Case No: FD12P02046

Neutral Citation Number: [2014] EWHC 913 (Fam)
IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
(In open court)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 March 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 (instructed by Miles & Partners) for the first respondent
Mr David Williams QC (instructed by Brethertons LLP) for the second respondent

Hearing date: 6 March 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. The history of the proceedings to date can be traced through the judgments given by Hedley J on 9 October 2012, *Re Jones* [2012] EWHC 2955 (Fam), and by Theis J on 25 January 2013, *Cambra v Jones* [2013] EWHC 88 (Fam), [2014] 1 FLR 5, and most recently in two judgments I delivered on 21 August 2013: *Re Jones* [2013] EWHC 2579 (Fam) and *Re Jones (No 2)* [2013] EWHC 2730 (Fam). In the first of those 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 requiring 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.

2. The time for compliance with the order I made on 21 August 2013 has expired. Neither Jessica nor Tomas has returned to Spain. The father, by application dated 29 January 2014, seeks the committal of the mother for breach of my order. The mother denies that she is in contempt. Put very shortly, her case, as set out in her statement dated 28 February 2014, is that it has been "impossible" for her to compel Jessica and Tomas 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 *Re Jones* [2013] EWHC 2579 (Fam). Jessica, I should add, was born in January 1998, and is therefore now 16 years old; Tomas was born in January 2000, and is therefore now 14 years old.

3. The hearing of the father's application had been listed, in accordance with directions I gave, for hearing on 6 March 2014. Very shortly before the hearing, 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. That necessitated an adjournment of the hearing, which was re-fixed for 30 April 2014. I now give judgment explaining my decision.

4. Jessica and Tomas were joined as parties to the Hague proceedings in January 2013 and were represented by CAFCASS legal at the hearing before me on 21 August 2013: see *Re Jones (No 2)* [2013] EWHC 2730 (Fam). This gave rise to a dispute between Mr Williams and Mr Turner as to whether this meant that Jessica was already and in any event a party to the committal application. Mr Williams said that she was: the committal application was made within the Hague proceedings, as shown by the fact that it shared the same number. Mr Turner begged to differ: the committal application was a discrete matter even though brought within the same proceedings. The point, although no doubt of some technical interest, seemed to me to be arid, for if Mr Williams turned out to be correct in his submission Mr Turner's riposte would no doubt have been an application to have Jessica removed as a party. I therefore declined to consider this preliminary point – a point on which, I make clear, I express no views at all – so that we could all concentrate on the substantive question of

whether or not Jessica should participate as a party to the committal proceedings. I turn, accordingly, to the real matter of controversy.

5. The basis of Jessica's application was set out by Mr Williams in his skeleton argument and elaborated by him in oral submissions. Her reasons for wishing to participate are threefold: first, she says that it is her own refusal to return to Spain that has resulted in my order not being complied with, and she does not want to see her mother being held responsible for that; second, she says that the impact on her personally if her mother were to be imprisoned at this crucial stage in her education (with GCSEs looming) would be hugely significant; third, she wishes to participate in any renewed attempt the father might make to enforce the order for her return to Spain, for it is, she says, unfair to her, as indeed to Tomas, to continue to seek their return despite what she says are their strong and long-held objections to returning.

6. Mr Williams on her behalf bolsters the last two points by submitting that use of coercive measures against the mother is coercion of Jessica: she is directly affected by what happens to the mother both because, she says, she bears responsibility for not returning and also because of the impact on her of what is happening to the mother. He points to *Shaw v Hungary (Application No 6457/09)* [2012] 2 FLR 1314, where the Strasbourg court cautioned against the use of coercive measures against children. He submits that the continuing efforts to secure her return (and that of Tomas) have become disproportionate, not least bearing in mind what he says is the cumulative toll the process is taking on her and on her relationship with her mother. He points in this context to what was said in *Re W (Abduction: Committal)* [2011] EWCA Civ 1196, [2012] 2 FLR 133.

7. More generally, Mr Williams submits that Jessica's own Article 8 rights are engaged, not merely at the point when her mother comes to be sentenced if contempt is proved but also at the prior stage when the issue of contempt falls to be determined. He points to Articles 3.1 and 12 of the United Nations Convention on the Rights of the Child 1989, in particular Article 12.2 which provides that:

> "the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

Jessica, he says, is plainly "affected" by the proceedings against her mother. He refers in this context to what Baroness Hale of Richmond said in *In re D (A Child) (Abduction: Custody Rights)* [2006] UKHL 51, [2007] 1 AC 619, [2007] 1 FLR 961, and in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166, [2011] 1 FLR 2170.

8. In terms of domestic procedural law, Mr Williams submits that Jessica's joinder as a party is permissible pursuant to FPR 16.2(1), as a child (in relation to which he referred me to *In re LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] UKSC 1, [2014] 2 WLR 124), and/or FPR 12.3(1), as a person with a "sufficient interest" both in her own welfare and that of Tomas (in relation to which he relied upon Baker J's decision in *W v W (Abduction: Joinder as Party)* [2009] EWHC 3288 (Fam), [2010] 1 FLR 1342), and/or FPR 12.3(3), a provision

which, as he points out, is unlimited in scope, though subject of course to the overriding objective in FPR 1.1, and which he says would permit Jessica to be joined as someone with a sufficient interest in the issues and the outcome. I say nothing about FPR 12.3(1), which applies only where the proceedings are for an order under the Hague Convention, but each of the other two provisions upon which Mr Williams relies would appear to be apt.

9. Finally, and fundamentally, Mr Williams points to the growing acceptance in the recent case law of the need to involve children – particularly children of Jessica's age and maturity – in processes which so directly impact upon them as this one undoubtedly does: see, for example, Thorpe LJ's well known comment about the "right to participation" of "articulate teenagers" in *Mabon v Mabon* [2005] EWCA Civ 634, [2005] Fam 366, [2005] 2 FLR 1011, para 28. The passage of the years since has served only to emphasise the continuing and growing impact of Thorpe LJ's characteristically prescient words.

10. Mr Turner accepts that Jessica's Article 8 rights are engaged at the sentencing stage but questions whether they are engaged at any earlier stage in the committal proceedings, referring in this connection to *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911, [2013] 2 FLR 1075. More fundamentally, he submits that Jessica's proper role in the committal proceedings is as a witness rather than a party. Whether in relation to the question of contempt, or in relation to subsequent mitigation, if that point is reached, Jessica can, he says, be called as a witness by the mother. If for any reason the mother does not call her then, he says, I can call her myself. I am prepared to assume, without deciding, that on this last point he is correct.

11. Moreover, he submits, relying for this purpose on Lord Wilson's recent analysis in *In re LC*, paras 47-53, that the court should still be cautious about giving even a teenager party status. It should not, he submits, be a matter of routine (the word used by Lord Wilson in para 53) and in most cases (the phrase used by Lord Wilson in para 47) something short of party status will, he submits, be sufficient. More specifically, he questions whether it is in Jessica's best interests to be involved in this particular issue as a party. He points to what Lord Wilson said, para 48:

> "The intrusion of the children into the forensic arena, which enables a number of them to adopt a directly confrontational stance towards the applicant parent, can prove very damaging to family relationships even in the long term and definitely affects their interests."

12. I entirely agree, but it all depends, of course, upon the circumstances of the particular case. In the present case, most unhappily for all, and most of all for the children, including Jessica and Tomas, it is hard to imagine that matters can get any worse. In January 2013, Theis J had referred to "this fractured family": *Cambra v Jones*, para 54. Positions, including the positions of Jessica and Tomas, are now seemingly polarised and immovable. It may be entirely the responsibility of the mother, who Theis J found to have "fundamentally let down" her children and "abdicated her parental responsibility" for them, but the fact is that Jessica and Tomas have long since been drawn into their parents' battles, both their battles at home and their battles in court. That, sadly, is a reality which I cannot ignore.

13. Jessica is, in the eyes of the law, a child, though she is, and no doubt sees herself as, a young woman. I must of course consider what is in her best interests. But I have to ask myself whether it can really be in her best interests to shut her out from participating in proceedings which, whether or not they engage her Article 8 rights, affect her very profoundly for all the reasons which she, and Mr Williams on her behalf, have articulated, and which she is so very anxious to be able to participate in. As Thorpe LJ said in *Mabon v Mabon*, para 28, and the point is so important it bears repetition,

> "we must, in the case of articulate teenagers, accept that the right to freedom of expression and participation outweighs the paternalistic judgment of welfare."

I respectfully agree. In all the circumstances, it is in my judgment overwhelmingly clear that Jessica's best interests are served by enabling her to participate as she would wish rather than preventing her.

14. Quite apart from that, there are, in my judgment, powerful arguments in favour of the view that the forensic process will be assisted by her participation as a party rather than as a mere witness. To adopt some words used by Lord Wilson in *In re LC*, para 54, Jessica's evidence "is evidence which, although the mother might have a valuable perspective on it, neither of the parents can give" and Jessica "has a standpoint incapable of being represented by either of the adult parties."

15. I conclude that Jessica should have party status.

16. Before leaving this case I add three points.

17. First, I wish to make clear that I have decided this case entirely by reference to current practice. Practice in this context, as I have already indicated, is continuing, and no doubt must continue, to develop. But there is no need for me today to embark upon any further development and this is not therefore an appropriate occasion to do so.

18. Secondly, there is no need for me to decide the interesting and important point in relation to Jessica's Article 8 rights on which Mr Williams and Mr Turner are at odds. Whether or not Mr Williams is correct in asserting that Jessica's Article 8 rights are engaged at all stages of the committal proceedings, the point is not determinative of the matter I have to decide. *If* and to the extent that Jessica's Article 8 rights are engaged, then that will carry with it the important procedural right to be "involved in the decision-making process, seen as a whole, to a degree sufficient to provide [her] with the requisite protection of [her] interests:" see *W v United Kingdom* (1988) 10 EHRR 29, para 64. However, although that may, it does not necessarily, carry with it the right to be represented or the right to party status: see *ZH (Tanzania)*, paras 34-37. In *CF v Secretary of Secretary of State for the Home Department* [2004] EWHC 111 (Fam), [2004] 2 FLR 517, proper representation was held to be necessary; because it was lacking, the decision was quashed. But there are many contexts where effective participation requires neither party status nor even representation.

19. Thirdly, and following on from the last point, nothing I have said in this judgment should be treated as bearing in any way on the practice of the criminal courts when

sentencing a defendant whose incarceration engages the Article 8 rights of the defendant's child.