NOTE: PURSUANT TO S 125 OF THE DOMESTIC VIOLENCE ACT 1995, AND S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 83/2021
[2021] NZSC 96

BETWEEN	D (SC 83/2021) Applicant
AND	HIGH COURT AUCKLAND Respondent

Court: William Young, Glazebrook and Williams JJ

Counsel: Applicant in person

Judgment: 9 August 2021

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant is an Australian woman who has been a party to Care of Children Act 2004 proceedings in relation to her two children. So far there has been a hearing in the Family Court before Judge Adams,[1] and an appeal against his judgment in which Powell J upheld the orders made by Judge Adams.[2] The current position is that the applicant shares care of both children with her former partner, both the applicant and her former partner are required to reside within a 30-minute drive of a particular school

1 *[N] v [D]* [2020] NZFC 7185.
2 *[D] v [N]* [2021] NZHC 691.

and, up until 31 January 2023, no application may be made for an order permitting the children to be taken outside New Zealand.

[2] The applicant's position is that the practical effect of the orders made by Judge Adams and upheld by Powell J is that she and the children are being unlawfully detained. She unsuccessfully sought habeas corpus on this basis prior to the determination by Powell J of the appeal,[3] and her appeal of that decision was rejected by the Court of Appeal in its judgment of 2 December 2020.[4] There were earlier similar proceedings which also failed.[5]

[3] After Powell J's judgment on appeal from Judge Adams was released on 31 March 2021, the applicant applied to this Court for habeas corpus with Powell J named as the defendant/respondent. This was the subject of a minute of William Young J of 27 April 2021 directing that the application not be accepted for filing. This was primarily because this Court does not have an originating jurisdiction in respect of habeas corpus proceedings. But this minute also explained why the applicant's resort to habeas corpus to resolve her concerns in respect of the Care of Children Act proceedings was misconceived.

[4] The current application was lodged on 13 July 2021. After some interaction with registry officers, Ms D confirmed that it was a challenge to the 2 December 2020 judgment of the Court of Appeal.[6]

[5] In a minute of 20 July 2021, William Young J directed that the application be treated as an application for leave to appeal against the 2 December 2020 judgment but also indicated that the application appeared to be an abuse of process. This was for reasons which were set out and to which the applicant was invited to respond.

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3 *Re an Application by [D] (writ of Habeas Corpus)* [2020] NZHC 2972.

4 *D (CA6542020) v High Court Auckland* [2020] NZCA 605 (Miller, Clifford and Collins JJ) [CA judgment].

5 See *[D] v Adams* [2020] NZHC 2253, delivered on 2 September 2020, and the appeal against that decision, *D (CA504/2020) v Adams* [2020] NZCA 454, delivered on 28 September 2020.

6 CA judgment, above n 4.

[6] The reasons were broadly as follows:

(a) The application is substantially repetitious of earlier similar applications concerning the same dispute[7] and is either precluded by s 15(1) of the Habeas Corpus Act 2001 or is, in substance, an attempt to re-litigate issues already conclusively determined against her.

(b) Although Ms D would prefer to have sole care of the children and to take them to Australia, the Family Court orders preventing this are not a detention for the purposes of the Habeas Corpus Act. Nor is her presence in New Zealand in order to maintain contact with the children.

(c) The challenge to the judgment of the Court of Appeal of 2 December 2020 has been overtaken by events. Although that was an appeal against the dismissal of her application for habeas corpus, Ms D was primarily challenging the lawfulness of the Family Court orders. Powell J subsequently dismissed the appeal against those orders on 31 March 2021, meaning the basis for the challenge which was before the Court of Appeal has fallen away.

(d) This is instead a collateral challenge to the judgment of Powell J of 31 March 2021.

[7] The submissions which the applicant has filed do not address the concerns identified beyond assertions that the effect of the orders made in the Family Court and confirmed on appeal, including the requirement to live within a particular radius of a school, is to detain her and the children. The simple position is that, for the purposes of the Habeas Corpus Act, there is no detention of Ms D and her children and any challenge to the orders should be made by way of appeal.

[8] For the reasons given above in [6], the application is an abuse of process. It is dismissed accordingly.

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7 The earlier proceedings being the judgments referred to above at n 5.