Neutral Citation Number: [2023] CA (Bda) 2 Civ

Case No: Civ/2022/09

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

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 17/02/2023

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL SIR MAURICE KAY
and
JUSTICE OF APPEAL GEOFFREY BELL

- -

Between:

AB
(a minor, by their father and next friend)

Appellant

- and -

THE MINISTER FOR EDUCATION

Respondent

Mark Diel, Marshall, Diel & Myers, instructed by Peter Sanderson, Beesmont Law Group Ltd., for the Appellant

Shakira Dill-Francois, Deputy Solicitor-General, for the Respondent

Hearing date(s): 16 November 2022

- -

APPROVED JUDGMENT

KAY JA:

Introduction

1. The rapid spread of COVID 19 throughout the world led to the adoption of measures in many countries which were intended to contain the pandemic.

2. This case is concerned with measures taken in Bermuda by the Minister of Education ("the Minister") on the reopening of public schools in October 2021. He directed that all students and staff must take a pre-return PCR test prior to arriving for the start of term. A negative test was required of all students and staff before returning to school buildings. 80% of students were required to have had a negative pre-return PCR test result for a school to reopen. Any student not having a negative pre-return PCR test result would be required to remain at home and receive work packets until a negative PCR test was provided. These measures were promulgated not by way of primary or secondary legislation, but by executive decision.

3. In October 2021 AB was a 10-year-old student at Gilbert Institute, a public primary school. AB's parents disputed the legality of the Minister's measures; correspondence ensued. In the event, AB took a PCR test with a negative result. In his first affidavit, AB's father, states that the decision to submit AB to a PCR test, *"was certainly made under duress and the act of conceding to testing cannot be viewed as being freely or voluntarily made."* In these judicial review proceedings, the notice of application sought to challenge the decisions of the minister (i) to deny AB entry to the school unless AB was able to provide a negative test; and (ii) to keep public schools closed unless 80% of students have produced a negative PCR test. The application was heard by Hargun CJ and in a judgment handed down on 22 April 2022, he refused the application

The Basis of the Challenge

4. In a nutshell, the challenge is based on three propositions. First, the mandatory testing regime, which took the form of a self-administered but supervised saliva test amounted to a *prima facie* breach of AB's constitutional rights pursuant to section 7(1) of the Bermuda Constitution Order 1968 ("the Constitution") which provides:

> *"Except with his consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises."*

5. Section 7(2) permits searches carried out under the authority of any law that is reasonably required in the interests of, *inter alia*, public health or for the purposes of protecting the rights and freedoms of other persons, except so far as the thing done is shown not to be reasonably justifiable in a democratic society. Secondly, consent does not arise in this case, because AB was tested under duress. Thirdly, the Minister cannot invoke, "the authority of any law", which is reasonably required in the interests of public health, or for the purpose of protecting the rights and freedoms of other persons. It is conceded that it would have been open to him to impose this testing regime by appropriate primary or secondary legislation. However, that was not done, and the Minister's executive decisions, lacked lawful authority and/or fell foul of the principle of legality. I should

address the three stages of the case advanced on behalf of AB. In this court by Mr. Mark Diel, who has generously appeared *pro bono*, as did Mr. Peter Sanderson in the Supreme Court.

Is a PCR test a section 7 search?

6. I shall be frustratingly brief on this threshold issue. The Chief Justice relying on the Canadian authority of R v Diamond [1988] 2 SCR 417 and the decision of the European Court of Human Rights in *Schmidt v Germany* application number 32352-02 concluded (at paragraph 18) that a mandatory requirement to take a saliva COVID test can constitute a search within the meaning of Section seven one. I am bound to say that I am not wholly convinced about that. The authorities relied on were concerned with differently drafted provisions and it is not self-evident to me that a self-administered saliva test amounts to a "search" in the context of section 7, which is headed "Protection for Privacy of Home and other Property". However, the Minister has not sought to reopen the Chief Justice's conclusion on this issue, and we have not received detailed submissions about it. In the circumstances, we must proceed on the basis that at least for the purposes of this appeal, it is common ground that the testing regime engaged section 7.

Consent

7. The Chief Justice held that the saliva test did not constitute a breach of section 7 of the Constitution, because the "search", was consensual. After a detailed discussion, he said this at paragraph 41:

> *"In the circumstances and having regard to the facts that the policy in question (i) requires the students to either provide a saliva sample for COVID-19 test or receive their education remotely during the pendency of the COVID-19 pandemic or until conditions improve; (ii) the Education Act contemplates that compulsory education can be provided to students "otherwise" then attendance "at" public schools; (iii) the saliva test is not unduly invasive in that it is simply self-administered collection of saliva by the individual student concerned; (iv) is introduced, on the recommendation of the Department of Health, with the objective of (sic) not only to help reopen the schools safely but to keep schools open for the learning and well-being of all students; (v) recognises that having to quarantine due to COVID-19 is disruptive to learning, unfair to other students and staff and members of their households, it cannot reasonably be said that when the Applicant agreed to take the saliva COVID-19 tests, her consent was vitiated by duress. Given this finding, it is common ground that there can be no valid claim for infringement of the Applicant's rights under section 7(1) of the Constitution.".*

8. The submission on behalf of AB, is that in that passage, the Chief Justice concerned himself more with the rationality of the policy than with the issue of consent, in a case specific context.

9. In his first affidavit, AB's father referred to three aspects of "duress". First, AB has a history of anxiety for which she has received counselling which cause AB's father to consider that *"the additional anxiety caused by failure to return to school and forced remote schooling was detrimental to AB's health"*. Secondly, the quality of education provided by the remote schooling

initiative was *"far inferior to in person learning in school"*. Thirdly, AB's parents both have responsible jobs in financial services, which require their *"full time, attention"*, as a result of which they would not have time to act as daytime tutors or home school supervisors, and this, in turn, would impair AB's educational development. All this would mean that unless they subjected AB to the saliva test, they would have to move AB to a private school, employ a home tutor and/or take time off work. Such choices, it is said, vitiate the notion that this their eventual permitting AB to take the saliva test was truly consensual.

10. In support of this submission, Mr. Diel refers to *Cruikshanks v Stephen* 1992 CanLII 1929 (BC CA) in which an applicant for parole would have had to spend a further three years in custody if he failed to comply with a urine analysis regime. Upon his agreeing to be tested, he submitted that his agreement had not been consensual. The Court of Appeal for British Columbia accepted that submission. In the present case, the Chief Justice held that *Cruickshanks* was readily distinguishable on its facts. There was simply no comparison between the further three years in custody and a period of remote education during the currency of the COVID 19 pandemic, or until conditions improved. In my judgement, the Chief Justice was undoubtedly correct about that. In addition to the factual distinction, the Chief Justice took something else from *Cruickshanks*. The Canadian court when considering consent, or the lack of it, had taken into account the *"completely arbitrary way"* in which the urine analysis requirements operated, and the fact that it lacked, *"any rational basis"*. The only justification proffered of the court had been that the authorities *"needed a baseline to monitor future samples"*. Even that unimpressive rationale had not been explained to the prisoner at the time when he was confronted with his choice.

11. In the present case, the Chief Justice observed that the position here was very different because the Commissioner for Education and the Chief Medical Officer had explained the rationale pursuant to which the Minister had introduced the testing regime in the interests of staff and students. For my part, I am not persuaded that the reasonableness of the policy is material to the issue of consent. The most well intentioned and reasonable policy might be implemented coercively and without consent, if, for example, non-compliance was to be punished by penalties such as imprisonment, or ruinous financial penalties. Accordingly, I think the Chief Justice was wrong to feed the rationale of the policy into his consideration of consent, although it may be relevant to the separate issue of lawful authority. Nevertheless, I consider that his conclusion that consent was not vitiated by duress, in this case remains correct.

12. Mr. Deil submits that the uncertain provisions of the Education Act 1996 ("the 1996 Act") support his submission that true consent was not present in this case. Section 51(1) of the 1996 Act enacts an entitlement of all children to free education *"at an aided or maintained school"*. However, the use of the preposition *"at"*, does not guarantee that every incident of education will take place on school premises. Come what may, circumstances arise in which a child will receive some of his or her education at home. For example, collapse of a school building, ill health of a student or suspension for disciplinary reasons. Such circumstances may necessitate a period of remote learning. But the student would still be properly described as being educated *"at"* the particular school. Section 42 has provoked debate in this case. It imposes a duty on parents to cause children of compulsory school age *"to receive suitable education, either by regular attendance at a recognised school, or otherwise"*. The words *"or otherwise"*, acknowledge that there is a permissible alternative to regular attendance at a recognised school, for example, home-schooling.

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

Lawful authority if the lack of consent had been established

13. The next issue would have been lawful authority. In other words, was the testing requirements reasonably required in the interests of public health (or for the purpose of protecting the rights and freedoms of others)? Was it reasonably justifiable in a democratic society?

14. The Chief Justice found lawful authority in the provisions of the Occupational Safety and Health Act 1982 ("OSHA"), and also held that the testing procedure did not offend the common law principle of legality. Having heard full submissions, it is appropriate for us to address these issues, even though the appeal has failed to surmount the consent hurdle.

(i) OSHA sections 3(1) and 4

15. Section 3(1) of OSHA provide as follows:

> *"3(1) It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.*
>
> *…*
>
> *4(1) It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety."*

16. The case for the Minister is that section 3(1) provided lawful authority for the testing requirements in relation to public schools; and section 4(1) did so in relation to students. It is clear that this was not a litigation afterthought. It was the position articulated on behalf of the Minister in the Commissioner of Education's first letter to AB's father which is dated 8 October 2021, four days after he had questioned lawful authority in an email.

17. In the context of this appeal, I shall concentrate on section 4. Mr. Diel's first submission about OSHA is that its purpose and context are employment related and cannot be a source of legal authority in relation to the restriction of the constitutional rights of students. I do not accept that submission. Although the safety of employees is the primary focus of the legislation, section 4 is exclusively concerned with the health and safety of persons who are <u>not employees</u> of an employer, but who may be affected by the conduct of his undertaking. It imposes a duty to ensure so far as

is reasonably practicable, that such persons are not exposed to risks to their health and safety. Clearly the duty exists to protect, for example, customers, clients, service users and others who visit the employer's premises notwithstanding the fact that they are not employees. Secondly, in written submissions, reference was made to section 9(1) of OSHA which empowers the appropriate minister to make regulations *"requiring the making of arrangements to promote the health of persons at work, including arrangements for medical examinations and Health Surveys"*. The point sought to be made is this although some 356 regulations have been made pursuant to section 9(1), none has prescribed mandatory testing for infectious diseases.

18. That may be so but the context with which we are concerned is an unprecedented pandemic. It seems to me that section 4(1) is widely drafted so as to impose the duty to non-employees without categorical limit. It requires the person on whom the duty is imposed to conduct his undertaking, so as to ensure so far as is reasonably practicable, that non-employees are not exposed to risks to their health and safety. There was ample evidence before the court of the ways in which schools acted as vectors of COVID 19 infection. If the Minister had done nothing to contain the risks, he would no doubt have been vulnerable to liability under sections 3 and 4. In these circumstances, I consider that OSHA did provide the necessary lawful authority to act.

(ii) The principle of legality

19. The final submission in support of this appeal is that even if OSHA provides the envelope of lawful authority, the actual measures taken fell afoul of the principle of legality. This is a protean concept, but the written submissions in support of the appeal, referred to the decision of the United Kingdom Supreme Court in *The Christian Institute v The Lord Advocate* [2016] UKSC 51 where Lady Hale said at paragraph 79.

> *"In order to be "in accordance with the law" under article 8(2), the measure must not only have some basis in domestic law – which it has in the provisions of the Act of the Scottish Parliament – but also be accessible to the person concerned and foreseeable as to its effects. These qualitative requirements of accessibility and foreseeability have two elements. First, a rule must be formulated with sufficient precision to enable any individual - if need be with appropriate advice - to regulate his or her conduct: Sunday Times v United Kingdom (1979) 2 EHRR 245, para 49; Gillan v United Kingdom (2010) 50 EHRR 1105, para 76. Secondly, it must be sufficiently precise to give legal protection against arbitrariness:*
>
> > *"it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law … for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any discretion conferred on the competent authorities and the manner of its exercise. The level of precision required of domestic legislation - which cannot in any case provide for every eventuality - depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and*

> *status of those to whom it is addressed." Gillan v United Kingdom, para 77; Peruzzo v Germany (2013) 57 EHRR SE 17, para 35."*

20. So far as accessibility is concerned, parents were emailed by the Ministry of Education on 2 October 2021, informing them of the testing requirements. The email specified the date, time and place for the testing, contained some instructions and rehearsed the essential requirements including the 80% condition on the statement that *"any student not having a negative pre return PCR test will remain at home and receive work packets until a negative PCR test result is provided"*. It seems to me that that was sufficient in itself to satisfy the accessibility criterion. Although we now know from the Commissioner's third affidavit, which was filed after this case had left the Supreme Court (and which I would grant permission to the Minister to adduce as additional evidence), that the ministry also provided a website, which contained, *inter alia,* further details of the testing procedure and a copy of the consent form. I have no doubt that the procedure was *"formulated with sufficient precision to enable any individual – of use if need be, with appropriate advice – to regulate his or her conduct"*.

21. As to the issue of foreseeability, the Chief Justice considered that there was sufficient protection against arbitrariness. Mr. Diel advances a "floodgates submission" to the effect that without the use of primary or secondary legislation as the prescriptive instrument, there is a risk that OSHA could be always be deployed as a backdoor route to undermine civil rights and freedoms in all sorts of areas, e.g., road traffic, strip searches of school children, electronic surveillance. Even if that is a theoretical possibility it ignores the fact that in relation to each and every putative use of statutory powers, such as those contained in sections 3 and 4 of OSHA, a judicial review exists as a protection against arbitrariness. In the present case, I consider that the Chief Justice was correct to conclude that the testing requirement as formulated and applied was not arbitrary.

Conclusion

22. It follows from what I have said that I would dismiss this appeal.

BELL JA:

23. I agree

CLARKE P:

24. I, also, agree. The appeal is, therefore, dismissed.