NOTE: PURSUANT TO S 437A OF THE ORANGA TAMARIKI ACT 1989, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA608/2023
[2024] NZCA 52

BETWEEN	IAN ADAMSON First Appellant
	MS HENDERSON Second Appellant
AND	CHIEF EXECUTIVE OF ORANGA TAMARIKI Respondent

Hearing:	13 February 2024
Court:	Collins, Woolford and Mander JJ
Counsel:	Appellants in Person M W McMenamin and O Kiel for Respondent
Judgment:	11 March 2024 at 12.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B There is no order for costs.

REASONS OF THE COURT

(Given by Mander J)

[1] Ms Henderson's 13-year-old son, Ryan, is currently in the care of Oranga Tamariki as a result of orders made by the Family Court in March 2023.[1] Ms Henderson, with the assistance of the other appellant, Mr Adamson, applied for a writ of habeas corpus in respect of Ryan.[2] That application was declined by Grice J, who held the Family Court's orders were lawfully in place and that Ryan was not unlawfully detained.[3]

[2] The appellants appeal the High Court's decision. They allege the Family Court orders made in favour of Oranga Tamariki were invalid and that the Judge could not have been satisfied Ryan had been lawfully detained. Alternatively, they submit the habeas corpus application should have been transferred to the Family Court.[4] They further argue that Ryan has become subject to a further restriction on his liberty as a result of an ex parte restraining order granted by the Family Court that prevents Ms Henderson from having contact with her son.

Background

[3] Following a defended hearing in the Family Court, an order was made placing Ryan in the custody of the Chief Executive of Oranga Tamariki (the Chief Executive).[5] This final custody order replaced existing interim custody orders in favour of the Chief Executive, who was also appointed an additional guardian of Ryan under s 110 of the Oranga Tamariki Act 1989 (the Act). Both orders were made on the basis of a finding that Ryan was in need of care and protection.

[4] Ms Henderson appealed the Family Court's decision to the High Court.[6] The appeal was heard on 6 September 2023 with judgment reserved.

[5] On 18 September 2023, after a number of incidents that involved Ryan absconding from Oranga Tamariki care placements to Ms Henderson's home, an

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1 *Chief Executive of Oranga Tamariki v [Henderson]* [2023] NZFC 2167 [Family Court judgment].
2 Pursuant to s 437A of the Oranga Tamariki Act 1989, any report of these proceedings must comply with ss 11B, 11C and 11D of the Family Court Act 1980. The appellants' names and the child's name have been anonymised in this judgment, as they were in the High Court.
3 *Henderson v Chief Executive of Oranga Tamariki* [2023] NZHC 2766 [Judgment under appeal] at [16].
4 Habeas Corpus Act 2001, s 13(2).
5 Oranga Tamariki Act, s 101(1)(a); and Family Court judgment, above n 1, at [103(b)].
6 *Henderson v Oranga Tamariki* [2023] NZHC 3018 [High Court appeal judgment].

interim restraining order was made by the Family Court. The Court considered Ryan's psychological wellbeing was seriously at risk as a result of Ms Henderson's conduct and that it was necessary to prevent her having contact with Ryan until a family group conference could be convened and a new plan for Ryan formalised and approved.

[6] Prior to the High Court's delivery of its judgment on 30 October dismissing the appeal against the custody and additional guardianship orders, Ms Henderson and Mr Adamson made an application for habeas corpus in relation to Ryan. The refusal of that application is the subject of the current appeal.[7]

[7] Currently, there are a number of applications before the Family Court. These include applications by Ms Henderson to discharge the custody and additional guardianship orders, and to rescind the restraining order, together with a number of associated applications relating to the proceedings before that Court. There was some dispute between the parties regarding whether these applications have been set down for hearing, but they are plainly matters currently before the Family Court. Judge Moss, in a minute on 16 January 2024, noted the Court was awaiting the scheduling of a fixture for these applications.

The High Court's habeas corpus decision

[8] After reviewing the background to the Family Court's orders and observing the current matters presently before the Family Court, Grice J held the custody and guardianship orders to have been lawfully made.[8] The Judge rejected the applicants' argument that the current breakdown in the implementation of Ryan's plan meant the orders in favour of the Chief Executive were no longer lawful.[9] The Judge noted a new plan was being developed which would be put before the Family Court for approval and that a family group conference was to be convened for that purpose.[10] The application was therefore dismissed.

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7 Judgment under appeal, above n 3.
8 At [16].
9 At [12].
10 At [13].

[9] In respect of the submission that the habeas corpus application should be transferred to the Family Court, the Judge rejected that course. Her Honour observed that any such transfer would merely complicate matters currently before the Family Court and this would not be in the best interests of the child.[11]

Analysis

[10] In approaching her assessment of the habeas corpus application, the High Court Judge observed that custody orders will only be amenable to such a writ in rare circumstances.[12] However, the Chief Executive accepted, for the purposes of the Habeas Corpus Act 2001, that Ryan was detained by reason of the custody and guardianship orders made by the Family Court. We proceed on the basis of that acknowledgement.[13]

[11] The appellants made a number of arguments in support of a submission that the High Court had been wrong to find that Ryan was not the subject of an unlawful detention. We address each of those grounds and other ancillary arguments made by the appellants.

Validity of orders after plan had broken down

[12] Under s 128 of the Act, where a court proposes to make an order under s 101 placing any child or young person in the custody of any person or an order under s 110 appointing a sole guardian, a plan must be prepared that addresses the objectives sought to be achieved by the orders, the details of services and assistance to be provided, the responsibilities of various persons and the steps or changes sought to be made within stated timeframes.[14] Such a plan was before the Family Court when it made its orders in March 2023.

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11 At [14]–[15].

12 At [10], citing *H v Family Court at Tauranga* [2018] NZHC 3459, [2019] NZAR 344 at [5]; *Adamson v Chief Executive of Oranga Tamariki* [2022] NZCA 505 at [28]; and *DE v Chief Executive of Ministry of Social Development* [2007] NZCA 453, [2008] NZFLR 85.

13 *TWA v HC* [2016] NZCA 459, [2016] NZFLR 763 at [11]–[12]; and *O'Connor v Chief Executive of Oranga Tamariki* [2017] NZCA 617, [2018] NZAR 94 at [20] and [22].

14 Oranga Tamariki Act, ss 129 and 130.

[13] As previously argued before the High Court, it was contended by the appellants that, because the s 128 plan had broken down, the orders made by the Family Court were no longer valid. They submitted the existence of a workable plan was a prerequisite to the orders' continued validity. It followed, in the appellants' submission, that Ryan was now the subject of illegal detention.

[14] We do not accept the Family Court's orders in favour of the Chief Executive were invalidated as a result of this change in circumstances.

[15] While it is correct that before custody or guardianship orders could be made in favour of the Chief Executive a plan was required to have been prepared and approved in accordance with the Act, it does not follow that when difficulties arise in relation to the implementation of that plan the orders are no longer valid. We accept the submission made by the Chief Executive that the Act contemplates a cycle of review and reassessment of such plans in light of developments and changed circumstances. That process was reflected in the orders made by the Family Court in March 2023 that provided for the s 128 plan to be reviewed in June and for documentation to be filed to facilitate that process.[15]

[16] Difficulties have arisen regarding the implementation of the original plan. It is described as having "broken down", but that occurrence only highlights the need for this process of regular review and revision by the Family Court. It does not result in the orders becoming unlawful. This is clear from s 137 of the Act, which governs the Family Court's consideration of reports furnished in respect of the review of a plan prepared in relation to a child or young person. Section 137(5) explicitly provides that where such a report is furnished in respect of the review of any plan, any order that is in force relating to the child or young person shall, unless the court otherwise directs, continue in force until the court has determined what (if any) decision should be made with respect to that order. Both the custody and guardianship orders made in respect of Ryan by the Family Court remain in force.

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15 Family Court judgment, above n 1, at [105(d)].

Supposed doubt as to whether order is valid and lawful

[17] The appellants placed some reliance on the language used by the High Court Judge in her decision when prefacing her findings with the remark that "[i]t *appears* the orders in force are lawful and validly made".[16] The appellants submitted the Judge's use of the word "appears" indicated some unsureness or doubt as to the validity of the Family Court's orders and that insufficient enquiry had been made into the "matters of fact and law claimed to justify the detention".[17]

[18] We do not agree. The Judge likely couched her reasoning in those terms because, while s 14(2) of the Habeas Corpus Act requires a judge to enquire into the matters of fact and law claimed to justify the detention, such enquiry is only to the extent that the arguments at issue are "properly susceptible to fair and sensible summary determination".[18] As the Judge herself stated,[19] while the existence of a Family Court order is not of itself a conclusive answer to an application for habeas corpus, provided the validity of the order can be established, any challenges are likely more appropriately pursued by way of an appeal or judicial review.[20]

[19] There is an artificiality to the appellants' submission that the Judge's wording indicates some unsureness as to the lawfulness of the orders. Later in her decision, the Judge expressly dismissed the application on the basis the Family Court orders were lawfully in place. Moreover, the same Judge subsequently dismissed Ms Henderson's appeal against the Chief Executive being granted custody of Ryan and his appointment as an additional guardian.[21] Any possible concern the High Court Judge harboured any doubt as to the lawfulness of those orders cannot survive her findings on the appeal. Finally on this point, the High Court had available to it not only the orders made by the Family Court but also its fully reasoned decision that justified their making.

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16 Judgment under appeal, above n 3, at [11] (emphasis added).
17 Habeas Corpus Act, s 14(2).
18 *Manuel v Superintendent of Hawke's Bay Regional Prison* [2005] 1 NZLR 161 (CA) at [49].
19 Judgment under appeal, above n 3, at [10].
20 *D (CA504/2020) v Adams* [2020] NZCA 454 at [9], citing *F v Chief Executive of the Ministry of Social Development* [2007] NZCA 50, [2007] NZFLR 613 at [14].
21 High Court appeal judgment, above n 6.

[20] We consider the Judge properly engaged in the arguments put forward on behalf of Ms Henderson, insofar as they could be within the constraints of a habeas corpus application. Any greater enquiry into the substantive issues of Ryan's custody and guardianship and the question of his best interests could not appropriately be dealt with in a summary manner in the context of a habeas corpus application, as indeed was acknowledged by Mr Adamson when making submissions before the High Court on behalf of Ms Henderson.

The restraining order

[21] The appellants argued that Ryan was subject to a further restriction on his liberty as a result of the restraining order issued by the Family Court against Ms Henderson. The appellants submitted the restraining order, which has the effect of preventing Ms Henderson from contacting Ryan, is a form of detention, especially having regard to his stated views of wanting to see his mother. They further argued the restraining order had been obtained unlawfully by way of an ex parte application to the Family Court in breach of the rules of natural justice.

[22] The status and effect of the restraining order was not argued in the High Court in support of the application for habeas corpus. However, we do not consider it would have assisted Ms Henderson's argument had it been raised at that time. We doubt the restraining order restricting Ms Henderson's contact with Ryan gives rise to his detention despite the appellants' submission the order affects the liberty of the child to have contact with his mother.

[23] What constitutes detention or a "restraint of liberty of the person"[22] under the Habeas Corpus Act will involve a context-specific assessment, and not every curtailment of movement will constitute detention under the Habeus Corpus Act.[23] Whether restrictions upon an individual constitute a restriction of their liberty and therefore detention for the purposes of the Habeus Corpus Act requires an examination of all the relevant circumstances and an evaluative judgment as to whether the

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22 Habeas Corpus Act, s 3 definition of "detention".

23 *Nottingham v Ardern* [2020] NZCA 144, [2020] 2 NZLR 197 at [20]–[21]; and *Drever v Auckland South Corrections Facility* [2019] NZCA 346, [2019] NZAR 1519 at [25]–[30].

legislation intended the established facts to satisfy the requirements of the statutory description of detention.[24]

[24] Insofar as Ryan's contact with Ms Henderson is subject to some form of limitation as a result of the restraining order made in respect of his mother for the purposes of the guardianship and care proceedings currently before the Family Court, we do not consider it can constitute a detention under the Habeas Corpus Act. This is starkly illustrated by the fact the writ of habeas corpus is directed to a person having custodial control of the subject of the application. The Chief Executive's current custodial control of Ryan is not sourced from the restraining order which takes the form of a legal obligation imposed upon Ms Henderson. The short point is that the restraining order does not confer any custodial or coercive powers to anyone other than, arguably, the court itself.

[25] It was further argued on behalf of Ms Henderson that a restraining order made pursuant to the Act cannot be made against a person unless they have been informed of the proposal to make the order and been given an opportunity to make representations to the Court. It was submitted that Ms Henderson had not been afforded this mandatory requirement of being heard or provided with the opportunity to make representations before the order was granted. We do not consider this submission is correct.

[26] The application granted by Judge Moss was an interim restraining order made under s 88 of the Act, not s 87. Section 87(2) provides:[25]

> (2) Subject to any rules of court empowering the court to make an order *under this section* on an *ex parte* application, the court shall not make an order under this section restraining the conduct of any person unless that person has been informed by the court of the proposal to make the order and has been given an opportunity to make representations to the court.

[27] Arguably, the prohibition contained in subs (2) only applies to orders made under s 87. Section 88 provides the Family Court jurisdiction to make an interim order that it would otherwise be empowered to make under s 87 pending the determination

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24 *Nottingham v Ardern*, above n 24, at [21].
25 Emphasis added.

of an application if it is in the best interests of the child or young person that an interim restraining order be granted as a matter of urgency.

[28] In any event, as submitted by the Chief Executive, the Family Court Rules 2002 permit an interim restraining order to be made without notice if the Family Court is satisfied the delay that would be caused by proceeding on notice might entail undue hardship or risk to the personal safety of the child or young person.[26] Judge Moss, in making the interim restraining order on an ex parte basis, was satisfied the delay in proceeding on notice would expose Ryan to a serious risk of harm. There is, therefore, a legitimate basis for the restraining order.

Current placement of Ryan

[29] A further argument made on appeal that was not advanced before the High Court was that Ryan is presently being housed illegally in a secure residence and that the Chief Executive did not have authority to make such a placement under s 101 of the Act.

[30] The nature of Ryan's present residency and its exact status as an Oranga Tamariki facility was not made entirely clear on the information before us. However, s 105 of the Act provides that where the Family Court makes an order under s 101 placing a child or young person in the custody of the Chief Executive, arrangements can be made for the child or young person to be placed in any residence, or any school or other institution that provides care, training, or physical or mental health care.[27]

[31] The Chief Executive questioned whether a placement made pursuant to s 105 was capable of constituting a form of detention under the Habeas Corpus Act. However, leaving that issue to one side, we are satisfied that any detention inherent to Ryan's current placement in the residence or institution where he presently resides is one that is statutorily authorised. To the extent Ryan is subject to any physical constraint, we understand it is not beyond a level of control that would be a normal

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[26] Family Court Rules 2002, rr 220(2)(a)(i) and 276(1)(b)(ii).
[27] Oranga Tamariki Act, s 105(1)(b).

incidence of parenting. Importantly, it was not suggested the residence was a youth justice facility which would give rise to different considerations and concerns.[28]

Transfer to Family Court

[32] The appellants repeated the submission made in the High Court that an appropriate alternative remedy was to remit the application for habeas corpus to the Family Court pursuant to s 13(2) of the Habeas Corpus Act. That subsection provides that if the substantive issue in an application is the welfare of a person under the age of 16 years, the High Court may transfer the application to the Family Court.

[33] Grice J concluded that such a course would not be in the best interests of the child because the substantive matters were already before the Family Court and that those proceedings would be unnecessarily complicated by such a referral.[29] We consider that assessment was available to the Judge and is a conclusion with which we agree.

[34] There is a further difficulty with such a course. Section 13(3) of the Habeas Corpus Act provides that any such referral must be dealt with by the Family Court in all respects, as if it were an application to that Court under the Care of Children Act 2004 (COCA). However, the process for varying or discharging ss 101 and 110 orders is provided by the Oranga Tamariki Act, and s 120 of that Act explicitly prohibits the making of orders in respect of guardianship, day to day care, or contact under the COCA. It follows from that statutory impediment that no progress could be made regarding Ryan's custody and guardianship issues by adopting such a course. In any event, these issues were already being pursued by Ms Henderson at the time by way of an appeal and are currently before the Family Court.

Other miscellaneous challenges

[35] The appellants raised a number of other matters regarding the High Court's decision, none of which we consider have merit.

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28 See *O'Connor v Chief Executive of Oranga Tamariki*, above n 13.
29 Judgment under appeal, above n 3, at [15].

[36] It was submitted the High Court Judge had "failed to give appropriate weight" to certain cases cited by the appellants in support of their argument. Having reviewed the approach taken by the Judge, we do not consider she erred in the application of the relevant legal principles, nor do we consider the authorities relied upon advance the appellants' case.

[37] The appellants also suggested the High Court had refused to exercise its jurisdiction under the Habeas Corpus Act simply because another proceeding was on foot, namely an appeal, and that this other remedy was not a jurisdictional bar to the Court hearing and determining the habeas corpus application. We find no evidence in the reasoned decision of the Judge to indicate she adopted such a course. The application was declined because of a finding that Ryan was not unlawfully detained.

[38] It was further argued the High Court had failed to follow mandatory requirements of the Habeas Corpus Act and had therefore breached the requirements of natural justice specified in s 27(1) of the New Zealand Bill of Rights Act 1990. We can find nothing to suggest that Ms Henderson was not afforded a full opportunity to make submissions in support of her application before an impartial decisionmaker. This ground is not sustainable.

Conclusion

[39] Having traversed each of the matters raised by the appellants in support of the appeal, we find none have merit. We consider the Judge, having found Ryan's detention to be lawful, was correct to decline the application for habeas corpus and that the appeal must be dismissed.

[40] The respondent did not seek costs on this appeal. Accordingly, there is no order for costs.

Result

[41] The appeal is dismissed.

[42] There is no order for costs.

Solicitors:
Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent