CO/4128/2003

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Thursday 13th November 2003

B E F O R E:

MR JUSTICE MUNBY

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MS S

Applicant

-v-

Haringey London Borough Council

Defendant

- - - - - - -

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The Applicant MS S in person.

MS LUCY THEIS QC (instructed by Head of Legal Services) for the Defendant

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J U D G M E N T

Mr Justice Munby:

1. Once again, in a manner which is ingenious but misconceived, a litigant seeks to involve the Administrative Court in a matter which is currently on foot in a family court — in the present case, as it happens, in the Family Division of the High Court. This is not the first time in recent months that I and other judges have had to grapple with the issue. I doubt it will be the last.

The facts

2. I can take the facts quite shortly. Since February 2003 I have been case-managing in accordance with the London care protocol (see President's Direction (Judicial Continuity) [2002] 2 FLR 367) care proceedings under Part IV of the Children Act 1989 . The proceedings relate to the four children of a mother who I will refer to as Ms S. The children were removed by the police from Ms S's care on 3 January 2003 and placed in foster care. The family proceedings court made emergency protection orders on 6 January 2003, followed by interim care orders on 10 January 2003, on which occasion the proceedings were transferred to the Principal Registry of the Family Division. On 4 February 2003 the proceedings were transferred to the High Court and listed for hearing before me on 11 February 2003.

3. Since then the proceedings have been before me on a number of occasions. All four children have remained subject to interim care orders and in foster placements. As the local authority would probably be the first to concede, the interim care orders regime and the children's foster placements have been, throughout, the subject of more than usually detailed monitoring and scrutiny both by the court and by the very experienced guardian. The final hearing was due to commence on 8 September 2002 though in the event it did not. It has now been re-fixed to commence on 5 February 2004.

4. On 16 July 2003 Ms S issued judicial review proceedings against the local authority, the guardian and the guardian's solicitor. Entirely properly in the circumstances, for I am a nominated judge of the Administrative Court and the Administrative Court Office was aware that I was the allocated judge dealing with the related proceedings in the Family Division, the judicial review papers were placed before me. I made an order the same day directing, inter alia, that the application for permission was to be listed for oral hearing before me on 24 July 2003, that being the date which I had already fixed for the next directions hearing in the Family Division proceedings. On 24 July 2003 I adjourned the application for hearing before me on 22 August 2003.

5. Immediately before the hearing began on 22 August 2003 Ms S issued in the Administrative Court the habeas corpus proceedings which are now before me. Later that day I refused her application for permission to bring the judicial review proceedings. I adjourned the habeas corpus proceedings to 8 September 2003. Following further adjournments due to lack of time on 8 September 2003 and again on 29 September 2003 (the urgent imperative on both occasions being to deal with the Family Division proceedings) I heard and dismissed the habeas corpus proceedings on 27 October 2003. I now (13 November 2003) give judgment explaining why I took that course. I should add that I dealt with the matter in Ms S's absence. Despite the fact that on 29 September 2003, and in her presence, I had made an order stating that the habeas corpus proceedings would be dealt with on 27 October 2003 and directing that she was to attend court on that day at 9.30 am, Ms S chose not to attend. Nor did she make any application for an adjournment.

The law

6. It may be helpful if I first briefly recapitulate the most relevant recent learning.

7. Experience suggests that there are two situations that arise from time to time which although they appear to be similar are in fact quite different and which require to be handled differently.

8. The first is where there is an attempt to litigate in the Administrative Court, by way of an application for permission to apply for judicial review, some issue which although it may have a public law element (using that expression not in the family lawyer's sense but in the administrative lawyer's sense) also raises issues to do with the 'welfare' (in the family lawyer's sense) of a child or an incompetent adult. That is the issue that I had to consider in A v A Health Authority , In *re J (A Child)* , *R (S) v Secretary of State for the Home Department [2002] EWHC 18 (Fam/Admin), [2002] Fam 213* . I do not repeat what I said on that occasion. It suffices for present purposes to quote what I said in para [72]:

> "There will, of course, be cases which, although they concern the welfare of either children or incompetent adults, plainly involve only issues of public law and are thus properly litigated, if at all, by way of an application in the Administrative Court for judicial review. … But there are many cases which, even if in part they may involve some issue of public law, are also private law cases about the best interests of either a child or an incompetent adult. In what court and by what procedure are such cases to be litigated? The courts have consistently said, and I agree, that such cases are to be litigated in the Family Division and before judges of that Division."

9. Exactly the same principle applies in 'family' cases where a freestanding application is made for relief in accordance with section 7(1)(a) of the Human Rights Act 1998 . Such cases should be heard in the Family Division of the High Court and, if possible, by judges with experience of sitting in the Administrative Court: see the observations of the President in C v Bury Metropolitan Borough Council [2002] EWHC 1438 (Fam), [2002] 2 FLR 868 , paras [53]–[55].

10. I mention those cases only for the sake of completeness. The present case is an example of the second situation, namely where there is an attempt to litigate in the Administrative Court an issue that arises in the context of pending or threatened care proceedings under Part IV of the Children Act 1989 .

11. In Re C (Adoption: Religious Observance) [2002] 1 FLR 1119 , Wilson J made it clear that where care proceedings are actually on foot an application for judicial review is normally a wholly inappropriate method of challenging the local authority's decision-making in relation to the child. Such issues can and should be resolved within the context of the care proceedings and by the court which is dealing with the care proceedings — whether the family proceedings court, the county court or the High Court. Re C was a case in which, whilst care proceedings were pending, an application was made by the guardian for judicial review of the local authority's proposed care plan. Dismissing the application for judicial review, Wilson J said this at para [51]:

> "… the guardian's issue of proceedings for judicial review of the local authority's decision to match C with Mr and Mrs A was, in retrospect, misguided. Even had the proceedings been well-founded in law, the proper forum was to challenge the care plan in the care proceedings. There the full merits — as opposed to the bare lawfulness — of the decision fell for debate. … It seems to me that the issue about the suitability of particular adopters — or of a particular type of adopters — identified in a care plan is just as well suited to ventilation in a family proceedings court as to ventilation in the Family Division; and I hope that no court is again required so painstakingly to consider the lawfulness of a decision when the real issue is as to whether it best serves the child's interests."

12. Following Wilson J's approach, I made it clear in *Re L (Care Proceedings: Human Rights Claims) [2003] EWHC 665 (Fam), [2003] 2 FLR 160* , that exactly the same principle applies in the case of applications under the Human Rights Act 1998 . Complaints arising before the making of a final care order to the effect that the local authority's proposals infringe the human rights of either the child or anyone else can, and normally should, be dealt with within the context of the care proceedings and by the court which is dealing with the care proceedings. Only in a "wholly exceptional case", I said, would it ever be appropriate to make a separate or freestanding Human Rights Act application in such a case. I summarised the position as follows (at para [36]):

"Just as applications for judicial review are to be deprecated where there are pending care proceedings, so are separate applications under ss. 7 and 8 of the Human Rights Act 1998 in such cases. The proper forum for litigating these issues will almost always be the court — whether the FPC, the county court or the High Court, as the case may be — where the care proceedings are being tried."

13. That may appear at first blush to conflict with what the President had earlier said in *C v Bury Metropolitan Borough Council [2002] EWHC 1438 (Fam), [2002] 2 FLR 868* . In fact it does not, and I explained why in *Re L (Care* Proceedings*: Human Rights Claims) [2003] EWHC 665 (Fam), [2003] 2 FLR 160* , paras [23]–[25]:

"[23] There is, however, in my judgment, even if the point is not made explicitly clear in C v Bury , an important distinction to be drawn between: (a) those cases in which a European Convention issue arises whilst care proceedings are still on foot; and (b) those cases in which a European Convention issue arises after a final care order has been made and when the care proceedings have accordingly come to an end.

[24] In the latter class of case — that is, where the care proceedings have come to an end — the appropriate remedy may well be a freestanding application under s. 7(1)(a) of the Human Rights Act 1998 . Such an application can be made either on its own or in conjunction with some other application, for example … an application under s. 39 of the Children Act 1989 for discharge of the care order. In such a case, as the President emphasised in C v Bury , the application should be heard in the Family Division and, if possible, by a judge with experience of sitting in the Administrative Court …

[25] In the other class of case — that is, where the care proceedings are still on foot — the position, in my judgment, is quite different. Here there is no need for any freestanding application under s. 7(1)(a) . Section 7(1)(b) will provide an appropriate remedy within the care proceedings themselves. Accordingly, Human Rights Act complaints arising before the making of a final care order can, and in my judgment normally should, be dealt with within the context of the care proceedings and by the court which is dealing with the care proceedings."

14. Having set out the passage from Wilson J's judgment in *Re C (Adoption: Religious Observance) [2002] 1 FLR 1119* which I have already quoted, I continued at para [28]:

"I respectfully agree with and wish to associate myself emphatically with every word of that. I draw attention to two points in particular: first, Wilson J's view, which I entirely share, that the proper place for such matters to be considered is within the care proceedings; and, secondly, his belief, which again I entirely share, that the FPC is often just as well suited as the Family Division to decide such matters."

15. In *Re M (Care: Proceedings: Judicial Review) [2003] EWHC 850 (Admin), [2003] 2 FLR 171* , I had to consider whether it is appropriate for parents anticipating the likely commencement in the family proceedings court of care or emergency protection proceedings under Parts IV and V of the Children Act 1989 to seek to prevent that happening by means of an application to the Administrative Court for judicial review and injunctive relief. I held that it is not. Indicating that in my judgment precisely the same approach was called for in this situation as in the situations that had previously arisen in *Re C (Adoption: Religious Observance) [2002] 1 FLR 1119* and *Re L (Care Proceedings: Human Rights Claims) [2003] EWHC 665 (Fam), [2003] 2 FLR 160* , I said (para [35]):

"Save in a wholly exceptional case, it is, in my judgment, simply not appropriate to bring judicial review proceedings where the object of the proceedings is, as here, to prevent a local authority commencing emergency protection or care proceedings."

I added at para [43]:

"… I emphasise that applications for judicial review are to be deprecated in this kind of case. I hope that in future proper heed will be paid to the views which on this point have been so consistently expressed and for so long by so many judges."

16. Finally in this context I should mention *Re A (Care Proceedings: Asylum Seekers) [2003] EWHC 1086 (Fam), [2003] 2 FLR 921* . That was a case in which parents who were failed asylum seekers sought to persuade me that I should continue care proceedings, properly commenced by a local authority, in circumstances where I was satisfied that there was no longer any genuine dispute requiring to be resolved in proceedings under Part IV of the Children Act 1989 and where the parents' only purpose in seeking to persuade the court to continue the proceedings was simply to frustrate the removal process and to prevent their return to their country of origin. The case had been transferred up to the High Court because of the immigration aspect. Commenting on this at para [70] I said:

"I can understand why in this particular case it was thought appropriate by the Circuit Judge to transfer the matter up to the High Court. And I do not criticise the Treasury Solicitor for asking for the case to be listed before a judge of the Division who is also a nominated judge of the Administrative Court. But I should not like it to be thought that there is any need for a care case to be transferred to the High Court, let alone listed in front of one of the Division's judges who also sits in the Administrative Court, merely because the parents or the children are subject to immigration proceedings or liable to removal. The relevant principles appear clearly enough from *R v Secretary of State for Home Department ex p T [1995] 1 FLR 293* and, other things being equal, are as capable of application by the Circuit Judge or the Family Proceedings Court as by the High Court."

17. It can be seen that there are two consistent themes running through the cases.

- i) First, that the proper forum for litigating issues that arise whilst care proceedings are on foot (different considerations apply where the care proceedings have finally concluded) will almost always be the court where the care proceedings are being tried — the family proceedings court, the county court or the High Court, as the case may be. Such issues should ordinarily be dealt with in the family court which is dealing with the relevant care proceedings, and as part of the care proceedings, even if they involve Human Rights Act or other issues of the kind that might otherwise be litigated either in judicial review proceedings in the Administrative Court or by a freestanding application for relief under the Human Rights Act in the Administrative Court or elsewhere.
- ii) Secondly, that the family proceedings court is often just as well suited to decide such matters as the county court or the Family Division.

18. I gave an extempore judgment on 22 August 2003 explaining why I was dismissing Ms S's application for permission to apply for judicial review. I need not repeat here what I said on that occasion. Suffice it to say that in essence her application, insofar as it would otherwise have had any merit, quite clearly fell foul of the principles laid down by Wilson J in Re C (Adoption: Religious Observance) [2002] 1 FLR 1119 and by me in Re L (Care Proceedings: Human Rights Claims) [2003] EWHC 665 (Fam), [2003] 2 FLR 160 , and in Re M (Care: Proceedings: Judicial Review) [2003] EWHC 850 (Admin), [2003] 2 FLR 171 .

19. Ms S now attempts to litigate much the same issues by means of an application for habeas corpus. In this connection I have been referred to two cases. The first is Linnett v Coles [1987] QB 555, where the Court of Appeal had to consider the extent of the court's powers when hearing an appeal pursuant to section 13 of the Administration of Justice Act 1960 against an order of a High Court judge committing the appellant for contempt of court. One of the grounds of appeal was that the committal order was bad on its face. The question arose as to whether in the light of that defect the contemnor was entitled to his release by way of a writ of habeas corpus. The Court of Appeal indicated that he was not.

20. Lawton LJ, having commented at p 561B that the writ of habeas corpus "is probably the most cherished sacred cow in the British constitution", continued:

> "but the law has never allowed it to graze in all legal pastures. The proceedings of criminal courts of record seem to have forbidden it. … Having regard to what seems always to have been a limitation on the issue of the writ of habeas corpus in criminal causes or matter, it seems to me that, save in exceptional cases, it is not the appropriate remedy for appealing against committal orders."

Woolf LJ said this at p 564D:

> "I recognise that a person, the subject of a committal order on the ground of contempt, might attempt to bypass the jurisdiction of this court by making an application for habeas corpus because he appreciated that this court on an appeal would cure the defect in the order on which he would like to rely. In my view, the question would then arise as to whether such an application, which was designed to prevent this court making such order "as may be just" under section 13(3) of the Administration of Justice Act 1960 amounted to an abuse of the process of the court on the basis of the reasoning of the *House of Lords in O'Reilly v. Mackman [1983] 2 AC 237* . As was indicated in argument, the court might decide that there was no reason why *O'Reilly v. Mackman* should not apply in reverse. However, this point does not arise for final decision on this appeal."

21. The other case is *R v Oldham Justices ex p Cawley [1997] QB 1* where applications for habeas corpus where made by three applicants, each under 21 years of age, who had defaulted in paying fines arising from summary criminal convictions and had been committed to prison. The warrant of commitment in each case was defective in failing to comply with formal requirements imposed either by section 82(6) or by section 88(5) of the Magistrates' Courts Act 1980 . The Divisional Court held that habeas corpus was not a necessary, recognised or appropriate means by which a defective warrant of commitment could be challenged, and that where the lawfulness of a decision of justices to commit a person to prison or of the warrant of commitment was in question the appropriate remedy was judicial review. Simon Brown LJ, with whom Scott Baker and Latham JJ agreed, said this at p 19B:

> "In my judgment habeas corpus has no useful role to play in reviewing decisions of the nature here under challenge. I recognise, of course, that where it applies, it enjoys precedence over all other court business, reverses the presumption of regularity of the decision impugned, and issues as of right. In practice, however, no less priority is accorded to judicial review cases involving the liberty of the subject; the presumption counts for little in such cases (is indeed effectively reversed by a defective warrant), and the court would be unlikely in its discretion to withhold relief if the actual decision to detain were found legally flawed. Importantly, moreover, in judicial review the court has wider powers of disposal: whereas in habeas corpus the detention is either held unlawful or not, and the applicant accordingly freed or not, on judicial review the matter can be remitted to the justices with whatever directions may be appropriate. Furthermore, on judicial review the challenge is directed where it should be — at the justices — rather than at the prison authorities whose involvement is in truth immaterial. For my part, therefore, I would hold that habeas corpus is neither a necessary, recognised nor appropriate remedy in the present cases; rather the applicants' detention can in my judgment only properly be challenged by judicial review."

22. I read those two decisions as more than justifying the conclusion to which I would in any event have come. There is nothing intrinsic to an application for habeas corpus, in contrast to an application for judicial review, which requires the Administrative Court to treat any more tolerantly an attempt to litigate by means of an application for habeas corpus than it would an attempt to litigate by means of an application for judicial review issues which arise whilst care proceedings are on foot. The principles, derived from Re C (Adoption: Religious Observance) [2002] 1 FLR 1119 , Re L (Care Proceedings: Human Rights Claims) [2003] EWHC 665 (Fam),

[2003] 2 FLR 160 , and Re M (Care: Proceedings: Judicial Review) [2003] EWHC 850 (Admin), [2003] 2 FLR 171 , which I have summarised in paragraph [17] above are, in my judgment, as equally applicable to applications for habeas corpus as they are to applications by way of judicial review or to freestanding applications for relief under the Human Rights Act .

23. The point has repeatedly been made that applications for judicial review are to be deprecated where care proceedings are on foot and where the purpose of the application for judicial review is to challenge the exercise by the local authority of its powers, including, I would add, the exercise by the local authority of any parental responsibility vested in it, pursuant to an interim care order, by virtue of section 33(3) of the Children Act 1989 . As Wilson J said, the proper forum for such challenges is within the care proceedings. In just the same way, applications for habeas corpus are to be deprecated where care proceedings are on foot and where the purpose of the application is to challenge the exercise by the local authority of its powers. The proper forum for such challenges is within the care proceedings, not in the Administrative Court.

Discussion

24. Ms S asserts that her children are being held by the local authority, by implication unlawfully, under the interim care orders which from time to time have been made in the Family Division. She asserts that the action of the police when they removed the children on 3 January 2003 was unlawful: indeed that it was procured by documents forged for that purpose by the local authority. She asserts that the emergency protection orders were procured unlawfully. She asserts that each of the children is being held by the local authority against their will. She asserts that the children have been abused whilst in the local authority's care.

25. I am content to proceed for present purposes on the footing that Ms S's factual allegations are true, though I wish to emphasise as strongly as possible that I am making no findings to that effect and that many of her allegations are quite plainly fatuous. But, even assuming for the sake of argument that her factual complaints have any validity, her application for habeas corpus is, in my judgment, hopelessly misconceived.

26. In the first place, whatever defects there may have been, either in the process by which the police removed the children on 3 January 2003 or in the process by which the emergency protection orders were granted on 6 January 2003 (and, to repeat, I make no findings to that effect), those defects cannot affect the validity of the children's current placements nor, insofar as the children are being ‘detained’, the lawfulness of that detention. The children are not where they are pursuant either to the actions of the police on 3 January 2003 or to the emergency protection orders granted by the family proceedings court on 6 January 2003. Rather they are where they are pursuant to the interim care orders that have been made from time to time, most recently the interim care orders that I made on 3 June 2003, 25 June 2003, 27 June 2003, 24 July 2003, 25 July 2003, 22 August 2003, 15 September 2003, 29 September 2003 and 27 October 2003. It is those interim care orders that clothe the local authority with the parental responsibility and with the other statutory powers that make it lawful for the authority to put and maintain the children in their foster placements.

27. Secondly, it is to be noted that Ms S has not articulated any basis of challenge either to the lawfulness of the various interim care orders or to the lawfulness of the children's foster placements during such time as the interim care orders regime has been in place. She may complain bitterly about the interim care orders I have made; she says that I was wrong to make them. But those complaints, whether or not they have any substance, are matters which, if she wishes to pursue them, must be ventilated in the Court of Appeal. And her complaints, even if well-founded (which I do not accept), cannot affect the lawfulness of the interim care orders I have made or the lawfulness of the children's foster placements so long as my orders stand, as they do, unappealed and undisturbed by the Court of Appeal.

28. The third point is more fundamental. Habeas corpus ad subjiciendum (which is the form of the writ with which I am concerned) is a remedy protecting the citizen or subject against an unlawful detention or imprisonment. Detention need not be at the hands of the state or public authority. Even a domestic house may for this purpose be a prison: see R v Jackson [1891] 1 QB 671 , esp per Lord Esher MR at p 682. That was the celebrated case where a wife who had been detained by her husband in his house, being given the full run of the house short of leaving it, was freed on a habeas corpus, the Court of Appeal denying that a husband has in law any right either to imprison or to confine his wife. But there must be a detention. The children in the present case are not in secure accommodation (whether in the sense in which that expression is used in section 25 of the Children Act 1989 or in any other sense). They are not being detained. They are simply living with foster parents in exactly the same type of domestic setting as any other children of their ages would be, whether living at home with their parents or staying with friends or relatives. Habeas corpus does not lie because a parent, or other person in loco parentis, makes it a rule that a child of tender years is not to leave the house unless accompanied by some suitable person or because an exasperated parent has sent a naughty child to his room and told him to stay there for two hours or because a rebellious teenager has been ‘grounded’ or subjected to a parentally enforced curfew, any more than habeas corpus lies if the headmaster of a boarding school forbids his charges to leave the school premises except at permitted times and for permitted purposes. And it makes no difference for this purpose that the domestic rule is actually enforced by the turning of a key in a lock.

29. The final point is this. Even if there was otherwise some arguable merit in Ms S's application, this is a matter which ought plainly to be dealt with in the Family Division as part of the care proceedings and not in the Administrative Court. I do not repeat what I have already said in paragraphs [22] and [23] above. The proper forum for this dispute is within the care proceedings, not in the Administrative Court. If Ms S is dissatisfied with the orders made in the care proceedings her remedy (if she has one) is an appeal to the Court of Appeal. She ought not to be attempting to litigate in the Administrative Court, whether her application be for judicial review or habeas corpus. Her application for habeas corpus is as misconceived as was her earlier application for judicial review. Both must suffer the same fate.