AUSTRALIAN CRIME COMMISSION V NTD8

Full Federal Court of Australia (Black CJ, Mansfield, Bennett JJ)
10 July 2009
[2009] FCAFC 86

Administrative law – Australian Crime Commission Examiner decision issuing notice to produce medical records of Aboriginal children – best interests of the children – best interests of the children a primary consideration – whether proper consideration given by Australian Crime Commission Examiner to the best interests of the children in issuing the notice to produce the records – failure to give adequate weight to a relevant consideration of great importance – *Australian Crime Commission Act 2002* (Cth), s 29

Facts:

NTD8 is the pseudonym given to an Aboriginal community-controlled health organisation that provides health services to the residents of Aboriginal communities, outstations and pastoral properties in the Katherine region of the Northern Territory. NTD8 was served an amended notice under s 29(1) of the *Australian Crime Commission Act 2000* (Cth) ('*ACC Act*') requiring it to produce medical records relating to patients whose treatment may have been associated with family and domestic violence and/or other forms of assault including sexual assault. The medical records were sought by the Australian Crime Commission ('ACC') as part of its special intelligence operation into Indigenous violence or child abuse in the Northern Territory. This operation, authorised by an ACC Board Determination on 5 February 2008 under s 7C of the *ACC Act*, was implemented as part of the 'intervention' into Aboriginal communities in the Northern Territory and had as one of its objects the facilitation of investigations into child abuse in Indigenous communities.

NTD8 had already commenced proceedings to challenge the original notice served by the ACC Examiner Mr Anderson a month earlier. In the period following the original notice, affidavits by medical staff at NTD8 were issued, which contained, amongst other things, details of eight Aboriginal girls aged between 13 and 15, the majority of whom had received the Implanon contraceptive. Consequently, on the 20 May 2008, Mr Anderson, after having the opportunity to consider the affidavits from NTD8, issued an amended notice. While the original notice was general in its terms, the amended notice was specifically limited to the persons described in the affidavits and requested the medical records of the eight Aboriginal girls. As a result, NTD8 amended its application during the course of proceedings to challenge that amended notice.

This is an appeal from a decision of a single judge of the Federal Court on 17 October 2008 to quash the decision of Mr Anderson made under s 29(1)(b) of the *ACC Act* to issue notice requiring NTD8 to attend and produce certain documents in relation to the eight young Aboriginal females. The relevant section of the *ACC Act* (s 29(1A)) provides that an examiner 'must be satisfied it is reasonable in all the circumstances' to issue the notice, and to record in writing the reasons for it. Resolution of the grounds of appeal depended on determining whether the best interests of the children are, in terms of s 5(2)(b) of the *Administrative Decisions (Judicial Review) Act 1977*(Cth), a relevant consideration to which the Examiner was to take into account. If the best of interests of children were a relevant consideration, the Court had to then determine whether the Examiner had in fact failed to take them into account.

Held, per curiam, setting aside the order of the primary judge to quash the decision of the Examiner:

1. There is no express obligation in s 29 of the *ACC Act* requiring the Examiner to take into account the best interests of the children. The Examiner is only to be satisfied in all the circumstances that it is reasonable to issue the Notice. Therefore, the obligation to consider the best interests of the children as a relevant consideration must be implied from the construction of the statute: [55]; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40 followed; *Foster v Minister for Customs and Justice* [2000] HCA 38 followed; *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50 cited; *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30 cited.

2. It adds little to the submissions to say that the best interests of the children are a 'primary' relevant consideration as opposed to a relevant consideration. If a consideration is one which the decision-maker is bound to take into account, it is a matter for the decision-maker as to the weight to be attributed to the relevant considerations: [56]; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40 followed.

3. The statutory power in s 29 of the *ACC Act* should be construed carefully as it is a provision that intrudes into the entitlement of any person to keep documents private and confidential and, if exercised, the failure to comply with notice carries significant consequences including imprisonment up to five years: [63]; *Commissioner of Taxation v Citibank Ltd* (1989) 20 FCR 403 cited.

4. In the context of the scope and purpose of the provisions of the *ACC Act* relevant to the Determination and the subsequent implementation of the special ACC operation, the clear implication of s 29(1A) is that the interests of Indigenous children are a matter required to be taken into account by the Examiner when issuing notice. The intention of the relevant provisions of the *ACC Act* is clear enough; therefore, it is not necessary to refer to the Explanatory Memorandum to the Amending Act or to the *Convention on the Rights of the Child*. The construction of the *ACC Act* will not be better informed by specific reference to the *Convention*; the *ACC Act* will indicate itself how and to what extent the *Convention* has been reflected in the terms of the *ACC Act*: [65]–[69]; *Minister for Immigration and Multicultural Affairs; Re Ex parte Lam* [2003] HCA 6 cited.

5. In these proceedings there are conflicting considerations going to the best interests of the children. One consideration is the assembling of information about Indigenous violence and child abuse and identifying those involved in such conduct. The other consideration is the detriment to the eight female Aboriginal children concerned, and to other Indigenous young women who might now choose not to avail themselves of the services of NTD8. The legal process required the Examiner to have regard to these considerations, but it is not appropriate for the Court to measure whether sufficient weight was given to each consideration. On the evidence, the Examiner had specifically taken into account both relevant considerations: [71]–[74]; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6 cited.