Forced Marriage:
An Update -
Recent Developments and Case-Law

1. Last year, the government's Forced Marriage Unit dealt with 1,302 cases.

2. Some 82% of victims were female and 18% male while 15% were under the age of 15. The cases involved 74 different countries with 43% relating to Pakistan, 11% to India and 10% to Bangladesh. However forced marriages are not confined to South Asia and there are a number of other cultures where they occur. No reliable statistics are available as to the number of cases which remain unreported – thought to be significant.

3. Please be aware that the Forced Marriage Unit can give help in finding a safe place to stay, and also advice on stopping a UK visa if a person has been forced to sponsor someone – details are:

   fmu@fco.gov.uk
   Telephone: 020 7008 0151
   From overseas: +44 (0)20 7008 0151
   Monday to Friday, 9am to 5pm
   Out of hours: 020 7008 1500 (ask for the Global Response Centre)

   Criminalisation – the Anti-Social Behaviour, Crime and Policing Act 2014

4. The biggest development to hit the headlines in forced marriages in 2014 was of criminalisation – a much-awaited development although not originally feted
by all victims. On 16th June the government enacted new legislation in the form of the Anti-Social Behaviour, Crime and Policing Act 2014, which makes it a criminal offence to force someone to marry. This includes:

- taking someone overseas to force them to marry (whether or not the forced marriage takes place)
- marrying someone who lacks the mental capacity to consent to the marriage (whether they are pressured to or not).

5. Breaching a forced marriage protection order is also a criminal offence. The civil remedy of obtaining a FMPO through the family courts will continue to exist alongside the new criminal offence, so victims can in theory choose how they wish to be assisted.

Anti-Social Behaviour, Crime and Policing Act 2014

s. 121. Offence of forced marriage: England and Wales

(1) A person commits an offence under the law of England and Wales if he or she—

(a) uses violence, threats or any other form of coercion for the purpose of causing another person to enter into a marriage, and

(b) believes, or ought reasonably to believe, that the conduct may cause the other person to enter into the marriage without free and full consent.

(2) In relation to a victim who lacks capacity to consent to marriage, the offence under subsection (1) is capable of being committed by any conduct carried out for the purpose of causing the victim to enter into a marriage (whether or not the conduct amounts to violence, threats or any other form of coercion).

(3) A person commits an offence under the law of England and Wales if he or she—

(a) practises any form of deception with the intention of causing another person to leave the United Kingdom, and
(b) intends the other person to be subjected to conduct outside the United Kingdom that is an offence under subsection (1) or would be an offence under that subsection if the victim were in England or Wales.

(4) “Marriage” means any religious or civil ceremony of marriage (whether or not legally binding).

(5) “Lacks capacity” means lacks capacity within the meaning of the Mental Capacity Act 2005.

(6) It is irrelevant whether the conduct mentioned in paragraph (a) of subsection (1) is directed at the victim of the offence under that subsection or another person.

(7) A person commits an offence under subsection (1) or (3) only if, at the time of the conduct or deception—

(a) the person or the victim or both of them are in England or Wales,

(b) neither the person nor the victim is in England or Wales but at least one of them is habitually resident in England and Wales, or

(c) neither the person nor the victim is in the United Kingdom but at least one of them is a UK national.

(8) “UK national” means an individual who is—

(a) a British citizen, a British overseas territories citizen, a British National (Overseas) or a British Overseas citizen;

(b) a person who under the British Nationality Act 1981 is a British subject; or

(c) a British protected person within the meaning of that Act.

(9) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 7 years.
(10) In relation to an offence committed before the commencement of section 154(1) of the Criminal Justice Act 2003, the reference to 12 months in subsection (9)(a) is to be read as a reference to six months.

6. Note that in relation to a person who lacks capacity, the conduct which is caught by these provisions is very wide-ranging. Lack of knowledge that the person lacked capacity is not a defence. Violence, threats or coercion as threats need not be directed at the person to be protected but could be aimed at a third party (the mother of the person to be protected, a younger sibling, or her boyfriend for example).

7. The geographical jurisdiction of this offence is very wide-ranging and extra-territorial in nature, mirroring the civil orders which have been available for several years now.

8. The new criminal legislation also allows for extra-territorial jurisdiction to be exercised over both the coercion and deception elements of the new offences. Any of the prohibited acts carried out outside the UK by a UK national or person habitually resident in England or Wales, or to a UK national or person habitually resident in England or Wales, will be an offence under domestic law and triable in the courts of England and Wales. It will also be an offence under domestic law if the prohibited acts are conducted by or against a person habitually resident in England and Wales, but take place in Scotland or Northern Ireland.

9. The maximum penalty for the criminal offence is 7 years imprisonment.

10. The criminal legislation now works alongside the civil forced marriage protection orders (“FMPOs”). Forced marriage protection orders can be sought under s.4A of the Family Law Act 1996 (the 1996 Act). Note: section 4a of the 1996 Act was inserted by the Forced Marriage (Civil Protection) Act 2007.

11. The 1996 Act makes provision for protecting both children and adults at risk of being forced into marriage and offers protection for those who have already been forced into marriage. The terms of orders issued under the 1996 Act can be tailored to meet the specific needs of victims. They are essentially
injunctive in nature, and may contain very wide-ranging terms – for example, forbidding someone to live in the same household as the person at risk of harm or to have contact with them, requiring the delivering up of passports, and these orders may be made without limit of time in appropriate cases. The definition of a forced marriage under the 1996 Act is set out in s. 63A (4) is that there is no full and free consent. “Force” includes coerce by threats or other psychological means.

12. Under s.120 of the 2014 Act, the maximum penalty for breach of a forced marriage protection order is five years imprisonment. A breach must be proved to the criminal standard, namely beyond reasonable doubt. The person to be protected will have a choice whether to pursue the breach in the criminal courts (assuming that the CPS decide there is sufficient evidence to pursue breach proceedings) or to apply in the Family Court for committal for contempt of court. The usual procedural rules apply to committal applications, and it is important to ensure that the original FMPO contains a penal notice warning of the consequences of breach.

13. As of 16th June 2014, a power of arrest can no longer be attached to a FMPO. This may bring with it certain disadvantages for the person to be protected who is reliant upon the police to exercise their discretion and take action in the event of an alleged breach. This situation now mirrors legislative reform in other areas such as injunctive relief for domestic violence under those provisions of the Family Law Act 1996.

Bedfordshire Police Constabulary v RU and Anor [2013] EWHC 2350 (Fam) High Court Holman J

The applicant for a FMPO was the 16 year old person to be protected. She was represented by solicitors and a without notice hearing took place, followed by a return date, at which FMPOs were granted. Some time later, the applicant came in person to court with her mother, asking to be released from the FMPOs to visit the applicant’s seriously ill grandmother in Pakistan. The judge refused, finding that the applicant was doing so under considerable
parental oppression. Six weeks later, a ceremony of marriage took place at the family home in Luton, between the young woman and a man she knew by sight. Although this marriage had no force of law it would be of huge significance within the Muslim community. A month later the young woman went to the police, alleging rape and other matters by the bridegroom. The police arrested her mother and an aunt. The aunt, unlike the mother, had not been named as a party to the FMPO proceedings but was arrested on the basis that she had been aware of the existence and terms of the FMPO and had helped organise the wedding.

The matter came back before the same judge who had heard the original FMPO applications and the young woman’s application for the FMPOs to be lifted. An interim care order was made in respect of the applicant, at the request of the responsible LA, and the court made the police interveners to the proceedings. The police subsequently issued an application for committal of the mother and aunt (note – this case pre-dates the criminalisation of forced marriage). The young woman’s case was that she was not forced into this marriage, but married, freely and gladly. She said she did not understand that the FMPO prevented a marriage which was a willing one and not a forced one.

The question arose as to whether the police, who had not been the original applicant in the FMPO, had locus to bring breach proceedings. The LA, who had an interim care order in their favour, did not bring any such application.

**Held:**

The police had no statutory footing to bring committal proceedings. The position for FMPOs and the legislative framework was contrasted with the provisions in Part IV of FLA 1996 which relate to domestic violence and associated injunctive relief. Holman J expressed a concern that the facts and circumstances of this case revealed a grave weakness in the existing forced marriage protection order machinery.


A round-up of recent authorities on forced marriages

Capacity to consent to marriage - some general principles

16. If a person does not consent or lacks capacity to consent to a marriage, that marriage must be viewed as a forced marriage whatever the reason for the marriage taking place. Capacity to consent can be assessed and tested but is time and decision-specific.

17. Who can make the decision to marry?

18. There are certain decisions which cannot be made on behalf of another person and this includes the decision to marry. The Court of Protection cannot make this decision!

19. There is therefore no legal basis on which someone can agree to marriage, civil partnerships or sexual relations on behalf of someone who lacks the capacity to make these decisions independently. However, families sometimes do believe they have the “right” to make decisions regarding marriage on behalf of their relative.

20. Locus classicus – what constitutes consent?

Re P (Forced Marriage) 2011 EWHC 3467 2011 1 FLR 2060 High Court Baron J
This was one of the first reported cases reported following the coming into force of the Forced Marriage (Civil Protection) Act 2007 as contained within Part 4A Family Law Act 1996. It concerns a woman with capacity, aged 20, who went to Pakistan with her family for a holiday and was told she was going to be married to a Pakistani national there. She protested strongly, but her protests fell on deaf ears and she was told that if she did not co-operate she would have to stay in Pakistan. A ceremony of marriage took place. She refused to consummate the marriage and 8 days later they separated. About a year later, following her return to the UK, she discovered that her husband was planning to enter the UK as her spouse. She wrote a letter to the authorities saying she had been forced into the marriage and did not support his application for permanent leave to remain. P applied to the court for relief. A decree of nullity was not available to her because proceedings had not been instituted within 3 years from the date of the marriage (s. 13 (2) (a) of the Matrimonial Causes Act 1973). Accordingly she sought a declaration that her marriage was not capable of recognition under English law.

**Held:**

The declaration sought of non-recognition was granted.

The burden was on P to satisfy the court that she had been forced into the marriage on the ordinary civil standard of the balance of probabilities. Applying *Hirani-v-Hirani [1994] FLR 232*, the crucial question was whether the pressure was “such as to destroy the reality of consent and overbears the will of the individual.” On the facts P had not given valid consent. She had been subjected to such unacceptable pressure such that her free will was overborn. This was not reluctant consent but no consent at all.

21. The next case is an important one and concerns vulnerable adults with capacity and the use of the inherent jurisdiction:

**Re SA (Vulnerable Adult with Capacity: Marriage) 2005 EWHC 2942 (Fam) 2006 1 FLR 867 High Court Munby J**
The LA applied to invoke the inherent jurisdiction in respect of a 17-year-old young woman functioning at the intellectual level of a 13 or 14-year old, who was profoundly deaf and unable to speak. She could not lip read but communicated using British sign language which neither of her parents, who spoke Punjabi, could understand. The LA was concerned that the family might take her to Pakistan to be married to someone contrary to her wishes. As she was still under 18 she could be made a ward of court, and injunctions were granted to prevent her being removed from the jurisdiction or married. However the main issue in the proceedings was what would happen to her once she was an adult. Both the LA and the guardian shared the view that even as an adult the young woman would need some element of continuing protection by the court, in relation to the specific issue of a marriage being arranged. Expert evidence was that she had capacity to marry, having a rudimentary but nevertheless clear and accurate understanding of the concept of marriage and of what a marriage contract would entail, including a sexual relationship. However, she did not understand immigration issues, and would have significant difficulty understanding the implications of a specific marriage contract to a specific individual, such as a change in her country of residence.

The young woman’s evidence was that: (a) she wished to marry, but not yet; (b) she expected that her parents would choose a Muslim husband for her, probably from Pakistan, but it would be for her to agree to the choice; (c) she would want a husband who would speak English, and would want to live in England, in the same city as her family; (d) she emphatically did not want to live in Pakistan.

**Held:**

An order was made requiring that the young woman be properly informed, in a manner she could understand, about any specific marriage prior to entering into it, with associated injunctions.

The court’s inherent protective jurisdiction could be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder or mental illness, was, or was reasonably believed to be, either: (i) under constraint; or
(ii) subject to coercion or undue influence; or (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent. The inherent jurisdiction was not confined to vulnerable adults, nor was a vulnerable adult amenable as such to the jurisdiction; it was simply that an adult who was vulnerable was more likely to fall into the category of the incapacitated in relation to whom the inherent jurisdiction was exercisable than an adult who was not vulnerable.

The court had power to make orders and to give directions designed to ascertain whether or not a vulnerable adult had been able to exercise her free will in decisions concerning her civil status. The principle that the jurisdiction was exercisable on an interim basis while proper inquiries were made applied whether the suggested incapacity was based on mental disorder or on some other factor capable of engaging the jurisdiction.

In the context of the inherent jurisdiction, a vulnerable adult could be described (rather than defined) as someone who, whether or not mentally incapacitated, and whether or not suffering from any mental illness or mental disorder, was or might be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation, or who was substantially handicapped by illness, injury or congenital deformity. The principle that the court should seek to prevent damage to children that it could not repair was equally applicable in relation to vulnerable adults.

While it was no part of the court’s function to decide whether it was in a person’s best interests to marry, the court was not debarred from considering whether it was in the best interests of someone lacking capacity to be exposed to an ineffective betrothal or marriage.

There was nothing to prevent a local authority from commencing wardship proceedings, or proceedings under the inherent jurisdiction in an appropriate case, as a body with a genuine and legitimate interest in the welfare of the individual in question. Guidance to the contrary in the document *Young People & Vulnerable Adults Facing Forced Marriage: Practice Guidance for Social Workers* (The Foreign & Commonwealth Office, 2004) [now superseded] was simply wrong.
The daughter was a vulnerable adult who might, by reason of her disabilities, and even in the absence of any undue influence or misinformation, be disabled from making a free choice and incapacitated or disabled from forming or expressing a real and genuine consent. There was a pressing need to intervene to protect the daughter from the serious emotional and psychological harm which she would suffer if she went through a ceremony of marriage with which she did not in fact agree, or if she were to find herself isolated and helpless in a foreign country.

PC and NC-v-City of York Council [2013] EWCA Civ 478 Court of Appeal

PC was a 48-year-old woman with significant learning disabilities who nevertheless had capacity to marry and to make other day-to-day decisions save for conducting the litigation in hand. The LA’s case was that despite having capacity to marry, PC lacked capacity to decide to cohabit with her husband NC. The Court of Protection judge held at first instance that she did indeed lack capacity to cohabit. One of the questions raised on appeal was, is capacity under the MCA 2005 always to be related to the general nature of the decision to be made, or could a decision be “person-specific” or “decision-specific”? On the facts of this case, 2 years after PC, who had an IQ of between 66 and 69, had entered into a relationship with NC and begun to live with him, he was convicted of serious sexual offences and sentenced to 13 years’ imprisonment. PC and NC married during his time in custody. He denied his guilt of all offences and so had never had therapy or treatment. There was no suggestion that he had ever ill-treated PC, and they both had a wish to resume married life together. The expert psychiatric evidence was that PC lacked capacity to decide any issue in relation to her relationship with or contact with NC, and that it was in her best interests to have no contact with her. Hedley J at first instance analysed that expert evidence and did not accept it on a number of counts. He did find however, that he was satisfied that PC was unable to understand that potential risk that NC presented to her, and she was unable to weigh up that risk, which would normally be part of a decision by her as to whether to resume cohabitation with NC as a particular
individual. He found therefore that she lacked capacity to decide whether to resume cohabitation with NC, and the COP jurisdiction was engaged to that extent. Hedley J went on to find that PC’s welfare was best served by resuming cohabitation with NC within a scheme of monitoring and support provided by the LA.

Held:

It was submitted on appeal by PC that the judge had, wrongly, applied a person-specific test to the question of cohabitation. The proper test should be act-specific and should consider whether PC lacked capacity to resume cohabitation with any person.

Macfarlane LJ, who delivered the leading judgment in the Court of Appeal, held that the central provisions of the MCA 2005 had been welcomed as an example of plain and clear statutory wording and no embellishment or gloss was necessary. Capacity to make certain decisions might be grounded in a specific factual context, and so, for example, in a case of dementia, it would be commonplace for the Court of Protection to be asked to regulate the contact that one spouse may have with another. The reference in MCA 2005 s. 3 (1) (a) to the ability to “understand the information relevant to the decision” must in this particular case include reference to information specifically relevant to NC in the light of his conviction and its potential impact on the decision before the court. The appeal would be dismissed on that particular ground.

However, on the evidence, including the expert evidence before the court, there was not enough material to persuade the CA that the finding made in the court below that PC was unable to make the decision to resume cohabitation with her husband was correct. If PC had capacity to marry she must be taken to have capacity to decide to perform the terms of the marriage contract. Therefore the judge’s finding that PC lacked capacity to decide whether or not to go to live with her husband was set aside. There was no finding of any deterioration in PC’s mental capacity since the date of the marriage. Nor had there been any change in circumstances, because at the date of the marriage NC had already
been convicted and imprisoned. Adult autonomy was such that people are free to make unwise decisions, provided that they have the capacity to decide.

22. A clear case of lack of capacity now follows, and one with an interesting outcome:

**Sandwell MBC-v-RG, GG, SK and SKG [2013] 2373 (COP) Holman J**

GC and RG were Sikh brothers, adults who lacked capacity to make decisions in a number of areas including where to reside, contact with others, their care packages. RG had visited the Punjab and entered into an arranged marriage with a lady, Mrs SK. The marriage had formal validity under the law of the place where it was contracted. Mrs SK was lame, and the picture was found to be one of a marriage, arranged by their families, for two people, who because of their respective mental or physical disabilities, might otherwise have been hard to marry. The marriage was consummated. Mrs SK only learnt after the marriage that her husband, RG, was “not like a normal person”. She bore no responsibility for what followed and there could be no question that she had had personally exploited the mental disability of RG. She said, that having married him, she was now committed to him, and now loved him. It would be impossible in her culture and in her religion for her ever to marry anyone else, and that if she were divorced, or her marriage was annulled, she would be ostracised in her community. She went on to say that the families who arranged this marriage had ruined her life. She was found by the court to have borne her position with fortitude and dignity. Although Mrs SK accepted that she could not provide to RG the support and daily care and assistance that he needed, (he was by the time of the hearing, living in LA accommodation), she implored the court not to facilitate or permit steps to be taken to annul their marriage. She also asked to be permitted to have some form of sexual relationship with her husband, although the expert was soundly against this, and it would have been contrary to the Sexual Offences Act 2003 to even enter into sexual touching. The LA originally sought a declaration that it was in the best interests of RG for the Official Solicitor to issue a petition of nullity and/or a declaration of non-recognition of the marriage, relying, inter alia, on policy as a
consideration. The OS did not support a petition for nullity and took the position that no benefit to RG could be identified in annulling the marriage.

**Held:**

A number of declarations, including a declaration that RG lacked capacity to consent to sexual relations or to marriage, were made.

As for the status and continuation of the marriage, the expert evidence was unequivocal that RG lacked capacity to enter into a marriage, including at the time that he entered into the marriage in the Punjab.

Following *Westminster City Council-v-C [2009] 2 WLR 185* and *XCC-v- AA BB CC DD [2012] EWHC 2183 (COP)*, the High Court plainly had power to make such a declaration, and in the latter case, Parker J had directed both that the OS should issue a petition for nullity and declared under the inherent jurisdiction that the marriage was not recognised in England and Wales. However, the latter case was distinguishable as on those facts there was no contact between husband and wife; in this one, there was continuing regular and beneficial contact between RG and his wife.

In the light of the fact that there was no evidence before the court as to proof of foreign law (as to capacity and consent to marriage), the LA could not pursue an application for a declaration of non-recognition, although could choose to do so later. That left the question as to whether a declaration should be made that the OS should present a petition for a decree of nullity on RG's behalf, there being no question that RG personally lacked any capacity to do so, and the Court of Protection being unable to annul a marriage itself. Such a declaration could in principle be made by the Court of Protection. S. 1 (5) MCA 2005 and the best interests test applied.

RG regularly used the words “wife” and “marriage”. His wife SK would visit him several times per week and he gained pleasure from that. He reacted badly to references to divorce, and when told by his brother that SK might be deported, he reacted extremely badly and aggressively. RG said he loved his wife and that he was said when she left and went to the bus stop. Holman found that
RG’s wishes, notwithstanding that he lacked capacity on the issue, were clearly to remain married to SK, and not to petition for a decree of nullity. RG had some awareness of being a Sikh, and in a simple way, participated in the practices and observances of that culture, and it was found that if he had had the capacity to contract the marriage it does not seem likely that he would have wished to bring shame and ostracism on his wife by divorcing her or seeking to annul their marriage.

Holman went on to say that he was completely unpersuaded that RG’s best interests required or justified the annulment of the marriage, declining to make the declaration sought in this regard by the LA.

23. An example of the terms of FMPOS and their operation:

**A-v-SM and HB (Forced Marriage Protection Orders) 2012 EWHC 435 (Fam) [2012]2 FLR 1077**

“Remedies” for forced marriages/marriages which are held to be invalid

24. In the case of a person who lacked capacity but who has nevertheless entered into a ceremony of marriage, what is the appropriate remedy?


**s. 12 Matrimonial Causes Act 1973**

*Grounds on which a marriage is voidable.*

A marriage celebrated after 31st July 1971 shall be voidable on the following grounds only, that is to say—

(a) that the marriage has not been consummated owing to the incapacity of either party to consummate it;

(b) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate it;

(c) that either party to the marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise;
(d) that at the time of the marriage either party, though capable of giving a valid consent, was suffering (whether continuously or intermittently) from mental disorder within the meaning of the Mental Health Act 1983 of such a kind or to such an extent as to be unfitted for marriage;

(e) that at the time of the marriage the respondent was suffering from venereal disease in a communicable form;

(f) that at the time of the marriage the respondent was pregnant by some person other than the petitioner.

(g) that an interim gender recognition certificate under the Gender Recognition Act 2004 has, after the time of the marriage, been issued to either party to the marriage;

(h) that the respondent is a person whose gender at the time of the marriage had become the acquired gender under the Gender Recognition Act 2004

13 Bars to relief where marriage is voidable.

(1) The court shall not, in proceedings instituted after 31st July 1971, grant a decree of nullity on the ground that a marriage is voidable if the respondent satisfies the court—

(a) that the petitioner, with knowledge that it was open to him to have the marriage avoided, so conducted himself in relation to the respondent as to lead the respondent reasonably to believe that he would not seek to do so; and

(b) that it would be unjust to the respondent to grant the decree.

(2) Without prejudice to subsection (1) above, the court shall not grant a decree of nullity by virtue of section 12 above on the grounds mentioned in paragraph (c), (d), (e) (f) or (h) of that section unless—

(a) it is satisfied that proceedings were instituted within the period of three years from the date of the marriage, or

(b) leave for the institution of proceedings after the expiration of that period has been granted under subsection (4) below.]
(2A) Without prejudice to subsection (1) above, the court shall not grant a decree of nullity by virtue of section 12 above on the ground mentioned in paragraph (g) of that section unless it is satisfied that proceedings were instituted within the period of six months from the date of issue of the interim gender recognition certificate.

(3) Without prejudice to subsections (1) and (2) above, the court shall not grant a decree of nullity by virtue of section 12 above on the grounds mentioned in paragraph (e) (f) or (h) of that section unless it is satisfied that the petitioner was at the time of the marriage ignorant of the facts alleged.

(4) In the case of proceedings for the grant of a decree of nullity by virtue of section 12 above on the grounds mentioned in paragraph (c), (d), (e) (f) or (h) of that section, a judge of the court may, on an application made to him, grant leave for the institution of proceedings after the expiration of the period of three years from the date of the marriage if—

(a) he is satisfied that the petitioner has at some time during that period suffered from mental disorder within the meaning of the Mental Health Act 1983, and

(b) he considers that in all the circumstances of the case it would be just to grant leave for the institution of proceedings.

(5) An application for leave under subsection (4) above may be made after the expiration of the period of three years from the date of the marriage.

26. A case where the applicant had capacity but the period of 3 years had lapsed, barring a nullity petition:

SH-v-NM (Marriage: Consent) [2009] EWHC 324 (Fam) [2010] 1 FLR 1927
High Court Moylan J

The applicant was aged 16 (by one day) at the date of her marriage in Pakistan to a man aged 27. She returned to England and subsequently went to the police alleging that she had been forced into the marriage, that she had not consummated it, that she had been beaten by the man, and that her family
were pressurising her to return to Pakistan. She received help from the UK authorities, however in confused circumstances she returned to Pakistan, to be removed by the writ of habeas corpus prepared by the British High Commission in Islamabad and an order from the Pakistani court. Following her return to England, she underwent a ceremony of marriage with another man, with whom she had a child. More than 5 years after the Pakistani marriage ceremony, the Pakistani man, who had been granted indefinite leave to remain, and who was now a British citizen, applied for a divorce on the grounds of her unreasonable behaviour. She responded by seeking a declaration under s. 55 (c) of the Family Law Act 1986 that the marriage had been invalid for lack of consent. A jointly instructed expert gave evidence to the court on Pakistani law. Under s. 13 of the Matrimonial Causes Act a grant of nullity could only be made on the basis of lack of consent within 3 years of the date of the marriage. Under s. 58 of the 1986 Act the court could not make a declaration that a marriage was at its inception void.

Held:

The marriage was valid only if both of the parties had, according to the law of their respective ante-nuptial domiciles, validly consented to marry the other. In this case, because the law concerning consent was essentially the same under both Pakistani and English law, it made no difference whether the general rule that the essential validity of a marriage was governed by the law of each party's ante-nuptial domicile also applied to the issue of consent. It was, in any event, appropriate in this case to apply the personal law of each party to the issues to be determined.

The marriage was invalid because the girl had not validly consented to being married to the man, in that her free will had been overborne as a result of the pressure exerted upon her.

The effect of the lack of consent under Pakistani law was that the marriage was invalid, whilst under English law, the marriage was voidable, but as regards the English court, the time within which a decree of nullity on the ground that the marriage was voidable could have been made had passed,
and further, the court had no power to declare either that the marriage at its inception was not a valid marriage or was a void marriage.

Equally, there was no justification for the marriage being invested under English law with any greater status than it would be accorded under Pakistani law. No lawful marriage had taken place, and a declaration that there was no marriage between the man and the girl that was entitled to recognition as a valid marriage in this jurisdiction was a far more appropriate and just remedy in the circumstances of this case to that potentially provided by a decree of divorce: City of Westminster v IC (by his Friend the Official Solicitor and KC and NN 2008 EWCA Civ 198 applied.

A Local Authority- v-X and Anor (Children) 2013 EWHC 3274 (Fam) High Court Holman J

X, aged 14 at the time, travelled with her family to Pakistan where, under duress, she underwent a ceremony of marriage to a 24-year-old man. She became pregnant and returned to England. The LA commenced care proceedings in respect of X and the baby. The LA sought a declaration of non-recognition of the marriage in Pakistan under the inherent jurisdiction of the court. The court found that X was domiciled in England at the time of the marriage and the validity of the marriage was therefore governed by the Marriage Act 1949, which stipulates that if either party to a marriage (which may be extra-territorial) is under 16 the marriage would be void.

Held:

X was now almost 17 and had ample age and mental capacity to do so, being of normal maturity and intelligence. There was no statutory gap in this case.

The court refused to grant the declaration of non-recognition as X had grounds for issuing a petition for nullity based on her domicile being England and Wales and the marriage being void pursuant to s. 2 Marriage Act 1949. Nullity was an option and not statute-barred. The facts were very different to those in B-v-I (Forced Marriage) 2010 1 FLR 1721 where the marriage was void due to duress yet 3 years had lapsed and so a petition for nullity was not available.
Adreeja Chatterjee
No5 Chambers
+44 (0) 845 210 5555
ach@no5.com