Kirkman v Moore [2001] NTCA 10

PARTIES:	MARCUS JOSEPH KIRKMAN v DAVID MOORE
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP67 of 2001
DELIVERED:	4 October 2001
HEARING DATES:	9 August 2001
JUDGMENT OF:	MARTIN CJ, MILDREN & BAILEY JJ

REPRESENTATION:

Counsel:

Appellant:	N. Green Q.C. and P. Gray
Respondent:	A. H. Silvester

Solicitors:

Appellant:	Central Australian Aboriginal Legal Aid Service
Respondent:	Withnall Maley & Co.

Judgment category classification:	B
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Kirkman v Moore [2001] NTCA 10
No. AP67 of 2001

BETWEEN:

MARCUS JOSEPH KIRKMAN
Appellant

AND:

DAVID MOORE
Respondent

CORAM: MARTIN CJ, MILDREN & BAILEY JJ

REASONS FOR JUDGMENT

(Delivered 4 October 2001)

THE COURT

[1] On 11 September 2000 the appellant was sentenced to imprisonment for a period of four years and six months with an order that he be released under the provisions of the *Sentencing Act* after serving two years imprisonment. The sentence was backdated to allow for time that the appellant spent in custody awaiting sentence. The appellant is due to be released on 5 December 2001.

[2] The prisoner began to serve his term of imprisonment at the Darwin Correctional Centre where he had been held in remand since December 1999.

[3] In the Northern Territory there are two adult Correctional Centres; one situated at Darwin and the other some 1,500 kilometers away at Alice Springs. Each Centre has a maximum capacity of 400 prisoners. On occasion it is necessary to transfer prisoners between the two Centres. There are many more persons sentenced to terms of imprisonment in Darwin than is the case in Alice Springs and when the number of prisoners approaches the maximum at the Darwin Correctional Centre, the Director of Correctional Services (the respondent, David Moore) must consider the transfer of prisoners from that Centre to the Alice Springs Correctional Centre.

[4] The legislative authority for the Commissioner of Correctional Services to remove a prisoner from one Centre to another, is to be found in s 58 of the *Prisons (Correctional Services) Act* (the Act). The exercise of the statutory power of removal is the subject of a Directive issued by the respondent, the terms of which have developed over a period of time.

[5] The initial decision that a transfer of some prisoners is necessary is made by the respondent based upon his knowledge and experience regarding prison operations and security. There is an assessment procedure followed by the Department. When it becomes necessary to effect a transfer, officers of the Department prepare a list of prisoners who are eligible and are available for transfer. That list identifies the prisoners who are suitable for transfer from the total pool of prisoners at the Darwin Correctional Centre. The list does not include prisoners who are ineligible for transfer because they have

matters pending before a court in Darwin, have less than three months to serve, are involved in prisoner rehabilitation programs, are involved in essential services or community work programs, or those in respect of whom the objection period has not expired. There are other reasons why prisoners may be ineligible for transfer. Further, prisoners are not transferred if there is sufficient capacity within their classification in the Darwin Correctional Centre. The identification of prisoners eligible for transfer involves input from medical, welfare and education officers within the prison. Of the total prison population, only somewhere between ten and fifteen percent of prisoners are at any time both eligible and available to be transferred.

[6] When the identity of those eligible and available to be transferred has been determined, the respondent undertakes what is described as a "balancing exercise". He considers each name on the list and satisfies himself that those prisoners are eligible for transfer. In determining who will be transferred, the respondent takes into account many matters including maintaining the racial mix of the prison, the personal circumstances of the individual prisoners and security and operational considerations.

[7] The assessment procedure allows individual prisoners to object to being placed upon the list of those eligible for transfer. At the time of being placed upon the list each prisoner is informed that this has occurred and told that he or she has a right of "appeal" or "objection" to the respondent. The prisoner is also told that should his or her circumstances change at any time a further application in writing to the respondent may be made. In the event

of an objection being received, the matter is reviewed by the respondent in the light of the further information provided by or on behalf of the prisoner. The balancing process is again undertaken by the respondent and a further decision made.

[8] In May 2000, whilst on remand, the appellant wrote to the respondent indicating his desire not to be transferred to Alice Springs. He referred to his family and indicated that any transfer would make him think of suicide. The respondent replied by letter dated 6 June 2000 in which he informed the appellant that he would not be considered for placement in Alice Springs Correctional Centre whilst he was on remand. He was informed that once he was dealt with by the courts and if he received a term of imprisonment, then he would be assessed for suitability for transfer against the prisoner placement criteria.

[9] The prisoner was sentenced on 11 September 2000 and he was notified on 14 September 2000 that his name had been placed on a list of those prisoners considered eligible for possible transfer from the Darwin Correctional Centre to the Alice Springs Correctional Centre. He was, at that time, informed that he had a period of fourteen days in which to make "application of appeal in writing to the Commissioner setting out valid and compelling reasons to preclude (him) from placement in Alice Springs Correctional Centre". He was told that he could speak with various identified officers who may be able to assist in the preparation of the appeal.

He was also advised that if at any time "an extreme change" in his circumstances occurred, he could make further application to the respondent.

[10] The appellant wrote to the respondent stating that he did not wish to transfer to Alice Springs. He set out his reasons which were that he only had fifteen months of his sentence to serve; that he has a wife and three children in Darwin; that he and his wife "are starting to work things out properly" and "any transfer would be very upsetting for my wife and children".

[11] The respondent replied to the appellant by letter dated 27 September 2000 indicating that the information provided did not cause him to change his mind. It was pointed out that visits with the family could still occur through video conferencing facilities provided by the prison. The letter also informed the appellant that no decision to transfer him had been made at that time, but that this situation "may change at some time in the future".

[12] In September 2000, an Assistant Commissioner wrote to the North Australian Aboriginal Legal Aid Service (NAALAS) enclosing a list of prisoners assessed as suitable for transfer to the Alice Springs Correctional Centre. The name of the appellant was on that list. No appeal or objection was made on behalf of the appellant by NAALAS.

[13] On or about 9 March 2001, the respondent directed that the appellant be transferred to the Alice Springs Correctional Centre. The appellant was informed of that on the day of his impending transfer. He spoke to his wife by telephone and then met with his wife and children on 13 March 2001. He

was transferred from the Darwin Correctional Centre to the Alice Springs Correctional Centre on 13 March 2001.

[14] Upon his arrival in Alice Springs, the appellant obtained legal representation through the Central Australian Aboriginal Legal Aid Service (CAALAS). On 15 March 2001, CAALAS wrote to the respondent and requested a review of the appellant's case on "welfare and procedural fairness" grounds. The letter set out the personal circumstances of the appellant and, for the first time, advised that the appellant's mother, who along with his wife and children had been a regular visitor to him in Darwin, was suspected by him of suffering from cancer. Whether or not she in fact suffered from cancer was not able to be determined by the learned Trial Judge.

[15] In the letter it was observed that the appellant had lost "six close members of his family: his auntie, two uncles, a grandfather and two cousins" and that he had been engaged in a "grief and loss" program in Darwin which was not available to him in Alice Springs. The letter advised the respondent that the appellant had threatened suicide and was, at that time, classified as a prisoner "at risk". In relation to the claim that the appellant was not accorded procedural fairness, it was said that he was not told of his "right to appeal the decision to transfer him to Alice Springs".

[16] The respondent treated that letter as a further objection. He took into account the matters raised but said that he "found no compelling reasons to preclude (the appellant) from transfer". The respondent said that his

information was that the appellant was then "settling in well" in Alice Springs.

[17] The appellant, through his solicitors, then obtained psychological assessments of himself, his wife and his children. These were provided to the respondent with the following request:

> In the light of these reports we invite you to reconsider your decision and specifically invite you to take into account Recommendation 168 of the Royal Commission into Aboriginal Deaths in Custody and Article 3.1 of the United Nations Convention on the Rights of the Child, which provides that "in all actions concerning children ... the best interests of the child shall be a primary consideration".

[18] The psychological report in relation to the appellant provided a more detailed review of his history. It recorded that, although he had in the past sought to harm himself and he had threatened suicide at the time of his transfer, he did not present with any suicidal ideation at the time of interview. The psychologist assessed the risk of suicide as "immediately low" in Alice Springs but noted that the risk of developing depression (which was not then present) was a higher risk at Alice Springs. It was said that his anger and grief needed to be addressed by both the appellant himself and by Correctional Services and that the necessary programs were not available in Alice Springs. The report referred to the distress that had been suffered by the family as a result of his transfer. It was said that it was in his best interests to relocate to Darwin where he would have contact with, and the support of, his family. It was suggested that in Alice Springs he "is

at high risk of developing depressive and trauma related symptomatology that will seriously compromise his mental health".

[19] The file of the appellant revealed that he had been assessed as a prisoner at risk of self-harm on 12 March 2001 which was the day before he was transferred. He was removed from that category by the visiting medical officer later on that day. He was also assessed as a prisoner at risk of self-harm on 14 March 2001 and the cessation of risk was recorded by a forensic psychiatric nurse consultant later on that day. It was noted that he had suffered from mild separation anxiety and anger due to the transfer from Darwin. It was said that he posed no threat to himself or others.

[20] The other report provided by the solicitors recorded an apparent close attachment between the appellant and his children. It was noted that their mother was doing an "excellent" job in rearing the children. The report recorded that the appellant's family is "not a traditional Aboriginal family" and that the parents had adopted a "more European approach". The report made the point that, as with most children, the children in this family want to have a close relationship with both parents.

[21] The Commissioner treated the letter and the reports as a further objection to the decision to transfer the appellant from Darwin to Alice Springs. He wrote to the legal representatives of the appellant on 6 April 2001. Again he referred to the appellant's right to receive visits being exercised through the medium of video conferencing. That service was free of charge and based

upon the same conditions as personal visits. In relation to the United Nations Convention on the Rights of the Child, the Commissioner noted that "to the extent that it is reasonably possible, given the availability and location of the two institutions, the Northern Territory complies with this Convention". The effect of the letter was to reject the further objection. The appellant brought proceedings by way of an originating motion seeking orders in the nature of certiorari and mandamus.

[22] The basis of the attack in the Court at first instance upon the decision to remove the appellant from Darwin to Alice Springs Correctional Centre rested on a claim that the appellant had been denied procedural fairness and the decision to transfer the appellant was unreasonable and an abuse of power. An alternative submission was based upon the provisions of s 58 of the *Prisons (Correctional Services) Act* which provides that a prisoner shall, on the order of a Judge of the Supreme Court, be removed from a prison to another prison. It was submitted that the Court had an unfetted discretion to grant relief to the appellant by an exercise of the power found in that section. The learned Trial Judge rejected the appellant's submissions and declined to grant any of the relief sought.

[23] The appellant has appealed to this Court on a number of grounds. Counsel for the appellant abandoned all the grounds except grounds 4 and 6 in the notice of appeal. Ground 4 provides:

The learned trial judge erred by addressing the question whether the United Nations Convention on the Rights of the Child was "taken into account" by the respondent rather than the questions:

(a) whether the respondent treated the best interests of the appellant's children as a primary consideration in making the transfer decision, the first re-transfer refusal and the second re-transfer refusal; and if not,

(b) whether the respondent informed the appellant that he proposed to make a decision inconsistent with the appellant's legitimate expectation that the best interests of his children would be treated as a primary consideration in the making of each of the aforesaid decisions and provided to the appellant an adequate opportunity to present a case against the taking of such a course in the making of each of the aforesaid decisions.

(c) His Honour ought to have addressed the aforesaid questions.

(d) His Honour ought to have found that:

(i) the respondent did not treat the best interests of the appellant's children as a primary consideration in making the transfer decision, the first re-transfer refusal and the second re-transfer refusal; and

(ii) the respondent did not inform the appellant that he proposed to make a decision inconsistent with the appellant's legitimate expectation that the best interests of his children would be treated as a primary consideration in the making of each of the aforesaid decisions and did not provide to the appellant an adequate opportunity to present a case against the taking of such a course in the making of each of the aforesaid decisions.

[24] Ground 6 of the notice of the appeal is as follows:

The learned trial judge erred in misconceiving the nature of section 58 of the *Prisons (Correctional Services) Act* in that:

(a) his Honour erroneously circumscribed the conditions under which the power conferred on the Court by s 58 could be exercised;

(b) his Honour ought to have held that the power conferred on the Court by s 58 was not so circumscribed and further was not conditional upon the presence of reviewable error in the transfer decision, first re-transfer refusal and second re-transfer refusal;

(c) his Honour ought to have held that the power conferred on the Court by s 58 was capable of being exercised afresh by the Court;

(d) his Honour ought to have found that, treating the best interests of the applicant's children as a primary consideration and in compliance with the terms of Recommendation 168, on all the evidence before the Court the correct and preferable decision was to direct pursuant to s 58 that the appellant be removed from the Alice Springs Correctional Centre to the Darwin Correctional Centre.

[25] After hearing submissions from Mr Green QC, counsel for the appellant, and Mr Silvester, counsel for the respondent, the Court announced that the appeal would be dismissed with the Court's reasons to be published at a later time. We now provide the reasons for that decision.

[26] The basis of the appellant's argument in relation to ground 4 is the decision of the High Court in *Minister for Immigration & Ethnic Affairs v Teoh* (1994-5) 183 CLR 273 where a majority held that the United Nations Convention on the Rights of the Child gave rise in administrative law to a legitimate expectation that, absent statutory or executive indications to the contrary, administrative decision-makers will act in conformity with the Convention and treat the best interests of children as "a primary

consideration". This gave rise to considerable discussion about whether or not the legitimate expectation referred to in *Teoh* applied only to decisions made by the Commonwealth and its officers, or whether it also applied to the States and Territories and their officers; and also as to whether or not a statement made by the Attorney-General for the Northern Territory in the Legislative Assembly on Wednesday 29 November 1995 amounted to "executive indications to the contrary" so as to remove any claim by the appellant that he had a legitimate expectation based upon that convention. In our view it is not necessary to decide these matters.

[27] There was only very limited evidence in the Court at first instance which touched on the question of whether or not the respondent treated the appellant's childrens' rights as a primary consideration. The only evidence before the learned Trial Judge on the matter consisted of the appellant's solicitor's letter to the respondent of 30 March 2000, the respondent's reply of 6 April 2001 and a short passage in the respondent's affidavit. The letter of 30 March 2000 says (in the relevant paragraph):

> In light of these reports we invite you to reconsider your decision and specifically invite you to take into account Recommendation 168 of the Royal Commission into Aboriginal Deaths in Custody and Article 3.1 of the United Nations Convention on the Rights of the Child, which provides that "(i)n all actions concerning children ... the best interests of the child shall be a primary consideration."(*sic)*

[28] The respondent's reply is to the following effect:

> You raise the United Nations Convention on the Rights of the Child. Following receipt of legal advice, this Convention does not apply to

> the Northern Territory and the transfer of prisoners are in accordance with Northern Territory laws which regulates the transfer of prisoners. However, to the extent that it is reasonably possible given the availability and location of the two institutions the Northern Territory complies with this convention.

In the respondent's affidavit, the respondent said that in reaching the relevant decision (which was in fact the last of the re-transfer decisions) "I took into account all of the matters raised in the letter from CAALAS together with the psychologist reports of Jane Vadiveloo dated 30 March 2001 and Anthony Franklin dated 25 March 2001.".

[29] The submission of Mr Green QC was that this material shows that the respondent did not treat the appellant's children as "a primary consideration".

[30] It is to be noted that Mr Green QC did not suggest that the decision in *Teoh* meant that the best interests of the appellant's children was the only primary consideration. He conceded frankly that there may well be other primary considerations, such as the fact that Darwin Correctional Centre was over-crowded. However, we do not consider that it can be inferred from the very limited materials that the respondent did not treat the best interests of the appellant's children as a primary consideration. We note that the respondent was not cross-examined on his affidavit in which the respondent says in effect that he took into account all of the matters raised in the appellant's solicitor's letter. That is open to be read as meaning, particularly given what is said in the letter of 6 April 2001, that the respondent did treat the

appellant's children as a primary consideration. In any event, the burden of proof in relation to this matter rests upon the appellant and we are not persuaded that an adverse inference should be drawn by this Court, particularly as the matter has not been the subject of any cross-examination by counsel for the appellant in the Court at first instance.

[31] As to ground 6 of the appeal, we are not persuaded that the learned Trial Judge fell into error in refusing to exercise the power conferred by s 58 of the Act.

[32] In our opinion, having regard to the purposes of the Act and in particular to the fact that the respondent has by virtue of s 6(2) of the Act control and custody of all prisoners, the exercise of the power conferred by s 58 of the Act by a judge ought to be confined to a purpose properly relevant to or connected with some criminal or civil proceedings before the court.

[33] In our opinion, no ground was made out before the learned Trial Judge or before this Court as to why s 58 should be invoked in favour of the prisoner to order his removal from the Alice Springs Correctional Centre to the Darwin Correctional Centre.

[34] Accordingly, for these reasons the appeal must be dismissed.

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