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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

M's Application [2004] NIQB 94

IN THE MATTER OF AN APPLICATION BY M

GILLEN J

[1] The judgment in this case is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and any other persons identified by name on the judgment itself) may be identified by name or location and in particular the anonymity of the children in this case and the adult members of their family must be strictly preserved.

[2] In this matter the Applicant seeks judicial review of a decision by Down Lisburn Trust ("the Trust") made on 3 December 2003. The Trust refused to permit the Applicant's solicitor to attend at a case conference concerning the Applicant's children as the Applicant's next friend at a time when the Trust was aware that the Applicant was a patient in the mental health unit of the Lagan Valley Hospital and accordingly was not going to be in attendance. The Applicant seeks an order of certiorari to quash the decision of the Trust, an order of mandamus to oblige the Trust to reconsider its decision and a declaration that the decision was irrational, unreasonable and unfair. Her case is founded on the proposition that the Trust acted contrary to Article 8 of the European Convention on Human Rights and Fundamental Freedom 1950 ("the Convention") in failing to permit the Applicant, in her absence, to have any representation or attendance of a next friend at a case conference which would involve discussions,

investigations and decisions in respect of the Applicant's children; that the Trust acted contrary to Article 6 of the Convention taken together with Article 14 of the Convention in that the Applicant's right to family life and to be involved in a case conference was impaired by reason of her disability and medical status and that the Trust had wrongfully fettered its own discretion in failing to consider the exceptional circumstances of and the health problems relating to the Applicant.

Background

[3] The Applicant in this case is 33 years of age and is the mother of C, born on 22 April 1991, and S born on 25 August 1995. Both children are the subject of interim care orders in favour of the Trust which were granted on 10 September 2003 at a Family Proceedings Court. The Applicant had instructed a solicitor, Stephen Tumelty, to appear on her behalf during the course of the proceedings.

[4] Mr Tumelty deposes, that during the course of the proceedings, the Applicant was invited to attend at case conferences and Looked After Children reviews ("LAC reviews") organised by the Trust in respect of the children. He attended at the conferences and LAC reviews with the Applicant in the capacity of the Applicant's next friend. During the course of the said meetings discussions took place and decisions were made in relation to the children including issues pertaining to contact with the Applicant and the extended family. Mr Tumelty further deposes that in or about November 2003, Ms S, a social worker with the Trust, advised him that she was in the process of seeking clarification from the Trust as to its policy in relation to the attendance of solicitors at LAC reviews and case conferences. He avers at paragraph 4 of his affidavit of 28 January 2004:

"A case conference was organised by the Trust on 3 December 2003. I attended at the same. I had anticipated that the Applicant would also be present. Upon my arrival, I was advised by Ms A.B., social worker, that the Applicant was not present. The Applicant had been detained in the mental health unit at Lagan Valley Hospital".

I pause to observe at this stage that it emerged in the hearing that that assertion was incorrect and that in fact the Applicant was a voluntary patient at Lagan Valley Hospital. The affidavit continues:

"I had anticipated that the case conference would proceed in the absence of the Applicant as I was present to represent her in the capacity as her next friend. Ms S then advised me that I could not be

present at the case conference as my client, the Applicant, was not present. Ms S was aware that I would be attending at this case conference in the capacity of the Applicant's next friend. She indicated that my presence at the case conference was subject to the presence of the Applicant. I did not agree with this decision and expressed my objection but ultimately I had no choice but to leave. I believe that the case conference proceeded in the absence of the Applicant or any attendance on her behalf.

(6) I wrote to the Trust on 4 December 2003 outlining the events of the previous day and expressing my concern that I had not been permitted to attend at a case conference. I expressed my concern that decisions are taken at case conferences, which have a considerable impact upon parents/carers of children ...

(7) I received a response dated 9 December 2003 from Mrs T, Director of social work and primary care services in the Trust."

[5] I observe at this stage that the letter from Mrs T, referred to by Stephen Tumelty, and which is exhibited to the affidavit, contains the thrust of the Trust case in this matter and accordingly I intend to quote from it in extenso:

"The Area Child Protection Committee current policy on the attendance of parental supporters at child protection case conferences states that:

'Parental attendance will usually be confined to 2 parents/carers or 1 parent/carer and adult supporter" (4.3).

This Trust is 1 of the 4 trusts subscribing to the Area Child Protection Committee on policy and procedures. The Area Child Protection Committee policies and procedures are currently under review as a result of the publication by the Department of Health, Social Services and Public Safety "Co-operating to Safeguard Children" (May 2003). On the topic of your query this document states "Where the

family attends, they should be allowed to bring a friend or supporter and help to fully participate" (5.52).

In the new procedures which are currently being developed by the Area Child Protection Committee as a result of the publication of "Co-operating to Safeguard Children" the latest draft states:

- '7.47 - Parents and children must be advised of the right to have a supporter or friend present in order to assist them with full participation.

- 7.48 - The role of the friend or supporter is to speak on behalf of the parent or child, having ascertained their view in advance of the meeting. The friend or supporter is not there to promote his own view. The Chairperson of the case conference must be informed of the intention of the parent to bring a friend or supporter prior to the case conference.

- 7.49 - In exceptional circumstances the Chairperson may prevent a friend or supporter from attending a conference, eg where a person has a conviction, or has been cautioned, for certain types of Schedule 1 offences. A supporter may also be required to leave the conference if the Chairperson deems his presence to be disruptive.

- 7.50 - The friend or supporter will not receive a copy of the case conference minutes'.

You will note that in the current policy and procedures, the DHSS&PS guidance and the draft new policy and procedures it is clear that the attendance of friends or supporters of a case conference is subject to the parent/carer being

present. Ms S's decision in the case to which you refer was therefore entirely correct and in accordance with both current and future policies and procedures and departmental guidance.

I note that your letter describes the case conference as a 'legal forum'. 'Co-operating to Safeguard Children' describes the case conference as follows:

'The case conference should be convened by the Trust, or the NSPCC, where there is an arrangement to this effect. It brings together the professionals involved after the completion of the initial child protection enquiries to:

- share and evaluate information gathered during the investigation;
- decide on the need for developing a child protection plan;
- decide on whether or not to include the child's name on the Child Protection Register" (5.45)

It is therefore a professional forum to share information and to make the decisions outlined above rather than a 'legal' one.

You are correct in stating that a solicitor may attend a child protection case conference with a parent/carer as a friend or supporter but not in a legal capacity".

The Applicant's Case

[6] Ms Moran, who appeared on behalf of the Applicant, in the course of a well-presented skeleton argument ably augmented by oral submission, made the following case:

(i) The Applicant does not seek to challenge by itself the philosophy behind the thinking of the Trust. She accepted that it was understandable that the Trust would want parents to be present at an information exchange at a case conference. She recognised the strength of the Trust argument that the whole

policy would be undermined if parents could simply avoid their responsibility of turning up by allowing a next friend/solicitor to substitute for them. What Ms Moran challenged was not the validity of the policy, but rather the inflexible rigid application of that policy with no allowance for exceptional circumstances. In terms she argued that the Trust had unreasonably fettered its own discretion and closed its mind to any reasonable deviation.

(ii) In this case she argued that the solicitor, Mr Tumelty, did not know that the client was not going to appear and that the policy is vague on that circumstance. Counsel submitted that if Article 8 of the Convention was to be implemented, parents must be involved in decision-making in order to protect their own rights to family life. In circumstances where a mother is genuinely unable to attend, and where it is clear that she did not wish to abdicate her responsibilities, then the Trust should not exhibit, as she argues they had done in this case, a closed mind to any discretionary movement on the policy.

(iii) Ms Moran submits that the case conference is more than just a meeting of professionals. Hershman and McFarlane "Children Law and Practice" at Volume B 481-486 describes the comparable English provisions dealing with child protection conferences as follows:

"'Working Together' states that those attending a child protection conference should be there because they have a significant contribution to make. These will include:

- family members;
- social services staff who have undertaken an assessment of the child and family;
- foster carers ...
- professionals involved with the child;
- professionals involved with the parents;
- those involved in enquiries (eg the police);
- local authority legal services;
- NSPCC or other voluntary organisations ...".

At paragraph 488 the author of the book quotes from the Cleveland Report:

“Irrespective of whether parents attend at conferences, social workers have a primary responsibility to ensure that the case conference has information relating to the family background and the parents’ views on the issue under consideration”.

Accordingly the Applicant submits that the parents must be involved if at all possible. The Applicant argues in this case that the parent was excluded from any involvement on foot of an impermissibly rigid rule that the attendance of a next friend was conditional upon and subject to the attendance of a parent.

(iv) Counsel submits that the Trust as a public body has an obligation pursuant to Article 8 of Convention to respect the Applicant’s family life and that no consideration was given to that in this instance in that due to her exceptional circumstances she was unable to attend the case conference and express her views.

(v) Finally, counsel submits that the decision of the Trust is contrary to Article 14 of the Convention in that, it is submitted, the Applicant by reason of her medical status and disability was not in a position to attend the case conference. This allegedly amounts to direct, or in the alternative, indirect discrimination against the Applicant on the grounds of her medical condition and disability contrary to Article 8 of the Convention taken together with Article 14. In effect the argument is that the policy of the Trust has a disproportionate and unjustified adverse impact upon such persons as would be in the same position as the Applicant by reason of their medical status and/or disability.

The Respondent’s Case

[7] Mr Lavery QC who had submitted an equally impressive skeleton argument drafted by junior counsel Mr Lavery, again augmented with succinct and helpful oral submissions, in essence made the following case:

(i) The policy under which the Trust operates was published in May 2003 entitled “Co-operating to Safeguard Children”. The policy was drawn up by the Department of Health and Social Services as part of the guidance issued by the Department pursuant to the Children Order (NI) 1995 (“the 1995 Order”). Mr Lavery submits that it is a reasonable and lawful policy which is predicated on the basis that parents must be allowed and encouraged to be part of the process in order to help implement any child protection plan particularly where

the parent may be the abuser. Accordingly the attendance of a next friend is conditional and subject to the attendance of the parent. Often, as in this instance, the child is already on the child protection register. The substantive decisions about the child will be made at the LAC review and not at this case conference. The role for the mother at this case conference is the exchange of information and to involve her in the process personally. It is pivotal to the Trust policy that parents do not use these case conferences to abdicate their responsibilities and undermine the purpose and effect of the policy which is to persuade parents to become personally involved. Mr Lavery submits that experience shows that less than half of parents attend these meetings. This founds his argument that if parents were given the option of sending representatives to meetings instead of personally attending they might in many cases opt for that rather than face the pressure which, no matter how sensitively handled, such meetings bring to bear on parents. He urges therefore the court to recognise the role of the case conference and the extent to which personal attendance is indispensable. He argues that there is a failsafe mechanism in place for those who cannot attend because the parent will get minutes of the meeting, she will be afforded the opportunity to prepare a statement and make further submissions before any decision will be taken arising from the case conference. The mischief he seeks to avoid therefore is the undermining of the general policy which the emergence of exceptions could serve to produce.

(ii) Mr Lavery submits that the role of the next friend is not meant to be a substitute for the personal attendance. The paramount importance is the welfare of the child and whilst everything will be done to encourage the parents' attendance, including the availability of a next friend to articulate her view provided she is present, the benefits to the child would be irreparably diluted if parents could escape the requirement to attend.

(iii) Mr Lavery argues that this case is a classic example of where the policy should be implemented. The Applicant was not a detained patient but rather a voluntary inpatient and could have attended the conference subject to medical advice. Instead she did not even inform her solicitor who apparently ascertained the position only after he arrived at the case conference. There was an absence of any medical certificate or verified excuse for her non-attendance. Clearly the Applicant's solicitor had expected her to be there. Mr Lavery questions what function he could have performed in the absence of his client. His role is to provide assistance and support the individual at the actual meeting and he argues it was never intended that the next friend should participate in a partisan way which is a normal role of a lawyer in contentious proceedings. The solicitor, it is submitted, has no particular expertise in these affairs and has no contribution to make in the absence of the parents. He argues that a policy which

envisages that a next friend should not be permitted to attend in the absence of a parent cannot affect that person's rights under Article 8 of the Convention.

(iv) Mr Lavery further submitted that the Trust was obliged to follow this policy having been set down by the Department and that there were no circumstances which would have justified a departure from the policy. He argues that the policy can only be challenged on Wednesbury grounds (Wednesbury Corporation -v- Ministry of Housing the Local Government (No.2) (1966) 2QB 275 which is now a common and convenient label indicating the special standard of unreasonableness which has become the criterion for judicial review of an administrative decision. In other words the decision is only unlawful if it is one to which no reasonable authority could have come.

Legal Principles

[8] I consider that the following legal principles govern the outcome of this case:

(i) Article 8 of the Convention afforded parents involved in care proceedings not merely substantive protection against any inappropriate interference with their private and family life but also procedural safeguards. The procedural protection offered by Article 8 was not confined to the trial process but extends to all stages of the decision-making process in child protection cases. Article 8 requires that parents are properly involved in the decision-making process not merely before and during care proceedings but even after those proceedings have come to an end and whilst the local authority are implementing the care order. I consider therefore that there is a duty to inform parents of child care concerns, setting out precisely the factual matters being relied on for any step being taken by the Trust. Moreover there is an obligation to give parents an opportunity to answer allegations being made against them and to make representations as to why an authority should not take any threatened step. Normally parents and their representatives should have the opportunity to attend and address critical meetings at which crucial decisions are being taken. These are provisions that apply to care proceedings as a whole (see Re G (care: challenge to local authority's decision) (2003) 2FLR p42). Whilst such principles broadly apply to case conferences, they must be interpreted in light of the purpose of such conferences and the need to preserve the welfare of the children involved.

(ii) R -v- Cornwall County Council ex parte LH (2000) 1FLR 237 arose in the context where as a matter of policy, a local authority did not permit solicitors to attend child protection case conferences on behalf of parents for any purpose

other than reading out a prepared statement. Nor, as a matter of policy, did the authority permit a parent who had attended such a conference to be provided with a copy of the minutes other than by order of the court. The Applicant sought judicial review of both policies. The court held that in general solicitors ought to attend and participate as they could make many helpful contributions. The Chair of the conference had a discretion as to who could attend, and for what purpose, and could exercise it to prevent a solicitor's attendance if it was felt in a particular case that such attendance would make the conference unnecessarily confrontational. In the course of his judgment Scott Baker J said:

"It is in any event, important for solicitors to advise parents of the importance and benefits of their attendance at child protection conferences and to assist in preparing them for the conference. The solicitor should first discuss with the client who, if anyone, would be the most appropriate person to accompany the client to the conference, and consider what the person's role should be, subject to the agreement of the conference Chair. If court proceedings are a possible outcome, the solicitor should discuss with the client the implication of giving information to the conference, particularly if there is a possibility that they may later be cross-examined in court. Where parents are unable to attend the conference the solicitor should encourage and assist the parents to prepare a statement to be read out at the conference".

At page 243 the judge said:

"Butler-Sloss LJ said in (R -v- Harrow London Borough ex parte D (1990) FAM 133) that a case conference was of its nature 'unstructured and informal' and not a judicial process. She continued: 'Unlike other areas of judicial review, the considerations are not limited to the individual who may have been prejudiced and the tribunal or organisation being criticised. In this field, unusually, there is a third component of enormous importance: the welfare of the child ...'. I, too, respectfully endorse these observations. However, in the present case what is complained of is not the decision of the conference

but the manner in which its deliberations were conducted. I do not think that of necessity and as a matter of generality participation by a solicitor at a case conference is against the interests of the child's welfare. Indeed it may be positively beneficial".

That of course was a case heard in a context where the parent was in attendance but the solicitor was not. The converse applies in the present instance. It is of significance that nowhere in Cornwall's case is there any suggestion made that a solicitor should be entitled to attend alone without the presence of his client. In my view the welfare of the child is the key component and hence the personal appearance of the parent albeit with the assistance of a next friend, is central to the conference. The mischief to be avoided wherever possible is the creation of a situation where that presence can be circumvented by too legalistic an approach.

(iii) The policy of the Trust in this matter derives from the guidance of the Department of Health and Social Services in the document "Co-operating to Safeguard Children" published in May 2003. In R -v- London Borough of Islington ex parte Rixon (1997) ELR66 Sedley J said at 71(a)-(d):

"What is the meaning and effect of the obligation to 'act under the general guidelines of the Secretary of State'. Clearly guidance is less than direction and the word "general" emphasises the non-prescriptive nature of what is envisaged ... In my judgment Parliament enacting S7(1) did not intend local authorities to whom Ministerial guidance was given to be free, having considered it, to take it or leave it. Such a construction would put this kind of guidance on a par with the many forms of non-statutory guidance issued by departments of state. While guidance and direction are semantically and legally different things and while "guidance does not compel any particular decision' (Laker Airways -v- Department of Trade (1977) QB643), especially when prefaced by the word 'general', in my view Parliament by S7(1) has required local authorities to follow the path chartered by the Secretary of State's guidance with liberty to deviate from it where the local authority judges on admissible grounds that there is a good reason to do so, but without freedom to take a substantially different course."

Although the legislation in England and Wales is of course different (the governing statute in Rixon's case was Section 7 of the local authority Social Services Act 1970), nonetheless I consider that the general principle applies here. In my view the Trust should be required to follow the path chartered by the Department of Health and Social Services and Public Safety ("the Department") with liberty to deviate from it where the Trust judges on admissible grounds that there is good reason to do so but without freedom to take a substantially different course. I believe it is clear that the Department did intend to ensure that the principle of parental attendance at these conferences should be preserved and no step ought to be taken which might lead to the undermining of that general principle of participation.

(iv) An authority can fail to give its mind to a case and thus fail to exercise discretion lawfully by blindly following a policy laid down in advance. It is a fundamental rule for the exercise of discretionary power that discretion must be brought to bear on every case. Each one must be considered on its own merits and decided as the public interest requires at the time. In this context, paragraph 5.50 of "Co-operating to Safeguard Children" states as follows:

"5.50 Consideration should be given to involving parents and other family members for all or part of the initial case conference. It is important to ensure that their presence does not inhibit the exchange of information by professionals, but where their co-operation can be obtained the future protection of the child may be facilitated by their participation.

...

5.52 When family members are invited, the social worker conducting the investigation should, before the meeting, explain the case conference's purpose, who will attend, and how it will operate. The Chair should meet family members on the day of the conference and explain how the conference will be conducted and indicate who has been invited to attend. Where the family attends, they should be allowed to bring a friend or supporter and help to fully participate.

...

5.56 The case conference should consider if the child is at continuing risk of significant harm.

...

5.59 Registration in itself will not offer protection to a child. It must be accompanied by a child protection plan. It is the responsibility of the case conference to make decisions about how agencies, professionals and the family will work together to ensure that the child will be safeguarded from future harm.”.

It is in this context that I consider that a principle appropriate to this case is to be found In the matter of an application by Freddie Scappaticci for Judicial Review (2003) NIQB 56. This was a case where the Applicant sought judicial review of a decision of the Minister of State at the Northern Ireland Office who could refuse to confirm or deny allegations that the Applicant was an undercover agent for the Government. At page 8 Carswell LCJ (as he then was) said:

“A decision-maker exercising public functions who is entrusted with a discretion may not, by the adoption of a fixed rule of policy, disable himself from exercising his discretion in individual cases ... In the customary phrase, he may not fetter his discretion, but must, in another commonly employed phrase, ‘keep his mind ajar’. That does not prevent him from adopting and following a policy that all cases of a certain type will be dealt with in a particular way, so long as he does not follow it so rigidly that he fails to entertain the possibility of admitting an exception in an appropriate case: CF R -v- Secretary of State for the Home Department, ex parte Venables (1998) AC407 at 497, per Lord Browne-Wilkinson.”

Conclusions

[9] I have come to the following conclusions in this case:

(i) As a general rule, I am satisfied that the Trust is permitted to adopt the policy of refusing to permit a friend or supporter or solicitor to attend a case conference unless the family itself attends. To hold otherwise would be to fail to recognise the true nature of the case conference process the purpose is to consider if the child is at continuing risk of significant harm. It must take into account the views of all agencies attending at a case conference in any written contributions. It is very important to involve parents and other family members

for all or part of that initial case conference so as to encourage the exchange of information and co-operation for the future protection of children. Their participation will facilitate this. That is the policy laid down in the document "Co-operating to Safeguard Children" by the Department and which has been followed in this instance by the Trust. I accept the submission of Mr Lavery QC that the essence of the concept of a next friend/solicitor being present is to provide assistance and support for the individual at the actual hearing but not that the next friend should participate in a partisan way as a normal lawyer would in contentious proceedings. The whole purpose of a case conference would be undermined if it became accepted that other than in the most exceptional circumstances a parent could send along a substitute. Such an approach would be to fly in the face of the purpose of case conferences and would in my view undermine the whole procedure. It is a principle that the case conference chair will jealously preserve. In my view this does not run contrary to Article 8 of the Convention because it serves to underline the importance of family life and in particular the right to family life of the children. The Convention enshrines the necessity to weigh up the varying rights of those claiming under Article 8 and in cases such as this the balance is likely to tip in favour of those of the child. All steps must be taken to encourage the attendance of parents including, for example, special arrangements to enable those to participate who, because of age, understanding, disability or language may have difficulties. Parents must therefore appreciate that their attendance is pivotal and that substitution runs contrary to the whole policy. Delay is anathema to the interests of the children. These case conferences may require rapid consideration and the gathering together of these professionals must not be frustrated by an over legalistic approach. I do consider such an approach is contrary to Article 14 of the Convention because it does not discriminate against parents with medical conditions but applies across the board irrespective of particular status.

(ii) On the other hand, I am also of the view that an inflexible and rigid blanket ban on any exception to that rule is unlawful and constitutes an improper fettering of discretion. The Chair of the conference must look at the particular facts of each instance and exercise her discretion. In the event I would anticipate that exceptions will only arise in the rarest of cases and be most sparingly permitted. An instance might arise for example where a parent had religiously attended a number of case conferences with the next friend and having attended on the day in question with a next friend suddenly became ill during the hearing and had to be removed from the case conference. If it was impossible to adjourn the case conference because matters were at a delicate and urgent stage, I find it difficult to believe that the next friend, who perhaps had a statement prepared on behalf of the parent could not be permitted to remain and convey her views. I emphasise however that a Trust would be entitled to refuse

to permit a next friend/solicitor to attend in the absence of the parent unless the circumstances were of this highly unusual or extremely exceptional circumstance. I do not believe that the particular facts of this case were considered but rather the inflexible blanket exclusion was applied irrespective of the facts.

(iii) Whilst I have come to the conclusion that the blanket ban applied in this case was unnecessarily rigid and inflexible, nonetheless in the particular circumstances of this case I must recognise that the remedy of judicial review is a discretionary one. In Credit Suisse -v- Allerdale Borough Council (1997) QB306, 355D Hobhouse LJ (as he then was) said:

“The discretion of the court in deciding whether to grant any remedy is a wide one. They can take into account many considerations, including the needs of good administration, delay, the effect on third parties and the utility of granting the relevant remedy”.

I consider that in the event the decision of the Trust not to permit the solicitor to attend in the absence of the parent was a proper and reasonable one. The client was a voluntary patient and no medical evidence had been produced to the effect that she could not attend. The solicitor himself was unaware that morning that she was a voluntary patient and indeed seems to have obtained the wrong information that she was a detained patient whereas she was not. Quite clearly no attempt had been made by the parent to let him know she was not attending. In the absence of a medical certificate or some other corroboration to the effect that she was medically unfit to attend (which has never been produced) then I consider it would have been a proper exercise of the discretion of the Chair of the case conference to exclude the solicitor. The solicitor did not specifically seek to read out a prepared statement or ask to have some new or unknown factor brought to the attention of the conference. In my view even had the Trust exercised the individual discretion necessary in each case and considered this case on its own merits, the refusal would in all likelihood have been the same as in the event occurred. I am satisfied that the Chair of a case conference will require cogent and convincing evidence that it is appropriate to permit the substitute for a parent to attend in any such instance and I am not satisfied that such evidence was present in this case. I wish to make it clear that even had medical evidence to the effect that the parent was unable to attend been produced, nevertheless the chair of the conference might still have justifiably decided to proceed without the presence of the solicitor. It would all depend on the facts of the case and whether or not it was one of those rare and exceptional cases where the solicitor was in a position to substitute for the parent consistent with the principles of a case conference.

[10] I have not doubt that in the overwhelming majority of instances substitution will not be admitted but each case must be considered on its merits. This case was self-evidently not one of those exceptional cases.

[11] Accordingly, I have come to the conclusion that it is neither necessary nor desirable in the interests of justice to grant the remedies sought in this case and I dismiss the application.