

IN PRIVATE



Case No: CA-2023-001274
[2023] EWCA Civ 995

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE HIGH COURT OF JUSTICE (FAMILY DIVISION)
(MR JUSTICE KEEHAN)

The Royal Courts of Justice
Strand, London, WC2A 2LL
Tuesday, 4 July 2023

Before:

LADY JUSTICE MACUR
LORD JUSTICE STUART-SMITH
SIR CHRISTOPHER FLOYD

H (A CHILD)

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Transcript of Epiq Europe Ltd, Unit 1 Blenheim Court, Beaufort Business Park, Bristol BS32 4NE
Tel No: 020 7404 1400 Email: civil@epiqglobal.co.uk (Official Shorthand Writers to the Court)

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REPRESENTATION

Miss Lorna Meyer K.C. and Miss Heather Popley instructed by **Lucie Allen** (of **Glaisyers Solicitors**) representing the **Applicant**

Miss Cleo Perry K.C. instructed by **Kevin Skinner** (of **Goodman Ray**) representing the **1st Respondent**

Mr Stephen Chippeck instructed by **Andrew Humphries** (of **Patrick Lawrence Partnership LLP**) representing the **2nd Respondent**

Mr Ajmalul Hossain K.C. appearing as a Litigant in Person as the **3rd Respondent**

Judgment
(Approved Judgment)
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LADY JUSTICE MACUR:

1. Stuart-Smith LJ, when sitting as out of hours judge on 2 July 2023, directed this application for permission to appeal to be considered at an oral hearing, with appeal to follow if granted. This hearing has been arranged at short notice for reasons that will become apparent in this judgment.
2. In summary, we grant leave to appeal but thereafter, after reconsideration of the parties' submissions on the substantive issue, we dismiss the appeal against the order of Keehan J made on 30 June 2023 which, inter alia, permitted the removal of H's body to Bangladesh for the purpose of a Muslim burial in the "eternal X family plot".
3. These are my reasons to join in the decision to grant permission to appeal, but to dismiss the appeal against the order on the merits.

Background

4. This is a most tragic case concerning the death of H who died of natural causes on 29 June 2023. She was 10 years and 1 month old. Her parents, siblings, and paternal grandparents, who were also her Special Guardians, grieve mightily.
5. H was the younger child of three of her mother and father; they married shortly before her birth. H had a neurological developmental disability caused by a genetic disorder encephalopathy. The mother had three other children, one of whom had also suffered from a genetic disorder and unfortunately died in 2013. The mother has subsequently had two other children, one of whom also died in 2019.
6. The mother and father separated in 2014. The children remained in the care of the father and, initially his new partner, although the paternal grandmother, who had travelled to London from Singapore to assist following H's premature birth, remained actively involved in H's care. From 2016, the paternal grandmother became her sole carer, and in 2017 she and her husband, the paternal grandfather, were appointed

Special Guardians for all five children of the family (that is, including H's two half siblings). They were their primary carers and assumed financial responsibility for all of them.

7. In October 2019, the paternal grandparents were granted leave to permanently remove H, and her two elder full siblings, to Singapore. Their application in relation to H's half siblings was adjourned on the basis that they would continue to be educated in boarding school in England but spend their school holidays in Singapore. The mother, who had not seen H since 2014, initially opposed the move but, following mediation with the paternal grandparents, consented to the application. It was agreed that the mother would have indirect contact through letters and cards and that she would receive quarterly updates on their progress. Specifically, in relation to H, it was agreed that the paternal grandparents would inform the mother if "H's health deteriorate or if health professionals indicate that she needs to be informed", or "if any issue arises in relation to their own health."
8. H and the paternal grandmother travelled to Singapore in January 2020. The Covid pandemic and subsequent lockdown shortly thereafter meant that the paternal grandmother provided for H's care without outside support.
9. In June 2022, the family returned to England with a view to selling their home and wholesale removal to Singapore. Unfortunately, soon after arrival H became ill and was admitted to hospital where she remained, often placed in intensive care and high dependency units, for 12 months. She was discharged home in June 2023, but after a few days was re-admitted to hospital and died a few days later. Her paternal grandmother had been constantly at her side during the periods of her critical illness.
10. In the final days of her life, the paternal grandparents were told that, although nothing would be done to hasten H's demise, it was likely that without further intervention she would die. On 27 June 2023, the paternal grandparents, in accordance with the agreed order referred to in [7] above, asked the Local Authority (see below) to notify the mother that H's situation was deteriorating rapidly. Fortunately, the mother and one of

her half siblings were able to visit H prior to her death. H died during the afternoon of 29th June.

11. At the time of her death, H was the subject of care proceedings initiated by the the Local Authority on 25 November 2022, but she was not subject to any interim public law children's order. However, there were orders which prevented her removal from the United Kingdom issued by a competent court on 13 December 2022.
12. On the 29 June, the Local Authority solicitor notified the clerk to Keehan J, the High Court designated judge then seized of the care proceedings, that H was critically unwell with multi organ failure and was not expected to survive. The following morning, they reported that H had died. Thereafter, on the same day, Mr Skinner, solicitor for H's father, notified the judge's clerk that:

"There is a delicate issue that his Lordship may need to consider today if possible and with fully recognising how busy the court is, my client, the father, has raised the burial of H and seeks for that to take place in Bangladesh in the family plot. I have raised this with the other parties. My client hopes that there will be agreement. I raise this solely to gauge whether his Lordship would have any time available to hear an application should one need to be urgently made today. I am sure his Lordship will recollect that H is Muslim and, in line with her religion, the burial should take place quickly."

13. The clerk to Keehan J responded to the effect that the judge could accommodate an urgent hearing that afternoon via a Teams link. The solicitor responded:

"The position as I understand it is as follows: (1) The father seeks permission to remove H's body to Bangladesh (2) The mother opposes this plan (3) H's guardian has not given a view on this proposal but does not think attending a hearing this afternoon when other issues could be dealt with, is necessary and proportionate and a consent order as suggested by his Lordship earlier should suffice to discharge the proceedings (4) The Local Authority has not given a view on this issue of a hearing (5) [a half sibling]'s guardian has been excused from attending (6) I have not heard from those representing either the paternal grandmother or paternal grandfather. This is not a criticism, given the short notice. I understand that they fully support H being removed to Bangladesh and that they would seek party status

to such an application. The paternal grandmother has, of course, been the main carer for H in recent months, if not longer. I can confirm her passport has been returned to her in preparation of any trip out of this jurisdiction. I have to accept on behalf of the father that the care proceedings have de facto come to an end. This means that the only parties to any application for the removal of H's body to Bangladesh would be the mother and father. My client would ask that his application is dealt with on a summary basis this afternoon, given the religious implications and need for a burial within the Muslim faith. If his Lordship does not think that this would be the proper way to deal with such an application, then I would suggest that the parents (and grandparents, if so advised) can file statements by 4.00 pm on Monday. Subject to his Lordship's diary, a listing of two to three hours, if at all possible, is found early next week to hear submissions from the parties. I am instructed to undertake to issue an application and pay any court fee in respect of it. I am available to attend any hearing this afternoon."

14. As indicated above, Keehan J had been the designated judge for the care proceedings, which were ended by H's death. He, nevertheless, assumed responsibility for a hearing and made inquiries via his clerk as to the grounds upon which the mother was opposing the paternal family' plans.
15. The mother's solicitor responded at 2.50 pm that afternoon indicating that they were in the process of taking further instructions from the mother and would seek to update the court as soon as possible; ten minutes later they confirmed that the mother objected to the proposal to remove H's body from the jurisdiction, she wished H to be cremated and for her ashes to be buried in the United Kingdom in order that her maternal family would be able to visit her grave and pay their respects. Consequently, she sought an injunction preventing the release of the body to the paternal family, pending the hearing to consider a declaration as to who should have the authority to deal with the funeral.
16. By that time, a hearing had already been arranged for 3.00 pm that afternoon. Shortly after that time Keehan J heard representations including on behalf of the mother and commenced at 3.50 pm to give a short ex tempore judgment, indicating that he was not prepared to delay arrangements for H's burial and did not see how a delay until the following week would better inform the decision he was asked to make.

17. The judge was satisfied, and found as a fact, that H had been raised in the Muslim faith and that, for the best part of her life, she had been cared for by her paternal grandparents and given an excellent quality of care. The judge commented on the devotion of the paternal grandmother and noted she had attended upon H throughout her time in hospital over the past 12 months.
18. The judge was pleased that the mother had been able to visit H before her death but stated that he could not ignore the fact that she had not cared for H, or seen her, since 2014. The mother's wish for cremation was wholly contrary to the Muslim faith and, whilst appreciating that the mother and other members of the maternal family in the United Kingdom would have difficulties to pay their respects at the place of her interment if in Bangladesh, it would be "wholly wrong and wholly inappropriate" for him to make any order regarding the funeral arrangements against the wishes of the paternal grandmother.
19. The judge granted letters of administration to the paternal grandparents, who he joined as parties to the proceedings, in order that they and the father, could arrange for the transportation of H's body to Bangladesh for burial in the paternal family plot where her mortal remains would be laid to rest with her paternal great grandfather.
20. Grounds of appeal were drafted on behalf of the mother, and the matter referred out of hours to my Lord, Stuart-Smith LJ, in the very late hours of 30 June 2023. Following his conversation with Ms Meyer KC, representing the mother, an e-mail was sent by Stuart-Smith LJ in terms: "... May I first of all offer my condolences to those affected by the loss of H. Returning to the content of our call:1. You told me that your junior is in touch with Mr Skinner, who acts for the father; 2. I told you that I am not prepared to make any order or intervention on present information. I am, however, prepared to hear you again at 10.30 tomorrow morning. Mr Skinner (and/or counsel on his behalf if so advised) should attend that hearing if at all possible. I indicated that I would also hear from the paternal grandfather (in person or represented) if he wishes to participate. You kindly agreed to take forward the logistics of arranging a link for a team's meeting ...3. Thank you for pointing out to me that Keehan J had been the Judge having conduct of the care proceedings. On that basis, unless anyone submits to the contrary, I

shall proceed on the basis that he was fully aware of and had in mind the issues that had been raised in those proceedings. My main concerns for the hearing tomorrow are that I should understand (a) the respondents' position on the urgency of removing H's body from the jurisdiction; and (b) what alternative funerary arrangements your client proposes and the basis upon which she says that her views should influence the Court's exercise of its judgment and discretion; and (c) the practicalities of what your client is suggesting should be the way forward for resolving this appeal if permission is granted i.e. timescales and the service of materials."

21. Mr Skinner contacted Stuart-Smith LJ's clerk by e mail the following morning, offering an undertaking on behalf of the father that "no steps will be taken to remove H's body from [the] jurisdiction today". He also indicated that in response to the question posed as regarding urgency, that his "instructions on that matter are as follows; the requirements are that a person should be buried within 24 hours, except when a brief delay would ensure attendance for those required to participate in the burial rites (which includes H's father and brothers), and to a location in which those who would tend to her grave in the Islamic tradition could do so attentively and for the longest period of time. I am instructed that there is also second factor that the court needs to consider, which is that H's full siblings, [T] and [T], who also share H's faith and Asian heritage. They reside in Asia and had lived with H throughout her life. They have not had an opportunity to pay their last respects to H in person as they are currently in Asia. Likewise, the father has not been able to so. There is an urgency that arises from preservation of H's body and giving the father, and wider paternal family, the earliest opportunity to pay their final respects. That opportunity was afforded to [the mother] with the support of the paternal grandparents, and the [mother], as well as H's maternal half-sisters each had two hours with H in person within her last twenty-four hours."
22. Mr Skinner e mailed again shortly afterwards to indicate that the paternal grandparents were also prepared to give an undertaking that they would not remove H's body from the jurisdiction, however "there are a number of religious rituals that they have to take to prepare H for her next life and they would like to continue to take those steps in the Islamic way."

23. Ms Meyer responded by e mail on behalf of the mother indicating that the mother had “no objections to H’s body being prepared in line with the traditions and rituals of the Muslim faith. She understands that H needs to be washed and would not wish to stop this from happening” also indicating that the mother’s position had “altered from that expressed before the Court below” in that she no longer sought for H to be cremated.
24. Stuart Smith LJ arranged a hearing for Saturday 1st July 2023, on which occasion he adjourned the application for permission to appeal, with appeal to follow, if necessary, to 4 July 2023.

The application for permission to appeal/ grounds of appeal.

25. The grounds of appeal may be summarised as follows: (1) in dealing with the hearing summarily, Keehan J failed to pay due regard to the mother's Article 6 rights to a fair trial in relation to what is, inevitably, the distressing and emotive issue of the interment or otherwise cremation of her daughter's body. The listing of the matter and the hearing were unfair to the mother in that the circumstances gave insufficient time to the mother to give informed and reasoned instructions to her counsel and gave insufficient time for her counsel to properly formulate the submissions and legal arguments on her behalf. It was wrong of the judge to refuse the mother's reasonable request for a very short adjournment for her instructions to be given and her materials and documentation to be ordered. This in the context that those representing the father indicated that if the judge was minded so to do, a hearing could be arranged for early in the following week. (2) the judge wrongly approached the issue on the basis that the mother was effectively required to justify why the father and paternal grandparents' plans should not be put into effect immediately. In doing so, the court failed to consider and properly balance all the relevant matters; see *Hartshorne v Gardner* [2008] 2 FLR 1681 and *Re E (A Child) (Burial Arrangements)* [2019] EWHC 3639 Family.

Discussion

26. In bald terms, I consider that whilst the nature of the application obviously called for speedy resolution it did not demand instant determination. The mother should have been given an appropriate albeit time limited interval to marshal not only her arguments, but also her thoughts at a time of great grief.
27. It appears to me that the proposal made in the 30 June e mail from Mr Skinner on behalf of the father, was sensitive to this fact and suggested a way forward that would have permitted a speedy resolution to the matter and gave rise to the possibility for a coming together of views that may have narrowed the issues between the parties and may have led to an agreed outcome, as it did in 2019; see [7] above. I am confirmed in this view by the mother's change of stance since her appearance before Keehan J, which shows the benefit of time to allow her to process her immediate emotional response to the situation and the proposals that had been made. That is, the mother now concedes that H is and was of the Muslim faith and must be accorded burial rights according to that religion; H's mortal body had to be 'washed' and must be interred rather than cremated.
28. I find that the nature of the summary hearing conducted by Keehan J compromised the mother's rights to a fair hearing to such an extent that it provides 'some other compelling reason to hear the appeal'. That is, the mother must be afforded the necessary access to justice which these sensitive circumstances demand, by provision of a hearing that will allow her to make her case reasonably and effectively.
29. It is clear that given the urgency of the situation as explained above, and all parties having now submitted written submissions, that this Court is in a position to conduct a rehearing of the stark issue as to where the balance of interests lies in relation to H's place of internment. All parties, save for the paternal grandfather who has ably represented himself, have made further oral submissions.
30. The options are for H to be buried in the United Kingdom, specifically in London in a plot in which, or near to which, her paternal great-grandmother is buried, or in Bangladesh, a family plot which contains many of her ancestors. The mother wishes for H to be buried in the United Kingdom to enable her and the maternal family to pay

their respects to a marked grave within the jurisdiction. The father and paternal grandparents seek that H be removed to Bangladesh in order that all due rights and customs, not only at the time of burial and interment, but thereafter, may be observed by members of her immediate and extended family. H cannot be buried in Singapore.

31. I do not think it is necessary or appropriate that this court should embark upon an investigation into the disputed reasons why the mother had not developed or maintained a physical relationship with her daughter. Equally, I do not think it is necessary or appropriate that this court should consider the disputed allegations that were made by H's elder half-siblings against the father which led the Local Authority to initiate care proceedings in respect of H. These matters are irrelevant to the issue before us.
32. This court must address the balance of interests which is fact specific to H's circumstances during her life and those aspects of the religion and tenets of her faith that regard the individual's afterlife to be of equal importance to their time on earth. As indicated above, the mother accepts that H was a Muslim and was raised by her paternal grandparents in accordance with that faith. At this time, her body has been cleansed in accordance with the attendant Muslim rites whilst the place of her interment awaits this decision.
33. I reject the paternal grandfather's submission that this court need only contemplate the "who" without the reference to the "where" or "how" that is proposed to finally lay H's body to rest, in that it suggests an assessment only of the character and virtue of the individual parties. It is necessary to consider that the paternal family's proposals do involve a removal of H's body from this jurisdiction and the concomitant implications of that fact.
34. Ms Meyer cites rule 22(1) of the Non-Contentious Probate Rules of 1987 ("the Rules") which provide that, in case of intestacy, the mother and father of a deceased are of higher degree in the order of priority for grant of administration than all others, save for a surviving spouse and children of the deceased. Accordingly, the mother recognises that the father has equal rights and does not seek to claim any priority over him in this respect, but Ms Meyer submits that the statutory hierarchal precedent means that the

mother's wishes should weigh more heavily in the balance than those of the paternal grandparents, even as Special Guardians who were in loco parentis to H .

35. I do not consider that this point advances her application in any material respect. Not only does Ms Meyer's further researches, conscientiously reported to this Court, indicate that the Rules are not applicable to non-domiciled individuals, which there is every reason to believe that H was not, but since the order of precedent is able to be displaced by order of the Court; see Supreme Court Act 1981, s 116. However, I accept Ms Meyer's submissions that the judge should have borne in mind that, regardless of the lack of her physical presence in H's life, the mother retained a strong biological link with her daughter and could reasonably anticipate that her views would be considered with due deference.
36. I bear in mind that the mother continued to have 'parental responsibility' for H throughout her life, the exercise of which was curtailed only by reason by virtue of her agreement to cede the personal care of her daughter to the paternal grandparents. I agree with Ms Meyer that this is a matter that should be weighed in the balance, not least in recognition for her Article 8 rights to respect for family life. This will also incorporate consideration of the relationship of H's elder half-sisters, who lived with H prior to her departure for Singapore, and would then have seen her during school vacations. They who have had more physical contact with H than did her mother. They are based in the United Kingdom.
37. I reject the paternal grandfather's argument that the mother's agreement to the order allowing the permanent removal of H to Singapore, was one that contemplated her early demise and the necessary arrangements that would be made thereafter for her interment outside the United Kingdom. That the mother should wish to be informed if her daughter's health deteriorated was indicative of her continuing biological maternal bond with her daughter and exhibited appropriate interest in her well-being. I do not accept that the mother anticipated that H's life would end so suddenly nor that she would necessarily be thinking at that distance of time of the necessary funeral arrangements that would have to be made.

38. However, it is a matter of undisputed fact that the greatest personal connection that H had to another human being was to her paternal grandmother. The evidence before us bears out the devotion of the paternal grandmother to H's physical and emotional care. At all relevant times of H's sentient life, she would have known her paternal grandmother as her primary caregiver. I would give great weight in the circumstances of H's congenital disabilities to the undoubted singular emotional attachment she would have formed with the paternal grandmother, and obviously vice versa. I find that the strength of this attachment informs the verity of the proposals the paternal grandmother advances for H's burial and which she believes will benefit H's afterlife. I find them to be made in good faith, without animus to the mother or other ulterior motive.
39. A further important consideration, in my view, is the choate nature of the proposals made by the paternal grandparents' and which, with the mother's agreement, have been partly executed. The mother's proposal, advanced by Ms Meyer this morning, is that in the face of the continuing disagreement between the parties, this court should grant letters of administration to the mother to ensure that H's body should not be removed from the jurisdiction and to permit her, if the paternal grandparents did not feel able to proceed with funeral arrangements in the United Kingdom, to proceed to do so herself. I bear in mind that this comparatively undeveloped plan may be the product of the short period of time in which the mother has been able to process all that has happened since Thursday last, but it has no regard for the necessity to proceed with all appropriate haste to pay due deference to the religious tenets which the mother now accepts should govern any interment. It appears to me that for this court to sanction such a proposal would not provide any resolution to a highly charged situation but would lead to further recriminations and sabotage any possible reconciliation. I find it difficult to understand how the mother can realistically hope that she could achieve all necessary speed to proceed from such a standing start to bring about H's interment with all due dignity and respect.
40. I have found considerable assistance in the paternal grandfather's statement which details the necessary religious funeral rites and observances dictated by the Muslim faith, but also why the paternal family wish for the interment to be in Bangladesh rather than in Singapore, assuming all necessary permissions could be obtained, which is

currently the main residence of the paternal grandparents and father, and their 'centre of interest'.

41. That is, the paternal grandfather describes the important connotations of the divine family plot in Bangladesh. The plot is the resting place of H's paternal great-grandfather who was of great standing in the community; his piety and devotion were recognised by the Viceroy of India. The Islamic faith requires that those who are respected for their piety in this life should be afforded great respect in their afterlife. His ancestors pay their due respects at his grave, as they would equally pay all due respect to H if she was to be interred within. H's full siblings reside in Singapore. The paternal family will also have to travel to pay their respects to H.
42. H's paternal grandparents say they would encourage and support her maternal family to be able to do so if the opportunity arose. Ms Meyer points out that the maternal family is inexperienced in international travel and without the funds to do so regularly or at all as compared to the paternal family's demonstrated capacity to do so. I note that Singapore is closer to Bangladesh than it is to London.
43. Weighing all these matters in the balance, I am satisfied that it is right that the paternal grandparents should be granted letters of administration and thereby permitted to arrange the burial of H. Their claim is strengthened by the special personal relationship that they, and particularly the paternal grandmother, had with H. The long-standing Special Guardianship order in their favour elevates their position above the normal grandparental role. These 'rights' do not automatically trump those of the mother so as to enable any court to peremptorily dismiss them, but I find that the predominant force is the well-articulated and genuinely held devout religious views of those with the real closest relationship to H, and their wish to best support what they believe will be her afterlife.
44. Accordingly, I would confirm the order of the court below.

LORD JUSTICE STUART-SMITH: I agree.

SIR CHRISTOPHER FLOYD: I also agree.

(Order: Permission to appeal granted)

(Order: Appeal dismissed)

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Unit 1 Blenheim Court, Beaufort Business Park, Bristol BS32 4NE
Tel No: 020 7404 1400
Email: civil@epiqglobal.co.uk