Case No: C1/2013/3346

Neutral Citation Number: [2014] EWCA Civ 1477
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice COLLINS
CO/16725/2013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 November 2014

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION
LADY JUSTICE SHARP
and
LORD JUSTICE VOS

- -

In the matter of an application for a Writ of Habeas Corpus ad Subjiciendum

Between :

JUSTICE FOR FAMILIES LIMITED	**Appellant**
- and -	
SECRETARY OF STATE FOR JUSTICE	**Respondent**

- -
- -

Mr John Hemming MP (a director of the company) for the Appellant
The Respondent was neither present nor represented

Hearing date : 14 October 2014

- -

Judgment

Sir James Munby President of the Family Division :

1. This is in form a challenge to the refusal by Collins J, sitting in the Administrative Court on 6 November 2013, to issue a writ of habeas corpus. It is in substance a challenge to the decision of Theis J, sitting in the Family Division on 11 October 2013, to commit Margaret Connors to prison for 28 days for contempt of court. Collins J described the application for the writ as being, in the circumstances, "hopeless" and "entirely misconceived". I agree. The challenge to Theis J's decision is equally devoid of merit.

The proceedings before Theis J

2. The history of the proceedings before Theis J is set out in an extempore judgment she delivered on Friday 11 October 2013 and which, after being transcribed, was placed on BAILII (where it is freely available to all) on 12 November 2013: *London Borough of Ealing v Connors* [2013] EWHC 3493 (Fam). The background, which I need not repeat, is set out in paragraphs 1-9 of Theis J's judgment.

3. On Tuesday 8 October 2013 (Theis J, judgment paragraph 9), on an application by the London Borough of Ealing, Theis J made a collection order in standard form in relation to two missing children: A, born in 1999, and B, born in 2001. A and B are the daughters of Margaret Connors. Paragraph 1 of the collection order ordered that the children be placed into the care of the local authority. Paragraph 2 provided that:

> "If MARGARET CONNORS … is in a position to do so … she must … deliver the children into the charge of the Tipstaff."

Paragraph 3 provided that, if not in a position to deliver the children into the charge of the Tipstaff, the mother, as I shall refer to her:

> "must … (a) inform the Tipstaff of the whereabouts of the children, if such are known to … her; and (b) also in any event inform the Tipstaff of all matters within … her knowledge or understanding which might reasonable assist him in locating the children."

The order contained a warning that:

> "the court has directed the Tipstaff to arrest any person whom he has reasonable cause to believe has been served with this order and has disobeyed any part of it."

4. At the same time as making the collection order, Theis J also gave a direction to the Tipstaff in standard form. Paragraph 1 directed:

> "the Tipstaff of the High Court of Justice, whether acting by himself or his deputy or an assistant or a police officer … as soon as practicable to take charge of [A and B] and thereupon to place [them] into the care of the applicant local authority where found."

Paragraph 3 directed:

> "the Tipstaff of the High Court of Justice, whether acting by himself or his deputy or an assistant or a police officer …to arrest any person whom he has reasonable cause to believe has been served with the collection order … and has disobeyed any part of it PROVIDED THAT he shall explain to that person the ground for the arrest and shall bring … her before the court as soon as practicable and in any event no later than the working day immediately following the arrest."

Paragraph 4 directed:

> "the Tipstaff of the High Court of Justice, whether acting by himself or his deputy or an assistant or a police officer … to cause any person arrested pursuant to paragraph 3 … to be detained until … she is brought before the court PROVIDED THAT, as soon as practicable during any such period of detention, he shall give that person the opportunity to seek legal advice."

5. The collection order was executed that evening by police officers acting in accordance with the direction given to the Tipstaff. They arrested the mother in pursuance of the power of arrest contained in paragraph 3 of the direction. In accordance with paragraph 3, the mother was brought before the court, Theis J, the following morning, Wednesday 9 October 2013 (judgment, paragraphs 10-13). The mother was represented by counsel. At the end of the hearing, Theis J remanded the mother in custody to HMP Holloway overnight until the next hearing, which she fixed for 9.30am on Thursday 10 October 2014. At the end of the hearing on 10 October 2013 at which the mother had again been represented by counsel (judgment, paragraphs 14-16), Theis J again remanded the mother in custody overnight until the next hearing, which she fixed for 9.30am on 11 October 2013.

6. At the hearing on Friday 11 October 2013, which, as the order makes clear, was in open court, Theis J refused an application by the mother's counsel for an adjournment (judgment, paragraph 16). She found the mother guilty of contempt of court (judgment, paragraphs 24-27):

> "24 I remind myself, of course, that the test in this matter is that I have to be satisfied to the criminal standard, namely, that it is beyond reasonable doubt. I have to be satisfied so that I am sure …
>
> 25 I am satisfied so that I am sure that this mother knows perfectly well where these children are, or at least where they can be contacted or located and she knew that when she was arrested on Tuesday. She acknowledged as much in answer to questions from [counsel] in her oral evidence yesterday, when she accepted that she could have got the children back any time prior to her arrest by the Tipstaff if she wanted to. Despite saying that she has refused to give any details about the

> whereabouts of the children other than them being at BC's house when clearly they were not. She told the police on 8 October, just prior to her arrest, that they were in Manchester, which on her own account to the court the following day was a lie.
>
> 26 I have reached the conclusion that it is inconceivable that as their mother who had their full time care prior to 23 September she has taken no active steps to find them or speak to them. Her evidence is inherently unreliable due to the inconsistencies in her accounts, coupled with her acknowledgment that she does not wish the children to be placed in care. In that context, her expressed intentions of future co-operation with the Local Authority rings very hollow. That is reinforced by the submission made by her counsel, on her express instructions this morning, that once she relays her permission to the family that the children should be produced at Social Services they will do so. That, in my judgment, makes it very clear it is within her control to ensure that these children are produced to the Local Authority and she has failed to do so.
>
> 27 Therefore, I am satisfied so that I am sure she is clearly in breach of paragraphs 2 and 3 of the Collection Order that I made on 8th October, and she has failed in the continuing duty to provide information in relation to the whereabouts of the children."

7. Having then heard submissions in mitigation by the mother's counsel (judgment, paragraphs 28-31), Theis J proceeded to sentence (judgment, paragraph 33):

> "I take the view that the very least sentence I can impose is one of 28 days imprisonment, which will include the period of time that has been spent remanded in custody. I have considered, as I should consider, the position in relation to suspending that sentence, but I take the view that in the circumstances of this case, where there has been no recent co-operation or reliable information been given to help locate these children, I can see no basis for the sentence being suspended. So it will be an immediate custodial sentence."

8. In accordance with her judgment, the committal order Theis J made directed that the mother was to be committed to prison "for a period of 28 days from the date of her arrest", that is from 8 October 2013. Contemnors are entitled to remission of one-half of their sentence. The mother, having, so far as I am aware, made no application to purge her contempt in the meantime, was accordingly released from prison on, I assume, 21 October 2013.

The proceedings before Collins J

9. On 1 November 2013, the appellant, Justice for Families Limited, applied for a writ of habeas corpus ad subjiciendum. The application was supported by a witness statement

dated 1 November 2013 by John Hemming, who described himself as a director of the company who had been "appointed to represent the company as a Litigant in Person." In his statement Mr Hemming said:

> "it has not been possible for the applicant to identify the name of the prisoner, where she is imprisoned, or the name of the solicitors acting for her. She is, therefore, held effectively incommunicado. I therefore request the issuance of a writ of habeas corpus ad subjiciendum to the prisons minister to identify the name of the prisoner and allow consideration of the lawfulness of her imprisonment."

Mr Hemming produced a letter dated 4 November 2013, and for some reason addressed to the Supreme Court, signed by him confirming "that I will be acting on behalf of the firm as has been agreed by the directors" and making "formal application for permission for me to be heard".

10. The application came before Collins J on 6 November 2013. He dismissed the application. He gave no judgment, but the reasons for his decision appear clearly enough from the transcript of the proceedings, which begins with the following exchange:

> "MR JUSTICE COLLINS: Can I see if I've understand this correctly? You've had no contact with the wife, the woman concerned?
>
> MR HEMMING: That's correct.
>
> THE JUDGE: You don't even know her name?
>
> MR HEMMING: That's correct.
>
> MR JUSTICE COLLINS: You don't even know if she is still in custody?
>
> MR HEMMING: I'm going by press reports that she was given 28 days, but she might not still --
>
> MR JUSTICE COLLINS: Yes she was, Of course, in any contempt proceedings, the contempt can be purged.
>
> MR HEMMING: Of course.
>
> THE JUDGE: And in this case it could be purged by … indicating where the children were.
>
> MR HEMMING: Of course."

A little later there is this exchange:

> "MR JUSTICE COLLINS: … She refused to disclose their whereabouts or told untruths about where they were, and that is

what led to the judge deciding as she did. Now there is no question but there is jurisdiction to impose a penalty, including imprisonment, for contempt of that nature because it is a contempt which is an interference with the administration of justice. And, of course, the whole background to this was the protection of children who otherwise would be at risk. Habeas corpus in these circumstances is an entirely misconceived remedy. There is a right of appeal. She was represented, she had legal aid, and she automatically will, even despite the government of which your party is a member and the removal of legal aid in many circumstances, still legal aid exists for an appeal against a committal order because liberty is at stake. So it is difficult to see what really you are doing here."

Mr Hemming then explained the basis of his application. Collins J responded:

"MR JUSTICE COLLINS: … there is no possible remedy through habeas corpus because habeas corpus only goes to whether there is a lawful sentence and there is a lawful sentence. And there is a right to appeal, an absolute right to appeal.

MR HEMMING: Yes.

MR JUSTICE COLLINS: For which legal aid is granted. She was represented by counsel and solicitors at the hearing before Mrs Justice [Theis]. You come along without any instructions, without having contacted her, without even knowing who she is --

MR HEMMING: Without the ability to contact her. That's right.

MR JUSTICE COLLINS: You know nothing about the background to the case. And I am afraid this is an interference which is totally unnecessary because her interests are protected by her representation. She may have purged her contempt for all I know.

MR HEMMING: Yes, we don't know, do we.

MR JUSTICE COLLINS: No, we don't

MR HEMMING: And that's the difficulty of the situation of people in prison in secret --

MR JUSTICE COLLINS: You could easily have got a copy of the committal order from the clerk of the rules.

MR HEMMING: So that's what you recommend, basically.

> MR JUSTICE COLLINS: Well, you can get it but I am afraid habeas corpus is hopeless --"

The appeal

11. The appellant's notice was filed on 20 November 2013. I set out the grounds of appeal verbatim:

> "1 The court hearing of 11th October 2013 was not a court hearing of competent jurisdiction for two reasons:
>
> a) It was not "competent" because the hearing was not listed.
>
> b) It did not have "jurisdiction" because Theis J was acting both as prosecutor and judge.
>
> As a consequence of either of the above two grounds the decision of the court to imprison the secret prisoner should be quashed under the Habeas Corpus Act. The application … is an application of right and the court does not have the discretion to refuse it.
>
> 2 No reasons have been given by Collins J for the imprisonment of the secret prisoner and the name of the secret prisoner has not been given. The return to the writ of habeas corpus would have obtained the committal order.
>
> 3 There are a number of grounds under which the committal is unlawful, but these would need to be considered in an appeal. However, by failing to provide the name of the secret prisoner or contact details for her legal representatives she is being held incommunicado and cannot be told of the grounds of appeal.
>
> 4 There is insufficient protection for the secret prisoner. The removal of the duty of the Official Solicitor means that some additional protection is needed.
>
> 5 The hearing was procedurally unlawful in that a private conversation with Theis J on the phone was followed by a discussion in court. The court order reports that the decision was made on paper."

12. The appellant's notice was supported by a skeleton argument prepared by Mr Hemming which conceded that "The secret prisoner has now been identified and released" but asserted that "the refusal of the application for a writ of Habeas Corpus raises important points of law and although … the application would necessarily fail through the release of the prisoner the issues as to the lawfulness of such imprisonments need to be considered."

13. Permission to appeal is not required in a habeas corpus case. But the papers were put before Davis LJ as supervising judge. He directed that the appellant should be invited (as it was by a letter from the court dated 5 February 2014) to consider carefully:

> "(1) Whether it has sufficient locus standi to pursue these proceedings …;
>
> (2) The question of representation in court, as a limited company …
>
> (3) Whether the proceedings have any justifiable aim or purpose: they now seem to be entirely academic."

The appellant's attention was directed to CPR 39.6 and CPR PD 39A.5.2. The appellant's response was in the form of two letters, each dated 18 February 2014 and signed by Mr Hemming. One provided answers to the three questions posed by Davis LJ. The other, in terms reminiscent of the earlier letter dated 4 November 2013, confirmed that "I will be acting on behalf of the firm as has been agreed by the directors."

14. The appeal was originally listed for hearing on 15 April 2014. Neither Mr Hemming nor anyone else was present to prosecute the appeal. Inquiries elicited the response that, so it was said, neither the appellant nor Mr Hemming had received notice of the hearing. The court (Sir James Munby P, Lewison and McCombe LJJ) decided to re-fix the appeal. The re-listed appeal came on for hearing before the court (Sir James Munby P, Sharp and Vos LJJ) on 14 October 2014. The appellant was represented by Mr Hemming. The respondent was neither present nor represented.

Preliminary points

15. Before turning to the substance of the appeal, there are two preliminary points that require consideration.

Preliminary points: representation of the appellant by Mr Hemming

16. CPR 39.6 provides that:

> "A company or other corporation may be represented at trial by an employee if –
>
> (a) the employee has been authorised by the company or corporation to appear at trial on its behalf; and
>
> (b) the court gives permission."

Paragraph 5.2 of CPR PD 39A provides that:

> "Where a party is a company or other corporation and is to be represented at a hearing by an employee the written statement should contain the following additional information:

> (1) The full name of the company or corporation as stated in its certificate of registration.
>
> (2) The registered number of the company or corporation.
>
> (3) The position or office in the company or corporation held by the representative.
>
> (4) The date on which and manner in which the representative was authorised to act for the company or corporation, e.g. _19_: written authority from managing director; or _19_: Board resolution dated _19_."

17. The letters dated 4 November 2013 and 18 February 2014, signed, it is to be noted, by Mr Hemming, are inadequate. Neither complies with paragraph 5.2(4). Each is, in reality, no more than an assertion by the signatory that he is acting with the agreement of the board, an entirely self-serving statement unsupported by any independent evidence that he does indeed have that authority. CPR PD 30A, para 5.2 is there to be complied with. There is no excuse in the present case, where the court had specifically directed attention to it. As a matter of indulgence we agreed to hear the appeal. Our indulgence on this occasion is not to be taken as any precedent.

18. We have not overlooked the principle, explained in *The Law of Habeas Corpus*, Farbey and Sharpe, ed 3, 2011, 238-239, that applications for habeas corpus are usually required to be made by counsel (now, a qualified advocate with higher court rights). Our agreement to hear Mr Hemming in this case is not to be taken as in any way weakening that long-established practice.

Preliminary points: locus standi of the appellant

19. In the nature of things, the court must be willing, where circumstances require, to hear an application for habeas corpus brought not by the prisoner but by some third party. For if the court refused to hear such a third party application, a prisoner unable to instruct someone to act for him would be denied a remedy and left to languish in what might be unlawful confinement. As is said in *The Law of Habeas Corpus*, 237, "If third parties were not allowed to initiate proceedings, a captor acting unlawfully would only have to hold his prisoner in especially close custody to prevent any possibility of recourse to the courts."

20. Thus it is clear that it is possible for a third party to make an application for habeas corpus even though acting neither as the agent of the prisoner, nor on his instructions, nor, indeed, even with his knowledge: see, for example, *The Case of the Hottentot Venus* (1810) 13 East 195, *In re Price* (1860) 2 F&F 263,[1] and *Re Antoni Klimowicz*

[1] An extraordinary case: "friends" of a married woman applied for habeas corpus to free her from detention by her husband. No objection seems to have been taken to the fact that it was a third party application. The claim failed because, as stated in the headnote, "A husband being … entitled to the custody of his wife, and to detain her if she desires improperly to leave him, a *habeas corpus* obtained on her behalf against him, will be discharged in such a case." Wilde B observed that "the proper residence of a wife is with her husband … He has [custody of his wife] … he is entitled to it … he has a right to restrain her. She must, therefore, return to her husband." This astonishing decision was not referred to in the famous case of *R v Jackson* [1891] 1 QB 671, but plainly on this point cannot have survived the decision of the Court of Appeal in the later case that a husband

(1954) unreported,[2] to each of which Mr Hemming helpfully referred us. But as the old case of *Ex p Child* (1854) 15 CB 238 shows, the right of a stranger to apply for habeas corpus is necessarily kept within bounds. As Jervis CJ said:

> "A mere stranger has no right to come to the court and ask that a party who makes no affidavit, and who is not suggested to be so coerced as to be incapable of making one, may be brought up by habeas to be discharged from restraint. For anything that appears, Captain Child may be very well content to remain where he is."

And it is to be noted that the unsuccessful applicant was there ordered to pay the costs of the respondent who had been brought "fruitlessly and unnecessarily" to court.

21. The principle in *Ex p Child* is now to be found stated in RSC Order 54, rule 1, as set out in Schedule 1 to the CPR:

> "(2) An application for [a writ of habeas corpus ad subjiciendum] …, subject to paragraph (3) must be supported by a witness statement or affidavit by the person restrained showing that it is made at his instance and setting out the nature of the restraint.
>
> (3) Where the person restrained is unable for any reason to make the witness statement or affidavit required by paragraph (2) the witness statement or affidavit may be made by some other person on his behalf and that witness statement or affidavit must state that the person restrained is unable to make the witness statement or affidavit himself and for what reason."

Mr Hemming's witness statement failed to comply with the latter requirement.

22. In what circumstances, then, is a third party application appropriate? Given the vital importance of the remedy and the infinite variety of possible situations – as the facts of each of the four cases I have just referred to so strikingly illustrate – it would be unwise to be too prescriptive. The court must be flexible. That said, I would expect most cases where a third party application is appropriate to be either (as in *Price* and *Klimowicz*) cases where the prisoner is incommunicado or (as in *The Hottentot Venus*) cases where, to quote the language of *The Law of Habeas Corpus*, 238, "the impediment preventing the prisoner from acting [is] ignorance or disability rather than close physical custody."

23. In the present case neither principle applies. The mother was *not* held incommunicado. There was no impediment to her acting: she had counsel. Collins J

---

cannot imprison his wife and that if he does she is entitled to habeas corpus against him. It remains good authority, however, on the third party application point.

[2] See Halsbury's Laws, ed 5, Vol 88A, 2013, para 60, fn 4: "in *Re Klimowicz* (31 July 1954, unreported), the writ was granted, on the application of the Home Secretary, directed to the master of a Polish ship lying in the Thames on which a person seeking political asylum in the United Kingdom was being detained." For the dramatic circumstances of the case, which at the time was a cause célèbre, see (a reference helpfully supplied by Mr Hemming, accessible via Google News) The Age for 23 August 1960.

was fully justified in expressing himself as he did. Mr Hemming's complaint that the mother was being held, "incommunicado", as a "secret prisoner" whose name was not known, was true only in the sense that neither the appellant nor Mr Hemming had made any effective attempt to discover her name.

24. As Collins J correctly observed, Mr Hemming could have obtained a copy of the committal order on application to the Clerk of the Rules. FPR 29.12(2) provides that:

> "A copy of an order made in open court will be issued to any person who requests it."

Mr Hemming's account of his attempts to obtain a copy of the committal order is vague and lacking in detail. He says that those acting for the appellant "spent some time wandering around the Royal Courts of Justice visiting the Family Division registry and talking to inter alia Jimmy in the Urgent applications court and the clerk to Justice Theis." He insinuates, without asserting in so many words, that he was unable to obtain the committal order because he knew neither the case number nor the names of the parties to the case.

25. As to that I propose to say only this. Plainly the court cannot be expected to embark upon an extensive and time-consuming trawl of its files to identify an order where the applicant is unable to identify what it is he is seeking. But here, Mr Hemming knew both the date of the committal order and the name of the judge who had made it. An applicant seeking a copy of the order, to which, I emphasise, he is *entitled* under FPR 29.12(2), should not be sent away empty-handed merely because he does not know the number of the case or the names of the parties. The court can, and should, supply a copy of a committal order, even if the applicant cannot provide those details, where the applicant is able to provide sufficient details of the case to enable the order to be located by the court without undue difficulty, for example, as here, the date of the order and the name of the judge.

26. I add, for the avoidance of doubt, that when I refer to the court in this context I mean the court office. Applications under FPR 29.12(2) should be directed to the appropriate court office and *not* to the judge or judge's clerk.

27. In my judgment, this is not a case in which the appellant had any business applying for a writ of habeas corpus. Collins J was correct to take the point. Davis LJ was fully justified in raising the question. Mr Hemming's riposte, in his letter of 18 February 2014, namely that the principle of locus standi does not apply to applications for habeas corpus, fails to meet the point.

<u>The grounds of appeal</u>

28. There are, in my judgment, two very simple reasons why this appeal is quite hopeless. Each provides a complete answer to the appeal, just as each provided a complete answer to the application before Collins J.

29. In the first place, and as Collins J correctly explained, habeas corpus does not lie to challenge a sentence of imprisonment imposed by a court of competent jurisdiction. The proper remedy in such a case is appeal: see *ex p Hinds* [1961] 1 WLR 325, *Linnett v Coles* [1987] QB 555 and *West v HM Prison Bure* [2013] EWCA Civ 604.

As Lord Goddard CJ said in *Re William Oswald Featherstone* (1953) 37 Cr App R 146, 147:

> "The court does not grant, and cannot grant, writs of habeas corpus to persons who are in execution, that is to say, persons who are serving sentences passed by courts of competent jurisdiction. Probably the only case in which the court would grant habeas corpus would be if it were satisfied that the prisoner was being held after the terms of the sentence passed on him had expired."

30. Secondly, and as I have already pointed out, the mother had been discharged from prison on the expiry of her sentence *before* the application for habeas corpus was made. Since the only issue on an application for habeas corpus is to determine the legality of the detention, habeas corpus will not lie if the detention has already been brought to an end: *Barnardo v Ford* [1892] AC 326, and (an authority supplied by Mr Hemming) *In re J M Carroll (An Infant)* [1931] 1 KB 317, 327. As Lord Watson put it in *Barnardo* (page 333):

> "The remedy of habeas corpus is … intended to facilitate the release of persons actually detained in unlawful custody … it is the fact of detention, and nothing else, which gives the Court its jurisdiction."

31. Mr Hemming's response to the first point is that the hearing before Theis J on 11 October 2013 was not a hearing by a court of competent jurisdiction. In support of this surprising contention he makes two submissions: first, that the court did not have "jurisdiction" because Theis J was acting both as prosecutor and as judge; secondly, that the court was not "competent" because the hearing was not listed.

32. As elaborated in his skeleton argument Mr Hemming asserts – perhaps, more accurately, assumes – that, as he put it, the "court" had "moved a motion for committal" and that the court was "sitting in judgment on a motion of its own initiative." This is simply wrong as a matter of fact. The matter was brought back to court following and because of the arrest of the mother by the Tipstaff. Theis J was sitting to determine whether or not, as reported to the court by the Tipstaff, the mother had breached the collection order and thereby committed a contempt of court. To be fair to Mr Hemming, as soon as we had explained the process in relation to collection orders, he readily accepted that there was no substance in his complaint that the court lacked jurisdiction. Quite plainly, in my judgment, Theis J had jurisdiction on 11 October 2013 in the sense in which Lord Goddard CJ was using the word.

33. Mr Hemming supports his alternative complaint that the court was not "competent" by reference to Article 6 of the Convention. The argument, in my judgment, is quite hopeless, whether or not bolstered by reliance upon Article 6. The fact is that Theis J was, as the expression was used by Lord Goddard CJ, sitting on 11 October 2013 as a court of competent jurisdiction. She was sitting in public. The mother was present and represented. The submission that an otherwise competent court was not competent because the hearing was not listed is, with all respect to Mr Hemming, devoid of all merit. I should add that I would have come to precisely the same conclusion even if, contrary to the facts, the hearing on 11 October 2013 had been held in private when it

should have been in public: see *McPherson v McPherson* [1936] AC 177, where the fact that a divorce case which should have been heard in open court was heard in private rendered the resulting decrees nisi and absolute voidable only and not void.

34. Mr Hemming's response to the second point – that habeas corpus does not lie once the prisoner has been released – was, as we have seen, set out in his skeleton argument, which I have already quoted. In short, he asserts that the case raises what he calls important points of law. He elaborated this in his letter of 18 February 2014:

> "It is known from statistics provided by the Ministry of Justice in response to a written parliamentary question asked by myself that there are of the order of 5 people a month imprisoned for contempt for whom there is no published judgment in accordance with the practice direction jointly issued by the President of the Family Division and the Lord Chief Justice on 3rd May 2013 [this is a reference to *Practice Guidance (Committal Proceedings: Open Court)* [2013] 1 WLR 1316]. Hence these people should be properly described as secret prisoners. This is not supposed to happen. It should not have happened on 11th October 2013. The applicant is hoping to obtain an authority from the court of appeal which would assist in preventing this from continuing to happen in the future by making it clear that such imprisonments are unlawful and that an application for a writ of Habeas Corpus must be granted whosoever applies for such a writ and that release from imprisonment would then be expected to follow."

35. I shall return to address these arguments below. Whatever their merit, they do not, however, justify the commencement and pursuit of an application for habeas corpus after the prisoner has been released.

36. Thus far, Mr Hemming's challenge has been to what took place before Theis J on 11 October 2013. But he also mounts quite separate challenges to what took place before Collins J on 6 November 2013. As I understand what is said in the grounds of appeal and in his skeleton argument. Mr Hemming has three complaints:

    i) The hearing before Collins J was, he says, "procedurally unlawful" because Collins J had a private conversation with Theis J on the telephone before coming into court. There is, in my judgment, no merit in this complaint. Given the exiguous materials placed before the Administrative Court by the applicant, and given the urgency which obviously attaches to any application for a writ of habeas corpus, Collins J was acting entirely appropriately and with complete propriety in seeking information from Theis J. It is clear from the transcript of the hearing before Collins J that he made no secret of the fact that he had spoken to Theis J. He volunteered the information and no doubt would have elaborated on what was said if Mr Hemming had asked – but he did not. There is nothing in the point.

    ii) Collins J should, says Mr Hemming, have obtained the committal order or, in the alternative, issued a writ of habeas corpus as a means of obtaining the committal order, as I understand what is being said, so as to ensure that the

committal order itself was "in order". I do not agree. *Linnett v Coles* [1987] QB 555, to which I have already referred, was a case where the committal order – an order of the High Court – was "unlawful on its face". Yet the Court of Appeal held that the proper remedy was appeal, not habeas corpus. So examining the order made by Theis J on 11 October 2013 to detect if it was "in order" – in fact, as we now know it was – would have served no useful purpose in the context of an application for habeas corpus.

iii) The grounds of appeal assert that the "court order" – I read this as a reference to the order made by Collins J – "reports that the decision was made on paper." I simply do not understand this. Both the hearing before Theis J on 11 October 2014 and the hearing before Collins J on 6 November 2013 took place in court – indeed, in open court – and each proceeded on the basis of oral submissions. Neither order contains any words supporting what is said in the grounds of appeal.

37. For all these reasons I conclude that Collins J was entirely right to proceed as he did and for the reasons he gave. The appeal must therefore, in my judgment, be dismissed.

Mr Hemming's wider complaints

38. What really lies behind both the application to Collins J and the appeal to this court would appear to be the concerns articulated by Mr Hemming in the passage in his letter of 18 February 2014 which I have already set out.

39. I have referred to *Practice Guidance (Committal Proceedings: Open Court)* [2013] 1 WLR 1316, issued on 3 May 2013 by Lord Judge CJ and by me. That was supplemented by *Practice Guidance (Committal Proceedings: Open Court) (No 2)* [2013] 1 WLR 1753, issued by me on 4 June 2013, and by *President's Circular: Committals* 2014 Family Court Practice 2976, issued by me on 2 August 2013.

40. For present purposes I draw attention to three aspects of this Guidance.

41. First, *Practice Guidance (Committal Proceedings: Open Court)* [2013] 1 WLR 1316 reiterated (paragraph 1) the "fundamental principle of the administration of justice in England and Wales that applications for committal for contempt should be heard and decided in public, that is, in open court." It emphasised (paragraph 4) that in those exceptional cases in which a committal application could properly be heard in private and where a person had been found to have committed a contempt, the court "must state in public":

> "(a) the name of that person;
>
> (b) in general terms the nature of the contempt of court in respect of which the committal order [committal order for this purpose includes a suspended committal order] is being made; and
>
> (c) the punishment being imposed."

The Guidance continued:

> "This is mandatory; there are no exceptions. There are never any circumstances in which any one may be committed to custody without these matters being publicly stated."

42. Secondly, *Practice Guidance (Committal Proceedings: Open Court)* [2013] 1 WLR 1316 spelt out (paragraph 6) that:

> "In every case in which a committal order or a suspended committal order is made the judge should take appropriate steps to ensure that … as soon as reasonably practicable:
>
> (a) a transcript is prepared at public expense of the judgment …;
>
> (b) every judgment as referred to in (a) is published on the BAILII website; and
>
> (c) upon payment of any appropriate charge that may be required a copy of any such judgment is made available to any person who requests a copy."

President's Circular: Committals Family Court Practice 2014 2976 spelt out that paragraph 6 of *Practice Guidance (Committal Proceedings: Open Court)* [2013] 1 WLR 1316 "applies in EVERY case in which a committal order or a suspended committal order is made, WITHOUT EXCEPTION." It went on:

> "The principle is very clear and MUST be rigorously followed. NO-ONE is EVER to be committed for contempt of court by a family court or the Court of Protection (whether the sentence is suspended or takes immediate effect) without (a) the name of the contemnor (b) proper details of the contempt(s) and (c) the reasons for the committal being made publically available in a judgment published on the BAILII website."

43. Thirdly, *Practice Guidance (Committal Proceedings: Open Court) (No 2)* [2013] 1 WLR 1753 set out (paragraph 2) the way in which a committal application in a family case should be shown in the public court list:

> "FOR HEARING IN OPEN COURT
>
> Application by [full names of applicant] for the Committal to prison of [full names of the person alleged to be in contempt]"

That form of wording is not apt to cover a case, like a collection order case, where there is no committal application as such before the court.

44. The latest figures from the Ministry of Justice of receptions into prison for contempt of court, show that in the twelve months from April 2013 to March 2014, a total of 116 contemnors arrived in prison (monthly totals 15, 11, 8, 13, 14, 7, 12, 7, 6, 8, 7, 8). These figures are broken down into County Court (aggregate total 36), Crown Court (5), Magistrates (4), High Court (5) and "Not recorded" (66). Mr Hemming's point, which appears to be borne out by an analysis he has conducted for us of the committal

cases which appear on BAILII, is that for a very large number of these committals there is no judgment to be found on BAILII. This, if true, and every indication is that unhappily it is true, is a very concerning state of affairs.

45. Analysis of the problem, and location of responsibility, is not of course assisted by the surprising fact that the available statistics record the type of committing court in less than 50% of the cases: in 66 out of 116 cases the committing court is not recorded.

46. Mr Hemming, as we have seen, draws attention to the fact that the Official Solicitor no longer has any responsibilities in relation to contemnors. He suggests that some additional protection is needed for what he calls the secret prisoner, who is at present, he says, insufficiently protected.

47. The duties of the Official Solicitor in relation to contemnors had their informal origins even before 1842, when they were put on a formal, albeit non-statutory, basis following the appointment of J J Johnson as Solicitor to the Suitors Fund (as the Official Solicitor was then called). They were put on a statutory basis by the Court of Chancery Act 1860. From 1963 they were to be found spelt out in a Direction to the Official Solicitor issued by Lord Dilhorne LC on 29 May 1963, requiring the Official Solicitor to:

> "review all cases of persons committed to prisons for contempt of Court, … take such action as he may deem necessary thereon and … report thereon quarterly on the 31st day of January, the 30th day of April, the 31st day of July and the 31st day of October in every year."

That Direction remained in force until revoked by the Lord Chancellor on 5 November 2012. Accordingly, as I understand it, the Official Solicitor no longer has a role to play in relation to committal orders which result from contempt of court.

48. It is not the function of the court to assist Mr Hemming in his campaign and beyond recording his submissions there is, in my judgment, little that can appropriately be added to what I have already said. I can, however, properly make the following points:

i) I draw the attention of all judges sitting in family courts to what I have said in paragraph 42 above. In particular, I emphasise that in *every* case in which a committal order or a suspended committal order is made, the judgment *must* be transcribed and published on the BAILII website "as soon as reasonably practicable" and, I stress, *whether or not anyone has requested this*. I suggest that in every case the judge, having given judgment, should immediately direct that a transcript be ordered *the same day* and prepared on an expedited basis.

ii) In collection (or location) order cases where, as here, there is no committal application as such before the court, the matter should be shown in the public court list as follows:

> "FOR HEARING IN OPEN COURT [add, where there has been a remand in custody: in accordance with the order of [name of judge] dated [date]]

> Proceedings for the Committal to prison of [full names of the person alleged to be in contempt] who was arrested on [date] in accordance with and for alleged breach of a [location / collection] order made by [name of judge] on [date]."

iii) In cases where it is not possible to publish these details in the public court list in the usual way the day before (for example, because the prisoner is produced at court by the Tipstaff on the morning of the hearing, having been arrested overnight), the following steps should be taken:

a) Where, as in the Royal Courts of Justice, the public court list is prepared and accessible in electronic form, it should be updated with the appropriate entry as soon as the court becomes aware that the matter is coming before it. This can be done very quickly.[3]

b) Notice of the hearing should at the same time be placed outside the door of the court in which the matter is being, or is to be heard, and at whatever central location in the building the various court lists are displayed.

c) The Press Association should be notified by email from the Judicial Office of the fact that the hearing is taking or is shortly due to take place.

iv) This is primarily a matter for others, but consideration might appropriately be given to ensuring that the statistics of the receptions of contemnors into prison accurately record in all cases details of the committing court. There ought not to be any insuperable obstacle to obtaining this information, because in every committal for contempt there will be a warrant identifying the sentencing court.

49. I add one final observation. I would not for myself want to give any credence to the proposition that a failure to sit in open court or a failure to list the case properly or a failure to publish the judgment, suffices of itself to invalidate an otherwise proper committal for contempt, let alone that such a failure can entitle the contemnor to release on a writ of habeas corpus. Mr Hemming has produced no authority in support of the proposition and in my judgment it is fundamentally unsound.

Lady Justice Sharp :

50. I agree.

Lord Justice Vos :

51. I also agree.

---

[3] For example, at 2pm on 17 October 2014 I handed down a Family Division judgment in open court at the Royal Courts of Justice. It had not been possible to include the matter in the court list the day before. I notified the Clerk of the Rules by email of the listing at 8.38am; the listing appeared on the publically accessible HMCTS website at 8.49am.