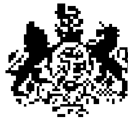

In The Supreme Court of Bermuda

CIVIL JURISDICTION

2009: 335

DEPARTMENT OF CHILD AND FAMILY SERVICES

Applicant

-v-

THE FAMILY COURT

Respondent

REASONS FOR DECISION

(In Court)

Date of Hearing: February 9, 2010
Date of Reasons: February 12, 2010

Mr. Leighton Rochester, Ms. Miriam Rogers
and Ms. Wendy Greenidge, Attorney-General's
Chambers, for the Applicant

Ms. Venous Memari, Christopher E. Swan & Co,
for the Respondent

Mr. Shawn Crockwell, Mello Jones & Martin,
for the Interested Parties

Introductory

1. On February 9, 2010, I refused the Applicant's application for an order of certiorari to quash a decision of the Family Court (Worshipful Juan Wolffe, Chair) dated July 16, 2009. The impugned decision (a) directed the Applicant to complete a Guardian Ad Litem report for the Interested Parties' adoption application by July 31, 2009, alternatively (b) use an existing Home Study report to complete the Guardian Ad Litem report by August 12, 2009, in default of which the Applicant was required to show cause why its officers should not be held in contempt of court. Since obtaining leave to judicially review the Order and an interim stay on August 12, 2009, the Applicant had admittedly taken no steps to complete the relevant reports.

2. I indicated that I would give reasons for my decision later and hear counsel as to costs when such reasons were given. In the course of the hearing a wide array of factual and legal issues were alluded to which I do not propose to resolve as to do so might interfere with the due conduct of the pending adoption proceedings before the Special Court.

3. The effect of the refusal of the present application is that the July 16, 2009 Order stands save that the parties can reasonably expect that the Family Court will (having regard to the stay I granted herein on August 12, 2009) set a fresh deadline for compliance with paragraphs 1 and 2 of its original Order.

The background to the July 16, 2009 Family Court Order

4. In June 2008 the Interested Parties (who are not Bermudian) adopted an infant child in Cambodia and obtained permission for the child to reside with them in Bermuda from the Department of Immigration. Prior to so doing, they had sought but not obtained the assistance of the Applicant, which apparently took the view that Bermuda should follow the British approach of not permitting children adopted in Cambodia to enter this jurisdiction. Bermuda currently has no operative legislative framework corresponding to the British legislation prohibiting the bringing of children adopted in Cambodia into the United Kingdom.

5. In any event, after the adoption took place, the British Embassy in Cambodia and the then Governor in Bermuda facilitated the child's leaving Cambodia with the adoptive parents to reside in Bermuda, seemingly transiting through the UK.

6. In or about January, 2009, the Interested Parties commenced adoption proceedings in the Family Court. The matter was first heard on April 29, 2009 when an unrealistically short timetable previously set for the production of the Guardian ad Litem report was cancelled, and the adoption hearing was fixed for May 29, 2009. It seems that at this initial directions hearing, Mr. Crockwell suggested that the Home Study Report prepared by a Florida-based agency recommended to the parents by the Applicant could, to save time, simply be used as a basis for the Guardian Ad Litem report. As Ms. Memari rightly submitted, the Adoption Rules 1964 made under the Adoption Act 1963 spell out in great detail what the statutory report must contain, so the existing report can be used as a substantial resource to abbreviate the compilation process. However, the Court below deferred to the Department's desire to prepare their own report and adjourned the hearing until May 29, 2009 based on the Applicant's representation that the reports could be prepared within four weeks.

7. Having received further representations from the Court Social Worker by letter dated May 4, 2009 about, *inter alia*, (a) the inappropriateness and lack of independence of the Home Study reports prepared by a US-licensed social worker employed in Bermuda and dated December 27, 2007 and April 21, 2009, respectively, ("the Chan Report") and concerns about the UK law position, the matter was next heard on June 1, 2009. On June 1, the Applicant indicated that a further 6-8 weeks would be required. The Family Court extended the deadline for service of the Home Study and Guardian's Report to July 14 in advance of an adoption hearing on July 16, 2009.

8. Shortly before the second supposedly effective hearing date, and after being chased by the Department to produce the report, the adoption worker assigned on or about June 9, 2009 to prepare the report first contacted the Interested Parties. At the July 16, 2009 hearing, a proposed schedule of visits was running into August placed before the Court which still gave no indication of when the report would be completed. It was against this background that the Family Court ordered as follows:

> "*1. That the Director of Child and Family services (the "Director") and/or Ms. Elaine Charles and/or any person assigned by the Director shall file and serve a Guardian Ad Litem Report on or before the 10th day of August 2009. In default of filing and serving the said Guardian Ad Litem report the Director, Ms. Charles or any person assigned by the Director to produce the Guardian Ad Litem*

report shall be immediately brought before the court to show cause why they should not be held in contempt of a court order.

2. That the Home Study Report shall be completed on or before the 31st day of July 2009, and if not the home study report produced by Dr. [sic] *Paul Chen* [sic] *dated the 28th day of December 2007 on behalf of the Florida Home Studies and Adoption, Inc., shall be used as the basis of the said Guardian Ad Litem report.*

3. That the Adoption Hearing shall take place on the 17th day of August 2009 at 9.30 a.m. in Court No.3…"

9. The Reasons for Ruling stated as follows:

"**Ruling**

May we say from the outset that we have a great deal of sympathy for the Applicants… who virtually have had to put their life and that of [the child] *on hold for what on the surface is a straightforward adoption application.*

Put simply, the history of the matter is absolutely pathetic, and it has never been through any fault of the Applicants. We are extremely perplexed as to why the Department of Child and Family Services has taken so long to process this matter and produce a Home Study and Guardian Ad Litem report. As far back as 29th April 2009 the DCFS has been aware of the necessity for a Guardian Ad Litem report to be done and if necessary a Home Study. We are of the opinion that the wheels could have been put into motion for a Home Study report and Guardian Ad Litem report from that date. In this regard, we do not accept Ms. Charles' apparent confusion as to what orders were made on a previous court appearance in respect of the production of the Guardian Ad Litem Report. This is underscored by the fact that on two separate occasions, 29th April 2009 and 1st June 2009 the court ordered that a Guardian Ad Litem report was to be done, and yet it is not done to date.

Further, we are of the opinion that the conduct of Ms. Apopa borders on being contemptuous. If Ms. Charles informed her of the urgency of this matter since 9th June 2009, then it begs the question: "Why did Ms. Apopa take until 10th July 2009 to contact the Applicants?" this is absolutely reprehensible and while we would not tell the DCFS what to do

one would think that they would hold her accountable for her dilatory conduct. After all, the parental status of a child is at stake.

Mr. Crockwell, given the history of this matter, is right to say that this matter should proceed today with the information that is presently before court. This is tempting but this court feels that it is inappropriate and inconsiderate to proceed to any adoption without sight of a Guardian Ad Litem report.

Effectively, this is the third time that this matter has been adjourned for hearing and this is totally unacceptable. In particular, the conduct of the DCFS is unprofessional and while we make no finding in this regard their conduct lends credence to Mr. Crockwell's submissions that they are intentionally thwarting and frustrating this adoption process. This, if true, goes to the very heart of non-compliance with the proper administration of justice."

10. The strongly-worded terms of this Ruling undoubtedly contributed to the decision to seek judicial review.

Merits of the application to quash the July 16, 2009 Order

11. I concluded that the application for certiorari was arguable and granted leave and a stay of the Family Court Proceedings on August 12, 2009 without a hearing. The materials before me did not include the Magistrates' Court record[1], upon which Ms. Memari addressed me so fulsomely at the eventual substantive hearing.

12. The grounds of the application may be summarized as follows: (1) error of law in failing to have regard to the failure to comply with the Department's procedures; (2) error of law in failing to take into account the time required to prepare the reports sought; (3) failure to take into account that granting the adoption order would contravene UK law; and (4) irrationality. Having read the parties'

[1] The urgency of the application no doubt made production of the Family Court record impracticable at the leave stage.

respective bundles before the hearing and heard Mr. Rochester's opening submissions it seemed to me that only Ground (2) had merit.

13. The impugned decision could not be said to unreasonable or irrational as it was a carefully crafted order made against a history of failure by the Department to meet its own deadlines which had been adopted by the Court. Ground (3) relating to a legal issue that could be raised at the effective hearing of the adoption application was not (according to the record) raised by the Applicant as an issue at either the June 1 or July 16 hearing. It is possible that, since the Applicant's letter of May 4, 2009 referred to legal advice being sought, the Family Court should have asked whether any legal points were likely to be taken at the June 1 hearing. But with no reference being made to legal points by July 16, 2009, the Court was entitled to assume that report preparation was the only outstanding issue.

14. Although it was obvious that this Court should always be slow to interfere with the exercise of case management powers in the Magistrates' Court, it seemed seriously arguable that the July 16, 2009 Order was wrong in principle in that it was seeking to place undue pressure on the Department in a matter where there was no evident pressing urgency. The Department and Mrs. Apopa, no doubt, have to service numerous clients of limited means who cannot hire lawyers to press for prompt reports. Based on the experience of this Court and social inquiry reports in child custody cases, it is not unusual for reports to take from three-six months to produce. Looking at the matter broadly, it initially seemed to me to be somewhat heavy-handed to effectively deprive the Department of the opportunity of completing its own independent reports when the time that had elapsed from the initial directions hearing on April 29, 2009 to July 16, 2009 was less than three months. Two key factors resulted in my concluding that the impugned order was not liable to be set aside.

15. Firstly, Ms. Memari's detailed analysis of the Family Court record made it clear that it would border on perverse to suggest that the Family Court had acted precipitously in making the July 16, 2009 Order. This is fundamentally because the Department itself was allowed to effectively set its own timetable on April 29 and June 1, 2009 and on July 16 was for a third time asking the Court to adopt its proposed timetable for report preparation and completion. In addition, no meaningful progress had been made at all between June 1, 2009 and July 16, 2009. This was against a background of the Court rejecting Mr. Crockwell's submission on April 29 that no practical need for a fresh report existed.

16. Secondly, Mr. Crockwell submitted that the Department had taken the wrong approach to the application and had been obstructive when first approached by the parents for support in relation to the Cambodian adoption application in 2007. The Learned Magistrate had been correct to rule on July 16 that the application was a simple one because it was not a first-time adoption case and the infant was in Bermuda and had been living with the Interested Parties for over a year. The notion that the adoption application was a simple one seemed inconsistent with what appeared to be an unusual background combined with a statutory framework which did not seem to explicitly contemplate applications designed in effect to domesticate a foreign adoption order[2]. This submission, however, became difficult to reject when Mr. Rochester in reply confirmed that in February 2010, almost a year after the Department was first charged with preparing the Guardian Ad Litem report and before its preparation had even begun in earnest, the Department had no specific concerns about either (a) the *bona fides* of the Cambodian adoption, nor (b) the suitability of the infant's parents.

17. This concession in turn brought into question whether any substantive concerns ever underpinned the Applicant's initial objections to (a) the appropriateness of the Chan Report and (b) the independence of the Chan Report. Unless the Department from the outset had reason to be concerned about the suitability of the Interested Parties as parents, the objections to the Chan Report were merely technical and lacking in any substantive merit. The Family Court on July 16, 2009 was confronted with a situation where, on the one hand, the adoption applicants had been submitting for over two months that their application should be dealt with summarily. Meanwhile, on the other hand, the Department, without justifying an extensive fresh home study inquiry by reference to even tentative suitability concerns, was asking for more and more time to pursue just such an inquiry. Although reference was made in a May 4, 2009 letter to the Court about seeking legal advice about the implications of the UK law position on recognizing Cambodian adoptions, this issue was not identified by the Department as a live issue when it appeared on June 1 and July 16. It is not immediately obvious to this Court what relevance the UK law position would have to an adoption under Bermuda law. In any event, the Department's representative did not raise such an inquiry as a ground for the delay.

---

[2] Section 14 ("Effect of adoption orders") does by virtue of the definition of "adoption order" in section 1 apply to foreign adoption orders and contemplates their recognition for some purposes, however. The present adoption application appears to be analogous to an application to enforce a foreign judgment to which no automatic reciprocal enforcement legislation applies.

18. The reasons for the July 16, 2009 order could perhaps have been expressed in more restrained terms, but it is impossible to fairly say that the approach adopted by the Court was wrong in principle. The language used in the Ruling was not inappropriate by general judicial standards even if it was arguably not conducive to promoting the sort of collegial and harmonious working relations required between Family law judges at all Court levels and the Court Social Worker and the Department. The suggestion that Mrs. Apopa was guilty of conduct bordering on contempt of court was of questionable merit as Mrs. Apopa does not appear to have ever appeared before or had direct communications with the Court. On the application for leave to seek judicial review, this Court was not given a comprehensive explanation of the history behind the July 16, 2009 Order. There is no evidence that when Mrs. Apopa was asked to prepare a Home Study Report in June 2009 that she was told by those instructing her that if she did not report by the next Court date that she would be in breach of a Court order.

19. The complaint that the Family Court erred in law by failing to take into account the amount of time fairly required for the preparation of the relevant reports, failed for one fundamental reason. There was no proper basis for concluding, having regard to the nature of the application before the Court and the antecedents of the Bermuda adoption application, that more time was reasonably required than the July 16, 2009 Order provided to complete what was essentially a "connect the dots" report. The only matter which to my mind potentially required serious analysis by the Department (based on the material before me and the Court below) was the question of whether or not the generic concerns about Cambodian adoptions reflected in UK legislation had any application to the present specific case. The UK ban on bringing children adopted in Cambodia to the UK appeared to have been based on concerns that the Cambodian authorities could not be relied upon to take appropriate safeguards to prevent, at worst, child trafficking, and at best adoptions where the requisite parental consents were duly received. One can imagine that the UK child welfare authorities were reluctant to assume the potentially onerous responsibility of vetting potentially large numbers of applications to bring children adopted from countries with weak child protection frameworks into the UK.

20. If the Department was influenced by similar concerns, the principal risk to be mitigated was not that the Interested Parties might be exposed as unfit parents. They already had another child, had been living in Bermuda for a number of years and (at first blush) were affording the child a far better standard of living and life opportunities than an orphan would likely have in a comparatively poor country. Although the Cambodian adoption was carried out through a Florida agency, the

Chan Report was prepared by someone resident in Bermuda and subject to the jurisdiction of the Bermuda courts. The Applicant admits that it supplied the name of Florida Home Studies and Adoption Inc. to the father as a licensed agency which had assisted other couples in Bermuda to adopt from overseas. The most cogent potential concern ought to have been that the Cambodian adoption might be revealed to have been a sham, or potentially a sham because of, for instance, the orphanage the parents adopted through was under investigation for child trafficking.

21. Yet on the face of the position before the Family Court in the proceedings under consideration, such potential concerns would not have seemed on their face to be serious ones because: (a) the Department of Immigration had approved the entry of the child into Bermuda, and (b) the British Embassy in Cambodia and the then Governor of Bermuda had both formally facilitated the child's entry to Bermuda as the adopted child of the Interested Parties. Having regard to the presumption of regularity in relation to official acts, positive evidence would be required to support the contentions that (a) the child's entry into Bermuda was contrary to Bermudian and/or British law, and/or (b) that there was a real risk that the Cambodian adoption was a sham.

22. The evidence made it clear that the language used in the Ruling caused the Court Social Worker and the Department understandable offence. But this criticism did not vitiate the validity of an Order essentially designed to give effect to the Interested Parties' right to have their civil rights and obligations afforded a fair hearing within a reasonable time under section 6(8) of the Bermuda Constitution. The Department's conduct of the Guardian Ad Litem Report assignment appeared to be drifting in an unfocussed manner with no clear end in view, and the Family Court was entitled to make the Order it did with a view to imposing discipline on the proceedings before it in which the adoption applicants were incurring the expense of legal representation and, no doubt, anxiety at a series of unexpected delays.

23. It was not sufficient for Mr. Rochester to persuade me that I might have dealt with the July 16, 2009 hearing in a rather more nuanced and less peremptory manner. The relevant judicial discretionary decision would only be liable to be quashed on the grounds of procedural irregularity in circumstances where this Court was able to identify a material error of law or principle affecting the substance of the impugned Order. No such error was established to my satisfaction.

Discretion to grant relief

24. When dismissing the present application on February 9, 2010, I also indicated that if I was wrong in my primary finding, I would in any event decline in the exercise of my discretion to quash the July 16, 2009 Order. The present application was indistinguishable from an ordinary civil appeal against an interlocutory order made in the Magistrates' Court and was only necessary because the Adoption Act 1963 does not provide for interlocutory appeals[3]. However, where a statutory procedural code permits certain categories of decisions to be appealed but not others, the discretion to grant public law relief should clearly be exercised both (a) more sparingly than in the appellate context, and (b) more cautiously than where Parliament has omitted to prescribe rights of appeal altogether.

25. Yet even when reviewing the case management decisions of a trial court in the more liberal appellate domain, a reviewing court must be slow to encourage litigants to believe that they can obtain tactical advantages by pursuing interlocutory appeals which are technically arguable but which have no substantive merit. In this regard, the conduct of an interlocutory appellant during the period after a stay pending appeal has been obtained and the date of the hearing of the appeal will often be of pivotal significance to the disposition of the substantive appeal.

26. For example, an interlocutory appeal might be lodged against an unless order made in the Magistrates' Court providing that unless a delinquent defendant filed a defence within 14 days the plaintiff would be entitled to enter judgment, refusing the defendant's application for an extension of time (e.g. 28 days) within which to file a defence. The appellant would typically seek a stay pending appeal and in the meantime perfect and serve a draft defence within 28 days which would be used on appeal to demonstrate if the extension of time application had been granted in the trial court, the defendant would indeed have been able to serve a pleading disclosing an arguable defence. If by the time the appeal came on for hearing six months had elapsed, the defendant had failed to prepare a defence and was seeking a further 28 days to serve his defence if the appeal was allowed, the relevant appeal would most likely be summarily dismissed as an abuse of the

[3] A decision to waive a statutory consent may be appealed by the person whose consent was not required however: section 12(ii).

process of the Court. The present application is analogous to such an interlocutory appeal.[4]

27. In the present case, leave to seek judicial review and a stay of the July 16, 2009 Order was granted on August 12, 2009, the fundamental complaint being that the Family Court was putting undue pressure on the Department to complete its report within an unreasonably short time. The other complaints about the personal offence caused by the reasons given for the Order and the pre-application "irregularities" had little or no bearing in legal terms on the present judicial review application. If the Department of Immigration failed to consult the Applicant when approving the child's entry into Bermuda, this may well have caused personal offence to the officers in the Applicant Department. But offending public officers' professional pride is not a ground of judicial review.

28. If there are substantial legal grounds for opposing the adoption application on its merits, then an alternative remedy exists of advancing the relevant arguments at the appropriate time in the Court below. If the Department wishes to promote formal policies based on legislation similar to that enacted in the UK pursuant to the Convention on Protection of Children and Cooperation in respect of Intercountry Adoption 1993, it may lobby within Government to have this Convention extended to Bermuda and have appropriate legislation passed[5]. If the Department is concerned about the timelines imposed by the Courts for the production of reports[6], it can in consultation with the Judiciary establish suggested standard timetables for the production of various categories of reports. If the Department is concerned about the propriety of judicial criticisms of its officers, these can be taken up with the relevant Judge or the Chief Justice[7].

29. However, the Department cannot abdicate its statutory duty to assist the Family Court under the 1963 Act[8] because of concerns (no matter how legitimate) which have no significant bearing on the merits of the specific application before the

---

[4] Coincidentally, the Applicant's written submissions were accidentally styled "*Skeleton argument of the **Appellant***" (emphasis added).

[5] It appears the Convention has only been extended to the Isle of Man, but not other British territories.

[6] In the present case, it seems clear from the record that prior to July 16, 2009, the Family Court very fairly accepted the timelines indicated by the Department itself.

[7] Or, in the case of a Magistrate, the Senior Magistrate.

[8] Technically it may well be that the Minister ought to have been appointed as Guardian Ad Litem.

Court. In all proceedings relating to children, the welfare of the child is paramount: Minors Act 1950, section 6. The Department is of course well aware of this and its officers (notably the Court Social Worker, this Court's main point of contact) ordinarily discharge their difficult duties in a professional manner without wholly unreasonable delays. For my part, the present case appears to have an exceptional history which appears to have generated an exceptional response on the Department's part.

30. It is correct that the stay which I granted on August 12, 2009 was in relation to "all proceedings", expressed in standard judicial review terms. But it is well recognised that the purpose of such a stay is to prevent the impugned decision being implemented before the judicial review application is heard, or "*preserving the status quo until the full hearing.*": '*De Smith's Judicial Review*', 6th edition, paragraph 16-069. The decision under challenge was not a final order but an interlocutory direction that reports be prepared within a certain time, coupled with a penal clause. The present application did not challenge the legality of the decision to order the reports itself, but merely challenged the validity of the timetable imposed by the Family Court. The only legitimate function of the stay granted in present context was to protect the Department's officers and/or agents from being held in contempt for failing to meet a deadline this Court might find to have been unlawfully imposed. It ought to have been obvious that the stay granted was not designed to bring the entire proceedings below to a grinding halt, including the process of report preparation. It was conceded that the Interested Parties did not refuse to cooperate with the Department after the present proceedings were on foot. If the Department wished to proceed with the reports but felt constrained by the stay, further directions could have been sought from this Court to allay such concerns.

31. The Department's inactivity over a period of nearly six months since the July 16, 2009 Order was stayed by this Court only compounded the delays the Family Court was seeking to remedy by the impugned order and accordingly constituted a misuse of the processes of this Court in its public law jurisdiction. For these alternative reasons, I ruled on February 9, 2010 that I would refuse to quash the July 16, 2009 Order even if the Applicant had established that Order was liable to be quashed on the grounds of procedural unfairness.

Conclusion

32. For the above reasons the Department's application for an Order of Certiorari quashing the decision of the Family Court directing it to complete its Guardian Ad Litem report by August 12, 2009 or show cause why the responsible officers should not be held in contempt was dismissed.

33. Unless any party applies to be heard as to costs within 28 days, I would award the Respondent and the Interested Parties their respective costs of the present application, to be taxed if not agreed, on an indemnity[9] basis.

Dated this 12th day of February, 2010 ______________
KAWALEY J

---

[9] Under the modern taxation scheme, awarding indemnity costs merely transfers the onus onto the paying party to prove the unreasonableness of any items he objects to.