a home. The Commission, in cooperation with the Forced Marriage Unit of the Foreign and Commonwealth Office (FCO) in London, was prepared to offer the assistance requested by the minor. They found that the minor met the "Gillick competence test", as set out in *Gillick [1986]*.According to it, a minor is found to have the capacity to consent to a certain treatment against their parents' wishes when the minor can demonstrate to have sufficient mental abilities to make up his or her mind on the matter.

Subsequently, the FCO applied for the court orders to provide it with the necessary legal backing to remove the minor from Pakistan and bring her to the UK. In the meantime, the local authority in Scotland assessed the minor's brother and concluded that his home was a suitable place for his half-sister to live in.At the FCO's request, the child was made a ward of court on 4 April 2008. She travelled to Scotland on 9 April 2008. The wardship was transferred from the English courts to the Scottish courts from this stage forward.

On 15 April, the current judgement was issued. It addressed the question of whether the court had jurisdiction to make the minor a ward of court since,

although a British national, she never took habitual residency in the UK, had never visited the country, and was not connected to it other than through her late father's British citizenship.

Ruling:

1. The court accepted that the leading authority in this case was *Al Habtoor v Fotheringham [2001]*, according to which the courts are to be "extremely circumspect in assuming any jurisdiction in relation to children physically present in some other jurisdiction founded only on the basis of nationality" (para. 7).

   The court's inherent jurisdiction and parens patriae principles were extended to offer protection to the underage British national at risk of forced marriage abroad by way of making her a ward of the court. (para. 9)

   Applying *Al Habtoor v Fotheringham [2001]*, the court reasoned that the risk of harm stemming from an imminent forced marriage amounted to "very dire circumstances" that fall within the *Al Habtoor* test (para. 8).

   Forced marriages are "abusive" and "beyond the pale". Forced marriages are different from arranged marriages. (para. 10)

2. The following factors were significant in the court's ruling:

- The minor was below the legal age for marriage in the UK,
- The minor was found to be *Gillick* competent, and
- The request to be made a ward of the court to be removed from Pakistan was made by the minor herself voluntarily. (paras. 8 – 9)

3. Each case must be decided on its own facts. A wardship order could only be made again in "similarly [dire and] exceptional circumstances" (para. 10).

4. The wardship assumed by the English court was discontinued to allow the Scottish courts to seize the matter moving forward. This was the right next step given that the minor was in Scotland at that point in the proceedings.

(para. 11)

Main quotations on cultural or religious diversity:

- “It is wholly and completely wrong to require a young person or anyone to enter a marriage contrary to his/her wishes, and even more so if they are under age [sic]. Arranged marriages are one thing; forced marriages are beyond the pale, and are indeed abusive.” (para. 10)
- “If a young lady was in this country put into this position of a forced marriage it is absolutely certain that this court would have assisted her and provided her with orders to protect her from being coerced into a marriage.” (para. 8)

Main legal texts quoted in the decision:

- Family Law Act 1986
- Forced Marriage (Civil Partnership) Act 2007

Cases cited in the decision:

- *Al Habtoor v Fotheringham [2001]* EWCA Civ 186

Cases cited in the commentary:

- *Gillick v West Norfolk and Wisbech AHA [1986]* AC 112
- *NS v MI [2006]* EWHC 1646
- *Re KR (Abduction: Forcible Removal by Parents)* [1999] 2 FLR 542
- *Re SA (Vulnerable adult with capacity: Marriage) [2005]* EWHC 2942
- *RE SK (An Adult) (Forced Marriage: Appropriate Relief) [2004]* EWHC 3202

Commentary

The Court’s Power to Protect a Dual Pakistani-British Minor at Risk of Forced Marriage Abroad

The *RB v FB and MA [2008]* case contributed to the establishment of a body of decisions concerning the extent to which the courts can intervene to protect an individual at risk of forced marriage. When read together with *NS v MI [2006]* (see CUREDI041UK021) and *RE SK (An Adult) (Forced Marriage: Appropriate Relief) [2004]* (see CUREDI041UK022), this case highlights the UK courts' protectionist attitude towards citizens who may face the risk of forced marriage, whether at home or abroad.

Prior to *RB [2008]*, case law had established that the courts can make any British national – including minors (*Re KR (Abduction: Forcible Removal by Parents)* [1999] 2 FLR 542), adults lacking mental capacity, as well as adults with full mental capacity (see *SK [2004]* CUREDI041UK022) – a ward of court if it believed the person was at risk of forced marriage.

At the same time, the Court of Appeal held in *Al Habtoor v Fotheringham [2001]* that when considering to issue a wardship, the courts "should be extremely circumspect in assuming any jurisdiction in relation to children physically present in some other jurisdiction founded only on the basis of nationality" (para. 7 of the current judgement). This posed a challenge in *RB [2008]*, which concerned a minor with both Pakistani and British citizenship who never took residency in the United Kingdom and had no affiliation with the UK other than through her later father's British nationality. However, the minor voluntarily sought the help of the British authorities in Pakistan to travel to the UK, alleging that her mother was forcing her to marry a man significantly older than her. "A British child […] was seeking British help […] would it have been right to ignore her pleas?" the judge asked (para. 9). It could have been argued that the child's affiliation to the UK was not strong enough to pass the *Al Habtoor [2001]* test.

In answering this question, the court concluded that "the tentacles of this court should stretch towards Pakistan to rescue this child from the circumstances she found herself in" (para. 9). It did so by extending its inherent jurisdiction and *parens patriae* (father of the nation) principles. "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 court referred to forced marriages as “abusive” and “beyond the pale” (para. 10), and reasoned that the risk of harm stemming from an imminent forced marriage amounted to “very dire circumstances” (para. 8) that fall within the *Al Habtoor* test. On this basis, it held that it was justifiable to make the minor a ward of the British courts to bring her to the UK where she would be safe from being forced into a marriage against her will. The court noted that should a British minor in the UK approach the British authorities with a request to help them escape a forced marriage, the authorities would undoubtedly invervene. Reasoning by analogy, the court concluded that a British minor abroad should be able to access the same level of support. “She wished to be rescued”, reasoned the judge, adding that “[i]f a young lady was in this country put into this position of a forced marriage it is absolutely certain that this court would have assisted her and provided her with orders to protect her from being coerced into a marriage” (para. 8).

The court acknowledged that extending its inherent jurisdiction was “a very unusual thing to do”. It was an unconventional approach because, in practice, the courts had used its inherent jurisdiction on only a handful of occasions deemed exceptional. For example, in *Re S (Hospital Patient: Court’s Jurisdiction) [1996],* the court used its inherent jurisdiction to protect an adult who lost their autonomy following a stoke. More recently, the court in *RE SK [2004]* used its inherent jurisdiction to protect a capacitated adult at risk of forced marriage (see CUREDI041UK022). Furthermore, in *Re SA [2005]*, the courts’ inherent jurisdiction was used to prevent the family of a capacitated adult with sensory neural loss from influencing her decision regarding an arranged marriage.

Little to no evidence was required to satisfy the court that the teenage girl in question needed protection. Under the *Forced Marriage (Civil Partnership) Act 2007*, no specific evidence is required to apply for an order as evidence shall be provided at a later stage in the proceedings if the order is contested. However, it

is unclear whether the teenager's mother in Pakistan was notified of the proceedings and whether she was given the chance to make submissions that would contest her daughter's case.

Another striking feature of this case is the extraordinary speed of the proceedings. The young lady contacted the British High Commission in Islamabad on 31 March and by 9 April she was already in the UK as a ward of British courts. This is another indication that the British authorities have prioritized the protection of its citizens from the risk of harm posed by a potentially imminent forced marriage.

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

- Clark, Brigitte and Richards Claudina. 2008. "The Prevention and Prohibition of Forced Marriages-A Comparative Approach". *The International and Comparative Law Quarterly* 57(3): 501-528.
- Dauvergne, Catherine and Millbank Jenni. 2010. "Forced Marriage as a Harm in Domestic and International Law". *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". *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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