Re A (A Child) [2008] EWCA Civ 1138

Case No: B4/2008/1971

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE PRINCIPAL REGISTRY, FAMILY DIVISION

(MR JUSTICE COLERIDGE)

Royal Courts of Justice

Strand, London, WC2A 2L

21st August 2008

B e f o r e :

LORD JUSTICE HUGHES

LORD JUSTICE THOMAS

and

LORD JUSTICE KEENE

_____

IN THE MATTER OF A (A Child)

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Official Shorthand Writers to the Court)

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Mr J Cowen (instructed by Moss Beachley Mullem & Coleman) appeared on behalf of the Appellant.

Mr N Cox (instructed by Law For All) appeared on behalf of the Respondent.

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HTML VERSION OF JUDGMENT

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Lord Justice Hughes:

This is an appeal against an order committing the appellant to prison for contempt of court in a family case. Nothing must be published which might identify the child at the centre of it.

The appellant is the father of a 20-month-old boy. The appellant is Syrian. The mother is of Moroccan origin but now a naturalised British citizen. The parents lived together with the boy in London. In the course of the dispute with the mother, father unilaterally abducted the boy to Syria. He flew out with the boy on 17 June, left the boy with his family there, and returned without him the next day to London. There exists on the papers some measure of dispute between the parents as to the state of their relationship immediately before this abduction but it is irrelevant to the present issues. There followed a series of orders that father cause the boy to be returned immediately to this jurisdiction. There is now no challenge to those orders. There was a challenge made but it failed before Hedley J on 14 July. Application to commit the father to prison in contempt of court by reason of his disobedience to those orders came before Coleridge J on 29 July, when the boy had been gone for six

weeks. Coleridge J made a suspended committal order of two months in custody, giving the father a further fortnight until 11 August to comply with the orders. Father has not caused the boy to be returned, and it followed that the judge's order took effect on that day 11 August.

Father contends that mother did not lay the proper evidential foundation for a finding that he was in contempt of court. He accepts that the boy is in Syria; he accepts that he has not brought about his return. Syria is not a party to any international convention for the return of abducted children. Father's responses to the successive court proceedings may not have been entirely consistent. He asserted himself willing to go to Syria to bring the child back, but, unsurprisingly, that was not acceptable since it was by no means clear that he could be relied upon to return. Secondly, he asserted that he was willing to finance mother to go and fetch the boy; that, equally unsurprisingly, she was unwilling to do. It seems that she feared obstruction and difficulty, for example in travel as an unaccompanied woman, married at least in the eyes of Syrian law. In any event the obligation under the order is for father to effect the boy's return; he does not comply with the order by casting the onus on the mother. Thirdly, father asserted that he had asked his own father, the paternal grandfather of the boy, in Syria, to deliver the child to the British embassy in Damascus. The letter which he had allegedly written to his own father made a request to the grandfather to do that. It seems to have been founded upon the tacit assumption that the embassy authorities would thereupon make themselves responsible for the transport of the child. In any event, father subsequently asserted (a) that the letter giving written authority to the grandfather had not reached Syria, and (b) that grandfather had suddenly been taken into hospital. Whether that is so or not, it is unsurprising to learn that in any event the embassy would not itself take responsibility for the physical custody of the child.

The suggestion which was made at a late stage immediately before the hearing before the judge -- that grandfather had recently been taken ill -- was one about which some doubts had been expressed as to its veracity. We need not say more about that at this stage because we are told that mother's case before the judge was put to him on the basis of an assertion that father could get others and in particular one or more of his siblings to effect the return of the child. The difficulty about that is that mother put in no evidence whatever before the judge except evidence as to the fact of the original abduction. We are told now that before the judge counsel for mother asserted, first, that father has four siblings living in Syria, two male and two female; and, secondly, that it was mother's contention that he could and should arrange for one of those people to travel with the child back to England. The proposition that there were four siblings in Syria was confirmed to Coleridge J by counsel for the father on instructions. Indeed the judge was given the additional information that all four siblings work either for the foreign ministry in Syria or at least for some arm of the government.

Put shortly, Mr Cowen's contention on behalf of father is that there was no sufficient evidence of contempt of court and that the approach taken by mother effectively reversed the onus of proof by requiring father to demonstrate that he was unable to effect the return of the child, rather than

accepting that it was mother's responsibility to demonstrate that he was in deliberate breach of the order.

So far as the law is concerned I for my part accept the following propositions. (1) The contempt which has to be established lies in the disobedience to the order to return rather than in the original abduction. At the time of the abduction there was no court order which forbade the removal of the child from the jurisdiction. That such removal was an appalling mistreatment of both child and mother and, moreover, that it may be the crime of child abduction contrary to section 1 of the Child Abduction Act 1984 do not in either case make the abduction a contempt of court. (2) Contempt of court must be proved to the criminal standard: that is to say, so that the judge is sure. Whatever the traditional form of notice to show cause may say, the burden of proof lies at all times on the applicant. (3) Contempt of court involves a contumelious, that is to say a deliberate, disobedience to the order. If it be the case that father cannot cause the return of the child he is not in contempt of court, however disgraceful and/or criminal the original abduction may have been. Nor is it enough to suspect recalcitrance, it has to be proved: see LB of Southwark v B [1993] 2 FLR 559. That the onus remains on the applicant throughout is clearly demonstrated by Mubarak v Mubarak [2001] 1 FLR 698.

Thus far I, for my part, go with Mr Cowen. I do not, however, accept the additional submission made by Mr Cowen that the only way contempt can be proved in a case such as this is by the applicant mother adducing positive evidence to demonstrate a particular step which is available to father. It would, as it seems to me, be sufficient for her to make the judge sure that father could achieve the return of the child, for example through the siblings if not through the grandfather, and she might be able to do that without calling specific evidence to refute each obstacle successively raised by father. Nor do I think that the only way contempt can be proved is by mother adducing evidence that the family in Syria is ready, willing and able to assist in bringing about the return. All those facts are facts which it might be open to the judge in an appropriate case to find proved from the surrounding evidence so that he is sure.

The difficulty in this case is that mother adduced no evidence at all. She did put before the judge a letter from the Foreign and Commonwealth Office dated 10 July 2008. I am prepared to accept that in the absence of objection the judge was entitled to treat it as evidence. It said, in effect, that the child would be free to travel, so far as the Syrian authorities are concerned, so long as father had not invoked a stop order in his capacity as the responsible father. It is also said that if he had imposed such a stop order it was open to him to revoke it by a letter giving authority for the child to travel. Such letter, said the Foreign and Commonwealth Office, would need to be attested before the Syrian embassy in London. The judge, at the same time as finding the father in contempt of court, made an order for the limited release of his passport, to enable that step at the embassy to be taken if it was necessary. But there was, other than that, no evidence whatever before the judge of what arrangements could be made for any adult sibling of father to arrange to enter the United Kingdom to bring the

child. The ability to do that was in issue. It was in issue because father had asserted in an earlier witness statement that travel out of Syria required a visa, that the British embassy in Damascus no longer issues such documents, and that application had to be made by travelling to the British embassy in Amman in Jordan. I ought to say in passing that father's assertion in this context appears to have been that the child required such a document from Amman before the child would be allowed to leave Syria. That is not a suggestion which has been maintained before us and is on its face plainly nonsense. The British embassy, whether in Amman or anywhere else, has no jurisdiction over who leaves a foreign country, in this case Syria. The true position is as set out in the Foreign and Commonwealth Office's letter of 10 July. Any British embassy is concerned not with exit from Syria but with entry into the United Kingdom. However, any accompanying adult who was to bring this child into this country would need such entry clearance, and plainly being suggested was the proposition that that could only be obtained in Amman.

We are now told by Mr Cox on behalf of mother that it is believed that the Foreign and Commonwealth Office would, under arrangements for co-operation with the High Court in child cases, assist mother by arranging to open the relevant office in Damascus for the purpose of issuing sufficient documentation to enable an adult sibling of father to accompany the child to this country. That may or may not be the position. The judge would certainly have been aware of the existence of flexible co-operative arrangements between the High Court via the office of the President of the Family Division on the one hand, and the Foreign and Commonwealth Office on the other. But as it seems to me some evidence at least of such an opportunity was needed if a finding of contempt of court was to be hung on father's failure to get some adult member of his family to bring the child to this country. The judge confined himself, no doubt in the course of an immensely heavy list, to saying simply this:

"9. I am not at all impressed with the father's efforts. They are far short of adequate. He has ten days to move heaven and earth.

10. I do not accept that the father's efforts justify not imposing a prison sanction. However, I am prepared to give him one last chance. If he doesn't get his family to bring the child back he is going to prison."

There was in the course of the judge's ruling no finding that the father was able to achieve return. Without that finding it seems to me that it was not justified to hold him in contempt of court. I have asked myself with some anxiety whether such a finding is implicit in what the judge said given that he would undoubtedly have been extremely familiar with both the onus and the standard of proof in a case of contempt of court, but it seems to me that in the absence of any evidence whatever from mother it is simply not safe to assume a finding which has not plainly been made. In a case of imprisonment for contempt of court it is necessary that there be a clear finding to the criminal standard of proof of what it is that the alleged contemnor has done that he should not have done or in this case what it is that he has failed to do when he had the ability to do it. There must, as it seems to me, be a clear finding not only of breach of the order but that the breach was deliberate.

The consequence of that is that, as it seems to me, this appeal must be allowed and the committal order must be set aside.

I ought, I think, before leaving the case to make a number of things clear. (1) It is the committal order which is set aside, not the order to father to effect the return of the child; that remains in force. (2) The order is set aside because of the failure of evidence and absence of clear finding as to contempt. For my part I simply do not know whether father was in contempt of court or not but I by no means rule out the real possibility that he was. (3) Whether he was then or not, since the order remains in force he may yet be held to be if it be demonstrated by sufficient evidence to make the judge sure that there is a means by which he can effectively return the child and he has failed to do so. It is open to mother to make a fresh application. Father should understand that it is his duty and his legal obligation to do everything within his power to undo the grave wrong which he has done both to the child and the mother. (4) I reiterate what I said earlier about the manner of proof. I add that evidence such as to make the judge sure of contempt of court need not come only from the applicant; it may come from the respondent or defendant. In particular, if the court is satisfied that successive obstacles have been raised by father in a manner which demonstrates that he does not wish to obey the order, that is perfectly capable of being a relevant consideration en route to a decision whether the judge is sure that he could indeed achieve the return of the child if he chose to exert himself. That does not mean that the court is relieved from addressing the question whether a deliberate failure to do something which could be done has been proved. In the last analysis, unless there is something father can do to bring about the return of the child he is not in contempt of court even if he is glad to find himself in that position. But, by contrast, if a father in the position of the father in LB Southwark v B, for example, were found to be encouraging his family abroad to take an uncooperative or recalcitrant stance when, if he took the opposite position, they would respect his wishes as the father, it would be open to the court to be satisfied so that it was sure that the father was in contempt of court. A judge would certainly be entitled, as it seems to me, to take into account the undoubted sovereignty of paternal rights over the child in an Islamic system and to consider whether or not it was clear the father was declining to exercise his authority. If he were that would be capable of being contempt of court.

In the present case, evidence which has subsequently been advanced by father might -- I say no more than might -- be material to adjudication upon this question were it ever to be raised by a subsequent application. First, a medical certificate for grandfather has been advanced but it is dated with a date earlier than the date on which father says that he ever knew that the illness existed. Why it should have been issued if no one was aware of the need to prove illness remains mysterious. Secondly, there has been produced subsequently a letter from father's eldest brother in Syria. In it the brother asserts that he was unable to travel to the United Kingdom, presumably for the purpose of bringing the child, because, first, the nature and place of his business would not allow it; secondly, because of the expense of flight; and, thirdly, because the child is exclusively the responsibility of grandfather. As to

the first of those, the agreed evidence appears to be that the brother works for part of the government. A visit of less than 48 hours would be more than adequate and could easily be carried out over the Islamic weekend. Secondly, it is already in evidence that finance is not a problem because father has offered to finance the return of the child and, thirdly, the suggestion that the child is the exclusive responsibility of grandfather appears to ignore father's power to make decisions about the child.

The assessment of evidence in any future application, if it should be made, will of course be for the judge before whom it comes. Those last two documents are, however, as it seems to me, the kind of documents which might at least be directly material to the question of whether a deliberate failure to effect the return of the child has or has not been proved.

I ought, I think, lastly to add that the father ought not to allow himself to think that if contempt were to be asserted and were to be proved, both of which of course remain uncertain, the kind of sentence of which he stands in peril is limited to the two-month order made by Coleridge J or anything like it. The maximum sentence is two years. In the context of the deliberate prior abduction of a toddler it would not be in the least surprising if a judge were thinking in terms of a sentence several times longer than that imposed by Coleridge J.

For all those reasons I would for my part allow the appeal and set aside the committal order.

Lord Justice Thomas:

I agree and so also allow the appeal.

Lord Justice Keene:

I agree. I would only add that on any further committal proceedings that may occur a judge would be entitled to view any further evidence from the appellant's siblings about their inability or unwillingness to assist in the light of the fax from the eldest brother (exhibit MRA2, page 126 of our bundle) to which my Lord, Hughes LJ has already referred. The reasons set out in that fax are so devoid of merit that they might lead a judge to infer that the siblings were fabricating reasons for their unhelpful attitude and were doing so at the instigation of this appellant. For my part I regard that fax as a potentially important piece of evidence whose significance may endure into the future. Nonetheless I too would allow this appeal and set aside the order of Coleridge J. That means, of course, that the appellant is entitled to be released from custody, Mr Cowen.

Order: Appeal allowed