Queensland Human Rights Commission

CASE NOTE:

Attorney-General for the State of Queensland v GLH [2021] QMHC 4

Court/tribunal	Mental Health Court
Cause of action	Appeal of decision of the Mental Health Review Tribunal
Application of *Human Rights Act 2019*	Sections 58 (conduct of public entities) and possibly 48 (interpretation), although not explicit
Rights engaged	Protection of families and children (s 20); Cultural rights – Aboriginal peoples and Torres Strait Islander peoples (s 28).
Outcome	Appeal dismissed
Commission intervened?	Yes
Year	2021

Background

The respondent had been the subject to a forensic order since 2004, as a result of random and violent offending for which he had been found of unsound mind. After several years in a secure mental health rehabilitation unit and community care unit, he moved into his own unit.

In 2015, a specialist team prepared an annual risk assessment which noted the respondent often spent time at his sister's place and helped her to look after his nieces. At the next forensic order review hearing, conducted by the Mental Health Review Tribunal, the Tribunal added a condition to the forensic order that the respondent not have unsupervised contact with children.

The condition continued until 2021. On 13 January 2021, the Mental Health Review Tribunal reviewed the respondent's forensic order, and decided to remove the condition restricting contact with children. The Attorney-General appealed the decision on the grounds that the condition was necessary due to the respondent's illicit substance use, violence, and chronic symptoms, and that these symptoms were similar to those present in 2015.

Considerations

The Mental Health Court is a statutory court, and an appeal to it is by way of rehearing. ([27]-[28]) The Court stands in the shoes of the Tribunal and conducts a review of the original forensic order. ([41])

The Court considered the framework of the *Mental Health Act 2016* and found that conditions on a forensic order that limit human rights should only be imposed to the extent necessary to reduce or maintain the risk posed by the person to a not unacceptable level. ([29]-[39])

The Court recognised the regime established by the *Mental Health Act* is compatible with the *Human Rights Act 2019*, and that it was necessary for the Court to consider the compatibility of its decision with human rights contained within the *Human Rights Act.* ([43]-[48]) The Court considered the interaction between human rights and the evaluation of 'unacceptable risk'. It held the phrase's flexibility means that it can be calibrated to the nature and degree of the risk in particular cases, and the imposition of conditions to address risk must be proportionate or no more onerous in their limitation of human rights than required.([49]-[51], [72])

The Court also noted relevant rights protected under both Acts, particularly the rights unique to Aboriginal peoples and Torres Strait Islander peoples. ([42], [46])

Outcome

Taking into account the respondent's circumstances and the expert evidence regarding risk, the Court was not satisfied that there was an unacceptable risk if the respondent had unsupervised contact with children.

The Court therefore confirmed the decision of the Mental Health Review Tribunal and dismissed the appeal.

Note

This is the first published decision of the Mental Health Court regarding the impact of the *Human Rights Act* on the *Mental Health Act*.

It may provide assistance in other jurisdictions on the meaning and assessment of 'unacceptable risk' compatible with human rights.

The decision also records the reasons of the Mental Health Review Tribunal below, which made its decision in accordance with the requirements of the *Human Rights Act*.

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