

Neutral Citation Number: [2016] EWHC 506 (Fam

Case No. FD15P00391

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

Date: Tuesday, 9th February, 2016

Before:

MR JUSTICE HOLMAN

(sitting throughout in public)

B E T W E E N :

SAIMA BI

Applicant/wife

- and -

IMRAN MOHAMMED

Respondent/husband

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MR H. KHAN (instructed by Dawson Cornwell) appeared on behalf of the Applicant/wife.

MR P. ROUTLEY (instructed by Makwana Solicitors) appeared on behalf of the Respondent/husband.

J U D G M E N T

MR JUSTICE HOLMAN:

- 1 This case was listed this week for a five day fact finding hearing. It is necessary for me to adjourn that hearing, not part heard since it has not really got underway at all. These brief words are merely to record the essential features from yesterday and today. For the purposes only of these brief words, I can summarise the factual background extremely shortly.

- 2 The wife/mother was born and brought up in Pakistan. The husband/father was born and brought up in England, and is a British citizen. The parties are first cousins of each other as their respective mothers are sisters to each other. Their marriage was an arranged one which took place in 2010. From their marriage, they have one daughter, who is now aged about four and three quarters. The daughter was born in Pakistan and lived there for the first 18 months or so of her life whilst the wife/mother sought to obtain a spousal visa enabling her to enter the United Kingdom. Once that was finally granted after an appeal, the wife/mother travelled to England in June 2012 with the daughter. Here, the wife/mother and daughter all lived together with the husband/father and other members of the paternal family at the paternal home in Essex.

- 3 As a matter of fact and record, in May 2015 the mother travelled without the child to Pakistan. She travelled in the company of an uncle of the

husband/father. There is huge dispute between these parties as to the surrounding circumstances of that journey to Pakistan. The fact is that the mother has not since returned to England and she has currently been refused any permission by the Secretary of State for the Home Department to re-enter the United Kingdom.

4 In essence and the briefest of summary, it is the mother's case that she is a "stranded spouse". She says that she was told at very short notice that she must fly to Pakistan and did so under a mixture of coercion by threats and being duped as to what would happen to her back in Pakistan. The case of the husband/father is, in essence, that the mother disliked or was not happy living here in England and decided to return to Pakistan as her own voluntary act and decision.

5 Once she was back in Pakistan, the mother was taken to the home of her own mother and, as I understand it, had her passport removed from her. At all events, as I have said, the Secretary of State for the Home Department, through her entry clearance officer in Pakistan, has twice refused any visa for the wife/mother to re-enter the United Kingdom.

6 In those circumstances, previous orders have been made setting up a fact finding hearing as to what the true facts and circumstances are as to the manner in which the mother lived with, and was being treated by, the paternal family

here in England, and as to the circumstances in which she came to return to Pakistan. It is patently highly desirable that she should be personally present for a hearing of such significance and importance.

7 So far, the Secretary of State, through the entry clearance officer, has refused a visa even to visit the United Kingdom for the limited purpose of attending these proceedings and this hearing. Earlier orders have made provision as a fallback for the mother to give evidence and participate by video link from Pakistan. The experience of the last two days has merely served to repeat and reinforce, at any rate in my mind, what I described in paragraph 15 of my own judgment in *Akhtar v Ayoub* [2013] EWHC 3840 (Fam), [2014] 2FLR 619.

8 There were long periods during which the video link could not be established, and on several occasions, after it had been established, it abruptly terminated. I was told by the mother's counsel, Mr Hassan Khan, that one of the reasons for that was the most basic, that the electricity kept on turning off in the premises in which the mother was viewing the video. There may be a range of other technical difficulties as well, including the weakness of the Wi-Fi signal in the location where the mother was situated. I was told that realistically, to obtain a good video connection, the mother would need to travel to Lahore, but she lacks the means and funds with which to do so.

9 I am frankly very doubtful indeed whether a fair, just and effective fact finding hearing could have taken place this week, if only because of those technical

difficulties and breakdowns. As it happens, it was in any event necessary to adjourn this hearing because of difficulties connected with disclosure of information by the police. An order was made at paragraph 6 of an earlier order of 11 November 2015 that:

“The Essex Police shall file and serve ... all information in their possession or control that relates to any report made in respect of the alleged stranding of the mother in Pakistan in or around May 2015. Such information shall include all call logs and any statements of evidence taken, as well as indicating whether the investigation has been closed or remains ongoing.”

10 Yesterday, an officer of the Essex Police, Detective Inspector Metcalfe, kindly attended at court. She told me informally (without giving sworn evidence) that the Essex Police do indeed have in their possession information and documents falling within the scope of paragraph 6, which includes “call logs” and “statements of evidence taken”. However, the Essex Police strongly resist having to disclose those documents and material on the grounds of public interest. That public interest was not much elaborated on by Detective Inspector Metcalfe yesterday. But the essential indication is, first, that there is a need to protect an informant or informants (the detective inspector was deliberately very careful not to reveal whether there was one or more than one); and, secondly, that their investigation is not yet concluded and no charging decisions have been made. Part of the reason for that appears to be

the non-availability of the mother/wife for interview here in England and Wales.

- 11 Accordingly, I decided, with the agreement of both counsel at a relatively early stage of the hearing yesterday, that in any event this matter would have to be adjourned in order to enable a PII hearing to take place. As a result of numerous enquiries made by Mr Hassan Khan of the Attorney General and other departments since yesterday, I now give some very detailed directions for that PII hearing to take place, which it is not necessary further to explain or elaborate in this short narrative.
- 12 The only point that I would wish to stress is that the Attorney General requires provision to be made for his costs of instructing a special advocate, as is fully explained and set out in the President's guidance dated 26 March 2015 on "The role of the Attorney General in appointing advocates to the court or special advocates in family cases".
- 13 In the present case, the person or party who patently should be required and expected to pay the costs of the Attorney General is the wife/mother since it is her lawyers who so strenuously seek production of these documents, which they regard as potentially essential to the fair consideration of her application. She has no means whatsoever and is legally aided with no doubt a nil contribution.

14 I cannot - and make clear that I do not - direct the Legal Aid Agency to agree to paying the costs of the Attorney General of instructing a special advocate. I am, however, prepared to say, as I do at paragraph 2 of the proposed order in relation to the PII aspect of this case, that:

“It is necessary that the wife/mother should undertake, as a necessary disbursement to her legal aid certificate, to pay the reasonable costs of the Attorney General of and incidental to instructing a special advocate, in compliance with the President’s guidance dated 26 March 2015. The solicitors for the wife/mother must obtain from the Legal Aid Agency prior authority to enable her to give that undertaking.”

15 Whilst the discretion must ultimately remain that of the Legal Aid Agency, it does seem to me that this must be a very necessary disbursement on her certificate. It is the view of her lawyers that it is essential, if they can, to obtain disclosure of these documents from the police. That cannot be done without some form of PII hearing, which will necessarily require the involvement of some form of special advocate. If the Legal Aid Agency in their discretion decide not to give a prior authorisation, the Attorney General may exceptionally accept that his own funds will have to bear the costs of the special advocate. Either way, this is a burden effectively upon state funds and broadly upon that part of state funds which pertains to the administration of justice.

- 16 Quite frankly, if some sensible accommodation cannot be reached to ensure that a special advocate is provided in a case such as this, the whole system of fair and open justice will have broken down. There would very likely have to be further hearings to discuss the implications, which themselves will add substantial costs to the state. It always needs to be remembered that every hearing before the High Court is very expensive to the state, involving, as it does, not merely legal aid disbursements but also provision of the court, the judge, the staff and all the other overheads, all of which fall upon the Ministry of Justice, which has ministerial responsibility also for the legal aid budget.
- 17 By his most excellent position statement at the outset of this hearing, Mr Patrick Routley, who appears on behalf of the father, raised the question whether this fact finding hearing should proceed at all. He relied in particular on that same reported decision of my own, namely *Akhtar v Ayoub*. I, for my part, do not resile in any way at all from anything that I said in that decision and judgment in November 2013 on the facts and in the circumstances of that case.
- 18 There is, however, a material difference between that case and this case. In that case, the mother had been refused permission to enter the United Kingdom and there is nothing in the judgment to indicate that she had any outstanding appeal from that refusal. At paragraph 10 of my judgment, I said:

“The fact of the matter as it currently stands is that the mother cannot enter the UK. She does not seek, or even suggest, that any of her children should move to live with her in Pakistan. Further, as recently as September of this year, she did in fact send the youngest child ... back to England to reside here in Blackburn with his father and siblings.”

19 The situation in the present case is materially different. In the first place, the mother does have a current, extant appeal against the refusal of a visa. I have been told today that that is lodged with the First Tier Tribunal and the papers are currently with a judge of that tribunal, although it is not known when the hearing will take place. Secondly, the mother in the present case does not rule out seeking that her daughter returns to Pakistan to live with her there, if it remains the position that the Secretary of State refuses to grant the mother any visa to enter the United Kingdom and all avenues of appeal are exhausted.

20 It is perfectly true, as Mr Routley stresses, that at paragraph 16 of her statement dated 3 November 2015 - now at bundle p.C99 - the mother said:

“I want to return to England and I want [the daughter] to reside with me in England. I do not want [the daughter] to move to Pakistan ...”.

21 She had also said at paragraph 10 of her earlier statement dated 16 September 2015 - now at bundle p.C45 and C46:

“I am making an application for my visa to return to England to attend these proceedings and to be reunited with [the daughter]. I want [the daughter] to be returned to my care as soon as possible. I expect that I should be able to return to England in the next two months ...”.

- 22 It was only in fact on 10 November 2015 - that is, just after the mother had made her second statement dated 3 November 2015 - that her renewed application for a visa was refused by the entry clearance officer, probably much to the mother’s surprise as well as to her despair.
- 23 Mr Hassan Khan has been able to communicate with his client yesterday and today, at times by a working video connection and at other times by mobile phone. He has told me that the express instructions of his client are that her primary case is that she seeks to gain readmission to the United Kingdom in order to resume the care of her child here in England and Wales; but if the Secretary of State refuses to permit her to return and all avenues of appeal are exhausted, then her secondary case is that her child should return to Pakistan in order to resume living with her there.
- 24 Patently, each of those cases requires resolution of this highly contested issue of fact as to the circumstances in which the mother travelled to Pakistan last May. It may indeed also be relevant (though I stress not in any way determinative) to later exercise of discretion by the Secretary of State through the entry clearance officer, to know what the determination of the High Court

has been on the question of whether or not the mother was induced to leave England and travel to Pakistan by coercion or being duped.

25 Even if the mother never succeeds in obtaining a visa to return here to England, then it is patently fundamental to her “secondary” application for the court to determine the circumstances in which she first left her child in England last May. If indeed she was induced into doing so by coercion and/or being duped, then that is one thing. If, on the other hand, she chose voluntarily to return to Pakistan leaving her child here with the paternal family, then clearly that is another thing.

26 After Mr Khan had made clear this afternoon what his client’s instructions are, and that her secondary, albeit fallback, position is that if she is not permitted to enter the United Kingdom, then the child should travel to Pakistan to live with her there, Mr Patrick Routley, on behalf of the father, with all the judgment and balance that he has displayed throughout this hearing, indicated that it would be difficult for him at this hearing to maintain the argument that he had first advanced in his written position statement yesterday. He makes clear - and I record - that he in no way abandons the argument and may wish to renew it, depending on how circumstances develop in this case; but, for the time being, I am no longer pressed to dismiss these proceedings altogether at this hearing. In any event, it would in my view be wrong and inappropriate of me to do so.