Neutral Citation Number: [2023] CA (Bda) 14 Civ

Case No: Civ/2022/51

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
THE HON. CHIEF JUSTICE
CASE NUMBER 2021: No. 037

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 23/06/2023

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL SIR ANTHONY SMELLIE
and
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER

- -

Between:

WANDA A. PEDRO

Appellant

- and -

(1) THE ATTORNEY-GENERAL & MINISTER OF LEGAL AFFAIRS AND CONSTITUTIONAL REFORM

Respondent

Wando Pedro, Appellant in Person
Brian Moodie, Attorney-General's Chambers, for the Respondent

Hearing date(s): 14 March 2023

- -

APPROVED JUDGMENT

CLARKE P:

1. We have before us a renewed application for leave to appeal from the judgment of the Chief Justice dated **26 September 2022** whereby he struck out the claim brought by Originating Summons filed on **5 February 2022** by Wanda Pedro ("Ms Pedro") against the Minister of Legal Affairs and Constitutional Reform (as Minister for the Department of Court Services) and the Attorney General. The Chief Justice himself refused leave on **25 November 2022.**

2. This is yet another piece of litigation[1] following on from the order made on **8 January 2010 in the Magistrates' Court** whereby care and control of Ms Pedro's son Michael Jones Jr ("Michael"), was given to Michael's father. Michael was born on 29 January 1999 and is now, therefore, 24. In the present action Ms Pedro complains that various actions of Magistrate (as he then was) Juan Wolffe and Magistrate Tyrone Chin amounted to misfeasance in a public office, abuse of power and breach of duty, and that those actions unlawfully sanctioned the removal of Michael from her care and control on the date when the order was made and caused her psychological trauma. The actions are said to be in breach of the rights of Ms Pedro and Michael under:

   (i) Articles 1, 3, and 6 of the Constitution of Bermuda, taken in conjunction with the European Convention on Human Rights, the United Nations Convention on Human Rights and the Convention of the Rights of the Child; and

   (ii) the Children's Act 1998.

3. Ms Pedro claims that the Magistrates denied her a fair trial in a number of respects which are set out in paragraph 2 of the judgment of the Chief Justice. This is but one aspect of her complaint against the whole family court system which, she contends, has conspired to take her son away from her, to cover up the lack of justification for doing so, and to put every obstacle in her way as she tries to establish why she lost her son, how woefully she has been treated, and why that happened. In her view she lost her son "*because of a lie from a revengeful man for which the authorities somehow decided they were going to support*". The lie which she claims to have been made is the allegation raised by Michael's father that she had ever harmed Michael, by choking or otherwise. This was the allegation which in March 2008 prompted the intervention of the DCFS and led to the proceedings before the Magistrates' Court.

4. At the hearing Ms Pedro stated that she remains deeply distressed at what has happened to her and wholly lacks confidence that the judicial system will, if things are allowed to continue as they have in the past, afford her the relief that she needs. In that context she invited us to recuse ourselves from determining this renewed application for leave. She did so largely on the ground that we had already decided against her in our judgment of 19 March 2021 to which I refer below. We declined to do so. The fact that judges have previously reached a decision adverse to a litigant is not, of itself, a bar to their dealing with a claim by that litigant raising similar issues. There did not appear to us to be any sound basis upon which a reasonable, fully informed

[1] The first action is referred to at [12] below. The present action is the second action. There is, also, a third action which was served on the defendants in 27 September 2022, the day after the delivery by the Chief Justice of the judgment in respect of which leave to appeal is sought. It seeks to recover damages in respect of allegations against social workers from the Department of Children and Family Services (DCFS) for what is said to be their breach of statutory duty under the Children's Act.

and fair minded observer would think that there was a real possibility of bias on our part if we were to determine the application. Indeed, on the contrary, it appeared essential for its just disposal that we should hear the present application, given our detailed understanding gained from the earlier appeal of the factual and legal issues which arise for consideration.

5. For reasons which will become apparent we think it helpful to set out the dates and some of the content of a number of key orders made, and reports filed, in relation to Michael. (It is not apparent to us that we have a completely full hand of the orders made and reports filed; but we certainly have all the significant orders and most of the significant reports (with summaries by Ms Pedro of others on which she places reliance). The list below is derived from the documents that are before us and from the Statement of Claim filed by Ms Pedro in December 2020). In this list a single asterisk indicates that Ms Pedro and her legal representative were present when the order was made; a double asterisk indicates that neither Ms Pedro nor her representative was present; a triple asterisk indicates that both Ms Pedro and Michael's father were present without attorneys on either side. The name of the Magistrate who chaired the proceedings is stated and he is recorded as making the order which the Bench made. For obvious reasons we have not set out a full summary of the often lengthy reports which are available for review. When they appear in the Record of Appeal we give the relevant page number.

6. The list is as follows:

3 March 2003[2]	Consent Order that custody of Michael should be vested solely with Ms Pedro, with Michael's father to have access to Michael on alternate weekends and generous access during the week. [147]
31 March 2008	Michael's father attends DCFS office to report a concern that Michael was being physically and emotionally abused by his mother. The report included reference to a voicemail from Ms Pedro where she could be heard screaming at Michael and saying that he was crazy and that she would not tolerate his behaviour any longer and another from Michael in which he said that his mother was choking him again and that he thought that she was trying to kill him.[3] Michael's father also reported that on previous occasions Michael had reported to him that his mother had choked him and had demonstrated to his father how she had done it. [296-9]

[2] It is not clear whether or not there was a hearing at which this order was made. The consent appears from the signatures of the attorneys. If there was a hearing, we would expect that both Ms Pedro and Michael's father were present.

[3] Ms Pedro has drawn our attention to an email from Michael's father of 10 November 2008 to a social worker, which she first saw when she obtained a file from Ms Dosanjh, her former lawyer's, office in or after October 2016, after she had come back to Bermuda to bury her stepfather. In the email he refers to the voicemail message that Michael had left indicating that his mother was trying to kill him. Michael' s father had found difficulty in obtaining a copy of this and other messages, and said that in the absence of them, he would add additional witnesses to his list to establish that Ms Pedro "*verbally abused and/probably physically abused (choking around the neck) Michael during the incident in question*". Ms Pedro relied on this formulation as showing that Michael's father could not prove that what he alleged happened. We do not accept that that follows from the terms of the email or that that email amounts to a rescission of Michael's father's complaint. We note that a Social Worker is recorded as having listened to the voicemails [298]

2 April 2008*	Magistrate Tyrone Chin makes a Supervision Order for Michael up to 5 June 2008, the review date. Michael is to reside with his father. The Court ordered Michael to have a mental health assessment by a clinical psychologist at Child & Adolescent Services. Both parties consented, and the Court ordered, that they should attend parenting classes and any other counselling classes deemed necessary by the DCFS[4]. [151]
June 2008	A 9-page report from Social Workers petitions for a further 6 months Supervision Order. The report set out in great detail events from 31 December 2001 onwards as explained to social workers by Michael's father; contains further reports of choking of Michael by his mother; and of confirmation of that by Michael in discussion with social workers. It records interactions between social workers and Ms Pedro when she was angry and disrespectful. It reports events after Michael went to live with his father; the fact that on April 29 2008 Ms Pedro's lawyer had said that she wished to relinquish her parental rights and, the next day, that she had begun to flip flop. It recorded a visit of Ms Pedro to see her son at the Department, at which she was said to have asked him a series of gruelling questions such that she was asked not to continue questioning him in an improper manner. She later resumed the visit, saying how much she loved him. Reference is made to the weekly visits not all of which had taken place; and to Ms Pedro saying that when Michael was returned to her he would be disciplined for what he had done and made to answer for his actions. The Report assessed Ms Pedro's involvement with the Department as sporadic, inconsistent erratic and impulsive. She alternated between being aggressive and antagonistic towards the Department and being cooperative. She had been diagnosed as suffering from PTSD on account of an abusive childhood and the Department was very concerned regarding the impact of her mood and behaviour on Michael. The Report contained a 13 point plan of care, which included provision for Ms Pedro to have supervised access at the DCFS once a week.[5] The above Report was accompanied by a mental health assessment of Michael by Dr De Silva dated 9 May 2008, following meetings with Michael and his father on 1 and 8 May 2008 [152]. The report records that Michael

[4] On 20 April 2008 Michael's father sent Ms Pedro an email, copied to DCFS which said that he did not have a problem dropping Michael off and picking him up but was hesitant to do so without authorisation from DCFS who had instructed him that he did not have permission to arrange a visit with Ms Pedro and that all such visits must be coordinated by DCFS. He suggested that she contact DCFS and get the on call social worker to ring him to authorise the visit. Ms Pedro relies on this email as demolishing the case against her. It does not seem to us that it does.

[5] This document was before us in the previous appeal and a copy was provided to Ms Pedro's attorney.

	did not want to talk about the allegations in relation to his mother and was "very guarded" in order to protect her. It, also, records, *inter alia*, that on 31 March 2008 Michael told a DCFS Social Worker that when his mother gets frustrated and cannot control herself she chokes him and then sends him to bed; and when he thinks that she is trying to come after him he hides in different places within the home.
5 June 2008*	Magistrate Tyrone Chin makes a 6 month Supervision Order for Michael who is to reside with his father; discharges the Consent Order dated 3 March 2003 and orders that Michael's father shall have full care and control and custody of Michael. The Court ordered that the 13 points of a Plan of Care of 4 June 2008[6] should be put into place. Under the Plan Ms Pedro was allowed to exercise supervised access to Michael for one hour each week. She was to undergo a comprehensive psychological assessment by 15 August 2008 and to resume individual therapy with Dr Adhemar with a view to her and Michael's father being referred for family mediation/therapy. [160] The matter was to be reviewed on 9 September 2018, but at the written request of Ms Pedro's then attorney, Mrs Georgia Marshall, the matter was adjourned to 5 November 2008. [167]
4 November 2008	The DCFS Report records that Michael had disclosed to a school official that things at his father's house were going "great". The Report recorded that on October 31 2008 Ms Pedro had told the Department that all further communications must be through her lawyer. Michael's father recorded that it had been six months since Michael had had any face to face contact with his mother (he had taken Michael to Ms Pedro on her birthday). The Report acknowledged that the contact between Michael and his mother was long overdue; that it was unfortunate that the visit as recommended in the Plan of Care of 5 June 2008 had not taken place and that Ms Pedro's lack of commitment to the recommendations in the plan that contact with the mother be done under the supervision of the Department with a counselling component attached, left questions as to whether she was aware of the impact of her recent behaviours on Michael, and whether there was a commitment on both parents to communicate positively for the betterment of their son's development and growth. Ms Pedro did not appear to have made contact with Dr Adhemar or to have made contact

[6] The Report is dated in the American style 6.4.2008 (4 June 2008 rather than 6 April 2008) but appears to have been filed on 5 June 2008. At [7] and footnote 4 of our Judgment of 19 March 2021, the Report appears to have been mistakenly referred to as filed in the Magistrate's Court in April 2008.

	with the Family Therapist to whom she had been referred. [166]
5 November 2008*	Magistrate Tyrone Chin orders, by consent, that all documents and recordings be exchanged between the parties on or before 26 November 2008. He then extends the Supervision Order for another 2 months. The Plan of Care dated 5 November 2008 was to be implemented. Ms Pedro was to have supervised access to Michael at times to be determined by the DCFS. Hearing dates were fixed for 16, 17, 18 and 19 December. [178]
16 December 2008**	It appears from the Statement of Claim of 15 December 2020 filed in the first action that Mrs Marshall Ms Pedro's attorney, had, on or by 3 December 2008, refused to act for her and the court declined to grant Ms Pedro an adjournment. On 16 December 2008 Ms Pedro does not attend, having written a letter on 15 December 2008 stating that she did not wish to proceed any further in the matter scheduled for 16-19 December 2008. The Court makes a 4-month Supervision Order for Michael, confirms that Ms Pedro was to have her mental health assessment with Dr Adhemar and orders that she is only to have access to Michael in the presence of his father unless or until Dr de Silva stated otherwise. The Plan of Care of 5 November 2008 was confirmed and Ms Pedro was to attend the Review which was to be held on 24 March 2009.
26 January 2009	A report on Michael from Dr de Silva reported that Michael had responded very well to the move to live with his father and there were no mental health concerns. He missed his mother and was saddened at their little contact with each other. [180]
I May 2009	The DCFS appears to have petitioned the Family Court to discharge the Supervision Order [186]
3 June 2009***	Magistrate Juan Wolffe[7] ordered that Ms Pedro should have access to Michael every other weekend from Friday after school until Sunday 6:00 commencing 12 June 2009. The hearing of the matter was to continue on 17 June 2009. That hearing was later adjourned until; it would seem 17 July 2009. [182]
17 July 2009***	Magistrate Juan Wolffe makes an order for Ms Pedro to have additional access to Michael from 31 July 2009 to 5 August 2009 and for the trial of this matter to continue on 29 August and 9 and 21 September 2009. [183]
21 September 2009***	Magistrate Juan Wolffe adjourns the hearing until 18 December 2009. [184]

[7] A new Magistrate was appointed to hear the matter after Ms Pedro has met and written to the Senior Magistrate in the course of which she had sought time to obtain counsel through legal aid. She was later advised that a new Magistrate would be appointed and that the matter would be heard on 3 June 2009.

26 October 2009	A DCFS report records that on **9 September 2009** a meeting was held by a social worker with Ms Pedro and Michael's father following a call to the Department by Ms Pedro. Michael's father indicated that Ms Pedro had called the police on several occasions and had recently been escorted from his home because the police found Michael to be in no danger. Michael's father stated that his son will be disciplined if he did not follow the rules of the home but that he did not use physical discipline towards his son, but did take things from him. He said that Michael continued to call his mother when he was being disciplined because he did not like that discipline. The social workers spoke with Michael and he indicated that his father had not used physical discipline on him for a very long time. He admitted that he was allowed to do a lot of things at his mother's home that he was not allowed to do at his father's home.
	On **2 October 2009** a call was received from Ms Pedro's lawyer who said that Ms Pedro had brought Michael to her office. Michael appeared distressed and told the lawyer that his father had hit him with a belt on his hand and that he was tired of his father terrorising him. He wanted to run away from his father and had tried to. He once ran to the bathroom and locked the door to escape his father but his father broke the door down. Social workers then interviewed Michael on **9 October 2009** and also interviewed his father. The Department deemed the allegations to be unsubstantiated. On **19 October 2009** Michael was transported by his father to the Child and Adolescent Unit of the Mid Atlantic Wellness Institute, for suicidal ideation. CAS staff interviewed Michael, who said that he was being physically and emotionally abused by his father and wanted to go and live with his mother. He had a desire to harm itself. A suicide risk assessment had been carried out which indicated a high risk of self-harm. Social workers had received numerous reports with similar allegations of physical abuse by Michael's father recently but none of the reports had been substantiated, whereas the allegations against Ms Pedro were substantiated. Michael had also expressly stated to social workers that he acts out and makes allegations against his father because he wishes to reside with his mother because she is more fun and he can do whatever he wants. At a later stage Michael was interviewed without his father present at which time he said that he felt safe with his father and would feel safe to return to his father's care. Michael confirmed to a social worker that when, on an earlier occasion, he had spoken to her of physical abuse by his father he had been referring to when he was

	physically disciplined by his father in the early months of 2009, which the social worker had investigated several months earlier. And not to additional incidents. Following the interview mental health professionals and social workers determined that Michael was not at significant risk of physical harm in his father's care. They were not, however, convinced that Michael would not harm himself and recommended admitting him to the unit as a place of safety. Michael agreed that he felt caught between his two parents and felt sad and depressed mostly due to the conflicted relationship between them and their inability to communicate effectively regarding him. Dr Naomie Jean-Baptiste of CAS recommended that Michael should not be returned to either his father or his mother at this time. The report recorded that the Department felt Michael would benefit from being placed into the home of a foster parent until it was deemed safe for him to return to the care of either parent. [185]
27 October 2009**	Magistrate Juan Wolffe orders that an interim Supervision Order shall be made in respect of Michael until such time as the Court decides whether to make a Care Order, or any other order, in respect of Michael. He orders that Michael shall remain with his father, that Michael's father and Michael shall follow any and all recommendations of the DCFS in respect of any counselling and/or assessment which may need to be carried out and that Ms Pedro was to have telephone access to Michael. The DCFS was to conduct daily school checks on Michael. The matter was to be reviewed on 29 October 2009. Dr Jean-Baptiste was to provide psychiatric reports in respect of Michael and those reports were to be disclosed to the parties as soon as practicable thereafter. [194]
28 October 2009	Dr Jean-Baptiste's report was made on this date. We appear to lack the third page. The report begins by referring to the fact that Michael had been referred to the Institute by his school counsellor because he had indicated to her and his father a desire to end his life, and had posted various statements on the internet indicating that he intended to kill himself. The report records that Michael was being seen by his school counsellor, and that he had told her he had difficulty sleeping, was very angry with his dad and was pining for his mother as they did many things together like playing soccer and swimming. The report also records the result of Michael's mental status examination over the 10 days since Michael's admission to the CAS unit. She recorded that Michael was aware of the permanence of death and that his drawings depicted sadness, loneliness and anger. He repeatedly reported that he was afraid of being hurt by his father as his father had broken down the bathroom and the

	bedroom door in order to come after him. He admitted to being disrespectful and very angry with his father at times. Michael described his mother as "*everything I ever wanted*". She raised chins and her voice when she was angry but his father in contrast used his hands and the belt. On 28 October Michael was very tearful and felt that nobody was listening to him. He expressly desired to speak to the Magistrate in court and "*set things straight*". He felt that a 10-year-old boy should not have to be made to suffer so much. A diagnosis was made of suicidal ideation with depressive symptoms and family dysfunction. [196][8]
3 November 2009*	Magistrate Wolffe makes an order, by consent, that there shall be a Supervision Order in respect of Michael until the Custody, Care and Control hearing is concluded; and by consent, that Michael should remain in the care and control of his father, with Ms Pedro to have access as specified in the order. The DCFS was to conduct weekly school checks on Michael and random home visits. Michael's father and Ms Pedro were to submit to psychological assessments[9] and counselling as deemed necessary by the DCFS and to anger management counselling if deemed appropriate and necessary by the DCFS. They were also to submit to, and complete, mediation as deemed appropriate and necessary by the DCFS. Michael was to continue with his sessions at CAS and submit to further counselling, The DCFS and the Department of CAS were to submit further interim reports. [199]
8 January 2010*	The order of Magistrate Wolffe records that Ms Pedro states that, in the interest and welfare of Michael she wishes to withdraw her application for Custody, Care and Control of Michael and the court orders that her application is hereby withdrawn. By consent between the parties Michael's father and Ms Pedro are to have joint custody of Michael and Michael's father shall continue to have care and control of Michael who is to reside with him.

[8] This report was not before us in the previous appeal in the first action. Mr Moodie told us that he had not included it because the orders of the Court were sufficient for the points that he desired to make; and he wished to avoid the inclusion of material relating to the sensitive issues between Michael's parents.

[9] Paragraph [61] of the draft Statement of Claim in the first action records that Ms Pedro was scheduled to be assessed by Dr Pitts-Crick but, when she learnt that Michael's father was also to be assessed by her, she advised the Doctor that she would not be carrying out any assessment of her if she was also to assess Michael's father. Ms Pedro was then assessed over various days in December by Dr Bownell who is said to have reported that there was nothing in any of the tests results that disqualified Ms Pedro as a mother capable of caring for her child: see paragraph [62]. SOC [62]

	Access shall continue as in the order of 3 November 2009 and the Interim Supervision Order of 27 October 2019 is discharged.
25 November 2011	Ms Pedro, who had moved with her daughter to England on **10 August 2011**, applied for (and obtained) an order for Skype access to Michael, after Magistrate Tyrone Chin had (we were told) called for Michael to be brought to Court, and heard him. Michael's father was present in Court and Ms Pedro participated by telephone. The access was to be at 5.30 pm every day from Monday to Friday and there was to be reasonable weekend access.
16 January 2012	On or about this date Ms Pedro applied for a court date for a hearing in respect of care and control of Michael; summer visitations and visits and food purchase by her designate. A few days after this Michael was run down by a motorcyclist when crossing the street. He needed emergency surgery for a broken leg and a cast up to his groin. In the event this application does not seem to have been pursued. As is recorded in [74] of the December 2020 Statement of Claim the incident "*diverted the appellant's attention completely"*.
20 April 2012	A consent order was made providing for Michael to travel to the United Kingdom and stay with his mother and sister between 28 June and 27 August 2012.
10 September 2013	On or about this date Ms Pedro applied for the court to address the issues of Michael not being given skype access as ordered by the Court on 25 November 2011 and that Michael was being physically abused by his father. On 17 September 2013 she was told in an email from Ms Ashley Smith, Clerk to the Family Court, that the Magistrate had reviewed her application and said that in order for the court to proceed with it she must confirm that she would be either retaining counsel on her behalf and have them file documentation or confirm that she would appear in person on a date set for hearing, and that until she did, the court would not entertain the matter.

The Hearing on 8 January 2010

7. We do not have a full transcript of the hearing of 8 January 2010. But Ms Pedro has listened to the CourtSmart recording and has transcribed bits of it. There are dangers in relying on a partial transcript, especially when it is not a continuous record of question and answer, and is, as this one is, interspersed with Ms Pedro's critical comments. In addition, the excerpts we have do not extend to the denouement of the hearing and the consent order. But the excerpts that we have are of some utility.

8. Primarily this is because they show that Ms Pedro was represented at the hearing by Ms Narinder Dosanjh, who had also represented her on 3 November 2009. It is apparent from what has been transcribed by Ms Pedro that Ms Dosanjh was in possession of Dr Jean-Baptiste's

report of 28 October 2009. She relied on it in support of her submission that Ms Pedro should have care and control of Michael, saying that, if Michael's wishes could be ascertained by the Court that day, then the Court could vary the order. It was Ms Pedro's evidence – see her affidavit of 18 July 2022 [206] - that she had never seen this report (which was written at a time that she was self-representing), before it was exhibited to the affidavit of Lauren Sadler-Best of 5 July 2022. We find this difficult to accept. But, in any event, it is clear that it was received by Ms Pedro's attorney – Ms Dosanjh – and referred to and relied upon by her in the hearing on 8 January 2010. In her affidavit Ms Pedro says that she had no doubt that Ms Dosanjh would have shared it with her if she had received it. Since it is plain that Ms Dosanjh did receive it, it seems to us overwhelmingly likely that she did share it with Ms Pedro in January 2010, even though Ms Pedro may not have received or retained a copy. And, even if she did not, Ms Dosanjh deployed it before the Court, in Ms Pedro's presence and on her behalf.

9. Magistrate Wolffe indicated that giving care and control to Ms Pedro was not going to happen but indicated that he might want to make some variation in the access arrangements. It appears that a school counsellor was in court and indicated that what Michael wanted was to live with his mother and have visits with his father, and that he was worried that he might have to go into foster care, which, Ms Pedro told us, the social worker was suggesting.

10. In the light of that evidence and the evidence of Dr Jean-Baptiste Ms Dosanjh sought an increase of access for Ms Pedro to cover every weekend. The Magistrate thought that that would deprive Michael's father of "*any fun time*" and that there had to be some flexibility. He went on to express the view that what Michael was crying out for was for his mother and father to get along and that what mattered, more than who had custody or care and control, was that they should get along. He expressed the view that Michael was the product of a dysfunctional relationship and it was that which needed to be remedied. Whatever order made would be window dressing if the two could not come together. The Magistrate said that Michael may have to come to court; but he was "*antsy*" (i.e. hesitant) about that; he understood why Dr Jean-Baptiste felt that Michael's opinion needed to be ascertained; but took the view, from his experience, that the effect of legal proceedings on a child could be damaging, especially in the light of the challenges that Michael was then going through ("*He's going to figure out that mum and dad are still fighting. Who knows what that will do to his mind?"*) although ultimately the court might need to hear from him.

11. As I say, the final discussions leading up to the consent order of 8 January 2010 have not been transcribed. But we understand Ms Pedro to be saying that the social worker was either suggesting, or seeking, an order that Michael be put into foster care; which was what Michael feared; and that, in the light of that and the fact that the Magistrate had indicated that Ms Pedro was not going to have care and control, Ms Pedro agreed to the order which was made. She did so because, unwilling though she was to have that outcome, she did not want to risk of Michael being put into foster care because, if that happened, she might lose him. That she made such a decision is something which, she insists, she felt was forced on her in the circumstances. But those circumstances, even if they had unfolded as she describes, did not amount to duress vitiating the consent which, as we have already found in our previous decision, she gave

The First Action

12. On **10 July 2018** Ms Pedro commenced proceedings by Writ of Summons claiming relief against the DCFS in respect of applications made by the DCFS to the Magistrates' Family

Court for supervision and care orders in respect of Michael. Ms Pedro sought damages in the sum of $ 250,000 for pain and suffering said to have been caused to her by the actions of the DCFS which were said to amount to child abduction, unlawful removal of her son, falsification of reports and records, suppression and omission of evidence and fraud.

13. By a Ruling dated **28 November 2019** Wheatley AJ struck out the entirety of Ms Pedro's claim on the basis that it was frivolous, vexatious and an abuse of process.

14. Initially Ms Pedro had made claims against Magistrates Wolffe and Tyrone Chin as well as against Miss Ashley Smith, a Court Associate in the Magistrates' Family Court. However, Ms Pedro later voluntarily elected to remove them as parties to the 2018 proceedings. This was explained by Wheatley AJ in her Ruling as follows:

> "8. *For the purpose of completeness, it should be noted these proceedings initially included the Sr. Magistrate, Juan Philip Wolffe, Magistrate Tyrone Chin and Miss Ashley Smith as her position of Court Associate in the Magistrates' Family Court. At the first directions hearing****, I brought it to the Plaintiff's attention that Magistrates could not be held personally liable for decisions made in their judicial capacity. This was accepted by the Plaintiff****.*
>
> *9. As it related to Miss Smith acting in her course of employment with the Judicial Department as a Court Associate in the Magistrates' Family Court, the Plaintiff also accepted that it was not Miss Smith who played any decision-making role as it relates to the case and was merely carrying out her employment function as a result of the decisions made by the Courts. As such, the parties' consented to these parties being removed as Defendants to this matter. (emphasis added)"*

15. The basis of the Ruling which AJ Wheatley made was set out in paragraphs 31-32 thereof:

> "*31 Ms. Pedro has not raised any valid argument that she can escape the reliance of the Defendant on her claim being time barred in accordance with the Act. Allowing Ms. Pedro to proceed with this claim would amount to clearly frivolous, vexatious (David Tucker and Hamilton Properties Limited) and an abuse of process of the courts (White Book (1999 Edition) 18/19/19) as it would effectively give her a second bite of the cherry. The Plaintiff did not appeal the decisions made in the Magistrates' Family Court or make any reasonable effort to bring this matter before the court in a timely manner (despite all the applications put before the Magistrates' Court all being consented to by her).*
>
> *32. The Defendant and the Plaintiff appeared in the Magistrates' Family Court for applications made by the Defendant for supervision orders of the Plaintiff's on [on] four occasions in 2008 and 2009. I fully accept the Plaintiff consented to these applications as she admitted this during the hearing. Furthermore, she also was admittedly represented by Counsel throughout these proceedings. At no point did Ms. Pedro appeal any of the orders made in relation to the Defendant's applications. Further, on her own admission, she made no attempt to view the court files until 2016 despite remaining in Bermuda until*

> *2011. She was passive in her attempts to bring any action (Jim Bailey v Wm E Meyer & Co Ltd [2017] Bda LR 5)." (emphasis added)*

16. Ms Pedro appealed to this Court. After the conclusion of the hearing of her appeal we caused the Clerk to the Court of Appeal to write to Ms Pedro, as he did on **9 November 2020**, to inform her as to the course that we proposed to take, and to afford her the opportunity to produce within 14 days an amended pleading. The contents of that letter are set out in the Chief Justice's judgment at [14] and we shall not repeat them save to note that we stated that we intended to hold that any claim to redress under the Constitution for not having had a hearing in September 2013 must, if it was to be pursued at all, be pursued in a separate action. We took that view because the claim had not been raised at first instance and appeared for the first time on the hearing of the appeal.

17. On or about **15 December 2020** Smith-Bean & Co produced a 109 paragraph Statement of Claim, which had 83 paragraphs of narrative.

18. On **19 March 2021** we handed down our judgment. In it we decided a number of matters, including the following:

    (i) the claims against the Magistrates and Miss Smith were properly withdrawn because the Magistrates were, in the light of the immunity from suit conferred by section 10A of the Bermuda *Magistrates Act 1948* immune from suit;

    (ii) there was no sustainable factual basis upon which it could be proven that the DCFS or its officers acted with the kind of targeted malice, bad faith or reckless indifference of the kind required to establish misfeasance in a public office;

    (iii) Ms Pedro had consented, with the benefit of legal advice, to orders made by the Magistrates' Court and, in particular the final order made on 8 January 2010; and had not appealed them;

    (iv) the underlying causes of action were time barred when proceedings were commenced on 10 July 2018, reliance no longer being made on section 33 (1) of the *Limitation Act* and reliance on sections 12 (4) and 15 of that Act being ill founded given Ms Pedro's awareness of her psychological trauma in 2009; and

    (v) a claim for negligence by a parent for alleged breach of a duty owed to him or her in the context of care and supervision proceedings was not sustainable as a matter of law.

19. On **22 June 2021** we dismissed the application by Ms Pedro to appeal to the Judicial Committee of the Privy Council on the ground that there was no genuinely disputable issue. We gave our reasons on **2 September 2021.** Ms Pedro then appealed to the Privy Council. On **18 March 2022,** on the advice of the Privy Council, Her Late Majesty approved the refusal of permission to appeal.

20. In his judgment in the current case the Chief Justice set out the several reasons why he declined to grant leave, which we propose now, ourselves, to consider.

21. The Chief Justice said, first, that it appeared to him that this Court had already determined and ruled (as we had) that any claim for damages arising out of the decisions made by the Magistrates in relation to the matters complained of in these proceedings was wholly misconceived because of their immunity from suit; and that the Supreme Court was bound by it. He did so in the following terms:

> "*27 This Court is of course bound by the rulings of the Court of Appeal in this matter on grounds of issue estoppel as well as the doctrine of binding precedent. Even without the decision of the Court of Appeal, it seems clear to the Court that the effect of section 10A of the Magistrates Act 1948*[10] *is that there can be no valid claim against a magistrate for monetary damages in respect of his judicial acts whether within or without jurisdiction. All the actions and omissions of the Magistrates complained of in these proceedings are judicial acts (whether within or without jurisdiction) and are protected by statutory immunity expressly set out in section 10A of the 1948 Act. Given that it is not possible to render a judgment awarding damages in relation to a magistrate's judicial acts, it is difficult to see how such a judgment could be given against the State (represented by the Attorney General in this case). In the Court's view such a result would be contrary to the statutory immunity set out in section 10A of the 1948 act. Furthermore, section 10A (2) merely provides that the decision of (a) magistrate can be challenged by all other available means. Section 10A (2) cannot be read as providing that in relation to any application under section 15 of the Bermuda Constitution a magistrate ceases to enjoy the statutory immunity against civil liability enshrined in section 10A of the 1948 Act."*

22. In relation to the last sentence of paragraph 27 of the judgment, there is, we think, some risk of confusion in the present context. There are two separate types of possible claim (i) a tortious claim against the Magistrates and/or the State; and (ii) a constitutional claim. In relation to the former, which was the claim made in the first action, (and which is also asserted at the beginning of the Statement of Claim in the present action) the Magistrates enjoy immunity from suit. It would, indeed, be odd if a claim for damages could be brought against the State in respect of the allegedly tortious actions of judges or Magistrates, when they themselves were immune from suit. This would be to create a form of vicarious liability for the acts of someone who was immune, which would be a contradiction in terms. No such claim can be made against the State.

23. Further, as it seems to us, the issue in respect of a tortious claim is determined by section 3 (1) of the *Crown Proceedings Act 1966* (which in subsection 3 (1) (a) deals with the liability of the Crown "*in respect of torts committed by its servants or agents"*) and the proviso to which provides:

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[10] ***"Scope of magistrate's immunity***
10A(1) Subject to this section, a magistrate shall be immune from any personal civil liability in respect of his judicial acts whether within or without jurisdiction.

(2) Nothing in subsection (1) shall in any way impair the availability of other forms of relief in respect of decisions of courts of summary jurisdiction, including appeals, applications for judicial review and applications for redress under section 15 of the Bermuda Constitution"

> *"Provided that no proceedings shall lie against the Crown by virtue of paragraph (a) in respect of any act of a servant or agent of the Crown unless that act would, apart from this Act, have given rise to a cause of action in tort against that servant or agent or his estate."*

24. A claim for redress under the Constitution is different. It is a claim that some provision of the Constitution has not been followed so that the claimant has been deprived of her rights thereunder. The actions which are said to have that effect may, or may not, be the same as that which would also give rise to a claim in tort (if it was available, which in the case of the judiciary it is not). It is important to bear in mind the distinction between the two types of claim. The claim under the Constitution made in the present action is a claim against the State. That a claim would lie against the Magistrates personally (if they lacked immunity) under section 15 seems to us debatable. If it would, the Magistrates have an immunity from suit which would probably apply to such a claim. However, it is not necessary to decide either of these questions since no claim against the Magistrates personally has been made in the present action. As Ms Pedro made clear in her submissions to us, her claim is against the Attorney-General or the Minister for a breach of her constitutional right to a fair hearing.

25. Second, the Chief Justice held - [30] – [32] - that it was an abuse of process to discontinue proceedings against Magistrates Chin and Wolffe and Ms Ashely Smith[11] on the basis that the Magistrates enjoyed statutory immunity against civil liability under section 10A of the 1948 Act, and then resuscitate the same causes of action against the Magistrates in these proceedings, The Chief Justice set out the principles which he had set out at [5] – [6] of *Ivanishvili v Credit Suisse Life (Bermuda) Limited* [2022] SC (Bda) Civ (25 July 2022).

26. We do not regard this ruling as correct. The claim in the first action was, as we have said, a claim against the Magistrates themselves, in respect of various torts. The claim in the second action repeats those tortious claims; but they are not pursued against the Magistrates, who are not parties to the action. Insofar as the second action is a claim against the State in respect of the allegedly tortious acts of the Magistrates, it is indeed an abuse. It is an attempt to claim that the State is liable for tortious acts (a) in respect of which the actors are immune (as Ms Pedro has previously accepted by her withdrawal of the claim against them in the first action); and (b) in respect of which the State is not liable: see the Crown Proceedings Act (above). Insofar as the second action is a claim against the State under the Constitution for breach of Ms Pedro's constitutional rights to a fair hearing, relying on the same facts as are said to amount to various torts, it is not an abuse of process. But the fact that the claim is not an abuse of process does not mean that it is, necessarily, tenable.

27. Third, the Chief Justice held, on the basis of the findings already made by the Court of Appeal, that the claim by Ms Pedro against the Magistrates was bound to fail - [33] – [36]. There was no sustainable factual basis upon which it could be proven that the Magistrates or Ms Smith acted with the kind of targeted malice, bad faith or reckless indifference of the kind required to sustain claims for misfeasance in a public office, abuse of power and breach of duty; and no fully particularised pleading supporting any such claim had been filed. Further, as the Court of Appeal had already held, the relevant orders and, critically, the order of 8 January 2010 were made by consent and when Ms Pedro was represented. By the 8 January 2010 order she withdrew her application for custody, care and control of Michael and consented to her and

[11] There is, in fact, no claim against Ms Ashley Smith in these proceedings.

Michael's father having joint custody, and Michael's father having care and control and for Michael to reside within him. In those circumstances it was impossible to see how Ms Pedro could sustain her claims of misfeasance, abuse of power and/ or breach of a duty of care.

28. Insofar as this part of the ruling relates to the tortious claims, we agree. The pleaded claim comes nowhere near what is necessary to establish misfeasance in a public office, abuse of power or breach of duty. In relation to the latter two, abuse of power is not a recognised tort and breach of duty begs the question as to what duty is here being referred to. It would seem to be either misfeasance in a public office or negligence, as to which see [31] below. And Ms Pedro, having consented to the order that placed Michael back into his father's care, cannot claim damages in respect of it.

29. That there is no sound basis for a claim of misfeasance pleaded is apparent from a perusal of the statement of claim. That there was no such misfeasance is also apparent from the sequence of events which we have summarised above, from which it is apparent that, as we said in the earlier action, "*orders [were] made after detailed assessments and enquiries were put before and considered by the courts, including reports from qualified and independent psychologists*", and in circumstances where the Court had difficult decisions to make in the light of the inability of the parents to cooperate and the allegations against each parent which could justify a period of foster care. Further the question whether Michael should be brought to give evidence in court in the presence of his warring parents was, itself a delicate one. It does not surprise us that Magistrate Wolffe referred on 8 January 2010 to his experience of the potentially injurious effect that might have upon a child.

30. Ms Pedro challenges every assessment made which was adverse to her, and any order made on the basis of that assessment. She disputes the validity of the action that was taken to remove her son in April 2008 and the fact that in 2010 Magistrate Wolfe (a) declined to hear evidence from Michael; (b) was not prepared then to grant her care and control; and (c) appeared receptive of the idea of placing Michael temporarily in foster care. But none of that is a satisfactory foundation for a claim in misfeasance.

31. Fourth [38], the Chief Justice held, any claim in negligence cannot stand in the light of the judgment of the Court of Appeal, relying upon the English Court of Appeal decision in *JD and Others v East Berkshire and Others* [2003] EWCA Civ 1151, as upheld by a majority in the House of Lords (Lord Bingham dissenting): see [2005] UKHL 25, that no duty of care is owed to a parent by a body such as the DCFS in respect of the exercise of its statutory authority. The rationale for the exclusion of a duty applied equally, the Chief Justice found, in relation to the existence of any such duty on the part of the Magistrates. We agree. We do not regard this case as inapplicable in the light of Merthyr *Tydfil County Borough Council V C* [2010] EQHC 62 in which case there was no suggestion of any abuse by either parent (as there was here in respect of both).

32. Fifth [40], the Chief Justice held that, just as the 2018 proceedings were time barred, being begun in July 2018 when they should have been begun no later than December 2015 (six years after late 2009, when Ms Pedro was aware of her psychological trauma) in respect of causes of action arising by the end of 2009, and, we would add, no later than 8 January 2016 in relation to any cause of action arising in relation to the order of 8 January 2010, so her claim in the present proceedings was time barred. As to her claim that she was denied access to the Magistrates Court in September 2013, that, also, was time barred when she commenced these

proceedings on 3 February 2021 (7 years 4 months later). Insofar as the claim is a claim in tort, we agree. But insofar as the claim is a claim under the Constitution we do not, since such claims are not subject to any limitation period.

33. In relation to any claim for redress under section 15 (1) and (2) of the Constitution the Chief Justice said this:

> "40…. *However, the proviso to section 15(2) provides that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress* [are] *or have been available to the person concerned under any other law. In relation to this proviso the Court is entitled to take into account that the applicant could have appealed against the orders now complained of and that the causes of actions available to the applicant under the general civil law on our* [sic: presumably are now] *statute barred. There is no satisfactory explanation as to why the Plaintiff did not exercise the other "adequate means of redress" which were available to her by appealing the orders to which she now objects".*

34. We agree that section 15 (2) precludes any successful claim by Ms Pedro under section 15 (1), but would approach the question somewhat differently. Some of the orders made between April 2008 and January 2010 were recorded as made by consent: in particular paragraphs 1 and 2 of the Order of 5 November 2009 and, critically, the order of 8 January 2010, in circumstances where Ms Pedro had legal representation. Unless the consent was legally invalid, that would, ordinarily preclude an appeal from the order and an application for constitutional redress based on the making of the order. Those that were not made by consent, including the September 2013 ruling, could have been appealed.

35. If the order of 8 January 2010 had been made under what the law would regard as duress (which, in our view, it was not), or there was any other ground which would have vitiated the consent in law, Ms Pedro's apparent consent would not have precluded an appeal to the Supreme Court against that order. Further, as it seems to us, if the apparent consent was, in law, invalid, an application could have been made to the Magistrates' Court, to set aside the consent order, and to make a new and different one. No technical difficulty lay in Ms Pedro's way in that respect since paragraph 7 of the order of 8 January 2010 provided for "*liberty of either party to restore in respect of any issue related to Michael Jr including but not limited to access or child support*" – a paragraph which would have allowed a renewed application to the Court, even if there was no invalid consent. Further, in matters concerning a child it is always open to a parent to make a fresh application to the Court for custody, care and control or a change of plan. Ms Pedro did make such an application on 16 January 2012 but her attention was diverted from pursuing it because of Michael's accident.

36. Sixth, the Chief Justice held that the claim for redress for Ms Pedro not having had a hearing in September 2013 was in no better position than the claims struck out by Wheatley AJ for the following reasons:

> "(i) *The factual basis for this claim is an email from Ms. Ashley Smith dated 10 September 2013 whereby Ms. Smith advised the Plaintiff that the Magistrate, having pursued the application, had decided that in order to have a hearing before the Magistrates Court the Plaintiff must either appear in person*

> *or must be represented by counsel. This factual allegation formed the basis of the claim against the Magistrates and Ms. Smith in the 2018 Proceedings…. However, the Plaintiff voluntarily abandoned this claim in light of section 10A of the 1948 Act ……Having abandoned this claim in September 2019 at the hearing before Wheatley AJ, it is [an] abuse of process to reassert the same claim in February 2021 claiming relief under section 15 of the Constitution.*
>
> *(ii) The direction conveyed by Ms. Smith to the Plaintiff in her email of 10 September 2013, reflected a judicial decision made by a Magistrate. The decision was a judicial act in respect of which the Magistrate enjoys statutory immunity under section 10A of the 1948 Act. This was recognized by Wheatley AJ and the Court of Appeal in the 2018 Proceedings. Accordingly, there can be no valid claim for damages against the Magistrate or Ms. Smith (who conveyed the direction) as a consequence of the statutory immunity set out in section 10A of the 1948 Act. If there can be no judgment for damages against the Magistrates in respect of their judicial acts, in principle there can be no liability for damages against the State in respect of the same judicial acts. The Court can of course, in an appropriate case, grant relief by setting aside the decision of the Magistrate or giving other directions to ensure compliance with the fundamental rights enshrined in the Constitution. However, here the only relief sought by the Plaintiff is an award of damages, a relief which is not available to the Plaintiff because of section 10A of the 1948 Act. Accordingly, the claim for damages in relation to this claim is bound to fail.*
>
> *(iii) The Plaintiff could have appealed the decision if she was dissatisfied with it. The Plaintiff could have commenced proceedings under section 15 of the Constitution at the time when the Court could have, if it considered that it was appropriate, grant effective relief.*
>
> *…*
>
> *(v) The actions of the Magistrate now complained of took place 8 years ago (and are statute barred under the general law). The Court is no longer able to grant an effective remedy and no such relief (other than an award of damages) is claimed."*

37. In our view this passage confuses claims against Magistrates in respect of alleged torts and claims against the State in respect of a breach of Constitutional rights. As we have said, the fact that a claim in the former category has been withdrawn does not make a claim in the latter category abusive, even if based on the same or similar facts. Further, the fact that there can be no judgment for damages against the Magistrates personally in respect of their allegedly tortious judicial acts does not, as it seems to us, mean that there can be no judgment against the State under section 15 of the Constitution (which could include monetary compensation) if those acts had the effect that Ms Pedro was deprived of her constitutional rights. Nor is it relevant that Ms Pedro could have commenced proceedings under section 15 of the Constitution long ago, given that there is no limitation period applicable for such claims, and relief under section 15 is only proscribed if adequate means of redress were or had been available to the person concerned "*under any other law"*

38. What, in our view, precludes Ms Pedro from seeking redress under the Constitution is section 15 (2) thereof. On the assumption that there was a breach of her constitutional rights Ms Pedro had adequate means of redress in the form of an appeal from the September 2013 order: see paragraphs [33] – [34] above. In view of what we have held in relation to the factual merits of the tortious claims that assumption may, itself, be ill founded; but it is not necessary for present purposes further to analyse the prospects of a constitutional claim that is precluded by section 15 (2).

39. The Chief Justice added that there was nothing untoward for the Magistrate to direct that for a hearing to take place in the Magistrate's Court the Plaintiff must either attend in person or be represented by an attorney. "In *effect, the Magistrate was taking the position in 2013 that the Magistrate Court could not undertake to arrange a remote hearing. Such a position cannot, in the judgment of this Court, amount to denial of a fair hearing in 2013*."

40. We take a different view. It seems to us that the Magistrate was wrong to insist on appearance in person or by an attorney. It would have been perfectly possible in 2013 to communicate remotely (as had happened in 2012) and, in our view, the interests of the child made such a hearing appropriate when the mother was in the United Kingdom. But, again, there were means of redress available to Ms Pedro. She could have pressed the Magistrate further (referring, in particular, to what had happened in 2012, and suggested a telephone or skype hearing or a hearing on the basis of written submissions. And she could have appealed against the Magistrate's direction.

41. For all these reasons we decline to give Ms Pedro permission to appeal from the decision of the Chief Justice, save in respect of the ruling that the present action is an abuse of the process of the Court. But we dismiss the appeal outright because the Statement of Claim discloses no reasonable cause of action and is frivolous and vexatious on the other grounds explained in the judgment of the Chief Justice, as qualified by this judgment.

42. I have said on an earlier occasion (a) that the Court fully understands the distress that Ms Pedro describes as having been experienced on account of what she would regard as the loss of her son in 2010 – over a dozen years ago; but (b) that the Court's function is to determine whether Ms Pedro has a valid cause of action against those whom she seeks to hold responsible. She has now failed to establish that she has any arguable claim in law on four occasions in this jurisdiction and on one occasion before the Privy Council. This repeated launching of invalid claims must stop. It confers no benefit on Ms Pedro and causes continued distress to her and to her son. In addition, although less importantly, it takes up a substantial quantity of hearing and preparation time of the Court and its Justices; and deprives other litigants of the opportunity to have their cases heard speedily.

SMELLIE JA:

43. I agree.

GLOSTER JA:

44. I also agree.