

Button v Salama [2013]

[2013] EWHC 2972 (Fam)

10/10/2013

Barristers

Mark Jarman KC

Court

High Court (Family Division)

Practice Areas

International Children Law

Summary

High Court application made within Wardship proceedings for further committal of Respondent to prison in light of continuing failure to comply with orders

Facts

In September 2013, Holman J heard an application to commit a father to prison for contempt.

The background to the matter was that a 6 year old girl, having been taken to Egypt on holiday by both parents in December 2011, had been removed from her mother's care and placed with paternal family by her father. The mother had returned to England without her, followed, about a year later, by the father. The mother had started proceedings in which the child had been warded and various orders were made (to which a penal notice was attached) including orders requiring the father to return the child to the jurisdiction, to disclose details of her whereabouts and the arrangements for her care.

The father's non compliance had resulted in his committal to prison, where he had remained since January 2012. The most recent committal had been pursuant to the order of Wood J in July 2013. The father's continuing failure to obey or even attempt to obey the orders had resulted in his having been detained for 21 months (which was the equivalent of an aggregate sentence of 3 and a half years imprisonment).

Held

Holman J stressed that it was essential to understand that Wood J had made fresh orders which placed the father under fresh obligations to comply.

He also noted that there was express provision for a further hearing to be fixed to consider the issue of the father's further contempt should the child not be returned; this was of relevance as there was a procedural defect. The notice to show cause had not been served on the father until his attendance at court. Given that it was fundamental that a respondent to any notice committal application should have adequate notice, "in almost any other circumstances" this defect would have been "fatal" to the

application. Here, however, the father had known both of the hearing and of its purpose from the order of 2nd July. He had known that if he did not comply, the issue of his further contempt would be considered at this hearing.

The father had frankly admitted non-compliance and knew “perfectly well” that he had breached the orders of Wood J. In the particular circumstances, therefore, the lack of personal service could be overlooked and the application could proceed.

Holman J reminded himself both that the standard of proof was that of the criminal jurisdiction and that the burden lay with the mother, before commenting that, like Wood J, he had found the father “shifty, evasive and plainly dishonest”. He did not accept his case that he had been unable to comply because his family had withdrawn from communication with him. The father was “bitter” with regard to both the mother and the English court, the jurisdiction of which he was unwilling to accept.

With regard to sentencing, the judge accepted that the approach in *Re W (Abduction:Committal)* was lawful; this provided authority for the court to make “successive mandatory injunctions requiring positive actions...a failure to comply with any fresh order would properly expose the defaulter to fresh contempt proceedings and the possibility of a further term of imprisonment.”

Holman J rejected the father’s arguments (that it would be unfair to sentence him again for the same offence and that he was entitled to know the “determinative ending” of his sentence) observing that he was not being so punished but was being sentenced for breach of the orders made on 2nd July only. He knew the determinative date and, if sentenced again, would know the end date and his release date at the half way point. His counsel, whilst submitting that *Re W* was wrong, accepted that it was binding and could only be challenged in a higher court.

As for the assertion on the father’s behalf that further sentencing would be disproportionate, having considered the relevant passages of *Re W*, Holman J, accepted the mother’s submission that the very fact of the breaches having been repeated had become an aggravating factor. Even though the father had now served 3 1/2 years and at some point, further punishment would become “excessive”, that point had not yet been reached.

He was not, however, persuaded to impose 12 month sentences (which might run the risk of being excessive) and therefore imposed further concurrent sentences of 6 months to be served consecutive to the sentences imposed by Wood J. He also made a further order in similar terms to that of Wood J, with directions to ensure that there would be no repeat of the procedural difficulties encountered.

Permission

Family Law Week 