Neutral Citation Number: [2024] EWCA Civ 1265

Case No: CA-2024-001167

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
FAMILY DIVISION
HIS HONOUR JUDGE MIDDLETON-ROY
FD23P00583

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 October 2024

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE PHILLIPS
and
LORD JUSTICE LEWIS

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Re: S (Children) (New Evidence)

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Anita Guha KC and **Lubeya Ramadhan** (instructed by **Brethertons LLP**) for the **Appellant**
Michael Glaser KC and **Ewan Murray** (instructed pro bono through **Advocate)**
for the **Respondent**

Hearing date: 3 October 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 24 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Moylan:

1. The mother appeals from the judgment given by His Honour Judge Middleton-Roy, sitting as a Deputy High Court Judge, on 2 May 2024. She seeks to challenge the findings made by the judge, in particular as to the circumstances in which her children travelled without her from their home with her in Afghanistan and came to be living with the father and his partner in England.

2. I gave permission to appeal on all the Grounds relied on by the mother because it seemed to me that they raised significant questions about the judge's approach to the evidence and his findings. However, it is no longer necessary to determine those Grounds. This is because, in the meantime, pursuant to an order which had been made by the judge following his judgment, the Home Office has given disclosure of a large number of documents relating to a number of immigration applications (for entry visas and for leave to remain) made variously by the father and the children. The mother sought permission to rely on these documents in support of her appeal. At the hearing, we refused the father's application for an adjournment and gave the mother permission, as explained further below. This led Mr Glaser KC for the father effectively to accept that the appeal had to be allowed and the matter remitted for rehearing because the new evidence materially undermined or potentially sufficiently undermined the judge's findings as to require a rehearing. He was clearly right to do so. This means it is not necessary to address the mother's original grounds of appeal and that it is only necessary to give a brief explanation for our decision.

3. At the hearing of the appeal, the mother was represented by Ms Guha KC (who appeared below) and Ms Ramadhan and the father was represented by Mr Glaser KC and Mr Murray (who appeared below) both of whom have acted pro bono through Advocate. We are grateful to all the advocates for their submissions but particularly to Mr Glaser and Mr Murray for acting pro bono.

Background

4. The mother and the father are both Afghan nationals. They married in 2009. They have two children who were born and brought up in Afghanistan until they travelled to England with their father in the middle of 2023. The mother has always lived, and still lives, in Afghanistan. There is some dispute about where the father has lived in recent years and how much time he has spent in Afghanistan but certainly in, at least, the early years of the marriage and until 2017/2019 he lived with the mother and the children in Afghanistan.

5. As referred to above, the children travelled to England with the father in 2023. Since then they have been living with the father and his partner (who I will call R). I have referred to her as his partner because, although they apparently went through a ceremony of marriage in England in 2019, the effect of this ceremony and whether it created a valid marriage may be in question.

6. The mother commenced proceedings in England in November 2023 seeking the return of the children to Afghanistan. She asserted that the children had been removed from Afghanistan without her agreement. She made a number of other allegations which I do not need to include in this judgment.

7. At a very early stage in the proceedings, and before the father had filed his statement, the Home Office was requested to provide certain limited information as to the immigration status of the father and the children in the UK. This information was promptly provided and disclosed that the father had been granted "Family/Private Life" leave to remain in 2021, valid until 2024, while the children had been granted leave to enter as "Dependent Child Family Member" in 2023, valid until June 2024.

8. In response to the proceedings, the father asserted that the mother had consented "on multiple occasions" to the children coming to live with him in England. He referred to a "visa application" which he said had been made for the mother and relied on a letter dated May 2022 addressed to the Pakistan Embassy in Kabul.

9. The father objected to the children being returned to Afghanistan for a number of reasons which included the quality of the care they had received from the mother which he described as abusive. The father relied on a letter from the relevant English Local Authority dated January 2024 which recorded what they had been told by the father when they had made a welfare visit in late 2023.

> "During the visit, family reported that they feel the girls are now safe in the UK, away from their mother in Afghanistan where they experienced various forms of abuse including physical abuse. [The father] stated that he took the decision to bring his daughters to the UK as there are no rights for girls in Afghanistan and he would like his daughters to have access to education and a better life in the UK. He also wants to live together as a family with his new wife … who is supportive of his decision and has assisted him in bringing the girls over to the UK. [The father and his new wife] both report that they have been through the appropriate legal channels and their case is being processed with the home office and they have a solicitor dealing with the matter."

10. The children were seen by a Cafcass Officer. They told her that they did not want to return to Afghanistan. Their reasons included how they said they had been treated by the mother.

11. At the hearing, the judge heard oral evidence from the parents and the Cafcass Officer. The nature of this appeal means that my focus is on the father's evidence. In doing so, this is not to give any indication as to the outcome of the rehearing.

12. Some key parts of the father's evidence as recorded in the judgment below were as follows. He said that "it was always his intention that [the mother] should come to the United Kingdom"; this "remains his intention" and "he will do all he can to help her come to the United Kingdom legally". He had "sought to apply in 2022 for visas for the whole family". He had "married his second wife in England in 2019 whilst still married to the mother".

13. We have also been provided with a Note of the oral evidence as prepared by the mother's solicitors. The father said that he had planned on the mother travelling to England for a "very long time"; that his intention when he came here with the children was that she would be joining them; that she would live "somewhere close to me"; and

that he had taken "steps towards visa"; and that he had told the mother "hundreds of times" that he was expecting her to come to England. He also told her that he was "doing everything" to obtain a visa for her. The father accepted that only he, and not the mother, had signed the visa applications for the children to enter England.

14. The father also said that he was *not* intending to divorce the mother and that he understood that taking steps to divorce her would "sabotage any visa application" on her behalf.

Judge's Judgment

15. Early in his judgment, the judge referred to Cobb J's decision of *Re B-B (Domestic Abuse: Fact-Finding)* [2022] 2 FLR 725, in which Cobb J summarised the principles applicable when the court is making findings of fact. I mention two of these.

16. The first comprises a quote from McFarlane LJ's (as he then was) judgment in *Re R (Children) (Care Proceedings: Fact-finding Hearing)* [2018] 1 WLR 1821 ("*Re R*"):

> "[62] … The primary purpose of the family process is to determine, as best that may be done, what has gone on in the past, so that that knowledge may inform the ultimate welfare evaluation where the court will choose which option is best for a child with the court's eyes open to such risks as the factual determination may have established."

17. The second was what Cobb J said, at [26(ix)], namely:

> "The evidence of the parties themselves is of the utmost importance. It is essential that the court forms a clear assessment of their credibility and reliability"

18. The judge found that "the evidence of the father was consistent on the material, core issue", namely whether the mother had agreed to the children moving to live without her in England. His assessment of the parents was starkly contrasted. He considered that the father had given his evidence "in a straightforward manner, without evasion" and concluded that, "overall, [he] *found the father's oral and written evidence to be largely consistent on the core, material issues*" (emphasis added). In contrast, he considered the mother an unreliable witness such that he "could not properly attach weight to her evidence". These conclusions clearly formed the critical, or fundamental, foundation for his determination of the factual disputes which included that the mother *had* consented to the children moving to live in England. For this and other reasons, as explained in the judgment, the judge dismissed the mother's application for a summary return order.

19. The judge did not dismiss or conclude the proceedings as he decided that there were further welfare issues which required determination including, in particular, the issue of contact between the mother and the children.

20. At a further hearing on 1 July 2024, the judge ordered the father, by 4pm on 8 July 2024, to "send to the mother's solicitors copies of all visa application made by himself and made on behalf of the children to enter and/or remain in the United Kingdom". We

were told that in response to this order the father provided one application. Mr Glaser said that this was because the documents were in the possession of the father's immigration solicitors. In addition, as referred to above, the Home Office was ordered to disclose all the visa applications and supporting documents submitted by or on behalf of the father and the children. This led to the disclosure on 10 September 2024 of approximately 700 pages.

Appeal

21. The mother does not seek to challenge the dismissal of her application for the summary return of the children. This is a commendably child-centred decision. She does, however, challenge the judge's findings which, it is submitted, are materially flawed. In support of this submission, Ms Guha seeks to rely on the new evidence which has been disclosed by the Home Office and which, it is submitted, undermines the judge's determination that the father's evidence was "largely consistent on the core, material issues". Ms Guha submits that the inconsistencies between what the father told the judge and what he told the Home Office are so significant that the interests of justice require the matter to be reheard.

22. Mr Glaser suggested, perhaps tentatively, that the appeal was academic because the mother no longer sought the children's return to Afghanistan and because even if one, or all, of the findings were set aside this would have no effect of the welfare inquiry. He also made a number of other submissions which I will deal with below.

Determination

23. I, first, deal briefly with preliminary issues raised by Mr Glaser. The first was that the appeal should be adjourned to enable the father to adduce evidence in answer to the new evidence on which the wife sought to rely. This would merely have caused delay in the determination of this appeal and was plainly not justified.

24. The second was that the appeal is academic. With all due respect to Mr Glaser this is without merit. There are continuing welfare proceedings and, as Ms Guha submitted, the factual matters determined by the judge would clearly be highly relevant to those proceedings. I would refer again to what McFarlane LJ said as quoted above. Put simply, welfare issues cannot be addressed on the basis of the current judgment because the judge's findings are no longer sustainable in the light of the new evidence.

25. The other, briefly advanced, submission was that the proper course was for the mother to apply to the judge below to set the judgment aside. This might have been a route open to her but she had already commenced her appeal before the new evidence had been received. It would not be consistent with the overriding objective to require a further hearing before another court when we are clearly well placed to decide the mother's challenge to the judge's findings.

26. The next issue I propose to deal with, also briefly, is that the mother's appeal is from findings of fact. This ties in with the point which I have just made, namely that the court is determining facts relevant to future welfare decisions. Any such judgment has to be appealable otherwise the purpose of the process would be compromised. It has, therefore, long been established that there is jurisdiction to hear an appeal from a fact-

finding judgment: see, for example, *In re B (A Minor) (Split Hearings: Jurisdiction)* [2000] 1 WLR 790.

27. It is also, in respect of appeals governed by them, permitted by the Family Procedure Rules 2010. PD30A, para 3 provides:

> "Rule 30.12 (hearing of appeals) sets out the circumstances in which the appeal court will allow an appeal.
>
> The grounds of appeal should –
>
> (a) set out clearly the reasons why rule 30.12 (3)(a) or (b) is said to apply; and
>
> (b) specify in respect of each ground, whether the ground raises an appeal on a point of law *or is an appeal against a finding of fact*." (emphasis added)

28. The substantive issue is whether the mother should be given permission to rely on the new evidence under CPR rule 52.21(2)(b). This, again, is a well-trodden legal path. I propose only to quote what Peter Jackson LJ said in *Re E (Children: Reopening Findings of Fact)* [2020] 2 All ER 539:

> "[23] It has been said that the *Ladd v Marshall* analysis is generally accepted as being less strictly applied in cases relating to children: *Webster v Norfolk CC, Re Webster (children)* [2009] 2 All ER 1156 per Wall LJ at [135]. At [138] he continued:
>
> 'The rationale for the relaxation of the rule in children's cases is explained by Waite LJ in *Re S (minors) (discharge of care order)* [1995] 2 FLR 639 at 646, where he says:
>
> 'The willingness of the family jurisdiction to relax (at the appellate stage) the constraints of *Ladd v Marshall* upon the admission of new evidence, does not originate from laxity or benevolence but from recognition that where children are concerned there is liable to be an infinite variety of circumstances whose proper consideration in the best interests of the child is not to be trammelled by the arbitrary imposition of procedural rules. That is a policy whose sole purpose, however, is to preserve flexibility to deal with unusual circumstances. In the general run of cases the family courts (including the Court of Appeal when it is dealing with applications in the family jurisdiction) will be every bit as alert as courts in other jurisdictions to see to it that no one is allowed to litigate afresh issues that have already been determined.'"

and

> "[25] A decision whether to admit further evidence on appeal will therefore be directed by the *Ladd v Marshall* analysis, but with a view to all relevant matters ultimately being considered. In cases involving children, *the importance of welfare decisions being based on sound factual findings will inevitably be a relevant matter.* Approaching matters in this way involves proper flexibility, not laxity." (emphasis added)

New Evidence

29. In addressing this issue, and to explain why we decided that it was plainly in the interests of justice for the new evidence to be admitted, I propose to set out a brief summary of some of the more salient elements which emerge from the material disclosed by the Home Office. As will be seen, in significant respects, the information provided to the Home Office was inconsistent with the evidence the father gave to the judge.

30. I would first note that there is no evidence of any application being made for a UK visa on behalf of or including the mother.

31. The first relevant application made by the father was in *2017.* This was an application he made for a visa for himself *only* as "a partner under Appendix FM of the Immigration Rules". In that application, in answer to the question "What is your marital status" he replied "Fiancée/proposed civil partner" (being R). Also, strikingly, he said that he had *no* dependent children. This application was initially refused (apparently because it was not accompanied by a divorce certificate) but the decision was then overtured with the father being granted a visa in 2019.

32. The father "arrived" in England in early 2019. He went through a ceremony of marriage with R in England in the next month.

33. In an application made in April 2019 for leave to remain, the father said that he had divorced the mother on 25 January 2017. In this application, he stated that he had two children who were living with their mother. It was also stated that the father considered "the UK as his homeland and primary place of residence".

34. Among the documents provided with the father's applications was one, in *English,* headed "Legal Divorce Certificate" which purported to be a divorce or to evidence a divorce between the father and the mother on 7 January 2017. This document was relied on as a "divorce certificate". Another document relied on by the father was one dated 31 March 2019, again in English, which purported to be signed by the mother. It is headed, "To whom it May Concern" and states that the children "are currently living with me at … since my separation and divorce" from the father; and that "as per his demand and request he can get his doughters (sic) in order to facilitate them with good education and life style".

35. In an application for an extension of leave to remain dated 14 September 2021, the father stated that he had living in the UK for 2 years and 8 months although he had also been out of the UK for just over a year in 2020/2021.

36. In April 2022, an application was made by the children for leave to enter the UK as dependent children of the father. I repeat that there is no evidence of any application made by the mother. In this application it was said that details could only be provided of one parent. Further information was included in a covering letter which was not part of the bundle provided to us. The form required a "letter of consent" which had to be signed by both parents, except where only one parent had sole responsibility for the child. Such a letter of consent does not appear to have been provided or, at least, was not included in the bundle.

37. The final application is one by the father dated August 2024 on behalf of himself and the children. In this it was stated that the father had been out of the UK for 18 months because he went "to collect my children" from Afghanistan. Also, although reference is made to the mother, it was stated that "I have sole responsibility for my children". There is again reference to the father and mother being divorced in 2017.

38. As referred to above, it can be seen that the information provided by the father to the Home Office is different in significant respects to the evidence he gave to the judge. Ms Guha submitted that, taking the example of whether the mother and the father were still married, either the father had lied to the judge or he had lied to the Home Office. We have, of course, not determined this issue but on any view the new material would have had an "important influence" on the judge's determination not least because it challenges his conclusion that the father was consistent on the core, material issues. Indeed, as Phillips LJ observed during the hearing, the fundamental basis on which the judge's decision was made is wholly undermined or vitiated by this evidence.

39. For the avoidance of doubt, I would also add that, even if we were applying the criteria set out in *Ladd v Marshall*, they are comfortably satisfied in this case. As was observed by Phillips LJ at the hearing, there is no reason to suppose that this material was not available to the father through his immigration solicitors but he did not disclose it. Mr Glaser's suggestion that the father did not disclose it because he was not asked to do so does not assist the father. It is the effect of the evidence which is critical and Mr Glaser did not seek to suggest that there had been any obligation on the mother to procure and produce this evidence.

Conclusion

40. In summary, the mother must be given permission to adduce the new evidence which undermines the judge's findings to such an extent that none of them can stand. The mother's appeal must therefore be allowed and the matter remitted for rehearing before a Family Division Judge allocated by the President of the Family Division. It will be for that judge to decide the nature and scope of the rehearing. By that I mean that he or she is not bound by the case management decisions made to date which dealt with the evidential scope of the hearing.

Lord Justice Phillips:

41. I agree.

Lord Justice Lewis:

42. I also agree.