

## Re J (Children)

**[2015] EWCA Civ 1019**

07/10/2015

### **Barristers**

Christopher Hames KC  
Private: David Williams QC  
Laura Morley

### **Court**

Court of Appeal (Civil Division)

### **Practice Areas**

International Children Law

### **Summary**

A father could not discharge the required criminal standard of proof in his application to commit a mother for contempt of court following her non-compliance with orders for the return of their teenage children to his custody; upon making the orders there had been an acknowledged risk that they would be frustrated by the children's objections to returning. The father's argument that contempt should be established on a strict liability basis simply by proof of non-compliance failed. The court commented upon the potential for using "best endeavour" type orders in family cases.

### **Facts**

A father appealed against a refusal ([2014] EWHC 2264 (Fam)) to commit the mother of his teenage children to prison for contempt of court following her non-compliance with court orders to return two of them to his custody.

The two children were aged 15 and 13 at the time of the return orders. The father was Spanish, the mother British, and the family had lived in Spain before the separation. The father still lived in Spain with the other three children. The teenagers had consistently and adamantly objected to returning to Spain. The mother's case was that it had been impossible to make them return. In the court below, the father argued that the mother had failed to take any meaningful steps to implement the orders and it was not fair to expect him to prove that compliance was, in fact, possible. He had argued for strict liability, or at least a reverse burden of proof, so that the bare fact of non-compliance by the mother would be sufficient to establish contempt unless she could satisfy the court that compliance was impossible. The judge held that the husband had the burden of proving, to the criminal standard, that it had been within the wife's powers to do what the order required. The teenagers gave evidence that nothing their mother said or did would have persuaded them to return. The judge concluded that the father's case was not strong enough to meet the standard of proof for committal.

The father repeated his argument that contempt should be established simply by proof of the fact that the order had not been complied with. He maintained that too often a parent failed to take any steps to make the child co-operate with an order where, had they acted differently, compliance might have been possible.

### Held

(1) The case had the potential to affect the wider field of civil litigation, but the arguments were firmly confined within the boundaries of family law and the case was determined on its particular facts. The court proceeded on the basis that an order requiring the mother to use her “best endeavours” to comply could not have been granted. However, such orders were not uncommon, and the court did not wish to lay down any rules as to their use without hearing specific argument on the point (see paras 27-29 of judgment). (2) The possibility of compliance had not been investigated before the return orders were made. The judge had made them despite an acknowledged risk that the teenagers would frustrate them. By doing so, he had proceeded on the basis that no finding of contempt could be made against the mother unless it was established to the criminal standard of proof that compliance had been within her power. Given the teenagers’ evidence, even if the husband had succeeded in his strict liability argument in the court below, it would have been a pyrrhic victory because there was no prospect of a penalty being exacted. The only possible foundation for imposing a penalty would be that the mother had not done all that she lawfully could to overcome the teenagers’ resistance. That was the same thing as saying that she had not used her best endeavours yet, on the father’s case, a best endeavours argument was impermissible. The obstacles against the father’s case were significant, *Al-Azzawi v Secretary of State for the Home Department* [2008] EWCA Civ 1139, L-W (Children) (Enforcement and Committal: Contact), *Re* [2010] EWCA Civ 1253, [2011] 1 F.L.R. 1095 and *K (A Child) (Return Order: Failure to Comply: Committal: Appeal)*, *Re* [2014] EWCA Civ 905, [2015] 1 F.L.R. 927 considered (paras 21, 30-33).

Appeal dismissed

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