



OUTER HOUSE, COURT OF SESSION

[2021] CSOH 60

F56/20

OPINION OF LADY WISE

In the cause

SM

Pursuer

against

AN

Defender

**Pursuer: McAlpine; Thorley Stephenson SSC
Defender: Ennis; Drummond Miller LLP**

19 May 2021

Introduction

[1] This is a divorce action at the instance of the husband SM against his wife AN. The pursuer asserts that the marriage has broken down irretrievably and that his wife has behaved in such a way that he cannot reasonably be expected to cohabit with her. While the merits of the divorce action are not, strictly speaking, defended, they form a backdrop to some of the contentious issues about the parties' child. There is one child of the marriage, NN who was born on 12 December 2019 and lives with the defender. SM seeks contact with his daughter, whom he has never met in the circumstances that were explored at proof. The

defender is opposed to any contact taking place. I heard proof on the issues of divorce and contact over a period of four days.

Undisputed facts

[2] The parties married in Pakistan on 5 March 2017 when the pursuer was aged 21 and the defender had just attained the age of 19 years. The pursuer is the defender's second cousin. Their marriage was arranged by their respective families. While the defender is a British citizen and has lived in Scotland throughout her life, the pursuer was brought up in Pakistan and did not live in the UK until after the parties married. The couple were in contact through phone calls and text messages between October 2015 and their wedding in March 2017. On 8 November 2017 the pursuer entered the UK on a spousal visa and went to live with the defender and her parents in Edinburgh.

[3] During the marriage the pursuer worked in a shop operated by his wife's family. After a period he began working in the local ASDA supermarket. The pursuer has a cousin who I will refer to as ASN. Mrs ASN is married to the defender's brother and when the parties were married and living together in Edinburgh so too were she and the defender's brother (KN). Mrs ASN and her husband lived with the defender's family, her in-laws, for a period after she came to Scotland from Pakistan in September 2016.

[4] The pursuer has an uncle, TM, who lives in Oxfordshire. Mr TM and his wife NM, are part of a much larger family group that contains the defender's relatives as well as those of the pursuer. In February 2019 Mr and Mrs TM travelled to Edinburgh to visit the defender's family and to attend a wedding in Manchester. While they were in Edinburgh a large family meeting took place which descended into violence. On 10 April 2019 the pursuer and his cousin ASN were challenged about a number of communications they had

exchanged in a WhatsApp group. Two weeks later the pursuer and Mrs ASN left their respective spouses and after spending a few days in a shelter were collected by Mr TM who has been providing accommodation and financial support for both of them since that date. In the Autumn of 2019 the defender took steps to pursue an Islamic divorce from the pursuer. Number 7/2 of process is an Islamic divorce certificate relating to the parties dated 8 January 2020 and confirming that it was valid from that date. The parties had no direct contact after they separated in April 2019 and prior to their daughter's birth in December 2019. When the defender registered the parties' daughter's birth on 17 December 2019 she did not disclose the date and place of the parties' marriage or any details of the child's father. The birth certificate she obtained is number 6/2 of process. The pursuer is the child NN's father and holds parental responsibilities and rights in relation to her. By the time NN was born the defender, her parents and the defender's younger brothers had moved house and now live in West Lothian. The defender continues to be employed as a pension servicer with a large company. She works three full days each week. Her mother looks after the child when she is not working.

Evidence led at proof

Pursuer's case

[5] The pursuer gave evidence and adopted both his first affidavit number 8 of process and his second affidavit number 34 of process as part of his evidence in chief. Those affidavits set out his position that he had been ill-treated by his wife and her family during the marriage. SM stated that he had been a victim of domestic violence. He complained that he had no control over anything during the marriage. The defender and her family controlled all of the finances. He required to work long hours in his father-in-law's shop,

from 6am to 6pm seven days per week. He was required to undertake domestic duties on finishing work. When he complained to his wife about this she started shouting at him, slapped his face and ripped his top violently. His mother-in-law, Mrs MON would also shout at him and threaten to break his legs. The pattern described by the pursuer was that when subjected to this treatment he was threatened with divorce and cancellation of his visa so that he would be sent back to Pakistan. This would have brought shame on him and his family. Mr SN described constant shouting and swearing by his wife at him and physical violence in the form of punching and kicking. He said his parents-in-law had seen such behaviour and told him to put up with it. In April 2018 the pursuer and his wife moved into their own accommodation. The pursuer said that he was told he had to meet the monthly mortgage payments for the property and all of the bills. He also required to pay money to his parents-in-law each month as he was told they had provided the deposit for the property. He stated he was never shown any paperwork relating to the house and his name was not included on the bills. He had been paid in cash by his father-in-law for working in the shop which he then had to put into a joint account. His wife had her own account and did not contribute to the joint account.

[6] During the marriage the pursuer became unhappy and confided in Mrs ASN, his cousin about his problems and she shared with him that she too was suffering ill-treatment at the hands of her spouse, the defender's brother. The pursuer was in contact with his uncle Mr TM during the marriage and told him of the ill-treatment at the hands of the defender and her family as it occurred. In February 2019 Mr and Mrs TM stayed with the parties overnight so that they could attend a wedding. After they had departed for that wedding there was a violent incident between the parties. The defender had been demanding to see the pursuer's phone and jammed his toe in a door in the property refusing

to let him leave the house. She slapped his face, scratched his hands and kicked him between the legs. She broke his phone. The defender then alleged to her father that she was the one who had been attacked and the defender's parents telephoned Mr TM who left the wedding he had been due to attend in Manchester and came to Scotland for a family meeting. While that meeting descended into violence between some other family members, the pursuer was persuaded thereafter to continue in the marriage.

[7] On 10 April 2019 the pursuer said he was summoned to see his in-laws and when he arrived at their home he found that his cousin Mrs ASN was present. Her husband and the defender's parents had taken possession of ASN's phone and were listening to messages on it. The pursuer said the messages in question were between ASN, his uncle Mr TM and himself in a WhatsApp group and were mostly complaints about how badly he and his cousin were being treated by their spouses and in-laws. The defender's family started alleging that the pursuer and ASN had been behaving improperly and even that they were in a relationship. The defender was screaming and saying she was going to pack the pursuer's bags and cancel his visa. The pursuer told his uncle TM and also his boss at ASDA what had occurred. His uncle advised him to go to the police but he was reluctant to do so and eventually contacted a domestic violence organisation called Shakti who referred him to an organisation called Abused Men In Scotland ("AMIS"). After a few days in safe accommodation the pursuer and ASN were collected by the pursuer's uncle and taken to Oxfordshire. The pursuer said he had been prescribed medication and had been very distressed at what had happened to him. He was terrified of returning to Pakistan because of being accused of having an affair with his cousin which might result in his persecution.

[8] So far as contact with his daughter was concerned, the pursuer's position was that he was unaware that the defender was pregnant when he left in April 2019. He had been

advised by the police not to make any contact with the defender or her family. He had received a message indicating the defender was pregnant but she had falsely claimed to be pregnant on a number of previous occasions and so he did not trust her. He discovered she had given birth to their child when he saw social media postings. He contacted the registrar of births, deaths and marriages in Edinburgh and obtained his daughter's birth certificate and only then realised that his wife had falsified the registration by failing to disclose that she was married and that he was the father of the child. Thereafter he had contacted a solicitor in Edinburgh to try to secure contact with his daughter. The pursuer's position was that he wanted contact with his daughter and to be part of her life. He appreciated that contact would require to be built up gradually. He would wish to move back to Scotland and be part of her day to day life. Initially he sought contact for a few hours twice per month. His uncle would facilitate this by helping him travel from Oxford to see her. He has an uncle in the Edinburgh area who would also assist. In the family home in Oxfordshire where the pursuer resides there is a young child, "Z", who is a little older than the pursuer's own daughter. The pursuer is very comfortable looking after that child and is confident that he would be able to attend to his own daughter's needs.

[9] Under cross-examination the pursuer confirmed that the series of WhatsApp messages and photograph number 6/14 of process was a series of messages between him and his uncle Mr TM. The pursuer had messaged his uncle "Can I tell u something" and the uncle had replied "yes" and so the pursuer had sent a picture of a positive pregnancy test and told his uncle that the defender was pregnant. This was on 22 January 2018. It was one of the occasions mentioned in his affidavit number 34 of process at paragraph 26 when his wife had falsely told him that she was pregnant. He had managed to retrieve this one because others were on the phone of his that his wife had destroyed on 16 February 2019. In

May 2019 he had seen photographs on Instagram but as previously indicated had not believed his wife's message that she was pregnant because of her previous behaviour. Had only one Instagram account which he did not really use but the photographs sent to him in May 2019 were on that. The defender had eventually told him that the January 2018 pregnancy test photographs had been taken from Google but she had waited two weeks to tell him that. While she had not told him that the subsequent messages about being pregnant in May 2019 were a joke he had no reason to believe her. By the time he received those messages he was in contact with the domestic abuse officer who had helped him move to a safe house. The police had advised him not to be taken in by the defender and her family. He had also received inconsistent messages from extended family about whether or not his wife was pregnant during 2019. His uncle TM did not know whether the defender was pregnant or not. The pursuer accepted that the defender had sent him a scan picture on 8 June 2019 (number 7/9 of process) but his thought at the time was that she had also faked this using Photoshop or similar. He accepted that she had not gone to the extent of sending a scan photo previously and then admitting it was a fake. In any event, the police advice had been not to contact the defender or her family for the pursuer's own safety. He disputed that the defender's mother had contacted a cousin of his uncle in Oxford to confirm the pregnancy.

[10] It was put to the pursuer that when he moved into the defender's family home the defender's mother had explained the house rules to him and he had taken exception to those. The pursuer agreed with that to the extent that he considered it unreasonable that he had not been allowed to talk to anyone in Pakistan, Oxford and Edinburgh, had not been allowed out without permission and that the defender's mother had told him she would break his legs if he disobeyed. He had been really shocked by the behaviour. He disputed

that all he had been told by way of rules were that there would be no mobile phones at the table and no permission to stay out late at night. He disputed that he had disregarded any of the house rules that he had gone out socialising and for meals. The pursuer said that he was only allowed out a few times after permission from the defender's parents and only with the defender. He agreed that there had been a few meals out in Edinburgh and a trip to the Christmas market. He agreed that there might be photographs of such occasions but reiterated that he had to seek permission from the defender's parents. In his affidavit evidence the pursuer had stated that he was watched through CCTV cameras by the defenders' family in their shop. He agreed that he had been asked not to use his phone when serving in the shop but said that he had only used the phone if there were no customers. He had started working in ASDA in October 2018 and his wife had assisted with the application. He had no complaints about working there, as ASDA gave him reasonable breaks and regular hours in comparison with working in the defender's family shop. The pursuer was challenged about whether the couple's bills had been met from his income. The single bank statement from the Clydesdale Bank from the parties' joint account (number 7/14 of process) was put to the pursuer and it was asserted to him that there were no withdrawals for a secured loan or other bills just cash withdrawals from a machine at ASDA and mobile phone payments. The pursuer was adamant that the joint account into which his salary was paid had been used to pay the family bills. He denied that he was the only one with a card for the account and that he had removed all monies from it. He said that he had an earlier bank statement now from that account and it would illustrate the secured loan and electricity account payment. He said that he had no money at all when he left the defender.

[11] The photographs lodged at number 6/8 of process were put to the pursuer and two of these had been taken in March 2017 in Pakistan after the parties' wedding but one had been taken in Oxford after he left the defender in April 2019. The photographs taken after his wedding illustrated marks on his neck caused by his wife when they were having sexual relations. The pursuer could not recall whether he had sent those photographs to his wife but agreed that they may have been sent in the context of her leaving for the UK after they had spent time together in March 2017. He had lodged them in this process to counter the allegation that he somehow forced the defender to have sex with him. She had been an active and physical participant in their sexual activity. He had other photographs in his old phone which had been destroyed by the defender. After the incident on 16 February 2019 he had been without a phone until his uncle sent one to him. That incident involved the defender snatching the phone from him and it had then hit the wall, fell onto a chair and broke. A variety of allegations of violence by the pursuer to the defender were put to SM all of which he denied. There were messages number 7/13 of process which purported to be between him and his wife in which he was telling her to "come home" and appeared to be annoyed that she was not doing so. The pursuer denied sending those messages. The pursuer's position was that those messages were not from his phone and that he did not send texts to his wife demanding to know where she was and telling her to come home.

[12] The pursuer accepted that he had received three notifications telling him that his wife was asking for an Islamic divorce in around October 2019. He had written to and spoken with the gentleman in Birmingham who had organised the Islamic divorce and who had sworn an affidavit number 24 of process (Mr FQ). Mr FQ's affidavit indicated that when he spoke with the pursuer SM knew that his wife was pregnant. The pursuer stated that he had asked Mr FQ whether his wife was pregnant because he did not know the

position. He disputed the accuracy of that part of FQ's affidavit. SM said that in addition to the defender's mother threatening to have his legs broken the defender's father also threatened to kill the pursuer and beat him up. He had been really scared that the threats visited upon him would be carried out in Pakistan. He felt safer here where his uncle and the police were helping him. As a result he no longer felt scared of the defender. If he was back in Edinburgh to exercise contact he would let the police know that he was coming and felt he could rely on them for support. The pursuer confirmed that he had first heard of his daughter's birth in January 2020 but was not 100% sure until he saw the birth certificate because of the defender's previous false statements about pregnancy. No one had contacted his side of the family in December and so he did not know until the January. He had seen photographs of the defender with the baby online but was still not convinced until he saw the birth certificate with his wife's name and address on it. When he had seen the photographs (number 6/4 of process) of her holding the baby he could not be certain that it was his child because she could have been holding someone else's baby.

[13] The pursuer confirmed that he had been shocked to find that his name was not included as NN's father on her birth certificate. He had consulted a solicitor in Edinburgh to try to secure contact with his daughter. The pursuer disputed that he sought legal advice because of a concern simply to have his name put on the birth certificate. He said all he wanted was to see his daughter and when he told his solicitor, Miss Carlin, that he wished to secure contact, she advised that he should write to the National Records Office which he did (number 6/3 of process). SM disputed that he had made no effort to see his daughter in March 2020. He had contacted a relative in Edinburgh (WM) who did not assist. He had received advice from the solicitor that he would have to follow a process before he could secure contact with his daughter. The pursuer accepted that he had not attempted any

direct contact with the defender or her family but said he was scared of them and reiterated that the police had told him not to contact them. He had made enquiries through WM's wife, as had his uncle, TM.

[14] Various matters in relation to the immigration process were put to the pursuer. When his application for settled status was refused in July 2020 he asked for that to be reconsidered and that was refused on 25 August 2020. A fresh application had then been submitted on his behalf in October 2020. The parties' child was mentioned in that application although the pursuer disputed that she was the primary or most important part of it. His principal argument was the risk to him if he was returned to Pakistan. He agreed that his desire to have contact with his daughter was also a feature of the application, as confirmed by its terms (number 6/9 of process). The application mentions him taking action in these proceedings to see his daughter. He agreed that he had told his immigration solicitor that he was desperate to see his child. The pursuer had instructed the raising of the present proceedings in August 2020 before preparation of the October immigration application. The period between April and August had been dominated by the Covid 19 pandemic when it was difficult to progress matters. There had been a period when he was discussing applying for legal aid as he could not afford to fund the litigation privately. Having contacted a number of solicitors who had been unable to help he reverted to the original solicitor with some financial assistance from his uncle and his own earnings. SM was adamant that his intention from the outset had been to see his daughter regardless of whether that would assist his subsequent immigration application.

[15] The pursuer was challenged about whether he tried to make any contact with the defender with a view to securing information about his daughter. He confirmed he had sent a birthday message and asked for a photograph but after WM and his wife refused to help

there was little he could do. SM confirmed that he was actively involved in helping looking after Z, with whom he currently lives, and that he takes him to the park and protects and looks after him. He agreed that of course such a child would find it strange at first to be introduced to someone new but if an adult who could comfort him could be there as well it would be fine. He agreed that if he was to see his daughter, to whom he is currently a stranger, someone that she knows would require to remain present. His plan was that he could meet her in a park or in a contact centre, somewhere safe and with someone she trusts present at least for the first couple of occasions. If permitted by the court, the pursuer's uncle TM would also attend. The pursuer remains scared of the defender's family but is no longer scared of coming into contact with the defender herself. His position was that the defender's account of being anxious and depressed because of her husband's treatment of her was fictitious and concocted so that he could not see his daughter. While there were reports of her being anxious and depressed even before her daughter was born, the pursuer had observed in Edinburgh a supposed "panic attack" on the part of the defender which she used as an excuse for her treatment of him.

[16] SM was asked a lot of questions about the availability of contact centres and gave detail of the researches he had made about the number of available contact centres and where they are, although all were currently closed because of the pandemic. Some of that evidence was given through the interpreter. The pursuer was aware of the set up at contact centres and the ability to have separate rooms where parents or other carers of a child would not wish to meet. He would be content to meet his daughter initially in a contact centre and then would hope to be able to take her out to a park or other place once she was settled. He accepted that in the beginning his daughter was likely to feel strange about seeing him but he was confident that he would make her feel more relaxed and then would be able to take

her out and spend time with her. He had noted in the defender's affidavit that she seems to be rarely out the house and he thought it would be good for his daughter to be able to do that with him. The pursuer confirmed that his claim for contact was made on the basis that he was very much hoping he would be remaining in the UK. However, if his immigration application failed and he required to return to Pakistan he would want to stay in contact with his daughter through video call or telephone. He would very much like to see pictures and videos of his daughter which he had asked for but never received. He had not contacted his wife directly to seek contact because he knew that she would never agree to it without being required to do so. He would be very happy in the first instance to receive a picture or video as a start to being part of his daughter's life. If permitted he would wish to contribute to his daughter's life by looking after her health, her emotional needs, education and whatever else is good for her. He will support his daughter in any way he can whether here in the UK or from Pakistan.

[17] In re-examination the pursuer confirmed that when questions had been asked of him about the bank account statement (number 7/14 of process) he had been confused because only one page had been shown and he was aware that the previous statement would show council tax of £148 per month and £528 per month for secured loan repayments. Those two transactions he knew because he had since seen the full statements and those were consistent with his earlier evidence that he made these payments. The witness agreed that he had spoken with FQ about the talaq (Islamic) divorce and had referred to pregnancy but had not said in terms that his wife was pregnant because, as he had already indicated, he did not know whether it was true. The pursuer agreed that if contact took place at a contact centre he would be content to have no direct communication with the defender or her mother if they were involved in bringing NN there and did not want to see him. There

would be no difficulty if whoever brought his daughter to the centre wanted to remain there during contact. In any event he would consider any other suitable venue for contact that was proposed. He would have no difficulty with the court making an order preventing him taking his daughter outside the UK as he had no intentions of leaving the country. He had assumed, given the terms of his wife's defences, that she would not wish to have any contact with him but he would be content to have direct contact with her now about their daughter if she changed her position.

[18] JH, a 54 year old immigration solicitor operating her own specialist firm in Oxford, gave evidence. She adopted her affidavit, number 13 of process, and her supplementary affidavit, number 33 of process, as part of her evidence. She first met the pursuer on 6 May 2019 at a time when he had leave to remain in the UK until 17 July 2020. She had been acting for him since then. She had made detailed representations (number 6/15 of process) to the Secretary of State for the Home Department supporting the pursuer's claim for leave to remain in the UK on the basis of private life. She had drafted this with information from the client, assisted by his uncle TM who is very involved. The process included an online application (number 6/9 of process) and the detailed representations, number 6/15, were the next step when the supporting documents had been emailed.

[19] Under cross-examination Ms JH confirmed that she was very surprised when the pursuer was refused settled status in July 2020. She had never had such an application refused and prided herself on preparing thoroughly. Further, she was also representing the pursuer's cousin, Mrs ASN, whose application was linked to that of the pursuer and hers had been granted. JH was extremely surprised to receive reasons from the Home Office that they considered the evidence submitted on behalf of the pursuer didn't exhibit that domestic abuse had occurred. After the administrative review of the refusal was itself refused on

25 August 2020 she advised a change of direction to emphasise the danger the pursuer would be in if he returned to Pakistan because of the allegations made about him both here and there. His right to family life was also raised but that was not the main thrust. There were two aspects to the secondary family life claim. First was the family life the pursuer had established with adults here in the UK which was an unusual form of family life claim but perfectly valid and then also his hoped family life with his daughter NN. These proceedings were mentioned in the application. While number 6/9 of process made several references to the contact claim, the letter, number 6/15, was the thrust of the application which emphasises the dangers in Pakistan. Ms JH had included a statement from the pursuer's solicitor about his desire to see his child with the application as it was important to explain the stage reached in the family case.

[20] In relation to injuries allegedly caused by the defender, the first application had mentioned the injured toe although no photographs were available at that time. The witness confirmed that number 6/8 of process were the photographs she had received although she was not sure she had seen all of them. She could not confirm being told when each photograph was taken. Ms JH had considered that the pursuer was a vulnerable adult because English was not his first language and his GP had told her that he was very distressed. For that reason she considered that he needed an appropriate adult to assist. The impression she had formed when meeting the pursuer was that it was clear he had been through a situation of some stress. Gradually he became more relaxed with her and he always came across as calm, polite and capable to her in contrast with his police interview when he had been distressed. Supporting evidence for the pursuer's claim had been obtained from his uncle TM, his cousin Mrs ASN, and other organisations.

[21] The pursuer's uncle Mr TM also gave evidence. He is 51 years old and lives in Oxfordshire with his wife, his son and daughter-in-law and their 2 year old son Z, two more sons, the pursuer and Mrs ASN. He adopted his affidavits numbers 9 and 35 as part of his evidence. These provided support for the pursuer's account of events in relation to the treatment he had received at the hands of his wife and her family and SM's abilities with the child Z who lives with him. The first affidavit details TM's observations of the February 2019 family meeting.

[22] Under cross-examination TM confirmed that there were about 20 households in the greater family group that connects his family and the defender's family, each household containing between two and six adults. All of the families are related and whenever there was a family wedding everyone would be invited. Everything has now changed because after the pursuer and his cousin left Scotland the extended family had been "torn down the middle". The Scottish side of the family had tended to form one group and those in England another and there is no real communication between them. The circumstances of the breakdown of the parties' marriage played a central part in the extended family division. During the period that the pursuer was married to and living with the defender in Edinburgh TM had a considerable amount of communication with his nephew. He gave him emotional and practical support. He sent him a phone and clothes and other things. Under reference to paragraph 6 of his first affidavit (number 9 of process) the witness gave considerable detail about what had occurred during the February 2019 incident. The context had been that the defender had hit the pursuer and kicked him between the legs and deliberately smashed his phone. One family member, WM, said that it was clear that the defender was at fault but her parents refused to see that and started shouting at WM telling him to shut up. They told the pursuer that he should apologise to his wife and touch her

feet and that he should be sent back to Pakistan. There were threats of having the pursuer killed. Violence erupted between some family members including the defender's father who slapped and punched WM. TM was so shocked at how aggressive and violent the defender's family were that he said he was going to call the police. Thereafter things calmed down and the defender had apologised and assured TM that these things would not happen to the pursuer again.

[23] TM had initially been told of the problems about the defender's behaviour and that of her family direct from the pursuer but WM and his wife and two others had all confirmed the violence. In April 2019 after the 10 April incident when the pursuer and his cousin were both summoned to the defender's family home TM said that he was on the telephone to them as it was all happening. The pursuer had been stripped of his valuables including gold and money boxes that he had brought into the marriage. His understanding was that the pursuer had reported that to the police in Scotland. Once the pursuer and his cousin were living with TM and his family, TM received a phone call telling him that the defender was pregnant and that he should send the pursuer back to Edinburgh. TM did not believe this and so told her family to send back the pursuer's gold first before he would address the request to return the pursuer. The defender's family had failed to do so. They had spread the word of the defender's pregnancy through the family but no one knew whether it was true or false. TM did see a pregnancy test and scans that AN sent but because she had provided false pregnancy tests before, seemingly as a joke he was cautious about accepting this third or fourth occasion of a so-called pregnancy. When the scan was sent with the defender's name on top TM had googled "false baby scans" and discovered that these could be obtained for less than £50. In any event, TM felt his nephew's life was in danger and that he could not go back to Scotland. The police had attended at the house in Oxfordshire and

told the pursuer to trust no one. TM felt that he was now having to deal with the fallout of the treatment of both the pursuer and Mrs ASN from the same family. The threats that he knew of had been very serious including the defender's parents both threatening to break the pursuer's legs and also to kill him. The pursuer was very scared but ultimately once the authorities were involved he felt safer and understood that the authorities here can be relied on in a way that they cannot in Pakistan. DC Gilroy, the officer involved in the case, had specifically said that if TM and the pursuer came to Edinburgh he should be informed. TM is a property landlord who does not require to work regular hours and would be in a position to travel to Edinburgh with the pursuer. He had been unaware that there was any allegation from the defender that the pursuer had been violent to her until he gave evidence.

[24] In re-examination the witness gave further details of the 15 February 2019 incident. The pursuer had been put in a chair as if he was on trial in the centre of the room and the defender's family kept saying "he's the one who needs a visa ... he's got to touch her feet ... he's the lower one ..." and then they shouted "we are going to kill him ... send him back to Pakistan". Then as soon as TM dialled 999 it was like turning the music off at a party. All of the behaviour stopped and TM said that if anything else happened he would be calling the police. Things had then quietened down for a few weeks until the April incident. When the pursuer had told him during the marriage of the violence towards him he had been crying. Although some details of the ill treatment were given to TM by the pursuer between 2017 and 2019 it was not until he was safe and living in Oxfordshire that the pursuer provided the remainder of the information about the abuse.

[25] Mrs ASN gave unchallenged evidence by affidavit as the defender had been offered but not insisted in an opportunity to cross examine her. She stated that she had been a victim of domestic abuse during her marriage to the defender's brother KN. Initially she had

lived with her husband's family but she and KN had been told by the defender's father to move out to make room for the pursuer when he arrived from Pakistan. Mrs ASN confirms that the pursuer confided in her during the marriage in relation to the ill treatment he suffered at the hands of the defender and her family. She saw bruises on his neck. The pursuer cried when he told her of the defender having faked a pregnancy test. The witness also confirmed the account given by the pursuer and his uncle of the tempestuous family meeting in February 2019. The defender had admitted to Mrs ASN that she had kicked and slapped the pursuer the night before. Mrs ASN also confirmed the pursuer's account of the 10 April incident when she and the pursuer had been confronted about the messages they had been sharing with TM. She felt she had done nothing wrong and had been very distressed. Her husband KN was told to take her home and deal with her. Thereafter the physical violence to which she was subjected escalated. She was scared for her safety, particularly as her husband's family was spreading a rumour that she was in a relationship with the pursuer. This turned her family against her and she felt she didn't want to live.

[26] Ultimately Mrs ASN sought refuge with the uncle in Edinburgh (WM) and then with Shakti Women's Aid. She and the pursuer had both been treated as being at risk and taken to a safe house. The police assisted their departure from Edinburgh to Oxford with TM and had visited them once in Oxfordshire to make sure they were safe. Both she and SM had resisted attempts made by the defender's family to have them return to their spouses. Mrs ASN has been granted leave to remain in the UK on the basis of her experiences.

Unchallenged affidavit evidence was also given by Mrs NZM (number 30 of process), particularly in relation to the February 2019 family meeting which she had attended with her husband Mr TM and by WM (the pursuer's cousin) who tried to intervene at that meeting. Mr WM swore two affidavits, numbers 14 and 31 of process. He is the father of the

child Z, whose care the pursuer has assisted with while in Oxfordshire. He speaks to having left his young child in the care of the pursuer on many occasions. He and his wife have no concerns about the pursuer's ability to feed a small child, change nappies and keep the infant occupied. I have accepted the unchallenged evidence of these witnesses.

Defender's case

[27] The defender AN gave evidence and adopted her affidavit number 37 of process. She spoke of the developing relationship she had by phone and text with the pursuer before she married him. Her position was that after an initial period that was happy enough the marriage broke down as a result of her husband's behaviour. She spoke to messages illustrating what she said were his dominating behaviour (number 7/13 of process). There were arguments because the pursuer thought that the defender's mother manipulated her and did not want her to stay with him. AN stated that she had wanted to leave the pursuer anyway and that was her own choice. She disputed that any of the messages had been fabricated. The defender did accept that she had sent a fake pregnancy test to the pursuer in 2018. She said she just wanted to see his reaction. She obtained the image of a positive pregnancy test from Google and sent it to him. The defender claimed that she told the pursuer the truth almost immediately thereafter. She said she just wanted to know how he would feel if she was pregnant. The defender denied falsifying a positive pregnancy test more than once. She accepted that she had told the pursuer not to tell anyone about her pregnancy when she had faked one. She did not know how sensitive the pursuer would be on the topic and felt that this was at a time when they were getting on well.

[28] During her pregnancy the defender received a lot of support from her parents and from her father's sister and husband. Her position was essentially that the pursuer either

knew or could have ascertained that she was pregnant with his child, that he did not contact her after she was born and she had come to the view that the child was better off without having a father rather than one who would provide negativity in her life.

[29] Under cross-examination the defender disputed that she and her family had imposed rules on the pursuer or been aggressive to him. She said that she only found out that he was a sensitive person after they had lived together. She denied having a temper herself although stated "everyone has a temper if the wrong boxes are ticked." The defender denied that her husband had been put to work in his father-in-law's shop saying that initially he went to work there because he wanted to and then later secured a job in ASDA. She agreed that he would sometimes eat separately from her and her parents but that he did so because he liked to eat in his own room. AN disputed that the pursuer was in some way regarded as of lesser worth coming from Pakistan. Although he did come from a different country with a different mind-set she and her parents had just "agreed to go along with it". She accepted that she had not wanted the pursuer to attend a party in Oxford but stated that it was not prohibited. Her position was that the pursuer had been lying in relation to the alleged abuse of him by the defender and her family. She accepted that the pursuer had been in regular contact with his uncle TM during the marriage but insofar as Mr TM stated that the pursuer had confided in him about the abuse during the marriage the defender stated that TM was also lying. When pressed on whether the pursuer and his uncle (and Mrs ASN in her affidavit) had all conspired and set out a completely false story to the court the defender said that was indeed what they had done.

[30] The defender recalled the incident in February 2019 when Mr TM and his wife had come to stay with the defender's parents. An argument had ensued within the home after Mr and Mrs TM left to go to a wedding in Manchester. It arose because the defender

wanted to see the pursuer's phone. She denied shouting, swearing, slapping his face and kicking him between his legs and said that his mobile phone had broken when it fell to the floor during the course of the argument. AN claimed that the pursuer had always been on his phone and ignoring her and that was the context in which she had asked for it that day. Her position was that her husband had been concerned that she would look at his phone and that after she had asked for it and he had given it to her he pushed her and she ran upstairs. The defender then claimed that her husband had pulled her hair and tried to put his hands into her pocket to get the phone during the course of which his hand was scratched. It was after that that the phone had dropped from her pocket and the screen broke. The defender said that both she and the pursuer had loud voices during that incident and that when she took her own phone out of her husband's hand to telephone her mum she thought she might have pushed him and he touched the fridge. When she went to leave she was opening an inner door and the pursuer put his foot in it which might have hurt his toe. The defender denied that she had subsequently lied and accused the pursuer of assaulting her saying that he had in fact pulled her hair and pushed her to the wall. She accepted, however that the pursuer had left and gone to the beach alone after the incident although said this was not because her father threatened to kill him. When Mr and Mrs TM came back there was a family meeting. The room was cramped, there were up to 16 people there. The defender denied that the pursuer had been told to touch her feet in a symbolic gesture. She accepted that there was violence during that incident but denied that the phrase "break his legs" was used or that there was talk of sending the pursuer back to Pakistan. When it was put to her that Mr TM had spoken of her laughing during this episode the defender stated that Mr TM must be lying about that too.

[31] So far as the 10 April 2019 incident was concerned the defender said that the pursuer was asked rather than summoned to her parents' home. Mrs ASN was there. The defender denied that she and her family had accused the pursuer and Mrs ASN of having some sort of inappropriate relationship. She seemed to accept that she had called the pursuer's parents dogs although explained that it was just in the sense that they were so loyal to their son that they could not let him go. The defender denied making any of the threats to him that the pursuer had claimed she did such as cancelling his visa. She denied being violent at the 10 April meeting. She disputed that she and her family had kept gold given to the pursuer by his mother, stating that it was given to her. She accepted however that the marriage had ended shortly after the 10 April meeting.

[32] When asked about what the statements on the bank account before the single statement lodged on her behalf in process might show, the defender stated that she did not know where her husband's salary was paid and that he had looked after all the household bills. She did not dispute that he might have paid the mortgage and council tax in respect of their matrimonial home. She denied that she had access to the account. Her own salary was paid into another bank account. The defender seemed to accept that it was the pursuer as between them who was keener to have a child during the marriage. She accepted that she had played a joke on him about a fake pregnancy in 2018. Her position was that she had just wanted to know how her husband would react to her being pregnant and to find out whether he wanted a boy or a girl. She accepted that he had been very happy to hear that she was pregnant on the occasion that she pretended to be so. When she actually was pregnant, after the end of the marriage, she said that she did not want to be blamed for not telling her husband she was pregnant. She was willing at that time to have a fresh start in the marriage for the sake of the unborn child. She wanted her husband to be part of her life.

It was finding out that she was pregnant that had changed her feelings. She felt she had no choice but to tell her husband because he had a right to know there was a child. She agreed that the baby was entitled to have a father and a mother or at least that is what she thought at the time. Messages were sent to the pursuer about the pregnancy and while he might say now that could not believe her at the time the defender felt that his lack of response made her think that he did not care. She did not know that her husband had been advised by the police not to contact her direct and said she was unaware that he had "done a domestic violence case on me."

[33] The defender's position was that if the pursuer had approached her and they had sat down and discussed matters after she was pregnant then they might have been able to work something out. However that had not happened and her pregnancy had been filled with stress. Her daughter was born underweight and at term. She did not now wish to meet the pursuer. She stated that she is still not able to leave her 14 month old daughter with anyone. Even if she was away for 1-2 hours the defender thought her attachment with her daughter would be broken. She seemed bitter that the pursuer had refused to believe she was pregnant because of one earlier joke when she had falsely claimed she was pregnant. She stated that she felt she had been the victim of a sham marriage. Her husband was alleging that he had been abused between 2017 to 2019 but that would mean that he had simply taken all of that abuse until he left. He had gone to a shelter and filed an abuse case before going to Oxford. She thought it was a concerted plan on his part. She questioned why he did not report any abuse earlier. She felt she had helped him to become familiar with life in this country by helping him to move around the city and telling him where he could find work at ASDA and so on. She questioned why her husband had only reported the alleged abuse once she had ended the relationship.

[34] In terms of her future intentions about her daughter having a father, the defender considered that when the time is right she would explain to her daughter what happened but at this moment in time she did not need to know who her father was. When she asks about him in future she will tell her honestly about him. The child would not have to know the detail but would be told that the couple were not compatible. The defender does not know the child Z who witnesses had explained the pursuer was good at looking after. She accepted that on the face of the information it would appear that the pursuer has a secure attachment with Z similar to that which she has with her daughter. She then stated that the pursuer would leave their daughter once he has got what he wants from her and that it was all a "well-planned conspiracy." Subsequently the defender stated that she did not deny that her daughter had a right to know her father, but she had felt that her unborn child had been at risk. She claimed to have received messages saying that when born the child would be going to Pakistan and that the pursuer's mother in Pakistan could look after her. It was put to her that it was hard for her to claim that the pursuer had made any threat to remove the child when the couple had not spoken since separation. The defender claimed that the pursuer was in contact with her family and that she had heard such allegations through other sources. While she retains the only passport that her daughter has, the defender stated that with access to her birth certificate the pursuer could secure a replacement passport if he stated hers was missing. The defender was unclear about what exactly the process would be for the pursuer securing a passport for his daughter but said she was concerned because it was a form of identity and she did not know the lengths to which the pursuer would go. When it was suggested that court orders could be made preventing a child being removed from the country the defender responded that she did not feel it was fair on her daughter to have a court order regulating such arrangements at a young age.

[35] The defender accepted that despite having known her home address throughout the proceedings the pursuer had done nothing inappropriate to interfere with her and her daughter's life. She could not say what her decision would have been had the pursuer written to her and asked her for contact rather than raising court proceedings. In relation to NN's birth certificate the defender said that she had seen a lawyer at Shakti who told her that her marriage would not be legally recognised in the UK and so she concluded that she was not married at all and did not need to insert such details. She accepted that if their marriage was legally recognised in the UK then the pursuer should be on his daughter's birth certificate but she claimed that the pursuer's motivation in obtaining the birth certificate was only because he wanted to use it for home office purposes. She remains opposed to the pursuer being named as their daughter's father on her birth certificate. While he had sent a birthday message in December 2020 and another message asking for a photo of his daughter the defender said she would have expected more. She did not think his concern for his daughter was genuine and was sceptical that someone who says that he was abused would now be asking for a photo. She accepted that there was nothing inappropriate in any message that he had sent. She had refused to send a photograph of their daughter to him because she was not comfortable sharing her daughter with the people that the pursuer lives with. She would not send a photograph to someone like the pursuer who she did not trust. When it was put to her that if she succeeded the pursuer would never see a photograph of his daughter for the duration of her childhood the defender stated "the way things are going yes." She was not criticising the pursuer for sending a birthday card but it had been posted after her birthday and because the defender had not replied to his text message. She felt the pursuer had made no direct effort to see his daughter.

[36] In relation to NN's routine, the defender's affidavit contained considerable detail of this being regular and consistent, including the timing of various feeds and naps. However, in her oral evidence she said that her daughter's routine was unpredictable and she misses meals even when she is with her mother. She referred to her daughter as "leading the way" and said she would be uncomfortable with a stranger. She runs away when the defender tries to change her nappy and she had taken an hour to console her last night at bedtime. In essence she considered that her attachment with her daughter and the relationship of trust between them would be affected if NN required to go for contact with her father.

[37] When asked what she would do to make contact to work the defender reiterated that she considered that the pursuer was trying to use his child to be allowed to stay in the country and that she did not want to send her daughter to him. She had never considered sending her daughter to a contact centre. She had read the emailed letter of Dr Kay Dalrymple (number 6/10 of process) about the possibilities for contact in this case but she remained unwilling to speak to the pursuer, to sit in a confined room, to see him and felt it would affect the mother-daughter relationship. If the court ordered contact she would comply. The defender repeated on several occasions that it had been the pursuer's choice not to believe her that she was pregnant and not to come back so that they could be a family. On when it might be good for her daughter to see her father, the defender said that as she gets older and has made secure attachments, perhaps when she is 5 or 6 years old she could meet him as a friend and by then he might have his immigration issue resolved and she could be introduced to him. Then she stated that maybe in "a couple of years" when there is no Covid pandemic and things have settled she might see him. The defender herself would not be comfortable seeing the pursuer but if the court wanted to allow contact in a couple of years' time when NN could speak that might be different. The defender did not think her

own mother would be comfortable taking NN to a contact centre to have contact with the pursuer. The defender would also be unwilling to facilitate a video call with the pursuer so that he could see his daughter. She would not want the pursuer seeing the background of where she was. She would find it awkward and uncomfortable to be in that situation and to give a mobile device to her daughter. That said if the court was going to order contact she might prefer it to be by video before direct contact. She had been able to FaceTime a friend with her daughter in the room but when it was suggested that she could do the same with the pursuer so that he could see NN she stated that she did not have much time and that she works.

[38] The defender's mother, MN, gave evidence and adopted her affidavit number 25 of process as a true and accurate account. She denied having threatened to break the pursuer's legs or having been otherwise abusive to him during the parties' marriage. She stated that the pursuer's claim of being watched in the family shop on CCTV and that his messages would be read that way was not possible, knowing what she did about the location of the cameras and the age of the system. Her position was that the pursuer had not been content to accept the rules and regulations she and her husband had for their household, that he had not treated their daughter well and that he had had tried to insist on going to Oxford for a party. She had asked him many times not to use his phone in the family shop. She complained that he had been "in so called secret contact with his uncle"(TM). MN spoke to there being many arguments between the parties, with each poking, pinching and shoving the other. She supported her daughter's version of the February 2019 incident and said that by then AN had decided she did not want to remain in the marriage. She disputed that the pursuer had been given gold on entering the marriage and said that her daughter had been given the gold by her mother in law.

[39] Under cross examination MN said that she had found out about her daughter downloading a fake positive pregnancy test, but not until April 2019. She was challenged on her account of how things had evolved and then deteriorated between the parties but maintained that her position was correct. In essence her evidence was the same as that of the defender in relation to the house rules, the pursuer eating alone and the party in Oxford. She disputed that the pursuer had been required to work long hours in the family shop, although she accepted that 2 co-workers had been asked to leave on the pursuer's arrival and that SM had "stood in". She said the shop wasn't too busy and the pursuer had been able to sit down. She had not permitted his mobile phone use in the shop, saying that she wouldn't do that so why should she let her son in law do so. She disagreed that he had got on well with the customers. On the incident at the family gathering in February 2019, MN denied that the pursuer had been abused and degraded or threatened with violence. She disputed that she and her family had wanted to put the pursuer in his place as inferior to them.

[40] In relation to what had led to the 10 April 2019 meeting, MN said that it was her son KN who had accessed the phone and Whats App messages about which Mrs ASN and the pursuer had been confronted. MN claimed that her daughter in law had been "psychotic" and abusive to KN. She did not dispute that the pursuer and Mrs ASN had been questioned for three hours, stating only that she could not remember how long it had lasted. She denied that there had been any violence between her and her daughter or her daughter and the pursuer that day. She could not recall the pursuer's parents being referred to as "dogs". MN's position was that the marriage had broken up because the pursuer had been videoing the defender and sending the recording on a group chat. The defender thought this disloyal and said she wanted to separate. She could not recall the date of the final separation but said

her daughter had moved back into the family home. She disputed that the pursuer's belongings had been put on the front step.

[41] MN stated that while her daughter had not been ready to have a family the pursuer had been "so much into having a baby". Despite the previous false pregnancy claim, the witness could not understand why the pursuer would not believe that his wife was pregnant during 2019. Of the false claim she said that AN "wanted his reaction – to know how eager he was to have this child". MN stated that she would be unwilling to meet the pursuer at a contact centre or otherwise facilitate contact between father and daughter. She said she could not imagine taking the child for contact and calming her down if she gets distressed. She had two younger children of her own and didn't want more responsibility. She felt that the pursuer "needs to learn to be a father" and that he had not fulfilled his responsibilities to date. Then she stated that she might go with her daughter to a contact centre depending on what other responsibilities she had. However, she would not want Face Time or other video contact in her house. She disagreed that if the court ordered contact it would be in her granddaughter's interest for it to progress as successfully as possible. One of the reasons she was adamantly opposed to contact between the pursuer and his daughter was the environment he was living in, the people he is living with, she said "I have no trust in them, I would never give my granddaughter over to people like that". If there was no contact she would be confident that if NN asked the defender why that was, AN would let the child know everything that has happened and why she didn't see her daddy. She said that her daughter has everything saved in a "wee booklet" which she would use to tell NN that she had made every attempt for her daddy to come back and that he hadn't. AN is adding to the book all of the email correspondence in relation to these proceedings including all

communications from the lawyers, to show her daughter when she is older and could understand everything.

[42] Four other witnesses gave affidavit evidence in the defender's case, the pursuer having been offered an opportunity to cross examine them but not insisted in doing so. First, CW, a community family nurse who started working with the defender in the summer of 2019. Her affidavit (number 22 of process) states that the defender had expressed fears to her that the pursuer would seek "custody" of the as yet unborn child and that he might abduct her. Secondly, FQ, the Sharia Council official asked to process an Islamic divorce of the parties stated in his affidavit (number 24 of process) that the defender had emailed him on 28 September 2019 requesting such a divorce. He had liaised with the pursuer thereafter and SM had told him that it was the defender who had been making trouble and that he had been beaten and victimised. FQ stated that the pursuer knew that the defender was pregnant. Thirdly, a worker from Shakti Women's Aid, DP, swore an affidavit (number 23 of process) confirming that the defender had contacted her on 12 August 2019 to report that she had been abused by her husband. She reported a fear that he would abduct their unborn child to Pakistan after the baby was born. The defender told DP that she did not want her husband to have any involvement (with the baby once born) and that she wanted a divorce. Finally, a friend of the defender. SS gave evidence in her affidavit (number 21 of process) that she had been a neighbour of the parties but had moved from the area in 2018. Before that she had spoken with the pursuer a couple of times in the garden and he seemed like a normal person. SS knew from the defender that she was not happy in her marriage. Since the parties' separation she has maintained contact with the defender but they have only met up once because of Covid 19 restrictions. When the defender was pregnant she told SS that

she wanted the pursuer to be part of the baby's life but was depressed because he was not responding to her messages.

Discussion

Credibility and Reliability

[43] The parties and their witnesses gave very disparate accounts of the events leading up to the breakdown of this marriage. It is not possible to reconcile those accounts by concluding that some witnesses were mistaken, either in substance or in detail. In assessing credibility and reliability I have considered the extent to which each witness's account was internally consistent and also whether it fitted with such independent evidence as was available. I have concluded that, as a generality, where their accounts differed, the pursuer's version of events is to be preferred over that of the defender. To disbelieve the pursuer, I would have to find that his contemporaneous reports to his uncle TM and his cousin Mrs ASN of the ill treatment to which he was being subjected in the marriage were part of an elaborate scheme to discredit the defender while the couple were married and still living together. Not only does that seem far-fetched but it does not fit with the unchallenged evidence of Mrs ASN about her own treatment at the hands of the defender's brother and about the circumstances in which she and her cousin both fled from the situation.

[44] The evidence on one or two discrete issues also tends to support a conclusion that the pursuer's version of events should be preferred. For example, the pursuer's claim that he had used his income to pay the bills during the marriage seemed to be challenged in cross examination under reference to a single bank statement showing no such withdrawals. When the pursuer was later able to give specific amounts and details of payments of mortgage and council tax made from the account immediately before the date of the statement, ultimately no suggestion was made that he was wrong. The evidence about the

defender sending the pursuer a false pregnancy test result in early 2018 is also instructive. Not only does it illustrate that the defender thought it appropriate to be untruthful to her husband, but she was aware at the time that having children was extremely important to him and she had discovered through living with him that he was a sensitive man. The defender's stance on why she did not disclose details of her marriage and NN's father when registering the birth was again helpful in working out whether her version of events was plausible. She claimed in her affidavit to have been advised by someone at Shakti Women's Aid that her marriage was not legally recognised here. No supporting evidence of that claim was produced and it did not sit easily with the defender's own evidence that she had to make an application here in the UK for the pursuer to join her here as her spouse (paragraph 7 of number 37 of process). The evidence of the Shakti worker DP (number 23 of process) confirms that by August 2019 the defender was stating that she did not want the pursuer to have any involvement with the (as yet unborn) child. That the defender continued to deny her motivation in falsifying the details of NN's birth certificate casts further serious doubts on her credibility and reliability. While she had applied for an Islamic divorce by the date of the birth registration in December 2019, it was not finalised until January 2020 and so it is not plausible that she considered she was not lawfully married. The defender's mother supported her daughter's version of events and was if anything even more uncompromising in her attitude to the pursuer. Her denials of threats and violence towards him were mostly monosyllabic and unconvincing.

[45] Such other independent evidence as was available also tended to support the pursuer's account. The affidavit of IQ, a solicitor and worker at ABIS (number 32 of process) and associated letter no 6/7 of process, speaks of her hearing of the pursuer's distress when disclosing the details of what he had experienced in his marriage. The evidence of JH, the

experienced immigration solicitor, was that she had considered it necessary to engage an appropriate adult for the pursuer who she deduced from her dealings with him had been through a situation of some stress and his GP had indicated he was suffering symptoms of PTSD. Finally, my own observations of the parties when they gave evidence supports a conclusion that the pursuer's account should be preferred. The pursuer came across in evidence as a sensitive and gentle person, consistent with JH's view of him as "a gentle, polite and timid man". While English is not his first language, he tried to give his evidence mostly in English, using the assistance of an interpreter only when being questioned on the technical detail of the provision of contact centres or where the question was otherwise complicated. His manner was one of a witness doing his best to answer questions honestly and comprehensively. He was visibly upset when his uncle TM was describing the incident of 15/16 February 2019. The focus of the court at that moment was on the witness, not the pursuer, and I am entirely satisfied that SM's reaction to that evidence was genuine distress at recalling the event. There were one or two inconsistencies in the pursuer's evidence, such as his work for the defender's parents and how it ended, but these were not central to the dispute and are more likely to be attributable to an unreliable memory than any attempt to dissemble. His evidence on photographs showing injuries sustained by the pursuer was also a little unclear, but his immigration solicitor seemed to have been given an accurate account of the circumstances.

[46] In contrast with the pursuer, the defender presented as an assertive individual, very culturally Scottish and confident of her position, which she stated emphatically. This served only to reinforce the credibility of the pursuer's claim that she and her family treated him as inferior due to his recent arrival in the UK and that he was ordered around due to his lack of assimilation. In relation to the contact issue her answers were particularly dogmatic and

uncompromising. At times her evidence came across as the narration of a script to which she was determined to adhere. When she contradicted herself (such as in relation to whether and when NN should ever meet her father) she was visibly agitated.

[47] So far as the other witnesses are concerned, I have already commented on the defender's mother MN. Her evidence was unconvincing and where it differed from that of the pursuer and his witnesses I have preferred their account. MN's unwavering loyalty to her daughter appears to have coloured much of her evidence. Mr TM was a credible if somewhat loquacious witness. His vivid recollection of the February 2019 incident in particular was convincing. I accept unequivocally the credibility and reliability of the immigration solicitor JH. The only witness who gave unchallenged affidavit evidence that requires comment in this section is CW, the family nurse. Counsel for the pursuer contended that there had been no attempt to set her up as a skilled witness who could express an independent opinion and there was no contrary suggestion. I accept that submission and have taken her evidence into account only as a witness to fact, speaking to the involvement she had with the pursuer during her pregnancy. My conclusion on the relative credibility and reliability of the parties is clearly central to the findings I have made on the key areas of dispute to which I now turn.

Divorce

[48] The law in relation to divorce on the basis sought by the pursuer is well established.

Section 1(2)(b) of the Divorce (Scotland) Act 1976 provides ;-

“ (1) In an action for divorce the court may grant decree of divorce if, but only if, it is established in accordance with the following provisions of this Act that –

(a) The marriage has broken down irretrievably; .

(2) The irretrievable breakdown of a marriage shall, subject to the following provisions of this Act, be taken to be established in an action for divorce if-...

(b) since the date of the marriage the defender has at any time behaved (whether or not as a result of mental abnormality and whether such behaviour has been active or passive) in such a way that the pursuer cannot reasonably be expected to cohabit with the defender."

The statutory test requires an assessment of what is reasonable for the parties taking into account their particular circumstances. It is clear from the words "...at any time" that behaviour postdating the parties separation may be relevant.

[49] There is no dispute that the parties' marriage has broken down irretrievably, the disputed issue is whether the pursuer has established unreasonable behaviour on the part of his wife such that he can no longer reasonably be expected to cohabit with her. Divorce on a non-cohabitation basis would be available but was not sought by the pursuer. There was in any event a clear connection between the circumstances of the marriage breakdown and the important issue of whether the pursuer should develop a relationship with his daughter. It was suggested on behalf of the defender that it would be possible to find irretrievable breakdown of marriage established on a basis not relied on by the pursuer, but in the event it is not necessary to consider that unprecedented course.

[50] Some of the undisputed evidence supports the pursuer's claim of unreasonable behaviour. For example, the admission by the defender that she sent him a false positive pregnancy test knowing that he was very keen to have children, referred to above, was one such unacceptable incident. I reject the defender's contention that she told him it was a joke almost immediately afterwards. The pursuer had shared the information with his uncle TM who confirmed the pursuer's account that the defender had falsely claimed she was pregnant three or four times during the marriage and that she had not confessed that it was false for at least two weeks. I accept that evidence and find that the defender acted unreasonably, albeit perhaps through immaturity rather than malice. Secondly, the

defender and her family accepted that they had laid down rules for the pursuer's residence in the family home when he arrived. While the defender's mother minimised this as being restricted to not swearing, staying out late and the timing and circumstances of family meals, her own evidence (number 25 of process at para 8) talks of having "...sat {SM} down with our rules and regulations for the house" because he was "from abroad" and would need to know these. This lends considerable support to the pursuer's complaint that he was treated as an inferior being. The defender accepted in evidence that she had referred to her husband's family as "dogs" during the February 2019 incident, albeit that she claimed that was a reference to their loyalty rather than a perceived lower status. But her admission fits with the pursuer's evidence of how he was being treated on that occasion, something recounted in graphic detail by his uncle TM who had been present.

[51] A significant conflict in the evidence related to the question of whether the defender (and her family) had physically mistreated the pursuer. The matter was complicated by the defender's claim that it was the pursuer who had behaved abusively to her. Of course I cannot rule out that there was ill treatment by each spouse of the other, but having considered the differing accounts I have decided that the pursuer was the victim of abusive behaviour and that the defender was not. As already indicated the support for his account provided by TM and Mrs ASM emanates from the pursuer confiding in them while events were happening. The chronology of events is also consistent with the pursuer's account, in that he sought independent help and refuge at the time he left the marital home. I find that he was subjected to verbal abuse and physical violence during the marriage. I accept the evidence he gave in his first affidavit (number 8 of process) that the defender would shout and swear at him and that sometimes she punched and kicked him. Not only did the defender's parents do nothing to stop such behaviour but they also threatened to break the

pursuer's legs. I conclude that the defender and her family were confident that they could tell the pursuer what to do and where to work. They exerted control over the finances; the pursuer required to pay his money into a joint account and meet the bills and secured loan repayments for a property he did not own while the defender's salary continue to be paid into her own personal account. In essence the defender and her family took advantage of the pursuer's vulnerability as a newcomer to the UK. The defender was confident in the knowledge that her parents would support whatever she said about the pursuer.

[52] The two specific incidents at which there were witnesses to the treatment meted out to the pursuer were those of 15/16 February and 10 April, both 2019. The February incident arose out of an argument between the parties after which the defender accused the pursuer of hitting her. However, when the pursuer's uncle TM arrived back in Edinburgh the pursuer was nowhere to be found having taken himself off to the beach. On his return there was a family meeting at which the pursuer was made to sit in the middle of the group and was questioned by his father in law, who was shouting at him. An argument broke out in the group because one or two members (particularly WM) stated that it was clear that the pursuer was the victim of the defender's mistreatment and not the other way round. The pursuer was humiliated and told to touch his wife's feet. There were threats to send him back to Pakistan. The defender's mother went to hit the pursuer and so she was slapped by WM, who was then attacked by the defender's father and another. The situation descended into violence generally until TM took out his phone and said he was calling the police. I accept that the defender had been the aggressor in the incident that led to the family meeting. In cross examination she accepted that she had pushed him during an incident when she had snatched his phone. While the parties agreed to continue in the marriage thereafter, this was clearly a turning point after which the pursuer and Mrs ASN

increasingly confided in each other even more about their treatment by their spouses and generally by the “N” family.

[53] The catalyst for the pursuer’s departure was the incident of 10 April when the pursuer and Mrs ASN were summoned separately to answer allegations of an inappropriate relationship because of the discovery of messages between them and TM. The defender did not dispute that her brother had obtained these messages but she made clear that she was not suggesting that there had been any inappropriate liaison between the pursuer and his cousin. She complained of disloyalty in the sense that he had apparently taken videos of her that he had shared, although the pursuer was not challenged about that in evidence. It was on 10 April that the defender referred to the pursuer’s parents as “dogs”. She was screaming at him while he tried to pack his bags. Within two weeks of the 10 April incident the pursuer had contacted ABIS and sought refuge. In December 2019 the defender gave false information to the registrar of births to conceal the birth of the parties’ child.

[54] On the basis of the evidence summarised above, I have no hesitation in concluding that the defender’s behaviour to the pursuer has been such that he cannot reasonably be expected to cohabit with her. It is unnecessary for me to reach any concluded view on the defender’s specific allegations against the pursuer in this context, other than to comment that they do not seem to have been made until much later and then in the context of seeking to avoid the pursuer having involvement with the parties then unborn child. I will revert to this issue when dealing with the dispute on contact. The parties have not lived together since 24 April 2019. I will grant decree of divorce as concluded for.

Residence and Contact

[55] The statutory test for making any order relating to parental responsibilities and rights is fairly straightforward, although the easily understood welfare test has been

elaborated on by amendment to the Children (Scotland) Act 1995 in a way that was said to be applicable in the present case. Both parties hold parental responsibilities and rights in relation to NN and the pursuer did not seek a residence order as being unnecessary. The disputed order is for the regulation of contact between father and daughter in terms of section 11(2) (d) of the 1995 Act. Section 11(7) of that Act provides that, in considering whether to make such an order, the court -

“ (a) shall regard the welfare of the child concerned as its paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all “.

No question arises of eliciting the view of the child in this case given her very young age. In applying the test in section 11(7)(a) the court must, have regard to certain listed matters.

These include;-

“ (7A)

(a) The need to protect the child from –

- (i) any abuse*
- (ii) the risk of any abuse,*

which affects, or might affect, the child;

(b) the effect of such abuse, or the risk of such abuse, might have on the child ;

(c) the ability of a person –

- (i) who has carried out abuse which affects or might affect the child; or*
- (ii) who might carry out such abuse,*

to care for, or otherwise meet the needs of, the child; and

(d) the effect any abuse, or the risk of any abuse, might have on the carrying out of responsibilities in connection with the welfare of the child by a person who has (or, by virtue of an order under subsection (1), would have) those responsibilities.

(7C) In subsection (7B) above—

“abuse” includes—

- (a) violence, harassment, threatening conduct and any other conduct giving*

rise, or likely to give rise, to physical or mental injury, fear, alarm or distress.

(b) abuse of a person other than the child; and

(c) domestic abuse;

“conduct” includes—

(a) speech; and

(b) presence in a specified place or area.

(7D) Where—

(a) the court is considering making an order under subsection (1) above;
and

(b) in pursuance of the order two or more relevant persons would have to co-operate with one another as respects matters affecting the child,

the court shall consider whether it would be appropriate to make the order.”

[56] These provisions were the subject of analysis by an Extra Division in the case of *J v M* 2016 SC 835. In that case the parties were not married and had never cohabited, their relationship having ended almost immediately after the birth of the subject child. The mother had made serious allegations about the father sexually abusing the child during contact. Under reference to the welfare test and to the provisions of section 11(7A)-(7E) of the 1995 Act, the court expressed the view (at paragraph 11) that ;-

“Before refusing an application for parental contact, a careful balancing exercise must be carried out with a view to identifying whether there are weighty factors which make such a serious step necessary and justified in the paramount interests of the child.....This approach is reflective of the general background of it almost always being conducive to the welfare of the child that parental contact is maintained...

...in the context of what are sometimes called intractable cases, it is not appropriate for the court, in effect, to give a veto to a parent who, for no good reason, and come what may, is simply intent on preventing contact”.

For completeness I record that reference was also made in submissions to the sheriff court decisions of **Treasure v McGrath** 2006 Fam LR 100 and **A v A** 2020 Fam LR 68, the latter being said to have similarities with the present case. While these are of interest, indisputably

cases on child welfare are extremely fact sensitive and the first instance court must assess the evidence led and particular issues raised without reference to any checklist other than factors included as part of the statutory test.

[57] There is no suggestion in this case that NN is not well cared for by the defender, who has the assistance of her parents with whom she leaves her daughter while she works three days a week. I am satisfied that the current arrangements for NN's residence are suitable and that she is being brought up in an environment where she is loved and supported. A formal residence order is unnecessary. NN has had no contact with her father since birth and the question is whether, having regard to her welfare as the paramount consideration, she should be introduced to him. I have referred above to the circumstances in which the pursuer was not registered as NN's father. Her birth certificate is clearly false in that respect, as the parties were married when she was conceived and born and the pursuer is both presumed to be, and as a matter of admission is, her father. Steps can no doubt be taken to rectify the register in due course.

[58] After the pursuer had left for Oxfordshire the defender discovered that she was pregnant. At that point she wanted to reconcile with the pursuer. I accept that she sent one or two messages to him including a picture of the foetus taken at an ultrasound scan. However, I accept also the pursuer's evidence that he did not know what to believe given the defender's previous false statements about being pregnant. While Mr FQ, the Muslim Council official who processed the Islamic divorce gave affidavit evidence that the pursuer knew his wife was pregnant, that is not inconsistent with the pursuer's account of having been given information about a pregnancy that he was sceptical of given the history of the defender making false statements to that effect. I accept his evidence that the pregnancy was mentioned to FQ but not in the context of his having accepted it as fact. Further, against

a background of the advice given to the pursuer by the police to keep himself safe from the defender and her family it does not seem to me that the pursuer could have been expected to make contact with the defender during that period. It is curious that the defender feels so aggrieved about the pursuer's failure to reconcile with her, something that does not sit particularly comfortably with the claims she made much later in the pregnancy (August 2019) that she had suffered abuse of which the pursuer was the perpetrator. In any event, the evidence clearly established that before NN was born the defender had already decided that she did not want her husband to have any involvement with the baby and made that clear to her family nurse. Her stated reason was a fear of abduction, apparently based on something that had happened to another child within the pursuer's family. However, the defender was and is aware that the pursuer has always wanted to settle in this country and is pursuing a claim to that effect through his solicitor JH. Any anxiety on the defender's part appears to be misplaced, although I don't rule out that it is genuine, and I did form the impression that she was generally quite tense in matters relating to her daughter.

[59] There was some evidence to support a conclusion that after she decided that the pursuer should not be involved with his daughter, the defender sought to prevent him from obtaining relevant details about her. She posted on Instagram a photograph of a cake with a different name to that given to the baby having registered the birth with another name. She complained about the pursuer failing to contact her while at the same time stating in evidence that she wanted nothing to do with him. It does appear that she had a difficult pregnancy and birth and I accept that she will have felt lonely and afraid without having a partner by her side. By the time of NN's birth the rift in the family had become permanent and each side mistrusted the other so deeply that there was no real prospect of the pursuer seeing his daughter without court proceedings such as these.

[60] The pursuer took steps to instigate contact. He consulted an experienced family law solicitor, Ms Carlin, with that aim. After emails and phone calls he visited her office. He was told that he would require to resolve the birth certificate issue and he tried to do that by writing to the national registrar (number 6/3 of process). I reject the suggestion that he was interested only in obtaining the birth certificate and not in pursuing contact with his daughter. As explained in the pursuer's affidavit evidence (number 34 of process, paragraphs 40 and 41), there followed a period of delay due to the Covid 19 pandemic. There were also issues with the unavailability of legal aid. One of the defender's main criticisms of the pursuer was that he did not seek to contact her direct to ask about his child. However, given the circumstances of the pursuer's departure from Scotland and the hostilities between the two extended families, I consider that complaint to be without substance. When she was asked by the pursuer to provide a photograph of NN to the pursuer she refused. She opposed (successfully) two separate motions for interim contact during these proceedings. The affidavit of CW confirms the defender's determination that the pursuer should have no involvement with NN, something she settled upon before the child's birth.

[61] Another of the defender's grounds of opposition to contact was that the pursuer's primary motivation was to pursue contact only as part of his immigration claim and not through any desire to form a relationship with his daughter. Against the admitted background of it being the pursuer, as between the parties, who was very keen to start a family during the marriage, there seemed to me to be no basis for the defender's assertion. I have accepted the evidence that it was the defender and her family who emphasised to the pursuer the vulnerability of his position in the UK and his dependence on them for his right to remain here. More importantly, the immigration solicitor JH clarified that, while his

pursuit of contact with NN was part of the pursuer's current application for leave to remain it was not the primary focus of his claim. Ms JH's surprise that the pursuer's application had not been accepted at the time that she had also applied successfully for Mrs ASN on a related claim tends to support the view that the pursuer's application could have stood alone without the subsequent introduction of his desire to maintain family life with his daughter. I have concluded that the pursuer's desire to form a relationship with the child he had longed for during the marriage is only tangentially related to his immigration status. He had consulted a solicitor about contact before his initial application of settled status was refused in July 2020. The extraneous evidence is consistent with the pursuer's position that he was interested in his child from the outset and when he had no cause to think his immigration application would be refused.

[62] The defender sought to advance an argument that contact should be refused because NN would be at risk of abuse. The basis was in part her claim that the pursuer had been an abusive husband to her. In contrast with cases such as *J v M*, cited above, there can be no suggestion in the circumstances of this case of any allegation that the pursuer has mistreated any child. The defender's allegations against the pursuer have the appearance of being created after the event. She and the pursuer were living with her parents and subsequently in close proximity to them during the marriage. They seem to be a close knit family and it is almost inconceivable that they would have countenanced the behaviour complained of. Some of the conflict in the evidence may be explicable by the defender's family being aware of the couple arguing but not characterising it as solely the pursuer's fault until after the final breakdown. For example the defender's mother MN's position in her affidavit (number 25 of process) was that the couple were having arguments and "shoving each other". She also states that the pursuer complained that the defender was "out of hand", but that MN

thought the disputes were minor and would be resolved. Further, while MN clearly blamed the pursuer for the breakdown she talked of her daughter being “sick of him” and telling her mother she was not happy. While I can accept that the defender may have been disappointed in how this arranged marriage turned into a life with a man she considered she was not compatible with, I reject in its entirety the defender’s claim that he was a physically abusive husband. Her claims lacked credibility and were inconsistent with her subsequent desire for a reconciliation, when she had considerable family support to face motherhood without him.

[63] The overall thrust of the defender’s stated position for refusing to countenance contact between father and daughter was that she regarded him as ill motivated and also that her relationship with her daughter would be adversely affected by NN developing a bond with her father. She stated in terms that if NN went to spend an hour or two on a contact visit with her father, her own attachment with her daughter would be damaged. She would not entertain any of the reasonable suggestions put to her by Counsel for the pursuer in relation to how and where contact might operate in a safe and suitable environment. She sought to present taking NN to contact centre as presenting unsurmountable difficulties. She agreed that initially video or Face Time contact would be preferable and then stated that she would not allow that. Her evidence in relation to when, if ever, NN should meet her father was inconsistent and at best confused. Initially she indicated that she would never agree to contact and that meant NN would grow up not knowing her father at all. Then she indicated that in about five years’ time when she is old enough NN could be introduced to her father. Eventually she suggested that in a couple of years’ time when the Covid 19 pandemic is over, NN can talk and the pursuer’s immigration status is finalised she might contemplate contact. Of even greater concern was her mother MN’s disclosure that her daughter has a

booklet with all of the information about this case and that this would be used to tell NN that her mother had made every attempt for her daddy to come back and he hadn't. I conclude that if no contact takes place NN will grow up in an environment in which she is presented with a negative view of her father and the circumstances in which she does not see him. That would be detrimental to her interests and deprive her of the chance of a meaningful father/daughter relationship. It is perhaps a feature of the defender's lack of maturity that she seemed to think that her attachment with her daughter would be damaged by short periods of non-residential contact, but there was no objective basis for such an assertion and I reject it.

[64] I reject also as unreasonable the defender's other stated reasons for refusing contact, based as they are on her unhappiness about the pursuer's failure to return to her during her pregnancy. The next step is to assess whether the instigation of contact at this stage would be likely to be in NN's interests, with her welfare being the paramount consideration. As a matter of general principle it is acknowledged that maintaining a relationship with both parents is in a child's best interests. Where no relationship has yet developed, whatever the reason for that, one has to weigh up the advantages and disadvantages of creating that relationship at this stage. The advantages for NN are clear enough. She would learn that she has two parents instead of one and her sense of identity would be enhanced as she grows older. She would begin to understand that there is someone important who does not live with her but who is part of her life story. Further, the pursuer has in my view established that he has much to offer his daughter. He was very keen throughout this short marriage to have a child. He has shown his ability to look after a young child, Z, who has been living at his uncle TM's house over the last year and a half. He has pursued this claim against implacable opposition by the defender and her family. As I observed and as the defender

was constrained to accept, the pursuer is a sensitive individual who will show his daughter a different, perhaps more reflective approach to life than she experiences at home. Most importantly, contact with her father will eventually allow NN to form her own view of him, rather than one influenced by the clear antagonism displayed by the defender and her mother.

[65] In terms of disadvantages, I reject any suggestion that NN would be at risk of abuse if she meets her father. I have found that he was the victim of ill treatment by the defender and I am not satisfied that he was ever abusive to her. In any event, in the circumstances in which I envisage contact taking place, the parties will not meet unless or until they are comfortable doing so. NN must be protected from observing acrimony or rancour where possible. In essence, there is nothing in the provisions of section (7A) – 7(D) that causes me to conclude that it negates the benefits that I consider NN will derive from contact. The extent to which the defender will require to co-operate with the pursuer in the early stages of the instigation of contact is minimal. In relation to the possible disadvantage to her were NN to form a relationship with her father which would cease if he is not allowed to remain in the UK, it seems to me that this is not in the circumstances of this case a reasonable basis for depriving NN of that relationship. To do so would be to give the defender the kind of veto disapproved of in *J v M (supra)*. I cannot predict the outcome of the pursuer's immigration application. If he succeeds he will remain in the UK and be available for direct contact. If his application is rejected, but after he and NN have developed a relationship, their relationship could be maintained insofar as possible, through virtual means such as video contact. The benefits to NN of knowing her father are not wholly dependent on his long term presence in the UK.

[66] Having had the opportunity to assess all of the evidence and the various factors referred to, I conclude that it would be in NN's interests to form a relationship with her father, and that it would be better for her to have that chance than for no order to be made at all, which would deprive her of that opportunity, probably indefinitely. Accordingly I will make an order for direct contact. This should proceed with short, initial meetings in a situation that will make NN feel secure. These should be of no more than two hours duration each, with there being perhaps two contact sessions in one week but only on alternate weeks, to reflect the geographical constraints and to allow NN to settle down at home between visits. I intend to hear from Counsel as to the particular circumstances in which contact should take place. Contact centres have been closed due to the pandemic but in the summer months contact could reasonably take place outside. If the defender considers that some other form of supervision is required, she can make suggestions as to who should perform that function if she does not wish to do so. Should she consider that protective orders to prevent removal of the child from the jurisdiction are required she can make an application for that, although I express no view at this stage about whether such orders are necessary. It was something the pursuer's Counsel offered as a possible comfort to the defender to allay any anxiety she has, although the acceptable evidence was supportive of the pursuer having no intention of removing himself or his child out of the country. I will not make any formal order until Counsel have had an opportunity to consider the decision in principle that I have made and to make submissions about the practicalities of setting up a contact arrangement.

Decision

[67] In light of the decisions I have made, I will in due course grant decree of divorce and make an order for direct contact between the pursuer and NN. Meantime I will fix a hearing

at which the practical arrangements to implement that proposed order can be discussed and to address any issue of expenses.