Neutral Citation: [2013] IEHC 517

THE HIGH COURT

[2011 No. 2031 P.]

BETWEEN

HEALTH SERVICE EXECUTIVE

PLAINTIFF

AND

R. (A MINOR REPRESENTED BY M. HER GUARDIAN AD LITEM) M. (D.2), M. (D.3) AND A. (D.4)

DEFENDANTS

JUDGMENT of MR. Justice Birmingham delivered the 7th day of November, 2013

1. In this case the Health Service Executive (HSE) are seeking an order directing the attachment and committal to prison of the second named defendant for contempt of court arising from alleged breaches by him of High Court orders made by MacMenamin J. In particular it is alleged that he:

> (i) failed to produce the first named defendant, his daughter, before the High Court in breach of a court order dated the 20th January, 2012,
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> (ii) facilitated the first named defendant's departure from the State in breach of an order of the Court dated the 2nd March, 2011,
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> (iii) departed from the State in breach of orders dated the 18th and 31st January, 2012,
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> (iv) failed to deliver up all of his travel documents in breach of the order dated the 18th January, 2012, and
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> (v) failed to assist in the return of the first named defendant to this jurisdiction in breach of the court order dated the 20th January, 2012.

2. The factual background to this application was set out in very considerable detail during the course of a written judgment delivered by MacMenamin J. on the 18th June, 2013 (Unreported, High Court, MacMenamin J. 18th June, 2013). At this stage I would draw attention to the terms of para. 51 of that judgment which states:

> "It transpired that as a result of a concerted plan, R.'s mother embarked on a scheme to obtain travel documents from the Egyptian embassy for R. and to take her out of this jurisdiction. In doing so, the mother was guilty of a very serious contempt of court; ignoring the still extant order restraining any such action. Her father, who claimed ignorance of what had occurred, soon followed. The court held both parents in contempt of court."

3. I will not repeat the details set out with such detail and with such care by MacMenamin J. However, by way of brief recap, it will be recalled that on the 9th June, 2011, MacMenamin J. granted a declaration that the purported marriage of the first named defendant to the fourth named defendant was void *ab initio* by reason of the absence of full, free and informed consent on the part of the first named defendant. On the 2nd March, 2011, MacMenamin J. made certain orders which are of significance in the context of the present proceedings. The orders listed at paragraphs 12, 13 and 14 are particularly in point.

4. They are in these terms.

> "12. The second, third and fourth named defendants, whether by themselves, their servants or agents, or otherwise howsoever be restrained from removing, or encouraging, assisting, or agreeing with any person to remove R. (D.1) a minor from the jurisdiction of this Honourable Court.
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> 13. The defendants, and each of them their respective servants or agents, do forthwith surrender to this Honourable Court any passport, or other travel document in the name of, or referring to R. (D.1) a minor, pending further order of this Honourable Court.
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> 14. The defendants and each of them, their respective servants or agents be restrained from taking any step within the jurisdiction of this Honourable Court, or otherwise, from applying for any new passport, or other travel documents in the name of, or concerning, R. (D.I) a minor, pending further order of this Honourable Court."

The letter used in the original order to refer to D.1 has been changed to R. in order to achieve clarity and continuity.

4. R.'s parents sought for her to have full, free and unfettered contact with her family. This was opposed by the HSE and the gardaí. It is of very considerable significance that Garda Inspector Tom Murphy, who was called to give evidence by the guardian *ad litem*, stated that the security risks remained high and that the garda position was that R. was at grave risk within her family and he put that risk level at 8/9 on a scale of O to 10. I draw attention to these concerns, not because I have formed any concluded view as to whether R. was in fact at grave risk, but rather to show the context in which the Court made orders and in particular the fact that the court orders were made in a situation where the Court believed it was dealing with a very serious situation. No one could have been in any doubt that the Court was making very significant orders and that the Court was very concerned indeed at the situation it was dealing with and required that the orders be faithfully observed.

5. A measure of how seriously matters were being taken was that the second named defendant and also R.'s mother and R.'s sister all in turn solemnly swore on the Koran that no harm would come to R. from them or from any family member or, from anyone else. On the 5th January, 2012, the HSE received a letter from the solicitors for the second named defendant (the father), the third named

defendant (the mother) and the fourth named defendant (the individual who had gone through the ceremony of marriage) which stated that R. had gone to Egypt.

6. The matter was back before the court on a number of occasions over the following days and on the 18th January, 2012, MacMenamin J. made a number of additional orders, paras. 2, 3, and 4 being particularly in point. They are in these terms:-

> "2. An order directing forthwith the second named defendant, to surrender to the Honourable Court his passport, other travel documents and his Garda National Immigration Bureau card [...] pending further order.
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> 3. An order restraining the second named defendant, from departing, or taking any step to depart from the jurisdiction of this Honourable Court and State pending further order.
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> 4. An order restraining the second named defendant, from applying for or taking any step to apply for, whether by himself, his servants or agents, or otherwise howsoever, any passport, travel document or any other documentation to facilitate travel outside of the jurisdiction of this Honourable Court pending further order."

7. The matter was before the court again on the 20th January, 2012. At that stage it emerged that R. had left a message on the voicemail of Mr. Kevin O'Neill (Chief Registrar) to the effect that she wished to stay in Egypt of her own free will, and did not want her parents to be in trouble. However, if anything this phone call served to raise the concern level as the question arose why R. would be leaving messages on the Courts Service number, and indeed the question was asked where she would have got that number, instead of communicating with and through her guardian *ad litem* as had been her normal practice. MacMenamin J. made the extent of his concerns clear and made further orders. Paragraphs 1 and 3 are particularly in point, they are in these

> (i) An order directing the second named defendant and the third named defendant to produce the person of the minor R.; who is the first named defendant before this Honourable Court sitting at the High Court, Four Courts, Inns Quay, Dublin 7 [...] on the 31st day of January, 2012.
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> (iii) An order permitting the second named defendant to apply to this Honourable Court for the release from custody of the Court and the return to him of his Garda National Immigration Bureau card as and when the second named defendant executes all and any documentation, whether at the request of the HSE, the plaintiff, or the Court appointed guardian *ad litem* or otherwise howsoever, to ensure and secure the return of the minor R. to the jurisdiction of this Honourable Court and State.

On the 26th January, 2012, the second named defendant swore an affidavit. In the course of the affidavit he stated as follows:

> "I say and believe there is little I can do to effect the return of my daughter at this juncture. Furthermore I am not in a position to talk on behalf of my wife or her family in this regard. While I say and believe that my daughter is safe in Egypt and at no risk of harm and that her medical issues are being dealt with competently that I am fully aware that this is not the issue particularly in light of the orders of the Court of the 20th January last."

9. I think it fair to say that the tone struck in the course of that affidavit, which is one of helplessness, has been a constant refrain. When the matter was before the court on the 31st January, 2012, the second named defendant was not present in the court. The matter was put back to the 3rd February, 2012, and an order was made that the second named defendant should be present on that occasion to assist the Court on issues which were causing further and greater concern. However, the second named defendant did not appear in court on that date.

10. On the 15th February, 2012, MacMenamin J. issued a bench warrant in respect of the second and third named defendants. Between February, 2012 and July, 2013, the matter was listed before MacMenamin J. on numerous occasions, but the next significant development was in late July, 2013. On the 26th July, 2013, the second named defendant was brought before the High Court. Evidence was given by a member of An Garda Siochana that the second named defendant had returned to Ireland some days previously, had contacted his solicitor and had surrendered himself at Tallaght garda station. Given the information that has emerged during the course of the earlier hearing about the second named defendant's political and philosophical views it may not be a coincidence that his return to Ireland came shortly after the removal from office of President Morsi by the Egyptian military.

11. Since last July, the matter has been listed in court on several occasions. It has been made abundantly clear to the second named defendant that the Court was very anxious that R. would travel to Ireland and appear in court in person. It was stressed that the visit to Ireland need only be one of very short duration if that was what R. shed. Although it was made clear to the second named defendant that if he would encourage his daughter to travel to Ireland and if he would facilitate the journey to Ireland that this would be enormously to his credit, unfortunately that has not happened. What has been achieved is that R. has, on one occasion, spoken to me in court by phone from the Irish Consulate in Alexandria. Because of the quality of the phone line, including a delay on the line, that conversation was less than satisfactory. It did emerge that she was saying that she would not be travelling to Ireland at this stage, that she was engaged to be married and that she would definitely travel to Ireland after the wedding had taken place. She was very clear in saying that she did not want her father to go to prison.

12. The second named defendant's response to the allegations made against him has been to freely acknowledge that he disobeyed a court order in leaving the jurisdiction and travelling to Egypt and to apologise for this and to point to the fact that he had returned to Ireland and had made contact with the authorities. For my part, I have sought to make it clear that if the issue of travel stood alone, that there could be no question of him facing committal to prison. Committal to prison in my view, should be seen as very much a last resort, to be considered only in exceptional circumstances. If the issue of travel stood alone then the fact that he had returned to the State, contacted the authorities, attended all subsequent court hearings and complied with the conditions of his bail would all have been factors that were very much to his favour.

13. However, in so far as the main allegations that he faces, that of being involved in his daughter's departure from the State and not securing her return, he takes a very different position. He says that on the 4th January, 2012, when he returned from work that R. and his wife and other children were not there. He understood that they had gone shopping and was not concerned and went to bed, but the following morning he received a phone call telling him that R. was in Egypt.

14. So far as the current situation is concerned, he presents himself as helpless, unable to direct his daughter to return to Ireland. He points to the fact that she has turned eighteen and says that he is powerless to secure her return to Ireland even for a short period. The moving party accepts that it is not a case where it is in a position to offer direct evidence of the involvement of the second named defendant in the conduct alleged to amount to a contempt of court. It accepts that its case could fairly be categorised as a

circumstantial one, but nonetheless says that the allegations that it lays against the second named defendant are established to the standard of proof beyond reasonable doubt.

15. The second named defendant says that far from the plaintiff's case having been established to the necessary standard of proof beyond reasonable doubt, that the criticisms made of him have not even been established on the balance of probabilities. It is pointed out that there was no notice of intention to cross examine him on the contents of his affidavit and it is said that his affidavit and the account that it presents now stands unchallenged.

16. For my part, I am satisfied to the criminal standard both in relation to the historic matters, his involvement in his daughter's departure from the State, and the current matters, his failure or refusal to secure his daughter's return to the State. I am bound to say that I regard the account given by the second named defendant as being in a literal sense incredible, incapable of being believed. To reject the case advanced by the moving party would be, to use the language of Carroll J. in *D.P.P. v. Nevin* [2003] 3 I.R. 321, an affront to common sense.

17. Accordingly, I must hold that the second named defendant is guilty of contempt of court in that he:

(i) failed to produce his daughter before the court in breach of the order of the High Court dated the 20th January, 2012.

(ii) facilitated his daughter's departure from the State in breach of the order dated the 20th January, 2012.

(iii) failed to assist in the return of his daughter R. to this jurisdiction in breach of the order dated the 20th January, 2012.

18. In addition I am satisfied that the second named defendant departed the State on or about, 31st January, 2012 in breach of a court order of the 18th January, 2012, a fact that the second named defendant acknowledges.

19. I therefore have to consider what action, if any, I should take on foot of the findings that I have made that the applicant is guilty of contempt to court. There are a number of factors to which I have regard. First of all, I must have regard to the gravity of the contempt in question. In that connection, I must record the fact 'that in my view given that the Court made its orders at a time when it had very serious fears for the safety of R., a fact that was well known to the second named defendant, that this means that this is a very grave contempt indeed. The existence of those fears on part of the HSE, the guardian *ad litem* and indeed the Court itself adds an aliditional dimension to the gravity of the contempt. It seems to me that the case has to be seen as being at a different level of seriousness even to cases involving breaches of court orders in the context of domestic child abductions. It need hardly be said that such cases will always be serious, but serious as they indeed are, this case is at a different and higher level yet.

20. It is proper and indeed necessary to have regard to the view of R. She does not want to see her father go to jail. I also take into account that the second named defendant is experiencing significant health difficulties and also that as an Egyptian national he is likely to find incarceration in an Irish prison a very difficult experience.

21. My concern is to secure, even at this late stage, compliance with the orders of the Court. In particular I am anxious that R. would come to Ireland, so that everyone can be satisfied that her departure from the State and her continued absence from the State since her departure is of her own free will.

22. I have been referred to the case of *Button v. Salama* [2013] E.W.H.C. 2474 (Fam.) and I found the approach taken there by Roderic Woods J. very helpful indeed. That was a child abduction case, which as it happens, also had an Egyptian dimension. Roderic Wood J. imposed a sentence of six months in respect of the breaches that he was dealing with, but he did that in a situation where the respondent already spent eighteen months in prison following earlier breaches of orders.

23. In my view, the gravity of the breaches that have occurred and continue to occur cannot be marked by a committal to prison for a period of anything less than twelve months. Having regard to the factors that I have mentioned such as the heath issues and the nationality of the second named defendant, and indeed having regard to his daughter's clear views, I will not commit him for a period longer than that, but I must and will commit him for that period.

24. I have had expert evidence from Mr. Ian Edge, a member of the English Bar, in relation to the legal capacity of the second named defendant to secure his daughter's return. But even without considering the legal niceties, I am quite coninced that the second named defendant is in a position to influence the actions of his daughter, both directly and also indirectly through other family members. In the hope that even at this stage he might be prepared to do this and in the process purge his contempt, I will place a stay on the order for his committal for four weeks and during that four week period there will be liberty to apply. However, absent steps being taken by the second named defendant to purge his contempt during that period I will direct that the second named defendant should be committed to prison on the 6th December, 2013, for a period of twelve months. I will discuss with counsel on both sides what additional conditions, such as additional signing on, curfews and the like would be appropriate during the period up to the 6th December, 2013.