In the Supreme Court of the Australian Capital Territory

No SC 328 of 2020

Nathan Davidson

Plaintiff

Director General of the Justice and Community Safety Directorate

Defendant

ACT Human Rights Commissioner

Intervener

SUBMISSIONS OF THE INTERVENER IN REPLY

A. INTRODUCTION

1. The Commissioner makes these submissions in reply to the submissions filed by the defendant on 28 April 2021. They respond to the defendant's submissions on the nature and scope of the right to humane treatment in s 19(1) of the *Human Rights Act 2004* (**HRA**); and the application of the interpretation requirement in s 30 of the HRA to s 45 of the *Corrections Management Act 2007* (**CMA**).

B. NATURE AND SCOPE OF THE RIGHT UNDER s 19(1) HRA

2. The Commissioner understands the defendant's position to be that access to the rear courtyard is consistent with the standard set by s 45 of the CMA properly construed, and is also compatible with the plaintiff's human rights, including the right to humane treatment under 19(1) of the HRA, such that the defendant has complied with its obligations under s 40B of the HRA.

3. The basis for the defendant's position with regard to s 19(1) of the HRA is understood to be as follows:

(a) The right to humane treatment in s 19(1) is an expression, in the detention context, of the prohibition against cruel, inhuman or degrading treatment in s 10(1)(b) of the HRA.[1] Like s 10(1)(b), s 19(1) requires any ill treatment to reach a minimum level of severity for a contravention to be established.[2]

(b) The nature of the protection afforded by s 19(1) of the HRA is inherently qualified by reason of the deprivation of liberty and must necessarily be informed by the context of a "closed environment".[3]

(c) The right to a daily minimum period of exercise and open air as understood in international human rights law is similarly qualified, including by considerations of practicability (*viz*., vagaries of weather).[4]

(d) Restricting the plaintiff's outdoor access to the rear courtyard did not cause him to experience any hardship or constraint beyond the hardship or constraint caused by his deprivation of liberty, having regard to the fact that a "necessary consequence" of his deprivation of liberty was that his rights were inevitably qualified or attenuated.[5]

(e) Accordingly, the plaintiff's treatment did not reach the minimum level of severity necessary to establish a contravention of s 19(1).[6]

4. The Commissioner submits that the defendant's approach to s 19(1) of the HRA should be rejected for the reasons set out below.

(i) The right to humane treatment (s 19(1)) and the prohibition against inhuman and degrading treatment (s 10(1)(b)) are not interchangeable

5. In coming to the conclusion that s 19(1) has not been breached, the defendant's submissions place some reliance on Article 3 of the European Convention on Human

[1] Defendant's submissions, [33]-[35].
[2] Defendant's submissions, [33].
[3] Defendant's submissions, [32], [35].
[4] Defendant's submissions, [109].
[5] Defendant's submissions, [113].
[6] Defendant's submissions, [116].

Rights (**ECHR**), which the defendant contends is the equivalent right to Article 10 of the International Covenant on Civil and Political Rights (**ICCPR**).[7] With respect, this is not correct.

6. Article 3 of the ECHR is equivalent to Article 7 of the ICCPR, which in turn is the source for the prohibition against inhuman and degrading treatment in s 10(1)(b) of the HRA. Article 10 of the ICCPR, from which s 19(1) of the HRA derives, has no express equivalent in the ECHR.

7. In his "authoritative commentary" on the ICCPR,[8] Manfred Nowak described the origin and content of the right to humane treatment specified in Article 10 of the ICCPR:[9]

> [Article 10] establishes a relationship between the rights to liberty of person (Art 9) and personal integrity (Art 7), which is lacking in the ECHR and many national bills of rights. On the one hand, the right to liberty of person has traditionally been limited to protection against arbitrary arrest and therefore does not contain any obligations regarding the treatment of prisoners, on the other hand the prohibition of torture has generally been understood as a classic right of the individual to ward off interference by the State, which meant the State was not required to take positive measures to guarantee humane treatment. Consequently, traditional enumerations of human rights often lack a right to a minimum of humane treatment in conditions of detention, as can be found in the (non-binding) 1955 "Standard Minimum Rules for the Treatment of Prisoners" or the "European Prison Rules" of 1987. Case law has been able to fill this gap only in exceptional circumstances by interpreting broadly the prohibition of inhuman or degrading treatment.

8. The right to humane treatment clearly complements the prohibition against torture and cruel, inhuman or degrading treatment or punishment.[10] However, each is a distinct right and the threshold for their engagement and breach are not the same.[11] Firstly, in contrast to Article 7, a wider range of less serious mistreatment engages Article 10. Mistreatment

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[7] Defendant's submissions, [33].

[8] *PJB v Melbourne Health* (*Patrick's Case)* (2011) 39 VR 373, 421 [67] (Bell J), citing Minister for Immigration Multicultural and Indigenous Affairs v Al Masri [2003] FCAFC 70; (2003) 126 FCR 54, [143] (Black CJ, Sundberg and Weinberg JJ).

[9] Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (2nd rev ed, 2005), pp 241-242.

[10] UNHRC, *General Comment No. 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 1992, [3].

[11] In *Taunoa v Attorney-General* [2008] 1 NZLR 429, Elias CJ considered that the equivalent rights ss 9 and 23(5) of the *Bill of Rights Act 1990* (NZ) (the **BORA**) 'are not simply different points of seriousness on a continuum but identify distinct, though overlapping, rights': at [5].

may amount to a contravention of Article 10 even if it does not rise to the level of torture or cruel, inhuman or degrading treatment or punishment.[12] Not all breaches of Article 10 will amount to "cruel, inhuman or degrading" treatment or punishment, but breaches of Article 7 are likely to breach Article 10 if the victim is a detainee.[13] In short, inhuman treatment within the meaning of Article 10 of the ICCPR evidences a lower intensity of disregard for human dignity than that within the meaning of Article 7 of the ICCPR.[14] A similar view was expressed by Blanchard J in *Taunoa v Attorney-General* in the context of equivalent rights in the NZ BORA:[15]

> As in the ICCPR, there are degrees of reprehensibility evident in ss 9 and 23(5). Section 9 is concerned with conduct on the part of the State and its officials which is to be utterly condemned as outrageous and unacceptable in any circumstances. Section 23(5), which is confined in application to persons deprived of their liberty, proscribes conduct which is unacceptable in our society but of a lesser order, not rising to a level deserving to be called outrageous.

9. Secondly, Article 10 imposes a positive duty towards persons who are particularly vulnerable because of their status as persons deprived of liberty.[16] As previously noted, the Victorian Supreme Court in *Castles v Secretary to the Department of Justice* explained the differences between equivalent rights in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the **Charter**) in the following terms:[17]

> Section 22(1) is a right enjoyed by persons deprived of their liberty; s 10(b) applies more generally to protect all persons against the worst forms of conduct. Section 10(b) prohibits 'bad conduct' towards any person; s 22(1) mandates 'good conduct' towards people who are detained. (emphasis added)

10. In *Taunoa v Attorney-General*, Tipping J characterised a failure to comply with the positive duty to treat detainees with humanity as being qualitatively different to a finding

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[12] See, for example, UNHRC, *Views: Communication No 731/1996 (Robinson v Jamaica)*, 68th sess, UN Doc CCPR/C/68/D/731/1996, (13 April 2000), [10.1]-[10.3].

[13] See, for example, UNHRC, *Views: Communication No 255/1987 (Linton v Jamaica)*, 46th sess, UN Doc CCPR/C/46/D/255/1987, (22 October 1992), [8.5].

[14] M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel, 2nd rev ed, 2005), p 245.

[15] *Taunoa v Attorney-General* [2008] 1 NZLR 429, [170] (Blanchard J).

[16] UNHRC, *General Comment No. 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 1992, [3].

[17] *Castles v Secretary, Department of Justice* (2010) 28 VR 141, [99].

of breach of the prohibition against inhuman treatment, and involving different considerations:[18]

> [294] [I] consider different considerations apply to a case in which the State is said to have failed to observe the positive duty contained in New Zealand's s 23(5), which requires those deprived of their liberty to be treated with humanity and with respect for their inherent dignity as persons. A failure to observe that positive duty is different from a breach of s 9. In the case of s 23(5), the person concerned can claim that the statutory standard has not been met. It does not matter for liability purposes why that is so. The State's duty is to achieve an objectively defined outcome. It is, however, of moment to whether there has been a breach of s 9 to consider the state of mind of the party said to be in breach and the consequences for the victim of the impugned conduct.
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> [295] A s 9 breach will therefore usually involve intention to harm, or at least consciously reckless indifference to the causing of harm, on the part of the State actors. It will also usually involve significant physical or mental suffering. If these ingredients are missing, the case for a s 9 breach will not usually be established but a breach cannot, as the European Court has said, be ruled out.
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> [296] Whether breaches of prison rules and regulations amount to a breach of s 9 must depend on the frequency, degree and consequences of the relevant breach or breaches. A failure to observe the law relating to the running of prisons may more readily cause a breach of the State's positive duty under s 23(5). The presence of that duty is relevant to where the threshold is set for a breach of s 9.
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> [297] Although s 9 is not worded in this way, it can be seen as prohibiting inhuman treatment, that is, treating a person as less than human. Section 23(5) requires prisoners to be treated with humanity. There is a danger of these concepts being conflated in a way which reduces the degree of seriousness required for a s 9 breach. The possible area of overlap between the sections is thereby substantially enlarged. Indeed, if one equates lack of humanity with inhuman treatment, there would be a total overlap between s 9 and s 23(5). A breach of the latter would per se be a breach of the former. In view of the presence of s 23(5), it is appropriate and was probably intended that s 9 be reserved for truly egregious cases which call for a level of denunciation of the same order as that appropriate for torture. While Mr Taunoa was not treated with humanity, I find myself unable to conclude that he was treated as less than human.

11. Tipping J was concerned that conflating these rights would risk lowering the threshold for what constitutes inhuman treatment. However, similar caution is warranted for the reverse

[18] *Taunoa v Attorney-General* [2008] 1 NZLR 429, [294]-297] (Tipping J)

proposition submitted by the defendant, which if accepted, would improperly raise the threshold required to establish a contravention of the positive duty in s 19(1). Contrary to the defendant's submissions, s 19(1) of the HRA does not require any deliberate intention to humiliate or debase the plaintiff.[19]

(ii) The principle that those deprived of their liberty should not suffer hardship or constraint other than that resulting from the deprivation of liberty has no application in the context of the minimum guarantees that must be afforded to all prisoners

12. The defendant agrees that the starting point for s 19(1) of the HRA is the principle that prisoners should not be subjected to hardship or constraint other than that resulting from the deprivation of liberty.[20] However, – citing Emerson J's statement in *Castles* that "[r]ights and freedoms which are enjoyed by other citizens will necessarily be 'curtailed', 'attenuated' and 'qualified' by reason of the deprivation of liberty" – the defendant contends that s 19(1) should not afford those in detention a higher standard of treatment than those not in detention.[21] Accordingly, the defendant asserts that s 19(1) would not be contravened in circumstances where any hardship suffered was a "necessary consequence" of the deprivation of liberty.[22]

13. The defendant's submission proceeds on a number of incorrect premises:

(a) That s 19(1) of the HRA is a right that is enjoyed by persons outside of the detention context. As noted above, s 19(1) is not simply a component or subset of s 10(1)(b). It imposes a positive duty of humane treatment towards persons in detention, and its contents must be informed by the international minimum standards for humane conditions of detention.

(b) That compliance with the minimum standards may be qualified as part of the ordinary incidents of detention. The international minimum standards specify the daily

[19] Defendant's submissions, [113].
[20] Defendant's submissions, [32].
[21] Defendant's submissions, [113].
[22] Defendant's submissions, [113]

minimum period of exercise and open air that must be afforded to all prisoners, *including those in separate confinement for misbehaviour within prison*. These standards were designed with an awareness of the necessary compromises arising from imprisonment and are intended to take account of the full spectrum of prisoner behaviour, both good and bad. As minimum standards they are intended to provide a base level of protection; they are not ideals to be worked towards only where practicable or for prisoners who are easy to manage.

(c) That *Castles* supports the proposition that s 19(1) does not afford those in detention a higher standard of treatment than those not in detention. Far from requiring less, *Castles* confirms that more is required of the State for prisoners by virtue of the complete control exercised over their lives, as evidenced by Emerton J's statement that the right to humane treatment requires 'good conduct' towards those in detention.

14. The defendant's characterisation of these issues fundamentally misconstrues the application of minimum standards and the contents of the right in s 19(1) and should not be adopted.

C. CONSTRUCTION OF s 45 CMA – RELATIONSHIP WITH S 12(1)(E)

15. With respect to the relationship between s 12(1)(e) and s 45, the defendant submits that:

(a) section 45 provides further detail of the standard referred to in paragraph12(1)(e); and

(b) paragraph 12(1)(e) is qualified by both practicability and a requirement that access to open air and exercise is to be reasonable.

16. The Commissioner cautions against reading the obligations in s 45 down using s 12(1)(e), for example by reading an additional requirement of reasonableness into s 45 in addition to the requirement of practicability. Such an approach is contrary to orthodox interpretive principles, which provide that specific provisions override general provisions,[23] and not the other way around. It is s 45, and not s 12(1)(e), that provides an entitlement for each

[23] *Refrigerated Express Lines (A'Asia) Pty Ltd v Australian Meat and Live-stock Corporation* (1980) 29 ALR 333, 347.

detainee for the purposes of Chapter 10 of the CMA (which deals with discipline and allows for the removal of privileges as punishment).[24]

D. CONSTRUCTION OF s 45 CMA – "AS FAR AS PRACTICABLE"

17. The Commissioner understands the defendant's position to be that:

(a) The interpretation obligation in s 30 of the HRA requires s 45 to be interpreted in a way which is compatible with the plaintiff's human rights, insofar as it is possible to do so consistently with the purpose of s 45.[25]

(b) However, s 30 has no application in respect of the words "as far as practicable" in s 45 because a human rights interpretation would negate the operation of those words, which are intended to operate as a limitation on the obligation to afford those rights.[26]

(c) Practicability is not limited to the "extreme" examples contained in the Explanatory Statement, but should be determined in the context of corrections management, which includes considerations of the security and safety of detainees and staff.[27]

(d) Also, practicability is not limited to what is physically possible to do but must additionally consider the end result of such action, which includes the safety and security of the detainees and staff.[28]

(e) Further, given the safety risks present in the physical design of the general exercise area, the individual circumstances of a detainee are also relevant to what is practicable.[29]

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[24] It is notable that other Australian jurisdictions mandate a right in similar terms, for example s 47(1)(a) *Corrections Act 1986* (Vic): "if not ordinarily engaged in outdoor work, the right to be in the open air for at least an hour each day, if the weather permits".

[25] Defendant's submissions, [39].

[26] Defendant's submissions, [39]-[40].

[27] Defendant's submissions, [43].

[28] Defendant's submissions, [49].

[29] Defendant's submissions, [50]-[51].

18. The Commissioner agrees that if the words of the statute are clear, the court must give them that meaning. However, the words "as far as practicable" and the concept of practicability are clearly capable of more than one meaning. It would appear that at least three meanings are available:

    (i) They may permit the s 45 entitlements to be denied to (or restricted for) particular classes of detainees (such as those placed on the 'hard side' of the Management Unit (**MU**)) for corrections management reasons (which may include considerations of the safety and security of detainees and staff as well as safety risks to the individual detainee posed by the design of the physical environment).

    (ii) They may permit the s 45 entitlements to be denied to (or restricted for) individual detainees for corrections management reasons (which may include considerations of the safety and security of detainees and staff as well as safety risks to the individual detainee posed by the design of the physical environment).

    (iii) They may permit the s 45 entitlements to be denied (or restricted) only for non-routine or unforeseen events in a corrections management setting and not for routine and foreseeable corrections management reasons (for which planning, building renovation and changes to resourcing and procedure are required in order to avoid the routine denial of entitlements).

19. Where a provision is capable of more than one possible meaning, s 30 requires the selection of the meaning that is most compatible with the relevant HRA right, provided that such a meaning is also consistent with its legislative purpose. Purpose should be ascertained by reference not only to the purpose of s 45 (as asserted by the defendant), but also in relation to the overall objectives of the CMA. In *Re Application for Bail by Islam*, Penfold J observed that:[30]

> [T]he *Human Rights Act* invites the courts to look at the purpose and meaning of specific provisions, or provisions dealing with specific topics, against the general background of any higher level purpose (whether that is found by reference to the Act, a Chapter, Part or Division of an Act or indeed by reference to a group of Acts by which a policy or scheme is implemented), and

[30] *Re Application for Bail by Islam* (2010) 4ACTLR, [52] (Penfold J).

to decide about the human rights implications of those provisions in that context.

20. The Commissioner submits that upholding the human rights of detainees, as informed by international law standards, is a clearly discernible purpose of s 45 and the CMA overall:

(a) It can readily be seen from the Preamble to the CMA, and the objects and principles set out in Part 2 of the Act that the overarching purpose of the CMA is to establish a human rights compliant detention regime which is aimed at achieving the secure but humane custody of offenders.

(b) It is also apparent that by providing "a statutory basis for rules 9 to 26, 37 to 39, 41 and 42 of the Standard Minimum Rules for the Treatment of Prisoners (1957)",[31] Chapter 6 of the CMA, which sets out the minimum living conditions that must be afforded to each detainee, including the s 45 entitlements, has a rights-protective purpose that is intended to be informed by international law standards.

(c) Consistent with the rights-protective objectives of the CMA, the *Corrections Management (Human Rights) Policy 2010* commits the defendant to 'meeting or exceeding the minimum standards for the treatment of prisoners in accordance with the HRA, which reflects the internationally agreed framework of human rights.[32] Similarly, the standards (including entitlements to open air and exercise)[33] articulated in the *Corrections Management (Human Rights Principles for ACT Correctional Centres) Direction 2019*, which the defendant is directed by the Minister to consider when making policies and operating procedures,[34] are also underpinned by international law standards (including the *Nelson Mandela Rules*).[35]

[31] Explanatory Statement, Corrections Management Bill 2006, p 19.

[32] *Corrections Management (Human Rights) Policy 2010,* cl 2.1 (made under s 14, CMA).

[33] *Corrections Management (Human Rights Principles for ACT Correctional Centres) Direction 2019,* cl 6.1 (made under s 13, CMA).

[34] *Corrections Management (Human Rights Principles for ACT Correctional Centres) Direction 2019,* s 3 (made under s 13, CMA).

[35] *Corrections Management (Human Rights Principles for ACT Correctional Centres) Direction 2019*, p 3 (made under s 13, CMA).

21. What is practicable must be considered in the context of what is being done and why (that is, in context). Depending on the context, the standard may be very demanding (for example, as when sentencing a child offender,[36] or where physical safety in a workplace is at stake[37]), or it may be less demanding depending on the particular circumstances or subject matter (for example, where requiring strict compliance with limitation periods would unreasonably deny individuals the opportunity to vindicate their rights).[38] In the context of providing minimum guarantees for prisoners, the Commissioner submits that the standard applied should be demanding. As a first world human rights jurisdiction, it could be argued that more should be required of the defendant than mere adherence to minimum standards that have been formulated to be applied globally.

22. The Commissioner submits that, consistent with the purpose of s 45 and the CMA, the phrase "as far as practicable" should be given a meaning that is at least as consistent with the baseline international human rights standards. Those standards accept that the obligation to ensure a daily minimum period of exercise and open air is not absolute, however as a minimum baseline requirement it cannot be made dependent on resources,[39] or be denied (or restricted) lightly or routinely. In conformity with rule 23(1) of the *Nelson Mandela Rules*, the examples provided in the Explanatory Statement contemplate only a narrow range of circumstances where it would not be practicable to provide the minimum entitlement to open air and exercise. These do not extend to routine factors and considerations that are part of the normal operations in any correctional management setting (such as having to manage prisoners with behavioural problems or taking steps to ensure that prison spaces are fit for purpose).

23. Interpretive options (i) and (ii) described above would impermissibly broaden the circumstances in which the defendant could be excused for a failure to comply with its obligations under s 45, and would permit s 45 to operate in a way that unreasonably limits human rights. Both interpretations are not consistent or compatible with the right to

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[36] *CNK v R* (2011) 32 VR 641.

[37] *Owen v Crown House Engineering Ltd* [1973] 3 All ER 618, pp 622-623 (citing *Adsett v K & L Steelfounders & Engineers Ltd* [1953] 1 All ER 97, [1953] 1 WLR 137; and *Lee v Nursery Furnishings Ltd* [1945] 1 All ER 387).

[38] *Owen v Crown House Engineering Ltd* [1973] 3 All ER 618.

[39] UNHRC, *General Comment No. 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 1992, [4].

humane treatment in s 19 of the HRA (as informed by international standards), nor are they consistent with the purpose of s 45, read in light of the statutory regime established by the CMA as a whole.

24. The restrictions on minimum entitlements contemplated by the defendant in its preferred construction of s 45 (option (ii)) are significantly more severe than those contemplated by the legislature when it passed the CMA. While option (ii) is ostensibly less restrictive than implementing a blanket policy (option (i)), both interpretations would extend the defendant's discretion to curtail detainees' access to minimum entitlements beyond what was intended by the legislature.

25. The interpretation in option (iii), for which the Commissioner contends, should be preferred. Having regard to the ordinary principles of statutory interpretation, the available meaning that best achieves the legislative purpose of s 45 and the CMA is that the words "as far as practicable" should not be interpreted to cover routine events in the correction management setting. As such an interpretation is possible in accordance with the ordinary rules of statutory interpretation, s 30 requires it to be adopted.

E. THE OBLIGATION IN s 40B

26. Finally, the Commissioner rejects the defendant's characterisation of the operation of the obligation to give proper consideration to human rights in this matter. The defendant asserts that "[t]he absence of proper consideration does not follow automatically from conduct that is inconsistent with human rights (even if such incompatibility were to be accepted)",[40] because it is argued that the issue turns exclusively on the interpretation of the entitlements in s 45 and whether or not the defendant had afforded those entitlements.[41]

27. The defendant's submissions appear to misstate the operation of the public authority obligations in the HRA. The procedural and substantive limbs in s 40B(1) are not mutually exclusive, and it would be incorrect to separate the end conduct from the underlying decision(s) that were taken to enable that conduct, particularly in

[40] Defendant's submissions, [120].

[41] Defendant's submissions, [120].

circumstances where the defendant retains the discretion under s 45 to determine access to the relevant entitlements. The obligation in s 45 is not framed – and cannot be interpreted – as a direction to do things in only one way. Therefore, the scope of the entitlements afforded to a detainee under s 45 will specifically turn on how the defendant decides to operationalise what is practicable, properly construed. That will necessarily include being required to give proper consideration to human rights when designing the relevant policies and operating procedures that apply.[42]

Dated: 3 May 2021

SARALA M C FITZGERALD

Castan Chambers

[42] *Minogue v Thompson* [2021] VSC 56, [45]-[78].