Neutral Citation Number: [2023] EWCA Civ 148

Case No: CA-2023-000020

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM FROM THE HIGH COURT (FAMILY DIVISION)
SIR JONATHAN COHEN
FD17P00043
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/02/2023

Before :

LORD JUSTICE BEAN
LORD JUSTICE MOYLAN
and
LORD JUSTICE LEWIS

- -

Between :

MOHAMMED EL ZUBAIDY	**Appellant**
- and -	
TANYA BORG	**Respondent**

- -
- -

Richard Bentwood (instructed by **Nicholls & Nicholls**) for the **Appellant**
Clare Renton (instructed by **Charles Strachan Solicitors**) for the **Respondent**

Hearing date: 9 February 2023

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Approved Judgment

This judgment was handed down remotely at 11.00am on 15 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Bean :

1. Mohammed Said Massoud El Zubaidy and Tanya Borg had three children, whom I will call A, B and C. A and C are girls, B is a boy. In 2015 the father took A and C to Libya. That was the last the mother saw of them. Since then the father, who returned to the United Kingdom with B, has flouted a series of orders of judges of the Family Division requiring him to bring about the return of his daughters to this jurisdiction. Prior to the order which is the subject of this appeal he had been sentenced on four occasions for a total of five years for contempt of court, though in each case he was released after serving half of the nominal sentence. On 16 December 2022 Sir Jonathan Cohen, sitting as a judge of the Family Division, imposed a further term of 12 months imprisonment. This is the father's appeal against that sentence.

Chronology

2. The father was born in Libya, the mother in Malta. They married in Malta in June 2000. A (who was declared a vulnerable adult by Mostyn J in 2018) is now 22; C is 11. B is 17: his 18th birthday will be in June of this year..

3. In February 2015, the mother agreed to the father travelling with all three children to Tunisia, to see their paternal grandmother. The father took them instead to Libya and refused to return them.

4. In October 2016, the father returned to England with B who has been here since then. A and C remain in Libya, so far as we know.

5. On 26 January 2017, following a hearing in the High Court, the children were made wards of court. The Court made tipstaff passport orders and a return order.

6. A series of orders were subsequently made to try to secure the return of the children, all of which have been unsuccessful:

    i) On 10 August 2017, Moor J sentenced the father to 12 months imprisonment for a series of breaches of orders which included failure to make the children available via telephone for the mother and failure to bring about the return of the children: [2017] EWFC 58.

    ii) On 26 February 2018, Mostyn J sentenced the father to another 12 months: [2018] EWHC 432 (Fam).

    iii) On 16 November 2018, Hayden J sentenced the father to two years imprisonment for 10 breaches of successive orders.

    iv) On 30 November 2021, Poole J sentenced the father to a further 12 months imprisonment for failing to execute a notarised consent and failing to use his best endeavours to procure the children's return: [2021] EWHC 3227 (Fam).

7. Meanwhile, the mother went to Libya in March 2019 to attempt to secure the return of A and C herself. She brought proceedings against the paternal grandmother who was holding the children at that time. On or about 7 May 2019, Almadiana District Court in Libya made a custody order in favour of the mother. However, the paternal grandmother

failed to produce the children and has since been uncontactable, the children's whereabouts now being unknown.

8. On 1 August 2022, Roberts J made two orders, each of which carried a penal notice, as follows:

> "13. The respondent father shall use his best endeavours to execute, and to serve upon the mother's solicitor, a duly attested consent to [A] (born on 28 February 2000) and [C] (born on 24 October 2011) travelling from Libya with the mother without him accompanying them by no later than 4pm on 15 August 2022. The document must be signed, dated and witnessed by an official of the Libyan Embassy/ Consulate in London.
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> 14. The father shall use his best endeavours on a continuing basis to procure the return to the jurisdiction of:
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> a. [C] born 24 October 2011
>
> b. [A] born 28 February 2000

9. These orders were served on the father by email on 13 and 14 September 2022. The mother's solicitors informed the father that they would invite the court to commit him to prison for contempt if he did not reply to them by 1pm on 16 September 2022 providing an explanation for non-compliance or delay in complying with the orders.

10. The orders were later repeated at two subsequent hearings held by HHJ Scarratt and Peel J with adjusted time scales for compliance. On 14 October 2022, Judge Scarratt extended the father's time for filing evidence. On 11 November 2022 Peel J adjourned the application to enable the father to obtain legal representation.

11. Despite the steps taken above, the father failed to comply with any of these orders.

The decision of the judge

12. At a hearing on 16 December 2022, Sir Jonathan Cohen held that the father was guilty of contempt of court for breaching the two orders dated 1 August 2022 and imposed sentences of 12 months imprisonment for each breach, such sentences to run concurrently and commence immediately.

13. The father accepted that he was in breach of the first order for failing to provide the documentation. Concerning the second order, the father made three submissions:

    i) The alleged breach was no more than a duplication of the first in so far as it referred solely to failure to execute documentation.

    ii) He did not have the necessary intent since he filed no evidence and there was nothing else he could do.

    iii) The consequences of breaching the second order were otiose as they added nothing.

14. The judge rejected these arguments and held that the father had clearly accepted breach of the second order since he had accepted that he had taken no steps at all.

15. The father offered no mitigation but instead submitted that any punishment for contempt would be ineffective in so far as it includes a coercive element since he was resolute that he would do nothing to help procure the return of the children. He highlighted the following two points:

    i) The maximum sentence under the Contempt of Court Act 1981 is 2 years imprisonment. There can be successive contempts and terms but the court should not ignore the legislative intent of the Act. The father has already received over twice the maximum sentence.

    ii) A useful signpost is that if the father were convicted of abduction in a criminal court, the maximum sentence would be 7 years with a 1/3 reduction for a guilty plea, leaving a maximum term of 56 months. The father has already served more.

16. The judge said:

> "12. It is useful to remind oneself that the removal of a child overseas so as to deprive the other parent of the care of the child, and the child its right to be cared for by the absent parent, is a very serious offence. Its consequence to both the child and the left behind parent can be catastrophic. I still recall the hearing that I conducted some four years ago when I dealt with an application by the father to purge his contempt. The distress exhibited by the mother at her plight was heart-breaking. I have no reason to think that her distress is any the less now.
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> 13. Secondly, by way of background I say this. The mother has an order of the Libyan court granting her custody of the children. But notwithstanding the order of the court the children are unable to leave the country without the consent of the father as a matter of Libyan law. Therefore not only is the father demonstrating his contempt of the courts of England and Wales, but he is doing so in relation to the law of his own home country.
>
> 14. Thirdly, he will not even let the mother know where the girls are. She has no means of contacting them and has not been able to speak to them for years.
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> 15. He repeatedly has breached court orders. It is a matter of no concern to him whatsoever.
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> 16. The children are being kept in a country, which the father himself described as dangerous and where public services are minimal. They are stranded with no access to either parent.

17. The girls are separated not just from their mother but from their brother as well. It is said by the father that they are in the care of the paternal grandmother but there is no way of confirming whether that is the case or whether the children are in good health or bad health.

18. In short, I regard this as about a bad a case as it is possible to imagine. It is against that background that I have to consider what impact the statutory provisions, to which I have referred, have upon sentence and how I should take into account the fact that one of the two purposes of a sentence of the court for contempt - namely the coercive element - is likely in this case to be toothless.

19. It is s.14 of the Contempt of Court Act 1981 that provides the maximum sentence of two years' imprisonment. In considering my sentence today I bear in mind the words of the Court of Appeal in *Re W (Abduction: Committal)* [2011] EWCA Civ 1196 and in particular paras.38 to 40 of the judgment of McFarlane LJ, as he then was. [The judge then cited passages from the judgments of Mc Farlane LJ and Hughes LJ in *Re W*, to which I shall return below, and continued:]

20. I accept that it is broadly the same breaches, albeit differently expressed, that have led to four sentences of imprisonment already. But the court cannot and is not bound by what may be the maximum sentence for any one individual contempt. If that was the case any parent in this situation could breach any court order, confident in the knowledge that they would only ever serve 12 months' imprisonment regardless of the serious consequences of their breach. Nor do I find the analogy with the sentencing powers under the Child Abduction Act to be precise. One very big difference is that whenever a civil contemnor is sentenced he may apply at any time to purge his contempt. That is to say he can come to court and say, "Do not punish me further because I will now obey the order." That does not exist in a criminal context.

21. Of course at any stage of his past sentences the father could have said, "I will now comply. Please release me." Indeed during his first term of imprisonment he did make such an application, albeit without merit, which came before me. It would be very dangerous if it were to be widely thought that a contemnor could escape punishment beyond a two year sentence, of which only one would be served, simply because that is the maximum that the Contempt of Court Act permits.

22. I recognise the force of the argument that enough is enough. That was the conclusion that Holman J reached in the case of *Button v. Salama* [2013] EWHC 4152 (Fam). I have read and

> re-read paragraph 24 of his judgment and his words, coming as they do from a very experienced judge, carry great weight.
>
> 23. Every case is fact specific and I cannot and will not overlook the wilful defiance of the court and the appalling consequences of his conduct. I recognise of course that one of the two rationales for punishment, namely the coercive element, is unlikely to have any effect. That is not to say that it is certain that it will have no effect, but the punishment is still appropriate.
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> 24. I hope the separation of the father from the parties' son for the first time since they came to live together might make him think again. If he does then he can apply to purge his contempt at any time."

Grounds of appeal

17. The Appellant advances one overarching ground of appeal subdivided into five specific grounds as follows:

> "The sentence imposed was manifestly excessive in all the circumstances. In particular, the judge erred in:
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> (i) failing to have proper regard to the legislative intent of s.14 Contempt Court Act;
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> (ii) failing to give appropriate weight to the previous sentences of imprisonment served for previous contempts, flowing from the same breaches as found in the instant case;
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> (iii) failing to give appropriate weight to the factors set out in *Re W (a Child) (Abduction: Committal)* [2012] 1 W.L.R. 1036;
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> (iv) failing to have appropriate regard to the fact that the coercive element of any sentence would be of nil effect;
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> (v) failing to have proper regard to the impact of any sentence on [B]."

Section 14 of the Contempt of Court Act 1981

18. Section 14 of the 1981 Act provides for a maximum sentence of 2 years imprisonment for a contempt of court as follows:

> "(1) In any case where a court has power to commit a person to prison for contempt of court and (apart from this provision) no limitation applies to the period of committal, the committal shall (without prejudice to the power of the court to order his earlier discharge) be for a fixed term, and that term shall not on any occasion exceed two years in the case of committal by a superior court, or one month in the case of committal by an inferior court."

Re W

19. The leading case on committals in the context of child abductions is *Wilkinson v Anjum*, better known as *Re W (Abduction: Committal)* [2011] EWCA Civ 1196; [2012] 1 WLR 1036. In that case, the father had previously been committed to prison for two years for failing to comply with an order to return his child and/or provide information as to the child's whereabouts. He appealed against a second committal order for 12 months' imprisonment given for his continued failure to do the same. The appeal was dismissed. McFarlane LJ, as he then was, held at [37] that successive terms of imprisonment can lawfully be imposed for further breaches of repeated orders:

> "37… As in the case of prohibitive injunctions, it must in my view be permissible as a matter of law for the court to make successive mandatory injunctions requiring positive action, such as the disclosure of information, notwithstanding a past failure to comply with an identical request. A failure to comply with any fresh order would properly expose the defaulter to fresh contempt proceedings and the possibility of a further term of imprisonment."

20. McFarlane LJ went on at [38-40] to set out the factors that the court should consider in deciding whether to impose a further sentence of imprisonment:

> "38. While such a course is legally permissible, the question of whether it is justified in a particular case will turn on the facts that are then in play. It will be for the court on each occasion to determine whether a further term of imprisonment is both necessary and proportionate.
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> 39. Part of the court's proportionate evaluation will be to look back at past orders and at the cumulative total of any time already spent in prison and to bear those factors in mind when determining what order is to be made on each occasion. The court should also have some regard, if that is appropriate, to the likely sentence that might be imposed for similar conduct in the criminal court.
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> 40. This is not however a licence for the courts to subvert the 1981 Act by blindly making successive committal orders for the remainder of a contemnor's natural life, as has been suggested on behalf of the father. It is a proportionate, stage-by-stage, hearing-by-hearing approach relying upon the discretion and judgment of the judge at each hearing."

21. Hughes LJ, as he then was, added at [51] and [53]:

> "51. Second, there is no doubt that there may be successive or repeated contempts of court constituted by positive acts disobeying an order not to do them. For my part, I am quite

> satisfied that there may also be consecutive or successive contempts of court constituted by repeated omissions to comply with a mandatory order positively to do something. However, where the latter is in question, it is plain that there may well come a time when further punishment will be excessive. When that will be is a matter of fact for each case.
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> …
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> 53. Fourthly, there is no doubt that all courts dealing with contempt of court applications for committal need to consider both punishment for past disobedience to orders and the potential coercive effect of the order that is made. For the reasons that my Lord has so clearly given, I am wholly unsatisfied that the coercive effect of the present order is yet spent. I too would dismiss the appeal."

Discussion

22. In his attractive and realistic submissions on behalf of the father Mr Bentwood accepted that his client's behaviour "has been of the highest gravity" and told us that he makes no criticism of the judge's findings as to the level of distress caused to the mother by being unable to see her daughters over a period of several years. He also accepts – inevitably, in the light of the decision in *re W* – that there can be successive sentences of imprisonment for a repeated contempt of this kind and that s 14 of the 1981 Act does not mean that the cumulative total of such sentences imposed on different occasions can never exceed two years. He submits, however, that this case raises a question of principle as to "whether the legislative intent which imposes a maximum of two years can be subverted through repeated periods of incarceration for effectively the same breach". He goes on to submit that, while such cases are fact-sensitive, the effect of *re W* is that the greater the total of the periods of incarceration, the greater adherence there should be to the principle that there comes a point when "enough is enough".

23. I do not accept that the imposition of repeated sentences for contempt in a case of this kind, even when the total has exceeded two years, subverts the legislative intent of s 14 of the 1981 Act, which was to end indefinite imprisonment for contempt and limit the maximum penalty for a single contempt. As this court held in *re W*, such a course is legally permissible, although it is for the judge in each case to decide whether a further term of imprisonment is both necessary and proportionate. Part of the court's evaluation of proportionality is to look at the cumulative total of any time already spent in prison under past orders of committal. If the court "blindly" made successive committal orders for the remainder of the contemnor's life that would indeed subvert the 1981 Act. What is required is a "proportionate, stage-by-stage, hearing-by-hearing approach relying upon the discretion and judgment of the judge at each hearing". Or, as Hughes LJ put it in his concurring judgment, "there may well come a time when further punishment will be excessive, but when that will be will be a matter of fact for each case".

24. Mr Bentwood's next point was made by reference to the Child Abduction Act 1984. In his skeleton argument he put it this way:-

> "The appellant has not been convicted of an offence of child abduction. Had he been, however, the maximum sentence would be one of 7 years imprisonment. The Appellant submits that from this maximum notional starting point any sentencing court would be bound to apply a discount of one third for any guilty plea, resulting in a maximum de facto sentence of 56 months imprisonment. "

25. He submitted that the total of the periods of imprisonment previously imposed was greater than this. He notes that the judge stated that he did not find that there was a precise analogy with the offence under the Child Abduction Act. (It is common ground that the offence of child abduction may not have been committed in this case, since the mother had consented to the original removal from the jurisdiction). However, he argues that great weight ought to have been given to the fact that the Appellant had already served more than the maximum he could have received for a similar criminal offence.

26. Like the judge, I do not think that there is any precise analogy, but in any event it seems to me that the point is a bad one on the facts. Had the Appellant abducted two children from the jurisdiction and been prosecuted the indictment would have charged the abduction of each child as separate counts. If he had been convicted on both counts after a trial the maximum possible sentence would therefore have been 14 years, not 7 years imprisonment. Of course, as Mr Bentwood rightly points out, in the event of pleas of guilty at the earliest opportunity the Appellant would have been given a discount of one third from the notional sentence after a trial and, if consecutive sentences had been imposed, they might well have been reduced to some extent to reflect the principle of totality. But I do not accept the hypothesis that the total sentence could not have been well in excess of five years imprisonment. I agree with the view of the judge that this is as bad a case as could possibly be imagined.

27. Mr Bentwood's next point is that his client has shown an absolute determination never to return his daughters to this jurisdiction whatever the consequences and that therefore any further sentence of imprisonment would simply be a punishment that would have no coercive effect. He relies on the observations of Holman J in *Button v Salama* [2013] EWHC 4152 (Fam) at [24]:-

> "The reality of this case is that this man has taken a stance, at any rate for so long as he remains in prison. He asserts that he cannot comply with these orders. Judges, including myself, have been sure that he can comply and is, rather, choosing not to comply. But that is the stance which he has taken. Although successive orders are legally permissible, the reality in this case is that from day one this father has manifested an absolute determination not, under pressure of court orders, to reveal the whereabouts of his child and not to cause her return to England. That is a very grave contempt of court in the circumstances of this case, but it was no less grave at the outset than it is now. The reality is that he made very plain indeed at a very early stage that he would not comply with these orders. For that flagrant contempt he could of course have been sentenced to the maximum term. The maximum term was two years'

> imprisonment. It seems to me that the court has to be very cautious indeed not to subvert altogether the will and intention of Parliament, when enacting section 14 of the Contempt of Court Act 1981, by now contemplating sentencing for aggregate periods that are more than double that term. It seems to me that this case has moved beyond the scope of what was described by the Court of Appeal in *Re W*, and that the man cannot be further punished."

28. Although Holman J referred to the decision of this court in *Re W* and purported to follow it, it seems to me that at least to some extent he departed from it in two respects: firstly by suggesting that it would "subvert altogether the will and intention of Parliament, when enacting s. 14 of the Contempt of Court Act 1981, by now contemplating sentencing for aggregate periods that are more than double the two year maximum term"; and secondly, attaching importance to the fact that the father made it very plain indeed at an early stage that he would not comply with these orders. The judgments of McFarlane LJ and Hughes LJ in *re W* are much more nuanced. They do not suggest that it is a subversion of the will and intention of Parliament to contemplate sentencing which would take the aggregate periods of imprisonment beyond four years, nor do they encourage the courts to allow contemnors to avoid further imprisonment in a case of this kind by defiantly stating that he will never comply. Indeed, on the contrary, such defiance may well exacerbate the nature of the contempt.

29. It is instructive to compare the facts of *Enfield London Borough Council v Mahoney* [1983] 1 WLR 749, which was referred to by McFarlane LJ in *re W*. A precious cross had been stolen by the defendant and hidden. The local authority sought its recovery. Mr Mahoney had been sent to prison for two years as a result of his failure to give the item up. The Official Solicitor applied for his discharge from custody. Mr Mahoney had some mental health difficulties (he was politely described as "an eccentric"), but it was also plain that, if anything, he was enjoying the notoriety he had attracted by his actions. In the course of his judgment Watkins LJ said:-

> "Of the two elements of the punishment inflicted by the original order, one has by now surely been served, namely, that of punishment for the contempt itself. All that remains now of the order, so it is asserted, is that part of the period of two years which can only be said to relate to the coercive effect which it was hoped by the judge the sentence would impose on him. It being obvious to everyone now that no form of coercion, including no matter how long a stay in prison, is going to cause this man to change his mind, it is pointless to keep him where he is."

30. I can well understand why the court took the view in the *Mahoney* case that no useful purpose would be served by keeping the respondent in prison, particularly given his eccentricity. But refusing to hand over a precious object is very different from refusing to hand over children. The continuing harmful effect of the father's refusal to comply with orders of the court, both on the mother and very probably on the children, are powerful factors militating against the argument that no further sanction should be imposed.

31. In any event, as McFarlane LJ went on to say in *re W*, "this court must start by giving great weight to the assessment and the evaluation of the first instance judge". It is a fact sensitive decision in each case whether the time has come for the judge to say "enough is enough". Sir Jonathan said at [23]:-

> "I recognise of course that one of the two rationales for punishment, namely the coercive element, is unlikely to have any effect. That is not to say that it is certain that it will have no effect, but the punishment is still appropriate. I hope the separation of the father from the parties' son for the first time since they came to live together might make him think again. If he does then he can apply to purge his contempt at any time."

32. I am entirely unpersuaded that there was any error in Sir Jonathan Cohen's decision that in the present case, to adopt the words of Hughes LJ, the time has not yet come when further punishment is excessive.

33. It was for these reasons that I concurred in the decision, which we announced after hearing the submissions of Mr Bentwood on behalf of the father, that the appeal would be dismissed.

Lord Justice Moylan

34. I agree.

Lord Justice Lewis

35. I also agree.