

Davidson v Director-General, Justice and Community Safety Directorate [2022] ACTSC 83

Court/tribunal

ACT Supreme Court (Loukas-Karlsson J)

Cause of action

Action for breach of human rights (s 40C); judicial review

Application of *Human Rights Act 2004*

Interpretive obligation (s 30) – meaning of “access to the open air”, “can exercise” and “as far as practicable” in s 45 of *Corrections Management Act 2007*

Public authority obligations (s 40B) – denial of access to the open air and exercise;

Rights engaged / discussed

- Right to humane treatment while deprived of liberty (s 19)
- Right to liberty and security of the person (s 18)
- Protection from torture and cruel, inhuman or degrading treatment etc (s 10)

Commission intervened?

Yes – application for leave filed on 6 November 2020; leave granted on 27 November 2020

Hearing:

5-6 May 2021, 3 June 2021

Orders made:

17 June 2021

Reasons and further orders:

21 April 2022

About the intervention

The Human Rights Commission intervened in the ACT Supreme Court to clarify the human rights arguments relevant to a detainee’s entitlement to a minimum daily level of open air and exercise:

[*Davidson v Director-General, Justice and Community Safety Directorate \[2022\] ACTSC 83*](#)

Summary

The ACT Supreme Court found that the failure by prison authorities at the Alexander Maconochie Centre (AMC) to provide a detainee with his minimum entitlement to “open air” and access to a suitable place to exercise breached the detainee’s right to humane treatment under s 19(1) of the *Human Rights Act 2004* (HR Act). The Court also declared invalid Clause 4.3 of the [*Corrections Management \(Separate Confinement\) Operating Procedure*](#) for being inconsistent with the minimum entitlement to “open air” as expressly recognised in the *Corrections Management Act 2007* (CMA). The Court also later issued its only second-ever declaration of incompatibility, under s 32 of the HR Act, concerning this clause.

Facts and background

Over several periods between October 2018 and September 2019, the plaintiff, Mr Davidson, had spent 63 days in segregation in the AMC's Management Unit. He alleged that, during these periods of confinement, ACT Corrective Services (ACTCS) had failed to respect his minimum entitlement to one hour of open air and exercise, required under ss 12(1)(e) and 45(1) of the CMA, and various rights under the HR Act, including his right to humane treatment while deprived of liberty (HR Act, s 19). The central issue was whether restricting access to an enclosed rear courtyard (roughly the same dimensions as the detainee's cell, with four solid walls, metal mesh overhead, and a thin horizontal window onto a small grassy area) met requirements related to his right to humane treatment. The evidence in this matter involved the Court and parties conducting a view of the rear courtyard, and a less enclosed, larger exercise yard that the plaintiff argued he could never access.

Interpretive obligation

Justice Loukas-Karlsson approached the interpretation of s 45(1), as required by s 30 of the HR Act, against the background of the HR Act, including reference to relevant international jurisprudence (eg *Taunoa v NZ*) and standards (*UN Standard Minimum Rules for the Treatment of Prisoners / Mandela Rules*). That detainees' human rights are prominent in the CMA's provisions, its objects, preamble and explanatory statement was also relevant.

Her Honour held that access to the rear courtyard of the Management Unit does not afford a detainee access to "an outdoor space" nor "a suitable space in which to exercise." Her Honour accepted that the phrase "as far as practicable" qualifies the entitlement, but construed this exception narrowly; as only applying to exceptional circumstances external to the normal operation of the AMC (eg a lockdown, inclement weather). Ongoing or routine obstacles that can be relatively efficiently and practicably resolved (eg staffing levels or the built environment) cannot, she indicated, justify a failure to afford detainees basic entitlements.

Operating procedure

Given the Court's finding that the rear cell courtyards did not provide an adequate "outdoor space" in which to exercise, it followed that Clause 4.3 of the *Corrections Management (Separate Confinement) Operating Procedure*, which deemed the rear cell door being open to count as a detainee's minimum one hour of air and exercise, was inconsistent with s 45(1) of the CMA. As the CMA only allows ACTCS to make operating procedures that are 'consistent with the [CMA]', Her Honour declared the operating procedure to be invalid; as if it never had any legal effect. Additionally, Her Honour issued a declaration that Clause 4.3 was incompatible with the right to humane treatment in s 19(1) of the HR Act insofar as it had sought to "deem" the rear courtyard as compliant with important elements of that right.

Public authority obligations

The Court affirmed that any limitation of human rights must be "set by law" and so conform to any legislative safeguards or requirements of the law that authorises it. Because ACTCS did not comply with s 45(1) by denying the plaintiff access to the existing general exercise yard (in favour of the rear courtyard), the plaintiff's right to humane treatment was not limited in a way that was "set by law." ACTCS was therefore held to have breached its duties as a public authority, under s 40B(1) of the HR Act, to act compatibly with human rights. There was also no evidence to establish that ACTCS had properly considered relevant rights in enacting Clause 4.3 or in adopting a practice that denied detainees access to the general exercise yard.

Commentary

Davidson v Director-General, Justice and Community Safety Directorate [2022] ACTSC 83 represents a significant clarification of the principles that govern the operation of public authority obligations under the HR Act. This decision notably marks the first consideration of a public authority's duty to properly consider 'relevant' human rights when making a decision by the ACT Supreme Court.

- It is a low threshold for determining whether a human right is 'relevant' to a decision and, in doing so, courts should construe rights "in the broadest possible way".
- Proper consideration obliges a public authority to understand in general terms which rights may be relevant and whether and how their decision will interfere with those rights. A decision-maker must seriously turn their mind to the decision's possible impact on an affected person's human rights and the implications for that person, and identify the countervailing interests and obligations (per *Castles v Secretary, Department of Justice* [2010] VSC 310).
- Proper consideration will involve balancing competing private and public interests. There is no formula for this exercise, and it should not be scrutinised overzealously by the courts.
- Proper consideration must be based on correct factual assumptions, or at very least a procedure to avoid such errors.
- Mere "lip-service" to a human rights instrument, such as the HR Act, while working towards a pre-determined outcome will not amount to giving proper consideration to human rights.

The Court also drew on Victorian jurisprudence to further describe the "heavy burden" that a public authority must bear in justifying any limitations of rights caused by their actions or decisions. This high standard of proof requires "a degree of probability commensurate to the occasion and must be strictly imposed in circumstances where the plaintiff is particularly vulnerable."

As a general observation, Her Honour briefly remarked, regarding the two exceptions to a public authority's duties in s 40B(2), that application of either will necessarily infer an incompatibility on the face of an ACT law or an inability to interpret an ACT law consistently with human rights.

Humane treatment while deprived of liberty

The decision also provides some useful guidance about the scope and content of the right to humane treatment while deprived of liberty (s 19(1) of the HR Act). The Court rejected ACTCS' argument that the right to humane treatment should be interpreted in the same way as the prohibition on cruel, inhuman or degrading treatment (s 10(1)(b) of the HR Act), which prohibits "bad conduct" towards any person, detained or not.

The scope of the right to humane treatment should not be conflated with or limited to incidents of ill treatment, and can, as such, may arise from general conditions of detention. Drawing on Victorian jurisprudence (Emerton J in *Castles v Secretary, Department of Justice*), Her Honour emphasised that the right to humane treatment instead obliges public authorities to take positive measures to ensure detainees are treated with dignity and humanity.

Relief

The Court declined a novel remedy sought by the plaintiff, under s 40C(4) of the HR Act, to have his sentence backdated for the 63-day period over which his human rights were held to be breached.