RE X (A CHILD BY HIS LITIGATION FRIEND) [2011] EWCA Civ 555

Court of Appeal

Lloyd and Wilson LJJ

24 March 2011

Contempt – Wardship – Active breach – Letter designed to thwart court order – Whether sentence of 8 month's imprisonment excessive

Wardship – Contempt – Active breach – Letter designed to thwart court order – Whether sentence of 8 month's imprisonment excessive

The child lived in London with the mother and an older sister; the father lived in Nigeria and, according to the mother, had no parental rights. When he was about 17 the child approached London solicitors and expressed concern that the mother was planning to take him to Nigeria and to force him into marriage there. The child, acting by a solicitor as his next friend, obtained a forced marriage protection order under s 63A of the Family Law Act 1996. On the child's instructions the order was not served on the mother. The child then went to Nigeria voluntarily, believing that he was going only for a family holiday and that he would return to England within a few weeks. When the child did not come back, his solicitor, again acting as his best friend, issued an originating summons in wardship; the child was made a ward of court, and an order was made for the child's return to England. The mother returned to England, but the child did not. Evidence put before the court gave rise to a substantial concern that the child was being retained in Nigeria against his wishes. Several orders were made requiring the mother to cause the child to be returned forthwith to England; when the mother failed to comply, the solicitor issued a summons for the mother's committal to prison. Eventually a consent order was made in which the mother formally instructed and authorised both the maternal aunt in Nigeria to hand the passport to the child's school, and the school to cause the child to be taken to the airport to catch a particular flight to London. As required by the order the mother also signed a letter giving the aunt and the school detailed instructions on how to comply with the order. However, she then sent another, separate, letter effectively countermanding the first, instructing the school to hand the child over to the aunt rather than to put the child on the flight. In the event, the child was not returned as required by the order. The solicitor acting for the child issued an additional summons for committal. The mother claimed that the second letter had merely been an attempt to clarify the first letter, and had been misunderstood. The judge found that there had been a deliberate attempt to thwart the child's return to England and committed the mother for breach of the order. Although the sentence was adjourned for 11 days, to give the mother yet another opportunity to co-operate, the mother failed to attend an appointment to sign the various letters intended to secure the child's return. When the tipstaff was sent to find her, it appeared that she was in hiding. The judge eventually sentenced the mother to 8 months' imprisonment; the maximum sentence was 2 years. At the sentencing hearing the mother did sign the relevant letters, but by this stage the father had issued Nigerian proceedings, and the Nigerian authorities had intervened to prevent the child's return. The mother appealed against her sentence.

Held – dismissing the appeal – this was not an inquiry into whether the child would have been returned to England had the mother complied with the order, although but for the mother's breach he might well have been returned safely by now, but into the seriousness of the mother's attempt to frustrate the court's attempt to secure the child's return: this had been an active breach of the order, rather than merely a failure to do

something that had been ordered, and had been intended totally to frustrate the arrangements made by the court (see paras [26], [30]).

Statutory provisions considered
Family Law Act 1996, s 63A
Forced Marriage (Civil Protection) Act 2007

Cases referred to in judgment
CJ v Flintshire Borough Council [2010] EWCA Civ 393, [2010] 2 FLR 1224, CA
Hale v Tanner; Practice Note [2000] 1 WLR 2377, [2000] 2 FLR 879, CA
Slade v Slade [2009] EWCA Civ 748, [2010] 1 WLR 1262, [2010] 1 FLR 160, [2010] 1 All ER 1231, CA

Oluwole Ogunbiyi for the appellant
David Williams for the respondent

WILSON LJ:
[1] A mother appeals against a sentence of eight months' imprisonment, not suspended, passed upon her by Macur J in the High Court, Family Division, Principal Registry, on 14 February 2011. On 3 February 2011 the judge had found that the mother had committed a contempt of court on 9 November 2010 by breaking an order made by Mostyn J on 8 November 2010. The latter order had been made in wardship proceedings relating to the mother's son, namely E, who was born on 10 March 1993 and who was therefore, at the relevant time, aged 17. The facts that he has recently attained the age of 18 and that therefore the wardship proceedings are now at an end have no impact upon the validity of the various orders made therein and particular on the order dated 14 February 2011 which is the subject of the appeal.
[2] Until August 2010 E lived with the mother and his older sister in London. E's father lives in Nigeria and, according at any rate to one statement of the mother made in the wardship proceedings, he has no parental responsibility for him under Nigerian law.
[3] It seems that in about July 2010 E consulted solicitors in London, namely Dawson Cornwell, and expressed concern that his mother was planning to take him to Nigeria and there to force him into a marriage. Acting by Ms Hutchinson, a partner in that firm, as his next friend, E obtained a forced marriage protection order under s 63A of the Family Law Act 1996, inserted into that Act by the Forced Marriage (Civil Protection) Act 2007. The precise terms of the protection order are irrelevant. On E's instructions the order was not served on the mother. No doubt the plan was to keep the order in abeyance until it was absolutely clear that adversary proceedings between E and his own mother were necessary in order to protect him from subjection to a marriage against his will.
[4] Later in July 2010 E travelled voluntarily with the mother and the sister to Nigeria on the understanding that it was to be a family holiday and that he was to return to England on 3 August 2010. In the event, on about that date, the sister did return to England; but E did not then return to England and he has remained in Nigeria ever since.
[5] The non-return of E to England led to the issue by him as plaintiff, again acting by Ms Hutchinson as his next friend, of an originating summons in wardship. He remained a ward of court until his recent birthday. On the

date of issue of the originating summons an order was made for E's return to England; and I expect that it was personally addressed to the mother.

[6] On 16 October 2010 the mother returned to England, where she has remained ever since. But she did not bring E back with her. In the wardship proceedings there were a number of hearings before judges of the Family Division in October, November and December 2010. Material was placed before the court which gave rise to substantial concern that E was being retained in Nigeria against his wishes. There may or may not have been material which also gave rise to concern that he was being prepared for subjection to a marriage. As I will explain, Mr Ogunbiyi, who appears for the mother today, tells us that such material as there was in that regard was exiguous. At all events the efforts of the judges were directed in the first instance to the speedy return of E to England.

[7] By late in October 2010 or early in November 2010 E, by his next friend, had issued a summons for his mother's committal to prison for breaking orders, of which I understand there to have been several, which required her to cause E to be returned forthwith to England. But, no doubt reluctant to press forward with a summons which might lead to his own mother's committal to prison, E seems to have been content that, under the shadow of the committal summons, yet further attempts should be made to attract her co-operation in securing his early return to England. By 8 November 2010, being the date of the hearing before Mostyn J, it seemed that his return to England was likely to be achieved. By that time he had been placed by the mother in a boarding school in Ibadan; and it seems that, perhaps through the good offices of a firm of solicitors in Nigeria who were assisting Ms Hutchinson, the school had indicated that, were the mother to instruct them to cause E to be taken to the airport at Lagos by noon on 9 November 2010, it would cause him to be taken there, with the result that he could catch the flight departing for London at 3 pm. The only other complication appeared to be that the mother's sister, whom I will describe as the aunt, was in possession of E's passport and so it was necessary also for the mother to instruct the aunt to give possession of the passport to the school by 8.30 am on 9 November 2010 so that it could equip E with it for the purposes of the flight.

[8] The order of Mostyn J, made on 8 November 2010 at the end of a hearing at which the mother was present and represented by counsel, recited that the mother was thereby formally instructing and authorising both the aunt to hand over the passport to the school and the school to cause E to be taken to the airport at the times to which I have referred. Nor was this arrangement merely recorded by way of recital. The third paragraph of the judge's order, made by consent, was that:

> 'The mother shall sign a separate letter today to the effect of her instruction as set out above and this shall be given to the child's legal team today at court for them to send by email or facsimile to the said school.'

No doubt it was also intended that the letter should be sent to the aunt.

[9] On the face of it the mother complied with what Mostyn J had ordered and indeed with what she had agreed. For on that date, 8 November, she duly

signed a letter, addressed compendiously to the aunt and to the headmistress of the school, in which she gave the necessary instructions and authorities to the aunt to give possession of the passport to the school and to the school to cause E to be taken to the airport. Unfortunately there was a typographical error in the letter in relation to the date of the flight but, happily, that misled no one.

[10] A few hours later, however, otherwise than through her solicitors, the mother sent, presumably by email or by fax, another letter to the headmistress. It was dated 9 November 2010 and by it the mother authorised and requested the headmistress to hand E over to the aunt 'because she is the main GUARDIAN and she has been the one that has been coming to the school regarding his welfare …'. The school duly received the letter and appears to have considered that, in the light of it, it was not able to act upon the previous instruction to cause E to be taken to the airport.

[11] In due course, by way of an additional summons for committal, E, by his next friend, therefore added to the charges already made against the mother the charge that she had broken the third paragraph of the order dated 8 November 2010. It was the additional summons which came for hearing before Macur J on 3 February 2011. The mother was present and represented by counsel; and she gave oral evidence to the judge. Her case was that the letter written by her to the school dated 9 November 2010 had not been intended to subvert the instructions which she had given to the school and indeed to the aunt in the letter dated 8 November 2010; and she contended that her object in sending the second letter was to assist in E's transport to the airport by causing the school to deliver E into the care of the aunt so that she could take him to the airport. But the judge rejected 'out of hand' the mother's account of her motive for sending the letter dated 9 November. There had of course been no reference in that letter to any intended conveyance of E by the aunt to the airport; and by the letter dated 8 November the mother had made it clear that it was for the school to cause him to be taken there. The only construction which the judge considered that she could place upon the letter dated 9 November was that it was to thwart the return of E to England. The judge said:

> 'Her contempt was deliberate, defiant and in the clear knowledge that this ward has been ordered to be returned to this jurisdiction on several previous occasions. Her act of defiance was quite clearly a contumelious disobedience of the court's order and intent.'

[12] Although the notice of appeal to this court recites an aspiration to appeal against 'conviction' as well as against 'the length of sentence', the grounds of appeal and the skeleton argument, both drafted by Mr Ogunbiyi, who has appeared so helpfully and ably for the mother today and who appeared for her on 14, albeit not on 3, February 2011, have made clear that the issue on the appeal relates only to the sentence of eight months' imprisonment passed by the judge for the contempt at the later hearing. For the record, however, I have no doubt that the judge was right to hold that the mother had been in breach of the third paragraph of the order dated 8 November 2010. Although superficially the mother might be said to have complied with the order by signing the letter dated 8 November, on the

judge's findings she deliberately deprived it of its effect by her transmission of the letter dated 9 November and so she thereby failed to comply with the order. Sensibly Mr Ogunbiyi's predecessor on 3 February had taken no technical point about ostensible compliance with the third paragraph of that order; and, even if the point had had any merit, the judge could no doubt easily have proceeded to treat the letter dated 9 November as a breach of the other orders that the mother should cause E to be returned to England.

[13] Although on 3 February 2011 she held the mother to be in contempt of court, the judge did not there and then proceed to sentence her for it. The matter was adjourned, probably at the request of the mother, so that she could take action which might qualify as mitigation in the sentencing exercise which would follow. In the event, as is clear, the adjournment was for 11 days. No doubt it was expected that the mother would at last provide genuine co-operation in securing E's return to England. To that end it was arranged, and I believe even ordered, that on the following day the mother would attend the offices of her solicitors and sign letters to various specified governmental authorities in Nigeria with a view to securing E's return to England. When the mother's solicitors were constrained to report to Ms Hutchinson that the mother had not attended their offices at the arranged time on 4 February in order to sign the letters, E, by Ms Hutchinson, secured an order from Mostyn J on that date for the issue of a bench warrant against the mother. In fact it appears that, at about 7.30 pm on 4 February, the mother did attend the offices of her solicitors but indicated that part of the content of the letters which it had been arranged that she should sign was unacceptable to her. The part which she indicated to be unacceptable was an assertion that she had at no time been married to E's father and that he had no rights of custody or other parental rights over him. Her complaint was that she had entered into a customary marriage with the father and that it would be untrue to say otherwise. She seems also to have complained that it would be untrue to assert that the father had no parental rights over E; but, as the judge was to observe at the hearing on 14 February, the mother's assertion that the father had parental rights seems to have been entirely inconsistent with her assertion in an affidavit sworn in October 2010 that all parental rights referable to E were vested in herself. Thus the letters intended to be sent to the authorities in Nigeria were not sent prior to the hearing on 14 February. Furthermore, when seeking to execute the warrant for the mother's arrest, the tipstaff was unable to locate her at her usual address in London; it appeared that she was in hiding.

[14] When on 14 February 2010 she came to explain the reasons for passing a sentence of eight months' imprisonment upon the mother, the judge rightly reminded herself that she was sentencing for the breach which occurred on 9 November 2010 and for nothing else. It was obvious, however, that, insofar as on 3 February 2011 there had been an expectation that events during the following few days would provide mitigation for that sentence, in fact they provided no such mitigation at all.

[15] At the hearing on 14 February, I expect pursuant to the wise advice of Mr Ogunbiyi, the mother did agree to sign the letters which it had been arranged that she should sign on 4 February, subject to a minor redaction referable to the issue whether she had undergone a ceremony of marriage with E's father. In other words, by the time of the hearing on 14 February the

mother was apparently prepared to assert, indeed (as I have explained) to reassert, that she alone had parental rights over E.

[16] The issue relating to the rights of E's father in relation to E had arisen in acute form in previous weeks when the father had issued proceedings in Nigeria referable to him. The judge had been told, I believe on 3 February, that a further attempt by the Nigerian lawyers assisting Ms Hutchinson to put E on a plane bound for England on 1 February had been thwarted at the airport by the airport authorities; and the obstruction was arguably attributable to the proceedings which the father had recently there issued. In her judgment on 14 February the judge was at pains to exculpate the mother from the failure of that particular attempt on 1 February to cause E to be brought back to England. But, by contrast, no proceedings brought by the father had been on foot on 9 November 2010 and so there was reason to conclude that, but for the mother's letter to the school dated 9 November, the arrangements for E's travel to England on *that* date would have been, or might well have been, successfully implemented.

[17] In explaining her sentence Macur J found that the mother was not truly remorseful for her breach of the order dated 8 November; that she had not done all in her power to effect E's return to England; and that she had not shown any indication of a willingness to co-operate other than on her own terms. The judge expressed herself unimpressed with Mr Ogunbiyi's plea that she should not forget the need of the mother's daughter, who, although not a minor, suffers, I am sorry to say, serious mental health problems for, as the judge observed, the mother had appeared to have no compunction about leaving the sister alone in England between about 3 August and 16 October 2010.

[18] The approach of this court to an appeal against sentence for a contempt of court was recently reaffirmed by Wall LJ, as he then was, in *Slade v Slade* [2009] EWCA Civ 748, [2010] 1 WLR 1262, [2010] 1 FLR 160 at [33] as follows:

> 'The result, I think, is that this court is unlikely to interfere unless it is of the view that the sentence passed is manifestly disproportionate or excessive. The judge is local, on the ground, and has the "feel" of the case. Any tinkering by this court is to be avoided.'

[19] Although not relevant to the length of the sentence, it is also worthwhile to remember, as the judge pointed out in her sentencing remarks, that, unlike a sentence passed in criminal proceedings, a sentence for contempt can be the subject of an application for an order for early discharge, formerly described as an application to purge the contempt: see the decision of this court in *CJ v Flintshire Borough Council* [2010] EWCA Civ 393, [2010] 2 FLR 1224, at [6].

[20] How then does Mr Ogunbiyi put his case to us? In the course of his submissions I have identified nine points.

[21] He opens with the important point that the sentence was for a first breach of order as found by the judge. Of course this was a point of which she had expressly reminded herself.

[22] Second, he stresses that the breach was one single act perpetrated at one single moment, rather than over a period of time. Again this was a point which the judge clearly and expressly considered.

[23] Third, he reminds us of the explanation which the mother had given to the judge on 3 February to the effect that, in writing the letter dated 9 November, her intention was not to thwart the arrangements which had been made on 8 November but to aid them. With great respect, that third point is not open to be taken in this court in the light of the judge's rejection of it and of the wise decision of the mother's legal advisers not to challenge her rejection thereof.

[24] Fourth, he presses upon us the point that, in removing E to Nigeria in July 2010, the mother was not in breach of any order and was of course unaware of the forced marriage protection order which had been made at E's instance by the court in an earlier week. That is all true so far as it goes. But I have had to ask myself: does it go very far in relation to this particular breach?

[25] Fifth, he reminds us, just as he reminded the judge, that the mother had signed not just the letter on 8 November which she had countermanded secretly but also other letters when requested to do so by the court at hearings on, for example, 11 November and 18 November; and indeed he shows us the mother's signature upon letters scheduled to court orders made on those dates. Clearly they have not had any effect in securing E's return to England; and in my view the fact that, under the constraint of court requirement, the mother signed those letters, which have had no effect on the ground in Nigeria, is of little moment in itself.

[26] Sixth, he relies on the failure of the plan to repatriate E to England on 1 February. If, says Mr Ogunbiyi, the Nigerian border authorities did not allow E to board the plane on 1 February, why might one conclude that they would have allowed E to board the plane on 9 November? In other words, submits counsel to us, one cannot confidently assume that the rogue letter dated 9 November actually impeded a flight which would otherwise have taken place. He accepts that on 9 November the proceedings more recently issued by the father in Nigeria referable to E had not been issued and so there was no possible complication in that regard. Mr Ogunbiyi, however, suggests that what precluded E's return on 1 February was not the issue by the father of the proceedings in Nigeria but rules about unaccompanied minors travelling on long distance flights from Nigeria. These matters were ventilated before the judge: Mr Ogunbiyi made an analogous submission to her. The judge's conclusion on the evidence before her was that on 9 November, absent the letter which was in breach of the order dated 8 November, E might well have been returned to England and that is as far as the matter can be taken. But at bottom this is an inquiry not into whether E would necessarily have been returned to England on 9 November but rather into the seriousness of the mother's attempt to frustrate the arrangements which had then been made and which had been hoped to secure his return at that time.

[27] Seventh, he refers to the mother's concern about the personal circumstances relating to E in England in the summer 2010. We know very little about this; but I am perfectly prepared to accept Mr Ogunbiyi's assertion that the mother has deposed to concerns about E's performance in his school in London, about the circle of friends with whom he was associating in London and about other matters which had led her to consider that his

upbringing in London was less than satisfactory. The trouble is that I do not regard that as a relevant consideration in relation to the breach on 9 November.

[28] Eighth, he reminds us about E's sister with her unfortunate problems and her apparent need for care,being presumably, says Mr Ogunbiyi, care by her mother. Of course one counter to that is the factor to which the judge adverted, namely that the mother was content that the sister should return to England on about 3 August whereas she, the mother, remained in Nigeria until 16 October 2010. So the judge concluded that at that time the mother did not have sufficient concern for the sister's need for her individual care, day upon day, to consider it necessary to accompany her back to England on about 3 August. Again, in any event, the circumstances of the sister are very much to the side of this matter.

[29] Ninth and finally, he asserts that the evidence put before the court in the wardship proceedings and in the forced marriage protection proceedings to the effect that the mother did or does have in mind to arrange for the forced marriage of E in Nigeria is, to use the word I have already used, exiguous. We do not have that evidence before us today. Let us proceed upon the basis that it is insubstantial although I suspect that there may well be an issue in relation thereto. The problem about this point from Mr Ogunbiyi's perspective today is that it does not logically impact upon the sentence properly to be passed for this breach.

[30] The mother's breach, being an active breach rather than just a failure to do something which had been ordered, was a breach which directly struck at what had been ordered hours previously. It was a breach which was, so the judge found, intended totally to frustrate the entire arrangements upon which the order dated 8 November, and the letter which the mother had then written pursuant thereto, had been constructed.

[31] It was decided by this court in *Hale v Tanner; Practice Note* [2000] 1 WLR 2377, [2000] 2 FLR 879, at [30], that the length of any sentence for committal for contempt had to bear some reasonable relationship to the maximum of two years, being of course the statutory maximum length of a committal for a civil contempt. The judge's sentence of eight months has to be considered in the light of those parameters. In my view it is perfectly obvious that this was a breach of such gravity that there had to be a sentence of imprisonment and that it could not sensibly be suspended. In relation to the length, the judge certainly had a discretion and I bear well in mind the remarks which I have quoted by Wall LJ at [18] above. Was the sentence going to be six months, eight months or nine months? That was a matter – was it not? – for the judge. I am clear, at the end of my careful attention to Mr Ogunbiyi's submissions, that the period favoured by the judge fell well within the parameters which were open to her on all the facts which I have tried to recount. Therefore I would dismiss this appeal.

LLOYD LJ:
[32] I agree. The appeal will therefore be dismissed.

Appeal dismissed.

Solicitors: *BH* for the appellant
Dawson Cornwell for the respondent

PHILIPPA JOHNSON
Law Reporter