

IN THE HIGH COURT OF JUSTICE  
FAMILY DIVISION



ZC18C00488

[2018] EWHC 3761 (Fam)

Royal Courts of Justice  
Strand  
London WC2A 2LL

Tuesday, 18 December 2018

Before:

MR JUSTICE MOSTYN

IN MATTER OF H

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J U D G M E N T

1 On the 6th December 2018 his Honour Judge Lord Meston QC made a passport order in respect of three children who he made wards of court on that day. On the 8th December the passport order was executed by the Tipstaff, and the Tipstaff arrested the father on the basis that the father was, in the opinion of the Tipstaff, failing to comply with his obligation in the order to reveal the whereabouts of the children. The father was brought before Hayden J on the 10th December 2018, and was remanded in custody until the 12th December 2018.

2 On the 10th December 2018 Hayden J granted the father legal aid to be represented in the proceedings. On the 12th December 2018 the matter came before Cohen J when the matter was further adjourned until today with the father again being remanded in custody to HM Prison Pentonville. It was provided in that order that the court today would consider an application for the father's committal, or would consider a further period of remand if the hearing was not effective for any reason. The father was given permission to file and serve a statement by 11.00 am on the 18th December 2018, i.e. by 11.00 am today.

3 On reading the paperwork last night, I was struck by the absence of any application for the committal of the father to prison in the prescribed form. By virtue of Family Procedure Rules 37.10 it is provided at sub-rule (1) that, "A committal application is made by an application notice using the part 18 procedure in the proceedings in which the judgment or order was made, or the undertaking was given". By sub-rule (3) it is provided that the application notice must:

"(a) set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged act of contempt including, if known, the date of each of the alleged acts and be supported by one or more affidavits containing all the evidence relied on."

4 Moreover, in circumstances where r.37.10(1) requires the Part 18 procedure to be used, then that brings into play the notice periods in Part 18. By r.18.8(b)(ii) it is provided that, "Any application notice must be served as soon as practicable after it is filed and in any event ... at least seven days before the court is to deal with the application". By r.2.9(4) it is provided that, "Where the specified period is seven days or less, and includes a day which is not a business day, that day does not count". A business day is defined by r.2.3(1) as, "Any day other than a Saturday, Sunday, Christmas Day, Good Friday or a bank holiday".

5 Accordingly, seven working days' notice had to be given, and it therefore follows that the notice in question had to be served by 4.00 pm on the 6th December, which of course is the same day that these proceedings were begun. Now, it is certainly true that the court has power to waive the formal requirements in the rules. This is provided by Practice Direction 37A, para.13.2, which provides that, "The court may waive any procedural defect in the commencement or conduct of a committal application if satisfied that no injustice has been caused to the respondent by the defect".

6 That provision was considered by Parker J in *Cherwayko v Cherwayko (Number 2)* [2015] EWHC 2436 Fam where she said at para.88:

"It is no longer the law that defects in the notice can only exceptionally be waived. The test is the interests of justice, and whether the alleged contemnor has suffered

any injustice or prejudice. The court has to address the fundamental point: did the alleged contemnor have enough information to meet the charge?"

7 However, that decision in 2015 has to be read in the light of the later decision in *Re L; In the matter of Gous Oddin* [2016] EWCA Civ 173 which was an appeal from a committal order made in comparable circumstances to these, where a father had been arrested for failing to comply with his disclosure obligations in a Tipstaff collection order. In that decision, made by a strong Court of Appeal comprising Sir James Munby P, Vos LJ as he then was, and Theis J, strict compliance with procedural rules was emphasised. In his judgment at para.75, Vos LJ said:

"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 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."

8 In her judgment, Theis J said at para.78:

"Before any court embarks on hearing a committal application whether for a contempt in the face of a court or for a breach of an order, it should ensure that the following matters are at the forefront of its mind: ...

(ii) prior to the hearing, the alleged contempt should be set out clearly in a document or application that complies with FPR r.37, and which the person accused of contempt has been served."

9 I would fully endorse those statements, and I would go further and say that, given that the liberty of the subject is at stake, I find it hard to envisage any circumstances where the terms of r.37.10(1) and (3) are waived. For my part I cannot envisage the sort of circumstances where the court would waive the requirement of spelling out in detail in the application notice the grounds on which the committal application is made, and in affording the alleged contemnor the full period of notice provided for in the rules, which have been of course approved by Parliament.

- 10 It may be that there will be circumstances where there has been a gross contempt committed in the face of the court, such as an assault on a member of the court staff or the judge, which might lead to the court dealing then and there with the contempt, but that is not the situation with which I am concerned.
- 11 For these technical reasons, I am satisfied that there are fatal errors in the process which must result in the committal application that is being mounted before me being dismissed, and the making of a consequential direction that the father is immediately released from prison. That is my decision on the committal application.
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This transcript has been approved by the Judge