

Mclver v Australian Capital Territory; Williams v Australian Capital Territory **[2024] ACTSC 112**

Summary

Curtin AJ of the Australian Capital Territory (ACT) Supreme Court has refused to grant an extension of time to bring claims for compensation or damages under the *Human Rights Act 2004* (ACT) (HRA) to persons who allege their human rights were infringed by a public authority, being the Australian Capital Territory (Territory), because of the finding that the claims were futile. The case contains helpful discussion of the operation of the HRA.

Facts

The two plaintiffs, Mr Mclver and Mr Williams, were prisoners held at the Alexander Maconochie Centre (AMC). The plaintiffs each made applications for an extension of time to sue the Territory for alleged breaches of their human rights under the HRA whilst they were held at the AMC.

If granted an extension of time, the plaintiffs would seek various declarations and compensation or damages under sections 18(7) and 40C of the HRA for breaches of their human rights.

In particular:

- Mr Mclver alleged that while he was detained on remand, the Territory failed to segregate him from convicted detainees (in breach of the *Corrections Management Act 2007* (ACT)) which Mr Mclver contended was a breach of his human rights under sections 18(2) and 19(1)-(3) of the HRA.
- Mr Williams alleged that the AMC denied him access to at least one hour of open air and exercise each day, which Mr Williams contended was in breach of various provisions of the *Corrections Management Act 2007* (ACT) and consequently a contravention of his human rights under sections 10(1)(b), 18(1)-(2) and 19(1) of the HRA.

In determining whether to grant an extension of time, His Honour considered the merits of the plaintiffs' substantive claims, including whether the plaintiffs' claims for relief by way of damages was futile. Accordingly, the central issue in the case was whether the Supreme Court of the ACT may award compensation or damages under the HRA to the plaintiffs.

His Honour was not required to determine the substantive claims about whether the plaintiff's human rights had been breached.

Decision

Whether a claim for damages is available under section 18(7) of the HRA

Both plaintiffs relied on section 18(7) of the HRA as the basis for their claim for compensation or damages. Section 18(7) provides that "anyone who has been unlawfully arrested or detained has the right to compensation for the arrest or detention."

His Honour explained at [432]-[435] that, to prove a breach of 18(7), the plaintiffs must establish that their detention was unlawful within the meaning of s 18(7). His Honour determined that the plaintiffs' allegations made could not amount to "unlawful detention" within the meaning of that concept in s 18(7). This is because "unlawful detention" in s 18(7) referred to the legal authority to detain someone, rather than the conditions of the detention. His Honour found at [436]:

"Unlawful detention' in s 18(7) must be considered as a composite phrase. The subject matter of the section is 'unlawful detention', that is, a particular type of detention. The cases referred to above refer to that type of detention as being one for which there was no lawful authority. It does not mean detention that is authorised but during which something 'unlawful' happens, such as a breach of a human right or a CM [corrections management] Provision."

There was no allegation that there was any lack of legal authority to detain Mr Mclver or Mr Williams.

Additionally, according to Curtin AJ, a contravention of section 18(7) is not a freestanding enforceable statutory right and does not enliven a claim for damages. The Court found no apparent intention to create

any freestanding statutory rights to damages. The “rights” to which section 18(7) refers are human rights, not necessarily equating to statutorily enforceable rights such to permit the Court to award damages. This is explained as follows at [14] of the judgment:

“So described, these ‘human rights’ are not, in and of themselves, enforceable statutory rights for damages. They may become so, but only if and when a state passes legislation making a human right an enforceable statutory right for damages. As will become apparent later in this judgment, the rights in the HRA are enforceable in a limited way against public authorities, such as obtaining declaratory relief, but this does not extend to the granting of damages to a person whose human rights were infringed.”

For these two reasons, His Honour determined that the plaintiffs’ claims for damages or compensation for breach of section 18(7) were futile, and an extension of time to bring these claims was refused. His Honour concluded at [440]:

“...I consider that the plaintiffs’ claims under the HRA for damages are futile because the HRA does not provide them a remedy in damages, and there is no merit in the pleaded claims that the plaintiffs were unlawfully detained.”

Whether damages may be awarded against a public authority given the terms of section 40C of the HRA

His Honour then examined the operation of section 40C of the HRA.

Section 40C relevantly provided (as it was at the date of the hearing):¹

(1) This section applies if a person—

- (a) claims that a public authority has acted in contravention of section 40B; and
- (b) alleges that the person is or would be a victim of the contravention.

(2) The person may—

- (a) start a proceeding in the Supreme Court against the public authority;

...

(4) The Supreme Court may, in a proceeding under subsection (2), grant the relief it considers appropriate except damages.

(5) This section does not affect—

- (a) a right a person has (otherwise than because of this Act) to seek relief in relation to an act or decision of a public authority; or
- (b) a right a person has to damages (apart from this section).

Section 40B relevantly provides:

(1) It is unlawful for a public authority—

- (a) to act in a way that is incompatible with a human right; or
- (b) in making a decision, to fail to give proper consideration to a relevant human right.

With respect to section 40C, His Honour says at [377] of the decision:

“... Section 40C(4), in terms, excludes any remedy in damages in proceedings brought against a public authority under s 40C(2). Section 40C(5)(b) means that s 40C (not just s 40C(4) alone) does not affect a right a person has to damages apart from (or ‘but for’) s 40C. Since s 40C includes ss 40C(1)-(3), what is being conveyed is that if a person is able to sue a public authority for breach of the person’s human rights otherwise than in a proceeding commenced pursuant to s 40C(2), then s 40C is no bar in those other proceedings to that person obtaining damages.”

¹ Note: As a result of the *Human Rights (Complaints) Legislation Amendment Act 2023* (ACT) sections 40C(4), 40C(5) and 40C(6) are now sections 40C(5), 40C(6) and 40C(7).

His Honour at [377] made clear that section 40C does not enable the Court to award damages. However, section 40C does not preclude the award of damages arising from a separate right to damages. This is explained at [366] of the decision:

“To my mind, all that the terms of s 40C(5)(b) are conveying is that, whilst damages are not an available remedy for a proceeding brought pursuant to s 40C, s 40C does not prevent any non-s 40C right to damages. That is, if there is a right to damages against a public authority for breach of a person’s human rights outside of s 40C (because s 40C(4) excludes damages), then s 40C does not interfere with that (outside) right.”

Therefore, the claims for damages or compensation under section 40C were also futile, and an extension of time to bring these claims was refused.

Balance of the plaintiffs’ claims

His Honour did grant an extension of time to Mr Williams to pursue two of the declarations he sought (which were not reliant on damages). That element of the matter is presently reserved.

An extension of time to pursue the balance of the declarations sought was not granted because they were also futile, lacking utility, insufficiently pleaded and/or a satisfactory explanation for the delay had not been provided.

Commentary

This decision by the ACT Supreme Court has clarified that rights under section 18(7) of the HRA are human rights, but do not carry an enforceable statutory right for damages. Damages are further excluded through the operation of section 40C(4).²

This means that, in order to seek damages as a remedy, a plaintiff must have a separate right to damages not founded in section 18(7) of the *HRA*. Absent this separate right, ordinarily the Court will be inclined to grant injunctive and declaratory relief only.

This summary was prepared by Eli Barrant and Jonathan Bui of KWM.

² As above.