EXPLANATORY MEMORANDUM TO

THE FAMILY PROCEDURE (AMENDMENT NO. 2) RULES 2022

2022 No. 821 (L. 10)

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Family Procedure (Amendment No. 2) Rules 2022 amend the Family Procedure Rules 2010 ("FPR") which, with supporting Practice Directions, set out the practice and procedure to be followed in family proceedings in the High Court and the family court.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is England and Wales.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 The FPR, and amendments to them, are made by the Family Procedure Rule Committee ("the FPR Committee") under section 75 of the Courts Act 2003 ("the 2003 Act"). Section 76 of the 2003 Act makes further provision about the scope of the FPR, including stating at sub-section (8) that the FPR "may, instead of providing for any matter, refer to provision made or to be made about that matter by directions". The FPR are formally allowed by the Lord Chancellor under section 79 of the 2003 Act. Section 79(1) of the 2003 Act requires the FPR Committee before making rules to meet (unless inexpedient to do so) and to consult such persons as they consider appropriate. The FPR Committee meets nine times a year and, except in very rare circumstances, considers any proposed matters for inclusion in the FPR in at least one meeting or in correspondence out of the FPR Committee. Consultation is addressed in section 10 of this memorandum.

7. Policy background

What is being done and why?

7.1 The FPR are amended from time to time, to reflect legislative changes and decisions of the courts or to improve the efficiency of the procedure and practice in family proceedings within the family court and High Court: this instrument makes amendments for both purposes and specifically makes the following amendments to the FPR:

7.2 Firstly, provision is made in relation to the service and notification to the police of Forced Marriage Protection Orders ("FMPO") and Female Genital Mutilation Protection Orders ("FGMPO"). The rule dealing with service of FMPO and FGMPO on the respondent and on any other person named in the order is amended so that instead of stating that the order must be served "as soon as reasonably practical" there is a fixed timescale requiring service within two days, unless otherwise directed by the court.

7.3 Also in relation to FMPO and FGMPO, a substituted rule 11.12 FPR will enable provision to be made in a Practice Direction for notification to the police when a FMPO or FGMPO is made, amended, extended, or discharged.

7.4 Secondly, this instrument inserts a new chapter 6A in Part 12 of the FPR to make special provision for international child abduction return cases in which the child is also an applicant, or a dependant of an applicant, for asylum or humanitarian protection in the UK ("linked protection claims"). International child abduction return cases should be dealt with quickly and a linked protection claim can slow down the decision or its implementation or lead to confusion about how the two cases interact. The insertion of the new chapter follows the judgment of the UK Supreme Court ('the UKSC') in G v G in March 2021, which involved such a case and in which the UKSC set out various practical steps ordinarily to be taken to enhance decision-making in them. The FPR already contain the powers to take such steps, but the new rule contained in new chapter 6A will ensure there is a procedure for the court hearing the return case to be made aware of the linked protection claim and to hold a hearing to consider exercising these powers. The specific procedure addresses the particular issues arising and should help to keep such cases moving.

7.5 Thirdly, the FPR make new provision in light of the fact that the Domestic Abuse Act 2021 ('the 2021 Act') introduces the Domestic Abuse Protection Order ('the DAPO'), a new court order that brings together the strongest elements of other protective orders used in domestic abuse cases into a single, comprehensive protective order. The DAPO also goes beyond existing orders to protect victims of domestic abuse and address perpetrator behaviour as, alongside prohibitions, the court can impose positive requirements (requirement to actively do something, like attend a behaviour change programme) and electronic monitoring. Additionally, the DAPO will be available in the family, civil and criminal court jurisdictions and can be applied for by victims, third parties either specified in regulations or with leave of the court, and the police.

7.6 The DAPO will be piloted from early 2023 for two years, ahead of national roll out. The amendment to Part 36 of the FPR enables the procedures and processes that will underpin the operation of DAPOs in the family court and the Family Division of the High Court for the duration of the DAPO pilot to be provided for in temporary practice directions limited to the duration of that pilot, with permanent provision in rules being established once the pilot is completed.

Explanations

What did any law do before the changes to be made by this instrument?

7.7 Firstly, prior to April 2021, there were concerns that FMPOs and FGMPOs were not being communicated to the police in a timely or accurate manner, as the FPR required applicants to send copies of orders to their local police station. A pilot Practice Direction making provision for the notification of FGMPOs and FMPOs to the police was launched in April 2021, which required the court to send notification of an order to a centralised police email address as soon as the order was made and sealed by the court. The pilot also made provision for the police to be notified by the applicant (or by the court, where it is to effect service on the respondent) as and when an order was served on the respondent, or when the respondent was otherwise made aware of its terms. The email address to which these notifications were sent linked to the police's automated email forwarding system, which ensured that the order and notification were automatically forward to the relevant local police. The pilot has increased police awareness of orders from below 70 per cent to 98 per cent.

7.8 In light of the success of the pilot scheme, the FPR Committee agreed that permanent (as opposed to pilot) provision should be made in the FPR and supporting Practice Directions. It agreed that the detail of the way in which the police are notified about orders should be set out in a Practice Direction, to ensure that the detail of the procedure could be amended as needs be if the police's automated email system were to change. (This new rule 11.12 FPR links to section 76(8) of the Courts Act 2003, as referred to at paragraph 6.1 above). The intention is to put in place a new Practice Direction supplementing this new rule, to set out the procedure the court and applicants should follow to notify the police of FGMPOs and FMPOs.

7.9 Secondly, the FPR already give the court powers to take the steps to which the UKSC referred in G v G, but there is no existing provision on the specific procedure for handling international child abduction return proceedings where there is a linked asylum claim, including no duty on parties to make the court aware of the linked asylum claim so that the court can consider exercising its powers to make directions.

7.10 Thirdly, the DAPO is a new court order, which will be piloted from early 2023. The commencement provisions in section 90(7)-(9) of the 2021 Act enable the DAPO provisions in Part 3 of the Act to be brought into force though a pilot. Section 90 specifies that the DAPO provisions may be brought into force in relation to different areas (for example, specified police force regions) and for different purposes (for example, specifying that only certain positive requirements are available to the court to include in a DAPO). In addition, the commencement provisions enable the DAPO provisions to be in force for a specified period, i.e. temporarily for piloting purposes, with the ability to extend the period of the pilot, or permit the pilot to come to an end as necessary. The wording of the enabling rule is intended to allow practice directions to be made that are tailored to the piloted commencement of the DAPO provisions as provided for by section 90(7)-(9) of the 2021 Act.

Why is it being changed?

7.11 Firstly, as noted above, the notification of FGMPOs and FMPOs has been provided for in a pilot Practice Direction since April 2021. The intention now is to make permanent provision in a new Practice Direction, supplementing new rule 11.12 FPR.

7.12 Secondly, the absence of a specific procedural rule on international child abduction return proceedings with linked asylum claims means that there could be a lack of clarity as to how such cases should be notified to the court and what powers the court will consider exercising once it is made aware.

7.13 Thirdly, the amendment to Part 36 of the FPR enables practice directions to be made, which will set out the processes and procedures and practices that will underpin the operation of the DAPO in the family court and the Family Division of the High Court for the duration of the pilot.

What will it now do?

7.14 Firstly, in relation to FGMPO and FMPO, a new Practice Direction will be made to supplement new rule 11.12 FPR, as outlined above.

7.15 Secondly, the new rule in chapter 6A of Part 12 creates two new duties. The first is a duty on parties to a return case to tell the court as soon as practicable if they are aware of a linked asylum claim. The second is that the court, once it becomes aware of a linked protection claim, must hold a hearing as soon as practicable to consider making specified directions. These include directions about additional participation (including by the Secretary of State for the Home Department) in the return proceedings and the disclosure of documents between the return proceedings and the linked protection claim proceedings.

7.16 Thirdly, pilot practice directions will be required to set out the procedures and processes for the applications for and making of DAPOs during the DAPO pilot. The DAPO pilot will be commenced through separate commencement regulations made under section 90 of the 2021 Act closer to the time of pilot commencement.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 The FPR provide a unified set of rules for all types of family proceedings. There are currently no plans to undertake a consolidation exercise, instead the FPR as amended by this instrument will be published on the Family Procedure Rules website at the following link: https://www.justice.gov.uk/courts/procedure-rules/family/rules_pd_menu.

10. Consultation outcome

10.1 The FPR Committee must, before making Family Procedure Rules, consult such persons as they consider appropriate (section 79(1)(a) of the Courts Act 2003).

10.2 The Committee consults, as it considers appropriate to the rules or amendments to rules in question, in a number of ways of differing degrees of formality, including specific correspondence with bodies considered appropriate to be consulted; involving

representatives of interested organisations in reviewing particular aspects of the rules; inviting and reviewing suggestions and observations solicited by its members from among the groups from which each is drawn; and inviting and reviewing suggestions from relevant Government Departments and other authorities affected by rules of family procedure.

10.3 Firstly, in relation to the new provisions about FGMPO and FMPO, as noted above, a pilot Practice Direction designed to test the new approach to notifying the police about these orders was introduced in April 2021. The Ministry of Justice approached the organisations most affected by the pilot for their views on its operation and received positive feedback. The FPR Committee took this into account when deciding to make permanent provision in the FPR.

10.4 Secondly, the FPR Committee set up the International Family Working Group (IFWG) to consider the G v G judgment and make proposals about its implementation. Some members of the IFWG are not members of the Committee and as specialist legal practitioners their participation contributed an external perspective. In addition, the Home Office was consulted on the immigration terms used in the rule.

10.5 Thirdly, in relation to the introduction of the enabling rule for the purposes of the DAPO pilot, although no formal consultation was undertaken, views were sought from members of the judiciary involved in giving effect to the proposals, with a formal consultation on the pilot practice directions to be undertaken in due course.

11. Guidance

11.1 Amendments to the FPR are drawn to the attention of participants, to members of the judiciary, to other relevant representative bodies (for example the Law Society, Bar Council, advice sector) and to the editors of relevant legal publications by the FPR Committee secretariat; as well as by publicity within Her Majesty's Courts and Tribunals Service. News of changes affecting the family jurisdiction are published on the Ministry of Justice website referred to in paragraph 9.1.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 A full Impact Assessment has not been prepared for this instrument because no, or no, significant, impact on the private, public or voluntary sectors is foreseen.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is for the amendments to form part of the FPR which are kept under continuous review by the FPR Committee, and may be subject to amendment accordingly.

14.2 The instrument does not include a statutory review clause.

15. Contact

15.1 Simon Qasim, Committee Secretariat, at the Ministry of Justice: Telephone: 07540 271184 or email: Simon.Qasim3@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Neal Barcoe, Deputy Director for Family Justice Policy, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 Lord Bellamy, Parliamentary Under Secretary of State in the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.