Neutral Citation Number: [2010] EWCA Fam 2438

Case No: LU09F03718

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/10/2010

Before :

Sir Nicholas Wall
President of the Family Division

1. A Chief Constable 2. AA	Plaintiffs
and	
1. YK 2. RB 3. ZS 4. SI 5. AK 6. MH	Defendants

Michael Gration (instructed by a Chief Constable) for the 1st Plaintiff
Henry Setright QC and Teertha Gupta (instructed by Dawson Cornwell) for the 2nd Plaintiff
YK (1st Defendant) appeared in person
RB (2nd Defendant) appeared in person
Ayesha Hasan (instructed by Franklins) for the 3rd Defendant
Ami Bartholomew (instructed by Nobles) for the 4th Defendant
Jennifer Barker (instructed by Smith Brown & Sparrow) for the 5th Defendant
Jonathan Swift QC appeared for the Attorney General
MH (6th Defendant) appeared in person

Hearing dates: 8th and 9th July 2010

- - - - - - - - - - - - - - - - - - - -

Approved Judgment

Sir Nicholas Wall P:

Introduction

1. This is a case under the Forced Marriage (Civil Protection) Act 2007 (the Act). I shall set out the relevant terms of the Act in a moment. In summary, however, it is sufficient for the purposes of this introduction to say that the Act adds a new Part IVA to the Family Law Act 1996 and empowers the court to make orders designed to protect a person from being forced into marriage, as well as a person who has been forced into marriage. Such orders, known as Forced Marriage Protection Orders (FMPOs) may be made without the respondent to the order being given notice of the proceedings in which the order is made. The application for such an order may also be made either by the person to be protected or "a relevant third party".

2. In the instant case, two sets of proceedings under the Act have been consolidated. Thus the applicant in the primary proceedings is a relevant third party namely a police force (the police) and the person to be protected (A) is the fifth defendant. The applicant in the second set of proceedings is A's former boy friend (C). The first and second defendants in both sets of proceedings are A's parents (the parents) They are in person. The third defendant in the consolidated proceedings is one of A's cousins (the cousin). The fourth defendant in those proceedings is A's prospective bridegroom (B), and the sixth defendant is B's father.

3. It is of the utmost importance that, for the time being at least, confidentiality is maintained in this case, and I propose throughout to identify the parties by using the anonymised terminology specified in the previous paragraph. At the same time, the case raises points of considerable public interest, and it is right that this judgment should be in the public domain. For reasons which will be apparent, however, nothing must be published which would identify any of the participants.

4. C's case poses fewer legal problems. C alleges that he has been assaulted by B (together with two other men unknown to C) and that the cousin has also harassed him and threatened to kill him, thereby causing him to flee to Pakistan. He also alleges that during his absence in Pakistan, B's father has threatened his (C's) grandparents. The allegations which he makes – and the relief which he seeks – are both capable of being dealt with in the normal way, subject, of course, to any measures which may be necessary to protect B's whereabouts. This judgment will, accordingly, concentrate on the police's application for a FMPO designed to protect A, and on any application by A to set the FMPO aside.

5. This judgment has two purposes. The first is to give directions in the case before the court. This includes the important question of whether or not it is appropriate to invite the Attorney-General to appoint special advocates to enable affected parties to deal with information which (inter alios) the police do not wish to be disclosed.

6. The second purpose of this judgment is to give what more general guidance I can about the way in which the issues arising in forced marriage cases can be addressed.

7. This is, accordingly, an open judgment designed to be read by all the parties and by the public at large. Certain information will, however, remain "closed" – that is to say it will not be disclosed in this judgment. The reason for the existence of, and the

need for "closed" material can be shortly stated. There will be cases both of "honour" violence and forced marriage in which disclosure to all the parties will reveal not merely information but also the source or sources of that information. This, in the wrong hands, could expose the source(s) of that information to violence and, possibly, death. For a graphic illustration of the nature of the violence which can occur (albeit not in a forced marriage context) see the facts of Re B-M (Care Orders) [2009] EWCA Civ 205. [2009] 2 FLR 20.

8. I do, however, need to make it very clear that in the instant case there has been no substantive hearing, and the court has made no findings of fact. Any allegations which are disclosed in this judgment are, accordingly, just that – they are allegations, and no more.

9. Nonetheless forced marriage cases are likely to throw up issues which are profound in the extreme. The subject matter itself is highly sensitive. In every case, as it seems to me, a clear distinction needs to be drawn between, on the one hand, forced marriage as a form of domestic violence and a serious abuse of human rights, and, on the other, the concept of the consensual arranged marriage which is rightly perceived as a cultural norm in certain societies and thus wholly acceptable: - see, for example the decision of Singer J in Re SK [2004] EWHC 3202 (Fam), [2005] 2 FLR 230 and that of Munby J (as he then was) in Re K [2005] EWHC 2956 (Fam) [2007] 1 FLR 399.

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)?

11. In a forced marriage case, the problem may, hypothetically, be particularly acute, if either the informant is another member of her family, a boyfriend or a member of his family, the party to be protected herself, or, indeed, any third party close to her. She (the person to be protected) may, once again hypothetically – and I emphasis that word -, be living in the household of those against whom the order is sought.

12. In this context, it has to be remembered that proceedings under the Act are not "statutory" for the purpose of the appointment of special advocates. Unlike, for example, the Prevention of Terrorism Act 2005 (see, in particular, paragraph 7 of the Schedule to that Act) which has built into it provision for the disclosure of "closed" information to special advocates, the Act has no such provision. Any available remedy must, accordingly, be sought either amongst the court's conventional powers or by reference to the inherent jurisdiction of the High Court.

The Act

13. Unusually, it seems to me sensible to look at the terms of the Act before examining the facts. The long title to the Act describes it as: -

An Act to make provision for protecting individuals against being forced to enter into marriage without their free and full consent and for protecting individuals who have been forced to enter into marriage without such consent; and for connected purposes.

14. The relevant provisions of the Act read as follows: -

1 Protection against forced marriage: England and Wales

After Part 4 of the Family Law Act insert—

Part 4A Forced marriage

Forced marriage protection orders

63A Forced marriage protection orders

(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.

(3) In ascertaining that person's well-being, the court must, in particular, have such regard to the person's wishes and feelings (so far as they are reasonably ascertainable) as the court considers appropriate in the light of the person's age and understanding.

(4) For the purposes of this Part a person ("A") is forced into a marriage if another person ("B") forces A to enter into a marriage (whether with B or another person) without A's free and full consent.

(5) For the purposes of subsection (4) it does not matter whether the conduct of B which forces A to enter into a marriage is directed against A, B or another person.

(6) In this Part—

"force" includes coerce by threats or other psychological means (and related expressions are to be read accordingly); and

"forced marriage protection order" means an order under this section.

63B Contents of orders

(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.

63C Applications and other occasions for making orders

(1) The court may make a forced marriage protection order—

(a) on an application being made to it; or

(b) without an application being made to it but in the circumstances mentioned in subsection (6).

(2) An application may be made by—

(a) the person who is to be protected by the order; or

(b) a relevant third party.

(3) An application may be made by any other person with the leave of the court.

(4) In deciding whether to grant leave, the court must have regard to all the circumstances including—

(a) the applicant's connection with the person to be protected;

(b) the applicant's knowledge of the circumstances of the person to be protected; and

(c) the wishes and feelings of the person to be protected so far as they are reasonably ascertainable and so far as the court considers it appropriate, in the light of the person's age and understanding, to have regard to them.

(5) An application under this section may be made in other family proceedings or without any other family proceedings being instituted.

(6) The circumstances in which the court may make an order without an application being made are where—

(a) any other family proceedings are before the court ("the current proceedings");

(b) the court considers that a forced marriage protection order should be made to protect a person (whether or not a party to the current proceedings); and

(c) a person who would be a respondent to any such proceedings for a forced marriage protection order is a party to the current proceedings.

(7) In this section—

"family proceedings" has the same meaning as in Part 4 (see section 63(1) and (2)) but also includes—

(a) proceedings under the inherent jurisdiction of the High Court in relation to adults;
(b) proceedings in which the court has made an emergency protection order under section 44 of the Children Act 1989 (c.41) which includes an exclusion requirement (as defined in section 44A(3) of that Act); and
(c) proceedings in which the court has made an order under section 50 of the Act of 1989 (recovery of abducted children etc.); and
"relevant third party" means a person specified, or falling within a description of persons specified, by order of the Lord Chancellor.

(8) An order of the Lord Chancellor under subsection (7) may, in particular, specify the Secretary of State.

Further provision about orders

63D Ex parte orders: Part 4A

(1) The court may, in any case where it considers that it is just and convenient to do so, make a forced marriage protection order even though the respondent has not been given such notice of the proceedings as would otherwise be required by rules of court.

(2) In deciding whether to exercise its powers under subsection (1), the court must have regard to all the circumstances including—

(a) any risk of significant harm to the person to be protected or another person if the order is not made immediately;

(b) whether it is likely that an applicant will be deterred or prevented from pursuing an application if an order is not made immediately; and

(c) whether there is reason to believe that—

(i) the respondent is aware of the proceedings but is deliberately evading service; and

(ii) the delay involved in effecting substituted service will cause serious prejudice to the person to be protected or (if a different person) an applicant.

(3) The court must give the respondent an opportunity to make representations about any order made by virtue of subsection (1).

(4) The opportunity must be—

(a) as soon as just and convenient; and

(b) at a hearing of which notice has been given to all the parties in accordance with rules of court.

63E Undertakings instead of orders

(1) The court may, subject to subsection (3), accept an undertaking from the respondent to proceedings for a forced marriage protection order if it has power to make such an order.

(2) No power of arrest may be attached to an undertaking given under subsection (1).

(3) The court may not accept an undertaking under subsection (1) instead of making an order if a power of arrest would otherwise have been attached to the order.

(4) An undertaking given to the court under subsection (1) is enforceable as if the court had made the order in terms corresponding to those of the undertaking.

(5) This section is without prejudice to the powers of the court apart from this section.

63F Duration of orders

A forced marriage protection order may be made for a specified period or until varied or discharged.

63G Variation of orders and their discharge

(1) The court may vary or discharge a forced marriage protection order on an application by—

(a) any party to the proceedings for the order;

(b) the person being protected by the order (if not a party to the proceedings for the order); or

(c) any person affected by the order.

(2) In addition, the court may vary or discharge a forced marriage protection order made by virtue of section 63C(1)(b) even though no application under subsection (1) above has been made to the court.

(3) Section 63D applies to a variation of a forced marriage protection order as it applies to the making of such an order.

(4) Section 63E applies to proceedings for a variation of a forced marriage protection order as it applies to proceedings for the making of such an order.

(5) Accordingly, references in sections 63D and 63E to making a forced marriage protection order are to be read for the purposes of subsections (3) and (4) above as references to varying such an order.

(6) Subsection (7) applies if a power of arrest has been attached to provisions of a forced marriage protection order by virtue of section 63H.

(7) The court may vary or discharge the order under this section so far as it confers a power of arrest (whether or not there is a variation or discharge of any other provision of the order).

15. Sections 63H-L deal with powers of arrest and remand, and do not seem to me to be relevant for present purposes. Section 63M limits the jurisdiction to make FMP0s to the High Court and the county court, although the Lord Chancellor is given the power in section 63N to extend the jurisdiction to the magistrates' court. Section 63O deals with contempt, and section 63P deals with appeals. Section 63Q empowers the Secretary of state to issue Guidance, Section 63R provides that the Act is additional to and independent of any other available relief to the victims of forced marriage and section 63S is the interpretation section. The balance of the Act, including its Schedules, do not seem to me to be material for present purposes.

16. The Rules governing the Act are the Family Proceedings Rules (FPR) as inserted by SE 2008/2446. Nothing in the rules seems to me to affect the issues under consideration.

Preliminary commentary on the Act

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.

20. Finally by way of preliminary comment, nobody suggested to me that the Act was not compliant with the Human Rights Act 1998 (HRA compliant) nor do I think that such a submission could properly be made.

The facts

21. The essential facts are that A is now 19. She is a British subject of Pakistani descent, and was born and brought up on this country. So far as I am aware she is fit and well and does not suffer from any disability.

22. On 30 September 2009, Her Honour Judge Pearce, sitting in the Luton County Court made a series of orders under the Act ex parte on the application of the police. By paragraph one of the first order, the police were given permission to apply for a FMPO. By paragraph 2. the parents and the cousin were forbidden: -

> "….. whether acting alone, or jointly with another or by instructing , encouraging or suggesting to another person to take any steps to cause or permit (A) to undergo any ceremony or purported ceremony or betrothal of marriage whether civil or religious in the United Kingdom (UK) or elsewhere outside the (UK)"

23. By paragraph 3 of the order, the same parties were forbidden in similar terms from aiding, abetting, counselling, encouraging or assisting any other person to take any steps to force, or attempt to force or to cause or permit A to enter a marriage; and by paragraphs 4 and 5 they were forbidden in similar terms from using or threatening violence against A, or from intimidating, harassing or pestering her.

24. By paragraph 6 of the order, A's parents were ordered on service of the order on them or the terms of the order being brought to their attention to allow the police access to A "alone and without the presence of any other persons, and outside the family home at a venue to be arranged by the police". A's parents were also ordered to hand over to the police any UK passport belonging to A or her sisters, together with any Pakistani passport, any other travel documents and any ID cards belonging to A or her sisters. They were further forbidden from removing A from England and Wales and from taking any steps to obtain travel documents which would enable A to leave England and Wales. The order was to be served on various issuing authorities with a request that no travel documents be issued. A return date was fixed for 14 October and a penal notice was attached to the order.

25. A second order made by Judge Pearce was addressed to B. He was forbidden from undergoing any ceremony or purported ceremony or betrothal of marriage whether civil or religious with A in the UK or elsewhere.

26. A third order made by Judge Pearce; (1) ordered the local authority to file a report under section 37 of the Children Act 1989 by 24 November 2009; (2) listed "the application" for hearing on 25 November; and (3) directed service of the order (the FMPO) together with the evidence filed by the police on the local authority "marked VERY URGENT".

27. A fourth order made by Judge Pearce on 30 September 2009 ordered the police to effect a port alert and an "all ports stop" in relation to A and her parents.

28. On 1 October 2009, A issued an application to discharge the FMPO. That application was heard by His Honour Judge Everall QC on the following day, also sitting in the

Luton County Court. It is apparent that the judge gave a full judgment, although I do not have a copy of it. In any event, the application was refused, and the FMPO remained in place. Indeed, the judge made a further order, which was in the following terms: -

> "(The parents), (the cousin) and (B) are forbidden whether acting alone, jointly, or jointly with another person or by instructing, encouraging or suggesting to another person to take any steps to cause of permit (A) to participate in any ceremony or purported ceremony of marriage or celebration or reception in connection with her marriage to include any such reception or celebration currently planned for the 3 and 4 October 2009."

29. Judge Everall further gave the police and A permission not to disclose the evidence relied upon to obtain the orders, and directed that the case be transferred to the High Court.

30. According to an open judgment given by Black J (as she then was) on 22 January 2010;

> "…. Despite the orders of the court, A went through a form of marriage ceremony at the beginning of October 2009, but that marriage has not been formally registered, and it cannot be by virtue of prohibitive order of this court, which remain in force."

31. On 9 October 2009, Wood J confirmed the orders made by Judge Pearce and Judge Everall, and made a further order preventing the civil registration of any purported marriage between A and B. The judge also joined A to the proceedings as fifth defendant, and listed a further hearing for directions on 20 October 2009. He also gave directions designed to ascertain A's wishes. In particular he ordered that: -

> "In the event that (A) consents to such a meeting, (A) is to meet with a representative of Karma Nirvana, or alternatively the Henna Foundation, alone and at a venue to be confirmed by the aforementioned foundation for the purposes of a risk assessment. The date and the time of the said meeting to be confirmed to A through her solicitors. Any costs incurred through the arrangement of such a meeting having been deemed a necessary and proportionate disbursement upon A's public funding certificate. "

32. On 16 October 2009, Holman J made injunctive orders on C's application, and listed it to be heard with the case relating to A on 20 October 2009.

33. On 20 October 2009. Bodey J joined C as second plaintiff, and B's father as sixth defendant. He continued the FMPOs and directed a further hearing on 21 January 2010, principally designed "to resolve the issues as to how the closed evidence may be dealt with".

34. The hearing on 21 January was taken by Black J. Amongst the recitals to her order is the following: -

> "AND UPON THE Court respectfully requesting, by way of a separate document, that the Attorney-General appoint a Special Advocate or Special Advocates to represent the interests of (the parents) in light of the leave not to disclose documentation…"

35. Black J ordered that the case should be listed for further directions/consideration of the disclosure position and the need to appoint further special advocates. On 22 March 2010, Moylan J repeated the request for special advocates, and on 31 March 2010, the Attorney General attended by counsel before Bodey J. She indicated that because she had not received the bundle from the police and that she had still to make her decision. The result was that the hearing was adjourned.

36. In the event, the Attorney General declined the invitation to appoint a special advocate, and following Black J's appointment of the Court of Appeal, it seemed sensible (particularly given the lack of judicial continuity in the case) for me to take it over. I thus read the papers and distributed a note which indicated the areas on which I required assistance.

37. Having taken over the case, I sent a memorandum to all the courts which exercise jurisdiction under the Act asking if difficulties of the type encountered in the instant case had arisen before. The response was largely negative, although in cases in which the person to be protected had left the family home, the issue was her protection and the need to keep her whereabouts concealed. In no case, however, were the circumstances of the present case replicated.

38. I then convened a hearing at which all the parties were present, and invited the Attorney General to instruct counsel to set out his position. This he duly did, and I am extremely grateful to Mr Jonathan Swift QC for his clear and cogent submissions, which I heard in both open and closed sessions. I am also grateful to the other counsel in the case for their detailed arguments. At the conclusion of the argument, I reserved judgment.

The reasons given by Black J for requesting the appointment of special advocates

39. Black J gave both an "open" and a "closed" judgment on 22 January 2010. In the "open" judgment, she outlined the positions of the various parties, and then said: -

> "In order to protect (A's parents') position, I think there is no alternative but to invite the appointment of a special advocate or advocates, depending on whether those instructed consider that there is an actual or potential conflict between their positions, to assist in ensuring that a fair procedure is adopted, which ensures that (A's parents) can answer the allegations made against them, and that the evidence on which the court ultimately proceeds is properly tested.
>
> I have considered disclosing some more of the existing evidence at this stage, but rejected that idea on the basis that the

> proper course would be to give the special advocates a chance to become familiar with the case first, and to make submissions, if they wish, and then a fully considered view can be taken, which may result in a further more comprehensive approach to the disclosure of evidence, rather than piecemeal……"

40. Black J did not consider a special advocate or advocates were necessary for any of the other parties, including B's father. In fact, no application has been made by A's parents to discharge the FMPO, although an application by A for its discharge remains outstanding. I propose, however, to approach the case on the basis that A's parents wish the order to be discharged and deny forcing A into marriage with B.

41. On 5 May 2010 the Attorney-General (then Baroness Scotland QC) formally refused Black J's request to appoint special advocates. The result (after inconclusive hearings before Bodey and Moylan JJ) was the hearing before myself at which the Attorney-General attended by counsel.

The Law (1) Public Interest Immunity (PII)

42. In seeking to argue the proposition that the information likely to be harmful to A and C should not be disclosed to the other parties, Mr. Michael Gration, for the police, drew extensively on the principle of PII.

43. PII is helpfully defined in paragraph 574 of the latest edition of Halsbury's Laws of England (5th edition, volume 11, 2009) in the following way: -

> "It is a general rule of law (founded on public policy and recognised by Parliament that any documentary evidence may be withheld or an answer to any question may be refused on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest. The rule is a rule of substantive law and may be described as a principle of constitutional law; it is not merely a matter of practice or procedure…..This right to withhold the disclosure and production of documents was formerly called 'Crown privilege'….and is now referred to as 'public interest immunity'. The fundamental problem is one of balancing or reconciling the two kinds of public interest which may clash; on the one hand , there is the public interest that harm should not be done to the nation or the public service by the disclosure of certain documents, and on the other hand there is the public interest that the administration of justice should not be frustrated by the withholding of documents which must be produced in evidence if justice is to be done. "

44. Although in its classic manifestation, PII arose in proceedings to which the Crown was a party, it is clear that PII can arise at any stage in proceedings between private individuals.

45. Two immediate questions therefore pose themselves: (1) is this a case in which PII arises? And (2) if it does, are special advocates required to deal with the PII issue?

46. In a wide-ranging and extremely helpful submission, made both in writing and orally, Mr. Gration argued that consideration of any further disclosure must be exceptionally carefully managed to avoid the significant risk of harm to the source of the allegations that may arise should any information that may identify the source be disclosed. It was for this reason, he submitted that the court had been invited to undertake a process analogous to a PII hearing and it was for that reason, as he understood the matter, that Black J had sought the assistance of a Special Advocate to assist the Court in undertaking a further disclosure process. It was then envisaged, in light of the guidance provided by McFarlane J in Re T (Wardship: Impact of Police Intelligence) [2009] EWHC 2440, [2010] 1 FLR 1048 (Re T) that a special advocate would remain involved to provide assistance through to final determination on the basis of such material as could be disclosed without giving rise to a serious risk of harm and, further, with the assistance of further gisted or redacted allegations to enable them to take such instructions as proved necessary to enable a proper trial of the issues.

47. Mr Gration further submitted that in the instant case the evidence (as yet undisclosed) suggested a situation of sufficient severity to more than justify both the actions of the police in seeking protective orders, and, further, the withholding of that evidence from the Defendants to the application so as to protect the source. Although he acknowledged that such a factual matrix was unusual, experience nonetheless suggested that there would continue to be cases in which complicated disclosure issues arose, and that practitioners would need to be alive to such issues from the earliest stage of any application to ensure both that:

    (i) the person to be protected or any alternative source of information was not placed at increased risk by any disclosure made to the parties, and that their ECHR Article 2 and 3 rights would not be infringed by such disclosure; and that

    (ii) the ECHR Article 6 rights of the defendants were protected at all stages throughout any application, through to final determination should such a hearing be necessary

48. Mr. Gration also submitted that, in cases where there was a plain risk to the victim, another witness, or a party to the proceedings arising through disclosure of documents, it was both proportionate and appropriate to fall on the side of caution at an early stage of the proceedings and prior to proper determination of any assertion of (as a term of art) public interest immunity by withholding evidence that might give rise to a risk if it were to be disclosed. He accepted that such a course of conduct was exceptional, and should be considered to be the exception, rather than the rule in any case. However, he argued that this approach was both in line with and fitted alongside the approach adopted by Black J at the earlier hearing. It was, moreover, consistent with that adopted by Hedley J. in A Local Authority v A [2010] 1 FLR 545, which was unavailable when Black J had heard the case.

49. Mr Gration also relied on the guidance in relation to the police asserting PII provided by Mr Justice McFarlane in Re T. He argued that McFarlane J's approach was

equally applicable to analogous cases of forced marriage where there might be allegations, or alternatively a high risk, of honour based violence, murder or abandonment over and above the already serious act of the forced marriage. That guidance, he argued might usefully be extended to cover the circumstances that may arise in cases of forced marriage. Mr. Gration thus sought from me guidance as to how such issues of disclosure might be approached in the future.

50. In the event that the court was minded to reconsider the request to appoint special advocates in this case, Mr. Gration submitted that the way forward was:

(1) for there to be a further process analogous to a PII hearing in order to determine what, if any, of the closed evidence might be disclosed without causing a risk to the source of the information, potentially, in light of the decision of Black J in January 2010, with the assistance of an independent Amicus Curiae to assist the Court in relation to the perceived risk of any such disclosure;

(2) following disclosure of the maximum amount of evidence possible further consideration as to how this case might be managed to a final hearing in light of the volume and nature of the material that may be disclosed.

The Law (2) Authorities

51. The argument on the law was very wide-ranging. I have read all the authorities cited to me. I begin with the self-evident proposition that this is not a case in which special advocates are provided by Statute – as, for example, in the cases under the Prevention of Terrorism Act 2005 or the Counter-Terrorism Act 2008. Moreover, the Statute which gives rise to the litigation is determinedly civil in content; indeed the words "Civil Protection" are in both its title and the orders made by the judge.

52. Neither factor, however, negates the propriety of a request for special advocates should the request be justified. I did not understand Mr. Swift QC, for the Attorney-General to be saying that there should never be special advocates in a case under the Act: what he was saying was that special advocates were not appropriate in the instant case.

53. I unhesitatingly accept, however, the summary of the law relating to special advocates set out by Dyson LJ (as he then was) giving the judgment of what is in effect the Court of Appeal sitting as a Divisional Court of the Queen's Bench Division in R (on the application of Malik) v. Manchester Crown Court and another [2008] EWHC 1362 (admin) [2009] 4 All ER 403 (Malik) at paragraph 98, where he cites the speech of Lord Bingham of Cornhill in R v H, R v C [2004] HL 3. [2004] 1 l ER 1269 (R v H):

> "The court should not be deterred from requesting the appointment of a special advocate to represent a defendant in public interest immunity matters, where the interests of justice are shown to require it. He (Lord Bingham) said: "But the need must be shown. Such an appointment will always be

> exceptional, never automatic; a course of last and never first resort"

54. The citation goes on to minimise the distinction between civil and criminal cases. In paragraph 97, the court identifies a number of the reported cases in which special advocates have been employed. I have read them, but do not need to cite them here, save to examine; (a) what special advocates can be employed to achieve; and (b) the particular circumstances in which they have been used.

55. R v H was a criminal case involving an alleged conspiracy to supply a Class A drug. Apart from emphasising the fact that the appointment of special advocates was invariably exceptional and a matter of law resort, the case is helpful in the present context for the point made at paragraph 36 by Lord Bingham of Cornhill, giving the opinion of the appellate committee: -

> "36. When any issue of derogation from the golden rule of full disclosure comes before it, the court must address a series of questions:"
>
> (1) What is the material which the prosecution seek to withhold? This must be considered by the court in detail.
>
> (2) Is the material such as may weaken the prosecution case or strengthen that of the defence? If No, disclosure should not be ordered. If yes, full disclosure should (subject to (3), (4) and (5) below be ordered.
>
> (3) Is there a real risk of serious prejudice to an important public interest (and, if so, what) if full disclosure of the material is ordered? If No, full disclosure should be ordered.
>
> If the answer to (2) and (3) is yes, can the defendant's interest be protected without disclosure or disclosure be ordered to an extent or in a way which will give adequate protection to the public interest in question and also afford adequate protection to the interests of the defence?"

56. R (Roberts) v Parole Board and another [2005] UK HL 41, [2005] 2 AC 738 (R v Parole Board) was an application by a life sentence prisoner for judicial review of the Parole Board's direction that certain evidence should only be disclosed to a specially appointed advocate on his behalf. By a majority, the House of Lord dismissed his appeal against the decision that the proposed procedure did not infringe his rights under ECHR Article 5(4).

57. Given that R v Parole Board involved; (a) ECHR Article 5 and; (b) the powers of the Parole Board, I do not find it of assistance in the instant case, save insofar as it reinforces the proposition that special advocates can be appointed in certain civil cases.

58. Secretary of State for the Home Department v MB and AF [2007] UKHL 46, [2008] 1 AC 40 (MB) were control order cases which are of general importance. Although

they do not directly involve the issue which I have to decide, the speeches of Lords Bingham of Cornhill and Lord Hoffman are helpful, whilst the references made by Baroness Hale of Richmond to disclosure in family proceedings seem to me of direct relevance.

59. In particular, when discussing the question of information being withheld in family cases, Baroness Hale said (at paragraphs 57 to 60): -

> "The object of all legal proceedings is to do justice according to law: but this is easily said and not so easily done. Doing justice means not only arriving at a just result but arriving at it in a just manner. The overriding objective of the Civil Procedure Rules is to enable the court to deal with cases justly: CPR r. 1.1(1). Of the fundamental importance of the right to a fair trial there can be no doubt. But there is equally no doubt that the essential ingredients of a fair trial can vary according to the subject matter and nature of the proceedings. "
>
> The basic requirement is to know the case against one and to have an opportunity of meeting it. But in In re K (Infants) [1963] Ch 381, 405, Upjohn LJ identified more detailed principles of a judicial inquiry: "the right to see all the information put before the judge, to comment on it, to challenge it and if needs be to combat it, and to try to establish by contrary evidence that it is wrong." However, as Lord Devlin pointed out in the same case in the House of Lords, at [1965] AC 201, 238:
>
> '. . . a principle of judicial inquiry, whether fundamental or not, is only a means to an end. If it can be shown in any particular class of case that the observance of a principle of this sort does not serve the ends of justice, it must be dismissed: otherwise it would become the master instead of the servant of justice.'
>
> If, as in that case, the whole object of the proceedings is to protect and promote the best interests of a child, there may be exceptional circumstances in which disclosure of some of the evidence would be so detrimental to the child's welfare as to defeat the object of the exercise: the modern principles are explained in In re D (Minors)(Adoption Reports: Confidentiality) [1996] AC 593. A similar approach is taken in the Mental Health Review Tribunal Rules 1983, which allow evidence to be withheld from the patient if "disclosure would adversely affect the health or welfare of the patient or others": see rr. 6(4) and 12(2). But nothing may be withheld from a suitably qualified representative of the patient: see r. 12(3). That representative is then in the difficult position of not being able to share all the information which he has with his client; but overall there may still be a fair trial of the issues.

> I mention these examples, not because they are factually similar to the present case, but to show that the problem is not a new one and that there are courts which have long been doing their best to try cases justly even though the ordinary principles of judicial inquiry identified by Upjohn LJ cannot be observed in every particular. If procedure is the servant rather than the master, then dealing with some cases "justly" may sometimes require a rather different approach (it follows that I take issue with CPR, r 76.2, which requires that in control order cases the overriding objective be read and given effect in a way which is compatible with the duty to ensure that information is not disclosed contrary to the public interest, thus apparently requiring that the court deal otherwise than justly with at least some cases).
>
> The examples of cases concerning children and mental patients fall fairly and squarely within the problem which now confronts us in the control order cases ……..”

60. Secretary of State for the Home Department v AF (No 3 and others) [2009] UKHL 28, [2009] 3 WLR 74 (AF) was a control order case in which special advocates were engaged. A nine judge House of Lords decided that a controlee had to be given sufficient information about the allegations against him to enable him to give effect instructions to his special advocate in relation to them, and that there could be a fair hearing without the need for detailed disclosure, but that where the disclosed material consisted of only general assertions (the case otherwise being based to a decisive extent on undisclosed material) the requirements of a fair trial would not be met.

61. In Al Rawi and others v The Security Service and others [2010] EWCA Civ 482 (Al Rawi) the Court of Appeal decided that it was not open to a court in England and Wales to order a closed material procedure in relation to the trial of an ordinary civil claim such as a claim for damages for tort or breach of statutory duty. Nobody, however, sought to suggest that the special advocate closed procedure was not available in a case under the Act. (FMCPA)

62. I was also referred to Re B (Disclosure to other parties) [2001] 2 FLR 1017 (Re B), in which Munby J (as he then was) enunciated three propositions of law with which I find myself in respectful agreement, and which I extract from the headnote to that case. They are, firstly, that whilst an entitlement to a fair trial under ECHR Article 6 is absolute, this does not mean that a party has an absolute and unqualified right to see all the documents. Secondly, the advent of the Human Rights Act 1998 means it is no longer the case that the only interests capable of denying a litigant access to documents are the interests of children involved in the litigation. Thus the interests of anyone else who is involved, whether as victim, party or witness and who can demonstrate that their ECHR Article 8 rights are sufficiently engaged, can also have that effect. Thirdly, a limited qualification of the right to see the documents may be acceptable if directed towards a clear and proper objective. Non-disclosure, as Munby J made clear, must be limited to what the situation imperatively demands and is justified only when the case is 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.

63. I also, moreover, agree with Hedley J's analysis in paragraphs 9 to 11 of his judgment in A Local Authority v A [2010] 1 FLR 545, to which I was referred Disclosure is the norm and the case for non-disclosure has to be "compelling". On the facts, disclosure was plainly appropriate in Hedley J's case.

64. Finally, I need to examine the decision of McFarlane J in Re T (Wardship: Impact of Police Intelligence) [2009] EWHC 2440 (Fam) [2010] 1 FLR 1048 (Re T), as reliance was placed upon it by Mr. Gration. The facts of the case were that the police obtained intelligence that the father of a ward had taken out a contract to murder the child's mother. As a consequence they took the child and his mother into police protection, which they threatened to withdraw if the father was awarded contact by the court. The police refused to reveal the detail of the alleged contract to the parties and asserted that this information must, in the public interest remain confidential and undisclosed.

65. Since the factual issue of whether or not the contract existed, and if so, the father's role in it, was material to the question of his contact with the ward, the judge had to investigate it. Since the police declined to disclose relevant information directly to the father (and were upheld in that refusal by the judge) the only way in which the father could properly challenge the evidence against him was by the use of special advocates, to whom information was imparted, and who were able, without disclosing that information to the father, to take sufficient instructions to enable the evidence to be tested.

66. In his analysis of the role of the special advocate, McFarlane J said the following: -

> "[21] A special advocate represents 'the interests of' a party, as opposed to fully representing that party (as a fully instructed legal team would do). In the context of the SIAC, the key functions of a special advocate are to become briefed by the party and his legal team, but thereafter to receive disclosure of all of the evidential material, both 'open' (ie disclosed fully to the party and his legal team) and 'closed' (not disclosed to the party or his legal team). A special advocate will seek to achieve the disclosure of such part of the closed material as may properly be disclosable (either fully or in a gisted or redacted form). A special advocate represents the interests of the party at closed hearings from which the party and/or his legal team are excluded. Following such a process it is normal for the SIAC to issue both an open and a closed judgment".

67. McFarlane J then conducted a review of the existing authorities, citing extracts from the speeches of Lords Hoffman and Bingham, and Baroness Hale of Richmond in MB, before stating, at paragraph 30: -

> "In the light of the wardship court's duty to investigate the 'contract to murder', and in the light of the fact that initially the MPS were declining to permit disclosure of any of the information held by them, it was essential for the court to establish some form of filter or buffer between the MPS and the parties in the wardship proceedings through which the relevant evidential material could pass or otherwise be assessed by the court in a manner that respected the parties' rights under Article 6(1) of the European

> Convention and in a manner that was as far as possible commensurate with any countervailing claims of public interest immunity. In this case the special advocate procedure allowed the court and the special advocates to discharge the duty described by Baroness Hale of Richmond in testing 'with the utmost scepticism' the MPS's blanket assertion of PII. The result was that the vast majority of the MPS material (some 90% in my estimation) was disclosed in one form or another. In relation to the small amount of material that remained undisclosed, the special advocates, again with Baroness Hale of Richmond's strictures in mind, conducted a process of cross-examination and submission designed to test the material and enable the court to see any weakness there may be in its evidential value".

68. McFarlane J then described in some detail how the special advocates functioned in the case before him. After dealing comprehensively with a number of issues which are not material to the case before me, he concluded his judgment by setting out, in paragraph 112, a series of propositions derived from the procedural and other observation made in its course.

The argument of the Attorney-General

69. Mr. Swift's submissions fell into two parts. The first part went to matters of the Attorney's general approach to a request to appoint a special advocate. Those were "open" submissions and served on all the parties. The second part concerned matters specific to the circumstances of the present case. These were "closed" and served only on the court and the police. His overall submission was that the court should reconsider whether the request for a special advocate was appropriate in this case.

70. Much of the material in Mr. Swift's "open" submissions was, I think, uncontroversial. In essence, and despite the absence of a statutory scheme, he accepted that it was open to the court, in a forced marriage case, to invite the Attorney-General to appoint special advocates where the point was taken that material could not be disclosed to one of the parties to the proceedings.

71. Mr. Swift began by pointing out, correctly, that in most situations the power to request the appointment of a special advocate existed as part of a statutory scheme which permitted the use of evidence not disclosed to all parties to the proceedings. He cited a number of examples of such schemes, some of which I have already identified. He submitted that the express legislative basis for the procedure adopted was significant. In each situation, the legislation permitted one of the parties to the proceedings (in each case the relevant Secretary of State / government department) to rely on "closed evidence", provided; (1) that the court was satisfied that disclosure of the material would be contrary to the public interest; and (2) a special advocate had been appointed.

72. Since the present case did not fall within any express statutory scheme, Mr. Swift submitted that the court must first (1) identify the nature / scope of the disclosure issue that confronts it; (2) reach a conclusion on that issue; and (3) satisfy itself that as a matter of principle a special advocate procedure could be used to address the situation consequent on the court's conclusion on the disclosure issue. Point (3), he

argued. must be addressed by reason of the decision of the Court of Appeal in Al Rawi: see in particular paragraph 71 of the Court's judgment

73. On the assumption that the admission of and reliance on evidence not disclosed to all parties to the proceedings was permissible in the instant case, the further questions to be addressed, Mr. Swift argued, concerned firstly whether the consequence of a disclosure decision was non-compliance with ECHR Article 6; secondly. whether the presence of a special advocate was necessary to address the resulting deficit, and, thirdly, whether the presence of a special advocate would in fact address that deficit. It was important to recognise that even in situations in which a special advocate procedure could properly be adopted, the appointment of a special advocate procedure was a means to an end – that is so say a means by which compliance with ECHR Article 6 could be achieved where this would not otherwise be the case.

74. Thus the first issue to address was whether non-disclosure of the relevant material would render the proceedings non-compliant with ECHR Article 6. Mr. Swift reminded me that this would not necessarily be the case, and cited the decisions of Munby J in Re B and the speech of Baroness Hale of Richmond in MB at paragraphs 57 – 62, most of which I have set out above. He also referred me to Hedley J's decision in A Council v A and the cases to which he referred. If there was no ECHR Article 6 "issue", Mr. Swift submitted, there was no basis on which the appointment of a special advocate was necessary.

75. However, even where an ECHR Article 6 issue did exist, Mr Swift argued, it was clear that the power to request the appointment of a special advocate was a power to be used sparingly, and that such a request must be a matter of last resort. Could the Article 6 issue be addressed by action which the court could take itself? If the answer to that point was "no", the question which still had to be asked was what was it that a special advocate could do that would address the Article 6 issue?

76. In making these submissions, Mr Swift relied on the cases to which I have already referred. In addition he relied on Sedley LJ's judgment in Murungaru v Home Secretary [2008] EWCA Civ 1015, which had emphasised the need for restraint in making requests for appointment of special advocates; and had placed further emphasis on what a court could legitimately achieve without the need to seek the appointment of a special advocate: see the judgment at paragraphs 105 – 106). Similarly, in Murungaru, he argued, the Court of Appeal had accepted that the Administrative Court could consider the material which was the basis for the decision to revoke the visa, and determine the application for judicial review, without the need to seek the appointment of a special advocate.

77. Although Mr. Swift submitted that the judgment of McFarlane J in Re T at paragraph 112(viii) might be taken to suggest that seeking the appointment of a special advocate was something other than both exceptional and a matter of last resort (and that on that basis it should not be followed) I do not read the judgment in that way In particular, I agree that the judgment in Re T should not be accepted as authority for the proposition that whenever a document is not disclosed to a party to proceedings, a request for a special advocate must necessarily follow.

78. Finally, on this limb, Mr. Swift submitted that before concluding that a request for a special advocate should be made, the court had to be satisfied that the use of a closed

evidence procedure would in practice address the ECHR Article 6 issue which the court has concluded would arise. If there was such an Article 6 problem, it was clear that "merely" securing the appointment of a special advocate and disclosing the information to that special advocate, did not address the problem.

79. Mr Swift identified four matters which it would be helpful for the court to identify before taking the view that the appointment of special advocates in a non-statutory case was warranted. They were: -

(1) the purpose for which the special advocate had been requested (for example, was it for the purpose of assisting the court on the determination of a PII application, or was it for the purposes of a hearing on a substantive issue, and if so which issue?);

(2) the situation which had arisen in the proceedings before it which had caused the request to be made;

(3) the reasons why the court had concluded that the appointment of a special advocate was necessary (rather than some other step within the court's own powers);

(4) the ways in which the court considered that a special advocate would address the procedural difficulty that existed.

80. These matters, he submitted, should be addressed by reference to the judgments of the court in cases such as R v H, Malik and Murungaru. Furthermore, if the court requested the appointment of a special advocate the order containing the request should also identify by whom the costs of the special advocate were to be met.

81. Mr. Swift argued that if one posed the questions identified in paragraph 79 above, one rapidly reached the conclusion that there was no real basis upon which the court, in the instant case, needed the assistance of special advocates on the PII issue. Furthermore, there was no real basis upon which a special advocate could address the procedural difficulty which had arisen. Mr. Swift expanded upon these issues in his closed submissions. He argued that it was in any event unusual to have special advocates in a PII application, and respectfully queried whether or not ECHR Article 6 was engaged on the facts.

82. As far as the assault on C was concerned, Mr. Swift submitted that there was nothing a special advocate could do which could not be done by C's counsel.

The argument for the police

83. For the police, Mr. Gration emphasised that they had two principal functions in the proceedings. The first was to take steps to protect A from being forcibly married against her will: the second was to take steps to prevent information harmful to her or C being disclosed. He submitted that Black J had been right to come to the conclusion that it was not possible to divorce the source of the information from the information itself, and that this rendered the factual matrix of the case exceptional, with the result that special advocates were called for. He submitted that the statutory guidance

required a victim centred approach, whilst acknowledging that the use of special advocates would be very unusual.

The argument for C

84. For C, Mr. Henry Setright QC, in addition to following his instructions, gave me the benefit of his considerable experience. He argued that there might well be problems going down the PII route, and that in the general run of cases, problems did not arise. He invited my attention to the second reading of the debate on the Forced Marriages Bill, and pointed out that there had been a deliberate decision not to include a criminal sanction, on the basis that its existence might well deter victims from seeking help. He submitted that whereas criminal allegations, on the whole, involved an open process of disclosure, the remedies provided by the Act were civil. He argued, moreover, that protection against disclosure was a critical part of the Act. The procedure, he submitted, should be conventionally accessible and cheap, and that it would be exceptional for there to be special advocates.

The arguments for the other parties

85. I mean no disrespect for the arguments addressed to me when I say that they followed largely conventional lines. Counsel for B queried whether this was a case for a closed procedure at all, and whilst accepting that the court had the power to limit disclosure, submitted that her client could not deal with the allegations against him unless he knew what they were. Counsel for the cousin submitted that her client had sufficient information to deal with the allegations against him: her principal complaint was that her client was subject to restrictions made on an ex parte basis without the opportunity to refute them at an inter partes hearing.

Discussion

86. In general terms I accept Mr Swift's submissions. I am satisfied that special advocates are not called for in this case.

87. On the first issue (does PII arise at all and, if so, does the court need special advocates to decide the PII issue?) I say at once that I have no difficulty on the facts of this case in accepting the first proposition which I understood Mr. Gration to advance, namely that in a forced marriage or "honour" violence case, circumstances might well arise in which disclosure of sensitive information is likely to lead to the risk of serious harm to the giver or the source of that information. I am equally in no doubt that this situation arises in the instant case, and that there is a powerful argument for non-disclosure.

88. Whether one identifies this as an issue of PII or non-disclosure based on a balance of ECHR rights (for example, Articles 2, 3 and 8 on the one side and Articles 6 (and, possibly 8) on the other) does not seem to me particularly material. What matters, in my judgment, is whether or not the special advocate procedure is appropriate in a forced marriage case to decide any issue of disclosure which may arise.

89. As is trite law, "never" is a difficult word to say in any jurisdiction, albeit particularly so is the Family jurisdiction where the factual matrix can vary widely from case to

case. In my judgment, however, the answer to the question posed in the preceding paragraph will usually be "no" and is certainly "no" in the instant case.

90. I reach that conclusion for several reasons. The first is the nature of the relief given by the Act. It is protective – quasi injunctive – and does not depend upon a complex factual matrix. The person to be protected (A in this case) has for most of the proceedings not sought actively to disturb the order. If, therefore, the view is taken that there is a proper basis for the court's exercise of its jurisdiction under the Act (as the police and Judge Pearce plainly and responsibly did) an order under the Act can properly be made ex parte: – see section 63D of the Family Law Act 1996 as inserted by section 1 of the Act.

91. That order will stand in its protective capacity, and in that capacity may require certain information not to be disclosed. Since protection is the primary purpose of the Act that, in my judgment, is sufficient to justify the invocation of either PII or non-disclosure under ECHR.

92. Furthermore, since the use of special advocates is a matter of last, as opposed to first resort, there has to be something which a special advocate can do, which it would not be appropriate for the judge to do. In my judgment, a judge on the facts of this case is fully in a position to resolve a PII or disclosure application, and there is nothing that a special advocate could do which cannot properly be done by the judge. I do not, accordingly, need a special advocate to assist on the basic disclosure or PII issue.

93. This leaves the wider question as to whether or not special advocates are needed to resolve the issues of fact which may arise on any application to discharge. In my judgment, largely for the reasons advanced by Mr. Swift, they are not.

94. For my part, I do not doubt either that Re T was properly decided or that the observations made by McFarlane J in paragraph 112 of his judgment in that case or elsewhere are; (a) correct and; (b) helpful. I also do not doubt either that special advocates were necessary in that case or that they were properly used. In my judgment, however, the case is readily distinguishable from the issues with which I have to deal.

95. First and foremost, I am dealing with a case under the Act, and I am bound by its provisions and its approach. In my judgment, and as I have already made clear, the jurisdiction provided by the Act is essentially protective and empowers the court to act ex parte.

96. In the instant case, the court has made it protective orders, and the only issue is whether or not those orders should be set aside on the application of A. There is no application by A's parents to set aside the orders, even though I have no doubt they wish them to be set aside.

97. In deciding whether or not to set aside the orders on A's application, it seems to me that the crucial issue is her health, safety and well-being. That, in turn, depends on her wishes and feelings, which I am taking steps to ascertain. In these circumstances, it seems to me that there is no role for the special advocate.

98. I would not, however, wish to decide this case solely on so narrow a basis, given the arguments which have been addressed to me, the importance of the issues engaged and the care with which they have been addressed. I also bear in mind that in a different case, whether of forced marriage or "honour" based violence, the problems which faced McFarlane J may well arise.

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 arise. 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 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.

103. In this context, I respectfully agree with two particular passages in the judgment of McFarlane J in Re T. The first, in paragraph 87 of the judgment, immediately precedes his reference to Baroness Hale of Richmond's speech in MB where he says:

> "……. In cases where PII is established and the court considers that some material evidence cannot be disclosed to all of 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 PII material. As Baroness Hale of Richmond observed in Secretary of State for the Home Department v MB, the need in an exceptional case in the family jurisdiction to take such a step has long been accepted".

104. Later, in paragraph 89, McFarlane J says: -

> "A further submission raised by counsel for the father was that the court could not rely upon the content of the 'Crimestoppers' call in that it was made by an individual whose identity was unknown, who was anonymous and who, obviously, did not give evidence at the hearing. That submission was made in robust terms, supported as it was by the decision of the House of Lords in R v Davis [2008] UKHL 36, [2008] 1 AC 1128, [2008] 3 WLR 125 which had recently been handed down. In Davis the House of Lords held that in a criminal trial the use of anonymous evidence was not acceptable and did not satisfy the requirements of Art 6 of the European Convention. In considering that submission, there is, in my view, a clear and vital distinction between the criminal jurisdiction and the wardship jurisdiction. Unlike the criminal jurisdiction, where the sole issue before the court is determining the guilt or otherwise of the defendant on a particular charge, the wardship court has a duty to investigate all of the relevant circumstances that may touch upon the ward's future welfare. That investigation must include receiving evidence, even if it is anonymous, hearsay evidence from an unknown individual, as part of the process. Thus, for the wardship court, it is not a case that a certain category of evidence cannot be acceptable or must be excluded, rather, it is a question of what weight is to be attached to that evidence when the court comes to evaluate it. During the exercise of determining the weight to be given to material such as the 'Crimestoppers' call, the principles underpinning the House of Lords decision in R v Davis will be of substantial relevance and may well be determinative, but the issue will be weight rather than admissibility. In this context the distinction apparently drawn by the M(etropolitan P(olice) S(ervice) as to 'information' or 'material' or 'intelligence' was, in the family court's eyes, a distinction without a difference; all of the data produced by the MPS was in some form or other evidence which was admissible in family proceedings; the task for the court was to evaluate it and determine what, if any, weight it may attract in the overall process".

105. In my judgment, the making of an order is manifestly dealing with the case in a proportionate manner, and it is likewise proportionate, given the purpose and nature of the Act, to adapt the rights of the parties affected by the order in the instant case "to give priority to the information contained in the PII material".

106. Equally, it seems to me that similar considerations, mutatis mutandis apply to an application under the Act as apply in proceedings in wardship, and that what McFarlane J says in paragraph 89 of his judgment can be adapted to apply in the instant case.

107. Above all, however, it seems to me that the Act provides a swift and simple remedy which, in essence, is protective. It has made its order. In the instant case, A cannot as a matter of English law be married without her consent, and any religious marriage into which she has entered cannot be registered. The court has exercised its jurisdiction, and A is protected.

108. I am also influenced by the fact that A is 19, and thus an adult. The principal order which I made in July 2010 was that the papers should be disclosed to an expert witness from one of the organisations which specialises in forced marriage and "honour violence" cases, with a view to that expert meeting A and discussing A's wishes and feelings with her. If such an expert is satisfied that A genuinely and independently wishes the order to be discharged, I will, of course listen to that evidence and any cross-examination of that witness by the police very carefully. That seems to me the way forward in the instant case.

109. I hope this judgment covers the ground. I adopt the advice which Mr. Swift tenders. In my judgment, the use of special advocates in forced marriage cases will be rare in the extreme, and in my judgment they are not called for in this case.

Coda

110. At the risk of venturing into territory which is not directly germane of the present case, I would like to associate myself with the observations of Wood J in H v L and R [2006] EWHC 3099 (Fam), [2007] 2 FLR 162 (H v L and R). In that case, Wood J was faced with a male litigant in person who wished to cross-examine a young adult woman whom he was alleged to have abused sexually when she was a child. The young woman in question was a borderline anorexic and a suicide risk.

111. It was common ground in that case that in criminal proceedings, section 34A of the Criminal Justice Act 1988 and sections 34 and 35 of the Youth Justice and Criminal Evidence Act 1999 forbad a defendant from cross-examining a child witness personally. No such provisions, however, applied in the Family Courts. In the event, in that case, the Attorney-General , at the court's urgent request, agreed, exceptionally, to provide an advocate. Wood J concluded his judgment with these words: -

> "The desirable solution
>
> [25] I would invite urgent attention as to creating a new statutory provision which provides for representation in such circumstances, analogous to the existing statutory framework governing criminal proceedings as set out in the 1999 Act. Such a statutory provision should also provide that the costs of making available to the court an advocate should fall on public funds. I can see no distinction in policy terms between the criminal and the civil process. Logic strongly suggests that such a service should be made available to the family jurisdiction. If it is inappropriate for a litigant in person to cross-

examine such a witness in the criminal jurisdiction, why not in the family jurisdiction? This is my judgment".

112. I respectfully agree with those words. written, as they were, nearly four years ago. If special advocates are not called for in the instant case, there will be undoubtedly be circumstances in family proceedings in which they are appropriate or in which, as in H v L and R representation by an advocate will be required.