



Neutral Citation: [2023] EWHC 1399 (Fam)

Case No: SE20F62306/SE20F62307

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
SITTING AT SHEFFIELD

Date: 7 June 2023

Before:

MR JUSTICE POOLE

Between:

Sheffield City Council

Applicant

- and -

(1) M
(2) F
(3) A
(4) B

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

(No. 2)

Respondents

Jane Wheatley (instructed by Sheffield City Council) for **the Applicant**
The First Respondent not appearing and not represented
Angela Wrottesley (instructed by Messrs Howells) for **the Second Respondent** at the Open
Hearing only
Anita Guha as Special Advocate representing the interests of **the Second Respondent**,
appearing at the Closed Hearing
Justine Cole (instructed by Best Solicitors) for **the Third and Fourth Respondents**

Hearing dates: 24 to 25 April 2023

OPEN JUDGMENT

Mr Justice Poole:

Introduction

1. Important evidence relied upon in support of applications for Forced Marriage Protection Orders has been withheld from the respondents to those applications, who are the parents of the children who are the subjects of the orders. The mother has not engaged in the proceedings but the father has done so. A Special Advocate has been appointed to seek to uphold the father's Art 6 rights. Following closed hearings at which the Special Advocate represented the interests of the father, and open hearings at which the father was represented by his chosen solicitor and barrister, I have decided that FMPOs and passport retention orders should be continued until, in each case, the protected person attains the age of 21. In this open judgment I shall give my reasons for those decisions and reflect on the use of a Special Advocate in these proceedings.
2. The Applicant, Sheffield City Council (SCC) seeks Forced Marriage Protection Orders (FMPOs) in respect of two children, A and B, now aged 17 and 15 respectively, whose mother (M) and father (F) are the First and Second Respondents. The mother has not engaged in these proceedings and her precise whereabouts are unknown. The father has engaged in the proceedings and has agreed, on a without admissions basis, to FMPOs being made (albeit not for the durations proposed by SCC) but opposes the making of orders for the authorities to retain the children's passports (currently held by the police). SCC has prepared a detailed document, agreed by the police, setting out the arrangements for the retention of the passports and their temporary release to each protected person on request. Those arrangements allow for a risk assessment to be carried out before the temporary release of a passport to allow the protected person to travel abroad. SCC invites the court to make passport retention orders until A and B each reach the age of 21. The Children's Guardian supports those orders being made.
3. On SCC's application, the court has previously determined that evidence on which SCC relies, should be withheld from M and F. For the reasons set out in my previous judgment *Sheffield City Council v M, F, A, and B* [2022] EWHC 128 (Fam), I appointed a Special Advocate to represent F's interests at closed hearings in these proceedings. Ms Guha has acted as Special Advocate, including at a closed hearing of oral evidence.
4. To avoid repetition, I refer to my previous judgment (above) for the background to SCC's applications for FMPOs and passport retention orders. Following that judgment, there have been further hearings at which I have ordered very limited disclosure to F and the continuation of the FMPOs and the passport orders. A listed hearing of oral evidence had to be postponed because of a development that was fully considered at a closed hearing. At a closed hearing in April 2023, I heard evidence from, amongst others, DC Frost, who has led the police investigations in relation to the matters giving rise to the FMPOs, and from Ms Fry and Ms Bi, social workers. On 26 April 2023, at an open hearing, I heard evidence from F and, again, from Ms Bi. I received written evidence and oral submissions at both hearings.

5. I have produced a closed judgment in which I consider all the evidence and submissions and give full reasons for my determinations. I am unable to give my full reasons in this open judgment due to the fact that I cannot refer to the closed material.

The Legal Framework

6. The power to make FMPOs is contained in Part 4A of the Family Law Act 1996. I set out the relevant provisions in my earlier open judgment in which I also referred to the President's judgment in *Re K (Force Marriage: Passport Order)* [2020] EWCA Civ 190 which provides very clear, authoritative guidance, including in relation to passport orders of the kind sought by SCC. Section 63A of the Family Law Act 1996 provides,

63A Forced marriage protection orders

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

—

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

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

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

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

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

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

(6) In this Part—

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

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

In *Re K*, the President noted at [30] that “the legislation is cast in the widest and most flexible terms”. The President continued,

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

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

[39] Once again, all parties before the court were in agreement that an assessment of proportionality must be undertaken. On one view, "proportionality" may seem to be an inappropriate concept when the court is considering an absolute Convention right such as Article 3. However, in cases where there has not yet been a forced marriage, the court will not be dealing with the certainty that future harm will take place but, rather, the assessment of the risk that it may do so. Where protective measures will necessarily limit the freedom of the protected person and others to enjoy other Convention rights, it will be necessary to evaluate, with a degree of precision, the extent of protection that is necessary in each individual case. In this regard, the exercise to be conducted in a FMPO application is broadly similar to that undertaken where the risk of future harm arises from the potential for Female Genital Mutilation ("FGM"). In that context, this court (Irwin, Moylan and Asplin LJ) considered the imposition of a "worldwide travel ban" in an FGM case in *Re X (A Child: FGMPO)* (Rev 2) [2018] EWCA Civ 1825

7. The President also set out a “routemap to judgment” at paragraphs 45 to 55 of his judgment: stage one is to establish the underlying facts; stage two is a determination of whether or not there is a need to protect a person from being forced into marriage or from any attempt to do so, or that a person has been forced into marriage; stage three is an assessment of the risks and the protective factors that relate to the particular circumstances of the individual vulnerable to forced marriage; stage four is achieving an accommodation between the necessity of protection and the need to respect their family and private life under Article 8.
8. The burden of proof is on SCC and the standard of proof is the civil standard of the balance of probabilities. It is not uncommon for witnesses in these cases to tell lies in the course of the investigation and the hearing. The court must be careful to bear in mind that a witness may lie for various reasons, such as shame, misplaced loyalty, panic, fear, distress and the fact that the witness has lied about some matters does not mean that he or she has lied about everything: see *R v Lucas* [1981] QB 720. In the recent Court of Appeal judgment in *A, B, and C (Children)* [2021] EWCA 451, Macur LJ advised at [57],

“I venture to suggest that it would be good practice when the tribunal is invited to proceed on the basis, or itself determines, that such a direction is called for, to seek Counsel’s submissions to identify: (i) the deliberate lie(s) upon which they seek to rely; (ii) the significant issue to which it/they relate(s), and (iii) on what basis it can be determined that the only explanation for the lie(s) is guilt. The principles of the direction will remain the same, but they must be tailored to the facts and circumstances of the witness before the court.”

Chronology of Events

9. I have been provided with a detailed chronology of events but, in brief, A and B were living with their Father in England when, in November 2020, as a result of information received, DC Frost and Ms Fry visited F at his home and seized his and A and B’s passports. Applications were made to court and FMPOs and passport orders were made. A and B are British citizens. They lived in England with their parents and two elder brothers who, by 2020, were adults. The family had all been in Bangladesh from 2015 to 2019, for a period of about three and a half to four years. They had then come back to England.
10. At some point in 2020, M and the two sons had travelled to Bangladesh. F says that they went because his father had suffered a leg fracture after a fall, and was very unwell. F bought one-way tickets for himself, A, and B to fly to Bangladesh in late November 2020. As a result of the court’s orders, the tickets could not be used. F says that he received an email notice from the UK Supreme Court warning him of fines if he did not ensure that his sons returned to England. Accordingly, he bought tickets for his wife and sons to fly back to England, which they did in late November 2020.

11. In early 2021, F became extremely unwell with covid-19, requiring ventilation in hospital. It was thought that he would die but he survived and recovered. His period of illness delayed progress in these proceedings for several months. Ms Bi became the allocated social worker in about June 2021. She had a number of contacts with the family in the family home. Another social worker was allocated in Ms Bi's place in or around October 2022. F says that M left England for Bangladesh on 29 June 2021 and that she has remained there since. M contacted a domestic abuse charity from Bangladesh warning that F intended to force one of their adult sons to travel to Bangladesh to be married. The police investigated and decided to take no further action. A and B continue to live with F and their two adult brothers in England.

Witness Evidence

12. DC Frost gave evidence at the closed hearing but some of the evidence she gave may be included in this open judgment. She told the court that this had been her first FMPO case as an officer although she had experience in safeguarding and dealing with vulnerable persons. She had received training only from more senior officers at the station. She had not approached this as a potential criminal investigation but as a safeguarding issue. After her initial visit to the Father when passports were seized, DC Frost had further contact with the family after M and the two adult sons returned to England from Bangladesh in late November 2020 when no concerns were expressed to DC Frost on her visit to the family home. She understood that F had used the money saved from not travelling with the girls to Bangladesh to pay for flights for his wife and sons to travel to England, but F told me at the open hearing that he was not refunded any money from the purchase of the unused tickets. DC Frost said that she had had subsequent contact with the Father when he had asked her for help on various related matters.
13. Ms Fry and Ms Bi gave evidence as the social workers who were allocated to A and B from November 2020 to about May 2021, and from May 2021 to about October 2022, respectively. Ms Fry in particular is an experienced social worker but I did have some reservations about some of her evidence being speculative, as I have explained in my closed judgment. Ms Bi gave evidence at both the closed and open hearings in April 2023 and appeared to me to be a thoughtful witness who had approached her role professionally and with an open mind.
14. At the open hearing, F gave evidence via a Bengali interpreter. Unfortunately, the interpreter had not been booked and a half a day of hearing was lost on 26 April 2023. We had to resume the hearing on Friday 28 April 2023. I take full account of the fact that F was giving evidence through an interpreter and that he had the disadvantage of not knowing the full, nor even most of the evidence in support of the applications which he opposes. Nevertheless, he presented as a very dogmatic man who would not accept any difference of view. He was forceful in the way he answered questions. When faced with inconsistencies in his evidence, or between his evidence and documentary evidence, he tended to shrug them off or say that he could not recall something.
15. F said that his children were free to marry partners of their choice at a time of their choice. There was no question of arranged marriage let alone forcing them into

marriage. He explained that his wife and sons had travelled to Bangladesh in October 2020 because his elderly father who lived there had suffered a fall in September 2020 when he had broken the top of his leg (I understood this to be his femur or his hip). On seeing his father, his wife had advised that he was very unwell and that he wanted to see F and the girls. F said that the girls wanted to see their grandfather. He only bought one-way tickets because there was a danger that positive covid-19 tests would prevent the family returning on the date pre-booked as a return flight. Also, he did not know whether his father would survive and so could not foresee exactly when it would be possible to return to England. Nevertheless, he denied intending to stay for a prolonged period. His wife and sons returned later in November (only about ten days after his and the girls' passports were seized) because he had received a notice from the Supreme Court (UK) demanding their return. He told the court that he obtained no refund for the unused tickets he had bought for himself and daughters to go to Bangladesh. He found £4,000 to pay for his sons and wife to travel back to England. Hence, it would have cost him about £8,000 to fly the whole family back from Bangladesh if he and his daughters had travelled there as planned. F's evidence as to the source of his funds to pay for the tickets for his sons and wife was unclear. He has said that he had the money in assets in Bangladesh, but also that he had to borrow part of the money from others. He is not employed and is reliant on benefits.

16. F was very clear that his wife flew back to Bangladesh on 29 June 2021 but his evidence did not sit easily with evidence from Ms Bi that she visited the family home on 1 July 2021 when F told her that M had just gone out to the pharmacy to collect some medication. Prior to 29 June 2021, M had connected a domestic abuse charity, Roshni. She also contacted Roshni from Bangladesh in June 2022 alleging that F was arranging for one their sons to be sent to Bangladesh to be forced to marry there. Investigations followed and no action was taken by the police or other authorities against F. He told the court that M had requested that their son travel to Bangladesh so as to then accompany her back to England but F had not wanted his son to travel on his own. He had told Roshni that he had booked a flight for his son but then cancelled it. In answer to the obvious question of why his wife would make up such an allegation against him, he suggested that she may have had mental health problems. She has not travelled back to England and, it appears, is probably still in Bangladesh. However, her precise whereabouts and reasons for remaining in Bangladesh remain very unclear. F told me that his wife contacts him by email only, that she has been kidnapped by a policeman, and that he has tried to recruit the help of the British High Commission to secure her safety. Elsewhere he has referred to the use of "black magic" on his wife whilst in Bangladesh and to her having a relationship with another man.
17. When asked why he has not travelled to Bangladesh since his passport was returned to him over two years ago, F said that he had been unwell with Covid-19, which is undoubtedly true for a period of time, and that he had wanted to fight this case which he said he could not have done from Bangladesh. However, it is clear that a short visit to Bangladesh to see his father would not have prevented him from participating in the present proceedings.

Conclusions

18. I received helpful submissions from Ms Guha as Special Advocate, from Ms Wrottesley as Counsel for F in the Open Proceedings, from Ms Wheatley for the Applicant, and from Ms Cole for the Guardian. The Guardian supports the applications. I have had careful regard to all the open and closed evidence and kept in mind that the burden of proof in relation to the application is on the applicant Local Authority, and that the standard of proof is the balance of probabilities.
19. Making due allowances for the fact that F gave evidence through an interpreter and that key evidence was withheld from him, I nevertheless found F to be an argumentative and evasive witness. He said that when he had purchased one-way tickets to Bangladesh the intention had been to stay there for a short time only – two weeks or so if they could come back then, and in any event before the start of the next school term in January 2021. I cannot accept his evidence. I cannot explain my full reasons in this open judgment but they include the following:
 - i) F's account of why the visit was needed at that time is not credible. His grandfather had access to help from a large number of close family members in Bangladesh. Not only were M and her two sons there, but F's father had many other children and children-in-law in Bangladesh. The grandfather's fall and fracture had occurred several weeks before the date of intended travel. There is no evidence that he had deteriorated since his fracture. There appears to have been no urgency. There is no evidence that he was close to death. If a short trip was planned, the father and his daughters could have visited in the school Christmas holiday period which was only about a month away, rather than disrupting the girls' schooling by flying out in November 2020. Further, I have no evidence that F's father was in fact gravely ill and F has had ample time to provide hospital or other medical records to establish the nature and severity of his father's condition at the relevant time. Indeed, two and a half years later, F's father remains alive and managing without the benefit of help from F or any his children. If he had been seriously unwell, F and M could have made arrangements for F to visit him once F had his passport returned, but they did not do so. F has not, even now, visited his father in Bangladesh, which tends to suggest that his father was not so unwell as F has claimed.
 - ii) There was no reason for M to travel back from Bangladesh with the boys in late November 2020 if, as F says, his father was seriously ill and she was needed in Bangladesh to look after him. F says that he was responding to the email from the Supreme Court but that email referred only to the two boys, not to her. The boys were old enough to travel unaccompanied.
 - iii) At the time, F said that he could not afford to bring the boys back to England and referred to his financial position as a reason for the one-way ticket purchases, but he did find the money to pay for three tickets from Bangladesh to England costing £4,000. His evidence about his finances has been inconsistent and not credible.

- iv) F's assertion that he could not commit to a return flight in advance because their plans might be derailed by positive covid-19 tests, would apply to any flight booking out of Bangladesh. If negative covid-19 tests were mandatory then they would be mandatory whether a flight out of Bangladesh was purchased three weeks in advance or two days in advance. And flight alterations following a positive covid 19 test could be arranged.
 - v) Even if F thought that the Supreme Court email required his wife's return as well as his sons' return to England, he does not appear to have made any enquiries about the email. I am sure that these proceedings and the involvement of the authorities prompted him to pay for flights home for his wife and sons, not that email. But for the involvement of the family court, police and social services, they would have remained in Bangladesh.
20. These, and the other, important factors set out in my closed judgment, lead me to reject as unreliable F's evidence about the reasons for the journey to Bangladesh, and the intended duration of the stay there. He has not told the truth about those matters.
21. Albeit F sought permission from B's school to take her for a visit to Bangladesh, and so was to that extent open about his intentions, it does not follow that he did not intend for his family to remain in Bangladesh for a prolonged period. The previous visit had lasted over three years, which demonstrates that he was prepared to keep his family there for a prolonged period if he considered it best to do so. It is likely that, had it not been prevented by police and court intervention, this visit beginning in November 2020 would have lasted for a substantial period. I am satisfied that F has not been honest about the reason why one-way tickets were purchased – his evidence on the matter does not withstand scrutiny. I am satisfied that he is lying about the reason one-way tickets were purchased to try to hide the truth that he intended to keep the family in Bangladesh for an extended period as had previously occurred.
22. In my closed judgment, I have considered significant evidence in relation to the risk to A and B of forced marriage upon travelling to Bangladesh in 2020. That evidence was properly tested at the closed hearing by Ms Guha and the court. As F was informed at the open hearing, the closed evidence did not establish that there had been any plan to force A or B to marry a specific person on a specific date. I have nevertheless found the evidence that A and B would have been at risk of forced marriage on travelling to Bangladesh in November 2020, to be persuasive.
23. I do take into account that the Local Authority have not sought to remove the girls from the Father's care. However, an acceptance that the girls did not need intervention by way of emergency protection orders or interim care orders to protect them does not dictate a conclusion that they were not at risk of forced marriage or that the Father is a truthful witness.
24. Having regard to all the evidence I have concluded that A and B were at risk of being forced into marriage had they been taken to Bangladesh in 2020.
25. I need to assess the risk of forced marriage as it is now. I take into account the ages and circumstances of A and B. I also take into account the fact that M has not returned to England and her whereabouts and circumstances are far from clear. Her warning that F intended to force one of their adult sons to travel to Bangladesh to marry adds

to the concerns about the risk to A and B. I am satisfied that either F deliberately misled Ms Bi in early July 2021, seeking to give the impression that M was still in England when she had already travelled to Bangladesh, or he is lying now by saying M left for Bangladesh on 29 June 2021 when she was still in England. It is suggested that she has had an affair, that she has re-married, that she has disappeared, that she is the victim of some “black magic”. I cannot reach any conclusions about her whereabouts save to find that she is probably alive and probably in Bangladesh. Her lack of engagement in these proceedings or with A and B is concerning and consistent with her being coerced into going to and remaining in Bangladesh.

26. I take into account the evidence received at both the open and closed hearings. The Father’s evidence gave me no reassurance that the risk of forced marriage has diminished. I conclude that if, as I find, A was at risk of forced marriage as a 15 year old, she is certainly still at risk now, and that B, now 15, is also at risk. If the closed evidence in particular is accepted, as it is, F and M were prepared to take A to Bangladesh and to force her into marriage there at the age of 15. The Father has not been honest about that in his evidence to the court – he has flatly denied it and I do not accept his denials. I can place no trust in him that his views or intentions have changed at all since 2020. He is a determined and dogmatic man who is not easily swayed. The risk of forced marriage was present then and I am satisfied that it remains. The risk is probably greater now for B than it was then, because she is now older.
27. I therefore conclude that the evidence establishes that the father has consistently lied about the length of the intended stay in Bangladesh for him and his daughters when he purchased one-way tickets for them to go there in November 2020. He intended that there should be a prolonged stay there. The reason he has lied is to cover up the true reason for the visit to Bangladesh which was not to see his father, but to spend a prolonged period there and, whilst there, to try to arrange for A’s marriage. He and his wife, M, intended to marry off A whilst in Bangladesh, and would then have considered doing the same for B in due course. F has covered up that intention by lying about the reason for the trip. Those are the underlying facts as I find.
28. As to the need to protect A and B from forced marriage, I find that they both remain at risk of forced marriage if they were to travel with their father to Bangladesh. The continuation of the FMPOs is necessary to protect them against that risk. The closed evidence, in particular, satisfies me of the need for continuing FMPOs.
29. The evidence establishes that the risk of forced marriage for each of F’s daughters is present if they were to be taken to Bangladesh. I cannot find that there is no risk if they remain in his jurisdiction but it is very much reduced. I would assess the risk of being taken to Bangladesh and to be forced into marriage there as being real and immediate. It is not as high a risk as it is in some cases where specific arrangements have been made and marriage is imminent, but the risk is real and it is present and ongoing. The real and immediate risk of forced marriage is associated with the real and immediate risk of being coerced into travelling to Bangladesh. In the absence of court orders that would have happened in 2020 and I have no hesitation in concluding that there is a significant risk that it would happen now were protective measures not in place. The father has lied about the true reasons for his wanting to take his daughters to Bangladesh in 2020 – he has maintained that lie for over two years. The circumstances of the girls’ mother are very concerning – she has lost connection with

her daughters, her whereabouts are unknown, and she has reported a risk of forced marriage for A and B's sibling. There does not appear to be any family or support network that would prevent F from coercing A and B to go to Bangladesh if their passports were in the family home. There appear to be no protective factors to prevent the father taking the two girls to Bangladesh.

30. The application is for the FMPOs to remain in force until A and B are 21. That appears to me to be a reasonable period of time and necessary to afford them protection from forced marriage. As to the retention of their passports to the same age, I have to consider the accommodation of competing rights: the right to be protected from forced marriage, and the rights to family life enjoyed by F as well as A and B. Any interference with their Art 8 rights should be likely to be effective to protect A and B, and must be proportionate to the risk.
31. The risk of forced marriage on travelling to Bangladesh with their father is a real one for these two young women. The consequences of forced marriage occurring would be fundamental and life-changing for either of them. Retention of their passports until they are 21 would give them significant protection against that risk. The proposed terms of retention allow for the release of the passports subject to risk assessments. A is soon to become an adult whereupon, if not before, her passport should be regarded as her property not her father's. I am satisfied that the interference, if any, with the Art 8 rights engaged, caused by retention of A's and B's passports would be small. Balancing all the factors and taking into account all the evidence, it seems to me to be plain that the passport retention orders should be made and continued until A and B are respectively aged 21.
32. The passport orders will prevent A and B from being coerced into going to Bangladesh and therefore will be effective in reducing the risk of forced marriage to a low level. The proposed mechanism for the retention of the passports and their release to each of A and B on their request or a request on their behalf – as happened recently when A travelled on a school trip to Berlin – may cause some delay and some difficulty on making arrangements to travel abroad, but those are minor inconveniences compared with the effectiveness of the arrangements in protecting the two young women from the risk of forced marriage. I approve the proposed arrangements. I conclude that the FMPOs should continue until A and B are 21 respectively, and that their passports should be retained until that age according to the arrangements proposed by the Local Authority and agreed by the police.
33. The Special Advocate's contribution to the just determination of this case has been significant. I am satisfied that the use of a Special Advocate has allowed the closed evidence to be effectively scrutinised. The involvement of the Special Advocate has led to the court, the Local Authority, and the Guardian, to consider with even greater care exactly what may be disclosed to the Father. It has allowed evidence to be given to the court which could not have been given had the proceedings been conducted openly. Indeed, as I observed in my previous judgment, the cost of insisting on disclosure of the withheld evidence would have been the withdrawal of the applications. As I have now found, those applications were well-founded and the FMPOs and passport orders necessary to protect two children from the risk of forced marriage.

34. However, use of a Special Advocate has an impact on the duration and cost of proceedings. When applications for FMPOs and/or passport orders are contested, and there are good grounds for withholding evidence relied upon, then the proceedings may become protracted. The court has to decide how Art 3 rights can be protected whilst accommodating competing Art 6 and 8 rights. Difficult decisions have to be made about what a respondent may be told, what evidence may be disclosed, how withheld evidence may be scrutinised, and how openly the court can give its decisions and its reasons. Nevertheless, unless the courts develop a sound means of dealing with these difficulties, some of those who require protecting from the risk of forced marriage will not be protected. The courts cannot allow the difficulties involved in seeking to protect sources of evidence to emasculate its protective powers.
35. As set out in my earlier judgment, *Sheffield City Council v M, F, A, and B* (above) Sir Nicholas Wall in *A Chief Constable and another v YK* [2010] EWHC 2438 questioned whether Art 6 was engaged in an application for a FMPO but did hold that Article 6 was engaged once an application to set aside a FMPO had been made. The first of the four stages that the court should follow when deciding whether to make a FMPO, as identified by Sir Andrew McFarlane in *Re K* (above), involves scrutiny of the facts, applying the civil standard of proof. When such an investigation is required, the court cannot ignore the “conundrum” of “how it is possible to achieve a fair hearing if parts of the evidence which it is necessary for the parties to know in order to enable them to meet allegations made against them, cannot safely be revealed to them...” (per Sir Nicholas Wall in *YK* (above)).
36. In some cases, the applicant may not need to rely on the evidence it does not wish to disclose. There may be sufficient other evidence to establish the case for a FMPO. The respondent may agree to a FMPO being made. However, if the application is contested and the evidence which it is proposed should be withheld is fundamental to the application, then the “conundrum” has to be addressed. The court’s experience in the present case suggests that in those circumstances the following steps are required:
- i) The applicant should identify the possible need to withhold evidence at the earliest opportunity. If the applicant decides that it cannot proceed without that evidence then the applicant should bring the issue to the attention of the court at the earliest opportunity, identifying what evidence it seeks to withhold, from whom, and setting out the reasons why the evidence should be withheld. All the evidence should be provided to the court.
 - ii) In a contested application, when the court will have to “establish the underlying facts based on admissible evidence” (stage one in *Re K*), the court’s first consideration will be whether to inform the respondent that an application to withhold evidence has been made and what information the respondent should be given about that application. Those decisions will have to be determined either on paper or at a closed hearing without notice to the respondents from whom the applicant seeks to withhold the evidence.
 - iii) The respondent might be told nothing about the application to withhold evidence; they might be told only that the application has been made and will be decided in their absence; they might be informed of the application, be given the gist of the evidence being considered, and be asked to make representations on the basis of that limited information. Each case will depend

on its own facts and consideration of the rights of the parties whom the FMPOs are designed to protect, the need to protect the source of the withheld evidence, and the respondent's Art 8 and Art 6 rights.

- iv) When deciding whether to withhold evidence, the court will have to anticipate how it could possibly proceed to make determinations at a contested hearing without (i) the respondent being aware that any evidence has been withheld; or (ii) the respondent being aware that evidence has been withheld but not being aware what that evidence is. It is generally undesirable to disclose such information or closed evidence to a party's representative but to withhold it from the party. The appointment of a Special Advocate should be regarded as an exceptional course. Again, each case will turn on its own facts and consideration of the rights of the parties whom the FMPOs are designed to protect, the need to protect the source of the withheld evidence, and the respondent's Art 8 and Art 6 rights.
- v) The funding of the costs of the Special Advocate must be provided for in order for an appointment to be made. In the present case the Local Authority agreed to meet those costs. An applicant who seeks to withhold material ought to be prepared to meet the costs of a Special Advocate if the court determines that that is the means by which the "conundrum" may be resolved.
- vi) If a Special Advocate is appointed then, prior to any hearing of the withheld evidence, the Special Advocate will need an opportunity to consider all the open and closed evidence and to make representations at a closed hearing about whether any or all of the withheld evidence should be disclosed. If any evidence remains closed, then a final hearing will take place that will be part closed, part open, with the Special Advocate dealing with the closed evidence. Practical arrangements will be required to avoid inadvertent disclosure to the respondent of the nature or source of the withheld material. Closed and open judgments will need to be given.