

Sanchez v Oboz and Oboz [2015]

[2015] EWHC 235 (Fam)

12/02/2015

Barristers

Michael Gratton KC

Court

High Court Family Division

Practice Areas

International Children Law

Summary

Application by mother for orders for the committal to prison of the father and paternal grandmother following alleged breaches of orders made within wardship proceedings for the return of 3 year old daughter, wrongfully retained in Poland. Found that the father had breached two orders but adjourned sentencing to a further hearing alongside determination of the alleged breaches by the paternal grandmother.

Facts

Background Summary

On 4 July 2014 without notice orders were made on the mother's application for a return of Isabella to this jurisdiction. The same order was made on 15 July, repeated on 31 July 2014 and again on 7 August, the father being present at all three hearings. The matter returned to court on 15 August 2014 and the orders repeated, again with penal notices attached. The first hearing of the mother's committal application was heard on 20 October 2014 and adjourned to 17 November; the respondents were ordered to attend that hearing and penal notices were attached to that requirement. Thereafter followed further hearings and the filing of evidence (including by the father) in respect of the committal application, before being heard in open court by The Honourable Mr. Justice Cobb on 4 February 2015.

Committal proceedings in the absence of the respondents

Counsel for the applicant mother invited the court to proceed in the absence of the respondents. Cobb J reminded himself of the following facts [4]:

- i) Committal proceedings are essentially criminal in nature and the court should proceed in the absence of the accused with great caution;
- ii) Findings of fact are required before any penalty can be imposed and the presumption of innocence applies;
- iii) The penalty of imprisonment for a proven breach of an order is one of the most significant powers of

a judge exercising the civil/ family jurisdiction;

iv) Articles 6(1) and 6(3) ECHR are actively engaged, entitling the respondent to, inter alia, a 'fair and public hearing' and to 'have adequate time and the facilities for the preparation of his defence.'

With regard to the above factors, alongside the guidance in *R v Jones*, *R v Purvis* [2001] QB 862, Cobb J set out a checklist of considerations which, he suggests 'may be a useful checklist in all such cases' [5]:

- i) Whether the respondents have been served with the relevant documents, including notice of this hearing;
- ii) Whether the respondents have had sufficient notice to enable them to prepare for the hearing;
- iii) Whether any reason has been advanced for their non-appearance;
- iv) Whether by reference to the nature and circumstances of the respondents' behaviour, they have waived their right to be present;
- v) Whether an adjournment would be likely to secure the attendance of the respondent or facilitate their representation;
- vi) The extent of the disadvantage to the respondents in not being able to present their account of events;
- vii) Whether undue prejudice would be caused to the applicant by any delay;
- viii) Whether undue prejudice would be caused to the forensic process if the application was to proceed in the absence of the respondents'
- ix) The terms of the 'overriding objective' under rule 1.1. FPR 2010

The written evidence before the court included a detailed chronology of hearings and orders, a transcript of a hearing at which the respondents were present, statements of service, and correspondence from the father in which he acknowledges receipt of particular documents. The court adjourned the application to commit the paternal grandmother as it was not satisfied that it would be safe to proceed in her absence [11, 45]. Applying the facts to each of the checklist factors in respect of the father, the court concluded that it would be safe to proceed in his absence but held that were any of the alleged breaches proved, sentencing would be adjourned to allow the father to make representations [18].

Held

Particulars of alleged breach

In approaching the determination of the alleged breaches of the orders of 8 August 2014 and 15 August 2014 Cobb J referred to the judgment of Munby LJ (as he was then) in *Re L-W (Enforcement and Committal: Contact)*; *CPL v CH-W and Others* [2010] EWCA Civ 1253:

“(1) The first task for the judge hearing an application for committal for an alleged breach of a mandatory (positive) order is to identify, by reference to the express language of the order, precisely what it is that the order required the defendant to do. That is a question of construction and, this, a question of law.

(2) The next task for the judge is to determine whether the defendant has done what he was required to do and, if he has not, whether it was within his power to do it. To adopt Hughes LJ's language (in *Re A*), Could he do it? Was he able to do it? These are questions of fact. (3) The burden of proof lies throughout

on the applicant: it is for the applicant to establish that it was within the power of the defendant to do what the order required, not for the defendant to establish that it was not within his power to do it. (4) The standard of proof is the criminal standard, so that before finding the defendant guilty of contempt the judge must be sure (a) that the defendant has not done what he was required to do and (b) that it was within the power of the defendant to do it.”

With these criteria firmly in mind, Cobb J considered the evidence and concluded that he was satisfied, to the required standard, that the orders were clear, properly served, explicit on their face as to the potential consequences of breach and that the father had understood his obligation to comply. He was therefore found to be in breach of the orders of 8 August and 15 August 2014 having not returned or caused the return of Isabella to England and Wales by 14 August 2014, 22 August 2014, any later date, or at all [38, 41].

Disposal of determination of the alleged breach by the father of a Tipstaff passport order, determination of the penalty for the proven breaches by the father of the relevant orders, and the application to commit the paternal grandmother were adjourned to 9 March 2015. The order to return Isabella was repeated [25, 44].

Permission

Family Law Week 