QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*FQA and MKD v Department of Children, Youth Justice and Multicultural Affairs* [2022] QCAT 126
PARTIES:	**FQA AND MKD** (applicant) **v** **DEPARTMENT OF CHILDREN, YOUTH JUSTICE AND MULTICULTURAL AFFAIRS** (respondent)
APPLICATION NO/S:	CML229-21
MATTER TYPE:	Childrens matters
DELIVERED ON:	16 March 2022
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Senior Member Aughterson
ORDERS:	**The application to review a decision filed on 15 July 2021 is dismissed.**
CATCHWORDS:	FAMILY LAW AND CHILD WELFARE – CHILD WELFARE UNDER STATE OR TERRITORY JURISDICTION AND LEGISLATION – OTHER MATTERS – where chief executive granted guardianship of subject children – where application to review contact decision made by chief executive – whether applicant person affected by decision – whether applicant a parent or family member – whether Tribunal has jurisdiction to determine the application *Child Protection Act* 1999 (Qld), s 5BA, s 11, s 12, s 13, s 87, s 99P, s 247, Schedule 2 *Human Rights Act* 2019 (Qld), s 25, s 26 *Allan v Transurban City Ling Limited* (2001) 208 CLR 167 *Child Safety, Youth and Women v PJC and the Public Guardian* [2019] QCATA 109 *NN and IN v Department of Child Safety, Youth and Women* [2020] QCAT 146 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362
APPEARANCES & REPRESENTATION:	This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and*

REASONS FOR DECISION

[1] On 15 July 2021, the applicants filed an application to review a contact decision made by the respondent on 24 January 2019. On 29 July 2021, directions were issued requiring the applicants to file in the Tribunal and give to the respondent, by 12 August 2021, any material in support of an application for an extension of time. On 20 August 2021, the time for filing that material was extended to 3 September 20221. Material was filed and given to the respondent on 14 September 2021.

[2] On 5 October 2021, leave was given to applicant FQA to be legally represented in the proceedings and the matter was listed for a directions hearing on 30 November 2021. At that directions hearing, FQA advised the Tribunal through her legal representative that she wished to withdraw her application to review and leave to withdraw was given by the Tribunal.

[3] Also at the directions hearing conducted on 30 November 2021, directions were issued requiring the applicant MKD, who identified himself as the step father of the subject children, to file in the Tribunal and give a copy to the respondent, by 14 January 2022, of any submissions in relation to the question of whether he had standing to bring the application to review the contact decision. On 25 January 2022, MKD, in a brief email, stated the following: '(FQA) is my partner we have been together 3 years we have a child together which is (the subject children's) half little brother. I think it is fair for all concerns the (subject children) can meet me as I'm the partner of (FQA)'.

[4] In response, the respondent states that:[1]

> [23] The Chief Executive has been granted guardianship of the subject children (currently aged 11 and almost 9) until they turn 18 years of age.
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> [23] The applicants have one child together (currently aged 15 months) who is currently subject to a child protection order granting custody to the Chief Executive until 31 August 2023.
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> [23] MKD has never met the subject children and, for a number of reasons, he has been refused to attend FQA's contact with the children.

[5] By s 247 of the *Child Protection Act 1999* (Qld) ('the Act'), an 'aggrieved person' for a 'reviewable decision' may apply to the Tribunal to have the decision reviewed. Schedule 2 of the Act sets out the 'reviewable decisions' and, in relation to each of those decisions, the 'aggrieved person' is listed. Contact decisions made pursuant to s 87(2) of the Act are reviewable decisions and, in relation to those decisions, an aggrieved person is 'a person affected by the decision'.

[6] In *Department of Child Safety, Youth and Women v PJC and the Public Guardian* ('*PJC*'),[2] the Appeal Tribunal considered the class of persons who may be 'a person affected by the decision' for the purposes of s 87 of the Act. It was there noted that under s 87(1) of the Act, the Chief Executive must provide opportunity for contact between the child and 'the child's parents and appropriate members of the child's

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1 Submissions on behalf of the respondent, [2]-[4].

2 [2019] QCATA 109.

family', while s 87(2) gives power to the Chief Executive to refuse to allow, or restrict or impose conditions on that contact.

[7] In *PJC,* application was made by a former approved foster carer of the subject child, seeking to review a decision of the respondent restricting her contact with the child. It was the position of the Department that the contact decision was not made pursuant to s 87, but rather under s13 of the Act.[3] Where the Chief Executive is granted custody or guardianship of a child, s 12 and s 13 of the Act allow the Chief Executive 'to make decisions about the child's daily care'. There is no right of review to the Tribunal from a decision made under those sections. It was submitted by the Department that s 87 of the Act is a supplementary provision dealing with contact decisions made as between the child and the child's parents and family members and, in relation to those decisions, there is a right of review before the Tribunal.[4] In *PJC* the Tribunal held that the applicant was neither a 'parent' nor 'member of the child's family' and, accordingly, the Tribunal did not have jurisdiction to determine the application.[5]

[8] In *PJC* reference was made to the High Court decision in *Allan v Transurban City Ling Limited,*[6] where it was stated that the term 'affected by' appears in a range of laws and in determining its scope it is necessary to consider the subject, scope and purpose of the legislation in question rather than by the application of concepts derived from decisions under the general law in relation to 'standing'. In *PJC,* it was said that the present context is the power to make a contact decision between a child and the child's parents and appropriate members of the child's family.[7] It was held that a former approved foster carer for the child in question was not a parent of the child and nor a member of the family and, as such, it was not a matter falling under s 87 of the Act and the Tribunal did not have jurisdiction to review the decision.

[9] It is the decision to refuse contact under s 87(2) of the Act which is a Schedule 2 matter and which can be reviewed before QCAT by a 'person affected by the decision'. As noted, s 87(2) allows the Chief Executive to allow, restrict or impose conditions on contact between the child and the child's 'parents or members of the child's family'. The persons directly affected by any such decision are those in relation to whom the decision is made. It might be that there are others who are indirectly affected. For example, in the present case, in which a decision was made in relation to contact between the subject children and FQA, there was an indirect effect on MKD in that for a number of reasons he was excluded from attending those visits.[8]

[10] That gives rise to the question of whether the reference in Schedule 2 to persons 'affected' by the decision includes those indirectly affected. Consistent with the decision in *PJC*, in my view it does not. The range of persons indirectly affected by a decision is potentially wide. It is evident that the legislative intention behind making separate provision for decisions relating to contact as between a child and their parents and family members, as distinct from the general power to make

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3 Ibid, [56]-[58].
4 Ibid, [58].
5 Ibid, [101]-[103].
6 (2001) 208 CLR 167. See *PJC,* [83]. See also, *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, [14].
7 [2019] QCATA 109, [84]-[88].
8 Ibid, [4].

decisions about the child's daily care under s 12 and 13 of the Act, was to allow for external review in those circumstances. That is consistent with the principles in s 5B of the Act, which emphasise the importance of family, including at s 5B(k) that 'a child should be able to maintain relationships with the child's parents and kin, if it is appropriate for the child'.

[11] Further, a broad interpretation of the term 'person affected', with the inevitable expansion of potential applications for review, does not sit comfortably with the 'principles for achieving permanency for a child'; in particular, at s 5BA(2)(b), the principle of ensuring the child experiences or has stable living arrangements. Review proceedings before QCAT can be disruptive and unsettling for a child. Also, in considering the operation of s 87 in the context of the Act read as a whole, it is noted that there is capacity for a person who is not entitled to bring an application on their own behalf, to make application to the Tribunal pursuant to s 99P of the Act to bring the application on behalf of the subject child. Under that provision, the President of the Tribunal has a discretion to allow the application where, among other things, it is in the child's best interests that the application be made.

[12] The question, then, is whether MKD is either a 'parent' of the subject children or a 'family member'. Section 11 of the Act is headed 'who is a parent' and s 11(1) provides:

> A *parent* of a child is the child's mother, father or someone else (other than the chief executive) having or exercising parental responsibility for the child.

Who is member of a child's family is not indicated in the Act.

[13] Account needs to be taken of the provisions of the *Human Rights Act 2019* (Qld). Section 26 of that Act provides, in part:

> (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.

[14] A discussion of those rights is set out in *NN and IN v Department of Child Safety, Youth and Women,*[9] as follows:

> [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.
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> [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'.
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> [24] The Commission also contends that:
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> > …[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'

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9 [2020] QCAT 146.

> 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[10] 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,

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10 https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rightsscrutiny/PublicSectorGuidanceSheets/Pages/Righttorespectforthefamily.aspx

> 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,[11] 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.[12] 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).[13] 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].

[15] In that context and in the context of the relevant provisions of the Act, it is a question of whether applicant MKD is a 'parent' or a 'member of the child's family' for the purposes of s 87 of the Act. FQA and MKD have been in a relationship for approximately 3 years.[14] The subject children, aged 11 and almost 9, have been in the care of the Chief Executive since 2014.[15] MKD is not the biological father of the children. He has not met them and has never exercised parental responsibility in relation to them.[16] As is noted above, for a number of reasons the respondent has refused to allow him to attend when FQA has contact with the children.[17] The respondent states that the children wish for their contact with their mother to be solely with her and for other persons, including MKD, not to attend.[18] The children are subject to a long term guardianship order and are not subject to a child protection order with aims to reunify them to the care of a parent.[19]

[16] As noted above, by s 11 of the Act: 'A *parent* of a child is the child's mother, father or someone else (other than the chief executive) having or exercising parental responsibility for the child'. Given that MKD is not the biological father of the children, and on the material before me, does not and has not exercised any parental

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11 *Zanhellini, Aleardo --- "To What Extend 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.*

12 *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].

13 *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)].

14 Submissions on behalf of the respondent, [3].

15 Ibid, [2].

16 Ibid, [9].

17 Ibid, [4].

18 Ibid, [9].

19 Ibid.

responsibility for the children, he cannot be considered to be a 'parent' within the meaning of s 87 of the Act.

[17] In relation to the term 'family member', some indication of its intended meaning can be drawn from the language used in s 5BA of the Act, where reference is made to 'the child's parents, siblings, extended family members and carers'. In particular, a distinction is made in the Act as between 'family members' (s 87) and 'extended family members' (s 5BA). Further, in relation to considerations arising under the *Human Rights Act,* in *NN* and *IN* it is noted that the UN Human Rights Committee, in a case arising in the Western context,[20] has stated that while the term 'family' should be given a broad interpretation, 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) of the *International Covenant on Civil and Political Rights.*[21]

[18] Those minimal requirements are far from the circumstances of the present case. MKD has never met the subject children and there is no indication of any other involvement with them, other than perhaps indirectly through his relationship with FQA, the nature and scope of which is not evident on the material before the Tribunal.

[19] On the material before me, it is evidence that MKD is not a 'parent' of the subject children and is not 'a member of the children's family'. He is not 'a person affected by the decision' of the respondent in relation to contact between the subject children and FQA. He has no standing to bring an application to review that decision and the Tribunal does not have jurisdiction to determine the application. The application is dismissed.

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20 In the present matter, no relevant person identified as Indigenous. Nor was it evident that any other ethnic or cultural considerations arose that might impact a determination of what constitutes a 'family'.

21 [2020] QCAT 146, [28].