Neutral Citation Number: [2021] EWCA Civ 900

Case No: B4/2021/0833

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
THE PRESIDENT OF THE FAMILY DIVISION
[2021] EWHC 1162 (Fam)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/06/2021

Before :

SIR JULIAN FLAUX
CHANCELLOR OF THE HIGH COURT

-and-

LADY JUSTICE KING

- -

Between :

HIS HIGHNESS MOHAMMED BIN RASHID AL MAKTOUM	**Applicant**
- and -	
HER ROYAL HIGHNESS HAYA BINT AL HUSSEIN	**Respondent**

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Lord Pannick QC, Richard Spearman QC, Andrew Green QC, Godwin Busuttil, Daniel Bentham, Stephen Jarmain, Penelope Nevill and Jason Pobjoy (instructed by **Harbottle & Lewis LLP**) for the **Applicant**
Charles Geekie QC, Timothy Otty QC, Sharon Segal and Daniel Burgess (instructed by **Payne Hicks Beach LLP**) for the **Respondent**
Deirdre Fottrell QC and Tom Wilson (instructed by **Cafcass Legal**) for the **Children's Guardian**

Hearing date: Wednesday 9 June 2021

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Approved Judgment

Sir Julian Flaux C:

1. By this application, His Highness Sheikh Mohammed Bin Rashid Al Maktoum (to whom I will refer as "the father") seeks permission to appeal against the judgment of the President of the Family Division dated 5 May 2021 following a fact-finding hearing. By an Order dated 18 May 2021 I ordered that the application for permission to appeal should be determined at an oral hearing given the nature of the case and the issues raised.

2. King LJ and I heard the application in a remote hearing using Teams on the afternoon of 9 June 2021. The oral advocacy for the father was presented by Lord Pannick QC and for the respondent mother by Charles Geekie QC. We also heard short oral submissions from Deirdre Fottrell QC. I am conscious that on all sides the written submissions and the preparation for the hearing were the responsibility of substantial teams of barristers and solicitors. I am grateful to all the legal representatives for the clear and focused way in which the submissions were presented.

3. At the heart of the proposed appeal is the contention that, despite what Lord Pannick QC acknowledged were the scrupulous steps taken by the President to put in place safeguards to ensure that the proceedings were fair for the father, in the somewhat unusual circumstances of the case as described in his judgment, there was nevertheless procedural unfairness to the father.

4. It is submitted on behalf of the father in relation to Ground 1 that the evidence of the experts (Dr Marczak on behalf of the mother and Professor Beresford, the court-appointed single joint expert) that the six phones in issue were hacked, was reliant on the sysdiagnose data and the so-called "second fingerprint" methodology devised by Dr Marczak. However, although that data and methodology was disclosed to Professor Beresford, it was not disclosed to the father. Dr Marczak was not prepared to disclose what he regarded as his commercially confidential workings to the "shadow" expert instructed by the father, Sygnia, or to the father and his legal representatives. The judge in effect upheld that objection. Lord Pannick QC's primary complaint is that this was unfair to the father because it deprived him of the opportunity to take expert advice upon the data and methodology used by Dr Marczak and to cross-examine Dr Marczak about that data and methodology which had been central to his conclusion that the relevant phones had been hacked.

5. The principal answer to this ground advanced by Mr Geekie QC for the mother (supported by Ms Fottrell QC for the guardian) was that, as the President had said at the hearing on 12 March 2021 (as reflected in [8] of his judgment from that hearing), if the father had instructed his own expert whose report was then served in accordance with Part 25 of the Family Procedure Rules, the data and methodology of Dr Marczak could and would have been disclosed to that expert and thus to the father and his legal team. What the President was quite correctly not prepared to countenance, Mr Geekie QC submitted, was disclosure of this confidential material to the father's shadow experts, Sygnia, who were outside the jurisdiction and whose expert views would remain confidential to the father and would not be disclosed to the mother or to the court.

6. This submission that, in effect, the father is the author of his own misfortune, has some force at first blush. However, I consider that the contrary argument by Lord Pannick

QC, that the entitlement of the father and his legal representatives to disclosure of the data and methodology which was critical to the expert opinion expressed by Dr Marczak, in which Professor Beresford concurred, should not be contingent upon the father agreeing to call his own expert, or at least to serve a report from his own expert under Part 25, is fully arguable.

7. In particular, there seems to me to be force in the point Lord Pannick QC made that such a limitation on the entitlement to disclosure in other jurisdictions, for example the Commercial Court, would be unthinkable. He submitted that, in commercial litigation, if the disclosure of critical technical material by a party to the other party were contingent on the other party calling its own expert, one would have no hesitation in saying that that was procedurally unfair and Lord Pannick submits, the real question here was whether there was something about the present proceedings which meant that a different standard had to be applied in relation to disclosure in the Family Division. He also submitted that any issues about the confidentiality of the data and methodology could addressed by a confidentiality ring such as is regularly put in place where necessary in litigation in the Business and Property Courts.

8. Whether or not these submissions on behalf of the father do establish that, notwithstanding the careful procedural safeguards put in place by the President, there was such procedural unfairness that the President's decision on hacking cannot stand, will be for the full Court, but I consider that Ground 1 has a real prospect of success and grant permission to appeal accordingly.

9. Ground 2 raises an issue of alleged procedural unfairness in relation to the President's decision attributing the hacking of the relevant phones to the father. Lord Pannick QC pointed out that this decision was based on circumstantial evidence and the drawing of inferences. The complaint is that there was no disclosure to the father or to the court of information to which Dr Marczak had access, namely the contents of his so-called "victims list". In circumstances where the President decided, as he did at [168] of his judgment, that no other potential perpetrator, whether a person or government having access to the Pegasus software, came close to the father in terms of probability, Lord Pannick QC submitted that there had been procedural unfairness because the father and his legal representatives had not had access to the contents of the victims list, which may have enabled them to put forward a stronger case than they could that the perpetrator was Jordan.

10. Mr Geekie QC submitted that the father's written and oral submissions betrayed a misunderstanding as to the nature of the victims list. It was not a list of individuals or of their devices, but only a list of IP addresses through which one or more mobile devices may have communicated with Pegasus servers. Whenever a phone connected to a different WiFi network, for example at home, at work or in a café, it would use three different IP addresses so that an IP address in itself did not necessarily tell you anything about whose phone was using it. Dr Marczak made it clear in his evidence that the victims list was vague and indefinite. He was not prepared to look at it as identifying victims of hacking, but only as a series of "leads". Contrary to Lord Pannick QC's submissions, having the contents of the victims list would not enable the father to make connections between the different IP addresses on the list.

11. Again, there is considerable force in the submissions on behalf of the mother. I rather doubt to what extent access to the contents of the victims list would enable the father

to advance his case that the perpetrator of the hacking may have been someone other than the father himself. If the only complaint of procedural unfairness was that in Ground 2, I would be disinclined to give permission to appeal. However, since there was arguable procedural unfairness as set out in Ground 1, in relation to which I will give permission to appeal, I will also give permission to appeal on Ground 2, so that all the issues of alleged procedural unfairness are before the full Court.

12. Ground 3 concerns the substance of the President's decision that the hacking of the relevant phones is to be attributed to the father. Lord Pannick QC submitted that the President had made a number of errors of principle (i) in concluding that on the material before the Court no other person than the father might have been responsible for the hacking; and (ii) in determining that the previous findings of fact made in his fact-finding judgment dated 11 December 2019, that the father had harassed and intimidated the mother and was prepared to use the arm of the State to achieve his aims, together with the evidence before him on this occasion, were more than sufficient to establish that it was more likely than not that the hacking was carried out with the express or implied authority of the father.

13. In my judgment, in the event that the appeal on Grounds 1 and 2 were dismissed, there is no basis upon which the full Court would interfere with the President's conclusions on attribution, which were quintessentially matters for his evaluative judgment as trial judge. As Mr Geekie QC submitted, the father's attempt to float the possibility that the perpetrator of the hacking was the security services of Jordan, for which State the mother is a diplomatic agent, overlooks completely that NSO's reaction to learning of the hacking of the relevant phones was to terminate the contract with the State in question, because this was improper hacking, that is to say, not for intelligence or national security purposes, and therefore in serious breach of contract. Lord Pannick QC sought to meet this point by suggesting that NSO might have terminated the contract with Jordan because the relevant surveillance had taken place outside Jordan. I did not find that argument at all convincing.

14. Surveillance by the security or intelligence services of any particular State for national security reasons may well take place outside the relevant State. The hypothesis upon which the suggestion that the Jordanian security services may have been the perpetrators of the hacking was based on the assertion that Jordan would have been interested in the substantial sums paid by the mother to her brother, who in turn may have been implicated in a coup attempt against the Jordanian government. Had this justification for the hacking of the phone of the mother and her associates been explained to NSO, it is highly unlikely that NSO would have concluded that there had been a breach of contract by Jordan, let alone one sufficiently serious to justify termination of the NSO contract.

15. I also agree with Mr Geekie QC that the Jordanian theory does not begin to provide a coherent explanation as to why the Jordanian security services would wish to hack the phones of Baroness Shackleton and Mr Manners from Payne Hicks Beach, the mother's solicitors. On the other hand, the father has an obvious motive for hacking the mother's and her security staff and solicitors' phones.

16. Lord Pannick QC was critical of the President's reliance on the father's previous conduct, as found in his 11 December 2019 judgment, as supporting his conclusion that the hacking of the phones had been carried out with the father's actual or implied

authority. He submitted that the two sets of acts were completely different. In the first judgment the President had found harassment and intimidation, whereas the hacking of the phones was surreptitious, but not harassment or intimidation. Given that these were distinct activities, there was no question of the previous conduct being similar fact evidence.

17. I cannot accept Lord Pannick QC's analysis of the two sets of acts. I agree with Mr Geekie QC that, if the hacking was at the behest of the father, it was not only another example of his being prepared to use the arm of the UAE State to achieve his own aims in relation to the women in his family, but also further evidence of harassment and intimidation. Hacking of phones is clearly harassing or intimidatory conduct. In the circumstances, if the conclusion that the father was responsible for the hacking was justified, the President was clearly entitled to take the previous harassment and intimidation into account in determining responsibility for the hacking: see PD12J of the Family Procedure Rules and the recent decision of this Court in *Re HN* [2021] EWCA Civ 448.

18. In the circumstances I refuse permission to appeal on Ground 3 whilst recognising that, if the full Court allows the appeal on Grounds 1 and/or 2, it may well determine that the case should be remitted to the Family Division for retrial of all the issues determined by the President including attribution.

19. Accordingly, I would allow permission to appeal on Grounds 1 and 2 and refuse it on Ground 3.

Lady Justice King

20. I agree.