



Case No: B4/2019/1872

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT IN READING
(HIS HONOUR JUDGE MORADIFAR)
RG17P00783

Neutral Citation number: [2019] EWCA Civ 1559

The Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 3 September 2019

Before:

LORD JUSTICE HENDERSON
LORD JUSTICE COULSON
and
LORD JUSTICE BAKER

IN THE MATTER OF NASRULLAH MURSALIN

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Neil Mercer (instructed by Public Access) appeared on behalf of the **Appellant**

The parties to the family court proceedings did not appear and were not represented

Judgment
(Approved)

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LORD JUSTICE BAKER:

1. This is an appeal against an order by HHJ Moradifar made in the Family Court in Reading on 12 July this year, under which he committed the appellant to prison for six months but suspended the order until 11 January 2020.
2. The appellant is a member of Lincoln's Inn and hopes to train and practice as a barrister. At the time of the hearing, he was working as a paralegal for a firm of solicitors called Gull Law Chambers in Hounslow. The firm specialises in immigration law and family law. The appellant's principal was a solicitor in the firm called Riaz Gull. In the course of his employment, the appellant assisted in the preparation of a case in the Immigration and Asylum Tribunal on behalf of a client of the firm, hereafter referred to as "Mr M". In the course of his work on the case, the appellant prepared and filed a bundle of documents to the Tribunal. It is said that the documents included a number of papers from family proceedings involving Mr M's children. Pursuant to section 12 of the Administration of Justice Act 1960 and Rule 12.73 of the Family Procedure Rules 2010, the disclosure of such documents in those circumstances would be a contempt of court unless the Family Court has given permission for the disclosure. No such permission had been sought or granted in this case. In due course, Mr M's appeal to the First-tier Tribunal was determined by a judge who, at the conclusion of his judgment dated 8 May 2019, made the following observation, which I cite from Judge Moradifar's subsequent judgment in the case under appeal:

"the behaviour of the appellant's legal representatives, Gull Law Chambers, I am satisfied falls a long way below that expected of solicitors. They have included in the appeal documents a court document that contains a very clear warning about publication and they seem unable to either read that or have any knowledge of

family law proceedings or indeed very limited knowledge of immigration proceedings given their repeated applications for adjournment in order that the Family Court proceedings are determined. I request a copy of this decision is forwarded by the appropriate Immigration and Asylum Chamber officer to...Family Court case number ...in order that the relevant family judge can consider the position and whether contempt proceedings are appropriate or not."

3. Shortly afterwards, the family proceedings resumed before a recorder in the Family Court in Reading. The recorder's attention was drawn to the First-tier Tribunal judge's remarks and, as a result, he included the following direction in the order made at the conclusion of the hearing:

"Gull Law Solicitors is to file a statement by 16:00 of 21 June 2019 dealing with why documents from the family proceedings were disclosed in the immigration proceedings and whether any application was made for permission from the Family Court to rely on the documents in the family proceedings in the immigration proceedings."

4. According to the appellant, in response to this direction, Mr Gull directed him to draft a statement in which he said *inter alia* that the family documents had been included in the bundle for the Tribunal because the appellant thought he was complying with directions made by the Tribunal judge; that the documents from the Family Court had been included in the bundle in good faith; that it was a genuine error committed by the appellant and it was never his intention to bypass "the protocol of the Family Court"; that the documents had been submitted to the Immigration Tribunal after taking instructions from the client, who wanted them included because he wanted to show the Tribunal that there was a family hearing due to take place; and that the appellant had the utmost respect for the Family Court and apologised for his misunderstanding of the directions.

5. Following receipt of the statement, the matter was listed before HHJ Moradifar, the designated family judge for Reading. It was not clear to me from the papers filed in connection with this appeal exactly how that listing occurred. We were told by Mr Mercer, who appears for the appellant today, that some sort of written direction was given to Mr Gull to attend the hearing and that he arranged for the appellant to attend as well. Certainly, no notice of any sort was served on the appellant himself. A transcript of the hearing before Judge Moradifar has been prepared for the purposes of this appeal. A barrister (not Mr Mercer, I should add) appeared at the hearing purporting to represent Mr M, Mr Gull and the appellant. At the point when the case was called on, the appellant had not arrived. At the outset of the hearing, the judge pointed out to the barrister that he was in a position of conflict and gave him an opportunity in a short adjournment to consider his position. Before doing so, however, and at a point when the appellant had still not arrived, the judge referred to the appellant's statement drafted as set out above, and said this:

"It is not a sworn testimony, so he has to go in the witness box, take the oath and confirm the accuracy of that as being true. Having done so, I suspect there will be other questions asked of him. I will have to give him a warning in advance that not only is he potentially facing a term of imprisonment for his breach if admitted or found, but also, if it is found that he has lied in his sworn testimony, there may be a prosecution for charges of perjury. So, in these circumstances, I would want first to ask him if he wants to have representation before he gets in the witness box and, if he does, subject to hearing from anyone else, I am highly likely to give him the opportunity to find representation. It may not be that it is today and we will have to come back another day for that, but in the meantime, I will expect Mr Gull to report this to the Law Society, and the Law Society may also have a view about this."

6. After an eleven-minute adjournment, the hearing resumed with the appellant now present. The barrister informed the court that she was now representing Mr M and that

Mr Gull and the appellant would be representing themselves. The judge then asked the appellant to stand up, and the following exchange took place:

"JUDGE: I have read your statement. For me to formally accept it, because it is not a sworn document I have to ask you to take the oath and confirm it as true whilst you are under oath, okay? It may be that you will be asked other questions about what has happened. What is at stake here is potentially a very serious breach of the court rules which in itself may lead to a committal which can carry a term of imprisonment of up to two years. Depending on what you say under oath and if it is proven or shown that you have potentially lied about your conduct under oath, there may be a referral to the Chief Prosecutor in the Attorney General's Office, who may or may not decide to investigate charges of perjury. This is the limitation that the Children Act puts on these matters, although the committal process in the court is wider than that. So, with all those factors in mind, if I ask you to take the oath, would you like to have the opportunity of seeking independent legal representation and legal advice first or do you want to proceed today?"

THE APPELLANT: I want to proceed today, sir.

JUDGE: Okay, can you please therefore then get in the witness box and take the oath?"

7. The appellant then gave evidence and was asked questions by the judge. He agreed that he was admitting a breach of court rules by disclosing Family Court papers to the First-tier Tribunal, adding that he had done so under Mr Gull's instructions. The barrister (acting of course on behalf of Mr M) then asked the appellant whether he wished to apologise, and the appellant said that he did. The judge then asked Mr Gull if there was anything he wanted to ask. In response, Mr Gull made a short speech in which he apologised to the court, accepted that the Family Court Rules had been broken and referred to the great pressure and distress his client had been under. The judge then asked the appellant if there was anything he wanted to say, to which the appellant

replied no. The judge then asked the appellant to stand up and gave what the transcript of the hearing produced to us describes as his "ruling" in the following terms:

"Mr [M], I find that you have breached the Family Court Rules by supplying documents without the court's permission or in accordance with any existing protocols which would permit you to disclose the said documents to those who are not involved or otherwise party to these proceedings. This is a serious breach of the Family Procedure Rules and the general family rules, and only weeks ago I gave a publicised judgment about the specialism that is required for those who undertake family work and appear in these courts, and, in the circumstances, I find that you have breached it, and it falls to me to pass a sentence. This breach is so serious that in my judgment it can only attract a custodial sentence, and in those circumstances, having taken into account all that you have said and bearing in mind all that has been said by Mr Gull, who is also taking responsibility as your supervisor and the principal lawyer in Gull Law Chambers Limited, I sentence you to a time of imprisonment for six months but suspend that for the same period of six months, and it will be dismissed at the end of that if no other matters have occurred in the intervening period."

8. The judge then directed Mr Gull to report himself to the Law Society (meaning presumably the Solicitors Regulatory Authority) and to make them aware of the breaches that had occurred. Subsequently, the judge prepared a judgment in which he summarised the relevant history as I have done. On the issue of the appellant's legal representation, he said in the judgment:

"Mr [M], I have explained to you the serious nature of this breach and the range of possible sentences that included a potential term of imprisonment. I gave you the opportunity of an adjournment to seek independent legal advice and representation. I have reminded you that you will be entitled to legal aid for such advice and representation. You declined this opportunity and stated that you wished for the matter to be dealt with today."

9. The judge then concluded his judgment in the following terms:

"7. I note the unchallenged facts as are set out in your statement. I note that you are not legally qualified and was working under the supervision of a supervising partner Mr Riaz Gull at Gull Law Chambers. I further note that you have admitted to breaching the Family Procedure Rules (2010) at the first available opportunity. I have no doubt that such a breach was born out of a genuine ignorance of the relevant rules and a misunderstanding of what is a 'protocol request'.

8. The rules against disclosure are in place for very good reasons that include the protection of the parties and the children who are the subject of court proceedings in the Family Court. These rules are fundamental to the operation of our justice system and for the protection of the subject children. Therefore, the breach of these rules cannot be taken lightly. The very document from the family case that was disclosed clearly states that it may not be disclosed. Therefore, you could not have been in any doubt about the need to consult and to seek advice.

9. Notwithstanding the relevant factors that I have set out above, given the gravity of this breach, in my judgment the only sentence that is commensurate to the gravity of this breach is one of a custodial sentence. Having regard to all the circumstances of the case and the range of my sentencing powers, I sentence you to a six-month term of imprisonment that is to be suspended for six months beginning today."

10. A committal order was duly drawn up reflecting the judge's decision, which stated *inter alia*:

"Whereas [Mr M] has been suspected of a breach of the Family Procedure Rules (2010), the court accepted [Mr M's] evidence on oath that he was in breach of the Family Procedure Rules (2010) by disclosing comments from the family proceedings to a third party without obtaining the court's permission, and the court having taken into account the circumstances as set out in his statement dated 20 June 2019 which was confirmed as true and accurate under oath, and the court further noting the comments of the judge of the First-tier Tribunal ... disposal, it is ordered that [Mr M] be committed to prison for a total period of six months suspended until 11.59 on 11 January 2020."

11. The appellant filed a notice of appeal against this order. His grounds of appeal in the notice included the following matters: that he did not have legal representation and did not understand what was going on at the hearing, hence his case was not put before the court in the appropriate manner; that he could not give all the relevant facts to the Family Court at the hearing as he did not have proper advice; that he was under the apprehension that Mr Gull was looking after his interest (however, this was not the case; Mr Gull made him take the liability in order to save himself); that he was not even aware that it was actually contempt proceedings on 12 July 2019 as he did not receive any notice regarding the contempt proceedings; that he was not aware as to exactly what the hearing was about; that he was surprised with what happened on the day as he did not have any legal representation; that he wants to start a career as a barrister and, after the judgment had been passed against him, he has had to cancel his booking for exams in order to defend himself; that if this judgment is not set aside, then "his dream of becoming a barrister would be shattered".

12. Permission to appeal is not required for an appeal against a committal order, and the matter has therefore been listed before us today. At the hearing, the appellant has been represented by Mr Mercer, who in his helpful skeleton argument has set out a number of criticisms of the conduct of the committal process in this case, in particular:
 - (1) The failure to give the appellant proper notice of the contempt allegation and the fact that he was facing an application to commit him to prison, the recorder's direction having been simply an order for the filing of an explanatory statement and no other notice having been issued or served on the appellant.
 - (2) The failure to particularise the alleged contempt, no attempt having been made to identify precisely the documents which had allegedly been unlawfully disclosed.

(3) The failure to give the appellant a fair opportunity to consider whether he wished to be legally represented. It is said that the judge ought to have appreciated that he did not understand what was going on and, in those circumstances, should have adjourned the hearing.

(4) The failure to ensure the allegations were put expressly to the appellant and to establish whether it was he who was responsible for any unauthorised disclosure rather than Mr Gull.

(5) By requiring the appellant to go into the witness box, thereby compelling him to give evidence.

(6) Further complaint is made as to the sentence imposed. It is submitted that the judge failed to give the appellant a proper opportunity to put forward any matters in mitigation and then passed a sentence which was unduly harsh.

13. In support of the appeal, Mr Mercer referred us to the relevant provisions of the Family Procedure Rules, in particular Rule 37.27, and to a number of authorities as well as the Practice Direction of the previous Lord Chief Justice dated 26 July 2015. Rule 37.27, insofar as relevant to this appeal, provides:

"(1) Unless the court hearing the committal application or application for sequestration otherwise permits, the applicant may not rely on –

(a) any grounds other than –

(i) those set out in the application notice ...

(2) At the hearing, the respondent is entitled –

(a) to give oral evidence, whether or not the respondent has filed or served written evidence, and, if doing so, may be cross-examined;
and

(b) with the permission of the court, to call a witness to give evidence whether or not the witness has made an affidavit or witness statement.

(3) The court may require or permit any party or other person (other than the respondent) to give oral evidence at the hearing.

[...]

(5) The general rule is that a committal application ... will be heard, and judgment given, in public ..."

14. This court has repeatedly stressed that committal proceedings are of the utmost seriousness and that it is imperative that the strict procedural rules governing such proceedings must be complied with. One recent example in a family case, albeit on somewhat different facts from the present case, is the decision of this court in *Re L (a Child) Re Gous Oddin* [2016] EWCA Civ 173, in which Vos LJ (as he then was) said at paragraph 75:

"The process of committal for contempt is a highly technical one as this case shows. But it is highly technical for a very good reason, namely the importance of protecting the rights of those charged with a contempt of court. In cases of an alleged breach of a previous court order, persons should not be at risk of being sent to prison for contempt of court unless (i) they have been served, or otherwise made fully and properly aware in accordance with the rules, of the order they are said to have breached *before* the alleged breach occurs, (ii) the fact that they have been served or so made aware is established before the committing court, (iii) they have been informed before the hearing of the precise details of the breach that they are alleged to have committed, (iv) they have been informed of their right to remain silent before they give evidence, if they choose to do so, and (v) the allegation of contempt is proved to the criminal standard. The principles as to the need for service have always been axiomatic in civil proceedings where injunctions are frequently made against defendants in their absence. It can be no different in family proceedings."

15. In this case, it seems prima facie that there may have been a breach of the Family Procedure Rules in the form of a disclosure of documents from the family proceedings without the court's permission. The consequences of that disclosure may not have been as serious as in other cases, for example where disclosure has inadvertently identified the whereabouts of a child at risk of abduction or the location of a victim of domestic abuse to a perpetrator. I have come across such cases in which inadvertent disclosure has had extremely serious consequences. It seems that no such consequences flowed from the disclosure here, but any disclosure of confidential information from family proceedings is unlawful. Furthermore, it seems that the judge in this case had had cause to address this problem in the past, and in such circumstances, it is unsurprising that he was concerned about the disclosure which had apparently occurred in this case. Nothing I say hereafter should be interpreted as excusing the unlawful, unauthorised disclosure of confidential Family Court documents.
16. I regret to say, however, that it is plain that there were a number of procedural errors in the process in this case which inevitably lead me to conclude that this appeal must succeed.
17. First, it is to my mind unclear whether or not the hearing was conducted in open court. There is nothing I can see in the transcript of the hearing or the subsequent judgment or on the face of the committal order itself to indicate whether or not the hearing was in open court. The appellant tells this court through Mr Mercer that nobody in court was robbed. It may be of course that the hearing was in fact conducted in open court, but the default position in the Family Court in children's proceedings is that they will be heard

in private. If the court sits in open court, that fact must be recorded on the face of the order.

18. Secondly, it is clear that the appellant was given no proper notice whatsoever that he was being accused of contempt of court or of the specific allegations against him. It is possible that some people in his position might have realised that they were being accused of contempt of court, but the appellant says he did not understand the significance of what was being said. The rules require that before any person can be committed for contempt, he or she must be given proper notice of the application and details of the order they are said to have broken and the specific allegations of breach. In this case, no such notice was given to the appellant. A direction was made requiring his employer to file a statement explaining what had happened, and his employer then directed the appellant to draft and sign the statement, and then, in circumstances which are unclear to me, a hearing was arranged which the appellant attended. On any view, that was insufficient notice. In those circumstances, I do not consider the warnings given by the judge about the consequences of a finding of contempt or the exchanges set out above about legal representation to be anything like adequate to protect the appellant's rights. The proper course which should have been adopted at that stage was either (a) to have issued a reprimand to Mr Gull, who seems to have been principally responsible for any unauthorised disclosure, or (b) if the judge considered the matter merited committal proceedings, to have particularised the alleged contempt and then adjourned the hearing to enable the appellant to consider his position and obtain legal advice. It was not sufficient for the judge to proceed simply because the appellant agreed that he could do so.

19. The failure to particularise the allegations led to a further defect in the process. So far as I can see from the papers, the judge was never shown the specific documents from the family proceedings which had been disclosed to the First-tier Tribunal. In those circumstances, it was impossible for him to gauge the seriousness of the alleged breach. For my part, I am unclear about exactly what documents from the family proceedings were disclosed to the Tribunal. According to a letter subsequently sent by Mr Gull to the Solicitors Regulatory Authority, they included a Cafcass report, but without considering the documents in detail, the seriousness of any breach of the court rules could not be assessed.

20. In addition, there is little sign that the judge considered the extent of the appellant's culpability for what had allegedly occurred. He clearly appreciated that the appellant was an unqualified employee. At one point, he made some criticism of the way in which some solicitors' firms use staff in that way. The judge was also of the view as set out above that Mr Gull may have infringed his professional code of conduct, hence his direction that he report himself to the professional authorities. But it does not seem to have occurred to the judge that Mr Gull may have been the real culprit. That omission stemmed from the failure to particularise the alleged contempt.

21. Finally, the errors set out above were compounded by the judge's direction to the appellant to go in the witness box. It seems he overlooked the fact that a defendant to an application for committal is not obliged to give evidence. The principle is of long standing, although it has been overlooked in other cases; see, for example, the case of *Re L* cited above. This is an example of the many procedural pitfalls which exist in committal proceedings. All the more reason, therefore, not to proceed in the summary

fashion adopted by the judge in this case but rather to adjourn to allow for proper presentation and consideration.

22. In these circumstances, I have no doubt that this appeal must be allowed and the suspended committal order set aside.

23. This case illustrates again the very great care which all courts have to take when dealing with allegations of contempt. I am well aware of the great pressures that family court judges are under, particularly designated family judges like Judge Moradifar, managing a very busy family court. But the consequences of the infringement of the procedural rules about contempt proceedings may be just as serious as the consequences of unauthorised disclosure of court documents. In this case, it is possible that the committal order against the appellant might have prevented him pursuing his ambition for a legal career. As it is, if my Lords agree, the order against him will be expunged from the record as a result of his appeal being allowed.

LORD JUSTICE COULSON:

24. I agree that, for the reasons given by my Lord, Baker LJ, this appeal should be allowed. In my view not one of the five conditions identified by Vos LJ in *Re L* was met in this case. In consequence no part of these committal proceedings was fair or transparent. The resulting order was manifestly unjust and must be quashed.

LORD JUSTICE HENDERSON:

25. I also agree with both judgments.

Order: Appeal allowed; order for costs reserved

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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