[2014] JMCA Civ 40

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 3/2012

BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCINTOSH JA

BETWEEN	**ABLETON LAWES**	**APPELLANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**RESPONDENT**

AND

SUPREME COURT CIVIL APPEAL NO 4/2012

BETWEEN	**UTON FAIRWEATHER**	**APPELLANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**RESPONDENT**

Miss Fara Brown for the appellants

Harrington McDermott instructed by the Director of State Proceedings for the respondent

10, 11 June and 7 November 2014

DUKHARAN JA

[1] The appellant in each of these appeals seeks to challenge the decision of the Full Court below to dismiss his application for judicial review of the decision of Her

Honour Mrs Feare-Gregory to have him committed to prison for failure to make payments due under a maintenance order.

[2] The matters, although unrelated, are similar in terms of their facts and raise the issue as to what is the procedure to be utilised in ascertaining whether a person's failure to make maintenance payments under a maintenance order is as a result of "wilful refusal or culpable neglect", which would thereby attract the consequence of committal to prison under section 21 of the Maintenance Act.

[3] The appellant in SCCA No 3/2012, Uton Fairweather, is father to three children in respect of whom a maintenance order was made in 1993; these sums were to be paid over to a collecting officer of the court. The order was that Mr Fairweather should pay $350.00 per week for each child until each attained the age of 18. In 2005, warrants of distress were issued, and although disputed by Mr Fairweather, the record indicates that there were insufficient goods to levy on. As a consequence, he was brought before the court on warrants of arrest in August 2005. At that time, Mr Fairweather was in arrears of over $500,000.00, and he made payments of $8,000.00, $4,000.00 and $4,000.00 in respect of the three children. Thereafter Mr Fairweather absconded and was not located until October 2008, when he was brought to court on a warrant. The matter first came before the learned magistrate in November 2008, and at that time, Mr Fairweather was still in arrears. In January 2009 the magistrate discounted the sum owing of over $500,000.00 by $200,000.00, the learned magistrate having taken into account information from two of the children that Mr Fairweather had paid sums over to

them directly. This decision was appealed but was later withdrawn. The matter came up before the court several times subsequently until February 2010 when he paid $3,000.00 and $2,000.00 on 19 and 22 February. On 1 March 2010, Mr Fairweather again appeared before the court and paid $2,000.00. The magistrate indicated that he should return on 5 March, but he indicated that he preferred to return on 8 March. The magistrate then ordered him to pay $299,350.00 or serve eight days in jail and having failed to pay the sums he was taken into custody until 8 March.

[4] The appellant in SCCA No 4/2012, Ableton Lawes, appeared in the Family Court in 2006 and was ordered to pay $3,500.00 per week plus half education and medical expenses towards the maintenance of a child he had fathered with Dianne Wilson. This appears also to have been a collecting officer's order. Although Mr Lawes, like Mr Fairweather disputed that a warrant of distress was issued, the evidence indicated that one was issued in October 2008 for the sum of $434,000.00, but there were insufficient goods on which to levy. As a result in 2009, Mr Lawes was arrested on a warrant and brought before the court in May. On 1 June 2009, he paid $92,000.00 and was offered bail in his own surety to return on 27 August 2009. Mr Lawes, however, did not appear before the court again until 8 March 2010 when he was brought on a "warrant on a warrant", he having absconded. On that date, the magistrate ordered him to pay $322,000.00 or serve 10 days in custody. He having failed to pay the sums, he was taken into custody until 17 March 2010 when he was offered bail.

[5] Both Mr Fairweather and Mr Lawes filed their claims for judicial review, on 1 October 2010 and 21 January 2011 respectively, against the orders for their committal made on 1 March and 8 March 2010 respectively. The reliefs sought in their claims were identical:

1. a writ of certorari to issue to quash the committal by the Resident Magistrate;
2. a declaration that the Resident Magistrate in committing them had acted unfairly, unlawfully and thereby acted ultra vires;
3. a declaration that the committal of them was in breach of their constitutional rights;
4. damages and exemplary damages for unlawful deprivation of liberty in breach of their constitutional rights; and
5. any other relief "as may be just".

[6] The Full Court after examining authorities referred to by counsel on both sides, stated that it ought to disturb the order of the Resident Magistrate only "if there is a really substantial error leading to a manifest injustice". The court then went on to consider the arguments of both parties and made the following findings:

(i) If the Maintenance Act requires a hearing and the magistrate deprived Mr Fairweather and Mr Lawes of such, then any incarceration would be a breach of natural justice. Additionally, it is

clear that an individual ought not to be deprived of his liberty without the opportunity to be heard.

(ii) There is no wording in the section or in any other place in the Act that indicates that there ought to be a formal hearing. The Act requires that the magistrate consider all the relevant factors to ascertain that there was in fact wilful refusal or culpable neglect. The Act required her to advert her mind to the facts known to her and consider whether there was wilful refusal or culpable neglect.

(iii) The facts set out indicated that the magistrate had material by which she could come to the conclusion that there was wilful refusal or culpable neglect. The detailed nature of the affidavits filed by the magistrate in both matters indicated that the relevant facts were considered by her.

(iv) Contrary to the magistrate's assertion contained in her affidavit, there was no duty on counsel to request a hearing. However, it was clear that the magistrate had extensive interactions with Mr Fairweather and Mr Lawes, personally and through their counsel, and that she used the information gleaned from those interactions to come to her conclusion.

[7] The Full Court also indicated that though it was "clear in totality that the judge acted within her powers", it was of the view that it would be appropriate to suggest some guidelines in relation to [the] procedure to be employed by judges when committing individuals. These guidelines include a magistrate: informing an individual who is likely to be committed, of the factors leading to the decision to commit, before the committal order is made; setting out in clear and concise language what order he intends to make; and giving the individual an opportunity to respond before the committal order is made.

[8] Both Mr Fairweather and Mr Lawes filed eight grounds of appeal challenging the decision of the Full Court. They read:

> "1. The learned Judges erred in finding that the learned Resident Magistrate did not act in excess of her jurisdiction.
>
> 2. The learned Judges erred in finding that there is no duty on the part of a learned Resident Magistrate to inquire of the person who is to be committed before being satisfied of the fact that the person's conduct amounts to a wilful refusal or culpable neglect.
>
> 3. The learned Judges erred in not applying the principle of natural justice to the Appellant's case: in particular that the Appellant should have been given the opportunity to be heard before being committed.
>
> 4. The learned Judges erred in failing to consider whether the actions of the learned Resident Magistrate amounted to a breach of the Appellant's constitutional right to liberty.

> 5. The learned Judges erred by not finding that it was necessary in the Appellant's case for the learned Resident Magistrate to inform the Appellant who is likely to be committed of the factors that have led the Judge to that conclusion; and further that the learned Resident Magistrate should have set out in clear and concise language what order she intended to make. In the absence of so doing the learned Judges should have made a declaration accordingly.
>
> 6. The learned Judges erred in finding that a declaration should not be made in this case.
>
> 7. The learned Judges erred in finding that a declaration should not be made in this case. [sic]
>
> 8. The learned Judges erred in finding that damages should not be granted to the Appellant."

[9] Before recounting the submissions of the parties, it is necessary to set out the provisions of section 21(1) of the Maintenance Act, because, as the Full Court observed, and with which I agree, the resolution of this matter is dependent on the interpretation to be given to these provisions. The section provides:

> "**21.-(1)** A person shall not be committed to an adult correctional institution for default in payment under a maintenance order unless the Court is satisfied that the default is due to the wilful refusal or culpable neglect of that person."

[10] Miss Brown submitted that both in terms of grounding the context and the remedies sought, judicial review was the most appropriate course for Mr Fairweather and Mr Lawes to have taken. She submitted that the appeal raised three important questions:

(i) What does it mean to be satisfied and was that condition met in the circumstances?

(ii) What is the effect of committing a person without complying with the requirement to be satisfied?

(iii) If there has been a failure to adhere to the requirements of the law, what are the available remedies?

[11] In relation to question one, it was submitted that in order to be satisfied of "wilful refusal or culpable neglect", what is necessary is that enquiry be made of the person who is brought before the court as to his/her circumstances and why he/she has not paid. Counsel submitted that there is a need to carry out the requirement in reference to a criminal standard or the very highest civil standard, and importantly, the burden of proof rests on those seeking to deprive a person of his/her liberty. In this case, the burden was on the magistrate. In support of this submission, counsel relied on **Lloyd and Others v UK** [2005] ECHR 147 (para [54]) and **Gardner v Gardner** [2012] JMSC Civ 160. The mental element required is recklessness or a high degree of negligence, it was submitted, and reliance was placed on **R v Luton Magistrates**' Court exparte Sullivan [1992] 2 FLR 196. It is impossible to be satisfied to the standard that is required without making an enquiry, counsel argued. It was further argued that as part of the process of the enquiry, the magistrate should take notes so that if the need arises, he/she would be able to refer to the factors that he/she took into account.

Counsel submitted that the reason for the requirement to enquire is that one cannot reasonably arrive at being satisfied without one. Thus, the duty to enquire imposed by the statutes of the United Kingdom reflects the common law. Further, it was argued, the principle of requiring a full means inquiry is not a distinguishing feature of English legislation, but is a confirmation of the fact that the principle has general application to committal whether it is expressed in statute. For this submission, counsel relied on **Ex parte Sullivan**.

[12] Miss Brown also argued that if there was an enquiry on an earlier occasion, this would not suffice and so it would still be necessary to enquire on the day when the committal is being imposed, because the circumstances may have changed. A failure to address the current circumstances amounts to non-compliance. To support this submission, reference was made to **Lloyd**. Counsel argued that the evidence put forward by the Resident Magistrate in this case did not meet this requirement. The only evidence that was heard by the magistrate was in relation to the quantum of the arrears, she submitted. She referred to the affidavit of Mr Fairweather arguing that there was not even a pretence of an inquiry. The appellant's account, counsel argued, was not denied by the magistrate, who stated that it was open to her to find wilful refusal on the basis of what took place before. She referred to the magistrate's affidavit, arguing that it was open to conclude that the magistrate did not think of "wilful refusal or culpable neglect" at all whilst the appellant was being committed, but had put this information forward retrospectively. There was nothing to indicate that she had thought of it. On the other hand, if she had thought of "willful refusal or culpable

neglect but failed to disclose this, this would be an obvious irregularity. She submitted that the power under section 21(1) to commit is reserved for conduct that represents a "flying in the face of the court" and not for impecunious persons such as Mr Fairweather.

[13] Counsel further submitted that if the Full Court can be said to have found that there is no duty to enquire but, to state by way of an alternative that there is a duty to inform the person of what is being considered, this is not an appropriate substitute and does not comply with section 21.

[14] In relation to question two Miss Brown submitted that the magistrate acted in excess of her jurisdiction. Counsel cited the case of **McC v Mullan and Others** [1984] 3 All ER 908, in which, it was submitted, the House of Lords stated that a decision-maker may be regarded as acting without, or in excess of, jurisdiction where there has been a failure to observe a "statutory condition precedent". She relied also on **R v Manchester City Magistrates' Court ex parte Davies** [1989] 1 All ER 90 in which the court held that the duty to enquire is a condition precedent and therefore a failure to enquire was a failure to fulfil the statutory condition precedent, which was in excess of jurisdiction. Counsel submitted that even though in Jamaica, the Maintenance Act imposes a differently worded statutory condition precedent from that of England, in England whenever there is reference to being satisfied of wilful refusal or culpable neglect, the law stipulates the need for an enquiry, and she referred to the Magistrates' Courts Act 1980 and the Community Charge (Administration and Enforcement) Act of

England. Therefore, a failure to enquire is a failure to comply with a condition precedent, she argued.

[15] Counsel also submitted that the failure to enquire is a breach of natural justice, which cannot be surmounted by the assertion that the statute does not require it. It matters not, counsel asserted, that if the opportunity to be heard had been given that the result would have been the same. The denial of the opportunity to be heard is a denial of procedural fairness. Miss Brown submitted further that the duty of the court in judicial review decisions is to confine itself to the question of legality and the Full Court erred in considering the merits of the case as decisive. An abundance of merits cannot rectify a process which is null, and for the court to resolve the matter by this reasoning would be a gross and fundamental error, she argued. The respondent's submission highlighted the approach of treating judicial review as if it were an appeal on the merits, counsel submitted.

[16] In relation to question three, it was submitted that the appellants' constitutional rights to personal liberty and freedom of movement had been violated by the order for committal, and accordingly, the appellants should be granted relief. A declaration, it was submitted, should be made because used in conjunction with the writ of certiorari this measure would serve to invalidate the order made by the magistrate. Further, it is inappropriate for an order to remain on the records of the court when that order is void for being made in excess of jurisdiction. It was also submitted that certiorari is an appropriate remedy where an order is void. In this case, the order had expired as the

term of the committal had already been served, the term imposed being of short duration. Counsel argued that in cases such as these where the term of committal is brief and the person who is the subject of the order is unrepresented, it is virtually impossible to apply for a stay of the order within the period of the committal. The consequence of this is that where an order would have been quashed by virtue of certiorari, this process of rectification would be defeated by the brevity of the sentence. Counsel submitted that if it is appropriate in all other respects for certiorari to be granted, the process should not be circumvented by the imposition of an order of short duration.

[17] Counsel also argued that the remedies sought ought to be granted because the appellants are affected by whether the order is declared null as the appellants' record at the Resident Magistrate's Court would reflect that they had been committed to prison. Further, the matter is one of public interest as every person who may become subject to a maintenance order has an interest in the outcome of the case and the status of committal orders and all magistrates have an interest as it will affect the way in which they carry out their duties.

[18] Mr McDermott, on behalf of the respondent, submitted that the Full Court seemed to have been concerned with whether there should have been a formal hearing, and the court appeared not to have addressed the question of whether there had been an enquiry, which is how the appellants, Mr Fairweather and Mr Lawes have formulated their case before this court. Counsel submitted that section 21 of the Act

creates no obligation on the magistrate to conduct a formal hearing, let alone a formal hearing on the day of the committal. Further, there is no express term requiring that a means enquiry be conducted. Counsel submitted that in **Lloyd** the provision in question had an express term that required the court in the presence of the debtor to enquire as to his means. In **McC v Mullan** the provisions in question concerned how a particular procedure ought to be carried out and it was in that context that the court ruled as to the indispensability of the statutory precedent.

[19] Counsel submitted that it was nonetheless recognised that the absence of the express words does not preclude the court from concluding that in fairness a hearing was required. However, the fair hearing requirement of natural justice is broad and the question of whether there had been a fair hearing is to be determined based upon the circumstances of the case. He submitted that the test was that which was stated by the Full Court, that is, whether there had been an error leading to demonstrable injustice. The question was whether it could be said that the magistrate carried out no enquiry, and, further, that the Full Court was wrong in concluding that in the circumstances, the magistrate acted lawfully. Counsel submitted that when the matter came before the magistrate, an enquiry, if ever one was required, would not have been of the same vigour as that recommended in **Lloyd** because of the relevant statutory provision and the history of the matter. He submitted that no authority had been found to support the appellants' position that the magistrate was obliged to look into the circumstances of the person to be committed as at the date of the matter. Mr McDermott submitted that not only was there evidence that an inquiry had been conducted, there was evidence to

support the conclusion of the Full Court that on the totality of the evidence, the magistrate was correct in committing the appellants. Although the magistrate did not say that she conducted an enquiry into the appellants' means, this could be gleaned from her affidavit and the affidavits of the appellants. The appellants had been appearing before the Resident Magistrate's Court in relation to their non-compliance. There was evidence as to their interactions with the magistrate, their failure to pay and the reasons therefor and there was evidence as to their absconding. Counsel submitted further that the cases relied on by the appellants did not involve persons absconding bail.

[20] On the issue of the remedies sought by Mr Fairweather and Mr Lawes, with respect to certiorari, Mr McDermott submitted that this remedy was not the subject of the grounds of appeal. He submitted further that remedies granted upon judicial review are purely discretionary, and so establishing that a public body has erred in law does not automatically entitle one to the remedy sought. For this submission counsel relied on **Credit Suisse v Allerdale Borough Council** [1997] QB 306. He also submitted that where the grant of a declaration is concerned, the court will not grant declaratory relief in matters that are of purely academic interest or are of no practical purpose. Counsel referred to **Williams v Home Office (No 2)** [1981] 1 All ER 1211 to support this submission. In the instant case, he argued, at the time of the claims before the Full Court, the magistrate's decision would have been spent and so any declaration sought would have been an exercise in futility and purely an academic exercise. The well-known caution by Lord Diplock in **Hadmor Productions Ltd and Others v Hamilton**

and Others [1982] 1 All ER 1042 that the Court of Appeal should not disturb the exercise of a discretion merely on the ground that it would have exercised its discretion differently, should be applied.

[21] Counsel also submitted that where the award of damages is concerned, the Full Court was entitled to decline to make an award for vindicatory damages or an order for damages to be assessed as the instant case did not fall within the category of cases which warrant such an award. Relying on the dictum of Downer JA in **Doris Fuller v Attorney General** (1998) 56 WIR 357, he submitted that recourse to the Constitution should be a last resort. Further, he submitted, section 3(5) of the Crown Proceedings Act bars the appellants from obtaining damages arising out of the exercise or purported exercise of the learned magistrate's judicial function. Counsel submitted also that any guidance that Mr Fairweather and Mr Lawes were urging this court to give had already been provided by the Full Court.

Analysis

[22] Mr Fairweather and Mr Lawes having decided to challenge the Resident Magistrate's order for their committal to prison, chose to do so by way of judicial review and not by way of appeal, although the latter was an option which they were entitled to exercise. The Full Court, being a court of judicial review in these circumstances, its consideration of the matter should have been, as counsel for the appellants submitted, concerned with the manner in which the decision in question was taken and not with the correctness of the decision and an appellate court in a judicial review matter is in

like manner constrained. As Brooks JA put it in **Industrial Disputes Tribunal v University of Technology and University and Allied Workers Union** [2012] JMCA Civ 46, the scope of judicial review pertains to "illegality, irrationality or procedural impropriety". He cited with approval the dicta of Roskill LJ in **Council of Civil Service Union v Minister for the Civil Service** [1985] AC 374 that the judicial review court is only concerned with the manner in which decisions have been taken.

[23] From the grounds of appeal and the arguments advanced on behalf of Mr Fair-weather and Mr Lawes, it seems to me that their challenge is on the grounds of illegality, in the sense that the magistrate exceeded her jurisdiction in failing to observe the statutory requirement of enquiring into their means on the day on which the order for committal was made; and procedural impropriety, in that she failed to observe proper procedure and failed to follow the rules of natural justice as to hearing from Mr Fairweather and Mr Lawes appellants before committing them. It seems to me also that in the circumstances of this case, these grounds are closely related. There is also issue raised as to the remedies which would be appropriate in this case, but that issue only arises if there is found to be a breach of the statutory procedure. There appears to be no complaint that there was irrationality in the finding that there was wilful refusal or culpable neglect as the main thrust of the argument, on behalf of Mr Fairweather and Mr Lawes seems to be that there was no enquiry.

[24] The question which now arises is whether, based on a reading of section 21(1), these arguments are of merit. In my view, this provision should not be interpreted in isolation, but must be considered in the light of section 20, which gives the court the

power to commit to prison for failure to make payments due under a maintenance order. Section 20, in so far as relevant, provides:

> "**20.-(1)** Where any amount ordered by a maintenance order to be paid to the Collecting Officer is fourteen clear days in arrears, a Resident Magistrate may, on the application of the Collecting Officer, issue a warrant directing the sum due under the order or since any commitment for disobedience as hereinafter provided and the costs in relation to the warrant, to be recovered by the respondent.
>
> (2) If upon the return of the warrant issued under subsection (1) it appears that no sufficient distress can be had, the Resident Magistrate may issue a warrant to bring the respondent before the Court.
>
> (3) If the respondent neglects or refuses without reasonable cause to pay the sum due under the maintenance order and the costs in relation to the warrant, the Resident Magistrate may commit the respondent to an adult correctional institution for any period not exceeding three months unless the sum and costs and the costs of commitment, be sooner paid.
>
> (4) …
>
> (5) …."

[25] It seems to me that as a precondition to ordering committal to prison, the magistrate or tribunal must be satisfied that the respondent or person who is obligated to pay under the maintenance order must have neglected or refused to pay the sums owing without having a reasonable cause for doing so. If there is no reasonable cause, then the refusal or neglect may be regarded as culpable or wilful. The magistrate can be satisfied of this only where he/she is possessed of information or has knowledge of the circumstances concerning the person who has the obligation to pay and his/her

non-payment of the sum. Miss Brown has contended that there ought to be a full means enquiry conducted. However, the English authorities on which she has relied in support of this contention all involved statutory provisions in which there was a specific requirement that an enquiry be conducted. In **Lloyds**, the statute required "the court … (in the debtor's presence) [to] inquire whether the failure to pay … was due to his wilful refusal or culpable neglect". In **Ex parte Davies**, the relevant provision required the court to "make enquiry in his presence as to whether his failure to pay the sum … was due either to his wilful refusal or to his culpable neglect". Therefore, to the extent that these cases are based on statutory provisions which provide for a specific procedure to be adopted before the order for committal is made, they are of no assistance since the provisions of our Act are not identical.

[26] Based on a reading of the section, it is my view that the Full Court was correct in its finding that section 21 does not impose a requirement to conduct a formal hearing on the magistrate who is considering whether to commit a non-paying person under a maintenance order to prison. Nor does the section expressly state that there must be an enquiry. Indeed, there is no stipulation in section 20 or 21 as to the procedure to be adopted, but I agree with the Full Court that an individual ought not to be deprived of his or her liberty without the opportunity to be heard and accordingly, the appellants ought to have been heard; this position accords with natural justice. Also, it is by allowing the person in arrears the opportunity to be heard that the magistrate will obtain information as to the circumstances surrounding the person's non-payment.

[27] There is no set procedure established at common law as to how a hearing is to be conducted. In fact, as Panton JA (as he then was) remarked in **Nyoka Segree v Police Service Commission** SCCA No 141/2001, delivered 11 March 2005, the right to be heard is not confined to a viva voce hearing. In that case it was held that the appellant's right to a fair hearing had not been compromised, although there had been no viva voce evidence, as the appellant had been given ample information as to what was being alleged and was given generous opportunities to respond. A hearing, it seems to me, involves allowing a person who is brought before a tribunal an opportunity to put his case to the tribunal and for the tribunal to consider these circumstances or facts before arriving at its decision. It is my view that in the context of the Maintenance Act, this was what was required and in light of the fact that the non-paying person should be before the court, it would involve giving that person an opportunity to state his explanation for his failure. Of course, in the course of the person giving his explanation, the magistrate may direct questions at him/her, but there is, in my view, no requirement for the magistrate to embark on an enquiry in the strict sense of the word. The submission that the common law is reflected in the requirement for an enquiry (which I understand to mean a formal enquiry) in the English statutes does not affect this position as the Jamaican statute is not in *pari materi* with the English statutes in this regard. Therefore, the common law could not be imported into the requirements of our statute. Likewise, the alternative submission that the requirement for an enquiry is of general application is unhelpful as the court was not

provided with any decided case which demonstrated an application of this principle to the statutory provisions that were referred to.

[28] Neither section 20 nor 21 stipulates the scope of the information to be considered. Thus, although the means of the person who is in arrears is a highly material fact to be considered in that it directly affects the person's ability to pay, the magistrate need not limit himself to this consideration. Although I do not find the case of **Ex parte Davies** to be authority on the procedure to be adopted, it is my view that because the test or standard in the English statute in that case is the same, that is, "wilful refusal or culpable neglect", this case provides some assistance on the issue of the scope of the information to be considered. In that case, the justices had carried out an enquiry into the appellant's means, but the English Court of Appeal held that the condition precedent of a proper enquiry had not been observed. O'Connor LJ observed that while it was necessary to try to find out what the present financial position of the defaulter is, the justices had overlooked the requirement of the statute which required that there be an enquiry with a view to determining whether non-payment was due to culpable neglect or wilful refusal. Neill LJ expressed the view that while there was some enquiry about the appellant's finances, the enquiry was directed at finding an answer to the wrong question. They had not examined the question whether failure to pay was due to culpable neglect or willful refusal. This case underscores the fact that the critical issue for consideration is not the means or financial position of the person in arrears, but the broader question of whether there was wilful refusal or culpable neglect, which

would involve a consideration of all the circumstances including factors such as whether the person is unemployed and the person's attempts at finding employment.

[29] Further, it is my view that the answer to the question of whether there is wilful refusal or culpable neglect is not confined to ascertaining the defaulting person's means on the day when the committal order is made. The Act does not provide any guidance on when the information in relation to the person's circumstances is to be ascertained. Therefore, a magistrate is entitled to consider the circumstances of the matter as may be gleaned from the history particularly when the matter involves several appearances in court by the person in arrears in which there were exchanges between the bench and that person. Also, it should be borne in mind that the section provides that once there has been default for 14 days and the warrant of distress is not satisfied upon execution then the person in arrears may be committed. Therefore where the circumstances are of such that a person has been in arrears for a period well in excess of 14 days, information as to the person's circumstances over that period, including the pattern of payment, would certainly be of relevance.

[30] I find support for this position in **Karoonian v Child Maintenance and Enforcement Commission** [2012] EWCA Civ 1379. In that case the scheme for dealing with maintenance is for a parent to apply for a maintenance calculation. Upon the calculation being made, the Maintenance and Enforcement Commission has the power to arrange for the collection of the child support maintenance payable in accordance with the calculation. Where a parent has failed to make payments and it is

inappropriate to make an order for deduction of payment from accounts which can be frozen, the commission may apply to the court for a liability order. Upon obtaining a liability order, the commission may levy distress. Where distress is levied and the amount owing still remains unpaid, the commission may apply for a warrant committing the liable person to prison or for disqualification from driving, but before making the order, the court should inquire as to the person's means and whether there has been wilful refusal or culpable neglect. In the course of examining the issue in the appeal, which was whether the commission was required to have attempted enforcement, Lord Justice Ward had to consider whether there was any "temporal focus for the court's enquiry". At para 24 of his judgment, he said:

> "It is his wilful refusal or culpable neglect to make payment after the liability order has been made that will lead to his committal. So the court must look to the period between the making of the liability order and the hearing of the application for committal. If at the time of the hearing he has the means but has not paid, the court will judge whether the failure to pay is due to wilful refusal or culpable neglect. If at some time between the making of the liability order and the hearing of the committal he did have the means to pay though at the time of the hearing he was without means, nonetheless the court must consider whether he was wilful or culpable when he was possessed of sufficient financial resources to discharge the liability imposed upon him by the liability order."

[31] Although there is no liability order to be made in the context of our Maintenance Act, it is my view that the reasoning is nonetheless applicable as the liability order may be regarded as being analogous to the maintenance order. In deciding whether to commit the person, the magistrate may therefore consider the behavior of the person in

arrears, in respect of him honouring his obligations to make payment of the sums owing under the Maintenance Act, from the day of the making of the order to the date on which the court is considering whether to commit him for non-payment and there is no stipulation that the means of this person on the day of the committal is the overriding consideration.

[32] It is my view that the evidence as contained in the affidavits of Mr Fairweather and Mr Lawes as well as the affidavit of the magistrate indicates that the appellants were given an opportunity to give an explanation as to why they did not pay the sums owing under the maintenance order which included information as to their means.

[33] In respect of Mr Fairweather, in his affidavit, he stated that the case regarding the maintenance arrears had been before the Family Court for an extended period and that in January 2009, some of the money owed was waived in respect of two of his children as they were allowed to attend court "and pleaded for me and explained to the court that they received money directly from me when they were going to school and this should be taken into account". According to the magistrate's account, after Mr Fairweather was brought to court on a warrant, he having absconded bail, he was represented by his attorney who chose to make submissions on the jurisdiction of the court in light of the fact that the order had been made under the previous Maintenance Act that had been repealed and the youngest child was at that time (November 2009) 19 years old. Throughout the magistrate's affidavit, it is clear that Mr Fairweather was

given opportunity to provide explanations and there were enquiries made of him as to his means. At paras 29 and 33 of her affidavit the magistrate stated:

> "(29) That as far back as November 2008 when counsel had appeared for my ruling [on the preliminary submissions as to jurisdiction], she advised the court that her client would endeavour to pay the sums as he was in the process of opening a cook shop. That reference to the cook shop was made on almost every subsequent court appearance. Sometimes the position was that the cook shop was not doing well but at the end of the day counsel's position was that Mr Fairweather would pay the sums….
>
> (33) That on the date I remitted the sums, counsel advised the court that although Mr Fairweather had health issues nevertheless he was putting plans in place to operate a business, specifically a Cook Shop which meant that he was not incapacitated by his malady to the point where he couldn't work…"

At para 45, the magistrate stated:

> "That the file shows that he had never paid a cent into the court unless he is arrested on a warrant and he has always absconded when these matters are being dealt with."

[34] These assertions of the magistrate were not denied by Mr Fairweather in his further affidavit. It seems to me that regardless of the correctness of her conclusion, the magistrate did allow Mr Fairweather several opportunities to explain himself, did ascertain his financial means and did take what he said into consideration. Even if it could be said that based on Mr Fairweather's evidence the magistrate had been seeking to find out how much Mr Fairweather could pay on the day, in the light of the evidence taken as a whole from both Mr Fairweather and the magistrate, it cannot be said that

the hearing which was afforded to Mr Fairweather was limited to this. Accordingly, it is my view that the requirement of the section was carried out.

[35] In relation to Mr Lawes, the affidavit evidence indicates that he was given an opportunity to be heard or to give an explanation as to the circumstances surrounding his failure to pay the sums owing under the maintenance order. At paras 4-6 of his affidavit, Mr Lawes stated:

> "4. On the 8th March 2010 when I was taken before the court, I paid $20,000.00 in court. I explained that the reason why I did not come to court on 27th August 2009 was because I did not have any money and I was afraid. I told the Judge that I had sent the money with my big daughter and I even had 3 receipts but they did not look on them.
>
> 5. I further told the court on that day that between me and my girlfriend we could pay $10,000.00 per month. I told the Judge about the setbacks I had because my house was robbed and my brother, whose car I drive to do taxi work, had not sent the insurance money and the car had been in the pound.
>
> 6. The judge then said that based on what I had told her I should do 10 days or pay $320,000.00 and the police carried me down."

In her affidavit, the magistrate stated that the maintenance order was made with the consent of the parties and that the warrant of distress dated 24 October 2008 was in the sum of $434,000.00 for arrears for 16 June 2006 to 24 October 2008, which, she stated, suggested that the arrears would have started accumulating three days after the order was made on 13 June 2006. The magistrate further stated that on 26 May 2009 a

forthwith order was made for Mr Lawes to pay the $434,000.00, which suggests that he made no payments between 2008 and 2009. Other than asserting that he had given the money to his older daughter to pay, Mr Lawes did not dispute these assertions in his affidavit evidence. The magistrate was entitled to consider the long period of default, the fact that Mr Lawes would have been operating a taxi previously with little or no payments appearing to have been made during that time as well as what he proffered as an explanation on the day of committal.

[36] In my view, the requirement of the Act as to the condition which should obtain before an order is made for the committal of a person in arrears to prison was satisfied. While the magistrate could have indicated to Mr Fairweather and Mr Lawes that she was satisfied that their non-payment had reached the standard stipulated by the Act, it was unnecessary for her to do so. What was important was that they understood that they were being committed to prison due to their non-payment of the maintenance sums. It was this non-payment that had caused them to be taken before the magistrate. While it does not appear that the magistrate gave them her reason for committing them and it may have been prudent for her to do so, it is my view that this cannot vitiate a decision that was, in all other respects, arrived at in accordance with the Act.

[37] In the light of the conclusion which I have come to, it is not necessary to consider the other issues raised by Mr Fairweather and Mr Lawes as to what is the

effect of a failure to comply with the statutory requirement as well as what remedies would be available.

[38] I would therefore dismiss both appeals with costs to the respondent to be agreed or taxed.

PHILLIPS JA

[39] I have read in draft the judgment of my brother Dukharan JA and agree with his reasoning and conclusion. I have nothing to add.

MCINTOSH JA

[40] I concur.

DUKHARAN JA

ORDER

Appeals dismissed. Costs to the respondent to be agreed or taxed.