Neutral Citation Number: [2021] EWCA Civ 1187

Case No: A4/2021/0419

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Mr Justice Waksman
CL-2011-001058

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2021

Before:

LADY JUSTICE ASPLIN
LADY JUSTICE CARR
and
SIR NICHOLAS PATTEN

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Between:

(1) LAKATAMIA SHIPPING COMPANY LIMITED **(2) SLAGEN SHIPPING COMPANY LIMITED** **(3) KITION SHIPPING COMPANY LIMITED**	**Respondent/First Claimant**
(4) POLYS HAJI-IOANNOU	**Second to Fourth Claimants**
- and -	
(1) NOBU SU (aka SU HSIN CHI; aka NOBU MORIMOTO) **(2) TMT COMPANY LIMITED** **(3) TMT ASIA LIMITED** **(4) TAIWAN MARITIME TRANSPORTATION COMPANY LIMITED** **(5) TMT COMPANY LIMITED, PANAMA S.A.** **(6) TMT COMPANY LIMITED, LIBERIA**	**Appellant/First Defendant**
(7) IRON MONGER I CO., LIMITED	**Second to Seventh Defendants**

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Stephen Phillips QC and James Goudkamp (instructed by **Hill Dickinson LLP**) for the **Respondent**
Thomas Grant QC, Ryan James Turner and Rory Forsyth (instructed by **Ashfords LLP**) for the **Appellant**

Hearing date: 15 July 2021

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Approved Judgment

"Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.00am 30 July 2021."

SIR NICHOLAS PATTEN:

1. On 5 November 2014 the Respondent to this appeal, Lakatamia Shipping Company Ltd ("Lakatamia"), obtained judgment in the Commercial Court against the Appellant, Mr Nobu Su ("Mr Su"), for a sum which with interest now exceeds $60m: see *Lakatamia Shipping Company Ltd v Su [2015] 1 WLR 216.* Since then very little of the judgment debt has been recovered but Lakatamia has pursued Mr Su for the recovery of what is due and has made a series of applications in the Commercial Court designed to obtain the disclosure of assets which are available to satisfy the judgment debt.

2. Prior to the trial of the action Blair J made a worldwide freezing order against Mr Su and on 26 January 2018 Popplewell J granted an order on a without notice application which required Mr Su to surrender every passport and travel document that would enable him to leave the jurisdiction and which restrained him from leaving England and Wales until after he had attended court to give information about his means at a hearing under CPR 71 ("the Means Hearing"). The order also required Mr Su to disclose to the tipstaff the address where he intended to reside and an email address and telephone number. I shall refer to this is as a passport order.

3. The court has jurisdiction to make a passport order under s. 37(1) of the Senior Courts Act 1981 but the grant of such relief is a relatively recent development along with freezing and search orders. The first reported decision concerning a passport order is that of the Court of Appeal in *Bayer A.G. v Winter [1986] 1 WLR 497* where the defendant was ordered to deliver up his passport and restrained from leaving the jurisdiction until disclosure had been given relating to counterfeit copies of the claimant's products. It was clear that if the defendant was allowed to leave the jurisdiction before disclosure took place there was a serious risk that the order for disclosure would be frustrated.

4. In his judgment at p.503C Fox LJ stressed that the relief sought was novel and that when exercising the jurisdiction to make an order under s. 37 on the basis that it appeared to be "just and convenient" to do so the court needed to keep firmly in mind the consequences for the defendant of having his liberty curtailed in this way:

> "The time during which the first of those orders should run should – and Mr. Prescott accepts this – be of very limited duration. It is an interference with the liberty of the subject, so that the period should be no longer than is necessary to enable the plaintiffs to serve the *Mareva* and *Anton Piller* orders which they have obtained, and endeavour to obtain from the defendant the information which is referred to in those orders."

5. Even with this safeguard in place the jurisdiction is not unlimited. Imprisonment is no longer available as a remedy for the non-payment of debts and it is common ground that the passport order jurisdiction cannot be used as a means of enforcing judgments by requiring the judgment debtor to remain within the jurisdiction and to reside in a particular place until the judgment debt is paid. In *B v B (Injunction: Jurisdiction) [1998] 1 WLR 329* Wilson J refused to make a passport order restraining a husband who was resident overseas from leaving the jurisdiction until a costs order against him had been satisfied. That, he said, would convert the passport order from an aid to the

court's established procedures for enforcing the judgment and make it a freestanding enforcement procedure in its own right.

6. The interference with the liberty of the respondent under a passport order must therefore be for no longer than is necessary to achieve the purpose for which it was granted. How long that actually is will necessarily depend upon the purpose for which it is granted. Most passport orders are granted (as in *Bayer A.G. v Winter*) to enable effective disclosure to be given and in the present case the passport order was limited in duration to the Means Hearing. But in many commercial cases involving foreign defendants the disclosure sought will be voluminous and complex and the time taken to bring on an effective hearing may be lengthy. The judge making the order will need to take into account the effect which being restrained from leaving the jurisdiction will have on a foreign defendant whose home and family life is abroad and to ensure that the terms and conditions of the order are proportionate. How that balance is to be achieved will vary depending on the facts and circumstances of each particular case.

7. The facts of the present case are by any standards extraordinary. More than 3 years after the passport order was made Mr Su remains subject to the injunction. His position is complicated by the fact that he has been found to have been in contempt as a result of breaching various interlocutory orders and he is currently in prison having been sentenced to a further term of 24 months in July of this year. The examination as to his means has been extended to a second hearing due to his failure to make full and complete disclosure of his assets at the original Means Hearing in February 2019. It is anticipated that this second hearing will take place in September when Mr Su will almost certainly still be in prison. The passport order (as subsequently continued and varied) now expires on 31 July unless extended. Lakatamia has yet to decide whether to make such an application.

8. Mr Su's appeal is against an order of Waksman J dated 21 January 2021 when he refused Mr Su's application to discharge his earlier order of 30 January 2020 under which Mr Su was restrained from leaving the jurisdiction until after the second Means Hearing. The principal ground for the application to discharge was that Mr Su's entry visa had expired so that he had become an overstayer and was therefore committing a criminal offence under s. 24 of the Immigration Act 1971. The judge had rejected this argument at the 30 January 2020 hearing and declined to revisit his decision on the point. But he also dismissed an argument that he should discharge his earlier order on account of the time which had elapsed since the continuation of the passport order on 30 January.

9. In the original grounds of appeal for which permission was obtained from Males LJ Mr Su contends that Waksman J's order of 21 January 2021 infringed Article 8 of the European Convention on Human Rights and was not in accordance with the law because it required him to commit the criminal offence of remaining in the UK without leave. But at the start of the hearing we granted permission to amend the grounds of appeal by adding two further grounds: (1) that the judge erred in treating the passage of time since his first order as legally irrelevant and therefore not a basis on which he could or should reconsider or discharge the passport order; and (2) that the judge had failed to follow general equitable principles in considering whether or not to discharge the order.

10. The position of Lakatamia, put very shortly, is that the judge was right to reject the arguments based on a breach of s. 24 of the Immigration Act or of Mr Su's Article 8 rights for the reasons which he gave. On the delay point they say that Mr Su is entirely responsible for their inability to have an effective Means Hearing any sooner and that the last 3 years have been characterised by repeated breaches of disclosure orders which themselves have resulted in Mr Su being committed to prison for contempt. Although a period of 3 years is exceptional and undesirable they say that it is justified on the facts of the present case.

11. Before turning to the grounds of appeal I need to set out in more detail some of the procedural history following the grant of the passport order.

12. On 10 January 2019 Mr Su arrived at Heathrow Airport en route to Germany and was served with the passports order. He surrendered his passport but gave police constables who served him with the passport order on behalf of the topstaff the name of a hotel which was different from where he in fact stayed and the number of a mobile telephone which was not working. Mr Su then travelled to Liverpool on 15 January where he attempted to board a ferry to Belfast but was arrested. The following day he appeared in court and was released subject to daily reporting requirements pending the Means Hearing.

13. This took place on 27 and 28 February 2019. One result of the hearing was to obtain confirmation from Mr Su that he either owned or had an interest in two properties in Monaco (the Villa Rignon and the Villa Royan) which had been sold for a net sum of €32m and their proceeds dissipated in breach of the worldwide freezing order. Mr Su's evidence was that the monies had been sent to his mother in Taiwan.

14. On 29 March 2019 Mr Su was committed to prison for a term of 21 months by Sir Michael Burton for various breaches of both the freezing order and the passport order. Sir Michael Burton found that Mr Su has dissipated the proceeds of sale of the Monaco properties; had failed to make proper disclosure of his assets in accordance with the freezing order and a subsequent order of Bryan J dated 16 January 2019; and had taken steps to attempt to flee the jurisdiction in breach of the passport order. Paragraphs 8 and 9 of the passport order and paragraphs 13 and 14 of the order of Bryan J required Mr Su to make disclosure of a variety of documents that might assist Lakatamia's solicitors to obtain further information and disclosure about the existing whereabouts of other assets belonging to him. Sir Michael Burton found that very few of these documents had been disclosed as ordered and despite the time allowed for compliance the breach of the orders was deliberate. He said that it was the most serious case of financial breach that he had experienced and that there was no reasonable or other excuse for what Mr Su had done.

15. An attempt by Mr Su to appeal against the committal order was rejected by the Court of Appeal as being out of time but on 4 November 2019 Mr Su applied for his early release from prison on the basis that he had purged his contempt. Most of the material relied on by Mr Su was in fact an attempt to challenge the findings made by Sir Michael Burton about his ownership of the Monaco properties. But the judgment debt remained unpaid and no offer had been made to make a substantial payment on account. The application was rejected by Jacobs J who said that Mr Su's behaviour was indicative of someone who was more inclined to obstruct than to help and that there needed to be positive action by him towards the payment of the judgment debt.

16. On 30 January 2020 Waksman J directed that two pending committal applications against Mr Su should be heard together in the week commencing 10 February 2020. The applications related to a failure by Mr Su to sign various bank mandates pursuant to an order of His Honour Judge Pelling QC made on 27 November 2019 and the non-disclosure of three New York apartments which were said to belong to Mr Su. The date of 10 February was chosen because Mr Su was due to be released from prison on or soon after 12 February after having served half of the 21-month term imposed by Sir Michael Burton in March 2019. The judge also heard an application by Lakatamia for Mr Su to be cross examined about his assets pursuant to CPR 71.2. Although one such hearing had already taken place as I have mentioned in February 2019, the rules do not exclude further hearings if the circumstances justify it. Further evidence in the form of witness statements from Mr Su's mother indicated that the net proceeds of the Monaco properties had been transferred by her to a company called UP Shipping which she said was owned and controlled by Mr Su and that a substantial part of the €27m had then been transferred to another company called Blue Diamond Sea Transport Limited. This information had prompted the order for the signing of the bank mandates which Mr Su had not yet complied with.

17. One effect of the examination of means carried out in February 2019 was that the passport order had expired so that on release from prison in February 2020 Mr Su would be free to leave the jurisdiction. As part of its renewed CPR 71.2 application Lakatamia therefore sought an order restraining Mr Su from leaving the jurisdiction until after he had attended the second Means Hearing. Waksman J made an order in those terms on 30 January 2020 and directed that the confiscation of his passports should continue. Mr Su was also to keep the tipstaff informed of his place of residence and of an email address and telephone number through which he could be contacted. The judge said that because of Mr Su's previous non-compliance with the disclosure order much less information had been obtained that would have been expected and that further disclosure and examination was justified particularly in relation to the transfers of money from the sale of the Monaco properties. The judge directed Lakatamia to arrange for the second Means Hearing to take place as soon as reasonably practicable.

18. At the hearing a Mckenzie friend (Mr Coleman) who assisted Mr Su made the submission to Waksman J that Mr Su had been admitted to the country on a 3-month visa which had long expired so that he was now committing a criminal offence by remaining in the jurisdiction. He also submitted that Mr Su had been in prison long enough. The judge said:

> "40. The second point that is made by Mr Coleman is that on the basis that Mr Su came here with a three-month visa only, being a non-national of this country, he is an overstayer now and he is committing an offence. We have not had the opportunity to investigate all of the provisions on the Immigration Acts, but I do know that there are many circumstances in which those who have come here can be detained prior to removal or deportation or are otherwise subject to court orders, and for my part I think it is extremely unlikely that there would be any risk of prosecution in the circumstances either, which is the present case, where Mr Su is in fact overstaying but in prison, or if I were to make any such order, an order that actually prevents him from

> leaving the jurisdiction. So I do not think that there is anything in that point.
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> 41. Mr Coleman's third point is that, supposing he was released and there was no further period of imprisonment, he cannot work because he is an overstayer without a right to be here, he cannot have access to healthcare and benefits and so on. That may be so but, as I have indicated, he has had the financial wherewithal to instruct leading and junior counsel as well, and if he was out of prison I do not think for a moment it would be beyond his wit to obtain funding, bearing in mind that when he first came here, according to the police, he was destined straight for the Dorchester, and that his credit card statements show a fairly lavish lifestyle. So there is nothing in that point either.
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> 42. The final point made by Mr Coleman concerns the overall justice of the case which is that he has spent enough time in prison now and should go home and be allowed to go home. However that begs a very large number of questions, given the way in which he has acted before and given the fact that, through no fault of their own, the claimants have been hampered in their perfectly legitimate attempts to gain information about his assets by the way in which Mr Su has deliberately conducted himself.
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> 43. I am quite satisfied in those circumstances that this is a case (and, if it needs to be exceptional, it is, for the reasons I have given exceptional) that there should indeed be a further examination of Mr Su."

19. There was no appeal against the order of 30 January and it was followed by a number of further applications by Lakatamia. On 11 February 2020 Mr Su was committed to prison for a further 4 months by Sir Michael Burton for contempt based on the non-disclosure of the New York apartments and his failure to sign the bank mandates. On 25 March Butcher J adjourned the second Means Hearing which had been listed for 31 March. Mr Su appears to have consented to the adjournment on the basis that the hearing could not be effective because Lakatamia was still pursuing various applications to obtain more information about his asset position. Then on 9 April 2020 Mr Su was released from prison having served half of the 4-month sentence.

20. On 26 March Foxton J had made further orders without notice designed to give Lakatamia access to information stored electronically subject to a review of the material for privilege and relevance by an independent lawyer. On the return date Mr Su applied to purge the contempt for which he was committed by Sir Michael Burton on 11 February but this application was dismissed by the judge. Foxton J affirmed his orders of 26 March and continued the passport order made by Waksman J on 30 January. By now Lakatamia was pursuing a third committal application based in part on Mr Su's failure to disclose an interest in a property in Tokyo. The judge noted that the application to purge his contempt was not based on any act of contrition on the part of Mr Su but rather on his concern that he might become infected with Covid-19 if he remained in prison. In terms of Mr Su's willingness to comply with the orders of the court nothing had changed.

21. On 17 June 2020 Andrew Baker J made a search order based on what was alleged to be Mr Su's persistent failure to make full disclosure in accordance with the earlier orders against him. This was executed on 18 June 2020 at the apartment in London where Mr Su was staying and resulted in the disclosure of some 800,000 documents stored electronically which were then reviewed by the independent lawyers appointed under the terms of the search order to preserve any available claims of privilege. The search order was continued by Foxton J on 2 July 2020.

22. On 8 July 2020 Mr Su was declared bankrupt on his own application. This is achieved by an online application without any form of judicial consideration or intervention but it did have the effect of vesting the administration of Mr Su's estate in the hands of his trustee in bankruptcy and of converting the judgment in favour of Lakatamia into a right to prove in the bankruptcy. This therefore impacted on the listing of the second Means Hearing. Lakatamia applied to have the bankruptcy order annulled on the basis that there was no jurisdiction to make the order because Mr Su's presence within the jurisdiction was involuntary and did not therefore satisfy the residence requirement contained in s. 263I of the Insolvency Act 1986. But the position about the bankruptcy remained unresolved until the bankruptcy order was eventually annulled (subject to the issue of the trustees' costs and expenses) by Bacon J on 1 July 2021.

23. In the meantime Lakatamia had applied in November 2020 for the hearing of the second Means Hearing to be expedited precisely because they were concerned about the time which had elapsed since the making of the original passport order. Surprisingly in the light of what is now his second ground of appeal this was in fact resisted by Mr Su but on 14 December 2020 he issued his own application to vary or discharge the passport order granted on 30 January 2020. It was this application that was dismissed by Waksman J on 21 January 2021 and which is the subject of the present appeal.

24. On 21 December Cockerill J varied the order so as to require Mr Su to report to Charing Cross Police Station twice a week rather than daily.

25. The application of 14 December 2020 sought the discharge of the passport order granted by Waksman J on 30 January on the basis that it was no longer required to enable a fair means assessment to take place. Mr Su made a witness statement dated 14 December 2020 in which he set out the procedural history. Following his release from prison in April 2020 he had gone to live in a flat in Maida Vale which is owned by Mr Robert McKendrick with whom he had shared a cell in Pentonville Prison whilst they were both serving their sentences imposed for contempt. There are comments in other documents about the flat being small and squalid. What Mr Su says in his witness statement is that the flat has very little in it and is like a prison. He has to report daily to the Police under the terms of the passport order and is concerned about catching Covid-19. As an overstayer he cannot work or seek education and has no right to use the NHS. The flat is the subject of possession proceedings brought by Mr McKendrick's mortgagees and Mr Su is concerned that he may soon become homeless.

26. More generally he says that he has not been able to spend time with his friends in Japan and elsewhere outside the UK or to play or teach tennis which is one of his principal pleasures. He has had, he says, no physical contact with his mother who is elderly and frail and whom he loves although he concedes that he does not have a particularly good relationship with her. He has also not been able to see his children.

27. In his judgment Waksman J set out the relevant procedural history including the hearing on 30 January 2020 when Mr Coleman had raised the issue about Mr Su's immigration status and the commission of a criminal offence. He said:

> "11. Mr Underwood, I interpose, makes the same argument before me today. There are two problems with his submission. First of all, nothing has changed in respect of that argument since the time it was first made. It is not open to him to make that argument. I have already decided it, and there was no appeal in relation to my first order. In any event, although Mr Underwood submits with force that every day Mr Su is here he is committing a criminal offence, I do consider that I am entitled to look at the practicalities because if Mr Underwood is right and is suggesting, as he faintly did at one point, that my original order might have been unlawful, then any stay in prison after he was an overstayer would equally be unlawful. That is a most surprising proposition and it only needs to be stated to be rejected. On that basis there is nothing in the deportation point now, as there was nothing in it then."

28. He then turned to consider the other consequences of Mr Su being an overstayer and his ability to improve his accommodation:

> "12. Let me go on to some more paragraphs. It was said that, because he is an overstayer without a right to be here he cannot have access to healthcare and benefits. That might be so but he has had the financial wherewithal to instruct leading and junior counsel. If he was out of prison I do not think for a moment it is beyond his wit to obtain funding, bearing in mind when he first came here he was destined to go to the Dorchester. Again, the passage of time does not affect that argument which also is made by Mr Underwood now. So there is really no basis on which I need to reconsider it, but equally now as then, Mr Su has had the wherewithal to instruct solicitors and instruct leading counsel. The epithet "squalid" may have been applied to his flat but, beyond that, he is not now suggesting there is anything specific about his living accommodation which makes it impossible for him to stay where he is even if he is not entitled to take a tenancy properly in his own name and, equally, so far as access to healthcare is concerned, first, it is not suggested for a moment that the present order is unlimited; it is tied to a means hearing so it will come to an end at some point, absent some further application; secondly, there is no evidence put before me of any particular medical condition which requires immediate attention, or any underlying condition."

29. The judge then rejected the submission that the passport order was no longer required in order for there to be an effective Means Hearing. He referred to Mr Su's previous attempts to flee the jurisdiction and to his various breaches of the disclosure orders. He rejected the suggestion that nothing further was likely to come out of the Means Hearing. The disclosure of the 800,000 documents would, he said, give Lakatamia's

representatives a serious opportunity of obtaining specific answers about specific assets even if only the minority of documents might on examination prove relevant. The second Means Hearing would, he said, have real utility and there was no guarantee that Mr Su would attend the hearing remotely if allowed to leave the jurisdiction.

30. Turning to the grounds of appeal Mr Grant QC (who, with Mr Turner and Mr Forsyth, did not appear below) on behalf of Mr Su does not challenge the judge's assessment that his client is a flight risk and might refuse to participate in a remote hearing. Nor does he challenge the various breaches of the disclosure orders which have occurred. The first ground of appeal concentrates on the judge's treatment of Mr Su's Article 8 rights which the judge, he says, was bound to consider in deciding whether or not to allow the passport order to continue. Even if he was right to reject the challenge based on s. 24 of the Immigration Act the judge was nevertheless bound to carry out a thorough and exacting proportionality review in relation to the impact of the continuation of the order on Mr Su's Article 8 rights.

31. There is no real doubt that Article 8 will often be engaged by an order of this kind. In the case of a foreign national resident abroad there is an immediate and obvious impact on that person's ability to continue his normal family and private life which has to be justified.

32. The judge said:

> "22. Nonetheless, Mr Underwood says that to the extent that there is utility, it has to be balanced against the interference with Mr Su's rights. Some of those matter I have dealt with, namely the question of being an over stayer and the question of access to services and the question of where he was living.
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> 23. There are some other points which Mr Su mentioned in his evidence, although Mr Underwood did not deal with them specifically. It is said that, because he cannot work, he has to sit around. But he will not have to sit around forever because this means hearing is going to come on as soon as I can practically fix it.
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> 24. It is said that he had a particularly unpleasant experience in prison, and I do not gainsay that, but that is not the situation that we are facing now so far as this restraining order is concerned. It is true that there is a third committal application, but if that is made out then that is simply because of the defaults which he knowingly made at the time and in those circumstances I do not see how that is relevant to the application which is before me.
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> 25. It is said that his rights to see his children and his elderly mother, although he does not seem to have always had a good relationship with her, are affected. All of that is true they were just as true when the matter was brought before me back in January of last year."

33. It is correct to say that the judge regarded the position of Mr Su's family and private life as being largely unchanged since he first considered them on 30 January 2020. The only material change in circumstances was, he said, the passage of a further 12 months since that hearing. His review of the impact of the continuation of the passport order on these matters was therefore by reference to his earlier decision. But I do not accept that he failed to carry out a proportionality review. It is apparent from his judgment that he did take into account the evidence contained in Mr Su's witness statement and the impact which the continuation of the order would have. But that evidence was very limited and his view was that the personal consequences of the continuation of the passport order were overstated and were in any event outweighed by the need for an effective second Means Hearing which could only be guaranteed by the continuation of the order.

34. This court can only interfere with an assessment of this kind if it can be shown that the judge took into account immaterial factors; failed to take into account material factors; or erred in principle: see *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note) [2003] 1 WLR 577.* The judge had the content of Mr Su's witness statement very much in mind in deciding whether the adverse effect on Mr Su on continuing the passport order outweighed the need to ensure that there was an effective Means Hearing. But he was entitled on the evidence to consider that Mr Su's lack of access to NHS facilities or to employment was of little or no material effect on someone who has significant assets at his disposal and can afford to litigate at considerable personal expense. The absence of personal contact with his mother and family are of course concerning but in an Article 8 context Mr Su's evidence falls short of establishing that either his mother or his children were part of his family life within the meaning of the Convention. In her judgment in *Mobeen v SSHD [2021] EWCA Civ 886* Carr LJ said:

> "44. The relevant principles relating to family life in the case of adults have been explored in a line of well-known authorities including *Kugathas; Singh v ECO New* Delhi [2004] EWCA Civ 1075 ("*Singh* 1"); *ZB (Pakistan) v SSHD* [2009] EWCA Civ 834 ("*ZB*"); Singh v SSHD [2015] EWCA Civ 630 ("*Singh* 2"); *Britcits; AU v SSHD* [2020] EWCA Civ 338 ("*AU*"). The position can be summarised as follows.
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> 45. Whether or not family life exists is a fact-sensitive enquiry which requires a careful assessment of all the relevant facts in the round. Thus it is important not to be overly prescriptive as to what is required and comparison with the outcomes on the facts in different cases is unlikely to be of any material assistance.
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> 46. However, the case law establishes clearly that love and affection between family members are not of themselves sufficient. There has to be something more. Normal emotional ties will not usually be enough; further elements of emotional and/or financial dependency are necessary, albeit that there is no requirement to prove exceptional dependency. The formal relationship(s) between the relevant parties will be relevant, although ultimately it is the substance and not the form of the relationship(s) that matters. The existence of effective, real or committed support is an indicator of family life. Co-habitation is

> generally a strong pointer towards the existence of family life. The extent and nature of any support from other family members will be relevant, as will the existence of any relevant cultural or social traditions. Indeed, in a case where the focus is on the parent, the issue is the extent of the dependency of the older relative on the younger ones in the UK and whether or not that dependency creates something more than the normal emotional ties.
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> 47. The ultimate question has been described as being whether or not this is a case of "effective, real or committed support" (see *AU* at [40]) or whether there is "the real existence in practice of close personal ties" (see *Singh 1* at [20]).”

35. The evidence set out in Mr Su’s witness statement was insufficient in its detail to enable the judge to find the existence of the support or close personal ties referred to in the authorities and the evidence in relation to Mr Su’s mother in fact points away from there being such a relationship. Given that Mr Su did not provide the material which could have supported a claim to a family life with his mother and children the judge cannot be criticised for his treatment of the evidence which was relied upon.

36. The other aspect of ground 1 which also informs the outcome of ground 3 is the argument that the passport order has the effect of compelling or causing Mr Su to commit a criminal offence under s. 24 of the Immigration Act 1971 by remaining in the UK without a current visa. Mr Grant submits that the jurisdiction under s. 37 cannot be used in a way which leads inevitably to the commission of a criminal offence and that it was not lawful for Waksman J to continue the passport order once Mr Su’s visa had expired.

37. At one level of generality it is obviously correct that the consequences of being restrained from leaving the jurisdiction including the possibility of committing an immigration offence are highly material for a judge to consider when deciding whether to make a passport order particularly when the consequences for the defendant may include a further sentence of imprisonment. But I am not convinced that the judge was faced with this issue in such stark terms. Quite apart from the passport order Mr Su has been confined to the jurisdiction for significant periods of time by the terms of imprisonment imposed on him for contempt. As things stand today he remains in prison having been sentenced to a further term of 24 months for contempt on 7 July. It is far from clear that Mr Su will face any further penalties by reason of the expiry of his visa. The Secretary of State has a residual discretion to grant leave to remain outside the Immigration Rules: see s. 1(2) of the Immigration Act 1971 and the Home Office guidance note on Discretionary Leave published on 27 May 2021. The power is exercisable where there are “exceptional circumstances” and as Mr Phillips QC submitted, the compulsory retention within the jurisdiction of a foreign national under an order of the court may very likely qualify as such. Mr Su has yet to make such an application but until he does and until it is refused the judge was I think entitled to take the view that there are unlikely to be any criminal consequences resulting from the continuation of the passport order.

38. That leaves the second ground of appeal which is that the judge treated the additional period of time between the making of the first and second orders as legally irrelevant.

Mr Grant contends that Waksman J approached the matter on the basis that the mere passage of time between the two orders was not a material change of circumstances that might justify the variation or discharge of the earlier order. I think that this is a misreading of his judgment. The judge dealt with this issue in paragraphs 27 to 28 of his judgment as follows:

> "27. Now, as against all of that, one has to then address the fundamental objection to this application in principle, which is that, in truth, the only change of circumstance has been passage of time, and the only reason we are where we are is because of Mr Su's serial defaults. That is plainly correct. If he had given full disclosure to begin with there would not be a need for a disclosure order. If matters were held up while he was in prison, well, he should not have broken the orders that led him to be committed in the first place and then, importantly, while it is true that Lakatamia in September told the court because, apart from anything else, they were aware of the fact that there was a continuing restraint order, that they needed a delay to process the documents, again, that delay would not have happened if the documents had been produced by Mr Su in the first place. When they did intimate a delay, there was no objection to it at that stage, on the basis of the restraint order. When they were in a position that they would go ahead with the Means Hearing and sought an expedited hearing precisely because there was the underlying restraint order, Mr Su's response to that was to say that it was not urgent. If he had agreed to that, this matter may not have been heard by now, but it certainly would have been fixed by now.
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> 28. So that objection really goes to the heart of the application. It would be a very odd situation if, essentially, because of his own series of defaults, it is now open to Mr Su to complain that effectively he has been kept in this jurisdiction too long, the passage of time being, as I say, in essence, the only material change of circumstances."

39. It seems to me that the judge did regard the passage of time as material but treated the delay as largely, if not exclusively, attributable to the conduct of Mr Su. In support of the appeal Mr Grant has not sought to argue that in the face of Mr Su's repeated breaches of the disclosure orders Lakatamia could have progressed the second Means Hearing more rapidly than they have in fact done. It is obvious that Mr Su has steadfastly refused to comply with the orders for disclosure and has deliberately concealed information about his assets. The protracted steps taken by Lakatamia to deal with this kind of conduct are entirely due to Mr Su's own behaviour.

40. The judge was therefore faced with an argument that notwithstanding Mr Su's responsibility for the delay the point had been reached when because of the time that had passed since the making of the original passport order and even since the order of 30 January 2020, the interests of justice could only be served by discharging the order.

41. Mr Grant is quite right to emphasise that under the guidance given by this court in *Bayer A.G. v Winter* a passport order should be of very limited duration given the interference with the liberty of the subject which is involved. But where the delay is caused by the defendant refusing to comply with the orders and the process which the passport order is designed to facilitate, an acceptance that after a particular length of time the order should be discharged would enable determined contemnors like Mr Su to benefit from their own misconduct.

42. It is not necessary, nor I think possible, for us in this case to lay down any definitive guidance as to the maximum possible duration of a passport order. The jurisdiction to grant and continue such orders involves the active exercise of a judicial discretion which must take account of all the relevant circumstances in deciding whether the continuation or extension of the order is justified. It goes without saying that the longer the order remains in place, the greater will be the onus on the applicant to justify its continuation. But the court is also entitled to protect its own process and to take a realistic view about the conduct and evidence of parties such as Mr Su who may think that the hardship imposed by the order is a small price to pay for the non-disclosure of his assets.

43. In the present circumstances of this case where directions had been given for a second Means Hearing as soon as reasonably practicable and there was an expectation that an effective hearing could take place within the next few months the judge was I think entitled to take the view that it was just and convenient to continue the passport order until that hearing took place. Although the length of time taken to reach this stage is exceptional the process has been managed both judicially and I think proportionately in the light of Mr Su's extraordinary resistance to any order which the court makes. There was in my view no error of principle in the judge's reasoning.

44. For those reasons I would therefore dismiss the appeal.

Lady Justice Carr:

45. I agree. For the reasons set out by Sir Nicholas Patten, the appeal is without merit. Whilst Mr Grant managed to persuade me at the commencement of the hearing that the appeal was not wholly academic (because of Mr Su's outstanding attempt to appeal against the most recent custodial sentence imposed on him), it is nevertheless difficult to see what practical purpose the appeal serves in circumstances where i) the passport order expires at the end of this month and ii) Mr Su is currently in prison, where on any view he will remain for the months ahead. It is imperative that the second Means Hearing now proceeds swiftly and effectively so that this aspect of the litigation at least can be put to rest.

Lady Justice Asplin:

46. I agree.