IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Neutral Citation: [2024] EWHC 841 (Fam)

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Strand
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Wednesday, 14 February 2024

IN THE MATTER OF THE SENIOR COURTS ACT 1981
AND IN THE MATTER OF THE INHERENT JURISDICTION OF THE HIGH COURT
AND IN THE MATTER OF THE CHILDREN ACT 1989

Before:

THE PRESIDENT OF THE FAMILY DIVISION
(Sir Andrew McFarlane)

(**In Private**)

B E T W E E N :

ALI FAKHER — Applicant

- and -

MARYAM ALLAMI — Respondent

MR M BASI (instructed by Dawson Cornwell LLP) appeared on behalf of the Applicant.

THE RESPONDENT appeared In Person (assisted by McKenzie Friend Mr Lennard).

J U D G M E N T

THE PRESIDENT OF THE FAMILY DIVISION:

1 This is an application brought by the father in what turned out to be long-running proceedings concerning the welfare of two children who are now aged, I think, 15 and 11. The proceedings had an international element in that certainly before they started, the family were resident in Iran but there came a time when the mother unilaterally left Iran. She hoped to take the children with her but in the event was unable to do that and left the airport to fly to the UK on her own.

2 There came a time in July 2021 when she understood the father was due to arrive in the UK. So she issued an application on an urgent basis to the High Court in order to obtain a passport order with the aim of retaining the father's presence in England and Wales so that there could then be court proceedings in this jurisdiction if the court accepted jurisdiction with regard to the welfare of the children. There had been previous proceedings between the couple with respect to the children in Iran.

3 The mother issued her application for a child arrangements order under s.8 of the Children Act 1989 and, on the same day, an application under the inherent jurisdiction of the High Court for the passport order. The matter came before Judd J on 22 July no doubt as the urgent applications judge. The court has the benefit of a transcript of that hearing.

4 It is plain that the mother as a litigant in person, who had given a very short and basic account of the background in the two application forms that have been submitted to the court, was questioned by the judge over the course of fifteen or twenty minutes in order for the Judge to understand more of the background. On the basis of what the judge had been told, she then made the passport order which was due to be served and brought back before the court for a hearing on 26 July. Unfortunately, service did not take place. Mr Basi who acts for the mother today explains that there was a technical problem in that the date of birth of one of the children had been incorrectly put on the passport order. It was re-drawn and then served on the father on 10 August.

5 That act of service brought the father into the proceedings and there then followed a substantial sequence of hearings before many of the judges of the division and some Deputy Judges resulting in a contested hearing before ICC Judge Mullen in December 2022 at which adverse findings were made against the father. In the event, the children were brought to this jurisdiction. They now reside in the mother's care.

6 Throughout the long process that the proceedings generated, the father remained subject to the passport order. It was reinforced at times with an electronic tagging requirement and, indeed, he was the subject of contempt proceedings himself before MacDonald J who sentenced him to a period of imprisonment.

7 Be all that as it may, as is his right, the father feels aggrieved about the manner in which the mother behaved at the very start of the proceedings and has issued an application for contempt against her in which he makes a number of allegations, the focus of which is what she said to Judd J at the first hearing in July 2022. The father's contempt application was issued as long ago as 9 January 2023. It had an unfortunate procedural history. I need not recite that today but fortunately, the matter has proceeded today before me.

8 The father has had, as apparently he had had at many hearings, the assistance of Mr Lennard, a McKenzie friend. At the start of today's hearing, I sought to adhere to the clear practice guidance, I think issued in 2010, which makes it explicit that McKenzie friends do not have a right of audience but as matters progressed, it was clear the father was in

difficulty both being taken by surprised by my decision not to hear from Mr Lennard, at least in part in presenting his case, but also that he was becoming to a degree distressed, which interfered with his ability to address the court. So after a short adjournment, I allowed Mr Lennard, or I gave Mr Lennard permission to address the court and, indeed, that was, as it turned out, a helpful turn of events because Mr Lennard has been able to marshal the documents with his knowledge of the case and make the points that the father wishes to have made in the course of a number of clear submissions.

9 At the end of the oral presentation, Mr Lennard handed in a short skeleton argument which had apparently been sent to the court some days ago but had not been put before me. I have now read that document. It helpfully summarises, first of all, the father's focus on having an effective hearing today and his opposition to any suggestion that there should be a further adjournment. The skeleton argument goes on to summarise the relevant law. It is fair to say that all of the points made, which seem to me well made and are familiar to me, relate to the question of sentence and that, of course, is a matter that would arise at the very end of the process. We are at the start.

10 Because the allegation that is at the centre of his case is one that the mother knowingly made a false statement in an affidavit, or affirmation, or other document verified by a statement of truth or in a disclosure statement, it is accepted that the father needs permission to proceed. The requirement in the Family Procedure Rules 2010 is to be found in r.37.3(5)(b). That rule is in precisely the same terms as the companion provision in the Civil Procedure Rules.

11 There is case law which describes the approach that the court should take to an application for permission and it is of assistance to have read a very recent decision by Knowles J, the case of *Collardeau v Fuchs & Anor* [2024] EWHC 256 (Fam) in which the judge reviewed the relevant authorities from [20] onwards. I am not going to read those matters into this judgment but the test for granting permission to proceed with the application for contempt when the allegation is one of making a false statement is that there is a strong *prima facie* case that the allegations will be proved to the criminal standard at a substantive hearing and that is a relatively high test. It is pitched at that level because a key characteristic of contempt proceedings of this nature is that they are matters of public law and the applicant, if he is given permission to proceed, does so on behalf of the public at large and not as an incidental step in the course of the litigation that otherwise may be conducted between the applicant and whoever is the respondent. So I have in mind the significant threshold that has to be crossed.

12 Not all of the father's allegations in support of the committal application relate to what the mother did or did not say to Judd J. Separately, he asserts that she is in contempt of court because she failed to achieve service of the original order on him in a timely manner so that he could attend the hearing booked for 26 July. Secondly, that she was required to file a statement of the evidence upon which she had relied before Judd J and to serve that on him, and she did not do that. My reading of the relevant statutory provisions is that no permission is required to bring contempt proceedings for matters of that sort. In particular, if they are founded on the breach of an order, the proceedings would simply be taken forward without this first permission stage. However, as is plain, both in the extensive case law relating to contempt and, indeed, in Practice Direction 37A, at all times the court retains jurisdiction to strike out an application for contempt if the court takes the view that it is of no merit or is otherwise an abuse of the court process.

13 With that background, it is necessary to become more granular in looking at the details of the application. The father's case is pleaded in the same terms, effectively, both in part 5 of

his application and in the witness statements that he filed in support of it and I propose to read the box on part 5 of the application which sets it out:

> "The defendant Maryam Allami, also known as Maryam Fernandez, did on 22 July 2022 did attend court *ex parte* before Judd J and knowingly misled the judge into believing that the children [and then the children are named] ... had been abducted and that I had caused them serious risk of harm without informing Her Ladyship that she, Maryam Allami, had previously issued proceedings in the Iranian court and abandoned it, and also not making reference to the fact and even that led to her abandoning the children at Tehran Airport in Iran on 3 August 2021. That, in short, Maryam Allami in signing the declaration at the end of her application form before Judd J had made a false statement before the court. She did not inform Her Ladyship that the children had entered Iran on an Iranian passport and that they needed to exit Iran on an Iranian passport and that whilst in Iran, the children were treated under the law in Iran as Iranians and did not provide Her Ladyship with the published information from the foreign and commonwealth office about Iran and the serious legal impediments in the way of seeking return of the children to the UK is impracticable."

14 As I say, the statement of the father filed and dated 8 January 2023 is in substantially the same terms. It is in that statement and indeed also on p.8 of the committal application that he makes reference to the fact that order was not served upon him in a timely manner and that the mother had failed to file a statement.

15 At the start of the hearing, I was keen to understand, this being an application based upon false evidence being placed before the court in order to achieve the granting of the passport order, what Mr Fakher said that the mother had said to Judd J that was false. That request led to Mr Lennard helpfully taking me to a number of matters in the transcript. The first is to be found on p.298 at G where the judge says:

> "MRS JUSTICE JUDD: Was he living there [Iran] or was he living here?
>
> MS ALLAMI: He was living in Iran."

16 Mr Lennard said that was not entirely correct. I then asked for more details but none were given in any precise way but the point to make is to be made in relation to this first item on the father's list but it applies to all of the others, that in order to prosecute an application for committal for contempt of court, the rules and the case law make it absolutely plain that the respondent and the court need to have before the hearing sufficient specific indications of what it is that the respondent is said to have done that places them in contempt of court and it is the case that it has never been put in writing before. Mr Lennard told me about it that this very short exchange was being relied upon.

17 Secondly and differently, in order for the contempt proceedings to have any chance of success and establish beyond reasonable doubt, that is to the criminal standard, that her statement, "He was living in Iran" is false and untrue, the father would need to have filed evidence proving that it was false and untrue but none has been filed. There is no prospect of there being a finding on the criminal standard that the mother is in contempt of court before of those five words she said to Judd J.

18 Moving on, Mr Lennard pointed to the immediately next interchange:

> "MRS JUSTICE JUDD: Right. When did you separate?
>
> MRS ALLAMI: We'd been separated years ago ... but he was always in touch with the kids and I'd never stop him to see the kids."

19 Mr Lennard told me that that was incorrect and that the father left the home in Iran in 2020. The father seemingly contradicted Mr Lennard later in his own submissions when he said:

> "We never separated. Sometimes we slept together. Sometimes we didn't. We came here. We went there. There was no problem at all."

However, the point is made by me already, again, the fact that this is said to be in contempt of court to tell the judge that they had separated years ago but he had been in touch with the kids and she had never stopped him, whether that was a lie has never been adumbrated and expressly pleaded in any way. Equally, it is almost impossible to understand how a court would find, on the criminal standard, that this was a lie so vague is the statement.

20 Moving on and more seriously, a short while later in the hearing the judge asked questions saying as follows:

> "MRS JUSTICE JUDD: ...You have also told me that you are worried about him going around to your house.
>
> MS ALLAMI: Yes.
>
> MRS JUSTICE JUDD: Can you just tell me why? I know it is difficult, but just tell me why, just so I know.
>
> MS ALLAMI: I'm scared of him.
>
> MRS JUSTICE JUDD: Is there something he has said or done that----
>
> MS ALLAMI: He told me a few times.
>
> MRS JUSTICE JUDD: What does he say?
>
> MS ALLAMI: Because he told me, 'If you do anything, I'm going to come and kill you. It doesn't matter. I'm going to go to the prison. The kids, they're going to be fostered somewhere else.' I think-- Because he's got some sort of mental issue, so ... I think he's capable of doing anything. He doesn't care."

21 Mr Lennard submitted that that account of a threat to kill was a lie. Again, the points that I have already made apply here. Firstly, it has never been specifically pleaded before and it is almost impossible to understand how a court would find, beyond reasonable doubt, that the father had never said, "I am going to come and kill you." It is one word against another and the observations I have already made apply to that.

22 The final reference was one at the very beginning of the hearing at p.300 of the bundle in which the mother, having given account about the passports, explains that it will be difficult for her to go to Iran now and to see the children. She says this:

> "I can't (inaudible) not to go to Iran and visit my kids because during this time, he-- without me being there, in my absence, he married me in Iran, so I can't go to Iran even to visit my kids."

It is said that that is a lie and that the mother should be found in contempt of court for saying that to the judge.

23 On further questioning, Mr Fakher helpfully explained that the couple were married years ago in England under the traditions of Islamic law. What he did do after the mother had left in 2021 is register that marriage with the Iranian authorities. The mother was told that and so the marriage from that date was effective and recognised in Iran in a way that it was not before.

24 So it is said, as I understand it, that the mother's choice of words, "He married me in Iran" is a lie but it is true that they were married and he registered the marriage to her in Iran. It is said that that should be the basis of a finding of contempt of court with, as the skeleton argument shows, the court then moving on to consider what sentence it should pass.

25 If I deal with the permission application on that basis, therefore, a number of observations can be made. First of all, for the reasons that I have given, it seems beyond any contemplation that the father could establish that any of these statements made by the mother as a litigant in person in the course of being questioned by the judge was a false statement, a lie that she knowingly made and the mischief that the court will be looking to address in contempt proceedings of this type is obviously to call out and find where it happens and punish where it happens someone who knowingly and deliberately falsely misleads the court into granting orders that they would not otherwise have been entitled to. The circumstances of this case are so far from that mischief as to make it an irrelevant consideration.

26 Secondly, and separately but equally importantly, the fact that those of us sitting in the courtroom heard that these were the four or so aspects of the hearing that the father relied upon as proof of lies was to know that for the very first time. The mother has been given no notice that this was the case she had to meet. Of course, had there been an application for the court to do so, an adjournment could have taken place and the matter could have been properly pleaded. No such application was made but I would not have granted it because, for the reasons I have given, there is nothing in the allegations at all. However, also procedurally, the father is simply not in a position to prove the case today. He has not filed any statement that proves that these four assertions by the mother are lies and, indeed, a number of them are extremely vague. In so far as the latest one referred to, the marriage in Iran, it would seem to be simply a matter of semantics if even that. So in terms of there being any prospect of the committal application proceeding and having any prospect of success, there is absolutely none. Equally, there is no public interest in that being the course to be followed.

27 I also take account of the fact that the matters relied upon are not in any statement signed by the mother nor yet in any affidavit by her. She was not on oath when she was being questioned by the judge. She was not giving evidence to the court in any formal way. She was simply assisting the judge with what she said was the background to her application at a short but not unimportant hearing. So, for all those reasons, this application relating to false statement has absolutely no prospect of success. Indeed, procedurally and substantively, it is totally without merit.

28 I turn now to the other two matters which are to do with the service of the order and the failure to file a statement. The service of the order can be taken shortly. The order of 22 July, the substantive order in the proceedings starts at p.46 of the bundle and it makes four case management orders at paras.8-11. The first is para.8 to re-list the matter on 26 July. The next, para.9, requires both of the parents to attend that hearing, and para.10 says this:

> "The court is to effect personal service of this order by email to the respondent with a record of this without notice hearing on the respondent."

Then para.11 deals with costs. The complaint is made that the order was not served until 10 August.

29 In the course of the hearing, the judge did stress to the mother the need for the father to become engaged with the court process as quickly as possible but the judge did not make an order requiring the mother to serve the order of 22 July on the father. The order provides for the court to do that. For the reason that Mr Basi has told me, to which I referred a short time ago, there was a technical difficulty and the order had to be reissued and was not served until 10 August. There is no basis for the court finding in any contested contempt proceedings that the mother was in contempt of court.

30 As I explained to the father, there is a difference between a judge asking someone to do something or indicating that something should be done during a hearing and a court order. Contempt proceedings only bite in these circumstances where someone is in breach of an order requiring them to do something, or prohibiting them from doing something and they have been warned that if they fail to do it, they may be subject to contempt proceedings. No court order was made requiring the mother to serve the order at all. So that is the end of that point.

31 The final point relates to there being no statement drawn up by the mother after the hearing on 22 July either recording what she said to the judge or setting out the greater detail that she had spoken of when addressing the judge so the father could see what was said that led to the judge granting the order and I certainly understand that point. It is important for those who are on the wrong end of orders that are made at a without notice hearing to understand what it was that was said to or read by the judge that led them to grant the order. However, in terms of contempt proceedings, again, the mother would have to be in breach of a court order requiring her to do something before the court could find that she was in breach of the court order and hold her up as being in contempt. The reality is, again going back to the order of 22 July which I have read out, there was no requirement on the mother to file a statement at the time.

32 In the course of his submissions, Mr Lennard took me to the recitals that sit in the early part of the passport order made on the same day and it is correct that those recitals start with this notice to the respondent, Mr Fakher in this case, "You have the following legal rights" and at (b), one of those rights is said to require the mother, at her own expense:

> "...to supply you with a copy of any affidavit and their note of any oral evidence referred to at para.(6) below."

Paragraph (6) reads:

> "The judge read the witness statements of Maryam Allami."

33 In fact, it is common ground that there was not a witness statement. The only writing down of her account was in the two applications. There is no court order in the passport order in terms requiring the mother to file a statement and, rhetorically, I ask how can a litigant in person, answering questions to a judge, have an accurate note of what she said? The way forward in cases of this sort, which is the way that these matters normally run, is for there to be an early hearing where both parties attend and then the case moves forward with there being clarity about what is being said on each side. However, be that as it may, there is no occasion for the mother to be in breach of any order from the court in failing to file a statement, or a note, or an account of what she said to the judge. In the end, in this case, both parties did come before the court at the first effective hearing and the proceedings, as I indicated, move forward from there.

34 So in terms of those two matters, the assertion that she was in breach by not serving him with the order in a timely way, and the assertion that she is in breach by filing to file a statement, those two are simply not capable of being made out, and without hearing any further evidence or submissions about it, I propose to strike out those aspects of the committal application on the basis that to proceed with them would have no prospect of success. They too are totally without merit and I regard this entire process issued by the father a year ago as being an abuse of the court process and an attempt to visit unpleasant consequences on the mother.

35 That is the end of the contempt proceedings and I hope it is the end of any prospect of this sort of litigation coming back before this court.

CERTIFICATE

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This transcript has been approved by the Judge.