

JERSEY / JUDGMENT

N v M (Family) 4-Dec-2020 [2020]

JRC 252A (04 December 2020)

[2020] JRC 252A

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judgment

the Commissioner: 1. This is an appeal against the decision of Registrar Daultrey dated 1 st October 2020 to refuse the Appellant ("the father") leave to file an expert report in proceedings between him and the Respondent ("the mother") relating to their child ("the child"). On 17 th November, the day after the hearing of the appeal, I issued my decision to dismiss the appeal but to give directions for the filing of certain additional evidence. I now give my reasons for that decision.

Background

2. The mother comes from Country 1. She is a Christian. The father comes from another country. He is a Muslim. The father and the mother met in Jersey and subsequently married and had the child. She has a Muslim name. Sadly, the parties' relationship broke down and they are now living apart. 3. There are a number of matters before the Family Division, but the key ones are that the mother has applied for leave to remove the child to Country 1 and add the mother's surname to the child's name, and the father has applied for a residence order, as well as opposing the application for the mother to remove the child to Country 1. A final hearing of these matters was fixed originally for 13 th and 14 th August 2020 but this was adjourned to 1 st and 2 nd October 2020. That has in turn been adjourned to a hearing over three days commencing 19 th January 2021. 4. Directions were given by the Registrar for the filing of all evidence to be relied upon by 31 st July 2020. This was essentially complied with, although the mother filed a witness statement by her mother ("the grandmother") some two weeks thereafter. On 22 nd September, the father applied for leave to file an expert report by S, a Country 1 lawyer who specialises in human rights matters. His report dealt with three areas: - (i) An overview of the way Muslims are treated in Country 1 and the reception that Muslims generally receive from the Country 1 community. (ii) A general description of the quality and level of the education system in Country 1 and the interaction of that system with the Muslim community. (iii) A general description of the quality and level of the medical system in Country 1. 5. In relation to (i) - and (ii) in so far as it relates to the treatment of Muslims - S's report consists for the most part of material drawn from published reports which are listed by footnote in the report, e.g. a report by the U. S.

Department of State entitled 'Country 1 2017 International Religious Freedom Report'. His report also includes statements made by the President of the Islamic League in Country 1 directly to S during the course of a private interview of the President by S, i.e. it is hearsay evidence of the President's views. There is very little opinion on the part of S contained in the report. Such as there is is summarised on page 25 of the report but again consists in reality of a summation of the conclusions from the published material or of the President of the Islamic League. 6. As to education and health, the report consists essentially of general statistics and information about the education and health systems. S makes it clear at page 25 that he cannot compare the medical and educational systems of Country 1 and the UK because of a lack of sufficient expertise. 7. The Registrar held that, in order to be admissible, an expert report must be 'necessary'. In doing so she placed reliance upon the observation of Sir James Munby, P in the English case of *Re H-L (a Child)*

[2013] EWCA Civ 655. She accepted that, if it were to be suggested that there were state condoned human rights abuses in Country 1 relating to Muslims, evidence of such a state of affairs would be necessary. But she did not consider that this was dealt with in S's report and evidence about general anti-Muslim feelings would not make Country 1 any different from any other European country or any different from Jersey. She also considered that S was not qualified as an expert on medical and educational matters. 8. Accordingly, she refused leave to adduce S's report, but directed that the parties could jointly instruct S to report on the issue of state condoned or sponsored human rights abuses against Muslims in Country 1 and also gave the parties leave to file such published reports and/or statistics relating to economic conditions, education and health provision in Country 1 as may be agreed between them. It is clear that in reaching her conclusion, the Registrar was concerned about possible delay in that, if the expert report was admitted in evidence, the mother might reasonably wish to adduce her own expert report and this could lead to a delay in the final hearing. Approach on appeal 9. The father now appeals against the Registrar's decision. It was common ground between the parties that the approach of this Court on appeal from the Registrar is that set out in *Downes v Marshall*

[2010] JLR 265. The father's skeleton argument set out the following extract from para 12 of that decision: - "An appeal from the Family Registrar should only be allowed if there has been a procedural irregularity or if, in exercising his discretion, he has taken into account irrelevant matters, or ignored relevant matters, or otherwise arrived at a conclusion which the court believes to be wrong. This test is not precisely the test applied on appeal from this court to the Court of Appeal. It reserves a wider discretion for this court to intervene, but it places nonetheless greater weight on the Registrar's exercise of discretion. This test will, we think, establish the right balance. Sufficient weight is to be attributed to the Registrar's finding of fact and exercise of discretion to discourage litigants from seeking a fresh bite at the cherry. On the other hand, this court will have the power to intervene if it thinks that the Registrar has gone wrong to the extent that intervention is required in the interests of justice and fairness." 10. As it was common ground at the hearing, no reference was made to the judgment in *Downes* itself. However, in the course of preparing

this judgment, I have re-read the judgment of Sir Philip Bailhache, Commissioner and it is clear from paragraph 10 of his judgment and indeed earlier in paragraph 12 itself that he is considering appeals where the Registrar has heard evidence, made findings of fact based upon his assessment of the evidence, and then exercised his discretion as to, for example, the allocation of matrimonial property between the parties or the resolution of some issue concerning children. In other words, the Commissioner is considering a final decision of the Registrar on the merits rather than some interlocutory procedural direction. 11. The point at issue before the Registrar in this case was the admissibility of certain evidence. No evidence was heard before the Registrar and she did not make any finding of fact. She dealt with the matter purely on the basis of submissions from the parties. It was indeed a procedural decision of the same type as the Master regularly makes in ordinary civil proceedings. On appeal from the Master, the approach of this Court remains that this Court considers the matter afresh and reaches its own decision, whilst paying due regard to the decision of the Master. I can see no logical reason for holding that interlocutory appeals of this nature should be treated differently depending on whether the appeal happens to be from the Registrar in family proceedings or from the Master in ordinary civil proceedings. There is no reason for conferring greater latitude upon the Registrar in relation to such procedural decisions than is conferred upon the Master. I emphasise that this is not to question the approach established in *Downes*. On the contrary, where the Registrar has made a decision on the merits concerning matrimonial property or children, the approach in *Downes* is clearly appropriate. 12. However, as the outcome of this appeal is the same whichever test is applied, I say no more about it. Admissibility of expert evidence 13. The test for whether evidence can be given by an expert is well established. A convenient summary, which was approved by the United Kingdom Supreme Court in *Kennedy v Cordia Services LLP*

[2016] UKSC 6 at [43] is to be found in the South Australian of *R v Bonython*

[1984] 30 38 SASR 45 where King CJ said at pp46-47:- "Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court." 14. If satisfied that the above test is met, the question then arises as to whether the evidence of the particular expert should be admitted. As already mentioned, the Registrar decided

that the test for admission was one of 'necessity'. As to the meaning of 'necessity', she referred to the judgment of Sir James Munby P in *Re H-L* (*supra*) where he said at [3]:- "The short answer is that 'necessary' means necessary. It is, after all, an ordinary English word. It is a familiar expression nowadays in family law, not least because of the central role it plays, for example, in Article 8 of the European Convention and the wider Strasbourg jurisprudence. If elaboration is required, what precisely does it mean? That was a question considered, albeit in a rather different context, in *Re P* (Placement Orders: Parental Consent)

- [2008] EWCA Civ 535.... Paras [120], [125]. This court said it 'has a meaning lying somewhere between 'indispensable' on the one hand and 'useful', 'reasonable' or 'desirable' on the other hand', having 'the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable.' In my judgment, that is the meaning, the connotation, the word 'necessary' has in rule 25.1." 15. However, it is important to note the context in which *Re H-L* was decided. As Munby P explains at [2] in his judgment, the previous test in England and Wales for admitting expert evidence to be adduced in family proceedings was whether it was 'reasonably required to resolve the proceedings'. In 2013, Rule 25.1 of the Family Procedure Rules 2010 was changed so that the test became whether it was 'necessary to assist the court to resolve the proceedings'. As Munby P made clear, a test of whether it was 'necessary' clearly set a higher hurdle than the old test of whether it was 'reasonably required' and it was in those circumstances that Munby P outlined the meaning of 'necessary'. 16. So what is the position in Jersey? Rule 4 of the Children Rules 2005 emphasises the duty of the Court to give effect to the overriding objective and at Rule 4(6) states that active case management to further the overriding objective includes 'regulating the extent of disclosure of documents and expert evidence so that they are proportionate to the issues in question' and 'giving directions to ensure that the trial of a case proceeds quickly and efficiently'. No further guidance is given in the Children Rules. 17. Practice Direction RC17/09 deals with the question of expert evidence in civil proceedings generally and, having stated at paragraph 5 that the need for expert evidence will ultimately be determined by reference to the overriding objective, goes on to say at paragraph 6:- "In ordering expert evidence, the court may have regard to what expert evidence is necessary to:- (a) determine a case at trial...." 18. Although the Practice Direction uses the word 'necessary', judicial authority suggests a wider test. In *Neal v Hawksford Trustees Jersey Limited*
- [2017] JRC 083, the Master said at paragraph 30:- "I therefore reached the conclusion that the overriding objective permitted me to determine the scope of any expert evidence under Rule 6/20(2) as part of deciding whether or not to give permission to adduce expert evidence. This is consistent with the approach taken under the Civil Procedure Rules which contain the same overriding objective which has now been introduced into the Royal Court Rules and where under Civil Procedure Rule 35/1 expert evidence is restricted to that which is reasonably required to resolve the proceedings. In deciding whether or not to grant permission under Rule 6/20 of the Rules, I reached the view that the same

approach should be taken, namely permission to adduce expert evidence generally should only be granted where such evidence is reasonably required to resolve the proceedings."

The Master thus laid down a test of 'reasonably required' despite the existence of the practice Direction. 19. A further important consideration is the nature of proceedings in the Family Division. They are very different from ordinary civil proceedings. As Hayden J said in *Westminster City Council v M*

[2017] EWHC 518 (Fam) at [23]:- "Perhaps most importantly, sight must not be lost of the fact that these are public law care proceedings, where the guiding philosophy of the Court is investigative, non-adversarial, sui generis. Driven by its obligation to regard the welfare of the subject child as the paramount consideration, the Family Court will instinctively permit a broad range of evidence in order ultimately to weigh and assess its quality and worth in the context of the evidence as a whole." This observation was made in the context of whether to admit hearsay evidence but in my judgment it is equally applicable when considering the topic of expert evidence. Furthermore, the paramount consideration is the welfare of the child in private law children proceedings just as in public law proceedings. The above approach is therefore equally applicable to private law cases concerning children. 20. Taking account of these various considerations, I am of the view that a test of necessity places the bar too high. Having regard to the paramount need to have regard to the welfare of the child and the nature of proceedings concerning children, I consider that if expert evidence is reasonably required to assist the judge in resolving the proceedings, it should be permitted in evidence provided the judge is satisfied that to allow it is consistent with the overriding objective and the need for proportionality. Ultimately, as set out in Rule 4(6)(d) of the Children Rules, the judge has a discretion to regulate the admission of expert evidence so as to ensure that it is proportionate to the issues in question. 21. In practice, there may be a distinction between opinion expert evidence and factual expert evidence. As made clear by the UK Supreme Court in *Kennedy* (supra) an expert can give both opinion evidence and factual evidence which draws on the work of others such as the findings of published research. Thus at [41] Lord Reed and Lord Hodge, giving the judgment of the Supreme Court, said:- "41. Unlike other witnesses, a skilled witness may also give evidence based on his or her knowledge and experience of a subject matter, drawing on the work of others such as the findings of published research or the pooled knowledge of a team of people with whom he or she works..... An expert in the social and political conditions in a foreign country who gives evidence to an immigration judge also gives skilled evidence of fact." The reference to a 'skilled' witness is the Scottish term for an expert witness. 22. The Supreme Court went on to say at [46]:- "46. Most of the Scottish case law on, and academic discussion of, expert evidence has focused on opinion evidence to the exclusion of skilled evidence of fact. In our view, the test for the admissibility of the latter form of evidence cannot be strict necessity as, otherwise, the court could be deprived of the benefit of a skilled witness who collates and presents to the court in an efficient manner the knowledge of others in his or her field of expertise. There may be circumstances in which a court could determine a fact in issue without an expert

collation of relevant facts if the parties called many factual witnesses at great expense and thus a strict necessity test would not be met. In *Daubert v Merrell Dow Pharmaceuticals Inc*

[1993] 509 US 579, the United States Supreme Court referred to rule 702 of the Federal Rules of Evidence, which in our view is consistent with the approach of Scots law in relation to skilled evidence of fact. The rule, which Justice Blackmun quoted at p 588, states: "If scientific, technical or other specialised knowledge would assist the tryer of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise". 47. The advantage of the formula in this rule is that it avoids an over-rigid interpretation of necessity, where a skilled witness is put forward to present relevant factual evidence in an efficient manner rather than to give an opinion explaining the factual evidence of others. If skilled evidence of fact would be likely to assist the efficient determination of the case, the judge should admit it." 23. As outlined earlier, the expert report of S consists very substantially of matters of fact by reference to published reports. It therefore falls within the category of expert evidence discussed above in *Kennedy*. Application to this case 24. Turning to the facts of this case, the father submits that, because the child has a Muslim name, it is relevant for the tribunal which decides the substantive applications to be heard in January to be informed as to the treatment of Muslims in Country 1 and whether they are discriminated against. This goes beyond solely state sponsored or condoned discrimination; it includes how Muslims are treated more generally in the community. 25. Unlike the Registrar, I accept that submission. This is not to say that such evidence will necessarily be decisive for the tribunal. On the contrary, even if there is evidence of some discrimination against Muslims, it may be outweighed by other considerations which point in favour of the child being removed to Country 1. That will be a matter for the tribunal to decide in due course. But I find it impossible to say that the tribunal should refuse even to receive evidence about the treatment of Muslims in circumstances where this has been raised by the father as a possible concern. 26. The question then arises as to how such evidence should be adduced having regard to the overriding objective. It is at this stage that, despite taking a different view from her as set out in the preceding paragraph, I agree with the decision of the Registrar not to admit the expert report of S. The Court must always have regard to the general principle that delay is to be avoided in cases concerning the welfare of children. In my judgment, it would be highly undesirable for the January date to be lost and for the matter to be further delayed. Advocate Brown made it clear that, although the mother wished to have the matter decided as soon as possible, she (Advocate Brown) would feel duty bound to obtain an expert report in response if S's report were to be admitted. That is not an unreasonable position to take. I accept that in those circumstances, there would be a real risk that the January date would be lost because of the delay in obtaining an expert report. Furthermore, because there would then be two experts to give evidence and be cross-examined, it is likely that the number of days needed for the hearing would be extended

and that would also lead to a delay in order to find a suitable gap in the judicial diary. 27. Given that much of the report of S was based upon and referred to published material, I explored with counsel during the hearing whether it would be possible for each side to produce an affidavit exhibiting such published material as they wished to rely upon in relation to the treatment of Muslims in Country 1, highlighting the relevant extracts from such published material. They agreed that this could be achieved before Christmas and that accordingly there was no risk of losing the January hearing date. In my judgment, balancing the need for the father to adduce evidence about the treatment of Muslims in Country 1 with the need to ensure prompt resolution of this matter in the best interests of the child, that is the appropriate way in which to proceed. Although this is an appeal, the Registrar forms part of the Royal Court and I am satisfied that, sitting in the Royal Court, even though I am dismissing the appeal, I have jurisdiction to issue procedural directions to take this matter to trial rather than send the matter back to the Registrar for her to give such directions, with the consequent risk of delay. 28. Advocate Emmanuel raised one objection to this proposed course of action. He said that if he was not able to adduce S's report, he would lose the evidence of what the President of the Islamic League had said in private to S. I accept that this is so, but in my judgment that is not sufficient to lead me to admit S's report in evidence, with the consequent likelihood of delay. In his affidavit sworn as long ago as 17 th April 2020, the father identified the possible discrimination against Muslims in Country 1 as an issue. Yet it was not until September 2020 that he sought to adduce evidence on this topic from S. If he had obtained this evidence more promptly and in accordance with the timetable laid down by the Registrar, it might have been possible for the mother to obtain a report of her own in response without endangering the hearing date as a result. In those circumstances I might have allowed S's report to be admitted. But that is not the position because of delay on the father's part. I do not consider, in the circumstances, that the loss of what the President of the Islamic League said to S outweighs the need to maintain the hearing date in January in the interests of the child. Overall, I conclude that it would not be proportionate and in accordance with the overriding objective to allow the admission of S's report with the consequent likelihood of delay, particularly when there is an alternative method of adducing most of the material content of the report without endangering the hearing date. 29. Accordingly, the day following the hearing of the appeal, I gave directions for the filing of affidavits by the father followed by the mother, with such affidavits to exhibit any published material upon which they wished to rely and highlighting those parts of the reports upon which they were going to place reliance. It will be for the tribunal hearing the substantive matters in January to determine what weight to place upon the different published reports having regard to the source of those reports and the stature of the body issuing the report. 30. I have so far dealt with the issue of the treatment of Muslims. S's report also dealt with matters of education and health in Country 1. However, as Advocate Emmanuel conceded, S cannot be said to be an expert on such matters and his report on those aspects should not be admitted on that ground alone. In any event, the Registrar addressed this matter in her order of 1 st October by providing that the parties should have leave to file such

published reports and/or statistics relating to economic conditions, education and health provision in Country 1 as may be agreed between them. 31. For these reasons, I uphold the Registrar's decision to refuse leave for the father to admit S's report, but I have given directions for evidence about the treatment of Muslims in Country 1 to be adduced in an alternative form. Alleged pre-judging 32. That leaves the final issue raised by the Appellant, which is that I should direct that the hearing in January should be before a different Registrar or before the Royal Court. The test for apparent bias is well established. It is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased; see for example *Bisson v The Minister for Infrastructure*

[2019] JCA 181 at paragraph 5 per Lord Anderson QC. 33. The father's application is based upon two extracts from the transcript of the hearing before the Registrar on 1 st October. The first is at page 16 and is as follows :- "REGISTRAR: Well, that's a separate question, isn't it? She is dual heritage. ADV BROWN: She is. REGISTRAR: And, therefore, in fairness to the father, it's something I should look at. Of course, the extent to which if the report comes back and says 'yes, there is State condoned or State sponsored or discrimination directly by the State of Muslims', then it becomes a question of to what extent that will affect this child, but, given she is dual heritage, I think I need to allow that very minor point, that very narrow point, not minor, it's a very major point but a narrow point, so I will give leave for an expert report upon the issue of State sponsored or State condoned discrimination which may affect [the child]...." 34. Advocate Emmanuel argues that referring to the question of State sponsored discrimination as a 'very minor' point shows that there is a real risk that the Registrar has minimised the seriousness of the potential risk that the child may be subject to discrimination as a Muslim if she moves to Country 1. 35. I do not accept that submission. It is clear that the Registrar simply misspoke. She immediately corrected the word 'minor' to the word 'narrow' and indeed emphasised that it was a very major point. Furthermore she gave leave for an expert report on the issue of State sponsored or condoned discrimination, which was the topic being discussed at the time. 36. The second extract is at page 22 of the transcript, which was part of a discussion about fixing a date for the substantive hearing and the time necessary for that hearing. The following exchange then took place: - "REGISTRAR: But please do keep a balance here. The point that's being made is it's not, these things are....certainly health and education are not up to the standards of Jersey. That's the point you're making. ADV EMMANUEL: Yes. REGISTRAR: And, as I say, that might well be agreed, but that's not, it's not the beginning and end. It's part of the overview, isn't it? It's a poorer country. The exercise doesn't come down to choosing between countries, does it? ADV EMMANUEL: No. REGISTRAR: It's looking at [the child's] welfare. ADV EMMANUEL: I think that's the point of the Muslim intolerance. REGISTRAR: Because she could stay in Jersey and, if her mother is unhappy or she lives between rowing parents, her life chances may be more affected than anything else. In fact, they probably would be, but that's what I've got to look at. So coming back to our witness template three days...." 37. Advocate Emmanuel

submitted that, particularly by use of the words "they probably would be", there is a real risk that the Registrar has pre-judged the case, in that she has already determined that rowing parents and unhappiness of the mother in Jersey would negatively affect the child's life chances more than in any difficulties in Country 1 such as the lack of education and health facilities or discrimination against Muslims. 38. I do not agree. This was an exchange which took place during the course of a procedural hearing. It is often the case that a judge will express a preliminary view about a matter but this does not lead to a conclusion that the judge's mind is made up and that the provisional view is not open to change. 39. In my judgment, the expression used by the Registrar would not suggest to the fair minded and well-informed observer that she had made up her mind on this issue. On the contrary, at this same hearing, she ordered the parties to jointly obtain a report on State sponsored or condoned discrimination against Muslims and also directed that the parties could file agreed evidence about the education and health provisions in Country 1. This clearly militates against her having already made up her mind. It is perhaps unfortunate that she used the exact wording which she did, but she immediately made it clear that this was what she had to look at. 40. In the circumstances I do not consider that this is a case of apparent bias and I therefore decline to direct that the substantive hearing be heard before a different Registrar or before the Royal Court.

Conclusion

41. For the reasons which I have given, I upheld the decision of the Registrar to refuse the father leave to adduce S's report, but made the procedural directions referred to earlier. *Authorities Re H-L (a Child)*

[2013] EWCA Civ 655. *Downes v Marshall*

[2010] JLR 265 United Kingdom Supreme Court in *Kennedy v Cordia Services LLP*

[2016] UKSC 6 *R v Bonython* [1984] 30 38 SASR 45 Family Procedure Rules 2010 Children Rules 2005 Practice Direction RC17/09 *Neal v Hawksford Trustees Jersey Limited*

[2017] JRC 083 *Westminster City Council v M*

[2017] EWHC 518 (Fam) *Bisson v The Minister for Infrastructure*

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