Hilary Term

[2019] UKPC 7

Privy Council Appeal No 0097 of 2016

JUDGMENT

Seepersad (a minor) (Appellant) v Ayers-Caesar and others (Respondents)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lady Hale

Lord Kerr

Lord Wilson

Lord Hodge

Lady Black

JUDGMENT GIVEN ON

18 February 2019

Heard on 31 October 2018

Appellant	Respondents
Richard Clayton QC	Howard Stevens QC
Anand Ramlogan SC	
Christopher Forsyth	
Jamie Burton	
(Instructed by Alvin Shiva Pariagsingh)	(Instructed by Charles Russell Speechlys LLP)

Respondents

(1) Her Worship Magistraite Marcia Ayres-Caesar

(2) Sterling Stewart, The Commissioner of Prisons

(3) The Attorney General of Trinidad and Tobago

LADY HALE:

1.
Astonishingly, this is an appeal, brought as of right, against an interim order made by the Court of Appeal in constitutional and judicial review proceedings as long ago as November 2015, with

judgment delivered in April 2016. The proceedings themselves were heard in February 2016 and judgment delivered in May 2016. Even by then, the acute dilemma to which the unusual facts of the case gave rise had passed. In such circumstances, the Board asks itself whether it was appropriate for this appeal to be pursued, as it serves no useful purpose other than to draw attention to the dilemma in question.

The dilemma

2.
The dilemma was this. The appellant was born on 24 January 1998. She is therefore now 21 years old. On 29 January 2014, when she was 16 years old, she was charged, along with her younger brother and another man, with the murder of Dulraj Deodath. Under section 5(2) and the First Schedule to the Bail Act (No 18 of 1994), a person charged with murder cannot be granted bail. Thus when she first appeared before the Chief Magistrate, the first respondent to this appeal, in January 2014 she was remanded to the Adult Women's Prison, Golden Grove Road, Arouca.

3.
However, on 18 May 2015, when the appellant was aged 17, section 54(1) of the Children Act 2012 was brought into force. This provided that a court remanding or committing for trial a child who is not released on bail must order that the child be placed in the custody of a Community Residence. Section 3 of the Act defines a "child" as a person under the age of 18. Also on 18 May 2015, the Children's Community Residences, Foster Care and Nurseries Act 2000 was brought into force. Section 2 of that Act defined a "community residence" as "a children's home or rehabilitation centre ...". A "rehabilitation centre" was defined as "a residence for the rehabilitation of youthful offenders, in which youthful offenders are lodged, clothed, and fed as well as taught ..." and a "children's home" as "a residence for the care and rehabilitation of children ...". The Adult Women's Prison was not a Community Residence within the meaning of the Children Act. Furthermore, under section 60(1) of the Children Act, a court shall not order a child to be detained in an adult prison.

These Proceedings

4.
These mixed constitutional and judicial review proceedings were begun on 1 September 2015. The application included a claim for interim relief in the shape of a conservatory order either that (1) the Attorney General, the third respondent to the proceedings, undertake that the Commissioner of Prisons, the second respondent, do forthwith release the appellant into the custody of her mother; alternatively that (2) the Attorney General undertake that a suitable Community Residence approved by the Children's Authority be established immediately in order to provide a place of safety for the appellant. It was argued that her imprisonment in an adult prison was in breach of her constitutional rights, as well as illegal on conventional public law grounds.

5.
The matter was dealt with promptly by the courts in Trinidad and Tobago. On 2 September 2015, Rampersad J granted leave to apply for judicial review and gave various directions for the grant of emergency legal aid and the production of evidence, including an order that the Children's Authority conduct an evaluation and report in respect of St Jude's School for Girls (then an industrial school) or such other facility which might qualify as a Community Residence with a view to identifying a suitable Community Residence. On 9 September evidence was filed from the Children's Authority reporting that the Authority was of the view that there was no suitable centre for accommodating the appellant in accordance with the Children Act. On 28 September, Rampersad J refused the applications for

conservatory orders because (1) would put the court in breach of both the Bail Act and the Children Act; and (2) was not pursued by the appellant; furthermore both (1) and (2) were mandatory rather than conservatory in nature.

6.
The distinction between mandatory and conservatory orders in constitutional proceedings stems from the Court of Appeal decision in Attorney General v Bansraj (1985) 38 WIR 286. Section 14(2)(b) of the 1976 Constitution is in very wide terms:

“The High Court ... may, subject to subsection (3), make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled.”

However, section 14(3) provides that “The State Liability and Proceedings Act shall have effect for the purpose of any proceedings under this section”. Section 22(2) of that Act (the SLPA) provides that “Where in any proceedings against the State any relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance the Court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties.” Section 22(3) makes similar provision in proceedings against the State for recovery of land. In Bansraj, the Court took the view that it could not grant an interim interlocutory order restraining the State from entering the lands of Mr Bansraj and others. However, they could make what was termed a “conservatory order”, directing the parties to undertake to maintain the status quo until the determination of the matter.

7.
The Court of Appeal heard this appellant’s appeal on 12 November 2015 and made an interim order to the effect (1) that the Attorney General provide a suitable Community Residence, as provided for in the Children Act and the Children’s Community Residences, Foster Care and Nurseries Act, for the placement of the appellant on or before 8 December 2015 (that being the date on which it was contemplated that the main action would be heard); and (2) on the provision of such a Residence, the Commissioner of Prisons transfer the appellant into the custody of that residence. The Court made no order for costs. It also agreed to give full reasons in the event of an appeal to the Privy Council.

8.
On 28 April 2016, the Court gave its reasons, in the judgment of Jamadar JA, with whom Mendonca and Bereaux JJA agreed. The principal issue, of considerable public importance, was whether the only interim order available in constitutional proceedings is a “conservatory order” as explained by the Court of Appeal in Bansraj. The Court in this case was unanimously of the opinion that it was not. Briefly, its reasoning was as follows:

(1)
Bansraj was a case decided 30 years ago on its particular facts: the state was threatening to compulsorily acquire and bulldoze private land for the purpose of building a highway. The Court in Bansraj recognised that a court was entitled to be creative and innovative in finding a formula which would provide effective interim relief; but the consensus was that section 22 applied strictly to final orders.

(2)

Because of this, the Court in Bansraj did not consider how the words “in any proceedings against the state … as might in proceedings between subjects be granted” in section 22(2) should be interpreted in public law proceedings which are not akin to civil proceedings as customarily understood.

(3)
The SLPA was designed to provide for civil actions in contract, tort and property against the state. As Lord Nicholls pointed out in Durity v Attorney General of Trinidad and Tobago [2002] UKPC 20; [2003] 1 AC 405, para 18, it was modelled closely on the United Kingdom’s Crown Proceedings Act 1947 and designed to modernise the substantive law and procedure in ordinary civil actions against the State. It did not apply to “proceedings analogous to proceedings on the Crown side of the Queen’s Bench Division in England” (para 32). It was never intended to apply to public law matters, whether administrative law or constitutional law (which, as Lord Bingham remarked in Gairy v Attorney General of Grenada [2001] UKPC 30; [2002] 1 AC 167, para 21, are “fairly [to] be regarded as sui generis”).

(4)
Section 8 of the Judicial Review Act of Trinidad and Tobago expressly provides for the granting of injunctive relief against public authorities in administrative law actions. It would be quite an anomaly if an injunction could be obtained in administrative law actions but not where there was an alleged breach of the rights under section 4(a) and 4(b) of the Constitution to due process and the protection of the law.

(5)
Section 22 refers to “any relief … as might in proceedings between subjects …”. Constitutional proceedings cannot be brought between subjects. It was reasonable to infer that the limitation on granting injunctions was not intended to apply to public law proceedings.

(6)
Despite the pronouncements in Bansraj that final orders for injunctive relief could not be granted in constitutional proceedings, there was a “plethora” of cases, including cases upheld in the Privy Council, in which orders akin to injunctions had been made (para 42). Reference was made to Lord Toulson in Alleyne v Attorney General of Trinidad and Tobago [2015] UKPC 3; 88 WIR 475, para 38; Lord Mance in Central Broadcasting Services Ltd v Attorney General of Trinidad and Tobago [2006] UKPC 35; [2006] 1 WLR 2891, para 36; Lady Hale in Surratt v Attorney General of Trinidad and Tobago [2007] UKPC 55; [2008] AC 655, para 59. In the last two cases, the Privy Council had made final orders akin to mandatory injunctive orders in constitutional proceedings. And in Daniel v Attorney General of Trinidad and Tobago [2011] UKPC 31; 80 WIR 456, the Court of Appeal and Privy Council upheld the mandatory order made by the trial judge. There were also many death penalty cases from Trinidad and Tobago where interim stays of execution and final orders had been made by the Privy Council in constitutional proceedings: an example was Thomas v Baptiste [2000] 2 AC 1.

(7)
Hence “the weight of judicial precedent is aligned with Lord Toulson’s matter-of-fact comment, that injunctive orders can be made in constitutional proceedings” (para 54). For policy reasons this should be so. An interpretation of section 14(3) of the Constitution and section 22 of the SLPA that least inhibits the grant of effective and appropriate relief to enforce the fundamental rights of citizens was more consistent with the underlying values of the Constitution and consistent with upholding the rule of law (para 57).

9.

For these reasons, the court held that it had power to grant the mandatory orders made. However, the court rejected the appellant's argument that, in the circumstances, the state had lost the power to detain her and she should be released into the custody of her mother. That would, it was held, be to predetermine the final outcome of the matter before it was determined that there had in fact been any breach of her constitutional rights (para 72).

10.
For completeness, it should be recorded that the proceedings themselves were heard by Kokoram J, along with similar proceedings brought by the appellant's younger brother, from 15 to 18 February 2016. He gave judgment on 24 May 2016. In summary, he declared that the first respondent had no jurisdiction, on or about 29 July 2015, to remand the appellant to the adult women's prison and granted certiorari to quash that order; he declared that the appellant's detention from 29 July to December 2015 was in breach of her constitutional rights, as was the failure of the State to provide a Community Residence meeting the requirements of the Children's Community Residences, Foster Care and Nurseries Act 2000, and to provide an institution for the detention of female young offenders where they could be detained on remand or after sentence; and he declared that the conditions in which she was detained in the Adult Women's Prison by the second respondent were in breach of her constitutional right not to be subjected to cruel and unusual treatment or punishment; and he awarded her damages of $300,000. However, on 19 December 2018, after the Board had heard this appeal, the Court of Appeal set aside the findings that the appellant's constitutional rights had been breached, and also the award of damages, and limited her relief to a declaration that the order of the Chief Magistrate remanding her to the Adult Women's Prison was in contravention of sections 54(1) and 60(1) of the Children Act.

The appeal to this Board

11.
As this is a constitutional matter, an appeal lies as of right to this Board. If the State had taken issue with the approach of the Court of Appeal to the question of constitutional relief, it might have appealed. But it did not. On the contrary, the respondents argue that the interim orders made by the Court of Appeal were entirely proper in the circumstances of this case. Instead, it is the appellant who appeals, on the ground that the Court of Appeal should have ordered the Attorney General to undertake that the Director of Prisons would forthwith release her into the custody of her mother. She also argues that the Court of Appeal should have awarded her her costs. She was granted conditional leave on 23 November 2015 and final leave on 4 April 2016. Meanwhile, she had reached the age of 18, and thus ceased to be a child, on 24 January 2016. That is why the dilemma had passed and no useful purpose can be served by pursuing this appeal: appeals are against orders, not against the reasons given for making them.

12.
In summary, the appellant argues that the Court of Appeal should have adopted the tri-partite test to the grant of interim relief in cases involving constitutional rights applied by the Supreme Court of Canada in Manitoba (Attorney General) v Metropolitan Stores Ltd [1987] 1 SCR 110 and RJR-MacDonald Inc v Canada (Attorney General) [1994] 1 SCR 311: first, there should be a preliminary assessment of the merits to see whether there was a serious issue to be tried (adopting the less stringent merits test laid down by the House of Lords in American Cyanamid Co v Ethicon Ltd [1975] AC 396); second, it must be determined whether the applicant would suffer irreparable harm if the application were refused; and third, an assessment must be made as to which of the parties would suffer the greater harm from the granting or refusal of the remedy pending a decision on the merits.

Instead, the Court of Appeal had simply stated that, as it had not yet been finally determined that there had been any breaches of the appellant's fundamental rights, to make the order sought "would be to pre-determine the final outcome of this matter and to make, as an interim order, what may be considered to be a final order" (para 72). But, it is argued, it was obvious that her constitutional rights were being violated: indeed the court itself said that "the failure to place the minor in the custody of a Community Residence is prima facie illegal, unlawful and unconstitutional (given the minor's rights to due process and the protection of the law)" (para 69). Further, there was no realistic prospect that the order which the Court of Appeal did make would be complied with within the time-table laid down. Hence the only proper solution was to order her release into the custody of her mother.

13.
To this the respondents point out that they had conceded that there was a prima facie case - there were serious issues to be tried. The courts would have to resolve, not the contradiction between the Bail Act and section 54 of the Children Act, but the friction between the Bail Act and the unavailability of a suitable Community Residence. The appellant was asking for an order for her release, contrary to the prohibition of bail. Release to her mother would be the equivalent of release on bail (indeed, as was pointed out during the hearing, it would provide rather less security for her surrender than would release on bail). The Bail Act itself was not being challenged as unconstitutional. The lack of a suitable Community Residence did not and could not abrogate the prohibition of bail. There was an issue about whether the Adult Women's Prison could be a Community Residence. There were very real issues as to whether breaches of her constitutional rights would indeed be established. The Court of Appeal was in a difficult position and was right to do what it did.

14.
The Board is in no doubt that in this difficult situation the Court of Appeal made the only order which it could have made. It was the order which best resolved the conflict between the Bail Act and the non-availability of a suitable Community Residence. The court concluded that it had power to make such an order after an impressive discussion of the relevant legislation and authorities, effectively confining the Bansraj decision to cases equivalent to private law disputes. That conclusion has not been challenged. It did not in terms refer to the tri-partite test in RJR-MacDonald, but the Court clearly had in mind each of its components. In particular, when considering the balance of harm, it took into account the best interests of the appellant as a child: it clearly had in mind that, under article 3.1 of the United Nations Convention on the Rights of the Child, the best interests of a child must be a primary consideration in any decision concerning her. The court then asked itself whether there were any conflicting values: the law of the land as contained in the Bail Act was one such. It also took into account that the appellant was almost 18 years old and thus close to no longer being a child and that attempts were being made to bring her accommodation "as close as is possible in an adult prison to the standards now applicable to minors held on remand" (para 74).

15.
The Board agrees that the tri-partite test in RJR-MacDonald is appropriate when considering interim relief in constitutional cases. It also agrees that, when considering the balance of harm in cases involving children, the best interests of the child should be a primary consideration, as required by article 3.1 of the United Nations Convention on the Rights of the Child. The Board needs no convincing that it is not in the best interests of any child to be incarcerated in an adult prison, mixing with adult offenders, and subjected to same accommodation and regime to which they are subjected. But article 3.1 does not mean that the best interests of the child are the paramount consideration.

They can be outweighed by the cumulative effect of other considerations as long as no other consideration is treated as more important.

16.
The Board is not concerned with what happened next, with whether the order made by the Court of Appeal was complied with, and with the current state of the law and practice relating to the detention of children in Trinidad and Tobago. It can only express the hope and expectation that Trinidad and Tobago is doing its best to comply with its obligations under the United Nations Convention on the Rights of the Child, an international instrument which has done so much to educate us all in the special status and needs of all our children.

Conclusion

17.
It follows that this appeal must be dismissed. Submissions on costs should be filed within 21 days of this judgment.