Neutral Citation Number: [2024] CA (Bda) 11 Civ

Civil Appeal No. 9 of 2022

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
THE HON. CHIEF JUSTICE
CASE NUMBER 2021: No. 368

Sessions House
Hamilton, Bermuda HM 12

Date: 04/06/2024

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL, SIR ANTHONY SMELLIE
and
JUSTICE OF APPEAL, IAN KAWALEY

- -

Between:

A
(a minor, by her next of kin)

Appellant

- and -

THE MINISTER FOR EDUCATION

Respondent

Mark Diel, Marshall, Diel & Myers, instructed by Peter Sanderson, Beesmont Law Group Ltd., for the Appellant
Mrs. Shakira Dill-Francois of Attorney-General's Chambers for the Respondent

Hearing date: 4 June 2024
Ruling date: 27 June 2024

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RULING ON LEAVE TO APPEAL TO THE PRIVY COUNCIL

SIR CHRISTOPHER CLARKE, P:

1. We have before us an application for leave to appeal to the Privy Council from our decision of 17 February 2023. Section 2 (b) of the *Appeals Act 1911* provides that an appeal from this Court to His Majesty in Council lies as of right from the final determination of any application or question by the Supreme Court under section 15 of the Constitution. It is common ground that this section *prima facie* applies because the determination of the Supreme Court addressed what was said to be a breach of the child applicant's right under section 7 (1) of the Constitution not to be subject to a search of her person except with her consent.

2. Although such an appeal is as of right the Privy Council has held, in **Alleyne-Forte v AG of Trinidad and Tobago** [1998] 1 WLR 68, that what is still required, in order to be able to bring such an appeal, is that there should be a "*genuinely disputable issue*".

3. That case has been followed in subsequent cases of the Privy Council: see **A v R (Guernsey)** [2018] UKPC 4; and applied by us in this jurisdiction in **Pedro v The Attorney General** [2021[CA (Bda) Civ 14.

4. The facts and content of this case, as considered by the Supreme Court and this Court, will be well known to the parties and to anyone who has to consider this ruling. I will not therefore set them out in any detail. In essence the case concerns the Covid testing regime which, in relation to public schools, required a child to take a form of self-administered but supervised saliva test if he or she was to be admitted to school on the reopening of those schools in October 2021. A positive finding would mean that the child in question would have to have remote schooling.

5. In the course of his judgment in this Court Maurice Jay J.A. addressed the significance of section 7 of the Constitution in the following terms at paragraph 12:

> "*But in my judgment, the section* [Section 42 of the Education Act 1996] *does not really impact upon the present case. It requires parents to make a choice. It no doubt permits them to reverse their initial choice. However, in itself, it is not dispositive of the issue of consent. I conclude that even if it may attract conscientious objection, the testing procedure in issue in this case, did not coerce students or their parents into a decision that can be described as non-consensual or the result of duress. That conclusion, although differing in some of its reasoning from that, as the Chief Justice* [sic] *results in the same consequence, it means that no breach of section 7 of the Constitution has been established. So, the case becomes unsustainable."*

6. As to that Mr Mark Diel, who appeared (pro bono) on behalf of the applicant, submits that there is a genuinely disputable issue relating to a constitutional right. The primary issue is as to whether the Covid testing regime for schools was coercive. On the applicant's case the requirement to take the test was indeed coercive, particularly when regard is had to the following circumstances:

(i) the child on behalf of whom the application is made had a history of anxiety for which she had received counselling; a failure to return her to school, and forced remote schooling, would cause her additional anxiety and be detrimental to her health.

(ii) the quality of education provided by the remote schooling arrangements (and the learning packets provided) was far below that afforded to a person learning in school;

(iii) both the parents had responsible jobs in financial services, such that they would not have time to act as daytime tutors or home school supervisors; and this would impair the child's educational development. So, unless they allowed her to be subjected to a saliva test, they would have, at great expense, to move her to a private school or employ a home tutor and/or take time off work.

The reality therefore was that they had no real choice; were under coercion or duress; and did not truly consent. Reliance is placed on the observations of Lord Romilly MR in **Ellis v Barker** [1871] 40 LJ Ch 603 at 607:

> *"Coercion takes an infinite number of forms, but it may properly be thus defined: - the moment that the person who influences the other does so by the threat of taking away from that other something he then possesses, or of preventing him from obtaining an advantage he would otherwise have obtained, then it becomes coercive and it ceases to be persuasion or consideration."*

7. Mrs Dill-Francois for the respondent Minister contends that the parents did consent. The child was not forced to take the test. There were two options:

(a) to take the test- in which case, if it was negative (as in the case of the child applicant it was) she could go into the school or, if it was positive, she would receive home schooling; or

(b) to decline to take a test in which case she would not be able to have teaching at the school.

The choice was for her parents to make on her behalf; there was no compulsion to take the test; nor was there any coercion or duress.

8. In my view the above issue, which is critical, and which depends in part on the ambit of the words "*Except with his consent*", is a genuinely disputable one. It has not ceased to be so because this Court has reached a conclusion on it which is adverse to the applicant.

9. There are, of course, other issues in the case. As Kay, JA recorded at [7] of his judgment:

> "*Section 7(2) permits searches carried out under the authority of any law that is reasonably required in the interests of, inter alia, public health or for the purposes of protecting the rights and freedoms of other persons, except so far as the thing done is shown not to be reasonably justifiable in a democratic society. "*

10. This Court decided that the Minister had power to require the taking of a test as a condition for coming back to school by virtue of sections 3 and 4 of the *Occupational Safety and Health Act 1982* ("OSHA"). There is an issue as to whether those provisions were apt to allow the Minister to take the action which he took; and whether, if they were, they represent a law that was reasonably required in the interests of health. The essence of what is said, as I understand it, is that to impose this requirement on public schools but not on private schools or any other places where there would be a sizeable gathering of people, such as government offices, bars, restaurants and hotels, and sports events was arbitrary; and the OSHA was not reasonably required to bring about such arbitrary discrimination. And the arbitrary discrimination which was the result of what was done under it was not reasonably justifiable in a democratic society.

11. Mrs Dill-Francois for the Minister submits that the OSHA sections relied on were indeed required in the interest of public health, and there was no arbitrary discrimination. The measures taken were not made applicable to private schools because they (or at least some of them) were carrying out their own testing. (The affidavit of Kalmar Richards, the Commissioner of Education of 17 January 2022 records that "*lateral flow testing for staff and students was implemented up to twice a week for certain private schools*"). And the requirement to pass a test (in order to come back to school) was limited to schools because adults could be expected to take the necessary measures (masks, distancing etc.) to prevent the spread of the disease, whereas children were, by their nature, unruly and not likely to do what was necessary for that end. Mr Diel observed that the fact that some of the private schools had taken up testing, and that there was no testing whatever required outside schools, mean that the blanket imposition of testing on all public schools was still arbitrarily discriminatory.

12. While we have seen the extensive exchanges of correspondence between the relevant authorities and the applicant in which the former went to considerable lengths to explain their reliance upon the OSHA provisions, this dispute, which has a number of possible ramifications both legal and factual, is again, one which appears to me to be a genuine one. In those circumstances I forbear from any prolonged analysis of it. And, as with the issue of consent, the fact that this Court has rejected the applicant's case does not deprive the issue of its genuine disputability.

13. The Minister also contends that the appeal that is sought to be made is wholly academic because testing is no longer required by the Ministry. Reliance is placed on what was said by Lord Neuberger of Abbotsbury MR in **Hutcheson v Popdog Ltd (News Group Newspaper Ltd, third party) Practice Note** [2012] 1 WLR 782 where he said.

> *"15 Both the cases and general principle seem to suggest that, save in exceptional circumstances, three requirements have to be satisfied before an appeal, which is academic as between the parties, may (and I mean 'may') be allowed to proceed: (i) the court is satisfied that the appeal would raise a point of some general importance; (ii) the respondent to the appeal agrees to it proceeding, or is at least completely indemnified on costs and is not*

> *otherwise inappropriately prejudiced; (iii) the court is satisfied that both sides of the argument will be fully and properly ventilated".*

14. Mrs Dill-Francois for the Minister submits that the present case is not one of some general importance and that, in any event, the Minister does not agree to it proceeding and is not completely indemnified as to costs.

15. As to that, Mr Diel submits that the claim is neither academic nor hypothetical. First, damages are in issue and will be claimed if the appeal is successful. (I would observe that any such damages would be extremely modest). Second, the vindication of constitutional rights will rarely be hypothetical. A person has a right to have a claim that her constitutional rights have been violated determined. Third, the case concerns important principles about the exercise of executive power which may have implications for future emergencies. The prospect of such emergencies is ever present and may arise, for instance, from new strains of Covid or from some other disease. Even if the dispute was hypothetical between the parties it is still of strong public interest.

16. I entertain considerable doubt as to whether the conditions expressed by Lord Neuberger, which related to an appeal to the English Court of Appeal, are applicable to cases where there is a right of appeal to the Privy Council on a constitutional issue. In any event the present case does not seem to me to be entirely academic or purely hypothetical - for the reasons advanced by Mr Diel.

17. Accordingly I would grant the applicant permission to appeal to the Privy Council and would invite the attorneys to draw up the usual order granting conditional leave to appeal.

18. I should like to pay tribute to the quality of the advocacy on both sides, by which the Court has been greatly assisted.

SMELLIE J.A.

19. I agree

KAWALEY J.A.

20. I agree.