SUPREME COURT OF QUEENSLAND

CITATION:	*Youth Empowered Towards Independence Incorporated v Commissioner of Queensland Police Service & Anor* [2023] QSC 174
PARTIES:	**YOUTH EMPOWERED TOWARDS INDEPENDENCE INCORPORATED** (applicant) **v** **COMMISSIONER OF QUEENSLAND POLICE SERVICE** (first respondent) **CHIEF EXECUTIVE, DEPARTMENT OF YOUTH JUSTICE, EMPLOYMENT, SMALL BUSINESS AND TRAINING** (second respondent)
FILE NO/S:	BS No 9554 of 2023
DIVISION:	Trial Division
PROCEEDING:	Originating application filed on 2 August 2023
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 August 2023
DELIVERED AT:	Brisbane
HEARING DATE:	2, 3 and 4 August 2023
JUDGE:	Burns J
ORDER (4 August 2023):	**THE COURT DIRECTS THAT:** **1. Pursuant to r 593 of the *Uniform Civil Procedure Rules 1999* (Qld), the children named second, fifth and eighth on the Writ issued by the Court on 2 August 2023 (the Remaining Children) be delivered by 10:00 pm today into the custody of the chief executive, in accordance with s 56(1) of the *Youth Justice Act 1992* (Qld).** **2. With respect to the children named in the Writ who are not the Remaining Children, the Writ is set aside.** **3. The respondents pay the applicant's costs of the proceeding on the standard basis.**
REASONS:	8 August 2023
CATCHWORDS:	PREROGATIVE WRITS AND ORDERS – HABEAS CORPUS – where the applicant is a charitable organisation

concerned with the welfare of children – where eight children who had been charged with offences appeared in the Magistrates Court in various places in Queensland and been remanded in custody but had since been detained in watchhouses under the control of the first respondent – where the applicant filed an originating application for the issue of a writ of habeas corpus directed to the respondents and requiring them to remove the children from the watchhouses and transfer them to youth detention centres under the control of the second respondent – whether any of the children detained in watchhouses was lawfully detained – whether the Magistrate Courts which remanded the various children ordered that the first respondent deliver the child as soon as practicable into the custody of the second respondent as required by s 56(4) of the *Youth Justice Act 1992* (Qld) – whether, on the return of the writ of habeas corpus, the respondents could establish that such an order had been made in the case of each child and that, in consequence, the child was lawfully detained

Youth Justice Act 1992 (Qld), s 54, s 55, s 56
Human Rights Act 2019 (Qld), s 52
Uniform Civil Procedure Rules 1999 (Qld), r 590, r 591, r 592, r 593

AKW22 v Commonwealth of Australia [2023] FCAFC 71, cited
Cox v Hakes (1890) 15 App Cas 506, cited
Dien v Manager of Immigration Detention Centre at Port Hedland (1993) 115 FLR 416, cited
Ex parte Khawaja [1984] 1 AC 74, cited
Green v Secretary of State for Home Affairs [1942] AC 284, 302, followed
McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (2020) 283 FCR 602, referred
Plaintiff M47/2018 v Minister for Home Affairs (2019) 265 CLR 285, followed
R v Kerr, ex parte Groves [1973] Qd R 314, cited
R v Lindbergh; ex parte Jong Hing (1905) 3 CLR 93, referred
Secretary of State for Home Affairs v O'Brien (1923) AC 603, cited
Waters v The Commonwealth (1951) 82 CLR 188, cited

COUNSEL: E Nekvapil SC, with K McAuliffe-Lake and J Underwood, for the applicant
G Del Villar KC SG, with K Blore and G Perry, for the respondents
P Morreau for the Queensland Human Rights Commission, intervening

SOLICITORS: Caxton Legal Centre Inc. for the applicant
G R Cooper, Crown Solicitor, for the respondents

[1] The applicant, Youth Empowered Towards Independence Incorporated, is a charitable organisation concerned with the welfare of children, including children in custody.

[2] By an originating application filed and made returnable on an urgent basis, the applicant sought the issue of a writ of habeas corpus with respect to eight named children. They had each been remanded in custody following appearances in the Magistrates Court and were at the time of filing being held in various watchhouses around the State under the control of the first respondent, the Commissioner of the Queensland Police Service.

[3] The application was brought pursuant to the provisions of Part 5 of Chapter 14 of the *Uniform Civil Procedure Rules 1999* (Qld). Although applications for the issue of a writ of habeas corpus are comparatively rare, they must be "always treated as an urgent matter" and take "precedence over all other business".[1] That is for the obvious reason that the object of the writ is to protect the liberty of the subject by "speedy and summary interposition".[2] To facilitate this, Part 5 of Chapter 14 UCPR prescribes the following procedure.

[4] An application for the issue of a writ of habeas corpus may be made by the person who is under restraint or by another person: UCPR r 590.[3] Although the application must be supported by affidavit, it may be made without notice being given to another party: UCPR r 591(1).

[5] At the initial hearing of the application, the court may order the respondent to release the person under restraint, order the issue of a writ of habeas corpus directed to the respondent (and give directions as to the course to be taken under the writ) or dismiss the application: UCPR r 592(1). If a writ of habeas corpus is issued, the person to whom the writ is directed must bring the person who is under restraint before the court as directed in the writ: UCPR r 592(2)(a). The court may also make an order as to the custody of the person under restraint pending the return of the writ: UCPR r 592(4). To make out an entitlement to the issue of a writ, a prima facie case to the effect that the person under restraint is being unlawfully detained must be shown. As Lord Wright observed in *Green v Secretary of State for Home Affairs*:[4]

> "It is clear that the writ of habeas corpus deals with the machinery of justice, not the substantive law, except in so far as it can be said that the right to have the writ is itself part of substantive law. It is essentially a procedural writ, the object of which is to enforce a legal right. The writ is described as being a writ of right, not a writ of course. The applicant must show a prima facie case that he is unlawfully detained. He cannot get it as he would get an original writ for initiating an action, but if he shows a prima facie case he is entitled to it as a right. The first question, therefore, in any habeas corpus proceeding is whether a prima facie case is shown

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1 *Secretary of State for Home Affairs v O'Brien* (1923) AC 603, 643; *R v Kerr, ex parte Groves* [1973] Qd R 314, 316.

2 *Cox v Hakes* (1890) 15 App Cas 506, 517.

3 This broad basis for standing reflects the common law. See *Waters v The Commonwealth* (1951) 82 CLR 188 where Fullagar J said (at 190): "Subject to certain qualifications, any person may move any court of competent jurisdiction for habeas corpus in respect of any person alleged to be unlawfully detained".

4 [1942] AC 284, 302.

> by the applicant that his freedom is unlawfully interfered with, and the next step is to determine if the return is good and sufficient."[5]

[6] On the return of the writ, the court may amongst other things receive further evidence in support of the application for release, permit the respondent to show cause why the person under restraint should not be released, order the person's release "or other disposition" if it considers the restraint is unlawful or set aside the writ: UCPR r 593. Importantly, at this return stage, the onus shifts to the respondent to demonstrate "that the restraint is lawful".[6] This is because:

> "Prima facie every man is entitled to be at liberty, and therefore, unless some reason is shown why a person in custody should remain there, he ought to be discharged."[7]

[7] Here, the application was made by the applicant on behalf of the named children and it was made on notice, albeit short notice, to the respondents. At the initial hearing on 2 August 2023, the applicant's counsel advanced an argument to the effect that each child the subject of the application was being unlawfully detained. The success of this argument will depend on a construction of specific provisions of the *Youth Justice Act 1992* (Qld) dealing with the custody of children charged with an offence but, because of the way in which the case developed over the next two days, it is unnecessary to express a view regarding the correctness or otherwise of that construction. It is sufficient instead to refer to the provisions of the Act engaged by the argument because a consideration of the mandatory requirements of one of those provisions (and not the construction urged on the court) ultimately led to the final disposition of the case.

[8] Section 54(1) of the Act provides that, until brought before a court, a child arrested on a charge of an offence or a warrant issued under the Act who is not released from custody must be held in the custody of the first respondent or the second respondent, the latter being the chief executive of the Department of Youth Justice, Employment, Small Business and Training. By s 54(2) the first respondent must make arrangements with the second respondent for an arrested child "wherever practicable to be placed in a detention centre until brought before a court".

[9] When brought before a court a child may be granted bail or, by s 55 of the Act, released without bail in certain circumstances. However, s 56 applies where a child is brought before a court and is remanded in custody. It is in these terms:

> "**56 Custody of child if not released by court**
>
> (1) Except where the child remains the prisoner of the court, a court that remands a child in custody must remand the child into the custody

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5 And see *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 283 FCR 602, [77]; *AKW22 v Commonwealth of Australia* [2023] FCAFC 71, [8].

6 *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285, [39].

7 *R v Lindbergh; ex parte Jong Hing* (1905) 3 CLR 93 per Griffith CJ, Barton and O'Connor JJ. The standard of proof is the civil standard, but "as the liberty of the applicant is at stake the issue is sufficiently grave to require strong, clear and cogent evidence": *Ex parte Khawaja* [1984] 1 AC 74, 112-114; *Dien v Manager of Immigration Detention Centre at Port Hedland* (1993) 115 FLR 416, 419.

(2) of the chief executive despite the provisions of any other Act to the contrary.

Note – See also part 5A in relation to a child who remains a prisoner of a court.

(3) Subsection (1) does not apply to a person who is an adult being dealt with for an offence committed by the person as a child if, under section 136, 137 or 138, the person must be held in a corrective services facility.

(4) Jurisdiction conferred by an Act on a court—

(a) to commit a person to a place of detention (other than a detention centre) pending appearance before a court; and

(b) to give directions to the person in charge of the place;

is taken, if the person is a child and subsection (1) applies, instead to confer jurisdiction on the court to remand the child into the custody of the chief executive and to give directions to the chief executive.

(5) A court that remands a child into the custody of the chief executive must order the commissioner of the police service to deliver the child as soon as practicable into the custody of the chief executive.

(6) A child held by the commissioner of the police service under an order made under subsection (4) is—

(a) before being delivered to the chief executive—in the custody of the commissioner of the police service; and

(b) after being delivered to the chief executive—in the custody of the chief executive.

(7) Subject to subsection (7), the chief executive may keep a child mentioned in subsection (4) who is in the chief executive's custody in places that the chief executive determines from time to time.

(8) The chief executive can not determine under subsection (6) that a child is to be kept in a prison." [Emphasis added]

[10] The argument advanced by counsel for the applicant at the initial hearing was that s 56(4) of the Act when read with, particularly, s 56(5) required the remanding court to make an order requiring delivery of the child by the first respondent into the custody of the second respondent as soon as it was "feasible for the first respondent to do so, regardless of the second respondent's opinion or position". On the assumption that such an order was made on the remand of each of the children the subject of the application, and the proven feature that the children were detained in watchhouses (under the control of the first respondent) and not youth detention centres (under the control of the second respondent),[8] the applicant argued that there

8 Affidavit material was relied on to that effect.

was at least a prima facie case that the children were being unlawfully detained. As to this, counsel for the respondents quite properly conceded that a prima facie case to that effect had been made out, although at the same time it was made plain that the respondents would argue on the return of the writ that the applicant's construction was wrong for various reasons.

[11] In light of the respondents' concession, a writ of habeas corpus was issued but it was not issued in a form requiring the children to be immediately brought before the court. Rather, it was ordered that the children be brought before the court "at such time as the court directs". The writ was made returnable the following day – 3 August 2023.

[12] During the course of argument at the initial hearing, I enquired whether the assumption underlying the applicant's argument – that an order was made on the remand of each child requiring the first respondent to deliver the child as soon as practicable into the custody of the second respondent – was sound. Whether that was so was of course something the respondents would need to establish on the return of the writ because, by then, the onus would have shifted to the respondents to establish the lawfulness of the detention of each child in question. The respondents, through their counsel, indicated that this was something they were intent on investigating.

[13] When the writ returned to court the next day, the respondents sought an adjournment to allow them to continue their investigation of the form of orders made by the remanding court in each case. I granted the adjournment until the afternoon of the next day – 4 August 2023.

[14] By the time the case came back on that afternoon, only three of the children who had been originally named had not been moved to youth detention centres. They were the children named second, fifth and eighth on the writ issued by the Court on 2 August 2023. The writ was therefore set aside with respect to the other children, each having been moved into the custody of the second respondent.

[15] As to the second, fifth and eight named children, counsel for the respondents informed the court that the respondents had not been able to establish that, on the remand of each of these children, an order was made by the remanding court in accordance with the mandatory requirements of s 56(4) of the Act. It followed that the respondents could not discharge the onus on them to establish the lawfulness of the detention of these children and an order was accordingly made pursuant to UCPR r 593 requiring the children to be "delivered" into the custody of the second respondent by 10:00 pm that night. The respondents were also ordered to pay the applicant's costs on the standard basis.

[16] It only remains to record that, after service of a notice on the Attorney-General for the State of Queensland and the Queensland Human Rights Commission pursuant to s 52 of the *Human Rights Act 2019* (Qld), the Commission intervened in the proceeding on 3 August 2023 and appeared by counsel that day and the next. The basis for the intervention was contended to be that various provisions of the *Human Rights Act* informed the proper construction of s 56(4) of the *Youth Justice Act*. However, as it was not necessary to determine this construction question to determine the outcome of the application, the Commission's argument was not developed beyond the filing of written submissions supporting its intervention.