

Case No: B4/2009/0981
Neutral Citation Number: [2009] EWCA Civ 548

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EPSOM COUNTY COURT
(HIS HONOUR JUDGE RYLANCE)
(LOWER COURT No: SM06P00315)

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: Thursday, 14th May 2009

Before:

LORD JUSTICE WARD
and
LORD JUSTICE WILSON

HAYLEY MARIE BURGESS (Appellant)

- and -

DEAN MARK STOKES (Respondent)

(DAR Transcript of
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Official Shorthand Writers to the Court)

Miss Helen Trotter of counsel (instructed by Charsley Harrison LLP, Solicitors, Windsor)
appeared on behalf of the Appellant Mother.

The Respondent Father did not attend and was not represented.

Judgment

(As Approved by the Court)

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Lord Justice Wilson:

1. A mother appeals from an order made yesterday, 13 May 2009, by His Honour Judge Rylance, sitting in the Epsom County Court but as if in the Guildford County Court, that she be forthwith committed to prison for three terms of 28 days, to run concurrently, for three contempts of court, namely in refusing to comply with two orders that she should make a child available for contact with her father and with a third order that she should attend court on a specified date in order to participate in a hearing about such contact. The judge however went on to provide for a further hearing within the 28 day period, namely on 22 May 2009, at which the mother might seek to purge her contempt.

2. The child who is the subject of the proceedings is a girl, T, who was born on 7 August 2005 and who is thus three years old. The primary basis of the appeal, however, is the situation of another child, a boy, B, born to the mother on 4 February 2009, and thus a baby aged three months, by a man who is other than T's father and to whom the mother is engaged but with whom she does not co habit. It will however be convenient for me to describe T's father, who is the respondent to this appeal, as "the father". It appears that, pending the marriage of the mother to her fiancé and the father of the baby, the mother and both children live with her own mother, namely the children's maternal grandmother.

3. Yesterday's hearing before the judge seems to have proceeded on the assumption, which was entirely valid, that, were the mother committed to prison, T could continue to live temporarily with the grandmother. The corresponding assumption in relation to B, however, seems to have been, although it was not expressly articulated until a very late stage of the hearing, that, were the mother committed to prison, the prison would allow her to take him with her to reside there during the period of her imprisonment. The mother is currently breastfeeding B and indeed he takes no food at all other than from the breast.

4. The primary ground of the appeal is that when, following the hearing in the Epsom County Court, a van arrived at court in order to convey the mother to HMP Bronzefield, it became clear that the prison would not, at any rate there and then, also admit B. The practice of the prison (so the mother and her advisors were told) is to require an application to be made on paper for a mother to be allowed to bring a child with her to reside in the prison and its determination of the application customarily takes about 28 days.

5. Thus it was that, out of hours yesterday evening, Miss Trotter of counsel, who had represented the mother before the judge, applied indirectly to me for a stay of execution of the judge's order in the light of the separation of the mother from B which would otherwise occur. I granted a stay until today's hearing, which I directed should take place on notice to the father, who had appeared before the judge in person. The father has been duly notified of this afternoon's hearing and has chosen not to appear before us. He has made his position clear by telephone, first to a CAFCASS officer this morning and, shortly prior to the beginning of the hearing this afternoon, directly to Miss Trotter. Miss Trotter tells us and we unhesitatingly accept that he indicated to her on the telephone that he did not wish to resist the appeal; that he did not regard it as in the best interests either of T or of B that she should be committed to prison; and that his view was that, at however late a stage and notwithstanding the history which I am about to recount, the mother had now probably suffered such a shock at the imminent prospect of her incarceration as to be likely to comply with further orders in relation to his contact with T.

6. The history which confronted the judge was a particularly serious history of a refusal by the mother to comply with contact orders requiring her to allow T to have contact with the father in specified circumstances and/or to attend court in that regard. In the event it seems to have been a district judge who, on 3 March 2009, issued of his own motion a notice requiring the mother to show cause why she should not be committed to prison for contempt of, in effect, three orders of the court.

7. The first order was that of a district judge made on 7 May 2008 that the mother should make T available for contact with the father at noon on 14 May 2008 at the home of the paternal grandparents in the presence of a CAFCASS officer. A penal notice had been duly attached to the order but the mother, so it was alleged, had failed to make T available for contact on that occasion.

8. The second order was that of a circuit judge made on 6 January 2009 that the mother should attend court at 10:00am on 14 January 2009 in order to participate in a hearing referable to the father's contact. A penal notice had been duly attached to the order but the mother, so it was alleged, had failed to attend that hearing.

9. The third order was that of the same circuit judge, made on 14 January 2009 and thus in the absence of the mother, that she should make T available for contact with the father at her own home on 24 February 2009 in the presence of a CAFCASS officer. A penal notice had been duly attached to the order but the mother, so it was alleged, had failed to make T available for contact on that occasion. It is irrelevant to address the manner in which she was alleged so to have failed.

10. The application for committal first came before His Honour Judge Rylance on 2 April 2009, whereupon he adjourned it until yesterday. He also made a further order that the mother should make T available for contact with the father on three specified dates later in April. At that hearing he observed, in the presence of the mother, that, had he then heard the matter on a substantive basis and found the allegations proved, he would be likely to have imposed upon her a suspended sentence of imprisonment but that, were he to be told at the resumed hearing yesterday that she had failed to comply with his further order for contact, he would be likely not to suspend a sentence of imprisonment.

11. At the hearing yesterday the mother, by Miss Trotter, admitted all three of the breaches which were the effective subject of the application for committal. The mother also admitted that she had failed to comply with the order for contact on three occasions in April 2009 which HHJ Rylance had made on 2 April. It appears that Miss Trotter did her best to articulate a plea of mitigation but she seems to have had virtually no material with which to do so.

12. I should add that, in addition to passing the sentence of imprisonment which is the subject of this appeal, and in addition to appointing the further hearing on 22 May 2009, the judge yesterday made a further order for contact to take place between the father and T next Sunday, 17 May 2009. Of course, the judge's premise was that at that time the mother would be in prison and that T would be cared for solely by the grandmother; and accordingly it appears likely that the order for contact was made against the grandmother. At all events contact between the father and T in the presence of a CAFCASS officer is due to take place on Sunday.

13. Let me first consider a subsidiary ground of appeal. From the admirable note of judgment which Miss Trotter has prepared for us at very short notice, it is clear that yesterday the judge reminded himself that he was passing sentence for the three breaches which were the subject of the notice to show cause and not for the further breaches of his own order dated 2 April 2009. Nevertheless, so Miss Trotter complains, the judge clearly recited the history of yet further breaches of his order dated 2 April 2009 in yesterday's judgment; and, in the light in particular of what he had expressly said to the mother on 2 April (to which indeed he expressly referred in yesterday's judgment), it is clear, so Miss Trotter submits, that the judge took the further breaches into account. So Miss Trotter's submission is that the judge thereby failed to follow his own self-direction and fell into the trap of sentencing the mother not only for the three breaches which were the subject of the notice but also for the further breaches. I disagree. The judge in my view had to consider -- in their context -- the severity of the three breaches which were the subject of the notice; and, by yesterday, part of the context had become the extraordinary level of continued contumaciousness on the part of the mother, as evidenced by her further breaches of the judge's own order dated 2 April.

14. The primary ground of the appeal is, of course, the apparently unexpected effect of the judge's order in separating the mother from her baby of three months, being, indeed, a baby whom she has at all material times continued to feed from the breast. In Miss Trotter's note of the judgment there is no reference to the baby; and, as I have observed, it appears to have been assumed on all sides at the hearing that, were the mother sent to prison, the baby could and would accompany her there.

15. In this regard the baby at least -- and I say nothing about the mother in this context -- has very potent rights under Article 8 of the European Convention on Human Rights; and I have readily concluded that, without realising that he was doing so, the judge by his order infringed them. The judge did not even consider whether the grave interference on his part by his order with respect for the baby's private and family life with the mother was proportionate and justified, because he did not realise that the interference, in the form of separation of the baby from his mother, would occur.

16. This unexpected feature leads Miss Trotter this afternoon to seek to persuade us not only to allow the appeal but also to substitute for the immediate sentence of imprisonment for 28 days a sentence of imprisonment for such term suspended for six months. For my part, and notwithstanding the line now taken by the father in respect of this appeal, I would reject that suggestion. The judge had a far wider and deeper grasp of the facts than we do this afternoon and, in identifying the appropriate sentence, he had a wide discretion. In principle, subject to the complications arising out of the policy of the prison in respect of its admission of small children with their mothers, I can see no ground for disturbing his conclusion that these were three contempts of such seriousness as to justify an immediate sentence of imprisonment. The days are long gone when mothers can assume that their role as carers of children protects them from being sentenced to immediate terms of imprisonment for clear, repeated and deliberate breaches of contact orders.

17. I would allow the appeal; direct that this court should, forthwith by letter, apply to HMP Bronzefield for authorisation for B to accompany the mother for the duration of any term of imprisonment which is again imposed upon her; vacate the hearing appointed by the judge to take place before him on 22 May; and direct that instead there be a further hearing before the judge, on the first available date in June 2009 following 28 days from today, at which, in the light of the response of the prison to this court's application and no doubt also to some extent

the change in the attitude of the father towards the matter, the judge can determine the appropriate sentence to be passed upon the mother for the three admitted breaches.

18. Of course, just as the mother's continuing disobedience to his orders dated 2 April 2009 rightly conferred an even darker colour upon the three breaches for which she was sentenced yesterday, so too, in the event that at the hearing in June 2009 the mother were to be seen not to have obstructed, but indeed to have helped to promote, the contact which is arranged to take place next Sunday, the colour of the breaches for which the judge will then sentence her might become somewhat lighter.

Lord Justice Ward:

19. I agree.

Order: Appeal allowed

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