

JERSEY / JUDGMENT

In the matter of C [2011] JCA 189 (29 September 2011)

[2011] JCA 189

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Court of Appeal September 2011 Before : The Hon Michael J. Beloff, Q. C, President; Dame Heather Steel, DBE, Michael S. Jones, Q. C. IN THE MATTER OF C AND IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY MRS L Mrs L appeared in person.

judgment

The president:

Introduction

1. This is an appeal against a refusal by the Bailiff dated 5 th August, 2011 ("the refusal") of an application by Mrs L for leave to apply for judicial review, based on her amended application and supporting affidavit dated 20 th May 2011. 2. The application relates to what Mrs L contends was the unlawful removal and detention ("the detention") of her children C (then aged 12) and A (then aged
- 7) in 2008 by the Children's Service on behalf of the Minister of Health and Social Services ("the Minister"). She seeks a declaration that the detention was unlawful and also seeks damages for a breach of her rights under Article 8 of the European Convention on Human Rights. There is no doubt that, if her factual allegations are correct, she has suffered a significant wrong.

Background

3. On 2 nd April, 2008, Mrs L's husband, who was the stepfather of C and A, went to collect C from Scouts. As a result of allegations made by C against his stepfather of deliberately hitting him apparently by way of disciplinary action for C's unacceptable behaviour towards a Muslim girl, C and A were taken into police protection. 4. On 10 th April, 2008, A was returned home but C has been in care ever since. 5. Mr L was charged with an offence against Article 35 of the Children (Jersey) Law 2002 and convicted on 18 th September, 2008, the Magistrate having rejected Mr L's defence that he was administering reasonable corporal punishment to C. 6. On 12 th September, 2008, the Royal Court granted the Minister an interim care order in respect of C. C remained with carers. On 14 th October, 2009, following

a contested hearing, the Royal Court made a full care order in respect of C in favour of the Minister (In the matter of C

[2009] JRC 200). 7. On 18 th November, 2009, S-v-AG

[2009] JRC 226 , the Royal Court allowed Mr L's appeal against his conviction on the basis that there had been a mis-transcription of the police interview which may have misled the Magistrate. A re-trial was authorised but the prosecution did not proceed with the case. 8. On 22 nd March, 2010, the Court of Appeal dismissed Mrs L's appeal against the decision of the Royal Court to grant a full care order (In the matter of C

[2010] JCA 063). Subsequently the Judicial Committee of the Privy Council refused leave to appeal referring, however, to "certain criticisms which could be made of the actions of the Children's Service". In consequence Mrs L has undoubtedly exhausted her remedies in respect of the making of the care order. 9. Mrs L's application raises the issue of the legality of the actions of the Minister (through the Children's Service) for the period between 6 th April and 12 th September, 2008. She accepts that Article 41 of the Children (Jersey) Law 2002 ("the 2002 Law") entitles the police to take a child into police protection for up to 72 hours, so that the removal of the children until 6 th April, 2008, was lawful. She also accepts that C's removal was lawful from 12 th September, 2008, (when the interim care order was granted by the Court) onwards. However, she says that there was no lawful authority for the Children's Service to have withheld C from her care between the expiry of the 72 hours and the making of the interim care order, and there was similarly no authority for them to detain A for the period from the expiry of the 72 hours until he was returned to her on 10 th April, 2008, ("the interim periods"). She asserts that she is a victim of the unlawful detention of the children during the respective interim periods, which was in the language of her application, "an unnecessary and disproportionate interference in the rights to respect for family life." (para 6). 10. This application is the sequel to an application for leave to apply for judicial review previously made to and rejected by W. J. Bailhache, Deputy Bailiff in November 2010. The basis of the previous application too was that the same detention was unlawful and a violation of Mrs L's human rights (Judgment para 3). Indeed in her present application Mrs L says with commendable candour that it is made on " wider grounds than the previous application" recognising that the core of both is the self-same allegation. It is obvious that a person refused leave by the Royal Court to apply for judicial review of particular administrative action can pursue the application by way of appeal before this Court (see by way of recent precedent Stuart Syvret-v-AG and Connétable of Grouville

[2011] JCA 146 ("Syvret") (para 2)). What such person cannot do is to renew the application at first instance on the same grounds (Syvret para 25 (v)). Such would be an abuse of process. 11. In this instance, however, that argument cannot be used against Mrs L. Mrs L asserted after the hearing in November 2010 that the Deputy Bailiff was conflicted because of his formal involvement in the prosecution of Mr L. The Deputy Bailiff denied that there was any such conflict and I consider that he was correct to do so. Nonetheless he very fairly

ordered both that the application be placed before another judge and that the fact that there had been a refusal should not be disclosed to the new judge. Nor in the event was it; the Bailiff's judgment explaining the refusal contains no reference to it. 12. Mrs L had also at the same time enquired about the procedure for filing an Order of Justice; and utilised the advice she received from the greffier to do so. She issued proceedings by way of Order of Justice against the Minister and the States Employment Board ("the Board") on the basis that they were both liable for the allegedly unlawful actions of the Children's Service. As originally framed, the Order of Justice sought damages and declaratory relief for breach of her human rights, for breaches of the Children's (Jersey) Law 2002 and for misfeasance and misconduct in public office; it was in short a claim in tort. When the matter came before the Court for the first time on 1 st July, 2011, counsel for the Minister and the Board asked for the matter to be adjourned so that Mrs L could amend her pleadings so as to comply with the requirements of Rule 9A of the Royal Court Rules insofar as concerned her claim under The Human Rights (Jersey) Law 2000 ("the Human Rights Law"). The Commissioner suggested that Mrs L might instead abandon her Human Rights claims so as to concentrate on her remaining claims, and she did so. The Bailiff, however, has granted her leave to amend her Order of Justice in order to re-instate the Human Rights claim so that, subject to the Royal Court extending the time to bring that claim, all her claims can be considered in the one set of proceedings with the Court having the advantage of hearing all relevant evidence at one and the same time. Decision 13. During the hearing, the Bailiff put to Mrs L that she could not bring both sets of proceedings when they both arose out of essentially the same facts. She would have to choose one or the other. She replied that she wished to continue with the Order of Justice in its amended form but to proceed with her Human Rights claim in judicial review proceedings. She referred to the fact that Article 8(3) of the Human Rights Law required proceedings under that Law to be brought within one year of the date on which the act complained of took place. She was therefore out of time. The problem that faces her, however, is that in terms of judicial review she is even more out of time, three months being the standard (see further Syvret para 25). 14. The foundation of Mrs L's claim in tort is located in paragraph 2 of her amended Order of Justice. "The two defendants have each in their official, public and/or statutory roles done wrongs to the Plaintiff which are unlawful" a proposition elaborated in paras 16-21 which capture her complaint as summarised in paragraph 9 above of this judgment. To establish that illegality will be a necessary though not a sufficient precondition for obtaining the remedies she seeks. I for my part am satisfied that a court seized of the Order of Justice would have to decide whether, and if so by authority of what law, customary or statute, the detention complained of was justified. Therefore, the Order of Justice would be as effective a means of investigating the actions of the Children's Service which Mrs L desires as the application for judicial review. 15. We do not at present know how the Children's Service will seek to justify their actions. The Bailiff said that they will rely on consent (para 11 of his judgment). Mrs L suggests that there was no material before him by reference to which he could make that statement. It suffices to say that if the Children's Service have explained their position in Court proceedings or correspondence (which they may well have done)

this Court has not seen the relevant material. It is, however, noteworthy that in other proceedings before the Royal Court in respect of the Minister's application for a care order for C (

[2009] JRC 200) the Court commented that the arrangements at an early stage of the interim periods were "entirely voluntary, the powers of the Minister under the Children's Law not having as yet been engaged" (para14) and later quotes an email from Mrs L of 19 June, 2008, (again during the interim period) sent to, inter alia, the Minister, withholding her permission "in the strongest possible terms" for the then arrangements for the children. In my view these are facts worthy of investigation. 16. The Bailiff expressed himself:- "quite satisfied that she (i.e. Mrs L) cannot pursue both actions (i.e. the application for judicial review and the Order of Justice) at the same time. In essence she has one claim, namely that the Children's Service were not entitled to remove the children from her care during the periods referred to above and had no lawful authority for not allowing them to return to her care. If she is correct, that may or may not give rise to one or more remedies; e.g. a declaration that the Minister acted unlawfully and/or that damages be awarded for breach of her Article 8 rights or otherwise. But the fact that she may seek more than one remedy does not alter the fact that all the claims arise out of one set of facts. The matter must, in my judgment, be dealt with in one set of proceedings." (para 15). I respectfully agree. 17. The Bailiff continued:- "Having so decided, I have no doubt that the correct proceedings in which the issues should be resolved are the Order of Justice proceedings currently before the Royal Court. I say that for the following reasons:-

- (i) Judicial review is a remedy of last resort, only to be deployed when other available remedies have been exhausted (see *Syvret-v-AG* and the *Connétable of Grouville*

[2011] JCA 146 per Beloff JA. at para 25(ii). Here, there is an alternative remedy, namely the Order of Justice proceedings. (ii) In the same paragraph Beloff JA refers to the fact that the machinery of judicial review is not designed to cope with the resolution of controversial issues of fact at para 25(v). This case would appear to turn on whether or not the applicant consented to the children remaining in the care of others. That will require oral evidence, cross-examination etc. Judicial review is not a suitable process for that sort of hearing." (para 16(i)(ii). I also respectfully agree. 18. Finally the Bailiff said:- "(iii) The applicant is out of time in relation to both proceedings. Thus proceedings for judicial review must be made promptly and in any event not later than three months from the date when grounds from the application first arose - see RCR16/3(i). The latest date upon which the grounds for the application could have arisen was immediately before the interim care order was made in September 2008. In the case of the proceedings by way of the Order of Justice, there is a time limit of one year from the same date if the Human Rights claim is included. In each case there is a discretion to extend the period, but it will be no easier for the applicant to persuade a Court to extend the period for judicial review than it would be to persuade the Court to extend the time for the proceedings under the Human Rights Law; the latter would appear easier as she is less out of time and there is no overriding

requirement to act promptly as there is in judicial review proceedings. Thus she will suffer no prejudice in this respect by having to proceed by Order of Justice rather than by way of judicial review" (para 16 (iii)). With that, too, and with equal respect as already indicated I agree. 19. For these reasons, like the Bailiff, I would therefore refuse Mrs L leave to apply for judicial review on the grounds that she has an alternative remedy, namely proceedings by way of Order of Justice, and that those are the more appropriate form of proceedings to deal with the particular claims which she is bringing, because of the disputed facts. I am also not persuaded that she has provided cogent reasons for the Court to extend the standard time period for the bringing of judicial review proceedings. She was aware of the facts said to illustrate the illegality at the time they occurred. Her involvement in other proceedings (the prosecution of her husband, her objection to the Care Orders, what she calls in her application "complaints procedures") may explain but cannot excuse a delay measured in this instance in years, not months. 20. I want to make it clear that I say nothing about the merits of her claim for damages. Issues will arise, inter alia, as to whether or not in law the defendants owed her a duty of care and, if so what kind: see discussion in Wade: Administrative Law 10 th ed ("Wade ") pp. 655-656, and as to whether the facts justify a claim for misfeasance in public office (see Wade: 670-1) as well as to whether the time period for her Human Rights claim, if resurrected, should be extended. Her tort claim would not appear to fall foul of prescription period Law Reform (Miscellaneous Provisions)(Jersey) Law 1960 , Article 2 and her claim for declaratory relief is free standing of her claim for damages. 21. I would add only that there are some procedural matters of general importance raised by this application. First, although the Bailiff for reasons peculiar to this matter stated that Mrs L is "perfectly entitled to bring these proceedings by Order of Justice and to seek a ruling as to the lawfulness of their action" (para 17), I am of the view that, in general, proceedings in which it is sought simply and solely to challenge the decisions or actions of public authorities should be brought by way of judicial review for two main reasons:- (i) the need to obtain leave to apply, which acts as a salutary filter; (ii) the strict time limits (albeit capable of being extended). As Lord Diplock said in *O'Reilly-v-Mackman* 1983 2 AC 237 , at p 285:- " Now that... ... all remedies for infringements of rights protected by public law can be obtained upon an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule be contrary to public policy, and as such an abuse of process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade provisions of Order 53 for the protection of such authorities." See also Judicial Review Rules 16(1). 22. While the rule of procedural exclusivity laid down in *O'Reilly-v-Mackman* , a signal exercise of judicial law making, would be best avoided in Jersey as the slow retreat from it beat by the English Courts over the next decades illustrates (see Wade pp 566-561) any blatant effort by an applicant to avoid the time limit for judicial review or need to obtain leave by use of the Order of Justice should be carefully scrutinised by the Courts and, if appropriate on the facts, categorised as abuse of process

and not allowed to proceed. 23. Second, anyone who proposes to apply for judicial review should preferably send a letter before action; (what in England and Wales is described as a pre-action protocol letter) which indicates the basis of the claim and the relief sought (unless of course urgent relief is required); and the putative respondent should (if the matter is not promptly settled) indicate the nature of any proposed defence, so that the Court is in the best position to judge as to whether permission should be granted at all, whether the matter should proceed by way of judicial review or Order of Justice, and what ancillary directions are required. Consideration should be given to promulgating an appropriate protocol or practice direction to this effect. 24. Mrs L has conducted her case with exemplary courtesy and restraint. Nonetheless it is clear to us that she would be greatly assisted for the future by professional advice. If she cannot afford to employ a lawyer and is ineligible for legal aid, it may be that the Bâtonnier could arrange for provision to her of pro bono assistance in the best traditions of the Bar. 25. The appeal against the refusal of leave to apply for judicial review is therefore dismissed. 26. Dame Heather Steel JA

- I agree. 27. Michael Jones QC JA
- I also agree. Authorities Children (Jersey) Law 2002. In the matter of C

[2009] JRC 200 . S-v-AG

[2009] JRC 226 . In the matter of C

[2010] JCA 063 . Stuart Syvret-v-AG and Connétable of Grouville

[2011] JCA 146 . The Human Rights (Jersey) Law 2000. Wade: Administrative Law 10th ed. Law Reform (Miscellaneous Provisions)(Jersey) Law 1960. O'Reilly-v-Mackman

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