Neutral Citation Number: [2019] EWHC 448 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice Strand, London, WC2A 2LL Date: 20/12/2018

Before :

MR JUSTICE MOSTYN

Between :

RJ *Applicant*

- and -

GANNA TIGIPKO *1st Respondent*

Lord Macdonald of River Glaven QC, Adam Wolanski, and Ruth Kirby (instructed by Sears Tooth) for the Applicant

Deborah Eaton QC, Alexander Cameron QC and Stephen Jarmain (instructed by Charles Russell Speechlys LLP) for the 1st Respondent

Richard Kovalevsky QC, Mark Jarman and Greg Callus (instructed by Stewarts) for the 2nd Respondent

The 3rd Respondent did not appear and was not represented

Samantha King QC and Michael Gration (instructed by Goodman Ray) for the 4th & 5th Respondents

Gervase de Wilde (instructed by RPC) for the Interested Parties

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Hearing date: 26 February 2019

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1. **Mr Justice Mostyn:**

2. On 14 and 15 January 2019 I heard the application by the applicant (father) dated 26 September 2018 that the provisions of section 12 of the Administration of Justice Act 1960 and, inferentially, section 97(2) of the Children Act 1989, be relaxed to permit certain information about this case to be released into the public domain. On 22 January 2019 I distributed, in the normal way, a draft judgment and told the parties that typographical corrections had to be received by noon on 24 January 2019 and that the judgment would be formally handed down on 25 January 2019. The draft judgment stated that the father's application was granted.

3. In reaction to the draft judgment the first respondent (mother) and second respondent (maternal grandfather – "MGF") each issued on 24 January 2019 an application seeking that certain passages of the draft judgment be redacted in the published version. The order that MGF sought was as follows:

4.

"Pursuant to s.11 Contempt of Court Act 1981 and/or the inherent jurisdiction of the court, the findings of fact made against the maternal grandfather contained within paragraphs [3], [14], [19], [50], [58] and [61] of the judgment handed down on 25 January 2019 may not be reported until the conclusion or abandonment of any relevant criminal investigation into, or criminal proceedings against, the maternal grandfather, or further order of the court."
The mother sought an equivalent order.

5. On 25 January 2019 I handed down the judgment and refused an application by the mother and MGF for permission to appeal. I made an order which provided that the publication of the contents of my judgment would be temporarily embargoed until the latest to occur of the following events:

6.

i) the refusal by the Court of Appeal of all applications for permission to appeal on behalf of the mother, MGF or the third respondent (Slava);
ii) if no application is made to the Court of Appeal for permission to appeal by any of the above, by 16:00 on 1 February 2019 or such later date if the period is extended by the Court of Appeal;
iii) if permission to appeal is granted by the Court of Appeal, until further order of the Court of Appeal;
iv) the determination by the court of the redaction applications dated 24 January 2019.

7. On 8 February 2019 Lady Justice King refused the mother's application for permission to appeal my judgment and order of 25 January 2019, and on 13 February 2019 she refused MGF's equivalent application.

8.

9. The passages within my 25 January 2019 judgment which MGF and the mother (save for paras [3], [14] and [58]) say should be redacted are set out below and highlighted in bold:

10.

[3] The father states that prior to the appeal hearing the maternal grandfather, the second respondent, ("MGF") requested that they meet up. That duly occurred on the very evening of the appeal hearing. The father says, and I accept, that MGF sought to persuade the father to agree that the children could live in the Ukraine but could give no guarantees that the children would be able to travel to England were that to be agreed. On being told by the father that, therefore, it would not be agreed MGF said that it was "not over". This was clearly a threat.

[14] The application by the mother's father, as referred to in her text and in the letter from her solicitors, was made on 14 August 2018 and named the mother, the father and Slava as respondents. It sought to prevent the girls and the baby from leaving Ukraine. It referred to my order of 27 April 2018 and said that I had dismissed the mother's relocation application for "unclear reasons". It asserted that were the children to leave the Ukraine it would make "my communication with grandchildren and their upbringing impossible" without mentioning that his own son is at boarding school here and that he has a visa allowing him to visit this country. On any view it was a thoroughly misleading application. It was returned to him on the 16 August 2018 and no injunction was ever granted on the application while it existed.

[19] There is no doubt in my mind that the mother, in concert with MGF and her husband Slava, has made the fateful decision to defy the authority of this court and to retain the girls in the Ukraine indefinitely.

[50] The mother says that there is nothing to prevent the father travelling to the Ukraine to have contact with the girls. However, the father says that he is not prepared to do so as he considers that he would be at risk of false accusations being made against him which could imperil his liberty. It is true that he made similar allegations in the relocation proceedings which I dismissed in my judgment of 27 April 2018. The situation now is very different. The mother has shown herself to have no respect whatever for the rule of law and MGF has been shown to have easily made untrue and misleading applications to the Ukrainian court. In my judgment the father's caution is entirely understandable.

[58] Fundamentally, my decision is this: there is a reasonable prospect, if publicity is allowed, that its effect will be to make the mother and MGF see sense and to agree, in advance of what seems to me to be an inevitable outcome of 1996 proceedings in the Ukraine, to the return of the girls to the land of their habitual residence to live in London under the care of both of their parents. I have already rejected above the argument of the mother that her new husband is raising an authentic impediment to this step being taken. It is my judgment that publicity is positively in the interests of these children on the specific facts of this case.
[59] I also agree, although it is irrelevant to the decision which 1 have reached, that there is a strong public interest in far more press reporting of the scourge of international child abduction. Child abduction is a heinous practice, and there are in force, as explained above, international agreements to seek to prevent it. Yet public awareness is curiously very limited. It is strongly in the public interest that much greater awareness is generated about this dreadful phenomenon. I echo the words of the Lord Chief Justice, Lord Judge, in R v Kayani [2011] EWCA Crim 2871, [2012) 1 WLR 1927 at [54]:
"The abduction of children from a loving parent is an offence of unspeakable cruelty to the loving parent and to the child or children, whatever they may later think of the parent from whom they have been estranged as a result of the abduction. It is a cruel offence even if the criminal responsible for it is the other parent."
[61] Finally, I deal with the application made by Mr Jarman that MGF be discharged as a party. This is, in my judgment, a hopeless application in circumstances where I am satisfied that MGF acted in concert with the mother in the abduction of these children. The father indicated at the hearing that he intended to seek further relief against MGF (and Slava) and duly issued an application on 21 January 2019; but that is not the reason for my refusal of the application. It is based on his deep complicity, of which I am fully satisfied.

11. Mr Kovalevsky QC and Mr Cameron QC argue that to remove these passages would leave the thrust of my judgment unaltered. The condemnation of the mother and MGF (who they accept will be named) would still be there as would my damnation of the scourge of international child abduction. I completely disagree. The redactions would largely hollow out my judgment and greatly rob it of the coercive effect that it was designed to achieve.

12.

13. I have set out above the jurisdictional basis for the application as pleaded by MGF. I agree with Mr Wolanski that section 11 of the Contempt of Court Act 1981 is not engaged. This provides:

14.

"Publication of matters exempted from disclosure in court.
In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld."

15. When I heard the case on 14 and 15 January 2019 a number of members of the press were present and I made a strictly limited reporting restriction order. I prohibited the naming of the actors and I stated that MGF should only be described as a businessman. Otherwise, the press could report what they heard in the proceedings. I have been given copies of the reports appearing in The Times, Mail Online and the Press Association on 15 January 2019. These describe the case in some detail but, of course, faithfully adhere to the reporting restrictions regime.

16.

17. Therefore, section 11 is not applicable. The reporting restriction regime imposed by me for the hearing on 14 and 15 January 2019 related only to the identities of the parties and to the occupation of MGF. There is no objection now to those details being published. The matters now sought to be redacted were ventilated at length before me and were to some extent reported.

18.

19. The other jurisdictional basis that is pleaded is the "inherent jurisdiction of the court". It is true, my judgment having been given in private proceedings, that I have the complete power to decide what parts of it are, and are not, published. However, Parliament has specifically

legislated in this area. Section 4 of the Contempt of Court Act 1981 provides

20.

"(1) Subject to this section a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.
(2) In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose."

21. Now it is true that this section does not strictly apply because the proceedings were not held in public, although the press exercised their right to attend under FPR 27.11. However, that does not mean that the policy underpinning the legislation should not be equivalently applied where the court is in fact exercising its powers under the inherent jurisdiction, rather than under the statute. In my opinion the famous words of Lord Hailsham of St Marylebone LC in Richards -v- Richards [1984] 1 AC 174, 199H apply equally to the proceedings here:-

22.

"Where, as here, Parliament has spelt out in considerable detail what must be done in a particular class of case it is not open to litigants to bypass the special Act, nor to the courts to disregard its provisions by resorting to the earlier procedure, and thus chose to apply a different jurisprudence from that which the Act prescribes. Any other conclusion would, I believe, lead to the most serious confusion. The result of a particular application cannot depend on which of two alternative statutory provisions the applicant invokes, where one is quite general and the other deals in precise detail with the situation involved and was enacted at a time when the general provision already existed."

23. In order for section 4(2) to apply there is a condition precedent that there are other proceedings "pending or imminent" before an order can be even considered. This seems

obvious, and is a criterion I would apply even if section 4(2) did not exist. In Re Yaxley-Lennon (a.k.a. Tommy Robinson) [2018] EWCA Crim 1856 Lord Burnett CJ stated at [40]:

24. "[Section 4(2)] is aimed at postponement, not prohibition, of publication of what has happened during court proceedings. It is most frequently deployed where subsequent related trials might be prejudiced by reports of the evidence, argument or outcome of earlier trials. Once all the trials have concluded, the period of postponement will come to an end and full publication can follow without risking adverse consequences to the fairness of the proceedings".

25. Thus, it can be seen that the power will generally be exercised where another trial has been fixed and is awaiting disposal. In the family sphere this is most commonly done where there are parallel fact-finding public law care proceedings and criminal proceedings arising from the same facts. If the fact-finding public law hearing precedes the criminal case then almost invariably the judgment in the former will be embargoed until a verdict is given in the latter. A classic example is The County Council of the City and County of Cardiff -v- Scully-Hicks & Ors [2016] EWFC 79. At [2] Mr Justice Moor stated:

26. "I accept immediately that the facts of this case raise serious issues that will be of genuine public concern. Initially, I made a Reporting Restriction Order pending the completion of the criminal trial for murder of Matthew Scully-Hicks. I could not permit the criminal trial to be derailed if my judgment had come into the public domain too early. I make it quite clear, however, that the Reporting Restriction Order would only last until the conclusion of the criminal trial. I indicated that, at that point, I would give permission for this judgment to be reported in full although there would have to be some anonymisation, if only to protect C."

In that case the fact-finding judgment was embargoed from December 2016 until conclusion of the criminal proceedings 11 months later. The criminal proceedings were plainly pending at the time that the fact-finding judgment was delivered.

27. In this case the father made a formal complaint to the police in September 2018. In his submissions Lord Macdonald stated, without challenge, that at the end of January 2019, the CPS advised the police to open an investigation. Plainly, many more months will elapse before a charging decision is reached applying the familiar two-limbed test (more likely than not that a conviction will be achieved; in the public interest to prosecute). It is not clear to me what criminal offences might even be charged. Plainly there has been no offence committed under section 1 of the Child Abduction Act 1984 as the children were not taken out of the United Kingdom without appropriate consent. It has been suggested that MGF might be charged with an offence under section 2 in that he has taken or detained the children in Ukraine without lawful authority or reasonable excuse. It has also been suggested that the mother might be charged with the offence of conspiracy to commit an offence under section 1. On any view it is highly speculative whether a positive charging decision will be made. If a positive decision is made, then an application to Ukraine to extradite the mother and MGF would have to be made as it seems vanishingly unlikely that they will present themselves here voluntarily. Lord Macdonald QC explained that in his experience extradition proceedings in Ukraine would take years, particularly having regard to the prominence of MGF. Therefore, he described the spectre of future criminal proceedings against the mother and MGF as being both extremely distant and, as he put it, "utterly contingent". His simple submission was that something that is so far distant and utterly contingent cannot ever be described as "pending or imminent".

28.

29. I agree. In circumstances where the condition precedent within section 4(2) is demonstrably not satisfied it would, in my judgment, be a misuse of my inherent powers to make an order which ignores that statutory criterion.

30.

31.

32. If a decision to charge the mother and MGF had been made, and they were present in