

CASE NOTE:

Owen-D'Arcy v Chief Executive, Queensland Corrective Services [2021] QSC 273

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| Court/tribunal | Supreme Court |
| Cause of action | Judicial Review |
| Application of <i>Human Rights Act 2019</i> | Meaning of compatible with human rights (section 8); Human rights may be limited (s 13); Conduct of public entities (s 58). |
| Rights engaged | Protection from torture and cruel, inhuman or degrading treatment (s 17); Liberty and security of person (s 29); Humane treatment while deprived of liberty (s 30). |
| Outcome | TBA |
| Commission intervened? | Yes |
| Year | 2021 |

Background

A prisoner applied for judicial review of two related decisions to continue his separation from others, after being held in solitary confinement since 2013. The prisoner 'piggy-backed' alleged breaches of the respondent's obligations under the *Human Rights Act 2019* (HR Act). The HR Act proved central to the proceedings, as the only successful grounds involved human rights.

One decision involved placing the prisoner on a maximum security order (MSO) for a further six months, and the other was to place the prisoner on a no association order. The effect of these decisions was to continue his accommodation in solitary confinement and prevent him associating with other persons.

The Commission intervened and made submissions about the obligations on public entities, including to consider the rights of all relevant people, and on the meaning of relevant rights such as the right to humane treatment when deprived of liberty and the right to life.

Role of the court

The court considered differing submissions from the parties about extent of its role in reviewing decisions such as these for compatibility with human rights. The court adopted the approach of Bell J in *Patrick's Case* (2011) 39 VR 373 that the judicial review of acts or decisions was a more intensive standard of judicial review. The requirement to consider proportionality with human rights 'draws the court more deeply into the facts, the balance which has been struck and the resolution of the competing interests than traditional judicial review'.

Obligations on public entities

The court considered both limbs of the obligations on public entities under s 58 of the HR Act. These are the obligation to act and make decisions compatibly with human rights ('substantive limb') and the obligation to give proper consideration to relevant human rights when making a decision ('procedural limb'). While some situations will call for more intensive examination, the court set out a framework for assessing these obligations:

- (a) Identification of the decision and the reasons, if any, given for making it.
- (b) Identification of any human rights which are relevant to the decision.
- (c) Determining whether the applicant has shown that the decision limits those human rights. If that is done, then –
 - (i) Has the respondent shown that the limits are reasonable when considering the factors listed in s 13 of the HR Act.
- (d) Has the respondent made a decision in a way that is not compatible with human rights: s 58(1)(a)?
- (e) In making the decision has the respondent failed to give proper consideration to relevant human rights: s 58(1)(b)?
 - (i) Has the respondent identified the human rights that may be affected by the decision: s 58(5)(a)?
 - (ii) Has the respondent considered whether the decision would be compatible with human rights: s 58(5)(b)?

Some of these issues may overlap, in particular, that of incompatibility.

Proper consideration

Section 58(5) is unique to the Queensland HR Act, and sets out further detail about the obligation to give proper consideration to human rights. The court dismissed the idea that this test 'codified' the existing Victorian case law on this obligation (as set out in *Castles v Secretary, Department of Justice* (2010) 28 VR 141). Instead, s 58(5) sets out two elements explicitly necessary to demonstrate that proper consideration has been given to a human right: has the respondent identified the relevant human rights affected; and has the respondent considered when the decision would be compatible with those rights? The identification of the relevant human rights is an exercise that must be approached in a common sense and practical manner. Administrative decision makers are not expected to achieve the level of consideration that might be hoped for in a decision given by a judge.

Onus on respondents

The court drew upon the decision of Warren CJ in *Re Application under the Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415, to note that the onus of demonstrably justifying a limitation on human rights resides with the party seeking to uphold the limitation (eg usually the respondent public entity). The standard of proof is high and requires a degree of probability which is commensurate with the occasion.

In assessing compatibility, the court disagreed that the onus was on the applicant to point to another way of addressing the applicant's risk of harming others which would have a less impact on human rights. Instead, 'it is not for the applicant to provide solutions; it is for the respondent to explain why there is no reasonable alternative'.

Further, the court suggested 'the burden on the respondent is a heavy one and cannot be discharged simply by the decision-maker reciting that he or she held a particular belief without providing any basis for that belief'. This is particularly in circumstances where the decision maker did not give sufficient weight to the fact that while the order may have been for a further six months, the total effect was an extension of a period which commenced in January 2013.

Relevant human rights

The court considered various human rights relevant to the prisoner's detention.

The parties made submissions about whether the right to liberty and security (s 29) was relevant to the detention of a prisoner, sometimes referred to as 'residual liberty'. In considering case law from Australia, Canada, New Zealand and the United Kingdom, the court concluded that s 29 was not relevant to the review of decisions affecting the conditions of detention.

Section 17 protects against torture, and cruel, inhuman or degrading treatment. Section 30 of the HRA provides a right to humane treatment when deprived of liberty. In considering how these two rights interact, the court concluded that s 17 prohibits bad conduct towards any person (imprisoned or not) while s 30 mandates good conduct towards people who are incarcerated.

After considering the various submissions about the relevant standards for people held in detention (including United Nations' *Mandela Rules*) the court adopted the summation of the general factors set out by Dixon J in *Certain Children* (No 2) when considering the equivalent right to s 17(b):

- (a) the scope of the right contained in s 17(b) is conditioned by a minimum standard or threshold of severity or intensity that can manifest in bodily injury or physical or mental suffering,
- (b) the combination of the adjectives – cruel, inhuman or degrading – define the prohibited treatment or punishment,
- (c) the assessment of the minimum threshold is relative, and it depends on all the circumstances of the case, including the duration of the treatment, its physical or mental effects, and the sex, age and state of health of the alleged victim,
- (d) most cases of breach will involve on the part of the decision-maker deliberate imposition of severe suffering or intentional conduct to harm, humiliate or debase a victim, and
- (e) the purpose of the decision-maker's conduct will, at the very least, be a factor to be taken into account, though the absence of such a purpose does not conclusively rule out a violation of the right.

Application in this case

The court observed that it is important to bear in mind the parameters of a decision-maker's delegated authority, particularly when the decision-maker did not have all the powers of the respondent. In this case, the decision-maker was not standing in the shoes of the Chief Executive. Therefore, some of the less restrictive means sought by the applicant were not within the decision-maker's remit.

The applicant led insufficient evidence to demonstrate that s 17 was 'engaged', including because the court found it could not accept international expert material on the effects of solitary confinement on him, or generally, without the applicant adducing appropriate expert evidence. Nonetheless, the court accepted that the effect of the confinement on the applicant was 'stultifying'.

However, the court did find the right to humane treatment when deprived of liberty in s 30 was limited because the prisoner was subject to hardship beyond that experienced by virtue of detention. In applying the criteria for assessing proportionality under s 13, the court accepted there was a legitimate aim in making the orders and that there was a rationale connection to that purpose. However, the respondents did not discharge the onus on it to demonstrate the limitation was reasonable as it did not provide evidence that there were no less restrictive alternatives available. The MSO did not strike a balance between the prisoner's risk of violence and the limitation of his rights.

The decision maker also failed to satisfy the procedural limb of s 58, including because the no-association decision did not sufficiently consider the right to humane treatment.

As the public entity contravened its obligations under the HR Act, the court concluded the decisions were unlawful. The court also found the applicant made out one of the grounds of judicial review, being a failure to take into account the effect of the decision on the applicant's human rights.

The court is still to hear from the parties on the nature of orders.

[*Owen-D'Arcy v Chief Executive of QCS* \[2021\] QSC 273](#)