

Application of the *Charter* to Guardianship and Disability

MM (Guardianship) [2008] VCAT 1282 (26 June 2008)

VCAT has imposed a supervised treatment order on a man with an intellectual disability, requiring him to be kept in detention to ensure his compliance with a treatment plan – despite his willingness to consent to the plan – to reduce the risk that he could cause harm to others. The Tribunal referred to, but undertook scant analysis of, the interpretative provisions of the *Charter* and the requirement that any limitation on a right be demonstrably justified in a free and democratic society.

Facts

MM, a 35 year old man with a mild intellectual disability, has a history of sexual assault against male children. He has been the subject of an interim supervised treatment order under the *Disability Act 2006* (Vic) since July 2007 (granted on the basis of the material accompanying the application for an order, prior to a full hearing), which required his detention due to the risk of him seriously harming others.

The central issue faced by VCAT in the hearing to decide whether a permanent treatment order should be made was whether MM was capable of giving consent to voluntarily complying with a treatment plan, or whether his continued enforced detention was necessary to ensure compliance.

Since the order was first imposed 12 months ago, MM has progressed from the most restrictive stage 1 to a less restrictive stage 3 of a treatment plan. On the facts before the Tribunal, MM actually wanted (generally) the requisite treatment to continue, but under the *least* restrictive stage 4 of a treatment plan, not under an order imposed on him.

Decision

VCAT's power to make a supervised treatment order requires the satisfaction of five elements:

1. there is a pattern of violent or dangerous behaviour causing serious harm;
2. there is a significant risk of serious harm to others which cannot be reduced with less restrictive means;
3. the services to be provided under the treatment plan will benefit the person and substantially decrease the risk of serious harm;
4. the person is unwilling or unable to consent to voluntary compliance with a treatment plan; and
5. detention is necessary to ensure compliance with the treatment plan and prevent the significant risk of serious harm to others.

In considering the fourth element in some detail, VCAT found that although MM was *willing* to consent to the comply with a treatment plan to substantially reduce the significant risk of serious harm to another person, he was in fact *unable* to do so. In support of this finding the Tribunal relied heavily on the evidence of a psychologist who expressed the opinion that although MM could understand the aspects of the treatment plan at an intellectual level, his 'limited emotional insight' would prevent him from analysing the emotional costs and consequences of treatment.

After reaching the conclusion that MM was unable to make a sufficiently informed decision to consent to treatment, and that the other four elements were also satisfied on the evidence, the Tribunal then turned to consider the 'only brief' submissions made in relation to the *Charter*.

Application of the *Charter*

The Tribunal referred to s 32 of the *Charter*, which requires that so far as possible statutory provisions are to be interpreted in a way that is compatible with human rights. Identifying relevant rights in this case as including freedom of movement (s 12), freedom of association (s 16), the right to liberty (s 21) and the right not to be punished more than once (s 26), the Tribunal noted that some of the rights are qualified (for example the right to liberty restricting *arbitrary* arrest or detention).

Although the rights guaranteed under the *Charter* must be protected, the Tribunal referred to s 7(2) of the *Charter* which allows for reasonable limitations on rights in circumstances where those limitations can be demonstrably justified (based on certain factors set out in s 7(2)).

In referring simply to the balancing of MM's rights with the benefits provided to him by the treatment order and the risk of serious harm to the community, the Tribunal disposed of *Charter* issues with the simple statement that 'on that basis [the balancing act], to the extent that MM's human rights would on the face of it be limited by a supervised treatment order, the *Charter* would permit those limits'.

However, consideration of s 7(2) of the *Charter* requires a proper analysis of each of the factors set out in the section, rather than a throw-away conclusion based on either hidden or no reasoning. Of particular relevance in this case would have been the relationship between the limitation on the particular right(s) and the object of the limitation, and whether any less restrictive means was available to achieve the same purpose as that sought to be achieved by the limitation.

While the Tribunal did refer to the requirement under the *Disability Act* that there must not be any less restrictive means of reducing the significant risk of serious harm (akin to the less restrictive means factor in s 7(2) of the *Charter*), the analysis did not in fact identify whether any potentially less restrictive options existed, but instead focused exclusively on the potential seriousness of harm to others. In the context of s 7(2) of the *Charter*, a limitation on a right is not justified if *any* less restrictive option for achieving the purpose of the limitation is reasonably available — the seriousness of the harm is not relevant, nor is that factor of s 7(2) dealt with by conducting a balancing exercise.

Further, it is disappointing to see the assessment of whether s 32(1) of the *Charter* is satisfied relegated to an afterthought. Where analysis of the statutory provision has led to a firm conclusion as to its proper interpretation, it is not surprising that subsequent consideration of s 32(1) of the *Charter* results in a finding that the *Charter's* provisions would not make any difference to the conclusion already reached.

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VCAT/2008/1282.html>.

Jonathan Kelp, Human Rights Law Group, Mallesons Stephen Jaques