IN THE SUPREME COURT OF BERMUDA

DIVORCE JURISDICTION

2024: No. 116

BETWEEN:

D

Applicant

-and-

J

Respondent

DECISIONS ON LEAVE TO APPEAL
(Determinations on the papers)

Before:	**Hon. Alexandra Wheatley, Assistant Justice**
Application made by:	**Georgia Marshall of Marshall Diel & Myers Limited, for the Respondent**
Date Application Filed:	**13 October 2025**
Date of Ruling:	**23 April 2026**

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Leave to Appeal; Interlocutory Applications; Children Cases; Exercise of Judge's Discretion; Decision Must be 'Plainly Wrong'; Court of Appeal Presumption that Court Considered All the Evidence; Lack of Reference to an Issue in a Judgment/Ruling Does Not Mean it Was Not Considered; Judgments/Ruling Are Not to be Subject to Narrow Textual Analysis

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DECISION of Assistant Justice Alexandra Wheatley

INTRODUCTION

1. The Respondent (hereinafter referred to as '**the Mother**') filed an *ex-parté* application on 13 October 2025 seeking leave to appeal the Imerman Ruling dated 15 September 2025 (**Imerman Ruling**) (**Leave to Appeal the Imerman Ruling**). An affidavit sworn on 10 October 2025 was filed in support which exhibited a draft Notice of Appeal setting out the intended grounds of appeal.

2. For clarity regarding the timing of this decision, Counsel for the Mother indicated to this Court on or around 13 October 2025 that there may be an appeal regarding the Mother's substantive application for leave to remove the children from Bermuda (**LTR Application**) which was heard on the following dates: 22, 23, 24, 25, 26 and 30 September 2025 and 1, 6, 7 and 8 October 2025. As such, it was determined that pending the Court's determination of the LTR Application and the potential for the Mother to seek leave to appeal that decision as well, Leave to Appeal the Imerman Ruling was held in abeyance.

3. The Court issued its decision of the LTR Application on 31 December 2025 (**LTR Decision**) which confirmed its decision to refuse the Mother' leave to remove the children from the jurisdiction application. Subsequently, on 14 January 2026, the Mother filed an *ex-parté* application seeking leave to appeal the LTR Decision (**Leave to Appeal the LTR Decision**) along with an affidavit in support sworn on 13 January 2026 which exhibited a draft Notice of Appeal setting out the intended grounds of appeal. The reasons were subsequently issued by the Court on 20 February 2026 (**Reasons for Refusal of the LTR Application**).

4. I had initially formed the view that I would only address the Leave to Appeal the Imerman Ruling on the papers as Mrs Marshall had indicated to the Court previously that she had intended to file an Amended Notice of Motion to include amended, intended grounds of appeal once the parties were in receipt of the Reasons for Refusal of the LTR Application. However, given that significant time has now passed since the issuing of the Reasons for Refusal of the LTR Application with no correspondence from MDM to the Court, no amended pleadings being filed, and the next Court of Appeal session swiftly approaching, I have also determined the Leave to Appeal the LTR Decision on the papers.

INTENDED GROUNDS OF APPEAL

Leave to Appeal the Imerman Ruling

5. There are thirteen intended grounds of appeal which are summarized as follows:

(1) **Failure to Consider Key Evidential Matters (a), (b) and (c)**
The Court did not properly consider critical evidence, including the relevance of search terms, the Husband's affidavit evidence and the significance of deleted metadata.

(2) **Error in Discretion Analysis**
The Court erred in analyzing whether discretion should be exercised to admit evidence, as this analysis was unnecessary given its ruling against the Wife.

(3) **Premature Determination of Evidence**
The Court made determinations about the relevance and importance of disputed emails without considering the full evidence presented in the substantive application for leave to remove the children from the jurisdiction.

(4) **Incorrect Interpretation of Email Relevance**
The Court incorrectly determined that the disputed emails were central to the case, despite their limited relevance to the welfare of the children.

(5) **Failure to Apply Secondary Burden of Proof**
The Court did not apply the secondary burden of proof to the Respondent's evidence, as required by legal precedent.

(6) **Unequal Application of Burden of Proof**
The Court applied the burden of proof solely to the Wife's evidence and failed to apply it equally to the Husband's evidence.

(7) **Improper Final Findings at Interlocutory Stage**
The Court made final findings about the relevance and interpretation of disputed emails at an interlocutory stage without considering the full evidence.

(8) **Premature Final Findings**
The Court made final determinations without considering the wider contextual evidence in the parties' affidavits and the pending full reply of the Wife.

(9) **Failure to Consider Pattern of Conduct**
The Court failed to give weight to evidence of the Husband's prior actions, including accessing confidential devices, which demonstrated a pattern of conduct.

(10) **Misinterpretation of Text Messages**
The Court misinterpreted text messages as supporting the Husband's case, without sufficient evidence to substantiate this conclusion.

(11) **Misinterpretation of Legal Guidance (L v K)**
The Court misinterpreted the legal protocol outlined in *L v K*, concluding that the Husband's attorneys were not required to follow the usual procedure for handling confidential information obtained with a spouse's authority, despite the circumstances of the case.

(12) **Error in Costs Award**
The Court erred in awarding indemnity costs to the Husband without allowing the parties to be heard on the issue, failing to provide reasons for the indemnity costs order, and disregarding the convention that each party typically bears their own costs in interim injunctions related to child proceedings.

(13) **Overall Errors in Findings of Fact, Relevance of Disputed Documents and Incorrect Application of *L* v *K***
This ground provides a summary of all the grounds of appeal from (1) to (12) as cumulatively amounting to errors in fact which were plainly wrong in the exercising of the Court's discretion and/or the Court was wrong in law.

Leave to Appeal the LTR Application

6. There are thirteen[1] intended grounds of appeal in relation to the LTR Application which are summarized as follows:

(1) **Mischaracterisation of the Father's Position**
The Court erred in misstating the Father's case, incorrectly recording that he sought sole care of the children in certain circumstances, when his consistent position was for a shared 50/50 care arrangement irrespective of whether the Mother remained in Bermuda or returned to the United States. This mischaracterisation materially affected the Court's analysis.

[1] There are actually fourteen intended grounds of appeal listed; however (14) is not a ground of appeal as it simply states the Mother is reserving her right to file amended grounds of appeal upon receipt of "the Judge's comprehensive analysis and reasons", i.e. the Reasons for Refusal of the LTR Application.

(2) **Improper Reliance on Biased Social Worker Evidence**
The Court erred in accepting the conclusions of the Court Appointed Social Worker (**CASW**) without proper regard to her cross-examination, which revealed bias against the Mother and a misunderstanding of the relevance of prior proceedings, thereby undermining the reliability of her recommendations.

(3) **Circulation of the Imerman Decision Without Guidance**
The Court erred in permitting the Imerman Ruling to be provided to the CASW without explanation as to its relevance or impact on the welfare assessment, thereby contributing to the CASW's misunderstanding and bias.

(4) **Misrepresentation of the Mother's Parenting Capacity**
The Court erred in mischaracterising the Mother's evidence as to her ability to cope with the Children, failing to properly acknowledge her demonstrated capacity as their primary carer despite significant challenges.

(5) **Failure to Address Deficiencies in the Social Inquiry Report**
The Court erred in relying on the Social Inquiry Report (**SIR**) despite its deficiencies, including a failure to adequately consider the Father's mental health history (including the types of medications the Mother alleges he has been prescribed), and without undertaking proper inquiry into those matters.

(6) **Failure to Give Due Weight to Admitted Bias**
The Court erred in failing to give adequate weight to the CASW's '*admitted bias*' against the Mother, including unwarranted criticism of the Mother's expert psychologist.

(7) **Further Mischaracterisation of the Father's Position**
The Court erred in again mischaracterising the Father's position by failing to recognise that he sought shared care even if the Mother relocated.

(8) **Failure to Properly Consider the Children's Wishes and Feelings**
The Court erred in failing to adequately consider the children's wishes and feelings, instead accepting conclusions that diminished or marginalised their expressed views and their close relationship with the Mother.

(9) **Flawed Welfare Analysis**
The Court erred in her welfare analysis by placing undue emphasis on the potential impact on the father-child relationship while insufficiently considering the detrimental impact on the mother-child relationship, contrary to the parties' shared intention for joint care.

(10) **Erroneous Finding of Lack of Necessity**
The Court erred in concluding that there was no demonstrated necessity for the Mother's relocation, disregarding unchallenged and uncontroverted evidence supporting that necessity.

(11) **Excessively Restrictive Access Arrangements**
The Court erred in imposing access arrangements for the Mother that were more restrictive than those recommended by the CASW, and inconsistent with the parties' shared care intentions.

(12) **Punitive Effect of the Order**
The Court erred in making an order that was punitive in effect, limiting the Mother's care of the children to a disproportionately small portion of the year.

(13) **Procedural Unfairness and Delay**
The Court erred in delaying the delivery of the judgment and providing only limited reasoning, thereby prejudicing the Mother's ability to pursue an appeal and adversely affecting the children's welfare.

THE LAW

7. In two recent decisions of the Court of Appeal *BHD* v *IAH* [2025] CA (Bda) 8 Civ and *Father* v *Mother* [2025] CA (Bda) 15 Civ, Justice of Appeal Hargun confirms the legal test to be applied by the Court in determining application for leave to appeal. More specifically Hargun JA addresses the test as applied in children cases where the Court must exercise its discretion in making its determination.

8. In *Father* v *Mother* at paragraphs 8 and 9, Hargun JA set out the test as follows:

> *"**The test to be applied for leave to appeal***
>
> *8. There is no dispute in relation to the test which this Court is obliged to apply in relation to a decision of the Supreme Court relating to access and custody and removal of children from the jurisdiction. Furthermore, a decision in relation to these matters necessarily involves an exercise of discretion by a judge and it would be a rare case where the Court would consider it appropriate to interfere with such a decision. In Bellenden (formerly Satterthwaite) v. Satterthwaite [1948] 1 All E.R. 343, Asquith L.J., dealing with the issue when it may be appropriate for an appellate court to interfere with a discretionary decision in matrimonial proceedings, said, at p. 345:*

"It is, of course, not enough for the wife to establish that this court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere."

9. *In order for this Court to give leave to appeal a discretionary decision of a judge, the grounds of appeal will not likely be reasonably arguable or have any real prospect of success unless the applicant can sensibly contend that the Judge erred by: (a) exercising her discretion under a mistake of law or misapprehension of the facts; (b) taking irrelevant matters into consideration or failing to take relevant matters into consideration; or (c) by making a decision which is irrational on any reasonable view (see paragraph 15 of the judgment of Subair Williams J in Apex Fund Services Ltd v Clingerman and Silk Road The Funds Limited (Leave to Appeal) [2020] Bda LR 12).*" [Emphasis added]

9. Albeit not a child case, in the Court of Appeal case of *Volpi and another* v *Volpi* [2022] 4 WLR 48; [2022] EWCA Civ 464 Lord Justice Lewison provides helpful, additional guidance as to the presumptions made by the Court of Appeal in the context of considering an appeal. Lewison LJ at paragraph 2 states as follows:

"*Appeals on fact*

2. *The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:*

   i) *An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.*

   ii) *The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.*

   iii) *An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the*

evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

iv) *The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.*

v) *An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.*

vi) *Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract*." [Emphasis added]

10. As *Volpi and another* v *Volpi* directly concerns appeals against findings of fact, it is of clear relevance to the Imerman Ruling. It is also arguably applicable to the LTR Decision (and the Reasons for Refusal of the LTR Application), since the requirement that an appellate court intervene only where a decision is '*plainly wrong*' applies equally to interlocutory decisions in children cases.

DISCUSSION

11. The intended grounds of appeal for both the Leave to Appeal the Imerman Ruling and the Leave to Appeal the LTR Decision are numerous and, in several instances, overlapping in substance. For the purposes of analysis and clarity, I have grouped them by reference to the underlying nature of the complaint rather than addressing each ground in isolation.

12. In undertaking this exercise, I have considered whether individual grounds raise common themes, such as alleged failures in the evaluation of evidence, errors in factual findings, misapplication of legal principles or complaints directed to the exercise of judicial discretion. Where multiple grounds were directed to the same or closely related alleged errors, they have been considered together within a single category. This approach avoids unnecessary repetition and permits a more coherent assessment of the issues arising on the intended appeal. Accordingly, the grounds have been organised into a limited number of broad categories which are self explanatory.

LEAVE TO APPEAL THE IMERMAN RULING

13. An injunction application in accordance with the Imerman principles is a fact-finding hearing. The law surrounding an Imerman application and the requirement for the Court to make findings of fact on the balance of probabilities is a position that was not contested in Counsel's submissions.[2] As stated in paragraph 10 above, it therefore follows that the guidance set out by Lewison LJ in *Volpi and another v Volpi* is relevant and applicable to the Imerman Ruling.

(A) Failure to Properly Assess and Weigh Evidence: Grounds (1), (9) and (10)

14. This category of grounds is said by the Mother to concern the Court's failure to properly consider, evaluate, or give appropriate weight to key evidential matters, including search terms, affidavit evidence, metadata, prior conduct, and text messages, leading to erroneous factual conclusions.

15. I refer to Lewison LJ's guidance in at paragraph 2 of *Volpi and another v Volpi* (as referenced in paragraph 10 above) as it relates to the considerations given by the appellate court when considering an appeal. Specifically, I refer to paragraphs 2 (iii) to (vi) the bold text highlighting the relevant positions:

> "*iii)* ***An appeal court is bound****, unless there is compelling reason to the contrary,* ***to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.***
>
> *iv)* ***The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence.*** *The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment).* ***The weight which he gives to it is however pre-eminently a matter for him.***

[2] Paragraphs 29 and 30 of the Imerman Ruling states as follows:

"29. Mrs Marshall also cited Mr Justice Peter Jackson's summary in *BR (Proof of Facts)* [2015] EWFC 41 as a reminder of basics that govern the factual stage of an *Imerman* application. In the recent Bermuda case of *A* v *B* [2024] SC (Bda) 66 app. (28 November 2024), I addressed the law surrounding fact findings hearings at paragraphs 13 through 17 of this Ruling. For the purposes this case there is no need to repeat the law on fact finding hearings as these principles are not being contested. *A* v *B* echoes those same features referenced in *BR (Proof of Facts)*.

30. In summary, the court acts on evidence, not speculation. The burden lies on the party who asserts a fact. The standard is the balance of probabilities and does not change with the seriousness of the allegation or its consequences. That framework applies to the central factual question in an *Imerman* Application: did the applicant prove that the documents were obtained without authority?"

v) ***An appeal court can therefore set aside a judgment*** *on the basis that the judge failed to give the evidence a balanced consideration* ***only if the judge's conclusion was rationally insupportable****.*

vi) ***Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract.***"

16. In addition to the principle that the Court's decision must be '*plainly wrong*', the additional principles referenced in paragraph 15 above have not been taken into consideration by the Mother. Accordingly, these intended grounds of appeal are bound to fail.

(B) Errors in Findings of Fact and Misapplication of the Burden of Proof: Grounds (5) and (6)

17. This category of intended grounds relates to what the Mother asserts are errors in the Court's factual findings, including the failure to apply the correct burden of proof consistently to both parties and the improper acceptance of the Father's evidence without sufficient scrutiny.

18. Mrs Marshall's reliance on *GT* v *RJ* [2018] EWFC 26, is misplaced. In this case, Mostyn LJ emphasises that in relocation cases findings of fact must be made where those facts are disputed. The party asserting those facts has the burden of proof which in fact-finding decisions is on the balance of probabilities. Thereafter, in a relocation case, it was emphasised that the applicant does not have a formal legal burden of proof placed on them given the court's inquisitorial function in such cases. Mostyn LJ states as follows at paragraph 5:

> "***[5]*** *The court's function in a relocation case is one of evaluation rather than a pure exercise of discretion (see Kacem v Bashir [2010] NZSC 112, [2011] 2 NZLR 1, [2010] NZFLR 884). Inevitably, the court will have to resolve disputed facts and there is a burden of proof on the party alleging the facts in issue. But once the facts are established there is no formal legal burden of proof on the applicant: see Payne v Payne [2001] EWCA Civ 166, [2001] Fam 473, [2001] 2 WLR 1826, [2001] 1 FLR 1052, at para [25] where Thorpe LJ stated: 'I do not think that such concepts of presumption and burden of proof have any place in Children Act litigation where the judge exercises a function that is partly inquisitorial'. However, common sense dictates that where one parent seeks that a well-functioning status quo should be changed she has to make the running in terms of the evidence and argument to show that change would be more in the children's interests than no change. Notwithstanding the partly inquisitorial function of the court to my mind the maxim affirmati non neganti incumbit probatio should loosely apply to the case for change.*" [Emphasis added]

19. It is difficult to see how *GT* v *RJ* bears upon the Imerman Ruling, beyond the fact that it arose from the Mother's application and that the burden of proof therefore lay with her. The Imerman Application was not, of itself, a children matter, but an interlocutory hearing concerning an evidentiary issue of an injunctive nature. Further, as was accepted by both Counsel, the Imerman Application necessarily fell to be determined in advance of the substantive LTR Application.

20. In exercising its discretion, the Court reached its conclusions having regard to the totality of the evidence adduced by both parties. The suggestion that those findings could be characterised as '*plainly wrong*' is wholly unsustainable. Therefore, these grounds of appeal are bound to fail.

(C) Premature and Irrelevant Determinations at an Interlocutory Stage: Grounds (2), (3), (7) and (8)

21. In this category, the Mother asserts that the Court erred by making findings and determinations, particularly as to relevance, interpretation, and discretion, that were premature, unnecessary, or inappropriate at an interlocutory stage and without the benefit of full evidence.

22. The Court's exercising its discretionary remit in the Imerman Ruling was raised by Mrs Marshall in the LTR Hearing wherein she argued this same point, despite failing to appeal the Imerman Ruling prior to the LTR Application was heard. I therefore had to extensively discuss the issue of the Mother's failure to appeal the Imerman Ruling throughout the Reasons for Refusal of the LTR Application.

23. The findings in the Imerman Ruling were addressed as preliminary issue on the first day of the LTR Application which is set out in paragraphs 20 to 29 of the Reasons for Refusal of the LTR Application which state as follows:

> "*20. A preliminary issue arose regarding the admissibility and weight of additional evidence the Mother sought to introduce in light of the Court's earlier Imerman Ruling.*
>
> *21. The Mother filed an application which was listed on the first day of the hearing (22 September 2025) seeking permission to file further affidavit evidence, to introduce third-party evidence and to call collateral witnesses whose statements had previously been included as letters within her affidavit exhibits.*
>
> *22. Mrs Marshall for the Mother argued that in the Mother's Second Affidavit, in the first paragraph she states that, "…she reserves the right to file further evidence following the decision of the Imerman application.". Mrs Marshall argued that the Mother had not addressed the images she had attempted to exclude in the Imerman*

Application because, had that application succeeded, such evidence would have been irrelevant.

23. *Mr Richards opposed the application. He submitted that the Mother did not acquire an automatic right to file further evidence simply by asserting one in her affidavit. He argued that the correct procedure would have been either to obtain an order varying the existing case management directions to allow further evidence or to raise the issue during the Imerman Hearing itself. He further questioned the relevance of the new evidence, given that the Court had already made findings regarding the content of the images in the Imerman Ruling.*

24. *At this stage, Mrs Marshall questioned whether the Court had "improperly predetermined these issues", suggesting that no findings of fact had been made regarding the content of the emails. In response, Mr Richards submitted that the Imerman Ruling clearly contained findings of fact in paragraphs 37–53. Mrs Marshall then asked the Court to clarify its findings, with particular reference to paragraph 45, which states:*

"45. I do not accept the argument that internal messages can be read only as short-term employment possibilities for the Mother. The ordinary meaning of the language used in the extracts placed before me suggests that a viable Bermuda-based solution existed in that her current role could be moved to Bermuda as it was considered to be "global", that it was discussed as a "sure thing" that could be kept in reserve, and that the Mother understood that such an option would be damaging to the position she intended to take in her application seeking leave to remove the children from the jurisdiction. That is consistent with the Father's account of why the October discussion occurred and why the messages mattered."

25. *After a brief adjournment, I provided an oral clarification. I began by referring to paragraph 36 of the Imerman Ruling, which sets out the basis on which my findings were made:*

> *"36. I make my findings on the balance of probabilities, having considered the demeanour of the witnesses, the consistency of their accounts, the consistency of those accounts with contemporaneous documents, and the objective probabilities. I have also considered what material was available to be produced and what inferences, if any, should be drawn where obvious sources of corroboration were not placed before the Court."*

26. *In addressing paragraph 45, I highlighted the final sentence, which refers to the consistency of the parties' accounts. I reiterated that the Imerman Ruling was explicit: the Court considered two alternative bases for admitting or excluding the*

evidence. The first was whether the Mother had consented to the Father taking photographs of the emails. If consent was not proved, the second was whether the evidence was nevertheless so central to the leave-to-remove application that excluding it would be unfair.

27. I explained that findings about the content of the emails were essential in assessing the consistency of the parties' accounts and determining the relevance and significance of that material to the substantive issues. I further explained that, even if my conclusion on consent had been wrong, I would still have admitted the images because their content was central to the LTR Application and would have been damaging to the Mother's case.

28. I also reminded Mrs Marshall that during the three-day Imerman Hearing, I had queried the relevance of certain material, and she had responded that it was necessary to understand the state of the marriage at the time the images were allegedly taken. A significant portion of the evidentiary hearing had been devoted to competing interpretations of the emails and related text messages. Accordingly, I confirmed that paragraphs 37–53 of the Imerman Ruling were, as stated, findings of fact.

29. Mrs Marshall then sought a ruling on whether the additional affidavit evidence should be admitted. Mr Richards indicated that he did not oppose admission of the affidavits, save for any passages purporting to challenge findings already made regarding the content of the images. I permitted the Mother's Third Affidavit and the Supervisor's Affidavit to be admitted in full. I did not consider it necessary to extract or redact sections touching upon matters already determined. However, I made clear that I was not "reconsidering" any factual findings made in the Imerman Ruling."

24. Most notably, having regard to the findings made in the Imerman Ruling, the substantive hearing proceeded on the basis that no appeal had been pursued. Notwithstanding this, the Mother repeatedly asserted throughout her submissions that those findings were "*wrong*". In my view, this approach reflects the unhelpful way the litigation was conducted by the Mother. If the Mother maintained that the findings materially undermined the fairness of the proceedings, one would have expected her position to be that the LTR Application should not proceed pending the determination of an appeal. Instead, on the first day of the hearing, Mrs Marshall indicated that she had not appreciated that certain findings had been made in the Imerman Ruling, notwithstanding that those findings were clearly set out under the heading "Findings and Analysis".

25. Following the Court's clarification that the findings contained in the "Findings and Analysis" section of the Imerman Ruling were operative findings of fact, Counsel for the Mother did not

contend that any purported misunderstanding required an adjournment of the LTR Application. The hearing of the LTR Application proceeded without objection on that basis.

26. For information purposes I draw attention to the concluding paragraphs 54 and 55 of the Imerman Ruling which also cites the Court's finding on the content of the emails the Mother was seeking to exclude:

> "*54. The Wife has not proved that the Husband obtained the images without permission. I accept the Husband's account that, during a discussion in mid-October 2024, the Wife showed him the relevant messages and allowed him to take photographs of several email messages. On that finding the application must be dismissed.*
>
> *55. Had it been necessary to consider discretion I would have refused to exclude the information or to restrain the Husband's lawyers. The emails bear directly on issues that will have to be decided in the Wife's Leave to Remove Application and exclusion would risk unfairness. The proper course is that the images and the references to them remain in the Husband's evidence. The Husband is entitled to his costs of the application and I order as such to be paid on an indemnity basis, to be taxed if not agreed.*" [Emphasis added]

27. I believe these concluding paragraphs provide little room for doubt to be cast on what findings the Court had made.

28. I also refer to paragraphs 295 to 298 of the Reasons for Refusal of the LTR Application which are also relevant to the Mother's position regarding the Imerman Ruling and state as follows:

> "*295. Turning to the evidence concerning the Mother's employment, I accept the Father's submissions. The emails the Mother attempted to exclude show that she herself identified her need to return to the United States as the central foundation of her relocation case, describing it as the "lynchpin" of her position. The Court has already found that the Father did not unlawfully access those emails and that the Mother voluntarily showed him the material. Her allegation of hacking was therefore untrue. Her repeated assertion that she would lose her job if she remained in Bermuda is also contradicted by the evidence.*
>
> *296. As confirmed in the Imerman Ruling, the internal communications indicate that transferring her role to Bermuda was a viable option because the position was global in nature. The Mother admitted in cross-examination that she made no enquiries of Company A's Global Human Resources Department about this possibility. The letter from Company A's Bermuda Office does not assist her, as it is based on misunderstandings and does not address whether her global role could be relocated.*

297. The Mother's argument that the Imerman Ruling did not reach the discretionary stage is unfounded. The Court addressed discretion directly at paragraph 50. It explained that even if the images had been obtained improperly, the emails would still have been admitted because excluding them could have prevented the Court from seeing the full picture. A proper exercise of discretion required the Court to consider the content of the emails.

298. It follows that both the factual and discretionary aspects of the Imerman analysis were completed. The Mother's suggestion that the findings were incomplete or "wrong" is rejected. In any event, the Court is now functus officio in respect of those findings. It is evident that the Mother's attempt to revisit these issues was directed at persuading the Court to alter its previous findings.

29. An additional reference is found at paragraphs 361 to 364 of the Reasons for Refusal of the LTR Application which state as follows:

"*361. Mrs Marshall also criticized paragraph 50 of the Imerman Ruling, which provides:*

> *"In case I am wrong on the factual findings, I address discretion. Even if the images had been obtained without authority, I would have refused the relief sought. The content of the emails are central to the issues the Court must resolve in the wider proceedings. The discretion to exclude evidence obtained unlawfully exists, but it is to be exercised so as to secure a fair trial. On these facts exclusion would risk obscuring the true picture and impede a just outcome." [Emphasis added]*

362. Mrs Marshall argued that this finding was wrong because, in her submission, the Mother's employment circumstances were not a central theme of the LTR Application. I do not accept that submission. The finding was made in the Imerman Ruling, and the Court is functus officio.

363. It is also necessary to address paragraph 50 of Mrs Marshall's written submissions, in which she stated:

> *"...With the utmost respect to the court, whether and to what extent the Mother lied about the content and import of the emails and whether the Father had accessed them without her consent is not a central or even tangential issue of this Leave to Remove proceedings..." [Emphasis added]*

364. This submission is untenable. If the content of the emails were irrelevant, it is unclear why the Mother considered it necessary to bring the Imerman Application in the first place. She pursued that application at considerable expense, seeking to exclude the very images she now claims were of no significance. That position is inconsistent with the time and resources devoted to seeking their exclusion. The only reasonable conclusion is that the content of the emails was indeed central to her case."

30. Accordingly, I am of the view that these intended grounds of appeal are bound to fail as I do not accept that the Court was '*plainly wrong*' in exercising its discretion. Moreover, I do not accept that the Mother's position following the substantive hearing of the LTR Application on the basis of the interlocutory decision being 'wrong' cannot be successful for that reason alone.

(D) Errors in Assessing Relevance and Scope of the Disputed Evidence: Ground (4)

31. This ground concerns the Mother belief that the Court's erroneous conclusion that the disputed emails were central to the issues in the wider proceedings, despite their limited relevance to the welfare issues to be determined.

32. For the same reasons set out in paragraphs 22 to 30 above, this ground of appeal is bound to fail.

(E) Error of Law and Misinterpretation of Legal Principle: Ground (11)

33. This ground relates to what the Mother says is the Court's misinterpretation and misapplication of the guidance in *L v K*, particularly in relation to counsel's duties.

34. Paragraphs 52 and 53 of the Imerman Ruling are the relevant paragraphs Counsel criticize and state as follows:

"*52. For the avoidance of doubt, both counsel noted during oral submissions that they were unable to find any case authority that addressed circumstances where the party accused of wrongly accessing confidential information of the opposing party with a finding that confidentiality was deemed to be waived due to the accusing party giving authority/access to the confidential information/documents. In such circumstances, which now arise in this case, guidance was requested as to the correct procedure for counsel considering the protocol set out in L v K2 to follow where a firm's client has advised the attorneys that the confidential information has been obtained with the authority of the spouse.*

53. In my view, the duty of counsel in such instances would not fall within the remit of L v K. It was clear to the attorneys for the Husband how the Husband obtained the images of the Wife's work emails, i.e. with the permission of the Wife. Therefore,

had I found in favour of the Wife that the Husband obtained the images unlawfully, I still would not have admonished Counsel for not following the usual protocol of L v K given the explanation provided to them by their client." [Emphasis added]

35. Upon reviewing Mrs Marshall's written submissions for the Imerman Application, paragraph 31 discusses the absence of guidance in Bermuda concerning the obligations of attorneys who come into receipt of material falling within the scope of the Imerman principles. Paragraph 31 states as follows:

> "***Disputed Documents and Procedure***
>
> *29. The Court is referred to G v G[3] which sets out the appropriate procedure to be followed when a lawyer receives documents to which 'Imerman' may apply. In the case before the court it is stated that the pdf s were provided to Richards on the 27th April after the metadata had been destroyed. Moreover H's evidence has been that W permitted him to view the emails and to copy them which is a to have been the instructions he gave to his attorneys. As such this aspect of matters appears to be a moot point.*" [Emphasis added]

36. Given that Mrs Marshall herself submitted that the guidance was rendered "*moot*" by the Father's evidence, it is difficult to discern any basis upon which this ground of appeal could succeed, the Court's finding at paragraph 53 of the Imerman Ruling being entirely consistent with that submission.

(F) Errors in Costs and Exercise of Discretion: Ground (12)

37. In this ground the Mother challenges the Court's costs order based on failure to hear the parties, provide reasons, or follow the usual costs approach in children-related proceedings.

38. The costs order against the Mother was made in the Court's discretion based on its findings. It is not accurate that as the Imerman Application was an *"...interim injunction originating in proceedings in respect of the parties children, that the convention is that each party pays their own costs*".

39. As referenced in paragraph 15 above, an Imerman type application seeks injunctive relief from the Court surrounding strictly evidentiary disputes. The fact that the substantive issue surrounds Children, in my view does not create an impenetrable barrier to costs being awarded to a successful party.

40. In any event, it could be said that despite Counsel giving indications at the close of their respective submissions to the Court that costs should be awarded to his and her respective

[3] G v G is a case relied on by Mrs Marshall at the Imerman Hearing which therein cites and relies on the principles set out in *L* v *K*.

clients, it is arguable that based on the findings made, Counsel for the parties should have been given further opportunity to address the Court again on the issue of costs. I will therefore grant leave to the Mother to pursue this ground of appeal.

(G) Cumulative Error / Overall Unfairness: Ground (13)

41. This ground asserts that, taken together, the Court's findings of fact, legal determinations, and discretionary decisions were wrong in law and/or plainly wrong in the exercise of discretion.

42. This is not a freestanding ground of appeal and as such there is nothing arising that requires further comment.

LEAVE TO APPEAL THE LTR APPLICATION

(A) Mischaracterization of Evidence and Parties' Positions and Their Consequences: Grounds (1), (7) (11) and (12)

43. In this category, the Mother is challenging the substantive orders imposed, particularly the '*restrictive*' and alleged '*punitive*' nature of the Mother's contact arrangements with the Children, which she says is inconsistent with the evidence and the Father's intention to have shared care.

44. It is widely recognised that relocation cases are among the most difficult decisions a court is required to make, not only because of the finely balanced and fact-sensitive welfare considerations involved, but also because the outcome will almost inevitably leave one or both parties dissatisfied. The Court is not constrained to grant the precise relief sought by either party. Rather, its discretion is broad, and with that breadth comes the inherent risk of litigation: that no party emerges entirely content with the result. Indeed, the Court's paramount consideration is that of the Children over and above all other considerations which includes the desires of the parents.

45. Further, the Court was clear as to the respective proposals advanced by each party. A 50/50 division of the Children's care, with the Mother and Father residing in two different jurisdictions, would be impracticable to implement and contrary to their best interests.

46. Whilst it may be said that another Court, including the Court of Appeal may have come to a different conclusion, this is not enough. This ground of appeal is bound to fail.

(B) Reliance on Flawed and Biased Expert Evidence: Grounds (2), (3), (5), and (6)

47. This category relates to what the Mother says the Court's improper reliance on the Court Appointed Social Worker's (**CASW**) evidence despite demonstrated "*bias*", misunderstanding

and deficiencies in the Social Inquiry Report (**SIR**), as well as procedural failings in how that evidence was presented and considered.

48. As previously addressed in Category (C) of the intended grounds relied on for the Leave to Appeal the Imerman Ruling, the Court extensively discussed and analysized the Mother's position in the LTR Application that the findings made in the Imerman Ruling were "*wrong*".

49. Additionally, I refer to paragraphs 327 to 341 of the Reasons for Refusal of the LTR Application which specifically speaks to the Imerman Ruling raised in the context of the CASW's recommendations. This section discusses Mrs Marshall's arguments regarding the Mother's position that the CASW should have been given a Lucas Direction by the Court prior to the draft Imerman Ruling being circulated to her. Given the length of the passages, I do not set them out in full here; however, paragraph 341 provides a helpful summary of the Court's position as follows:

> "*341. For these reasons, the Mother's criticisms relating to the Imerman Ruling, the circulation of the draft judgment and the alleged influence on the CASW are rejected. For the avoidance of doubt, the following findings are made:*
>
> *(i) Mrs Marshall did not request such a direction at any stage of the proceedings.*
>
> *(ii) In children matters where factual disputes have been resolved in a fact-finding process, social workers and litigation guardians are expected to prepare their reports using the factual matrix established by the Court.*
>
> *(iii) A Lucas Direction is a judicial tool used by the Court when assessing witness credibility. It is not directed to professionals who prepare expert reports.*
>
> (iv) *There was no basis for issuing a Lucas Direction to the CASW and it was neither required nor appropriate.*"

50. In the Reasons for Refusal of LTR Application the Court made the following findings at paragraphs 335 and 336 as follows:

> *"335. It is also relevant that the hearing of the LTR Application was scheduled to begin on 26 September 2025, <u>fifteen days later, and the Mother did not file an application for leave to appeal the Imerman Ruling</u>. If she genuinely believed that the findings under the heading "Findings and Analysis" were obiter, it is unclear why her Counsel did not seek clarification from the Court. <u>I regard this</u>*

as another example of the Mother's litigation strategy, which involved seeking to rely on this asserted misunderstanding to advance later applications.

336. It is notable that, after the Court clarified the Imerman Ruling at the outset of the hearing on 26 September 2025, the Mother did not then promptly seek leave to appeal. Instead, throughout the hearing she maintained the position that the Court had erred in making the findings." [Emphasis added]

(C) Failure to Properly Assess Relevant Evidence and Welfare Factors: Grounds (4), (8) and (9)

51. The Mother, in this category of intended grounds, submits there were failures by the Court in its welfare analysis, including inadequate consideration of the children's wishes and feelings, imbalance in assessing parental relationships, the Mother's parenting capacity and disregard of unchallenged evidence relevant to the necessity of relocation.

52. A significant portion of the analysis carried out by the Court in determining what was in the best interests of the Children was by utilizing the guidance of the UK Welfare Checklist[4]. The UK Welfare Checklist comprises of the following factors:

(i) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);

(ii) his physical, emotional and educational needs;

(iii) the likely effect on him of any change in his circumstances;

(iv) his age, sex, background and any characteristics of his which the court considers relevant;

(v) any harm which he has suffered or is at risk of suffering; and

(vi) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs.

53. Each of these factors were thoroughly considered and analyzed by the Court in light of its factual findings, as part of its determination of what was in the best interests of the Children. Further, the Court was exercising a discretionary function, and the Mother was therefore required to demonstrate that the findings were "plainly wrong". In those circumstances, these intended grounds of appeal are bound to fail.

[4] It is trite law that the Bermuda Courts, to make determinations regarding the welfare of a child, utilize the statutory guidance in the UK defined as "The Welfare Checklist" as helpful guidance.

(D) Error in concluding there was no necessity for the Mother to return to the United States: Ground (10)

54. The Mother's complaint in Ground 10 is as follows:

> "*The Judge erred [in] concluding at paragraph 24 of her Decision that there was an absence of demonstrated necessity, referring to the Mother's return to [the United States], where the independent sworn evidence of [SP] was unchallenged as the Father, who initially had requested that the deponent be presented for cross examination, declined to hear her attend for that purpose. Her evidence was thus unchallenged, and the conclusion drawn that there was an absence of demonstrated necessity could not be properly drawn. The Learned Judge's hostile 15 September 2025 Ruling in the Imerman Application clouded and biased her to such an extent that no account was taken by her of that uncontroverted and unchallenged evidence.*"

55. As it relates to the finding at paragraph 24 of the LTR Decision, I refer to paragraph 23 above wherein the relevant section of the Reasons for Refusal of the LTR Application were quoted and address this specific complaint.

56. It is clear that the Court emphasized, and that Counsel were informed in advance of the hearing, that while SP's affidavit was permitted into evidence, no reliance would be placed on any material within it that touched upon findings already made in the Imerman Ruling, which the Court could not and would not revisit.

57. As previously addressed throughout this decision, any grievance the Mother had with the Imerman Ruling ought to have been pursued by way of appeal. In circumstances where no appeal was brought, it would be contrary to principles of natural justice to permit a collateral challenge to a decision in respect of which the Court was at the time *functus officio*.

58. As it relates to the suggestion that a court becomes "*clouded and biased*" by reason of findings made in an interlocutory application within the same proceedings is, at best, difficult to sustain. Were that proposition correct, any party dissatisfied with an interlocutory decision could contend that the judge was thereafter disqualified from determining the substantive application on grounds of apparent bias. That cannot be the law.

59. Accordingly, this ground of appeal is bound to fail.

(E) Procedural Unfairness: Ground (13)

60. The Mother alleges delay in delivering judgment and insufficient reasoning, which is said to have prejudiced the Mother's ability to appeal and impacted the welfare of the children.

61. I am not satisfied that this discloses an arguable ground of appeal and leave to appeal is therefore refused on this ground.

CONCLUSION

62. Considering the above, the Mother's applications for Leave to Appeal the Imerman Ruling and Leave to Appeal the LTR Decision are both dismissed, save for leave being granted in relation to the order for costs made against the Mother in the Imerman Ruling.

DATED this **23rd** day of **April 2026**

ALEXANDRA WHEATLEY
ASSISTANT JUSTICE OF THE SUPREME COURT