Neutral Citation Number: [2013] EWHC 2579 (Fam)

Case No: FD12P02046

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 August 2013

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

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In the Matter of an application by Her Majesty's Solicitor General for the committal to prison of Jennifer Marie Jones for alleged contempt of court

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Ms Melanie Cumberland (instructed by the Treasury Solicitor) for Her Majesty's Solicitor General
Mr Christopher Hames (instructed by Miles & Partners LLP) for Jennifer Jones

Hearing dates: 23-24 July 2013

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR JAMES MUNBY

This judgment was handed down in public on 21 August 2013

Sir James Munby, President of the Family Division :

1. This is an application by Her Majesty's Solicitor General for the committal to prison of Jennifer Marie Jones for alleged contempt of court. The Solicitor General has failed to prove his case. The application is dismissed.

The background

2. The background facts can be stated quite shortly. The respondent (who I shall refer to as the mother) is Welsh and lives in Wales at Llanelli. While working in Spain she met, and subsequently in May 1995 married, a Spaniard, Tomas Palacin Cambra (who I shall refer to as the father). They had five children; Sara, born in May 1996; Jessica, born in January 1998; Tomas, born in January 2000; Eva, born in November 2002; and David, born in August 2004. The marriage ran into difficulties and the parents separated in 2008. Since then there has been much litigation, both here and in Spain. The father has twice made successful applications in this jurisdiction for orders for return pursuant to the Hague Convention.

3. The second set of Hague proceedings culminated in an order made by Hedley J on 9 October 2012, which, so far as material for present purposes, was in the following terms:

> "It is ordered that:
>
> 1 Jessica … Tomas … Eva … and David … shall be returned forthwith to the jurisdiction of the Kingdom of Spain pursuant to the provisions of the 1980 Hague Convention on the Civil Aspects of International Child Abduction.
>
> 2 Paragraph 1 above shall be given effect as follows
>
> (a) The children shall return to Spain accompanied by the father on a flight scheduled to depart from England and Wales no later than 24.00 hours on 12 October 2012 (00.00 hours on 13 October 2013); and
>
> (b) The mother shall deliver up the children into the care of the father, or cause the children so to be delivered up, at Cardiff Railway Station at no later than 4pm on 12 October 2012"

The mother was present when that order was made. It was endorsed with a penal notice and subsequently, as she accepts, served on her. She takes no point on service.

4. In the judgment he delivered on 9 October 2012, Hedley J explained why he made that order: *Re Jones* [2012] EWHC 2955 (Fam). He concluded his judgment with these words:

> "It seems to me to be one of those cases where the importance of upholding Convention policy in the face of flagrant and, in this case, repeated breach seriously outweighs the objections [of the children], especially when every matter that is relied on

> in support of those objections and in support of retention in this country is before the Spanish court and all the evidence is capable of being deployed before it. That is the court with jurisdiction, the court that ought to make the order, and, for all those reasons, I propose to direct the summary return."

5. The children were not delivered to Cardiff Railway Station, either by the time specified or at all.

6. During the evening of the same day, 12 October 2013, the out of hours judge, Charles J, made a location order and directed the matter to be listed before the urgent applications judge the following Monday, 15 October 2012. At a hearing on 15 October 2012, Roderic Wood J dismissed an application by the mother to set aside or stay the order of Hedley J. He discharged the location order made by Charles J and replaced it with a collection order. By the time an attempt was made to enforce the collection order in the early hours of 16 October 2012, the mother together with her partner, John Williams, and the children had disappeared. The matter came back before Roderic Wood J later the same day. He made various orders, the details of which are not material for present purposes, and, having made a statement to members of the press, authorised the disclosure of the children's names and publication of their photographs in order that their whereabouts might be discovered.

7. On 17 October 2012 the mother, her partner and the children were found by police at a guesthouse in Gwent. In accordance with the collection order the two younger children, Eva and David, were handed over to the father, with whom they returned to Spain. The two older children, Jessica and Tomas, refused to go. In the teeth of the order made by Hedley J, which despite many efforts by the mother to have it set aside has continued throughout in full force and effect, they remain in Wales with the mother.

The committal application

8. On 18 October 2012 Roderic Wood J invited the Attorney General to consider bringing proceedings against the mother for contempt. The Attorney General's Office wrote to the mother on 21 November 2012. She provided written representations in response on 12 December 2012, and 7 and 18 January 2013 and provided a very large quantity of material.

9. On 6 April 2013 the Solicitor General issued an application for the mother's committal. The grounds of the alleged contempt were set out as follows:

> "The [mother], between 4pm on 12th October 2012 and 17th October 2012 failed to comply with paragraph 2 of the Order of Hedley J dated 9th October 2012 … In particular, [she] failed to deliver up [the children] into the care of their father by 4pm on 12th October 2012 at Cardiff Railway Station in order for them to return to Spain. [She] continued to breach paragraph 2 of the Order of Hedley J dated 9th October 2012 by failing to deliver up the … children or causing them to be delivered up into the care of their father after 4pm on 12th October 2012 and thereafter. [Her] breach of paragraph 2 of the Order of 9th

> October 2012 continued until 17th October 2012, when [she] and [the] children were found by police".

10. The application came before me on 23 July 2013. The Solicitor General was represented by Ms Melanie Cumberland and the mother by Mr Christopher Hames. The Solicitor General's case was supported by an affidavit sworn by a Legal Advisor in the Attorney General's Office. In response there were witness statements from the mother, from Mr Williams, and from a very old friend and neighbour of the mother, Allyson Thomas. I heard oral evidence from both the mother and Mr Williams. I reserved my decision overnight. The following morning, 24 July 2013, I announced that the Solicitor General had failed to prove his case. I made an order dismissing the application, with no order as to costs. I said I would give my reasons in due course.

A preliminary point

11. Mr Hames, as he was entitled to, questioned Roderic Wood J's referral of the case to the Attorney General and challenged the *locus standi* of the Law Officers to make an application for committal.

12. It is well known that, on occasions, judges refer the papers in a case which has been before them to some outside agency with a view to that agency considering whether or not to take any steps arising out of the matters referred by the judge. Sometimes the papers are referred to the police, the Crown Prosecution Service or the Director of Public Prosecutions with a view to the possible commencement of criminal proceedings. Sometimes the referral is to some professional or other regulator. Sometimes the referral is to Her Majesty's Revenue and Customs. Sometimes, as here, the referral is to the Law Officers. No doubt there are other instances. Although the basis upon which such referrals are made has not very often been explored in any depth – the judgment of Charles J in *A v A; B v B* [2000] 1 FLR 701 is an exception – there can be no question about the right of the judges to act in his way. Nor, in my judgment, can there be any objection to a judge, as here, referring the papers to the Law Officers with a view to them considering whether or not to bring proceedings for contempt; and, I should make clear, whether the contempt is criminal or, as in the present case, civil. I was personally involved, whilst at the Bar, in a case in 1984 where Hollis J referred the papers to the Law Officers with a view to possible committal proceedings (in the event no application was made). Ms Cumberland was able, on instructions, to tell me of a more recent example in a case, also in the Family Division, before Macur J.

13. The more important question is as to the *locus* of the Law Officers to make such an application. On this I was referred to four authorities: *Attorney-General v Times Newspapers Ltd* [1974] AC 273, *Gouriet v Union of Post Office Workers* [1978] AC 435, *Clarke v Chadburn* [1985] 1 WLR 78, and *Attorney General v Harkins, Attorney General v Liddle* [2013] EWHC 1455 (Admin), [2013] All ER (D) 215 (Apr). I was also taken certain passages in Arlidge, Eady & Smith on Contempt, ed 4, in particular paras 2-184 – 2-187.

14. It is quite clear, in my judgment, that the Law Officers have *locus* to apply for the committal of an alleged contemnor even if the contempt is civil and involves the breach of an order obtained, as in the present case, by a private individual in the course of proceedings between private individuals. The Law Officers act to safeguard

the public interest and the administration of justice. I need do no more than quote what Lord Reid said in *Attorney-General v Times Newspapers Ltd* [1974] AC 273, 293:

> "I agree with your Lordships that the Attorney-General has a right to bring before the court any matter which he thinks may amount to contempt of court and which he considers should in the public interest be brought before the court. The party aggrieved has the right to bring before the court any matter which he alleges amounts to contempt but he has no duty to do so. So if the party aggrieved failed to take action either because of expense or because he thought it better not to do so, very serious contempt might escape punishment if the Attorney-General had no right to act. But the Attorney-General is not obliged to bring before the court every prima facie case of contempt reported to him. It is entirely for him to judge whether it is in the public interest that he should act."

A recent example of such an application made by the Attorney General in the public interest is *Attorney General v Harkins, Attorney General v Liddle* [2013] EWHC 1455 (Admin), [2013] All ER (D) 215 (Apr), where the committal proceedings arose out of alleged breaches of the injunctions granted by Dame Elizabeth Butler-Sloss P in *Venables v News Group Newspapers Ltd, Thompson v News Group Newspapers Ltd* [2001] Fam 430.

15. It is, moreover, clear that, apart only from certain statutory rights conferred on local authorities, the Law Officers have the exclusive right to represent the public interest. As Lord Diplock said in *Attorney-General v Times Newspapers Ltd* [1974] AC 273, 311, speaking of the Attorney General:

> "He is the appropriate public officer to represent the public interest in the administration of justice."

In *Gouriet v Union of Post Office Workers* [1978] AC 435, 481, Lord Wilberforce, in a passage to which Ms Cumberland drew attention, said:

> "That it is the exclusive right of the Attorney-General to represent the public interest – even where individuals might be interested in a larger view of the matter – is not technical, not procedural, not fictional. It is constitutional."

16. Curiously, what was effectively the same point came before Holman J the very next day after I had announced my decision in this case. Holman J gave judgment on 26 July 2013: *The Bedfordshire Police Constabulary v RU and FHS* [2013] EWHC 2350 (Fam). The question in that case was whether a police force can apply for committal for alleged breach of a forced marriage protection order made under Part 4A of the Family Law Act 1996 when the police were not the applicants who had obtained the relevant order. Holman J held that the police force could not; it lacked standing to make the application. I respectfully agree.

17. It is not for the court to review let alone control the Law Officers' decision as to whether or not the public interest either requires or justifies their intervention. I can, however, well understand why the Solicitor General should have thought it appropriate to intervene in a case such as this. There is a clear public interest involved in the proper enforcement of the Hague Convention system – the Convention, after all, imposes international obligations on the United Kingdom. And as Hedley J observed, the mother's breaches here had been flagrant and repeated.

The basis of the application

18. The Solicitor General does not base any allegation of contempt on a breach of paragraph 1 of Hedley J's order. He was right to adopt that stance, for paragraph 1 was not an injunction, whether in form or in effect. First, paragraph 1 was not addressed to anyone in particular. It directed, in the abstract as it were, that something was to be done. But it did not order the mother, or anybody else for that matter, to do something: see the analysis in *Re HM (Vulnerable Adult: Abduction) (No 2)* [2010] EWHC 1579 (Fam), [2011] 1 FLR 97. Secondly, paragraph 1 did not specify any time for compliance, and that omission is fatal: *Temporal v Temporal* [1990] 2 FLR 98.

19. In relation to paragraph 2 of Hedley J's order, the Solicitor General, as we have seen, puts his case on two different footings. First, he says that the mother was in breach in failing to deliver up the children by 4pm on 12 October 2012. Secondly, he says that she continued to breach the order by failing to deliver up the children *after* 4pm on 12 October 2012, which breach, he alleges, continued until 17 October 2012.

20. There is, in my judgment, simply no basis in law upon which the Solicitor General can found an allegation of contempt for anything done or omitted to be done by the mother at any time after 4pm on 12 October 2012. Paragraph 2(b) of the order was quite specific. It required the mother to do something by 4pm on 12 October 2012. It did not, as a matter of express language, require her to do anything at any time thereafter, nor did it spell out what was to be done if, for any reason, there had not been compliance by the specified time. In these circumstances there can be no question of any further breach, as alleged in the Solicitor General's notice of application, by the mother's failure to deliver up the children after 4pm on 12 October 2012 or, as alleged in the application, any continuing breach thereafter until 17 October 2012 when she and the children were found.

21. A mandatory order is not enforceable by committal unless it specifies the time for compliance: *Temporal v Temporal* [1990] 2 FLR 98. If it is desired to make such an order enforceable in respect of some omission after the specified time, the order must go on to specify another, later, time by which compliance is required. Hence the form of 'four day order' hallowed by long usage in the Chancery Division, requiring the act to be done "by [a specified date] or thereafter within four days after service of the order". This is an application of the wider principle that in relation to committal "it is impossible to read implied terms into an order of the court": *Deodat v Deodat* (unreported, 9 June 1978: Court of Appeal Transcript No 78 484) per Megaw LJ. An injunction must be drafted in terms which are clear, precise and unambiguous. As Wall LJ said in *Re S-C (Contempt)* [2010] EWCA Civ 21, [2010] 1 FLR 1478, [17]:

> "if ... the order ... was to have penal consequences, it seems to us that it needed to be clear on its face as to precisely what it

> meant, and precisely what it forbad both the appellant and the respondent from doing. Contempt will not be established where the breach is of an order which is ambiguous, or which does not require or forbid the performance of a particular act within a specified timeframe. The person or persons affected must know with complete precision what it is that they are required to do or abstain from doing – see (inter alia) *Federal Bank of the Middle East Limited v Hadkinson and Others* [2000] 1 WLR 1695; *D v D (Access: Contempt: Committal)* [1991] 2 FLR 34 and *Harris v Harris, A-G v Harris* [2001] 2 FLR 895 at para [288]."

22. The present case is a particularly striking example of the impossibility of reading in some implied term. What the order required the mother to do was to:

> "deliver up the children into the care of the father … at Cardiff Railway Station at no later than 4pm on 12 October 2012."

Suppose that for some reason she failed to do that. What then did the order require her to do? Deliver the children to the father at Cardiff Railway Station or at some other (and if so what) place? And assuming it was to be at Cardiff Railway Station by what time and on what day? Or was she (to adopt the language of a subsequent proposed order) to return, or cause the return of, the children to the jurisdiction of the Kingdom of Spain by no later than a specified date and time? It is simply impossible to say. 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. When a mandatory order is not complied with there is but a single breach: *Kumari v Jalal* [1997] 1 WLR 97. 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 part of the contemnor – then it is necessary first to make another order specifying another date for compliance, followed, in the event of non-compliance, by an application for committal for breach not of the original but of the further order: see *Re W (Abduction: Committal)* [2011] EWCA Civ 1196, [2012] 2 FLR 133.

24. It follows that the only question which properly arises on the present application is whether the mother was in breach of paragraph 2(b) of Hedley J's order by reason of events down to 4pm on 12 October 2012.

<u>The events of 12 October 2012 – the law</u>

25. Mr Hames, relying on *Re A (Abduction: Contempt)* [2008] EWCA Civ 1138, [2009] 1 FLR 1, and *Re L-W (Enforcement and Committal: Contact); CPL v CH-W and Others*

[2010] EWCA Civ 1253, [2011] 1 FLR 1095, submitted that it had not been within the power of the mother to comply with the order, or, to be more precise, that the Solicitor General had failed to prove that it had been.

26. In *Re L-W*, in a judgment with which Jacob and Sedley LJJ agreed, I said this (para [34]):

> "(1) The first task for the judge hearing an application for committal for alleged breach of a mandatory (positive) order is to identify, by reference to the express language of the order, precisely what it is that the order required the defendant to do. That is a question of construction and, thus, a question of law. (2) The next task for the judge is to determine whether the defendant has done what he was required to do and, if he has not, whether it was within his power to do it. To adopt Hughes LJ's language, Could he do it? Was he able to do it? These are questions of fact. (3) The burden of proof lies throughout on the applicant: it is for the applicant to establish that it was within the power of the defendant to do what the order required, not for the defendant to establish that it was not within his power to do it. (4) The standard of proof is the criminal standard, so that before finding the defendant guilty of contempt the judge must be sure (a) that the defendant has not done what he was required to do and (b) that it was within the power of the defendant to do it. (5) If the judge finds the defendant guilty the judgment must set out plainly and clearly (a) the judge's finding of what it is that the defendant has failed to do and (b) the judge's finding that he had the ability to do it."

Having referred to the defence of "reasonable excuse" provided by sections 11J(3) and 11O(3) of the Children Act 1989 (which impose a reverse burden of proof), I continued (para [40]):

> "Bearing in mind that a defendant is not in breach of a mandatory order, even if he has not done what the order required, if it was not within his power to do it, issues of *force majeure* are properly to be considered as going to questions of breach rather than reasonable excuse. So, for example, if a parent taking a child for contact is prevented from going on or is delayed by unforeseen and insuperable transport or weather problems – one thinks of the sudden and unexpected grounding of the nation's airlines by volcanic ash – then there will be no breach. Reasonable excuse, in contrast, arises where, although it was within the power of the defendant to comply, he has some good reason, specifically, a "reasonable excuse", for not doing so. A typical case might be where a child suddenly falls ill and the defendant, reasonably in the circumstances, takes the child to the doctor rather than going to contact."

27. It is also useful to note what I said a little later (para [84]):

> "If it is to be said, for example, that on 30 January 2010 the father was in breach of the order then, to repeat, the task for the judge is to identify, by reference to the express language of the order, precisely what it is that the order required the father to do on 30 January 2010 and then to determine whether the father has done what he was required to do and, if he has not, whether it was on 30 January 2010 within his power to do it. So any allegation of breach necessarily involves a close and careful scrutiny of the events of the day in question. Moreover, the question in the example I have given is whether, on 30 January 2010, it was or was not within the power of the father to do what the order required. If the answer to that question is that it was, then so be it. But if the answer is that it was not (or, to be more precise, that it has not been proved that it was within his power) then that is the end of the allegation, and it matters not at all that the father may by his own acts (or omissions) on previous occasions have brought about the state of affairs upon which he now relies by way of defence."

28. The primary submission made by Mr Hames was that it was not within the power of the mother on 12 October 2012 to comply with the order. Since he succeeds on that ground there is no need for me to go on to consider whether a contempt must be either contumelious or deliberate. I merely record that on this question Ms Cumberland referred me, in addition to *Re A (Abduction: Contempt)* [2008] EWCA Civ 1138, [2009] 1 FLR 1, to cases such as *Heatons Transport (St Helens) Ltd v Transport and General Workers' Union* [1973] AC 15, *Attorney-General v Times Newspapers Ltd* [1992] 1 AC 191 and *Miller v Scorey* [1996] 1 WLR 1122.

The events of 12 October 2012 – the facts

29. I turn at last to the central issue in the case: the close and careful scrutiny of the events of the crucial day, 12 October 2012. In fact, as I shall explain, the relevant inquiry focuses on an even narrower time-span: the period from 1.39pm to 2.56pm on the afternoon of 12 October 2012.

30. The unchallenged evidence of the mother, based on a Google printout, is that her home in Llanelli is 54.4 miles from Cardiff Railway Station, and that the journey by car along the M4 takes about 64 minutes. So, in order to get to Cardiff by 4pm they would have had to leave by 2.56pm at the latest. Also unchallenged was her evidence that she had arranged the loan of a friend's 8-seater people carrier at 2.30pm to take herself and the four children to Cardiff and that, having herself packed the younger children's luggage, at about 1pm she told the two older children to go upstairs to pack. At 1.37pm (the time is fixed by his mobile phone) Mr Williams received a telephone call from his daughter, who was driving past the house, to say that she could see Jessica on the flat roof outside her bedroom window and Thomas outside the house with his bag (apparently he had jumped down off the flat roof). Mr Williams went upstairs and pulled Jessica back into the house. She gave him the slip and ran out of the house and away with Thomas, Mr Williams in pursuit. He telephoned the police: the call was logged at 1.39pm. None of this is challenged by Ms Cumberland. So the crucial inquiry narrows down to the 77 minutes or so between 1.39pm and 2.56pm.

31. In relation to what happened during that period I am dependent in large part on the accounts given by the mother and Mr Williams. Both, as I have said, made witness statements and gave oral evidence. Their accounts can be summarised as follows: Mr Williams set off in pursuit, giving the police a running commentary on the phone: this is borne out by the police log. The children were found in the public library and collected by the police; the police log records them as being in the process of being taken back to the police station at 2.1pm. While they were being taken to the police station Mr Williams returned home and told the mother she was needed at the police station. Her friend Allyson Thomas took her there in her car. On her arrival – at about 2.30pm she thinks, perhaps a little earlier – she had to wait some time on her own. She then had a conversation with a police officer, who told her what the children had been saying. Only then was she able to see the children herself. Eventually they all returned home. A police log records at 4.59pm that they had left the police station "approx 1 hour ago" but the mother and Mr Williams think this is wrong and that they had in fact left somewhat earlier; the mother recalls her friend being anxious to get back in time to get her son to work by 4pm.

32. Having heard both of them giving evidence and being cross-examined, I accept this account as given by the mother and Mr Williams. They were, I think, being honest and doing their best to be accurate in what they said. Partly, this is a conclusion I arrive at having seen the way in which they gave their evidence. This was not some glib rehearsed account. The mother in particular was thoughtful, giving every appearance of trying to recall – to visualise – what had been happening that afternoon. Nor did she seek to put any kind of 'spin' on her account. If anything, quite the reverse. She did not seek to use the entry in the police log as showing that she had left the police station later than the time she recalled. And, significantly, she made no bones about the fact that as soon as she was reunited with the children in the police station she made it clear to them that they were not going back to Spain, nor about the fact that she repeated this to all the children at or soon after 4pm once she and the two older children had returned from the police station.

33. It is clear, both from her own account and from the police logs, that the mother told the police that she had to get the children to Cardiff by 4pm, and that she explained why. The police logs show that she was told it was a matter for her, and not the police. The mother's account is that, whilst she was at the police station talking to the officer before being reunited with the children, he gave her an account of what they had told him and expressed his own opinion as being that Jessica was a danger to herself and others on the plane.

34. Apart from the police logs I have no account from the police of events at the police station. None of the officers gave evidence.

35. Mr Hames submits that in these circumstances there is a clear answer to the critical question, Was it within her power to comply with the order, could she do it, was she able to do it? She could not. Through no fault of her own, and having made every effort to arrange a timely departure that would get them all to Cardiff by 4pm, the mother's plans were frustrated: two of the children ran away, and whenever precisely it was that she left the police station it was on any footing well after 3pm, and probably nearer to 3.30pm – too late to get to Cardiff in time. As a fallback position, Mr Hames points out that it is for the Solicitor General to prove the case, and,

moreover, to the criminal standard of proof. He submits that I simply cannot be sure that it was within the mother's power to comply.

36. Ms Cumberland points to the mother's frank admission of what she said to the children, to the fact that the mother, on her own account, made no effort to get the two younger children to Cardiff, and to the fact that, again on the mother's own account, by shortly after 4pm she had embarked on a course of conduct that, far from trying to make alternative arrangements with the father, led to them all going on the run.

37. I can see the force of what Ms Cumberland says, and cannot help thinking that the mother has, quite fortuitously, been able to take advantage of two things that are unlikely to re-occur: one the serendipitous happenstance that the children ran away; the other that nothing which happened after 4pm is capable of being a contempt of court. So I have to come back to the critical question: Was it within the mother's power to get the children back home from the police station in time for them all to leave for Cardiff no later than 2.56pm? Ms Cumberland says that it was: no-one had been arrested, everyone was free to leave the police station whenever they wished, and in any event there was nothing going on in the police station that would have prevented the two younger children being taken to Cardiff.

38. At the end of the day I am concerned with what is essentially a question of fact arising in most unusual circumstances. I have to put myself in the mother's shoes as she is in the police station during the half hour or so between her arriving there at about 2.30pm and the time – 2.56pm – by which she has to leave for Cardiff. Two of her children have run away and been taken by the police to the police station. She has to wait, before receiving worrying information from the officer and only then being able to see her children. However the lawyer might subsequently analyse what had happened, the reality is that the mother was, metaphorically if not literally, in the hands of the police and having to work to their timetable. It is far from clear on all the evidence that the mother had been reunited with the children by 2.56pm – perhaps, but then perhaps not – and on that fact alone, in my judgment, the Solicitor General fails to prove his case.

39. Standing back from the detail, it is for the Solicitor General to prove that, as events worked themselves out on the afternoon of 12 October 2012, it was within the mother's power to leave Llanelli by 2.56pm so that she could get the children to Cardiff Railway Station by 4pm. In my judgment he has failed to do so. The application must accordingly be dismissed

Conclusion

40. It was for these reasons that I announced on 24 July 2013 that the application was dismissed.

Costs

41. This is not a jurisdiction in which costs necessarily follow the event. The fact, in my judgment, is that the Solicitor General was fully justified in bringing the application in the light of all the information available to him at that stage and the evidence filed in answer to the application was not so compelling as to require him to desist. He was entitled to pursue the matter and to have the evidence tested before a judge. In all the

circumstances the appropriate order, the fair, just and reasonable order, is that there be no order as to costs. I make clear that this would have been my decision whatever the basis upon which the mother was (or was not) funding the proceedings.

Public funding

42. Mr Hames has been acting for the mother *pro bono*, as have the solicitors who instruct him. For that both he and they deserve her thanks and mine. There can be no higher call on the honour of the Bar than when one of its members is asked to act for no fee on behalf of a client facing imprisonment. The Bar, I am sure, will never fail in its obligation to stand between the Crown and the subject in such a case. And the same goes, I am sure, for the other profession. But it is disconcerting that something so fundamental – the right to a proper defence when a great officer of state seeks to have you imprisoned – should be dependent upon the willingness of the Bar and its instructing solicitors to act without fee.

43. I raise the matter because I am told that the reason why the mother was denied public funding was not because of the merits of her case, not because her income took her out of scope, but because the value of her share of two properties in Spain meant that her capital exceeded the statutory limit of £8,000. Mr Hames told me on instructions that there was no method by which she could realise the value of her share within the short timeframe of the proceedings. There is, I am told, no other basis upon which public funding can be made available in a case such as this. *If* this is really so, it might be thought that something needs to be done, not least bearing in mind the requirements of Article 6(3)(c) of the Convention and the learning expounded in *Hammerton Hammerton* [2007] EWCA Civ 248, [2007] 2 FLR 1133.