

ENGLAND AND WALES / JUDGMENT

M & Anor (Children)

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Neutral Citation Number: [2008] EWHC 2281 (Fam) IN THE HIGH COURT OF JUSTICE FAMILY DIVISION (In Public) Case No: Royal Courts of Justice Strand, London, WC2A 2LL Date: 6 October 2008 Before : MR JUSTICE MUNBY

- ----- In the matter of M and N (Children)
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- ----- Details of the advocates and solicitors and of the dates and location of the hearings are omitted in the interests of the children's anonymity
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Judgment

Mr Justice Munby : 1. 2. 3. Not so long ago, whilst sitting on circuit, I found myself on successive days listed to hear cases which proved abortive because of the failure of those acting for a parent in private law family proceedings properly to engage themselves with and to ascertain what was going on in the parallel immigration proceedings in which their client was involved. In each case the outcome of the immigration proceedings was highly material to the decision I was supposed to be making. In each case the consequence of what had happened was delay for the child, waste of public money and the prejudice of other litigants whose cases were ready and who would no doubt have been delighted to be offered an earlier hearing. These melancholy but, so far as my experience around the country suggests, unhappily far from unusual events demand public comment. And since there are, I fear, lessons to be learned I am giving this albeit deliberately anonymised judgment in public. The judgment is anonymised in the interests of the children and because it would be unfair to single out for public criticism and humiliation the particular solicitors involved when my experience is that the failings which these particular cases exemplified are far too common. The time has come to spell out, and it is saddening that one needs to spell it out, that this kind of sloppy practice is simply unacceptable. I have deliberately referred to the “waste” of public money. I use that phrase in both the colloquial and the technical sense. The professions need to take heed. Future shortcomings may be met with more severe and more public consequences. The facts – M’s case 4. 5. 6. In the one case, a mother whose immigration status was precarious was seeking a residence order although she had no accommodation of her own and was living in accommodation being provided on a temporary basis by friends. She was present in the United Kingdom with the benefit of a visa which however precluded her from having any recourse to public funds. So she was not in a position to apply to

the local authority for housing of the kind she would probably need if a residence order was to be made in her favour. It was unclear where matters stood with the Home Office in relation to the mother's attempts to improve her immigration position. The solicitors acting for the mother in the family proceedings had seemingly had difficulty in obtaining information from the other solicitors who were acting for her in relation to the immigration matter. And no-one on either side had thought to invite the court to invoke the President's Protocol: Communicating with the Home Office of 28 February 2006. Nor was there any evidence as to what the attitude of the local authority might be if the restriction on her visa were to be removed. In these circumstances counsel for the respondent father not surprisingly relied upon the decision of the Court of Appeal in *Holmes-Moorhouse v Richmond-Upon-Thames London Borough Council* [2007] EWCA Civ 970, [2008] 1 FLR 1061, and, in particular upon what Moses LJ had said at paras [35]-[36]. 7. Having referred to section 1(3)(f) of the Children Act 1989, which obliges the court when considering whether to make a section 8 order to have regard to how "capable" each of the parents is of meeting the child's needs, Moses LJ continued: In order to comply with its statutory obligation, the "[35] family court is obliged, where an order is opposed, to have regard to the accommodation available to both parents at the time the s 8 order is under consideration. Accordingly, in order to have regard to the capability of a parent to meet the needs of a child in circumstances where that parent has no available accommodation in which the child could reside, in the statutory sense of 'living' with that parent, the court is obliged to consider the likelihood of such accommodation becoming available. To satisfy that inquiry it seems to me that a family court is bound to inquire of the relevant local housing authority as to what accommodation is currently available and what is likely to become available in the future. In answering such a necessary inquiry, a local housing authority may take the opportunity to place before the family court those matters relevant to the local housing authority's own consideration in pursuance of its statutory obligation under s 193 of the 1996 Act. [36] Thus, where a s 8 order is opposed, it will not be sufficient for a parent merely to assert that he or she wants a child to come, for at least part of the time, to live with him, that parent must expect to be faced with the local housing authority's own representations on the issue." 8. 9. The father's counsel submitted that, by parity of reasoning, where the 'capability' of a parent to look after a child may be affected by that parent's precarious immigration status, the court is similarly bound to make appropriate inquiries of the Home Office. I can see the force of that submission, which seems to me to be plainly correct. In the event, I had to adjourn the matter, directing the mother to file further evidence both in respect of her immigration status (and the progress of any application or appeal) and in respect of accommodation. I made a peremptory order that the mother's immigration solicitors deliver to the solicitors acting for her in the family proceedings a complete copy of their immigration file. And pursuant to the President's Protocol I requested the Home Office to provide answers to certain questions. I was, however, able to make use of at least some of the time that had been set aside for the hearing by dealing with matters of interim contact. The facts – N's case 10. 11. In the other case – where the hearing before me was in consequence rendered wholly abortive – the failings were particularly concerning. The mother, who was the residential parent, was seeking permission to remove the child permanently from the jurisdiction to go and live with her in her home country. 12. 13. 14. 15. Neither parent was British.

The father was an EU national; the mother was not. Basing herself upon her former husband's rights under Community law, the mother claimed to be entitled to reside permanently in this country pursuant to paragraph 15(1)(b) of the Immigration (European Economic Area) Regulations 2006. It was made clear to me, as it had been made clear to Roderic Wood J at an earlier hearing on 11 February 2008, that the mother would not be pursuing her application to return with the child to her own country in the event of the Home Office acknowledging her right to permanent residence in this country. On the occasion when the matter had previously been before Roderic Wood J there was a letter before the court from the Immigration and Nationality Directorate of the Home Office dated 30 January 2008. It had been written in response to a letter from the President's Chambers sent in accordance with the President's Protocol on 14 January 2008. The letter from the Home Office, which was detailed and helpful, included a passage which, as I read it, indicated that, on the basis of the facts as they were understood by the Home Office, the mother had acquired permanent residence and that she could apply, on form EEA4, for what was described as "confirmation that she has become permanently resident." In these circumstances Roderic Wood J directed that the mother was to make the appropriate application to the Home Office by 4 March 2008. His order went on to specify the date (over four months later) on which the matter was fixed for final hearing before me. In accordance with that order the application was made to the Home Office on 3 March 2008. When the matter came on before me I was told that no substantive response had been received from the Home Office and that it might not be obtained until early September 2008. As too often occurs in such cases, those present before me were unable to explain properly how this seemingly deplorable state of affairs had arisen. I demanded that inquiries be made. And as almost inevitably happens in such circumstances, the person dealing with the immigration matter was not available to speak with those dealing with the family proceedings. Such further information as could be obtained threw very little additional light on what had happened. From what I could gather, what had happened was this: On 3 March 2008 the mother's immigration solicitors sent the completed form EEA4 to the Home Office. The covering letter failed to bring to the attention of the Home Office either the contents of the letter dated 30 January 2008 or the date for which the final hearing of the family proceedings had been fixed. On 25 March 2008 the Home Office sent a formal acknowledgment in obviously standard form indicating that applications of this nature "should be resolved within six months" – a timescale manifestly likely to frustrate the timetable which had been set by Roderic Wood J. On 28 May 2008 the mother's family solicitors wrote to her immigration solicitors. Since I have not been shown a copy of that letter I do not know what it said. It generated a response from the immigration solicitors dated 30 May 2008 which enclosed copies of the form EEA4 and of the letters dated 3 March and 25 March 2008 and pointed out the indication from the Home Office that the application could take up to six months. 16. That is all I have been told. What I infer from these facts (and in particular from the fact that the letter from the immigration solicitors dated 30 May 2008 enclosed the documents I have referred to) is that: i) ii) The family solicitors took no adequate steps when communicating the terms of Roderic Wood J's order to the immigration solicitors to ensure that they (the immigration solicitors) clearly and specifically drew to the attention of the Home Office (a) the terms of the letter from the Home Office dated 30 January 2008, (b) the date of the hearing fixed by Roderic Wood J and (c) the need for a decision in time

for that hearing. The family solicitors took no adequate steps to monitor the immigration solicitors' correspondence with the Home Office. (I infer from the fact that the letter from the immigration solicitors dated 30 May 2008 enclosed the documents I have referred to that that they had not previously been sent by the immigration solicitors to the family solicitors.) In consequence, the family solicitors were, until it was too late to do anything effective in time for the hearing before me, unaware of the fact that the immigration solicitors had failed to bring those two vital matters to the attention of the Home Office and unaware of the fact that the Home Office was most unlikely to produce a decision in time for the hearing. 17. I was left with no option but to vacate and re-fix the hearing. Since it had, appropriately, been listed for two days, the consequence was that two days of court time were wasted, no doubt to the detriment of other litigants whose cases had been fixed on the basis that the hearing of the matter listed before me would be effective. The President's Protocol 18. 19. It is convenient at this point to refer in a little more detail to the President's Protocol which, unhappily, has not until very recently been as readily accessible to the public and the professions as it should be and which, in some parts of the country, seems not to be as well-known as one would wish. In its original version, the Protocol was published in December 2002: see the text as set out in [2003] Fam Law 357. The Protocol was reissued with only the most minor alterations on 1 December 2003: see the text as set out in [2004] Fam Law 151 and [2004] 1 FLR 638. The Protocol was updated in June 2004, in particular by indicating that a specific form – Form EX660 – should be used: see the text of the Protocol as set out in [2004] Fam Law 608 and the text of the Protocol and Form EX660 as set out in Rayden and Jackson on Divorce and Family Matters, ed 18, Vol 1(2), para 55.55. The Protocol was supplemented in January 2006 by Guidance from the President's Office: Communicating with the Home Office which also provided a sample court order to be used in conjunction with Form EX660. (Earlier versions of the Protocol had a preface which, in slightly different terms, is set out in the Family Court Practice, 2008, at page 2747 and in Rayden and Jackson at para 55.55.) Form EX660 was amended in February 2006. The entire body of material was reissued on 28 February 2006: see the text as set out on-line on the Family Law Bar Association's website. 20. It will be appreciated from this that the relevant material as issued on 28 February 2006 and current at the time of the hearings before me therefore consisted of (i) the Protocol as updated in June 2004; (ii) the Guidance as issued in January 2006, (iii) the Form EX660 as revised in February 2006 and (iv) the sample order attached to the Guidance. Unhappily it appears that this material was not available anywhere in 21. 22. 23. 24. 25. 26. the obvious printed sources in a complete and accurate form. Indeed, the surprising fact appears to be that the only place in which it was publicly available in complete and accurate form was on the Family Law Bar Association's website. The FLBA is to be applauded for its public-spiritedness in publishing the material in this way but it is remarkable that there appears to have been no other comprehensive and accurate dissemination of this important material, either official or unofficial, in any publicly available resource. The website of Her Majesty's Court Service contained the text of the current Protocol but contained no reference to the Guidance and took one (via a hyperlink) to the original, and not to the then current, version of Form EX660. The website of the Judiciary of England and Wales merely took one to the inaccurate HMCS website. The current (2008) edition of the Family Court Practice reproduces (at page 2747) only an earlier version of the Protocol. Hershman and

McFarlane's Children Law and Practice, at paras C[1145] and C[2995], though referring to Form EX660 and correctly directing the reader to [2004] Fam Law 608 (where the current text of the Protocol is to be found), neither refers to the Guidance nor prints the Form and in the Table of Cases unhappily conflates the references to [2004] 1 FLR 638 and

[2004] Fam Law 608. Rayden and Jackson, although reproducing (at para 55.55) the current text of the Protocol, does not refer to or print the Guidance, prints the original, and not the revised, Form EX660 and (at para 41.36) directs the unwary reader's attention to the Protocol as printed in [2004] 1 FLR 638, that is, to the Protocol as issued in December 2003 but not as updated in June 2004. The relevant materials in their then current form were not printed in either the Family Law Reports or the Family Court Reports. The relevant material was available, as I have said, complete and accurate, on the Family Law Bar Association's website, but surely it should also have been made available, complete and accurate, in the usual printed resources and, indeed, on the HMCS website. Since I began preparing this judgment the Form EX660 has again (July 2008) been very slightly amended. And the complete current materials, that is (i) the Protocol as updated in June 2004; (ii) the Guidance as issued in January 2006, (iii) the Form EX660 as revised in July 2008 and (iv) the sample order attached to the Guidance, have now been put on both the HMCS website and the website of the Judiciary of England and Wales. I would hope that the appropriate steps could also now be taken to amplify and (where necessary) correct the information available in the text books and, in particular, that steps could be taken to publish the complete text of all the materials in such places as Family Law, the Family Law Reports and the Family Court Reports. For the benefit of practitioners I might add that the version of the Form EX660 available on the various websites is electronically interactive, so it is easy to complete it electronically and then print it off, though inconveniently it can neither be 'saved' nor e-mailed. Discussion 27. It is my experience – based on too many such cases – that too often, though there are honourable exceptions, those acting for a parent in family proceedings who is also party to concurrent asylum or immigration disputes with the Home Office (and the same too often applies also in cases, for example, where there are parallel criminal proceedings) are quite unable to answer with any precision even the simplest and most obvious questions from the bench about what has been going on and what the 'current state of play' is in the other matter. 28. Experience suggests that there are various factors in play which tend to underlie or exaggerate these problems. Some, in my experience, are more common than others; some are more serious in their implications than others.

29. What I have in mind include the following. 30. 31. 32. First, there is sometimes a failure to appreciate the difficulty in inviting a family judge to decide some issue without the court first being made aware of what is going on elsewhere. The decision of the Court of Appeal in *Holmes-Moorhouse v Richmond-Upon-Thames London Borough Council* [2007] EWCA Civ 970, [2008] 1 FLR 1061, has, I suspect, potentially much wider implications than its narrow subject matter might at first suggest. For it is likely that an analogous approach will be adopted wherever the 'capability' of someone to look after a child is in issue, whether the

issue arises in private law proceedings or in public law proceedings (for example, where a family member is putting themselves forward as a carer). And in the same way it is likely that an analogous approach will be adopted whether the issue as to that person's 'capability' arises, for example (no doubt other examples can readily be imagined) because of the would-be carer's lack of accommodation, precarious immigration status, precarious physical or mental health, or involvement in criminal proceedings or in a police investigation. In all such situations the family court will need the fullest and most up-to-date information. And where the outcome is dependent upon or is likely to be affected by the decision of some third party, whether, for example, a local authority housing department, the Secretary of State for the Home Department, the Crown Prosecution Service, or a NHS Primary Care Trust, or whoever, the family court will also need the fullest and most up-to-date information as to where exactly that decision-making process has got to, what the decision is, if it has been given, or when it is expected if it is still awaited. Consideration will also need to be given – and at the earliest possible stage – as to whether and if so how that third party decision maker should be brought into some appropriate form of direct engagement with the family proceedings. Secondly, there is the fact that, partly because of the way in which the modern legal profession increasingly tends to be structured, and partly because of the way in which Legal Services Commission contracts are arranged, it is common – indeed, usual – to find different solicitors and counsel acting for the same client in the family proceedings, in the asylum/immigration matter, in the criminal proceedings and – sometimes – in the housing matter. This necessary division of labour comes at a price: the fragmentation of knowledge and responsibility. But at the same time it imposes additional burdens and responsibilities on family practitioners: in particular, the ongoing duty to remain au courant with what is going on elsewhere even if the matter there is being handled by other professionals. 33. 34. 35. Thirdly, there is the sheer failure of too many family lawyers to appreciate the need to be au fait with what is going on in relation to such other matters and the need to be in a position to answer the kind of questions which, in the nature of things, a family judge may well ask about them. I never cease to be astonished at the frequency with which the only answer to perfectly obvious and very simple questions (for example, has the Crown Prosecution Service yet decided whether or not to prosecute, has the trial date been fixed, and if so when is it, has the Secretary of State yet decided the asylum application, has an application for housing been made, when is the operation going to take place – I could give many others) is that the advocate to whom the question is addressed does not know and is unable to find out from anyone in court or readily contactable by telephone. This is simply not good enough. The fact that, typically in such cases, the other matter is being dealt with by a different firm of solicitors and almost invariably by different counsel, is absolutely no excuse. It is the duty of those involved in family proceedings to take adequate steps before each hearing to find out, from the solicitors or other professional advisers acting for their client in any other relevant matter, what has been going on, where the other matters have got to and, in cases where some formal decision is anticipated, when that decision is likely to be given. And, bearing in mind the ongoing duty of full and frank disclosure on the part of parents in family proceedings –

their ongoing obligation to be frank and open with the court – it is the parents’ duty to instruct those advising them in any other relevant matter to keep their family solicitors informed of what is going on, just as it is the duty of those advising them in the other matter, having received such authority, to keep the family solicitors informed accordingly. Fourthly, there is the fact that many family practitioners lack anything more than a fairly rudimentary knowledge of immigration or asylum law and practice (or for that matter housing law and practice). Too often, therefore, when answers to even quite basic questions are forthcoming it is painfully apparent that what one is being told simply cannot be correct. I make the point not to criticise practitioners, who in the modern world of specialisation and sub-specialisation cannot be expected to keep themselves up to date with or to understand the minutiae of other areas of law, but to emphasise a practical point. Copies of the correspondence and other documents on the immigration/asylum or housing solicitors’ files are usually much more helpful in showing exactly what is happening than attempts by the family lawyers in correspondence with their immigration/asylum or housing counterparts to find out by means of questions and answers which may, through lack of understanding, miss the point or be misunderstood. (The problem works both ways: the family lawyers may not fully understand precisely what the immigration/asylum or housing lawyers are doing and the immigration/asylum or housing lawyers may not fully understand precisely what the family lawyers are doing or what it is they are trying to find out. So the scope for misunderstanding and confusion is increased.) Summary 36. In summary, in cases where a parent in family proceedings is also involved in some other relevant matter – for example, an asylum or immigration dispute with the Home Office, criminal proceedings or a criminal investigation, a housing dispute, etc – then: i) ii) iii) Practitioners acting for the parent in the family proceedings have an ongoing duty to remain au courant with what is going on elsewhere even if the other matter is being handled by other professionals. The parents, as part of their ongoing obligation to be frank and open with the court, are under a duty to instruct those advising them in any other relevant matter to keep their family solicitors informed of what is going on. And it is the duty of those advising them in the other matter, having received such authority, to keep the family solicitors informed accordingly. Practitioners involved in family proceedings have a duty to take adequate steps before each hearing to find out, from the solicitors or other professional advisers acting for their client in any other relevant matter, what has been going on, where the other matters have got to and, in cases where some formal decision is anticipated, when that decision is likely to be given. iv) With a view to minimising the room for uncertainty or misunderstanding, it is preferable to obtain copies of the correspondence and other documents on the other solicitors’ files rather than attempting to find out what is going on by means of questions and answers in correspondence which may, through lack of understanding, miss the point or be misunderstood. v) If the practitioners acting for the parent in the family proceedings are finding it difficult to obtain the relevant information from the solicitors or other professional advisers acting for their client in the other matter, then prompt consideration needs to be given – and at the earliest possible stage – to approaching the court with a view to inviting the court either to make a peremptory order that the other advisers deliver a complete copy

of their file to the solicitors acting in the family proceedings or to make an order pursuant to the Protocol. Such applications should not be left to the next directions or other hearing which has already been fixed if waiting until then may generate inappropriate delay. vi) Where the outcome in the family proceedings is dependent upon or likely to be affected by the decision of some third party, consideration should be given – at the earliest possible stage in the proceedings – as to whether and if so how that third party decision maker should be brought into some appropriate form of direct engagement with the family proceedings.

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