Remedies for Forced Marriage

A HANDBOOK FOR LAWYERS

EDITED BY

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INTERIGHTS

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Chapter 1
LEGAL REMEDIES FOR FORCED MARRIAGE IN THE UNITED KINGDOM

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Contents

B. Public Law Remedies in relation to Children

1. Introduction

2. Care And Supervision Orders under the Children Act 1989

2.1 Who may make such orders?
2.2 Who will be the subject of such orders?
2.3 What are the criteria for making such orders?
2.4 What is the definition of 'significant harm'?
2.5 What is the Standard of proof – for the threshold criteria?
2.6 What is the process for obtaining an Order under s. 31 Children Act?
2.7. A Care or Supervision Order?
2.8. How is the Jurisdiction in Public Law (Local Authority Care Proceedings) established?

3. A Summary of the Other Relevant Sections of the Children Act 1989 pertaining to Public Law Remedies

3.3.1 Section 17 of the Children Act 1989 - Provision of services for children and their families in their area
3.3.2 Section 20 of the Children Act 1989 - Provision of accommodation for children The Children Act 1989
3.3.3 Section 22 of the Children Act 1989
3.3.4 Section 44 of the Children Act 1989: Emergency Protection Orders (EPOs)
3.3.5 Section 46 - Removal and accommodation of children by police in cases of emergency
3.3.6 Section 49 - Abduction of children in care

4. An Overview of the Public Law Procedure in Forced Marriage Cases

5. The Inherent Jurisdiction - The Public Law Perspective

5.1 The Powers of the Court - Local Authorities and Children
5.2 The Powers of the Court - Local Authorities and Adults

C. Private Law Remedies in Relation to Adults

1. Remedies for Adults: Domestic Violence

a) Injunctions under the Family Law Act
b) Injunctions for Harassment
c) The Forced Marriage Civil Protection Act 2007
d) Inherent Jurisdiction

2. Remedies For Adults: The Inherent Jurisdiction and the Court Of Protection

CHAPTER 1

LEGAL REMEDIES FOR FORCED MARRIAGE IN THE UNITED KINGDOM

Anne-Marie Hutchinson O.B.E. and Teertha Gupta QC

Introduction

This chapter is a guide to the remedies in national law available to British nationals who are threatened with forced marriage, or have entered into a forced marriage, whether in England, Wales, Scotland or overseas.[1] The chapter does not however address the issue of forced marriage where both parties have been living outside the United Kingdom for a considerable period of time. It is intended to be a detailed guide into the legal remedies available rather than an exhaustive summary of the law.

These two sections set out the law and procedure relating to remedies for forced marriage as it stands in England, Wales and Scotland. Although England and Wales form a separate legal jurisdiction to that of Scotland, the underlying basis of the law in each jurisdiction is the same, with different principles applying in each case. While there is no comprehensive law of forced marriages as such, there is a collection of statutes and case law, which can be applied to the situation of forced marriage.

The available remedies for forced marriage fall into three distinctive areas, which can be categorised as:

- Prevention,
- Repatriation and
- Protection.

This chapter relates to forced marriage as it affects both minors (that is to say children, as defined by the Children Act 1989, under the age of 18 years) and adults. It outlines the range of remedies available to ensure the safety of an alleged victim or proposed victim of forced marriage, including under the Forced Marriage (Civil Protection) Act 2007. It explains who can start proceedings, for example, local authorities, the police and of course private parties (relatives, friends, teachers) as well as the alleged victims themselves. It also sets out the nature of the proceedings that can be commenced. It is hoped that this will provide the reader with the necessary knowledge and the recommended legal course of action in a case where forced marriage is alleged.

This chapter is largely focused on civil law and procedures but it also outlines in brief the duty of police and law enforcement agencies and the criminal law provisions that may apply in cases

* This chapter has been updated up to 2011. Significant changes have occurred in the relevant law in the meantime, and these are outlined in the Introduction.

[1] Due to constraints of time and space, and given that cases of forced marriage have not been reported to date in Northern Ireland, this Handbook does not discuss the law and practice in Northern Ireland. While there is some discussion of Scottish law, references are limited.

of threatened or actual forced marriage.[2] In many situations there will be simultaneous sets of proceedings in both criminal and civil law for the protection of the forced marriage victim. Given that there may be a significant overlap between the civil law and criminal law, it is essential that any professional in this area has a basic working knowledge of each sphere. Further, the Human Rights Act 2000 may provide significant protection to an alleged victim of forced marriage, for example against inhumane or degrading treatment. This statute gives the Court a formal context in which to place the allegations and the legal remedies sought by the applicant. The chapter should be read in conjunction with cross-governmental multi-agency guidelines for practitioners dealing with the issue of forced marriage.

Section I explains the meaning of the term 'marriage', the requirements of a valid marriage and the circumstances in which a marriage may be void, voidable or dissolved. It is important to understand the basic tenets of the law on marriage to know what is and what is not a legitimate marriage. This part of the chapter provides a context in which the following section, which is more specifically addressed on the prevention of and remedies to forced marriage, should be read. At the end of this first section is a summary of the criminal remedies that are presently available in cases where forced marriage is alleged, as well as an outline of the overarching principles established by the Human Rights Act 1998.

Section II discusses remedies for prevention of forced marriage and protection of those affected. It is divided into two parts, with the first containing an introduction and definitions, together with 'private law' remedies, and the second part containing 'public law' remedies for forced marriage.

[2] The Foreign and Commonwealth Office has carried out a consultation process designed to inform it as to whether there should be a specific criminal offence of 'forcing someone to marry'. [Editors' Note: The law has now been amended to create a criminal offence of forced marriage, see the Introduction].

SECTION I:
CONTEXT FOR MARRIAGE IN LAW

1. The Court Structure

At first instance, family cases are dealt with in one of three courts, as discussed below:

- **The Family Proceedings Court**, often housed in the same building as the criminal Magistrate's Court, deals with the least complicated family cases. The Tribunal often comprises three lay Justices of the Peace. Appeals from this court can be made without express permission being sought and are to a single High Court judge.

- **The County Court** deals with more complicated cases and the tribunal is usually a District Judge or (the more senior) Circuit County Court Judge; this is the local court which deals with the majority of divorce and children cases. Appeals from the District Judge are to the Circuit Judge and from the Circuit Judge to the Court of Appeal. Permission to appeal is necessary.

- **The High Court** has a Family Division of 18 or so specialist Family Judges who deal with the most complex of cases including wardship, cases with an appreciable international element or which require the use of the enforcement officers, such as the Tipstaff.[3] For example, a High Court Judge can direct the Tipstaff and his officers to remove a child's passport from a parent, or indeed remove a child from an individual or a place, and in the normal course he will call on the assistance of the police in enforcing these orders. Appeals are to the Court of Appeal. Again permission to appeal is required.

2. Marriage and the Circumstances in which a Marriage may be Void, Voidable or Dissolved

2.1 What is the Legal Status of a Marriage?

When presented with an alleged marriage, it is necessary to ask: What is the legal status in England, Wales or Scotland[4] of the alleged marriage?

A marriage can have one of three statuses:

a) **Valid –** it has full legal status as a marriage and it can only be ended by dissolution (divorce) by one of the parties by application to the court;

[3] This is the Court's enforcement officer and his assistants. The Tipstaff describes himself as the holder of an ancient and unique post, who is the enforcement officer for all issues falling within the jurisdiction of England and Wales. He takes action to enforce or prevent a breach of the orders of the Court.

[4]In Scotland, the minimum age at which a person may marry is 16 years on the day of the marriage. Parental consent is not necessary. Both parties, however, must be capable of understanding the nature of a marriage ceremony and of consenting to marrying.
Under Scots Law, a marriage is void if either party was forced to marry against their will, for instance as a result of duress, or force and fear (true consent, and not merely the external appearance of consent, is essential for the constitution of marriage). A void marriage is regarded as never having taken place, however, a decree of nullity may be required from the Court of Session in order for the marriage to be treated as void and it is important, therefore, that appropriate legal advice is sought. A Scottish court can take jurisdiction to decide on the question of whether a marriage is void on the basis of lack of consent, regardless of where that marriage was performed. A forced marriage may also be dissolved by a decree of divorce, but many people prefer the recognition of the reality of the dissolution that nullity gives.

b) **Void** – it is void and has no legal status, that is the parties have no legal rights or duties in relation to each other;
c) **Voidable** – it has legal status until the court declares it void by annulment following an application by one of the parties.

The overriding statute in England and Wales relating to the recognition of valid marriages is the Matrimonial Causes Act 1973. In Scotland, the overriding statute is the Marriage Scotland Act 1977.

There are special rules relating to the recognition of marriages that take place abroad (see below, para. 2.2.2(b)).

2.2 What is a Valid Marriage in England, Wales and Scotland?

The following rules apply to marriages in England, Wales and Scotland. If a marriage has taken place abroad it is most probably prima facie legal, and specialist legal advice needs to be taken. However parties who have married abroad can be divorced in England, Wales and Scotland.

2.2.1 The Parties must have 'Capacity to Marry'

To contract a valid marriage, the parties must have the 'capacity to marry', which means that:

a) They must not be within the **'prohibited degrees of relationship'**.[5] The law provides that 'marriage' between certain blood relatives is invalid; so, for example, a brother may not marry his sister or an uncle his niece.

b) Both parties to the marriage must be **over the age of 16 years**.[6] If either party is aged between 16 to 18 years, then his/her parental consent is required for the marriage to take place. Importantly, a marriage that takes place overseas, where one party is under the age of 16 years, will be void if the country of domicile of either party is England and Wales.[7] This applies whether or not the marriage is treated as valid overseas. This latter point is one that social workers and other professionals should heed when faced with, for example, a fifteen year old who has already married before proceedings have begun.[8]

c) The parties must be **male and female** respectively.[9]

d) **Neither party must be already lawfully married**. That is to say, where either of the spouses was at the time of the marriage a party to a prior and subsisting valid marriage, then the second marriage is void.[10] It does not matter whether the subsisting lawful marriage took place overseas or in England and Wales.[11]

[5] The Marriage (Prohibited Degrees of Relationship) Act 1986 and Matrimonial Causes Act 1973 s.11. provide a full list of prohibited relationships.
[6] See Matrimonial Causes Act 1973 s.11 and the Marriage Act 1949 s.2, *Pugh v. Pugh* [1951] 2AllER 680 which is relevant for England and Wales and para. 2.3 below.
[7] Matrimonial Causes Act 1973 s.11.
[8] Please see paragraph 2.3 below.
[9] Matrimonial Causes Act 1973 s.11.[Editorial Note: The law in this area has now changed, see Introduction].
[10] Matrimonial Causes Act 1973 s.11.
[11] *Kassim* (otherwise *Widmann v. Kassim*)(otherwise *Hassim*) [1962] p.224, 1962 3 All ER 426.

e) Special rules apply to the recognition in England of **polygamous (second) marriages** that take place abroad[12], specifically where neither party was domiciled in England and Wales. They will not automatically be void and specialist advice as to status is required.

f) Similarly even where a marriage appears to be void, for example when it appears that one of the parties was already married, it may be advisable to obtain a declaration from the court as to marital status.[13] A decree of nullity can be granted in the case of a void marriage.[14] (Presently these proceedings are conducted in open court so that members of the public can attend, unless the court gives express permission to the contrary.)

2.2.2 The 'Formalities' of a Marriage

a) Marriages that take place in England and Wales and in Scotland: In order for a marriage that takes place in England and Wales to be valid certain rules and formalities must be followed.

These rules and formalities -- known as "the Preliminary Formalities" -- are set out in the Marriage Acts 1949-1986 and the Marriage Act 1994. They set out who may conduct the marriage formalities, where the marriage may take place and what must be declared during the ceremony (e.g. that the parties are free of any lawful impediment to enter into the marriage). They also require the signing of the marriage schedule by the witnesses and the celebrants.

In addition, they require that **all** marriages must be registered and a certificate of marriage issued, that is to say a state appointed registrar must formally register the marriage. In the case of marriages that take place outside of the Church of England, it is necessary to obtain a Registrar's certificate or licence or general licence. Weddings in Church of England churches - and most other Christian churches - can be registered in the church at the end of the religious ceremony. Registration of marriages of other religions held in different venues is now possible as long as the venue (e.g. hotel) has obtained a general licence or a specific licence for that particular wedding to be registered. Religious celebrations of marriage will create a valid marriage where they are solemnised on premises approved by the Local Authority[15] and by an official authorised by the Marriage Acts i.e. a Registrar. In England and Wales, it is common amongst ethnic minorities for the civil ceremony to be followed by a religious ceremony or vice versa. A simple religious ceremony in this country in such circumstances, where there has been no civil, legal registration is insufficient for a party to be deemed married.

b) Marriages that take place outside the UK: In the normal course, a foreign marriage, that is one that takes place outside the UK, will be taken by the courts in England, Wales and Scotland as valid provided that adequate proof of its existence is provided.

[12] See Matrimonial Causes Act s.11(d) and Private International Law (Miscellaneous Provisions) Act 1995 s.5 Part III.
[13] Family Law Act 1986 Part III s.55.
[14] Family Law Act 1986 s.58.
[15] Marriage Act 1994.

Where a forced marriage takes place overseas, and one of the parties subsequently returns to the UK, the validity of the marriage will need to be proved before the courts of England, Wales or Scotland.

The rules relating to proof are set out in the Family Proceedings Rules 1991.[16] as follows:

R.10.14 Evidence of a marriage outside England and Wales
1. The celebration of a marriage outside England and Wales and its validity under the law of the country where it was celebrated may (in any family proceedings in which the existence and validity of the marriage is not disputed) be proved by the evidence of one of the parties to the marriage and the production of a document purporting to be: -
(a) A marriage certificate or similar document issued under the law in force in that country; or
(b) A certified copy of an entry in a register of marriages kept under the law in force in that country.

2. Where a document produced by virtue of paragraph (1) is not in English it shall, unless otherwise directed, be accompanied by a translation certified by a notary public or authenticated by affidavit.

3. This rule shall not be construed as precluding the proof of marriage in accordance with the Evidence (Foreign, Dominion and Colonial Documents) Act 1933 or in any other manner authorised apart from this rule.

Therefore, in summary one needs an officially/state produced document certifying the marriage or a similarly generated entry on a register with a certified translation.

The only other way of proving that the marriage has taken place is as provided by the Evidence (Foreign, Dominion and Colonial Documents) Act 1933 (e.g. s. 1(3) in the case of officially copied registry entries) or other specific legislation. It has to be shown that the marriage was compliant with the laws of the country it took place in and that it is a valid marriage. Where it is not possible to obtain a certificate of registration, other forms of proof such as an affidavit from the person solemnising the marriage, or from a lawyer setting out the requirements of a valid marriage, may suffice.

2.3 Void Marriages Taking Place Abroad

In essence, where a marriage takes place abroad, it will be recognised in England and Wales as a valid subsisting marriage provided that it is a valid marriage in the country in which it took place. However, its validity will also depend on the 'lex domicilii' of the parties, i.e. the law of the country in which they are domiciled.[17] The marriage must be legal according to the laws of country of domicile of both of the parties to the marriage.

[16] Family Proceedings Rules 1991 R.10.14.
[17] Domicile is the place where one intends to live permanently, as opposed to citizenship or nationality or habitual residence i.e. it is one's civil rather than political/formal status

So, for example, if a marriage takes place abroad of an under 16 year old domiciled in England (as is frequently the case in forced marriages), it will not conform with the rules as to capacity set out above and will be void.[18]

Where there is any doubt as to the validity of a marriage that took place abroad it is possible to seek a declaration as to marital status.[19]

2.4. Voidable Marriages

A voidable marriage differs from a void marriage. A voidable marriage is one that will be treated as valid and subsisting until a Court annuls and declares it void. In contrast, a void marriage is one that will be treated as if it had never taken place, hence the phrase 'void ab initio'. Children born of a voidable marriage before it has been rendered void are treated as legitimate for all purposes.

To render a voidable marriage void, a nullity petition must be submitted to the court and a decree of nullity obtained on specific grounds.

2.4.1 Grounds for Obtaining a Decree of Nullity

The rules relating to voidable marriage are set out at s.12 Matrimonial Causes Act 1973. This provides that a marriage shall be voidable on the following grounds:

a) that the marriage has not been consummated owing to the **incapacity of either party to consummate** it;
b) that the marriage has not been consummated owing to the **wilful refusal of the respondent to consummate** it;
c) that either party to the marriage **did not validly consent** to it,
d) whether in consequence of **duress, mistake, unsoundness of mind or otherwise**;
e) that at the time of the marriage either party, though capable of giving a valid consent, was suffering (whether continuously or intermittently) from **mental disorder** within the meaning of the Mental Health Act 1983 of such a kind or to such an extent as to be unfitted for marriage;
f) that at the time of the marriage the respondent was suffering from **venereal disease** in a communicable form;
g) that at the time of the marriage the respondent was **pregnant by some person other than the petitioner**.

It is notable that under s.12(b) of the Matrimonial Causes Act 1973 (wilful refusal to consummate), it is the *Respondent's* wilful refusal to consummate that forms this ground of nullity; thus a victim of a forced marriage who refuses to consummate the marriage cannot raise a petition for nullity based on his/her *own* refusal.

3. Matrimonial Remedies for Forced Marriage

In the case of forced marriages, the most usual remedy will be an order of annulment under s.12(c) of the Matrimonial Causes Act 1973, on the grounds of lack of valid consent, whether in consequence of duress, mistake or unsoundness of mind. This is because forced marriage by

[18] See *Pugh v. Pugh* [1951] 2 All ER 680.
[19] Family Law Act 1986 Part III.

its nature involves vitiating the consent of one or both parties. A nullity application must be issued before the expiry of three years from the date of the marriage.[20]

Where a nullity petition is not an option, another remedy available is to seek dissolution of the marriage through divorce (see below).

3.1 Annulment

The voluntary consent of both parties is necessary for a valid marriage. There is a presumption that consent has been given.[21] Section 12 (c) of the Matrimonial Causes Act sets out the means by which lack of consent can be shown, that is by "duress, mistake, unsoundness of mind or otherwise". The burden of proof is on the person who wishes to have the marriage annulled (i.e. the person who has been allegedly forced into marriage). The standard of proof here is the balance of probabilities.

In such cases, the most relevant grounds are:

a) Want of Consent due to Duress: If a spouse is induced to go through the ceremony of marriage by threats or duress without giving any real consent to the marriage then the marriage is invalid. The test is: was the consent to the marriage a "real" (i.e. active) consent?[22] The petitioner must show that the threats, duress or other factors were such as to destroy the reality of the consent s/he gave and to have overborne her/his will. Each case will turn on its own facts, and it will have to be shown that the threats or acts of duress were such as to overbear the will of the particular victim. Thus all factors which would have led the particular victim in question to succumb to the duress will be important, for example evidence of prior vulnerability or particular timidity.

CASE LAW ON CONSENT

The issues concerning consent (and how it may be invalidated) in forced marriages are highlighted in *Hirani v Hirani* [1983] 4 F.L.R. 232 and *Singh v Singh* [1973] 2 All ER 828. In *Hirani*, a 19 year old Hindu girl Plaintiff had an association with a boy of whom her parents disapproved because he was a Muslim. To prevent the association continuing her parents arranged for her to marry a man that neither she nor her parents had met. The marriage took place but after six weeks the marriage had not been consummated and the Plaintiff left. She applied for the marriage to be nullified on the grounds of duress exercised by her parents. Her parents had threatened to throw the Plaintiff out of their home if she did not go ahead with the marriage. The crucial question identified by the court was whether the threats or pressure were such to overbear the will of the individual and destroy the reality of consent. It was held that on the facts of the case that the pressure applied by the parents had indeed vitiated the Plaintiff's consent. In contrast, in *Singh*, the Court found that the Plaintiff's (a 17 year old Sikh girl) consent had not been invalidated. It held that in

[20] Please see paragraph 3.2 below.
[21] *Cooper v Crane* [1891] 369.
[22] There are a number of leading cases on this issue: *Hussein Otherwise Blitz v Hussein* [1886] 12 P. D. 21; *H. v H.* [1953] 3 W.L.R. 849; *Buckland v Buckland* [1967] 2 All ER 300; *McLarnon v McLarnon*, [1968] 112 S.J. 419; *Singh v Singh* [1971] 2 All ER 828; *Harper v Harper*, [1981] C. L. Y. 730; *Hirani v Hirani* [1983] 4 F.L.R. 232. SCOT: *Akram v Akram* [1979] WL 69232 (OH); *Mahmud v. Mahmud* [1977] S.L.T. (Notes) 17; *Mahmood v Mahmood* [1993] S.L.T. 589; *Mahmud v Mahmud* [1994] S. L. T. 599.

consenting to the marriage, the Plaintiff was acting in obedience to the wishes of her parents and out of a sense of duty to them and to Sikh customs. The Court found that there was no evidence that her will had been overborne or that her consent had obtained by fear. Unfortunately the earlier case of *Singh* was not cited nor considered in *Hirani*, which may be why the resulting decisions were so different. In the most recent reported case *P v R (Forced Marriage: Annulment: Procedure)* [2003] 1 FLR 661, the Court re-emphasised the appropriate test for duress and highlighted the importance of public funding to young persons wishing to obtain decrees of nullity. For the leading Scottish case, see *Sohrab v Khan* 23.4.2022 Outer House of the Court of Session; here, interestingly, the Court annulled a marriage that had taken place in the UK.

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b) Want of Consent due to Mistake: Frequently in forced marriage cases the victim is induced to go through what s/he believes to be one form of ceremony (say a betrothal) when in fact it is a marriage. The Courts in England will annul a marriage if it is proven that there was a mistake in the mind of one of the parties as to the nature of the ceremony.[23] In some cases both mistake and duress will be present.[24]

c) "Unsoundness of Mind or otherwise": The test, as referred to by the Matrimonial Causes Act 1973 s. 12(c), is a different legal test to that relating to s. 12(d) of the Act (incapable of giving consent due to mental disorder within the meaning of the Mental Health Act 1983) which requires proof of a mental disorder as defined within the Mental Health Act.[25] In the latter case the proceedings for nullity under s.12(d) would normally be brought by the Official Solicitor in relation to a patient who is the subject of the Court of Protection's jurisdiction. To plead 'unsoundness of mind' by contrast does not require a diagnosed mental disorder.[26] The statute does not define all of the categories that go to invalid consent; thus consent may be invalid due to intoxication from alcohol or drugs.

3.2 Bars to the Relief of Nullity[27]

The respondent can raise a defence to a petition for nullity and show that the Petitioner, in the knowledge that it was open to her/him to apply for a nullity decree, so conducted himself/ herself in relation to the respondent so as to lead the respondent reasonably to believe that he/she would not seek to do so and it would be unjust to the respondent for the Court to grant the decree.

The general rule is that a nullity decree shall not be granted unless the petition is brought, that is proceedings are started, within three years of the date of marriage. However, there are certain exceptions to this rule.[28]

3.3 The Procedure for Obtaining a Decree of Annulment

[23] *Mehta (otherwise Kahn) v Mehta* [1945] 2 ALL ER (female believed Hindu ceremony was for betrothal not marriage).
[24] *Parojcic v Parojcic* [1957 1 ALL ER1] 20.
[25] Matrimonial Causes Act 1973 s. 13.1.
[26] *Re M & B & A & S* [2005] EWHC 1681(Fam) and *Re A (Alleged Patient), Sheffield City Council v E* and S [2005] 1 FLR 965.
[27] Please see footnote 26.
[28] e.g. s.13.4 ibid, regarding those suffering from 'a mental disorder' as set out in s1(2) of the Mental Health Act 1983 i.e. a mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind…" and The Family Proceedings Rules 1991 r.9.1.

A person who wants to annul their marriage may bring a Petition for Nullity before the Court. The proceedings are complex and legal representation will almost always be required. Practitioners must ensure that they set out fully why an annulment is important to the client and of the benefit to the client. A Petitioner can apply for the Court's permission not to disclose his/her address in the Court documents.[29] Such applications are made in cases where an alleged victim of forced marriage wants the protection of knowing that no one except the Court knows of her exact whereabouts.[30]

The proceedings will be brought in a divorce County Court or the Principal Registry in London. Proceedings for nullity after the expiration of three years will be transferred to be heard in the High Court. In such cases, the Queen's Proctor will be involved (this is a specialist post which is represented by counsel in cases where the court requires assistance from a skilled neutral source).[31]

SH v NB (Consent) 2009 EWHC 3274 [2010] 1 FLR 1927 is a noteworthy recent case where a nullity was granted over seven years after the marriage on the grounds that the marriage was non-consensual and in the country where it took place, Pakistan, such marriages are invalid.

3.4 Effect of an Annulment in Voidable Marriage

A decree of nullity operates to annul the marriage from the date when the Court issued the Decree Absolute of Nullity. The marriage is treated as having existed up until the time that the decree was issued.

4. Children Born from Void Or Voidable Marriages

The children born in a voidable marriage are treated as legitimate for all purposes. The children of a void marriage shall be treated as legitimate if at the time of conception (or the marriage if later) one or either of the parents reasonably believed that the marriage was valid and if the father was domiciled in England and Wales at the time of birth.[32]

6 Dissolution of Marriage (Divorce)

5.1 The Grounds for Divorce

Where the relief of annulment is, for whatever reason, not available, a person wishing to terminate the marriage must do so by way of proceedings for divorce. Generally speaking, divorce proceedings are the recourse of last resort in cases of alleged forced marriage, as such proceedings require more time and render the married couple 'divorced' (rather than simply having had a marriage rendered void) which could have a deleterious effect on the victim's future well being and his/her ability to remarry.

Divorce is governed by the Matrimonial Causes Act 1973. The party seeking the divorce may do so by pleading the ground that "the marriage has broken down irretrievably".[33] This ground may be proved by satisfying the Court that one of the following facts applies, namely

[29] The Family Proceedings Rules 1991 Rule 2.3.
[30] The authors of this chapter have recently written an article 'Forced Marriage Nullity Procedure in England and Wales', March [2006] International Family Law 20 on the current nullity procedure in forced marriage cases.
[31] For an example please see *Kaur v Singh* (CA) 1972 1WLR 105.
[32] Legitimacy Act 1976 S. 1(1) (2).
[33] Section 1(2), Matrimonial Causes Act 1973.

adultery, unreasonable behaviour, two years separation, five years separation or desertion, as discussed below:

f) **Adultery:** The petitioner must prove adultery by the respondent. Alternatively, the respondent must accept that the adultery took place. This is a difficult ground to pursue unless the respondent is also anxious to dissolve the marriage.

g) **Unreasonable Behaviour**: A petitioner must establish 'unreasonable behaviour' of the respondent and not that of his/her family. If the respondent is aware that the petitioner was forced into marriage, and the respondent was not forced into the marriage himself/herself, this may form grounds for an unreasonable behaviour petition, particularly if the marriage was consummated without the petitioner's consent. If the unreasonable behaviour in fact emanates from the spouse's family, the petitioner may need to demonstrate that the respondent consented, acquiesced, encouraged or participated in such behaviour when he or she could otherwise have protected the petitioner. If such behaviour included non-consummation of the marriage, due to the refusal of the respondent, or his/her walking out on the marriage, then it may be worth considering nullity proceedings.

h) **Two Years Separation**: A petitioner relying on this ground must also obtain the consent of the respondent.

i) **Five Years Separation**: In such cases, unlike an application under the two year separation grounds, the petitioner does not require the consent of the respondent spouse.

j) **Desertion:** The petitioner must establish that the respondent had abandoned him/her for a considerable period of time. In many instances, the facts of such a case may more usefully support a petition on the ground of unreasonable behaviour.

A person who was forced into a marriage and seeks a divorce will have to plead grounds depending on the facts of the case. In most such cases, the most likely ground to be used will be that of 'unreasonable behaviour'.

It should be emphasized that a religious divorce (such as a *talaq*) obtained or pronounced in England does not constitute a civil divorce.

5. 2. Recognition of Overseas Divorces

The Courts in England and Wales may recognise overseas divorces, under section 46 (1) of the Family Law Act 1986. So if, for example, if a *talaq* is obtained in Pakistan in compliance with Pakistani law, then the divorce may be recognised in England and Wales.[34] However, if proceedings for *talaq* are initiated from England, in respect of a party then domiciled/present in Pakistan, then such a termination of marriage is not recognized under English law as a valid divorce obtained through 'proceedings', but is termed as a 'transnational *talaq*'.[35]

5.3 Bars to Divorce

[34] Please refer to the chapters on Bangladesh, India and Pakistan for an overview of the type of divorce deemed procedurally correct in those countries.
[35] See *Quazi v. Quazi* [1979] 3 All ER 897, *R v. Immigration Appeal Tribunal and another, ex parte Secretary of State for the Home Department and other Applications* [1984] 1 All ER 488.

It is not possible to present a petition for divorce to the Court until the expiry of one year from the date of the marriage.[36]

5.4 Procedure for a Decree Of Divorce
Divorce proceedings in England and Wales are commenced by petition. The petitioner must prove one of the heads of divorce set out above, for example adultery. A petition must be served and service must be proved. Once the petition grounds of divorce are proved, the Court will pronounce a Decree Nisi. It can pronounce a Decree Absolute only on expiry of six weeks from the Decree Nisi (save in exceptional circumstances for which permission from the Court is required).

5.5 Effect of Divorce in Cases of Forced Marriage
A decree of divorce terminates the marriage. However, unlike a decree of nullity, it does not return the petitioner to her previous unmarried state.

6. Legal Aid for Annulment and Divorce
A Public Funding Certificate may be available in the case of a defended divorce, as it is to the parties to a nullity suit. It is not available for undefended divorce suits. However issuance of the Certificate is subject to the 'means and merits' test. The means test requires that the petitioner must come within the capital and income eligibility limits. The merits test requires the petitioner to show that it is reasonable to bring the suit and that there is a "reasonable prospect of success" rather than little or no prospect.[37]

7. Remedies under Criminal Law
Although there is currently no specific criminal offence of 'forcing someone to marry' [Editorial Note: please see the changes in this area], within England and Wales or Scotland, the law does provide protection from the crimes that might be committed when forcing someone into a marriage.

Depending on the circumstances, perpetrators – usually parents or family members - could be prosecuted for a range of offences. These include:

7.1 ENGLAND AND WALES[38]

7.1.1. **Kidnapping:** Kidnapping is a common law offence committed by the taking or carrying away of one person by another; by fraud or force; without the consent of the person so taken or carried away; and without lawful excuse. Parents can be convicted of kidnapping their

[36] Matrimonial Causes Act 1973 s3.
[37] Please see the dicta of Coleridge J. (especially in relation to public funding) in *P v R (Forced Marriage: Annulment: Procedure)* [2003] 1 FLR 661.
[38] The Domestic Violence, Crime and Victims Act 2004 is the biggest overhaul of domestic violence law in 30 years and when it is brought into force will give tough powers to the Police and the courts to protect victims and prosecute abusers. These include: making common assault an arrestable offence; making breach of a non-molestation order a criminal offence, punishable by up to five years' imprisonment; and giving courts the power to impose a restraining order where a defendant has been acquitted but the court believes the victim needs protection. It builds on the Government's ongoing reform of the criminal justice system, rebalancing the process in favour of victims and witnesses. The Act gives victims guaranteed rights, for the first time, to support, information and the advice they need, and creates an independent Commissioner for victims and witnesses, so they have voice across Government. It also includes proposals to strengthen the law in familial homicide cases, where parents co-accused of their child's murder have in the past escaped punishment by blaming each other.

children. The offence is punishable by fine or imprisonment, or both. There is no maximum penalty.

7.1.2. **Child Abduction**: The Child Abduction Act 1984 makes it an offence for a person "connected with" a child under 16 to take or send the child out of the UK without appropriate consent. This would be relevant, for example, to a case where one parent took a child out of the UK without the consent of the other parent, in whose favour a residence order was in force with respect to the child. Offences contrary to the 1984 Act are punishable with up to seven years' imprisonment. The Act also covers 'stranger abductions'.

7.1.3 **False imprisonment:** This is the unlawful and intentional or reckless constraint of the victim's freedom of movement from a particular place. Restraining a child within the realm of reasonable parental discipline is not unlawful. It is a common law offence, punishable by fine or imprisonment, or both. There is no maximum penalty.

7.1.4 **Assault and battery:** The term "assault" is frequently used to include both an assault and a "battery" but strictly an assault is an independent offence and should be treated as such. An assault is an act by which a person intentionally or recklessly causes another to apprehend immediate unlawful violence[39]; a battery is an act by which a person intentionally or recklessly applies unlawful violence to another person. Assaults, without any companying battery, and the most minor offences of "battery", will result in a charge of "common assault", contrary to section 39 of the Criminal Justice Act 1988, which is punishable with up to six months' imprisonment. A more serious act of violence may result in a charge of assault occasioning actual bodily harm (ABH), wounding or grievous bodily harm (GBH), depending on the circumstances and the nature of the injury. These offences are found in the Offences Against the Person Act 1861. The maximum penalty for ABH, GBH and wounding is five years; the maximum penalty for wounding or causing GBH with intent to do so is life. Emotional or psychological abuse leading to psychiatric injury to the victim can constitute assault occasioning actual bodily harm.[40]

7.1.5. **Threats to Kill:** Section 16, Offences Against the Person Act 1861, provides that a person who, without lawful excuse, makes to another person a threat to kill that person, intending that that other person would fear that the threat would be carried out, is guilty of an offence and liable to a maximum penalty of ten years' imprisonment. The threat need not be immediate; therefore a threat "if you do X/do not do X I will kill you" would be covered by this legislation.

7.1.6 **Public Order offences**: The Public Order Act 1986 created various offences relating to abusive and threatening behaviour, including the offence of affray (the use or threat of unlawful violence causing a person to fear for their personal safety), which can be committed in

[39] The threat of immediate unlawful violence is a crime. However, the threat of violence sometime in the future, perhaps conditional on future event is not an offence. For example, it is not an assault if a father says to his daughter "unless you agree to this marriage I will beat you", because until the daughter indicates she will not agree then she may not apprehend immediate violence. By way of contrast a father who raises his fist to his daughter and is about to hit her commits an assault even if he actually does not because she shouts "OK I will marry him".

[40] It is necessary for the assault to actually cause a psychiatric illness with psychological symptoms, as opposed to mere emotions such as fear, distress or panic. This was established in *R v Chan Fook* 1994 99 Cr.App.R.147 CA. Injury must be proved by expert psychiatric evidence, see *R v Ireland* 1997 4 All ER 225 at 23-233, HL, approving *Chan-Fook*.

dwellings and other private places as well as in public places. This offence is punishable with up to three years' imprisonment.

7.1.7 **Harassment:** Action short of violence and the immediate threat of it may amount to an offence under Section 2 of the Protection from Harassment Act 1997 if it is conducted on at least two occasions which leads to harassment, alarm or distress. The maximum penalty is six months imprisonment. If the course of conduct causes a fear of violence, an offence under Section 4 of that Act may be committed, attracting a maximum penalty of five years. Breach of an injunction or restraining order under that Act also carries a five-year penalty.

7.1.8 **Child cruelty:** Where the victim is under 16, a parent or "person who has attained the age of 16 and has responsibility for" the child who wilfully assaults or ill-treats them so as to cause unnecessary suffering or injury could be charged with the offence of child cruelty under section 1 of the Children and Young Persons Act 1933. The maximum penalty is 10 years' imprisonment.

7.1.9 **Sexual offences**: Depending on the circumstances of a particular case and the age of the victim, various offences under the Sexual Offences Act 2003 may be established. For example, sexual intercourse without consent is rape[41] and attracts a maximum penalty of life imprisonment. Anyone who aids and abets that offence is liable to the same penalty. If the victim is under 16, it is an offence to cause or incite a child to engage in sexual activity[42] or arrange or facilitate the commission of a child sex offence.[43] The offences of trafficking for sexual exploitation[44] may also be committed if travel of the victim within or out of the UK is arranged in the belief that it is likely that a relevant offence (such as rape or a child sex offence) will be committed against them. These offences apply in some circumstances to acts committed outside the UK whether or not they constitute an offence in the country where they took place.

7.1.10 **Blackmail**: This is an offence contrary to section 21 of the Theft Act 1968, which is punishable with up to 14 years' imprisonment. It is committed when a person makes an unwarranted demand with menaces, with a view to a gain for himself or another person or with intent to cause loss to another person (gain or loss being construed as extending only to money or other property).

7.2 SCOTLAND

7.2.1. **Abduction:** This is a common law crime. Abduction for any purpose, including marriage, is criminal. The abduction need not be accompanied by assault or fraud in order to be characterised as a criminal act. The essential element of the crime of abduction is the deprivation of the victim's personal freedom. There is no maximum penalty.

7.2.2. **Assault:** Any attack upon the person of another is assault. "Attack" has a very wide meaning and an assault may still be committed in the absence of significant violence or injury to the victim. The deliberate use of threatening gestures in order to place a person in a state of fear and alarm for his safety is thought to be sufficient to constitute the crime of assault.[45] There is no maximum penalty.

[41] Section 1 Sexual Offences Act 2003.
[42] Section 10, Sexual Offences Act 2003.
[43] Section 14, Sexual Offences Act 2003.
[44] Sections 57-9, Sexual Offences Act 2003.
[45] *Lord Advocate's Reference (No. 2 of 1992)* 1992 S.C.C.R 960.

7.2.3. **Breach of the peace:** This is a very flexible common law offence with no maximum penalty. A breach of the peace may be generally described as conduct causing or likely to cause alarm or annoyance and so lead to a disturbance of the person alarmed or annoyed. The type of conduct covered by this offence might include behaviour associated with stalking and harassment.

7.2.4. **Breach of a Non-Harassment Order**: This must be granted under the Protection from Harassment Act 1997 and breach thereof is a criminal offence. The maximum penalty available for conviction on indictment is imprisonment for five years and a fine. The police have the power of arrest where there is breach of a Non-Harassment Order. A power of arrest allows the police to arrest without warrant, a person who appears to be in breach of the terms of an order or interdict.

7.2.**5 Interdict against threat of abuse**: Any person may ask a civil court to grant an "interdict" to prohibit another person from taking a particular course of action. If someone is at risk of physical or mental abuse then it may be possible to obtain an interdict to protect against this. The Protection from Abuse (Scotland) Act 2001 allows a court to attach a power of arrest to any interdict granted for the purpose of protecting against abuse.

7.2.6 **Child cruelty:** Where the victim is under 16, the offence under section 12 of the Children and Young Persons (Scotland) Act 1937 may be committed by a person with parental responsibilities (in relation to the victim) who wilfully assaults or ill-treats them or exposes them to assault or ill-treatment so as to cause unnecessary suffering or injury to health. The maximum penalty available for conviction on indictment is imprisonment for five years and a fine.

7.2.7 **Rape:** Sexual intercourse by a man with a woman without the woman's consent constitutes the crime of rape. There is no maximum penalty.

7.2.8 **Sexual offences**: Depending on the circumstances of a particular case and the age of the victim, various offences under the Criminal Law (Consolidation) (Scotland) Act 1995 may be established. For example, it is an offence to detain any female against her will with the intent that she may engage in unlawful sexual intercourse with men or with a particular man.[46]

7.2.9 **Other offences**: Other offences that may be committed as part of forcing someone into a marriage include failing to ensure attendance at school, contrary to the Education Act 1996, immigration offences and murder.

Decisions whether to prosecute for criminal offences in any given case are for the police and the prosecuting authorities, taking into account both whether there is sufficient evidence available and whether a prosecution would be in the public interest.

8. Remedies under the Human Rights Act 2000

The Human Rights Act 1998 established a set of overarching principles under which all cases in the UK are to be heard. It specifically protects the right to private and family life (Article 8) as well as the right to marry (Article 12). The right to marry (Article 12) is often breached in

[46] Section 8(1).

forced marriage cases, which may occur as a reaction by the family when a young adult seeks to enter into a relationship or marriage of choice. The removal of the victim abroad for the purposes of a forced marriage is often the means by which the victim's family seek to terminate the relationship of choice.

In England, Wales and Scotland, there is no separate Human Rights Court and the remedies available under the Act, that is for damages or declarations for incompatibility, have not to date been sought in cases of forced marriage. Nevertheless, as indicated above, human rights are overarching principles which influence the Courts' approach and thinking when looking at all cases.

For example, the rights to private and family life (Article 8) were cited in the case of *Re M and B*[47] where Mr Justice Sumner granted an injunction to prohibit the forced marriage of an incapacitated adult. In so doing he said:

> *"I grant an injunction to protect S's private life. I do so to ensure it is not jeopardised by her parents' actions in seeking to arrange a marriage for her". [emphasis added]*

In *Re F (Adult: Court's jurisdiction)*[48] Hedley LJ said:

> *"The family life for which Article 8 requires respect is not a proprietary right vested in either adult or child it is as much an interest of society as family members ….. The purpose in my view is to assure within limits the entitlement of individuals to the benefit of what is benign and positive in family life".*

These cases indicate that human rights are at the forefront of the judges' minds, especially when dealing with such cases. Of course the very allegation of forced marriage and the surrounding practices will always involve a breach of the human rights of the victim and ideally the breaches should be identified and pleaded.

[47] *Re M and B and A and S* (2005) EWHC 1681 (Fam) [2006] 1FLR 117.
[48] 2000 2FLR 512 at p. 531.

SECTION II
REMEDIES IN PRIVATE AND PUBLIC LAW

A. Private Law Remedies in Relation to Children

1. Introduction

The victims of a threatened or actual forced marriage are frequently children. The perpetrators are often their parents, ostensibly jointly acting within the remit of their parental responsibility.

Parents may be restricted in the exercise of parental responsibility in some cases where other bodies or individuals may be able to take action to ensure the interests of the children concerned. Developments in family law, and an understanding of rights within the family and concerning children in particular, have led to increasing recognition of the **child's right to self-determination**, and the availability of remedies to safeguard this right.

This means that in some cases public authorities will intervene if the actions or potential actions of the parents are serious enough to justify the intrusion into the family's life in order to protect the welfare of the child. Such authorities would include local authorities acting under **public law** or the police usually acting within the criminal law. Alternatively, if the local authority is unable or unwilling to intervene or act, then such actions would merit **private law** proceedings being brought in order to safeguard the interests of the child at risk.

1.1. THE DEFINITION OF A CHILD

In England and Wales and, a child is a person under the age of 18 years.[49]

1.2. THE JURISDICTION OF THE COURTS

The Family Courts of England and Wales (that is to say the Family Proceedings Courts - often situated inside Magistrates' courts) the County Courts and the Family Division of the High Court have jurisdiction to deal with the welfare interests of a child if s/he is:

- **habitually resident** in England or Wales ; or
- **present** in England, or Wales , respectively and not habitually resident in any other part of the United Kingdom or specified dependent territory.[50]

a) 'Habitual Residence' is a question of fact in each case. A child who lives in England or Wales with their parents, attends school here and has a life built here would be considered to be habitually resident de facto (in actual fact) in the jurisdiction of England or Wales respectively.[51]

b) 'Presence' means physical presence. In some cases children are brought to England or Wales but are nevertheless considered to be habitually resident in a foreign jurisdiction. In an emergency situation, such as child abduction or child abuse, the Courts of England and Wales,

[49] See s. 105(1) Children Act 1989 (England);
[50] Please see The Family Law Act 1986 s.3 (1) (b).
[51] *Re: M (Minors) (Residence Order: Jurisdiction)* [1993] 1 FLR 495.

will have jurisdiction to make emergency protection orders in respect of such children based on their physical presence in this country.[52]

c) Enforcing civil court orders: In the correct circumstances committal proceedings can be brought to imprison or fine an individual for breaching a court order that a) has been personally served on him/her and b) has a penal notice[53] written into the body of the order. However in the context of an alleged forced marriage it is often the case that an alleged victim does not want a member of his/her family actually imprisoned. Hence the application to commit is often more effective in theory (e.g. setting the application down to be heard by a judge) rather than in actual execution and the applicant is often not the alleged victim but another party.

d) **Enforcing civil court orders abroad**: The Courts in England and Wales can make orders in relation to a child whose habitual residence remains in England and Wales respectively (even though they have already physically been removed). However, the jurisdiction of the courts stops in each case at the borders of England and Wales. Thus, in the absence of any multilateral or bilateral agreements, the Court's orders in relation to children are not directly executable overseas.[54] This means that in all cases, wherever possible, steps should be taken to prevent the removal of the child from the jurisdiction for the purposes of a forced marriage before it takes place

2. REMEDIES TO FORCED MARRIAGE

2.1 As stated earlier in the introduction to this chapter, the remedies for threatened or actual forced marriage may be grouped as follows:

a) **Prevention** of forced marriage and protection of the victim and her/his person from any further attempts at forced marriage;

b) The protection and **repatriation/recovery** of the victim where s/he has been taken abroad for the purposes of a threatened forced marriage or where a forced marriage has taken place; and

c) The assistance and **ongoing protection** afforded to victims of a threatened or actual forced marriage following their repatriation/recovery, which may include taking the necessary steps to void or dissolve the marriage.

2.2 The legal remedies referred to above are available in the following three different categories of proceedings:

a) In **Private Law**, under the Forced Marriage (Civil Protection) Law 2007
b) In **Private Law**, under the Children Act 1989 (see the remainder of this sub-section below);
c) In **Public Law**, also under the Children Act 1989 (see sub-section two below); or

[52] The Family Law Act 1986 s.3(1)(b).
[53] For example, "You must obey the directions contained in this order and in particular paragraphs 4, 10 & 11 herein. If you do not you will be guilty of contempt of court and you may be sent to prison, fined or your assets seized".
[54] Examples of such agreements are the 1980 Convention on the Civil Aspects of International Child Abduction of 25.10.80 and the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children 20.5.80. The Anglo-Pakistani Protocol 2003, Council Regulation (EC) No 2201/2003.

d) Und**er the Inherent Jurisdiction** of the High Court (including through Wardship) (see paragraphs 12 and 17 below), which is a remedy that is technically available to any interested party i.e. local authorities and private individuals.

Often th**e** most difficult aspects in cases of forced marriage is bringing the child's plight to the attention of the authorities and the Court i.e. the complainant is often a child or a young and vulnerable person who is isolated from the authorities and unaware of his or her legal rights.[55]

In certain situations, the evidence available of a threat of forced marriage will be sufficient for the local authority to take steps to initiate care proceedings, which would put them in a position of sharing parental responsibility with the parents but with the right to restrict the parents' decisions over issues concerning the child's welfare.[56] In other situations, for example where the evidence available is insufficient for this purpose, the local authority may feel unable to take preventative steps. In such cases, it will be necessary for proceedings in private law or within wardship and inherent jurisdiction to be taken in respect of the child. As will be seen below, there is a range of persons who might be able to commence these two further types of proceedings in private law.

3. PRIVATE LAW – FORCED MARRIAGE PROTECTION ORDERS

The Forced Marriage (Civil Protection) Act 2007 came into force in England, Wales and Northern Ireland on 25 November 2008. It does not apply to Scotland. Proceedings under this new statute are supposed to complement and augment remedies under existing legislation to assist and protect victims rather than to replace them. Certain Courts have been designated to deal with FMCPA cases - an updated list can be found on the FMU website but it is right to say that in cases where the alleged victim is abroad, the High Court (Family Division) is the correct starting point for any proceedings.

Local Authorities are designated third parties and unlike for example Police forces, they do not need permission to commence FMCPA proceedings. The introduction of this piece of legislation has meant for example that local authorities can *simultaneously* start public law care proceedings as well as FMCPA proceedings or as another example the CPS can prosecute an individual for assault whilst at the same time seeking FMCPA orders to protect an alleged victim. In the event that an authority commences proceedings it must remember that the usual civil rules of disclosure do not necessarily apply when an alleged victim's safety and life is at stake and that the alleged victim should be joined as a party to any litigation aimed at protecting him/her as a fundamental right of fair trial.

3.1 Provisions of the Act

Essentially the Act inserts a new Part 4A into the Family Law Act 1996 which is a statute that deals with domestic violence. The Act enables the Family Courts to make a Forced Marriage Protection Order (FMPO) ('the order') for the purposes of protecting:

- A person from being forced into marriage or from any attempt to do so or
- A person who has been forced into a marriage.

[55] As in the case of *Re SA* [2005] EWHC 2942 (Fam) Munby J.
[56] Please see below for a full analysis of public law remedies.

The Act therefore offers protection for victims either facing being forced into marriage or after a forced marriage has taken place. Emergency orders (known as without notice orders) are available to offer protection immediately in urgent situations.

3.2 Consent and Force

The Act protects an individual's right to give free and full consent. It does not matter if the conduct of the person forcing the victim into a marriage is against the victim or another person or directed at themselves

Under the Act 'force' includes coercion by threats or other psychological means (and related expressions to be read accordingly). This recognises that the type of force used in these circumstances can be verbal, physical or mental.

This allows for an application in the following situations namely:

- B forces or attempts to force A to marry through threats etc made towards A
- B forces or attempts to force A to marry by threats etc to commit suicide / self harm
- B forces or attempts to force A to marry through threats etc made to harm someone other than A.

3.3 Applicants

Three types of applicants can apply for an order namely

- The person to be protected
- A relevant third party
- Any other person, with the leave of the court

There is no age restriction for applicants applying for a Forced Marriage Protection Order, enabling both adults and children to make an application. There is no leave requirement for children. A relevant third party will be a designated agency or institution specified to act as such by order of the Lord Chancellor.

3.4 Order of the Court's own motion

A court may make an order without an application when:

> (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.

In the first phase after the Act comes into force, only certain designated County Courts and the High Court will have jurisdiction to make a Forced Marriage Protection Order. There are provisions to transfer cases to an appropriate court.

3.5 Terms of a Forced Marriage Protection Order

The Court may make an order containing any measures that are considered appropriate in order to protect against conduct that may lead to a person being forced into marriage; or to protect a person who has been forced into a marriage. The orders may prohibit or restrict certain activity or they may require a person to do something, such as produce their passport. The Court is given a wide discretion to include "such other terms" as may be appropriate.

The terms may relate to:

- Conduct outside England and Wales as well as (or instead of) conduct within England and Wales;
- 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;

Other persons who are, or may become, involved in other respects as well as respondents of any kind. For these purposes this includes:

- Aiding, abetting, counselling, procuring, encouraging or assisting another person to force, or to attempt to force, a person to enter into a marriage; or
- Conspiring to force, or to attempt to force, a person to enter into a marriage.

The court may make a Forced Marriage Protection Order for a specified period or until varied or discharged.

3.6 Attaching a Power of Arrest

The Court must attach a power of arrest to one or more provisions of the order if it considers that the respondent has used or threatened violence against the person to be protected or otherwise in connection with the matters being dealt with by the order; unless it considers that, in all the circumstances of the case, there will be adequate protection without such a power. The 'respondent' includes any person who is not a respondent but to whom the order is directed.

Where a power of arrest is attached, a constable may arrest without warrant a person whom the constable has reasonable cause for suspecting to be in breach of any such provision or otherwise in contempt of court in relation to the order. Where no power of arrest is attached, a warrant maybe applied for to arrest a person in breach of an order.

The person arrested must be brought before the relevant judge within the period of 24 hours beginning at the time of the person's arrest (ignoring Christmas Day, Good Friday and any Sunday).

Anyone found in breach of an order by the Court can be sent to prison for two years by the County Court under its' powers of contempt of court.

4 Private Law -- Children Act 1989 Proceedings

This section refers to private law remedies that is to say remedies available to private citizens as opposed to institutions and bodies such as local authorities; it discusses remedies for children only.

4.1 Parental Responsibility

a) Parental responsibility means all the rights, duties, powers, responsibilities and authority, which by law a parent of a child has in relation to the child or their property.[57]

b) The exercise of parental responsibility can therefore be viewed as the legal exercise of a parent's rights and duties in respect of a child. It will include, for example, the right to consent to a child having medical treatment, the right to decide on a child's place of residence, including a child's residence overseas, and, importantly, the right to consent to a marriage of a child over the age of 16 years but under 18 years (otherwise it would be void ab initio).

c) The parents of a child have parental responsibility for that child. Where a child's father and mother are married to each other at the time of the child's birth, they each have parental responsibility for the child.[58] Where the child's parents are not married at the time of birth, the mother alone has parental responsibility for the child; however, the father can take steps to acquire parental responsibility by agreement with the mother in approved form or by Court order.[59] If the child was born after 1st December 2003 and the (unmarried) father's name was put on the birth certificate then he automatically has parental responsibility.[60]

d) Parental responsibility can be shared with persons or bodies other than the parents. For example, where a child is the subject of a Care Order, both the parents and the local authority will have parental responsibility for that child (see the section on Public Law, below).

e) In the normal course, therefore, parents, in the exercise of their parental responsibility, may make a decision for the future welfare and life of their child (for example, a decision that the child should be sent overseas to live with another relative). In so doing, and subject to any contra-indications, they are acting properly and appropriately within the law and within the powers that they have as parents with parental responsibility for a child.

4.2 Restrictions on Parental Responsibility

However, as will be seen below, the Court may make Orders to restrict the manner in which parents exercise their parental responsibility. The fact that parents have parental responsibility for a child does not entitle them to act in any way incompatible with an Order made by a Court with respect to the child under the Children Act.[61] In order for a Court to take steps to restrict one or both parents in the exercise of their parental responsibility or to prevent them taking certain steps in its exercise, cogent evidence will be required to show that the steps which they intend to take are not in the best interests of the child.

a) In determining what is (and what is not) in the best interests of a child, the Court will consider the welfare of the child as paramount, and apply the "welfare checklist"[62] for this purpose. Some of the criteria which the Court will consider in administering the welfare checklist include: "the ascertainable suffering wishes and feelings of the child" and "any harm s/he has suffered or is at risk of suffering". The matters which the Court will have regard to in making

[57] See s.3(i) Children Act 1989.
[58] See s.2(i) Children Act 1989.
[59] See s.2(ii) Children Act 1989.
[60] The Adoption and Children Act 2002 s.111 amended s.4 of the Children Act 1989.
[61] See s.2(8) Children Act 1989.
[62] Section 1(3) of The Children Act 1989.

its determination will vary in the importance given to them on a case to case basis. Thus, it will give more importance to "the ascertainable wishes and feelings" of the child concerned in the case of a teenager than in the case of a very young child.

b) The orders which the Court can make to restrict and define the manner in which parental responsibility can be exercised are set out under Section 8 of the Children Act 1989.

c) A major difficulty with this type of relief/proceedings is with respect to the standing of the applicant i.e. these proceedings can only be initiated by certain individuals and in forced marriage cases it is those very individuals who are the prime movers behind the forced marriage itself (e.g. parents, brothers, uncles etc.) rather than potential Applicants who would seek to stop the marriage.[63]

4.3 Orders Obtainable under S.8 Children Act 1989

4.3.1 There are four main types of order available under this section regulating the day to day life of a child i.e. where and with whom a child is to live, how often s/he will see the non-custodial parent and regulating any other specific issues e.g. health or education. Section 8 orders can also restrict parents from performing any specific acts which they normally would be allowed to perform on the basis that they may place the child in danger e.g. of removal from the jurisdiction.

a) **Residence Order:** A residence order means an order settling the arrangements to be made as to the person with whom a child is to live.[64] It does not interfere with the parental responsibility of a parent. In a forced marriage case, in addition to a residence order providing for a child to reside with one of the parents or another person for his/her own protection it would normally be necessary for other orders to be put in place to restrict the parents in what they may or may not do. For example, it might be necessary to prevent a parent from removing the child from that place of residence or collecting him/her from school. Such restrictions are best put in place by way of a prohibited steps order.

b) **Specific Issue Order:** A specific issue order is an order giving directions for the purposes of determining a specific question which has arisen or which may arise in connection with any aspect of parental responsibility for a child.[65] Such orders can direct that parents take specific steps for a child, for example, that s/he be sent to a particular school, or undergo certain medical treatment. In prevention of forced marriage cases, where it is desired to know and control the whereabouts of a passport, however an order can be made requiring parents to surrender all passports relating to the child to the Court but this would be pursuant to s. 33 of The Family Law Act 1986 in relation to a UK Passport and under the inherent jurisdiction of the High Court in relation to a foreign passport[66] allied with a Tipstaff Order for it to be seized by police officers.

c) **Contact Order:** A contact order requires the person with whom the child lives, or is to live, to allow the child to visit or stay or have contact with the persons named in the order.[67]

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[63] Please see section 4.5 below.
[64] s.8(i) Children Act 1989.
[65] s.8(i) Children Act 1989.
[66] *Re A-K (Foreign Passport Jurisdiction)* [1997] 2FLR 569 (CA).
[67] See s.8(i) Children Act 1989. A contact order is what used to be termed and access order. There are two types: direct (staying or visiting) and indirect (through telephone calls and letters etc).

In extreme cases the Court can order that a parent shall only have contact with a child at a specified place and under supervision.

d) **Prohibited Steps Order:** A prohibited steps order is an order that steps of a kind specified in the order, which could be taken by a parent in meeting his or her parental responsibility for a child, shall not be taken by any person without the consent of the Court.[68] A prohibited steps order can be directed to any person. Thus, it can apply to a person who is not a party to the proceedings, for example, another relative.[69] Further, a prohibited steps order can accompany other orders of the Court, for example, an order that the child should reside with a certain person (see above). Where appropriate, a penal notice can be attached to a prohibited steps order. A penal notice is written on the face of an order and simply and clearly states to the person who is the object of the order that s/he could be fined or sent to prison if s/he breaches the order.

4.3.2 The most common orders in relation to threatened forced marriage made under s.8 are as follows:

a) That each or either of the parents shall not take any steps to arrange for or otherwise allow the child to enter into a marriage without leave of the Court (prohibited steps order);
b) That the parents or each of them shall not remove the child from the jurisdiction of England and Wales without leave of the Court (prohibited steps order);
c) That each or either of the parents shall not remove the child from the care of a specified person, for example, a relative with whom the child feels secure (prohibited steps order) and of whom the court approves;
d) That the parents shall be prohibited from making any application for a passport or travel documents for the child (prohibited steps order).

4.4 To whom will a Section 8 Order Apply? A Court should not make a Section 8 Order which will have effect for a period which ends after the child has reached the age of 16 years, unless it is satisfied that the circumstances of the case are exceptional. In practice however, in most cases of threatened forced marriage, the Court would be likely to consider the circumstances of the case to be exceptional for these purposes, and would allow the Orders to extend until the child is 18 years old.[70]

Further, the Court shall not exercise its powers to make a Specific Issue Order or a Prohibited Steps Order with a view to achieving a result which could be achieved by simply making a residence or contact order.[71] An example would be a final order prohibiting a father from removing a child from the mother's care, when a residence order to the mother and probably a contact order to the father would be clearer and arguably more understandable to the parties involved.

4.5 Who can make an application under section 8 of the Children Act?

- **A parent** may apply to the Court for any of the Section 8 orders, as a matter of right.[72]
- **Local authorities** cannot apply for a residence order or a contact order.[73]

[68] s.8(i) Children Act 1989.
[69] See *Re: H (Prohibited Steps Order)* [1995] 1FLR 638 CA.
[70] See s.9 (6) Children Act 1989.
[71] See s.9 (5) Children Act 1989.
[72] See s.10(4) Children Act 1989.
[73] Ibid. s.9(2).

- **Other persons**, for example a competent **sibling or an adult relative** of the child, may apply for Section 8 Orders if they have leave (prior permission[74]) of the Court. In practice, in many cases of prevention of forced marriage, an older sibling will be the person to whom the child turns and they will make an application to the Court for section 8 orders. They will usually seek a residence order for the child to reside with them, and prohibited steps orders that restrict the actions that the child's parents may take in respect of the child.
- The **child concerned** may apply for section 8 orders, if s/he has leave (prior permission) of the Court.[75] It will usually only be necessary to do so where the child has **no competent adult** who feels able to bring an application on her/his behalf to prevent the child from being removed from the jurisdiction, or where there are **financial restrictions** on that competent adult bringing the application.

4.6 Factors for Court to Consider in Making a Section 8 Order to other person: In considering whether or not to grant leave to a person to make an application for a section 8 order, the Court may consider the following factors:

- The **nature** of the application;
- The person's **connection** with the child;
- The **risk** to the very child who is the subject of the proceedings of disrupting their life to such an extent that the child might be harmed;[76]

4.7 Factors for the Court to Consider in Making a Section 8 Order to a Child:
The Court may only grant leave to make the application to the child if it is satisfied that the child has '**sufficient understanding'** to make the proposed application. (This is a different test to the consideration of the wishes and feelings of the child where the Court considers the orders that it should make in respect of the child under the welfare checklist).[77]

4.7.1 The Court must act cautiously when considering an application made by a child. The court has discretion as to whether to grant leave to the child to bring the application and when exercising that discretion it will look to the **likelihood of the success** of the proposed application.[78] Thus, for example, if a child brings an application to reside with another person, for instance, a family friend, the Court will consider carefully why it is the child who is bringing the application and not the person with whom the child wishes to live.

This often causes problems in cases of preventing forced marriage where a family friend or a relative is prepared to offer a neutral home, but does not wish to become a party to the proceedings or to be placed in a position of confrontation with the parents. The position of that person must be explained very carefully to the Court when making the child's application for leave.

[74] This prior permission is not required if the child has been living with the individual for three years, s.10(5)(b) Children Act 1989.
[75] See s.10(8) Children Act 1989.
[76] *Re M (Care: Contact Grandmother's Application for leave)* [1995] 2FLR 86.
[77] S. 1 Children Act sets out 7 factors that the court should have particular regard to when making a section 8 order.
[78] *Re: C (Residence: Child's Application for Leave)* [1995] 1 FLR 927.

4.8 The Child's Appointment of a Solicitor: A child may appoint and instruct their own solicitor who will become their Solicitor Guardian.[79] The child will need leave of the Court to bring the application by their solicitor guardian. In granting leave, the Court will need to be satisfied that the child is able to give instructions on her/his own behalf. [80] Therefore, the child will need to:

- have **sufficient rationality** to instruct a solicitor;
- **understand the nature of the order** s/he is asking the Court to make; and
- **understand the consequences** of such an order being made.

The age at which the child will be considered to have sufficient age and understanding for bringing an application is not defined in chronological terms and it must be tested on a case-by-case basis.

4.9 Public Funding: Where a child applies for leave to make the application her/himself, they are entitled, through their solicitor guardian, to make an application for a public funding certificate (legal aid) and to be represented under such a certificate. The application for public funding is means and merits tested. (Editors' Note: The law on eligibility for legal aid has changed considerably, please check the Introduction).

4.10 The Appropriate Court: Applications for leave for a child to make an application by way of a solicitor guardian must be made in the High Court and only the High Court can grant the child leave.[81]

As forced marriage cases usually have a significant international element, involving a victim being taken overseas, the High Court should always deal them in any event. The eighteen judges of the Family Division of the High Court are the most senior judges of first instance and have a joint extensive experience of international child abduction law.

These judges have inherent powers that other more junior judges do not and in the correct circumstances, if the evidence justifies it, they unhesitatingly use their powers to protect/repatriate children and prevent further harm. Whilst other Courts can make s.8 orders the elements of wardship[82] and the recognition of the same and ancillary orders abroad militate towards all cases of alleged forced marriage coming before a High Court Judge at first instance. Wardship,[83] the inherent jurisdiction orders and those addressed to the Tipstaff is the sole province of judges of the Family Division.

However, in the case of the Forced Marriage (Civil Protection) Act 2007, FMPOs can be made by the High Court and a limited number of County Courts. In addition, a child does not need to obtain leave to apply before making an application for a FMPO.

4.11 Passports

[79] See Rule 4.12 Family Proceedings Rules 1991.
[80] See *Re: H (A Minor – Care Proceedings Child's Wishes)* 1931 FLR 440.
[81] See Practice Direction of 22 February 1993 and Family Proceedings Rules 1991 Rule 4.3.
[82] See Presidential Practice Direction 5 June 1992 : [1992] 2 FLR 87
[83] Re KR (Abduction: Forcible Removal by Parents) [1999] 2 FLR 542 Singer J. sets out succinctly the importance of the High Court wardship jurisdiction and its particular applicability to cases of forced marriage.

The court can effectively impound a child's passport until it is satisfied that it is safe to return it to the child or adults with parental responsibility. Passports of adults who are not the alleged victim of forced marriage (e.g. parents) can be seized by the Court for a limited period of time to assist with enquiries as to the whereabouts of a child. Passports of other adult relatives can similarly be seized but only if the individual concerned is made a party to the proceedings.

a) Power to impound passports

Often the best way to stop an individual from being transported out of the country is by obtaining all of the passports that have their details thereon.

- UK passports of a child can be surrendered pursuant to an order of the County Court, under s.37 of the Family Law Act 1986.

- As indicated above, foreign passports can only be seized under the inherent jurisdiction of the High Court.[84] The latter court is often the best place to commence proceedings where passports need to be seized (rather than simply surrendered) because the Tipstaff Officers (court officers with powers to enforce High Court orders) have powers under a standard 'location order' to seize such documents and to arrest an individual if such documents are not forthcoming.

- An order for surrender of a passport may also be made in the terms of a FMPO.

b) Notification of passport agencies

After the passport orders have been obtained the relevant passport agencies can be notified with the court's permission of the fact (indeed in the case of British Passports it is automatic pursuant to the two Practice Directions of 29/4/83 and 16/5/83) and of any injunctions that have been issued prohibiting the removal of a named individual from this country.

While the English Court cannot order foreign Embassies or Ambassadors to do or not to do anything, it may invite them to do or not do something, and this language is often employed.

5. The private law scenario: the without notice procedure

5.1 Providing notice of orders to be made

It is important to note that with respect to all such section 8 Orders, whilst the initial application can be made without notice to the Defendant/Respondent parties, they must at some point be put on notice. The Applicant must be full and frank at the without notice hearing so the judge is in possession of all the salient facts, even those that militate against the Applicant's case.[85]

It is not possible, therefore, to obtain Orders to prevent certain steps being taken in respect of a prospective victim without the Orders being served on the Respondents (who are usually the parents) and without them becoming aware of the proceedings. This must be fully explained to any young person who is considering taking such steps. S/he may take the view that service of these proceedings will aggravate the situation rather than remedy it.

[84] Re *A-K (Foreign Passport Jurisdiction)* [1997] 2FLR 569.
[85] As per Munby J.'s dicta in *RE S (EX PARTE ORDERS)* [2001] 1 FLR 308.

In the normal course, the Court will make a **Without Notice Order** and will fix a 'return day'. On that date, the parents, who will have been served with the orders, have the opportunity to put their side of the case, and can apply for the orders that have already been made to be set aside, or varied. It is important that the young person knows that this opportunity will be given to her or his parents.

6. Investigations Ordered By The Court

On an application made under the Children Act (or under wardship and the inherent jurisdiction, see para 12 below), the Court will order that certain investigations be undertaken into the social welfare and background of the child. These investigations will be carried out by a statutory agency, either by a CAFCASS Officer[86] (who is the reporting officer to the court in private law proceedings) or by the local Social Services.

a) **Investigations by a CAFCASS Officer:** The CAFCASS Officer may be ordered by the court to investigate and report. Normally s/he will interview the child and make enquiries at her school, speak to the parents and any other professionals involved etc. Alternatively, especially in cases where there has been prior social services involvement, the Court may order that the report be compiled by the local Social Services.[87]

b) **Investigations by the Local Authority:** The Court also has, in private law proceedings, the power to direct a local authority to report to the Court and/or undertake certain investigations.[88] Where there has been prior involvement by Social Services, often unconnected with the forced marriage but, for example, regarding truancy or dealing with family problems, the Court will normally order what is known as a Section 37 Report. These orders for reports are directed to the appropriate local authority (the Social Services) for the area in which the child lives. This is a particularly important provision in cases of forced marriage where the local authority has previously declined to take any public law steps in order to protect or assist the child.

Section 37 of The Children Act 1989 provides, amongst other things, that where the Court gives a direction to the local authority, the local authority should consider whether to:

(a) apply for a Care Order or a Supervision Order;
(b) provide services or assistance for the child or his or her family; or
(c) take any other action in respect of the child.

Where the Local Authority undertakes such an investigation it must inform the Court of the following information:

(a) Its reasons for deciding not to take a Care or Supervision Order;
(b) Any service or assistance it has provided or intends to provide for the child and his or her family; and
(c) Any other action it has taken or proposes to take in respect of the child.

[86] CAFCASS (Child and Family Court Advisory Support Service) is an independent state funded service that provides officers with experience and expertise in family matters to give the court an objective evaluation of the situation.
[87] See Family Proceedings Rules 1991; Rule 4.11(b) and s.7 Children Act (Welfare Report).
[88] S. 7 Children Act 1989.

When a s.37 Report is ordered the Court can make an Interim Care Order to the relevant Local Authority without the said Local Authority applying for or even agreeing to it.[89]

7. Personal Protection Orders (Family Law Act 1996)

Within any private law Children Act proceedings, the Court has power to make orders to prevent molestation or interference with the child. These are known as Family Law Act 1996 Personal Protection Orders and sometimes these orders will run in tandem with Children Act 1989 Provisions).

7.1 Ongoing Protection of a Child or an Adult

This section briefly sets out the private law injunctions for which private citizens can apply against one another under the Part IV of Family Law Act 1996. These may not be effective in stopping a forced marriage/abduction taking place but in practice they have proved useful in providing ongoing protection after a child and/or an adult has been returned to this country. They are also an important mechanism for providing protection for adults. The ultimate sanction they provide is imprisonment of the defendant if he breaches the terms excessively. A defendant has to be in this jurisdiction for this sanction to be used.

7.1.1 Non-molestation injunctions: Non-molestation injunctions are available under s.42 of the Family Law Act 1996. Freestanding applications for this relief are not necessary. These injunctions prohibit a named individual from assaulting, threatening, molesting or otherwise interfering with the applicant or any relevant child (or instructing or encouraging an unnamed person to do so). Those who can apply for such an injunction are any party to family proceedings against the defendant (e.g. for residence or contact) or associated persons, for example, relatives (s.62 (3) to (6) of the Family Law Act 1996 i.e.: blood relatives and step relatives (s.63). A child may not apply for an order without specific permission (s.43).

7.1.2 Exclusion Orders: Orders excluding associated persons form a dwelling house are also available under Part IV of the Family Law Act 1996, as is exclusion from a dwelling house in respect of interim care orders of a 'relevant person' . This power includes, under Section 38A of the Children Act 1989, a power to prevent a person not living at home from entering the dwelling house. The problem with injunctive relief under this Act is that it involves no external authorities. The local authority, the Tipstaff, the police etc are not as a general rule envisaged as putting the injunctions into effect. Hence the exclusion orders are only as good as the individuals living in the house is at reporting breaches of them to the authorities. A child may not apply for an order without specific permission (s.43, Family Law Act 1996, Part IV).

If no family proceedings are on foot, then freestanding proceedings need to be issued and those will have to be brought by an associated person or the child (with leave of the Court). Again, as mentioned above, as the initial effectiveness of the order is down to the individual (e.g. the police can be called to a property to effect a power of arrest if the defendant is attending the property in breach of an order which has the power of arrest attached to it). The orders place a great emphasis upon the applicant's ability to summon help. Unfortunately, in cases where there is a defendant who is intent upon violence such injunctive orders often failed to have the required effect. Placing the emphasis upon the vulnerable person in a home where all other members of the family wish to force her into a marriage may not result in an injunction (if

[89] S.38(1)(b) of The Children Act 1989

indeed it has been obtained) being enforced. Support systems need to be in place and these are best identified by the use of Social Services who can be provoked into action via the High Court warding a child and ordering a s.37 report on their marriages.

8. The inherent jurisdiction of the High Court: the private law perspective

8. 1 INTRODUCTION

The High Court has an inherent jurisdiction to make orders in respect of children, in addition to its statutory powers.[90] The High Court's inherent jurisdiction runs in tandem and co-exists with its statutory powers, for example under the 1989 Children Act.

This inherent jurisdiction is unlimited and unrestricted except where specifically stated by statute. It may be invoked against any person irrespective of whether they are a party to proceedings. The High Court's exercise of its inherent jurisdiction includes jurisdiction regarding wardship of children and even orders in relation to adults (for adults, see below).[91] Wardship is of particular importance in forced marriage cases and is discussed below.

8.2 Wardship

a) What is wardship?

Wardship vests parental responsibility in respect of a child in the High Court in addition to the parents. The High Court Judge's decisions however take priority over the parents' wishes, while their child remains a ward.

Once a child is a ward of Court, there is an automatic prohibition against the removal of the child overseas. In cases where there is a dispute as to the child between two parties, the neutrality of a wardship order (which vests parental responsibility in the High Court), may be important in influencing a Court overseas. Jurisdictionally wardship is a neutral way to commence proceedings, being based either on habitual residence or the mere physical presence of the child in England and Wales.

b) Who can bring wardship proceedings?

A child can apply through a guardian to make her/himself a ward of court if s/he obtains leave of the Court to bring the proceedings. In deciding whether the child is competent to do so, the Court will apply the same test as in Children Act cases (i.e. 'sufficient understanding'). Any other interested party may apply to make a child a Ward of Court including a local authority (but only if it has permission under s.100 of the Children Act).

Public funding is available for wardship proceedings on the same basis as in private Children Act proceedings (that is, it is means and merits tested).

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[90] See s.19 Supreme Court Act 1981.

[91] *Re SK (Proposed Plaintiff) (An Adult By Way of her Litigation Friend)* [2005] 2 FLR 230 (this includes a draft order), see *Re Sk (Proposed Plaintiff) (An Adult by way of her Litigation Friend)* [2005] 2 FLR 230 and *Re SA [2005*] EWHC 2942 (Fam) (this also includes a draft order), see http://www.jordanpublishing.co.uk/online-services/family-law

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c) Who can be made a Ward of Court?
Any child (that is any person aged under 18 years old) may be made a ward of court if he or she is **habitually resident** in England or Wales or if he or she is **present** within the jurisdiction of England and Wales (for meaning of these terms see paragraphs 1.2(a) and (b) above).[92] The Court no longer refers to concepts such as *parens patriae*, which is based on nationality of the child, in deciding jurisdiction in wardship proceedings.[93] If it is alleged that a child has already been married, it may not prove to be an absolute bar to wardship proceedings.[94] The leading authority on using wardship to prevent a threatened forced marriage of a minor is *Re KR.*[95]

d) What is Habitual Residence?
Unlike in KR's case, in many other cases the evidence will indicate that the parents do not intend to change the child's UK habitual residence but that the child has been sent abroad for the purposes of an extended holiday. A mere holiday where there are plans for return does not in itself change the child's habitual residence. This is why in such cases, the High Court would have jurisdiction in wardship proceedings even though the child is physically outside England and Wales.

There will be cases however, where a removal of the child has taken place a number of years ago and, in those situations, it may be more difficult to show that the parents were/are not acting properly within the exercise of their parental responsibility in changing the child's habitual residence. In these cases there will be neither presence of the child in England and Wales, nor habitual residence upon which to found wardship proceedings. There has to be a connection between the child and England and Wales if the Court is to have a jurisdiction to make orders relating to them, for example a sole surviving parent living in this England.

e) Why are wardship proceedings useful in forced marriage cases?
Wardship proceedings are particularly useful in cases where the child in question is aged 16-18, given that a wardship order extends until a child is 18 years old, even where there are no obvious 'exceptional circumstances', and given the unavailability of Children Act proceedings in such cases because of the provisions of S.9 (6) and (7) of the Children Act 1989 (the prohibition concerning orders in relation to 16 year olds). An extant wardship order gives the party a 'fast track' back into the High Court should anything arise concerning the repatriation or the further protection of the child.

Further, a local authority may use wardship proceedings, as it is permitted in certain circumstances under section 100 Children Act[96] in the case of a child who has reached the age of 17 years, or one who is 16 and has married. This is because no care order or supervision order may be made in respect of a child who has reached the age of 17 years or 16 in the case of a child who is married.[97] In practice it is rare for a local authority to seek wardship or inherent jurisdiction orders in relation to children and especially in relation to adults.

Every order that is made by a High court judge is dependant upon the particular facts of any given case and it is difficult to generalize the type of order made in this inherent/wardship

[92] The Family Law Act 1986 s.3(1)(b)
[93] *Al Habtoor v Fotheringham* [2001] 1 FLR 251.
[94] *Re Elwes (No 2)* (1958) Times July 30, CLY [1958] 1620, and for example if the marriage was void.
[95] *Re: KR (Abduction: Forcible Removal by Parents)* [1999] 2FLR 542 – see n. 102 below.
[96] See subsection two and *Re SA* (see n102) for an example.
[97] See S 31(3) Children Act 1989.

jurisdiction. However the Orders in KR, SK and SA,[98] are examples of what can be done in the jurisdiction of the High Court.

B: Public law remedies in relation to children

1. Introduction

1.1 In cases of threatened forced marriage within the UK, or threatened or actual removal of a child abroad for the purposes of a forced marriage, the first agency to become aware of the situation may be the Social Services Department for the area in which the child normally resides. It is the writers' experience that historically, prior to the cross-governmental guidelines;[99] social services have appeared disinclined to become actively involved in cases where forced marriage has been alleged.[100] This is understandable given the conflicting obligations to mediate in family matters and to be culturally sensitive on the one hand, whilst on the other hand striving to protect and to support a young person's allegations, where care proceedings are inappropriate.

1.2 Local authorities owe a duty of care for any child who is '…in need…' and who is in its area. This duty exists whether or not the authority takes or has commenced care or supervision proceedings for the child. Thus, even where measures are taken in private law proceedings for the child's protection, the duties of the local authority to provide accommodation and assistance, as set out below, continue to exist. Frequently the proceedings under which orders are obtained to protect the child and prevent a forced marriage will be in private law proceedings but the Court will be in receipt of reports and information from the local authority as to the practical steps that are being taken to assist and protect the child.[101]

1.3 Private Law proceedings are not available to Local Authorities.[102] So for example, a Local Authority attempting to obtain a Prohibited Steps Order (under s. 8 of the Children Act 1989) to prevent a mother removing a child from a community home would be in breach of Sections 9(5) and Section 100(2)(b) Children Act 1989.

In most forced marriages cases it is difficult to prove the 'threshold criteria' to the requisite standard (see below at 2.33 for the definition), as the proof is often too insubstantial to justify the commencement of the machinery of care legislation. Even though such proof or evidence would sometimes lead an experienced High Court judge to make orders within wardship in an attempt to ensure the safety/discovery of a child, the relevant social service case workers or social workers on the ground often do not think it appropriate to act. Part of the reason for this is that the Care Order legislation is rightly seen as a draconian jurisdiction of last resort as it vests parental responsibility for a child with the state. A social worker who is attempting to work in partnership with the family, to be culturally sensitive, whilst at the same time trying to investigate the whereabouts or welfare of a child, is therefore placed in an invidious position. Often the very investigation by the social worker may provoke an immediate removal of the

[98] *Re: KR (Abduction: Forcible Removal by Parents)* [1999] 2FLR 542, *Re SK (Proposed Plaintiff) (An Adult by way of her Litigation Friend)* [2005] 2 FLR 230 (this includes a draft order) and *Re SA* [2005] EWHC 2942 (Fam) (this includes a draft order) all in in Jordan Publishing.

[99] Guidelines for The Police, Second Edition and The Right to choose: multi-agency statutory guidelines for dealing with forced marriage

[100] For example, in the case of *KR* above, the sister had sought and failed to obtain the assistance of the child's local authority before approaching the Court.

[101] For example pursuant to ss.7 or 37 of the Children Act 1989.

[102] See *Nottinghamshire County Council v P* [1993] 2 FLR 134 CA.

child from this jurisdiction. Unlike the police, social workers guidelines on forced marriage have only relatively recently been introduced. Below is a summary of first, the powers, and second, the duties which are vested in local authorities as a result of the Children Act 1989.

This subsection should be read in conjunction with the multi-agency statutory guidelines for dealing with forced marriage 'The Right to Choose', which is the aforesaid social work practical guidance for cases where young people and vulnerable adults are facing forced marriage.

2. Care and Supervision Orders under the Children Act 1989
Frequently asked questions relating to public law remedies are as follows:

2.1 Who may make such orders?

In practice these proceedings are only initiated by a local authority.

2.2 Who will be the subject of such orders?

Care orders or supervision orders may not be made in respect of a child who has reached the age of 17 years or who has reached 16 and entered into a voidable marriage.[103]

2.3 What are the criteria for making such orders?

Section 31 Children Act 1989 sets out the procedure for the making of a care or supervision order.

> "1. On the application of any local authority or authorized person the court may make an order: -
> a. Placing the child with respect to whom the application is made in the care of the designated authority, or
> b. Putting him under the supervision of a designated local authority."

However, a care order may only be made if the facts of the case meet certain criteria which cross the 'threshold' of 'significant harm'. These criteria are called the 'threshold criteria' and can be found in s.31 (2) of the Children Act 1989. The material time is the point at which continuous protective measures were initiated. So, for example, in a case of alleged forced marriage, the local authority would have to prove at the initial and interim stages that there were reasonable grounds to believe that when the alleged victim was accommodated by the local authority, s/he was being emotionally or physically harmed, or was likely to be so harmed. For final care orders, the local authority would have to prove that such harm was indeed likely, rather than that there were simply reasonable grounds to believe that such harm was to be inflicted on the child. Obviously the more serious the allegations, the more clear and cogent the evidence has to be.

2.4 What is the definition of 'significant harm'?

[103] S. 31(3) of The Children Act 1989.

"Significant harm" means ill-treatment or the impairment of health or development.[104] Ill-treatment includes sexual abuse and forms of ill-treatment which are not physical. Development means physical, intellectual, emotional, social or behavioural development.

The Court must be satisfied that:

> "...the child concerned is suffering, or is likely to suffer, significant harm; and that the harm, or likelihood of harm is attributable to the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give him...".[105]

2.5 What is the Standard of proof – for the threshold criteria?

The burden of proof is on the local authority and the standard of proof is on the 'balance of probabilities'. However, in practice in forced marriage cases, what causes the most concern to social workers in the field is the task of proving the threshold criteria to the level necessary to justify social services intervention in a family.

In order to intervene in cases of threatened forced marriage, the local authority will have to show that the child will be likely to suffer significant harm. Here, the term 'likely' means a real possibility. [106] The local authority need evidence in the form of witness statements from family members and people from the community as well as from the victim herself and in a case of forced marriage obtaining this evidence to prove 'significant harm' may be difficult.

The Court must determine on the basis of the facts admitted or proved before it, on the balance of probabilities, whether the threshold criteria have been met. Suspicion of the likelihood of significant harm is not sufficient. However, the range of facts which may be taken into account is infinite. Facts which are minor or trivial, if considered in isolation, may when taken together, suffice to satisfy the Court of the likelihood of future harm. Thus, the Court can conclude that there is a real possibility of future harm even though in a particular case harm in the past has not been established. So, for example, if a child has been significantly physically harmed then his/her sibling could be likely to sustain similar harm in the future even though the sibling herself has to date not been harmed.

The difficulty in many threatened forced marriage cases is that there is a lack of cogent evidence of what the parents/family intend to do. The victim is often relying on what she has overheard or what she has surmised from the arrangements that are being made.

2.6 What is the process for obtaining an Order under s. 31 Children Act?
Obtaining an order under s.31 is a two-stage process: first the Court considers the threshold criteria and then secondly it considers what orders to make, that is, whether to make a care order, a supervision order or no order.

2.7. A Care or Supervision Order?

[104] s.31 (9) Children Act 1989.

[105] s.31(2) Children Act 1989.

[106] See *Re H and R (Child Sexual Abuse)* [1996] 1 FLR 18 HL.

There is a duty on the Court to consider whether a care or supervision order is more appropriate.[107] The Court must ask itself whether:

i) A stronger order is needed to protect the child;
ii) The risk to the child can be met by a supervision order;
iii) The parental co-operation of the child could only be obtained through the more draconian care order.

There is a duty under Section 8 of the Human Rights Act 1998 to make an order that is justified and proportionate. Obviously the State's intervention in any particular family life has to be kept to a minimum whilst still protecting children within it. Care Orders vest Parental Responsibility with the relevant local authority while Supervision Orders do not.[108]

2.8. How is the Jurisdiction in Public Law (Local Authority Care Proceedings) established?

The Jurisdiction of the court to entertain care proceedings is particularly difficult when looking from the perspective of a forced marriage case where the child has already gone abroad. [109] However, the Court will have jurisdiction to entertain the designated local authority's application if the child concerned is either habitually resident or present in England and Wales/Scotland when the application is made.[110] The designated local authority with responsibility is that in which the child ordinarily lives. The locus of a local authority to commence care proceedings after a child has been removed from the country is problematic. The general view of practitioners is that if care proceedings have been commenced *prior* to the child leaving then the court has the jurisdiction make further orders. However, if no such proceedings have been instituted, there is no jurisdiction for the local authority to obtain legal relief, unless English or Welsh habitual residence can be proved e.g.: the child has left very recently or ostensibly is on a holiday. With the permission of the Court, a local authority can ward a child after she has left the jurisdiction.[111]

3. A Summary of the Other Relevant Sections 0f the Children Act 1989 Pertaining To Public Law Remedies:

3.1 Before the enactment of the Children Act 1989, children were 'taken into care' through the wardship legislation. In other words, the High Court made a child a ward and placed him/her in the care and control of an authority or individual. However, following the Children Act, the emphasis was placed upon the relevant local authority to obtain parental responsibility for a child. Although technically shared, this overrode the parental responsibility of the parents and allowed the local authority to dictate the future upbringing of a child for whom it had a care order pursuant to s.31 Children Act. Wardship still continues as a concept but in most cases it is circumvented by the framework for care orders under the 'new' Children Act 1989.

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[107] See *Re D (Care or Supervision Order)* 2000 Family Law 600.
[108] For a recent discussion of this see *Re B Care Interference with Family Life*)[2003] EWCA Civ 786 [2003] 2FLR 813
[109] See *Re R (Care Order: Jurisdiction)* [1995] 1 FLR 711 FD.
[110] See *Re R (Care Order: Jurisdiction)* [1995] 1 FLR 711 FD.

[111] This is explained by Munby J in *Re SA* (see n.102) paragraph 105 and is contrary to the current social services guidelines (see n.103).

3.2 As can be seen below, a court cannot exercise its powers so as to force a local authority to commence care proceedings or even to accommodate a child. The rationale behind the Children Act 1989 was to put the local authorities in the driving seat and to ensure finality of proceedings by virtue of s.31 care orders, while still setting out their duties to children in their respective areas. If a local authority is not performing its duties correctly, then the ultimate legal sanction is for that local authority to be judicially reviewed in the High Court (Administrative Division) and/or for a civil claim for damages for negligence.

3.3 In practice however very few cases involving children are the subject of these types of proceedings as social workers are immediately responsible to their line managers, who ensure that they perform their duties correctly. Each local authority must have a formal complaints procedure and this must be exhausted before any decision is judicially reviewed. Swift though they maybe, the problem with this course of complaints procedures and judicial review is that they take too much time and are inappropriate in cases of suspected forced marriage where immediate assistance is required, for example:

- to obtain accommodation for a child who has left home either fearing or after a forced marriage;
- to curb the exercise of the parent's powers of parental responsibility; or
- to assist a repatriated child to start making a life for herself.

The duties are paraphrased below because knowledge of them may assist the reader in persuading a social worker to observe them when faced with the type of emergency situation that Forced Marriage presents:[112]

3.3.1 Section 17 of The Children Act 1989 - Provision of services for children and their families in their area.

Section 17 provides a general duty to local authorities to make provision for children in their area. This may include provision of special services and education programmes in areas of high incidence of forced marriage.[113] S.17 is the section under which cash is often provided to give assistance (s.17(6)).

Minors who are alleged victims of forced marriage are not treated as a separate class of children as their plight is yet to be recognized by the legislature as a national phenomenon worthy of discrete treatment.

3.3.2 Section 20 of The Children Act 1989 - Provision of accommodation for children

Under this section children are accommodated with their parent's consent. The advantage to this course of action is that it can be done without legal proceedings. The disadvantage is that those with parental responsibility for the child are the sole arbiters of what happens concerning the child's day to day care. Hence the child can be removed from the local authority's accommodation without any permission being deemed necessary. S.20(11) reproduced below is a useful tool for cases of alleged forced marriage involving but a child of over sixteen who wishes to take advantage of local authority accommodation and might require some ancillary orders to protect her person.

[112] Reference to the *Social Services Guidance* (see n.103) may also prove invaluable.
[113] See *Choice by Right Report*, the report of the Parliamentary working group on forced marriage dated June 2000.

The Children Act 1989:
Section 20(1) - Every local authority shall provide accommodation for any child in need within that area who appears to them to require accommodation as a result of:

a. there being no person who has parental responsibility for him;
b. he being lost or having being abandoned; or
c. the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.

Section 20(3) - Every local authority shall provide accommodation for any child in need within their area who has reached the age of 16 and whose welfare the authority considers is likely to be seriously prejudiced if they do not provide him with accommodation.

Section 20(4) - a local authority may provide accommodation for any child within their area (even though a person who has parental responsibility for him is able to provide him with accommodation if they consider that to do so would safeguard or promote the child's welfare.

Section 20(5) - A local authority may provide accommodation for any person who has reached the aged of 16 but is under 21 in any community home which takes children who have reached the age of 16 if they consider that to do so would safeguard or promote his welfare.

Section 20(6) - Before providing accommodation under this section, a local authority shall, so far as is reasonably practicable and consistent with the child's welfare:

a) ascertain the child's wishes regarding the provision of accommodation; and
b) give due consideration (having regard to his age and understanding) to such wishes of the child as they have been able to ascertain.

The problem with provision of accommodation to an alleged victim of forced marriage under s.20 Children Act is that:

Section 20(7) - A local authority may not provide accommodation under this section for any child if any person who:

a) has parental responsibility for him; and
b) is willing and able to:
i. provide accommodation for him or;
ii. accommodation to be provided for him,
objects.

Section 20(8) - Any person who has parental responsibility for a child may at any time remove the child from accommodation provided by or behalf of the local authority under this section.

But please note:

Section 20(11) - Sub-sections (7) and (8) do not apply where the child has reached the age of 16 and that child agrees to be provided with accommodation.

3.3.3 Section 22 of the Children Act 1989

This section sets out the duties that local authorities have in relation to children who are looked after for them. A "looked after" child is one who is a child in its care or who is provided with accommodation by the authority the exercise of any functions, which are social services functions. Under this section it is the duty of the local authority to take account of the wishes and feelings of the child and his or her parents.

Note however the duty to ascertain the wishes and feelings of the parent under s.22(4)(b) before making any decisions with respect to a looked after child is directory and not mandatory.[114]

If the child cannot be accommodated with her parents' permission and she is under 16, then the local authority must consider care proceedings. If a child is accommodated by the local authority and s/he reaches the age of sixteen then s/e automatically qualifies for leaving care provisions otherwise known as Pathway Planning. This includes the provision of Personal advisors and the preparation of a plan which assists the young person's transition into adulthood e.g. independent living.[115]

3.3.4 Section 44 of The Children Act 1989: Emergency Protection Orders (EPOs)

Care proceedings are often preceded by proceedings to obtain an emergency protection order. These are short lived (a maximum of days) and are separate distinct proceedings initiated in practice by a local authority before it has had time to consider care proceedings and file a care plan. Any person can apply for an EPO including a local authority and a designated police officer, but only if:

> *"There is reasonable cause to believe that the child is likely to suffer significant harm if...he is not removed to accommodation provided by or on behalf of the applicant or he does not remain in the place in which he is then being accommodated…"*

The Court when making an 'EPO' may give directions in respect of any named person who is or is not being allowed to have contact with the child. It may also make directions for medical or other psychiatric examination of the child. Furthermore, the Court has power to exclude a relevant person from the house in which the child lives.[116] Note however that an EPO lasts only eight days and can only be extended once and then only for a further seven days.

An application for an EPO (and indeed one for an Interim Care Order commonly referred to as an 'ICO') has to be commenced in the Family Proceedings Court (FPC) unless there are pre-existing High Court proceedings. Although the local authority may

[114] Re *P (Children Act 1989) SS 22 and 26. Local Authority Compliance* [2000] 2 FLR 910.
[115] S.19B Schedule 2 of The Children Act 1989
[116] . See s.44A Children Act 1989.

be more used to commencing an EPO in the FPC than a wardship in the High Court and although the magistrates may expedite the transferral of the case up to the High Court via the county court, the reader must bear in mind the reasons why the powers and procedure of the High Court in cases with an international dimension are considered to be more appropriate.

3.3.5 Section 46 - Removal and accommodation of children by police in cases of emergency

Section 46(1) - where a constable has reasonable cause to believe that a child would otherwise be **likely to suffer significant harm**, he may:

a. remove the child to suitable accommodation and keep him there; or
b. take such steps as are reasonable to ensure that the child's removal from any hospital, or other place, in which he is then being accommodated is prevented.

A Police protection order (commonly referred to as a 'PPO') only lasts 72 hours however and the police have a duty to inform the local authority. This is often the pre-cursor of applications for EPO's and Care Proceedings and is an invaluable weapon in the armoury of the Police when it meets the challenge of rescuing and protecting minors.

3.3.6 Section 49 - Abduction of children in care

It is an offence[117] for a person to knowingly and without lawful authority or reasonable excuse remove a child from the responsible person or keep a child away from the responsible person or to induce, assist or incite such a child to run away or stay away from the responsible person. Section 49 applies to a child who is the subject of an interim care order or an emergency protection order or a police protection order.

4. An overview of the public law procedure

In many cases the local authority is in the best and most independent position to seek orders to repatriate and protect an individual. However in practice the remedies are seen to relate to children only and the usual public law procedure in care cases is ill-suited to the emergency relief required in matters of forced marriage. The application has to be made in the Family Proceedings Court (The FPC), and by definition this court is not experienced in the area of international child abduction or forced marriage cases as stated above. EPOs are usually taken out by local authorities as a precursor to care proceedings, whereas private citizens seeking directions for a removal/discovery of a child are best advised to go to a High Court judge to seek relief under wardship proceedings. Fast effective remedies are more readily available in the High Court which has an extensive experience of these cases and whose orders in the inherent jurisdiction and under wardship have greater influence in foreign states.

An Emergency Family Division 'Applications Judge' is available at 10:30am and 2pm on all working days at the Royal Courts of Justice in Strand, London to hear without notice applications. In addition to this an 'out of hours judge' can hear telephone applications when

[117] The maximum term of imprisonment is 6months: s.49(3) of of The Children Act 1989

the court building is closed[118] but the latter route is preferable in view of the duty to be full and frank and to advantage of being able to show the court documentation if attending one is it in person.

5. The Inherent Jurisdiction - The Public Law Perspective

This term embraces the powers of the High Court in all cases concerning children and adults, whether in public law or private law; an individual child does not have to be a ward of court or even a minor for the Court's inherent jurisdiction to be exercised.

5.1 The Powers of the Court - Local Authorities and Children

The High Court may make orders under its inherent jurisdiction in addition to and in support of relief granted under the Children Act 1989.[119] In this form of jurisdiction, the Court has the power to determine the extent to which a parent or guardian may meet his responsibility for the child. The High Court can restrict the exercise of certain aspects of parental responsibility by a child's parents. It may also make collateral orders and directions to parties who are not the child's parents to ensure the child's welfare. The following sections of the Children Act 1989 radically redefined the powers of the Court in enjoining local authorities to become involved in proceedings and stopped the Courts from having the power to force local authorities to look after children or to start proceedings.

The language of these sections of the Children Act 1989 is clear:

> *s.100 (2), 'Restrictions on Court's Inherent Jurisdiction regarding Children'*
>
> *i. Section 100(2) - No Court shall exercise the High Court's inherent jurisdiction with respect to children:*
> *a) So as to require a child to be placed in the care, or put under the supervision, of a local authority;*
> *b) So as to require a child to be accommodated by or on behalf of a local authority;*
> *c) So as to make a child who is the subject of a care order a Ward of Court; or*
> *d) For the purpose of conferring on any local authority power to determine any question, which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.*

The following 'gate keeping provision' ensures that a local authority needs express permission to seek relief from the High Court under its inherent jurisdiction:

> *ii. Section 100(3) - no application for any exercise of the Court's inherent jurisdiction with respect to children may be made by a local authority unless the authority has obtained the leave (permission) of the Court.*

[118] Telephone number 0207-947-6000
[119] However *See Re M (Care Order: Jurisdiction)* [1997] 1 FLR 456 FD. See in particular Section 33(3)(b) of The Children Act 1989.

Therefore a Local Authority can ward a child but only after leave has been granted pursuant to this subsection. The criteria for such permission are as follows:[120]

> *iii. Section 100(4) - The Court may only grant leave if it is satisfied that:*
> *a) The result which the authority wish[es] to achieve could not be achieved through the making of any order of a kind to which subsection (5) applies; and*
> *b) There is reasonable cause to believe that if the Court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm.*
>
> *iv. Section 100(5) - applies to any order:*
>
> *a) Made otherwise than in the exercise of the Court's inherent jurisdiction; and*
> *b) Which the local authority is entitled to apply for (assuming in the case of any application which may only be made with leave, that leave is granted).*

The advantage of the High Court procedure is set out above and orders for wardship and within the inherent jurisdiction of the High Court may distinctly be to a Local Authority's advantage in searching for, repatriating and protecting a victim of forced marriage who is on the cusp of adulthood.

6.2 THE POWERS OF THE COURT - LOCAL AUTHORITIES AND ADULTS

The reader is referred to *Re SA* [2005] EWHC 2942[121] (Fam), where Munby J explains the continuing jurisdiction that the court and hence local authorities have in relation to vulnerable adults. *Re SK* and *Re SA* were cases which illustrated the fact that protection which is available for children is also available for adults in appropriate cases.

In Munby J.'s judgment in *Re SA*, he stated at paragraph 112 the following dicta:

> "…. (counsel) has helpfully drawn my attention to the following note which appears at page 668 of the Family Court Practice 2005 under the heading 'Inherent jurisdiction and forced marriages':
>
> > "It is submitted that, applying the above principles to the issue of forced marriages and having regard to the need in such cases for urgent, immediate and effective relief, the inherent jurisdiction is the only route available to safeguard and protect a "child" and to prevent the child from suffering significant harm, particularly by removal from the jurisdiction of the court. In such cases, there is often no effective interested party who is able to make the application other than the local authority. Therefore, the local authority should confidently apply for leave to invoke the inherent jurisdiction and the court's approach to such an application should be sympathetic and robust as in *Re A (Wardship: Jurisdiction)* [1995] 1 FLR 767; and *Re KR (Abduction: Forcible Removal by Parents)* [1999] 2 FLR 542. Where the victim of the forced marriage and abduction is an

[120] This is explained by Munby J in *Re SA* (see n.102 above) at paragraph 105 and is contrary to the current social services guidelines.
[121] See n.102 above.

> adult the inherent jurisdiction should also be invoked on similar principles as those which apply in cases where the subject of the proceedings is unable to make the application personally due to some incapacity."
>
> I agree with that note. It accords with my experience of the current practice which is indeed, as it should be, sympathetic and robust.

It is clear therefore that Local Authorities should not be reticent about seeking relief for a victim of forced marriage who is a child or even a vulnerable person who is chronologically an adult.

C. PRIVATE LAW REMEDIES IN RELATION TO ADULTS

1. Remedies for Adults: Domestic Violence

The civil remedies that are available for chronological adults, that is for individuals aged over 18 years, are limited because they fall outside the ambit of wardship proceedings and the Children Act 1989. The law in this area is developing, especially in the scenario that the adult concerned has already been forced abroad and requires someone to take proceedings on her behalf in England and Wales.

e) **Injunctions under the Family Law Act:** The Family Law Act 1996 (as amended) offers a range of protection to victims of forced marriage. Applications for FMPOs can be made by anyone seeking protection from being forced in marriage or those who have been forced into marriage. Other Family Law Act injunctions are available if the parties are 'associated' (i.e. cohabiting or relatives). Relief can also be sought under the inherent jurisdiction of the High Court, for example to seize foreign and adults' passports.

f) **Injunctions for Harassment**: There is further injunctive relief available under the Protection of Harassment Act 1997. An applicant under this Act merely needs to be 'a victim of tort committed or threatened.'[122] Such proceedings can be commenced in the High Court or the local County Court. The former is recommended in forced marriage cases involving adults because its inherent jurisdiction is available for any orders that are beyond the ambit of the Protection of Harassment Act 1997.

g) **The Forced Marriage Civil Protection Act 2007:** As set out above, this statute has effectively been inserted into the Family Law Act 1996. It allows adults to seek exactly the same relief and protection as children for themselves and others but now on a statutory basis. The Act states the following:

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.

[122] See *Khorasandjan v Bush* [1993] 2FLR 66 for an example of this tort prior to the commencement of the Harassment Act 1997.

(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, counseling, 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.

The insertion of s.63B(2)(a) is worthy of note as it effectively grants something akin to extra territorial effect. A further interesting addition is s.63R

Section 63R Other protection or assistance against forced marriage

(1) This Part does not affect any other protection or assistance available to a person who

(a) is being, or may be, forced into a marriage or subjected to an attempt to be forced into a marriage; or

(b) has been forced into a marriage.

(2) In particular, it does not affect—

(a) the inherent jurisdiction of the High Court;

(b) any criminal liability;

(c) any civil remedies under the Protection from Harassment Act 1997 (c. 40);

(d) any right to an occupation order or a non-molestation order under Part 4 of this Act;

(e) any protection or assistance under the Children Act 1989 (c. 41);

(f) any claim in tort; or

(g) the law of marriage.

This shows that the statute is meant to complement existing legislation rather than replace it.

d) **Inherent Jurisdiction**: Two recent cases have defined the High Court's inherent jurisdiction to repatriate and protect suspected adult victims of forced marriage. These cases are *Re SK* and *Re SA*,[123] which indicate the lengths to which the High Court judiciary, (Mr Justice Singer and the then Mr Justice Munby respectively) will go to ascertain an individual's wishes and to protect her/his ability to make informed choices. The difficulty arises however not when the court begins to make decisions for adults who are competent but not able to seek relief (eg. if they are kept incommunicado against their will abroad) but when they are not competent to seek protection.

2. Remedies for Adults: The Inherent Jurisdiction and the Court of Protection

[123] See n.102 above

Prior to the introduction of the Mental Capacity Act 2005, proceedings whereby local authorities sought declarations as to what was in an adult's best interests were issued in the High Court under its inherent jurisdiction, as in the case of *The City of Westminster v IC* (by his next friend) and *KC and NN* [2008] EWCA Civ 198 [2008]2 FLR 267. There, Thorpe LJ at the beginning of his judgment set out the facts of the case:

> *"(1) The family at the heart of this appeal are British nationals domiciled and habitually resident in this jurisdiction. However the family is of Bangladeshi origin and only IC was born in this country.*
> *(2) IC was born on the 11 October 1981 and is sadly handicapped. He suffers from severe impairment of intellectual functioning and autism. Expert evidence before the court is to the effect that in no area of his development does IC currently show the skills that are to be expected of an average 3-year old. Indeed in many areas he functions substantially below this mark. He needs very considerable support in all areas of his life and cannot be left alone without risk. He is highly suggestible and vulnerable. He receives home care 5 mornings a week before he attends a day centre. Additionally he receives a high level of respite care. The local authority has been involved in supporting and protecting him since he was 4 years of age.*
> *(3) The role of marriage in the life of one so handicapped is inconceivable in our society. Furthermore as a matter of law marriage is precluded. IC lacks the fundamental capacity to marry. However the marriage is not precluded in Bangladesh.*
> *(4) The city council had raised the issue of marriage with IC's parents in the autumn of 2006. There was clearly no agreement that IC could not and should not ever marry. Accordingly on the 23 April 2007 the local authority applied under the inherent jurisdiction of the High Court for:*
>
> *'A declaration as to the capacity of IC to marry. The local authority does not consider that IC has the mental capacity to marry.'*
>
> *The application also sought declarations in relation to IC's circumcision."*

The High Court held that IC lacked the capacity to marry and that a "marriage", that had taken place while valid in Muslim law and in Bangladesh civil law, was not valid under English law and also ordered that IC should not be removed to Bangladesh.

In the court of appeal, lawyers for the family questioned whether the High Court had jurisdiction to make such a ruling about IC's residence, and Thorpe LJ ruled that the Mental Capacity Act 2005 did not 'circumscribe the court's jurisdiction to determine the residence of the vulnerable adult where on the facts his protection or the consolidation of his welfare so require.'

However, despite this ruling, since the coming into force of the Mental Capacity Act ('MCA') in 2007, it is extremely ill-advised to seek protective orders on behalf of adults who are present in the jurisdiction but who lack or may lack capacity without issuing proceedings in the (MCA) Court of Protection. This is in part due the following guiding principles of the Mental Capacity Act 2005:

(1) A person must be assumed to have capacity unless it is established that s/he lacks capacity.

(2) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

(3) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

(4) An act done or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.

(5) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

Initial injunctive orders can be obtained before a judge of the Family Division (such judges also sit as Court of Protection judges) but the Official Solicitor needs to be consulted with before any further steps are taken concerning an adult whose competence is in question.