

IN THE SUPREME COURT OF NEW ZEALAND

**SC 75/2007
[2007] NZSC 94**

BETWEEN

DE AND ORS
Applicants

AND

CHIEF EXECUTIVE OF THE MINISTRY
OF SOCIAL DEVELOPMENT
Respondent

Court: Tipping, McGrath and Anderson JJ

Counsel: Applicants in person
J C Pike for Crown

Judgment: 28 November 2007

JUDGMENT OF THE COURT

A. The application for leave to appeal is dismissed.

B. There will be no order for costs.

REASONS

[1] The applicants are the mother and maternal grandparents of a young child. When the child was eight weeks old, social workers employed by the respondent sought, and obtained ex parte, a custody order under s 78 of the Children Young Persons and Their Families Act 1989. They took the young child into care pursuant to that order. Rule 220 of the Family Court Rules authorised the making of such an order on an ex parte basis.

[2] The applicants applied to the High Court for a writ of habeas corpus to recover the child from the respondent's care. They contended that the making of the s 78 order on an ex parte basis was unlawful and hence the respondent's custody and detention of the child were unlawful. Asher J declined the application in a judgment delivered on 25 June 2007. The Court of Appeal dismissed the ensuing appeal in a judgment delivered on 18 October 2007.

[3] In the meantime an inter partes hearing took place in the Family Court of an application to set aside the s 78 order. That application was declined with the effect that the order which had been made ex parte was confirmed, after the applicants had had an opportunity to put their case. The practical result of this is that the lawfulness or otherwise of the ex parte order is moot. That order has been overtaken by the confirming order, the legality of which cannot be questioned on any ground which would justify the issue of a writ of habeas corpus. In these circumstances it would not be appropriate to give leave to the applicants to appeal from the decision of the Court of Appeal.

[4] We should add that we would also have been disposed to refuse leave on the basis that no reasonable ground has been shown for contending that the decision of Asher J was erroneous. In short, none of the grounds specified in s 13 of the Supreme Court Act 2003 for the granting of leave to appeal has been made out. The application must therefore be dismissed.