QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*NN and IN v Department of Child Safety, Youth and Women* [2020] QCAT 146
PARTIES:	**NN and IN** (applicant) **v** **DEPARTMENT OF CHILD SAFETY, YOUTH AND WOMEN** (respondent)
APPLICATION NO/S:	CML330-19
MATTER TYPE:	Childrens matters
DELIVERED ON:	30 March 2020
HEARING DATE:	27 March 2020
HEARD AT:	Brisbane
DECISION OF:	Member Roney QC
ORDERS:	**1. I direct the Respondent Department to serve on the Applicants, and file in this Tribunal within 30 days of the date of the making of these orders any further written submission which it seeks to make having regard to the issues raised in these reasons, or any other issues which the Department seeks to raise in any written submission.** **2. I direct the Applicants to serve on the Respondent, and file in this Tribunal within 60 days of the date of the making of these orders any further written submission which it seeks to make having regard to the issues raised in these reasons, or any other issues which they seek to raise in any written submission.** **3. I direct that the Department provide a copy of these reasons to the Public Guardian within seven (7) days of their publication to the parties.** **4. In the event that the Public Guardian seeks to be made a joined party to the present application, or otherwise make submissions on the issues that this matter concerns, I direct that the Public Guardian file an application for its joinder, and that the**

application be determined on the papers.

5. **In the event that the Public Guardian does become a joined party to this proceeding, I direct that it serve and file any written submission which it seeks to make having regard to the issues raised in these reasons, or any other issues which the Public Guardian seeks to raise in any written submission.**
6. **I adjourn the application to a date to be fixed.**
7. **I otherwise give the parties liberty to apply on seven (7) days' written notice to the Tribunal**

CATCHWORDS: FAMILY LAW AND CHILD WELFARE – CHILD WELFARE UNDER STATE OR TERRITORY JURISDICTION AND LEGISLATION – OTHER MATTERS – where decision to place conditions on contact – where applicants not parents or biological member of family – whether applicants have a right of review – effect of the *Human Rights Act* 2019 (Qld)

Charter of Human Rights and Responsibilities Act 2006 (Vic), s 17

Child Protection Act 1999 (Qld), s 5A, s 5B, s 87

Human Rights Act 2019 (Qld), s 26

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 19, s 20(1)

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (QCAT Act).

REASONS FOR DECISION

[1] This is an application that relates to a child who I shall refer to as L. L is presently seven years of age. He has two natural parents, each of whom is alive. L is the subject of proceedings before the Ipswich Childrens Court in which the Director of Child Protection Litigation filed an application seeking the making of a Child Protection Order granting long term guardianship of L to the Chief Executive of the Department until he reaches his majority.

[2] Orders have been made in that proceeding granting temporary custody of L to the Chief Executive of the Department of Child Safety, Youth and Women ('the Department'), who is the Respondent in the proceeding in this Tribunal. The First Applicant in this Tribunal, whom I shall refer to as NN, is a former foster sister of L. She refers to herself as L's 'Aunty' in relation to her relationship with L. The second Applicant, whom I shall refer to as IN, is the former foster father of L's mother. He

is referred to in Departmental records as L's maternal grandfather, although is perhaps better described as his 'Foster Grandfather'.

[3] The material before the Tribunal filed on behalf of the Applicants suggests that the child L's natural mother has been an integral member of the Applicants' family and left the family home only when she got married. The Applicants' family was significantly involved in L's natural mother's wedding, which was paid for by foster parents. When L was born, Ms NN, the First Applicant here, was in the operating theatre for the birth. The material suggests that in the period from 2013 until L was removed by the Department in 2018, Ms NN spent time with her foster sister, L's mother, and L himself for four or five days a week and that contact included weekly sleepovers. The material suggests that prima facie there is a strong relationship between L and the Applicants' immediate and extended family.

[4] On 5 August 2019, the Department made a decision to restrict and place conditions upon the Applicants' contact arrangements with L and issued an Information Notice to the Applicants in relation to that decision, including advice that they held direct rights to seek a review of the decision in the Tribunal.

[5] As a result, the Applicants filed an application in the Tribunal on 2 September 2019 seeking a review of the decision, and that application is presently before the Tribunal. In support of that application, the Applicants contend various matters; critically, they seek to be allowed to have more contact with L, essentially returning to the regime that applied at the beginning of the 2019 year, including a full weekend every four weeks, and to be able to enjoy day trips, rather than the relatively limited access that is now being permitted. It is suggested that L has stated that he wants to spend more time with the Applicants.

[6] In notifying of the decision, the Department specified in correspondence of 5 August 2019 the decision made was under s 87(2) of the *Child Protection Act* 1999 (Qld) ('the Act'), which decision was such as to be effective from 5 August 2019, limiting contact with L to one hour on one day a week, and every second Saturday for three hours. The stated basis for this decision included a recognition that the Applicants would prefer greater contact with L, indeed even more contact than they were then getting, which was for a period of five hours every weekend, and once per month from Friday through to Sunday. The decision cited as the basis for the restriction earlier reports that the Applicants had been talking to L about the current child protection matters and that these were having an impact on his emotional stability. The reasons also mentioned the necessity to protect L's mental health, and to avoid the necessary attachment stressors in his life, with a view to avoiding L being confused about who will provide primary care to him.

[7] Before the merits of the application filed 2 September 2019 could be heard, the Department filed an application for summary dismissal of the application on 28 November 2019.

[8] The foundation for that application, which is set out in a brief two page outline of submissions dated 28 November 2019, is that the Applicants are not biologically related to L, or his mother, and were therefore not aggrieved persons within s 87 and Schedule 2 of the Act.

[9] In the contact decision, the Department stated that it made the decision pursuant to s 87 of the Act.

[10] This section provides:

> **Chief executive to provide contact between child and child's parents**
>
> (1) The chief executive must provide opportunity for contact between the child and the child's parents and appropriate members of the child's family as often as is appropriate in the circumstances.
>
> (2) However, the chief executive may refuse to allow, or restrict or impose conditions on, contact between the child and the child's parents or members of the child's family, if the chief executive is satisfied it is in the child's best interests to do so or it is not reasonably practicable in the circumstances for the parents or family member to have the contact.
>
> (3) If the chief executive refuses to allow, or restricts or imposes conditions on contact between a child and a person, the chief executive must give written notice of the decision to each person affected by the decision.
>
> (4) The notice mentioned in subsection (3) must comply with the QCAT Act, section 157(2).

[11] Section 247 of the Act provides for the review of a reviewable decision and states:

> An aggrieved person for a reviewable decision may apply, as provided under the QCAT Act, to the tribunal to have the decision reviewed.

[12] Schedule 2 of the Act provides that when a decision is made under s 87(2) the aggrieved person is 'a person affected by the decision'.

[13] Notwithstanding the Department's written advice given to the Applicants that they could review the contact decision, the Department raised a preliminary issue about whether the Applicants are persons who can apply to the Tribunal to review the contact decision under the Act. The Department has now sought orders that the Tribunal dismiss the Applicants' review application pursuant to s 47 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act') on the basis that it is misconceived.

[14] In support of that argument it relies upon a decision of the Appeals Tribunal of 24 July 2019 in *Department of Child Safety, Youth and Women v PJC and The Public Guardian* [2019] QCATA 109.

[15] That was a matter heard on 31 August 2018 and based on further written submissions filed in December 2018 and January 2019. It was based on the law as it stood at that time.

[16] The Appeals Tribunal was concerned there with a case where for more than five years, a child lived with her approved foster carer, until a decision was made to remove the child from her care. The carer was notified about the removal of the child from her care by a letter dated 23 May 2017 from the Department of Communities, Child Safety and Disability Services. Relevantly, that Department advised the carer that the child would not be returning to her care, and in effect, the carer was to refrain from having contact with the child.

[17] The Appeals Tribunal considered the importance of the recent amendments to the Act and the inclusion of the new s 5BA that contained relevant principles for achieving permanency for a child including, for example, to ensure that the child experiences or has ongoing positive, trusting and nurturing relationships with 'persons of significance to the child'.

[18] The Appeals Tribunal held:

> [94] In summary, we do not accept the Public Guardian's submission that s 87(2) of the Act as to the class of persons who are 'affected' should be construed more broadly to include the child's 'kin' or as further defined under Schedule 3 to include 'persons of significance to the child', such as to include PJC. As we have said, s 87 of the Act must be read, according to established principles of statutory construction, together with the Act as a whole. Division 4 clearly provides for decisions about contact only between the child and those persons prescribed in s 87. That is family with whom the child would reside and/or family members who would form part of the child's family.
>
> [95] Further, the consistency in the terminology used in s 87(2) and (3) respectively, and the terminology in Schedule 2 in providing for a s 87(2) decision to be a 'reviewable decision' and for an 'aggrieved person' in respect of a s 87(2) decision to be 'person affected by the decision' does not support, and indeed, militates against the construction contended for by the Public Guardian. This is particularly when considered in context with s 247 providing that an 'aggrieved person' may apply to review a reviewable decision, in light of the definitions in Schedule 3 of 'reviewable decision' and 'aggrieved person' discussed earlier which are to be read into it.

[19] The Appeals Tribunal ultimately concluded as follows:

> [100] PJC is a former approved foster carer for QS. Although PJC may therefore be considered broadly to be a person of significance in QS' life, she is not a parent of QS nor is she part of QS' family.
>
> [101] As discussed, on a proper construction, s 87(3) of the Act which provides that a person 'affected by the decision', who is entitled to be given a written notice of the decision, must properly be interpreted in the context of the words in the other sub-sections of s 87, in particular, s 87(2). A decision made under s 87(2) is a decision of the chief executive to refuse, or restrict, or impose conditions upon contact between a child and the child's parents or a member of the child's family. That is, to be a person 'affected by the decision,' the person must fall within the specified class of persons: therefore, a person affected must be a child, a parent of a relevant child or a member of the child's family.
>
> [102] PJC does not fall within the definition of 'parent', nor is she a member of the child's family as provided under the Act, even though QS was in PJC's care for a long time. The decision to place QS in PJC's care was, although continuing for a number of years, always temporary in the sense that the chief executive had guardianship of QS under a child protection order.
>
> [103] We accept the Department's submission that the correct source of power to make decisions about QS' daily care and wellbeing including a decision about whether QS and PJC have contact is under s 13 of the Act. A decision made under s 13 is not reviewable notwithstanding the fact that the Department advised PJC in its first contact decision letter that she had an entitlement to review the decision. That said, it was not for PJC to interpret the Act to ascertain whether the Department correctly provided a notice to her. In light of the Department's advice to PJC that she was entitled to review the decision, it was proper for the review proceeding to be commenced by PJC. It was then for the Tribunal to determine its jurisdiction for the review.

[20] Queensland's *Human Rights Act* 2019 was passed by State Parliament in February 2019. From 1 January 2020 the Act required public entities to act compatibly with human rights.

[21] Section 26 of the Human Rights Act provides that:

> (1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.
>
> (2) Every child has the right, without discrimination, to the protection that is needed by the child, and is in the child's best interests, because of being a child.

[22] These rights are based on Articles 23(1) and 24(1) of the International Covenant on Civil and Political Rights. Australia ratified this treaty in 1980.

[23] These rights are said by the Queensland Human Rights Commission ('the Commission'), in a Facts Sheet published on the issue, to 'guarantee ... institutional protection of the family and positive measures for the protection of children by society and the state' and contends that '[f]amilies are entitled to protection. Children have the same rights as adults with added protection according to their best interests'.

[24] The Commission also contends that:

> …[the] right is also supported by the right to privacy in section 25 of the Act. This prohibits a public entity from unlawfully or arbitrarily interfering with a person's family. If the term 'family' is interpreted consistently with international law it should be interpreted broadly, extending to different cultural understandings of family and small family units with or without children. The term 'family' has been interpreted broadly in Victoria, where the same protection exists in the Charter of Rights and Responsibilities Act 2006. Laws or policies that allow for the removal of a child from a family unit or the incarceration of a parent need to be considered in light of sections 25 and 26 of the Act.

[25] The Victorian Equal Opportunity and Human Rights Commission has identified that the explanatory material accompanying the Victorian *Charter of Human Rights*, which preceded the Qld Act and has in s 17 an equivalent to the Queensland s 26, says that:

> Parliament intended that the term 'families' be given a meaning that recognises the many different types of families that live in Victoria, all of whom are entitled to protection. The term 'family' should be given a broad interpretation to include all people who make up a family unit, reflecting the meaning of 'family' in Australian society. For example, a 'family' could include a situation where children are living with their grandparents rather than their parents, or with a legal guardian, or a foster family. The term 'family' could also include extended family in some circumstances: for example, where there are kinship ties to extended family, or where someone's culture or ethnicity gives their extended family unit particular significance for them.

[26] The Victorian Equal Opportunity and Human Rights Commission also suggests that s 17 could be engaged by activities that:

> …affect the law regarding close or enduring personal relationships or fail to give legal recognition to these relationships.

[27] The Australian Government has recognised in published material[1] that the UN Human Rights Committee has considered the protection of the family to be closely related to the prohibition under article 17 on unlawful or arbitrary interference with family. It has stated that the term family in article 23 should have the same meaning as under article 17, in that it should be given a broad interpretation to include all those persons comprising the family as understood in the society of each country. It states that in relation to Indigenous Australians, it is important that family be understood to include kinship structures, which encompass an extended family system often including distant relatives. There are other groups in Australia for whom family would include extended and other non-conventional family structures. It states that the Committee has made it clear that the definition of family is not confined by the concept of marriage. If countries recognise other arrangements that may constitute a family, those arrangements must be protected under article 23. However, the rights in article 23(4) are limited to married or formerly married couples.

[28] There has been some detailed analysis of the operations of Articles 17 and 23 in the Australian context[2] , and some of that academic analysis supports the view that the UN Human Rights Committee's jurisprudence on the issue has reiterated the principle that 'the term "family" be given a broad interpretation so as to include all those comprising the family as understood in the society in question' and has consistently applied this principle when dealing with what counts as a family for the purposes of art 23(1) in a non-Western context.[3] On the other hand, in a case arising in the Western context, the Committee has stated, as late as the mid-1990s, that a relationship must display the 'minimal requirements' of 'life together, economic ties, a regular and intense relationship, etc' in order for it to be protected as a family under art 23(1)[4]. However, more recently the Committee noted that 'the right to protection of family life [is not] necessarily displaced by geographical separation, infidelity, or the absence of conjugal relations': *Ngambi v France*, UN Human Rights Committee, Communication No 1179/2003, UN Doc CCPR/C/81/D/1179/2003 (16 July 2004) [6.4].

[29] Although the carefully articulated written submissions filed on behalf of the Applicants make reference to the language of s 26 of the Human Rights Act, those submissions do not address either:

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[1] https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Righttorespectforthefamily.aspx

[2] *Zanhellini, Aleardo --- "To What Extent Does the ICCPR Support Procreation and Parenting by Lesbians and Gay Men?" [2008] MelbJlIntLaw 4; (2008) 9(1) Melbourne Journal of International Law 125* http://classic.austlii.edu.au/au/journals/MelbJIL/2008/4.html#fn9

[3] *Hopu v France*, UN Human Rights Committee, Communication No 549/1993, UN Doc CCPR/C/60/D/549/1993/Rev.1 (29 December 1997) [10.3].

[4] *Santacana v Spain*, UN Human Rights Committee, Communication No 417/1990, UN Doc CCPR/C/51/D/417/1990 (29 July 1994) [10.2]. In an early case the absence of cohabitation (between a mother and daughter) was sufficient to deny that a family existed for the purposes of art 23(1): *AS v Canada*, UN Human Rights Committee, Communication No 68/1980, UN Doc CCPR/C/12/D/68/1980 (31 March 1981) [8.2(b)].

(a) The question of whether at the time of the decision under review, s 26 had operation and/or applied to the decision maker;

(b) The question of whether upon its commencement after the date of the relevant decision of 5 August 2019 it in some other way affects the outcome here;

(c) The question of whether the effect of the enactment prior to the relevant decision of 5 August 2019 and upon commencement of the Act and the scope of s 26 of the Human Rights Act affects the reasoning adopted by the Appeals Tribunal in the aforementioned decision *of Department of Child Safety, Youth and Women v PJC and the Public Guardian*;

(d) The question of whether in construing the operation of s 87(2), insofar as it refers to the rights of aggrieved persons it should be treated as having a different construction to that which it was said to have at the time of the decision of *Department of Child Safety, Youth and Women v PJC and the Public Guardian*; and

(e) The question of whether having regard to s 26 of the *Human Rights Act* 2019, the Applicants or either of them had standing on 2 September 2019 and still have such standing individually as a person affected by a decision under the Child Protection Act or as a person who is an aggrieved person with a right of review to this Tribunal.

[30] Despite the fact that those submissions were filed in the Tribunal on 4 March 2020, the Department does not appear to have in any way responded to them.

[31] Having regard to the importance of the question which this application throws up, it seems to me to be appropriate to make, and I do make the following directions and orders:

1. I direct the Respondent Department to serve on the Applicants, and file in this Tribunal within 30 days of the date of the making of these orders any further written submission which it seeks to make having regard to the issues raised in these reasons, or any other issues which the Department seeks to raise in any written submission.

2. I direct the Applicants to serve on the Respondent, and file in this Tribunal within 60 days of the date of the making of these orders any further written submission which they seek to make having regard to the issues raised in these reasons, or any other issues which they seek to raise in any written submission.

3. I direct that the Department provide a copy of these reasons to the Public Guardian within seven (7) days of their publication to the parties.

4. In the event that the Public Guardian seeks to be made a joined party to the present application, or otherwise make submissions on the issues that this matter concerns, I direct that the Public Guardian file an application for its joinder, and that the application be determined on the papers.

5. In the event that the Public Guardian does become a joined party to this proceeding, I direct that it serve and file any written submission which it seeks to make having regard to the issues raised in these reasons, or any other issues which the Public Guardian seeks to raise in any written submission.

6. I adjourn the application to a date to be fixed.

7. I otherwise give the parties liberty to apply on seven (7) days' written notice to the Tribunal.