In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015: No. 154

IN THE MATTER OF AN APPLICATION PURSUANT TO SCHEDULE 2, SECTION 15(1) OF THE BERMUDA CONSTITUTION FOR A BREACH OF SCHEDULE 2, SECTIONS 1, 3, 6 & 12

BETWEEN:

(1) J

(2) S

Applicants

-v-

(1) THE ATTORNEY GENERAL

(2) THE DIRECTOR OF PUBLIC PROSECTIONS

Respondents

JUDGMENT

(in Court)[1]

Date of hearing: December 2, 2015

Date of Judgment: January 20, 2016

Mr. Saul Dismont, Marshall Diel & Myers Limited, for the Applicant

Ms. Shakira Dill-Francois, Deputy Solicitor-General, for the Respondents

[1] To save costs, the Judgment was circulated without a hearing to hand down judgment.

Introductory

1. The present applications arise from unrelated charges brought against each Applicant in the Magistrates' Court when they were 17 and 16 years of age, respectively. Their counsel contended in each case that their constitutional rights were being infringed through charging them in an adult court. In each case, the proceedings were adjourned in the Magistrates' Court in accordance with section 15(3) of the Bermuda Constitution. An Originating Summons seeking the same relief was issued by the Applicants on April 27, 2015.

2. The Applicants seek the following substantive relief:

    (1) "*A declaration that the Plaintiffs' constitutional rights have been violated*";

    (2) "*A declaration that S.2(1) and S.9(1) of the Young Offenders Act is unconstitutional*";

    (3) "*A declaration that S.2(1) of the Young Offenders Act should be amended to read:*

        '"child" means a person under the age of eighteen years';

    (4) "*Alternatively, a declaration that S.9(1) of the Young Offenders Act should be amended to read:*

        "A Family Court shall have and exercise jurisdiction in accordance with this Act, to hear and determine in a summary manner a charge of any offence preferred against a child or a young person".

3. The legal complaint can be shortly stated. The Young Offenders Act 1950 makes provision for children to be tried before the Family Court (formerly known as the Juvenile Court). However, it defines children as persons under the age of 16 years old. This definition is inconsistent with the Children Act, which defines a "child" as a person under the age of 18 years old. It is also inconsistent with the definition of "child" in the United Nations Convention on the Rights the Child 1989 ("UNCRC") and the United Nations Minimum Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules").

4. The Applicants complain that being deprived of the opportunity to appear before the Family Court contravened their rights under sections 1(a), 3, 6 and 12 of the Constitution. The Respondents submitted that none of the said constitutional provisions were engaged and that it was not legally possible to directly enforce the international treaties relied upon under domestic law. The constitutional complaints were not developed or supported by any directly relevant authority in the Plaintiff's Skeleton Argument and so, from the outset seemed to lack substance. On the other hand, the complaint that Bermuda domestic law is inconsistent with the UNCRC seemed fundamentally sound.

Legal findings: the relevant statutory provisions

5. Under section 2(1) of the Young Offenders Act 1950 " *'child' means a person under the age of sixteen years… 'young person' means a person who has attained the age of sixteen years but is under the age of eighteen years*."

6. Section 6 prohibits imprisoning a child altogether but restricts the right to imprison young persons in the following manner:

> "*6(1) No court shall impose imprisonment on a child.*
>
> *(2)No court shall impose imprisonment on a person who (though not a child) is under the age of eighteen years unless the court is of the opinion that no other way of dealing with him is appropriate; and for the purpose of determining whether any other way of dealing with any such person is appropriate the court shall obtain information relevant to the circumstances of the offence of which he has been convicted and such information as can with reasonable expedition be made available to the court relevant to his character, environment and antecedents and to his mental and physical condition, and the court shall take into account any information so obtained and any other information before the court which is relevant to the matters aforesaid.*
>
> *(3)Where a court of summary jurisdiction imposes imprisonment on a person under the age of eighteen years the court shall state the reason for its opinion that no other way of dealing with him is appropriate and shall record the reason in the judgment of the court and in the record book required to be kept under section 22 of the Summary Jurisdiction Act 1930.*"

7. Section 9(1) of the Young Offenders Act provides as follows:

> "*(1)A Family Court shall have and exercise jurisdiction in accordance with this Act, to hear and determine in a summary manner a charge of any offence preferred <u>against a child</u> except—*
>
> *(a) a charge of murder; or*

(b) a charge of attempted murder; or

(c) a charge of manslaughter; or

(d) in the case of a girl, a charge of infanticide;

(e) *and no charge of any offence preferred against a child, except a charge of murder or a charge of attempted murder or a charge of manslaughter or a charge of infanticide, shall be heard or determined by any court other than a Family Court.*" [Emphasis added]

8. The 1950 Act clearly discriminates between minors under the age of sixteen and minors of sixteen years and older in that the two categories are dealt with differently with more favourable treatment being afforded to the younger age group. In the Children Act 1998, section 2(1) provides that "*'child' means, except in Part IX, a person who is under the age of 18 years*". Apart from that part of the Act dealing with day care and pre-school age children, the 1998 Act treats all persons under the age of 18 as children. The age of majority was reduced from 21 to 18 by the Age of Majority Act 2001.

9. The Children Act formulates the welfare principle in a way which only has significance for the application of that Act:

> "*6.In the administration and interpretation of this Act the welfare of the child shall be the paramount consideration.*"

The International Treaty provisions

10. Mr Dismont referred the Court to the following key provisions of the UNCRC which it was common ground had been entered into on Bermuda's behalf by the United Kingdom Government:

(1) Article 1: "*For the purposes of the present Convention, a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier*";

(2) Article 3: "*1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures…";

(3) Article 40: "*1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.*
2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

…

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

…

(vii) To have his or her privacy fully respected at all stages of the proceedings."

11. The Applicants' counsel also referred to the following provisions of the Beijing Rules:

> "*2.2 For purposes of these Rules, the following definitions shall be applied by Member States in a manner which is compatible with their respective legal systems and concepts:*
>
> *(a) A juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult;…*"

12. It is clear that as a matter of international law, all minors should be treated as children and given commensurate protections when they are charged with criminal offences, without discrimination based on age. However, as Ms Dill-Francois submitted in reliance upon, *inter alia*, the observations of Diplock LJ (as he then was) in *Saloman-v-Commissioners of Excise* [1966] 3 All ER 871 at 875, "*the treaty, since in English it is not self-operating, remains irrelevant to any issue in the English courts until Her Majesty's Government has taken steps by way of legislation to fulfil its treaty obligations.*"

13. Some 50 years later, it is no longer accurate to say that international treaty obligations are "irrelevant". They may be relevant as an aid to construction (the presumption that Parliament does not intend to legislate inconsistently with Her Majesty's international obligations). Such treaty obligations may also give rise to a legitimate expectation that the Executive will not act in a manner inconsistent with treaty obligations the Executive has itself assumed. But in general terms, a breach of international treaty obligations, in and of itself, cannot be remedied under domestic law.

Findings: breaches of constitutional rights complained of

Sections 1(a) and section 12

14. Section 1 of the Bermuda Constitution merely has declaratory effect (*Attorney-General-v-Grape Bay Ltd* [1998] Bda LR 6, Kempster JA at pages 16-17) and section 12 does not prohibit discrimination on the grounds of age, as Ms Dill-Francois rightly submitted. Age discrimination in the provision of goods and services is, of course, prohibited by the Human Rights Act 1981 (section 5(1)), but that is an entirely different legal complaint of uncertain merit which falls outside of the scope of the present constitutional proceedings. These limbs of the Applicants' claim accordingly fail.

Section 3

15. Section 3 of the Bermuda Constitution provides as follows:

> "*No person shall be subjected to torture or to inhuman or degrading treatment or punishment.*"

16. At first blush, the suggestion that this provision would be infringed by subjecting a minor between the ages of 16 and 18 to trial in an adult court seemed surprising. The Deputy Solicitor-General submitted that these facts would not reach the requite threshold by reference to an authority on article 3 of the European Convention on Human Rights ("ECHR"), from which section 3 of the Bermuda Constitution is clearly derived. Mr Dismont accepted that the test relied upon by the Respondents was the correct one, but insisted that the requirements were met by the adult court trials which the Applicants faced in the present case. In *Adam, R (on the application of)-v-Secretary for the State for the Home Department et al* [2006] 1 AC 396, Lord Hope opined at follows (at paragraph [54]):

> "*54. But the European Court has all along recognised that ill-treatment must attain a minimum level of severity if it is to fall within the scope of the expression 'inhuman or degrading treatment or punishment': Ireland v United Kingdom (1978) 2 EHRR 25, 80, para 167; A v United Kingdom (1998) 27 EHRR 611, 629, para 20; V v United Kingdom (1999) 30 EHRR 121, para 71. In Pretty v United Kingdom 35 EHRR 1, 33, para 52, the court said:*
>
> > *'As regards the types of 'treatment' which fall within the scope of article 3 of the Convention, the court's case law refers to 'ill-treatment' that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall*

within the prohibition of article 3. The suffering which flows from naturally occurring illness, physical or mental, may be covered by article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible.'

It has also said that the assessment of this minimum is relative, as it depends on all the circumstances of the case such as the nature and context of the treatment or punishment that is in issue. The fact is that it is impossible by a simple definition to embrace all human conditions that will engage article 3."

17. Mr Dismont persuaded me that, if one construes section 3 in a broad and purposive manner, it would be wrong to conclude that the trial of a minor in an adult court could never give rise to a valid complaint of cruel or degrading treatment. Whether or not section 3 was engaged would depend on a combination of factors which would vary from case to case. Relevant considerations would likely include:

    (a) the unique characteristics of the minor accused and the existence of any abnormal developmental, emotional and/or psychological features; and

    (b) the manner in which the trial was conducted, including issues like publicity and the length and nature of cross-examination and/or the proceedings as a whole;

    (c) where the minor accused was particularly vulnerable, what steps were taken to mitigate the relevant vulnerabilities.

18. However, I am bound to reject the complaint that the provisions of the Young Offenders Act 1950 which require a "young person" to be tried in the Magistrates' Court are on their face inconsistent with section 3 of the Constitution. Nor has it been shown that the Applicants have any unique personal characteristics which a Magistrate could not adequately accommodate through sensible case management so that, on the facts of their respective cases, the pending trials would inevitably involve a breach of section 3 of the Constitution.

Section 6

19. Section 6 of the Bermuda Constitution provides so far as is material as follows:

    "*(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.*"

20. In his oral argument, Mr Dismont added flesh to the bare bones of the section 6 complaint by reference to *R (HC)-v- Secretary of State for the Home Department* [2013] EWHC 982. This case indirectly supports the general proposition that a failure to adequate measures in the criminal trial process to mitigate the vulnerabilities of a child may give rise to a breach of article 6 of the ECHR upon which our own section 6(1) is based. The case did not directly concern article 6 of the ECHR and addressed

pre-trial interview procedures. Moses LJ merely mentioned article 6 in passing in the following passage upon which the Applicants' counsel relied:

> "*93.Even though I need not decide whether Article 6 is engaged, both Durham Constabulary and Panovitz explain the proper approach of the criminal justice system to children. Within the scope of special protection which a criminal justice system ought to provide come those who have not yet reached the age of 18. The focus for 17 year olds, as s.37 of the Crime and Disorder Act 1998 recognises, should be on prevention and diversion, which exemplify the welfare-based approach to juvenile offending (see Baroness Hale at paragraphs 28-30 of Durham Constabulary). If 17 year-olds are treated as adults, the police retain the right, as in this case, to refuse contact between such a 17 year-old detainee and his parent or appropriate adult. This is hardly a promising introduction for a 17 year-old to the criminal justice system. It merely reinforces the 17 year-old's vulnerability in the face of an intimidating criminal justice system. It undermines the very purpose the youth criminal justice system is designed to achieve.*"

21. These observations amount to a judicial criticism of the failure of the Legislature to treat young offenders differently from adults, not a finding that the legislative provisions providing for older children to be tried as adults are inconsistent with article 6 on their face. The correct legal analysis appears to be that to ensure compliance with article 6 (or section 6), the criminal process must generally take into account the vulnerabilities of a non-adult offender to a sufficient extent. This conclusion is supported by the preceding paragraph in the judgment of Moses LJ in *HC* upon which Ms Dill-Francois referred to in the course of argument:

> "92. *The decision of the first section of the European Court of Human Rights in Panovitz v Cyprus (Application No. 4268/04) 11 December [2008] 27 BHRC 464 is authority for that proposition. The accused was 17. The Court said:-*
>
> > *'67. The court notes that the applicant as 17 years old at the material time. In its case law on Article 6 the court has held that when criminal charges are brought against a child, it is essential that he be dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities and that steps are taken to promote his ability to understand and participate in the proceedings (see T v The United Kingdom [GC No 24724/94] 16 December 1999 paragraph 84). The right of an accused minor to effective participation in his or her criminal trial requires that he be dealt with due regard to his vulnerability and capacities from the first stages of his involvement in a criminal investigation and, in particular, during any questioning the police. The authorities must take steps to reduce as far as possible his feelings of intimidation and inhibition (see mutatis mutandis T v The United Kingdom cited above, paragraph 85) and ensure that the accused minor has a broad understanding of the nature of the investigation, of what is at stake for him or her…it means that he or*

she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said by the arresting officer and during his questioning by the police…(ibid.)"

22. So, as in the case of the section 3 complaint, I am bound to find that the provisions of the Young Offenders 1950 requiring 16 to 17 year olds to be tried in the Magistrates' Court are not inconsistent with section 6 on their face. Nor is there any basis for concluding on the facts of the present case that the pending trials will inevitably be unfair to the Applicants to so great an extent as to entail a contravention of section 6 of the Constitution.

23. The authority relied upon by the Applicants' counsel highlighted the importance of ensuring that pre-trial interview procedures were fair to older children arrested pending charge in an adult court. What the Bermudian practice was in this regard under the Police and Criminal Evidence Act 2006 was unclear. The Deputy-Solicitor-General helpfully supplied supplementary submissions and further evidence (from Inspector Peter Stableford, Custody and Property Officer) which indicated that the position in law and practice is as follows:

    (a) Code C (under the Police and Criminal Evidence Act 2006) is not yet in effect but only requires children under 17 to be interviewed with an adult, consistent with the position under the Judges' Rules;

    (b) in practice even seventeen year olds will in most cases be interviewed in the presence of an adult, as will younger children.

24. It seems clear that not only is the Young Offenders Act inconsistent with the UNCRC; the formal interview rules (if not the practice) are inconsistent as well. On the other hand, it appears to be the case that genuine efforts are being made by the Police in practice to recognise the generic vulnerabilities of all children in the UNCRC sense at the custody and interview stage of the criminal process.

Conclusion

25. It follows that, although the Applicants have demonstrated the important point that their trials in the Magistrates' Court will be inconsistent with the UNCRC, they have failed to establish that the statutory provisions requiring them to be so tried will on the facts of their respective cases contravene their rights under the Bermuda Constitution. Nor have the statutory provisions complained of been shown to conflict on their face with either sections 1, 3, 6 or 12 of the Bermuda Constitution.

26. Mr Dismont did succeed in demonstrating that there is a potential risk for children between 16 and 18 on trial in the Magistrates' Court, if tried altogether as if they were adults, to be deprived of their constitutional fair trial rights under section 6 of the Constitution. The Applicants have alternative means of redress as regards any potential conflict between their pending adult trials and their constitutional rights through enforcing the Magistrates' Court's common law duty to ensure that their criminal trials are fair. How the proceedings in relation to a minor are conducted in any adult court are always subject to modification to ensure that the trial is fair. That

such accommodation ought in principle to take place may not have been formally judicially acknowledged previously under Bermudian law.

27. Granting relief in respect of a breach of constitutional rights which can potentially be avoided by deploying provisions of the general law would be premature. Section 15(2) of the Constitution obliges this Court to grant relief for contraventions of Chapter 1 rights subject to the following proviso:

> "*Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.*"

28. Although this point was not canvassed in argument, it is also possible that the Applicants have an arguable case for contending that the impugned provisions of the Young Offenders Act 1950 discriminate against them as minors on the grounds of their age and are accordingly inoperative because they conflict with the Human Rights Act 1981. Section 5(1) of the Human Rights Act prohibits age discrimination in the provision of "*services*". It also provides that the Human Rights Act has, subject to express contrary provision, primacy over other legislation (section 30B) and empowers this Court to declare inconsistent statutory provisions to be inoperative (section 29): *Bermuda Bred Company-v-Minister of Home Affairs* [2015] SC (Bda) 82 Civ (27 November 2015).

29. An application for such Human Rights Act relief on two novel points (age discrimination and Court services as "services" within section 5 of the 1981 Act) do not merely lie beyond the scope of the present proceedings. The merits of such alternative arguments are too uncertain to justify the Court taking the exceptional case management step of directing their resolution in the context of the present proceedings.

30. The Applicants are legally aided. Unless any party applies by letter to the Registrar within 21 days to be heard as to costs, no order shall be made as to the costs of the present application.

Dated this 20th day of January 2016 _____
IAN RC KAWALEY CJ