

Chief Constable and AA v YK & 5 ORS

[2010] EWHC 2438 (Fam)

06/10/2010

Barristers

Henry Setright KC
Teertha Gupta KC
Michael Gration KC

Court

Family Division

Practice Areas

Private Children Law

Summary

It was usually inappropriate for special advocates to be appointed in proceedings concerning forced marriage protection orders under the Forced Marriage (Civil Protection) Act 2007.

Facts

In the course of an application by the applicant chief constable under the Forced Marriage (Civil Protection) Act 2007 for a forced marriage protection order in respect of the fifth respondent (X), the court was required to consider the issues of disclosure and the appointment of special advocates. X, a 19-year-old girl, was a British national of Pakistani descent who had been born and brought up in the United Kingdom. Her parents wanted her to marry a man of their choosing (B). The court made a forced marriage protection order on the ex parte application of the chief constable and gave him permission not to disclose the evidence he relied upon. X and B nevertheless went through a form of marriage ceremony. At a subsequent directions hearing the court invited the Attorney General to appoint a special advocate and listed the case for consideration of the issues of disclosure and whether there was a need to appoint further special advocates. The Attorney General declined to appoint a special advocate. The issues were whether the case was one in which public interest immunity applied and, if it did, whether special advocates were required to deal with that issue.

Held

1) Special advocates were not called for in the instant case. In a forced marriage or “honour violence” case, the disclosure of sensitive information might well lead to a risk of serious harm to the source of that information. That was so in the instant case and there was a powerful argument for non-disclosure. However, it was immaterial whether that was to be identified as an issue of public interest immunity or one of non-disclosure based on a balance of rights under the European Convention on Human Rights 1950. What mattered was whether or not the special advocate procedure was appropriate in forced marriage cases. The answer would usually be “no”, and was certainly “no” in the instant case. The nature

of the relief given by the Act was protective, quasi-injunctive and did not depend on a complex factual matrix. Any order would stand in its protective capacity and might require certain information not to be disclosed. Since protection was the primary purpose of the Act, that was sufficient to justify the invocation of either public interest immunity or non-disclosure under the Convention. Since the use of special advocates was a matter of last resort, there had to be something that a special advocate could do which it would not be appropriate for the judge to do (see paras 87-89 of judgment). The court was entitled to take the view that any forced marriage was a breach of human rights, and that where a responsible body such as the police had credible information sufficient to form the basis of court orders, an issue arose which entitled the court to act and make orders, irrespective of the truth or otherwise of the information leading to the application. In the instant case a special advocate was not needed to assist on the disclosure or public interest immunity issue. The judge was in a position to resolve those issues and there was nothing that a special advocate could do that he could not properly do. (2) Nor was a special advocate needed to resolve the issues of fact on any application to discharge, T (Wardship: Impact of Police Intelligence), Re (2009) EWHC 2440 (Fam), (2010) 1 FLR 1048 distinguished. The court was bound by the provisions and approach of the Act, which were essentially protective, empowering ex parte action. X's parents had not applied to set aside the order and the only issue was whether it should be set aside on the application of X herself. That depended on her wishes and feelings, which the court was taking steps to ascertain, and there was no role for a special advocate (paras 93-97). That would be so even if there were factual issues requiring investigation. Given the protective nature of the court's jurisdiction, the judge could decide whether or not the order should stand without either detailed investigation of the factual issues or the intervention of special advocates. (3) It was arguable that art.6 of the Convention was not engaged on an application for a forced marriage protection order, the forcing of a person into marriage being neither a civil right nor an obligation. In any event, since the exercise of jurisdiction was permitted ex parte and on the basis of the applicant's belief, a respondent's right to apply to set the order aside did not entitle him to access to information which, if abused, would lead to serious breaches of the rights of the person to be protected. An application to set aside the order was, however, likely to engage art.6; a person against whom the order had been made might well deny forcing a marriage and might assert that the order represented a breach of their art.8 rights. Nonetheless, his right to a fair trial did not entitle him to see all the information in the case, B (Disclosure to Other Parties), Re (2001) 2 FLR 1017 Fam Div followed (paras 100-102).

Permission

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