NTD8 V AUSTRALIAN CRIME COMMISSION (NO 2)

Federal Court of Australia (Reeves J)
17 October 2008
[2008] FCA 1551

Administrative law – Australian Crime Commission Examiner decision issuing notice to produce medical records of Aboriginal children – best interests of children – best interests of 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 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, which was implemented as part of the 'intervention' into Aboriginal communities in the Northern Territory and the object of which was to, *inter alia*, facilitate 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 in these proceedings to challenge that amended notice.

It fell to the Federal Court to determine whether in issuing the notice the ACC Examiner was required to take into account, as a primary consideration (as opposed to merely *a* consideration), the best interests of the children concerned. 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. If the best of interests of children were a primary consideration, the Court had to then determine whether the Examiner had in fact failed to take them into account.

Held, setting aside the decision to issue the notice under the *Administrative Decisions (Judicial Review) Act 1977*(Cth), ss 5(1)(e), 5(2)(b):

1. There was an obligation to take into account the best interests of the children as a primary consideration. Absent statutory or executive indications to the contrary, Australia's ratification of the *Convention on the Rights of the Child* (and particularly art 3) gives rise to a legitimate expectation that administrative decision-makers in decisions concerning children will take into account the best interests of the children as a primary consideration. If those decision-makers do not intend to do so, they should give the persons affected

an opportunity to be heard: [28]; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 followed; *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 followed; *Wan v Minister for Immigration and Multicultural Affairs* [2001] FCA 568 cited; *Sebastian v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 31 cited.

2. Where a decision-maker is required to take the best interests of the child into account as a primary consideration, those interests must be identified as a relevant factor of great importance and given adequate weight. Those interests must be given first importance, along with any other considerations that may, in the circumstances, require equal but not paramount weight: [30], [32]; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 followed.

3. An administrative decision-maker who is required to take into account the best interest of children as a primary consideration should: identify what the best interests of the children concerned are and what they call for in the circumstances; identify any other considerations that are worthy of equal importance; and determine which consideration is to be given the greater weight in coming to the final decision: [42]; *Wan v Minister for Immigration and Multicultural Affairs* [2001] FCA 568 considered; *Perez v Minister for Immigration & Multicultural Affairs* [2002] FCA 450 considered.

4. On the evidence, Mr Anderson, while taking into account the best interests of the children as *a* consideration, did not take those interests into account as a primary consideration: [36]–[37], [51].