Murielle & Ors v Moore & Anor [2000] NTSC 23

PARTIES:	CHRISTOPHER MURIELLE, MATHEW LALARA, HAMILTON LALARA, CAMPSON LALARA AND JAMES BISHOP v DAVID MOORE AND ERIC HOLT
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY
FILE NO:	56 of 1999
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JUDGMENT OF:	Mildren J

REPRESENTATION:

Counsel:

Plaintiffs:	C Howse and D Beckett
Defendants:	M Spargo

Solicitors:

Plaintiffs:	North Australian Aboriginal Legal Aid Service
Defendants:	Withnall Maley

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IN SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Murielle & Ors v Moore & Anor [2000] NTSC 23

No. 56 of 1999

BETWEEN:

CHRISTOPHER MURIELLE, MATHEW LALARA, HAMILTON LALARA, CAMPSON LALARA AND JAMES BISHOP
Plaintiffs

AND:

DAVID MOORE AND ERIC HOLT
Defendants

CORAM: Mildren J

REASONS FOR JUDGMENT

(Delivered 14 April 2000)

MILDREN J*:*

[1] Each of the plaintiffs, having been sentenced to serve terms of imprisonment, and having been committed to prison, were initially taken into custody at the Darwin Correctional Centre at Berrimah. The defendant Moore is the Commissioner for Correctional Services and the Director of Correctional Services, appointed pursuant to s6(1) of the *Prison (Correctional Services) Act* (the Act) who, pursuant to s6(2) has the control of all prisons and the custody of all prisoners in this Territory. On 23 March 1999 the plaintiffs were transferred from the Darwin Correctional

Centre (colloquially known as "Berrimah") to the Alice Springs Correctional Centre. Both of the aforementioned Correctional Centres are prisons declared under s10 of the Act. The defendant Holt was, at the relevant time, the assistant Commissioner-Operations for the Northern Territory Correctional Service and the delegate of Commissioner Moore for the purposes of the management of the policy relating to the transfer of prisoners from one prison to another.

[2] The power to transfer prisoners is contained in s58 which provides:

> 58. PRISONER MAY BE REMOVED
>
> A prisoner shall -
>
> (a) on the order of a Judge of the Supreme Court; or
>
> (b) at the written direction of the Director,
>
> be removed from a prison or police prison to another prison or police prison or be brought before a court or taken to such other place as required.

[3] The plaintiffs seek certain declarations that the transfers were unlawful and beyond power and for orders in the nature of *certiorari* and *mandamus* quashing the decisions to transfer them and requiring those decisions to be reconsidered on four grounds:

1. the decisions to transfer were made without according to the plaintiffs' procedural fairness;

2. the transfer did not comply with s58 as there was no written direction by Commissioner Moore or his delegate authorising it;

3. the decisions to transfer were made without taking into account considerations relevant to the decisions to transfer;

4. the transfer had the effect of cancelling the right of each of the plaintiffs to receive visitors.

Christopher Murielle

[4] The plaintiff Christopher Murielle is serving a sentence of imprisonment for six years. He will become eligible for parole in October 2001. He is twenty-nine years of age, married, with one daughter. He was born in Port Keats and has lived there all of his life except for about two years when he lived at Palumpa Outstation. He is able to read some English, and can also speak English, but he is not completely fluent in that language. He claims that the first that he was made aware he might be sent to serve his sentence in the Alice Springs Correctional Center was about two days before he was actually sent. He says he did not want to go there. Whilst in the Darwin Correctional Center he received visitors nearly every day. Since being transferred the only contact he has had is one telephone call once a month. His transfer also interfered with arrangements he had in place to attend a family funeral (pursuant to s63 of the Act). On 22 March 1999, the North Australian Aboriginal Legal Aid Service (NAALAS) wrote to the Acting Director of the Department on Mr Murielle's behalf indicating that he

received regular visits from his sister and did not want to be transferred. Mr Murielle was cross-examined. He denied being told by Prison Officer Hoskins when he was first sent to the Darwin Correctional Centre anything about the possibility of transfer to Alice Springs. He had also been transferred to Alice Springs on a previous occasion whilst serving a sentence in Darwin.

Mathew Lalara

[5] The plaintiff Mathew Lalara is not due for parole until December 2000. There is no evidence as to the length of his head sentence. He is twenty-two years of age, married with one child. He was born at Gove but has apparently lived most of his life on Groote Eylandt. Before being transferred to Alice Springs Correctional Centre he had visits by members of his family, but it is not clear on how many occasions. Since his transfer, he has had one visit from a cousin-brother. He has also had some telephone contact with his family. He claims not to have been aware that he was on a list of prisoners eligible to be transferred to Alice Springs. The first he knew he was to be transferred was about a week before the transfer. On 22 March 1999, NAALAS wrote to the Acting Director of the Department on his behalf advising that he did not wish to be transferred, that he would lose contact with his family if transferred and wanted to remain in close contact in the event of the death of his family. He was not cross-examined on his affidavits.

Hamilton Lalara

[6] The plaintiff Hamilton Lalara is not due for parole until 1 January 2001. There is no evidence as to the length of his head sentence. He is nineteen years of age and single. He has lived all of his life at Anguragu, on Groote Eylandt. According to his affidavit, Ext P3, the first time he knew he was going to Alice Springs was at the time when he was put on a truck to go to the airport. In a subsequent affidavit, Ext P8, he acknowledges making a telephone call from Darwin Correctional Centre to his father to tell him about his impending transfer. The date of this phone call is not in evidence. In cross-examination he agreed with a proposition put to him in leading form to the effect that a short time after he arrived at the Darwin Correctional Centre, he was told about "maybe being transferred to Alice Springs at some time". Later in re-examination, he answered much the same question in the negative. He also agreed that he was told by a prison officer - but he could not recall whom - that he would be transferred to Alice Springs about three days before he left Darwin. He claims to have had about one visit per month whilst in Darwin. It seems that his only communication with visitors since being transferred was a visit from a lawyer and his sister (who acted as interpreter) and a video-conferencing session with his father. In addition, in the letter of 22 March 1999 from NAALAS previously referred to, the Acting Director was advised that Hamilton did not want to be transferred because he receives family visits in Darwin and is concerned about lack of contact if he is transferred.

Campson Lalara

[7] The plaintiff Campson Lalara is eligible to be released on parole in September 2000. I have no information as to the length of his head sentence. He is twenty years of age and single. It is not entirely clear, but he appears to have spent most of his life - if not nearly all of it - living on Groote Eylandt. He claims not to have been made aware that he was placed on a list of prisoners eligible to be transferred to Alice Springs. He acknowledged receiving a copy of the Prisoner's Handbook when he first went to gaol. He says that the first he knew he was going to be transferred was on the Thursday before he was transferred, i.e., on 18 March 1999. He said that he had some visitors whilst in Darwin (it seems on only one occasion) and none at all since being transferred, although he has tried to telephone his family. He claims that his mother passed away whilst he was at the Darwin Correctional Centre and he was unable to attend her funeral, and that his father is getting old and is unable to walk. In the letter of 22 March 1999 from NAALAS referred to previously, it says that he does not wish to be transferred as he receives family visits in Darwin and wants to remain close to his home community as a family member is ill. He was not cross-examined.

James Bishop

[8] The plaintiff James Bishop is twenty-four years of age. I am not sure of his racial heritage. Presumably, as he is represented by NAALAS, he is at least part Aboriginal. He was born in Newcastle, NSW, but grew up in Brisbane.

He was adopted as a very young child and attended Ipswich West State School. He has been living on the streets since the age of 13 and has been in and out of various institutions for a good part of his life. When he was aged seventeen, he met his natural mother who now lives in Darwin and he has maintained a relationship with her. He has also met his natural father, but has not seen him since he was aged nineteen. He has been serving a lengthy sentence commencing in November 1995 for armed robbery and breaking and entering. His head sentence is not due to expire until 2005. He will become eligible for parole in November 2000.

[9] When he was first imprisoned, Mr Bishop was told that his name was on a list of people eligible to be transferred to Alice Springs. He is unable to recall if he was told he could appeal to the Commissioner. The matter did not come up again until Friday, 19 March 1999 when he was told he was being transferred on the following Tuesday. He was allowed to telephone his "missus" to contact Legal Aid. He spoke to a Mr Derry (who is apparently a field officer) the same day and on the following Monday he spoke to a solicitor. The letter of 22 March 1999 from NAALAS, previously referred to, records that he did not wish to be transferred. He was fearful of coming into contact with his co-offender and was afraid he would be assaulted. The letter also noted that he received regular visits from his de-facto partner. Mr Bishop claimed that his partner, her children from another relationship, and his mother, visited him every week whilst he was in Darwin. He has asked his defacto to come to Alice Springs but she is unable

to do so. He has received no letters from her as she is unable to write and he says he has not spoken to her on the telephone since the transfer. He was not cross-examined.

[10] Mr Bishop also acknowledged receiving the Prisoner's Handbook when first imprisoned. There is nothing in the Handbook about the subject of the transfer of prisoners: see Ext P12, document 8.

How the plaintiffs were transferred

[11] As previously mentioned, there are now only two adult prisons in the Northern Territory. Darwin has the capacity to hold a maximum of 360 prisoners; Alice Springs' maximum design capacity is 400. These figures include remand prisoners as well as sentenced prisoners as there is no separate remand facility in the Northern Territory. The figures also include female prisoners and any prisoners under eighteen years of age (but do not include juveniles sixteen or under held in a detention centre).

[12] It has long been the practice to transfer prisoners from one prison to another for various reasons, including the fact that the Darwin Correctional Centre does not have sufficient capacity to hold all prisoners who are sentenced by Courts in the Top End. On 20 August 1998, Commissioner Moore signed a new "directive" - Directive No 2.4.1 - which set out, *inter alia,* the procedures to be adopted in relation to the transfer of prisoners. Directive No 2.4.1 set out, *inter alia,* the criteria to be considered in assessing prisoner placement (see paras 5.6 and 5.7); the fact that NAALAS was to be

provided with a list of all Aboriginal prisoners identified as suitable for transfer at least on a monthly basis; providing for written objections to be made to the Commissioner; providing for prisoner notification; as well as other matters. It will be necessary to consider Directive 2.4.1 in more detail later.

[13] The arrangement to send lists of prisoners eligible to be transferred pre-dated the official opening of the new Alice Springs Correctional Centre on 17 July 1996. On 26 June 1996, the Department wrote to NAALAS enclosing a list of prisoners who could be selected for transfer to Alice Springs "in the short to medium term". NAALAS was advised that "should you have any comment or wish to relay any inmates (sic) concern please do so as soon as possible". I note that the plaintiff Campson Lalara's name was on that list, but not that of any of the other plaintiffs: see Ext P12, Document No 13.

[14] By letter dated 12 July 1996, the Northern Territory Aboriginal Justice Advisory Committee replied to the Department's letter advising that the issue of prisoner transfers was now being dealt with by the author of that letter. So far as Campson Lalara was concerned, the letter stated that his situation was identical to that of a Mr Ashley Lalara, about whom the following was written:

> Mr Lalara is from Angurugu. As an Anindilyakwa speaker he is amongst a very large number of countrymen at Berrimah. Mr Lalara is certainly not keen to go to Alice Springs where he will be relatively isolated and pining for his family and country. One cannot

> help but feel that sending Mr Lalara to serve his time in the Alice gaol will amount to one of the most serious failures to adhere to Recommendation 168 that can be found.

[15] Recommendation 168, which is a reference to one of the recommendations by the Royal Commission into Aboriginal Deaths in Custody, provides:

> That Corrective Services effect the placement and transfer of Aboriginal prisoners according to the principle that, where possible, an Aboriginal prisoner should be placed in an institution as close as possible to the place of residence of his or her family. Where an Aboriginal prisoner is subject to a transfer to an institution further away from his or her family the prisoner should be given the right to appeal that decision.

[16] It is an agreed fact in these proceedings that the government of the Northern Territory supports and has implemented Recommendation 168.

[17] Thereafter, further letters were sent from time to time by the Department to NAALAS enclosing lists of prisoners identified as possible transferees to Alice Springs in the near future. It is apparent that not all of the correspondence between the Department, NAALAS and The Northern Territory Aboriginal Justice Advisory Committee has been tendered. However, it is clear that transfer of prisoners from remote Top End communities was a serious issue, as was late notification of identified prisoners for transfer. On 15 July 1998, Commissioner Moore wrote to NAALAS in which the following points were made:

- It is necessary to maintain maximum flexibility in prisoner placement. The efficiency of the whole prison system is the paramount concern and it becomes necessary at times to quickly schedule a movement of prisoners.

- Where possible NAALAS will be given notice of a transfer up to one month in advance, depending on security considerations and operational needs at the time.

- Prisoners wishing to appeal against a decision of transfer may write to the Superintendent or to the Commissioner.

- Compassionate grounds are not considered sufficient reason to stop a transfer.

[18] It is also apparent from the documents tendered as Ext P12 that there was a gradual shift of emphasis on the weight to be given to visitor access by the Department. The reason for this appears to be that this factor was seen as placing too much of a restriction on eligibility criteria: see for example document No 19 dated 9 October 1996 which specifically sought and obtained ministerial approval to transfer prisoners irrespective of the number of visits they receive. Directive No 2.4.1 dated 20 August 1998 is couched in less unambiguous language. Paragraph 5.7 thereof provides:

> The frequency of family visits may be taken into account, however, it is not a determining factor to remain in Darwin.

[19] On 4 January 1999, Assistant Commissioner Holt wrote to NAALAS enclosing a list of prisoners identified as suitable for possible transfer. The list included the names of all five plaintiffs. NAALAS was asked to advise if there were "any outstanding legal mattes which may preclude these prisoners being transferred". NAALAS replied by letter dated 25 January 1999, in which reference was made, *inter alia*, to Recommendation 168. The following others points were also made:

- James Bishop wanted to be transferred.

- Certain prisoners had outstanding legal matters (but not any of the plaintiffs).

- Specific submissions on other grounds were made in respect of four other prisoners (including the fact that three of those prisoners receive family visits).

- No submissions were made in respect of any of the other plaintiffs, and the author was unaware of any information suggesting they should not be considered for transfer:

> Though note that our resources and access to information is limited, accordingly we request that our silence not be interpreted as these persons not having arguable cases for not being transferred. We submit the Department should consult directly with these persons.

[20] Further lists were sent by letters dated 25 January 1999 and 1 March 1999. All five plaintiffs were on both lists. No objection was made until about 5:00 pm on Monday 22 March 1999. That letter did not come to the attention of any of the relevant Departmental officers until after the aircraft transferring the prisoners had departed Darwin on Tuesday 23 March 1999.

[21] I will now briefly describe the process whereby the plaintiffs were selected for transfer and actually transferred by the Department or its officers. The lists of prisoners regarded as being eligible to be transferred to Alice Springs were prepared in the first place by the Chief Prison Officer, with the

assistance of two other prison officers. The list which was prepared and sent by letter of 1 March 1999 to NAALAS was in fact prepared by CPO Hoskins, but he did not prepare all of the earlier lists as he was relieving in another position between November 1998 and 3 February 1999. In determining who was eligible, he followed the procedures in Directive 2.4.1 by compiling a list of all prisoners who satisfied paragraphs 5.6a-d. Those requirements do not deal with the affect on the transferees' ability to receive visitors, which is dealt with by paragraph 5.7. When the list was finalised it was forwarded to the Superintendent of the prison, who in turn forwarded it to the Assistant Commissioner-Operations, Mr Holt. He then sent a copy of the list to NAALAS on 1 March as previously noted. At some time prior to 18 March, Mr Holt decided that there should be a transfer of prisoners to Alice Springs as the Darwin Correctional Centre had reached over 90% of its capacity. On 18 March, Mr Holt, with the assistance of a Procedure Officer, Miss Derrington, went through that list to compile a final list of prisoners to be transferred. Some prisoners' names were removed because their release dates were approaching; others because they were involved in undertaking programmes or courses not available in Alice Springs; yet others because of medical reasons; and others still because they were on a list regarded as "Not Suitable for Transfer" for various reasons. It is clear that, at no stage, did anyone involved in the preparation of the final list have any regard to paragraph 5.7 of the Directive unless an appeal was received. In this case, no appeal came to the attention of Miss Derrington or Mr Holt

until after the transfer was in the process of being effected. By then, it was too late. The prisoners were not notified that they were on the final list until the morning of Friday 19 March. According to CPO Holt, he advised all prisoners who were to be transferred that they would be transferred "on a Tuesday" and that they could make a ten minute telephone call to inform their friends or family, and that if they did not want to go, they could also call their lawyer or write to the Commissioner. CPO Holt was cross-examined. I accept his evidence in preference to that of the plaintiffs wherever there is conflict. I am satisfied that at least one of the prisoners, the plaintiff Bishop, contacted NAALAS on 19 March, and that a field officer attended him at the prison, and possibly others as well. In any event, no solicitor went to the prison until the following Monday morning, 21 March. Until NAALAS' letter of that date was received, the defendants thought that the plaintiff Bishop wanted to be transferred and they had no information about the attitude of the other plaintiffs, except that Campson Lalara had indicated two and a half years earlier that he did not want to go for the reasons mentioned in paragraph [14] above. Also, it is clear that the defendants did not take any steps themselves to interview any of the prisoners, notwithstanding the suggestion in NAALAS' letter of 25 January 1999. The "final" list prepared on 18 March was amended to exclude three names and add three more before the transfer finally took effect. On 22 March, Miss Derrington prepared a minute to be signed by the Acting Director, Ron Richards, addressed to the Superintendent of the Darwin

Correctional Centre headed "Prisoners Selected for Transfer to Alice Springs". This document says: "Please find following the amended list of prisoners selected for transfer to Alice Springs". This is the last of a series of similar documents, but this is the only such document signed by either the Director or the Acting Director, Ron Richards.

[22] CPO Hoskins gave evidence that he personally has interviewed every prisoner at the Darwin Correctional Centre who has been sentenced to serve more than six months' imprisonment and informed them that because of this, they may be transferred to Alice Springs. He said, in cross-examination, that he also would have told them about their right to appeal. None of the prisoners, except James Bishop, remembers being told anything like this prior to the Thursday or Friday before they were transferred. If they were told this, there is no evidence that any were personally told in February or March that they were actually placed on a list of prisoners eligible to be transferred until the list was finalised. James Bishop must have been aware prior to then that he had been placed on such a list, given that his instructions to his lawyers were, initially, that he wished to be transferred.

Was the decision to transfer one requiring the defendants to accord procedural fairness to the plaintiffs?

[23] The plaintiffs' submission was that notwithstanding authority to the contrary, the duty to accord procedural fairness to prisoners arose in this case because the decision to transfer them affected their rights, interests and legitimate expectations. There is a long line of authority in this country,

both before and after the seminal decision of the High Court in *Kioa and Others v West and Another* (1985) 159 CLR 550, dealing with the question of whether or not decisions made by persons having the custody of prisoners are subject to judicial review. The usual starting point is a passage in the judgment of Dixon J (as he then was) in *Flynn v The King* (1949) 79 CLR 1 at 8:

> It is pointed out in the case of *Horwitz v Connor* that if prisoners could resort to legal remedies to enforce gaol regulations responsibility for the discipline and control of prisoners in gaol would be in some measure transferred to the courts administering justice. For if statutes dealing with this subject matter were construed as intending to confer fixed legal rights upon prisoners it would result in applications to the courts by prisoners for legal remedies addressed either to the Crown or to the gaolers in whose custody they remain. Such a construction of the regulation-making power was plainly never intended by the legislature and should be avoided. An interpretation of the power to make prison regulations and of the regulations made thereunder as directed to discipline and administration and not to the legal rights of prisoners is in my opinion supported by the decision of this Court in *Horwitz's Case* and the decision of *Horridge* J in the case of *Morriss v Winter* and by the observations made upon the *Prison Regulations* by *Goddard* LJ in *De Laessoe v Anderson* in the second column.

In *Bromley v Dawes* (1983) 34 SASR 73, the Full Court refused to interfere with a decision to transfer a prisoner to another part of the same prison. At p107, Mitchell ACJ said, with the concurrence of Legoe and Mohr JJ:

> I respectfully agree with White J [the Judge appealed from] that *Flynn's* case is not a complete answer to the respondent's claim. Further I respectfully agree with him that "the principles of natural justice apply whenever the institutional head is called upon to make a judicial decision". But the courts will not review an administrative decision of the Director: see *Reg v Hull Visitors; Ex parte St Germain*, especially per Walker LJ at p466. A breach of duty in administering prison regulations has long been held not to confer a

> right of action upon a prisoner: See *Horwitz v Connor; De Laessoe v Anderson; Smith v Commissioner of Corrective Services,* especially at p328; *Becker v Home Office.* In *Reg v Institutional Head of Beaver Creek Correctional Camp; Ex parte McCaud,* an authority to which White J referred *in extenso* and upon which Mr Doyle placed some reliance, the Ontario Court of Appeal said, at p551, in reference to a prisoner: "Since his right to liberty is for the time being non-existent, all decisions of the officers of the Penitentiary Service with respect to the place and manner of confinement are the exercise of an authority which is purely administrative," and which it follows does not give the prisoner any right of action. See also *Reg v Classification Committee; Ex parte Finnerty.*

[24] Since *Kioa v West, supra,* (to which I shall later return), the courts have adopted a less stringent approach. The leading authority is the Full Court's decision in *McEvoy v Lobban* [1990] 2 Qld. R 235, where the Court held that it did have jurisdiction to examine purely administrative decisions by prison authorities, but that it would not interfere if the decisions were made *bona fide* and were a reasonable use of the power of management, and were not used for the indirect object of punishing individuals: see per Macrossen CJ at 236-7; Thomas J at 241; Lee J at 242. *McEvoy v Lobban* was not a transfer case, but was applied as the relevant guiding principle in cases concerning the transfer of prisoners dealt with by single judges: see *Re Walker* (1993) 2 Qld R 345 at 348-9; *Modica v Commissioner for Corrective Services* (1994) 77 A Crim R 82 at 87-88. Nevertheless, both of those latter cases recognised the possibility of other more general grounds for interference. In *Modica*'s case, Dunford J considered arguments based on improper purpose and general (*Wednesbury*) unreasonableness: see pp8-89. In *Re Walker*, Williams J said at 349, after considering *McEvoy v Lobban:*

> Those judgments stress the necessity for legitimate expectations to be adversely affected before a managerial decision taken by prison authorities will be reviewed by the courts. Here, neither decision to transfer affected in any way the applicant's status. He had no entitlement or legitimate expectation, for example, to spend the rest of his incarceration at Maconochie Lodge. It must not be forgotten that the applicant effectively had his right to liberty taken away by the sentence imposed upon him; if liberty is partially granted by prison officials in making a managerial decision as to where and how the inmate should be kept in custody, it cannot be asserted that the right to liberty has been taken away by a subsequent managerial decision, made in good faith, to the effect that in the interests of prison discipline and security, the inmate should be detained elsewhere in the system.

His Honour eventually dismissed the summons, observing at 351:

> ...in my view the statutes and regulations in question were not intended to create legitimate expectations in prisoners except where an entitlement to a specific benefit was clearly conferred either by legislative provision or by administrative policy and practice which gave effect to such provision.
>
> The evidence here does not establish that the managerial decisions in question have deprived the applicant of any specific benefit to which he had a right or with respect to which he had a legitimate expectation.

[25] As was submitted by Mr Beckett for the appellants, the common law now imposes a duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention: see *Kioa v West, supra,* esp at 584, 632; *Annetts v McCann* (1990) 170 CLR 596 at 598. The expression "legitimate expectation" is, as Dawson J observed in *Haoucher v Ministerof State for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 659, apt to mislead.

Whatever else may be meant by this expression, I consider that where a public authority or the executive has decided to adopt a particular procedure before arriving at an administrative decision, this gives rise to a legitimate expectation by those likely to be affected by the decision that the procedure will be followed: see *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 291-2 per Mason CJ and Deane J; and at 301 per Toohey J; *Attorney-General (Hong Kong) v Ng Yuen Shiu* (1983) 2 AC 629 at 638 (Privy Council). It is not necessary for the plaintiffs to establish that they were personally aware of the procedure or to have personally entertained any expectation that a particular procedure would be followed. Legitimate expectation is not based on estoppel. It is sufficient if it can be established objectively by adequate materials to support it: see *Minister for Immigration and Ethnic Affairs v Teoh, supra,* at pps291, 301; *Haoucher v Minister for Immigration and Ethnic Affairs, supra,* at 669-70. In this case, the plaintiffs submit that the relevant legitimate expectation arose *inter alia* from the Commissioner's Directive No. 2.4.l. This does not mean that a decision cannot be made which is inconsistent with a legitimate expectation; but if that course is proposed:

> ...procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course.

See *Minister for Immigration and Ethnic Affairs v Teoh, supra,* at 291-2.

[26] In the present case, the Commissioner's Directive 2.4.1 provided;

- All prisoners serving more than three months are to be advised of the possibility of transfer to Alice Springs at their Induction Security Assessment (para 5.1.8)

- In normal circumstances, prisoners are to be verbally notified of their suitability for transfer (para 5.1.9).

- A prisoner may file a formal written objection to the Commissioner (para 5.11).

- Objections must substantiate reasons opposing their transfer status (para 5.12).

- In the case of a pending transfer, prisoners are to be given no less than 48 hours notice of any intended transfer. It is recognised that this may not always be practical when emergency situations arise (para 5.14).

- The Operations Support Unit will forward to North Australian Aboriginal Legal Aid (NAALAS), a list of all Aboriginal prisoners identified as suitable for transfer, at least on a monthly basis (para 5.1.5).

- All valid appeals from a prisoner and/or their legal representative will be examined on their merits to ensure flexibility is maintained, however, the final decision remains with the Commissioner (para 5.1.13

- Under no circumstances, is the specific time and date of a transfer to be disclosed to the prisoner (para 5.1.16).

[27] The specific requirements of the Directive relating to notification to be given to NAALAS, is significant. A similar practice in fact pre-dated the Directive, and, according to the correspondence, arose out of an agreement reached between NAALAS and the Department at a "Law and Justice Forum" held at some time prior to 26 June 1996. There was no similar

practice in place involving non-Aboriginal prisoners or any other legal aid agency. It is a reasonable inference that the practice arose from Recommendation 168, and also from the notorious fact that Aboriginal prisoners often do not speak English as their first language, often have difficulty in comprehending their rights and are very often illiterate, or virtually illiterate. I infer that the idea of advising NAALAS was to create a safety net so that those Aboriginal prisoners who might be transferred could lodge appeals in ample time for their appeals to be considered. It was suggested by counsel for the plaintiffs that NAALAS was not invited to lodge appeals, but merely asked to identify any "outstanding legal matters" which may preclude the transfers. I do not accept that NAALAS understood that its role was to be restricted in any way. As the correspondence shows, objections on various grounds other than outstanding legal matters were in fact made. In this case, NAALAS knew, at least from early January 1999, that each of the plaintiffs was considered suitable for possible transfer to Alice Springs and so far as four of the plaintiffs (except James Bishop) were concerned, made no submissions on their behalf.

[28] I find that each of the plaintiffs had been told by CPO Hoskins that, because their sentences were in excess of six months, they might be transferred to Alice Springs. This complied with the spirit of paragraph 5.1.8 of the Directive. However, paragraph 5.1.9 required each prisoner to be notified of his suitability for transfer. Counsel for the defendants submitted that this was complied with by service upon NAALAS. I do not accept this

submission. In the context of the Directive as a whole, I consider that paragraph 5.1.9 required personal notification to a prisoner once a list of sentenced prisoners assessed as suitable for transfer had been compiled. I consider that it is clear that paragraphs 5.1.5 and 5.1.9 create separate and individual requirements. It cannot be assumed that NAALAS is still acting for every Aboriginal prisoner, or indeed for any particular prisoner. There may be prisoners who are or were represented by other Aboriginal legal aid organisations, and there may be others who are self-represented or privately represented. There is no evidence that personal notification was attended to in the case of any of the plaintiffs other than the plaintiff Bishop, and there is no explanation for why this was not done. The significance of this is that these four plaintiffs personally knew nothing about their impending transfer until the Friday morning prior to their transfer. This left little time for an effective appeal to be lodged on their behalf. I am satisfied that an appeal could be lodged at any time after a prisoner's name went on the list, and was not confined to the period after notification in accordance with paragraph 5.1.14 of the Directive. I am satisfied that the plaintiffs each had a legitimate expectation that the procedures set out in the Directive would be followed. Except in the case of the plaintiff Bishop, in respect of whom the procedures were followed, the defendants or their subordinates failed to ensure that paragraph 5.1.14 of the Directive was complied with. There is no evidence that any notice was given that paragraph 5.1.14 would not be complied with in the future. Accordingly, I find that procedural fairness

was not given to the plaintiffs Murrielle, Mathew Lalara, Hamilton Lalara or Campson Lalara.

[29] It was submitted that the content of the requirement for procedural fairness went beyond what was required by the Commissioner's Directive 2.4.1. The argument was put that the plaintiffs had rights, interests and legitimate expectations flowing from the right under s40 of the Act to receive visitors, an interest in their own rehabilitation, legitimate expectations arising from s40, the Prisoner's Handbook, the recommendations of the Royal Commission into Aboriginal Deaths in Custody adopted by the Northern Territory Government and the endorsement by the government of the Standard Guidelines for Corrections in Australia, that contact with their families and other members of relevant social groups would be permitted and facilitated by the prison administration; that they would be housed during their incarceration as close as possible to their communities of origin, and that in the event of a decision to transfer them, they would be afforded a proper, timely and real opportunity to put their case.

[30] It is not necessary to consider this submission in detail, except in the case of the plaintiff Bishop in view of my previous findings.

[31] There are several answers to this submission. First, the evidence is that at about the time of the transfer, Darwin Correctional Centre was very close to its full capacity, and in fact, on 18 March, had exceeded its capacity. The process actually adopted by the defendants inevitably meant that some

prisoners who did not want to be transferred because of the impact on their friends' and relatives' ability to visit them in person, would have to be transferred as all other prisoners who had no other good reason for staying in Berrimah had either been transferred already, or were on the list awaiting transfer. Recommendation 168 recognises the possibility that there may be circumstances where it is not possible to keep an Aboriginal prisoner in the institution nearest his home. Secondly, in Bishop's case, he had been given proper notice of his impending transfer and had indicated he had no objection to it. It is not clear when he changed his mind. He did not indicate any change of mind to the defendants until the letter of 22 March. It is true that he then had little opportunity to act once he was told he was definitely being transferred but, unlike the other plaintiffs, Bishop, I find, knew he could appeal because instructions had been taken from him on this question previously. I accept also the evidence of CPO Holt that each of the plaintiffs, including Bishop, was told he could write to the Commissioner or contact legal aid. In this case, Bishop knew he was being transferred on Tuesday next, a piece of information he was not entitled to receive. It must have been obvious before then that, once on the list, a transfer could take place at any time on short notice. There is nothing to indicate that Bishop did not appreciate this. There is nothing to indicate that he cannot read or write in English, and could not have written his own letter of protest (or "appeal") on the same Friday. In those circumstances the evidence does not

satisfy me that in Bishop's case there was any relevant legitimate expectation which was not met.

Did the transfer take place in accordance with s58?

[32] It is necessary to recall that, subject to the Act and the directions of the Minister, the Director has the control of all prisons and the custody of all prisoners in the Northern Territory (s6(2)). None of the warrants of commitment in relation to any of the plaintiffs are in evidence. There is nothing to show that the warrants committed the prisoners to any particular gaol or gaoler. It could not be said that the Director's custody was merely notional: see *Day v The Queen* (1984) 153 CLR 475 at 481-2.

[33] Section 58 is, in its terms, unconditional, the only requirement being that the transfer, if made by the Director, be at his written direction. Section 7(1) empowers the Director to delegate any of his or her powers or functions. There is no provision in the Act for an Acting Director. However, s41(2) of the *Interpretation Act* provides:

> Where an Act confers a power or imposes a duty on the holder of an office or the occupier of a position or designation as such, the power may be exercised and the duty shall be performed by the person for the time being holding or occupying or performing the duties of the office, position or delegation.

[34] Further, s46A(1) of the *Interpretation Act* provides*:*

> A provision of an Act that confers a power to delegate a power or function on a person (whether by reference to an office, designation, position or otherwise) is to be construed as conferring on the person a power to delegate the power or function to -

(a) & (b) .....

(c) a person from time to time holding, acting in or performing the duties of a named office, designation or position.

[35] It is an agreed fact that Ron Richards was acting in the position of Director of Correctional Services as at 22 March 1999. No submission was made challenging the lawfulness of his appointment.

[36] As mentioned in paragraph [21] above, the only document which could be said to be a written direction to transfer the prisoners was the document signed by Ron Richards on 22 March 1999. Counsel for the plaintiffs, Mr Beckett, submitted that this document did not comply with the terms of s58. It was submitted that this section, which confers great power on the Director, must be strictly observed. It was not submitted by either party that the power had to be read with s8 of the *Habeas Corpus Act 1679* (31 Car 11 C2) by which it is provided that if any person should be committed to any prison or in the custody of any officer or officers whatsoever for any criminal or supposed criminal matter, the said person should not be removed from the said prison and custody into the custody of any other officer or officers, unless it be by *habeas corpus* or some other legal writ, or in certain particular cases specified in the section. (It is likely that s8 never applied in the Northern Territory: see *Ordinance 6* Vic Cap 4, ss2, 17 and 18 (SA); *Prisons Act* 1869, ss40 and 43 (SA); *Prisons Ordinance* 1950 (NT) ss20, 21 and 22). It was submitted, in effect, that because the origins of the section may be traced back to the *Habeas Corpus Act*, it was an important

constitutional safeguard. In *Day v The Queen*, *supra*, at 482-3, the High Court considered a similar power contained in s53 of the *Prisons Act (WA).* That power however was much more restricted than the power contained in s58, in that, s53 of the Western Australian provision did not authorise the removal of prisoners without good reason. In view of the fact that s58 is unconditional (and assuming that s8 of the *Habeas Corpus Act* is no longer in force) I consider that Mr Beckett is correct. The section must be strictly complied with - near enough is not good enough.

[37] Mr Beckett submitted that there was in fact no written direction requiring any of the prisoners to be removed. He submitted that all that existed was a list of prisoners selected for transfer. I accept this submission. The document signed by Mr Richards is not a written direction; nowhere does it say words to the effect "I hereby direct that the following prisoners be removed..."; it is a mere list, and nothing more, of the prisoners selected for transfer. It did not authorise the transfer. Section 58 was therefore not complied with.

[38] Counsel for the defendants, Mr Spargo, submitted that s58 is irrelevant. His submission was that s58 does not prescribe that the written direction of the Director is a condition of a transfer; instead it made compliance with s58 mandatory by those to whom such a direction was addressed. He submitted that the power to transfer was derived from s6(2) which gave the Director custody of all prisoners. That submission in my opinion ignores the history of s58 which derives, as I have said, from the *Habeas Corpus Act*, and the

provisions of the various South Australian Acts and of the *Prisons Ordinance* to which I have previously referred. It has never been the law since 1679 that mere custody of a prisoner was sufficient to authorise his removal. I consider that the purpose of s58 was to confer such a power, as well as require those to whom the written direction was directed, to obey it. The transfer of the plaintiffs was therefore unlawful.

Was the decision to transfer made without taking into account relevant considerations?

[39] It was submitted by Mr Howse that the defendants were bound to take into account four matters which were not taken into account:

1. whether the transfers would substantially impair the plaintiffs' right to receive visitors;

2. whether the transfers would substantially impair the plaintiffs' prospects of rehabilitation;

3. the expectations of the community;

4. the content of the relevant recommendations of the Royal Commission.

[40] The principles of administrative law upon which this submission rests were summarised by Mason J, (as he was then) in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-42. The question for the Court is in the first place to identify which factors a decision-maker is bound to consider as a matter of construction of the Act. Where the power

confers a discretion which is in its terms unconfined, those factors must be determined by implication from the subject matter, scope and purpose of the Act.

[41] Mr Howse referred me to a number of provisions of the Act, viz., ss10(2), 20, 40, 45, 50, 51, 63, 85 and 91. Section 91(1) is interesting in that it requires the Director to ensure that every prisoner upon reception into a prison is "...informed in general terms of his or her rights, duties, responsibilities and liabilities under this Act..." There is no doubt, for example, that s40 confers a right upon a prisoner to receive visitors, subject to the provisions of Part XI of the Act. Mr Howse submitted that the Act evinced an intention that the scope and purpose of the Act included the protection of prisoner's rights with respect to the continuation of the prisoners' personal lives to the extent that this was compatible with the necessary constraints required for the good management and security of a prison. It was submitted that the transfer of a prisoner to a prison some considerable distance out of Alice Springs may, in a practical sense, be an effective barrier to a prisoner's right to receive visitors, in cases where the potential visitors were unlikely to have the financial means to travel to the prison, or were otherwise precluded or deterred by distance from making a visit. I accept the general thrust of this submission.

[42] On the facts of this case, it is clear that no specific consideration was given to this factor by any of the persons responsible for the finalisation of the list of prisoners who were transferred to Alice Springs. However, there is no

evidence that any of those persons had any specific information available to them which indicated how the transfers might affect that factor. No submissions had been made, as I have already observed, by any of the plaintiffs or by NAALAS, except in respect of the plaintiff Bishop. Records are kept of how many and how frequently each prisoner receives visitors to which Miss Derrington conceded she could have had access. However the defendants were not bound to make enquiries. The requirement is that the decision-maker is usually only required to make his or her decision on the basis of the materials available to him or her at the time the decision is made: see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd, supra,* at 45. Thus, whilst it might be said that the decision-maker had constructive knowledge of the number and frequency of prisoner visits, there was no information as to whether the plaintiffs' visitors were likely or unlikely to attend at Alice Springs, or whether there were other potential visitors who might find the Alice Springs facility more convenient. Also, it is relevant to observe that there was, and still is, in place a facility enabling visits by video-conferencing which is available free of charge and on the same conditions as personal visits, subject only to making a booking, so that visitors who could attend Berrimah but not Alice Springs would not be disadvantaged. In these circumstances, I do not consider that it has been demonstrated that the defendants failed to take into account the consideration that the transfers would substantially impair the plaintiffs' rights to receive visitors. If I am wrong about this conclusion, I find that

this factor was so insignificant that the failure could not have materially affected the decision: see *Minister for Aboriginal Affairs v Peko-Wallsend, supra,* at 40. There was clearly an urgent need to deal with the problem of prisoner over-crowding. The steps taken to isolate those prisoners eligible to be transferred according to the criteria contained in Directive 2.4.1 para 5.6, as well as the other factors referred to in para [21] above make it clear that all other prisoners had been eliminated for one reason or another. In those circumstances and given the access available to video-conferencing by visitors, the mere fact that the plaintiffs may have difficulty in having personal visits by some visitors could not have affected the decision at the time it was made.

[43] The three other factors referred to in paragraph [38] which Mr Howse relied upon do not arise, even on his submission, from a consideration of the subject matter, scope and purpose of the Act, but rather from the terms of internal documents such as Directive 2.4.1. As such they are not considerations which the decision-maker is bound to consider in terms of the decision in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd.*

Did the decision to transfer have the effect of cancelling the plaintiffs' right to receive visitors?

[44] Mr Howse submitted in effect that the Director's power under s58 could not be exercised in such a way as to destroy the plaintiffs' right to receive visitors under s40; in other words the power to transfer had to be read as subject to s40. Whether this is so or not, the transfer did not destroy that

right. The right still existed if visitors attended at the Alice Springs Correctional Centre and, as I have said, could still be exercised through the medium of video-conferencing if visitors attended at Berrimah.

Discretionary matters

[45] The relief sought in this case is discretionary. No submission was made by counsel for the defendants that relief should be refused on discretionary grounds, or that *mandamus* did not lie because the defendants were servants of the Crown. It is not obvious that the relief, if granted, would not now be of any avail to the plaintiffs. There will accordingly be declarations and orders.

1. Declare that the transfer by the defendants of the plaintiffs from the Darwin Correctional Centre to the Alice Springs Correctional Centre on 23 March 1999 was unlawful.

2. Order that the decision to transfer the plaintiffs from the Darwin Correctional Centre to the Alice Springs Correctional Centre on 23 March 1999 be quashed.

3. Order that the defendant David Moore reconsider the decision to transfer each of the plaintiffs after giving to each of the plaintiffs an opportunity to lodge with him an appeal in writing setting out the grounds of his objection within fourteen days of notification to each of the plaintiffs that he intends to confirm the decision to transfer the plaintiffs to the Alice Springs Correctional Centre.

4. The defendants are to pay the plaintiffs' costs of the action to be taxed.

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