CASE SUMMARY OF THE COURT OF APPEAL CASE:
RE SA (*BY HER LITIGATION FRIEND, THE OFFICIAL SOLICITOR*) (DECLARATION OF NON-RECOGNITION OF MARRIAGE) [2023] EWCA CIV. 1003

Reflecting on the cases I have worked on over the past 12 months, this one stands out. The case concerned an appeal regarding the High Court's inherent jurisdiction to make a declaration that a marriage is not recognised as valid in England and Wales, in respect of a vulnerable lady with care and support needs, who was taken abroad for an arranged marriage.

The proceedings began in October 2019 when the local authority made an urgent application to the High Court for a Forced Marriage Protection Order ('FMPO') in respect of SA and another, following safeguarding concerns being raised about a forced marriage.

BACKGROUND OF ISSUES IN THE CASE

At the time of the court application, SA was 20 years old with moderate learning disabilities and assessed to have needs for care and support under the Care Act 2014.

SA attended day services and on 7th October 2019, the day service provider reported that SA's father had told them that SA had travelled to Bangladesh as her aunt was seriously ill, which led to a safeguarding alert.

On 11th October 2019, Adult Social Services were informed that SA had gone to Bangladesh to be married and SA was apparently not aware that this was the plan. The Police were informed, and the incident reported to the Forced Marriage Unit.

Social Services were later informed that SA was engaged on 13th October and her wedding would be on 23 or 24th October 2019. It was later established that SA, whilst in Bangladesh, was married on 25th October 2019.

The Official Solicitor was invited to act on behalf of SA who was assessed to lack litigation capacity and a FMPO was made on 25th October 2019 in respect of SA.

The court granted permission for an independent mental capacity assessment of SA's capacity to make decisions in relation to:

- Marriage
- Sexual relations
- Litigation.

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The independent expert's recommendation in the first report was that SA be given the opportunity to receive further education in relation to both marriage and sexual relationships and for her capacity to be re-assessed thereafter.

This was undertaken and the re-assessment concluded that SA lacked capacity in respect of the relevant issues (referred to above).

Given the lack of capacity, the local authority considered the Mental Capacity Act 2005 and applied to the Court of Protection seeking declarations in respect of SA's capacity. It also sought declarations under the High Court's inherent jurisdiction that the marriage was a nullity or alternatively that the marriage should not be recognised.

As part of the proceedings, an independent expert psychologist was instructed to assess SA's diagnosis of learning disabilities. This assessment confirmed SA's diagnosis of Moderate Intellectual Disability.

COURT JUDGMENTS IN THE FIRST INSTANCE

A contested hearing took place in February 2022 focussing on SA's capacity and at which the court heard oral evidence from three social workers, the parents and the independent expert mental capacity specialist.

Mr Justice Newton handed down the first judgment on 21st February 2022. This determined that SA lacked capacity to enter into a marriage and engage in sexual relations, both at the time of the court hearing, and at the time of her wedding on 25th October 2019. The Judge made declarations under s.15 of the Mental Capacity Act 2005 accordingly.

A second hearing took place on 18th May 2022 to look at relief following the court's determination of SA's capacity (as detailed above). The local authority sought an order for non-recognition of SA's marriage.

On 26th May 2022, Mr Justice Newton handed down his judgment and made a declaration of 'non-recognition of marriage'.

APPEAL

An appeal was brought by the mother on the grounds that the High Court lacked the power under its inherent jurisdiction to make a non-recognition declaration. The final FMPO and the declarations as to SA's lack of capacity to marry and to engage in sexual relations were not subject to appeal. The appellant relied on the judge's obiter observations in the case of *NB v MI (Capacity to Contract Marriage) [2021] EWHC 224 (Fam)*, which cast doubt on the Court of Appeal's decision in *Westminster City Council v C and Others* [2009] Fam 11 ("*Westminster CC*").

The parties in the proceedings were SA's mother (appellant), the local authority, SA's father and SA (by her litigation friend, the Official Solicitor). The appeal was opposed by the local authority and the Official Solicitor.

Permission to appeal was granted by the Rt. Hon. LJ Peter Jackson on the basis that he did not consider that the appeal had a real chance of success in relation to the judge's declaration, however, the judge was faced with submissions "*about the existence of the power and the criteria for exercising it*" and he noted that similar arguments are likely to be made in other forced marriage cases, noting "*There is therefore a compelling reason for them to be fully considered by this court*".

The appeal hearing at the Court of Appeal took place on 22nd February 2023 and the case was live- streamed on You-Tube, in order "*to increase open justice and improve public access and understanding of the justice system. This means that high profile and legally significant cases in the court would be made available"*.

OUTCOME

Following a reserved judgment, the Court of Appeal handed down its judgment remotely on 30th August 2023; the appeal was dismissed for the reasons below.

In its determination, the court restated that, as accepted by the appellant, the marriage in this case was a forced marriage, and in respect of a person who has a significant learning disability. The court also reiterated that public policy in respect of forced marriages is clear and is replicated in civil law by giving the courts power to make a FMPO, and in the criminal law provisions, which make forcing someone to marry a criminal offence.

The court considered the legal framework in terms of forced marriages, the differences between 'void' and 'voidable' marriages under the relevant legislation, in addition to analysing the issue of public interest in terms of whether a marriage is entitled to be recognised and public policy grounds.

The court noted that it is "*bound by this court's decision in Westminster CC which expressly decided that the court has power to make a declaration of non-recognition in respect of a voidable marriage*" and held that "*the present case is indistinguishable from that case. As in that case, the marriage in this case is voidable because one party lacked the capacity to consent to marry."*

The court rejected the grounds of appeal because it did not consider that the declaration which the judge made bypassed the effect of the FLA 1986; the court therefore found that the judge was right to make a declaration and had the power to do so. The court further rejected the appellant's submission that *"severe violence or some other factor which showed a high degree of suffering"* is required before a declaration is justified, determining that a marriage has to be *"sufficiently offensive"* to be contrary to public policy and does not require physical violence or extreme suffering for it to cross this threshold.

On considering the facts of this case, the Court of Appeal held that, "*the judge was clearly entitled to decide that the circumstances of the marriage were sufficiently offensive to justify making the declaration*".

The appeal was therefore dismissed accordingly.

This was a very interesting case for me to be a part of because it covered multiple issues and involved a few different areas of law and legislation; it not only pushed me outside of my usual area of expertise, but it was also fascinating for me to be involved in a complex appeal case, with a landmark judgment. The experience was not only professionally enriching but also yielded a positive outcome for our local authority client and more importantly the vulnerable lady at the heart of this decision.

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