Case No: FD12P02046

Neutral Citation Number: [2014] EWHC 2264 (Fam)
IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
(In Open Court)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 July 2014

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

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Between :

TOMAS PALACIN CAMBRA	**Applicant**
- and -	
(1) JENNIFER MARIE JONES	
(2) JESSICA MARIA PALACIN JONES	**Respondents**

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Mr James Turner QC and Mr Edward Devereux (instructed by Dawson Cornwell) for the applicant
Mr Christopher Hames and Ms Laura Morley (instructed by Miles & Partners) for the first respondent
Mr David Williams QC (instructed by Brethertons LLP) for the second respondent

Hearing dates: 30 April, 1-2 May 2014

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Judgment

Sir James Munby, President of the Family Division :

1. This is the latest application in a bitterly contested private law (Hague Convention) dispute. It is the fourth judgment I have given. Many judgments have previously been given by other judges, both in this country and in Spain. One to which I need to refer is a judgment given by Theis J on 25 January 2013: *Cambra Jones* [2013] EWHC 88 (Fam), [2014] 1 FLR 5.

2. The first two judgments I gave were each delivered on 21 August 2013: *The Solicitor General v J M J (Contempt)* [2013] EWHC 2579 (Fam), [2014] 1 FLR 852, and *Re Jones (No 2)* [2013] EWHC 2730 (Fam). In the first of these judgments I explained why I had dismissed an application by Her Majesty's Solicitor General for the committal to prison of the first respondent (the mother) for breach of an order made by Hedley J on 9 October 2012. That order had required the mother, amongst other things, to return the second respondent (Jessica) and her younger brother Tomas (Tomas) to Spain. In the second judgment I explained why I was making a further order requiring the mother to return Jessica and Tomas to Spain.

3. The time for compliance with that order has expired. Neither Jessica nor Tomas has returned to Spain. The father, by application dated 29 January 2014, sought the committal of the mother for breach of my order. The hearing of the father's application had been listed for hearing on 6 March 2014. Very shortly before, notice was given by solicitors for Jessica that she wished to take part and be represented at the hearing of the committal application. Mr David Williams QC appeared on her behalf to make that application. His application was supported by Mr Christopher Hames on behalf of the mother but resisted by Mr James Turner QC and Mr Edward Devereux on behalf of the father. After hearing argument I decided that Jessica should participate as a party to the committal proceedings: *Cambra v Jones* [2014] EWHC 913 (Fam). That necessitated an adjournment of the hearing, which was re-fixed for 30 April 2014. At the same time I gave the father permission to amend his application to seek in addition the mother's committal to prison for breach of an order I had made on 20 August 2013 requiring her to bring the children to London next day. Neither child was brought to London.

4. Jessica was born in January 1998, and was therefore 15 years old in the autumn of 2013; Tomas was born in January 2000, and was therefore 13 years old. Jessica and Tomas had been joined as parties to the Hague proceedings in January 2013. Both were interviewed by the immensely experienced Mr John Mellor. There is a transcript of the evidence that Mr Mellor gave to Theis J on 30 November 2012. His evidence focused upon the wishes and feelings of Jessica and Tomas as expressed to him in interviews the day before. The whole of that transcript requires careful reading. I illustrate the high points by reference to a small number of particularly striking passages.

5. Mr Mellor recorded that:

> "the children chorused emphatically right from the outset that there was no way they were going back to Spain … they were resolute. Each individually in their different ways remained steadfastly so throughout the time I spent with them."

Quoting what he had been told by Tomas, Mr Mellor said:

> "He was absolutely insistent he wouldn't co-operate. He said: You'd have to tie me up; you'd have to drug me'."

Jessica is similarly recorded by Mr Mellor as having said to him:

> "I don't think anyone in this country is going to drag me kicking and screaming, they're not going to drug me, they're not going to put me in handcuffs. I'm not going to get on that plane. Once I get to Spain, if I'm not legally allowed to live with my mum here in Wales, they won't let me get on a plane to come back home."

Summarising matters Mr Mellor said:

> "I see no prospect of anyone prevailing upon them at this stage, in their current frame of mind, to comply with the orders that have been made for their return … The resistance shown by these children is exceptional, in my experience."

Coming from someone with Mr Mellor's vast experience, that last observation is striking.

6. Mr Mellor further assisted Theis J with a written report dated 10 January 2013, recording a further interview with the children on 8 January 2013:

> "Both were emphatic; they felt exactly the same, under no circumstances did either wish to return to Spain. Neither could identify anything anyone could do or say that might lead them to change their minds. Both stated their absolute determination to resist any steps to make them go back."

He summarised his reading of the situation as follows:

> "I remain of the view that in their present frame of mind, it is extremely unlikely that Jessica and Tomas can be prevailed upon to return to Spain. Though others, notably the father, may have constructive, practical suggestions to make, for my part I cannot identify any means by which their compliance might be secured."

7. One of the consequences of the children not being brought to London on 21 August 2013 was that Mr Mellor was not able to speak to them again as I had intended.

8. Much of the responsibility for this unhappy state of affairs undoubtedly rests on the mother, who in very significant part bears responsibility for the children's intransigence and for what Theis J aptly described (*Cambra v Jones* [2013] EWHC 88 (Fam), [2014] 1 FLR 5, para 54(2)) as "this fractured family." Theis J's verdict on the mother was scathing. She said (para 40):

> "In my judgment the harsh reality is that both Jessica and Tomas have been fundamentally let down by their mother by her refusal to comply with the court order requiring them to return to Spain. She has put them in an impossible situation which has resulted in them being physically separated from their siblings, with whom they have always lived and clearly have a close relationship with. Her actions have, in my judgment, fractured those significant relationships to the long term detriment of all the children. Despite the orders in place in the Spanish courts and the attempts by this court and the Court of Appeal, together with undertakings offered by the father to ensure the return would take place with no risk to the mother of further proceedings on her return to Spain she has, wholly unreasonably in my view, refused to exercise her parental responsibility in relation to Jessica and Tomas in such a way that would assist and support them to return to Spain and be re-united with their father and siblings."

She added this (para 54(2)):

> "The mother is to be deprecated for the position she takes. She has, in my judgment, abdicated her parental responsibility for these children and she will have to answer to them and their siblings in due course. I do not see her position now in isolation, it has been part of a concerted campaign by her over a number of years to thwart and undermine the legitimate orders made regarding the welfare of these children in Spain."

9. Theis J also recorded the mother's expressed attitude. Referring to a hearing on 9 November 2012 (para 25), "the mother said, in effect, she was not going to accompany Jessica and Tomas back to Spain." Referring to the hearing on 16 January 2013 (para 43), she recorded the mother's instructions to her counsel:

> "his instructions are the mother will not return to Spain and will not take any steps to return Jessica and Tomas to Spain … Mr Hames' express instructions are that the mother will not take any steps to comply with any order made requiring her to encourage Jessica and Tomas to return to Spain."

10. Nothing I have read, seen or heard since I first became involved in this unhappy case has done anything but strengthen my conviction that Theis J was entirely correct in her analysis. I expressly associate myself with what she said in the various passages I have quoted.

11. The mother denies that she is in contempt. Put very shortly, her case is that it was "impossible" for her to bring Jessica and Tomas to London on 21 August 2013 and that it has been "impossible" for her to compel them to return to Spain. As a matter of law, it is not for her to prove this assertion; it is for the father to disprove it and, moreover, to the criminal standard of proof: see *Re A (Abduction: Contempt)* [2008] EWCA Civ 1138, [2009] 1 FLR 1, *Re L-W (Enforcement and Committal: Contact);*

CPL v CH-W and Others [2010] EWCA Civ 1253, [2011] 1 FLR 1095, and *The Solicitor General v J M J (Contempt)* [2013] EWHC 2579 (Fam), [2014] 1 FLR 852.

12. For present purposes it suffices to repeat what I said in *Re L-W*, para 34:

> "(1) The first task for the judge hearing an application for committal for 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, thus, 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."

13. I add that the question of impossibility has to be determined by reference to the state of affairs as at the date fixed by the order for compliance. So the question is whether, on that date, it was or was not within the power of the defendant to do what the order required. As I explained in *Re L-W*, para 84:

> "if the answer is that it was not (or, to be more precise, that it has not been proved that it was within his power) then that is the end of the allegation, and it matters not at all that [he] may by his own acts (or omissions) on previous occasions have brought about the state of affairs upon which he now relies by way of defence."

That is particularly important in the present case where, as I have said, the mother in very significant part bears responsibility for the children's intransigence.

14. As in any application for committal the first necessity is to identify what the relevant order required of the person to whom it was addressed. The critical wording of the two orders is seemingly quite clear.

15. The order dated 20 August 2013 required the mother to "bring Jessica and Tomas to London on 21 August 2013 and … deliver them, by no later than 10.45am, to the *Cafcass* room on the first floor of the Queen's Building at the Royal Courts of Justice".

16. Paragraph 1 of the order dated 21 August 2013 required the mother to "return, or cause the return of Jessica … and Tomas … to the jurisdiction of the Kingdom of Spain by no later than 4pm (UK time) on 4 September 2013." Paragraph 2 of the

order provided that "In the event that it is impossible for [her] to comply with paragraph 1", the mother was to "return, or cause the return of Jessica and Tomas to the jurisdiction of the Kingdom of Spain by no later than 4pm (UK time) on 11 September 2013." Paragraph 3 provided, in terms similar to paragraph 2, for a long-stop date of 18 September 2013. The purpose of the order being expressed in these terms was to avoid the difficulty highlighted in *The Solicitor General v J M J (Contempt)* [2013] EWHC 2579 (Fam), [2014] 1 FLR 852, paras 19-23.

17. Mr Turner, however, submits that the orders not merely required the mother to bring about the stipulated outcome. They required her, he says, to use all lawful means to do so. His purpose is to demonstrate that there were a number of things that the mother could lawfully have done, but did not. So that, even if he is unable to prove to the criminal standard that it was possible for the mother to bring about the stipulated outcome, he can nevertheless, he says, establish contempt on the basis of her failure to do those things she lawfully could.

18. Attractively though Mr Turner sought to develop this submission it is, in my judgment, fundamentally unsound as a matter of law. In *The Solicitor General v J M J (Contempt)* [20131 EWHC 2579 (Fam), [2014] I FLR 852, para 21, I referred to the:

> "principle that in relation to committal "it is impossible to read implied terms into an order of the court": *Deodat v Deodat* (unreported, 9 June 1978: Court of Appeal Transcript No 78 484) per Megaw LJ. An injunction must be drafted in terms which are clear, precise and unambiguous."

Mr Turner seeks to avoid this difficulty by disavowing reliance upon any implied term and asserting that the provision for which he contends is necessarily implicit in the language of the orders. I disagree. Why should it be implicit that the mother has to have recourse to all lawful means, irrespective of cost or practicability, rather than it being implicit that she is to use her best endeavours or that she is to use all reasonable endeavours? To this, at the end of the day, Mr Turner really had no answer. As I observed in relation to a similar point which arose in *The Solicitor General v J M J (Contempt)* [2013] EWHC 2579 (Fam), [2014] 1 FLR 852, para 22, "It is simply impossible to say. Speculation founded on uncertainty is no basis upon which anyone can be committed for contempt."

19. I had witness statements from, in particular, the mother, her partner, Mr John Williams, and Jessica. All three also gave oral evidence before me. The evidence was all too predictable: Jessica said that there was nothing their mother could have said or done to persuade Tomas or her either to come to London or to return to Spain. The mother for her part said she had done her best, but to no avail. Mr Williams supported these accounts.

20. Mr Turner submitted at the outset by reference to the written evidence, and repeated in closing after the oral evidence, that the mother's efforts were superficial, minimal and insufficient, and that they were not genuine, the mother merely 'going through the motions' rather than being motivated by any real wish to achieve that which the court had ordered. He subjected the evidence to careful scrutiny with a view to demonstrating – successfully – that although long on generalities it was strikingly thin on the detail of any specific things allegedly said or done by the mother. He drew

attention to the fact that there was no evidence of any attempt by the mother either to threaten or actually impose sanctions or to hold out inducements with a view to getting the children to comply. Why, for example, had she not threatened 'grounding' or the confiscation of mobile phones, computers or other electronic equipment? He commented that the mother appears able easily to exercise parental responsibility in relation to Jessica and Tomas in relation to *all* other aspects of their upbringing. Yet she claims to be unable to ensure their compliance with the court's orders. Why? Because, he says, she has declined to exercise her parental responsibility, having no wish that the children return to Spain. In truth, he submits, the mother is simply continuing the campaign described by Theis J.

21. Mr Turner also submitted that, by defying the court and failing in her duties to her children, the mother has impeded the process of testing whether the court's orders really are "impossible" of performance – a proposition that would have been easier to test than in the event it was if the mother had really put her back into it. So her attitude has impeded the court's process and – no doubt intentionally – made it that much more difficult for the father to prove what he has to prove if his application is to succeed.

22. There is, in my judgment, very considerable force in Mr Turner's submissions. I was left by the end of the evidence with the very distinct impression that the mother had really done very little either to persuade the children to come to London, let alone to return to Spain. I was left with the very distinct impression that what little she did was indeed not much more than going through the motions. I accept Mr Turner's characterisation of her efforts as superficial, minimal and utterly inadequate. I suspect that she acted as she did knowing – from what I had said in *The Solicitor General v J M J (Contempt)* [2013] EWHC 2579 (Fam), [2014] 1 FLR 852 – that the father had to prove his case and that he would face an even more uphill task if she made no real effort.

23. The question, however, as I have explained, is not whether the mother used her best efforts, or, indeed, whether she did everything she lawfully could to ensure compliance with the court's orders. The question is whether the father has proved to the criminal standard, so that I am sure, that the mother had it in her power, in the one case on 20-21 August 2013 and in the other case in September 2013, to do what the orders required. Could she do it? Was she able to do it? Mr Hames and Mr Williams make common cause in submitting that she did not and could not. Mr Williams submits that Jessica and Tomas remain in the same intransigent frame of mind described by Mr Mellor. Mr Hames points out that there was no modification of the children's position even when confronted with the possibility of their mother's incarceration.

24. Perhaps unsurprisingly, Jessica was ambivalent in parts of her evidence. She said that she loved her father and missed him, but she was adamant that she would not return to Spain. She was calm while giving her evidence – there were no histrionics – but also, as I thought, clear, settled and determined in her views, views which remained unchanged since her interviews with Mr Mellor.

25. Mr Turner rightly disavowed any suggestion that the mother should have had recourse to brute force or sedation. The question ultimately, therefore, comes down to this. Has the father managed to prove, so that I am sure on the totality of the evidence I have

read and heard, that the mother could, whether by argument, persuasion, cajolement, blandishments, inducements, sanctions or threats falling short of brute force, or by a combination of them, have ensured compliance with the orders? In my judgment he has not. Has the father managed to prove, so that I am sure on the totality of the evidence I have read and heard, that the mother could, as Mr Turner asserted, have ensured compliance with the order for the children's return to Spain by herself returning to that country? Again, in my judgment, he has not. In relation to the order providing for the children's return to Spain, the father, in my judgment, falls well short. In relation to the order providing for the children to be brought to London, the father's case is much stronger, though not, I have concluded, strong enough to meet the criminal standard of proof.

26. It was accordingly for these reasons that at the end of the hearing on 2 May 2014 I announced that the father's application failed and must be dismissed.

27. Founding himself in part upon the reality that, as I have found, the mother has by her failure to take any meaningful steps to implement the relevant orders impeded the process of testing whether it really is impossible for her to implement them, Mr Turner mounted a characteristically ingenious but in my judgment ultimately forlorn argument. He said that in such circumstances it was not fair or just to expect the father to be able to satisfy a persuasive burden as to the possibility of implementation. Therefore, he submitted, fairness and, indeed, the requirement of the Convention jurisprudence that States take all reasonable steps to implement judicial orders, justifies the imposition of strict liability, or at least a persuasive (or reverse) burden, on the mother. So, he said, where, as here, the mother has not made any serious attempt to implement the orders, proof by the father of the bare fact of non-compliance should be sufficient, unless the mother can satisfy the court on a balance of probabilities that compliance was impossible.

28. Mr Turner acknowledged that to impose such a strict liability or reverse burden might be said to go against what has been said in previous authorities about the burden of proof being on the applicant throughout. Indeed, it does. He suggested that the burden of proof referred to in those authorities is to be construed as being the burden of proving simply the fact of non-compliance. That, in my judgment, is an impossible contention. Finally, he submitted that the authorities were decided *per incuriam* inasmuch as they did not address the analogy of the position under criminal law, and the approval of that position by the Strasbourg court, to the effect that even in criminal law a reverse burden may be justified if it is proportionate and does not impose a burden on a defendant unfairly. One matter to be borne in mind, he says, is the ease or difficulty that the respective parties would have in discharging the relevant burden. In that regard he referred me to *Sheldrake v Director of Public Prosecutions; Attorney General's Reference (No 4 of 2002)* [2004] UKHL 43, [2005] 1 AC 264, esp paras 5, 11-15 and 23.

29. I accept, of course, that such an approach can, as a matter of Convention law, be adopted where appropriate in the criminal law. Mr Turner submitted that the common law relating to contempt is, like the criminal law, capable of being shaped by the Strasbourg jurisprudence. So, no doubt, it is. But the simple fact, in my judgment, is that in this particular context – the law of contempt – such an approach has not been adopted. The law on this point is clear. Moreover, and despite Mr Turner's suggestion to the contrary, the law on this point, in my judgment, is Convention compliant. And

his argument that the relevant authorities, both decisions of the Court of Appeal, were decided *per incuriam* is, in my judgment, both wrong and, in any event, not one that it is open to him to address to me at first instance.

30. Before finishing there is something I must add. Theis J concluded her judgment in January 2013 with these words (*Cambra v Jones* [2013] EWHC 88 (Fam), [2014] 1 FLR 5, paras 59-60):

> "59 Whilst this judgment has focussed on the dry legal landscape one cannot ignore the underlying human element to this case. As Mr Mellor observed in his oral evidence he was struck by the observations of Mr Justice Hedley about the role the parents had played, how they had chosen to parent and the damage that they had done to their children. I would echo and associate myself with the astute observations of Mr Justice Hedley, who considered this case in October [2012], when he said
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> > " … the position of the parents is one of complete impossibility. I do not think they begin to even understand, if they care in the slightest, that they carry on their battle with a total disregard for the cost paid by their children for what they are doing. It is deeply saddening and deeply troubling that parents can be quite so unspeakably selfish as to conduct this kind of battle over years and years and stand by and watch their children pay the price of it. That is how they chose to parent and they must answer for it to their own children in the fullness of time."
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> 60 As Mr Mellor commented what he found so troubling is that the parents do not appear to have heeded one word of what Mr Justice Hedley said so we now have this impossible situation. I am deeply concerned about the emotional health of this family, in particular all the children, if the parents continue their past behaviour into the future. I sincerely hope that will change."

I agree with every word of what those two wise judges said. Matters today are no better, only worse.

31. Listening to Jessica's evidence was one of the saddest experiences of my time on the Bench. Her account of how and why her previously close relationship with her elder sister has changed was poignant. It is almost unbearable to think of these five siblings divided as they are, three living in Spain with their father, the other two with their mother in Wales, and all five having as little contact with each other as seems at present to be the case. Somehow there must be some healing within this fractured and bitterly divided family.

32. Both parents bear a heavy responsibility, not so much to the courts as to their children. If they remain unable to change things for the better, the price will in due

course be heavy, not just for the children they have damaged but also for them. That future does not bear thinking about.

33. Having read the draft of this judgment, Mr Turner seeks permission to appeal. His written submissions dated 4 July 2014 identify four grounds of appeal in relation to matters on which, he submits, I have fallen into error. The first is his contention that questions of possibility or impossibility of compliance are simply irrelevant. The 'offence' is one of strict liability, so that if there has been non-compliance contempt is established irrespective of any question of possibility of compliance. The second, in the alternative, relates to the 'reverse burden' issue dealt with in paragraphs 27-29 above. The third is his contention that a "purposive construction" of the relevant orders is required (see paragraphs 17-18 above). The fourth is a challenge to the finding (see the fifth and sixth sentences of paragraph 25 above) that the father has failed to prove that the mother could have ensured compliance with the order for the children's return to Spain by herself returning to that country.

34. I refuse permission to appeal. In relation to the first ground I regard the point, which was scarcely argued before me, as unarguable. In relation to the second and third grounds I draw attention to what I said in, respectively, paragraphs 29 and 18 above. The law is clear. I am not persuaded that Mr Turner's contentions to the contrary have any real prospect of success. In relation to the fourth ground this is an attempt to challenge a finding of fact – or, rather, a finding that the father had failed to persuade me of something to the criminal standard of proof – in circumstances where that finding was arrived at having regard to the totality of all the evidence, including the oral evidence, referred to in the judgment. Insofar as this ground is framed as a 'reasons' challenge, the reasons sufficiently appear from, in particular, paragraphs 5-6, 19 and 23-25 above.

35. Mr Turner submits that my decision involves points of general and considerable public importance and that it is in part founded on decisions of the Court of Appeal that were *per incuriam*. These are matters on which the decision as to whether to give permission to appeal is best left to the Court of Appeal. For my own part I would not grant permission on this basis. As Mr Williams submits, the children have suffered years of litigation and it is not right to subject them to yet further litigation in pursuit not of their own welfare but rather of some general public interest.

36. Finally, Mr Turner has invited me to consider granting a certificate for a 'leap-frog' appeal to the Supreme Court. He recognises that section 15(4) of the Administration of Justice Act 1969 may appear to present an obstacle but submits that in fact it does not. Section 15(4) provides that:

> "No certificate shall be granted under section 12 of this Act where the decision of the judge, or any order made by him in pursuance of that decision, is made in the exercise of jurisdiction to punish for contempt of court."

Mr Turner submits that since my decision was a decision to *not* exercise the jurisdiction to punish for contempt of court, the power to issue a certificate under section 12 is not inhibited by section 15(4). I do not agree. As Mr Williams put it, a decision whereby contempt is not found proved is as much a decision made "in the

exercise of jurisdiction to punish for contempt" as a decision finding contempt. Precisely so.