Neutral Citation Number: [2024] EWHC 2439 (Fam)

Case No: FD23P00126

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/09/2024

Before :

MR JUSTICE PEEL

- -

Between :

CHAIMAE CHAT KAHA	**Applicant**
- and -	
ADIL LAHMER	**Respondent**

- -
- -

Liz Andrews (instructed by **Duncan Lewis Solicitors**) for the **Applicant**
Gemma Lindfield (instructed by **Anthony Louca Solicitors**) for the **Respondent**

Hearing date: 17 September 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 27 September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Peel :

1. These proceedings concern a boy, V, who will be 5 years old in November. His mother ("M") by Notice dated 30 May 2024 applies to commit his father ("F") for breaches of an order made by Sir Jonathan Cohen on 15 April 2024. Specifically:

   i) By para 17, he was ordered to return V from Algeria to this jurisdiction by 4pm on 7 May 2024.

   ii) By para 18, he was ordered to buy flight tickets for V's return, to send copies of the tickets to M's lawyers, and to inform M's solicitors as to the identity of the third party who was to accompany V back.

   iii) By Para 19, he was ordered to "provide written authority to the 3rd party who is going to accompany the child on his return to England and Wales. The written authority is to state the following:". In fact, the order does not go on to state the content of the written authority. As it stands, the order at para 19 makes no sense. I am told by counsel for M that it was intended that F would, by the written authority, give consent for the third party to accompany V to this jurisdiction. However, the order does not say so, nor does the transcript of the judgment given on that day. It may be a logical interpretation of what was envisaged, but in my view the order lacks the essential clarity of the obligation on the respondent which is a pre-requisite of any committal application. On balance, I do not consider that it is appropriate to waive this procedural defect under FPR 2010 PD37A(2) and this pleaded breach shall be struck out.

   iv) By para 21, he was ordered to make V available for video contact three times per week.

2. F was present at the hearing at which the orders were made, and was represented. Personal service was dispensed with by para 35 of the order, although he was subsequently sent a copy by email. The relevant penal notice appears on the face of the order.

3. V has not been returned to this country, and indirect contact has not taken place. The essential issue is whether F was able to comply with the order or whether, as is submitted on his behalf, he was prevented from doing so by his mother. Of course, it is for M to prove that these matters were within F's power, not for F to prove that it was impossible for him to comply.

Representation and course of the hearing

4. Both parties were represented. I reminded F of his right to remain silent. In the event, no oral evidence was called. F's counsel did not seek to cross examine M, and F elected not to enter the witness box. I heard oral submissions from both counsel which supplemented their comprehensive written submissions.

Procedure

5. M's Notice of Contempt Application in Form N600, supported by an affidavit, is dated 30 May 2024. I am satisfied it is compliant with rule 37.4 of the FPR 2010 which

incorporates the essential safeguards identified by Theis J in **L (A Child) [2016] EWCA Civ 173**.

6. It is submitted (in written submissions, but not pursued with vigour orally) on behalf of F that para 12 of the Form N600 is deficient in that it does not recite in full the facts alleged to constitute contempt of court. I disagree. In my judgment the facts are clearly set out, so that F can be in no doubt as to the case against him.

Contempt applications: general principles

7. I attempted to distil the general legal principles applicable to contempt applications in **Bailey v Bailey (Committal) [2022] EWFC** as follows:

"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."

8. Para 29 of **Bailey** is of particular relevance to this case.

9. I have also been referred to **Re A (A Child) (Removal from Jurisdiction: Contempt of Court) [2009] 1 WLR 1482**, **Re S-C (Contempt) [2010] EWCA Civ 21** and **The**

Solicitor General v J.M.J. (Contempt) [2013] EWHC 3579 (Fam), all of which I have taken into account.

The background

10. I take this background from the bundle before me, including a comprehensive judgment handed down by Ms Gollop KC sitting as a Deputy High Court Judge on 13 December 2023.

11. F is a dual Algerian and British national. M is Moroccan by origin. They met in Germany in 2018 and married there under Sharia law. On 9 November 2019, M moved to England to live with F. V was born 2 weeks later. They married in a civil ceremony in Warrington on 9 March 2022.

12. It is not in dispute that F removed V from this jurisdiction to Algeria on 30 March 2022. Ms Gollop KC judge found that the removal was wrongful, having been made without M's knowledge or consent. F returned to this jurisdiction on 7 April 2022 without V, who he left in Algeria with his family, in particular his mother, V's paternal grandmother. F granted a Power of Attorney in favour of his mother on 12 May 2022 at the Algerian Embassy in London in respect of guardianship of V. V has been in Algeria ever since. It appears that he has been in the care of his grandmother throughout, apart from a short period of some two weeks or so at the end of 2023 when he was placed in the care of Algerian social services before being returned to the grandmother. The consequence is that V has not been in the care of either parent for 2 ½ years.

13. F, upon his return to this country, was arrested by the police in connection with a possible offence of child abduction. I am told that he has now been charged with child abduction.

14. On 7 March 2023, M applied by Form C66 for wardship and return orders, which were made without notice the next day by Arbuthnot J. F, on being served with the proceedings, challenged the jurisdiction of this court to make orders, and opposed a return order. A series of hearings took place thereafter, leading to a final hearing on both jurisdiction and welfare before Ms Gollop KC over 4 days in October and November 2023. She handed down a reserved judgment on 13 December 2023 concluding that the court had power under the parens patriae jurisdiction to make orders, and that it was appropriate to make a return order. Her determination is contained in an order dated 11 December 2023. F did not appeal her order.

15. Shortly afterwards, the grandmother made an application to the Algerian courts in respect of V on 25 December 2023.

16. That order of Ms Gollop KC was not complied with by F. V was not returned to this country. M issued a committal application on 26 January 2024 which was dismissed on 7 March 2024 by Cusworth J because of procedural flaws in the application. As I have indicated, a further return order was made by Sir Jonathan Cohen on 15 April 2024. F applied for permission to appeal against that order. The application was refused by the Court of Appeal on 12 June 2024.

17. I am entitled, in my view, to take into account express findings made by Sir Jonathan Cohen on 15 April 2024. He heard oral evidence from F, during which I am told that F

referred to the purported refusal of his mother to cooperate. The judge reached a number of important conclusions contained in his ex tempore judgment:

i) He found F's evidence to be "very unsatisfactory", saying that "It is absolutely clear that he has taken no step to obtain the return of V to this jurisdiction" (para 10).

ii) He recorded that F "has provided no documents in relation to Algerian proceedings. He says there is a port alert. He says there is a Care Order but he can provide not one document that supports that being the case" (para 11).

iii) F told him that "the power of attorney is now all irrelevant because the Court in Algeria will act on welfare principles", even though the Power of Attorney was the basis of the grandmother's application to the Algerian court (para 14).

iv) "It seems to me the father has not begun to discharge the argument that the paternal grandmother in Algeria is not just doing his bidding" (para 15).

v) "In short, it seems to me that the father has done absolutely nothing to attempt to bring [V] back to this jurisdiction and has not produced a shred of evidence to show that it is impossible for him to do so" (para 17).

These are all evidential findings, albeit made to the civil standard, which I am entitled to take into account, and which were left undisturbed by the Court of Appeal.

18. A further contempt application was issued by M on 30 May 2024, in respect of alleged breaches of the order made on 15 April 2024. It was personally served on F on 3 June 2024. A directions hearing on the application took place on 26 June 2024 at which F was present and represented. A direction was made for F, if he wished to rely upon any evidence, to file such evidence by 10 July 2024. He was, of course, under no obligation to go so. In the event, he has not filed any evidence.

19. In late April 2024 (after the making of the order which is the subject of this committal), F accepted in correspondence between his solicitors and M's solicitors that he had not complied with the paragraphs of the order identified above. It was said on his behalf that he was not able to do so because the grandmother would not assist. In an email dated 29 April 2024, his solicitor said:

"We have received from our client instructions and he confirmed that he has not purchased the travel ticket and does not have any third party to put forward who can assist him with returning the child to the UK. Client states that from the start of court proceedings his family told him that they will not assist him to return the child to the UK. Client's mother and sister are aware that there is a penalty notice attached to this order, they are still not willing to assist the father to return the child to the UK. Client informed us that his mother initially stopped talking to him, she has not spoken with the father since December 2023, and now his sister has stopped picking up his calls after he sent her the last order. Due to the reasons mentioned herein, the father is unable to comply with the order."

20. F's assertions in that email about his inability to comply must, in my judgment, be seen in the context of the history of this litigation.

21. He has repeatedly confirmed that, regardless of any orders made in this country, he will not return V. In a statement dated 24 March 2023 he said: "My son…is very happy now and I will not change his surrounding and I will never take him anywhere…No one can take my son from Algeria except me and I am not going to do it at all". On 31 August 2023, he referred to what he described as V's quality of life in Algeria and said: "I will not facilitate my son's return to the UK if a summary return order is made". In a statement dated 5 October 2023 he said that "…when I took my son to Algeria, my intention was for him to live there permanently". He had no intention of permitting him to return, and has fought tooth and nail to prevent a return. In none of these or other statements throughout 2022 and 2023 did he intimate that his mother had the power to determine whether V returned to the UK. On the contrary, on a plain reading of his own words, he considered he held that power himself, regardless of the fact of a Power of Attorney having been granted in his mother's favour. At the final hearing in December 2023 (and, so far as I can tell, at all hearings before then), F did not advance a case that he had no power to secure a return because of his mother's opposition. Even after the final hearing, in a statement dated 22 January 2024, he said nothing about his mother preventing him from complying.

22. The first time he set out his purported inability to effect a return due to his mother's opposition was in a statement dated 5 March 2024 in response to the first committal application. His case is that his mother's views supersede his. A short formal letter from his mother attached to that statement asserts legal rights although it does not say in terms that she would not assist F if requested to do so. I have already referred to the trenchant findings made by Sir Jonathan Cohen.

23. The court has made numerous previous orders for return, and must therefore have been satisfied that F could secure such a return. Most recently, Sir Jonathn Cohen made explicit findings to that effect and duly made the return order..

24. I note further that F acknowledged that he could facilitate indirect contact between M and V via his sister in his statement of 5 October 2023.

25. I also bear in mind that F has not filed any evidence in response to the committal application. That is his right. But it does mean that there is no evidence post-dating the committal application in respect of the grandmother's attitude, and the court is left with the recent judgment of Sir Jonathan Cohen concluding the exact opposite of what has been submitted to me today about F's purported inability to facilitate a return.

26. I do not accept what is submitted on F's behalf as to his inability to comply. I am satisfied from everything I have read and heard, and to the requisite standard of proof, that F, not his mother, has the power and control to take the significant decisions in V's life. I am equally satisfied, to the requisite standard of proof, that such decisions include procuring the return of V to this country, together with ancillary provisions, and the arrangement of indirect contact. I am satisfied that the grandmother does not take these decisions and cannot or would not thwart F if he wanted to comply and ensure a return of V to this country. F deliberately abducted the child to Algeria, and never had any intention to return him. In my judgment, his mother is no more than a cipher for his actions. Insofar as F relies upon the Power of Attorney granted to his mother (which he himself told Sir Jonathan Cohen is now irrelevant), he has chosen not to take the necessary steps to revoke it in the past two and a half years.

27. Further, regardless of the dynamics between F and the grandmother, I am satisfied that F is able to ensure the return of V to England through the Algerian courts. A report was commissioned from Dr Edge on Algerian law and the means of procuring a return of the child to England. In his report dated 18 June 2023, Dr Edge said that the only way to secure a return under Algerian law is for F to agree to the child returning; the Algerian court would adhere to F's authority and consent to this effect. The Algerian court would not accede to an application by M without F's consent. I am satisfied, again beyond reasonable doubt, that F has made no attempt to secure from the Algerian court an order which would enable V to be returned. He has taken no steps to give instructions and consent for that step to be taken.

28. F says through counsel there are ongoing proceedings in Algeria pursuant to which the Algerian court has prohibited V from leaving the country. So, it is said, that is a logistical and practical hurdle to compliance. The problem is that Sir Jonathan Cohen said there was no evidence of such an order, nor is there any such evidence before me. There is evidence that the grandmother issued proceedings in Algeria on 25 December 2023, but there is not a scrap of evidence that any substantive orders in her favour were made by the Algerian courts (port alert, or the equivalent of s8 orders). The only evidence (contained in the bundle before me) is that the Algerian court dismissed the application on 19 May 2024. In any event, I am satisfied that F is well able to ensure that there are no legal steps to V leaving Algeria if he so wishes; the truth is, however, that he does not so wish.

29. I am satisfied that M has discharged the burden on her of establishing to the criminal standard of proof that F has deliberately refused to comply with the order of this court made on 15 April 2024, and that it was at all material times fully within his power to comply. I reject the contention that the grandmother prevents him from so complying.

30. Turning to the specific allegations, I am satisfied to the requisite standard of proof that F is in breach of:

    i) Para 17 in that he did not procure V's return by 7 May 2024; his refusal to do so was deliberate and he was at all times well able to ensure that V returned.

    ii) The first sentence of para 18 in that he did not purchase flight tickets and send copies to M's solicitors by 29 April 2024. I am not satisfied that the alleged breach of the second sentence is made out; although it is a technical point, he was not ordered to effect the return via a third party and it therefore seems to me that he cannot be in breach of an order to identify such a third party.

    iii) I have already indicated that para 19 should be struck out.

    iv) Para 21 in that he did not arrange indirect contact three times per week, in circumstances where I am wholly satisfied that he was able to ensure such arrangements were implemented.

31. I will hear mitigation before considering sentence.