Rocco Fazzari

COVID-19 and Detention

By Celia Winnett

The COVID-19 pandemic gives rise to unique challenges, and dangers, in detention environments. Detainees in Commonwealth immigration detention facilities, and in prisons, are necessarily limited in their ability to protect themselves from illness. This is because their freedom of movement, capacity to avoid gatherings of people in close confines, access to medical care and ability to procure hygiene products and protective equipment is subject to the conditions that prevail from time to time in the facilities in which they are housed. The courts have accepted that the relationship of dependence inherent in custodial arrangements gives rise to a duty of care owed by prison authorities to prisoners,[1] and by the Commonwealth to persons held in immigration detention.[2] That duty of care lies at the heart of several legal actions recently brought by human rights organisations in an attempt to protect the health rights of detainees during the pandemic.

In the immigration context, the Human Rights Law Centre (HRLC) filed a High Court challenge in late April 2020 against the Minister for Home Affairs and the Commonwealth, on behalf of a refugee in immigration detention who has numerous medical conditions that render him particularly vulnerable to severe illness or death should he contract COVID-19. The plaintiff seeks orders that the Minister not detain him in conditions where he cannot practise physical distancing – for example, housing him in a shared bedroom with a shared bathroom. The HRLC notes that almost 1,400 people remain in immigration detention in Australia, and that their living conditions often require them to eat in crowded locations, share bathrooms and sleep in rooms with up to six people.[3]

Shortly thereafter, the Public Interest Advocacy Centre lodged a group complaint with the Commonwealth Ombudsman on behalf of 13 men held in Australian immigration detention. The complaint asks the Ombudsman to conduct an urgent inspection of detention facilities 'to examine the adequacy of conditions and measures being taken to mitigate and manage the dangers posed by COVID-19 to detainees and staff'. It notes that the complainants, who have various chronic health conditions, are 'held in close proximity and rely on shared facilities such as kitchens and bathrooms, making social distancing near impossible'.[4]

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In the prison context, the Fitzroy Legal Service and HRLC filed proceedings in the Supreme Court of Victoria on behalf of Mr Rowson, a prisoner suffering from heart disease and other serious medical issues, seeking orders releasing him from Port Phillip Prison 'because of his health risks, including the risk that he will die, if he is infected with the COVID-19 virus'.[5] On 1 May 2020, the Court gave judgment on the plaintiff's application for urgent interlocutory relief. Justice Ginnane found that Mr Rowson had established a prima facie case that the prison authorities had breached their duty to take reasonable care for his health.[6] His Honour noted various features of Mr Rowson's living environment that could be addressed to reduce the risks to his health – for example, social distancing measures were not adopted, including at times when prisoners were required to queue for food/ medication or to work in activities such as the laundry; prisoners were limited to purchasing one bar of soap a week; and prisoners were responsible for cleaning and other tasks relating to the prison's operation.[7]

However, the Court found that the balance of convenience did not favour Mr Rowson's release from prison, in circumstances where (inter alia) Mr Rowson still had much of his sentence to serve, the means by which he could remain in State custody outside of prison was not clear, and no diagnosis of an infected person in prison had yet occurred.[8] Rather, his Honour held, the appropriate outcome for preserving Mr Rowson's health during the conduct of the proceeding was for the defendants to undertake an independent risk assessment of the risk to prisoners and employees working in the prison, and to implement any recommendations arising from that assessment.[9] Nonetheless, Ginnane J noted in obiter that he considered that the Court would have power to make the order sought by Mr Rowson 'in an extreme case under its inherent jurisdiction to preserve the subject matter of litigation'.[10] BN

ENDNOTES

1 See, e.g., *New South Wales v Bujdoso* (2005) 227 CLR 1 at [44].
2 See, e.g., *MZYYR v Secretary, Department of Immigration and Citizenship* (2012) 129 ALD 331 at [20]; *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 217 at [199], [218], [220]; *Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Mastipour* (2004) 207 ALR 83 at [35]-[36], [127].
3 https://www.hrlc.org.au/news/2020/4/21/legal-challenge-refugee-at-covid-19-risk.
4 https://piac.asn.au/2020/05/07/covid-19-group-complaint-for-asylum-seekers-at-risk-in-immigration-detention-calls-for-urgent-investigation/.
5 *Rowson v Department of Justice and Community Safety* [2020] VSC 236 (*Rowson*) at [1].
6 *Rowson* at [11], [98].
7 *Rowson* at [97].
8 *Rowson* at [12], [94].
9 *Rowson* at [13], [102].
10 *Rowson* at [93].