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Enforcement of Return Orders

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Introduction

1. Obtaining an order for a return of the child to the overseas jurisdiction is sometimes only part of the battle. Enforcement of such an order can present its own problems – sometimes major problems.

2. Many examples will be found in the reported authorities of the sort of problems that can be encountered in the enforcement process. Those reported problems include (but are by no means limited to):

   (i) the abducting parent refusing to co-operate and/or positively obstructing the process of enforcement (sometimes by inciting or otherwise encouraging obstructive behaviour on the part of the subject child, which can take the form of refusing to accompany the child on the return journey);

   (ii) the abducting parent going on the run with the child (or the subject child itself going on the run);

   (iii) the subject child running amok in the aircraft in which it was being transported, resulting in the pilot turning around on the departure runway and refusing to carry the child on the flight; and

   (iv) the subject children barricading themselves in a bathroom, armed with cricket bats and stumps and refusing to co-operate.

Drafting of the return order and subsequent orders

3. When drafting the order for a return of the child to the overseas jurisdiction (and any subsequent order in relation to the mechanism for the return) it is important to take great care, because the availability or efficacy of enforcement steps may depend on that wording. In particular, the construction of such orders is very strict when it comes to implementation by way of committal proceedings: see, for example, *The Solicitor General* v. J.M.J. *(Contempt)* [2013] EWHC 2579 (Fam), [2014] 1 F.L.R. 852 (Sir James Munby P), which is one of many judgments relating to enforcement difficulties in that particular case (the *"Cambra v. Jones"* litigation, with the names and some of the related judgments being apparent from the text of the judgment and from the case citations in subsequent reported instalments of the case).

4. As will be seen from paragraph [21] of *The Solicitor General v. J.M.J. (Contempt)*:

   (i) A mandatory order is not enforceable by committal unless it specifies the time for compliance (reference being made in that regard to the aptly named case of *Temporal v. Temporal)*, and, although it is not said in that authority, this should include the hour of the day by which compliance is required;

   (ii) It is impossible to read implied terms into an order of the court for the purposes of committal proceedings (based on the earlier case of *Deodat v. Deodat*);

   (iii) An injunction (i.e. an order that either forbids something or purports to compel the doing of something) must be drafted in terms which are clear, precise and unambiguous.

5. The reason for the requirements set out in the preceding paragraph is that, as a matter of basis fairness, a person is entitled to know precisely what he/she must, or must not, do (and by when) if that person is to be subject to enforcement procedures.

6. As to the wording of the return order, the first matter to bear in mind is that Article 12 of the 1980 Hague Convention provides that where there has been a wrongful removal or retention, unless one of the exceptions provided for by Articles 12 and 13 is engaged, *"the authority concerned shall order the return of the child forthwith"*. There are authorities in the general law of England and Wales which ascribe to the word *"forthwith"* meanings such as *"as soon as it can be reasonably done"*, implying immediacy. Of course, expressions used in international documents have an autonomous effect, but in any event an order that simply requires a *"return forthwith"*, without more, would be unlikely to satisfy the requirements set out above for enforcement by way of committal.

7. Therefore, with a view to enforcement, it is desirable to deal with the drafting of the order for the return with suitable specificity, otherwise a return to the court may be necessary to further define the requirement for the *"return forthwith"*, before the return to the overseas jurisdiction can be enforced. The time of the day by which, as well as the date by which (and/or the precise mechanism by which) the respondent must do whatever it is that he or she is to be required to do by way of effecting the return, should also be included.

8. It will sometimes happen that a slightly delayed return, or a return that does not take effect until a specified time after certain specified steps or events occurring, will either (i) be agreed between the parties; or (ii) specified by the court on the basis that such delay will avoid the existence of what would otherwise justify a refusal to order a return at all (e.g. a condition precedent of suitable accommodation being made available in the overseas jurisdiction, so as to avoid an Article 13b situation). Again, great care should be taken in the drafting, with an eye to the facilitation of enforcement procedures.

9. There are many and various mechanisms that can be specified in an order for the purpose of effecting the relevant return, depending on the facts of the case. Neither the 1980 Hague Convention nor the legislation by which that Convention is given effect make any specific provision in this regard (*cf* section 5 of the 195 Act as to interim powers that are *"exercisable at any time before the application is determined"*), but the courts have always accepted that they have the power to give any necessary directions as to precisely how an order for the return of a child

to an overseas jurisdiction is to be implemented, i.e. as to the implementation of the order. Such detail may be included in the original order for return, or by a subsequent order in the event that problems arise. If necessary, it could also be argued that the High Court has power to give such directions as to implementation pursuant to its inherent jurisdiction in relation to children who are physically present within the jurisdiction (and such directions would not fall foul of the stay on other proceedings *"relating to the merits of rights of custody"* that is imposed by reason of rule 12.52 of the *Family Procedure Rules* 2010).

10. Whatever mechanism is specified it must be borne in mind that, as a matter of principle, the court should not make orders unless it is satisfied that it will be possible for the person against whom the order is made to comply with the order, and, in any event (as will be explained below) on a committal application based on any alleged failure to comply with an order it will be necessary for the applicant to prove that it was possible to comply with that order.

11. One mechanism is simply to require the abducting parent to return, or effect the return, of the subject child to the relevant overseas jurisdiction by a certain time and date (leaving that party to effect the return in whatever way he/she may choose), then take enforcement steps if the return has not been effected by that date. However, a more detailed mechanism may well be thought appropriate if passports are to be returned, and the detail in that situation will depend on whether the abducting parent is herself/himself going to return with the subject child or whether someone else is going to accompany the child.

12. There is some debate amongst practitioners as to whether the High Court can actually give a direction requiring the abducting parent himself/herself to accompany the child on the return overseas (even though that parent could not be required to then remain overseas). In some cases a child may be reluctant (or refuse) to embark on the return trip overseas unless accompanied by the abducting parent, so a direction requiring that parent to actually accompany the child on the trip will be helpful in facilitating the return (after all, if a parent can be required to transport the subject child to the departure airport, why can that parent not be required to accompany the child on the aeroplane, with enforcement procedures threatened in default).

13. Sometimes it may be appropriate to direct the abductor to deliver the child up to the other parent, or to some third party, at some specified place and at (or by) some specified time, in order to effect the return, but the necessity to give directions with sufficient clarity and specificity in that regard must be borne in mind, with an eye to enforcement.

14. This can also give rise to the problem of what is to happen if a time or date specified for any compliance step is not met (whether that failure be for good or bad reason). That issue arose in *The Solicitor General v. J.M.J. (Contempt)*, *ante*, where the abducting mother had failed to comply with an order to deliver up the children to the father at a particular time and place. Committal proceedings were brought against her by the Solicitor General, who failed in those proceedings to prove to the requisite criminal standard that it had in fact been within the mother's power to comply. The court also rejected a contention on behalf of the Solicitor General to the effect that the mother was in contempt of court in that she had nevertheless failed to deliver up the children at any time after the date and time that had been specified in the order. The direction in the order as to what the mother must do had been specific and; it had not, as a matter of express language, required her to do anything at any time thereafter, nor spell out what should happen in the event of failure (for whatever reason) to comply with timetable in the specific direction, and it is not permissible to imply further requirements in such an order in the context of committal proceedings.

15. As was said by Sir James Munby P in *The Solicitor General v. J.M.J. (Contempt)*:

> [22] ... Speculation founded on uncertainty is no basis upon which anyone can be committed for contempt.
>
> [23] ... I do not want to be misunderstood. If someone has been found to be in breach of a mandatory order by failing to do the prescribed act by the specified time, then it is perfectly appropriate to talk of the contemnor as remaining in breach thereafter until such time as the breach has been remedied. But that pre-supposes that there has in fact been a breach

> and is relevant only to the question of whether, while he remains in breach, the contemnor should be allowed to purge his contempt. It does not justify the making of a (further) committal order on the basis of a further breach, because there has in such a case been no further breach. ... If in such circumstances it is desired to make a further committal order – for example if the sentence for the original breach has expired without compliance on the contemnor – then it is necessary first to make another order specifying another date, followed in the event of non-compliance, by an application for committal for breach not of the original but of the further order.

16. Following the failure of the committal application that has been discussed in the two preceding paragraphs, Sir James Munby made a fresh order against the mother, requiring her to deliver-up the children at a further specified date and time, but with a number of fall-back dates and times, so as to provide continuing specified obligations in the event of non-compliance with one or more of the specified dates and times (although, as will be explained below, there was continuing non-compliance with those directions and a further committal application).

17. In some circumstances the best form of fall-back provision might be the use of words to the effect of *"and in the event of non-compliance, for whatever reason, with the directions given above, [name of the relevant party] must return, or cause to be returned, the child [name] to [identify the overseas jurisdiction] by [insert time and date]"*. Such a provision will impose and further specific and positive obligation on the abductor, although, as will be seen below, a failure to comply will not necessarily result in success on a committal application. The use of phrases such as *"use her best endeavours"* or *"use all reasonable endeavours"* in this context might well be deemed insufficiently precise to found committal proceedings.

18. Finally as to the drafting of an order, if it is to be enforceable by way of committal proceedings it must satisfy the requirements of rule 37.9(1) of the Family Procedure Rules 2010, in that a penal notice must be prominently displayed on the front of that order, as to which see also the judgment of Holman J in *Re Dad (Application to commit Mohammed Nawaz Choudhry* [2015] EWHC 2655 (Fam).

Enforcement procedures

19. The type of enforcement procedure that is most appropriate in a given case will depend upon the facts and circumstances that are present in the particular case at the relevant time.

20. In some situations the best course in the first instance may be simply to go back to court to seek further bespoke directions to address the circumstances that have arisen.

21. If the situation is one in which the requisite return of the subject child has not been effected and that child has disappeared (whether with or without the abductor), it will be possible to obtain an order from the court under section 24A of the *Child Abduction and Custody Act* 1985, which permits the court (at any stage of the proceedings) *"to order any person who it has reason to believe may have relevant information to disclose it to the court"*. By reason of section 24A(2), a person who is the subject of such an order cannot rely on self-incrimination (or spousal incrimination) as a justification for non-compliance.

22. The court may also seek assistance from the Press to publicise the search for the subject child(ren), as was done by Roderic Wood J in the *Cambra v. Jones* saga, when his Lordship issued a statement to the Press on 16 October 2012, which did result in the children being located. Of course, the services of the Tipstaff and the police may also be sought.

23. In a situation in which the child has disappeared, the process of sequestration of assets will sometimes be remarkable effective against the party in default and against anyone who has been lending assistance to that party: see, for example, *Re S. (Abduction: Sequestration)* [1995] 1 F.L.R. 858 (Johnson J). In that case the children were rapidly produced once the sequestration process had been commenced.

24. As will be apparent from what has already been said above, an application to commit to prison will sometimes be necessary/appropriate in an attempt to secure enforcement. The topic of "committal" is a major topic in itself and will not be addressed in detail in the present paper. However, the relevant rules will now be found in Part 37 of the *Family Procedure Rules* 2010.

25. A particular problem that can arise in committal proceedings is exemplified in the most recent stage of the *Cambra v. Jones* saga. Following the failure of the initial committal application brought by the Solicitor General, and the making of further orders thereafter by Sir James Munby P for the delivery up of the children to the father, as to which see above, the children were still not delivered up. The father then brought a further committal application against the mother. The mother asserted that she had done her best to comply with the further orders that had been made but that the children themselves had frustrated the implementation of the directions. Having heard evidence from the mother Sir James concluded that the mother had at best paid lip-service to the orders and had failed to take any serious steps to comply with them, but he nevertheless found that the father had failed to prove to the requisite "criminal" standard that it would have been possible for the mother to have achieved what was required by the orders, even if she had tried her best, bearing in mind the evidence as to the stance that had been adopted by the relevant children themselves (albeit having been subjected to the influence of the mother): *Cambra v. Jones* [2014] EWHC 2264.

26. In reaching the decision explained in the preceding paragraph, Sir James Munby rejected various arguments that had been put forward by the father as to the proper approach in such cases, primarily contentions to the effect that if it be established that as a matter of fact there had been non-compliance with the order (i) that should be treated as an "offence" of strict liability; or (ii) that if it also be proved that there had been no serious attempt to comply with the order by way of persuasion of the children or otherwise, the burden should then shift to party against whom the order had been made, so as to require her to prove (on a balance of probabilities) that it would have been impossible to achieve the outcome required by the order, rather than expect the father to prove something in circumstances in which the failure of the mother to make any attempt at compliance had undermined his ability to prove that compliance would have been possible.

27. On behalf of the father it had been submitted that his suggested approach was the only fair approach in such circumstances, and that it accorded with the approach in criminal cases where there is a "reverse burden of proof" and that it accords with ECHR requirements as to fairness. It was also contended that his suggested approach accords with one line of domestic authority, albeit not with another such line of domestic authority. Permission was subsequently granted by McFarlane LJ to argue those points on an appeal to the Court of Appeal, but the substantive appeal was ultimately dismissed without (it might be thought) really addressing those points in definitive manner: *Re J. (Children)* [2015] EWCA Civ 1019, [2016] 2 F.L.R. 1207. Therefore, it may be possible to pursue those points in another case, whether that be a 1980 Hague Convention case or an implacable hostility "contact" case.

28. The sad reality is that in some cases there is a limit to what the court can do by way of enforcement, particularly if (for whatever reason) the subject child(ren) are able to take practical steps to thwart implementation of an order for return to the overseas jurisdiction. In some such cases, the upshot may be a successful appeal against the order for return, as in *Re M. (A Minor) (Child Abduction)* [1994] 1 F.L.R. 390, CA (the case where the child's behaviour resulted in the aeroplane turning around), and *Re C. (Abduction: Setting Aside Return Order: Remission)* [2012] EWCA Civ 1144, [2013] 1 F.L.R. 403 (the stance of a 15 year old child).

29. In other such cases there may come a time when the Court of Appeal will give up and impose a stay on the order for return: *Re B. (Children)* [2001] EWCA Civ 865 (the case where the children barricaded themselves in a bathroom with cricket bats and stumps). Such situations may also now result in re-consideration of the situation by the first instance court (as to which a separate paper is being delivered at the Conference on 11 February 2017).

30. The final consideration in cases where difficulty arises in enforcement of orders for a return to the overseas jurisdiction is the possibility of an application to the ECtHR, asserting an improper interference with the rights under Articles 6 and 8 of the ECHR. There are a number of such cases in which the ECtHR has held that there is a positive obligation on Signatory States to take adequate, effective and sufficiently prompt measures to implement an order for the return of a child that has been made pursuant to the 1980 Hague Convention: see, for example, *Shaw v. Hungary (Application No. 6457/09)* [2012] 2 F.L.R. 1314, ECtHR, where other relevant authorities were reviewed and a breach of Article 8 of the ECHR was established.

31. In these cases the ECtHR has made it clear that in the domestic courts "*the use of sanctions must not be ruled out in the event of unlawful behaviour*" by a parent, although "*coercive measures against the children are not desirable in this sensitive area*". That would seem to rule out the use of drugs or shackles on a recalcitrant child, but it might leave open an avenue for a further attack on the committal procedures that are adopted in such cases in England and Wales, as foreshadowed on behalf of the father in the *Cambra v. Jones* litigation (although the matter became somewhat academic in that case itself following the most recent hearing in the Court of Appeal).

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