



Neutral Citation Number:[2022] EWHC 128 (Fam)

Case No: SE20F62306/SE20F62307

**IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 January 2022

Before:

MR JUSTICE POOLE

Between:

Sheffield City Council

- and -

(1) M

(2) F

(3) A

(4) B

(Third and Fourth Respondents by their Children's Guardian)

Ms Kate Burnell QC and Ms Helen Davey (instructed by Sheffield City Council) for the Applicant

The 1st Respondent was not in attendance with no representation

Ms Angela Wrottesley (instructed by Howells Solicitors) for the 2nd Respondent

Ms Justine Cole (instructed by Best Solicitors) for the 3rd and 4th Respondents

Ms Lucy Ray was also present from **The Government Legal Department**

Hearing date: 12 January 2022

JUDGMENT

This judgment was given at a private hearing. The anonymity of the child and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Poole:

Introduction

1.

“Forced marriage is a violation of internationally recognised human rights standards. Marriage shall be entered into only with the free and full consent of the intending spouses”, Art.16.2 of The Universal Declaration of Human Rights. Forced marriage is a form of domestic abuse and is a criminal offence. Forced Marriage Protection Orders perform an important role in protecting individuals, including children, who are threatened with forced marriage, for example by prohibiting a parent from taking their child out of the country. However, the source or nature of information that a person is threatened with forced marriage may itself require protection. There may be good grounds not to disclose that material to the child’s parents or to others who are subject to restrictions imposed by a Forced Marriage Protection Order. When such material is withheld, how should the court manage hearings at which a Forced Marriage Protection Order is challenged? In this judgment I set out my reasons for sanctioning the appointment of a Special Advocate to represent the interests of the respondent father. Such appointments will be rare in the family justice system but they merit careful consideration in Forced Marriage Protection Order applications where the applicant relies on material that cannot be disclosed to a Respondent but the respondent challenges the justification for the order and applies to have it discharged.

2.

The Court has previously made and extended Forced Marriage Prevention Orders (FMPO’s) against the First and Second Respondents who are the mother and father of the protected persons, their daughters A and B, aged 16 and 13 respectively. The orders prohibit the mother and father from, amongst other things,

i)

Forcing, attempting to force or otherwise instructing or encouraging any other person to force the protected persons to undergo any ceremony (or purported ceremony) of marriage, civil partnership, betrothal or engagement.

ii)

Instructing or otherwise encouraging the protected persons from undergoing such ceremonies or purported ceremonies.

iii)

Facilitating, allowing or otherwise permitting the protected persons to undergo any such ceremony.

iv)

Removing the protected persons from the jurisdiction of England and Wales.

In addition, by order of the court, the children’s passports are retained by the police. The applicant Local Authority seeks a final FMPO to protect each child. The father has applied to discharge the orders and seeks the return of the children’s passports to him.

Background

3.

A and B have two brothers, both now adults. In November 2020 the mother and sons were in Bangladesh, but the two daughters were living in England with the father. He purchased one-way tickets to Bangladesh for himself and his daughters. He told A’s school that she and her sister would be taken out of school to visit Bangladesh for a short period to visit their paternal grandfather who

had broken his leg. A and B had previously missed at least three years from school in England due to an extended trip to Bangladesh. South Yorkshire Police were contacted and, following a review of the evidence, on 13 November 2020 the police seized the passports belonging to the father and the two girls. On 18 November 2020 the Local Authority applied without notice for FMPO's in respect of each child. The court made the orders sought. Notice of the application and the orders was then given to the mother and father. After a hearing on notice, the orders were extended. They have been further extended at numerous subsequent hearings and remain in force as set out above. The father's passport was returned to him, but the court has ordered that the girls' passports be retained by the police. The children were made parties to the proceedings on 24 August 2021.

4.

Presently, the two elder brothers having returned to England, the father lives here with all four children. The mother returned to England from Bangladesh for a period whilst the father was unwell with Covid 19 - he suffered very badly and required hospitalisation - before she returned to Bangladesh in June 2021. She has not engaged in these proceedings and on 12 November 2021 the father reported her missing to the police: he had expected her to return to England on 7 November 2021 but she had failed to do so. On 17 November 2021 he assured the police that he had been able to speak to the mother who had been ill and unable to travel and who had had difficulties with her telephone. The mother has not responded to communications from the Local Authority or the court. She has not appeared at any hearings. It is of concern that her voice has not been heard and that she has spent a great deal of time out of the country and away from her two daughters.

5.

In making its application for a FMPO the Local Authority has relied on evidence which has been provided to the court but not disclosed to the parents. I shall refer to this as the closed material. Until 27 October 2021, when the case first came before me, the parents had not been informed that material had been withheld from them. On that date, at a closed hearing which excluded the parents, I directed that although the closed evidence should remain closed, the parents should be informed that an application had been made for parts of the evidence to be withheld from them, that orders had been made withholding parts of the evidence and that those orders had been continued. The parents were informed accordingly and on 24 November 2021 I conducted a further hearing at which Ms Wrottesley represented the father. The mother failed to attend or engage in the proceedings, as has been the case throughout. The father's position was, and remains that:

i)

All closed material should be disclosed to him.

ii)

The passport order should be discharged and the children's passports should be returned to him.

iii)

The FMPO should be set aside.

I again ordered that the closed material should continue to be withheld from the parents but directed that consideration be given to whether a Special Advocate should be appointed. I directed that the Attorney General be invited to instruct a Special Advocate on behalf of the father. The Local Authority agreed to pay for the costs of a Special Advocate.

6.

At the hearing before me on 12 January 2022, Ms Ray, a lawyer within the Special Advocates Support Office, attended to assist the court. Counsel has been instructed as a Special Advocate by the Attorney General but could not attend the hearing. All parties agreed that, in the circumstances of this case, a Special Advocate should be appointed and directions given to allow for the Special Advocate to assist in relation to the determination of the question of disclosure and then, if needed, at a final hearing of the Local Authority's substantive application for a FMPO and the father's application to discharge the orders previously made.

7.

The President's Guidance of 26 March 2015: 'The Role of the Attorney General in Appointing Advocates to the Court or Special Advocates in Family Cases', provides that Special Advocates,

"...are not the subject of ... any Memorandum. Usually a Special Advocate is required because a public body that is a party to the litigation, often a local authority or the police, resist disclosure of sensitive documents. The Attorney General has asked that at the point of requesting him to instruct a Special Advocate the court should specifically consider and make provision (after, of course, hearing submissions from the parties) as to which party should pay the costs of the Special Advocate ... I can see no reason why he should be expected to [bear the costs of the Special Advocate] ... and no reason why the court should not fix in advance which party will pay the costs of the Special Advocate. Please, therefore, do this."

As noted, funding arrangements are in place and I am satisfied that the court has complied with the guidance, limited though it is.

8.

The reasons for my earlier decision to withhold the closed material are given in a closed judgment. This is not a case which involves questions of national security. Nevertheless, rule 11.7(2) of the FPR 2010 provides:

"The court may direct the withholding of any submissions made, or any evidence adduced, for or at any hearing in proceedings to which this Part applies -

- (a) in order to protect the person who is the subject of the proceedings or any other person; or
- (b) for any other good reason."

This rule applies to applications for a FMPO. In deciding that the closed material should not be disclosed to the parents I considered the Arts. 2, 3 and 8 Convention rights of the protected persons and the Arts. 6 and 8 rights of the respondent parents. However, the decision was made in closed proceedings and the parents have had no opportunity to make meaningful submissions regarding disclosure. The question now to be determined is whether a Special Advocate should be appointed to represent the interests of the father (the mother not having engaged in the proceedings) as a means of managing future hearings to determine whether the FMPO's should be discharged or should be made final, when there is closed material which the father has not seen.

Forced Marriage Protection Orders

9.

Jurisdiction to grant FMPOs is provided for in the [Family Law Act 1996](#), Part 4A "Forced Marriage", which was inserted into [the 1996 Act](#) by the [Forced Marriage \(Civil Protection\) Act 2007](#), [s 1](#). By [s 63A](#)

- (1) The court may make an order for the purposes of protecting—

- (a) a person from being forced into a marriage or from any attempt to be forced into a marriage; or
- (b) a person who has been forced into a marriage.

(2) In deciding whether to exercise its powers under this section and, if so, in what manner, the court must have regard to all the circumstances including the need to secure the health, safety and well-being of the person to be protected.

10.

By [s 63B](#),

(1) A forced marriage protection order may contain—

- (a) such prohibitions, restrictions or requirements; and
- (b) such other terms;

as the court considers appropriate for the purposes of the order.

(2) The terms of such orders may, in particular, relate to—

- (a) conduct outside England and Wales as well as (or instead of) conduct within England and Wales;
- (b) respondents who are, or may become, involved in other respects as well as (or instead of) respondents who force or attempt to force, or may force or attempt to force, a person to enter into a marriage;
- (c) other persons who are, or may become, involved in other respects as well as respondents of any kind.

(3) For the purposes of subsection (2) examples of involvement in other respects are—

- (a) aiding, abetting, counselling, procuring, encouraging or assisting another person to force, or to attempt to force, a person to enter into a marriage; or
- (b) conspiring to force, or to attempt to force, a person to enter into a marriage.

By [s 63CA](#), a person who without reasonable excuse does anything that the person is prohibited from doing by a FMPO order is guilty of an offence. [Section 63G](#) makes provision for a court to vary or discharge a FMPO on an application by a party to the proceedings, a person protected by the order, any person affected by the order or by the court even if no application for variation or discharge has been made.

11.

In *Re K (Forced Marriage: Passport Order)* [2020] EWCA Civ 190, the current President, Sir Andrew McFarlane noted,

[29] The Secretary of State submitted that Part 4A of the [FLA 1996](#) pursues the legitimate aims of seeking to prevent forced marriages being entered into, and of providing assistance to those individuals who have been forced to marry. Five specific aspects were highlighted:

1) Preventing a breach of the right to marry under ECHR, Article 12 (see *R (Quila) v Secretary of State for the Home Department* [2011] 3 WLR 836);

2) Discharging the UK's positive obligation under ECHR Article 8 with regard to the right to respect for private life and the protection of the moral and physical integrity of individuals by enhancing or liberating the autonomy of a vulnerable adult;

3) Discharging the UK's positive obligations under ECHR, Article 3 in cases where forced marriage may give rise to a real risk of behaviour sufficient to engage Article 3. In cases in which the Article 3 threshold has been crossed, 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;

4) Discharging the UK's positive obligation under ECHR Article 5 with respect to deprivation of liberty;

5) In particularly serious cases, discharging the UK's positive obligations under ECHR Article 2.

[30] All of the parties are agreed that the legislation is cast in the widest and most flexible terms. [FLA 1996, s 63A](#) simply gives the court jurisdiction to make an order for the purposes of protecting a person from being forced into a marriage, or from any attempt to do so, or protecting a person who has been forced into a marriage. 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\(2\)](#)).

The President continued,

[37] It therefore follows that, in cases where there is potential conflict between Article 3 and Article 8 rights, the court must strive for an outcome which takes account of and achieves a reasonable accommodation between the competing rights. In this context, I have deliberately chosen the word "accommodation" to reflect the court's approach. The required judicial analysis is not a true 'balancing' exercise in consequence of the imperative duty that arises from the absolute nature of Article 3 rights. Where the evidence establishes a reasonable possibility that conduct sufficient to breach Article 3 may occur, the court must at least do what is necessary to protect any potential victim from such a risk. The need to do so cannot be reduced below that necessary minimum even where the factors relating to the qualified rights protected by Article 8 are particularly weighty. Hence the need to find a word other than 'balance' to describe this process of analysis.

[38] The need to accommodate the Article 3 and Article 8 rights is likely to be at the centre of most, if not all, FMPO cases and it was, therefore, understandably, the principal focus of the submissions made to this court. The facts of the present case, in which the judge's order imposes a permanent travel ban upon K leaving the UK, presents the conflict, between the need to protect the individual from serious harm against the individual's freedom to conduct their private life as they wish, in stark relief.

[39] Once again, all parties before the court were in agreement that an assessment of proportionality must be undertaken. On one view, "proportionality" may seem to be an inappropriate concept when the court is considering an absolute Convention right such as Article 3. However, in cases where there has not yet been a forced marriage, the court will not be dealing with the certainty that future harm will take place but, rather, the assessment of the risk that it may do so. 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. In this regard, the exercise to be conducted in a FMPO application is broadly similar to that undertaken where the risk of future harm arises from the potential for Female Genital

Mutilation ("FGM"). In that context, this court (Irwin, Moylan and Asplin LJ) considered the imposition of a "worldwide travel ban" in an FGM case in *Re X (A Child: FGMPO)* (Rev 2) [2018] EWCA Civ 1825.

12.

Where, as in the present case, the applicant (or other body) seeks to withhold evidence from a respondent, then the court must additionally consider Art. 6 rights. In doing so it is important to consider the process for determining an application for a FMPO. In *Re K* (above), the President referred to four stages to be followed:

[46] Stage One is for the court to establish the underlying facts based upon admissible evidence and by applying the civil standard of proof. The burden of proof will ordinarily be upon the applicant who asserts the facts that are said to justify the making of a FMPO.

...

[50] At Stage Two, based on the facts that have been found, the court should determine whether or not the purpose identified in *FLA 1996, s 63A(1)* is established, namely that there is a need to protect a person from being forced into a marriage or from any attempt to be forced into a marriage, or that a person has been forced into a marriage.

[51] At Stage Three, based upon the facts that have been found, the court must then assess both the risks and the protective factors that relate to the particular circumstances of the individual who is said to be vulnerable to forced marriage. This is an important stage and the court may be assisted by drawing up a balance sheet of the positives and negatives within the circumstances of the particular family in so far as they may relate to the potential for forced marriage.

[52] At the conclusion of Stage Three, the court 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.

[53] At Stage Four, if the facts are sufficient to establish a risk that the subject will experience conduct sufficient to satisfy ECHR, Article 3, the court must then 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. This is not a strict "balancing" exercise as there is a necessity for the court to establish the minimum measures necessary to meet the Article 3 risk that has been established under Stage Three.

[54] In undertaking the fourth stage, the court should have in mind the high degree of flexibility which is afforded to the court by the open wording of *FLA 1996, s 64A*. In each case, the court should be encouraged to establish a bespoke order which pitches the intrusion on private and family life at the point which is necessary in order to meet the duty under Article 3, but no more. The length of the order, the breadth of the order and the elements within the order should vary from case-to-case to reflect the particular factual context; this is not a jurisdiction that should ordinarily attract a template approach.

13.

Having regard to the jurisdiction to make a FMPO and the procedure to be adopted, how might the Art 6 rights of a respondent be protected on an application to withhold evidence from them?

Case-law in Relation to Non-disclosure

14.

In Re B (Disclosure to other parties)[2001] 2 FLR 1017 Munby J outlined the approach the court should take to non-disclosure in litigation concerning children and families:

(i) the entitlement to a fair trial under article 6 was absolute but that did not mean an absolute and unqualified right to see all documents.

(ii) the interests of anyone who was involved whether the child or as victim, party or witness and who could demonstrate that their article 8 rights were sufficiently engaged could be capable of denying a litigant access to documents. Since the [Human Rights Act 1998](#) it is no longer only the rights of the children that are capable of denying access to documents;

(iii) although a litigant was prima facie entitled under article 6 to disclosure of all materials, the article 8 rights of the other parties had to be afforded due respect. A limited qualification of the right to see documents may be acceptable if directed to that clear and proper objective. Non-disclosure must be limited to what the situation imperatively demanded and was justified only when the case was compelling or strictly necessary with the court being rigorous in its examination of the feared harm and any difficulty caused to the litigant counterbalanced by procedures designed to ensure a fair trial.

15.

The Court of Appeal endorsed that approach in Re R (Children: Control of Court Documents) [\[2021\] EWCA Civ 162](#),

“The power to limit access to documents before and during a hearing can only be used where it is strictly necessary, with the court being rigorous in its examination of the feared harm and careful to counterbalance any resulting disadvantages to ensure a fair trial: Re B (Disclosure to Other Parties) [2001] 2 FLR 1017. That case concerned keeping sensitive documents in care proceedings away from a father at the request of a mother. The interference with the father's rights was justified by the need to protect other rights.” per Peter Jackson LJ at [19]

16.

The issue of withholding evidence and submissions requires to be considered in the context of the type of proceedings, here, applications for FMPOs. Sir Nicholas Wall, as President of the Family Division, in A Chief Constable and another v. YK [\[2010\] EWHC 2438 \(Fam\)](#) agreed with Munby J in Re B that there was no entitlement to see all the documents or to have all of the information in the possession of the court:

10. The legal conundrum potentially thrown up by the instant case (and certainly likely to arise at some point in the future) is one which, potentially, goes to the root of family justice, namely how is it possible to achieve a fair hearing (i.e. comply with ECHR Article 6) if parts of the evidence which it is necessary for parties to know in order to enable them to meet allegations made against them cannot safely be revealed to them on the ground that disclosure of the information or its source is likely to identify the informant (and thus place him or her at risk)?

.....

17. Two aspects of [the Act](#) are immediately striking. The first is that it is very widely drawn. It is extra-territorial in its application and orders may be both made and discharged ex parte. Secondly, [the Act](#) plainly creates a protective / injunctive jurisdiction. Its object is to prevent forced marriages by

protecting those who may be, or have been, forced into marriage. The position in relation to respondents, moreover, seems to me robust, and the only criterion for protecting a respondent to such an order appears in [section 63D\(3\)](#), where the order is made ex parte and the court is required to give any respondent "an opportunity to make representations" (see [section 63D\(3\)](#)). That opportunity must be "as soon as just and convenient" ([section 63D4\(a\)](#)) and at an "on notice" hearing ([section 63D4\(b\)](#)). The order otherwise lasts until varied or discharged (63F).

18. Although the court is required to take into account "all the circumstances" when deciding whether or not to make an order there is nothing in [the Act](#) which requires the court to apply any given criteria beyond the matters identified in [section 63A\(2\)](#). There is, moreover, nothing in [the Act](#) to stop the court acting on hearsay evidence, or information provided to it by the police which has not been disclosed to the respondents.

19. Thus the highest the case is put for any respondents are the requirements where there is an ex parte order; (1) for service and; (2) for the respondent to be given the opportunity to make representations. In other words, there is no requirement for there to be a conventional hearing at which the respondents are alerted to the case against them and have the opportunity to rebut it. These are issues to which I shall need to return later in this judgment.

.....

99. So far as disclosure simpliciter is concerned, as I have already made clear, it does not seem to me that special advocates have any role to play. The court, in my judgment, is entitled to take the view that any forced marriage is a breach of human rights, and that where - as here - a responsible body such as the police have credible information sufficient to invoke the court's jurisdiction and form the basis of court orders, an issue arises which - in the context of [the Act](#) and the jurisdiction it provides - entitles the court to act and make its orders, irrespective of the truth or otherwise of information which has led to the application.

100. The difficulties which arise - or may arise - come into focus when an application is made to set the order or orders aside. In such circumstances, I fully recognise that factual issues may arise which the court is required to investigate. However, not only is that not this case, but, even if it were, it does not seem to me that special advocates have any role to play. The police - or the alleged victim - argue that certain information likely to lead to a breach of the rights provided by ECHR Articles 2, 3 or 8 should not be disclosed. Balanced against that are the ECHR Article 6 (and possibly 8) rights of the persons subject to the order. Given the protective nature of the court's jurisdiction, it seems to me that the court can decide the issue of whether or not the order should stand without either detailed investigation of the factual issues or the intervention of special advocates.

101. Furthermore, when I come to analyse the ECHR Article 6 rights of the parties affected, I am tempted to the view that ECHR Article 6 is not engaged at all. Article 6 protects a party's right to a fair trial "in the determination of his civil rights and obligations". To force a person into marriage is manifestly not a civil right, still less an obligation. In my view, accordingly, it is arguable that ECHR Article 6 is not engaged in an application for a FMPO. In any event, since the court permits the exercise of jurisdiction ex parte and on the basis of the applicant's belief, it does not seem to me that a respondent's right to apply to set the order aside entitles him or her to access to information which, if abused, will lead to serious breaches of the rights of the person to be protected.

102. Any application to set aside a FMPO, however, is likely to engage ECHR Article 6. A person against whom the order has been made (A's parents in this instance) may well deny forcing A into

marriage - or any intention of doing so - and may assert that the order represents a breach of their ECHR Article 8 right to respect for their family life in arranging a marriage for their daughter. We are thus back to the dichotomy identified in paragraph 9 of this judgment. Assuming, therefore, that ECHR Art 6 is engaged, it nonetheless seems to me that the right to a fair trial manifestly does not entitle a party either to see all the documents in the case or to have all the information in the possession of the court: - see Munby J's analysis in *Re B*.

The reference at [102] to the dichotomy identified in paragraph 9 must be in error - the dichotomy was identified at paragraph 10 of the judgment.

17.

Much of what Sir Nicholas Wall P said in *YK* was directed to without notice applications and initial return date hearings. However, when the continuation of the order is challenged and the respondent seeks to discharge it, as in the present case, the four stages identified by Sir Andrew McFarlane P in *Re K* (above) will be more likely to engage Art 6, and as Sir Nicholas Wall P noted at [102] Art 6 is likely to be engaged.

18.

The appointment of a Special Advocate is one mechanism by which the dichotomy identified by Sir Nicholas Wall may be resolved. In *Re T* (Wardship: Impact of Policing Intelligence) [2009] EWHC 2440 (Fam), [2010] 1 FLR 1048, McFarlane J addressed the use of Special Advocates in a wardship application, noting that it was the first recorded family case in which Special Advocates had been used. He noted the history of the use of Special Advocates in other contexts such as the making control orders under the Prevention of Terrorism Act - *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] 1AC 440. He held that the duty on a party seeking non-disclosure was to provide all relevant material to the court and it was for the court to decide what should be disclosed. In cases where the court had determined that some material evidence should not be disclosed to all the parties, "rights under Arts 6 and 8 fall to be adapted in a proportionate manner to accommodate the priority that is to be given to the" closed material [87]. In such cases where "key evidence" must be withheld from a party,

[85] ... the family courts have developed a number of strategies for dealing with controlled or limited disclosure without before now, using special advocates. However, there may well be other cases where the procedural imbalance and potential unfairness created by difficulty over disclosure can be alleviated by the use of special advocates in the manner that has transpired in these present proceedings."

The manner in which Special Advocates assisted in that case is described in the course of the judgment. In *R(Closed Material Procedure - Special Advocates - Funding)* [2017] EWHC 1793, Cobb J noted:

[16] ... It is only reasonably exceptionally that a family court will consider it appropriate to hold closed material hearings and invite the appointment of Special Advocates: see McFarlane J (as he then was) in *Re T* (Wardship: Impact of Police Intelligence) [2009] EWHC 2440 (Fam) (*Re T*). This point was emphasised by Sir Nicholas Wall P, in describing the closed material procedures (similar to those engaged here) as "a matter of last, as opposed to first resort" (see *A Chief Constable v YK, RB, ZS, SI, AK, MH* (Sub nom *Re A* (Forced Marriage: Special Advocates) [2010] EWHC Fam 2438, [2011] 1 FLR 1493 [92]: (*Re A* (Forced Marriage: Special Advocates))). Separately, and more recently still, Baroness Hale supported this approach, describing as "very powerful" the arguments against using a closed material procedure in family cases ("an inroad into the normal principles of a fair trial") in her

judgment in re A (A Child) (Family Proceedings: Disclosure of Information) [2012] UKSC 60[2013] 2 AC 66 at [34]. Quite apart from any other consideration, while it is recognised to be a "valuable procedure" in certain limited circumstances, it is also clearly an "imperfect" one (see respectively Lord Bingham at [35], and Lord Hoffman at [54] in *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] 1 AC 440, [2007] 3 WLR 681).

[17] Currently, there are no family procedural rules equivalent to Part 82 of the Civil Procedure Rules 1998 ('CPR') dealing with these situations in family cases; Part 82 was inserted into the CPR in 2013, at the time of the implementation of the [Justice and Security Act 2013](#) to deal with Closed Material Procedure issues. Nonetheless, procedures have been adapted in the family court to replicate as appropriate the arrangements for a closed material process, to achieve fairness, and ensure the protection of the Article 6 rights of the parties.

Conclusions

19.

I am persuaded that a Special Advocate should be appointed to represent the interests of the father in this case. All of the parties agree to that course. I am also persuaded that the Special Advocate should have the opportunity to address the court both in relation to the question of disclosure of the closed evidence, and, if the court then determines that some or all of the closed evidence should remain closed and so withheld from the parents, to represent the father's interests at a final hearing of the application for FMPO's and the father's application to discharge them.

20.

I note the weight of authority that the use of Special Advocates in family proceedings is and should be only rarely required. Nevertheless, on the basis of the evidence currently before the court, including the closed material, whilst mindful that I have not yet received submissions on behalf of the father in relation to that evidence, I have determined that a Special Advocate should be appointed and that the procedures set out below should be adopted. My reasons are as follows:

i)

FMPO's are a vital means of protecting the fundamental rights of the protected person but they also have a far-reaching impact on the respondent. Breaches of such orders, without reasonable excuse, constitute an offence punishable with imprisonment of up to five years. Furthermore, in this case the court's orders include withholding the children's passports from the parents so that the family cannot travel abroad together as the father wishes to arrange. The children's mother appears to be living abroad so the consequences of the orders are particularly profound for the family. Accordingly, the orders in this case have a very important purpose and a very significant impact.

ii)

At present, following closed proceedings, I am satisfied the FMPO's and passport orders are justified on the basis of the evidence I have seen, which includes the closed material. The evidence establishes that A and B are under threat of forced marriage and require protection.

iii)

The court is entitled to determine that certain evidence should not be disclosed and to take into account that closed material to determine that an FMPO should be made. It may well be, following the approach of Sir Nicholas Wall, that on initial consideration of a FMPO application the court can take a view of the material without disclosure to the respondent and without taking steps to allow the respondent to scrutinise or challenge the material. However, when an application is made to set aside

a FMPO and/or a passport order made to support a FMPO, then consideration has to be given to how to manage the issue of disclosure and whether there is a role for a Special Advocate - A Chief Constable and another v. YK (above).

iv)

In this case the closed material is of profound significance. The Local Authority has conceded that it could not justify seeking a FMPO or the passport order on the basis of the open evidence alone. I agree that without the closed material there would be insufficient grounds to justify the making of the orders. Accordingly, were the applicant Local Authority not permitted to rely on the closed material, there would be no protection of the children by way of FMPO's.

v)

On the present evidence that I have seen, and prior to any submissions from a Special Advocate, I am satisfied that there would be a significant risk that were the court to order disclosure of the closed material as the father seeks, the Local Authority would withdraw its application rather than elect to disclose. Accordingly, there would be a risk that the opportunity to protect the children's rights by way of FMPO's would be lost.

vi)

The hearing to determine whether final FMPO's should be made or whether the existing orders should be set aside, will involve the four stage approach set out in Re K (above). It will involve an evaluation of the underlying facts based on the admissible evidence and an assessment of the need to protect the children and of risk on the basis of those facts. In this case, where the respondent father contests the basis and justification for the orders made, it is difficult to envisage how he could meaningfully participate in such a hearing unless he has some means of scrutinising the closed material. He cannot make a reasoned challenge to a decision to make the FMPO's without knowing anything about the evidence on which they have been made.

vii)

The Children's Guardian, who has seen the closed material, cannot represent the interests of the father.

viii)

The appointment of a Special Advocate will allow for the father's Art. 6 rights to be accommodated whilst allowing the Court to have regard to the closed material and to take such measures as are lawful to protect the rights of the children.

ix)

No other strategy or mechanism for accommodating the father's Art. 6 rights has been identified by the parties and I cannot envisage any other means than the use of a Special Advocate which would allow the court fairly to dispose of the applications in this case.

x)

Having considered the importance of the closed material to the application, the impact on the father's Art. 6 and Art. 8 rights were he to have no means of scrutinising that material, and the purpose of the application for FMPO's which is to protect the fundamental rights of the children, I am satisfied that the proper course, in accordance with the submissions of all parties, is for a Special Advocate to be appointed to represent the interests of the father. The appointment is a proportionate means of accommodating the father's Convention rights within the context of FMPO proceedings which concern the fundamental rights of his children.

21.

I emphasise that those conclusions are reached without the benefit of submissions from the Special Advocate on disclosure or the need for the protective orders, or any further evidence on behalf of the father in relation to those issues. In my judgment, having been appointed, the Special Advocate should have the opportunity to address the court in relation to the question of disclosure as well as the substantive issues.

22.

As already noted, the funding of the costs of the Special Advocate is provided for - I am grateful to the Local Authority for meeting those costs.

23.

The procedure to be adopted in the present case will be as follows:

i)

The Special Advocate will have an open conference with the open representative and the father.

ii)

The Special Advocate will then be provided with the closed material and prepare submissions to be filed and served on the applicant and the children's guardian regarding the disclosure of the presently closed material or, failing that, the gist of the closed material.

iii)

The Special Advocate will then have time to meet with those parties who are privy to the closed material ("the information owners") to discuss any disagreement in the opening up of the closed material and to agree any outstanding issues of disclosure to be considered by the court.

iv)

A hearing shall be listed to resolve any outstanding disclosure issues. This will be a closed hearing attended by the information owners and the Special Advocate.

v)

Any opened up material will then be given to the open representatives. They shall have time to consider the material. If all the closed material is opened up at the direction of the court, the role of the Special Advocate will fall away.

vi)

If some or all of the closed material remains closed following the direction of the court, then time will be allowed for consideration of any opened up material and for preparation for a final hearing.

vii)

The final hearing will take place which will be part closed, part open, with the Special Advocate to deal with any remaining closed material. Submissions from the open representatives will then be received before a final determination is made. Closed and open judgments will be given if material remains closed.