QCAT

Queensland **Civil and Administrative Tribunal**

CITATION:	*IM v Adult Guardian and The Public Trustee of Queensland* [2011] QCATA 114
PARTIES:	IM (Applicant/Appellant) v Adult Guardian and The Public Trustee of Queensland (Respondents)
APPLICATION NUMBER:	APL233-10
MATTER TYPE:	Appeals
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	**Justice Alan Wilson, President** **Clare Endicott, Senior Member**
DELIVERED ON:	10 May 2011
DELIVERED AT:	Brisbane
ORDERS MADE:	**1. Appeal allowed.** **2. Set aside the orders of the Tribunal made on 1 June 2010.** **3. Order that the matter be remitted to the Tribunal for reconsideration, with the hearing and receipt of such additional evidence and submissions as the Tribunal may, in accordance with the Reasons in this Appeal, direct.**
CATCHWORDS:	APPEAL – ERROR OF LAW – where procedural fairness was not provided to participant at hearing – where access to relevant document given after commencement of hearing – where request for adjournment declined – where failure to give notice to adult invalidated hearing about appointment of guardian for restrictive practices

Queensland Civil and Administrative Tribunal Act 2009, ss 29(1), 28, 32, 142(3)(b), 146, 230
Guardianship and Administration Act 2000, ss 103, 118(6)

Towie v Victoria [2008] VSC 177
Francis-Wright v VCAT [2001] 17 VAR 306

APPEARANCES and REPRESENTATION (if any):

By order made on 7 March 2011 the hearing and determination of the application for leave to appeal and the appeal took place on the papers (pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009*).

REASONS FOR DECISION

President:

[1] In this matter the Appeal tribunal was comprised of Senior Member Clare Endicott, and me. I have had the advantage of reading her Reasons in draft. I agree with them, and the conclusions she has reached and the orders she proposes.

Senior Member Clare Endicott:

[2] A case worker from the Department of Communities (Child Safety Services) lodged an application for the appointment of a guardian and administrator for AB, who would turn 18 years of age in July 2010. AB was subject to a short term custody child protection order which would expire when he reached 18.

[3] AB had been diagnosed with Autism Spectrum Disorder in 1997 and subsequently with severe Obsessive Compulsive Disorder. A comprehensive 20 page report by a transition officer of the Department of Communities (Disability Services) was provided to the tribunal in support of the application for the appointment of a guardian and administrator.

[4] On 5 May 2010 the tribunal sent out notices to AB and to the active parties in the application, as well as to the parents of AB. The notices contained information as to the time, date and venue of the hearing of the application to be held on 1 June 2010.

[5] AB's father, IM attended the hearing and participated actively in it. AB did not attend the hearing. At the end of the hearing orders were made appointing the Adult Guardian as guardian for all personal matters, and, appointing The Public Trustee of Queensland as administrator for all financial matters. An order was also made appointing the Adult Guardian

as guardian for restrictive practices (general) for AB. All appointments were made until 11 July 2011.

[6] IM lodged an application seeking to appeal the orders made by the tribunal. Under s 142(3)(b) of the *Queensland Civil and Administrative Tribunal Act 2009* (the QCAT Act), a party may appeal a decision of the tribunal on a question of fact, or on a question of mixed law and fact, but only with the leave of the appeal tribunal. Appeals on questions of law only do not require leave.

[7] In his appeal IM has relied on questions of law as well as questions of mixed law and fact: he described the grounds of his objection to the orders made on 1 June 2010 in terms of procedural errors connected with the hearing, he alleged that evidence presented to the tribunal was false, and he alleged that the tribunal had failed to take evidence presented by him into account.

[8] Turning to the alleged procedural errors, IM argues that the evidence relied on by the tribunal was produced to him after the hearing had commenced, that he was given around 15 minutes to read the evidence, and that his requests for an adjournment were refused. It appears from a reading of the transcript of the hearing that these claims are correct.

[9] IM was not an active party in the application made under the *Guardianship and Administration Act 2000* as the term "active party" is defined as the adult about whom the application is brought, the applicant, the proposed or current guardian and administrator, the Adult Guardian and The Public Trustee of Queensland. Active parties have the right under s 103 of the *Guardianship and Administration Act 2000* to access before the commencement of a hearing any documents that are before the tribunal that are relevant to the issues in the proceeding.

[10] As he was not an active party, there was no opportunity provided to IM under s 103 to access the 20 page report about his son prior to the commencement of the hearing.

[11] However the tribunal has been designed as a court of record.[1] The tribunal is required by s 230 of the *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act) to keep a record containing all documents filed in the registry for each proceeding. Any person may on payment of the prescribed fee inspect the record of a proceeding and obtain a copy. IM could have accessed the report held on the tribunal's file under s 230.

[12] IM was not informed prior to the hearing that he could have inspected the tribunal's file and accessed the report that was before the tribunal and which was relied on to support the application for the appointment of a guardian and administrator for AB. The notice of hearing contained information that only referred to the right of active parties to inspect the documents on the tribunal's files. Although he was given over three week's notice of the hearing, he was not informed what evidence was to be relied on by the tribunal nor that he was able to access that evidence prior to the hearing.

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1 Section 164 of the *Queensland Civil and Administrative Tribunal Act 2009.*

[13] IM was not familiar with the procedure followed by the tribunal in guardianship matters. He appears to have expected that the hearing on 1 June 2010 would be similar to hearings in which he had been involved in children's matters. That was not the case. The focus is on the adult in guardianship matters and the hearings are not adversarial in nature. The parties are not required to serve documents on each other and the tribunal controls the issues to be determined and the hearing process.

[14] The tribunal is required by s 29(1) of the QCAT Act to take all reasonable steps to ensure that each party to a proceeding understands the practice and procedures of the tribunal. The tribunal is also required by s 28 of that Act to act fairly and to provide procedural fairness to the parties in a proceeding.

[15] Although the learned members provided an opportunity for IM to read the report during a short break in the hearing, their primary focus remained on the adult and on the question whether there was a need for an appointment of a decision maker to take effect from AB's eighteenth birthday.

[16] It is apparent from the transcript that IM constantly interrupted the hearing and raised issues that were not relevant to the issues to be determined by the tribunal. It is understandable that the learned members were distracted, by these interruptions, from ensuring that procedural fairness had been fully afforded to IM.

[17] From reading the transcript, it appears that IM was under the impression at the commencement of the hearing that he would be AB's guardian once the child protection order expired.[2] The learned members did not clarify whether AB wanted to be considered for the role of guardian (if they found that there was a need for the formal appointment of a guardian for AB). This is not a criticism of the learned members: again, IM's disruptive behaviour and tangential comments tended to obscure the purpose behind what he was saying.

[18] Taking all these matters into account, however, it is inescapable that IM was not given a proper opportunity to respond to the applications brought by the Department of Communities for the appointment of decision makers for AB. He was not given an adequate opportunity to respond to the report on which the tribunal largely relied in forming its conclusions, and his requests for an adjournment were declined when a short adjournment would have provided fairness, in the process, to him.

[19] The focus of the learned members was, quite properly, on AB's interests. They did not, however, also give due consideration to the interests of IM to ensure that he could fully and fairly participate in the appointment process and the learned members thereby inadvertently failed to ensure procedural fairness for IM.

[20] A failure to afford procedural fairness is an error of law: *Towie v Victoria* [2008] VSC 177; *Francis-Wright v VCAT* [2001] 17 VAR 306.

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2 See page 4, line 5-6 of the transcript.

[21] Although not raised by IM, it is also necessary to record that one of the appointments made by the tribunal was invalid in any event. Under s 118(6) of the *Guardianship and Administration Act 2000* failure to give notice to an adult invalidates a hearing and the tribunal's decision about an application. AB was given notice that the tribunal would consider the appointment of a guardian and administrator at the hearing held on 1 June 2010. He was not given notice that an application for the appointment of a guardian for restrictive practices would be heard.

[22] It appears that the learned members initiated this further application during the course of the hearing after being informed that AB was administered medication to manage his behaviour. Under the *Guardianship and Administration Act 2000* a specific process is provided for the tribunal when considering the appointment of a guardian for restrictive practices.[3] There is no indication that the tribunal considered that process before making the appointment of a guardian for restrictive practices. Lack of notice to the adult about this further application invalidates the appointment of the guardian for restrictive practices.

[23] This Appeal tribunal may, under s 146 of the QCAT Act, set aside the decision made on 1 June 2010 and return the matter to the tribunal for reconsideration. That is the appropriate course here – it is necessary for all the applications to be reconsidered, so as to enable any person who puts themselves forward as a proposed appointee may participate fully in the hearing.

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[3] Section 80ZD of the *Guardianship and Administration Act 2000.*