

This judgment was delivered in public. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
[2022] EWHC 3491 (Fam)



No. FD17P00043

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 16 December 2022

IN THE MATTER OF THE SENIOR COURTS ACT 1981

AND

IN THE MATTER OF COUNCIL REGULATION (EC) No. 2201/2003

AND

IN THE MATTER OF A (a girl aged 22), B (a boy aged 17) and M (a girl aged 11)

Before:

SIR JONATHAN COHEN

(Sitting as a High Court Judge)

B E T W E E N :

TANYA BORG

Applicant

- and -

MOHAMMED SAID MASOUD EL ZUBAIDY

Respondent

MS C RENTON (instructed by Charles Strachan Solicitors) appeared on behalf of the Applicant
Mother.

MR R BENTWOOD (instructed by Nicholls & Nicholls) appeared on behalf of the Respondent
Father.

J U D G M E N T

SIR JONATHAN COHEN:

1 I am dealing with an application for committal to prison of the respondent for breaches of an order of Roberts J on 1 August 2022. The breaches, which were alleged and which I have found to be the case, were of two orders. The first was that:

"The respondent father, Mr El Zubaidy, shall use his best endeavours to execute and serve upon the mother's solicitor a duly attested consent to his two daughters, now aged respectively 22 and 11, travelling from Libya with the mother without him accompanying them by no later than 4.00 p.m. on 15 August. That document must be signed, dated and witnessed by an official of the Libyan Embassy or Consulate in London."

The second order was that:

"The father should use his best endeavours on a continuing basis to procure the return to the jurisdiction of [the two children]."

A Penal Notice was attached to both orders. Those orders were repeated at subsequent hearings by HHJ Scarratt and by Peel J with an adjusted time frame for compliance. There has been no compliance with either order.

- 2 This case has a very long background history and the chronology is not in dispute. The father was born in Libya and the mother was born in Malta. They married in Malta and have three children, two girls – to whom I have referred – and a son aged 17.
- 3 In February 2015 the father travelled with the children to Tunisia on an agreed visit to see the paternal grandmother. The father then instead took the children to Libya and refused to return the children. In October 2016 the father returned to England with the son and he has lived in England since that time. The girls remain in Libya, so far as is known. Notwithstanding that the elder girl is now an adult of 22, neither child can leave Libya without the father's consent.
- 4 For these purposes I can go quickly through the past history because there were a series of orders that were made to try and secure the return of the children, which were unsuccessful. On 10 August 2017 Moor J sentenced the father to 12 months' imprisonment in total for a series of breaches of orders, which included failing to make the girls available for telephone contact to their mother and for failure to bring about the return of the children. On 26 February 2018 Mostyn J sentenced the father to another 12 months' imprisonment for his failure to procure the return of the children. On 16 November 2018 Hayden J, for ten breaches of successive orders for failing to return the children, sentenced the father to two years of imprisonment. On 30 November 2021 Poole J, for the father's failure to execute a notarised form of consent, and failing to use his best endeavours to procure the children's return, sentenced the father to a further 12 months' imprisonment.
- 5 It was because the father was in breach of orders to execute the notarised consent form that Roberts J made the orders that she did. Thus it is that the father has served four terms of imprisonment totalling five years. Of course on each occasion he served only half the time in prison.

6 In relation to the matters which are the subject of the application, he says through his counsel this: He accepts that he is in breach of the failure to provide the documentation and that the contempt is the subject of no dispute at all. In relation to whether he has used his best endeavours on a continuing basis to procure the return to the jurisdiction of the children, he says this:

- "1. If the complaint refers solely to his failure to execute the documentation then the complaint that he has failed to use his best endeavours to procure the return of the children is no more than duplication of the first complaint.
2. It is said on his behalf - and I put it that way because the father has, as is his right, chosen to file no evidence or give no evidence - that he believes there was nothing that he could do that had not been done before, and therefore he made no endeavours and therefore he is not in breach because he did not have the necessary intent.
3. He says that the consequences of this second breach, if that is what it is, are otiose as it adds nothing."

7 At the first stage of this hearing I rejected his argument in respect of the second alleged breach of court orders. It seemed to me that it was destroyed by his acceptance that he had taken no steps at all to procure the return of the children. That admission is a clear acceptance of breach of the court order. Whether it adds anything to the outcome by way of sentence is something I will need to consider.

8 The father wished to proceed straight to sentence and I would wish to pay tribute to the excellent and realistic submissions by Mr Bentwood on behalf of him. He offered, on behalf of Mr El Zubaidy, no mitigation at all. His submissions were simple. He says this in summary:

- (1) This father will do nothing to help procure the return of the children to the jurisdiction.
- (2) It therefore follows that insofar as punishment for contempt includes a coercive element it will be ineffective because no punishment will lead the father to adopt a different course.
- (3) He said that even if granted further time for compliance he will do nothing to assist, whether by signing the required document or otherwise.

9 Mr Bentwood goes on to say that the parties' 17-year-old son has since, this summer, been living with his father in England. If the father is to be imprisoned and the result is that his son is deprived of his father's care then, says the father, so be it. It is more important to him that his daughters remain in Libya than he can look after his own son in London.

10 The submission as to law, put forward on behalf of the father, falls into a number of parts. He says, rightly, that the maximum sentence under the Contempt of Court Act is two years' imprisonment. There can of course be successive breaches of the same orders leading to

successive findings of contempt and terms of imprisonment exceeding in aggregate the two-year maximum. But, says Mr Bentwood, the court should not ignore the legislative intent of the Act. Mr El Zubaidy has already received over twice the maximum sentence for contempt.

- 11 Secondly, he said that if convicted of child abduction in a criminal court the maximum sentence that Parliament describes is seven years' imprisonment. With one-third off for an immediate plea of guilty, if that was tendered, the maximum effective term would be 56 months. This father has already served more than that sum. Of course the father has not been charged with a criminal offence. But, says counsel on his behalf, this is a useful signpost to support his argument that as a matter of practice, or principle, the court should not impose a further sentence of imprisonment.
- 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.
- 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.
- 15 He repeatedly has breached court orders. It is a matter of no concern to him whatsoever.
- 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 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. At para.38 the judge says this, and here the judge is referring to imposing a further sentence of imprisonment:

"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.

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.

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."

Then in the judgment of Hughes LJ, as he then was, at para.51, he says this:

"... 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."

- 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.

- 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.
- 25 The sentence of the court is one of 12 months' imprisonment. There is no basis for suspending the order because the father has given not an ounce of indication that that would achieve anything. So that is the order that I make.
- 26 I should make it clear that I make that order in respect of both contempt's, to run concurrently and not to be consecutive. The father has of course 21 days to appeal, for which he requires no permission. That is my judgment.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

*Transcribed by Opus 2 International Limited
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital*

This transcript has been approved by the Judge