

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title: PM v Childrens Court of the Australian Capital Territory & Ors

Citation: [2018] ACTSC 258

Hearing Date: 14 August 2018

Decision Date: 7 September 2018

Before: McWilliam AsJ

Decision:

1. The decision of the ACT Childrens Court made on 19 March 2018 is set aside and, in lieu thereof, the Court declares that on 28 February 2018, the plaintiff was 17 years of age.
2. The proceeding is remitted to the ACT Childrens Court for further determination according to law.

Catchwords: **JUDICIAL REVIEW** – statutory construction – *Legislation Act 2001, s 149* – whether a person who was born on 29 February 2000 was classified as a child or an adult on 28 February 2018.

Legislation Cited: *Acts Interpretation Act 1901* (Cth) s 37A
Administrative Decisions (Judicial Review) Act 1989 (ACT) s 5
Children and Young People Act 2008 (ACT) ss 11, 12, 94
Crimes (Sentencing) Act 2005 (ACT) Pt 8A
Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 11
Legislation Act 2001 (ACT) ss 4, 149
Magistrates Court Act 1930 (ACT) ss 287, 288
Supreme Court Act 1933 (ACT) s 34B
Court Procedures Rules 2006 (ACT) r 3554

Cases Cited: *Day v Harness Racing New South Wales* [2014] NSWCA 423; 88 NSWLR 594
Prowse v McIntyre (1961) 111 CLR 264
The Attorney-General v Smith (1985) 39 SASR 311

Texts Cited: *The Pirates of Penzance*, W S Gilbert and Arthur Sullivan (1879) Act II

Parties: PM (Plaintiff)
Childrens Court of the Australian Capital Territory (First Defendant)
Magistrates Court of the Australian Capital Territory (Second Defendant)
Director of Public Prosecutions (Third Defendant)

Representation: **Counsel**
Mr S McLaughlin (Plaintiff)
Mr J Walker (Third Defendant)

Solicitors

Legal Aid ACT (Plaintiff)

Director of Public Prosecutions (Third Defendant)

File Number: SC 215 of 2018

Decision under appeal: Court/Tribunal: Magistrates Court of the ACT
Before: Chief Magistrate Walker
Date of Decision: 19 March 2018
Case Title: R v PM
Court File Number(s): CH18/258; CH18/259; CH18/260;
CH18/261.

1. The plaintiff in these proceedings was born in a leap year, on 29 February 2000. She has been charged with committing certain criminal offences on 28 February 2018, being a common year (or non-leap year). The question on this judicial review application is whether, at the time she allegedly committed those offences, she was 17 and therefore a child at law, or 18 and therefore an adult.
2. If she was a child on 28 February 2018, pursuant to s 288 of the *Magistrates Court Act 1930* (ACT) (**Magistrates Court Act**), she is entitled to be tried in the Children's Court, as I will refer to it. (Section 287 of the Magistrates Court Act, which establishes such a court, lacks the apostrophe, but I consider it is necessary to make the term grammatical.)
3. Alternatively, if she was classed as an "adult" on that day, then the Children's Court had no jurisdiction, and she was required to be tried in the Magistrates Court of the Australian Capital Territory (**Magistrates Court**).
4. The distinction in the choice of forum has some legal consequence for how the plaintiff will be tried and sentenced on the charges, examples being the application of s 94 of the *Children and Young People Act 2008* (ACT) (**CYP Act**), which contains mandatory youth justice principles, and Part 8A of the *Crimes (Sentencing) Act 2005* (ACT) which specifically provides for sentencing young offenders. Whether it would make any difference in practice is not an issue the Court needs to consider here.
5. On 19 March 2018, the Children's Court Magistrate (**magistrate**) concluded that the plaintiff was 18 years old and was to be treated as an adult for the purpose of the criminal proceedings in relation to charges against the plaintiff for offences originally filed as CH2018/258-261. It was then determined that there was no jurisdiction to hear the charges in the Children's Court.
6. By originating application filed 17 May 2018, the plaintiff seeks judicial review of that decision. A submitting appearance has been filed on behalf of the first defendant, the Children's Court. The second defendant, the Magistrates Court, was also joined in relation to a stay of the equivalent charges brought in that Court. It has also filed a submitting appearance. Thus the only active defendant in the proceedings is the third defendant, the ACT Director of Public Prosecutions (**Director**).
7. For an abundance of caution, while the outcome of the proceedings was yet to be determined, at the hearing I ordered that the plaintiff's name was not to be published

until further order (in accordance with s 111 of the *Evidence (Miscellaneous Provisions) Act 1991* (ACT)).

8. As the reasons that follow demonstrate, this is an example of the current state of the law achieving, in perhaps a complicated manner, what most people would assume to be the position; namely that on 28 February 2018, the plaintiff was not yet 18 years old and therefore not yet an adult.

The Court's power on judicial review

9. There was no dispute before the Court that s 34B of the *Supreme Court Act 1933* (ACT) and r 3554 of the *Court Procedures Rules 2006* (ACT), gives this Court power to review the decision of the Children's Court. There was some discussion as to whether the Court also had jurisdiction to hear the plaintiff's application under s 5 of the *Administrative Decisions (Judicial Review) Act 1989* (ACT). However, the circumstances of this case did not require consideration of any distinction between those two sources of jurisdiction.

The issue on the application

10. The various grounds upon which the plaintiff relies are really different characterisations of the same argument. They allege that there was jurisdictional error in the findings that:
 - (a) the plaintiff was 18 years old in law on the date of the alleged offences, 28 February 2018;
 - (b) as a consequence the Children's Court did not have jurisdiction; and
 - (c) the matter ought be transferred to the Magistrates Court.
11. It can be seen that the success of the second and third grounds will rise or fall with the outcome of the first.
12. A further ground, raised in support of an application for a stay of the operation of the relevant charges now laid in the Magistrates Court, was that there would be 'substantial injustice' if the plaintiff is dealt with as an adult in the Magistrates Court prior to this application being determined. It is unnecessary to deal with that issue, as there was no dispute that the progress of the charges against the plaintiff was awaiting the outcome of these proceedings.
13. It is also not necessary to deal in any detail with the reasons of the decision made in the Children's Court, because both the plaintiff and the third defendant agreed that the reasoning process of the magistrate was affected by legal error, in that the magistrate found there was nothing in either the CYP Act or the *Legislation Act 2001* (ACT) (**Legislation Act**) to displace the common law position, which (as discussed below) was to the effect that a person attained the age of 18 years on the day before their 18th birthday.
14. The active parties both contended before this Court that the question was to be resolved by the process of statutory construction, and in particular that s 149 of the Legislation Act operated to displace the common law position. The issue between the plaintiff and the Director then became the proper construction of the words in s 149, the terms of which are set out below.

The common law

15. It is important to understand the common law position relied upon by the magistrate, because the process of statutory construction is, itself, part of the common law (an observation to that effect was also made in *Day v Harness Racing New South Wales* [2014] NSWCA 423; 88 NSWLR 594at [94]). Further, in construing the statute, it may be necessary to determine whether that statute evinces an intention (expressly or necessarily implied) to exclude the common law, or to confirm it.
16. Of particular importance for the reasoning that follows in this case, an understanding of the common law may inform the mischief which the legislature of the Territory sought to address, in the particular words that the legislature used in the relevant statutory provisions (discussed below).
17. The magistrate determined that the plaintiff was an adult by applying *The Attorney-General v Smith* (1985) 39 SASR 311 (**Smith**), which in turn relied on the earlier authority of *Prowse v McIntyre* (1961) 111 CLR 264.
18. In *Smith*, King CJ, with whom White and Millhouse JJ agreed, was considering the definition of “child” in s 4 of the, then in force, *Children’s Protection and Young Offenders Act* (SA) stated at 314-315 (with footnotes in the original included here as citations and emphasis added unless otherwise stated):

The date upon which the offence is alleged to have occurred is the day before the respondent’s eighteenth **birthday**. The question is whether the respondent had **“attained the age of eighteen years”** within the meaning of the definition of “child” in s 4 of the Act on that day. ...

It is clear law that a person **attains his majority at the first moment of the day preceding** his twenty-first, or under the present law **his eighteenth, birthday**: *Prowse v McIntyre* (1961) 111 CLR 264. The rule is so lacking in rational foundation and is so out of touch with ordinary usage, that **I would be most willing, if it were possible, to restrict it to the determination of the date upon which a person attains full legal capacity**. I am satisfied, however, that the rule cannot be so restricted. It is true that the statements of the rule and of the authorities, for the most part, refer to the attainment of the age of majority. **It has been understood, however, as applying to the attainment of any age**. In *In re Shurey: Savory v Shurey* [1918] 1 Ch 263 it was applied to determine the age at death of a beneficiary under a will who died on the day before his twenty-fifth birthday, the gift in the will being to such of the testator’s three sons “as shall attain the age of twenty-five years”. Sargant J. formulated the point to be decided in the case as follows: “Does a person **attain** a specified age in law **on the anniversary of his or her birthday**, or on the day preceding that anniversary?” That case was cited with apparent approval by Dixon CJ in *Prowse v McIntyre* (1961) 111 CLR 264 at 271. In the same case, moreover, Windeyer J, although discussing the rule in the context of the attainment of full age, said: “The rule, is, moreover, not consistent with the law’s method of computing lapse of time for any purpose unrelated to reach an age.” (Italics mine) (1961) 111 CLR 264 at 281. I have reluctantly reached the conclusion that **there is no escape from applying the rule to the attainment of any age and for any purpose unless the context in which the expression as to age is used indicates an intention to the contrary**.

19. The emphasised words in the extract above highlight the effect of the common law position, which was to distinguish between a person’s “birthday”, being the anniversary of the day of his or her birth, and the day that a person “attained” any age, and in the case above “attained the age of 18 years”.
20. The words chosen in the legislation must be read in the light of that common law distinction.

Tracing through the Legislation

21. Section 288 of the *Magistrates Court Act 1930* (ACT) (**Act**) relevantly provides for the jurisdiction of the Children’s Court as follows:

Jurisdiction of the Childrens Court

- (1) The Childrens Court has jurisdiction to hear and decide –
- (a) any criminal proceeding against a person in relation to the summary offence if the person was under 18 years old at the time of the alleged offence; and
 - (b) any criminal proceeding against a person in relation to an indictable offence (other than an offence punishable by imprisonment for life) if the person was under 18 years old at the time of the alleged offence; and

22. Sections 11 and 12 of the CYP Act respectively define “child” and “young person” as follows:

child means a person who is under 12 years old.

young person means a person who is 12 years old or older, but not yet an adult.

23. There is then a notation under the definition of “young person”:

Note **Adult** is defined in the Legislation Act

24. Attention thus turns to the Legislation Act, where s 4 provides:

(1) This Act applies to all Acts (including this Act) and statutory instruments.

25. The Dictionary to the Legislation Act defines “adult” as follows:

Adult means an individual who is at least 18 years old.

26. The respondent relied upon the following further definitions in the Legislation Act contained in the Dictionary to the Legislation Act:

calendar month means one of the 12 months of the year.

calendar year means a period of 12 months beginning on 1 January.

month means a period beginning at the start of any day of one of the calendar months and ending—

- (a) immediately before the start of the corresponding day of the next calendar month; or
- (b) if there is no such corresponding day—at the end of the next calendar month.

Examples

- 1 The period beginning at the start of 8 May 2014 and ending at midnight on 7 June 2014 is a month.
 - 2 The period beginning at the start of 30 January 2014 and ending at midnight on 28 February 2014 is a month. The month ends on the last day of February because in that year, February does not have a day corresponding to 29 January (because 2014 is not a leap year). If the period began at the start of 30 January 2016 (ie a leap year), the month would end at midnight on 29 February 2016.
27. Beneath the definition of “month” and the examples contained in the Dictionary, there is a note confirming that while an example is part of the Act, it is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears.
28. To answer the question of when someone is “at least 18 years”, so as to become an adult, s 149 of the Legislation Act then provides (emphasis added):

Age in years

For an Act or statutory instrument, a person is an age in years at the beginning of the person's **birthday** for the age.

29. Birthday is not defined in the Legislation Act and the entire application turns on what those words in s 149 mean.

The proper construction of s 149 of the Legislation Act

30. The dispute between the parties may be summarised as follows.
31. The Director submitted that a person's age can be determined by reference to the definitions of "calendar month" and "month", as set out above. Each year that the plaintiff has aged since 29 February 2000 is measured by the passage of 12 calendar months. Substituting the definition of "month", because there is no corresponding day three out of every four years, the 12th month of every common year the plaintiff has been alive, concludes on 28 February.
32. In 2018, the day the plaintiff was 18 as "an age in years" for the purposes of s 149 was 28 February 2018, because there was no corresponding day of 29 February 2018.
33. The plaintiff submitted that the definitions of "year" and "calendar year" were unhelpful, and that, as a matter of logic, a person born on 29 February 2000 is not 18 years old on 28 February 2018. The plaintiff submitted that "birthday" should be afforded its ordinary meaning, being the anniversary of the date of birth of a person.
34. The Macquarie Dictionary (6th Ed.) definition defines 'birthday' as follows:
1. The day of a person's birth
 2. The time of origin or beginning of a thing
 3. The anniversary of someone's birth or the origin of something.
35. The plaintiff relied on simple maths. Putting to one side 29 February, the anniversary of any other date occurs either 365 or 366 days after the date in question. To find that the anniversary of 29 February was 28 February would cause the anomaly that the anniversary occurs after only 364 days, which the plaintiff submitted would be an absurd outcome.
36. The Director in turn criticised the plaintiff's argument as one of arbitrary simplicity, leading to the wrong conclusion, reminiscent of the argument used to deceive the character of Frederic in Gilbert and Sullivan's *The Pirates of Penzance* (who wanted to leave the pirates on his 21st birthday and who was also born on 29 February), into believing that he only had a birthday once every four years:
- Though counting in the usual way, years twenty-one I've been alive,
Yet, reckoning by my natal day, I am a little boy of five!
- (W S Gilbert and Arthur Sullivan, *The Pirates of Penzance* (1879), Act II),
37. In my view, it is unnecessary to resort to mathematical calculations of a year, or definitions of a 'month' in order to work out what a 'year' means.
38. Taking the orthodox approach to statutory construction of considering the text, context and purpose, I consider that applying the ordinary dictionary definition of 'birthday', is the preferable construction. It gives primacy to the text.

39. In my view, the common law is critical in considering why the word “birthday” was chosen by the legislature in s 149 of the Legislation Act. The purpose, or the mischief to be addressed, was the position at common law that someone ‘attained’ an age on the beginning of the day *before* a person’s birthday.
40. In choosing the words “at the beginning of the person’s birthday”, in my view, the legislature has evinced a deliberate intention to move away from any meaning that would equate to a person attaining a specified age the day before his or her birthday.
41. As the plaintiff submitted, s 37A of the *Acts Interpretation Act 1901* (Cth) is consistent with such a construction. It provides:

Attainment of particular age

For the purposes of any Act, the time at which a person attains a particular age expressed in years is the commencement of the relevant anniversary of the date of the birth of that person.

42. Again, to my mind, this fortifies the desire of the legislature to move away from any suggestion that a person attains an age by how a year might be calculated, and instead focuses on the date of birth as the reference point.
43. It follows that on the proper construction of s 149 of the Legislation Act, on 28 February 2018, the plaintiff was not yet an adult, being someone who was ‘at least 18 years old’, because she had not yet reached the beginning of the anniversary of her birth. It was only on 1 March 2018 that she became someone who was ‘at least’ 18 years old.

Conclusion and order

44. For the above reasons, the application will be allowed. No order for costs was sought by either party. The parties each submitted that as the order of this Court will take the place of the orders made in the Children’s Court, it was not necessary to remit the proceedings. However, I will so order for an abundance of caution.
45. The orders of the Court are as follows:
 - (1) The decision of the ACT Childrens Court made on 19 March 2018 is set aside and, in lieu thereof, the Court declares that on 28 February 2018, the plaintiff was 17 years of age.
 - (2) The proceeding is remitted to the ACT Childrens Court for further determination according to law.

I certify that the preceding forty five [45] numbered paragraphs are a true copy of the Reasons for Judgment of her Honour Associate Justice McWilliam

Associate:

Date: