IN THE SUPREME COURT OF NEW ZEALAND

IN THE MATTER of Applications for Leave to Appeal

SC 88/2006

BETWEEN **NIKALA JANICE TAYLOR**

Appellant

AND **CHRISTOPHER DEAN JONES**

Respondent

SC 90/2006

BETWEEN **KAY HALTON SKELTON**

Appellant

AND **CHRISTOPHER DEAN JONES**

Respondent

Hearing 6 December 2006

Coram Chief Justice
Blanchard J
Tipping J
McGrath J
Anderson J

Counsel W C Pyke for the Appellant Taylor
D P H Jones QC for the Appellant Skelton
T Sutcliffe and L F Walkington for Respondent

APPLICATIONS FOR LEAVE TO APPEAL

10.00am

Pyke If it pleases the Court, Pyke for the appellant T.

Elias CJ Yes, thank you Mr Pyke.

Sutcliffe Yes if it pleases the Court, Sutcliffe for the respondent, Mr Jones, together with Miss Walkington.

Elias CJ Thank you Mr Sutcliffe, Mr Jones and Miss Walkington.

Jones May it please the Court, Jones, I'm here for the applicant Skelton.

Elias CJ Thank you Mr Jones. Right, the first matter, I'm sorry I'm just looking for my notes here but the first matter I wonder whether counsel could assist us with is the name suppression order because I think it's necessary for us to decide what is to happen with that in this Court. Is any application made to continue that?

Pyke Yes an application is made on the basis that it continues in the High Court and it would defeat the order otherwise. There's been no application in the High Court to vacate it or challenge it any way and in my respectful submission that would be a matter for the High Court Judge later

Elias CJ Well it's not apparent to us from the judgement we have why the name suppression order was made and it wasn't apparent to the Court of Appeal so do you want to make an application to us as to why that order should be continued here?

Pyke The order initially was made at the end of an urgent hearing and Heath J rightly recorded the grounds advanced but it's been signalled

Elias CJ They're not supported by any evidence that we've got?

Pyke No, no, it was done orally. It's been signalled that if there is to be a challenge to that a formal application would be made in the High Court supported by evidence and broader grounds largely relevant to the reporting of in large part of the proceedings in the Court of Appeal nominating my client by the description 'T' and elaborating the claim to privilege against self-incrimination and commenting upon that in the media, so given the fact that she almost certainly faces charges to be brought by the police, it would be my submission that that would compromise her right to a fair trial. No one's actually challenged the order. I've signalled that that would be the approach I'd take. She's also got a special needs child and I was planning on putting evidence before the High Court on that issue as well.

Elias CJ And why are the interests of the special needs child affected? What basis did you put forward in the High Court?

Pyke Well simply that at programme on her mother being involved in the alleged abduction.

Tipping J How old is the child?

Pyke Pardon.

Tipping J How old is the special needs child?

Pyke Six years old.

Tipping J Six years old.

Pyke So it seemed a little ironic that on one hand that was the interest of one child being looked after and yet the others might be ignored but I haven't been called upon to justify that order. I signalled to the High Court it might be made; there's been no appeal against it; there's been no challenge in the High Court, so I

Elias CJ We have to decide Mr Pyke what we do in this Court and whether we should grant suppression order here. What you're really saying is that it would vitiate the order made in the High Court but I'm wondering really whether that's sufficient on the basis that you've put forward today. It's just that the submission you make that children may be affected by publicity given to conduct of their parents applies to hundreds of people appearing in the Courts everyday. It really does need to be substantiated.

Pyke Well in my respectful submission it's not fair to ask me to do that here today when I've been given no notice. It would be right that 'T' has an opportunity to put evidence before a Judge to substantiate and if this Court wishes to signal in a judgment that that should happen then I'll attend to it but with all of the other pressures of time, it's not a matter that I thought I had to attend to and so I haven't, but can do, and in my respectful submission the proper place would be before the High Court.

Anderson J Mr Pyke the form of the order is an order forbidding publication pending further order of the Courts. It's not a final order, it's one that this Court could displace by making a further order, and it would be revoked.

Pyke Pardon.

Anderson J This Court could make an order revoking that

Pyke Well this Court could but

Anderson J That would be the mechanism of it.

Pyke It wouldn't be fair in my submission given that I've been given no notice. I accept in principle what Your Honour says about the element of publicity relating to the child but if we just bear in mind it was done under urgency.

Elias CJ Well Mr Pyke I think what we'll do is, we'll maintain the order in the terms made by Justice Heath for now and I'll confer with my colleagues at the morning adjournment and we'll consider whether we will invite you to place what evidence you would like to before us and address us on the point of suppression later.

Pyke Yes, as Your Honour pleases.

Elias CJ Alright.

Jones Just on the broader question of suppression, there has been a media application which was being ruled on by the Court. There will be matters which will be the subject of argument which in my submission will not be properly able to be published due to the criminal proceedings against my client, so what I'd ask for at the beginning of the hearing before we commence is an order that there be no publication of argument until further order of this Court which presumably can be made at the end of the hearing. I simply don't want any material to be put into the public domain which is in this proceeding and is potentially going to have the effect of prejudice of my client in the criminal proceedings.

Tipping J Do you want the argument to be completely uninhibited but then we review at the end of the hearing what is to be published or what may be published?

Jones Indeed Sir, yes.

Tipping J Yes, that seems fair.

Elias CJ Yes. Alright we'll proceed on that basis that the argument addressed to the Court is not to be published until further order of the Court.

Jones I'm obliged Ma'am.

Elias CJ Thank you, and we will hear you further on that at the end of the case Mr Jones.

Jones Thank you.

Elias CJ Yes Mr Pyke.

Pyke If the Court pleases I notice it's possibly intended I address the Court from there but because of the volume of papers I would prefer to do it from where I am, and having not appeared in this Court before I'm simply seeking

Elias CJ We would prefer you to speak from the lectern. It assists us greatly

Blanchard J It also assists in the recording.

Pyke If I would take a moment Sir, I'll put a few things within reach.

Elias CJ Perhaps Mr Sutcliffe could shuffle along a little bit, giving you a bit of space on the other side as well?

Pyke I'm really seeking the Court's guidance as to the preliminary point that I apprehend that on the question of leave the issue of jurisdiction is primary and that was

Elias CJ Mr Pyke I think that you can press on with the substantive appeal and we won't hear you separately on the leave application.

Pyke I'm grateful for that Your Honour. Turning nevertheless to that question of jurisdiction, there is the cross appeal and the challenge by 'T' is to the order of the Court of Appeal, or the judgment of the Court of Appeal framing the orders of Heath J as interim orders under s.11 instead of what Heath J in my submission clearly intended them to be, which was

Tipping J Couldn't we not say Justice Heath rather than Heath J?

Pyke Yes, thank you Your Honour, Justice Heath under s.14. The point really is a short one and in my respectful submission Justice Heath clearly intended to and did make orders under s.14 and it never was in his contemplation that they were interim and that's apparent from the face of the judgment. What happened in the Court of Appeal was that the question of jurisdiction under s.16 of the Act was argued although it's fairly shortly elaborated in the Court of Appeal's judgment, it was found that there was a right of appeal, that it wasn't restricted because of the issue of the welfare of the child but rather there was a right of appeal where that issue was the issue in the proceeding rather than the issue on appeal. Now in my respectful submission that is the correct interpretation of s.16 for the reason I've set out in my submissions and in the supplementary submissions I filed. That leaves the issue of whether or not the orders of the Court of Appeal were correct to categorise orders by Justice Heath as opposed to filed. Now in my respectful submission that is an issue of interpretation of the judgment of Justice Heath and in my respectful submission it's an interpretation which is not open on the face of the judgement at all or on the evidence that was put before him or on the basis of the nature of the application made to the High Court.

Tipping J The sealed order, para.1 of it, commands the addressees to discharge and release

Pyke Yes.

Tipping J Now if that's not a final order in this context, it won't be easy to see what would be.

Pyke Yes.

Tipping J They've been ordered to be discharged and released into the custody of the Court aren't they in a sense in that they were ordered to be brought before the Court, so the effect of it is that they'd be discharged from custody and brought to the custody of the Court. Is that the way you wish us to see it?

Pyke Yes, and it was clearly the only option open to the Judge on the evidence placed before the High Court and in my respectful, there being no challenge to the question of whether or not the child was in fact detained by someone else, namely Dick Headley, wasn't in the custody of the parent entitled to custody and there was no issue taken with the question of whether that was legal or not. So all of the facts that needed to be found in the High Court, there was evidence to find them in general terms to make the orders and there was no challenge.

Tipping J And the substantive issue, the substantive issue, and I'm looking at 16(1)(a), sorry 16(1)(b), the substantive issue you say is the welfare of the young boy.

Pyke In the substantive issue in the proceeding.

Tipping J In the proceeding?

Pyke Yes, and that was made clear, and page 171 of the case on appeal, volume 2, para.33

Elias CJ Sorry what page again?

Pyke Page 171. This is covered in my supplementary submissions. Justice Heath records the self-evident proposition. He said 'it's self-evidence a six year old child removed from the care of a parent in the manner that occurred in this case is likely to suffer psychological or emotional consequences of a serious nature, notwithstanding efforts that may be made to ameliorate those effects by a person who genuinely may be acting out of love' and in my respectful submissions there's no question that that was the way that Justice Heath saw it in terms of there being a issue as to the welfare of the child.

Tipping J Well if this case was not within para.(b), substantive issue is, it would be hard to see any custody access-type case being within that paragraph I would have thought.

Pyke Yes, I don't take it that it's argued that in

Tipping J But isn't argued against you that the substantive issue is the substantive issue in the appeal rather than in the underlying proceeding. That's what you have to meet and you say that doesn't make any sense.

Pyke No, that would mean for example before the Court could even consider the issue of leave, the Court would have to investigate the grounds of appeal to see whether in fact the question of the welfare of the child was in fact a ground, which is effectively meaning that the Court would have to go into the merits.

Blanchard J I would have thought that that phrase about substantive issue is the welfare of a person under the age of 16 years is simply a shorthand method of preserving the distinction which was apparent in the case law before the Habeas Corpus Act was passed where cases involving custody and other issues relating to the welfare of a child were treated as being in a completely separate category where the bar on appeals had no application. It's pretty well summed up in a quotation from Lord Justice Lopes – I think that's how you pronounce his name – which is cited with approval by Lord Atkinson in the *O'Brien* case at page 628 where he says that 'in the case of a discharge from custody under a writ of habeas corpus there is no appeal because the Court cannot give effect to its order'. In other words it can't do anything to bring the person within custody, and then it goes on 'this reasoning is inapplicable to the case now under consideration which was *Barnardo*. There has been no discharge of the infant. The infant is within the control of the Court' and that fits with what my brother Tipping has just said about the form of the order that's been made here. 'And the Court can make what order it thinks fit with regard to his custody and can give full effect to its order or judgment'. Now I strongly suspect that what the Law Commission was doing here was simply preserving that jurisprudence. Perhaps not in the happiest form of words but they're quite capable of being interpreted to cover the ground.

Pyke Yes and the Law Commission's report indicates that that in fact is what the Commission was doing at para.14. It's not in the materials but the report says 'the Commission is loathe to withhold entirely the remedy of the habeas corpus procedure in custody situations and so s.10(1) of the draft Act confers on the High Court the various special procedural powers such as the right to appoint counsel for the child conferred by the Guardianship Act. The Draft Act also gives an unsuccessful defendant in custody cases a right of appeal, but to thwart the routine use of the habeas corpus procedure in custody cases, we have after consultation with the Principal Family Court Judge, included a s.10(2) provision enabling removal of proceedings to the Family Court.

Elias CJ But does it deal, I haven't looked at the Law Commission report, but does it deal with the appeal provision in connection to custody matters?

Pyke That's all it says, that's the only sentence in the report 'the draft Act also gives an unsuccessful defendant in custody cases a right of appeal'.

Elias CJ Then you might be better relying on the passage

Tipping J That's the point, in custody cases it's a classification formula not an issue-by-issue formula.

Pyke That's right, yes.

Tipping J That's the key point.

Pyke Yes.

Tipping J And unfortunately when they changed the language to the final version they rather mask that point.

Pyke Yes, although the heading to the section will indicate that it's meant to be given the interpretation I submit it should be given.

Elias CJ It's rather clumsily expressed but you say that it means that where the writ is sought in a custody context there is a right of appeal?

Pyke Yes, otherwise there would be the scenario of in a custody context one parent having a right of appeal and yet not the other, which flies against the history of the rights of appeal in that context in any event.

Tipping J Well it would be completely unbalanced.

Pyke Yes, and I submit if there was going to be a radical change in that then it would have been explicit and the Commission would have gone into it in far more depth.

Blanchard J Well the Law Commission was engaged in a facilitative exercise, it wasn't intending to put in new restrictions?

Pyke Yes, it was mainly procedural the reform to streamline procedures and that report says the habeas corpus procedure and that's effectively what it did hear and in my submission there's been no change substantively

Tipping J It would be crazy to have a right of appeal in a custody case where the writ is refused but not where it's granted.

Pyke Yes.

Tipping J I mean there could be no policy reason for that at all that I could see.

Pyke Yes, I agree.

Elias CJ Well I suppose there would be some symmetry but it's not clear what the exception would be directed at.

Anderson J The answer lies in the history of the writ. Originally a writ was issued ex parte and the inquiry was conducted upon the return and so you

couldn't appeal from the ex parte issue and that changed during the 19th Century when the procedure was adopted of applying for a rule nisi for the issue of a writ. It's discussed in *Barnardos*.

Pyke Yes, and then the Commission's job was to streamline it even further and simply moved to having the writ issued as soon as possible, hence the timeframes in the legislation.

Anderson J The Habeas Corpus Act doesn't effect the process of ordering a return on the writ which is effectively I would say what Justice Heath did here in the course of making a final order for the issue of the writ.

Pyke Well the Act is silent on the question of the form 'all content of the return' and there's nothing in the statute that prescribes what that should take.

Anderson J I simply mention that to indicate that it's well arguable that the other orders that Justice Heath made don't convert the first order into an interim order – they are anticipating the return.

Pyke Yes, although there's a timing issue in that respect which is a little odd in that the orders are that the child be returned on a Wednesday but the affidavit's been filed the day before in anticipation of the child not turning up.

Anderson J Well that might be a problem with the ancillary orders but it doesn't alter the character of the issue of the writ.

Pyke No.

Elias CJ And the question of jurisdiction. I wonder really Mr Pyke whether you can develop this much further. It may be that we should call upon, unless Mr Jones has anything he wants to add on the point of jurisdiction, we should call on Mr Sutcliffe to respond on this question?

Pyke Yes, as the Court pleases.

Elias CJ Thank you.

Jones I have nothing to add thank you Ma'am. Mr Pyke has carried the fight thus far to the Court of Appeal and to this Court and I will be a spectator.

Elias CJ Thank you. Yes Mr Sutcliffe we'd like to hear from you on this question of jurisdiction.

Sutcliffe Yes as Your Honour pleases I have benefited from the discussion that's passed between the bench and counsel. Essentially the proposition is this. Whilst these proceedings are brought against the background of

custody proceedings, the essential act which effectively took the child away from my client is not defended on the basis in any respect or put forward that it is in the interests of the child to be anywhere other than in my client's care and in that sense when one comes back and looks at the purposes of a writ under habeas corpus which is to ensure the prompt return of a person detained, what we are faced with here is because this is against a background of custody proceedings and naturally in any situation whether they be custody proceedings or otherwise, a person who is detained unlawfully under the age of 16, their welfare will be at the centre of any Court's concerns. The prompt return of the writ is effectively being stymied or delayed by relying on the fact of the unfortunate history of this case, when in reality the central issue that is being argued or proposed advanced on appeal are the rights of others who may be implicated in the child's detention and not the child's welfare concerns at all, and

Elias CJ That may be an argument you'll want to advance to us on the substantive appeal as to why the writ was appropriate but is it sufficient answer on this question of jurisdiction, which really turns simply on the interpretation of s.16(1)(2).

Sutcliffe Yes well my argument has been that the issue on appeal must be the welfare of the child and that

Blanchard J But if that's just a description of a general category in order to distinguish it from the classic case of the prisoner who may be being unlawfully detained behind bars, then these words would have to be interpreted in the way suggested for the appellant.

Sutcliffe I don't grasp that point Your Honour.

Blanchard J Well if you back to the history of it – this is the point I was making to Mr Pyke before – the House of Lords clearly recognised that cases where people were battling about a child were completely different from those where the issue was the liberty or otherwise of a prisoner

Sutcliffe I accept that.

Blanchard J And that the bar on appeals which applied in relation to a person who had been successfully freed by the making of a habeas corpus order, simply didn't apply in cases where the issue was the welfare of a child or anything to do with a battle between those who were seeking either de jure de facto custody of the child.

Sutcliffe I accept that but what I'm putting forward as an argument here, as a submission here is that

Blanchard J I understand your argument but what I'm saying is we're in a different category of case here. I understand that the particular issues which have arisen in the appeal may not directly relate to the welfare of the

child. They're more about the rights or otherwise of a party, but my point to you is the appeal bar is related to categorisation and you're in the category which is the exceptional case, where appeals have always been permitted.

Sutcliffe On that basis I can't take that point any further.

Blanchard J Yes.

Tipping J I agree, because frankly the substantive issue must be logically focused on the proceedings as a whole, not on the appeal, but I think you've probably taken the right approach. It's not the approach of the Court of Appeal but the Court of Appeal's approach wasn't aided by the discussion that we've just been having.

Sutcliffe No, thank you.

Elias CJ Thank you Mr Sutcliffe. Alright Mr Pyke we can proceed.

Pyke The next issue in my submission is whether or not the writ issued against 'T", whether the evidence was sufficient to prove that she detained a child on the 18th October, the day of the hearing in the High Court and what the standard of proof should be given that the allegation is one of abduction of a child.

Elias CJ You don't want to develop as your first point whether the writ was appropriate in these circumstances at all? You prefer to put your case principally on the lack of evidence?

Pyke My focus is solely with respect to 'T'. Whether it should have been issued in respect of other defendants is a matter

Blanchard J No but I would of thought that you'd simply have relied on *Barnardo* which has three, two or three statements from the Law Lords which appear to rule out habeas corpus against somebody in 'T's position because although 'T', and I'm working on assumptions of facts here, although 'T' on the assumed facts we must deal with may have acted totally unlawfully, what she is said to have done is to have released the child into the custody of someone else prior to the issue of the writ.

Pyke Nearly two months prior

Blanchard J And as I read the *Barnardo* case the Law Lords there are saying that habeas corpus isn't an appropriate writ in those circumstances, unless there is continuing control by the person who has released the child to someone else.

Pyke Yes.

Anderson J Effect of agency.

Pyke Effect of agency. That was the submission I made in the Court of Appeal and I make again, having to as it were meet the possibility that the Court might take a different view which seemed to be based upon the testing of the truth of the proposition whether or not someone in 'T's shoes had in fact parted with custody of the child but here in my submission there was simply no evidence as such.

Tipping J But the Court of Appeal seems to have approached this on the basis that the writ should go as a means of putting pressure on a defendant to speak.

Pyke Yes.

Tipping J But I would have thought it's quite clear from *Barnardo's*, as my brother Blanchard has said, and from the general authorities that you can't issue a writ unless the defendant either has custody of or control of the detainee.

Pyke Yes.

Tipping J And it's as simple as that.

Pyke Yes.

Blanchard J There's a passage from Lord Herschell in which he says 'the very basis of the writ is the allegation and the prima facie evidence in support of it that the person to whom the writ is directed is unlawfully detaining another in custody. To use it as a means of compelling one who has unlawfully parted with the custody of another person to regain that custody, or of punishing him for having parted with it, strikes me at present as being a use of the writ unknown to the law and not warranted by it'.

Pyke Yes.

Blanchard J And there are a couple of other statements from other Law Lords to similar effect.

Tipping J So I would have thought the sole issue here was on the evidence leaving aside the question of the standard of proof, if putting it loosely, was your client in custody or control of the child at the time the writ was issued?

Pyke Yes, in my submission

Tipping J And your argument presumably is no.

Elias CJ And no one's suggesting.

Tipping J And no one's really suggesting.

Pyke Yes, that was the argument I made in the Court of Appeal and it's still the argument that I make today. The other argument was developed in anticipation of as it were what I might have to meet, but that is the straightforward proposition.

Tipping J And what level of proof do you suggest. Does the applicant for the writ have to show reasonable cause to believe that the defendant has custody or control or probably has custody or control or what would you suggest?

Blanchard J Prima facie evidence is what Lord Herschell said.

Tipping J Well that's a difficult proposition because prima facie begs an underlying question.

Anderson J Something less than probability.

Tipping J Yes.

Pyke Well it depends on what stage that the procedure one is at. The older cases would suggest if the rule nisi was being sought or it was ex parte, it was prima facie and then when the writ came to be issued it was on the balance of probabilities. That would seem to be the approach so

Tipping J I would have though that the fusing that we've now got in this Act would lay out a strong case for saying the Judge must be satisfied that the defendant probably has custody or control.

Pyke Yes.

Anderson J That might set it too high to make

Elias CJ I wouldn't want you to take it that I would necessarily accept that. I think this is a peremptory, salutary, summary response to real need the writ and it may be that with the merging a prima facie standard is appropriate.

Tipping J But prima facie is with respect I think difficult because prima facie suggests that absent a response there should be an order for release. Now that could only be done on the hypothesis, underlying hypothesis, of what degree of certainty do you have to have that the person actually has amenability to the writ.

Anderson J I wonder whether the writ has to be kept useful enough to meet the sort of social circumstances that existed when it was developed and which may not necessarily be absent for all time.

Tipping J Well reasonable cause to believe might come close to it. I'm not wedded to probably, you know, but we've got to have some sort of a threshold haven't we?

Elias CJ Well there has to be some evidential basis but whether the Judge needs to be carried by that to a point of being persuaded even on a provisional basis. I mean on its face it would have to be sufficient. Yes probable cause, but probable cause is not the same probable conviction.

Pyke In my submission it's a matter for the applicant to determine what sort of application to make. If there's doubt as to who detains then an application for interim orders may be more appropriate.

Tipping J Well that's not the point. The point Mr Pyke is what standard does the Judge have to direct himself by before he can be satisfied that the writ should go against a particular person?

Pyke Yes well in my submission if it's a question of a writ under s.14, it's got to be the balance of probabilities, because it has to be satisfied that there is detention. There's nothing in the Act to say that the standard of proof should be less than that.

McGrath J But doesn't Lord Herschell's observation indicate that there is a rather lesser point that might be reached where the issue is in doubt and the ritual issue for the purpose of clarifying that doubt?

Pyke But the doubt anticipated there was the doubt over whether or not a person had control

McGrath J Whether *Dr Barnardo* had control he could still reach the child as it were because the person who took the child might be an agent of *Dr Barnardo*. Now if you get to that sort of doubt might not at that point it be appropriate to issue the writ to answer questions if we're to continue to apply in New Zealand that dictum of Lord Herschell?

Pyke Well at that point, probably the standard of proof becomes somewhat academic because there will be an acceptance there has been detention or custody at some past point in time that has been surrendered to a third party

McGrath J Your position here really is that your client was seen walking away from the library without any child with her and that there is absolutely nothing to suggest that she has been implicated in the detention of the child thereafter in any way?

Pyke Yes, that's right, yes.

McGrath J So you're saying that in the circumstances this whole question of burden of proof isn't relevant once you understand the correct issue

there's absolutely nothing to suggest she's implicated in the crucial matter in any way.

Pyke On any standard, yes.

Elias CJ That's why I think prima facie is not too far off the mark.

Blanchard J Well I would have thought that the formula could be something like that it is a situation where it appears probable on the facts before the Court.

Elias CJ Yes, yes.

Blanchard J I think that's what they were getting at.

Pyke Yes well I'm loathe to make too much argument on that where it's not connected to the facts of this case in a meaningful way.

Tipping J The key difference between you and the Court of Appeal is that the Court of Appeal took the view that the writ could be issued for coercive purposes even though the defendant had no apparent connection with the current detention.

Pyke Yes, and that was common ground really. There was no evidence before the Court from the applicant, from the plaintiff that there was any suggestion that he had any custody or control from the time the child left the library and she was seen walking on her own down the road.

McGrath J Am I right in saying that the Court of Appeal thought that approach was appropriate really as a matter of simply bringing the law of habeas corpus up to date, it wasn't able to cite any authority for it in terms of the old habeas law cases or point to any direct indication that the scope of the writ should be broadened in this way?

Pyke Quite the contrary. The statute provides for detention and the writ in the schedule says that – the release from detention – so if the person doesn't detain it raises the spectre which I think is mentioned in the judgments in *Barnardo* of a person who's lost custody of control; having to engage private investigators and send people abroad or something of that nature to try and comply with the Court's order which in circumstances where it may be impossible for them to do so, so it can't be right that that's what the writ is intended to do and historically it wasn't.

Anderson J It's not there to create informants, it's there as a coercive aspect. It's to coerce information that will resolve the issue of whether there is continuing control.

Pyke Yes. There are other mechanisms for witnesses to be compelled if that's what the objective is, but that's not what happened here, and in my respectful submission it flows from that that the order that 'T' filed an affidavit if the writ didn't properly issue, that must fall as well.

Tipping J Well if the writ wasn't properly issued nothing can survive.

Elias CJ What do you say if we are carried to that point, what do you say the Court should do about the affidavit?

Pyke In the notice I've asked for an order that it be permanently sealed and all copies destroyed.

Elias CJ Right, sorry I hadn't appreciated that.

Pyke The two options is that the original will be destroyed and copies or alternatively it be permanently sealed, the original, and all copies destroyed, a copy having been provided to the counsel for the respondent.

Anderson J I thought your first suggestion was more appropriate if it shouldn't have been extracted it shouldn't still remain on the Court file.

Pyke It could come off.

Anderson J Yes, because it has no relevance anymore.

Pyke No.

Elias CJ Alright Mr Pyke I think we'll ask Mr Sutcliffe to respond and you'll have a right of reply if anything emerges from that.

Pyke Thank you.

Elias CJ Thank you.

Sutcliffe As Your Honours will appreciate the argument which you've addressed with my learned friend Mr Pyke just now was raised by him in the High Court and His Honour Justice Heath's response was to the effect that the narrow interpretation which my learned friend was seeking to convince His Honour then would have the effect that an individual or group of individuals who may participate in situations such as this, an unlawful abduction, who can then pass the child on to other parties and then simply say we don't know where he is and have no idea.

Anderson J It's self-evident, it's not explanatory.

Sutcliffe Yes, well it may be self-evident but at the end of the day the effect that that has is it in the absence of the ability of the applicant to obtain information which it would otherwise be impossible to obtain

Anderson J You would have to look at the type of conspiracy and issues of timing then.

Sutcliffe Sorry.

Anderson J You'd have to look at the facts of a particular case and timing would be quite significant if the requisitioning a day or so after a kidnap, that might be appropriate grounds for believing that there is an element of control.

Sutcliffe I suppose the other matter that needs to be considered in that context is the ability of the applicant to have possession of that sort of information in the timeframe where it would be available to apply for a writ in those circumstances and as Your Honours are aware a great deal of the information as to what actually occurred came as a result of an ongoing police investigation as opposed to an applicant position here of a father who simply wouldn't have the ability to access that sort of information.

Elias CJ Mr Sutcliffe you have to get back to the purpose of the writ don't you, and you are talking about obtaining information. The writ is to bring someone detained before the Courts so that the lawfulness of the detention can be ascertained.

Sutcliffe Yes. And as the Courts have said, the liberty of the person is a particularly important thing as is the liberty of in this case, this young boy, Jayden Headley and the point that His Honour was making is that there was evidence here to a prima facie standard I would suggest that there had been a conspiracy to which this applicant 'T' had clearly been a party. I've set out in my submissions in some detail the information which the police have which seemed in terms of time and circumstance in relationship to give rise to a sequence of

Tipping J Could I just interrupt and ask what actually you're propounding? If the writ can be directed against someone who doesn't have custody or control, let's just assume that for the moment, which may be what you've got to establish to get home, what criterion is the correct one for dictating to whom the writ can be issued? What would be your proposition? What would be the criterion for

Sutcliffe Well I'm not arguing that this person didn't have at least some form of control over

Tipping J Do you accept the custody control criterion but argue the tiers within it?

Sutcliffe Yes.

Elias CJ Does that mean that if anybody can be shown to have, or if the person detained can be shown to have passed through anyone's hands, the writ can issue to that person?

Sutcliffe If on the face of it the evidence would suggest that it is part of an overall plan, of course if a child or a person passes somewhat accidentally innocently through the hands of a third party then that may well be a different situation to a point although I note that the Court of Appeal sort of likened this situation in a way to a case where a proprietary interest for a third party might innocently come into possession of information and can be compelled to release it, but in this case, in my submission on the face of it we are not talking about an innocent third party, we're talking about somebody who has clearly on the evidence been part of a plan.

Blanchard J But guilt or innocence doesn't enter into it. The *Barnardo* case makes that quite clear. The question is whether at the time the writ is issued, the person to whom it's directed has custody or control. Now what control did 'T' have at the time when the writ was issued?

Sutcliffe My submission would be that on the evidence before the Court the control would be the position of information where the child had gone to.

Blanchard J That's not control of the child. I fully accept she may well have known where the child was but what evidence is there that she had any control over that?

Sutcliffe Well there was none.

Blanchard J Well that's the end of it isn't it?

Sutcliffe Well my submission would be if that is the end of the use of the writ in circumstances such as

Blanchard J Against 'T'.

Sutcliffe Against 'T' in circumstances

Blanchard J It's a different situation where the writ is directed against the person who is setting it all up and who may not directly have custody but is controlling the actions of the person who does have custody, but I suggest to you that there's no evidence that 'T' is in that position.

Sutcliffe I would suggest that the very fact that she was engaged in quite an intimate way with the actual abduction of the child, would say that she at least prima facie does and

Elias CJ What, have control?

Sutcliffe Yes. That the information

Elias CJ No, no, does she have control of the child, is that what you're saying?

Sutcliffe Perhaps if we take a step back, if I could take a step back and look at it this way. Even focusing on the next applicant, Skelton, other than the significant amount of information to the background of this case, the bare denials that they do not have any control or knowledge or so on with respect can't bear scrutiny control, what does that mean – physical control?

Anderson J Is there anything to suggest that at the time the writ issued Dick Headley wasn't any sense her agent for the purposes of detaining the child.

Sutcliffe At the time the writ issued, no.

Anderson J Well that's it.

McGrath J There's nothing in the judgments of either Justice Heath or the Court of Appeal that would assist you to advance the factual finding you're proposing we might be prepared to make, is there?

Sutcliffe No, other than the observations which I've been making which were made by the Court of Appeal that in this case the writ should be subject to the ability of the Courts to extend its use.

McGrath J Well that's I think perhaps your better point that the Court of Appeal didn't think that the constraints on the writ in the *Barnardo* case which I think were essentially the ones that Justice Blanchard was referring to should necessarily remain part of New Zealand law. I'm looking for example at para.78 of their judgment '..you may well wish to advance a submission in support of the legal propositions of the Court of Appeal that there should not be constraints on issuing the writ to secure information' which I think is their essential position.

Sutcliffe Yes it is and they did that by virtue of referring to, as did His Honour Justice Heath in the High Court, the analogy with *Anton Pillar* orders that were available in that sense and His Honour already indicated that writs need to be useful enough perhaps to meet changing social circumstances.

Tipping J But are you now resiling at my brother McGrath's invitation from your acceptance that the criterion is custody or control, because we've got to make it clear what your argument actually is?

Sutcliffe Yes I see where Your Honour's driving at. Well I have to accept that the criteria has been custody of control

Elias CJ But are you contending for the more expanded view of the writ developed by the Court of Appeal by analogy with discovery?

Sutcliffe Well I would think in the circumstances Your Honour, I think I'm obliged to make that argument and with respect it seems to be an argument that really does in the circumstances meet the justice of the occasion and it was clearly in Justice Heath's mind a difficult proposition that to accept that there could be as he put it in a sense an act of conspiracy where people then distance themselves from the very act and say well we have no knowledge, we have no control and are not able to assist the Court, particularly in circumstances where we're dealing with the case of a child which is in fact under the Guardianship of the Court.

Tipping J Could I ask for your help on para.34 of Justice Heath's judgment, page 171 of the case, because it seems to me that the finding there makes your argument in relation to 'T' almost impossible. The Judge says at para.34 ..'I am satisfied from the evidence that each of the other five defendants are likely to have knowledge of the place of which Jayden is presently held and apart from Miss 'T' may be able to exercise influence over Mr Headley to return him'. Now all you've got is the proposition that Miss 'T' may or probably knows where Jayden is. The Judge disavows any proposition that she may be able to influence his return.

Sutcliffe In this situation I'd have to say that my impression of what the Judge's indications there were that the other four were members of the family, the immediate family.

Tipping J But he's excluded Miss 'T' from any ability to influence the return now how can you possibly issue a writ against someone in those circumstances unless you're just doing it for information gathering purposes.

Anderson J Compulsory interrogation.

Elias CJ Or to put pressure on others.

Tipping J Or to put pressure on others. I mean I found this quite startling when I read that.

Sutcliffe Well the writ by its very nature has been indicated as coercive and

Tipping J But if she's got no capacity to influence the return, coercing her to do what?

Sutcliffe Well the point of the issue of the writ in this situation may well have been ultimately only to have received information which may well have led to locating and releasing the child from custody.

Tipping J Oh yes, I understand entirely, but the issue is, is that a proper scope or purpose of the writ?

Sutcliffe I would say that it is in circumstances where there is clearly a tight-knit conspiracy to hide the child away.

Tipping J But this conspirator has got no means apparently of getting the child back.

Sutcliffe Well what His Honour said was and influenced exercise over Mr Headley, what he didn't say was that there wasn't anything that she couldn't do.

Tipping J Well the reference to Mr Headley is that he is the presumed physical custodian.

Sutcliffe That's correct and that is a presumption which perhaps is well-founded but unproven.

Tipping J Well let's assume it's correct.

Sutcliffe Yes, but we still have a situation coming back to His Honour's comments about whether or not the Court of Appeal was right in these circumstances to meet the issues before it by extending the writ or its coverage to include

Tipping J Well the strange thing was they didn't think it was necessary to extend the writ. They actually just observed in passing it might be a good idea to do so. Is that a fair appreciation of their reasoning?

Sutcliffe Well what the Court of Appeal indicated was well it seems to be apparent in other less serious types of situations in a civil context we are able to compel information to be provided in a situation where you're dealing with the rights of liberty of an individual, why shouldn't we do it there, it's a natural extension and involvement of the use of the writ and in my submission that would meet the interests of justice and perhaps an expectation that the Courts would be able to respond in that way in the face of an entrenched respondent, or group of respondents who

Elias CJ Is this a submission that it would be a good idea to have this power?

Sutcliffe Well as in the case of the applicant, he comes before the Court and says '..listen, my son's been taken; he's being unlawfully detained; I'd like to get him back. The police can't do it; he's effectively under the guardianship of the Court; I need the Courts to respond to this situation; this is the information which I have; this is the person who has abducted him and clearly passed him on to somebody else. These people are not saying anything; I'm not getting anywhere. The justice requires this Court to respond and assist me'. That's simply what it is

and the use of the writ is a mechanism which has, as the Courts have referred to through a number of the decisions, evolved from time to time to meet the needs of a particular situation.

Elias CJ The Court doesn't evolve strategies which are auxiliary to police investigations in a sort of general way which you seem to be asking us to do here. It seems to me that you are acknowledging that the writ has never traditionally been applied in these sort of circumstances but that it would be very useful, and I entirely understand the position of the applicant in this, and I'm not seeking to diminish that anguish at all, but it just seems a very unprincipled approach for you to be putting to us that because it might help the writ should be extended in this way.

Sutcliffe Well the Court of Appeal clearly in the circumstances determined that the writ was available to do just that in a sense that it was available if the law had evolved in civil proceedings generally, not specific situations to the point that it could require even innocent third parties to provide evidence by way of affidavit, then in terms of habeas corpus proceedings where the liberty of a person was at stake, it could order and require an affidavit to be provided by, on the face of it, prima facie, the abductor to say what happened to the child.

Tipping J The Court of Appeal's discussion that your trying to adopt and urge us to apply seems to start at about para.70 where Their Honours said that there was no reason why the procedures for habeas corpus should not evolve to meet the needs of the age of the wide-bodied jet, an observation that may not have any direct relevance to this particular case, and then they went on to talk about this contra mundum idea that you could issue the writ against everybody, the world. Then they said that the *Barnardo's* criteria were actually satisfied so they actually didn't need to extend the writ. They thought it was within *Barnardo* which with great respect I have difficulty with, and then they went on to suggest further developments and at 75 they said '..having demonstrated an implication by', sorry, 'the applicant having demonstrated an implication by the appellant, that's 'T' in the abduction, a legal burden is cast on the appellant to demonstrate effective dissociation from the transaction'. Now I'm not sure whether that was a purported paraphrase of *Barnardo* which if it was it was not correct, or whether it was a suggested development of the law and I don't find anywhere in here, other than para.78 when they seem to go even wider, any clear articulation of a principle upon which the Courts should now address or direct themselves in relation to this wider connotation of habeas corpus, now what do you say that principle is?

Sutcliffe If I might just have a minute Sir?

Tipping J No it's a fast ball because I think it's not easy to determine, but if we lay down some new law everybody's got to be able to be very clear what it is.

Sutcliffe Your Honour's suggesting that the broad proposition referring to the evolving of the law in terms of the

Tipping J Well I'm just wanting your help as to what is the law that you're asking us to develop and lay down because in 78 there's some wide sweeping statements about there can be no reason why a person reasonably suspected of relevant knowledge should not be required to keep evidence of it.

McGrath J Then tries to squeeze it into s.14(2).

Tipping J Exactly. With great respect it's all not very easy to pin down as to what Their Honours are proposing, and what you're proposing based on what Their Honours were proposing.

Sutcliffe Yes.

Tipping J You see I read Their Honours in effect as saying here in 78 that it would be a good idea if a Judge in these sort of circumstances could act as a kind of commission of inquiry and get people to come along and give evidence and help the Judge to find the child. Well everyone can sympathise with that but I doubt that the Courts have got the power to suddenly create some commission of inquiry sort of path. I mean you might want to pause because we've got to have a clear articulation of what principle you're contending for if you're accepting that it's, well this is on the premise that it's not within *Barnardos* and frankly I have difficulty seeing how it could be.

Sutcliffe I would like the opportunity

Tipping J I'm sorry, no, continue, yes.

Sutcliffe I was going to suggest that I would like the opportunity to consider that point further.

McGrath J But Mr Sutcliffe I think that if you consider s.78, as I mentioned a moment ago, the Court of Appeal does seem to think that the statutory responsibility of inquiring into matters of fact under s.14(2) provides some authority for what it did, but as it has already been mentioned that power appears to be to enquire into matters of fact in law claimed to justify the detention and this was Mr Pyke's point I think in response to a question of mine, that power is expressed narrowly and it's not expressed in going into the matters that you're now trying to justify. But that's the other basis which the Court of Appeal offered and I can't see anything else. They thought it might be within *Barnardo* but they saw *Barnardo* was restrictive and thought it should be widened anyway. They thought it might be within s.14(2). It's just hard to see how either of those fit the situation you're in and that you're trying to argue for.

Sutcliffe Yes, I suppose if there is a way to sort of consider the context in which this case has brought in terms of developing a principled approach. It may well be found in the, I'd like to give it some thought, but it may well be found in the Courts inherent jurisdiction and particularly the application of the parens patriae which Justice Heath at least in respect to what is referred to by my learned friends as the subsequent orders seem to indicate that had some significant influence on the jurisdiction that he was exercising.

Elias CJ But isn't that what the police are doing? Isn't that what the police are doing in this case? They are investigating. Where's the need for the Court to craft tools that are not more generally available to the police in their work?

Sutcliffe Well this application of course is not brought by the police

Elias CJ No I know that. I appreciate that but if it had been made by the police, because the police aren't precluded from making an application for habeas corpus

Sutcliffe No they're not.

Tipping J There was a warrant out too under the Guardianship Care of Children Act wasn't there from memory?

Sutcliffe There was a warrant issued to enable the police to take possession of the child when the child was located.

Tipping J And enforcement warrant under s.70 something?

Sutcliffe That was deemed necessary to enable the police to actually take possession of the child if they did find them.

Anderson J Just picking up on the point the Chief Justice reverted to, if the writ should be developed in the way you suggest, then any time someone goes missing the police could invoke interrogatory powers by applying for habeas corpus in relation to a suspected witness or someone suspected of complicity, apply for habeas corpus and say well here's enough to show this person had some involvement at some stage, interrogate them against their interest.

Sutcliffe Well that raises another issue doesn't it, as to whether or not it would be against their interest and that raises the argument that my learned friends have relied on in terms of the right against self-incrimination.

Anderson J If it wasn't against their interest one would expect a citizen to give information relating particularly to the abduction of this poor young child.

Sutcliffe Well one would hope that that would be the case but the factual background in this case doesn't necessarily bear that out.

Anderson J Well anyway the point I was making is that type of situation is clearly in conflict with the Bill of Rights.

Sutcliffe But then again Your Honour so is the directions that this Court, oh the Court can make in respect of requiring deponents of affidavits in *Anton Pillar* cases and the protection mechanisms are there but that leads off obviously on another issue.

Anderson J *Anton Pillar* is here I suppose but it doesn't mean to say that it's universally beloved.

Sutcliffe No.

McGrath J Mr Sutcliffe now one point I suppose you could make it is the view of the writ that's being tentatively suggested to you from the bench would not give it much scope and indeed might well not give it any scope I suspect beyond what the Care of Children's Legislation would allow but that may well be what s.13(1) is getting at, that it's expected that people will pursue all remedies in terms of Care of Children Legislation do in the most unfortunate situation that's arisen but habeas corpus will be available in case it's of some use on a residual basis, without the great expectation that very often it will be.

Sutcliffe Yes and that would be fair, that's right and that is what has actively occurred in this case. All other options have been exhausted.

McGrath J What did you do under the Care of Children Act before you issued your proceedings in October?

Sutcliffe Well before the proceedings were issued in October Mr Jones had obtained interim custody of the child in the Family Court

McGrath J No that was in June I think wasn't it?

Sutcliffe That's right and of course it really isn't known or was known other than letters to the media and so on who actually had custody or care of the child. The application for a warrant to uplift the child if located was obtained and beyond that no further application was made and I'm not aware of any that could usefully have been made that would have altered the situation at all in any event.

Elias CJ I haven't looked at the powers under the Care of Children Act. Do they include any powers for interrogation or investigation?

Sutcliffe Not that I'm aware of Your Honour.

Elias CJ Because it just occurs to me, or the penny hadn't dropped before, that s.13(1) could in fact be quite a powerful argument against you because the scheme of the legislation is that the Court can use those powers interchangeably and if the scope of the orders available under that Act don't extend to investigation and interrogation it may be a pointer that the writ isn't assumed to have that wider scope.

Tipping J '..Section 129 of the Care of Children Act gives the Court power to call witnesses other than in criminal proceedings. A Court may on its own initiative call as a witness a person who's evidence may in its opinion assist the Court'.

Elias CJ Sorry 12?

Tipping J 129, Care of Children Act. ..'A witness called by the Court under this section has the same privilege to refuse to answer any questions of the witness had been called by a party', and then there are procedural provisions and then there are cross references to the Summary Proceedings Act and then there are expenses of the witness and so on. So it's a general power to call witnesses if the Court thinks on its own notion that the doing so may assist and if there's specific power to call the husband or a wife to compel

Anderson J But you can't override a privileged self-incrimination

Tipping J So I don't know quite where that takes us but I doubt the habeas corpus is intended to be more generous if you like than that because of the cross referencing. So the Judge might well have been able in constituting himself as a Family Court or acting in a 13(1) to have called someone then the person would have been able to say 'I'm sorry I may incriminate myself', so I don't see how a habeas corpus can be regarded as a vehicle whereby you can overcome that.

Sutcliffe Yes, if I can give the matter some thought I would appreciate that.

Tipping J It's a difficult one Mr Sutcliffe please don't think I'm out of sympathy for your client's predicament but there are far greater issues at stake here than the immediate case.

Elias CJ Have you completed your argument on that?

Sutcliffe Yes, I'd like to be able to give the matter a little bit more thought to come back and respond to the issues as to whether or not there's a point of principle that might be salvaged as to

Tipping J Well just what you would say the development of the writ if it needs one ought to be, what would be the principle that we'd be laying down that the writ could achieve and on what criteria.

Sutcliffe Well essentially as the Court of Appeal have indicated that following their views, that in circumstances where as in this case the Court is satisfied that the person who the applicant is seeking to be subject to the writ has participated knowingly on the face of it in the detention at some point of the person and that their control or custody has passed that they can be compelled to tell the Court what happened to the person after they left their custody.

Tipping J Can be compelled by habeas corpus?

Sutcliffe By habeas corpus. Essentially as I think it was *Barnardo*, it said that the pressure of the writ can be used in that situation.

Tipping J And what can they be compelled to testify to.

Sutcliffe I believe that the questions which His Honour Justice Heath set out at para.44(b) of his decision would meet those requirements in terms of what they know about what happened to Jayden after he left the library. Any contact that they may have had with Jayden after he left the library. Any knowledge they may have as to where he went.

Tipping J What is to stop the Judge in the course of hearing the application for the writ, exercising the power under s.129. Issuing a witness summons to 'T' and asking her these questions, in response to which she's entitled under the section to invoke certain privileges.

Sutcliffe Yes. I suppose in the circumstances there's nothing to prevent the Judge from doing that but then you don't have the influence of the writ in order to require the person to tell the truth. In other words

Tipping J But can they be compelled under the writ to testify wider than they can be compelled under s.129?

Sutcliffe I would suggest that they can because, and that brings into the issue the extension of that reasoning from *Anton Pillar* orders particularly where the rights against self-incrimination are protected as they have been in this case.

Tipping J And how would that fit with the Bill of Rights? It's a sophisticated thumbscrew.

Sutcliffe Well it guarantees in those circumstances the individual that anything that they do say which may incriminate them cannot be used in criminal proceedings against them.

Elias CJ But the right is not to be compelled to self-incriminate. It's not clear to me that that right is not breached even if the affidavit is held sealed.

Sutcliffe Well with respect His Honour's already indicated that perhaps the use of that, or the extension of this doctrine in respect of *Anton Pillar*

orders is not beloved. It nevertheless is a situation where that has come into conflict with the Bill of Rights and has found to be well-catered for. It would seem to me that where an individual is provided the type of protection here before the evidence is given

Tipping J The privilege is to refuse to answer.

Sutcliffe Well

Tipping J It's not to be told well you must answer but we're going to protect you.

Sutcliffe Well that may be the privilege but the privilege is there to protect against self-incrimination and where the Court provides before the questions are even answered or asked, well in this case asked, before they're even answered that any answers they give will not and cannot be used against them to incriminate them.

Tipping J So there's no risk of incrimination?

Sutcliffe Then the risk of incrimination doesn't exist.

Anderson J You can't put them in jeopardy of prosecution.

Sutcliffe No, it's

Tipping J But that would be a method of getting something out of someone where they have a right at law to refuse to answer.

Sutcliffe Yes but the right only exists where the answer will incriminate them.

McGrath J Tend to incriminate.

Sutcliffe And if the answer

McGrath J But it can lead to derivative incrimination can't it? Information comes out that can be used when it wouldn't otherwise be available. I mean this is a common argument that's advanced that's critical of the statutory powers of the Serious Fraud Office to compel people suspected of serious fraud to give interviews.

Sutcliffe Well that of course would always depend perhaps on first of all the nature of the answer and secondly whether or not it could be argued that that would in fact lead to some form of derivative use. For example it's not uncommon for Judges to deal with pre-trial applications where they do consider matters where incriminating evidence is being given and so in that sense in my submission there cannot be anything offensive in the Court actually receiving the information and then ruling as to whether or not it would have that wider implication, but in any event in a situation such as, perhaps best use a hypothetical, where a person in the position of 'T' were to say

well ‘this is what happened to this boy, he was taken to a particular place and these are the people who were there’. Clearly if the boy was located at that place and those people were interviewed and then gave information as to the involvement of ‘T’ then the question arises as to whether or not that is derivative use or whether or not the police would have located that information in any event.

McGrath J Yes, the point I’m making simply is that the fact that the evidence can’t be used doesn’t necessarily completely remove the prejudice to the person who’s compelled to incriminate themselves.

Sutcliffe Well I would imagine if the evidence is proved and had some derivative use then they would clearly be protected but they could

McGrath J So you’re saying there’s actually a great advantage all they’ve got to do is sew some sort of link and the Crown can’t prosecute them?

Sutcliffe Yes, absolutely. There may well be those circumstances where, and it’s not been lost on counsel that in fact there may well be some advantage in the

Elias CJ Any derivative product would be excluded?

Sutcliffe Yes, and again if we come back to the point which Your Honour made earlier on, we’re not dealing with a case which is going to have a significant impact necessarily on the general approach of the law in this area because of course we’re dealing with a very fact specific situation in habeas corpus proceedings where we’re talking about a very narrow fact situation.

Blanchard J It does give the Court a very unusual role though. One which is not its normal role where it’s essentially using the writ of habeas corpus as a means of summoning potential witnesses before it in order to investigate them in an inquisitorial way, and doing so in an area which is already being investigated by the police.

Sutcliffe Yes, I suppose I’m concerned to sort of distinguish between what my client’s actions are and what the responses the police has or will or may end up being in terms of the inquiry and I don’t see that the use of the writ in this way as in anyway being in conflict with that or there being some particular difficulty because I suppose it’s no different than a situation where the police may be sued for false arrest or something of that nature, or prosecuted for that matter, but the situation here I see as being quite separate to what the police are doing.

Blanchard J This is occurring at the same time as the police investigation. It’s not looking at things after the event.

Sutcliffe No.

Tipping J I would have thought that there's a strong argument that the only inquisitorial function laid on the Judge under this Act, Habeas Corpus Act, is that in 14(2), where there is a direct statutory duty to inquire into the matters of fact and law, as brother McGrath pointed out and others have, claimed to justify the detention. That seems to cast some sort of a proactive role if you like onto the Judge but it seems to me that it would be both contrary to the sort of general tenure of that and contrary to the general approach of the law to give the Judge some sort of coercive powers to carry out a general inquisition into all this.

Sutcliffe Well the Court of Appeal made the point that the Act itself, the Habeas Corpus Act is procedural and that those procedures which were established are not necessarily intended to inhibit the development of the common law in respect of the use to which a writ can be put, and in particular the need to do what may be necessary within the operation of the law to secure the release of the person, and certainly in the case of *Barnardos*, after the writ having been issued, the person having stated 'well we don't have him anymore' the Court of Appeal said well on the return of the writ we'll test the truth of that.

Tipping J Well that's after the writ isn't it? I'm concerned about before the writ is issued that the criteria would have to be satisfied before the writ is issued and the purpose of the issue of the writ, never mind what happens after the writ, because that will be dictated by the first step. Anyway you might like to

Elias CJ We'll take the morning adjournment now if that's convenient.

11.32am Court Adjourned
11.50am Court Resumed

Elias CJ Yes Counsel we've conferred over the morning adjournment and on the question of publication and the suppression order in respect of argument, we will hear counsel at the end of the hearing and invite you to identify for us areas of argument which are of concern in that regard. On the name suppression Mr Pyke we will hear you also at the end of the argument as to why we should make an order for name suppression and we'll consider any material you want to put forward to us at that stage in support.

Pyke Yes as the Court pleases.

Elias CJ Thank you. Alright Mr Sutcliffe, is there more that you want to advance to us?

Sutcliffe No there's nothing further.

Elias CJ Nothing further, thank you. Mr Pyke was there any matter of reply there.

Pyke Just briefly if the Court pleases. The question of an inquiry as covered in para.78, page 264 of the case on appeal volume 2, para.78 of the judgment of the Court of Appeal

Elias CJ Sorry paragraph?

Pyke 78.

Elias CJ Yes, thank you.

Pyke And the Court there held 'there can be no reason why a person reasonably suspected of relevant knowledge should not be required to give evidence of it, no doubt most conveniently by affidavit, and be cross-examined upon it in exercise of the Judge's responsibility under s.14(2) to enquire into matters of fact'. If in fact this Court holds that the orders made by Justice Heath were orders under s.14 then the possibility of an inquiry into section can't exist and so to fit the affidavit orders into the framework would be impossible. They would have to somehow become a form of enforcement and anticipation.

Tipping J A final order has already been made on that hypothesis.

Pyke Yes, so the inquiry is over.

Tipping J Yes.

Pyke The question of submissions from my friend started to touch upon the issue of privilege against self-incrimination. I know that's a matter that my learned friend Mr Jones QC wishes to develop an argument and I'm asking the Court whether the Court wishes to hear from me on those issues at the moment because it's probably better for Mr Jones QC to carry the lead on that issue.

Elias CJ Yes that will be fine. If there's anything additional you want to add following his argument we'll hear you then.

Pyke Yes, as the Court pleases.

Elias CJ Yes Mr Jones.

Jones The applicant, Miss Skelton, has a further hurdle to overcome in terms of attaining the leave of this Court in that she is appealing directly from the decision of Justice Heath for the reasons set out in the application for leave and also in the memorandum. Essentially because of the way in which this matter unfolded she was left with little choice and due to the way in which the Court of Appeal dealt with the matter most expeditiously but also in terms of the jurisdictional argument, there was

no other avenue for her to take but to come to this Court for the reasons set out Ma'am, so in my submission this is one of those exceptional cases where under s.14 of the Act leave can be given for an appeal direct from the High Court. As far as the background of the case is concerned, if I could simply outline in a chronological sense what has happened. On the 18th August 2006 the young boy

Elias CJ Mr Jones Justice Tipping suggests to me that you probably don't need to take us through the factual background. We've read the papers.

Jones I'm obliged. I was simply going to make the point that this leads into the abuse of process argument that these proceedings were taken two months to the day after he was in fact abducted. Now that means that this case was not a burning coal on the carpet if I can use that phrase. This was a calculated attempt to try and force in my submission the appellant which she could not be required to do under the criminal law and that was done with the assistance of the police in large part and has resulted in a hearing which took place on the 18th October which has been the basis for her subsequent incarceration. Now what we have as far as that hearing is concerned is a claim that that was contrary to her rights in terms of a breach of natural justice in the ways that have been set out and that of course is enshrined in s.27 of the New Zealand Bill of Rights Act.

Tipping J Is it the subsidiary or collateral orders that were made that you're now referring to? The first orders that she was commanded to produce the child I would have thought was mainstream habeas corpus, subject to the relevant criteria being satisfied for the issue of the writ.

Jones Indeed, yes, I accept that but the issue is that she was not given any opportunity to test the evidence that was put forward in support of that writ issuing.

Elias CJ Well what testing do you want, because there's been no application to file further evidence in this Court?

Jones Well none of the witnesses were cross-examined on the 18th October

Elias CJ But is this a hypothetical submission Mr Jones or is there something you're going to point to which has caused prejudice?

Jones Well one of the issues was, and obviously the substance of the writ, as whether or not there is custody or control of the person as at the date of the application being determined which is the 18th October. There was some significant reliance placed on the evidence of a person called 'Thurston' who gave evidence of what he said were discussions with the appellant and other members of the family in early September. Now even taking for the sake of argument that there is ample evidence that the appellant was involved in the initial abduction, it is the ongoing control in terms of the *Barnardo* principles that has to be established.

Now the evidence of Thurston, he doesn't even give his occupation or anything of that sort, he simply says that is my name and this is what happened. He could have been cross-examined on that issue as to what happened in terms of any discussions because he says firstly in an oblique way and then in a more direct way that the appellant said that she knew where her son was, and this is in September, and that of course would be an important plank in terms of proving an ongoing ability to control

Tipping J Is your argument essentially that she was not allowed by time constraints and allied factors to rebut or rejoin to the proposition that she had sufficient control for the writ to go against her?

Jones Yes.

Tipping J Is that the nub of it?

Jones Yes it is.

Elias CJ But what was the impediment to her putting in an affidavit challenging that account?

Jones She was served Ma'am at 7.45am that very morning.

Elias CJ No I mean in the interim. She's sworn an affidavit on the 24th October. Why hasn't she traversed these other matters if they're an issue?

Jones She wasn't given the opportunity and in the appellant's submission it was a final order under s.14 that was made on the 18th October. She had no ability to do it.

Anderson J She could have given oral evidence at the hearing.

Jones She could have but as indicated in her affidavit

Anderson J Saying I haven't a clue where he is and I've got nothing to do with it. It's Dad's folly of his own.

Jones Indeed, but as is set out in her affidavit, she did not have the lawyer who was representing her at the time, she had other counsel; an adjournment was sought; that was declined, and then argument ensued.

Elias CJ But there's still no evidence that has been sought to be put forward in the Court of Appeal or here answering the material that Justice Heath relied on. That's why I'm saying why is it not hypothetical?

Jones It's not a hypothetical point Ma'am because the finding on the 18th October in my submission was a final one and that completed the inquiry. There was no ability

Elias CJ Oh this is your functus argument?

Jones Yes, there was no ability to actually put any evidence forward or to do anything after that point. She was not given the ability to be heard.

Elias CJ I wonder really whether that takes into account the nature of the writ?

Jones In my submission Ma'am it does. When one considers that a full week was given for the child to be brought to Court, why on earth the application itself could not have been adjourned say to the Friday to enable consultation with counsel and also to prepare cross-examination, take instructions, things of that sort and have the hearing on the Friday.

Tipping J Were the deponents there ready for cross-examination if that had been

Jones I can't answer that, I wasn't there at the time. I was instructed after that hearing.

Tipping J I suspect they probably weren't, but that's just speculation. You say really this was all done in unnecessary haste?

Jones Indeed yes, two months after the event it all happens within a matter of hours of her being served. There was no need for that urgency.

Blanchard J Was there any application for adjournment so that she'd have the opportunity of coming up with evidence?

Jones There was a generic application for an adjournment made which is referred to in the decision of Justice Heath, but the grounds for that adjournment in terms of whether it was to adduce further evidence or prepare for cross-examination isn't articulated, it was simply a general application for an adjournment on the basis that there was inadequate time to prepare.

Elias CJ What about an application for re-hearing? Why could not an application for re-hearing have been made if there was evidence that your client wished to put forward?

Jones The Court had made its decision and under the Act once the decision is made that's it.

Tipping J But when your client came up

Elias CJ A very strange submission.

Tipping J When your client came up for contempt of the order, could she not then without abeying the questions which she rejected to, could she not then have put in evidence saying well I asked for an adjournment, this is what I would have produced if I'd been granted it and you shouldn't

punish me for contempt because I never was a proper subject of the writ?

Jones Well she certainly

Tipping J I would have thought that someone would facing the barrel of imprisonment would be given every encouragement to do that.

Jones She certainly did the first part of that.

Tipping J Well she said she didn't want to answer the questions.

Jones Yes.

Tipping J But this is a different issue. This is an issue directed to whether she had custody or control. I have some sympathy for the view you know that this was certainly done in considerable haste but I would have thought she's had plenty of opportunity since to express her view on this issue.

Jones The difficulty with that with respect is that once the Court has made the order under s.14, the order is made.

Tipping J Yes but she surely can't be precluded from saying thereafter that it shouldn't have been either on appeal or

Jones That's what she's tried to do on appeal.

Tipping J Yes, but what evidence has she produced?

Jones Well she hasn't produced any evidence at this stage apart from affidavits

Elias CJ But if you're running a natural justice argument, it has to be based on evidence doesn't it?

Jones Well

Tipping J This is what I would have done or could have done had I been given the opportunity.

Elias CJ Yes.

Blanchard J Mr Jones I don't quite understand this argument about finality in this context. What section of the Act are you talking about?

Jones It's s.14 Sir.

Blanchard J Section 14.

Jones 14, subsection 3, talking about a Judge must determine an application by either refusing it or granting it.

Blanchard J Yes but what's to stop the Judge being asked to reconsider the decision that has been made on a rehearing?

Jones Section 15 Sir.

Blanchard J Which part of it?

Jones Subsection 1.

Blanchard J 'No further application can be made by any person etc etc requiring a re-examination of substantially the same questions as those considered by the Court when the earlier application was refused'.

Tipping J You can't go along to another Judge as used to be done.

Jones Yes.

Blanchard J But that wouldn't stop it here.

Jones Well if the order has been made under s.14, if the Court is functus officio then there is no ability for the Court to reconsider.

Elias CJ Where do you get this notion of the Court being functus officio? What's the legal basis for that?

Jones Well under s.14, if one accepts that those are the basis for the orders being made to bring the child to the Court then that is the end of the application.

Blanchard J What about a rehearing?

Jones Well things had already progressed past the point when we get to the contempt proceedings.

Blanchard J But you're saying that the order shouldn't have been made in the first place because there was a breach of natural justice. Isn't this classic territory for going back to the Court and asking for a re-hearing on that ground?

Elias CJ And putting out the evidence you would have put in to demonstrate that there has been a breach of natural justice.

Jones That is one aspect of it but surely the inability to cross-examine and to prepare must in itself be a breach of natural justice.

Anderson J Well that would be more compelling if she said 'look I don't have the child; I don't have control; I don't know where the child is, and I

would have been able to prove that if I'd had more time'. She's not saying that she's simply files an affidavit a week later assiduously avoiding the crucial issues and saying that she didn't have time to challenge the evidence without saying 'and it's wrong'.

Jones The difficulty with that with respect is the finding of Justice Heath, page 172 of the case, para.37, where His Honour states in his view it is not credible to suggest that the appellant does not know where he is an what is happening to him, nor is it credible that she doesn't know where her father is. Any evidence she put in would be against that finding that it wouldn't be credible.

Elias CJ Oh well really. On the evidence before the Judge he might have entitled to come to that. If your client had put before him credible evidence he would have changed his mind. It's the absence of evidence that's the issue and we still don't have any evidence Mr Jones.

Jones No, I'm making the point in relation to the hearing on the 18th

Elias CJ Yes I know, I understand that.

Jones The findings that were made and the effect of exclusion of any denial as far as the appellant was concerned that she knows where her father is.

Elias CJ But you may be entirely right about that. You may be right that this proceeded too hastily and there may have been information that your client should have, or would have wanted to put before the Court, but where is it, where is the harm?

Jones Well there was no ability to cross-examine Ma'am. We don't know

Elias CJ But what's the harm in that? What would have been put in cross-examination?

Jones Well the issues relating to Mr Thurston which goes to the very issue of custody or control.

Blanchard J But we haven't been apprised of these. We're being asked to make this decision on an entirely theoretical argument.

Jones It's based on the way in which the hearing was conducted and that the minimal requirement

Blanchard J Well sure, there may have been a breach of natural justice but that hasn't actually been demonstrated because we haven't been told the respects in which it would have made a difference if there'd been more time, opportunity to cross-examine and so on. It's theoretical.

Jones Well it's difficult to say whether it would have made a difference or not. The issue is that the rights were not given to her and that must establish the breach

Blanchard J Well one has to look at this in the context that this is a habeas corpus application and they have to be dealt with at speed as the Act makes clear.

Jones Indeed yes, but it was filed on

Blanchard J So isn't it incumbent on you if you're going to make an argument about breach of natural justice to put up something to demonstrate reality rather than theory.

Jones Well in my submission no. The conduct of the hearing can be such that natural justice breaches can be shown, for example the inability to cross-examine, the shortness of time to prepare. Those things in my submission are evident on the face of the record. Essentially what she would then have to do is enter into the fray and she would have to say on oath things that she cannot be required to say on oath in a criminal proceeding which she already faces.

Blanchard J Well how was that going to be done anyway?

Jones Well the issue is she's placed in an impossible situation.

Tipping J Well she's having two bob each way on that argument. She says she should have been given the opportunity but she wouldn't actually have been able to avail herself of it.

Jones Well it may not have been her that actually gave evidence.

Blanchard J Well where's the evidence from the person who would have given evidence?

Jones Well that isn't before the Court.

Blanchard J No.

Jones It's being argued on the basis that there was no opportunity for that to be done.

Blanchard J But we don't know that if there had been that opportunity there was anyone who was going to give evidence.

Jones Well true, but as far as the cross-examination point is concerned, what we have is the Court making a final order on the basis of untested evidence, essentially ex parte.

Elias CJ Well it wasn't ex parte

Jones Well there was no ability to challenge Ma'am, there was simply inability to make submissions. There was no ability to go away and take instructions and deal with the matter in a considered way and in the timeframe that was available, namely a week, there was plenty of time to do that within the strictures of the timeframe under the Act.

Elias CJ But you have to demonstrate that it's material and really at the moment I'm not at all convinced that you've done that.

Jones Well I accept your point Ma'am. Essentially this is a case that was brought in a calculated way, the appellant says, and was pushed through denying her her rights to properly defend the application and then that flows through into the hearing on the 25th October when she's found to be in contempt.

Elias CJ And that's something that hasn't been appealed?

Jones The contempt, that's correct.

Elias CJ So we're not going to go there, is that right?

Jones No, but I'm simply saying that everything happened very quickly against the background of the orders that were made on the 18th without her having the ability to have an adjournment to give instructions to be able to cross-examine any of the witnesses or to test the evidence in any way.

Anderson J She got the opportunity a week later to say 'look this writ should not have been issued against me because there's no way that I have any control'. She didn't even say it then.

Jones The difficulty, well I simply come back to para.37

Anderson J She doesn't deny control, she doesn't admit it, but she doesn't deny it. That's what makes your argument theoretical.

Jones Well with respect Sir, Justice Heath at para.37 said it's not credible that she doesn't know where he is.

Blanchard J Well he's speaking of the evidence before him.

Jones But if it's not credible and she comes along and says 'I don't know where he is'

Anderson J Then there's more evidence then

Jones Why on earth would the finding change? I don't believe you; it's not credible to say that.

Anderson J Because there was nothing on oath from her contradicting it or saying 'I don't know where the child is'.

Elias CJ How much time was needed to put in an affidavit to that effect Mr Jones?

Jones Well probably a couple of days.

Anderson J Half an hour to be put in handwriting

Tipping J I think the real truth of the matter is that your client was in a very delicate position and she is skilfully with your aid trying to not commit herself in either direction.

Jones Well the difficulty is that she's been told in a judgment that it's not credible to deny what the Judges found.

Tipping J Well I hear all that, I hear all that, but I think we should move on frankly.

Jones I'm happy to do that but I need to make that point about the breach.

Tipping J You've made it very clear.

Jones Now that leads on to the, well I've spoken about the abuse of process argument. In my submission this proceeding is an abuse of process because of the coercive nature in terms of what it is supposedly requiring my client to do. Now again against the background we have a police investigation which has been ongoing for some two months before this application was actually filed.

Tipping J If the criteria, the legal criteria for the issue of at least that first order was satisfied, how can it be an abuse of process?

Jones It can't but the subsequent orders can be, the affidavit orders.

Tipping J Oh right, well that I think you've got to be very careful to keep these two steps separate and not talk amorphously if you like about abusive process.

Jones Well it's probably a two-tiered argument. The proceedings themselves in my submission are an abuse because they are done in calculated way with the assistance of the police in order to do something the police are already investigating.

Tipping J Part of the proceedings maybe. Part of the orders you may say may be an abuse but unless you can show, if you can show that there were no grounds for the issue of the writ, nothing else matters. If there were

grounds for the issue of it I don't understand, and you've acknowledged that that part of it, that order can't be an abuse.

Jones Well it can't be an abuse if the grounds are made out, but it's my submission that the whole basis of the proceeding is running alongside a criminal investigation where a charge has already been laid

Tipping J But why should that make the proper scope of habeas corpus an abuse? It means you're insulated from it because you happen to have been charged.

Jones Alright, well I accept that and I won't advance that.

Elias CJ And indeed if you think about the historic development of the writ in very many cases people were incarcerated while police investigations into crimes or, well not pre-police investigations into crimes were continuing, so it can't be a total prohibition on the exercise of the jurisdiction to grant the writ that there are criminal proceedings afoot.

Jones Not at all, it is simply that in this particular case, in the circumstances of this case, it submitted that it is an abuse but the secondary argument which is probably the only one I can maintain is that the orders that were made, the affidavit orders, are in fact an abuse of process.

Elias CJ Yes.

Anderson J Why do you call it an abuse, why don't you just say that in the circumstances it was inappropriate that they were made?

Jones With respect Sir I don't think inappropriate is a strong enough term.

Anderson J Yes, but why is it an abuse? What is the character, what is the abusive character of it?

Jones Because it simply rides roughshod over the rights of the individual in terms of the right to silence.

Anderson J Well that doesn't make it an abuse. It might make it wrong, it doesn't make it abusive.

Jones Well in my submission I've simply used that term because it is not something which the proceedings the writ of habeas corpus entertain

Anderson J So it was an error?

Jones Well it's wrong, but perhaps I'll use the generic term that it's wrong.

Anderson J That's all you need to say.

Jones Well I've simply used the abuse for the reasons I've outlined them. I'm happy to amend that.

Anderson J Abuse has pejorative connotations that are more apt for other types of cases.

Tipping J I think what you're saying Mr Jones is that the writ was sought for an improper purpose.

Jones Well it was done to put pressure on the appellant and it was improper pressure.

Tipping J Do you challenge the first part of it? I mean are you about to argue that there were no grounds on the custody and control approach, there were no grounds upon which the Judge could have taken the view sufficient for the purposes that your client had custody or control?

Jones No I can't.

Tipping J No.

Blanchard J But Mr Jones the writ does have some coercive function and again that's apparent from what Lord Herschell says in *Barnardo* when he talks about whether there is a doubt the denial of detention and it is unquestionably entitled to use the pressure of the writ to test the truth of the allegation.

Jones But what I'm talking about is against the background of criminal proceeding. It seems this is simply a shot that has been fired against the appellant, against that background, with the assistance of the police. Where the police have failed they are using a civil remedy, that is the point I wish to make.

Tipping J Well if as you say that you can't argue that she had no sufficient custody or control, the only thing you can argue then is that the collateral orders should not have been made.

Jones Yes.

Tipping J Is that fair?

Jones Yes, as the arguments progress it is yes.

Tipping J And why is that so?

Jones Because the order was a final order and what the collateral orders were, were essentially enforcement.

Tipping J They anticipated, wrongly anticipated non-compliance is that the argument?

Jones Yes it was a threat essentially, and the inquiry under s.14 had been completed. The orders had been made. The only further inquiry that the Court had was in terms of any potential contempt, and that's exactly how Justice Keane interpreted the orders when the hearing commenced on the 25th October.

Anderson J In a sense it's really an argument that he should have been able to approach the issue of what amounts to a return as he saw it.

Jones Indeed yes.

Anderson J And no shackled by an anticipatory regime.

Jones Yes and also the orders in my submission were made without any basis. The Court had to wait and see if there was a return and then make an inquiry. What it did is it pre-emptively made orders saying well you have to actually file an affidavit before the date and time that the child has to be returned and you have to say these various things which in my submission were totally in breach of her rights against self-incrimination.

Tipping J So the Court couldn't make an order to bite before the return date because that's anticipating what the return might be?

Jones The inquiry had concluded and the ancillary orders essentially relate to an inquiry and enforcement in terms of contempt, and so what should have happened is the first part of the order should have been made and then when the proceedings had been adjourned to the 25th, if the return was not made then the inquiry could have been undertaken.

Anderson J What I suppose what might have been a happier route would be to make the order and say 'and if you don't return him the Court's going to be making inquiries as to why not'.

Jones Yes, but instead what we had was a regime set down whereby affidavits had to be filed which in my submission go past what can be required of a person in this situation where she's charged with criminal offence.

Anderson J Because a person, and I'm not talking about this case specifically, but someone in that position might on the return date have said well I haven't produced the person because I don't in fact have any power to do so. After the writ was issued I had no power, and they would be tested on that.

Jones Yes, and then there could be an inquiry and then that would be a question of whether or not there was any wilful breach of the order when we move into the contempt jurisdiction.

Anderson J Like the Captain of the ship who wouldn't recognise a 17-year old from a 23-year old who is two inches taller.

Jones Yes.

Tipping J Do you agree Mr Jones or not that the effect of the Judge's order A was an order not for release immediately as it might appear from the first sentence but for release into the custody of the Court at 10 o'clock on Wednesday the 25th October, because the two sentences don't precisely mesh but it seems to me that that's probably what the Judge had in mind. The named people were ordered jointly and severally to discharge and release the boy from detention, fullstop and then they were ordered to bring in before the Court at 10 o'clock on Wednesday the 25th. Now literally read, that meant they had to release him immediately from his current detention and then a week later they had to bring him before the Court, but I think that would be unreal

Jones Yes.

Tipping J I think what the Judge must have been endeavouring to say was that they should release him into the custody of the Court at that time. Is that fair.

Jones Yes. The obligation was to release him and to bring him to Court.

Tipping J Yes.

Jones I don't think it was a question of releasing him and then several days later find him again and then take him back.

Tipping J No, it's just with respect not very aptly expressed.

Anderson J If he was released immediately you'd have the six-year old boy wandering around the bush in Northland somewhere.

Jones Or somewhere else?

Tipping J Wherever.

Jones Yes and then you'd get into a situation where whoever it was who came to Court and said 'well I did have him but I let him go' in accordance with the order and I can't bring him on the 25th which is rather silly.

Tipping J Because I can't now find him.

Jones Yes.

Tipping J Yes, well I just wanted to double check that with you. It seemed to me that that was obviously what the Judge was effectively directing.

Blanchard J Mr Jones do you know whether there was any discussion with the Judge before he made those orders about the orders that are in 44(b)?

Jones I understand there wasn't. I wasn't there but I understand there wasn't from other counsel Sir.

Tipping J Well they weren't part of what the applicant was seeking.

Jones There was nothing that the applicant sought other than the writ.

Tipping J Yes.

Jones That was it and s.14 is referred to in the application and in the memorandum of support which is part of the materials.

Anderson J Well that meets your argument about abuse of process doesn't it and when seeking it?

Tipping J This is the Judge's idea.

Jones Well it is, the ancillary orders were it seems they came out of the blue.

Blanchard J Well that perhaps is a better point of your attack on breach of natural justice.

Jones Well it's an additional factor, perhaps if I can put it that way. I'm loathe to give away the fact that someone doesn't have the right to cross-examine or to prepare properly.

Blanchard J Yes, I understand that.

Tipping J But there was no warning of this. At least your client had some warning of the first part of it, because that was what was served on her.

Jones Yes, undoubtedly so, yes.

Tipping J But what would be the effect of us saying in agreement with your argument, yes the Judge shouldn't have made any of those orders, what would be the practical effect of that on the current state of affairs.

Jones In terms of my client's incarceration?

Tipping J Yes, or in terms of the affidavit?

Jones In terms of the affidavit if there's no ability to require the affidavit to be sworn then that places my client in a totally different position, because the hearing on the 25th in terms of contempt proceeded on the basis of the fact that the child hadn't been brought to Court by any of

the six and that she had declined to say where he was. Now the decision

Elias CJ Well did she, decline to say, oh, she declined to give an affidavit in terms of the order.

Jones She declined to give an affidavit in the terms of (b).

Elias CJ The order of course makes the requirement of this affidavit contingent on these named people being unable to bring Jayden before the Court. I'm just wondering whether the fact that your client makes this affidavit is an indication, I'm just thinking about your point that this was before the date, the 25th October she was required to do it, whether it could be said that she had implicitly acknowledged she wasn't going to bring the child to Court by making this affidavit, addressing the second part of the orders.

Jones The affidavit refers to two aspects. The first is the conduct of the hearing and the background to it on the 18th and the second is the concern she has about the affidavit orders, the ancillary orders, however one terms it, and the undertaking that had been given by the plaintiff through counsel and the concern she had about self-incrimination. Those are the two bases for the affidavit.

Tipping J This affidavit at the moment is in the hands of your instructing solicitors?

Jones No Sir it was filed.

Elias CJ No, no I'm talking about the filed one.

Tipping J Oh the filed one, yes.

Elias CJ The 24th October.

Jones There is not affidavit in terms of Miss 'T's affidavit that's been held anywhere.

Tipping J Oh I'm mistaking the cases aren't I, sorry.

Jones No, the only affidavit that Ms Skelton has filed is the one that forms part of the case.

Elias CJ I'm just interested in the logical basis for her filing this affidavit rather than bringing the child to Court. It's got to be an acknowledgement that she's not going to bring the child to Court because she doesn't have to swear an affidavit in terms of the order unless she brings him to Court.

Anderson J Unless she is unable to.

Tipping J It's an odd word 'unable'.

Anderson J Beyond her power to.

Jones Out of her control

Blanchard J Well she doesn't address that at all in the affidavit.

Jones No, she objecting to the orders made in relation to having to swear an affidavit on those particular issues.

Elias CJ Yes, but in terms of the orders she doesn't have to swear that.

Jones No.

Tipping J But this word 'unable' is an extraordinarily difficult word in its context and we're talking here about imprisonment and contempt and so on. It doesn't say fail or refuse.

Jones I'm sorry Sir which

Tipping J In para.(b) of the order, 'in the event that all or any of those people are unable'.

Jones Yes.

Tipping J But what if she's able but refuses?

Jones Well then that would be an issue for contempt.

Anderson J She's not in contempt. She's in contempt for not bringing the child, not for failing to answer the questions but file the affidavit.

Tipping J Her duty to file this affidavit is only if she's unable to bring him. She may very well be able to. That was the whole premise on which the order was made.

Elias CJ And indeed you acknowledged that she has control so it would seem to be factually accurate.

Jones I don't acknowledge that, I acknowledge that there is sufficient evidence upon which that finding could be made.

Elias CJ I see, I'm sorry.

Anderson J It would have been more compelling if she'd said 'I am unable to bring him to Court, therefore I was ordered to answer these matters but I cannot answer those matters without self-incriminating, or running the

risk of it'. She doesn't say that. She doesn't oppose to any inability whatsoever.

Jones The difficulty is Sir that and I come back to it, the finding by Justice Heath that it wasn't credible to suggest that she didn't know where the boy was or where her father was.

Anderson J There's more to controlling knowledge.

Jones Indeed

Tipping J What was she committed for contempt for – not bringing the child or not filing the affidavit, or a bit of both?

Jones I think there was a mix but if one goes to page 197 of the case, and the interesting thing is at para.35 the contempt is that she'll be committed to prison until she discloses, so it seems to be based on the affidavit failure.

Anderson J Well if you look at the last sentence of 34 that indicates the basis upon which the Judge was acting. Now she's in prison. She wouldn't physically be able to produce the child, it would be a question of disclosing his whereabouts and authorising someone on her behalf such as the Director of Child Welfare or the Court Officer and it would have been happier if he had gone to say that to show what the mechanism is and it would require more than mere disclosure. But if would appear from Justice Keane's judgment that the contempt is the failure to produce the child without any explanation.

Blanchard J That para.34, final sentence, is really a finding which she has control of the situation and therefore could have brought the child before the Court and it seems to me that the contempt finding relates to that.

Anderson J Yes I think that's probably right.

Jones Justice Keane says that he's satisfied that she knows where her father is and also Jayden.

Blanchard J And that had she wished to she could have complied with the order requiring her to bring Jayden to Court this morning.

Jones Yes.

Blanchard J He must necessarily believe that she has control of the situation in order to make that finding?

Jones Yes.

Anderson J So she hasn't been in jeopardy because of the ancillary orders at all. She's been in jeopardy because she's defied the writ.

Jones Well in my submission Sir that's not correct. She has been in jeopardy because the writ was issued along with the ancillary orders which required compliance prior to the writ being complied with.

Anderson J She could have produced the child, that would have been the end of it. The Judges found that she could have done that and she hasn't. The writ directed her to do that. The ancillary orders are in default of compliance of the writ.

Jones But the ancillary orders were made at the same time and

Anderson J She hasn't actually been affected by the ancillary orders, she's been affected by her defiance of the writ.

Blanchard J The ancillary orders are actually helpful to her because they give her the excuse for not producing Jayden. She is able to say well I was unable to do so and here's the information I have.

Jones Well

Blanchard J Sot it may be that those ancillary orders were premature but they're really not directly relevant.

Jones Well in my submission they are because they're made at the same time and so in terms of a consideration of the overall position we have someone bring the child to Court but if you can't you have to file an affidavit saying why not.

Anderson J Well let's put it like this. Suppose the ancillary orders were found wrongly made and this Court allowed the appeal to that extent, it wouldn't make one shot of difference to her position. She'd still be in defiance of the writ.

Jones Well in my submission Sir that's unfair to her because Justice Heath found that it's not credible to suggest that she doesn't know where her father and the child are. Now if she then said I'm unable to bring him to Court because I don't know where they are that would be dismissed as being unbelievable.

Anderson J No because that would then be more evidence on which the Court could consider the situation.

Jones With respect Sir a simple denial in my submission wouldn't advance the matter at all and Justice Heath makes that plain.

Anderson J Well then she would have to say 'and the reason I don't know where he is, is because of this and this and this and this'.

Jones And then we would get into the issue of self-incrimination potentially.

Anderson J Well anyway it just seems to me that the ancillary orders are for present purposes irrelevant because she's been imprisoned for contempt for defying the writ. That's how it seems to me.

Jones Well in my submission the way in which things have been directed in the High court can't be looked at in isolation. Because of the way the High Court has made the finding she cannot but produce him or make an affidavit in terms of the ancillary orders. Nothing else will suffice, and Justice Heath who says, well it will either be myself or Justice Keane sitting next week says this is what's going to happen. Now she's faced with the position where a High Court Judge says 'it's not credible for you to suggest that you don't know where your father or your son are', it isn't credible to suggest that, so if she does suggest it how on earth can it be said that that's suddenly going to change things.

Elias CJ I think it's quite clear. I hadn't read Justice Keane's judgment with this in mind before, but I think it's quite clear the contempt wasn't imposed for failure to answer the ancillary questions, and you get there because in 25 he's saying he's taking no inference adverse to her as a result of her decision to remain silent and he's simply determining it. In fact he says in para.9 that he has an affidavit filed yesterday as Heath J's order required so he's

Jones In a temporal sense Ma'am, yes.

Elias CJ Yes, yes, but he's not making anything of the failure to answer the specific questions and his finding is that she had (in 34), she had taken complete control of herself and she did so acting with her father. 'I'm satisfied she knows where he is. She could have complied with the order bringing him to Court and that is why the contempt was made out', so it's the failure to bring him to Court.

Jones Well essentially what the Court seems to be saying is because she has knowledge she therefore has control, that seems to be what the finding is.

Elias CJ But you haven't appealed this. You're appealing Justice Heath's order

Jones Yes the underlying orders, yes.

Elias CJ On a basis which doesn't seem to be material.

Jones Well the difficulty is Ma'am that

Elias CJ Because you've acknowledged he could make the order requiring her to produce him, that there was sufficient basis for him to do that, and that seems to be the only material order.

Jones But the difficulty is Ma'am that if she had turned up and said I can't produce him then the issue would be well why not, and then as soon as we start getting into that

Elias CJ Well then you're into matters of excuse aren't you and if she had taken it upon herself to proffer some excuse the Judge would have had to take into account in deciding whether she was in contempt. But she hasn't done that.

Blanchard J And you're before a different Judge who really is looking at it afresh.

Elias CJ Yes.

Jones The difficulty that she was faced with is that she has been told in the judgment of Justice Heath that saying I don't know where he is isn't good enough and isn't going to be believed.

Blanchard J Well it's fair comment it would seem on those facts. Perhaps the Judge shouldn't have expressed it as strongly as that but Justice Keane quite obviously has gone back and looked at all the evidence himself.

Elias CJ The criticism you're making of Justice Heath's judgment seem to be spent. It just doesn't seem to bite on where the case has gone.

Jones Well those are the underlying orders

Elias CJ No the underlying order is that she produce the child. You acknowledge there was a foundation for that order to be made, Justice Heath then looks at all the evidence and says I'm satisfied on the evidence. She doesn't put in further evidence saying I couldn't bring him, I don't know where he is, and he comes to the conclusion that she has taken control of him with her father. She could have produced him; she's in contempt; what's the problem?

Jones If she embarks upon any sort of evidence being tendered she gets into the same position as Miss 'T'. She puts in an affidavit and says I don't know where he is. The Court has already indicated that it's well prepared to have cross-examination.

Elias CJ I just wonder really Mr Jones whether your client's appeal, it's piggy-backed on the other appeal but analytically it's different and at the moment it seems to me that your course should have been to appeal the decision of Justice Keane if you felt there was something wrong with that. I can't see that the criticism about the affidavit evidence that Justice Heath made, the second order, matters at all.

Jones Well in my submission what she was faced with was the order to produce the child and in default of that but before the time period had expired she has to swear an affidavit which would have the potential for her to incriminate herself.

Elias CJ But she didn't. She didn't incriminate herself. She swore an affidavit. The subsequent Judge doesn't treat that affidavit as having been itself a contempt because it doesn't answer the other questions; he places the contempt simply on her failure to bring the child to Court.

Jones Well in my submission the two can't be distinguished in that way.

Blanchard J What was she going to do if he hadn't made the second order, if he'd simply made the first order, bring the child to Court?

Jones Then on the 25th the issue would have been 'well is he here', 'no he's not' and then there could have been issues of contempt then.

Elias CJ Well that's exactly what happened.

Jones Well

Blanchard J I'm having difficulty understanding this argument. It just seems to be divorced from reality.

Tipping J I'm wondering whether you're arguing, although not putting it quite this way, but had it not been for order (b) she would have brought him to the Court. Now I'm not saying there would have been any such

Blanchard J I didn't think

Tipping J But that's

Jones No, as obtuse as I may be at times that is not what I'm suggesting Sir.

Tipping J Well if that is the case, well then what possible malice in order (b)?

Jones It can't be divorced from order (a).

Blanchard J What would have happened if there had been no order (b)? On the 25th she presumably would have said nothing

Tipping J She will have turned up without a child.

Blanchard J And she would have been found in contempt.

Tipping J It's exactly the same thing.

Jones Well the inquiry would then have been undertaken as to what reason she may have had for not being able to bring him.

Blanchard J And what is that reason Mr Jones, we haven't yet heard it?

Jones Well Sir with respect she is entitled to keep her peace on that because of the charge.

Elias CJ What was the impediment? What was the impediment to her putting forward an explanation as to why she hadn't been able to bring the child?

Jones The impediment is that she would then have to divulge potentially knowledge of what had happened as far as his abduction had been concerned.

Elias CJ No, that's not a question of answering the 'how's' and 'where's' of the abduction, it's simply explaining that she cannot bring the child to Court for some reason.

Jones Well if she does an affidavit and says 'well I can't bring the child to Court because I don't know where he is, I haven't known for two months'

Elias CJ But she hasn't done that.
Jones Yes well I'm simply saying if that were the case

Elias CJ Then the Judge would have to have considered the contempt against that evidence.

Jones Yes but with respect realistically that simply wasn't going to be sufficient for Justice Heath.

Elias CJ Well how can you say that when that evidence was not put before the Court.

Jones Well His Honour said it wasn't credible to suggest it.

Elias CJ No that was another Judge.

Jones But we didn't know who the Judge was going to be on the 25th with respect. His Honour said it could either be me or Justice Keane.

Blanchard J The difficulty faced is that there is a credibility problem. Now that was going to exist regardless of what Justice Heath may have said.

Jones Well His Honour had already essentially said 'I'm not going to believe you if you say you don't know where he is'.

Anderson J No he didn't say that at all. That's not what he said. He didn't say 'I'm not going to believe you', he said 'it's simply not credible that she doesn't know'.

Jones Well if she said she doesn't then surely that must mean

Anderson J Well then she could have been cross-examined and she doesn't have a blanket right to refuse to answer any question of the issue. She only has a privilege against questions which might tend to incriminate her, so she could be asked 'well what steps have you taken to find out where he is', now how's that going to incriminate her?

Jones Well there was a step in terms of her appearing on television and asking for her father to return him and that was in early September.

Anderson J Why didn't she say 'look I've tried, I don't know where he is'.

Jones That was in the evidence, that was already in the evidence.

Anderson J Well I think she's being very coy and deflecting attention from the real issue which is that she was ordered to produce. She's given no explanation why not; she's refused to do so and she's been jailed for contempt. That's all it amounts to. And the ancillary orders are simply a red herring in the present context.

Jones Well in my submission they have to be looked at in conjunction one with the other because that's how they were made and the ancillary orders pre-date the return

Anderson J They were made

Blanchard J Mr Jones I don't see how you get around the fact that she had been ordered to produce the child and she had to either give an explanation or remain silent. If she remained silent she was likely to be in contempt. Now that was the situation whether or not we had these ancillary orders.

Jones It was but that comes back to the original issues in terms of her ability to properly deal with the case on the 18th. And we have a Judge at first instance making a finding that it's not credible to suggest she doesn't know where he is and so what can she do. It's already been pre-judged on the basis of untested evidence. That is her situation.

Elias CJ Well Justice Keane goes back over the history of the matter and he expresses himself as being satisfied. Why isn't it that judgment that's material?

Jones It's certainly material as far as the contempt is concerned.

Tipping J Well this is what's so puzzling. There's no appeal against that. There's an appeal against the ancillary orders, but seemingly not against the substantive order and

Jones No the appeal is against all orders but as things have progressed

Tipping J Well yes I know but you've accepted, and properly, if I may say so. And I can see no prejudice from the ancillary orders.

Jones I think it has to be put this way that the way in which the hearing proceeded the findings of the Court in relation to credibility and the orders that were made painted a picture in terms of how the matter was going to proceed and her position as far as her compliance with any orders or non-compliance is concerned that put in an impossible situation.

Tipping J But you quite rightly disclaimed any suggestion that she deliberately, she would have produced the child but for the presence of these ancillary orders.

Jones Yes.

Tipping J So I don't know where we're going frankly.

Elias CJ Well does that conclude your argument Mr Jones or do you want to develop anything further?

Jones Well the only issue in my submission Ma'am that needs to be looked at further is the issue of self-incrimination and we have for example under the Act, under s.13 of the Habeas Corpus Act the ability of the High Court to exercise the powers that are conferred on the Family Court by the Care of Children Act and also for referral to the Family Court by the High Court of an application. Now

Tipping J But if she's being punished for contempt of not producing the child, how does this question of self-incrimination bite on anything?

Jones Because of the ancillary order that was made.

Tipping J Which is not in any way causative of what happened.

Jones Well in my submission it is causative of how she has responded.

Elias CJ Well again we have no evidence of that at all.

Blanchard J I just don't follow that argument.

Jones Well she has responded in a particular way in her affidavit in terms of the ancillary

Tipping J It doesn't matter a jot what's in the affidavit.

Jones It's implicit that she cannot or will not bring the child to Court.

Elias CJ And that's why Justice Keane holds her to be in contempt.

Jones The issue from the appellant's perspective is she was dammed if she did and she was dammed if she didn't.

Elias CJ No, she was never was put to the test. She never was put in a position where she was being asked to incriminate herself.

Jones She was with the ancillary orders Ma'am with respect.

Elias CJ But that isn't

Tipping J Well wait a moment. The ancillary orders would only bite if she was unable to bring Jayden before the Court.

Jones Yes.

Tipping J It has been found against her that she was able

Jones Initially at the 18th October yes.

Tipping J Both initially and in the contempt process?

Jones Yes.

Tipping J So the ancillary orders actually didn't speak.

Anderson J Didn't bite.

Tipping J Didn't bite.

Jones Well in my submission she was faced with the situation where she had to make an affidavit in accordance with the Court order or refuse to do so on the basis of self-incrimination. She chose the latter.

Tipping J She had to make the affidavit only if she was unable.

Jones Yes and by implication she's unable to do that.

Blanchard J What implication?

Jones Well she only had to make the affidavit if she's unable to bring him to Court. She made an affidavit.

Tipping J But she was able to bring him to Court.

Anderson J The argument that 'I didn't make an affidavit because I was unable but I would incriminate myself',

Blanchard J And I've made an affidavit which doesn't address that question.

Jones Well if we went through and we actually had things in a proper sequence and she hadn't filed an affidavit and he hadn't come to Court, we then have a situation where she's then asked 'have you brought him to Court' – 'no I haven't' – 'why not' – 'I can't, I'm unable to', and then they get asked the questions and interrogated by way of cross-examination or whatever, the questions that have been put in the ancillary orders

Elias CJ You never got to that point.

Jones But it's been pre-empted Ma'am with respect. That's why the affidavit has been put, it's pre-emptive because the timing of the order as such that it pre-empts the position.

Tipping J Precisely what prejudice did that pre-emption cause your client?

Jones It caused her to have to make a decision in terms of what she was going to do and file an affidavit accordingly. She relied on her right against self-incrimination by way of affidavit as opposed to responding in open Court, so she puts her position in the affidavit and says I am relying on my rights, so I'm not going to respond to the questions.

Anderson J But she doesn't say 'I am unable to produce the child but I cannot answer in terms of the orders because I might self-incriminate'. She doesn't say that.

Jones Well with respect Sir the finding of Justice Heath that it's not credible for her to do that, takes that away from her.

Anderson J Well I think we've ploughed that furrow many times and it's no more fertile now than when we started.

Jones Well the difficulty is Sir when you have a situation where you have essentially a summary hearing, a Judge who makes a comment about something not being credible to suggest it and then making an order that someone has to file an affidavit setting out various things, she's placed in an impossible situation. If she says 'look I'm unable to do it and I don't want to answer questions because they're going to incriminate me', it's not going to matter a jot with respect when one looks at it realistically.

Tipping J You said that this ancillary order caused her to have to make a decision in the light of those orders. What precise decision?

Jones In terms of whether or not she was going to comply with the order or whether or not she was going to say 'no I'm not going to answer on the grounds of self-incrimination'.

Tipping J Not the decision whether to produce the child I take it?

Jones Well no, she only has to do the affidavit if she's unable to do that.

Tipping J But not the decision to produce the child, whether to produce this child. What precise decision?

Jones Whether or not to comply with the order that she file an affidavit answering those questions.

Anderson J Is the suggestion that the fact of non-production leads to the inference of inability to produce?

Jones Well she has said that, well in essence the affidavits according to Justice Heath should only be made if, I'll just get the wording right, 'in the event that all or any of those people are unable to bring him'. So her saying in her affidavit I'm unable to bring him but I decline to answer these questions on the grounds of self-incrimination would add nothing to what she's already done with respect.

Anderson J Well what it would open up then is the opportunity to test her assertion that she's unable.

Jones But that would then bring into play the issue of self-incrimination

Elias CJ Well then she could claim the privilege which is why I say you never got to that point.

Jones Well she's claiming it pre-emptively in her affidavit because the questions have already been laid out in the judgment, so what she's doing is saying 'I'm not going to answer these questions'. So essentially because of the way the judgment's been framed she's had to assert that right before the contempt proceedings on the 25th.

Anderson J Well where is the evidence of her inability to produce to as to trigger the obligations under the ancillary orders?

Jones Well the fact that she's making the affidavit

Anderson J No, no that's a circular argument. If I had some ham I'd have ham and eggs, if I had some eggs.

Elias CJ Speaking of ham and eggs unless you want to answer that question now I'm sorry I have a commitment, did you want to answer that at this point?

Jones No I'll leave it.

Anderson J It was rhetorical.

Elias CJ I think it was rhetorical.

Jones I'll leave the culinary assertions

Elias CJ We'll resume at 2.15pm and Mr Pyke we will need you to address us on the suppression thing at the end of the hearing.

Pyke Yes if Your Honour pleases.

1.03pm Court Adjourned
2.23pm Court Resumed

Elias CJ Thank you. Yes Mr Jones.

Jones Thank you Ma'am.

Elias CJ I'm sorry for the fact that we're late, that's my fault.

Jones The only further matter I want to raise Ma'am is simply in relation to Miss Skelton's affidavit. It's at volume 1 of the case, page 164. Now I've attempted to articulate during the course of the argument the combination of the two orders, the order for the writ and the order for the affidavits. I can barely say that I'm emboldened by the discussion but as far as Miss Skelton's position is concerned it's set out on page 164 and I simply ask that that is taken into account.

Elias CJ This is para.10 is it?

Jones Paragraphs 9 is the background then we have 10. It addresses the affidavit as opposed to anything else and importantly para.11 where it is made absolutely clear that the affidavit is an answer to the ancillary orders and also importantly specific reference is made to the point that I've made a number of times this morning about the credibility finding of Justice Heath and that is the position that the appellant felt in where she says 'clearly any denials by me of such knowledge will not be accepted by the Court in any event, therefore I have nothing further to add'. That is simply the evidential basis in terms of saying that that is what she was confronted with so the orders can be looked at in a combined sense as opposed to disjunctively. Now in terms of the overall picture, the discussion seemed to develop on the basis of what is the practical effect of the ancillary orders going and essentially what we do come to of course is the order in terms of the writ and the failure to comply with that and then the subsequent contempt proceedings. What would be of assistance in light of the way in which the High Court dealt with the matter on the 18th October with respect to some guidance in terms of what is required as far as the further proceedings are concerned, they are going to be called again on the 8th, which is two days away and they were called last week I think, or were going to be called and that was adjourned. I simply don't want to get from a pragmatic sense into a situation where if Miss Skelton does make an

affidavit in the terms that has been discussed that we simply get back to, 'well we don't believe you'. Obviously that's an issue that is for the High Court but it's difficult from my perspective when the argument has been put on the basis of her belief and how she's responded to the combined orders in terms of the affidavit. It is a difficult situation having regard to the fact that the ancillary orders are made at the same time and essentially in a pre-empted way.

Elias CJ What's been called on the 8th?

Jones Well as a result of the Court of Appeal ruling the High Court on the 13th ruled that the proceedings as against Brett Skelton

Elias CJ Oh yes, I see.

Jones Yes, those three had been finally determined. How that quite fits I'm not quite sure because it seems they were contempt proceedings on the 25th and if it was a final order then it was determined in any event. But the proceedings are still according to the High Court's ruling on the 13th, as a result of the Court of Appeal's reasons on the 10th, they are still said to be outstanding as against Miss Skelton, Dick Headley, who's absent of course, and also Miss 'T', so the proceedings as far as Miss Skelton are concerned are said to be outstanding subject of course to what this Court

Elias CJ You mean they're interim?

Jones Yes.

Elias CJ The order is said to be interim.

Jones That seems to be the gist of the ruling on the 13th.

Tipping J Well that's consistent with their view that it was only an interim order and therefore there was no jurisdiction to appeal presumably.

Jones Well the High Court, sorry, the Court of Appeal gave reasons on the 10th. The directions on the 13th were from Justice Heath who interpreted the Court of Appeal decision and considered that the proceedings

Tipping J I don't think he's going to be concerned with the Court of Appeal decision after we've given judgment Mr Jones.

Jones No, I don't, but I simply ask that I suppose it's in limbo as far as Miss Skelton is concerned.

Blanchard J Do you know what it was intended be done on the 13th?

Jones The 13th was simply a nominal date. It was simply as a result of the reasons that were given. The next hearing is on Friday, two days hence.

Anderson J Is there a minute that covers this Mr Jones?

Jones There is Sir, it's in the bundle, second volume, page 204, it's para.2, sorry page 205 in fact. Then para.3 'the application for habeas corpus remains alive'.

Blanchard J That's presumably because of the way the Court of Appeal dealt with it.

Jones Yes Sir, it is.

Blanchard J So that if we take a different view the Judge will not regard the matter as remaining live.

Jones Yes that would have to be the case.

Tipping J I would have thought as far as your client's concerned Mr Jones that having been found subject to the writ, assuming that stands and having been committed for contempt, the only issue would be as to whether she wants to appear before the Court to purge her contempt.

Jones Well a request has been made to do that and been declined.

Elias CJ I'm sorry, a request has been made?

Jones To bring her back to re-argue the issue as to whether or not she still

Tipping J No, no, not to re-argue

Jones Well to see whether she is still in contempt given the affluxion of time.

Elias CJ Sorry, who's made the application?

Jones It was made on her behalf.

Elias CJ To get the matter back before the Court?

Jones Yes.

Tipping J The High Court?

Jones Yes.

Blanchard J And they've declined that?

Jones That was declined. That was after she had been in custody for three weeks.

McGrath J Was that on the basis that the contempt had somehow been spent or that

Jones Well the thing is that she was incommunicado, she was in custody, and

Elias CJ Do you have the application?

Jones It was done in the form of a memorandum and there was a minute issued. It's not in the bundle I'm afraid.

McGrath J So because she was unable to communicate with the other respondents therefore she did not continue to be in contempt? Is that the

Jones Well there was an affluxion of time issue in terms of any control that she may have had reducing and also further evidence potentially coming forward from the police. They got a video and something else and it was simply to bring her back before the Court to review the contempt issue. To see whether or not she was still in contempt because matters had moved on considerably since the 25th October.

Elias CJ And there was a minute issued declining to entertain that application was there?

Jones Yes.

Tipping J By a Judge?

Jones By Justice Heath. Justice Heath has taken the matter over and he's directed that he is seized of it and I can probably find

Tipping J What ground did he give in the minute for not being willing to consider an application to him? This is probably outside our proper purview but it seems a little strange.

Jones It is, it's just that the discussion before lunch went to the practical effect and so I'm simply attempting to address that. If I just might have a moment I think I have another file here which I

Elias CJ It may be you see that this just isn't before us and you have to seek some remedy from the Court of Appeal, either by way of appeal from Justice Keane's decision or/and by way of appeal in respect of the refusal to entertain the application.

Jones Well it was a memorandum that was filed seeking a hearing to review her position in terms of the contempt and whether or not as a result of further information the police had in terms of I think a letter from Mr Headley and also I think they had a video and the affluxion of time,

whether or not the Court still considered she was in contempt in terms of control issues.

Anderson J Meaning as at the time that might be heard whether the child is under her control?

Jones Yes, and that was put in I think some three weeks after she was originally committed for contempt and that was declined and then there was the order made that amicus be appointed and then amicus was given I think a couple of weeks to deal with the matter and come up to speed with it and then there was a hearing scheduled for last week that was vacated as a result of the minute from this Court after the appeals had been filed.

Tipping J I wonder if, and this is just thinking allowed, if there would be any utility, assuming there's a power in this Court, to direct that she be brought before the High Court on a certain date, or there may already be that direction, for the purpose of reviewing the current position at least in the light of what this Court may have said about the matter.

Jones Thank you Sir. The case is to be called this Friday on the 8th and an order to produce has been directed. It is apparently going to be a Chambers hearing.

Elias CJ Who's applied for the order to produce?

Jones The Court has directed an order to produce.

Elias CJ I see.

Jones That was not done on application, it was simply directed that she be in attendance.

Elias CJ Right.

Anderson J Could you file an application perhaps seeking that the order that she be detained be discharged on the grounds that she is no longer in contempt being unable to comply so you bring it to a head?

Jones Yes, that was the purpose of the memorandum to ask that she be

Anderson J Perhaps you should do it formally?

Jones Yes, well the purpose of the memorandum was simply to bring the matter to the Court's attention and get a date set.

Anderson J I mean it's not unusual is it for people who are in continuing contempt to have their position reviewed to see if

Jones Indeed, that is what was sought but it was suddenly declined on the same day with a hand-written note on the facing page.

Anderson J Or may be a formality.

Jones Yes, but shall we say the flavour of the note was such that formality or otherwise it didn't seem to make a great deal of difference.

Anderson J I know but if it's formal at least then you may have ways that you pursue it.

Jones Yes indeed.

Elias CJ But in any event this Court might indicate that there is no impediment to the High Court keeping the matter under review.

Jones Yes, that will be of assistance Ma'am.

Tipping J Was this an open-ended order for imprisonment made by Justice Keane? It can't have been literally open-ended can it?

Anderson J Yes until she says where the child is.

Tipping J Until she says where the child is.

Jones There is no limit.

Tipping J So there is no return to review?

Jones None.

Elias CJ It

Jones It's left certain problems with the incarceration and classification but those are practical issues.

Elias CJ These are matters of course within the control of your client. She can make application to have the matter brought before the High Court. She could exercise her rights to appeal the order made by Justice Keane. These are not

Tipping J She could apply for habeas corpus.

Elias CJ She could apply for habeas corpus, I thought you were going to say that.

Jones It's been thought of but rejected at this point.

Elias CJ So there are processes you can invoke. The matter isn't directly before us and I think probably an indication that we see no impediment to the

matter being kept under review by the High Court is all we could undertake at this stage.

Jones Yes my friend Mr Pyke has just given me a copy of the, it was the 10th November that the memorandum was filed.

Elias CJ I'm sorry Mr Jones could you repeat that please?

Jones Sorry Ma'am, it's the 10th November; in fact the day that the reasons were delivered by the look of it I don't think that the, I'm not sure if the reasons had actually been received at that point but it was asked that she brought back to the Court to review her position in terms of the issue her ability to comply with the orders and the minute was it seems after the Court of Appeal had delivered the reasons that in the absence of some specific application for a specific reason she was not to be brought before the Court.

Elias CJ Well a specific application might be a good idea.

Jones Yes but for a specific reason but it now seems the Court has ordered at it's own volition an order to produce so she is brought before the Court so

Elias CJ So she is to be brought before the Court on Friday.

Jones On Friday, yes.

Elias CJ Right thank you.

Jones If the Court pleases.

Elias CJ Thank you Mr Jones. Yes do you want to be heard in reply Mr Sutcliffe?

Sutcliffe Unless there are matters which Your Honours wish to raise there are a number of matters I could comment on but whether it's profitable to do so

Elias CJ Yes, we'd be assisted by hearing anything additional. My colleagues say that they don't require to hear further from you unless there's anything particularly you would like to put before us.

Sutcliffe No, no I don't.

Elias CJ Thank you Mr Sutcliffe. Alright then Mr Pyke.

Pyke Yes if Your Honour pleases the

Elias CJ The question of name suppression and we'd like to hear from you on the suppression orders about the submissions made today. Because in the normal course we post to our website the transcript of the hearings.

Pyke Yes before I turn to that Your Honour I've made no submissions on the question of the privilege against self-incrimination that I've covered extensively in written argument. I apprehend that the Court doesn't wish to hear from me on that, I don't seek to be heard any further unless the Court indicates otherwise.

Elias CJ No thank you, I think we're content with that.

Pyke As to the question of suppression orders I've made what argument I can in support. I can't offer any additional material. I apprehend that the order will be lifted and I ask the Court to simply timetable that to be lifted at 9am tomorrow morning so I have an opportunity to tell my client.

Elias CJ You indicated that there was material you'd want to put before us - there's nothing?

Pyke I'm not in a position to do that. I'd need to get affidavits from my client to the effect that she has a special needs child but there's nothing more that could be said than that that child may be approached by other children and secondly the question of publicity of her claim to privilege. But having reflected on that it's probably an allergist to, if she is charged, to a jury learning that a person's exercised their right to refrain from making a statement to the police and could be covered by trial Judge directions, so

Tipping J Well I think there may be a link there with what's in the transcript. What if the argument can probably be published?

Pyke But there's nothing in the argument that I've put forward today to disclose the contents of her affidavit at not being before the Court so I can't think of anything specifically there and probably if anything the fact that well I don't apprehend that there's anything in the argument as such that would be unduly prejudicial.

Anderson J And you say that the order of suppressing her name should be ordered to lapse at 9am tomorrow?

Pyke Just to give me the opportunity to warn her. I don't say that it should be but I'm

Anderson J But you ask for it too not to lapse till then.

Tipping J If it is lifted not till then?

Elias CJ Mr Pyke just thinking about what evidence you might have put forward, if it's accepted, as I'm sure we are able to accept that your client has a special needs child and that that is the basis, the basis that you put to us is the one on which she seeks name suppression, there's no further purpose to be served by evidence is there because that is the sole ground that you put forward?

Pyke Yes.

Elias CJ Yes. Well I think we can accept that. I don't think further evidence would assist us at all on that.

Pyke Yes and other than that bare proposition I haven't got any instructions to go any further than that or to take it any further than that so on that point is there anything more I can offer?

Elias CJ And on the submissions point was there anything further? You've indicated that there wasn't anything in the submissions as developed today that you would suggest needed suppression.

Pyke No, not from the submissions I've made relating to 'T' as such.

Elias CJ Yes.

Anderson J Is your client legally aided Mr Pyke?

Pyke No.

Anderson J Is there any issue of costs?

Pyke There will be, yes. I'd simply apply to the Court to deal with that in the normal way, presumably by memoranda. There's of course issues and costs in the Court of Appeal and the High Court too, and I'm not sure whether the Court would make orders on in respect of that. I haven't turned my mind to that.

Tipping J We normally made orders according to the practice as of course if you like following the event unless counsel ask us for some reason not to.

Pyke Yes.

Tipping J I presume you'd simply seek an order as of course at least in this Court if you win.

Pyke Yes that's what I was assuming.

Elias CJ Yes, we'll need to hear Mr Sutcliffe as to whether he'd want to be heard on that.

Pyke There's just one final matter Your Honour. His Honour Justice Heath when issuing a minute at page 215 of volume 2 of the casebook, volume 2 of the case on appeal sorry, para.5 said it would be helpful to me if the counsel for Miss 'T' could seek further guidance from the Supreme Court on that issue at the conclusion of the hearing, the issue being whether the proposed hearing to come on the 8th December can proceed. So I take from that His Honour's seeking guidance as to whether it's appropriate for him to convene the hearing if for example the Court's judgment still remains reserved at that date.

Elias CJ Well presumably he's set this hearing on the basis that the Court of Appeal has said that the judgment was interim, so he's proceeding with the substantive case.

Pyke Yes.

Elias CJ Yes.

Pyke So my respectful submission is that the Judge is quite understandably seeking guidance as to whether he should put it off again and

Blanchard J He sent us a copy of this last week as he indicated in para.8.

Tipping J Well presumably if to the extent we can properly do so it might be helpful to His Honour for us to indicate what we thought was the proper compass of the exercise on Friday. In other words the matters that require to be addressed.

Pyke Well as regards 'T'

Tipping J Your view is that there'll be nothing?

Pyke Yes. I suppose what His Honour is saying well I won't do anything until the judgment of this Court has been delivered, unless this Court indicates I should act otherwise. That reading between the lines the minute has given me the responsibility of raising that issue which is why I'm doing it but it may be more important to others than my client in the context of the case now and I suppose His Honour Justice Heath is wanting to simply deal with time-tabling matters and the like.

Elias CJ Yes thank you Mr Pyke.

Pyke Unless I can assist further those are my submissions.

Elias CJ Mr Jones do you want to be heard on suppression?

Jones Yes Ma'am I do. Ms Skelton faces a charge of kidnapping. The decision of Justice Heath was published and there was significant public comment shall we say in relation to that. Justice Keane's findings were also published. There is a prohibition on the reasons but

unfortunately it seems that it was stated in public that he had found beyond reasonable doubt that she knew where he was so my client was

Elias CJ Sorry, when you say the judgments were published, do you mean that just the orders were published?

Jones Justice Heath's decision was published subject I think to paras.55 and 56 of the decision. Justice Keane's decision was not. The result was to be published but the reasons were not. There has been a vast amount of publicity about the case already and the concern that I have about the publication of argument in relation to Ms Skelton in this Court is that that will add to the publicity already there. There has been frank discussion in terms of acceptance of the ability of the Court to make the order. There has been discussion about her right against self-incrimination and things of that sort

Elias CJ But these are matters we'll have to deal with in our decision. Your not suggesting that our reasons for decision should be suppressed are you Mr Jones?

Jones No Ma'am but the difficulty is that I'm thinking ahead in terms of a jury trial and what that's going to mean to lay people when they are reviewing, if they do, argument or submissions that are made on a website or on a piece of paper or whatever in terms of discussion and how things were accepted or conceded and how the argument flows. The concern I have that publication of that in an unlimited way is going to adversely affect the rights of my client later.

Elias CJ Well what aspect of the submissions are you concerned about?

Jones I have no issue with the ancillary argument in terms of the legal ability to do that. The concern I have is the discussion concerning the ability of the Court to have made the order for habeas corpus that there was a foundation on which they could do that which incorporated the abduction and the control aspect. Anything to do with that would adversely impact in my submission on a fair trial issue.

Blanchard J Won't it be obvious if the conclusion is against your client that there was the ability to order to habeas corpus?

Jones The fact of it, yes, but we're talking about the submission Sir with respect and concessions that were made during the course of argument. I don't want to be seen in any way, shape or form in terms of the media to be conceding anything to do with my client's ability to defend her charge on the basis that it's conceded she does have control over the child or that there was an ability for the Court to find on the evidence. I don't want it to be seen to be coming from her own lawyer for example.

Elias CJ But it's an entirely different case isn't it the habeas corpus case and the issue of control within the *Barnardo* principle?

Jones It is in a legal sense Ma'am but the essence of the plaintiff's case has always been that Miss Skelton was the architect of the abduction and the affidavit of Detective Sergeant Bubear annexes the plan which is all part of the police case, so whilst the issue is the detention of the child as at 18th October, the involvement in the abduction as an integral part of that and has to be established before the control can be established, so it's all inter-linked. So whilst technically we're looking at something that happened two months later, it's all against that very real background of 'was she involved in the kidnapping' and then after that, 'does she retain control'. So those are the evidential issues that had to be determined.

Elias CJ This is all directed towards the purpose of bringing the child before the Court so that the lawfulness of the detention can be determined. It's nothing to do with whether the charge of kidnapping is demonstrated or whether there's any defence to it. I just can't quite understand what is said here, what was said in submissions will add anything to the necessary discussion that is going to have to take place in the reasons for Court.

Jones Well the factual issues that this Court has to determine relate back to the issue of the kidnapping and what happened after that and who was involved in the kidnapping.

Elias CJ No, they relate to the question of control at the time the writ was sought.

Jones But the factual scenario is that my client was involved in the kidnapping and retained control. It's not just a question of what happened on the 18th October.

Elias CJ Well we're certainly not going to be determining that Mr Jones.

Jones Indeed not but the kidnapping charge is there and I certainly would not want to have published

Elias CJ What do you want then?

Jones Well anything that relates in argument to certainly any concessions made on her behalf that there was sufficient evidence, anything along those lines to make the order.

Elias CJ But that must appear in any judgment.

Jones Well I suppose that exemplifies the difficulty when we have criminal proceedings that are running alongside civil proceedings.

Anderson J Concession made in the course of a civil appeal by counsel can't possibly sound against your client in a prosecution.

Jones It can't but it can be perceived to be an acceptance by her lawyer.

Blanchard J The trial, but the trial is months away.

Jones Indeed yes.

Anderson J Concessions are made for the purpose of argument in a particular case.

Tipping J I think the trial Judge will no doubt make appropriate directions and one has to assume albeit perhaps with a mild degree of cynicism that the jury will obey them and on that premise I can't see how there can be any prejudice.

Jones Well I suppose my position is simply this. It simply isn't realistic to believe that the jury however far away is going to be able to differentiate between findings of any Court and arguments made and concessions made by a lawyer who's going to appear for the client in one Court and saying something different in another.

Tipping J But the jury members won't know they're jurors at the time when all this is published. The only possible risk is that during the course of the trial someone goes and looks up our website. Now that seems to me to be a but far-fetched, contrary to the instructions that the Judge would no doubt give.

Jones Your Honour there is a website that's been set up by somebody else that has all the relevant material on it.

Tipping J Well?

Anderson J The trial Judge will just have to give very very firm direction and counsel will be astute to ask for them I'm sure.

McGrath J I think the impression I have is you've been pretty careful in the concessions you've made and indeed I think you've corrected an expression of one of your concessions from the bench, perhaps no doubt with the situation in mind.

Jones Yes, well I hope sincerely that the faith that we all have in jurors is borne out.

Tipping J But the one thing that does trouble me, and I'll just lay it out in case it has any force is that we must be very careful not to inhibit counsel in making responsible concessions and taking a responsible stance in argument before any Court and that if there was a thought that there was just going to be blanket publicity as such then that might be

counter-productive. I think that is a point of some force but I'm not sure that it would really carry day in this particular case.

Jones Well the particular concession I'm thinking of is the one that Your Honour extracted from me I think in terms of the ability, or that there was a proper foundation for the Court to make the order under number 1.

Anderson J Well let's put into the record then that someone might look at we understand that a submission to that effect is appropriately made by counsel in the context of the civil appeal and has no relevance in any other forum.

Tipping J I understand the force of the points you're making Mr Jones that we don't wish, although I put a slightly different angle on it, we don't want to deprive ourselves of appropriate and candid assistance from counsel who feel obliged to take some unrealistic approach in order to protect their clients from the possible downside of publicity from this Court

Blanchard J Mr Jones I don't think that any concession that you've made will look any different to members of the public than the frequently printed concessions by counsel at depositions hearing that there has been a prima facie made out. That's not ever thought to prejudice the trial.

Anderson J It's a procedural concession that's all.

Jones The only difficulty is in the context of this case there has firstly been a finding by one High Court Judge that there is sufficient evidence to issue the writ and the second that he's satisfied beyond reasonable doubt that she's able to return the child and has wilfully not done so.

Blanchard J Well you're not conceding that second point.

Jones No I'm not but I'm saying that as against that background and it's all fairly recent because of the way the proceedings have happened, there would then be a further concession in this Court by me.

Tipping J Are there two counts against you or only one?

Jones Just the one at this stage.

Tipping J I deliberately put it in that oblique way Mr Jones.

Anderson J Is your client legally-aided Mr Jones?

Jones No Sir.

Anderson J What about Mr Jones' litigant, his position?

Jones No he's not legal-aided Your Honour.

Elias CJ I think this is a matter upon which we probably will require the assistance of counsel by way of memoranda in terms of costs but what I'd like to do if you've finished your submissions Mr Jones

Jones I have Ma'am, yes thank you.

Elias CJ Is for us to retire for a few minutes to consider how we'll proceed from here.

Jones As the Court pleases.

3.00pm Court Adjourned
4.01pm Court Resumed

Elias CJ Thank you. The decision of the Court will be announced by Justice Anderson.

Anderson J In relation to Nikala J Taylor, leave to appeal is granted. The order for habeas corpus made by Justice Heath in the High Court on 18th October 2006 was a final order and accordingly the Court of Appeal had jurisdiction to hear and determine the appeal. The appeal is allowed. The orders for habeas corpus and other orders made by the High Court on 18th October 2006, except order number 9 relating to publication of the name of Nikala J Taylor are quashed in respect of this appellant. The order for suppression of this appellant's name made by the High Court on 18th October 2006 is to lapse at 9.00am on 7th December 2006. Costs are reserved. In relation to Miss Kay H Skelton, leave to appeal is granted. The order for habeas corpus made by Justice Heath in the High Court on 18th October 2006 was a final order. The appeal is dismissed. Costs are reserved. On each appeal in respect of the proceedings in this Court we are not prepared to make any suppression orders. Reasons for judgment in each case will be given in due course. We wish to make it clear that the order of Justice Keane imprisoning Miss Skelton was not the subject of any separate appeal to this Court.

Elias CJ Thank you.

Pyke If the Court pleases there is just one matter relating to the affidavits and I seek order that those be destroyed.

Elias CJ Oh the affidavit and the

Pyke There's one sitting on the High Court file, the original, there's one in my possession and one in my learned friend Mr Sutcliffe's possession.

Elias CJ Yes we'll make the order that the affidavits are to be returned to Mr Pyke for destruction and that includes the sealed affidavit on the Court file.

Pyke If the Court pleases.

Elias CJ Thank you. Thank you counsel.

4.04pm Court Adjourned