



Neutral Citation Number: [2019] EWCA Civ 74

Case No: B4/2018/1993

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
Mr Justice Keehan
High Court of Justice
Family Division
FD16P00282

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/02/2019

Before:

LORD JUSTICE McCOMBE
LORD JUSTICE MOYLAN
and
LORD JUSTICE COULSON

Between:

Re A (Children)

Ms B Connolly QC and Ms A Guha (instructed by **Dawson Cornwell**) for the **Appellant**
Ms C Papazian (instructed by **Direct Access**) for the **Respondent**
Mr M Gration (instructed by **CAFCASS**) for the **Children/Guardian**

Hearing dates: 21st and 22nd November 2018

Approved Judgment

**If this Judgment has been emailed to you it is to be treated as 'read-only'.
You should send any suggested amendments as a separate Word document.**

Lord Justice Moylan:Introduction:

1. The mother appeals from a fact finding judgment given on 30th July 2018 by Keehan J in the course of private law proceedings concerning four children aged between 16 and 10.
2. The purpose of the judgment had been to provide an evidential platform for the court's subsequent determination of what child arrangements orders would be in the best interests of the children. In particular, it was to provide some context for what appeared to be a fractured relationship between the mother and the children with them not only saying that they do not want contact with her but with them also being abusive to her, and her family, during Skype contact (which was described by the Guardian as "perhaps the worst" he had seen in decades of experience). I say, appeared to be, because at present there has been little professional engagement with the children to explore why they have been behaving as they have.
3. The father's case was that the children have been responding to ill-treatment by the mother and her family and to her having "abandoned" them. The mother's case was that the children have been influenced by the father (and his family) to behave as they have and that a central part of the father's conduct were his actions which led to her being "stranded" in Pakistan and which formed part of his abuse of her. In simplified terms, these issues were, as set out in Ms Papazian's submissions for the father on this appeal, "central to the question of whether the children held a true narrative ... for their rejection of" the mother or whether there was some other reason such as their having been alienated by the father and his family.
4. The mother's application for permission to appeal and, if granted, her substantive appeal have been listed for determination together pursuant to the order of McCombe LJ.
5. Given the outcome which I propose, namely that permission should be granted and the judgment set aside, with the matter being reheard, it would not be appropriate for me to enter into an analysis of the evidence and of the parties' respective cases beyond that required to explain my decision. Further, my analysis of why the judgment cannot stand is based on some of the findings made by the judge. At the rehearing these findings will have been set aside with the consequence that the judge will start with a clean sheet. Accordingly, in particular my observations based on those findings are not intended to give any indication of what the ultimate determination should be on the merits of the parties' allegations and the history behind the question at the centre of this case, namely what lies behind the way in which the children have been acting towards the mother.
6. At this hearing the mother was represented by Ms Connolly QC (who did not appear below) and Ms Guha; the father was represented by Ms Papazian; and the children were represented through their Guardian by Mr Gratton. I am grateful to all counsel for their submissions.

7. The Guardian was initially broadly neutral on the appeal but in his oral submissions at the hearing he supported the appeal as set out further below.

Background

8. I take my summary of the background largely from Keehan J's judgment.
9. The mother and the father were both born in Pakistan. By the date of the marriage in Pakistan in 2001, the father had been living in the United Kingdom for some time and was a UK national. The mother came to England in 2002, once she had been granted a spousal visa.
10. The mother and father lived with the paternal grandparents and other members of the paternal family in a property owned by the grandparents.
11. The eldest child was born in 2002.
12. On 13th April 2003 the mother was granted indefinite leave to remain in the United Kingdom. Shortly after this the family travelled to Pakistan where the second child was born. The parents then separated for a period with the mother and children going to live at her family's home. In December 2004 the father and the elder child returned to England.
13. The mother returned to the UK in April 2005 on a ticket which had been purchased by the father to ensure that the mother did not remain outside the UK for more than two years. If this had happened the mother's indefinite leave to remain visa would have lapsed. Both parents, and other members of their respective families, were aware of this requirement. The father then travelled to Pakistan to bring the second child to the UK in May 2005.
14. In 2010 there was an incident at the family home involving the mother's nephew which led to the father and the nephew being arrested. The mother left the home. Telephone transcripts have been obtained from the police. These contain the initial call and later conversations with someone speaking on behalf of the mother who said that the mother had left because of domestic violence. A day or two later the mother and the, by then, four children went to stay with one of her sisters in Oldham. After a short period they then moved to live in a property in Peterborough in the same street as another of the mother's sisters. At that time the children were aged approximately 8, 6½, 4 and 2.
15. Whilst they were in Oldham, social services undertook a "safe and well check". This report also recorded allegations made by the mother: that she had suffered emotional abuse from the father and that the father and his family had not allowed her to visit relatives of hers. The report concluded that there were "no concerns" about the mother's ability to meet the children's needs. The elder three children were seen during the assessment and were happy although they missed friends from school.

16. In July 2010 the mother and the two younger children travelled to Pakistan because her father was gravely ill. They stayed for a few weeks before returning to the UK. While the mother was away, the eldest child stayed with the aunt in Peterborough for a few days until the father brought her back to the family home. The second child stayed with the aunt in Oldham until the mother returned.
17. The father alleged that, during this period when the parents were separated, two of the children had been assaulted and/or mistreated by the mother's sister in Oldham whilst the family was staying there and that the eldest child had been mistreated on one occasion by the mother's other sister in Peterborough while she was living there.
18. The parents were reconciled in September 2010.
19. In May 2012 the whole family travelled to Pakistan following the death of the maternal grandmother. They stayed there until February 2016 in circumstances that were heavily disputed.
20. The mother's case was that the father retained her passport and refused to give it to her when she asked, thereby preventing her from returning to the UK in particular before her visa lapsed. She said that for much of the time she lived at a shelter for women.
21. The father's case was that he had given the passport to the mother's family when he had been asked for it and had been told that the mother's family was dealing with the visa issue.
22. It was agreed that for some periods, the dates and circumstances of which were not agreed, the parents separated. During these periods the children, in the main, lived with the father and/or the paternal grandparents (or one of them). It was also agreed that there had been at least one period of separation during which the mother had sought to maintain contact with the children by going to their school.
23. In July 2014 the mother obtained a replacement Pakistani passport without the knowledge or assistance of the father.
24. In November 2014 Dawson Cornwell were contacted on behalf of the mother by a lawyer in Pakistan with a request that proceedings be initiated in England. It was alleged that the father had taken the mother's passport, with the indefinite leave to remain stamp, and the children's passports and was not allowing them to travel back to the UK. The mother was said to be living in a shelter; the children were "not allowed to live with her" and were living "separately" with the father's parents. The solicitors applied for legal aid but the application was rejected with the result that proceedings were not commenced.
25. The children returned to the UK with the father in February 2016 leaving the mother in Pakistan. The father's case was that this was agreed with the mother and that he and the children continued to have contact with her by telephone after their arrival here. This

contact came to an end when the proceedings commenced. The mother's case was that the father returned with the children without her knowledge or agreement.

26. The mother was not able to obtain a visa enabling her to return to the UK until October 2017.
27. As I have said, what happened during the period between May 2012 and February 2016 was heavily disputed by the parents. Their respective cases were set out in a number of statements filed following the commencement of these proceedings by the mother in May 2016 which I deal with further below.

Proceedings

28. Proceedings were commenced by the mother in the Family Division on 18th May 2016 while she was still in Pakistan. They were commenced by the same solicitors, Dawson Cornwell, who had been contacted on her behalf in 2014 and who were, on this occasion, able to obtain legal aid.
29. The case was unable to be progressed substantively until after the mother's return to the UK in October 2017. However, a number of case management orders were made. These included the order of 26th May 2016 which contained a recital that the father had stated "through counsel that he will pay for the mother's return flight to England and do whatever is necessary to secure her immigration status and ability to re-enter this jurisdiction". This assurance was repeated in the order of 11th July 2016.
30. The mother's case from the outset was that, in particular by keeping her passport following their arrival in Pakistan in 2012 and refusing to return it, the father had effectively ensured that she could not return or not easily return to the UK, especially after her indefinite leave visa had lapsed in 2014.
31. The mother also alleged that the father (and, perhaps, the paternal grandparents) had caused her and the children to be separated for significant periods of time by evicting her from the paternal home in Pakistan, where the family was living, and by refusing to allow her and the children to have contact. During at least one of these periods, the mother had only been able to see the children by going to their school. The mother said that she had spent a substantial period living at a shelter in Mirpur. It was her case that the father had returned to the UK with the children in February 2016 without her knowledge or agreement. It was also part of her case that she had been the victim of domestic violence.
32. The father, initially, did not allege that the mother had physically mistreated the children; only that, while the family had been living in Pakistan after May 2012, there had been periods when the mother had "abandoned" the children by leaving the paternal home. The allegations that the mother had abused the children were not made until the father's statement dated 15th January 2018. The initial allegations of ill-treatment made by the father had been confined to occasions when some of the children were said to have been badly treated by the mother's family.

33. The father denied that he had kept the mother's passport in Pakistan. He said that he had given it to her family to keep. Although it was "common knowledge" that the mother would need to return to the UK before May 2014, "she did not". When he "raised this problem she would dismiss me and say that her brother was dealing with it". The father accepted that, in April 2014, he had had a visit from the manager of the shelter referred to by the mother who had asked about the mother's passport. The father had told her the "full story" which led her to say that the mother was "lucky to be with" him.
34. The father said that by August 2014 he and the mother "were in discussions" about how they "should resolve her immigration". They agreed that he would return to the UK to sort it out. He tried "to secure a basis" for the mother to be able to enter the UK but failed to achieve this. He alleged that shortly after he had left Pakistan in August 2014, the mother had left the paternal home in Pakistan without the children. He returned to Pakistan in May 2015 when he and the mother were reconciled.
35. The father was "puzzled" why the mother had commenced proceedings when the return to England had been agreed and when she was aware that he was "doing everything possible to arrange" her visa. It was his case that the family had been living together in Pakistan between May 2015 and February 2016. They had agreed that he would return to the UK to pursue the application for the mother's visa. He had proposed that the children stay with the mother in Pakistan but she had insisted that they return with him. After their arrival in the UK he and the children had had contact with the mother by telephone and Skype "very frequently" until the proceedings had been commenced. He believed that the mother had started proceedings "to try and return to the UK bypassing the immigration laws". She had told him she had started them to "help her get her visa more quickly".
36. The parties were required to prepare a schedule of the allegations on which they each relied. The key findings sought by the mother were that:
- (a) she had been the victim of domestic abuse by the father;
 - (b) she had been stranded by the father in Pakistan;
 - (c) the mother had been evicted for significant periods from the paternal home in Pakistan, separating her from the children, and the father had then removed the children from Pakistan in February 2016 leaving the mother stranded there; and
 - (d) the father had alienated the children against her.
37. The father's case was that the mother had "assaulted/abused" the children on three specific occasions in 2008, 2010 and 2012 and that one of the children had been hit "on dates unknown". The mother's sisters in Oldham and Peterborough were also alleged to have assaulted the children in 2010. The mother had "abandoned" the children for periods while the family were in Pakistan by "voluntarily" leaving the family home. The children treated the mother in the way that they did, "contrary to his best endeavours", because of "her past actions and conduct towards them".

38. The Guardian found that, particularly the elder three children, “extol the narrative of their direct experience of ill-treatment” by the mother and her family. The elder three referred to the mother leaving them when they were living in Pakistan and, in essence, said that she was not interested in them.
39. The Guardian’s report made clear his concern for the children based on the way they treated the mother during Skype contact which he described as “harrowing”. They would be abusive and told the mother that she was “only doing this for Child Benefit money”, an interesting comment to be made by children. In his opinion, even “if there is an evidential basis for their extreme hostility and alienation, this, if not resolved, harms their sense of identity and will carry forward corrosively into adulthood”.
40. It is also, in my view, potentially revealing that the elder child referred to the mother and father having a discussion in 2012, which would seem to have taken place in the absence of the child, about the mother’s passport. This included the father apparently asking the mother whether she cared about the children or the passport and was said to have led to the father giving the passport to the mother or her family. The last element of this account was part of the father’s case but which was rejected by the judge.
41. The children were joined as parties, with a guardian appointed from the Cafcass High Court Team, in November 2017. The mother’s sisters were joined as parties in April 2018. The fact-finding hearing took place in July 2018. The mother, father and the Guardian were all represented. The aunts attended for part of the hearing; one of them acted in person and the other had pro bono counsel. The judge heard oral evidence from a number of witnesses including the eldest child.

The Judgment

42. The judge made clear which witnesses he believed and which he did not. He found that the mother was “an extremely unsatisfactory witness”. He also rejected much of the evidence given by the other witnesses relied on by the mother, including that given by the person who managed the shelter in Mirpur. The one witness relied on by the mother who the judge found was an “entirely honest and open witness” was the mother’s nephew.
43. The judge found that the father was, “in the main, candid and honest in his evidence”. However, he decided that the father had lied about giving the mother’s passport to her family, after they had reconciled in late 2012, and had lied about what the manager of the shelter had said to him in April 2014. The judge also found that the father had not done “all he could have done to secure the mother’s return to” the UK. The judge accepted much of the evidence given by the witnesses relied on by the father.
44. The judge made a number of key findings which, in important respects, were clearly interlinked.

45. The pivotal parts of the mother's case rejected by the judge were that she had been the victim of abuse including, in particular, by being stranded in Pakistan as a result of the actions of the father and that the father had alienated the children against her.

46. In respect of the issue of stranding, the judge explained his conclusion as follows:

“106. In what may be described as the ‘classic’ stranded wife case, the mother is living, or forced to live with the paternal family with little or no contact with her maternal family or with government agencies or, as in this case, the British High Commission. In this case, for much of her time, the mother was, as I find, living with her family, she was able, without the knowledge or assistance of the father to obtain a replacement passport and was in contact with and travelled to the British High Commission to seek an indefinite leave to remain visa. She having been able to do all of this without the assistance of the father, I have not been given any explanation why:
i) she could not have applied for a passport and thus returned to the UK before her original visa expired in April or May 2014; or
ii) why the father is at fault for it taking until October 2017 for the mother to obtain a further indefinite leave to remain visa.

107. In these circumstances I decline to find that the father ‘stranded’ the mother in Pakistan.”

47. As to the father's case, that the mother had “ill-treated and/or mistreated the children”, the judge was particularly influenced by a video said to have been taken by the father's brother on his mobile telephone in 2008 but not disclosed to the father until December 2017. The judge described this as: “One, if not the most, crucial piece of evidence in this case”. The judge found that this showed the mother hitting the eldest child with a slipper. Based, it would appear, significantly on this evidence, the judge found that the mother would “resort to the physical chastisement” of two of the children “from time to time”.

48. The judge also found that the mother's sisters had “ill-treated” the children when they stayed with them in 2010. When asked for clarification of this finding on behalf of the mother, the judge said that the ill-treatment was “emotional rather than physical harm”.

49. The judge made no findings about whether the mother had been evicted from the family home in Pakistan or whether she had “abandoned” the children. When dealing with the father's case, that the mother had abandoned the children, he only said: “Whatever the truth of this assertion, the father was and remains of the view that she had abandoned the children”. This led the mother's representatives to ask for clarification of the judge's findings on this issue. He responded with the observation, included in the order of 30th July 2018, that he had not made a finding that “the mother did not abandon the children in Pakistan between 2012 and 2016”.

50. The judge was, however, satisfied that the father's view, that the mother had abandoned the children, had been "inevitably communicated directly or indirectly to the children". He also found that the father had not "actively and intentionally alienated" the children against the mother.
51. The judgment contained no findings about the circumstances in which the father and children had returned to the UK without the mother in 2016. When asked on behalf of the mother to provide clarification on this issue he said that he "did not make a finding that there was a wrongful removal" at that time.
52. When dealing with the eldest child's evidence, the judge said that, even if her account of events was true, he was "at a loss" to understand how those events "should result" in the child's "hatred" of her mother and her aunts. Further, although the judge did not accept the child's evidence against the aunts (because he found only emotional harm) he considered that she believed her account to be true.
53. Finally, as referred to above, the judge found a nephew of the mother's to have been "entirely honest" in his evidence. Part of his evidence was that he had spoken to the mother on many occasions whilst she was living in a shelter in Pakistan; that he had spoken to the manager of the shelter "on occasions"; and that a friend of his had collected the mother from the shelter and taken her to the British High Commission but they had been unable to assist her. This evidence was, therefore, inconsistent with the judge's conclusion that the mother had never lived at the shelter.

Submissions

54. Counsel for the parties to this appeal have each made comprehensive written and oral submissions which addressed all the points which, in my view, could reasonably be advanced in respect of their cases. I propose only to summarise their submissions. I acknowledge that, as a result, I will not refer to many of the points they made so it would be right to make clear that I have taken all the matters raised into account when determining this appeal.
55. The mother's Grounds of Appeal advanced a wide ranging attack on the judgment. The general grounds included: that the judge had failed to give adequate reasons; that the findings made by the judge were inconsistent and contradictory; that the judge had misunderstood aspects of the evidence; that the judge's approach to analysing the evidence was flawed; and that the judge's principal findings were plainly wrong.
56. In her oral submissions, Ms Connelly, as well as accepting that she had to surmount a high threshold to overturn a fact finding judgment, narrowed the mother's case and focused on: the judge's rejection of the mother's "crucial" allegation that she had been stranded; the judge's failure to deal with the manner in which the father's case had developed and inconsistencies in it, including in respect of the children's relationship with the mother; the judge's failure to deal with key issues; and inconsistencies in the judgment.

57. On the issue of stranding, Ms Connelly submitted that, if the judge's finding on this issue was flawed, the whole judgment was flawed because of its pivotal place in the history and its impact on the other issues. In her submission the judge's conclusion is unsustainable. Having found that the father had kept the mother's passport, in that he had not given it to her family as he had alleged, it was inconsistent for the judge then to conclude that the mother had not been "stranded" as a result of the father's actions. The fact that the mother might have been able to take steps to deal with the consequences of the father's actions did not negate the impact of those actions.
58. The issues which Ms Connolly submitted the judge failed either to address adequately or at all were, in particular, those advanced by the father, and identified by at least the elder children, to explain why the children were so hostile towards the mother, namely the mother's alleged ill-treatment of them and her abandonment of them. There was, she submitted: no analysis of the inconsistencies in the evidence, especially in the father's evidence but also that of the elder child, as to the nature of the allegations that the mother had physically chastised the children; no analysis of the manner in which the father's case as to ill-treatment had mutated during the proceedings; and no analysis of the case that the mother had abandoned the children. Why, for example, did the children appear to consider that they had been abandoned by the mother in 2014 when she sought to maintain contact with them by seeing them at their school until she was stopped from doing so by the father or his family?
59. Ms Papazian mounted a robust defence of the judgment. She submitted that there was very little independent evidence in this case leading to the judgment being based largely on the judge's assessment of the oral evidence given during the course of the hearing. She submitted that the judge can be seen to have carefully examined and evaluated the evidence; for example, the judge did not accept all of the father's evidence. He had also expressly referred to his having "had considerable sympathy with the case advanced by the mother" prior to the start of the fact finding hearing.
60. She also gently reminded us, as of course I accept, that the judge, to whom the case had been allocated from November 2017, was best placed to assess the evidence and decide whose evidence was reliable and that this court should be "circumspect in substituting" its own view. Ms Papazian relied on *Piglowski v Piglowska* [1999] 1 WLR 1360 in submitting that a judgment is no more than a "distillation" of the evidence and of the judge's evaluation of it.
61. Ms Papazian also relied on there being no challenge to the judge's summary of the law governing the approach he should take when making findings which included his referring to the well-known Lucas direction.
62. In respect of the issue of stranding, Ms Papazian submitted that the judge was entitled not to find that the father had stranded the mother. Indeed, she went as far as submitting that "the history of who held the passport was immaterial" because the mother had been able to obtain a replacement passport. She further submitted that this issue had to be

considered “in the context of (the judge’s) other findings” because of the “inter-relationship” between this aspect of the judgment and the judge’s determination of other parts of the parents’ respective cases. Additionally, during the course of her oral submissions Ms Papazian acknowledged, in my view rightly, that the judge’s finding on stranding was one of the cornerstones of the judgment which was inter-connected with the others.

63. In summary, Ms Papazian submitted that the judge made findings which “were properly made having regard to his assessment of both the written evidence” and the oral evidence. They were sufficiently reasoned and there is nothing, she submitted, which would support the conclusion that the judge’s findings were contrary to the evidence or that his decision making process was flawed.
64. In his written submissions the Guardian adopted a broadly neutral position on the appeal whilst indicating that he would review this having heard the parties’ oral submissions.
65. Mr Gration identified the critical overarching issue, which the fact finding hearing was intended to determine, as being whether the children’s relationship with their mother was based on a true “narrative” or whether they had “internalised a narrative that is at odds with the facts”. It was critical, Mr Gration submitted, because a flawed process or “unreliable” judgment would compromise the welfare determination.
66. In this context, he submitted that, of “great significance”, were the allegations that the mother had abandoned the children and that she had been stranded in Pakistan. The former because this was an issue which the children had raised with the Guardian and was important to them. The latter because, if the mother had been stranded, it would demonstrate the father’s attitude towards her and would add weight to her allegations about how the father had treated her including in February 2016 when he and the children had left her in Pakistan, these matters also being relevant to the question of abandonment.
67. Having heard and reflected on the parties’ submissions, the Guardian supported the appeal in his oral submissions. This was on the basis that the judge’s approach to the issue of stranding was flawed and also because the judgment had not sufficiently addressed certain key factual issues which needed to be addressed for the purposes of the welfare hearing. These latter issues were, in particular, the issue of abandonment which, Mr Gration submitted, had not been properly considered and the connected question of the circumstances in which the children and the father returned to England without the mother in February 2016.
68. In respect of stranding, Mr Gration submitted that experience would suggest that there is no “classic” form of stranding. The only common element is some step or steps seeking to prevent a spouse from returning to the UK. What those steps might be can differ markedly from case to case. He submitted that the judge’s approach distracted from the question of what actually happened to the mother and the impact that had had on the children’s relationship with her. Further, it “glossed” over what had happened while the family had been living in Pakistan which connected with the issue of abandonment.

69. In respect of the issue of abandonment and the connected question of how the mother came to be left alone in Pakistan in February 2016, Mr Gration submitted that these were of “fundamental importance” for an understanding of the reasons for the children’s fractured relationship with the mother. The children’s behaviour was “extreme” and the findings made in the judgment did not sufficiently assist in identifying from where their “hatred” derived. The return of the children and the father to England had prevented direct contact and represented a further severance in this relationship. These issues needed to be substantively considered within the judgment and had not been. They had been the subject of a great deal of evidence which was also not reflected in the judgment.

Law

70. “Transnational Marriage Abandonment”:
The expression “transnational marriage abandonment” appears in Practice Direction 12J of the Family Proceedings Rules 2010 which deals with “Domestic Abuse and Harm”. It states:

“3. For the purposes of this Practice Direction -

“domestic abuse” includes any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to, psychological, physical, sexual, financial, or emotional abuse. Domestic abuse also includes culturally specific forms of abuse including, but not limited to, forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment.

“abandonment” refers to the practice whereby a husband, in England and Wales, deliberately abandons or “strands” his foreign national wife abroad, usually without financial resources, in order to prevent her from asserting matrimonial and/or residence rights in England and Wales. It may involve children who are either abandoned with, or separated from, their mother”.

It is clear from the Practice Direction that the words abandonment and stranding are not terms of art and that they are not intended to be applied in a formulaic manner. This is because there are a number of ways in which a spouse might be said to have been abandoned or stranded abroad or in which the other spouse might have sought to achieve this. I would agree with Mr Gration when he submitted that cases can include many differing elements which militates against their being placed in distinct categories.

71. The core feature of the concept of stranding or abandonment is the exploitation or the attempted exploitation by one spouse of the other’s vulnerability or weakness to seek to

ensure that they are not able to come to or return to the UK. As Peter Jackson J (as he then was) said in *ZM v AM* [2014] EWHC 2110 (Fam), at [1], it can be the “opportunity” the secure immigration status of one spouse and the insecure immigration status of the other gives “the former to exploit the latter’s weakness”. However, as PD12J makes clear, it is based more generally on “controlling, coercive or threatening behaviour, violence or abuse”.

72. We were referred to *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409 and to *Fage UK Ltd & Another v Chobani UK Ltd & Another* [2014] EWCA Civ 5 but it is not necessary to cite any passages from those decisions.

Determination

73. I can state my conclusions shortly both because, by the end of the hearing, it was clear to me that the appeal must be allowed and a rehearing ordered and because I need to avoid trespassing into areas or issues which will have to be addressed and determined at the rehearing.
74. I start by acknowledging that the judge was faced with a large amount of evidence given in a variety of different forms, some of which had technical problems, about a wide range of matters. It was clearly not an easy hearing to manage. In contrast, this court has only been required to focus on a few specific issues.
75. I also recognise, as the authorities make clear, that this court should only interfere with findings of fact if compelled to do so. The judge was best placed to determine which evidence to accept and which to reject. He made clear which witnesses he believed and which he did not. As referred to above, he found that the mother was “an extremely unsatisfactory witness” and that the father was, “in the main, candid and honest in his evidence”.
76. However, with all due deference to the judge’s position as the trial judge, it is clear to me that his conclusion that the mother was not stranded is not supported by his analysis (which is set out in paragraph 106 as quoted above). The judge turned the question on its head by basing his decision on the mother’s failure to explain why she had not applied for a passport prior to April 2014 or why the father was at fault for her not obtaining a visa until October 2017. He seems to have been most influenced by his assessment of the contrast between the position of “the ‘classic’ stranded wife” with that of the mother in that she had contact with her family, was able to obtain another passport and had travelled to the British High Commission to seek (it must be said, without success) to obtain a new visa. He concluded that, because the mother could have taken steps to deal with her situation without the knowledge or assistance of the father, and had not explained why she had not, she could not be said to have been stranded. However, as Coulson LJ pointed out during the hearing, the argument that the mother had a “remedy”, which was the word aptly used by Ms Papazian during her submissions, would indicate that there had been some prior act which put her in need of a remedy.

77. In my view, the prior act in this case was the judge's finding that the father had withheld the mother's passport from her. Although the judge recognised that the father's lie – that he had given the passport to the mother's family – had “a bearing” on the issue of stranding, it is difficult to see how this was taken into account when the judge concluded that she was not stranded.
78. As submitted by Ms Connolly, I consider that the judge took an unduly narrow approach to this issue when he measured the mother's situation against that of “the ‘classic’ stranded wife”. I agree with Mr Gration that the manner in which a spouse can act in order to seek to prevent the other spouse returning to the UK can take many forms. In my view, it is not helpful to seek to assess what has happened in any case by reference to any notional concept of the “classic” case. As set out above, stranding is a broad concept and can include any action taken by a spouse which puts obstacles in the way of the other spouse being able to return to the UK. In some respects, it matters not whether the attempt is successful or not. Even if not successful it could still support a conclusion of controlling or coercive behaviour as referred to in PD 12J.
79. Simply stated, the judge's determination that the mother was not stranded is inconsistent with his finding that the father kept the mother's passport. This was the key act which impeded her ability to return to this country and, in particular, to return prior to the expiry of her visa. The judge's reasoning, as set out above, that the mother might have been able to take steps herself to overcome the situation created by the father and had not explained why she had not, cannot, therefore, support his determination.
80. I would add that my conclusion on this issue is fortified by the impact of the judge's finding about the passport on other aspects of the father's case on stranding. The judge did not deal with these other aspects in the judgment nor, I would add, with the father's motivation in keeping the passport. In my view, this finding would seem inevitably to lead to the conclusion that, for example, the father's case about his raising “this problem” with the mother prior to May 2014 must also have been false. This would mean not only, as the father accepted, that he knew she needed to return to the UK to prevent her visa lapsing but that, at the very least, he deliberately sought to make it difficult for her to do so. If this part of the father's case was also a lie, the judge's conclusion that the mother was not stranded by the father's actions becomes even less tenable.
81. What is the effect of this determination being set aside? Can the balance of the judgment stand?
82. I have reflected on whether the judge's judgment, and in particular his other findings, based as many of them are on his assessment of the witnesses, can nevertheless stand. I have concluded that they cannot. In summary, this is because all parties accept that the issue of stranding is a fundamental issue in the case and also because, essentially, all parties accept that it is an issue the determination of which significantly interconnects or overlaps with the determination of the other key factual issues in the case.

83. As set out above, during the hearing of this appeal Ms Papazian rightly acknowledged that the judge's finding on stranding was a cornerstone of the judgment which interconnects with the other elements which underpin it. Her position before this court mirrored that which the father had taken during the proceedings below. As set out in Ms Papazian's written submissions for the appeal, the father had contended that stranding was one of the small number of issues the determination of which was "central to the question whether the children held a true narrative". As this could be said to be the main purpose of the judgment, the setting aside of the determination of one "central" issue means, in my view, that the whole question of whether the children have a true narrative needs to be reconsidered and, for that purpose, the judge needs to start with a clean sheet.
84. The issue of stranding connects with the other main factual issues so that once this determination goes, the whole judgment is undermined. The removal of the finding that the father did not strand the mother requires these other issues to be reconsidered. Why did the father lie about this? And why did he keep the passport if he was not trying to control the mother's ability to travel? Why did he keep it when he knew the consequences of the mother remaining out of the UK beyond May 2014? Further, why had he said that, when he raised the need for the mother to return to the UK before May 2014, the mother had said that her brother was dealing with it? These questions are not answered in the judgment.
85. Significant other elements of the case are directly impacted by this issue. For example, it potentially undermines the whole of the father's case as to the steps he was taking from 2014 "to sort out (the mother's) immigration status". This connects directly with the circumstances in which the mother was left behind in Pakistan in February 2016 which would appear to form a key part of the children's narrative of abandonment and rightly considered by the Guardian to be a central issue. The judge would need to consider whether what happened in February 2016 was a continuation of the father's actions to strand the mother or was, somehow, separate from them.
86. I would add that, if it was necessary for this court to do so, I consider it inevitable that the judge's finding on stranding would be substituted with a finding that the father had stranded the mother. This would be based on the judge's finding about the passport and what I consider to be the consequences of that finding on other aspects of the father's case. Such a finding would, therefore, result in the rest of the judgment being undermined because it would not fit into the narrative as generally accepted by the judge nor, I would add, with his conclusion that the father "*largely* gave ... a truthful account of events" (my emphasis).
87. I also consider that a rehearing is required because the judge did not deal sufficiently with the issue of whether the mother had "abandoned" the children. As Mr Gration submitted, this was a critical issue because, as referred to above, it was one of the key elements referred to by the children as explaining their attitude towards the mother. The judgment only contained passing references to this issue. Why, it might be asked, for example, did the mother resort to having contact with the children at their school if she had abandoned them? Similarly, why did she seek to start proceedings in England in 2014 if she had

abandoned the children? These and other issues are not answered in the judgment and are not answered by the additional clarification provided by the judge.

88. Until asked for clarification, the judge also did not address the circumstances in which the father and the children returned to England in February 2016. As Ms Connolly submitted it is difficult, without proper analysis, to see how the father's case that this return was agreed and that relations between the mother and the children were good, can fit with the mother's commencement of proceedings in May 2016. Again, the judgment does not address this conundrum.
89. In the light of my conclusions as set out above, it is not necessary to address any of the other submissions made on behalf of the mother. However, I propose to make additional observations about three other points.
90. First, there is considerable force in Ms Connolly's submission that the judge should have undertaken some analysis of the inconsistencies in the father's case as to the allegations of the mother ill-treating the children and the manner in which that case mutated. In my view, these inconsistencies and changes were of sufficient substance to require some explanation of why, despite their nature, the judge was satisfied that the father's evidence was largely true.
91. Secondly, the judge's determination that the mother never stayed at the shelter would seem, without explanation, to be inconsistent with his finding that the mother's nephew was "entirely honest". As set out above, part of his evidence was that he had spoken to the mother on many occasions whilst she was living in the shelter; that he had also spoken to the manager of the shelter "on occasions"; and that a friend of his had collected the mother from the shelter and taken her to the British High Commission. This evidence, accepted by the judge was, therefore, inconsistent with the judge's conclusion that the mother had never lived at a shelter in Pakistan. This inconsistency is not explained in the judgment.
92. Thirdly, I have concerns about the video found by the judge to have been taken by the father's brother in 2008. It only became apparent during the hearing, when the brother's telephone with the video on it was produced, that it was being claimed by the brother that he transferred the video from another mobile telephone (which was stated to no longer be available) in April 2010. This may be innocuous but given the judge's assessment as to the "crucial" nature of this evidence, one of the matters which will clearly require consideration for the purposes of the rehearing is whether expert evidence is necessary to address this, and perhaps, other issues relating to this evidence.
93. In conclusion, therefore, in my view this appeal must be allowed and the judgment set aside. The manner in which the matter is to be reheard will need to be considered at a directions hearing to be listed as soon as possible before a judge nominated by the President of the Family Division.

94. Finally, it would be right to acknowledge that, from the father's perspective, this judgment might seem to be one-sided. This is because the issue in this appeal has been whether the judge's findings should be set aside. Those findings were almost entirely in his favour and were based on the judge's acceptance of the bulk of the evidence from the father and his witnesses. I have not lost sight of the judge's assessment of the mother and, apart from her nephew, of the other witnesses on whom she relied. However, the questions raised by this appeal have required me to focus on the findings to determine whether they are susceptible to challenge as submitted by the mother. This, in turn, means that the principal focus has been on the father's case, on which the judge's findings were based, including because the judge rejected so much of the mother's evidence. To make clear, I am not determining whether the mother's case was or was not true but whether the judge's determination in his judgment can be sustained.

Lord Justice Coulson:

95. I agree

Lord Justice McCombe:

96. I also agree