In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 173

BETWEEN:

TF
(BY HIS LITIGATION GUARDIAN, TIFFANE THOMAS) Plaintiff

-and-

THE COMMISSIONER OF PRISONS 1st Defendant
DIRECTOR OF CHILD AND FAMILY SERVICES 2nd Defendant

Before: **Hon. Assistant Justice Pettingill**

Appearances: **Mr Adam Richards, Marshall Diel & Myers Limited, for the Plaintiff**
Mr Brian Moodie, Attorney General's Chambers, for the Defendants

Date of Hearing: **3 May 2019**

Date of Judgment: **3 May 2019**

RULING

Introduction

1. This matter involved an application for a writ of Habeus Corpus Ad Subjiciendum by The Plaintiff TF, ("The Plaintiff") a minor. The application was brought on an

urgent basis given the detention of The Plaintiff aged 15 years at the time, at the Co-Ed facility ("A Detention Facility"). The basis for the application was that the minor Plaintiff was being unlawfully detained and had been placed in the Co-Ed Facility (a detention facility operated by the Commissioner of Prisons under the Ministry of National Security) at the direction of the Director of Child and Family Services ("DCFS").

2. On Friday, 3 May 2019, I made an Ex Tempore ruling allowing the writ of Habeus Corpus to issue and releasing the Plaintiff combined with an Order that he be under the control of the DCFS in line with a recent Magistrates Court ruling relating to his care. I indicated that I would give a more fulsome review of the reasons for my ruling and analysis of the law involved and I do so here.

The Background

3. I am obliged for the assistance of Mr. Richards for the Plaintiff and Mr. Moodie, Crown Counsel representing the Respondents, who agreed at the outset that the issue for the Court was a narrow point related to the legality of TF being "housed" at the Co-Ed Facility in accordance with s.50 (2)(d) of The Children Act 1998, ("The Act"). However, the agreed factual background of the matter is important and warrants consideration of the Court in my view, with some observations as relates to the powers of the DCFS, the Bermuda Police Service and The Minister under The Act.

4. The Plaintiff, a 15 year old minor boy, was clearly suffering from what I will term some "family challenges", when he was placed in the care of the DCFS by Magistrates Court Order on 27 March 2019, in a "Residential Home". This situation, for what appears to the Court to be, TF being non-compliant, was deemed to be unworkable and an application was made to the Court on 29 April 2019 with a submitted plan of care in accordance with s.31 of The Act, which included the removal of TF under s. 84 of The Act, to a facility in Utah where he was to be placed into a program which I understand the DCFS has availed itself of

in the past. Whilst that arrangement is not the subject of these proceedings, I will assume at this juncture that all is legally copus mentus in that regard and no issue was taken by Counsel.

5. It is accepted that TF initially was compliant with the ruling of the Magistrate Court to be sent to the Utah facility and arrangements were made for his immediate transport to the airport to be placed on a flight to the U.S. It is apparent that TF on the way to the airport requested that he be allowed to gather some personal items to take with him on the trip and this was denied given time restraints and he was told that whatever he needed could be purchased for him when he arrived.

6. In my view, the request of TF to gather some personal affects was by no means unreasonable, he is a boy of the age of 15, and I observe that whilst perhaps coming across as precocious at times, I found his manner and behavior in Court, and in addressing the Court, to be that of a typical 15 year old boy. He was in fact well-behaved, attentive and polite throughout although it is not lost on me that there may well have been an attempt at some "wool pulling over the eyes" of the Authorities and the Court. Candidly, it matters not for the sake of this decision. It could be that TF had some personal totem or comfort item that was important to him or a jacket that he wished to wear or a t-shirt or photograph of some emotional value. It is a significant measure to remove a child out of the jurisdiction to a foreign country and consideration should be given to anything that may add comfort to such an action. In any event, it appears that this refusal "tipped the pebble off the cliff" and on arrival at the airport, TF left the van and went to the bus stop and ultimately returned to the Housing Facility for the night and then attended school the next day.

7. It is agreed that whilst at school, two social workers and three police offers attended and TF was placed in hand cuffs and removed from the campus despite the fact that he was compliant and was certainly not under arrest for any crime. This is the first element of this matter which causes the Court significant concern

as I fail to recognize by what legal authority the Police became involved and effectively placed a minor child in custody. Whilst I accept that there appears to have been a Recovery Order in place in relation to the minor child, and whilst on agreement of counsel I extended the Order at the Habeus Corpus hearing, I cannot see how such an Order had legal force at the time of the Plaintiff being taken from school.

8. Section. 45 of the Act states:-

Recovery of Abducted Children etc.

"45 (1) *Where it appears to the Court that there is a reason to believe that a child to whom this section applies-*
(a) Has been unlawfully taken away or is being unlawfully kept away from the responsible person;
(b) Has run away or is staying away from the responsible person; or
(c) Is missing

(3) a Recovery Order…

(d) Authorizes a police officer to enter any premises specified in the order and search for the child using reasonable force if necessary."

9. With regard to the latter part I am by no means satisfied that the "reasonable force" mentioned in the section was intended by Parliament to be used against the child, but rather in relation to an adult acting unlawfully in relation to the child which would include harboring him if he had run away.

10. Furthermore, I do not see how on the facts of this matter that the requirements of 45(1) were met in that it was agreed that TF returned to the Residential Home and attended school the next day. I fail to see where he could have been properly classified at that stage as "running away". In my assessment, this section is designed to give a power to the Police on specific application to the Court to enter

a premise where there is potential risk to a minor child, not to attend at his school and handcuff him and take him to Co-Ed without a Court Order on specific application under s. 52 of The Act.

11. There is provision in The Act under s.41 for a police officer to "detain a child" but that section in my view relates to instances were a police officer may come across a minor child in a concerning situation, such as a domestic abuse incident or a child running away and, in the midnight hour perhaps, being found in nefarious company, and consequently in the interest of safety and the well-being of the child because they are at risk of "*significant harm*" the Police are able to "detain" them, and then report such incident to the DCSF. This is simply not the case in this instance and given that that DCFS workers were present it is apparent that some request must have been made for the police to be involved, I anticipate at best under a misunderstanding of the existing power under the Recovery Order. I leave it to Crown Counsel to perhaps consider this action by the BPS and advise accordingly as the Court is aware that this is not the first instance of the Police acting beyond their powers at the request of the DCSF, which in my assessment is putting the cart before the horse with regard to the true intention of police involvement in "detaining" a minor. See: *J T et al v Director of Child and Family Services et al* [2018] SC (Bda) 12 Civ (5 February 2018).

12. The situation is further compounded at this stage in that TF, by agreement and prior arrangement with the Commissioner of Prisons, was transported to the Co-Ed facility by the Police who had "detained" him without proper legal authority or explanation. The Court fails to understand why at this juncture an emergency application was not made to the Magistrates Court on May 1st in accordance with s. 52 of The Act which states:-

> "Transfer from residential home to senior training school
>
> S. 52. *(1) Where-*

(a) An order has been made under Section 16(f) of the Young Offenders Act 1950, or
(b) An Order has been made under this Act

Committing the child to the care of the Director…, having placed the child in a residential home, is of the opinion that the child is incorrigible or is exercising a bad influence on the other children of the home, The Director may, with the consent of the Minister, apply to the Court which made an order for an order under this section.

(2*) Where an application is made under this section and the Court is satisfied that a child should be removed from the residential home it may make an order revoking the order committing the child to the residential home and by order of this section direct that the child be transferred to the senior training school (i.e The Co-Ed facility)."*

13. The concern about the transfer to the Co-Ed of TF was raised by Tiffany Thomas who was previously appointed as Litigation Guardian for TF and swore an Affidavit in this matter in support of the Plaintiffs application and clearly took the view that TF was in fact being unlawfully "detained" at the Co-Ed and was in a prison environment. Mr. Moodie acting on his instructions for the Respondent, explained in his submission that DCFS staff had been assigned to the Prison to supervise TF and he was not under the "control" of prison guards or subject to the general prison regime. This may be some amelioration to TF being placed at the Co-Ed but, in my view it simply does not, by some colorable artifice, obviate the fact that TF without Court Order, was being detained in a "prison" and not an approved "residential home."

14. I make the observation here that in my view the appointment of a Litigation Guardian as mandated by s.35 of The Act, is a fundamental element for safeguarding the interests of a child who is unrepresented in proceedings. The importance of this independent role was highlighted by circumstances that

occurred in this case and the ultimate application to the Court evidenced pellucidly by the Affidavit of Ms. Thomas.

The Law

15. Mr. Richards for the Plaintiff argued pointedly that there was no Court Order in place which would allow the minor to be placed in a "place of detention" and that the Co-Ed facility was not listed as an approved housing facility in accordance with the provisions of. s.50 (2)(d) which states:

> *"A residential home may include-*
> *(d) a facility for the detention of young offenders."*

The above only has application however if read with the foregoing s.50 (1) which states:-

> "*The facilities operated and managed by the Minister known as the Youth Development Centre, The Observatory Cottage and the Brangman Home are residential homes where a child is committed to the care of the Director, the Director may place the child in those facilities or other residential home approved by the Minister."*

16. Mr. Moody in response argued valiantly that the actions of the DCFS were in fact on all fours with s.50 and that they had legal authority to detain TF at the Co-Ed as this action had been approved by the Minister responsible for DCFS who is also the Attorney-General. Mr. Moody indicated, which I accept without reservation, that he had spoken with the Attorney General shortly before the hearing of the Habeus Corpus and that she had indicated that she approved of the Co-Ed as a "housing facility "in accordance with s.50 (2)(d) having been apprised it appears of the current situation involving TF.

17. However, I am not satisfied that this is sufficient or correct in law. Certainly by Friday at the time the minor was produced before the Court by Court Order to the Commissioner of Prisons, he had been detained since Tuesday, 1 May 2019 and the proverbial horse had well bolted. I do not see that this was a fixable situation at this stage based on a phone conversation with the learned A-G. In my view, the approval of place as a "*residential home*" requires some detailed analysis as set out in sections 50 (4) –(7) of The Act and, some official notice that any particular place is deemed appropriate as said facility. Mr. Richards quite rightly in my view pointed out that this would effectively render s.52 of The Act redundant and obviate the need for a Court Order in order to transfer a minor to a Secure Facility, i.e. The Co-Ed. Particularly given that such a facility would in fact fall under the remit of a different Ministry (National Security). In my view s.50 is not designed to allow for the crossing of the Rubicon where any facility, including a detention centre, can simply and conveniently be deemed as a "*residential home*". Clearly in my assessment the Legislature intended that required steps had to be in place, evidenced fully before a competent Court and an Order made before the more Draconian step of effectively incarcerating a minor could be taken as a result of their behavior.

18. I find that the Co-Ed facility was not in fact a "*facility operated and Managed by the Minister…"* as required by s.50 nor was it in my view capable of being "*approved"* as such, particularly post facto the transfer and "on the fly" as Mr. Moodie effectively admitted in his submission to the Court.

Conclusions and Ruling

19. There can be no doubt that the DCFS has an onerous responsibility in fulfilling its mandate which I accept, must as a paramount priority, operate in the interest and protection of Children. I appreciate that there must on occasion be situations that arise that require some "out the box' thinking and action as I termed them in my comments to Counsel, which includes emergency situations where a child needs to be protected from significant harm.

20. However, there must necessarily be a system of checks and balances, clearly set out within the structure of The Children Act 1998, that must be diligently observed and adhered to and this in my assessment clearly applies to the following:-

i) The involvement of the Bermuda Police Service in any matter under the Children Act.

ii) The designation of "Residential Home" by the Minister, and

iii) The power to transfer a Minor from a residential home to a "senior training school" or the Co-Ed facility which must be by Court order.(s.52)

21. With regard to the above I find that;

i) There was no legal authority for the Police to have effectively arrested TF at school and transported him to the Co-Ed and in so doing they acted unlawfully and beyond the scope of any Recovery Order that was in place.

ii) The Co-Ed facility is not a facility operated by the Minister responsible for the management and approval of a "residential home" set out in the Act and the Minister would have acted *ultra vires* in the circumstances in approving the Co-Ed as a "residential home".

iii) The Plaintiff was not lawfully transferred to the Co-Ed under the authority of a Court Order and such application could have been made in this regard in accordance with s.52 of the Act and was not.

22. It may well be that there are issues of concern with practical application of various provisions under the current legislation, but those are matters to be properly addressed by review and amendment to the Act if necessary. This cannot, and must not, be accomplished by giving a broad interpretation to the existing law. To do so would be to grant a licence to the authorities involved to act outside of the proper guidelines of the law allowing for injustices to occur and civil liberties to be violated. This in my view can never be acceptable no matter what working frustrations may arise. The law cannot operate properly, particularly when it comes to issues of enforcement and detention, on the basis of convenience.

23. As a consequence of the foregoing findings above, I rule that the issuing of a Writ of Habeus Corpus was granted and that the detaining of the minor Plaintiff by the Commissioner of Prisons was unlawful. I further find that the Director or Child and Family Services was complicit in the unlawful detention of the minor Plaintiff TF by misapplication or disregard for the requirements of The Children Act 1998.

24. Costs for the Plaintiff.

Dated 3 May 2019

MARK PETTINGILL
ASSISTANT JUSTICE