Neutral Citation Number: [2023] EWCA Civ 1214

Case No: CA-2023-001221

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
FAMILY DIVISION
MR JUSTICE MACDONALD
[2023] EWHC 1248 (Fam)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 October 2023

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE PHILLIPS
and
LORD JUSTICE BIRSS

- -

Between:

Fahad Abdi	**Appellant**
- and -	
(1) Manchester City Council	**Respondents**
(2) (3) (4) (5) The Children via their Children's Guardian) (6) Maryan Yusef	

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The appellant appeared in person
Sara Mann (instructed by **Manchester City Council**) for the **First Respondent**
The **Second to Fifth Respondents** were not in attendance and were not represented
Simon Miller (instructed by **Pluck Andrew Solicitors**) for the **Sixth Respondent**

Hearing date: 14 September 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 20th October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Moylan:

1. This is an appeal concerning a committal for contempt of court for failing to comply with court orders made in proceedings relating to four children aged between 11 and 6. It is an appeal by Mr Fahad Abdi ("Mr Abdi" or "the father") from the committal order made by MacDonald J ("the judge") on 11 May 2023 by which he committed the father to prison for 12 months for breaches of orders made on 16 February and 3 March 2023.

2. The appeal is opposed by Manchester City Council ("the local authority"), which applied for the committal order and which is the applicant in the substantive proceedings. The children's mother ("the mother") is a respondent to this appeal.

3. The judgment below is reported, [2023] EWHC 1248 (Fam) ("May judgment"). The judge had determined a previous committal application on 5 December 2022 and that judgment is also reported, [2022] EWFC 160 ("December judgment"). The details set out and quoted below are largely taken from these judgments which contain a much fuller account of the background.

4. The children were born in the United Kingdom. The parents are Somalian although the mother is understood also to have Dutch nationality. The local authority has been involved with the family since 2012. Because of the events described below, the factual background relating to the family's circumstances in England has not yet been the subject of any court determination and judgment.

5. The local authority and the Police were actively engaged with the family in March 2022. The absence of the children from school led to the Police visiting the family home on 23 March 2022. The father told them that the children were in New York. The Police telephoned the mother who "was not forthcoming with information". It subsequently became known that the mother had flown to Istanbul with the children on 18 March 2022 where she obtained medical treatment for one of the children. The mother then flew with the children to Somalia in April 2022. She returned to England later in April 2022, leaving the children in Somalia.

6. The father is entitled to free legal representation but has chosen to act in person at this hearing. He made powerful oral submissions at the hearing and conveyed his firm belief that he has been the subject of an unjust process and unjust decision which have caused him very considerable harm. The local authority was represented by Ms Mann and the mother was represented by Mr Miller.

Proceedings

7. The local authority commenced proceedings on 13 October 2022. On 14 November, HHJ Singleton KC, sitting as a High Court judge, made an order requiring the mother and the father to return the children forthwith to England and made a passport and a location order which required each of the parents, among other things, to inform the court through the Tipstaff "of the whereabouts of the children" and to give the Tipstaff their passport(s) and any other travel documents.

8. The location order was executed on the father on 18 November 2022. He was arrested by the Police for failing to provide the required information and documents. At a subsequent hearing on 22 November 2022, and as recorded in the order, the father "has

today agreed to provide his mobile 'phone and any travel documents he has in his possession to the local authority for analysis. To this end he has today provided the keys to his home to his solicitor and given them authorisation to enter his property to retrieve the said items". The order also provided that the father's telephones were to be subject to forensic analysis by a jointly instructed expert with the solicitor for the local authority being "the nominated lead solicitor".

9. During the hearing of the appeal, the father sought, in effect, to challenge this recital, saying that he questioned how his belongings, in particular his mobile telephones, came to be in the possession of the local authority. He suggested that they had been obtained improperly, it appeared probably by his home being "raided" or broken into. Despite the father's challenge, there is no reason to conclude that the recital does not accurately record what was agreed at the hearing on 22 November 2022 at which the father was legally represented. This shows how his mobile telephones came legitimately to be in the possession of the local authority.

10. The local authority applied for the committal of both the mother and the father including for failing to comply with the order to return the children to England and to disclose the whereabouts of the children. The father's case in response was that he did not know where the children were "and contends that they were last known to be with the mother earlier this year" and that his travel documents "were lost, and then found, but by the time they had been found they had been cancelled".

11. At a hearing on 29 November 2022, the committal application was adjourned. The father was represented at that hearing but his counsel applied for, and was granted, "permission to withdraw by reason of professional embarrassment".

12. In his December judgment, the judge set out a summary of the relevant legal requirements relating to committal applications. These included that each alleged contempt must be proved to the criminal standard of proof; that the burden of proof lay on the local authority; that the father was entitled to remain silent and was not obliged to give evidence; and that the father must be given the opportunity to secure legal representation to which he was entitled.

13. The judge recorded that he was satisfied that each of the procedural requirements had been met. He referred to the fact that the father had been represented by counsel at the hearing on 29 November 2022 but that she had withdrawn as referred to above. As set out in the December judgment:

> "The father is today unrepresented. He informs me that he has now also dispensed with the services of his solicitors and indicated that he now represents himself. He did not make an application to further adjourn this hearing."

The judge also set out that, if a contempt was proved:

> "In sentencing the contemnor, the disposal must be proportionate to the seriousness of the contempt, reflect the court's disapproval and be designed to secure compliance in the future. Committal to prison is appropriate only where no reasonable alternative exists. Where the sentence is suspended or adjourned the period

> of suspension or adjournment and the precise terms for activation must be specified."

14. The judge found that, at the time the location order was executed, the father "knew the then current location of the children". In the course of a detailed judgment, the judge set out an account of the history. The mother had explained that she had taken the children to Somalia "under duress from the father and the wider paternal family"; that they had been "collected at the airport by [a] paternal uncle … and other males who the mother had never met before"; that "her phone was immediately taken off her as was her passport and the children's passports"; and that "she and the children were taken to a gated community in Mogadishu". She had subsequently, effectively, been forcibly returned to England by the father's cousin without the children. She said that, on her return, the father had said "that he would return to Somalia to recover the children and … she remained with him in the hope that he would do this as soon as possible".

15. The father did then travel to Somalia in May 2022, but he did not return with the children. As set out in the December judgment, "the father has denied that he travelled to Somalia in May 2022" but, following the father's arrest, the Police had found "a boarding pass for a flight to Addis Ababa, Ethiopia on 6 May 2022" in his home. I return to this finding below, as the father argued before us that it was wrong.

16. The mother then travelled to Somalia between August and September 2022 when she tried, but failed, to find the children with the assistance of the Somalian courts and police. Evidence on which the judge clearly placed significant weight was a "voice note" the father sent the mother which the judge set out in full in the judgment and which he described as follows:

> "The mother alleges that during the period in which she was in Somalia the father sent her a voice note threatening that she should "behave" and stating that she had no right to go to Somalia to search for the children without his permission. The voice note is in Somali and has been provided to the police. A certified translation of the voice-recording is exhibited to the mother's statement. The father did not seek to deny that his is the male voice that can be heard on the voice note. Of note in light of the mother's contention regarding the warrant issued by the Somali court, the voice note records the father admonishing the mother for "going to the house without telling me so that you can take the children back to England."

I quote some of the things the father said in the voice note, as set out in the translation in the judgment:

- 'If you don't misbehaving you never see those children';
- 'I will not let you see you children unless you behave well. You will not see and you will not talk to or see the children";

- "The stupidity of going to the house without telling me and to try to take children so they can go with you to England, and you are doing all that."

17. The Police visited the father in England on 16, 18 and 19 August 2022. The judge set out the father's differing accounts. He first said, on 18 August, that he did not know where the children were and was "under the impression that the mother and the children were still in Turkey" and that they had gone for a holiday. He was not "concerned when they had not returned to the jurisdiction as the mother was 'always doing this'"; he had "no means of contacting the mother." The father then said, on 19 August, that he "had rung his family in the United Kingdom to try and ascertain whether there were members of his family in Somalia that could help look for the children". He also said that he had "no immediate family in Somalia and does not know of anyone that he could speak to in that jurisdiction, albeit that there may be distant relatives that could help. The father had made no mention of Somalia when speaking to the police the day before".

18. The judge found that the mother was not in breach of the orders as alleged. He was satisfied that she had done her best to comply with them. He was satisfied that she did not know where the children were and that she had "continued to make efforts to locate the children with a view to recovering them to this jurisdiction" but was "not able to comply with the return order".

19. As to the father, the judge found that he was in breach of the order to disclose the whereabouts of the children. He explained his finding as follows:

> "… having regard to the evidence before the court I am satisfied that at the time the location order was executed, the father knew the then current location of the children. Notwithstanding his continued denials, the voice note sent by the father to the mother, which the father did not deny or seek to dispute, proves beyond reasonable doubt that the father knows where the children are, as does the fact that he travelled to Somalia in May 2022, as I am satisfied beyond reasonable doubt that he did. I accept the submission that the voice-message is incriminating and clearly suggests that the father knows the children's whereabouts and had detailed knowledge of the mother's actions in Somalia attempting to locate them. In addition, I note that notwithstanding his purported worry concerning the children's whereabouts, unlike the mother he has never reported them missing to the authorities nor sought the assistance of the court to locate the children in one of the alternative locations he has mentioned, namely Turkey or the United States. I am satisfied that this is because he knows full well where the children are currently. When arrested and spoken to by police, I am satisfied beyond reasonable doubt that the father made no mention at all of the children being in Somalia, denying all knowledge of their whereabouts. The recording of the father's statement on 18 November 2022 makes no mention of the children being in Somalia, the only reference to another country being to Turkey."

20. As referred to above, during the hearing of this appeal, the father sought to challenge the judge's finding that he had travelled to Somalia in May 2022. He said that the boarding pass which was found in the family home does not support this conclusion. This is not, in fact, an issue before us but the judge has sufficiently explained why he made this finding which was clearly a finding he was entitled to make.

21. In respect of the allegation that the father had breached the return order of 14 November 2022 the judge concluded as follows:

> "the position is complicated by the fact that the father was arrested on 18 November 2022, four days after the order was made. He has been remanded in custody ever since. In those circumstances, it has not been possible for him to comply with the return order himself. It also is not clear to what extent he has been able to communicate with members of his family to ensure the return of the children, although I take it to be unlikely that he has been able to communicate with Somalia from prison. In the circumstances of those uncertainties, and whilst the continuing absence of the children from the jurisdiction is powerful evidence of the father's failure to comply with the return order, I am not satisfied that it would be safe to conclude today that the local authority has proved beyond reasonable doubt that the father has failed to comply with the return order."

22. In deciding what sentence to impose in respect of the breach he had found, the judge repeated that "a penalty for contempt has two primary functions", namely:

> "it upholds the authority of the court by marking the disapproval of the court and deterring others from engaging in the conduct comprising the contempt. Secondly, it acts to ensure future compliance."

The judge referred to the fact that the father had shown no sign of being prepared to comply with the terms of the location order but was "persisting" in failing to do so "notwithstanding the evidence now before the court that indicates beyond reasonable doubt both that he knows where the children are and that he has travel documents". He decided that the appropriate sentence was a term of imprisonment for four months but he reduced this to three months because the father had already spent three weeks "on remand".

23. The judge made a further order on 6 December 2022 providing that the father "shall ensure that the children … are returned to the jurisdiction of England and Wales forthwith and by no later than 16 January 2023". The judge also informed the father that he could apply to purge (apologise for and seek to remedy) his contempt and be released from prison "in particular should the children be returned to" England.

24. The children had not returned to England by 16 January 2023. There was, and still is, a port alert in place so, if they did return, this would become known. This led to the local authority making a second committal application on 18 January 2023.

25. The father was released from prison on 20 January 2023.

26. On 1 February 2023, HHJ Singleton KC adjourned the application because the father "indicated that he wanted legal representation which he had been unable to secure". The application was further adjourned on 2 February to 9 February because the father had still been unable to obtain legal representation.

27. On 9 February 2023, the father again sought an adjournment to enable him to obtain legal representation. This was refused by HHJ Singleton KC. We do not have a transcript of the judgment refusing that application. Nor do we have a copy of the judgment determining the committal application. The father was found to be in breach of the return order made on 6 December 2022. The judge adjourned sentencing and remanded the father in custody. She also made further directions so that the father would be represented at the next hearing.

28. The father was sentenced on 16 February 2023. He was represented but he dispensed with the services of both counsel and solicitors or they withdrew before the hearing began. We have a Note of the judgment. The judge sentenced the father to prison for 25 weeks. The judge referred to the fact that she was satisfied of the father's ability to comply with the order whilst he had been in custody. She also urged the father, "whatever his misgivings about the local authority, to engage with the process".

29. HHJ Singleton KC made a further order on 16 February 2023 which provided, in the same form as before, that the father "shall ensure that the children … are returned to the jurisdiction of England and Wales forthwith and by no later than 31 March 2023". She also made an order again requiring the father to provide information about the whereabouts of the children.

30. On 3 March 2023, HHJ Singleton KC made an order in the substantive proceedings requiring the father to "inform the Local Authority by no later than 31st March 2023 23.59 [of] the PIN number and passwords for his mobile phones belonging to him in the current possession of the local authority to enable examination of the said phones". As set out in the May judgment, this was "to enable the examination of those phones to further see whether there is information that might assist in locating the whereabouts of the children, and securing their return to this jurisdiction".

31. The committal application determined by the judge was made by the local authority on 13 April 2023. It was alleged that the father had failed to ensure the return of the children and had failed to provide his PIN number and passwords for his mobile telephones as ordered. The application was supported by a statement from a social worker which, among other matters, set out the attempts which had been made by the local authority to obtain information from, to engage with the father and to assist him to procuring the return of the children.

32. The application was initially listed for determination on 3 May 2023. At that hearing the court was informed by the prison in which the father was detained that he "had refused to get into the prison van. His stated grounds for refusing to attend court on that occasion were that these were civil proceedings, and therefore there was no obligation for him to be produced. The court has been informed that the father later told the prison officer that he required four weeks to prepare for the hearing". The judge adjourned the hearing in any event to 11 May 2023 because he was not satisfied that the father had been give notice as required by the rules. The father was provided, again, with a list of solicitors who he could instruct.

33. The father did not attend the hearing before the judge on 11 May 2023 and was not represented. As set out in the May judgment, the following email was received from the prison in which the father was then detained:

> "I am on duty at HMP Kirkham this morning as orderly officer. It has been brought to my attention that Mr Abdi, A2724DA, has been scheduled to attend a court hearing. I have been made aware that transport has been booked, which is yet to arrive, but prior to its arrival I have instructed staff to advise Mr Abdi of the move. Mr Abdi's response to this was that he is refusing to attend, and he has stated it is a civil matter, and so he believes he has a right to refuse."

The judge decided to determine the application in the father's absence.

34. The judge repeated the legal requirements in respect of a committal application, as set out in his December judgment. Counsel for the local authority referred to what the father's case might have been if he had attended court which the judge addressed as follows:

> "at the previous hearings the father has suggested that he is not able to comply with orders made by the court whilst he is in prison. Ms Mann further suggested that that may well have been, had the father attended court, the position he advanced today. In those circumstances, it is proper for the court to address it on the assumption that that would have been the submission of the father by way of explanation for the prima facie failure to comply with the orders."

He first addressed the requirements in the order of 3 March 2023:

> "First, the contention of course does not address the second order made by HHJ Singleton on 3 March 2023. Compliance with that order, namely the provision of a PIN and passwords to a representative of the local authority attending the prison, is not conditional on the father being at liberty, particularly in circumstances where the Local Authority have organised repeated visits to the father to enable him to provide that information. I am satisfied that the father knows his own PIN code, that that information is in his possession and, had he wished to do so, he could have provided it. He has failed to do so."

35. He then addressed the order of 16 February 2023:

> "[20] I am likewise satisfied that the fact that the father is currently in custody does not prevent him from complying with an order to ensure the children be returned from the jurisdiction of Somalia to the jurisdiction of England and Wales. As I have noted, the father has had multiple visits from social workers from Children's Services, to whom he could have given information

> confirming the whereabouts of the children, this court having found as a fact that he knows the whereabouts of the children in the jurisdiction of Somalia, in order that the local authority can arrange for their return. The father has likewise had repeated opportunities to instruct lawyers, whom he could also have given information concerning the children's whereabouts, to cause their return to this jurisdiction. It is likewise possible for the father to contact members of his family whilst he is incarcerated. Finally, the father could have attended court today to assist the court further with information he has in relation to the whereabouts of the children. Once again he has done none of those things."

Accordingly, the judge rejected "the contention that [the father] has been unable to comply with the order from prison". He concluded:

> "In the circumstances, I am satisfied beyond reasonable doubt, and find as a fact, that the father is in breach of the order of 16 February 2023 in that he failed to ensure that the children were returned to the jurisdiction of England and Wales forthwith, and by no later than 31 March 2023 at 23.59 hours."

36. The judge considered whether he should "adjourn the question of sentence, to give the father a further opportunity to attend a hearing to mitigate". He decided not to because he doubted whether the father would attend as he had refused to attend the hearings on 3 and 11 May 2023. The judge again referred to the two functions of "the penalty for contempt". He also referred to *Wilkinson v Anjum* [2011] EWCA Civ 1196, reported as *Re W (Abduction: Committal)* [2012] 1 WLR 1036 ("*Re W*"), which I deal with further below.

37. The judge took into account that the father had failed to take any step to seek to comply with the orders despite the fact that "he knows where the children are". This had been a persistent course of conduct. He had failed to provide details of his PIN number and passwords "which order was made with the specific intention and aim of seeking to identify where the children currently are, in order that steps can be taken to secure the return of the children to the jurisdiction". As a result:

> "four young children continue to be absent from the jurisdiction of their habitual residence, outside the care of their parents, and without oversight of the authorities who have an obligation to promote and safeguard their welfare. The father has persisted in taking that position notwithstanding a sentence of custody of three months, and a sentence of custody of six months' imprisonment, and continues to refuse to comply with the order of the court."

38. The judge considered what mitigation there might be and could not identify any. He noted again that the father had "failed in all respects to cooperate" and that there was no reasonable explanation for his failure to comply with the orders. He decided that the appropriate sentence was one of imprisonment for 12 months.

Appeal

39. The father relies on a number of matters in support of his appeal which, as set out in his written grounds, can be summarised as follows:

(i) He has been sentenced three times for the same matter;

(ii) He has been unable to find the children or arrange their return while in prison;

(iii) He was not given any chance to find the children or arrange for the return of the children;

(iv) All the orders have been made while he has been in prison;

(v) The mother is the only person who took the children abroad;

(vi) The local authority has used false and misleading information;

(vii) Everything has been stolen from his home;

(viii) He was not given enough notice;

(ix) He has not been able to obtain legal representation;

(x) His imprisonment serves no purpose and is being used improperly;

(xi) All his civil and human rights are being breached;

(xii) Imprisonment is having devastating consequences for him.

40. At the hearing of the appeal, Mr Abdi made a number of points including some of which I have referred to above. As to his ability to participate in the proceedings, he said that being in prison had limited his ability to find a lawyer, to provide documents to the court and to see the documents relied on by the local authority. He said that, from the beginning of the case, false evidence has been given and false accusations have been made. These included that he had taken the children to Somalia when it was known that it was the mother who had done this and that the children are British citizens. He also, as referred to above, said that the court had been wrong to find that he had travelled to Somalia. The orders made against him had been obtained by the local authority giving misleading evidence and by manipulating the evidence and by facts being ignored on purpose. He said that the local authority's actions were driven by racism and discrimination towards him. This was the only motivation of the local authority which was not interested in the best interests of the children.

41. As referred to above, Mr Abdi questioned how the local authority came to be in possession of his mobile telephones. He suggested that this was through his home being burgled. He also said that documents which had been in his home before it was burgled were in the possession of the mother's family.

42. With considerable force, Mr Abdi emphasised the devastating impact being in prison was having on him, emotionally and to his well-being generally. He had had a good

job which he had lost and faced the potential loss of his home. He also had an honours degree in engineering. He could not "over-emphasise enough how bad prison is". He considered that prison was being used "as a means of torture" and had no other purpose.

43. Ms Mann on behalf of the local authority made submissions in support of the judge's decision and sentence. She submitted that Mr Abdi had not been sentenced three times for the same matter. Each time, he had been sentenced in respect of a new order which he had then breached. In respect of legal representation, she referred to what had been done to assist Mr Abdi in obtaining legal representation. Mr Abdi had been provided with lists of solicitors who would be able to act for him, including by the court and hearings had been adjourned to give him a further opportunity to obtain representation.

44. She submitted that Mr Abdi had orchestrated the removal of the children to Somalia. They were with his family in Somalia and he could ensure their return. There was no evidence that he had had done anything to seek to arrange their return and Mr Abdi did not suggest otherwise. She referred to the fact that Mr Abdi had not provided any information about the children either to the local authority or to the court. He had refused to meet with social workers. She submitted that the local authority's only concern was securing the return of the children so as to protect and promote their best interests.

45. Mr Miller made brief submissions on behalf of the mother.

Section 14 of the Contempt of Court Act 1981

46. Section 14 of the 1981 Act provides for a maximum sentence of 2 years imprisonment for a contempt of court as follows:

> "(1) In any case where a court has power to commit a person to prison for contempt of court and (apart from this provision) no limitation applies to the period of committal, the committal shall (without prejudice to the power of the court to order his earlier discharge) be for a fixed term, and that term shall not on any occasion exceed two years in the case of committal by a superior court, or one month in the case of committal by an inferior court."

47. There are a number of decisions in which the court has addressed what must be proved to establish contempt of a court order. It is clear, as stated by Munby LJ (as he then was) in *Re L-W (Enforcement and Committal: Contact)* [2010] EWCA Civ 1253, [2011] 1 FLR 1095, at [40]:

> "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 …"

This reiterated what had been said by Hughes LJ (as he then was) in *Re A (A Child) (Removal from Jurisdiction: Contempt of Court)* [2009] 1 WLR 1482 ("*Re A*"). In that case, at [2], the court had made "a series of orders that the father cause the boy to be returned immediately to this jurisdiction". The mother applied for the father's committal. The father set out both the steps he suggested could be taken to seek to

cause the child to be returned to England, which included him travelling to Syria and the mother travelling to Syria, and the steps he had taken which included his having asked his father to take the child to the British Embassy. The mother had adduced no evidence at all. The case advanced on behalf of the father was as follows:

> "[5] Put shortly, Mr Cowen's contention on behalf of the father is that there was no sufficient evidence of contempt of court and that the approach taken by the mother effectively reversed the onus of proof by requiring the father to demonstrate that he was unable to effect the return of the child, rather than accepting that it was the mother's responsibility to demonstrate that he was in deliberate breach of the order."

48. Hughes LJ dealt with that contention, at [6] and [7]:

> "[6] … (3) Contempt of court involves a contumelious, that is to say a deliberate, disobedience to the order. If it be the case that the father cannot cause the return of the child he is not in contempt of court, however disgraceful and/or criminal the original abduction may have been. Nor is it enough to suspect recalcitrance, it has to be proved: see *London Borough of Southwark v B* [1993] 2 FLR 559. That the onus remains on the applicant throughout is clearly demonstrated by *Mubarak v Mubarak* [2001] 1 FLR 698.
>
> [7] Thus far I, for my part, go with Mr Cowen. I do not, however, accept the additional submission made by Mr Cowen that the only way contempt can be proved in a case such as this is by the applicant mother adducing positive evidence to demonstrate a particular step which is available to the father. It would, as it seems to me, be sufficient for her to make the judge sure that the father could achieve the return of the child, for example through the siblings if not through the grandfather, and she might be able to do that without calling specific evidence to refute each obstacle successively raised by the father. Nor do I think that the only way contempt can be proved is by the mother adducing evidence that the family in Syria is ready, willing and able to assist in bringing about the return. All those facts are facts which it might be open to the judge in an appropriate case to find proved from the surrounding evidence so that he is sure."

49. Hughes LJ went on to say, at [12], that in "the last analysis, unless there is something the father can do to bring about the return of the child he is not in contempt of court". Hughes LJ concluded that the contempt had not been proved and the committal order should be set aside:

> "[10] There was in the course of the judge's ruling no finding that the father was able to achieve return. Without that finding it seems to me that it was not justified to hold him in contempt of court. I have asked myself with some anxiety whether such a finding is implicit in what the judge said given that he would

> undoubtedly have been extremely familiar with both the onus and the standard of proof in a case of contempt of court, but it seems to me that in the absence of any evidence whatever from mother it is simply not safe to assume a finding which has not plainly been made."

50. In respect of successive committal orders, I propose to refer to *Re W*. In that case, the father had been committed for 2 years for failing to comply with an order requiring him to return a child to England and to give details of her whereabouts. A further order was made as to the disclosure of information in respect of which a second committal application was made. The father was found to be in breach of that order and he was committed to prison for a further 12 months. The father appealed, contending that the judge should not have rejected his argument, at [14], that his "actions were, in reality, all part of one piece of behaviour for which he had already been punished, and therefore could not be punished again".

51. The appeal was dismissed. McFarlane LJ (as he then was) held, at [37], that successive terms of imprisonment can lawfully be imposed for further breaches of repeated orders requiring a party "to comply with an identical request":

> "[37]…As in the case of prohibitive injunctions, it must in my view be permissible as a matter of law for the court to make successive mandatory injunctions requiring positive action, such as the disclosure of information, notwithstanding a past failure to comply with an identical request. A failure to comply with any fresh order would properly expose the defaulter to fresh contempt proceedings and the possibility of a further term of imprisonment."

He also pointed out, at [38], that, although "legally permissible", whether it was justified would depend on the circumstances of the individual case. It was "for the court on each occasion to determine whether a further term of imprisonment is both necessary and proportionate".

52. I would add that Hughes LJ separately confirmed, at [51], that each successive breach is a contempt:

> "… there is no doubt that there may be successive or repeated contempts of court constituted by positive acts disobeying an order not to do them. For my part, I am quite satisfied that there may also be consecutive or successive contempts of court constituted by repeated omissions to comply with a mandatory order positively to do something."

He also referred, at [53], as the judge did in the present case, to the fact that committal orders have two aspects: "punishment for past disobedience to orders and the potential coercive effect of the order that is made".

Determination

53. I am satisfied that the procedural matters advanced by the father do not undermine the judge's determination and order. Apart from the father saying so, there is nothing which would support the conclusion that he was unable to obtain legal representation if he had wanted to do so. He was represented in November 2022 and again in February 2023. He was provided with the necessary information and the court is familiar with litigants obtaining legal representation whilst in prison. Further, the court adjourned the application to ensure that the father had sufficient time to obtain representation.

54. We are not in a position to deal with the broader assertions made by the father during the hearing of the appeal about the evidence and the local authority's conduct. These were not raised at the hearing before the judge, with the result that the local authority *and* the court has not been able to consider them and the court has not been able to determine their merits. I would, however, say that nothing the father said to us would support the conclusion that the court's findings were wrong or that the proceedings are motivated other than with the intention of securing the children's welfare.

55. I will deal again with the father's contention that he cannot understand how the local authority has possession of his mobile telephones. They clearly have possession of them because the father authorised his solicitors to collect them from his home. They were then provided to the local authority for the purposes of the instruction of a forensic expert as directed by the court.

56. The judge expressly considered whether the father's ability to comply with the orders had been impeded because he was in prison. This clearly did not apply in respect of the failure to provide the PIN number and passwords. In respect of the return order, as referred to above, Mr Abdi would not be in breach of that order "if it was not within his power to do it". The onus of proving a breach was, of course, on the local authority.

57. The circumstances of the present case are very different from those in *Re A*. In this appeal, the background circumstances were dealt with at length in the December 2022 judgment. This set out, despite his denials, the father's involvement in the children going to and being retained in Somalia. On that occasion, the judge decided that the breach of the return order had not been established.

58. I would next note that, as set out in Hughes LJ's judgment in *Re A*, evidence does not have to be adduced that "a particular step is available to the father" nor "to refute each obstacle successively raised by the father". Indeed, as he also said, in an appropriate case, it would be open to a judge to find that the "surrounding evidence" was such that he was sure that the breach had been proved.

59. Adopting Hughes LJ's wording, did the judge find "that the father was able to achieve" the return of the children? The judge was clearly aware that it had to be proved that it had been "possible for [the father] to comply with the return order himself" because he set this out in his December judgment when he had not found the then alleged breach proved because he had concluded this had "not been possible".

60. Although the judge did not use these words again in his May judgment, he did find "that the fact that the father is currently in custody does not prevent him from complying with an order to ensure the children to be returned from the jurisdiction of Somalia to the jurisdiction of England and Wales". In my view, it is clear that by finding that the father was not prevented from complying with the order by being in prison, the judge

was necessarily finding that he was able "to achieve" their return. This was, no doubt, based on the background facts as well as the examples the judge gave (as quoted above) of what the father could have done "to bring about the return of the child".

61. I next turn to the issue of whether, as Mr Abdi argued, he has been sentenced again for the same matter. It is clearly established, as set out above, that a failure to comply with an order to do something can be a new and separate contempt even if a person has been previously committed for breaching an earlier order which required him to do the same thing. As McFarlane LJ said: "A failure to comply with any fresh order would properly expose the defaulter to fresh contempt proceedings and the possibility of a further term of imprisonment". I, therefore, reject Mr Abdi's argument that he has been sentenced three times for the same matter.

62. I also reject his submission that imprisonment has no legitimate purpose. I accept that Mr Abdi has been profoundly affected by being in prison and that it is having a seriously harmful effect on him. However, as McFarlane L said in *Re*, at [44]:

> "This court must start by giving great weight to the assessment and the evaluation of the first instance judge, who was seised of the case and who heard the father give his evidence. The judge not only felt it right to impose a sentence of imprisonment, but also made a fresh and further order for disclosure. The clear implication is that the judge did not come to the view that the coercive element had run its course in this case".

As in that case, I consider it impossible to hold that the judge was plainly wrong in imposing the sentence which he did. Indeed, I am satisfied that the judge was entitled to sentence Mr Abdi to 12 months' imprisonment in part as punishment and in part for its coercive effect.

63. I have considered all the matters raised by Mr Abdi but it is clear to me that the appeal must be dismissed. The committal order has not breached his civil or human rights.

64. Finally, I would urge Mr Abdi to consider engaging with the court. He still has the opportunity, as it is described, to purge his contempt. The best way of doing this would be by explaining how the children can be brought back to their home in England. It is not too late and it would stop the father's situation getting even worse than it already is, as he so powerfully described.

Lord Justice Phillips:

65. I agree.

Lord Justice Birss:

66. I also agree.