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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

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

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AND IN THE MATTER OF G AND D (MINORS)

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BETWEEN:

THE MOTHER OF G AND D

Appellant;

-and-

BELFAST HEALTH AND SOCIAL SERVICES TRUST

Respondent.

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Before: Coghlin LJ, Hart J and Sir Anthony Campbell

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COGHLIN LJ (delivering the judgment of the court)

[1] This is a consolidated appeal from three judgments of Stephens J sitting in the Family Division delivered on 26 March 2010, 14 June 2010 and 8 February 2011. On 26 March 2010 Stephens J discharged a wardship order in respect of G and D then aged 12 and 14 respectively and, at his request, a draft Forced Marriage Protection Order ("FMPO") under Schedule 1 of the Forced Marriage (Civil Protection) Act 2007 ("FMA") was made available by the respondent Trust to all parties for their consideration. On 14 June 2010 Stephens J confirmed the substantive terms of the FMPO, a copy of which order is annexed to this judgment Appendix 1. On 8 February 2011 Stephens J ordered that publication should be permitted of his second judgment but, since both the earlier judgments were then under appeal, he stayed enforcement of any such publication pending the decision of this court. For the purposes of the hearing before this court the appellant was represented by Ms Higgins QC and Ms Farrell while the respondent Trust

was represented by Mr Toner QC and Ms MacKenzie and Mr McGuigan appeared on behalf of the Official Solicitor. The court wishes to express its appreciation of the industry and professionalism of all counsel in their management and organisation of the complex materials involved and their well prepared written and oral submissions.

Background facts

[2] The relevant background facts may be usefully summarised as follows:

(*i*) The appellant is the mother of six children of whom the youngest, G and D, are both female and currently 14 and 15 years old. The appellant is a UK citizen who was born and raised in Birmingham. When she was 17 years of age she married her first cousin and lived for some 14 months in Pakistan. Following the marriage the appellant moved to Birmingham in 1986 but she has been resident in Northern Ireland since at least 1997.

(*ii*) In or about the beginning of 2005 the two eldest children S and T, both boys then aged 16 and 17, were informed by their mother that their father would be taking them on holiday to Pakistan in the summer. Between January and June 2005 the boys overheard a number of whispered conversations between their parents in which "arrangements for the marriage" and their mother reminding their father to pick up jewellery in Birmingham before leaving for Pakistan were discussed. However, it seems that neither boy felt that their suspicions were serious. After spending some five days in Birmingham with their maternal grandmother the boys and their father boarded an aircraft for the flight to Pakistan. A few hours into the journey their father informed the boys that the purpose of the visit to Pakistan was for them to be married and that he would brook no argument. Not surprisingly both boys were shocked by this information and, initially, unwilling to comply with their father's demands.

(*iii*) In the course of a statement prepared for the purpose of wardship proceedings T provided a detailed account of a horrifying degree of emotional and physical abuse to which they were subjected by their father over the 4 or 5 days after their arrival in Pakistan for the purpose of compelling them to take part in the marriage ceremony. T described their condition at the end of this period in the following terms:

> "By the fifth day my dad had really worn us down. He said he had our passports and threatened to take them home with him and leave us behind. This really frightened ……. and me. We knew that if we did not go along with this pretence my dad would no longer be able to hold his head up in his village. He would be seen as a disgrace to other family members as this was seen as tradition throughout his family and anyone breaking this tradition would be like an outcast and no longer respected. S and I decided we could not take any more beatings or threats from our dad so we eventually gave in to him."

The boys were then compelled to go through a ceremony the language of which they did not comprehend which they believed to be a form of marriage to two girls, neither of whom they had ever met before and one of whom may have been approximately 12½ years of age. Both boys were compelled to spend a night in a hotel with the girls. This came as a considerable shock as it appears that they had been reassured by their father that the wedding was only a front "….to get the girls visas and to have him shown respect by his relatives." When they declined to spend further overnight stays with the girls in the local village they were again subjected to a beating. Some two weeks after the return to Belfast both boys escaped from the family house and ran to a local police station from which they were taken into care by Social Services. T was placed in foster care.

(*iv*) S appears to have returned to the family home in or about November 2005 but T remained with his foster family. Ultimately, the appellant and her husband, together with the wider family, subjected T and the foster family to such a degree of harassment that T felt compelled to apply for a non-molestation order and wardship on 11 May 2006. During the wardship the appellant swore an affidavit in which she denied the allegations relating to forced marriage made by S and T maintaining that the ceremony in Pakistan had been only a betrothal carried out to please their grandfather who was very ill at the time. On 27 October 2006 Gillen J found that the boys had been forced to go through a ceremony of marriage in Pakistan and, accordingly, confirmed an order making T a ward of court as well as granting that child a non-molestation order in respect of his parents.

(*v*) On 29 January 2007 T told his social worker that he believed his mother would be sending G and D to Pakistan during the summer but that he believed they were not keen to make the journey. At that time G and D would have been approximately 10 and 11 years of age. The social worker decided not to intervene until tickets were purchased and it was clarified whether G and D would be moving permanently to Pakistan. In June 2007 T told his social worker that G and D were to be sent to Pakistan on 30 June 2007 with one way tickets and that he was concerned that this might be for the purpose of de-westernising the children with a view to persuading them to go through with a form of marriage. Enquiries were duly made at G and D's school where it was confirmed that the girls would not be returning after the summer break. The appellant was interviewed and she confirmed that the girls had left school in Northern Ireland and maintained that they would be attending an English speaking school in Pakistan. She expressed concern about the girls being influenced by western culture during their adolescence and said that she was keen that they should be educated in accordance with Islamic culture in Pakistan. She specifically denied that the girls were being sent to Pakistan to be married. The respondent was concerned about the vulnerability of G and D and applied to the court for guidance and directions. On 25 June 2007 Master Wells made an ex parte wardship order in respect of G and D.

(*vi*) On 26 June 2007 the wardship order was listed before Weir J who confirmed wardship on 29 June 2007. On 28 June 2007 the appellant swore an affidavit seeking discharge of the wardship and indicating the areas in which G and D would be staying when they went to Pakistan. She maintained that they were

being sent to Pakistan in order to be educated and denied that any plans had been made for them to be married. The appellant and her husband were interviewed on 9 July 2007 but, at that time they were unable to provide the names and addresses of relatives who would be caring for the girls in Pakistan nor could they supply the name and address of the school which would be attended by G and D. The Trust subsequently received correspondence from the appellant's solicitor providing contact details and an address where it was said that G and D would be residing in Peshawar. A telephone number was provided for a Mr Y. In addition the Trust received correspondence addressed to G and D advising that they had "firmly accepted an unconditional offer of a place" in the International Public School Peshawar to be taken up with effect from 27 August 2007. The Principal's name was stated to be Mr Momen Khan and a telephone number was included for further information. It was noted that the telephone number for Mr Y with whom G and D would be residing and the number of the school appeared to be identical and, accordingly, further enquiries were instituted with the Consular Directorate in Islamabad. On 19 September 2007 the respondent Trust received the following information from the Consular Directorate:

- The mobile telephone number provided on the letters belonged to a Mr Y, a relative of G and D.
- Neither of the girls had been offered places at the International School.
- Mr Y had approached the school about enrolling the girls but had been told that they could not be offered places until the Principal had met them.
- Mr Y confirmed that he had forged the letters on a computer using a computer generated stamp.
- Mr Y maintained that he had done this on the advice of the appellant.

On 18 September 2007 the appellant swore a detailed affidavit in which she asserted, inter alia, that she trusted her nephew Mr Y who had assured her that the letters were not forgeries and that he would provide a detailed explanation in due course to her solicitors. On 21 September 2007 Weir J adjourned the case generally advising the appellant that the wardship would remain in place unless she could offer a better explanation than she had provided in her affidavit for the obviously forged correspondence.

(*vii*) A series of further reviews and applications were heard including an application granted by Morgan J for G and D to travel to England in order to attend a family wedding, appropriate undertakings having been received from the appellant.

(*viii*) On 21 November 2008 the appellant's solicitors wrote to the solicitors acting on behalf of the Trust drawing their attention to the FMA which, at that date, had not been implemented in Northern Ireland. The solicitors referred to the level of disruption in the lives of the family caused by the wardship, despite the absence of any welfare concerns regarding the children in the family home, and sought the views of the Trust as to

whether an appropriate order under the FMA might be put in place and, thereby, enable the wardship to be discharged. Schedule 1 of the FMA came into force in Northern Ireland on 22 December 2008 and the court was advised as to the potential for a FMPO to be obtained under the FMA on 22 May 2009. The Trust advised the court of its view that the current level of intervention with the family was more than warranted in the circumstances, being unnecessarily intrusive and restrictive as well as potentially stigmatising for the children. In such circumstances the Trust expressed itself to be keen to explore the potential for a FMPO to provide an alternative, less interventionist, method of dealing with the points at issue and invited the court to make a FMPO of its own motion in accordance with paragraph 3(1)(b) of Schedule 1 of the FMA. A full hearing commenced on 22 February 2010 and Stephens J delivered judgment No. 1 on 26 March 2010.

The grounds of appeal

[3] The grounds of appeal advanced by Ms Higgins on behalf of the appellant may be usefully summarised as follows:

(*i*) The evidential threshold establishing the criteria for a forced marriage under Part I of Schedule 1 of the FMA had not been met and there was no adequate evidence that G and D were being forced into a marriage or that there was any attempt or intention on behalf of the appellant to do so.

(*ii*) That the learned judge had exceeded his powers under the FMA and unlawfully and disproportionately interfered with the Article 8 and Article 12 Convention rights of the appellant and G and D by placing a blanket prohibition upon any betrothals, arranged marriages or marriages freely entered into without the leave of the court, placing an indefinite restriction on travel by G and D outside Northern Ireland without the leave of the court, ordering G and D to surrender their passports and identity cards to the Office of Care and Protection and, generally, directing that the order should continue on an indefinite basis.

The statutory framework

[4] The Family Proceedings (Amendment No 3) Rules (Northern Ireland) 2008 extended protection against forced marriages to Northern Ireland on 22 December 2008 by applying Schedule 1 of the FMA. Part I of Schedule 1 relates to Forced Marriage Protection Orders and provides as follows:

> "(1) The court may make an order for the purpose of protecting –
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> (*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 paragraph 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 Schedule 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 sub-paragraph (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 Schedule –

'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 paragraph.

(2) **Contents of orders**

(1) A forced marriage protection order may contain –

(*a*) such prohibitions, restrictions or requirements; and

(*b*) such other terms;

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

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

(*a*) conduct outside Northern Ireland as well as (or instead of) conduct within Northern Ireland;

(*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 purpose of sub-paragraph (2) examples of involvement in other respects are –

(*a*) aiding, abetting, counselling, procuring, encouraging or assisting another person to force, or 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.

(3) **Applications and other occasions for making orders**

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

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

(*b*) without an application being made to it but in the circumstances mentioned in sub-paragraph (6).

(*2*) An application may be made by –

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

(*b*) a relevant third party.

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

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

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

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

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

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

(*6*) The circumstances in which the court may make an order without an application being made or where –

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

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

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

[5] Article 8 and Article 12 of the European Convention provide as follows:

"**Article 8**

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 12

Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

The evidential question

[6] Ms Higgins submitted that, in order for the court to have jurisdiction to make a FMPO in accordance with Schedule 1 of the FMA it was necessary to produce concrete evidence of a present risk that a person was being forced into a marriage or that an attempt was being made to do so by identified individuals. She argued that it was clear from the meaning of the words used in Schedule 1 paragraph 1 that the court must make a finding that a risk was "imminent and not too remote or a vague possibility". She referred to the House of Commons Library Standard Note S/HA/1003 (27.11.2009) prepared by Pat Strickland summarising the effect of paragraph 1(*a*) emphasising the use of the present

tense and argued that any risk that had been established before the learned trial judge was too remote in time and uncertain to fall within the ambit of the Act. She also drew the attention of the court to the change in circumstances that had taken place between 2007 and the hearing before Stephens J with particular regard to the fact that S and T had become reconciled to their family, that T was living with the young woman with whom he had gone through the ceremony in Pakistan as his wife and that the father of the children was no longer living within the jurisdiction and had become significantly incapacitated as a consequence of the deterioration of the condition from which he suffered. Ms Higgins further submitted that the provision of the forged documentation by the appellant was not sufficiently serious on the 'sliding scale' of dishonesty to warrant the weight that had been attributed to it by the learned trial judge. There was no longer any plan to send G and D to live in Pakistan and the middle children of the family, U and V, had been permitted to make several trips to Pakistan for holidays since 2005. Ms Higgins drew the attention of the court to the observations of Baroness Hale in Re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS) (Intervening) [2009] 1 AC 11 at paragraph 50 when she said:

> "If there is a dispute as to whether the child has suffered or is at risk of suffering harm, the task of the judge, when considering whether to make any order, whether it be a care or supervision order under Section 31 or a Section 8 order (residence, contact and other orders with respect to children), must be to resolve that dispute … The question is how such a dispute is to be resolved.
>
> To our mind there can only be one answer to this question, namely the same answer as given by the majority in Re H. The court must reach a conclusion based on facts, not on suspicion or mere doubts ….
>
> Counsel's point was that if there is a real possibility of harm in the past, then it must follow (if nothing is done) that there is a risk of harm in the future. To our minds, however, this proposition contains a non-sequitur. The fact that there might have been harm in the past does not establish the risk of harm in the future. The very highest it can be put is that what might possibly have happened in the past means that there may possibly be a risk of the same thing happening in the future. Section 1(3)(*e*), however, does not deal with what *might* possibly have happened or what future risk there *may* possibly be. It speaks in terms of what *has* happened or what *is* at risk of happening.
>
> Thus, what the court must do (when the matter is at issue) is to decide whether the evidence establishes the harm or risk of harm."

[7] In arriving at his decision to make a FMPO Stephens J took into account a number of factors, including:

(*i*) The finding by Gillen J in 2006 that S and T had been forced to go through a ceremony of marriage in Pakistan in 2005 which grounded the making of the original wardship and non-molestation orders. Between paragraphs [31] and [38] of his initial judgment Stephens J reviewed the evidence placed before Gillen J relating to the original allegation of forced marriage. The appellant gave evidence before Stephens J in the course of which she attacked the credibility of T and asserted, inter alia, "this was not an arranged marriage, simply a ceremony of betrothal to please a dying old man and that to suggest otherwise is a complete lie." Stephens J recorded that T had recently become reconciled to his parents and had informed the social worker that his parents had "agreed that they were wrong to force marriage upon him". After a careful review of all of the evidence Stephens J confirmed the findings made by Gillen J in 2006, namely, that S and T had been forced to undergo a ceremony of marriage.

(*ii*) Stephens J took into account the concerns expressed by T in January and June 2007 with regard to the purchase of one way tickets for G and D to travel to Pakistan. According to the appellant that arrangement was in order to receive a high quality education at an English speaking school which would ensure they had an opportunity to learn about Islamic culture. Between paragraphs [46] and [51] of his initial judgment the trial judge detailed the careful investigations carried out by the respondent Trust and the ultimate discovery of the forged correspondence and documents. Stephens J rejected the account given by the appellant that she was simply leaving the choice of schools to her 20 year old nephew in Pakistan and concluded that nothing had been done about selecting a school until proceedings had commenced in June 2007. He considered that the absence of any timely enquiries or planning in relation to schools with all arrangements being left until G and D arrived in Pakistan was completely inconsistent with the appellant's emphasis on education and advancement. Having heard her give evidence, Stephens J formed the view that the appellant had not been open and honest about her real intentions.

(*iii*) The trial judge recognised that circumstances had changed to some degree since 2007. In particular he noted the physical incapacity of the father and the fact that the parents no longer wished G and D to be educated in Pakistan. He recorded that, despite the appellant's health having been adversely affected by the emotional stress of her husband's illness and a degree of racial hostility in the locality in which the family lived, G and D were to be regarded as "a credit to both of their parents". He noted that both children had elicited very positive assessments from their teachers and that the social worker had described both as "delightful, confident and intelligent". However, the learned trial judge expressed concern about the appellant's relationship with U, one of the middle two children of the family, who had been excluded from the family home and to whom the appellant had not spoken since October 2009. It seems that the appellant had not provided that child with any financial assistance and that, in general, she did not know nor did she wish to know where he lived. While he accepted that some of U's behaviour might well have been "reprehensible" the trial judge considered that the appellant's relationship with U constituted a "clear message to other family members, including G and D, that if they do not do what she says out of respect for

her they also can be cut off from her affections, excluded from the family home and isolated." Stephens J considered that such treatment constituted a "powerful, psychological factor in the case."

(*iv*) The learned trial judge had regard to the views, wishes and feelings of G and D in the light of their age and understanding which were conveyed to the court through the medium of the Official Solicitor. Stephens J considered that the information imparted to those involved in the proceedings by G and D was severely curtailed either out of loyalty to or directly by their parents. In particular, he noted that, despite being informed about the risks of forced marriage, G and D purported to be unaware of that reason and, despite the evidence relating to the exclusion of U, during a conversation with a solicitor from the Official Solicitor's office on 16 February 2010 G volunteered the information that "all of her brothers live at home with her."

After carefully considering the evidence in detail Stephens J reached the view that the real reason that G and D were to be sent to Pakistan in 2007 was so that they could learn "respect" as an overarching filial duty which, in the context of this family, meant obedience overriding their full and free choice. He found that thereafter it was the intention of the parents that G and D would be forced to marry in Pakistan and, accordingly, he found, as a fact, that there was a present, real and substantial risk that they would be forced to marry.

[8] Paragraph 1(1) of Part 1 of Schedule 1 of the FMA provides, inter alia, that the court may make a protection order for the purpose of protecting a person "from any attempt to be forced into a marriage" and, in deciding whether to exercise its powers, 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. Paragraph 1(6) defines "force" as including coercion by threats or other psychological means. Paragraph 2(1) provides that a protection order may contain such prohibitions, restrictions or requirements and such other terms as the court considers appropriate for the purposes of the order and paragraph 2(2) provides that the terms of such orders may relate to conduct outside Northern Ireland. Paragraphs 2(2)(b) and (c) provide that the terms of such orders may relate to respondents who *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 a marriage and other persons who are, *or may become,* involved in *other respects* as well as *respondents of any kind* (our emphasis). In our view it is clear from the breadth and flexibility of these detailed provisions that Parliament was fully aware of the need to equip the court with a remedy that was sufficiently comprehensive to deal with situations that were likely to be sensitive and highly fact-specific.

[9] There is no statutory or other authority to support the assertion advanced by Ms Higgins that the risk of a forced marriage or attempted forced marriage must be "imminent" before the court can make a protection order. In NS v. MI [2007] 1 FLR 444 Munby J, in the course of giving judgment, referred to forced marriage as "utterly unacceptable," "an appalling practice" and an "abomination" which required the court to bend all its powers to prevent it happening. He expressed the view that the court should

not hesitate to use every weapon in its protective arsenal if faced with what was or appeared to be a case of forced marriage and at paragraph [8] he said:

> "[8] The court's protective jurisdiction is also particularly important in this context because, sadly, it is precisely from those who ought to be their natural protectors – parents and other close relatives – that all too typically the victims of forced marriages need to be protected. The law must always be astute to protect the weak and helpless, not least in circumstances where, as often happens in such cases, the very people they need to be protected from are their own relatives."

A similar view was expressed by Sir Nicholas Wall in the course of giving judgment in AA v. WK and five others [2010] EWHC 3282 when he said with regard to the FMA at paragraph [17]:

> "[17] Two aspects of the Act are immediately striking. The first is that it is very widely drawn. It is extra-territorial in its application and orders may be both made and discharged ex parte. Secondly, the Act plainly creates a protective/injunctive jurisdiction. Its object is to prevent forced marriages by protecting those who may be, or have been, forced into marriage . . .
>
> [18] Although the court is required to take into account 'all the circumstances' when deciding whether or not to make an order there is nothing in the Act which requires the court to apply any given criteria beyond the matters identified in Section 63A(2). There is, moreover, nothing in the Act to stop the court acting on hearsay evidence, or information provided to it by the police which has not been disclosed to the respondents."

[10] As noted above, in the course of her written and oral submissions Ms Higgins drew the attention of the court to the observations of Baroness Hale in Re B. That case concerned a discussion as to whether the threshold criteria for harm had been satisfied for the purposes of Section 31(2) of the Children Act 1989. Baroness Hale pointed out that Section 1(3)(*e)* of that Act did not deal with what *might* possibly have happened or what future risk there *may* possibly be. That is not this case. In this case two judges sitting in the Family Division, despite the denials of the appellant, have concluded that two young boys **were** sent to Pakistan and compelled to go through a ceremony of forced marriage. Against that background, approximately 18 months later it was proposed to send the two sisters, then aged approximately 10 and 11, on one-way tickets to Pakistan ostensibly to be educated. The sisters were to stay with the same family whose young daughters had been participants in the earlier forced marriage. In response to concerns expressed by the respondent Trust the appellant then submitted forged documentation in support of the reason for sending the girls to Pakistan. That documentation appears to have been forged by the brother of the sisters involved in the original forced marriage ceremony. We bear in mind the observations of Lord Hoffman in Piglowska v. Piglowski [1999] 1 WLR 1360 when he said at page 1372:

> "First, the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. If I may quote what I said in *Biogen Inc v. Medeva plc* [1997] RPC 1:
>
> > 'The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance . . . of which time and language do not permit exact description, but which may play an important part in the judge's overall evaluation'"

We respectfully adopt those observations and in applying them we have no hesitation in endorsing the conclusion of the learned trial judge on the evidence.

[11] Before leaving the evidential question, it is necessary for us to refer briefly to paragraph [14] of the judgment of Stephens J. In that paragraph, when referring to the relevant circumstances that might be established in accordance with paragraph 1(2) of Schedule 1 of the FMA the trial judge said:

> "For instance in this case the circumstances include a rare devastating hereditary disease suffered by the father who is a first cousin of the mother, which is to be seen in the context that the brothers S and T were forced to marry their first cousins and the Trust contention that there is a prospect that G and D could also be forced to marry their first cousins. The nature and extent of the precautions are to be proportionate to the circumstances and in this case a consequence of a forced marriage would not only be a gross abuse of the rights of G and D but if the forced marriage was to a first cousin it could have a devastating impact on the health of any of their children."

Ms Higgins submitted that no relevant expert evidence had been placed before the court to establish any causal connection between the debilitating physical condition suffered by the children's father and inter-cousin marriage. In such circumstances, she argued that the trial judge had clearly taken into account a factor that he should not have taken into account. There appeared to be substance in that submission and, consequently, it was a matter to which we had specific regard when considering the conclusions reached by the trial judge. That is not a matter to which the trial judge appears to have returned in the course of setting out his reasons for reaching the conclusion that there was a present, real

and substantial risk that G and D would be forced to marry and, in our view, even if any such medical risk were to be omitted, there was still ample evidence to fully justify the decision reached by Stephens J.

Forced Marriages and Arranged Marriages

[12] In the course of her well researched and comprehensive submissions Ms Higgins emphasised to the court that the purpose of the FMA was to protect against "forced marriages" and that it was very important to distinguish such prohibited activities from "arranged" marriages which were perfectly lawful. Ms Higgins referred the court to an article by Fariha Thomas in Res Publica 2008 in which the author observed that:

> "While the extremes of forced marriage involving physical force or abduction are easy to identify, the distinction between forced and arranged marriage can become blurred. The definition of what constitutes undue pressure with regard to marriage choices can be hard to define and may depend on the emotional resilience of the individual and their social circumstances."

She also drew the attention of the court to the words of the President of the Family Division when he said in the course of delivering his judgment in AA v WK and five others at paragraph [9]:

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

She also noted the observations by Munby J in Re K when he encouraged the court to be sensitive to the cultural, social and religious circumstances of the particular child and family and to be slow to find that parents only recently or comparatively recently arrived from a foreign country have fallen short of an acceptable standard of parenting if in truth they have done nothing wrong by the standards of their own community – see Re K paragraph [26]. In such circumstances Ms Higgins submitted that Stephens J should have obtained evidence from an expert "evaluator" in whom the person to be protected could place their trust and confidence and who would then be able to advise the court as to the degree of informed consent that was present.

[13] It seems to us evident from paragraph [18] of his judgment that the trial judge was alert to the distinction between forced and arranged marriages and he specifically recorded that:

> "A court should be astute in that grey area where a filial duty of obedience can override free consent but also guarding against the risk of stereotyping."

Cases may well arise in which the type of evaluator referred to by Ms Higgins would be helpful to the court in arriving at a balanced decision as to whether or not, after having due regard to accepted religio/cultural norms, informed consent was present. This is a tolerant and diverse society in which care must be taken to ensure differences are understood and, in accordance with the relevant circumstances, afforded appropriate respect. Such assistance might be especially relevant in the case of children or young people of more mature years. However, once again, this was not such a case. The issue in this case was not whether G and D had expressed their informed consent to participate in contemplated arranged marriages. The task faced by Stephens J was to determine on the basis of all the relevant evidence whether there was the risk of a forced marriage that warranted the making of a FMPO in respect of G and D.

The submission that the court did not have power to impose a blanket prohibition on all marriages and betrothals

[14] Ms Higgins submitted that the powers of the court to make protection orders were limited to protecting G and D from a forced marriage as defined by the FMA and she argued that the wide powers afforded by paragraph 2 of Schedule 1 must be interpreted consistently with Article 12 of the ECHR. In such circumstances, according to Ms Higgins, a court prohibiting or placing restrictions upon a party entering into a marriage with a partner of their own choosing or a partner chosen for them by their parents whom they had endorsed would constitute a violation of those rights.

[15] We have commented earlier upon the breadth of the powers afforded to the court by virtue of Part I of Schedule 1 of the FMA. Ms Higgins focused her criticisms upon paragraphs 1 and 2 of the order made by Stephens J on 14 June 2010 asserting that the requirement for leave from the High Court constituted a violation of the Article 12 rights of the appellant and G and D. Once again, it is important to underline the fact specific context of the order made by Stephens J which did not *prohibit* engagements, betrothals or marriages other than forced marriages but simply required the leave of the court to be obtained before entering into any relevant commitment. That order was made in the context of two young boys being compelled to undergo a forced marriage ceremony in Pakistan and, within approximately two years, the making of a proposal to send two young girls into the care of relatives in the same location in Pakistan on a long term basis that was grounded upon forged documentation. In the course of his second judgment the trial judge noted that the original draft order had not prohibited an arranged marriage but, on the basis of the evidence, he formed a view that the parents were either unable or unwilling to distinguish between forced marriages and arranged marriages. Stephens J invited submissions from the parties and Ms Higgins advanced the arguments that she made before this court in relation to this aspect of the appeal. A further review was arranged and, thereafter, there was a further exchange of written submissions followed by a further review to finalise the terms of the order. Stephens J then recorded the following findings at paragraphs [10] and [11] of his second judgment:

> "[10] I reject the contention by Ms Higgins that the only prohibition, restriction or requirement that can be contained in a forced marriage protection order is a prohibition, restriction or requirement in relation to forced marriages. There is no such limitation in paragraph 2 of Schedule 1 to the Forced Marriage Civil Protection Act 2007. The aim is of course limited to protection from forced engagements or marriages and in the event to permit all other engagements and marriages including arranged engagements and marriages. However in order to protect against a forced engagement or marriage there can be a restraint imposed in respect of all engagements or marriage with liberty to apply to enable an independent view to be formed as to whether what is proposed is in fact a forced engagement or marriage. The effect of such an order is not to prohibit an arranged engagement or marriage but rather to protect against and to prohibit a forced engagement or marriage. The effect of the order is to permit arranged marriages.
>
> [11] It should also be emphasised that the only object of the enquiry that will take place on any future application to the court is as to whether the proposed engagement or marriage is forced. For instance the enquiry is not to form any view as to any perceived advantages or disadvantages of a proposed marriage. Those sensitive decisions are the entire preserve of the persons to be engaged or married with whatever advice they seek or obtain from their own intimate or extended family members or close personal friends. This is in contrast to the wardship jurisdiction under which the court remains in control and no major step in the life of a ward may be taken without the consent of the court. A major step would include engagement or marriage and the jurisdiction of the court in respect of a ward is not confined to the short question as to whether what is proposed is forced. A forced marriage protection order is therefore less intrusive into intimate relationships than a wardship order."

The trial judge expressed the view that the aim of the order was to prevent damage being caused to G and D rather than correcting the damage once it had occurred. In our view, particularly bearing in mind their tender age, such an order was appropriate and did not violate in any respect the Article 12 rights of G and D.

Article 8

[16] Ms Higgins submitted that paragraphs (1)(*a*), (*b*), (*c*) of the FMPO, the requirement that G and D should provide written notification to the Official Solicitor within 14 days of entering into any engagement to marry, the prohibition of G and D from entering any betrothal ceremony or marrying, whether within this jurisdiction or elsewhere, without the leave of the court, the various requirements and restrictions relating to the lodgement of passports, travel cards, birth certificates and identity cards together with the

prohibition against G and D leaving Northern Ireland or applying for such documents constituted breaches of the Article 8 rights of the appellant and G and D. Article 8 is a qualified right interference with the exercise of which may be shown to be necessary in a democratic society in the interests, inter alia, of the prevention of crime, for the protection of morals or for the protection of the rights and freedoms of others. There can be no doubt that the protection of individuals, particularly those of tender years, from being compelled to participate in forced marriages is a legitimate aim and, having considered the evidence, in our view the order of 14 June 2010 was rationally connected to that objective. We also consider that the FMPO represented a proportionate and fair balance between all affected interests in this case. As Ms Higgins herself pointed out, in the course of her helpful skeleton argument, proportionality is applied on the understanding that, in law, "context is everything".

The "Contra Mundum" element in the order of 14 June 2010

[17] Ms Higgins was critical of the extent of the order insofar as it purported to impose prohibitions/restrictions on unnamed persons. However, it is clear that, for example, unknown persons in Pakistan were at least aware of the arrangements for the marriage of the boys. At paragraph [32] of his judgment the trial judge recorded that one of the boys overheard a telephone call between his father and a person in Pakistan confirming that arrangements had been made. In the course of his conversation during the flight the boys' father made clear that there would be "no argument". It is also clear that the family of the girls whom the boys were compelled to "marry" must have been complicit in facilitating the ceremony. In the course of an article entitled "Forced Marriage, Local Authorities and Applications without Leave: The New Provisions" by Louise McCallum, Barrister, referred to by Ms Higgins, the author notes that protection orders may be made against named respondents but that in addition:

> "Orders may also be made against other persons who are, or may become, involved in other respects as well as respondents': Section 63B(2)(*c*). Thus, unusually FMPOs (Forced Marriage Protection Orders) can be directed against unnamed persons. A blanket order could for example be made prohibiting any person from facilitating arrangements for the marriage of the PTBP ('Person to be Protected')."

Duration of the order

[18] Ms Higgins submitted that the indefinite prohibitions and restrictions placed upon the appellant and G and D in respect of arranging marriages or betrothals or travel outside Northern Ireland without the leave of the court were disproportionate in the circumstances. She referred to the fact that G and D had not been allowed to travel to Pakistan for a holiday since 2007 and, consequently, had been prevented from adding to their understanding and appreciation of their relatives in that location and the culture in which they resided, whereas their brothers had not been restricted from so doing. Ms Higgins argued that circumstances were bound to change with the passage of time and that what was in the best interests of G and D might well have been overtaken by events even between the original decision of Stephens J in 2010 and the present time. She

contended that it should be for the State to justify an indefinite interference with the family's Article 8 rights and that it could not be said that such an indefinite order was "the least intrusive in the circumstances and one that struck a fair and appropriate balance between all affected interests".

[19] Stephens J dealt with this aspect of the order at paragraphs [13] to [15] of his judgment. He noted that paragraph 5 of Schedule 1 to the FMA provided that a protection order might be made for a specified period or until varied or discharged. The trial judge accepted that the duration of the order should be appropriate and proportionate setting out his approach as follows at paragraph [13]:

> "What is appropriate and proportionate depends on the particular facts of each individual case. For instance the age, understanding and personality of the person or persons to be protected ordinarily would be included in the factors to be taken into account as an indicator of risk. The older, the greater the understanding and the more physically and emotionally independent the person to be protected then in general the less potential for risk. Conversely the younger, the less understanding and the more physically and emotionally dependent the person to be protected then in general the greater potential for risk. The essence of every order is that it is to be appropriate and proportionate for the particular facts of the individual case."

[20] After setting out a number of general propositions the trial judge recorded his conclusions in the following terms at paragraph [15]:

> "[15] In this case there is no anticipated change in circumstance which limits the duration of the risk except increasing maturity and the potential this brings for increasing physical and emotional independence. I do not consider that the risks will have sufficiently diminished by virtue of G or D attaining the age of 18. I decline to limit the duration of the order to them reaching the age of majority. The order will be made until varied or discharged. If in the event when G and D reach 18 (or I might add at any stage prior to or subsequent to that age) the risks do reduce to a sufficient extent so that the order can be varied or discharged then an application can be made."

[21] This is a matter which has given this court some concern. While, as we have indicated above, we do not believe that there can be any justified criticism of the original order made by Stephens J, we do consider that there may be substance in the submissions advanced by Ms Higgins with regard to the requirement to seek the leave of the court which has been indefinitely imposed upon G and D. The specific nature, weight and relevance of any changing circumstances are always likely to fall, at least initially, within the unique experience and knowledge of the appellant and G and D and the order provides them with the power to apply for discharge or specific variations whenever they consider it appropriate to do so. However the initiation of legal proceedings makes

significant demands both in terms of cost and emotion and, given the number and extent of the prohibition/restrictions contained in this particular order, we consider that it might well have been advisable to arrange for a review of the matter when G or D attain their respective majorities. While there is no express statutory power of review, Part 1 of Schedule 1 provides at paragraph 6 (2) that a FMPO made in accordance with paragraph 3(1)(b) may be varied or discharged by the court even though no application has been made by any party to the proceedings This is a matter to which the trial judge may wish to give further consideration.

[22] Accordingly, for the reasons set out above we propose to dismiss this appeal.

ANNEX

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
FAMILY DIVISION
OFFICE OF CARE AND PROTECTION

Before THE HONOURABLE MR JUSTICE STEPHENS

ON Monday the 14th day of June 2010

IN THE MATTER OF G, a minor and H, a minor

AND

IN THE MATTER OF THE JUDICATURE (NORTHERN IRELAND) ACT 1978

AND

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

Between

BELFAST HEALTH AND SOCIAL SERVICES TRUST

Applicant

and

Mother of G & H
Father of G & H

Respondents

WHEREAS the case is in the list this day pursuant to Directions given on the 10th day of June 2010,

NOW UPON HEARING Counsel for the Applicant Trust and Senior Counsel and Counsel for the first-named Respondent and Counsel for the Official Solicitor and upon reading the documents filed in this matter,

AND FURTHER having considered the necessity to make any Order under the Children (Northern Ireland) Order 1995 pursuant to Article 10 (1) (b) thereof and having considered the position of both parties and the best interest of the minors,

THE COURT ORDERS that:-

1. The respondents without the leave of the High Court are prohibited whether by themselves their servants or agents or otherwise howsoever and whether within this jurisdiction or outside of it from –

   (a) causing or permitting G or H entering into any engagement to marry, any betrothal ceremony or any marriage, civil or religious, whether within this jurisdiction or outside of it;
   (b) entering into any arrangements in relation to the engagement to marry or matrimony whether by civil or religious ceremony of G or H whether within this jurisdiction or outside of it;
   (c) removing or attempting to remove G or H from the jurisdiction of Northern Ireland;
   (d) threatening intimidating or harassing G or H whether within this jurisdiction or outside of it;
   (e) using force or violence or threatening force or violence against G or H whether within this jurisdiction or outside of it;

2. Any other persons without the leave of the High Court are prohibited whether within this jurisdiction or outside of it from –

   (a) causing or permitting G or H entering into any betrothal ceremony or any marriage, civil or religious, whether within this jurisdiction or outside of it;
   (b) entering into any arrangements in relation to a betrothal ceremony or matrimony whether by civil or religious ceremony of G or H whether within this jurisdiction or outside of it;
   (c) removing or attempting to remove G or H from the jurisdiction of Northern Ireland;
   (d) threatening intimidating or harassing G or H whether within this jurisdiction or outside of it;

(e) using force or violence or threatening force or violence against G or H whether within this jurisdiction or outside of it;

3. The respondents shall lodge in the Office of Care and Protection by 12.00 noon on the 23 June 2010 all current passports, travel cards and identity cards together with the birth certificates for G and H;

4. The passports travel cards and identity cards of G and H shall be retained by the Office of Care and Protection together with their birth certificates and shall not be released save upon application to the High Court and leave being granted;

5. The identity and Passport Service is directed not to issue any further passport in the name of G and H from the United Kingdom passport agency or from any other foreign passport agency save with the leave of the High Court;

6. G and H are required to provide written notification to the Official Solicitor of 2nd Floor of the Royal Courts of Justice, Chichester Street, Belfast, BT1 3JF within 14 days of entering into any engagement to marry whether within this jurisdiction of elsewhere and they are prohibited from entering any betrothal ceremony or marrying whether within this jurisdiction or elsewhere without the leave of the High Court;

7. G and H are prohibited without the leave of the High Court from:

(a) leaving this jurisdiction
(b) applying for any new passport or other travel documents or identity documents in their names from the United Kingdom Passport Agency or from any other United Kingdom or foreign passport or other agency
(c) applying for any birth certificate in their names from any United Kingdom or foreign agency.

8. The respondents are forbidden whether by themselves their servants or agents or otherwise howsoever without the leave of the High Court from:

(a) applying for any new passport or other travel documents or identity card for G and H from the United Kingdom Passport Agency or from any other United Kingdom or foreign passport or other agency.

(b) applying for any birth certificate for G and H from any United Kingdom or foreign agency.

9. Permission is granted to disclose this Forced Marriage Protection Order to the Foreign and Commonwealth Office, the United Kingdom passport agency and the Forced Marriage Unit and/or the British High Commission in Islamabad as deemed appropriate;

10. The Wardship Orders in respect of each child are hereby discharged.

11. The costs of the first-named Respondent, an assisted person, be taxed in accordance with the provisions of Schedule 2 to the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 AND THE JUDGE DOTH CERTIFY for Senior Counsel;

12. The matter stands adjourned until the 22nd day of September 2010 at 9:30 am for further consideration before the assigned Judge;

13. Any person affected by this order may apply to vary or discharge it;

Please check that this Order has been accurately transcribed. The Family Judge has indicated that any application for amendment must be made within 1 week of receipt of the Order.

Mark Hamill
Proper Officer

Time Occupied: 14 June 2010 (25 minutes)

Copies served on:-

Regional Business Services Organisation, by Courier

Holmes & Moffitt Solicitors
DX 3801 NR BELFAST 10

The Official Solicitor, by Courier