NOTE: PURSUANT TO S 437A OF THE CHILDREN, YOUNG PERSONS, AND THEIR FAMILIES ACT 1989, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS.

IN THE SUPREME COURT OF NEW ZEALAND

SC 108/2016
[2016] NZSC 136

BETWEEN	TWA Applicant
AND	HC First Respondent
	THE CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Second Respondent

Court:	Glazebrook, Arnold and O'Regan JJ
Counsel:	Applicant in person J M Attfield for First Respondent A M Powell for Second Respondent
Judgment:	18 October 2016

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Background

[1] Mr A is the father of S. When she was born both Mr A and S's mother[1] were serving prison sentences. S was placed in the care of Ms C (the first respondent). Ms C is still S's carer. Mr A is still in custody.

[2] In 2014 the Family Court (Judge Neal) made orders to provide for the long term care of S. These orders were made with the consent of Mr A and provided for S to remain in the care of Ms C, with supervised visitation rights for Mr A if S requested contact.

[3] Despite having consented to the orders, Mr A applied for a writ of habeas corpus, on the basis that S was unlawfully detained because the orders made by the Family Court were illegal. He also believes S should have a relationship with him as her father and that she is not receiving the required support and counselling to encourage her to see him.[2]

[4] In the High Court, Toogood J held that S's liberty was not in question and refused the writ.[3] He also refused to make a declaration that the Family Court orders were made without jurisdiction.[4]

[5] On appeal, the Court of Appeal held that the orders made in the Family Court under the Care of Children Act 2004 were not lawfully made.[5] This was because the Family Court had also made an order under s 110 of the Children, Young Persons, and their Families Act 1989 (the CYPF Act) and, pursuant to s 120 of that Act, no orders under the Care of Children Act could be made while that order was in force.[6]

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1 S's mother has since died.
2 *TWA v HC* [2016] NZCA 459 [CA judgment] at [3].
3 *TWA v HC* [2016] NZHC 1765 [HC judgment] at [16]–[17].
4 At [25].
5 The Court of Appeal held that the High Court was wrong to dismiss the application on the basis that S was not detained: CA judgment, above n 2, at [12].
6 CA judgment, above n 2, at [32]. No-one has sought to challenge that conclusion in this Court and we express no opinion about it.

[6] The Court of Appeal did not, however, make an order under s 14 of the Habeas Corpus Act 2001. Instead, it transferred the proceedings to the Family Court for determination, exercising the power under s 13(2) of that Act.[7] To ensure S's continued protection in the meantime, the Court applied the *parens patriae* jurisdiction to preserve the existing care arrangements.[8]

Grounds of application

[7] Mr A submits that:

(a) It was not open to the Court of Appeal, having determined the detention was unlawful, to transfer the matter to the Family Court under s 13(2) of the Habeas Corpus Act.

(b) The *parens patriae* jurisdiction was not available in an appeal under the Habeas Corpus Act. Rule 48(4) of the Court of Appeal (Civil) Rules 2005 (the Civil Rules) must be read as limited to orders that could be made within the jurisdiction conferred by the matter under appeal. In any event, the orders should not have been made.

The legislation

[8] Section 13 of the Habeas Corpus Act provides:

> **13 Powers if person detained is young person**
>
> (1) In dealing with an application in relation to a detained person who is under the age of 18 years, the High Court may exercise the powers that are conferred on a Family Court by the Care of Children Act 2004.
>
> (2) If the substantive issue in an application is the welfare of a person under the age of 16 years, the High Court may, on its own initiative or at the request of a party to the proceeding, transfer the application to a Family Court.
>
> (3) An application referred under subsection (2) 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.

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7 At [43].
8 At [44]–[45].

[9] Section 14 of that Act provides (in relevant part):[9]

> **14 Determination of applications**
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> (1) If the defendant fails to establish that the detention of the detained person is lawful, the High Court must grant as a matter of right a writ of habeas corpus ordering the release of the detained person from detention.
>
> …
>
> (3) Subject to section 13(2), a Judge must determine an application by—
>
> (a) refusing the application for the issue of the writ; or
>
> (b) issuing the writ ordering the release from detention of the detained person.

Our assessment

[10] Section 13(1) of the Habeas Corpus Act allows the High Court to exercise the powers conferred on the Family Court by the Care of Children Act when it is dealing with an application in relation to a child or young person under 18. The application may be transferred to the Family Court under s 13(2) if the substantive issue is the welfare of a person under 16.

[11] Even assuming Mr A is correct in his contention that, where a detention is held not to be lawful, an order for release should be made, it would not be appropriate to make such an order without exercising the s 13 powers to ensure continuing care arrangements for a child under 16. This could include remitting the issue to the Family Court, (as a specialist court), under s 13(2), to decide on the care arrangements that would meet the best interests of the child involved.

[12] If the matter is remitted to the Family Court (as it was here), then interim care arrangements will need to be put in place to care for the child pending a Family Court decision. We accept the submission made by the Chief Executive that, on the approach taken by the Court of Appeal, interim orders for S's care could not

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[9] Section 14(3) was amended to include "Subject to s 13(2)" by the Habeas Corpus Amendment Act 2013, s 6. Section 11 of the Habeas Corpus Amendment Act provides that the amendments made to the Habeas Corpus Act 2001 apply in respect of an application made under the Habeas Corpus Act whether before, on or after the commencement of the Habeas Corpus Amendment Act.

have been made under s 13(1) of the Habeas Corpus Act because of the existence of orders under the CYPF Act.[10] We also accept the submission that, assuming the matter had been dealt with in the High Court, S could and would not have been left outside of the protection of the law. This means that, had the matter been dealt with in the High Court, it would have exercised the *parens patriae* jurisdiction, which is preserved by s 16 of the Judicature Act 1908 and s 13(2) of the Care of Children Act 2004.

[13] Rule 48(4) of the Civil Rules provides:[11]

> The Court may give any judgment and make any order which ought to have been given or made, and make any further or other orders that the case may require.

[14] We do not accept that this rule should be read down in the manner Mr A suggests. [12] If the order is one the High Court could have made, then it is one the Court of Appeal can also make, if it considers the High Court ought to have made the order. As the High Court in this case would have exercised the *parens patriae* jurisdiction, the order by the Court of Appeal was clearly authorised by rule 48(4). [13]

[15] Mr A's next submission is that the Court of Appeal could not assume that it was in S's best interests effectively to continue the impugned orders. He says that there is at present an investigation underway as to whether conscious or subconscious alienation from S's birth family has been occurring and the orders may influence that investigation.

[16] We do not accept this submission. The orders merely continue existing care arrangements pending a full Family Court consideration. Nothing has been raised to

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10 Section 13(1) allows the High Court to make orders under the Care of Children Act but the Court of Appeal had held that such orders could not be made in this case because of s 110 of the CYPF Act.

11 The Court of Appeal (Civil) Rules 2005 were made pursuant to s 51C of the Judicature Act 1908, which gave the Governor-General the power to make rules regulating the practice and procedure of the High Court, Court of Appeal and the Supreme Court. This power is retained in cl 145 of the Senior Courts Bill, which passed its third reading on 12 October 2016.

12 As the Chief Executive submits (relying on the House of Lords' interpretation of a similar rule in *Attorney-General v Vernazza* [1960] 3 All ER 97) this is a wide power. The Court can "make any order that the case may require" under the rule: *Gair v Newnham* [1974] 1 NZLR 662 (CA) at 664. See also *McGechan on Procedure* (looseleaf ed, Thomson Reuters) at CR 48.04.

13 Mr A effectively concedes that the High Court could have made the orders, as he submits that the proceedings should have been returned to the High Court with a direction to make such an order.

suggest it would be in S's best interests to disrupt (on an interim basis) her current living arrangements with a family she has been with since birth.[14] What is in her long term best interests will be decided by the Family Court.

Result

[17] The first matter Mr A seeks to raise may be a matter of general or public importance but the practical effect, even if his submission is correct, is the same. Leave is therefore inappropriate.

[18] As to the second matter he seeks to raise, the jurisdiction argument is not seriously arguable. Whether Ms C should have been given the interim care of S is an issue to be decided on the particular facts and therefore not a matter of general or public importance. Further, no valid reason has been put forward to suggest that these interim arrangements should not have been made. It is thus not in the interests of justice for leave to be granted on this point.[15]

[19] The application for leave to appeal is dismissed.

Solicitors:
Tagelagi & Attfield, Manurewa for First Respondent
Crown Law Office, Wellington for Second Respondent

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14 The Chief Executive confirmed to the Court of Appeal that the service had commenced a child and family assessment but that, at this stage this does not indicate any concern for the safety of S: CA judgment, above n 2, at [46].

15 Supreme Court Act 2003, s 13(1).