Neutral Citation Number: [2024] EWHC 303 (Fam)

Case No: FD23P00451

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 February 2024

Before :

MR JUSTICE CUSWORTH

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Between :

NATALIE DAWN KENNEDY **Applicant**

- and –

PHILIP THOMAS **Respondent**

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Ralph Marnham (instructed by **Anthony Louca Solicitors**) for the **Applicant**
Edward Bennett (instructed by **Dawson Cornwell**) for the **Respondent**

Hearing date: 8 February 2024

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JUDGMENT

This judgment was delivered in public and may be published.

Mr Justice Cusworth :

1. I am faced today with an application for committal to prison. That is a serious application, justified only when there has been a clear and consequential breach of a court's order. In Family Law cases, such an order will obviously be used sparingly, and only if absolutely necessary.

2. The applicant is the mother of Alice Alexandra Kennedy, who was born on 16 August 2018, and so is aged 5 years and 6 months. Her father is the respondent. The mother's application was made on 11 December 2023, but not issued until 19 January 2024, in the following circumstances.

3. Alice was living with her mother under an order made after contested proceedings by HHJ North in Norwich on 21 April 2023. On 23 July 2023, she travelled with her father to Florida for a 2 week holiday, and was due to be returned by him to England and Wales on 6 August 2023. This, he did not do. Since then there have been a series of applications to court to seek to secure Alice's return to the jurisdiction, Alice has been made a Ward of Court, and although the father has engaged remotely on a number of occasions, he has declined direct invitations from the court to identify where he and Alice are staying, and has not returned her to this jurisdiction despite a series of orders that have required him to do so.

4. After the contempt application was issued, 5 days after an order dated 15 November 2023 that required Alice's return to the jurisdiction by 6 December 2023, the matter came for hearing before Arbuthnot J, who has retained carriage of the case since then. The application was issued only after a further return order which she made on 18 December 2023 had expired on 11 January 2024. The matter was before her again on 5 February, and she made a further return order, which requires Alice's return by 20 February 2024. The matter is listed to come back before her again on 4 March.

5. Hitherto, the father has acted in person, but today, in the circumstances of these committal proceedings, he has been ably represented by Mr Bennett of counsel. Mr Marnham appears for the mother. Although there was an order made by Arbuthnot J which required the father's personal attendance at this hearing, he has not complied with that direction, notwithstanding a penal notice being attached to it. Being aware that he was in remote communication with his counsel, I have permitted his attendance today remotely, given the seriousness of the application and the desirability that he be involved and able to give instructions to his counsel having seen all that is taking place in the court room.

6. I commenced the hearing 25 minutes late to allow the father to confer with Mr Bennett; and during the hearing, I rose for a further 20 minute period, having indicated to the parties that I would contemplate adjourning the determination of the application if through counsel the father would assure me unequivocally that he would comply with Arbuthnot J's order of 5 February 2024, and return Alice by 20 February. Having taken further instructions, Mr Bennett was unable to offer any such assurance.

7. In terms of evidence, I have of course considered the Judgment of 21 April 2023, and the statements produced by the mother since, including that in support of this application. There is no evidence before me on the father's behalf, and Mr Bennett has assured me that he has explained to his client his entitlement not to give evidence in response to an application such as this.

8. There therefore being no reason to adjourn the application, I have then dealt with what are 2 admitted breaches of court orders today, the detail of which I will set out below, but I will first set out the law that I have to apply.

9. I have first been referred to Peel J's summary in *Bailey v Bailey (Committal)* [2022] EWFC 5 at §24, where he identified the general principles that apply:

"Contempt applications: general principles

25. In terms of legal principles, committal proceedings are essentially criminal in nature, even if not classified in our national law as such (see *Benham v United Kingdom* (1996) 22 EHRR 293 at [56], *Ravnsborg v. Sweden* (1994), Series A no. 283-B).

26. The burden of proof lies at all times on the applicant. The presumption of innocence applies (Article 6(2) of the ECHR). There is no burden on the defendant.

27. Contempt of court must be proved to the criminal standard: that is to say, so that the judge is sure (see *Cambra v Jones* [2014] EWHC 2264 per Munby P).

28. Contempt of court involves a contumelious that is to say a deliberate, disobedience to the order. The accused must (i) have known of the terms of the order i.e precisely what s/he is required to do and (ii) have acted (or failed to act) in a manner which involved a breach of the order and (iii) have known of the facts which made his/her conduct a breach (see *Masri v Consolidated Contractors Ltd* [2011] EWHC 1024 (Comm).

29. If it be the case that applicant cannot prove that the defendant was able to comply with the order, then s/he is not in contempt of court. It is not enough to suspect recalcitrance. It is for the applicant to establish that it was within the power of the defendant to do what the order required. It is not for the defendant to establish that it was not within his/her power to do it. That burden remains on the applicant throughout, but it does not require the applicant to adduce evidence of a particular means of compliance which was available to the defendant provided the applicant can satisfy the judge so that s/he is sure that compliance was possible. The judge must determine whether s/he is sure that the defendant has not done what s/he was required to do and, if s/he has not, whether it was within his/her power to do it. Could s/he do it? Was s/he able to do it? These are questions of fact. That said, breach may occur where compliance is difficult or inconvenient but not impossible; see *Perkier Foods Ltd. v Halo Foods Ltd*. [2019] EWHC 3462 (QB).

30. If committed, the contemnor can apply to purge his/her contempt."

10. I also remind myself of the guidance given by Hale LJ (as she then was) in *Hale v Tanner* [2000] EWCA Civ 5570 which set out the principles to apply when sentencing for committal in a family law case. Hale LJ said:

"25…. Family cases, it has long been recognised, raise different considerations from those elsewhere in the civil law. The two most obvious are the heightened emotional tensions that arise between family members and often the need for those family members to continue to be in contact with one another because they have Children together or the like. Those two factors make the task of the court, in dealing with these issues, quite different from the task when dealing with commercial disputes or other types of case in which sometimes, in fact rarely, sanctions have to be imposed for contempt of court.

26. Having said that, firstly, these cases have to come before the court on an application to commit. That is the only procedure which is available. Not surprisingly, therefore, the court is directing its mind to whether or not committal to prison is the appropriate order. But it does not follow from that that imprisonment is to be regarded as the automatic consequence of the breach of an order. Clearly it is not. There is, however, no principle that imprisonment is not to be imposed at the first occasion: see Thorpe v Thorpe [1998] 2 FLR 127, a decision of this court...

27. Secondly, there is the difficulty, as Mr Brett has pointed out, that the alternatives are limited. The full range of sentencing options is not available for contempt of court. Nevertheless, there is a range of things that the court can consider. It may do nothing, make no order. It may adjourn, and in a case where the alleged contemnor has not attended court, that may be an appropriate course to take, although I would not say so in every case. It depends on the reasons that may be thought to lie behind the non-attendance. There is a power to fine. There is a power of requisition of assets and there are mental health orders. All of those may, in an appropriate case, need consideration, particularly in a case where the court has not found any actual violence proved.

28. Thirdly, if imprisonment is appropriate, the length of the committal should be decided without reference to whether or not it is to be suspended. A longer period of committal is not justified because its sting is removed by virtue of its suspension.

29. Fourthly, the length of the committal has to depend upon the court's objectives. There are two objectives always in contempt of court proceedings. One is to mark the court's disapproval of the disobedience to its order. The other is to secure compliance with that order in the future. Thus, the seriousness of what has taken place is to be viewed in that light as well as for its own intrinsic gravity.

30. Fifthly, the length of the committal has to bear some reasonable relationship to the maximum of two years which is available.

31. Sixthly, suspension is possible in a much wider range of circumstances than it is in criminal cases. It does not have to be the exceptional case. Indeed, it is usually the first way of attempting to secure compliance with the court's order.

32. Seventhly, the length of the suspension requires separate consideration, although it is often appropriate for it to be linked to continued compliance with the order underlying the committal.

33. Eighthly, of course, the court has to bear in mind the context. This may be aggravating or mitigating. The context is often the break-up of an intimate relationship in which emotions run high and people behave in silly ways. The context of having Children together, if that be the case, cannot be ignored. Sometimes that means that there is an aggravation of what has taken place, because of the greater fear that is engendered from the circumstances. Sometimes it may be mitigating, because there is reason to suppose that once the immediate emotions have calmed down, the molestation and threats will not continue.

34. Ninthly, in many cases, the court will have to bear in mind that there are concurrent proceedings in another court based on either the same facts or some of the same facts, which are before the court on the contempt proceedings. The court cannot ignore those parallel proceedings. It may have to take into account their outcome in considering what the practical effect is upon the contempt proceedings. They do have different purposes and often the overlap is not exact, but nevertheless the court will not want, in effect, the contender to suffer punishment twice for the same events.

35. Tenthly, it will usually be desirable for the court to explain very briefly why it has made the choices that it has made in the particular case before it. One understands all the constraints in a busy county court, dealing with large numbers of these cases these days, and one would not wish to impose too great a burden on the judiciary in this respect. Nevertheless, it would be appropriate in most cases for the contemnor to know why he or she was being sentenced to a period of imprisonment; why it was the length that it was; if it was suspended, why the suspension was as it was, but only very briefly"

11. I have finally considered the checklist provided by Theis J in *L (A child)* [2016] EWCA Civ 173 § 78. I need not set this out in full as in this case, Mr Bennett sensibly accepts on his client's behalf that:

    a. All of the requirements of Part 37 FPR 2010 in relation to the application have been complied with.

    b. In respect of the breaches alleged of the orders made on 4 October 2023, and 15 November 2023, both of which amount to a failure to comply with a return order in respect of Alice, by a specified date, and in respect of which the order was properly stamped and served on the father, there is an acceptance on the father's behalf that the application is properly founded and that the breaches are admitted and have still yet to be remedied.

    c. I am not the judge dealing with the substantive applications in relation to Alice's welfare.

    d. The father has exercised his right not to give evidence to me.

12. I have left over and not dealt with the other alleged breaches where Mr Bennett raises some issue with the form of the original order – in one case the addition of a redundant consonant in the spelling of the father's name in the paragraph of the order containing the order allegedly broken. But, given that 2 of the breaches are admitted and without technical defence, I have left the remaining alleged breaches over to another day. I am aware too that further orders have been made since the application was drafted, which the father acknowledges that he either has not or will not comply with. However, those are not the matters which are before me today.

13. I have also been referred by Mr Marnham to the recent decision of David Lock KC in *H v Butt & Anor* [2023] EWHC 3042 (Fam), where he determined, in a case raising similar issues, albeit one where the father who stood in contempt

had been the child's primary carer prior to their removal from the jurisdiction, unlike the father in this case. In that case, Mr Lock KC concluded his consideration of whether to impose a sentence of immediate imprisonment as follows:

> 21. I have considered whether, as this is a first committal application, it would be appropriate either to impose no sentence of imprisonment or to suspend the sentence. I do not consider it would be appropriate to take either course for four reasons. First, this is a very serious and continuing breach of court orders. The Father has been in deliberate breach of the terms of court orders for over two years. Secondly, the Father has not just acted in breach of one court order but has breached ten orders made by the High Court. Thirdly, his defiance of the Court is continuing. Even at this stage, his counsel indicates to me that he has no intention of returning E from the UAE. Hence if a lesser penalty was to be imposed it seems inevitable that its only effect would be that the Mother would have to make a further application for contempt and on that further occasion, the court would be invited to impose a custodial sentence. Fourthly, rather than imposing a suspended sentence, it seems to me that it would be better to allow the Father a short period of time to return to the UK with E before this order takes effect rather than imposing a suspended sentence.
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> 22. In those circumstances it is clear to me that the custody threshold has been met and that the only appropriate sanction is a significant term of imprisonment. Doing the best that I can based upon the available information and having regard to all of the factors set out above, it seems to me that the appropriate length of the sentence should be one of 12 months. That is a sentence which is sufficiently long to send out a message both to the Father and to others that repeated breaches of orders of the High Court have extremely serious consequences.

14. Of course, although many of the same considerations apply here, every case is different. In *H v Butt*, the father had continued to disregard a series of court orders going back over a period of nearly 2 years before the committal application came before the court, but it was the case that at the point of removal, there was an order that the child lived with him and was to have supervised contact with the mother.

15. In this case, I have also considered whether, given that this is a first application to commit, no sentence, or a suspended sentence, might be appropriate. Here, as in *H v Butt*, there is also a series of serious, continuing and undeniable breaches. In this case, I expressly invited Mr Bennett to consider with his client whether he would agree to comply with Arbuthnot J's last order, for a return by 20 February, in which case I made clear that this application could be adjourned. The father simply declined to confirm that he would comply with that order, in the absence of what he deemed satisfactory progress between himself and the mother in mediation – of which he would be the arbiter. In other words, that unless everything was agreed to his satisfaction, he would continue to wilfully disregard the court's orders.

16. I did not, given the nature of these proceedings, ask today for him to provide the address, or even the country in which Alice is currently being kept by him, but I am aware that he has previously declined to provide that information when asked directly by the court to do so. It is thus completely clear that the father, despite now having the benefit of legal advice, intends to continue to disregard the court's orders. There is thus no obvious benefit to any period of adjournment or reflection, at the end of which a further application would inevitably have to be made.

17. I have considered the careful judgment of HHJ North dated 21 April 2023, and have in mind especially the following paragraphs:

> 64. The next factor is the likely effect on the child of any change in circumstances. As I have said, I accept the evidence of Dr Horrocks and the guardian that a move from the mother as primary carer, especially one which would take her to Hemel, would have a significant impact upon Alice. Alice might in the longer term adjust, but such a move should only be ordered if it will improve her overall welfare. I cannot see that a move from the mother to the father does that. The same problems of parental conflict will endure, but the father, of the two parents, seems less able to take on board the need to change. He continues to lack empathy and insight. The mother, despite her anxiety, has shown the green shoots of change (as it was put to me). She was able, as I have commented already, to support the holiday, which is what the court required of her. The father takes, in my judgment, an overly simplistic and fixed view of

things, and his posts show that he does not see things from others' perspectives. He needs to make very real shifts…

66. The next factor in the checklist is any harm which the child is suffering or is at risk of suffering. The guardian and Dr Horrocks have warned the court that this child will ultimately suffer emotional harm if she is exposed to parental conflict, particularly so if it remains high conflict.

18. The father's lack of empathy and insight, as found by the judge, are clearly very likely to be causing significant emotional harm to his daughter as this stand off progresses. I described her during the proceedings as a pawn in this situation, and it is very clear that the father is not currently seeing the extent to which she will be suffering by reason of his fixed and ultimately selfish view that he should be permitted to impose his will on the situation. He is well aware that if he has a grievance, he can make his case to the family court on his return with Alice to England. For him to sit in hiding with her, whilst incredibly important months of her childhood pass without direct time spent with her mother, will be the cause of serious harm not just to Alice, most importantly, but to all concerned, not least the father himself whose actions have brought upon him the serious application which is before the court today.

19. I am entirely satisfied in this case that the custody threshold has been met, and that the appropriate sentence to pass is one of 12 months. Whilst it is the same length as that passed in *H v Butt*, I have determined it as appropriate having considered this case entirely on its own facts, and weighing both the seriousness of the breaches which the husband admits to having committed, and at the same time his complete unwillingness to countenance, even at this late stage, complying with the current return order. He can now have no more excuses for failing to do what he has been ordered to do, and must accept the consequences of his lack of repentance. He should also be aware that if a further application needs to be made, a longer sentence will undoubtedly be considered by the court on that occasion.

20. Finally, as indicated, I have decided for Alice's sake that the order should be suspended in its operation for a period of 28 days. I have selected this period specifically because it allows not only for the period during which the father can still comply with Arbuthnot J's order of 5 February 2024, but also concludes after the next hearing listed before her on 4 March 2024. If, therefore, the father has returned Alice to the jurisdiction by the time of that hearing, he can apply to the court on that day to purge his contempt, and invite the court to lift the sentence of imprisonment. If he fails to do so by that date however, then he will risk arrest on his later arrival. Clearly, he can always apply for relief from such a sanction in advance, in the event that he does decide to return Alice, but he should understand that the longer he continues to keep her away, the more likely it becomes that that sentence will in due course be imposed.

21. That is my judgment.