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Case No: FD13P01759

Neutral Citation Number: [2014] EWHC 2110 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

26 June 2014

Before :

THE HONOURABLE MR JUSTICE PETER JACKSON

Sitting at the Royal Courts of Justice

Between :

ZM

Applicant

-and-

AM

Respondent

Katy Chokowry (instructed by Dawson Cornwell) for the Applicant
Richard Harris (instructed by Petherbridge Bassra Solicitors) for the Respondent

Hearing dates: 23-25 June

Judgment date: 26 June

JUDGMENT

Mr Justice Peter Jackson:

1. Where one party to a failing marriage has secure immigration status and the other does not, the opportunity arises for the former to exploit the latter's weakness by taking advantage of immigration controls. This case is a bad, but by no means unique, example of what has come to be known as the stranded spouse. A very young wife was lawfully brought to the United Kingdom, where she was dependent upon her husband and his family, and where she gave birth to a child who has major disabilities. Her husband made little effort to secure for her the immigration status to which she was entitled and when the marriage got into difficulties, she was then sent out of the country with no right to re-enter. The result is that she and her child have been separated for the past three years, a situation that is a wholesale breach of their right to respect for their family life under Article 8 of the European Convention on Human Rights. The only way in which this breach can be remedied is by the mother regaining the ability to enter this country. The nature of the child's condition means that while his mother remains abroad there is no opportunity for any meaningful relationship between them.
2. The child, S, was born in 2005 and is nearly 9 years old. He has very severe learning and communication disabilities. His parents are both of Pakistani origin. The father was born in England while the mother came here in June 2002 after an arranged marriage that was celebrated in Pakistan in 2000 when she was around 15 years old. The parents are first cousins, the mother's mother being the sister of the father's father.
3. After the mother's arrival, the parents lived in the home of the father's parents, which was also occupied by one of the father's brothers and his family. The mother lived there between 2002 and July 2011, when she went alone to Pakistan. The father and S remained in the family home with the father's mother, his father having died in May 2013 and his brother and family having moved abroad. Since the mother's departure, the father has been the main carer for S, who attends a special school.
4. The father is a British citizen. His only visit to Pakistan occurred at the time of the marriage. The mother is a Pakistani citizen. Her efforts to remedy her immigration status have so far been unsuccessful, a visa that would have allowed her to attend this hearing having been refused in March 2014 despite a request from this court. That refusal is currently subject to appeal.
5. In December 2012, the father pronounced a talaq. In August 2013, the mother remarried in Pakistan. She says that this marriage was a marriage of convenience. Her father was planning to arrange for her remarriage to a person of his choice and she went through a ceremony of marriage with someone else to prevent this. Her evidence is that she has never lived with this "husband" and has no intention of doing so in future or of bringing him to the United Kingdom.

6. In September 2013, the mother began these wardship proceedings, claiming that she had been tricked by the father into going to Pakistan in 2011, with the result that she could not get back and has not seen S since.
7. The father denies the mother's allegations, saying that she went to Pakistan of her own accord (having gone alone for two months in the previous year) and that she has since remarried there. Her application is, he claims, a means of gaining immigration status for herself and her new husband.
8. Between February and July 2011, so just before the mother departed, there were proceedings concerning S in the County Court. These led to a residence order being made in the father's favour with the reported agreement of the mother. The father relies on this as showing that the mother went to Pakistan voluntarily. In response, she says that she knew nothing of those proceedings.
9. This has therefore been a hearing to consider the mother's allegations and to make consequential orders concerning S, who is presently a ward of court.
10. During the course of this hearing, I have heard evidence from the mother, from the father and a witness on his behalf, and from Mrs P, the CAFCASS officer in the 2011 proceedings. A report has been provided for this hearing by Mr John Power of CAFCASS.
11. The mother alleges:
 - (1) That during the course of the marriage she was subject to excessive control and occasional violence by the father and by his mother.
 - (2) That the father was engaged in drug-dealing and other criminal activity.
 - (3) That she had no knowledge of the 2011 proceedings and that the residence order was procured by fraud.
 - (4) Centrally, that she was tricked into going to Pakistan.
12. These claims are fundamentally disputed by the father. The mother bears the burden of proof on the balance of probabilities. In this case, a conclusion about where the truth lies depends on an assessment of the credibility of each parent in the context of other sources of information and of the inherent probabilities.

Assessment of the parents as witnesses

13. My ability to closely assess the mother was not helped by her inability to attend the hearing. The video link to Pakistan was adequate, but the mother was a somewhat voluble witness who created difficulties for the interpreter by

the length of her answers. Nevertheless, it was possible to assess her as a spontaneous and unguarded witness who gave evidence with conviction.

14. In contrast to the mother, the father was a somewhat unforthcoming witness who calculated his answers from all angles before giving them. He was frequently at a loss to explain why events should have happened as they did. His overall view was that the mother had made her bed and must now lie in it. He was plainly uncomfortable with the idea that she should have any meaningful role in S's future. He has described S as reacting badly to the death of his grandfather, but said that he had not been affected by the disappearance of his mother.
15. I turn to the mother's specific allegations.

Control

16. The mother complains that she was not allowed to go out on her own or to communicate freely with her family and that her activities with S were restricted. The father says that the mother often went out with or without S and that she had her own mobile phone, which she used regularly.
17. The only outside information about this comes from Mr Power: *"The school told me that the mother would visit the school but was always closely chaperoned, overshadowed and mediated by the paternal grandfather to an extent that was not culturally normative. They remember her looking very young and marginalised."*
18. It is inevitable that the mother, whose English is even now very limited, will have been dependent on the father and his family for support. However, and in the light of my findings on other issues, I accept that the father and his family did not foster the mother's ability to play an equal and independent role and that she will have felt a high degree of control over her activities.

Violence

19. The mother described several occasions on which the father and his mother would slap and kick her and pull her hair. These did not cause major injury and she did not seek medical treatment or, in general, complain to the authorities. However, on 7 February 2011, she did make a police report and went overnight to a refuge. She explains this as being because the father struck S on that occasion.
20. The father denies any violence whatever and I have not heard from his mother.
21. I note that the father has criminal convictions for

- (1) Violent disorder, committed in 2001 for which he received a sentence of 15 months in a young offenders institution;
 - (2) Assault occasioning actual bodily harm, committed in 2004 for which he received a community punishment order;
 - (3) Possessing an offensive weapon in a public place, committed in 2005, for which he received a community punishment order;
 - (4) Assault occasioning actual bodily harm, committed in July 2012, for which he received a sentence of 11 months imprisonment suspended for two years.
22. I also note that throughout the marriage the father maintained a relationship of some kind with a woman who had been a girlfriend of his in 1999 and that she complained to the police of two incidents of violence on his part in 2008. When making one report, she says that the incident arose after she had accused him of being unfaithful to her. This woman describes violence of a similar nature to that described by the mother.
23. I find that on a number of occasions during the marriage the father assaulted the mother in the way she describes. I accept her evidence and reject the father's denials. His description of himself as a calm person may apply for much of the time, but he is plainly capable of violence when displeased with someone, as he was with the mother on the occasions she describes. In the overall situation, it would have taken a lot for the mother to contact the police as she did in February 2011, and her explanation for this (that S had been slapped) was convincing.
24. I make no finding in respect of any violence by the father's mother, it not being necessary to do so and the court not having heard from her.

Criminal activity

25. The mother accuses the father of small-scale dealing in Class A drugs in the home, with detrimental effects on S (fumes from putting drugs in the microwave). The father denies this and points out that the reference in the 2011 CAFCASS safeguarding checks to him having a conviction of this kind is not borne out by the PNC disclosure. The mother also accuses the father of other criminal activity, such as car crime. I do not consider it necessary to reach a finding about this issue for the purpose of these proceedings.

The 2011 proceedings

26. The mother spent the night of 7 February 2011 in a refuge. The father persuaded her to return and by Wednesday 9 February she and S were back in the family home. The father went to see a solicitor on 10 or 11 February. On

Wednesday 16 February, the father's application, accompanied by a statement, was placed before the District Judge, who directed that it be heard on the following Monday (21 February), with time for service being abridged to 48 hours. The father's application was for a prohibited steps order preventing the removal of S from England and Wales and for a residence order in his favour.

27. In his statement, the father portrayed himself as S's main carer. He described how the mother had gone to the refuge for no good reason and how she was now possibly going to leave to go to Pakistan to pursue a relationship with someone else. He was concerned that she would attempt to take S with her.
28. At the same time, the father now says that he talked everything through with the mother, who was quite happy with his actions.
29. When the matter came before the court on 21 February it was adjourned to 24 February, the mother not having been served.
30. A Statement of Service was filed on 22 February, showing that the process server had personally served the mother at the family home on the afternoon of 21 February. The process server, a former police officer, certified that the mother was identified by her own admission and by the description provided by the father. Further questions have been put to the process server in these proceedings. He says that he is quite confident that the woman he served was the mother, although he probably did not have a photograph of her. She spoke English fluently enough to have a conversation. She said that she already knew about the court proceedings and that she had received papers from the father's solicitors, but had not responded.
31. On 24 February, the father and his solicitor appeared before the District Judge again. The mother did not attend, nor was she represented. An order was made preventing her from removing S from England and Wales. A further hearing was fixed for 11 April to allow for CAFCASS safeguarding checks. There is no information about that order ever being served on the mother.
32. The safeguarding checks were reported to the court on 8 April. The court's attention was drawn to the risk to S in the light of the mother feeling the need to move into a refuge, and also to the father's convictions.
33. On 11 April and again on 12 May the father and his solicitor attended, but the mother did not. The court apparently left it to the father to inform the mother of each successive hearing date.
34. At that hearing on 12 May, the father gave a home telephone number to CAFCASS. This appears as an 11-digit number ending in 944 against the father's name but ending in 994 against the mother's name.

35. On 1 July, Mrs P, an experienced CAFCASS officer held a telephone interview. A reliable interpreter called the family home to speak to the mother and asked a series of questions. The conversation was carried out in such a way that Mrs P could not hear what was being said in response to questions, but the answers were short. They were to the effect that the father's statement, which was interpreted over the telephone, was confirmed; that the mother had no particular reason for wanting to leave the family home but wanted to live separately and marry someone else; that everything was fine including her relationship with the father; that the father was S's main carer and that she supported him; that she had no concerns about the father's care of S and that if she did move out of the family home she would want contact; that she agreed to the father having a residence order; that she had never suffered domestic violence or involved the police; and that she had complete confidence in the father caring for S.
36. On 11 July, the matter again came before the District Judge. A transcript of the extremely short hearing shows that Mrs P told the court that the mother "*had nothing to complain about*". A residence order was made in the father's favour, concluding the proceedings. There had been five hearings, all attended by the father and his solicitor. The mother did not attend on any occasion or file a single document.
37. The father says that he kept the mother informed of every stage of the proceedings. He encouraged her to come to court but she refused, saying that she was happy to let him get on with it.
38. The mother says that she never knew that these proceedings were taking place at all and said in her evidence: "*Why should I give my son away?*" She described the order as having been obtained by lies and fraud, and denied receiving papers or speaking to Mrs P.
39. In her evidence, Mrs P said that in 2011 her service had been under considerable pressure. It was not a very long call and the responses were not as detailed as she would have wanted. In her mind, she was speaking with the mother, but now she cannot be sure. At the time, it did strike her as odd that the mother denied any domestic violence or police involvement. She accepted that the information could have been given by anyone who was vaguely aware of the family situation. Over that period she was very busy and with hindsight she wishes that she had carried out further enquiries.
40. On the surface, the mother's case about the 2011 proceedings seemed surprising. The father had produced evidence of service and CAFCASS had confirmed that she knew what was going on. However, when one looks below the surface a different picture emerges. I have concluded that the mother knew nothing about those proceedings and that this is what the father wanted. My reasons are these:

- (1) Having heard the mother's evidence on this issue, I believe her.
 - (2) The father's evidence was by contrast unconvincing. He could not explain why the mother should want to put herself at such a disadvantage. His account of attempting to persuade her to attend court on each occasion was patently untrue. The distance between the family home and the courthouse is approximately 3 miles. Her genuine support would have strengthened his case and he would have had no trouble in prevailing upon her to attend if that was her true position.
 - (3) The father's decision to seek a residence order within days of the mother calling the police shows that he had decided that the marriage was over and that he would now assume control of S's future. He did everything necessary to feather his own nest by getting legal representation, but nothing to protect the far weaker position of his wife, who received no legal advice at all. It is noteworthy that the father's statement does not suggest that he had told the mother about these proceedings, still less that she agreed with them.
 - (4) I am not satisfied that the process server gave the papers to the mother. It is more likely that the father arranged for someone else to receive them.
 - (5) Likewise, I find that the person with whom Mrs P communicated on 1 July was not the mother. The answers that were given were (a) factually untrue and (b) wholly in the father's interests. Having seen the mother give evidence, I found her someone who is almost incapable of giving short answers of the kind described by Mrs P. I do not know who was impersonating the mother or how the father arranged it, but it would not have been difficult. For completeness, I find that the discrepancy in the telephone numbers is more likely to be a clerical error than something more sinister.
 - (6) I also refer to my findings in regard to earlier and later events, which are seriously damaging to the father's credibility.
41. Unfortunately, in this case the court process provided no protection for the rights of the mother or child. There were a number of indicators that should have alerted the court to the fact that it was not getting the whole story. A residence order was, unusually, being made in relation to a child whose parents were living under the same roof, with no clarity about what was to happen next. The order was made after the most perfunctory consideration of the child's best interests, or his mother's rights. As a minimum, somebody should have had a face-to-face meeting with this mother ahead of an order that had important consequences for a particularly disadvantaged child. Instead, the father's already dominant position was further enhanced, enabling him to move on to the next stage in his plan.

The mother's immigration status

42. The mother's spousal visa expired in October 2002, four months after her arrival. Neither the father nor his father did anything to renew it. However, in November 2008 they submitted an application on her behalf for leave to remain in the United Kingdom. This was granted for a two-year period from May 2009. Accordingly, by the time of her departure, it had expired and the mother had no right to be in England.
43. The father's failure to secure the mother's immigration status was a gross dereliction of his responsibility towards her and towards S. In his evidence, he claims that he was unaware of her precarious position, having left matters of that kind to his own father. He says that when she left the country in July 2011 he did not know what the position was. I found the father's evidence incredible and I reject it. He knew perfectly well that if the mother left, she could not return. The reason why the father and his family were so careless of the mother's position was because it suited them.
44. In contrast, I accept the mother's account that she relied upon the father in immigration matters and was unaware of her predicament until it was too late.

The mother's departure for Pakistan

45. On 12 July 2011, the day after the final court hearing, the father booked a one-way ticket for the mother alone to travel to Pakistan, paying £330. When she had travelled in 2010, he had bought her a return ticket for £470. The father says that he was hoping that the mother would return to the marriage, having spoken to her own family, but he did not buy her a return ticket.
46. On 17 July, the grandfather drove the father, the mother and S to the airport. At 10 pm, the mother boarded a flight for Pakistan alone. She was collected by her family and taken to their village.
47. The father describes this as having happened at the mother's initiative, because she wanted to return to Pakistan. The mother says that she did not know that she would be going until the morning of travel. She says that she was told that the whole family would have to go because her mother was ill. At the airport, the father told her to go ahead and he would catch up. By the time she was on the plane, he and S had not arrived. She was extremely distressed, but was comforted by someone called "Auntie" who said that the father was on his way. But he was not.
48. Once in Pakistan, the mother says that the father soon cut off communications. Her efforts to get help were fruitless. She was turned away from the British High Commission by a security guard. She contacted a named social worker in

England who said that he could do nothing for her as she was abroad. She consulted an immigration solicitor in 2012, but nothing came of it.

49. The father says that the mother made little or no attempt to get in touch or to find out how S was getting on. Instead she remarried and began these proceedings only six weeks afterwards. Her motivation, he says, is to secure the right of entry for her husband.
50. Having considered all the evidence on this issue, I find that the mother was tricked into going to Pakistan. My reasons are these:
 - (1) It is overwhelmingly unlikely that the mother would have voluntarily walked out of S's life in this way. She was up to that point, I find, his main carer – or at least an equal carer with the father. When she went to the refuge five months earlier, she took him with her. Even the father conceded in evidence that she was a main carer for her son.
 - (2) I believe her evidence about the events at the airport. The father had arranged for her to be chaperoned by other passengers during her 2010 trip and her account of being reassured by another passenger on this occasion had the ring of truth – it was a spontaneous detail not contained in her statement.
 - (3) The reason why four people travelled to the airport that evening was to maintain the pretence that three of them were going to be travelling to Pakistan. There was no other reason for S or his grandfather to undergo a 110 mile round trip.
 - (4) The father's evidence showed that he has very little concern about the effect on S of losing his mother. He would not have hesitated to cut her off in this way. In the three years since the mother left England, he has made no direct contact with her whatsoever.
 - (5) Although it was unrealistic for the mother to expect S to have travelled to Pakistan, I accept her account that she thought it was just about manageable.
 - (6) I do not attach much weight to the evidence of the father's witness Mr A. He described an argument between the parents after the mother's return from Pakistan in 2010. Left alone for a few moments, he says that he told her that she could go to Pakistan if that is what she wanted, and that she said that she thought that she would. Such a conversation may have taken place, but it does not significantly support the father's case or undermine the mother's.
 - (7) My findings in relation to the father's deception in the legal proceedings are relevant to this issue as well.

51. I am not able to make reliable findings about the circumstances of the mother's remarriage. The information about this is thin. What is clear to me, however, is that the remarriage has nothing to do with the circumstances of the mother's departure or of her wish to return and resume her relationship with her son. The mother's case at this hearing gave no support to her "husband" coming to this country: on the contrary, what she said would amount to a solid basis for the refusal of any such application.

Conclusion and consequential orders

52. The mother has substantially proved her case. A copy of this judgment will be available to the Home Office to enable it to reconsider its refusal of an entry visa. Failing that, it will be available to the tribunal hearing the mother's appeal in August. My order will contain declarations as to the infringements that have occurred in this case.

53. As to the further progress of these proceedings:

- (1) S will remain a ward of court until his future is clarified. At this stage, I say nothing about what may be in his longer term best interests. Mr Power's report contains concerning information about the extent of S's self-harming and his struggling with his environment.
- (2) In the meantime, it is clearly in S's interests for his mother to be reintroduced to him. While she remains in Pakistan, voluntary arrangements can be made between the school and herself for contact in the form of Skype and exchange of information by way of reports and photographs: the father is to be kept informed of this, but his approval is not to be required.
- (3) Once the mother is in England, the matter shall be restored for directions, before me if available. At that point, consideration will be given to the gathering of evidence about S's welfare, to the mother's claim to have direct contact and to have S to live with her, to S's status within the proceedings, to the possible role of CAFCASS, to the question of a possible transfer of the proceedings to the local court and to the issue of the father's passport.
- (4) In the meantime, I shall follow the advice of Mr Power and make a Family Assistance Order to the local authority where S lives. At this stage, this is for the purpose of monitoring and supporting the reintroduction of the mother to S in such a way that he is not avoidably unsettled. Mr Power aptly describes this as a Herculean task: I hope that even now the father will amend his opposition to the mother's involvement for the sake of his son, who depends so much upon him.

APPROVED JUDGMENT

- (5) I shall discharge the residence order made in the County Court on 11 July 2011.
- (6) I direct that S is not to live away from his current address or be removed from England and Wales until the further hearing and that the father's passport shall remain with the Tipstaff for the time being.