Neutral Citation Number: [2019] EWCA Civ 1721

Case No: B4/2019/2449

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT FAMILY DIVISION
Mr Justice Cohen
FD17P00634

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 October 2019

Before :

LORD JUSTICE MOYLAN
and
LORD JUSTICE PETER JACKSON

- -

O (Committal: Legal Representation)

- -

Francis Wilkinson (instructed by **NR Legal Solicitors Ltd**) for the **Appellant Mother**
Caroline Harris (instructed by **Stock Denton Solicitors**) for the **Respondent Father**

Hearing date: 11 October 2019

- -

Approved Judgment

Lord Justice Peter Jackson:

1. On 2 October 2019, the appellant Adriana Ortega Zeifert was imprisoned for four weeks for disobedience of a High Court order. On 11 October we allowed her appeal and ordered her release. The appeal succeeded on the single procedural ground that the appellant, who ostensibly wished to be legally represented, was unrepresented at a hearing on 13 June at which a suspended committal was made and at a later hearing on 2 October when the suspension was lifted.

2. The case is a reminder that respondents to committal proceedings are entitled to be provided with legal representation if they want it and that they will qualify for non-means-tested legal aid. There is an obligation on the court to ensure that this protection is made available. Where this does not happen any resulting order for committal may be procedurally irregular.

3. PD37A of the Family Procedure Rules contains, in the same manner as CPR PD81, a list of matters to which the court must have regard at the hearing of a committal application. These include:

> "12.5 The court will also have regard to the need for the respondent to be –
>
> (1) allowed a reasonable time for responding to the committal application including, if necessary, preparing a defence;
>
> (2) made aware of the possible availability of criminal legal aid and how to contact the Legal Aid Agency;
>
> (3) given the opportunity, if unrepresented, to obtain legal advice; and
>
> (4) if unable to understand English, allowed to make arrangements, seeking the assistance of the court if necessary, for an interpreter to attend the hearing."

4. The issue of representation and legal aid in committal proceedings has been considered in a number of cases, including:

   King's Lynn and West Norfolk Council v Bunning and The Legal Aid Agency [2013] EWHC 3390 QB; [2015] 1 WLR 531 (Blake J)

   Brown v London Borough of Haringey [2015] EWCA Civ 483; [2017] 1 WLR 542 (CA)

   CH v CT [2018] EWHC 1310 (Fam); [2019] 1 FLR 700 (Baker J)

5. In *Brown*, the absence of legal representation and the failure of the court to sufficiently consider that issue, led to a committal order being set aside. In the course of his judgment, McCombe LJ said this:

> "39. Clearly, the right to a fair trial at common law and under the ECHR is squarely engaged on any application to commit an individual to prison for contempt of court. It is highly desirable that such an individual should be legally represented, if he or she so wishes. …
>
> …
>
> 41. … One must have sympathy with the judge who was confronted with a litigant who, in the earlier parts of the proceedings before him had not behaved well and who had displayed from time to time a tendency to extreme truculence. However, when it came to the committal application, the proceedings had moved to an entirely different phase. They were no longer civil proceedings, but had obtained a quasi-criminal character; the tenant's liberty was at risk. It was necessary to isolate the quasi-criminal application before the court from what had passed before and to make full inquiry (a) as to whether the tenant wanted legal representation and (b) whether he had applied for the necessary funding to do so and with what results. For my part, I do not think that the judge's short inquiry about representation, which I have quoted above, went nearly far enough in this respect."

6. In *CH v CT* at [37-47], Baker J gave detailed consideration to the statutory scheme concerning entitlement to legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO') and its associated regulations. At [42], he identified that

> "… there is no financial test for criminal proceedings in the High Court, and that a person who is the subject of a committal application in that court, including an appeal against a committal order, is entitled to publicly-funded representation. "

7. Turning to the present case, the underlying proceedings are in the Family Division, the appellant being the mother and the respondent the father. They came here from Mexico with their three children in 2010, but the parents' relationship ended and the father returned to Mexico in 2013. The mother remained under a student visa, but since January 2016 she and the children have been refused an extension and are now overstayers. An appeal to the First-tier Tribunal was dismissed in May 2018; permission to appeal to the Upper Tribunal was refused in December 2018; and permission to apply for judicial review was refused in January 2019.

8. In November 2017, the father issued an application under the Hague Convention 1980 seeking to enforce his right of access to the children. The mother agreed that the children wanted to go, and should be going, to Mexico for their summer holidays and at other times, but she said that this could not happen until the immigration position was settled. However, she soon engaged in what judges of the Division considered to be tactical manoeuvring to prevent the children returning at all. In December 2018, Cohen J ordered her to return the children to Mexico by 30 January 2019, but she did not do so. The matter came before Francis J on 7 March 2019, that being the ninth

hearing in the proceedings. The mother had notice of the hearing, but she did not attend. Francis J ordered her to return with the children to Mexico by 8 April. She did not do so, and on 11 April, the father issued a committal summons.

9. The committal proceedings came before Cohen J, who conducted no fewer than six hearings. The number of hearings reflected the court's patient efforts to secure compliance with its orders without the need to impose sanctions.

10. At the first hearing on 30 April, the mother had not obtained legal advice and the matter was adjourned to allow her to do so. On 17 May, she was again unrepresented because, although she had approached specialist solicitors, they informed her that she had not been granted legal aid on the basis of her means. The judge described the mother as having been apparently frustrated in her efforts to obtain representation. He adjourned until 13 June.

11. On 13 June, the mother once again appeared in person. The judgment given on that date includes these passages:

> "24. … The mother still has not got legal aid and apparently, again, there is an issue as to whether or not she is financially eligible.
>
> 25. I have reservations as to whether the Legal Aid Agency has in fact applied its own rules appropriately, because my reading of the relevant regulation is that such legal aid is not means tested and is available as a right, and I will, following this hearing, ask my clerk to email both parties with the relevant link.
>
> 26. I have considered carefully whether or not it would be appropriate to adjourn the matter yet again. I have determined that it would not be appropriate. The mother has had two months and she does not pretend that there is any defence to the allegations that she is in breach. When I asked her today whether she accepted she was in breach, she said she was, but it was not intentional. That was hardly an acceptable answer."

The judge then commented on a number of positions taken up by the mother: attempts to remove the father's parental responsibility in Mexico, a fresh immigration application, allegations that the father had been abusive to the children, and continued:

> "29. … This is yet more tactical jockeying and manoeuvring on the part of the mother. She has ducked and dived repeatedly for over eighteen months and, in my judgment, these proceedings must now be brought towards an end.
>
> …
>
> 32. As I say, the contempt is blatant and admitted. She has done everything to frustrate court orders over a long period. What I

> intend to do is I sentence the mother to four weeks' imprisonment. The implementation of the order is suspended until 31 July 2019. If the mother has returned the children to Mexico by that date, I will discharge the committal order on 31 July. …"

12. After the hearing, as he said he would, the judge forwarded references to relevant authority to the parties for their assistance on the legal aid issue. On 11 July, non-means-tested legal aid was granted to the appellant's solicitors to represent her in the committal proceedings.

13. The children were not returned and on 31 July, a further hearing took place at which the mother was represented by a solicitor who, it is now said, did not have higher rights of audience. The mother was granted a further suspension until 9 August after she had, though only after some prevarication, bought tickets for the children to fly on 8 August.

14. On 8 August, an application for a stay and for joinder was made by a different specialist solicitor on behalf of the oldest child, aged 15. A stay was refused and, having read the judgment of 13 June, the solicitor did not renew the application for joinder.

15. Later on 8 August, the mother brought the children to the airport. After they went through immigration, one of them refused to board the plane and they were returned to their mother.

16. At a hearing on 9 August, the mother was represented by the same solicitor. The judge rejected his submission that there was nothing more that the mother could have done. He said that he had absolutely no doubt that she had orchestrated the events of the previous day. He ordered her to return the children to Mexico by 2 September. He fixed a further hearing for 2 October, and again suspended the committal order until then. He invited participation by the Home Secretary in relation to what steps she intended to take in relation to the immigration position. He expressed strong concern about the harm the mother was doing to the children by her actions.

17. The children were not returned by 2 September. On 12 September, the father issued a further committal summons alleging breaches of the later orders.

18. On 2 October, the matter came before the judge again. The mother appeared in person, while the father and the Home Secretary were represented by counsel. On this occasion no representative from the mother's solicitors attended. Instead the mother came to court with an unsigned letter from that firm requesting an adjournment on the basis that they had been unable to find counsel for the hearing with requisite knowledge of family, criminal and immigration law: the judge rejected this as incredible as a representative of the solicitors had been present on 9 August when the hearing date had been fixed. The mother indicated that she would be making further immigration applications but, apart from applications for waiver of fees, none had yet been made. The judge described the absence of legal representation and the application for fee remission is "nothing other than delaying devices.". In the course of his judgment he said this:

> "A committal to prison is a last resort. She has seen this coming. She is repeatedly and unapologetically in breach of court orders. She is determined to ignore court orders. She regards them as being of no importance… It is not acceptable and the time has been reached that continued disobedience can no longer be tolerated."

19. The judge then made these orders:

- He activated the 4 week sentence handed down on 13 June, while noting the mother's ability to apply to purge her contempt at any time.
- He adjourned the father's second committal application, giving him liberty to reinstate it within the next 6 months.
- He reserved any further hearing to himself and invited the Home Secretary to remain involved.

20. Although the mother was not represented at the hearing on 2 October, her solicitors issued an appellant's notice on the day of her imprisonment. On behalf of the father, it is observed that the document, which is typed, appears to have been prepared before the hearing that day.

21. So the mother had the benefit of a legal aid certificate that covered the hearings on 31 July, 9 August and 2 October. Despite that, her solicitors did not instruct counsel on any of these occasions and only provided legal representation by a solicitor without rights of audience on the first two occasions. As to the hearing on 2 October, it is entirely unclear why the solicitors, who had the benefit of a legal aid certificate, did not attend court but instead sent a letter seeking an adjournment and drafted an appellant's notice that described the client as acting in person. An explanation for these matters from the firm's senior partner is required.

22. On receipt of the appellant's notice, this court made a representation order, granting legal aid and representation to the appellant under s.16 of LASPO. At the hearing on 11 October, the solicitors instructed Mr Wilkinson to represent the appellant.

23. It is first necessary to identify what order or orders are under appeal. Mr Wilkinson sought to attack not only the whole of the committal proceedings but also fundamental aspects of the orders made in the underlying Hague Convention proceedings. These include the lack of oral evidence, or (as he puts it) consideration of the children's wishes and feelings, or a Cafcass report, or a welfare judgement in the context of a permanent return to Mexico when they would not be accompanied by their primary carer. He complains that the children were not permitted to become parties and their objections were not heard. Nor was the mother's account of abuse taken into account. He draws attention to the fact that some orders required the mother to accompany the children, while others did not. He points out that a return order was made in proceedings concerning access. He says that the validity of the order said to be breached is a significant issue in the appeal and should be heard at the same time as the appeal against the committal order. He accepts that he would need permission to appeal out of time and to amend his appellant's notice for this purpose.

24. In my view, none of these are matters which this court can now properly consider. The orders made in December 2018 and March 2019, were not appealed at the time and are not the subject of this appeal. Once an order is made, it is to be obeyed unless and until it is set aside. We are concerned only with the integrity of the enforcement proceedings.

25. Even that is not plain sailing. The appellant's notice specifies the order of 9 August as the order appealed from. However, Mr Wilkinson in the end accepted that the appeal is in reality from the orders of 13 June and 2 October.

26. An appellant does not require permission to appeal from a committal order: CPR 52.3 (1)(i). I would interpret this to include not only an order for committal but a subsequent order relating to whether the suspension of a committal order should continue, at least where such a subsequent order had the effect of depriving an appellant of liberty.

27. At the same time, the time for appealing under CPR 52.12(2)(b), i.e. within 21 days of the decision under appeal, applies equally to committal orders. In this case any appeal from the order made in June would require time to be extended. On behalf of the father, Ms Harris very properly did not seek to deter us from extending time in respect of the order of 13 June. We granted permission for the appellant's notice to be treated as amended and for time to be extended so that the substance of the matter could be considered .

28. The grounds of appeal ultimately boiled down to the core submission that there was a serious procedural error arising from the court's failure to secure representation for the appellant from the outset of the committal proceedings. Other grounds fell away as not coming within the scope of the appeal or as amounting to arguments in support of the core submission.

29. In response, Ms Harris argued that the process was not unjust overall in that the appellant had legal aid from 11 July. She was represented at two hearings and had no apparent defence to the summons, indeed she had admitted that she was in breach. She submits that there is strong reason to believe that the mother's unrepresented state may have been tactical, bearing in mind that she had obtained representation at other hearings and in the immigration proceedings and in Mexico: in effect she has made sure she is represented when she wants to be. The judge's efforts to ensure she was effectively represented went far enough in the circumstances.

30. I have sympathy with some of these submissions, and with the situation that the judge faced. He was well placed to assess the mother's true motivation and he had given her many opportunities to comply with the court's orders. She had been specifically ordered to return the children to Mexico by dates in January, April, July and September 2019, all of which had come and gone. Since the committal order was made in June, it had been suspended three times to allow her every opportunity for compliance. A committal order may have been a likely outcome, even had the mother been legally represented.

31. Despite all this, the orders cannot be upheld. Committal proceedings are criminal in nature and they are different in kind to the proceedings from which they spring. As this court said in *Brown*, when it came to the committal application, the proceedings

had moved to an entirely different phase. The judge was the first to appreciate the mother's entitlement to be represented if she wanted, and he adjourned twice on that account. However, when she was frustrated in obtaining representation, apparently on invalid grounds, he should have taken further steps to resolve the problem, such as by making a representation order himself or by adjourning yet again on 13 June to ensure that the refusal of legal aid was effectively challenged. He did provide useful information to the parties, but only after the hearing at which the substantive order was made. That was too late, and the fact that the mother subsequently had legal representation cannot save the situation.

32. As to the order of 2 October, the judge understandably regarded the reason given by the solicitors for seeking an adjournment (inability to find suitable counsel) as incredible, but he should nonetheless have confronted the unexplained absence of any legal representation by deferring a decision, if only for a very short period, in order to investigate what was on the face of it an inadequate legal service to a litigant facing a serious penalty. I appreciate that the mother accepted to some extent that she was in breach of the order but, in my view, this further highlights the impact that legal representation might have had. It cannot be known what the outcomes of both hearings might have been had the mother being represented: they might very well have been the same, but they might not have been.

33. There may be circumstances where the court will decide to proceed with hearing a committal application without the alleged contemnor having legal representation, for example because it is just to do so where an adjournment is likely to prejudice the litigant himself. There may be other similar circumstances. But this was not such a case.

34. In the circumstances, the appeal from the contempt findings and the order for committal must be allowed and the father's committal application will have to be reheard by a different judge, who will inevitably (if a fresh finding of contempt is made) make allowance for the fact that the appellant has served nine days imprisonment.

35. I finally note, though it is not a matter before us, that the father's second committal summons has been adjourned generally within the following six months. This is not normally an appropriate course, but here the judge was no doubt wishing once again to give the mother every opportunity to comply with the orders of the court. As matters now stand it would clearly be right for the applications, if both are pursued, to be heard together.

36. Our order will therefore be as follows:

    1. Time for appealing from the committal order of 13 June 2019 is extended.

    2. The appeal is allowed.

    3. The findings of contempt and the suspended committal order of 13 June 2019 are set aside.

    4. The warrant of committal of 2 October 2019 is set aside.

5. The appellant shall be released from the sentence of imprisonment put into effect on 2 October 2019.

6. The committal summons of 11 April 2019 shall be listed for urgent directions before a judge of the Family Division other than Cohen J, on which occasion the court may also wish to give directions in the summons issued on 12 September 2019.

7. No order for costs.

37. We further order that the senior partner of NR Legal Solicitors Ltd shall within 14 days write to this court (for the attention of Lord Justice Moylan) giving an explanation for the fact that the appellant was not provided with fully-qualified legal representation at the hearings on 31 July, 9 August and 2 October 2019, to the extent that an explanation can be given without breaching client privilege.

Lord Justice Moylan:

38. I agree.