

Case No: ZC20P01485

**IN THE FAMILY COURT AT WEST LONDON**  
**SITTING AT THE ROYAL COURTS OF JUSTICE**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 2 November 2021

**Before:**

**RECORDER BRIGGS**

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**RE: CHILDREN (PRIVATE LAW: COVERT RECORDINGS: ADJOURNMENT OF  
FINAL HEARING)**

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**Mr Gration** (instructed by **The International Family Law Group**) for the **Applicant**  
**Ms Hobbs** (instructed by **Fountain Solicitors**) for the **Respondent**

Hearing dates: 1-2 November 2021

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**JUDGMENT**

## Recorder Briggs:

1. This is an application by a mother for permission to remove two children from this jurisdiction to live in another country. The case was listed for a three-day trial commencing on 1 November 2021 to determine whether there had been domestic abuse in the parental relationship, which would be relevant to the decisions the court is to make about the children's future arrangements.
2. The areas in dispute include whether F was physically violent to M and whether he acted in a coercive/controlling manner towards her. At the most recent hearing on 7 October 2021, both parents were given the opportunity to file further statements of evidence, first M and then F, if so advised.
3. On 15 October M filed a statement to which she attached a number of exhibits, including copies of bank statements and flight details. Amongst those exhibits were five pages which purported to be transcripts of three conversations she had had with F; one in December 2020 and two in June 2021. She said she had recorded those conversations because at handover F *'has deliberately raised something provocative, often in front of the children'*. F was unaware he was being recorded.
4. No formal application was made for permission to adduce these purported transcripts. F did not raise any objection to them being filed at any point between 15 October 2021 and the first day of the trial. He did not take up the opportunity to file a statement in response.
5. I received the trial bundle on Friday 29 October and position statements were due to be filed on that day but were not provided. I was however invited by counsel via email to start the evidence in the afternoon of the first day of the hearing, which was not opposed.
6. On the morning of Monday 1 November, having read the trial bundle, I was provided with position statements from the advocates for both parties. The document filed on F's behalf said that M ought to have sought permission to rely on the purported transcripts and I should refuse to admit them. Those transcripts were already in the Court bundle, with no prior objection having been made.
7. In her position statement, counsel for F made reference to one authority, **Re A (A Child) (Hague Convention: Wrongful Retention)** [2021] EWHC 1204 (Fam), specifically to §20 at which Mr Justice Poole, then refusing an application to rely upon recordings of his video contact with a subject child, for which he had not obtained permission in advance. Mr Justice Poole said:

*On 25 March 2021 I dismissed the father's application to rely on these recordings as evidence at this hearing. I did so because they had been made covertly and the father had sole control over what was recorded and could have steered recorded conversations with his child to suit his purposes.*

*Hence, the evidence would be of very little weight. Further, the use of covert recordings, including of contact with a child, was a breach of trust with the child and the other parent and should be strongly discouraged by the court.*

8. Counsel for F in this case said that she knew of no rule that requires a litigant to seek permission before relying on audio evidence, but it was in her experience best practice that such applications be made.
9. I considered rule 22.2 FPR 2010 which states that evidence must be oral at final hearing or written at other hearings. I have also considered rule 23.2 FPR 2010, which does require any party who intends to rely on hearsay evidence at a final hearing to comply with s2(1)(a) of the Civil Evidence Act 1995 by giving advance notice of that intention and to give, on request from the other party, particulars of or relating to the evidence which would enable the other party to deal with any matters arising from its being hearsay.
10. I have also had regard to **Re B** [2017] EWCA Civ 1579 in which the Court of Appeal considered a judgment of His Honour Judge Bellamy, which was premised on there being a requirement for permission before adducing audio evidence. Sir James Munby said at § 23:

*The first [concern] relates to the premise underlying the whole of the judge's analysis under this heading, namely that, as he put it (para 114), "Anyone seeking to rely on such material must ... apply to the court for permission." FPR 22.1, to which he refers, undoubtedly empowers the court (FPR 22.1(1)) to "control the evidence" and (FPR22.1(2)) to "exclude evidence that would otherwise be admissible." But that is not the same as saying that the permission of the court is required before lawful, relevant and otherwise admissible evidence can be adduced. This is a matter that requires more detailed analysis, including of the FPR, before one can safely conclude that what the judge said is correct.*

11. I have not had the benefit of any such detailed analysis at this hearing and I am aware that there is a working group dealing with the treatment of covert recordings in family proceedings which has yet to report on this issue.
12. It was not accepted on M's behalf that she was under any duty to put F on notice that she intended to rely on this audio material, to reveal at the point of disclosure whether these transcripts represent an edited tranche of a recording, to reveal whether she had other covert recordings of F in her possession on which she did not seek to rely or indeed to provide any copy of the audio for inspection upon filing the statement with these purported transcripts attached.

13. During the hearing and in response to questions from me, M accepted through her counsel that the purported transcripts *were* taken from longer recordings running to at least 4 hours and 40 minutes in total. M also admitted that she had at least a hundred other covert recordings of interactions with F which she had not disclosed to him or to this Court.
14. In response, counsel for F said that these recordings may hold information that otherwise is relevant to the fact-finding process and upon service of the audio, F may seek to rely on some of that material at trial. Without going into the detail of those arguments, they struck me as having considerable force. It was agreed that all recordings be served on F and that F's counsel would endeavour to listen to three conversations of which M sought to rely on edited clips before deciding what applications he wished to make. The recordings were not served on F's counsel until 10pm that night owing to technological problems.
15. Ultimately, on day two of the hearing, the advocates agreed that an adjournment was necessary to give F the opportunity to consider the full recordings.
16. I granted the application to adjourn. M had exhibited the purported transcripts to her statement with minimal information as to the selection and editing of the recording, leaving it to F to raise these issues. He did not do so until the start of the trial. This meant that the obvious complexities raised by this type of evidence were not brought before the Court to be tackled in advance. This in turn led to the collapse of this hearing with serious consequences to the children who are at the heart of this dispute.
17. The impact on the children is that there will be a delay in decision-making for them. There is no court availability to hear this adjourned trial until May 2022, in 6 months' time. Proceedings were issued nearly a year ago and the only reason for this delay is the lack of effective management of the audio evidence. This should not have happened. The production of audio and video material in family proceedings is now a frequent occurrence and there are obvious issues surrounding editing, quality of any transcription, production of original footage and wider context which must be case managed in advance of a trial. Even if that is not a matter of law (and I have yet to hear full argument on that issue), it is quite obvious from a practical perspective.
18. Both parties have instructed lawyers privately and F's counsel has said she may instructed to pursue an order for costs against M as a result of adjournment of this hearing. Any such argument will need to deal fully with the law on the proper practice and procedure when seeking to rely on audio evidence at a final hearing or trial. Whatever the outcome of that application, the adjournment of this hearing would have been avoided had there been earlier and proper thought given to the management of audio recordings in evidence.

Recorder Briggs

3 November 2021