C INCORPORATED V AUSTRALIAN CRIME COMMISSION

Federal Court of Australia (Reeves J)
28 November 2008
[2008] FCA 1806

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 – failure to afford procedural fairness – *Australian Crime Commission Act 2002* (Cth), s 29

Facts:

C Incorporated ('C Inc') is a pseudonym for a large Aboriginal community-controlled organisation which provides primary health care services to Aboriginal and Torres Strait Islander people living in and around Alice Springs. As part of its Special Intelligence Operation into Indigenous violence or child abuse in the Northern Territory, which was itself a feature of the federal 'intervention' in the Northern Territory, the Australian Crime Commission on 20 May 2008 issued C Inc with an amended notice to produce certain medical records (an earlier notice having been served in April). The medical records related to the treatment of child and adult patients for sexually transmitted infections, pregnancies and contraception, and sexual and physical abuse. One of the objects of the Special Intelligence Operation was to facilitate investigations into child abuse in Indigenous communities.

Following the original notice, which was issued by ACC Examiner Mr Anderson, the appellant sought to challenge Mr Anderson's decision under s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). After Mr Anderson issued the amended notice, C Inc amended their application in these proceedings so as to challenge that amended notice.

There were a substantial number of issues to be decided by the Court. The first was whether the time limit for seeking judicial review under s 57 of the *Australian Crime Commission Act 2002* (Cth) (*'ACC Act'*) applied to this case and, if so, whether C Inc was entitled to an extension of time. Second, the Court had to determine whether in issuing the notice Mr Anderson was required to take into account, as a primary consideration (as opposed to merely *a* consideration), the best interests of the children concerned and, if so, whether he fulfilled that requirement. Third, it had to be determined was whether Mr Anderson, in deciding to issue the notice, was required to have evidence that C Inc or its employees were engaged in the under-reporting of Indigenous-related child sexual abuse. Fourth, the Court had to decide whether Mr Anderson was required to take the impracticality of compliance with the notice (due to time and staff constraints) into account as a relevant consideration. Fifth, the Court had to decide whether Mr Anderson was required to take into account as a relevant consideration the fact the information sought could be obtained elsewhere. Sixth, it had to be determined whether Mr Anderson was required to afford C Inc natural justice by providing it with an opportunity to be heard and respond to the material on which he was to make his decision. Seventh, the Court had to decide whether Mr Anderson's decision to issue the notice was so unreasonable that no reasonable person could have so exercised the power in the circumstances.

Held, setting aside the part of the notice that relates to children's medical records under *Administrative Decisions (Judicial Review) Act 1977*(Cth), s 5, but affirming the part of the notice directed to adult's medical records:

1. C Inc lodged its application to amend the existing proceedings within the time limit under s 57 of the *ACC Act*. Notwithstanding C Inc's earlier failure to comply with the s 57 time limit in relation to the original notice, the later amendment made C Inc's application valid. If those conclusions were incorrect, the circumstances nevertheless amounted to 'special circumstances' under s 57, and an extension of time would thereby be granted: [28]–[29]; *Duff v Freijah* (1982) 43 ALR 479 cited.

2. By virtue of Australia's ratification of the *Convention on the Rights of the Child* and the fact that the decision in question concerns children, there was an obligation to take into account the best interests of the children as a primary consideration, giving rise to a legitimate expectation that those interests will be so taken into account. Unless the decision-maker gives notice of his or her intention to not meet that expectation, the decision-maker will have failed to afford procedural fairness and the decision will accordingly be set aside: [39], [58]; *NTD8 v Australian Crime Commission (No 2)* [2008] FCA 1551 followed; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 followed; *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 cited.

3. A presumption that procedural fairness is to be afforded arises where a power is apt to affect the interests of an individual in a way that is substantially different from the way in which it is apt to affect the interests of the public at large, or is apt to affect the interests of an individual alone or apt to affect his or her interests in a manner which is substantially different from the manner in which its exercise is apt to affect the interests of the public: [69]; *Kioa v West* (1985) 159 CLR 550 followed.

4. Notwithstanding the potentially large size of the group of Aboriginal children, each child's individual interests in the privacy and confidentiality of their medical records were to be overridden completely, and affected in a direct and immediate way, by Mr Anderson's decision. The disclosure of such sensitive information could cause acute embarrassment to the Aboriginal children and may have implications for their relationships with others. As such, Mr Anderson's decision did attract procedural fairness: [71].

5. On the evidence, Mr Anderson did not treat the best interests of the particular group of Aboriginal children as a primary consideration in making his decision to issue the notice. Consequently, there was a failure to afford procedural fairness and the decision must be set aside to the extent that it affects the children concerned: [93].

6. Because Mr Anderson's decision in relation to the children was set aside due to a failure to afford procedural fairness, it was not necessary to consider whether Mr Anderson, in deciding to issue the notice, was required to have evidence that C Inc or its employees were engaged in the under-reporting of Indigenous-related child sexual abuse: [94]–[95].

7. While evidence was advanced by the appellant as to the impracticality of complying with the original notice, there was no similar evidence in relation to the amended notice. In addition, the evidence demonstrated that Mr Anderson, in deciding to issue the amended notice, did in fact consider the difficulties of complying with that notice as a relevant consideration, regardless of whether he was required to do so by law: [101].

8. The general discretionary power under s 29 of the *ACC Act* to obtain information is not confined by the fact that the information is available from some other source. If that power was so confined, it would lead to an absurd situation where every time particular information was retained by more than one source, each source would be able to point to the other by way of objection, and the information would not be able to be obtained from either: [104].

9. In relation to the adult patients' information, there was no failure to afford procedural fairness. This was due to the fact that, by issuing the original notice, Mr Anderson then obtained details of C Inc's concerns in the form of its original application for judicial review and its affidavits. On the evidence, Mr Anderson, in deciding to issue the amended notice, took these concerns into account insofar as they apply to the adult patients: [106].

10. There was nothing overwhelming in Mr Anderson's decision that could be said to constitute unreasonableness: [108]; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 cited.