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Monthly Bulletin of the Human Rights Law Centre

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Judgment in Melbourne Fertility Control Clinic case highlights need for safe access zones

26 August 2015

A Melbourne abortion clinic is looking to Spring Street to create safe access zones after the Supreme Court of Victoria found that whilst the Melbourne City Council had made mistakes in the way it dealt with the clinic, it would not be compelled to take action to prevent women being harassed and intimidated as they entered the clinic.

The Human Rights Law Centre's director of advocacy and research, Emily Howie, said whilst the decision was a partial win and should lead to some improvements on the ground, more work was required to find a broad-based and lasting solution.

"Whilst in a number of ways this is a partial win for our client, it obviously does not provide an adequate solution. This case focused on one clinic, but what we need now is a clear law to ensure that all Victorian women can access health services without being harassed or intimidated. It's time for the Government to introduce safe access zones for abortion clinics across Victoria," said Ms Howie.

The Fertility Control Clinic's Psychologist, Dr Susie Allanson, said intimidation and harassment was an everyday reality for the clinic's staff and patients.

"It shouldn't take a court case to ensure women can safely access our services. It's clear from this decision that more is needed. We need clear laws that protect a woman's right to access medical services and I strongly believe that safe access zones are the most sensible way to ensure that," said Dr Allanson.

A proposed law was introduced last week (see below) by cross-bench member Fiona Patten MLC which would create zones around reproductive health services in which people would be prohibited from harassing, intimidating or impeding people entering the clinic, as well as communicating with or recording those people.

The clinic and its legal team are encouraged that the judge made some important findings today in its favour. In particular, the judge noted that the Council made a mistake in the way it dealt with this complaint and that asking the Clinic to resolve the issue by private means, such as requesting assistance from the Victorian Police, is not appropriate. In addition the judge found that the behaviour of the Helpers of God's Precious Infants outside the Clinic potentially constituted a nuisance. However, it's ultimately disappointing that the judge decided not to compel the Council to act in this particular instance.

Katie Robertson, associate at Maurice Blackburn, said the clinic had been subject to years of bullying and harassment by anti-abortionists who were deliberately preventing women from safely accessing health services and the decision highlights the need for urgent law reform to ensure women can access all health services safely and free from harassment.

"This decision goes some way in addressing the problem but its impact will be limited unless it's followed up with practical action from the Victorian Government to stand up for women's rights," said Ms Robertson.

In 2013 Tasmania introduced access zones around clinics in which terminations are conducted. Similar zones also exist in the United States and Canada. The ACT government has also released an exposure draft of a bill to create patient privacy zones that support women's rights to access health services privately and free from intimidating conduct.

"Safe access zones are an easy and sensible solution. They are about respecting the privacy and dignity of women accessing terminations. UN human rights bodies as well as courts in the US and Canada have all found that sensible measures to ensure safe access to women's health services do not excessively limit the right to freedom of expression and assembly," said Ms Howie.

The judgment of Justice McDonald of the Supreme Court can be found online here.

The case has been run with the generous assistance of Peter Hanks QC, Kristen Walker QC, Therese McCarthy and Claire Harris, who also provided their services pro-bono.

Welcome proposal for safe access to abortion clinics in Victoria

19 August 2015

A proposed law designed to ensure women can safely and privately access abortion services in Victoria has been welcomed by the Human Rights Law Centre.

The HRLC's Director of Advocacy, Emily Howie, said the bill, introduced by cross-bench member Fiona Patten MLC, would create safe access zones around all reproductive health services in Victoria.

"For too long women have had to run the gauntlet of harassment and intimidation to access health services. It's difficult to understand how this behaviour has been allowed to continue for so long," said Ms Howie.

The proposed law would create a zone around reproductive health services in which people would be prohibited from harassing, intimidating or impeding people entering the clinic, as well as communicating with or recording those people.

"Currently in Victoria we are seeing a harmful set of behaviours deliberately constructed to impede a woman's right to safely access health services, clearly something has to be done," said Ms Howie.

Earlier this year the HRLC and Maurice Blackburn Lawyers took legal action in the Victorian Supreme Court on behalf of a East Melbourne fertility clinic besieged by an anti-choice group for decades. A decision is expected in coming months.

"No one is suggesting that people should be prevented from expressing their opinions, we're just asking that they do so in a way that respects women's rights to privacy, security and access to healthcare," said Ms Howie.

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"Safe access zones are about respecting the privacy and dignity of women accessing terminations. UN human rights bodies as well as courts in the US and Canada have all found that sensible measures to ensure safe access to women's health services do not excessively limit the right to freedom of expression and assembly," said Ms Howie.

REFUGEES & ASYLUM SEEKERS

High Court sets date for case challenging offshore detention

21 August 2015

The High Court will sit in Canberra on 7-8 October to consider the lawfulness of the Australian Government's role in offshore detention on Nauru, in a case brought by a group of people seeking asylum.

The case, filed by the Human Rights Law Centre, raises important and untested questions about the Australian Government's power to facilitate, fund and otherwise be involved in detention arrangements outside Australia.

HRLC Director of Legal Advocacy, Daniel Webb, said the case was being run on behalf of over 150 men, women and children who have been detained on Nauru previously and brought to Australia for medical treatment or to give birth.

"These families came to Australia seeking safety but their time locked up offshore has exposed them to danger and has clearly taken a toll on them and on their children," said Mr Webb.

A case raising similar legal issues in respect of the Manus detention arrangements is also underway and has been adjourned pending the outcome of the Nauru challenge. Ruth Hudson, Practice Group Leader at Stacks Goudkamp lawyers, is representing several of the men involved in the Manus case.

"Many of the men experienced torture and trauma in their countries of origin. They tell us that the conditions and their experiences in detention, particularly the violence and unrest they witnessed in February 2014 and the deaths of fellow asylum seekers, has caused significant deterioration in their already fragile mental states. Many of them are suffering potentially permanent physical and psychological injuries," said Ms Hudson.

The case so far

When the HRLC commenced the case on 14 May this year it contended that there was no Australian law which gave the government the necessary power to fund and otherwise facilitate the current offshore detention arrangements.

The government responded by hastily introducing one. With the support of the Opposition, the government enacted legislation which seeks to retrospectively authorise three years of offshore detention and the expenditure of several billion dollars for that purpose. The law passed through the Parliament in June within two days of it being announced.

"The Government repeatedly assures the Australian people that it is acting legally. But a Government confident its actions are lawful doesn't suddenly and retrospectively change the law when its actions are challenged in court," said the HRLC's Director of Legal Advocacy, Daniel Webb.

Despite the legal changes, Mr Webb said that serious questions remain about the extent of the Commonwealth's involvement in offshore detention and whether its actions are lawful.

"While the government and the opposition have tried to retrospectively authorise three years' of offshore detention and spending, there are serious and untested questions about whether the Australian Constitution permits them to do so," said Mr Webb.

"We know the Government has powers to detain people in Australia and powers to remove people from Australia. But it is another thing altogether to then be involved in the indefinite

detention of innocent men, women and children in the territories of other sovereign nations," said Mr Webb.

The people at risk of removal

The men, women and children involved in the case are covered by legal undertakings from the Australian Government that they will not be returned to Nauru or Manus Island without notice. In the months since the case was filed the HRLC has worked closely with the Refugee Advice and Casework Service in Sydney, the Darwin Asylum Seeker Support and Advocacy Network in Darwin and support agencies and pro bono lawyers around the country to ensure people at risk of deportation offshore have received legal advice about the case.

Katie Wrigley, Principal Solicitor at RACS, said many of the people involved in the case had been terrified that they would be sent back to Nauru without notice.

"It shouldn't take a case in the highest court in this country for the government to promise not to deport vulnerable people – including newborn babies – without any notice and without any opportunity for those families to speak with their lawyers," said Ms Wrigley.

"The case has provided important temporary shelter to some incredibly vulnerable individuals who, at least for now, can now go to sleep at night without fearing being suddenly woken up and secretly whisked away to offshore detention," said Ms Wrigley.

The legal team running the case includes barristers Ron Merkel QC, Craig Lenehan, David Hume, Rachel Mansted and Stacks Goudkamp Lawyers. Assistance has also been provided by the Refugee Advice and Casework Service and Darwin Asylum Seeker Support and Advocacy Network.

POLICE POWERS

High Court to hear case against NT's excessive police powers for 'paperless arrests'

25 August 2015

The full bench of the High Court will hear an important human rights case next week in Canberra.

The case – bought by the North Australian Aboriginal Justice Agency with the assistance of the Human Rights Law Centre, Ashurst Lawyers and a team of probono barristers led by Mark Moshinsky QC – challenges new Northern Territory police powers introduced into the *Police Administration Act.* The new powers allow police to detain someone for four hours (or longer if intoxicated), if police believe they have committed, are committing or are about to commit a host of low-level infringement notice offences. These offences include making too much noise, swearing in public and failing to keep ones front yard clean.

In a stark reminder of the importance of this case – and the real life consequences of the paperless arrest powers – the Northern Territory Coroner recently recommended these new powers be repealed, after hearing evidence during a coronial inquest into the death in custody on 21 May 2015 of Kumanjayi Langdon. Mr Langdon was arrested and detained after he was found drinking in a parkland in the Darwin CBD.

The Coroner found that Mr Langdon was not causing any disruption before, during or after his arrest, and was rather enjoying a quiet drink with his family and friends. But the park he was drinking in was a designated public area under the *Liquor Act* – which made his drinking an

offence which carries a maximum penalty of $74. In the past Mr Langdon would have been dealt with by way of an on-the-spot fine. Rather, Mr Langdon was arrested and detained under the new paperless arrest powers. Mr Langdon died in a police cell less than three hours after being detained. The Coroner found that even though Mr Langdon would likely have died due to chronic illness in any event, he was entitled to die as a free man.

Most states, the ACT and the Commonwealth have intervened in the High Court case. The Australian Human Rights Commission has also sought leave to intervene. At the heart of the case are questions relating to whether the Constitutional doctrine of the separation of powers applies to territories, like the Northern Territory. Following from this are important issues relating to the right to liberty, such as the circumstances in which the police (the administrative arm of government) can detain citizens without judicial oversight. The court case will likely go for two days, and we are hopeful to have a decision by the end of the year.

All submissions in the High Court case are available here.

The HRLC's media release from when the case was filed can be found here along with an background info sheet here.

The Coroner's findings in the Coronial Inquest into the death in custody of Kumanjayi Langdon are available here.

DEMOCRATIC FREEDOMS

Stripping enviro groups of the right to take legal action is a dangerous knee-jerk reaction

19 August 2015

Stripping environmental groups of the right to take legal action under Federal environmental laws will undermine core democratic freedoms, a leading human rights organisation has warned.

The Human Rights Law Centre's Senior Lawyer, Ruth Barson, said that changing laws to limit court scrutiny of government decision-making is a retrograde step in a democracy like Australia.

"The ability to take legal action in the public interest is central to ensuring governments remain accountable. Locking particular groups out of the courts is heavy handed and will mean that bad decisions will go unchecked and unchallenged," said Ms Barson.

The Attorney-General George Brandis' proposed amendment to the *Environment, Protection, Biodiversity and Conservation Act* (introduced by the Howard Government), involves repealing an important provision which recognises that nature cannot speak for itself, and therefore environmental organisations need to be able to initiate legal challenges.

Ms Barson said the proposed amendment was a dangerous knee-jerk reaction to a recent Federal Court challenge bought by local environment groups. The Government ultimately withdrew from the challenge, effectively acknowledging that the Environment Minister had failed in his legal duty to consider relevant threatened species when he approved the massive coal mine in Queensland.

"It is ironic that the Government is rushing through this amendment on the back of essentially conceding inadequate ministerial decision making. Without the legal scrutiny of the environment groups who took this case, it is entirely possible that significant environmental impacts would have remained overlooked," said Ms Barson.

The Attorney-General has also been criticised for his inflammatory remarks about legal proceedings brought by environmental organisations.

“Using a term like ‘vigilante’ when describing a court case – one of the most orthodox and proper methods for challenging Government decision making – is extraordinary. The Attorney-General should be showing more respect for the separation of powers and the rule of law,” said Ms Barson.

In addition to the weakening of transparency and court oversight, Ms Barson said she was concerned by the escalating attacks on basic rights.

“This steady erosion of fundamental democratic rights and freedoms in Australia should be a wake up call. Rather than accepting the valuable scrutiny provided by the courts, the Government wants to rewrite the rule-book about who can access the courts. This is dangerous territory. Governments shouldn’t have a free-license to act without effective scrutiny when making decisions that impact all Australians,” said Ms Barson.

OPINION

Citizenship bill lacks clarity and necessary safeguards

The Australian Citizenship Amendment (Allegiance to Australia) Bill proposes three significant expansions to the current grounds for citizenship loss in Australia.

First, the Bill expands s 35 of the *Australian Citizenship Act*, which provides that a dual citizen who serves in the armed forces of a country at war with Australia will lose their Australian citizenship. Under the expanded s 35, dual Australian citizens who are in the service of a declared terrorist organisation will also lose their citizenship.

Secondly, a dual citizen will lose their Australian citizenship if they are convicted of an offence prescribed in s 35A of the Bill. The range of prescribed offences is broad, and includes offences that have no necessary connection with allegiance or national security, such as damaging Commonwealth property.

Finally, s 33AA provides that where a dual citizen engages in prescribed conduct relating to terrorism or foreign incursions, they will lose their Australian citizenship at the moment the conduct is committed. Prescribed conduct is defined by reference to offences in the Commonwealth *Criminal Code*, but citizenship loss does not require a conviction. The Bill does not clarify how it will be determined that a person has committed s 33AA conduct.

An individual who is stripped of citizenship faces considerable consequences. In Australia, these consequences include a loss of voting rights, deportation from Australia and potentially indefinite immigration detention. A person who loses citizenship while overseas would lose their right to re-enter Australia.

These consequences do not necessarily mean that citizenship stripping legislation can never be appropriate. The Explanatory Memorandum for the Bill describes the proposed changes as part of a multi-faceted approach to countering [rising] threats to national security. Several countries, including the UK and Canada, have adopted similar justifications for expanded citizenship stripping legislation. It is imperative, however, that such legislation operates in a clear manner, and incorporates safeguards to ensure that citizenship is only lost in serious circumstances, and that adequate protections against error are in place.

The process for citizenship loss in the Bill is neither clear nor appropriately safeguarded. In contrast to most foreign citizenship stripping laws, citizenship loss is not predicated on the exercise of ministerial discretion, but rather occurs automatically when particular conditions are satisfied. This is particularly dangerous as the conditions triggering citizenship loss are broad, and do not require the seriousness of a person's conduct to be assessed. Consequently, people who pose no security risk – for instance, a teenager convicted without sentence of vandalising a Commonwealth building – would face automatic citizenship deprivation. The minister is granted a discretionary power to 'exempt' a person from citizenship loss that has already occurred automatically. The impact of such an exemption on administrative action taken on the basis that a person had lost their citizenship automatically is unclear.

The Bill also excludes key procedural safeguards that routinely apply in Australia to the exercise of administrative decisions. There is no requirement to inform a person that they have lost their citizenship under the Bill, or of the information relied upon to form this conclusion. This is compounded by the exclusion of s 39 of the ASIO Act, which ordinarily requires ASIO to complete full security assessments before Commonwealth agencies can act on the basis of its advice.

These exclusions combine to allow a process woefully lacking in rigour. For instance, an immigration departmental official could, following informal discussions with ASIO officials, conclude that a person has engaged in conduct rendering them a non-citizen under s 33AA of the Bill, and take steps to place the person into immigration detention. There is no requirement that the affected person be informed that they are considered to be a non-citizen, prior to the point at which efforts are made to remove them.

The government has emphasised that judicial review remains available under the Bill. This is true, but somewhat misleading. As the Bill frames citizenship loss as occurring 'automatically', rather than as a result of an executive decision, a person would be unable to challenge the loss of their citizenship itself, merely administrative decisions taken subsequent to this loss. Moreover, where a person has been removed from – or denied re-entry to – Australia, accessing the Australian courts to bring a judicial review challenge will be difficult. This has significantly hampered the quality of judicial review available under UK citizenship stripping legislation. The difficulties of bringing a successful challenge are compounded under the proposed Australian model by the fact that an affected individual has no right to obtain information about the basis upon which they are regarded as having lost their citizenship.

While citizenship removal may, in certain circumstances, be a justifiable mechanism for dealing with national security threats, careful drafting and appropriate safeguards are necessary to counterbalance the inevitably onerous consequences for affected individuals. The Bill fails resoundingly on both these points.

Sangeetha Pillai *is a Lecturer in the Faculty of Law at Monash University.*

EVENTS

In conversation with Meenakshi Ganguly from Human Rights Watch

22 September 2015 - Melbourne

Join us in Melbourne for a public discussion between our Director of Advocacy and Research, Emily Howie, and Human Rights Watch's South Asia Director Meenakshi Ganguly.

Meenakshi Ganguly is based in Mumbai and before taking over as South Asia Director, Ms Ganguly served as Human Rights Watch's South Asia researcher since 2004. Prior to joining Human Rights Watch, Ganguly served as the South Asia correspondent for *Time Magazine,* covering Afghanistan, Pakistan, Nepal, India, Bangladesh and Sri Lanka.

Ms Ganguly will be discussing some of the issues affecting the protection and promotion of human rights in South Asia – Political turmoil and the shrinking space for freedom of expression in Bangladesh, Nepal's constitutional crises, failures by the Indian government to address military abuses in Kashmir and areas affected by the Maoist conflict, and what is to be expected following recent elections in Sri Lanka.

Details and bookings here.

Indigenous Rights are Human Rights

17 September 2015 - Perth

Join us in Perth with the Australian Human Rights Commission, the Law Society of Western Australia and Amnesty International Australia for a panel discussion about current Indigenous rights issues in Western Australia.

Panel members:

Tammy Solonec, Indigenous Rights Manager, Amnesty International

Ben Schokman, Director International Advocacy, Human Rights Law Centre

Mick Gooda, Aboriginal & Torres Strait Islander, Social Justice Commissioner, Australian Human Rights Commission

Moderator: Krista McMeeken, Convenor, Indigenous Legal Issues, Committee of WA, Law Society of WA

Topics: Remote Communities, Indigenous Incarceration, Constitutional Reform

Details here.

Audio now available from our recent Manus Event: Inside Australia's Pacific Non-Solution

Two years after the 'Regional Resettlement Agreement' between Australia and PNG was announced, more asylum seekers sent to Manus have died than been resettled and 945 men continue to languish indefinitely in detention. The Human Rights Law Centre's Daniel Webb and Human Rights Watch's Elaine Pearson recently returned from Manus Island, Papua New Guinea where they were investigating conditions on the ground. Hear what they had to tell RRR FM's Michelle Bennett.

Details and podcast here.

AUSTRALIAN HUMAN RIGHTS CASE NOTES

Supreme Court orders IBAC to reconsider complaint of cruel, inhuman or degrading treatment by Victoria Police

Bare v Independent Broad-based Anti-corruption Commission & Ors [2015] VSCA 197 (29 July 2015)

On 29 July 2015, the Court of Appeal, by majority, allowed an appeal by Nassir Bare against a decision of a single judge of the Supreme Court. The trial judge upheld the original decision of the Director of the Office of Police Integrity not to investigate a complaint against a member of Victoria Police of cruel, inhuman or degrading treatment.

The Court of Appeal quashed the Decision and ordered the Independent Broad-based Anti-corruption Commission – which has since replaced the OPI – to reconsider Mr Bare's complaint in accordance with the *Charter of Human Rights and Responsibilities Act 2006*.

Facts

On 3 February 2010, Mr Bare – who had migrated to Australia from Ethiopia – complained to the OPI that, on 16 February 2009, members of Victoria Police stopped a car in which he was travelling and that, when he got out of the car, a police officer pushed him against the car, handcuffed him and then kicked his legs out from under him. Mr Bare claimed that, as he lay on the ground, the police officer repeatedly pushed his head into the ground so that his jaw struck the gutter, chipping his teeth and cutting his jaw. He also alleged that the police officer forcefully sprayed him with capsicum spray and said words to the effect "you black people think you can come to this country and steal cars. We give you a second chance and you steal cars".

Mr Bare claimed that the conduct complained of amounted to a breach of his rights under ss 10 and 8 of the Charter, specifically:

- a person must not be treated in a cruel, inhuman or degrading way (s 10(b)); and
- every person is entitled to equal protection of the law without discrimination (s 8).

Importantly, Mr Bare claimed that he was entitled to an effective investigation of his complaint, independent of Victoria Police, pursuant to an implied procedural right in s 10(b) of the Charter.

On 19 October 2010, the Director's delegate made the Decision pursuant to s 40(4)(b)(i) of the *Police Integrity Act 2008* (**PI Act**) (now repealed). He offered to refer the complaint to the Ethical Standards Division of Victoria Police for investigation instead. Mr Bare refused the offer and applied for judicial review of the Decision.

Court of Appeal's Decision

At first instance, the trial judge upheld the Decision (see *Bare v Small & Ors* [2013] VSC 129 (25 March 2013)). That was the subject of the appeal to the Court of Appeal.

The Court of Appeal held, by a majority (Chief Justice Warren dissenting), that the Decision was unlawful on the basis of an error of law on the face of the record – specifically, the Director's failure to give proper consideration to Mr Bare's human rights, as required by s 38(1) of the Charter.

The Court of Appeal:

- declared that the Decision was unlawful and of no force or effect and contrary to s 38(1) of the Charter;

- made an order in the nature of certiorari quashing the Decision; and
- remitted the matter to IBAC for it to make a fresh decision in relation to the correct course for dealing with Mr Bare's complaint.

The Judgment

The salient points in the judgment are as follows:

The privative clause

Adopting a restrictive construction of s 109(1) of the PI Act – as is required – the majority (Justices Tate and Santamaria) held that it applied only to oust the Court's review jurisdiction with respect to decisions made or acts done "for the purposes of an investigation". The majority further held that a refusal to investigate a complaint is not a decision made or act done "for the purposes of an investigation". It followed that the privative clause did not apply and, on that basis, the Decision was amenable to judicial review for jurisdictional and non-jurisdictional error.

"Proper consideration" of human rights

All three judges agreed that the Director failed to comply with his obligations under s 38(1) of the Charter to give "proper consideration" to Mr Bare's rights when making the Decision. In particular, the Director failed to weigh the serious nature of Mr Bare's complaint with any countervailing interests or obligations of the State.

The three judges noted the "*Castles* test" (see *Castles v Secretary of the Department of Justice & Ors* [2010] VSC 181 (4 May 2010)) as the relevant test for giving "proper consideration" to rights under s 38(1) of the Charter, citing Justice Emerton's comment, at [185], that:

Proper consideration need not involve formally identifying the 'correct' rights or explaining their content by reference to legal principles or jurisprudence. Rather, proper consideration will involve understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made. As part of the exercise of justification, proper consideration will involve balancing competing private and public interests.

Mr Bare submitted, and the three judges broadly agreed (at [221], [288] and [536]), that, based on the "*Castles* test", there are four key elements that should be present to show that a decision-maker has given "proper consideration" to a relevant human right, being:

- understanding, in general terms, which of the rights may be relevant and whether, and if so how, those rights will be interfered with by the decision;
- seriously turning their mind to the possible impact of the decision on the person's human rights and the implications for the person;
- identifying the countervailing interests or obligations of the State; and
- balancing completing private and public interests as part of the exercise of justification.

Non-jurisdictional error

The majority held that the Director's failure to comply with s 38(1) of the Charter constituted an error of law on the face of the record, meaning that the Decision was unlawful. Given that, in the view of the majority, the privative clause did not apply, this resulted in the majority ordering that the decision be quashed.

The majority, however, found it unnecessary to determine, in this case, whether the contravention of s 38(1) of the Charter constituted jurisdictional error.

In what might be an indication of the Supreme Court's future consideration and determination of such a point, Chief Justice Warren held, in her dissenting judgment, that such a contravention did not constitute jurisdictional error.

The implied right to an effective investigation

The three judges agreed that s 10(b) of the Charter does not contain an implied right to an effective investigation of an allegation of cruel, inhuman or degrading treatment.

While Mr Bare and the Commission were entitled to rely on international jurisprudence to assist in the interpretation of the Charter, such reliance must be approached with caution. The three judges agreed that the Charter lacks certain necessary elements that exist in its European equivalents, including the undertaking to "secure to everyone…the right and freedoms" of those European equivalents, to permit the implication of a right to an effective investigation.

Commentary

The judgment of the majority of the Court of Appeal makes it clear that a failure of a decision-maker to comply with s 38(1) of the Charter, and give "proper consideration" to human rights, is a legal error on the face of the record and results in the decision being unlawful.

Unfortunately, we must await further judicial consideration of the Charter to clarify whether a failure to comply with s 38(1) of the Charter constitutes jurisdictional error. This judgment indicates, though, that the Court is inclined to a position that it does not.

It was disappointing that the Court did not uphold the position under international human rights law that any breach of the right to cruel, inhuman or degrading treatment by the State incorporates a duty to independently and effectively investigate the incident.

This decision continues the trend in conservative decision making by Victorian courts as to the nature and scope of Charter rights. It also highlights the distinct differences between the content of human rights, and the manner in which they are secured, under the Charter as against the more developed international human rights instruments (see, for example, Article 1 of the European Convention on Human Rights).

The outcome in this case will hopefully prompt greater consideration of the limitations of the Charter as an accountability mechanism in the independent review that is currently underway.

The decision is available online here.

***Kate Oliver** is a Senior Associate at Maddocks which, together with Jason Pizer QC, Emrys Nekvapil and Fiona Spencer of Counsel, acted pro bono for Mr Bare in the trial and the appeal.*

INTERNATIONAL HUMAN RIGHTS CASE NOTES

Russian prisoner serving life sentence challenges restrictions on family visits

Khoroshenko v Russia (Grand chamber of the ECrtHR) 30 June 2015

Summary

The European Court of Human Rights found that serious restrictions on a life prisoner's family visits violated Article 8 of the European Convention on Human Rights. The restriction was non-rehabilitative in nature and its undifferentiated application to all life-sentence prisoners were disproportionate.

Facts

This case concerns the applicant, Andrey Khoroshenko, who is a Russian national. He was convicted of murder and sentenced to death in 1995. His sentence was changed to life imprisonment in 1999 and he is currently serving that life sentence.

In October 1999, the applicant was transferred to a correctional colony for life prisoners. During the first ten years of his imprisonment he was allowed to receive no more than one visit from relatives, lasing no longer than four hours, every six months. These were non-contact visits, and prison guards overhead every conversation with family members.

This special regime is usually applicable for ten years after the date of arrest. However, in the applicant's case, this ten year period was calculated from October 1999 when he was placed in the correctional colony. This was because of the application of a special rule for prisoners who had misbehaved during their detention on remand.

The applicant maintains that due to these severe restrictions he lost contact with some family members, including his son.

In August 2004 the applicant lodged a complaint with the Russian Constitutional Court, which rejected his claim that the restrictions were discriminatory and breached his right to respect for private life.

In October 2004, the applicant lodged an application with the European Court of Human Rights. He complained that the restrictions on contacts with his family members under the regime in the correctional colony from October 1999 to October 2009 had been in breach of his rights under Article 9 and Article 14 of the Convention.

A Grand Chamber hearing took place on 3 September 2014.

Decision

There was a unanimous decision of the European Court of Human Rights in favour of the applicant.

Article 8

The Russian legislation violated Article 8 (right to respect for private and family life) of the European Convention on Human Rights.

The court looked at the regulation of prison visits in other Council of Europe member States and observed a great variety of practices. However, visits in member States were all not lower than once every two months. A majority of these States did not discriminate between prisoners sentenced to life and other prisoners. Russia was the only state to treat life prisoners as a group and force upon them a low frequency of visits over a long time. These restrictions made the applicant considerably worse off than an average prisoner serving a long-term sentence in Russia.

The Court referred to its case law, and reinforced that it had consistently ruled that prisoners generally enjoyed all fundamental rights guaranteed by the Convention except the right to liberty. Where there is a severe measure that limits Convention rights, there had to be a sufficient link between the measures and the conduct and circumstances of the involved individual. The Russian Government states that the restrictions aimed at the 'restoration of justice, reform and the prevention of new crimes'. The Court found that the restrictions on family visits were not proportionate to the Government's aims. The restrictions complicated the applicant's social reintegration and rehabilitation and isolated him.

In addition, the Court referred to the recommendations of the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment. These recommendations stated that long term prison regimes should seek to compensate for the desocialising effects of imprisonment.

Article 14

The applicant's claim succeeded under Article 8, and the court did not see the need to separately examine the complaints under Article 14.

Just satisfaction (Article 41)

Russia was ordered to pay the applicant 6,000 euros for non-pecuniary damage and 11,675 euros in costs and expenses.

Commentary

This case is one in a growing trend of increasing rights for prisoners serving life-sentences. For example, the ECHR in *Vinter v UK* and *Hutchinson v UK* held that whole life sentences that denied any possibility of review and release were in breach of Art 3 ECHR (inhumane and degrading treatment).

Moreover, policies applying to life imprisonment are increasingly becoming standardized with reference to policies that apply to other prisoners.

The case represents a limit on State regulation in the area of penitentiary policy. Life imprisonment cannot be considered 'civil death', and the aims of regulations around life imprisonment cannot ignore social reintegration and rehabilitation. The loss of hope of prisoners serving life sentences is no longer acceptable. The Court rejected the Russian Government's retributivist arguments that isolating life prisoners should be the sole aim of the relevant prison regime.

The Court also emphasized the need to have flexible penitentiary policy that can be tailored to the individual circumstances of the prisoner, instead of blanket bans.

The Court's main judgement focused on the lack of proportionality between the aims of the Russian Government and the policy put in place. The concurring opinion criticized this approach on the basis that lack of legitimate aims should alone be enough to find a breach of the Convention.

The decision can be found online here.

***Beatrice Paull** is a legal researcher at the Human Rights Law Centre.*

Landmark ruling for same sex couples in Italy

Case of Oliari and others v Italy

The European Court of Human Rights has concluded that Italy must provide legal recognition of same-sex couples.

The ruling confirmed that Italy, by denying recognition to same-sex couples, was in violation of Article 8 of the European Convention on Human Rights, which provides for the right to respect for privacy and family life.

Facts

Oliari originated with two separate applications filed against the Italian Republic (Applications) by six Italian Nationals, Mr Oliari, Mr "A", Mr Felicetti, Mr Perelli Cippo, Mr Zacheo and Mr Zappa (Applicants).

In the case of each of the couples, the partners had applied to marry and been rejected from doing so on the basis that marriage is between spouses of the opposite sex.

The Applicants alleged that because Italian legislation did not allow them to get married, or enter into any other type of civil union, they were being discriminated against as a result of their sexual orientation, in breach of Articles 8, 12 and 14 of the Convention.

The Submissions

In relation to Article 8 of the Charter, the Applicants, *inter alia,* submitted that in view of the positive trend registered in Europe relating to the recognition of same-sex couples, the Court should impose on States (including Italy) a positive obligation to ensure that same-sex couples have access to an institution, of whatever name, which was more or less equivalent to marriage.

In turn, the Government submitted that while the Court recognised the Convention right of same-sex couples to see their union legally acknowledged, it considered that the relevant provisions (Articles 8, 12 and 14) did not give rise to a legal obligation on the Contracting States, as the latter enjoyed a wider margin of appreciation in the adoption of legislative changes able to meet the changed "common sense" of the Community. Therefore, the States should have autonomy to decide on the timing and mode of legislative changes to reflect recognition of same-sex couples.

The Court's Conclusion

After considering the submissions, the Court ruled that Italy was in violation of Article 8 of the Convention [at 185-187].

The Court concluded that while the essential object of Article 8 is to protect individuals against arbitrary interference by public authorities, it may also impose on a State certain positive obligations to ensure effective respect of the rights protected by Article 8.

Disappointingly, however, the Court did not go so far as to indicate that marriage was required, simply referring to a "specific legislative framework", which the Court considered was needed to protect and recognise same sex unions, and to guarantee to them certain rights relevant to a couple in a stable and committed relationship. Therefore, in the absence of a prevailing community interest being put forward by the Government, against which to balance the Applicants "momentous interests", and in light of domestic courts' conclusions on the matter which remain unheeded, the Court found that the Government "overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the Applicants had a specific legal framework to recognise and protect their relationships".

Legislative change

The Court has previously adopted a cautious approach on the issue of same-sex partnerships. The ruling marks the first time it has taken a stance on the issue, making clear that same-sex couples must have legal protection, a new legal principle for the European Union. A similar conservative approach was taken by the UN Human Rights Committee in *Joslin v New Zealand* (902/99), whereby the Committee interpreted the right to marry as a right of heterosexual couples only - where the relevant Covenant referred specifically to "men and women" as opposed to "every human being".

While the ruling in Oliari is non-binding on the rest of Europe, it is hoped that the ruling will be of some persuasive value and set a precedent for the rest of Europe, and in particular, the 23 Council of Europe States which have not yet enacted legislation permitting same-sex couples to have their relationship recognised as a legal marriage or as a form of civil union or registered partnership.

Notably, while the Applications were being determined, an amended bill relating to amendments to the Italian Civil Code and other provisions on equality in access to marriage and filiation by same sex couples, civil unions and cohabitation and solidarity, was presented to the Senate and to the Lower House. Subsequently, on 10 June 2015, the Lower House adopted a motion to favour the approval of a law on same sex unions, taking particular account of the situations of persons of the same sex.

It is therefore expected that civil unions of same-sex couples will soon be recognised under Italian Law.

The decision can be found online here.

Ashlea Hawkins *is lawyer at Lander & Rogers Lawyers.*

"Curing homosexuality" found to be a fraudulent business practice

Ferguson v. JONAH (Sup Ct of NJ, Docket No. HUD-L-5473-12, 25 June 2015)

Summary

In June 2015, a jury unanimously found in favour of five plaintiffs who filed a suit claiming that counselling and therapy provided by JONAH (Jews Offering New Alternatives for Healing) contravened New Jersey consumer fraud legislation. The plaintiffs claimed that JONAH engaged in misrepresentations and unconscionable commercial practices by claiming that homosexuality was a mental disorder and that JONAH's services could reduce or eliminate this disorder. A jury found unanimously in favour of the plaintiffs and awarded a total of US $72,400 in damages.

Facts

The plaintiffs, Michael Ferguson and others who had paid for the therapy, filed an action against the defendants, JONAH and others. JONAH used counselling and other methods purportedly to help individuals reduce or eradicate their feelings of same-sex attraction.

JONAH stated their belief that:

> …homosexuality is a learned behavior and that anyone can choose to disengage from their same-sex sexual fantasies, arousals, behavior and identity - if motivated and supported in that process. We also believe that with appropriate assistance, same-sex attractions can be reduced or eliminated followed by the subsequent development of one's innate opposite-sex attractions.

Importantly, JONAH typically charged the plaintiffs $60 for group therapy and $100 for individual counselling. Depending on the individual, these costs could exceed $10,000 per year.

During the individual counselling sessions, the plaintiffs were encouraged to disrobe and touch their genitals and buttocks. They were counselled to spend more time at the gym, spend time naked with their fathers and beat effigies of their mothers. In group therapy sessions, activities included standing in a circle naked, re-enacting scenes of past abuse through role-plays, making

homophobic taunts and slurs and group cuddling sessions involving counsellors and their younger clients.

Legal claims

The plaintiffs claimed that JONAH's business services breached the *Consumer Fraud Act*, N.J.S.A. §§ 56:8-1 to -20. ("CFA"). The CFA at 56:8-2 provides that:

The act, use or employment by any person of any *unconscionable commercial practice*, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise … is declared to be an unlawful practice …

The plaintiffs claimed that JONAH breached this provision by misrepresenting that homosexuality is a mental disorder and that their therapy program was successful in treating this disorder.

The plaintiffs sought two types of damages: restitution of all sums paid to JONAH and reimbursement of costs associated with the mental health counselling required after undergoing JONAH's program.

Verdict

There were two relevant stages in this matter. First, in January 2015, the plaintiffs brought a motion to exclude expert testimony from witnesses brought by JONAH that supported the notion that homosexuality was an abnormal mental disorder. In February 2015, Judge Bariso, A.J.S.C. granted the plaintiffs' motion, finding in an unpublished opinion that the view was "outdated and refuted", and that "(b)ecause the generally accepted scientific theory is that homosexuality is not a mental disorder and not abnormal, these (expert) opinions are inadmissible." (*Ferguson v. JONAH* (Sup Ct of NJ, Docket No. HUD-L-5473-12, 5 February 2015).

Secondly, the substantive proceedings were decided by jury verdict on 25 June 2015. The jury found unanimously for all plaintiffs that JONAH had breached the CFA by engaging in misrepresentation and unconscionable commercial practices. The plaintiffs were awarded US$72,400 in total.

Commentary

This case is significant in that it brings conduct associated with sexual orientation change efforts within the ambit of consumer laws. Interestingly, this case confirms that conduct can be classified as consumer fraud if it is contrary to accepted scientific theory. In particular, this religious-based counselling purported to "cure" a mental illness which is well accepted to not be a mental illness.

Given the similarities between the CFA and the Australian Consumer Law in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) ("ACL"), it is conceivable that an Australian court could find a breach of section 18 of the ACL on the same facts, particularly if a fee for service counselling service was to advertise their services as being able to "cure" same-sex attraction.

Any conduct must be "in trade or commerce" which includes "any business or professional activity (whether or not carried on for profit)". In *JONAH* the plaintiffs all paid a fee for the counselling sessions which brought JONAH's services within the ambit of the New Jersey CFA.

While there is some uncertainty about whether the ACL could be used in a similar way in Australia, given the lesser likelihood of fees being charged, consumer protection law and regulator may provide a useful starting point should a similar factual scenario arise.

Kelly Roberts *is an Associate and* ***Kathryn Schultz*** *is a Graduate at Baker & McKenzie.*

NOTICEBOARD

Nominations open for Human Rights Awards 2015

The Australian Human Rights Commission is calling for nominations for its annual Human Rights Awards. Details here.

Jobs: Asylum Seeker Resource Centre

ASRC is currently recruiting for a number of positions including Solicitor & Migration Agent and Human Rights Law Program Manager & Principal Solicitor.

Job: Justice Connect

Justice Connect is currently seeking a Legal Administrator for its Homeless Law and Seniors Law divisions.

Job: Ashurst

International law firm Ashurst is seeking a Pro Bono Lawyer/Senior Associate.

Why the criminalisation of begging does not help the problem

Last month begging received a lot of media attention so the Council to Homeless Persons caught up with Lucy Adams, principal lawyer at Homeless Law, who has done extensive research on the criminalisation of homelessness.

Begging is an offence in Victoria under the Summary Offences Act 1966. Both CHP and Homeless Law would like to see begging decriminalised, yet policy discussions are yet to result in any real change.

“Leaving begging on the books as a crime prevents us from properly considering more effective responses,” Ms Adams said. “It means we keep turning to the justice system to tackle health, housing and social problems.”

The evidence also shows that dealing with begging via the criminal justice system is not effective, and whilst the justice system path is “well worn,” Ms Adams thinks it’s time for approaches to change.

“The evidence shows it’s not working and not dealing with the causes of why people beg. It’s expensive as well as ineffective.”

We don’t have publicly available evidence on the cost of policing begging in Victoria, but a Canadian example showed that the cost of fining people for begging over an 11 year period was almost $1 million. It took over 16,000 hours of police time, but less than $9,000 in the fines were paid.

Recent crackdowns in the Melbourne CBD have also been resource intensive. For example Operation Minta, which saw a police blitz on begging in the CBD in 2014, saw 30 people arrested and 15 of them represented by Homeless Law at the Magistrates' Court.

"The focus [of Operation Minta] was on diversion and linking people in with services," Ms Adams said.

"That is certainly a focus that should be welcomed, but it doesn't need to be done by the justice system – it should be done on the frontline by services like Street to Home."

"The clients we represented had been begging passively, sitting on the ground with a hat or a cup. Two had approached people to ask for money, but it wasn't suggested that any of these people were aggressive. They were a highly vulnerable group of people (all but one were dealing with a mental illness) and getting caught up in the justice system added to their stress and hardship.

Much of the discussion involves the actions of government and law enforcement. However, the public also has a role to play.

"Public attitudes have a crucial role to play in how society responds to its most struggling members," Ms Adams said.

"If people are annoyed or uncomfortable with very obvious hardship, that's going to lead to reactive responses from government and law enforcement.

"There's a role for government and leaders to play in shaping community awareness around social issues, but the relationship is definitely two way and media also have a role to play in that.

"If the public is supported to understand begging and its causes and if some of the misconceptions about begging are addressed rather than fuelled, this will encourage a better thought out, more effective, less reactionary approach to begging and the hardship that underpins it."

Source: Council to Homeless Persons

Class action resolves: wrongfully imprisoned children to be compensated by NSW Police

The parties to a class action on behalf of young people, who were allegedly wrongfully imprisoned by NSW police as a result of problems with the NSW Police database, have reached a settlement of at least $1.85 million. The settlement is subject to final Court approval and paves the way for the young people affected to be properly compensated.

The Public Interest Advocacy Centre (PIAC) and Maurice Blackburn, who are jointly acting for the young people, are pleased that a settlement has been reached.

The case commenced in 2011 after PIAC became aware that children and young people were being wrongfully detained as a result of inaccurate or out-of-date information on the NSW Police computer system known as COPS (Computer Operational Policing System).

It was brought in order to achieve justice for the victims and to highlight the inaccuracies in this computer system.

'Depriving a person of their liberty causes serious harm, especially to a young person. This case has re-affirmed this very important principle,' said Edward Santow, PIAC's CEO.

'One of our 14-year-old clients was arrested, handcuffed and strip-searched on three separate occasions over a two-week period. He was held in custody overnight each time.

'We call on the NSW Government to fix any remaining problems with COPS so that no-one else is arrested based on incorrect information,' Mr Santow said.

'Deprivation of liberty is the punishment of last resort. To detain without lawful excuse is wrong and those wronged deserve to be compensated. We are very pleased that the State has agreed to compensate these young people who were deprived of their liberty because of a computer problem,' said Ben Slade, NSW Managing Principal at Maurice Blackburn.

'There is no way vulnerable young people could possibly challenge such a well-resourced defendant as the state government without the class action regime we have in NSW,' Mr Slade said.

Any young person not already registered will need to register by 9 October 2015 to be eligible for compensation. We encourage young people not already registered to contact PIAC on (02) 8898 6500.

Source: Public Interest Advocacy Centre

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Ten News report featuring our Director of Advocacy & Research, Emily Howie, on the Supreme Court's ruling.

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Commonwealth face new legal challenge to offshore processing

Our Executive Director, Hugh de Kretser, spoke with ABC's AM program about our upcoming case in the High Court.

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Australia's High Court to test constitutionality of offshore processing

Our Director of Legal Advocacy, Daniel Webb, spoke to Radio New Zealand about the High Chart challenge.

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RAAF serviceman sacked for having HIV

RAAF's blanket policy unjustified and anachronistic, Hugh de Kretser tells The Australian.

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The Human Rights Law Centre would like to thank everyone who contributed to the production of this Bulletin.

The Human Rights Law Centre protects and promotes human rights in Australia and in Australian activities abroad. We do this through a strategic combination of legal action, advocacy, research and capacity building.

The HRLC is a registered charity and has been endorsed by the Australian Taxation Office as a public benefit institution. All donations are tax deductible and gratefully received.

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