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IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
[2019] EWHC 1868 (Fam)



No. FD19F05012

Royal Courts of Justice
Strand
London, WC2A 2LL

Monday, 1 July 2019

IN THE MATTER OF THE FORCED MARRIAGE (CIVIL PROTECTION) ACT 2007

Before:

MR JUSTICE HOLMAN

(Sitting throughout in Public)

B E T W E E N :

THE METROPOLITAN POLICE SERVICE

Applicant

- and -

(1) JAMA MOHAMED BILE
(2) MARIAN AHMED HASSAN

Respondents

MR THEODORE BUNCE (instructed by Legal Services, The Metropolitan Police Service)
appeared on behalf of the applicant.

MRS MELISSA MILLIN (instructed by Vickers Solicitors) appeared on behalf of the first
respondent.

THE SECOND RESPONDENT did not attend and was not represented.

J U D G M E N T

(as approved by the judge)

MR JUSTICE HOLMAN:

- 1 Today was listed as the so-called “final hearing” of an application made by the Commissioner of Police of the Metropolis for a forced marriage protection order pursuant to Part 4A of the Family Law Act 1996, as inserted and amended. There is a very clear and important distinction between a so-called “forced marriage” and an “arranged marriage”. The law tolerates arranged marriages and they are lawful. This case is not concerned in any way whatsoever with arranged marriages or any suggestion of an arranged marriage. It concerns only a suggestion that there might be, or might have been, a forced marriage.
- 2 I wish to stress and make very clear at the outset of this judgment that forced marriages, when they occur, are a terrible scourge. Indeed, the very notion of a “forced marriage” involves a brutal contradiction in terms. It is fundamental to any civilised notion of marriage that it is entered into freely and voluntarily, and in the exercise of free will. Those who do, or may, force others into marriage commit very serious criminal offences which, when proved, are likely to lead to substantial sentences. Nothing at all which I will shortly say is intended in any way whatsoever to soften the approach of courts, and, indeed, society as a whole, in outlawing and preventing, so far as possible, forced marriages. However, and having said that, the facts and circumstances of the present case illustrate, in my view, an issue of procedural concern which I have previously encountered in other cases and which needs squarely to be addressed. That issue is whether the appropriate applicant in cases such as the present is, or should be, the police, or the Foreign and Commonwealth Office through its Forced Marriage Unit (“FMU”). I will return to that issue later.
- 3 The essential facts and circumstances of the present case are briefly as follows. Over 30 years ago, when he was aged about 24 or 25, a Somali man travelled to this country as a refugee. He has lived here continuously for the subsequent 30 years and has been, for an appreciable time, a British citizen. He still lives here now and is in the courtroom as I

speak. He later married a Somali woman. They lived together in England and have altogether six children, who range in age from about 30 down to 20. There are two sons and four daughters. The present proceedings concern their second daughter and fourth child. It does seem to be the case that she has had some history of mental ill health or instability which, however, has been treatable and controlled by medication.

4 In 2017, that daughter (whom I will call “M” although several other of the children have the same first initial) travelled to Somalia but later returned. It does seem that there was some involvement by the FMU at that time. Back in England, M became pregnant by a man whose identity is uncertain and who does not seem to have played any further part in her life. Before she gave birth to her son, M returned to Somalia. It is said by her father that she has said that she went back to Somalia to give birth there because she knew that the local authority here in England were expressing concern for the unborn child because of her own history of mental ill health. So (as many other mothers have done in such circumstances) she travelled abroad before the birth. At all events, M has remained living ever since in Somalia and her own mother (her father’s wife) has since travelled to Somalia to help her care for that child there.

5 On 30 April 2019, the Metropolitan Police issued an application in the High Court for leave to apply for a forced marriage protection order, and for such an order. That application was supported by a witness statement made by a woman detective constable dated 29 April 2019. The woman detective constable described in her statement how M had previously travelled to Somalia and returned from there in 2017. She went on to describe that a report had been made to the police by the FMU in December 2018. The gist of the information received by the police from the FMU was said to be that the FMU had, in turn, received information from a named worker in a Somali charity based in Cardiff. That information (received by the police as at least double hearsay) was to the effect that M had been forced

to marry a named person in Somalia. Reporting that hearsay, the woman police constable said:

“M said she was forced to marry a male called [X]. She explained that he is violent, he beats her when he often comes home, and checks her phone for messages and calls.”

The statement continues that:

“Since receiving this initial information, contact stopped with M ... although multiple attempts were made.”

However, the statement further continues that:

“M has now made further contact with the FMU and provided much more information. She has stated that she has been married. She states she is living in Hargeisa, Somaliland, with her husband, mother, and aunt. The husband and aunt’s details are not known to police. M states she wants to be rescued but cannot leave the country without money and passport documents for her and her son.”

Significantly, the statement continues by saying:

“There has been no contact with the police from M. All information has been passed from [the named worker in Cardiff] and the FMU.”

- 6 On the basis of that statement and no other evidence or information, a Queen’s Counsel, sitting as a deputy High Court judge, did, on 30 April 2019, grant to the police leave to make their application for a forced marriage protection order, and did make such an order, all, at that stage, on a without notice and obviously interim basis.

7 In relation to the application for leave, the order recites that:

“Upon counsel for the MPS [the police] making an oral application for leave to make an application for a forced marriage protection order, and the court considering that such an application may be made by the MPS considering all the circumstances, including their knowledge of M’s history and current circumstances, their responsibility to protect her, and the wishes and the feelings of M...”

8 The order continues at paragraph 7 that:

“The court considered that the applicant, Metropolitan Police Service, fulfils the criteria for the grant of leave to commence proceedings pursuant to the Forced Marriage (Civil Protection) Act 2007 for the following reasons:

(a) The police have received information from the FCO that the person to be protected has been forced to marry and is being married in Somalia against her will.”

9 The resulting order was directed against M’s father and served upon him. He has attended and been represented at two further hearings, at the second of which the present so-called final hearing was listed. The father has himself now made two witness statements and also given oral evidence upon an oath sworn on the Quran to me this morning. I will come to the gist of his evidence shortly. There have also been two further witness statements by the same woman detective constable who made the first one in these proceedings. In her statement dated 15 May 2019, the woman detective constable says:

“The FMU representative has made contact with M on the weekend of 4 and 5 May 2019. M has said explicitly that she is not in a forced marriage and

that the rep 'has been misinformed'. M has also said she never asked for help and wants the FMU to leave her alone..."

10 In a third statement dated 30 May 2019, the woman detective constable says:

"The FMU has been contacted and they stated that they have not had any contact from M since 14 May 2019 when she refused further assistance from them and stated that she was not in a forced marriage."

11 The gist of the written and oral evidence of M's father is consistent and clear. He has given evidence about his own early history and the composition and structure of his family. He said that he himself has not been in Somalia since 2016. He said that his daughter, M, travelled voluntarily and freely to Somalia at a time when she was already fully adult and expecting her first child. He said that it is not true that she has been forced to marry. He said that he has spoken to her many times on the telephone. She has told him the name of the man whom she has married, although the father himself has never met that man nor otherwise heard of him, nor has any knowledge of him or his family. He said that his daughter, M, has told him that she chose the man herself as her husband; she is living with him as a family; and is now expecting a baby by him which will be her second child. He said that it is his understanding that the reason why his daughter went to Somalia in 2018 was for fear that the social services might remove her first baby from her after that baby had been born. He said there had been a number of meetings between her and social workers.

12 Unfortunately, the woman detective constable who has had conduct of this case from the beginning, and has made the statements to which I have referred, has been unable to attend today for reasons to do with her own current health. There is a detective sergeant in the courtroom on behalf of the Metropolitan Police, but he has little first-hand knowledge or information about this case.

- 13 I propose, first, to deal with the outcome of this application, and I will then revert to the procedural issues with regard to the grant to the police of leave to make the application, and whether or not the Metropolitan Police were, or are, the appropriate applicants in proceedings on this category of facts.
- 14 Mr Theodore Bunce acted on behalf of the police at the previous two hearings (but not at the first hearing when leave was granted) and appears again on their behalf today. He is a pupil barrister still within the first three months of the practising stage of his pupillage, and I would like to compliment him on the skill with which he has conducted this case today and his measured approach to it.
- 15 Towards the end of last week, Mr Bunce clearly had an appreciation that there might be some difficulties for the police in positively establishing the entitlement to a substantive forced marriage protection order, and he drafted a suggested order which contemplated that there would be no order on the substantive application on the basis of certain proposed undertakings by the father to the effect that the father would not force, or encourage, or facilitate others to force M into a marriage.
- 16 On behalf of the father, Mrs Melissa Millin (who also appeared on his behalf at the previous hearing) submitted that this is not a case in which the court should, or indeed can, require or accept any undertakings from the father at all. In my view, that submission by Mrs Millin is well founded. Section 63E of the Family Law Act 1996 makes provision for “Undertakings instead of orders”. Section 63E(1) provides that:

“In any case where the court has power to make a forced marriage protection order, the court may accept an undertaking from the respondent instead of making the order.”

17 It is clear from that subsection that the first prerequisite before the court is empowered to accept an undertaking from the respondent is that “the court has power to make a forced marriage protection order”. That takes one back to the opening section of Part 4A of the 1996 Act, namely section 63A. That is headed “Forced marriage protection orders”. Section 63A(1) provides that:

“The court may make an order for the purposes of protecting—

(a) a person from being forced into a marriage or from any attempt to be forced into a marriage; or

(b) a person who has been forced into a marriage.”

18 Section 63A(4) provides that:

“For the purposes of this Part a person ... is forced into a marriage if another person forces [the first person] ... to enter into a marriage ... without [that person’s] free and full consent.”

19 It is immediately apparent from the drafting of section 63A(1) that the Act contemplates, and is directed to, two alternative situations. The first situation is where a marriage has not yet taken place but there is evidence that a person may be forced into a marriage or an attempt may be made to do so. The second situation, under section 63A(1)(b), is where a person has already been forced into a marriage. Clearly, in the situation where a marriage has not yet taken place, a court has to consider and evaluate the degree of risk or likelihood that a forced marriage is threatened, or may take place if not prevented. Such an evaluation no doubt requires a judgment as to future risk and likelihood, weighing all the known facts and circumstances of the case in point. There is, frankly, no evidence at all in the present case that there is some risk or likelihood of M being forced into a marriage in the future unless that is prevented. All the evidence, such as it is, from any available source is to the

effect that she has already married a man in Somalia. The very first statement from the woman detective constable dated 29 April 2019, which I have quoted already, includes a paragraph that:

“M said she was forced to marry a man called [X]... She has stated that she has been married...”

20 The second statement from the woman detective constable dated 15 May 2019, which I have also already quoted, refers to contact between M and an unnamed representative of the FMU on the weekend of 4 and 5 May 2019 in which she has explicitly said that she is not in a forced marriage, but implicitly that she is in a marriage. The evidence from M’s father, which I considered to be consistent, credible, and worthy of belief, is all to the effect that M has already married somebody in Somalia. So the present case falls squarely within paragraph (b) of section 63A(1).

21 The questions whether or not M has already actually married, and, if so, whether she was forced into that marriage, must necessarily be pure questions of past fact to be decided on the ordinary civil standard of the balance of probability. They do not require, or involve, making an evaluation or judgment as to future risk or likelihood. In my view, the evidence in this case is, to that civil standard, clearly to the effect that M has already married a man in Somalia. The next question is whether that marriage was “forced”. Again, on the balance of probability, it seems to me that there is no sufficient evidence to that standard that the marriage was forced. All the evidence available to me, apart from that from the father, is double or triple hearsay from unattributed sources. I have not even been told the name of the representative at the FMU.

22 In any event, the reported evidence from M herself is clearly conflicting, and her more recent statement is to the effect that she was not forced into marriage. Further, her father has said, entirely credibly, that he has spoken many times to her on the telephone and she

informed him that she married a man of her own choosing; that she lives with him now; and that she was not forced into marriage by anybody. It thus seems to me, on the basis of the available evidence, that, on the balance of probability, the marriage which has taken place is not a forced marriage.

23 It follows from that that the court has no power under section 63A of the Act to make any forced marriage protection order at all and, accordingly, no power under section 63E of the Act to accept any proposed undertaking from the respondent father, instead of making an order. For those reasons, I will discharge all orders of continuing effect in this case, including the current orders for the Tipstaff to hold the passport of the father, whose passport must be returned to him. I will dismiss this application for a forced marriage protection order.

24 I now revert to the procedural issue concerning the grant of leave to the police to make this application in the first place. Section 63C of the 1996 Act provides that the court may make a forced marriage protection order on an application being made to it, or, in certain circumstances, without an application being made to it. Section 63C(2) provides that:

“An application may be made by—

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

(b) a relevant third party.”

25 Section 63C(3) provides that:

“An application may be made by any other person with the leave of the court.”

26 In the present case, no application was made by M herself who was the person to be protected by the order. Section 63C(7) provides that a “relevant third party” means a person

specified, or falling within a description of persons specified, by order of the Lord Chancellor. So far, so far as I am aware, the only description of persons specified by the Lord Chancellor pursuant to section 63C, by statutory instrument, are a local authority. The police have not been specified as a “relevant third party” for the purposes of making an application pursuant to Part 4 of the 1996 Act. Accordingly, the police, whether the Metropolitan Police or any other police force, can only make an application if they first apply for, and obtain, the leave of the court pursuant to section 63C(3). Section 63C(4) goes on to provide that:

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

- (a) the applicant’s connection with the person to be protected;
- (b) the applicant’s knowledge of the circumstances of the person to be protected; and
- (c) the wishes and feelings of the person to be protected so far as they are reasonably ascertainable and so far as the court considers it appropriate, in the light of the person’s age and understanding, to have regard to them.”

27 I have already quoted the recital at paragraph 5 of the order made by the deputy High Court judge on 30 April 2019, which expressly refers to “all the circumstances” and the “knowledge of M’s history and current circumstances”. The order does not specifically make any reference to “the applicant’s connection with the person to be protected”.

28 The reality of the facts and circumstances of the present case are that the police had zero connection with M at the time of that application for leave, and their only knowledge of any kind of the circumstances of the applicant, and still less of her wishes and feelings, had been

communicated to them by the FMU. That resulted, as I have said, in statements being made by the woman police constable which contain several tiers of hearsay. At one point, she is describing what the FMU has told her that the worker in Cardiff had told the FMU that M had allegedly told the worker in Cardiff. In other places, she is quoting what the FMU has reported to the police about alleged communication directly between M and the FMU, but there was no attempt to adduce in evidence any statement from the representative of the FMU with whom such communication allegedly took place.

- 29 Of course, the rules of hearsay were long ago relaxed in family proceedings, but there is still, in the law of evidence, a general rule known as “the best evidence” rule. It is highly unsatisfactory to have tiers of hearsay of this kind, when higher up the tier there is a person readily available who could give much more direct evidence of the matter in point. More fundamentally, as it seems to me, on the facts and in the circumstances of this case, the police allowed themselves to be drawn in as little more than a “puppet” or “cypher” for the FMU.
- 30 If any body of the state had information and knowledge about M and her circumstances, it was, and remains, the FMU, not the Metropolitan Police. It is important sharply to distinguish the facts and circumstances of the present case from those which quite frequently do arise, when a person directly approaches the police, and says that he or she is afraid that he or she may be going to be forced into a marriage, or a situation where a third party, such as a friend or neighbour, approaches the police and gives information to that effect. In that sort of situation, the police have a direct, or fairly direct, connection with a person who is claiming that he or she has been, or may be, or may become, the victim of a crime.
- 31 I do not wish in any way whatsoever to discourage the police from making applications of their own for forced marriage protection orders when they are approached in that way by persons who themselves state that they have been, or may be, the victims of a crime, or

when concerned members of the public go directly to the police as informants with credible evidence to that effect. However, that type of situation is markedly different from that in the present case. In the present case, at all material times, the alleged person to be protected, namely M, was already in Somalia. She has never made any contact at all with the police. No member of the public has ever made contact with the police on her behalf. The person or body who contacted the police was the FMU, which is a part of the Foreign and Commonwealth Office. M is herself a British citizen, and I perfectly understand that the Foreign and Commonwealth Office may consider that it has a duty to protect persons who are British citizens even when, at all material times, that person is already abroad. I, for my part, cannot see any convincing reason why the Foreign and Commonwealth Office, through its FMU, cannot itself apply to the court for leave to make an application in such circumstances, if the Foreign and Commonwealth Office, one of whose functions is to consider the wellbeing of British citizens abroad, considers that such an application should be made.

32 I raised these issues for consideration during the course of this morning. As a result, Mr Bunce then obtained and showed me this afternoon an illuminating exchange of emails on 5 April 2019 between the Metropolitan Police and the FMU in relation to this matter. In the first email sent during the morning of 5 April 2019, a woman detective constable in the Metropolitan Police (not the same woman detective constable who subsequently made the witness statements) said to her correspondent at the FMU that:

“I have now spoken with our legal team ... and my manager. From reading through all the information the police has, it is believed the police are not the best placed authority to seek this order. All the information we are receiving has come from the FMU FCO or [the worker in Cardiff], it’s not first hand information to police. Social services are concerned for the child and M, as they previously did before she returned to Somalia. So it seems

that they would have an interest in this. From seeking advice about this, the FMU can seek a forced marriage protection order, is that correct? Would this not be best for your department to do as you have maintained the contact with M?..."

33 On the afternoon of 5 April 2019, the correspondent at the FMU replied:

"As mentioned on the phone, social services have had involvement in the past. However, M did not have a good relationship with them and therefore has not given me the consent to get in contact with them."

There then follows the following critical sentence:

"The FMU's role in cases is advisory and we assist in instructing the police or social services how to take out FMPOs. We don't actually have the capability within our team to take them out ourselves unfortunately."

34 With respect to the FMU and, more particularly, to the Foreign and Commonwealth Office and the Secretary of State for Foreign and Commonwealth Affairs, I personally find that sentence wholly unconvincing. When the FMU says "we don't actually have the capability... unfortunately" to apply for FMPOs, they presumably mean that they do not currently have the funding or manpower resources to do so. But the Foreign and Commonwealth Office is a major organisation and branch of the executive, which patently has very large funds available to it. It is a matter ultimately for the Secretary of State for Foreign and Commonwealth affairs to decide how he apportions and distributes the large funding available to him. But, frankly, this exchange of emails reads to me very clearly, as the police correctly identified, that on the facts and in the circumstances of this case (i.e. in which no complaint had been made directly to, or investigated by, the police) it was not a

police matter, at any rate unless and until there was later credible evidence to the effect that a criminal offence had been, or was about to be, committed.

35 In the meantime, in the suggestion of the police, the proper body of this state to take any appropriate action to protect this British citizen abroad was the Foreign and Commonwealth Office. As I have said, I regard the email from the FMU on the afternoon of 5 April 2019 as a very unconvincing attempt to shuffle off responsibility to another. This has had the very undesirable effect that these proceedings have continued with double or triple hearsay statements from the police who, frankly, have no knowledge of their own about matters at all. Leave was granted to a body, namely the police, whose connection with the person to be protected and knowledge of her circumstances was much more slender than that of the Foreign and Commonwealth Office.

36 Further, I already know that a spirited application will be made Mrs Millin on behalf of the father for an order for his own legal costs of and incidental to defending his position in these proceedings. The father is a gentleman who was disabled at a young age by polio. He is in receipt of disability allowance, which he is able to supplement to a small degree by working as a taxi driver. His means are very modest indeed. He has not been shown to have done anything wrong at all, either in relation to his daughter or these proceedings. He has been forced, out of his own very meagre pocket or borrowings, to obtain funding in order to properly defend and represent himself, and although I have not yet heard the application for costs, it provisionally seems to me that he has a strong basis for asking for costs. However, there is only one body against whom he could make such an application, namely, the police who are the applicants in these proceedings.

37 Mr Bunce has already trailed an argument that the police should not be held in any way responsible for what has happened since, he submitted, the deputy High Court judge granted leave to apply. I am afraid that is always a very unconvincing argument, no matter the

circumstances in which it is advanced. In all sorts of situations in the law, far, far removed from forced marriage protection, applications can only be made with the prior leave or permission of the court. For instance, claims can only be made for judicial review after the court has granted leave. But if ultimately such a claim is unsuccessful, it is extremely lame, and rarely a defence to an application for costs, that some judge at a short hearing, or on paper, thought it appropriate to grant leave. So it may yet transpire that, as a result of their somewhat meekly caving in to the email from the FMU on the afternoon of 5 April 2019, the police find themselves picking up a bill for costs which properly ought to lie with the Foreign and Commonwealth Office.

38 In my view, the lesson from this case (and this is something that I have experienced before) is that in this class of case, namely, where the proceedings have initially been triggered by the FMU of the Foreign and Commonwealth Office, and not by some complaint being made directly to the police, the police ought to be much slower before making an application pursuant to section 63C for leave to apply. The police should be much more questioning as to whether they are the appropriate applicants. Further, if such an application is made to the court, the court should, in my view, be more questioning and circumspect than the deputy judge was on this occasion about whether or not it is appropriate to grant leave to the police. The correct response may well be to refuse leave to the police, but to require a clear message to be sent to the FMU of the Foreign and Commonwealth Office that if they remain concerned about a British citizen abroad, it is open to them, or to the Secretary of State for Foreign and Commonwealth Affairs, to make their or his own application for leave.

39 In view of the procedural issues which this case thus raises, I shall direct that an official transcript is made of this judgment at the expense of public funds. A copy will, in any event, be sent to the police as the applicants in the proceedings. I direct that copies must also be sent to the Secretary of State for Justice, the Forced Marriage Unit on behalf of the Foreign and Commonwealth Office, and to the President of the Family Division. It seems to

me that this case clearly highlights a serious procedural problem in this sort of situation, which requires to be addressed, perhaps ultimately by some appropriate practice direction or similar guidance document.

40 So, for those reasons, there will be an order which, after all the normal formal parts, dismisses the whole application, discharges all orders of continuing effect, directs the Tipstaff to return to the father his passport and any other documents of his held by the Tipstaff, and directs that a transcript be made of this judgment at the expense of public funds and copies sent, as I have said, not only to the parties but to the Secretary of State for Justice, the FMU on behalf of the Foreign and Commonwealth Office, and the President of the Family Division.

[After further submissions the court ordered the Metropolitan Police to pay the father's costs, summarily assessed in the sum of £9,940.00 inclusive of VAT.]

CERTIFICATE

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