IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S ECI 2020 02317

AA — Plaintiff

- v -

SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES — First Defendant

- and -

BB — Second Defendant

- and -

CC — Third Defendant

S ECI 2020 02424

BB — First Plaintiff

- and -

CC — Second Plaintiff

- v -

SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES — First Defendant

- and -

AA — Second Defendant

S ECI 2020 02429

SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES — Plaintiff

- v -

AA — Defendant

JUDGE:	INCERTI J
WHERE HELD:	Melbourne
DATE OF HEARING:	4 June 2020
DATE OF JUDGMENT:	2 July 2020
CASE MAY BE CITED AS:	AA v Secretary to the Department of Health and Human Services & Ors
MEDIUM NEUTRAL CITATION:	[2020] VSC 400 Second Revision: 17 December 2020

ADMINISTRATIVE LAW – Judicial review – Procedural fairness – Whether s 11 decision-making principles mandatory – Reconsideration of administrative decisions – Jurisdictional Error – Whether nullity – Child protection – Care by secretary order – Family preservation order – Series of decisions to remove children from care without proper notice – Secretary required to give notice and opportunity to be heard – *Craig v South Australia* (1995) 184 CLR 163 – *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 – *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 85 – *Mann v Medical Practitioners Board of Victoria* [2004] VSCA 148 – *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 – *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 – *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 – *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care* (2003) 145 FCR 1 – *Kabourakis v The Medical Practitioners Board of Victoria* [2006] VSCA 301 – *Christiansen v Social Security Appeals Tribunal* (2010) 126 ALD 423 – *Michael v Secretary, Department of Employment, Science and Training* (2006) 90 ALD 457 – *Minister for Immigration v PDWL* [2020] FCA 394 – *Children, Youth and Families Act 2005* (Vic) ss 8, 9, 10, 11, 280, 281, 289A, 300, 301, 304, 305, 309, 331, 332 and 333.

CIVIL PROCEDURE – Extension of time to permit bringing applications – Joinder – Standing – *Supreme Court (General Civil Procedure) Rules 2015* (Vic) rr 9.06(b) and 56.02.

EVIDENCE – Failure to call witnesses – Whether adverse inference should be drawn – Case proved through direct documentary evidence – *Jones v Dunkel* (1959) 101 CLR 298 – *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345.

APPEARANCES:	Counsel	Solicitors
S ECI 2020 02317		
For the Plaintiff	Dr A McBeth with Ms M Stead	TP Legal and Associates
For the First Defendant	Dr I Freckelton QC	Department of Health and Human Services
For the Second Defendant	Mr M Hosking	Nicholes Family Lawyers
For the Third Defendant	Mr M Hosking	Nicholes Family Lawyers

APPEARANCES:	Counsel	Solicitors
S ECI 2020 02424		
For the First Plaintiff	Mr M Hosking	Nicholes Family Lawyers
For the Second Plaintiff	Mr M Hosking	Nicholes Family Lawyers
For the First Defendant	Dr I Freckelton QC	Department of Health and Human Services
For the Second Defendant	Dr A McBeth with Ms M Stead	TP Legal and Associates

APPEARANCES:	Counsel	Solicitors
S ECI 2020 02429		
For the Plaintiff	Dr I Freckelton QC	Department of Health and Human Services
For the Defendant	Dr A McBeth with Ms M Stead	TP Legal and Associates

HER HONOUR:

Introduction

1 This case involves the care of two young children aged 5 and 3. In short, the children lived with their maternal grandparents ('the Grandparents') for over two years under what is called a care by Secretary order ('CBSO'). In January 2020, with virtually no notice, the Secretary to the Department of Health and Human Services ('the Secretary') made a decision which had the effect of removing the children from the care of the Grandparents and reunifying them with their father ('the Father'). The decision to remove the children is now challenged by the Grandparents.

2 Regrettably, not even 3 months later, the Secretary again, with no notice, arrived at the Father's home and removed the children from his care and placed the children back with their Grandparents. The Father now challenges that decision.

3 The Secretary concedes that her handling of this matter has been egregious. The Secretary comes to the Court with contrition and accepts the Court must now determine what decisions, if any, were lawful.

The Evidence

4 The following affidavits were filed in the three proceedings:

(a) an affidavit of John Brennan affirmed on 24 May 2020;

(b) two affidavits of Stephanie Gonsalves affirmed on 29 May and 3 June 2020;

(c) two affidavits of Alastair Noakes sworn on 2 June 2020; and

(d) an affidavit of Timothy Huestis affirmed 3 June 2020.

5 Additionally, Ms Stephanie Gonsalves gave *viva voce* evidence for the Secretary.

Legal and Factual Issues in Dispute

6 The three proceedings in this case ultimately pose three central questions for this Court to consider:

(a) Were the Secretary's 6 January 2020 Change In Case Plan Decision, 20 January 2020 Removal Decision and 21 January 2020 Direction Notice (all terms as defined below) affected by jurisdictional error?

(b) If these decisions were affected by jurisdictional error, did the Secretary have power to reconsider them?

(c) Was the Secretary's 6 May 2020 Removal Decision (as defined below) contrary to the Family Preservation Order ('FPO') in force on that date, not authorised by the *Children, Youth and Families Act 2005* ('the Act') and beyond power?

Chronology

7 The eldest child is 5 years and 5 months' old while the younger child is 3 years and 6 months' old.[1] They lived with their Mother ('the Mother') and the Father.

8 On 21 April 2017, the Melbourne Children's Court granted an FPO in respect of the eldest child under s 280 of the Act. This gave the Secretary responsibility for the supervision of the eldest child but for day-to-day parental responsibilities to be given to the Mother. An FPO application was also made by the Secretary with respect to the younger child. The Mother subsequently returned positive drug screen results in breach of the FPO with respect to the eldest child.

9 On 2 June 2017, the children were formally placed in their Grandparent's care.

10 Pursuant to ss 166 to 168 of the Act, the Secretary has a responsibility to develop a case plan for a child in need of protection (including a permanency objective). As of 2 June 2017, the Secretary's permanency objective with respect to the children's care plan was family reunification with either the children's Father or Mother.

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1 Pursuant to s 534 of the *Children, Youth and Families Act 2005* ('the Act'), the names of the Father, the Grandparents, the Mother and the Children have been removed to protect their identities.

11 On 9 August 2017, the children were subject to a family reunification order, to last until 1 June 2018, which the Secretary applied to extend on the basis that the children's Mother and Father should be afforded a further opportunity to achieve reunification with the children.

12 This permanency objective (of family reunification) was reviewed by the Secretary in August 2019. The Secretary's assessment was that a permanency objective of permanent care was appropriate given the ongoing issues of parental substance abuse and lack of improvement or engagement with services to address these issues. This new permanent care objective was communicated to the parents and the Grandparents during a case plan meeting on 7 August 2019, at which point, the Secretary's intention was for the children to remain in the Grandparent's care.

13 The Secretary did not receive a request for internal review of the permanent care case plan under s 331 of the Act from the parent or Grandparents.

14 On 21 August 2019, the Secretary filed and served an application for a CBSO pursuant to s 289 of the Act. This was granted by the Children's Court on 15 November 2019 and was set to expire on 14 November 2021. Pursuant to the CBSO, the Secretary decided that the should children reside with their Grandparents.

The 6 January 2020 decision to alter the objective of the case plan from permanent care to family reunification with the Father ('6 January 2020 Change In Case Plan Decision')

15 On 23 December 2019, a delegate of the Secretary reviewed the case plan pursuant to its continuing obligations, which included an internal consultation with the Principal Practitioner to discuss reunification of the children with their Father.

16 On 24 December 2019, the Father was contacted and he confirmed he would support the children's return to his care. The case note for this meeting confirmed that when the Father was asked as to the timeframe that he could provide full time care for his children, he answered 'whenever'.[2] The Father also said he was moving into his new

[2] Exhibit 1.

home mid-January 2020 and was advised that if reunification was endorsed, that it might happen quickly. The Father advised that he had no issues with this and requested that reunification occur before the eldest child started school.[3]

17 On 6 January 2020, a delegate of the Secretary prepared a case note in respect of the eldest child regarding a consultation with the Principal Practitioner on how best to plan for reunification of the children with their Father. This case note states that due to concerns about the 'toxic relationship' between the Grandparents and both the Father and the Mother, the Principal Practitioner recommended that a case plan meeting occur with the Grandparents on the Friday to 'provide them the weekend to digest the news and then reunification to occur on the Monday. [We/I] Do not want to provide the [G]randparents too much time to scare or alter reunification plans'.[4]

18 On 7 January 2020, a delegate of the Secretary met with the Father to discuss the case plan, and advised him of a decision to change the permanency objective from permanent care, to family reunification of the children with him. The record of the case planning meeting confirms that the Secretary would convert the CBSO to an FPO and that the Father and his current partner (who is not the Mother) would assume primary care of the children from 20 January 2020. Further, when the Father asked if the matter would return to court, he was informed that the Secretary would notify the court of the change in circumstances, including the Direction Notice (as defined below), but the matter would potentially have to return to court for conditions to be placed on the FPO.[5]

19 The change in case plan decision was separately communicated to the Grandparents by letter dated 16 January 2020, provided to the Grandparents on 17 January 2020 at a case plan meeting.[6] The letter states that after consultation with the Principal

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3 Exhibit 1.

4 Affidavit of Stephanie Maryann Gonsalves, affirmed 3 June 2020, Exhibit SG-16 ('Second Affidavit of Stephanie Gonsalves').

5 Ibid, Exhibit SG-17.

6 Affidavit of Alastair Noakes in support of Originating Motion for Judicial Review, sworn on 2 June 2020 [8]–[9] ('Affidavit of Alastair Noakes in support of Originating Motion'); Transcript of Proceedings, *MM v Secretary to the Department of Health and Human Services* (Supreme Court of

Practitioner in the case, in line with the best interest principle under s 10 of the Act, the decision was made for '[the Children] to be reunified to the care of their father', and that the case planning decision had been made for 'immediate reunification to occur'. The letter advised the Grandparents of a right of appeal with VCAT.[7]

20 Prior to receiving this letter, the Grandparents alleged that they were not notified that the Secretary was proposing to make a decision of that nature, nor were they given an opportunity to make submissions. An email from the Grandparents' solicitors dated 17 January 2020 to the Secretary confirmed that after the non-reunification case plan was previously endorsed on 7 August 2019, no information was provided to the Grandparents regarding alternate case plans being developed or endorsed, nor was evidence provided to support the new case plan.[8]

21 The Grandparents attended a case plan meeting on 17 January 2020, where the amended case plan to achieve family reunification with the Father was communicated to them again. A note of this meeting confirmed that an internal review (which included a consultation with the Berry Street therapeutic team) concluded that the Secretary should endorse reunification with the Father. The note also records that the grandfather, expressed that 'they knew this decision was coming', and was informed of the appeal process, including being provided with a letter detailing instructions on initiating the appeal.[9]

22 On the same date, the Mother was also advised on this decision on the telephone.

23 The Grandparents, in an email to the Secretary on 17 January 2020, raised the following issues:

(a) the Father failing to complete urine screens in accordance with court orders;

Victoria, S ECI 2020 02429, S ECI 2020 02424, S ECI 2020 02317), Incerti J, 4 June 2020) 142.19–21 ('T').

7 Affidavit of Stephanie Maryann Gonsalves, affirmed 29 May 2020, Exhibit SG-5 ('First Affidavit of Stephanie Gonsalves').

8 Ibid, Exhibit SG-6.

9 Department of Health and Human Services, Case Planning Meeting Record, 17 January 2020 at 9:30am, 2.

(b) the Father's urine screens (when they were completed) showing evidence of cannabis use;

(c) sporadic attendance by the Father at scheduled attendance meetings with the children;

(d) the Father's history of domestic violence;

(e) the Father not being assessed as appropriate to transport the children; and

(f) appropriate conditions to be placed on the FPO.

24 The Department of Health and Human Services (the 'Department') responded to the Grandparents' solicitors by email, and confirmed that they had assessed that the children should be reunified with their Father, with both the Mother and Father agreeing to the process.[10] Specifically, in the email response to the Grandparents' concerns, the Department wrote:

> [W]ith respect to the mother's contact, Child Protection are in the Process of arranging a Family Led Decision Making Meeting with the mother and father to make arrangements for the facilitation of contact. Both the mother and father have agree[d] to this process and are already engaging in positive communication regarding the children.[11]

25 No further information was provided as to when these discussions took place and what exactly was said by the Mother. The solicitors sent a follow-up email on the same day raising further concerns and requested a review of the new permanency objective (of reunification with the Father) under s 331 of the Act. No response was received to the second email.

26 I note the Mother was not separately represented in the hearing of this matter and there was no evidence filed on her behalf.

The 20 January 2020 decision to remove the children from the Grandparents' care and place them with their Father ('the 20 January 2020 Removal Decision') and the

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10 Affidavit of Alastair Noakes in support of Originating Motion; Exhibit AN-7.
11 Ibid 3.

21 January 2020 Direction Notice

27 As a fact, the children were placed into the Father's care on 20 January 2020. On 20 January 2020, the solicitor for the Grandparents sent an email to the Secretary to clarify why the children's placement had changed given that no internal review had been undertaken. No response to this email was received.

28 On 21 January 2020, the Secretary's delegate made a direction notice under s 289A for the CBSO to be taken as an FPO ('the Direction Notice'), giving the Secretary responsibility for the supervision of the children, but placing them in the day-to-day care of the Father. This direction to change the nature of the CBSO to a FPO was submitted to the Melbourne Children's Court on 21 January 2020. On the same day, the Secretary also filed an application to include conditions on the FPO. The hearings for these applications at the Children's Court occurred on 11 February 2020 and 21 February 2020.

29 The Secretary's general practice (which was not adopted in this case) is to monitor the success of the reunification and to plan for a transitional reunification rather than an immediate formal change to an FPO.[12] The same practice was referred to by the Assistant Director of Child Protection in the Brimbank-Melton Area ('Assistant Director of Child Protection') in his s 331 Report dated 1 May 2020.[13] While never formally tendered, the Secretary provided an electronic link to, and relied on, the Secretary's Policy in Respect of Reviews of Case Planning Decisions.[14] On the same website, the Secretary outlines its 'Family Reunification Advice',[15] and the procedure for 'Directing a Parent to Resume Full Parental Responsibility'.[16]

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12 First Affidavit of Stephanie Gonsalves, [32].

13 Ibid, Exhibit SG-13.

14 Department of Health and Human Services, 'Internal Review of Decisions — Advice' (Web Page, 1 March 2016) <https://www.cpmanual.vic.gov.au/advice-and-protocols/advice/case-planning/internal-review-decisions#h3_2>.

15 Department of Health and Human Services, 'Family Reunification — Advice' (Web Page, 1 March 2016) <https://www.cpmanual.vic.gov.au/advice-and-protocols/advice/case-planning/family-reunification#h3_7>.

16 Department of Health and Human Services, 'Directing a Parent to Resume Full Parental Responsibility' (Web Page, 8 April 2016) <https://www.cpmanual.vic.gov.au/policies-and-procedures/phases/protection-order/directing-parent-resume-full-responsibility>.

30 Regrettably, we were given a link to part of the procedures relating to case planning decisions. I note that the website also contained relevant information on family reunification and parental responsibility instructions. The link was provided by the Secretary in the final minutes of the hearing and the actual information contained was not tendered as an exhibit. However, aside from initial objections about the lateness at which these policies were provided to the Court and to parties by the Secretary, there has been no challenge to the submissions made by Counsel for the Grandparents and the Secretary about the policies and their content. Additional time was given to the Father to respond to this material, which his counsel declined.[17] For completeness, I have reviewed the content of the link provided.

The s 331 Internal Review of the Direction Notice

31 Pursuant to the internal review of the amended case plan to achieve reunification as requested by the Grandparents under s 331 of the Act, the Assistant Director of Child Protection was allocated the internal review on 5 February 2020 and commenced the review on 14 February 2020.

32 The Assistant Director of Child Protection met with the Grandparents as part of the s 331 internal review process on 27 February 2020. However, by this time, reunification of the children with their Father pursuant to the Direction Notice had already taken place.

33 On 21 February 2020, the Secretary's application to impose conditions on the FPO was heard by Magistrate Ehrlich, who commented to the parties that a decision by the Children's Court to place conditions on an FPO would render the internal review redundant. On this basis, the application was adjourned for the internal review to be concluded.

34 The Secretary concedes a failure to afford procedural fairness to both the Mother and the Grandparents as well as breaches of the decision-making principles under s 11 of the Act when converting the CBSO to an FPO. The concerns with procedural fairness

17 T196.15–197.24.

and therefore the validity of the Direction Notice was raised before Magistrate Parkinson in the Children's Court on 18 March 2020 in the context of an application to withdraw the Secretary's earlier application to include conditions on the FPO.

35 In the Children's Court proceeding on 14 April 2020, Magistrate Dotchin sought assurances that the children would remain living with the Father until the completion of the review, even if the Secretary considered the FPO was a nullity.

36 Magistrate Dotchin struck out the Secretary's application to vary the FPO and ordered that 'the outcome of the case plan to be provided to the parties' legal representatives as soon as possible after the decision is made.'[18]

37 The s 331 internal review report ('the s 331 Report') was completed on 1 May 2020. The s 331 Report upheld the Grandparents' concerns and concluded that the Secretary's delegates had not complied with the principles in ss 10 and 11 of the Act.[19] The s 331 Report noted that there had been a failure to consult with the Father's service providers, including alcohol and drug counsellor and the Men's Behavioural Change Program. It noted that the children had remained in the care of the Grandparents for 984 days, with a failure by the Secretary to give consideration to the desirability of continuity and permanency in a child's care when making decisions. The Assistant Director of Child Protection, in the s 331 Report, purported to 'overturn' the reunification case plan and endorse the permanent care plan (that is, for the children to be placed into the Grandparents' care permanently).

38 As part of the s 331 review, the Assistant Director of Child Protection interviewed the Father on 20 April 2020 and the Mother on 17 April 2020. The report also stated that Child Protection advised that returning the children to their Father was in their best interests.

39 Given the s 331 Report's findings, the Secretary determined that the Direction Notice

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18 Affidavit of John Patrick Brennan, affirmed 24 May 2020, Exhibit JB-5 ('Affidavit of John Brennan'). See also First Affidavit of Stephanie Gonsalves, Exhibit SG-12, 24.10–24.16.

19 First Affidavit of Stephanie Gonsalvez, Exhibit SG-13.

was void and of no effect. The Secretary then adopted the position that the permanency objective of permanent care for the children identified in August 2019 was the most appropriate long-term decision for them.

6 May 2020 Decision to remove the children from their Father's care ('May 2020 Removal Decision')

40 On 4 May 2020, the Grandparents attended a meeting with the Assistant Director of Child Protection to discuss the outcome of the internal review.

41 Two delegates of the Secretary attended the Father's home on 6 May 2020 to advise him of the completed s 331 internal review and the required change in placement (i.e. to return the children to the care of the Grandparents). The Father alleges that the purported basis for the removal was that the CBSO had been 'reinstated' in place of the FPO pursuant to a Children's Court proceeding on 14 April 2020. The Father alleges that the Children's Court made no such order, and further, it did not have the power to do so without an application under s 304 of the Act.

42 According to a case note prepared by one of the Secretary's delegates regarding the visit to the Father's home on 6 May 2020,[20] the Secretary's delegates spoke to the Father's partner and advised her that they would be back later in the morning to speak with him. The Father contends that the note does not mention that the Secretary's delegates attempted to contact him before coming to his home. In cross-examination, Ms Gonsalves, who was one of the Secretary delegates at the Father's house that day, said she had made a note of an earlier attempt to contact him by phone call in a separate case note that was not exhibited to the affidavits in this proceeding.[21]

43 After the children's removal from the Father's care, he was provided with a letter from the Secretary setting out the purported legal basis for the removal.[22] This letter

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20 Affidavit of John Brennan, Exhibit JB-2.
21 T56.31–57.6.
22 Affidavit of John Brennan, Exhibit JB-3.

does not mention the FPO that the Father claimed to be in force at the time pursuant to the Direction Notice.

44 The children have been in the Grandparents' care since being removed from their Father's care on 6 May 2020.

45 On 6 May 2020, the same date of the children's removal from their Father's care, the Father filed an application to revoke the CBSO made on 15 November 2019 at the Children's Court. On 13 May 2020, Magistrate Billings heard the application and adjourned the application for submissions to 22 May 2020.

46 On 22 May 2020, the Father submitted that the revocation of the CBSO could not proceed as the Direction Notice was still operational and that there was no CBSO in force. The application in the Children's Court was adjourned to enable the Father's application before this Court to proceed.

Procedural History

47 There are three proceedings filed with the Court:

(a) an Originating Motion filed by the Father dated 24 May 2020 proceeding S ECI 2020 02317 ('the Father's Proceeding');

(b) an Originating Motion filed by the Grandparents dated 3 June 2020 proceeding S ECI 2020 02424 ('the Grandparents' Proceeding'); and

(c) an Originating Motion filed by the Secretary dated 3 June 2020 proceeding S ECI 2020 02429 ('the Secretary's Proceeding').

Father's Proceeding

48 In the Father's Proceeding, he claims that there was no act or decision that had the effect of terminating the FPO and/or reinstating the CBSO. Consequently, the removal of the children from the Father's care on 6 May 2020 was without legal authority. The Father seeks:

(a) a declaration that the FPO remains in force in respect of the children and the

Father;

(b) a declaration that the action of the Secretary in the May 2020 Removal Decision was contrary to the FPO in force on that date, and not authorised by the Act, and beyond power; and

(c) an injunction requiring the Secretary to return the children to the Father's care.

Grandparents' Proceeding and Application for Joinder

49 The Grandparent's relief is sought on the ground that the Direction Notice was affected by jurisdictional error because in making that direction, the Secretary failed to afford the Grandparent's procedural fairness. The Grandparents seek:

(a) an extension of time to bring the proceeding; and

(b) an order of certiorari quashing the Direction Notice made by the Secretary; and

(c) a declaration that the CBSO made by the Children's Court on 15 November 2019 in relation to the children remain in force.

50 Further, by their summons filed 3 June 2020 in the Father's Proceeding, the Grandparents seek an order under r 9.06(b) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) ('the Rules') that they be added as defendants to the Father's Proceeding. They also seek directions that the Father's Proceeding and the Grandparents' Proceeding be heard together.

The Secretary's Proceeding

51 The Secretary concedes that the Grandparents and the Mother were not consulted as they should have been in relation to the Change in Case Plan Decision, the 20 January 2020 Removal Decision and the Direction Notice, thereby depriving them of procedural fairness. In addition, the Secretary claims the decision-making failed to accord with the obligations imposed by ss 10 and 11 of the Act. Finally, the Secretary

claims that having identified that decisions were effected by jurisdictional error she was permitted to reconsider and correct the decisions. The Secretary seeks:

(a) an extension of time to bring the proceeding;

(b) a declaration that the children are subject to the CBSO until 14 November 2021; and/or

(c) a declaration that the following three decisions in respect of the children were unlawful by reason of failure to accord procedural fairness and failure to conform to the principles in ss10 and 11 of the Act, the decisions being:

(i) the 6 January 2020 Change in Case Plan Decision;

(ii) the 20 January 2020 Removal Decision; and

(iii) the Direction Notice in respect of the children; and

(d) an order quashing the Direction Notice.

Procedural Applications: Joinder, Standing and Extension of Time

52 To summarise, the Father's Proceeding was filed first (in time) and challenged the 6 May 2020 Removal decision. The Secretary was the only defendant to that proceeding. The day before the hearing, the Grandparents and Secretary filed separate Originating Motions and, in the Grandparents' case also issued a summons for leave to be added to the Father's Proceeding. The Grandparents, by contrast, challenge the 21 January 2020 Direction Notice and the Secretary the trio of decisions made in January 2020.

53 Accordingly, it is convenient to deal with the Grandparents' and Secretary's Proceedings first, because if they are successful in obtaining the relief sought in their respective Originating Motions, it will potentially have the effect of dismissing or affecting the relief available in the Father's Proceeding.

54 I heard applications for joinder, standing and extensions of time at the

commencement of the hearing. I delivered a brief ruling at the time and these are now my written reasons.

55 In the Grandparents' Proceeding, they sought:

(a) an order under r 9.06(b) of the Rules, that they be added as defendants to the Father's Proceeding; and

(b) directions that the Grandparents' proceeding be heard together with the Father's proceeding, and that evidence in each of those proceedings be evidence in the other proceeding.

56 The Grandparents also sought an extension of time under r 56.02 of the *Supreme Court (General Civil Procedure) Rules 2015* ('the Rules') to file their Originating Motion.

57 The Father opposed the joinder application, and contended that the Grandparents did not have standing to file their Originating Motion, and that the extension of time to do so should not be granted.

58 Dealing first with the Grandparents' joinder application to the Father's proceeding, pursuant to r 9.06(b)(ii) of the Rules, a person may be added as a party to a proceeding if they are:

> a person between whom and any party to the proceeding there may exist a question arising out of, or relating to, or connected with, any claim in the proceeding which it is just and convenient to determine as between that person and that party as well as between the parties to the proceeding.

59 There is clearly a question arising out of the Father's proceeding which is tied to issues raised by the Grandparents, and it is both appropriate and convenient that they be dealt with together in the one proceeding. Specifically, in respect of the Direction Notice, the Secretary and the Grandparents contend that this direction was affected by jurisdictional error, while the Father contends that it was not.

60 Only one of those positions is correct; in other words, either the impugned Direction

Notice was affected by jurisdictional error (as the Secretary and Grandparents argue), or it was not (as the Father contends). Therefore, in order to determine whether to grant the relief sought by the Father, or by the Secretary and the Grandparents, I need to consider the *same decision*; that is; whether that impugned Direction Notice was affected by jurisdictional error.

61 Both proceedings arise from the same set of facts and the issues arise from the series of decisions made by the Secretary. It is difficult in this case to hive off one decision from another decision. There have been a series of decisions made which have directly affected a number of people, most critically the children, the Father and the Grandparents. There is such an interconnectedness between each of the decisions made by the Secretary that it is appropriate that the Grandparents be added as defendants to the Father's Proceeding, that the proceedings be heard together and the evidence in each of the proceedings be evidence in the other proceeding.

62 In relation to standing in the Grandparent's Proceeding, it was submitted that when considering an FPO under the Act, the legal rights and responsibility for the children are vested, in this case, in the parent. While I accept the Father's arguments that they may not, under the Act, be able to make applications to revoke or vary an FPO, [23] they are persons who have an interest in the decisions as set out in ss 10 and 11 of the Act. Given what ss 10 and 11 requires the decision-maker (in this case the Secretary) to have regard to, including the Grandparents' views and any information they can provide, they clearly have a sufficient interest in this matter and have standing to bring the proceeding.

63 Further, given that they were taking care of the children up to the day before Direction Notice was made, it was a requirement (as will be explained below) that they be afforded procedural fairness in that decision. I consider the Grandparents have a sufficient interest to give them standing to bring this proceeding, given that their central argument is that they were in fact denied procedural fairness.

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23 The Act ss 300, 305(1)(a)–(b).

64 Pursuant to r 56.02(1), a proceeding under O 56 must be commenced within 60 days after the date when grounds for the grant of relief claimed first arose, which was 21 January 2020 in this case when the Direction Notice was made. Sixty days after 21 January 2020 is 21 March 2020. The extension of time sought here is just over two months. The delay and extension of time issues are exactly the same for the Secretary's Proceeding.

65 Under r 56.02(3), the Court may extend the 60 day time limit in 'special circumstances'. The line of authority is clear that in considering 'special circumstances', the Court should consider all the relevant circumstances,[24] including whether the parties seeking the extension have an arguable case and whether, in this case, the Father would be prejudiced by an extension of time.[25]

66 I consider the delay is minimal. This is not a case where the Secretary and the Grandparents were being idle during this two month period. This matter has been ventilated before the Children's Court now on a number of occasions. There have been reviews on foot by the Secretary which were only concluded on 1 May 2020. I accept that the Grandparents would have considered, in that time period, that this matter was being dealt with by the Secretary internally, and in particular, that the issue of jurisdictional error and the power of the Secretary to reconsider her decisions was alive and being considered. I do not consider that there is any real prejudice to the Father given that the key issues in dispute are ones which the Father's legal representatives have been aware of for a significant period of time, and indeed, involve determination of the very same questions.

67 Therefore, I grant the extension of time sought by the Grandparents and the Secretary to file their respective Proceedings, and order that the Grandparent's be added as defendants to the Father's proceeding.

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24 *Madafferi v Chief Commissioner of Police* [2017] VSC 652 [38]–[43] (McDonald J).
25 *Mann v Medical Practitioners Board (Vic)* [2004] VSCA 148 [57]–[58] (Hansen AJA).

The *Children, Youth and Families Act 2005* (Vic)

68 The Act is the bedrock legislation regulating the law in relation to children, youth and families in this State. It is one of the most important pieces of legislation in this State. At the heart of the legislation are a set of values propounded by Bell J in *Secretary to the Department of Human Services v Sanding*:[26]

> Children are ends in themselves and not the means of others. They form part of the family, the fundamental group unit of society. Children bear rights personally, and are entitled to respect of their individual human dignity. The views of children should be given proper consideration in relation to matters affecting them. Children are especially entitled to protection from harm, and to human development. Those values are inherent in the best interests of the child which is the foundational principle of the Children, Youth and Families Act. That principle is the cardinal consideration in protection proceedings in the court, including the making and revoking of custody to secretary orders. The legislation contains a detailed scheme for identifying and protecting the child's best interests which it is the responsibility of the secretary to administer and the jurisdiction of the court to enforce.

69 The importance of the Act and how it relates to the daily lives of children and families across the State cannot be underestimated. The Secretary wields significant power and holds tremendous responsibility in relation to these children and families.

70 It is in this light that I note that the issues raised in this proceeding necessitate a construction of many integral sections of this legislation. The parties have raised various, competing interpretations of the Act.

Sections 8, 9, 10 and 11

71 Part 1.2 of the Act governs the decision-making principles for Family Division matters. Sections 8, 9, 10 and 11 of the Act set out certain principles that the Secretary, the Children's Court and other relevant decision-makers are required to consider. Section 8 sets out the principles that decision-makers under the Act must have regard to:

> **8 Decision makers to have regard to principles**
>
> (1) The Court must have regard to the principles set out in this Part (where

[26] (2011) 36 VR 221, 227 [11].

relevant) in making any decision or taking any action under this Act.

(2) The Secretary must have regard to the principles set out in this Part (where relevant) in making any decision or taking any action under this Act or in providing any service under this Act to children and families.

(3) A community service must have regard to the principles set out in this Part (where relevant) in making any decision or taking any action in relation to a child for whom it is providing, or is to provide, services under this Act.

(4) This section does not apply in relation to any decision or action under Chapter 5 or Chapter 7 (in relation to any matter under Chapter 5).

72 Section 9 of the Act addresses the role of these principles:

9 Role of principles

(1) The principles set out in this Part are intended to give guidance in the administration of this Act.

(2) The principles do not apply to Chapter 5 or Chapter 7 (in relation to any matter under Chapter 5).

73 Section 10 of the Act provides that for the purposes of the Act the best interests of the child must always be paramount and the considerations which inform the best interests of the child:

10 Best interests principles

(1) For the purposes of this Act the best interests of the child must always be paramount.

(2) When determining whether a decision or action is in the best interests of the child, the need to protect the child from harm, to protect his or her rights and to promote his or her development (taking into account his or her age and stage of development) must always be considered.

(3) In addition to subsections (1) and (2), in determining what decision to make or action to take in the best interests of the child, consideration must be given to the following, where they are relevant to the decision or action—

(a) the need to give the widest possible protection and assistance to the parent and child as the fundamental group unit of society and to ensure that intervention into that relationship is limited to that necessary to secure the safety and wellbeing of the child;

(b) the need to strengthen, preserve and promote positive relationships between the child and the child's parent, family members and persons significant to the child;

(c) the need, in relation to an Aboriginal child, to protect and promote his or her Aboriginal cultural and spiritual identity and development by, wherever possible, maintaining and building their connections to their Aboriginal family and community;

(d) the child's views and wishes, if they can be reasonably ascertained, and they should be given such weight as is appropriate in the circumstances;

(e) the effects of cumulative patterns of harm on a child's safety and development;

(f) the desirability of continuity and permanency in the child's care;

(fa) the desirability of making decisions as expeditiously as possible and the possible harmful effect of delay in making a decision or taking an action;

(g) that a child is only to be removed from the care of his or her parent if there is an unacceptable risk of harm to the child;

(h) if the child is to be removed from the care of his or her parent, that consideration is to be given first to the child being placed with an appropriate family member or other appropriate person significant to the child, before any other placement option is considered;

(i) the desirability, when a child is removed from the care of his or her parent, to plan the reunification of the child with his or her parent;

(j) the capacity of each parent or other adult relative or potential care giver to provide for the child's needs and any action taken by the parent to give effect to the goals set out in the case plan relating to the child;

(k) contact arrangements between the child and the child's parents, siblings, family members and other persons significant to the child;

(l) the child's social, individual and cultural identity and religious faith (if any) and the child's age, maturity, sex and sexual identity;

(m) where a child with a particular cultural identity is placed in out of home care with a care giver who is not a member of that cultural community, the desirability of the child retaining a connection with their culture;

(n) the desirability of the child being supported to gain access to appropriate educational services, health services and accommodation and to participate in appropriate social opportunities;

(o) the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance;

(q) the desirability of siblings being placed together when they are placed in out of home care;

(r) any other relevant consideration.

74 Finally, s 11 provides additional decision-making principles for the Secretary and a community service — and expressly *not* the Children's Court — in making a decision or taking an action in relation to a child:

> **11 Decision-making principles**
>
> In making a decision or taking an action in relation to a child, the Secretary or a community service must also give consideration to the following principles—
>
> (a) the child's parent should be assisted and supported in reaching decisions and taking actions to promote the child's safety and wellbeing;
>
> (b) where a child is placed in out of home care, the child's care giver should be consulted as part of the decision-making process and given an opportunity to contribute to the process;
>
> (c) the decision-making process should be fair and transparent;
>
> (d) the views of all persons who are directly involved in the decision should be taken into account;
>
> (e) decisions are to be reached by collaboration and consensus, wherever practicable;
>
> (f) the child and all relevant family members (except if their participation would be detrimental to the safety or wellbeing of the child) should be encouraged and given adequate opportunity to participate fully in the decision-making process;
>
> (g) the decision-making process should be conducted in such a way that the persons involved are able to participate in and understand the process, including any meetings that are held and decisions that are made;
>
> (h) persons involved in the decision-making process should be—
>
> (i) provided with sufficient information, in a language and by a method that they can understand, and through an interpreter if necessary, to allow them to participate fully in the process; and
>
> (ii) given a copy of any proposed case plan and sufficient notice of any meeting proposed to be held; and
>
> (iii) provided with the opportunity to involve other persons to assist them to participate fully in the process; and
>
> (i) if the child has a particular cultural identity, a member of the appropriate cultural community who is chosen or agreed to by the child or by his or her parent should be permitted to attend meetings held as part of the decision-making process.

75 The Act is clear that, according to s 8, the Secretary *must* have regard to the principles set out in ss 10 and 11. Counsel for the Father invited the Court to interpret s 9 to mean that Parliament did not intend to condition the exercise of powers under the Act on compliance with each and every-decision-making principle in every case. It was submitted that the intention, as set out in s 9 (role of principles), is for these principles to provide guidance, which results in the application of the s 11 decision-making principles to be context specific and non-obligatory. Further, the Court was invited to interpret the expression in s 10(1) that 'the best interests of the child must always be paramount' as meaning that the s 11 decision-making principles yields to the best interests of the child.

76 I disagree with this approach. As counsel for the Secretary submitted, adherence to these principles is mandatory, reflected in the imperative language of ss 10 and 11, as the values contained within these principles 'are intended to constitute the values underpinning all decision-making under the Act.'[27] It is perhaps beneficial to read the first sentence of s 11 in reverse to elucidate its meaning. The section provides that the Secretary '*must also give consideration*' to a number of principles in 'making a decision or taking an action in relation to a child.' From this reading, it is clear that the consideration of the s 11 principles, which is mandatory ('*must*'), informs the ultimate decision or action that the Secretary takes. This results in the Secretary's decision or action operating in a purposive manner.

77 This interpretation of the Act is reinforced in *Certain Children v Minister for Families and Children & Ors (No 2) ('Certain Children')*, where John Dixon J construed s 11, amongst other provisions of the Act, to mean:

> Part 1.2 of the Act sets out certain principles that *require* the Secretary and the Children's Court, among other relevant decision makers, *to have regard* to the best interests *and decision making principles* set out in this Part *in making any decision or taking any action under the Act*.[28]

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27 Secretary to the Department of Health and Human Services, Outline of Submissions, 3 June 2020, 9 [41].

28 *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 441, 455 [27] (emphasis added) ('*Certain Children*').

78 If the requirements of s 11 were guidelines, they would be no more than discretionary, and adherence to them would be determined by the Secretary, her delegates or employees of relevant community services. I do not consider that this was Parliament's intention in crafting the legislation. The Act provides a structured, coherent, purposive approach to the paramountcy of the best interests of the child. The mandatory regard to the s 11 decision-making principles ensures that decision-makers frame their decision-making through the prism of these principles. Though regard must be had to these principles when making decisions, the applicability of each of the s 11 decision-making principles will be context dependent.

Protection orders

79 Protection orders are central to this case. Protection orders are orders available to the Children's Court to protect children. The two protection orders at issue in this case, the FPO and the CBSO, have distinct purposes, effect and operation.

80 Section 280(1) of the Act addresses the content of an FPO. The Act gives the Secretary responsibility for the supervision of the child. Supervision by the Secretary does not affect a person's parental responsibility for the child and provides for the child to be placed in the day to day care of one or both of the child's parents. There are a range of conditions that can be imposed by the Court on an FPO.[29]

81 The Secretary's powers under an FPO are limited and include visiting a child at the child's place of residence to carry out the duties of the Secretary under the order, and to give any reasonable and lawful direction that the Secretary considers to be in the best interests of the child.

82 A CBSO, on the other hand, is made 'where the objective … to make arrangements for the permanent or long-term care of the child when reunification is not possible.'[30] The powers of the CBSO, with its origins in the wardship system, represents 'a major

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29 The Act ss 281(1)–(2).

30 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 August 2014, 2659 (the Hon. Mary Woolridge MP, Minister for Community Services).

form of State or public intervention into the affairs of private citizens.'[31] This major intervention is such that s 289(1) confers parental responsibility for the child under a CBSO on the Secretary (as opposed to the parent under an FPO).

83 The oversight that the Children's Court has over the exercise of power pursuant to a CBSO attests to its exceptional nature. Section 10(3)(a) requires the Court to ensure that intervention into the relationship between parent and child is limited to that necessary to secure the safety and wellbeing of the child. Since this intervention is coupled with prioritising family preservation as the highest ranking permanency objective under the Act,[32] the powers contained within a CBSO should be applied sparingly. Former Magistrate Peter Power, in his comprehensive and insightful Children's Court research materials, described a CBSO as 'an order of last resort, usually confined to cases where the child is considered to be at unacceptable risk of harm in the care of the parent and the prospect of reunification with a parent within a reasonable time is zero or slight.'[33]

84 In summary, the key distinction between an FPO and a CBSO is the person(s) that has responsibility and/or supervision of the child. An FPO gives the Secretary responsibility for the supervision of the child but does not affect a person's parental responsibility for the child. A CBSO confers parental responsibility for the child onto the Secretary to the exclusion of all others. Under a CBSO, the Secretary can direct that a parent of the child resume parental responsibility for the child whilst the CBSO remains in operation.

85 Having established the relevant background of the mandatory considerations in s 11, and what CBSOs and FPOs are, I now turn to the relationship between CBSOs and FPOs, and the decision which triggered the unfortunate saga of errors before me in

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31 Department of Community Welfare Services Victoria, Guardianship Services Manual, September 1984, 2, DHS.3002.381.0021, available at <https://www.childabuseroyalcommission.gov.au/sites/default/files/DHS.3002.381.0008.pdf>.

32 The Act s 167(1).

33 Former Magistrate Peter Power, Children's Court of Victoria, Research Materials, Chapter 5: Family Division – Child Protection [5.18.1] (last updated April 15 2020) ('Children's Court Research Materials').

this case.

86 Section 289A provides for a change in the nature of a CBSO and for it taken to be, through an administrative decision-making process, an FPO, if the Secretary gives a direction that parents are to resume parental responsibility for the child. From the date of such a direction:

(a) the CBSO is taken to be an FPO giving the Secretary responsibility for the supervision of the child, and correspondingly, the Secretary ceases to have parental responsibility for the child;

(b) the child is placed in the day to day care of the parent/s who assume parental responsibility for the child;

(c) Division 3 of Part 4.9 (Protection Orders) applies to the order; and

(d) the order ceases to be a CBSO for the purposes of the Act.

87 Section 289A(3) empowers the Secretary to apply to the Court to determine that the FPO is to include conditions. If such an application is made, the Court may impose conditions on the FPO.[34]

88 The nature of s 289A is unique; it empowers the Secretary to create, in effect, a new FPO from a previously existing CBSO imposed by an order of the Children's Court. Once the FPO (having the nature of a court order) is created,[35] different legislative provisions apply detailing the new FPO's operation, content and repeal. On its face, this power sits uneasily with the rest of the Act. This is because the rest of the Act provides a clear pathway for the Children's Court to oversee the creation of protection orders.

89 The relationship between s 280(2) (which envisages an FPO to be ordered by a Court) and s 289A (which allows for the *Secretary* to direct that a CBSO is to be taken

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34 The Act ss 288A(4), 281.

35 Ibid s 280(2).

as an FPO) is uncertain. The former section envisages either an FPO operating for a 12 month period, or a Court satisfying itself that conditions exist enabling an FPO to operate for a period in excess of 12 months. However, in the present circumstances, the Direction Notice under s 289A creating the impugned FPO did not stipulate a timeframe.

90 Section 289A effectively grants to the executive the ability to make an order ordinarily associated with the exercise of judicial power. This underpins the important role of the mandatory considerations in s 11 in governing the exercise of the Secretary's powers.

Variation and Revocation procedures

91 The Act provides different ways in which an FPO or a CBSO may be varied or revoked. On application by a child, a parent or the Secretary, the Children's Court may vary the FPO (or any conditions included in the FPO)[36], or revoke the FPO.[37]

92 Section 305 provides that a CBSO may be revoked on application by the Secretary, the child or a parent. This may only occur in specific circumstances.[38] Unlike for an FPO however, the Children's Court has no power to place conditions on a CBSO.

Case Planning and Internal Review Procedure — s 331

93 A case plan is prepared by the Secretary for the child.[39] It must contain all significant decisions made by the Secretary concerning a child that relate to the present and future care and wellbeing of the child, including the placement of, and contact with, the child.[40]

94 A case plan includes, amongst other things, a permanency objective for the child as required by s 167.[41] Section 167(1) requires a case plan to include one of the following five permanency objectives to be considered in the following order of

36 Ibid ss 300, 301.
37 Ibid ss 303, 304(1) and 307.
38 Ibid ss 305(2).
39 Ibid s 166(1).
40 Ibid s 166(2).
41 Ibid s 166(3)(a).

preference as to be determined to be appropriate in the best interests of the child:

- family preservation;
- family reunification;
- adoption;
- permanent care; and
- long term out of home care.

95 The process of internal review, pursuant to s 331, of case planning decisions is important in this case. The mechanism for this is set out in s 331. The relevant provisions of that section provide:

> **331 Internal Review**
>
> (1) The Secretary must prepare and implement procedures for the review within the Department of decisions made as part of the decision-making process following the making of a protection order.
>
> (2) The Secretary must ensure that a copy of the procedures prepared under subsection (1) is given to the child and his or her parent together with the copy of the case plan required to be given under section 168.

96 It is plain that although s 331(1) imposes on obligation on the Secretary to prepare and implement procedures for review, the content and scope of those procedures are not specified in the Act. Moreover, s 331(2) limits the applicability of the provision of a copy of these procedures to the child and their parent.

97 The decision to undertake an internal review, on a plain construction of the Act, is provided to the Secretary on a discretionary basis, as long as such review must implement procedures adopted by the Secretary. Importantly for this case, it was agreed that an internal review of a case plan under s 331 of the Act cannot provide a basis for determining where, and with whom, a child will live under a CBSO or an FPO.

98 I note that former Magistrate Power makes the observation that it is his experience that 'a significant number of contested cases in the Children's Court involve an

attack on the Department's case planning process as a central component'.[42]

99 Relevantly, section 333 of the Act empowers a child or parent to apply to VCAT for review of:

- a decision contained in a case plan; or
- any decision made by the Secretary concerning the child.

100 Section 333(3) prohibits an application to VCAT unless the applicant has exhausted all available avenues for internal review under ss 331 and 332.

101 Although s 331 does not create a statutory right of internal review of case planning decisions, s 333(3) does appear to contemplate that requesting an internal review under s 331 constitutes a review avenue before a person is entitled to apply to VCAT for the review of a case plan decision. In this case, there is an issue as to whether the Grandparents had an entitlement to an internal review and the implications of any such entitlement as to the determination of whether the Grandparents were denied procedural fairness and/or whether the Secretary breached its obligations under ss 10 and 11 of the Act.

The Proceedings

102 I will now turn to how the s 11 mandatory considerations, along with the powers of the Secretary under the Act, interact in the actual decisions that were made. The three proceedings attack decisions made by the Secretary or her delegate:

(a) the Father's Proceeding challenges the 6 May Removal Decision;

(b) the Secretary's Proceeding challenges the Trio of Decisions in January 2020; and

(c) the Grandparents' Proceeding challenges the Direction Notice made on 21 January 2020;

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42 Children's Court Research Materials, [5.29.3].

on the basis that they were affected by jurisdictional error.

The Grandparent's Proceeding and the Secretary's Proceeding

103 I have already explained in [53] above why I will deal with the Grandparents' and Secretary's Proceedings first.

104 In the Grandparents' Proceeding, they argue that the Direction Notice was affected by jurisdictional error by reason of the Secretary failing to afford them procedural fairness.

105 In the Secretary's Proceeding, she argues that the:

(a) the 6 January 2020 Change in Case Plan Decision,

(b) the 20 January 2020 Removal Decision; and

(c) the 21 January 2020 Direction Notice (together, the 'Trio of Decisions in January')

were affected by jurisdictional error for failing to afford the Grandparents and the Mother procedural fairness at common law, and for failing to conform to the principles in ss 10 and 11 of the Act.

Jurisdictional Error

106 When a decision is challenged as being affected by jurisdictional error, the decision-maker is said to have lacked legal foundation or authority to act or decide as they did.[43]

107 According to the High Court in *Craig v South Australia*,[44] a decision-maker falls into jurisdictional error where it 'mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist.'[45]

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43 [1969] 2 AC 147, 171.
44 (1995) 184 CLR 163.
45 Ibid 177.

108 The High Court went on to explain that the most obvious kind of jurisdictional error is where a decision is 'wholly or partly lies outside the theoretical limits of [the decision-maker's] functions and powers.'[46]

109 Lord Reid in *Anisminic Ltd v Foreign Compensation Commission*,[47] gave a non-exhaustive list of examples of a decision-maker falling into jurisdictional error, which is a helpful illustration to what can be a quite conceptual idea:

> [T]here are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or *failed to do something* in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. *It may have failed in the course of the inquiry to comply with the requirements of natural justice*. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive.[48]

110 In terms of the effect of a decision involving jurisdictional error, it is regarded at law as no decision at all.[49] Whether a decision affected by jurisdictional error nonetheless has some operative legal effect will be discussed below from [192].

111 I will first consider whether jurisdictional error flowed from an alleged breach of procedural fairness as against the Grandparents and the Mother. I will then consider whether the decisions were made in jurisdictional error because of non-compliance with, or a failure to consider, the decision-making principles in s 11.

Procedural Fairness

112 In *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*, Gleeson CJ recognised that '[w]hether one talks in terms of procedural fairness or

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46 Ibid.

47 [1969] 2 AC 147.

48 Ibid 171 (emphasis added). I note that in *Craig v South Australia* (1995) 184 CLR 163, 178–9 the High Court did not consider Lord Reid's paragraph as being similarly applicable to a court of law (as opposed to an administrative tribunal). However, given that the decision-maker in question in this case was an administrative agency, this distinction is not important for the purposes of this case.

49 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 616 [53].

natural justice, the concern of the law is to avoid practical injustice.'[50] For the purposes of this judgment, I will treat the terms 'procedural fairness' and 'natural justice' as interchangeable.

113 As the Court of Appeal reiterated in *Mann v Medical Practitioners Board of Victoria*,[51] if a statute confers a discretionary power on a public official to 'destroy, defeat or prejudice a person's rights, interests, or legitimate expectations', procedural fairness will apply to the exercise of that power unless they are plainly excluded by the statute.[52] However, the content of procedural fairness requirements vary based on the nature of the power to be exercised.[53]

114 Going back to Lord Reid's list of jurisdictional errors at [109], a failure to comply with the requirements of procedural fairness can amount to jurisdictional error.

115 This has been subsequently confirmed by the High Court in *Re Refugee Review Tribunal; Ex parte Aala,*[54] which established that a failure to afford procedural fairness will constitute jurisdictional error if affording procedural fairness could have resulted in the decision-maker making a different decision.[55]

Was the Secretary Required to Afford Procedural Fairness to the Grandparents?

116 Before considering whether there was a breach of procedural fairness, I must determine whether the Secretary was required to afford procedural fairness to the Grandparents.

Submissions

117 The Grandparents argue that the Secretary was required to afford them procedural fairness in connection with the exercise of power under s 289A of the Act. The Grandparents submit their interests were clearly affected by the making of the

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50 (2003) 214 CLR 1, 13–14 [37].

51 [2004] VSCA 148.

52 Ibid [12], citing *Annetts v Mc Cann* (1990) 170 CLR 596, 598 and *Kruger v The Commonwealth* (1997) 190 CLR 1, 36.

53 Ibid [13], citing *Mobil Oil Australia v Federal Commissioner of Taxation* (1963) 113 CLR 475, 491.

54 (2000) 204 CLR 82.

55 Ibid 89 [5] (Gleeson CJ), 101 [41] (Gaudron and Gummow JJ), 135 [142] (Kirby J), 143 [169] (Hayne J). See also *Mann v Medical Practitioners Board of Victoria & Anor* [2004] VSCA 148 [15].

Direction Notice for 'at least' the following reasons:

(a) the legal effect of the impugned direction was that the CBSO was taken to be an FPO in circumstances where:

(i) the CBSO had been made to give effect to the August 2019 decision that the children should remain in the care of the Grandparents;

(ii) the CBSO, taken to be an FPO pursuant to the Direction Notice, transferred parental responsibility from the Secretary to the father, and legally placed the children in the care of the father; and

(iii) by the time the Direction Notice was made, the children had been in the care of the Grandparents for more than two years;

(b) the Direction Notice rendered futile their request made on 17 January 2020 for an internal review of the case planning decision under s 331 of the Act; and

(c) as a result of its effect on the internal review, the making of the Direction Notice prevented the Mother from applying to VCAT for review of the case planning decision under s 333 of the Act and therefore prevented the Grandparents from seeking to be joined to that proceeding.

118 The parties disagreed on the applicability of common law procedural fairness and the requirements in the Act to accord procedural fairness in the making of administrative decisions. Discussion also emerged as to whether procedural fairness is applicable at all to the circumstances of the case.

119 The Grandparents submit that there is a presumption that the power in s 289A is conferred on the condition that it be exercised in a manner that affords procedural fairness to individuals in their position. It is submitted that nothing in the Act clearly displaces that presumption.

120 Counsel for the Grandparents argued compellingly that the Act intends to afford procedural fairness in relation to the exercise of powers by the Secretary for

protection orders and care plans. It was also submitted that the decision of Dixon J in *Certain Children* that an entitlement to procedural fairness was inconsistent with the purposes of the statutory power in s 484(1) in Pt 5.8 of the Act could be distinguished here. Counsel for the Grandparents submitted that s 9(2) excludes the decision-making principles from applying to Chapter 5 (Children and the criminal law) or Chapter 7 (The Children's Court of Victoria) of the Act.[56] .It was submitted that as s 289A sits under Chapter 4, the decision-making principles in s 11 apply and the presence of those decision-making principles evidence an intention that procedural fairness should be afforded in connection with the exercise of the power in s 289A. I agree with this construction, that the express exclusion does not apply to Chapter 4 (and therefore to s 289A) of the Act.

121 The Father does not accept that a duty of procedural fairness was owed to the Grandparents. The Father argues that, although procedural fairness is not excluded by the legislation as such, the Act effectively codifies in ss 8 to 11 how procedural fairness will operate in the conduct of the Act. It was further argued that Parliament intended that there should be a measure of procedural fairness in the operation of the Act but the effect of codification is that procedural fairness, due to a guidance-based construction of s 9, yield to the best interests of the child in an appropriate case.

122 On the issue of whether the Grandparents had an entitlement to internal review, counsel for the Secretary submitted that while the Act did not provide a statutory right to internal review, the Secretary has prepared and implemented internal review procedures as mandated by s 331(1). Counsel for the Secretary directed the court to a webpage containing the Secretary's Policy in Respect of Reviews of Case Planning Decisions.[57] That webpage states that the 'internal review process is available to people directly affected by a child protection decision and who have a

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56 This is applicable to Chapter 7, in relation to any matter under Chapter 5.

57 Department of Health and Human Services, 'Internal Review of Decisions — Advice' (Web Page, 1 March 2016) <https://www.cpmanual.vic.gov.au/advice-and-protocols/advice/case-planning/internal-review-decisions#h3_2>.

significant relationship to a child' and states that 'kinship carers', like the Grandparents, may access the internal review process. Counsel for the Father emphasised that the permissive language contained within the procedure indicated that the provision of an internal review was at the discretion of the Secretary, and thus, did not create an entitlement of review for the Grandparents.

Consideration

123 The interaction between procedural fairness and statutory power was succinctly articulated by the High Court in *Minister for Immigration and Border Protection v SZSSJ*:[58]

> [I]t must now be taken to be settled that procedural fairness is implied as a condition of the exercise of a statutory power through the application of a common law principle of statutory interpretation. The common law principle, sufficiently stated for present purposes, is that a statute conferring a power the exercise of which is apt to affect an interest of an individual is presumed to confer that power on condition that the power is exercised in a manner that affords procedural fairness to that individual. The presumption operates unless clearly displaced by the particular statutory scheme.[59]

124 An intention on the part of the legislature to exclude the rules of procedural fairness is not to be assumed nor spelled out from 'indirect references, uncertain inferences or equivocal considerations.'[60] In the absence of 'plain words of necessary intendment' the legislature is not taken to have intended to exclude the rules of natural justice.[61] Accordingly, such an intention is not to be inferred 'from the presence in the statute of rights which are commensurate with some of the rules of natural justice.'[62]

125 The presumption that Parliament will not depart from fundamental principles of procedural fairness or 'the general system of law, without expressing its intention

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58 (2016) 259 CLR 180.

59 Ibid 205 [75]. See also *Kioa v West* (1985) 159 CLR 550, 584 (Mason J), 609–611 (Brennan J); *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319, 352 [74].

60 *The Commissioner of Police v Tanos* (1958) 98 CLR 383, 396 (Dixon CJ and Webb J). See the discussion in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 258–259 [12]–[15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

61 *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ).

62 Ibid, citing *Baba v Parole Board of New South Wales* (1986) 5 NSWLR 338, 344–5, 347, 349. See also *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 258–9 [12]–[15].

with irresistible clearness, derives from the principle of legality.'[63] Thus, as Gleeson CJ observed in *Electrolux Home Products Pty Ltd v Australian Workers' Union*:

> The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.[64]

126 The Act evidences an intention that procedural fairness should be afforded in connection with this exercise of powers by the Secretary (or a delegate), including the power in s 289A.

127 If anything, the provisions in Part 1.2 of the Act make it clear that the Act does not exclude the requirement to afford procedural fairness.[65] The decision-making principles set out in s 11 of the Act put a clear emphasis on the requirement of consultation in relation to decisions, including consultation with people who have the care of children in relation to whom decisions are being made. This should be contrasted with the situation in *Certain Children*, as discussed at [120] above.

128 I consider that under the Act, the Secretary was required to afford the Grandparents procedural fairness in connection with the exercise of the power under s 289A of the Act in relation to the children. The Grandparents' interests were affected. The legal effect of the Direction Notice was that the CBSO was taken to be an FPO. By the time the Direction Notice was made, the children had been in their Grandparents' care since June 2017, well over two years.

129 Importantly, the making of the Direction Notice rendered futile the Grandparents' request on 17 January 2020 for an internal review under s 331. Once an FPO is in place, an internal review of a case plan under s 331 of the Act cannot provide a basis

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63 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [15].

64 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 [21].

65 See *Cumming & Ors v Minister for Planning & Anor* [2019] VSC 811, [103]–[106] (Garde J) for an example of where procedural fairness was not excluded in a legislative scheme where Parliament had expressly provided the primary means by which procedural fairness would be rendered.

to alter with whom a child will live.[66]

130 The possible outcomes of the internal review were severely limited, because once an FPO is in place, that order determines who will have the care of the children. Unless the FPO is revoked, there cannot be any condition as to where the child lives.[67] Once the FPO was created through the Direction Notice, the Grandparents had no right under the Act to make an application for revocation.[68] I note that the Grandparents did request that the Secretary make an application for conditions to be attached to the FPO, which was done. However, the attachment of conditions could never affect *where* the children would live.

131 Counsel for the Father was correct in highlighting that the Grandparents did not have an express statutory right of an internal review pursuant to s 331. Section 331 states that it is only for the Secretary to prepare and implement procedures for the review. Section 331(2) requires the Secretary to give a copy of the procedures to the child, to the parent, but not the Grandparents or anyone with whom the children happens to be placed under an order. This does not, however, preclude the Grandparents from *requesting* an internal review. The Grandparents did seek a review, consistent with the Secretary's processes.[69]

132 As such, any ability to have the FPO revoked either under the Act expressly, or through an internal review, was either not available to the Grandparents or futile given the removal decision was implemented on 20 January 2020 and the Direction Notice was made on 21 January 2020.

133 Counsel for the Father argued that there was no evidence that the decisions were not in the best interests of the children. It is not the role of this Court to undertake a merits review of whether it was in the best interests of the children to transfer their

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66 The Act ss 280(1)(c), 281(2).
67 Ibid s 281(2).
68 Ibid s 304(1).
69 Department of Health and Human Services, 'Internal Review of Decisions — Advice' (Web Page, 1 March 2016) <https://www.cpmanual.vic.gov.au/advice-and-protocols/advice/case-planning/internal-review-decisions#h3_2>.

care from the Grandparents to the Father.

Were the Grandparents denied procedural fairness?

134 As I have determined that the Secretary was required to afford procedural fairness to the Grandparents, it is now necessary to consider whether the Grandparents were denied procedural fairness in relation to the Trio of Decisions (and most importantly, the Direction Notice) in January 2020.

Submissions

135 The Grandparents submit, citing *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd*[70] and *Minister for Immigration and Border Protection v SZMTA*,[71] that procedural fairness entails an affected party being given the opportunity to be heard, to ascertain relevant issues, to be informed of the nature and content of adverse material, to tailor and present evidence and to make submissions on the procedure adopted by the decision-maker. In that regard, it is submitted on behalf of the Grandparents that:

(a) the Grandparents were not given any notice of the Department's intention to make the case planning decision for immediate reunification of the children with the Father, nor were they given an opportunity to be heard in relation to that decision. Although Mr Noakes (their solicitor) conveyed some of the Grandparents' concerns about the decision in emails sent on Friday 17 January 2020, the ability to send those emails did not represent an opportunity to be heard. It is claimed that a person is not afforded procedural fairness when they are only given an opportunity to put their case forward 'when it was a matter of persuading a public authority to change an opinion it had already formed and to countermand or modify a course of action it had

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70 (1994) 49 FCR 576, 590–1, affirmed in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152, 162 [32] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ). See also *Mann v Medical Practitioners Board of Victoria* [2004] VSCA 148, [13]–[15] (Nettle JA).

71 [2019] HCA 3; (2019) 264 CLR 421, 440–1 [29] (Bell, Gageler and Keane JJ) citing *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40; (2015) 256 CLR 326, 339 [43]–[44] (Kiefel, Bell and Keane JJ), 343–4 [62]–[67] (Gageler and Gordon JJ).

already authorized';[72]

(b) the Grandparents were not given adequate notice of the Department's intention that the Direction Notice would be made under s 289A of the Act, nor were they given an opportunity to be heard in relation to that decision. It is submitted that the Grandparents needed more than a single afternoon and a weekend to consider their position and make submissions, in order for them to have an adequate opportunity to be heard. It is further submitted that an internal review of the case planning decision was sought and this clearly indicated that they proposed to make further submissions in relation to that decision, which would be relevant as to whether (and when) the Direction Notice should be made; and

(c) the Grandparents were not given notice of a significant alteration in the procedural context in which an opportunity to be heard would ordinarily be afforded in connection with a case planning decision and the Direction Notice. This was compounded by the fact that, in the ordinary course, no direction under s 289A of the Act would ordinarily be made until it had been possible to monitor the success or otherwise of the reunification.[73] In addition to the ordinary course not being followed, and thus providing time for an internal review process, the Secretary provided no response to Mr Noakes' email on 17 January 2020, with the Secretary's delegate proceeding to make the Direction Notice.

136 The Grandparents argue that, as this was an instance in which affording procedural fairness could have resulted in the decision-maker making a different decision, a failure to afford procedural fairness constitutes jurisdictional error. It is submitted that if the Secretary had instead conformed with the general practice of the Department and deferred the making of the Direction Notice until *after* it had been

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72 *Babalis v City of Adelaide* (1985) 38 SASR 450, 462–3 (Cox J). See also *R v Milk Board; Ex parte Tomkins* [1944] VLR 187, 198 (Lowe J).

73 First Affidavit of Stephanie Gonsalves, [32].

possible to monitor the success or otherwise of the reunification, with all interested parties afforded an opportunity to be heard in relation to the case planning decision, before concluding whether the Direction Notice should have been made, the Secretary might have decided against issuing the Direction Notice.

137 The Grandparents seek an order from this Court in the nature of certiorari quashing the Direction Notice. It is argued that once the legal effect of the Direction Notice is quashed by this Court, it will follow that the CBSO was never taken to be an FPO and, therefore, the CBSO remains in force.

138 The Grandparents argue that if the Court grants the relief sought, the Father's Proceeding should be dismissed. It is further argued that if the Court finds that the CBSO remains in force, it would follow that it was open to the Secretary to conduct an internal review and to make a new case planning decision as a result of that review.

139 The Secretary also submits that the Trio of Decisions in January 2020 were profoundly flawed by reason of a failure to afford the Grandparents procedural fairness. The Secretary's submissions as to why procedural fairness was not afforded to the Grandparents is in essence the same as the Grandparents' submissions.

140 The Father does not accept that there was any breach or that the duty was owed to the Grandparents. The Father submits that the Grandparents were not denied procedural fairness. This is because the Secretary filed an application to include conditions on the FPO on 21 January 2020 after receiving the emails from the Grandparents on 17 January 2020 which highlighted their concerns. The Father argues that the Secretary, in applying to have conditions placed on the FPO, demonstrates that the Secretary *had* taken the Grandparent's issues into consideration and actually *acted* upon these concerns.

141 Regarding the speed of implementation and any departure from regular procedure, the Father submits that this was because he had previously advised the Secretary that he was moving house in mid-January 2020 and requested that any reunification

occur before the eldest child started school (and he was advised by the Secretary that reunification might happen quickly if it was endorsed).

Consideration

142 The evidence confirms that the Grandparents were not consulted as they should have been by the Secretary's delegate about the Trio of Decisions in January 2020. These decisions were flawed by reason of a failure to accord procedural fairness to an interested party.

143 As put on behalf of the Secretary:

> The three decisions by the delegate of the Secretary constitute a corpus of decision-making fundamentally tainted by the failure to communicate with and allow persons integrally involved in the wellbeing of the children – the mother and Maternal Grandparents who would exercise care and control for a lengthy period over [the Children] – to be heard and thereby to have input into the decision making process.[74]

144 What procedural fairness requires in any particular case will depend on the circumstances of the case. However, there are some general requirements of procedural fairness that will always apply unless there is some good reason, usually a clear statutory intention, to exclude them.

145 The first is the requirement to give a person notice before making a decision which will affect their interest. Second, there is a requirement to give a person an opportunity to be heard. Third, the requirement to give any person notice if the decision-maker is going to depart from the ordinary procedural course that would be followed in making a decision and giving the interested party an opportunity to be heard in relation to that decision.[75]

146 I am satisfied that the Grandparents were not given any real notice of the Secretary's

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74 Secretary to the Department of Health and Human Services, Outline of Submissions, 3 June 2020, 7 [33].

75 *Commissioner for Australian Capital Territory Revenue v Officer Alphaone Pty Ltd* (1994) 49 FCR 576, 590-1 (Northrop, Miles and French JJ) affirmed in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152, 162 [32] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ). See also *Mann v Medical Practitioners Board of Victoria* [2004] VSCA 148, [13]–[15] (Nettle JA).

intention to make the case planning decision for immediate reunification of the children with the Father. The relevant decision for reunification was made on or about 6 or 7 January 2020 and was not communicated to the Grandparents until 17 January 2020, by way of a letter dated 16 January 2020. The Mother was also advised of the decision via telephone on 17 January 2020.[76] The Father was consulted about the decision earlier in December 2019.

147 On 23 December 2019, the Secretary's delegate held a case consultation meeting with the Principal Practitioner. The record of the meeting reveals that there were no protective concerns preventing the children from being in the care of their Father. The next relevant communication is a note dated 6 January 2020 which reveals that there was another meeting with the Principal Practitioner. Relevantly, the note records:

> Writer attended PP consult regarding how to best plan for reunification of the children to their father.
>
> - Reunification to occur on 20th January to provide the children time to settle prior to school commencing.
>
> - Writer raised concerns regarding how the grandparents will react to the information of reunification occurring. Writer explained the toxic relationship between the grandparents and mother/father. Concerns of malicious reporting to prevent progression of contact. Denied birthday party access, Christmas access or flexibility in access with the mother or father. Does not inform family of graduation or celebration events of the children.
>
> *… PP recommended the case plan meeting occur with the grandparents on the Friday and provide them the weekend to digest the news and then reunification to occur on the Monday. Do not want to provide the grandparents too much time to scare or alter reunification plans.*[77]

148 The document confirms that the decision that the children would be reunified with the Father on 20 January 2020 was made on 6 January 2020 and that the Grandparents would be notified at the case planning meeting by letter of the decision. We know that the meeting occurred 10 days later on Friday 17 January 2020.

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76 First Affidavit of Stephanie Gonsalves, [24]–[25].

77 Second Affidavit of Stephanie Gonsalves, Exhibit SG-16 (emphasis added).

149 Another case meeting took place on 7 January 2020 at 12:30pm. In attendance were the children's Father and his partner. The record of the case planning meeting confirms that a number of very significant decisions were made at the meeting, including that:

> **SIGNIFICANT DECISION**
>
> - DHHS have reviewed the case plan and have assessed that reunification to the father is appropriate.
> - DHHS will revert the CBSO to an FPO.
> - [The Father and his partner] to resume primary care of [the children] on Monday 20 January 2020.[78]

150 There was no consultation at the 17 January 2020 meeting between the Secretary and the Grandparents, nor was there an invitation for the Grandparents to provide relevant information before any final decision was made.

151 On the same day at 11:39am the Grandparents' solicitor, Mr Noakes, sent an email to the Secretary's delegate in which he confirms that the Grandparents have received no information as to any case plan or what evidence was relied on by the Secretary to make such a decision.[79] This is contemporaneous evidence consistent with the proposition that there was no notice provided to the Grandparents of the intention to make those decisions and no opportunity to be heard in relation to the decisions.

152 The internal review undertaken by the Assistant Director of Child Protection reveals a number of concerning matters regarding the decision-making process. The s 331 Report concludes that there was non-compliance with the Act, and in particular the best interests principles at s 10 and principles for decision-making at s 11. He concludes that the Child Protection decision to overturn the case plan from permanent care to family reunification to their Father, did not give sufficient weighting to the need for permanency for the children, nor sufficiently consider the s

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78 Ibid, Exhibit SG-17.
79 First Affidavit of Stephanie Gonsalves, Exhibit SG-6.

10 best interests principles and the s 11 decision-making principles of the Act.[80]

153 Critically, the s 331 Report states, under the heading 'Transition Planning':

> On review, there was an inconsistent approach about when Child Protection advised each of the parties regarding a family reunification case plan. Equally, I remain concerned in the manner in which such discussions occurred with [the Mother and the Grandparents].
>
> I also remain concerned in the rushed fashion in which the [Grandparents] were advised of this decision and their capacity to have their views considered. *It is clear in files and in my discussions with the [Grandparents] they could not understand how and why this case plan decision had occurred, nor afforded an opportunity to have input [in] this decision.*
>
> Despite Child Protection knowing on 17 January 2020 the [Grandparents] were not in agreement with the case plan, and contact with a lawyer representing [the Grandparents], further confirming this, the case plan direction continued nonetheless.
>
> Equally the notion of the children being placed in their father's care occurred without the usual planning that occurs in such matters, where children would increase their contact over time, whilst this situation was being closely reviewed and monitored by a professional care team. *The practice approach of reunification would occur with a family reunification program/service working intensely with the family and in the care team prior to such young children being returned to a home situation which previously featured family violence and substance abuse.*
>
> I found no evidence this was considered. This shortcoming in practice has impacted a range of people, and the children, and created distrust by [the Grandparents] towards Child Protection.[81]

154 The evidence confirms that approximately 10 days after the case planning decision for reunification was made, the Grandparents were simply told that the decisions had been made and the decisions were then implemented on 20 January and 21 January 2020.

155 Mr Noakes' email at 11:39am on 17 January 2020 to the Secretary notes the Secretary's power to confer parental responsibility back to the Father pursuant to s 289A. He raises the Grandparents' concerns that there are no conditions in place, and significantly notes that reunification must occur in a significantly more planned way.

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80 Ibid, Exhibit SG-13.

81 Ibid (emphasis added).

He refers to the Secretary's letter dated 16 January 2020 and raised the lack of any transition plan for the children out of the Grandparents' care and that the Secretary failed to prioritise any stability for the children. He notes that the decision to reunify the children with the Father in the manner posed was inconsistent with an earlier Department report dated 14 June 2019 which outlined that reunification was to occur over a period of approximately six weeks.[82]

156 The Secretary's email response dated 17 January 2020 at 4:37pm confirms that a decision had been made:

> Dear Mr Noakes … as discussed with your clients on 17 January 2020, the Department has assessed that the children … are to be reunified and return to the care of their father.[83]

157 The Secretary's 17 January email then sets out the reasons for that decision, however, it cannot be construed as demonstrating that the Grandparents were actually given an opportunity to be heard in relation to whether or not the decision should be made.

158 At 5:30pm on 17 January 2020 Mr Noakes then sent an email to the Secretary and raised further concerns. He requested on behalf of the Grandparents an internal review into the decision, specifically the concern that the reunification should not occur without a transition plan and given the minimal time for the children to be prepared for a significant change to their living situation.

159 Mr Noakes went on to say:

> As outlined in our previous correspondence, our clients would expect that no reunification occur until this review has been completed. The Department is invited to utilise this time to develop an appropriate transition plan for the children.[84]

160 The Grandparents' solicitor never received a response to the 5:30pm email. He sent a further email on 20 January 2020 to the Department asking why the children's

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82 Affidavit of Alastair Noakes in support of Summons dated 2 June 2020, Exhibit AN-2.
83 Affidavit of Alastair Noakes in support of Originating Motion, Exhibit AN-7.
84 Ibid.

placement had changed when no internal review had been undertaken.[85] No response was received to the 20 January 2020 email.[86]

161 I am satisfied, consistent with the High Court decision of Gageler and Gordon JJ in *Minister for Immigration and Border Protection v WZARH,*[87] that the Secretary's decision-making vis-à-vis the Grandparents:

(a) was not fair or transparent;

(b) their views could not have been properly taken into account;

(c) they were not encouraged and were not given an adequate opportunity to participate fully or at all in the decision-making process;

(d) they were not invited to a meeting or consulted so that their input could be gained and to help them understand the process;

(e) there was a deliberate decision by the Secretary's delegates to delay relaying information to the Grandparents about the change in case plan;

(f) the deliberate decision not to seek information from the Grandparents was made for the very reason that they would likely not agree with the decision and would likely appeal;

(g) they were not given sufficient time to participate in the decision-making process; and

(h) the decision was made by the time it was communicated to them on 17 January 2020.

162 I consider the sequence of events and the content of the single email response from the Department on Friday afternoon on 17 January at 4:27pm indicates that the

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85 Ibid [14].
86 Ibid [15].
87 [2015] HCA 40; (2015) 256 CLR 326, 343–4 [62]–[67] (Gageler and Gordon JJ).

process did not afford the Grandparents an opportunity to be heard. The Department's timing to notify the Grandparents on Friday morning for the first time after more than two years that they had been caring for the children, gave them no time or opportunity to do anything about the decision. The Grandparents had the Friday afternoon to be heard in relation to the course of action that was going to be implemented. The Department had the power to determine under the CBSO to place the children in the Father's care and take the CBSO to be an FPO. What is important, however, is the recognition of the significance and importance for the children of that power and the requirement that it be done in accordance with the principles in ss 10 and 11 and in accordance with the general principles of procedural fairness. Objectively, it cannot be said in the circumstances of this case that the Grandparents were provided adequate notice and were not afforded an opportunity to be heard about the decisions.[88]

163 As such, I conclude that the Secretary denied the Grandparents procedural fairness, in relation to the 21 January Direction Notice (as claimed by the Grandparents in their Originating Motion), but also with regard to the Trio of Decisions in January 2020 (as claimed by the Secretary).

164 For completeness, I am not satisfied that the Secretary discharged a requirement to afford the Grandparents procedural fairness in relation to the decisions by giving them notice of the decision approximately 10 days after it was made, and only a few days before its implementation.

165 Even if denied procedural fairness, the Grandparents must still establish that if the Secretary had afforded them procedural fairness, that it could possibly have resulted in the Secretary making a different decision.

166 The evidence is that having conducted an internal review, the Secretary's delegate ultimately concluded on 1 May 2020, after consultation with the Father and the

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88 *Sales v Minister for Immigration and Multicultural Affairs* [2006] FCA 1807, [31].

Mother and the Grandparents, that the children should remain in Grandparents' care. The outcome of the internal review clearly demonstrates that there was the possibility that if procedural fairness had been afforded in relation to the decisions that were made on 7 January and implemented on 20 and 21 January 2020, that there could have been a different outcome in this case.

167 I do not consider that the Grandparents were afforded procedural fairness. This leads me to the inevitable conclusion that the Secretary's Trio of Decisions in January 2020 were contaminated with jurisdictional error.

Was the Mother denied procedural fairness?

168 There is no separate proceeding by the Mother. She does not seek to be joined to the proceedings, nor does she seek judicial review of the impugned decisions. The Secretary potentially denying her procedural fairness in respect of the Direction Notice was raised by the Secretary. While this highlights the Secretary's potential failure to consider the views of any interested and involved party, the Court is not in a position to take matters any further in relation to any issue that the Mother may or may not have with the impugned decisions, given that no relief has been sought by her. It is also unnecessary to the Secretary's case given that I have already found above that the Grandparents were denied procedural fairness.

Jones v Dunkel inferences

169 Counsel for the Father submitted, relying on *Jones v Dunkel*,[89] that because several witnesses were not called to give evidence, including:

(a) the Assistant Director of Child Protection who authored the s 331 report or any other Department decision-maker (regarding the basis for the Department's self-determination of jurisdictional error); and

(b) the Grandparents or the Mother (regarding whether they were afforded an opportunity to be heard);

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89 [1959] HCA 8; (1959) 101 CLR 298.

the Court should draw an adverse inference from failure to call them as witnesses, as their evidence would not have assisted their cases.

170 The Secretary submitted that the *Jones v Dunkel* inferences raised by the Father was nothing more than a 'distraction and a furphy'.[90] I agree that there is little substance in this point. As I have outlined above, the evidence regarding the Secretary's denial of procedural fairness to the Grandparents contained in the email correspondence between their solicitor, Mr Noakes and the Secretary, as well as the Department case note stating that the change in case planning decision to reunification was intentionally relayed to the Grandparents late so as not to provide them with time to challenge or alter the decision.[91] As the High Court explained in *Australian Securities and Investments Commission v Hellicar*,[92] where the Secretary and Grandparents here are attempting to prove their respective cases through direct documentary evidence rather than inference, there is no basis to rely on the rule in *Jones v Dunkel* to draw an adverse inference against their cases.[93] I have found that the Grandparents were denied procedural fairness, on the evidence above, without hearing directly from the Grandparents. I was not required to draw inferences to reach this conclusion.

171 Similarly with respect to the Secretary's determination that the Direction Notice was affected by jurisdictional error, the s 331 Report and the email correspondence between the Secretary and the Grandparents' solicitors demonstrate that this determination was indeed made, and detail the Secretary's reasons for doing so. Further, the Secretary's outline of submissions dated 27 March 2020 prepared for the Children's Court proceedings provide additional evidentiary support for this.[94] Accordingly, aside from confirming what was written in the report and the Secretary's position, there was no 'particular matter' left unaddressed (to borrow the High Court's expression) that the Assistant Director of Child Protection or another

90 T128.23–24.
91 Second Affidavit of Stephanie Gonsalves, Exhibit SG-16.
92 [2012] HCA 17; (2012) 247 CLR 345.
93 Ibid 413–14 [168]–[169] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
94 See First Affidavit of Stephenie Gonsalves, Exhibit SG-8.

Department decision-maker could 'elucidate', even if called as a witness and allowed to be cross-examined.[95]

Failure to be guided by ss 10 and 11 of the Act

172 It is also strictly unnecessary to consider the allegation by the Secretary (in a slightly quixotic state of affairs) that her own Department's decision-making process failed to accord with the obligations imposed by ss 10 and 11 of the Act.

173 However, given the importance of the decision-making principles, the failures which occurred in this case and the submissions made by the parties, I will nonetheless provide some observations on this issue. Moreover, the importance of these principles allows for a further finding that the 21 January 2020 Direction Notice was affected by jurisdictional error; it provides for a *separate* basis to quash the decision.

Submissions

174 The Secretary submits that the Trio of Decisions in January 2020 were profoundly flawed by reason of the Secretary's failure to comply with ss 10 and 11 of the Act.

175 Largely mirroring the submissions made with respect to the Secretary's denial of procedural fairness to the Grandparents, it was submitted that these are breaches as to the nature or limits of the Secretary's powers and that these powers were misapprehended or disregarded. Counsel submitted that the Secretary failed to communicate with and allow persons integrally involved in the wellbeing of the Children, namely the Mother and the Grandparents who had exercised care and control for a lengthy period of time over the Children, to be heard and to have enabled them to have an input into the decision-making processes. More specifically the Secretary argues that:

- in breach of s 11(c), the process of decision-making was not fair or transparent to the Mother or the Grandparents;
- in breach of s 11(d), it is unlikely that the views of the Mother and the

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95 *Australian Securities and Investments Commission v Hellicar* [2012] HCA 17; (2012) 247 CLR 345,413–14 [169] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

Grandparents were properly taken into account;

- in breach of s 11(f), the Mother and the Grandparents were neither encouraged nor given an adequate opportunity to participate fully in the decision-making process;
- in breach of s 11(g), the Mother and the Grandparents were not afforded a meeting or otherwise consulted so that the decision-making process enabled them to participate in and understand the process; and
- in breach of s 11(h), the Mother and the Grandparents were not afforded sufficient time to seek legal advice to enable them to participate in the decision-making process or given a copy of the proposed case plan and sufficient notice of any meeting proposed to be held.[96]

176 Meanwhile, the Father submits that that there is no basis in the statute for interpreting that the Secretary's failure to comply with the decision-making principles in s 11 was intended to invalidate the Direction Notice. Further, he submits that the Secretary has not adduced sufficient evidence to prove that she *in fact* failed to comply with those principles. Specifically, he argues that s 9 of the Act states that ss 10 and 11 are only intended to 'give guidance' in the administration of the Act, rather than as an essential precondition to the exercise of powers under the Act on every occasion.

177 Consequently, according to the Father's submissions, even if the Secretary had breached the principles under s 11 of the Act, this was not jurisdictional error and did not invalidate the Direction Notice. Finally, it was submitted that any divergence from the s 11 principles was necessary in the best interests of the children, as confirmed by the Principal Practitioner on 23 December 2019.

Consideration

178 As I have said, the Act undoubtedly renders the best interests of the child to be the paramount consideration in the operation of the Act. However, the Act does not envisage the best interests principle to be applied loosely, on an *ad hoc* basis. Rather,

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96 Secretary to the Department of Health and Human Services, Outline of Submissions, 3 June 2020, [12].

the Act creates an integrated, purposively driven pathway of administrative decision-making that acts, at least partly, to *operationalise* the best interests of the child in the making of administrative decisions. Having regard to the Secretary's power in relation to the CBSO provisions, it is all the more important that the decision-making principles are adhered to.

179 As discussed, the CBSO is used sparingly and only where there are grave concerns for a child. It follows that the administrative decision-making process by the Secretary to make the Direction Notice, which as discussed brings the operation of the CBSO to an end, must *also* be undertaken rigorously. The Secretary or her delegates must satisfy themselves that the decision is in the best interests of the child. This reinforces the need for the Secretary or her delegates to comply with the obligations under s 11 when they are undertaking such significant administrative decision-making. The Secretary, as I said, wields tremendous power and responsibility in relation to the CBSO regime. It is a power that must be exercised with rigour and consistency.

180 Given my conclusion that the s 11 principles operate as mandatory considerations underpinning any decisions and actions by the Secretary, I find that the Secretary's conduct in paragraphs [142]–[167] above also amount to breaches of ss 11(c), (d), (f), (g) and (h). This is *separate* from the Secretary's failure to afford procedural fairness to the Grandparents at common law. As the High Court in *Craig v South Australia* stated, a decision-maker falls into jurisdictional error when she 'disregards the nature or limits of [her] functions or powers'.[97] Even though the conduct that I rely on here is largely the same as the Secretary's conduct in relation to procedural fairness, the focus of this ground of jurisdictional error is more squarely on the Secretary's obligations under the Act.

181 Common sense suggests that the Grandparents, having cared for the children for more than two years, were in a unique position to provide information, support and

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97 [1995] HCA 58; (1995) 184 CLR 163, 177 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

could help prepare the children for any transition of care to the Father.

182 In the present case, the fact that the Grandparents were not appropriately consulted reveals that the Secretary failed to consider the principles in ss 10 and 11 of the Act. In such circumstances, proper consideration (with input from the Grandparents) was itself in the best interests of the children. It would appear that, had these principles been considered, as is mandated by the Act, the unfortunate events which have transpired in this case would have been avoided.

Conclusion

183 I do not consider that the Grandparents were afforded procedural fairness, when considering either the 21 January Direction Notice alone (as challenged by the Grandparents), or the Trio of Decisions in January 2020 (as challenged by the Secretary).

184 I also find that the Secretary has failed to give consideration to the principles set out in the Act under ss 10 and 11 with respect to the same decisions.

185 I consider so significant were the flaws in the decision-making of each of the decisions in the Trio of Decisions in January 2020 by the Secretary's delegates by failing to afford procedural fairness to the Grandparents, and failure to be guided by ss 10 and 11 of the Act, that the Secretary misapprehended or disregarded the limits or nature of her functions and power.

186 This leads me to the inevitable conclusion that the Secretary's Trio of Decisions in January 2020 were contaminated with jurisdictional error. I should say that the Grandparents submit that the fact of the failure to accord procedural fairness is where the matter can end. As will be discussed, the Grandparents argue that the failure to afford procedural fairness is the basis upon which the court should now quash the Direction Notice and that this would mean, in legal terms, that the CBSO never ceased to be in force and continues to be in force.

187 The fact that the Secretary's Trio of Decisions in January 2020 were contaminated

with jurisdictional error does not, however, mean that I am compelled to grant the relief sought by the Grandparents. In a case such as the present, the totality of issues raised by the parties should be considered and the relief provided must be determined through the inherent discretion available in judicial review proceedings. Counsel for the Grandparents is correct to assert that if the relief sought by the Grandparents is granted, then the relief sought by the Father is not available. This point, however, merely reinforces the need to consider the issues raised in this case holistically.

188 I will therefore consider the other relevant issues in this case before turning to my analysis of the relief to be provided to the Grandparents due to the Secretary's breach of procedural fairness and/or failure to consider the ss 10 and 11 principles.

The Father's Proceeding

189 I have concluded that the Grandparents were not afforded procedural fairness with respect to the Trio of Decisions in January 2020. In reality, if judicial review had been sought for the January 2020 decisions after they were made, I would end the judgment here. However that is not what happened. Following the series of decisions in January 2020 made by the Secretary in error as discussed above, her delegates then took it upon themselves to find that the decisions were affected by jurisdictional error. They purported to reconsider those decisions by treating the CBSO as still in place, and removed the children from the Father's care on 6 May 2020 and returned them to the Grandparents.

190 In this case, the next question that needs to be determined is whether the Secretary, having determined that she made a jurisdictional error, can treat her own decision to take the CBSO to be an FPO under s 289A, as a nullity and proceed as if the CBSO were still in place. This was also an issue raised by the Secretary in the Secretary's Proceeding.

191 The Father contends that the Secretary did not have the power to reconsider the Direction Notice and as such the FPO remained in force at the time of the 6 May 2020

Removal Decision. The Father further contends that *even if* the power to reconsider existed, this purported reconsideration by the Secretary *was itself* affected by jurisdictional error for failure to accord procedural fairness to the Father and/or for failure to comply with the s 11 principles. Specifically, no notice was provided to the Father and he was not given an opportunity to be heard.

Does the Secretary have the power to treat a decision she considers was made in jurisdictional error as invalid and reconsider the decision?

Relevant principles

192 In *Minister for Immigration and Multicultural Affairs v Bhardwaj* ('*Bhardwaj*'),[98] the High Court considered an administrative error resulting in the Immigration Review Tribunal ('IRT') being unaware of an application for an adjournment. The matter proceeded without consideration of the application and without the applicant's involvement/presence. When the error was discovered the matter was relisted and considered anew. Gaudron and Gummow JJ, approving Canadian authority,[99] held that:

> [I]f the duty of the decision-maker is to make a decision with respect to a person's rights but, because of jurisdictional error, he or she proceeds to make what is, in law, no decision at all, then, in law, the duty to make a decision remains unperformed. Thus, not only is there no legal impediment under the general law to a decision-maker making such a decision but, as a matter of strict legal principle, he or she is required to do so.[100]

193 Furthermore, Gleeson CJ held:

> The requirements of good administration, and the need for people affected directly or indirectly by decisions to know where they stand, mean that finality is a powerful consideration. And the statutory scheme, including the conferring and limitation of rights of review on appeal, may evince an intention inconsistent with a capacity for self-correction. Even so, as the facts of the present case show, circumstances can arise where a rigid approach to the principle of *functus officio* is inconsistent with good administration and fairness. The question is whether the statute pursuant to which the decision-maker was acting manifests an intention to permit or prohibit reconsideration in the circumstances that have arisen. That requires examination of two questions. Has the tribunal discharged the functions committed to it by

98 [2002] HCA 11; (2002) 209 CLR 597.
99 *Chandler v Alberta Association of Architects* [1989] 2 SCR 848.
100 [2002] HCA 11; (2002) 209 CLR 597, 616 [53].

> statute? *What does the statute provide, expressly or by implication, as to whether, and in what circumstances, a failure to discharge its functions means that the tribunal may revisit the exercise of its powers* or, to use the language of Lord Reid, reconsider the whole matter afresh?[101]

194 Jurisdictional error does not automatically result in the administrative decision-maker obtaining the power to render the decision a nullity. As Gaudron and Gummow JJ explained:

> [O]nly if the general law so requires or the Act impliedly so directs, are decisions involving jurisdictional error to be treated as effective unless and until set aside.[102]

195 *Bhardwaj* established firmly in Australian law that administrative decision-makers may have the power to 'reconsider,' 'correct' or 'rectify' decisions made that are infected by jurisdictional error.

196 However, the question of whether an administrative decision-maker may reconsider a decision or treat a decision made in jurisdictional error as of no effect will depend on the terms of the statute conferring the power. As Kristian Walker QC writes:

> [N]otwithstanding the general proposition that a decision affected by jurisdictional error is no decision at all, a majority of the judgments in *Bhardwaj* contemplated a situation in which a purported decision which is affected by jurisdictional error may be treated as having *some legal effect until it is set aside*.
>
> This is because a statutory regime may impose legal consequences on the *fact* that a (purported) decision was made, as opposed to the making of a valid decision.[103]

197 In *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care*, Gray and Downes JJ considered this point and stated:

> *Bhardwaj* cannot be taken to be authority for a universal proposition that jurisdictional error on the part of a decision-maker will lead to the decision having no consequences whatsoever. All that it shows is that the legal and factual consequences of the decision, if any, will depend upon the particular statute.[104]

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101 Ibid 603–4 [8] (emphasis added)
102 Ibid 614 [50].
103 Kristen Walker, 'Jurisdictional Error Since Craig' (2016) 86 *AIAL Forum* 35, 41 (emphasis added).
104 [2003] FCAFC 288; (2003) 145 FCR 1, 16 [42].

198 Thus, dependent on the statute, and the legal and factual consequences of the decision, a decision made in jurisdictional error can have some legal effect.

199 *Bhardwaj* also received consideration by the Court of Appeal of the Victorian Supreme Court in *Kabourakis v The Medical Practitioners Board of Victoria* ('*Kabourakis*') by Nettle JA (as he then was).[105] His Honour reasoned in that decision that common sense favours the finality of decisions:

> Self evidently, an administrative decision has only such force and effect as is given to it by the law pursuant to which it is made. As was pointed out in *Bhardwaj*, Parliament may give an administrative decision whatever force it wishes. Consequently … the question in this case comes down to whether the statute manifests an intention to permit or prohibit reconsideration in the circumstances that have arisen. But, as was also said in *Bhardwaj*, as a rule a statutory tribunal cannot revisit its own decision simply because it has changed its mind or recognises that it has made an error within jurisdiction. More often than not, the requirements of good administration and the need for people affected directly or indirectly by decisions to know where they stand mean that finality is the paramount consideration, and the statutory scheme, including the conferring and limitation of rights of review on appeal, will be seen to evince an intention inconsistent with capacity for self correction of non-jurisdictional error. In the bulk of cases, logic and common sense so much incline in favour of finality as to permit of no other conclusion.[106]

200 In *Christiansen v Social Security Appeals Tribunal*,[107] Collier J stated that:

> In light of the reasoning of the majority in *Bhardwaj*, whether an administrative decision-maker can "remake" its own decision depends on factors including:
>
> - whether the relevant statute empowers the decision-maker to do so (or at least does not prohibit the decision-maker from doing so); and
> - whether the original decision was attended by jurisdictional error (for example, failure of the tribunal to discharge its statutory function), rather than a non-jurisdictional error.
>
> As has been observed elsewhere however, this is also not a process to be followed lightly.[108]

201 The principles enunciated in *Bhardwaj* have received practical application in the

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105 [2006] VSCA 301.
106 Ibid [48].
107 [2010] FCA 1146; (2010) 126 ALD 423.
108 Ibid 442 [65]–[66] (citations omitted).

Administrative Appeals Tribunal. I adopt the observations of Downes J in *Michael v Secretary, Department of Employment, Science and Training*,[109] approved by Collier J in *Christiansen v Social Security Appeals Tribunal*,[110] that:

> [I]t will only be appropriate for tribunal [in this case, departmental] decisions to be reconsidered pursuant to the *Bhardwaj* principle when an impugned decision was obviously wrong and when the cause of the error is some administrative or similar mistake. In all but the rarest of cases, tribunal [and departmental] decisions must be treated as final and subject only to reconsideration for error of law on appeal.[111]

202 Justice Downes was, of course, speaking as to a quite different legislative and administrative context to the present case. Although his reasoning is useful for the operation of administrative law generally, it is important to reinforce Nettle JA's sentiment in *Kabourakis* that 'the question of whether a decision may be re-opened to correct an error turns in the end on the meaning of the statute under which the decision is made.'[112]

203 In *Minister for Immigration v PDWL*,[113] a case presented by counsel for the Father, Wigney J in the Federal Court pushed back against any suggestion that an administrative decision-maker could set aside a tribunal decision, notwithstanding if that order was made in jurisdictional error. The case involved two different decision-maker with different sets of competencies and jurisdiction, namely the IRT and a Commonwealth officer in the Department of Home Affairs, with the Commonwealth officer believing that the IRT's decision was a nullity. As to whether the Commonwealth officer could set the IRT's decision, Wigney J held:

> [T]he Tribunal's decision is not a nullity until the Court sets it aside and declares that it is a nullity. It may, of course, be readily accepted that if that occurs, the decision is then treated as having been a nullity at all times; that is, it is treated as if the decision was never made. That may no doubt have other implications. But it does not mean that the Tribunal's decision can

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109 [2006] AATA 227; (2006) 90 ALD 457.

110 [2010] FCA 1146; (2010) 126 ALD 423, 442 [66].

111 *Michael v Secretary, Department of Employment, Science and Training* [2006] AATA 227; (2006) 90 ALD 457, 461 [17].

112 [2006] VSCA 301, [47]. See also *Jackson v Purton* [2011] TASSC 28, [86] (Wood J); *Purton v Jackson* [2012] TASFC 2, [20] (Blow J).

113 *Minister for Immigration, Citizenship, Migrant Services v PDWL* [2020] FCA 394.

> reasonably be considered to be a nullity by some hypothetical officer of the Minister's Department simply because he or she thinks that the Court might eventually, or even will eventually, declare it to be so.
>
> The decision has not yet been set aside or declared by the Court to be a nullity. While the Minister may have reasonable arguments as to why the Court should, at some stage in the future, declare it to be a nullity, that has not yet occurred. The Minister, or officers in his Department, cannot simply ignore, or decide to give no effect to, a decision of the Tribunal simply because they do not like it or believe it is wrong.[114]

204 The following principles of law, relevant to this case, can be deduced from the above cases and commentary:

(a) common sense generally favours the finality of administrative decisions with a decision-maker rendered *functus officio* after a decision has been made;[115]

(b) however, where a statute expressly, or by implication, provides a decision-maker with the power to reconsider their decisions the position is clear;[116]

(c) even where the statute does not provide a power to reconsider, the general proposition is that a decision affected by jurisdictional error is no decision at all.[117] However, if the Act provides either expressly, or by implication, that a purported decision is to be treated as having some legal effect, then a decision-maker may not treat their decisions as invalid or reconsider their decision *unless* and *until* it is set aside (even if made in jurisdictional error).[118] Thus, whether an administrative decision-maker has the power to reconsider a decision (either expressly or impliedly) due to a jurisdictional error will ultimately turn on the meaning of the statute under which the decision is made;[119] and

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114 *Minister for Immigration, Citizenship, Migrant Services v PDWL* [2020] FCA 394, [82]–[83].

115 *Kabourakis v The Medical Practitioners Board of Victoria* [2006] VSCA 301, [47]–[48] (Nettle JA).

116 *Bhardwaj* (2002) 209 CLR 597, 605-6 [8] (Gleeson CJ); *Kabourakis v The Medical Practitioners Board of Victoria* [2006] VSCA 301, [48] (Nettle JA).

117 *Bhardwaj* (2002) 209 CLR 597, 605 [15] (Gleeson CJ), 616 [53] (Gaudron and Gummow JJ), 647 [154]–[155] (Hayne J), 649 [163] (Callinan J).

118 *Bhardwaj* (2002) 209 CLR 597 614–15 [50], [54] (Gaudron and Gummow JJ); *Minister for Immigration, Citizenship, Migrant Services v PDWL* [2020] FCA 394, [82]–[83] (Wigney J); Kristen Walker, 'Jurisdictional Error Since Craig' (2016) 86 AIAL Forum 35, 41.

119 *Kabourakis v The Medical Practitioners Board of Victoria* [2006] VSCA 301 [47]; *Jackson v Purton* [2011]

(d) even where a decision-maker has the ability to reconsider a decision made in jurisdictional error, the impugned decision should be obviously wrong and the cause of the error must be some simple, administrative or similar mistake. Decisions should be treated as final expect in the rarest of cases.[120]

Submissions

The Father's Submissions

205 The Father submits that a complaint by a third party that they were denied procedural fairness should not form the basis of the Secretary's decision to unilaterally determine that the Direction Notice was affected by jurisdictional error, particularly as it was open to the Grandparents to seek a judicial review of the decision.

206 The Father submits that the 6 May Removal Decision was unlawful as the FPO was still in force at the time. The Father argues that once the Direction Notice had been made the CBSO is taken to be an FPO, and the FPO has the character of a court order, given that s 289A of the Act provides that Division 3 (Family Preservation Order) of Part 4.9 (Protection Orders) of the Act applies on and from the date of the direction. The process to revoke an FPO requires an application under s 304 by the child, a parent or the Secretary, to the Children's Court. It was submitted that the availability of this option for redress in the Act points against any statutory intention to allow the Secretary to overturn the FPO herself.

207 Relying on *Minister for Immigration, Citizenship, Migrant Services and Multicultural Afaairs v PDWL*, the Father submits that a tribunal's decision is not a nullity until a court sets it aside.[121] Therefore, he contends that the Secretary was obliged to abide by the FPO until a court declared it a nullity. It was argued that the exception to this general principle, that is the power of bureaucratic reconsideration as recognised by

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TASSC 28 [86] (Wood J); *Purton v Jackson* [2012] TASFC 2 [20] (Blow J).

120 See, eg, *Michael v Secretary, Department of Employment, Science and Training* [2006] AATA 227; (2006) 90 ALD 457, 461 [17] (Downes J); *Christiansen v Social Security Appeals Tribunal* [2010] FCA 1146, [66] (Collier J).

121 *Minister for Immigration, Citizenship, Migrant Services v PDWL* [2020] FCA 394, [82]–[83] (Wigney J).

the High Court in *Bhardwaj*, must derive from statute. It is argued that in this case that the Act evinces no intention for the Secretary to be able to determine that the Direction Notice was affected by jurisdictional error, but rather the reverse is evident, given the procedure for applying to a court to revoke an FPO set out in ss 304 and 307.

208 Further, he submits that the Secretary or her delegate had no authority to determine for themselves that the direction was affected by jurisdictional error. It is submitted that the s 331 review of the Direction Notice could not form a lawful basis for determining unilaterally that the decision was affected by jurisdictional error, and therefore, could not form a lawful basis for removing the children from their Father's care on 6 May 2020.[122]

The Secretary's Submissions

209 Counsel for the Secretary argues that the legislation does not provide any explicit provision about the ability of the Secretary to reconsider or correct a decision infected by jurisdictional error. Counsel for the Secretary argues that, due to the paramountcy given to the best interests of the child under the Act, where a serious error has occurred in breach of s 11 and has contaminated a decision-making process, it is appropriate to construct the Act such that the decision-making process is void. Counsel for the Secretary argues further that there is nothing express or implicit in the Act prohibiting the reconsideration of a decision that was fundamentally flawed to a point that it amounted to a failure to perform a statutory function.

210 Counsel for the Secretary argues that the decision of the Secretary in respect of the recognition of the flaws in the Trio of Decisions in January 2020 did not give rise to a further decision-making process. The Secretary argues that if her delegate was correct that there had been jurisdictional error and that the Trio of Decisions in January 2020 were void, the CBSO was legally in effect, and no further consultation

122 The Father's Outline of Written Submissions, filed 1 June 2020, [10]–[21].

was necessary. The Secretary argues that if the Father was dissatisfied about the Secretary's reconsideration of her decision, it was open to him to seek to challenge the CBSO in the Children's Court.

Consideration

211 There are no express provisions in the Act conferring power to the Secretary to reconsider a decision of the Secretary's delegate to give a direction under s 289A that the Father is to resume responsibility for the children. Nor does the Act contain any provisions expressly allowing the Secretary to treat a Direction Notice which she considers was effected by jurisdictional error as invalid of no effect.

212 The Direction Notice creates a new court order from a previously existing order. As I canvassed earlier, the new order, an FPO, is governed by different legislative provisions to the CBSO. Once the CBSO is taken to be an FPO by the giving of the direction, the Secretary's power over making decisions as to whether the children live with the Father, or remain with the Grandparents, ceases. In this regard the Secretary is *functus officio*.

213 The legislative provisions governing the FPO demonstrate the plain intention of the Parliament is to take the matter outside the realm of Departmental decision-making once that direction is made. It is thereafter to be treated with the same force as any other direction made by a court under the Act.

214 There remains the issue of the legal effect or force, if any, the FPO had when it was issued through the Direction Notice. For the Direction Notice to have some legal effect before it is set aside by a court, the Act must expressly, or by implication, direct that it has some legal effect.

215 Further, having regard to:

(a) the procedures available in the Act for variation and revocation;

(b) the purposes of the Act; and

(c) the importance of finality in administrative decision-making in determinations involving parental responsibility over children,

it can be implied that a Direction Notice made by the Secretary in jurisdictional error has some legal effect unless and until set aside by a court.

216 The Act implies that an FPO created through a Direction Notice has some legal effect until quashed by a court. The Act imposes legal consequences on the fact that a purported decision was made. These include the rights and liabilities imposed on persons pursuant to an FPO including the parent and the Secretary related to parental responsibility and supervision of the child respectively.

217 The scheme in the Act does not prevent an FPO from being revisited at any time. Section 304 of the Act expressly provides a process for revocation of a protection order, including an FPO on application by the Secretary, or a parent of the child, or the child in respect of whom the order was made.

218 The simple point is that the Secretary could have made an application to the Children's Court for revocation of the FPO under s 304.[123]

219 Further, ss 311 to 318 of the Act, provide for revocation or variation of an FPO if the Secretary is satisfied on reasonable grounds that there has been a failure to comply with any condition of the FPO,[124] or there has been a failure to comply with any direction by the Secretary under s 282,[125] or the child is living in conditions which are unsatisfactory in terms of the safety and wellbeing of the child.[126]

220 The Act also provides for an emergency situation where an FPO is in place for the immediate removal of the child without notice if the Secretary is satisfied that there is good reason not to proceed with the notice procedures set out in s 312(1) or that service of the notice under s 312(1) cannot be carried out (s 314(1)).

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123 On an application under s 304, the court, if satisfied may revoke the order under s 307 of the Act.
124 The Act s 312(a).
125 The Act s 312(1)(b).
126 The Act s 312(1)(d).

221 Under s 304 there is no criteria prescribing when an FPO could be revoked, save for the overriding principle of the best interests of the child and the other decision-making principles that apply to the decision-maker.

222 As such, if the Secretary discovers or considers an FPO should not have been made, for example in the course of the internal review or any other circumstances, the procedure under s 304 is the appropriate path and the one mandated by Parliament for the Secretary to put the matter before the Children's Court. If the FPO was revoked by the court, the Secretary can then apply for a fresh CBSO.

223 The availability, in particular for the revocation option under s 304, weighs heavily *against* the Secretary's submission that it is the statutory intention to allow the Secretary's delegate to overturn a direction that has the force of a court order unilaterally. This is the case even if the direction was made in jurisdictional error.

224 In addition to the procedures under the Act that the Secretary could have used to apply for a revocation of the FPO, the Secretary could have also made an application for judicial review upon completion of the s 331 internal review, when it determined that the decisions were affected by jurisdictional error, for a declaration to that effect.[127]

225 By 14 April 2020, the Secretary asserted in the Children's Court that the direction was effected by jurisdictional error as explaining why she was withdrawing her application to vary the FPO.[128]

226 The Children's Court did not and could not make an order declaring the Direction Notice to be effected by jurisdictional error, or quashing the Notice Direction.

227 Considering the Act and its construction, there is no basis to imply that the Secretary had the authority to make a unilateral determination based on a review under s 331 of the Act undertaken by the Secretary's delegate that the Direction Notice was

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127 Section 329 of the Act contemplates an appeal to the Supreme Court on a question of law.

128 First Affidavit of Stephanie Gonsalves, Exhibit SG-12, T5–6.

effected by jurisdictional error, then remove the children from the Father and reinstate the CBSO.

228 The Secretary's delegate was not a tribunal as in *Bhardwaj*, where its members were exercising a function of review conferred on it by statute. The tribunal in *Bhardwaj* was empowered to remake its own decision where it became apparent that it had failed to give effect to its own intention, which was to give the applicant a hearing as required by statute, because it had overlooked a request by the applicant to adjourn the hearing.

229 The authority of a tribunal to do so was held in *Bhardwaj* to derive from the statute, the nature of the review power of a tribunal and the nature of the error.[129]

230 In addition to the issues of statutory construction, there are serious consequential issues and public policy considerations. This takes me to what is at the heart of this proceeding, the protection orders.

231 One of the purposes of the Act is to 'promote the protection of children'.[130] Part 4.9 of the Act sets out a careful regime governing protection orders, including the types of protective orders, who has the power to make the order, the process for application, variation and revocation.

232 It would be a slippery slope to allow a public servant, such as a delegate of the Secretary, to have the authority to consider a direction which has the force of a court order and determine that it is a nullity because they believe the correct decision-making process was not followed. The Secretary's delegate is ill-placed to make such a determination and there is the real danger that third parties could put pressure on the delegate to reverse the decision. The impact that orders under the Act, and particularly protective orders, have on the child is so significant that to allow their lives to be uprooted, as was done in this case, without the determination of a court,

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129 *Bhardwaj* [2002] HCA 11; (2002) 209 CLR 597, 603 [6] (Gleeson CJ), 612 [44] (Gordon and Gummow JJ).
130 The Act s 1(b).

such as is envisaged by the Act to protect their best interests, cannot be permitted.

233 The sequence of decision-making by the Secretary's delegates in this case confirms why it could not be in the child's best interests to allow a public servant to review administrative decisions of significance which already have a process of review clearly set out in the statute.

234 The Direction Notice was profoundly flawed by reason of its failure to afford procedural fairness to the Grandparents and the failure to be properly guided by ss 10 and 11 of the Act. It is only in the rarest of cases that the court will imply a power of reconsideration in the statute beyond simple, administrative mistakes. To imply a power of reconsideration in these circumstances, would lead to uncertainty for children subject to the order or persons charged with carrying them out.

235 Further, and critically, it would authorise the Secretary and/or her delegates as members of the Executive to take for themselves the judicial function for oversight of administrative decision-making, regardless of how bad the error, that they or their colleagues have committed.

236 In conclusion, as the Direction Notice had some legal effect notwithstanding that it was made in jurisdictional error and the Secretary did not have the power to reconsider the Direction Notice, the FPO remained in place *unless* and *until* it was set aside by this Court, or the Children's Court varied or revoked the FPO in accordance with the Act. The Secretary could not unilaterally decide that the Direction Notice was of no effect and act as if the CBSO was still in place. It follows that that 6 May 2020 Removal Decision and action was not authorised by the Act, and was beyond power.

Was the Father afforded procedural fairness?

237 As stated above, the Father alternatively contends that *even if* the power to self-correct existed, this purported self-correction by the Secretary *was itself* affected by jurisdictional error for failure to accord procedural fairness to the Father and/or for failure to comply with the s 11 principles.

238 In light of my finding above, it is strictly unnecessary to decide this issue. Nonetheless, I find without hesitation that the Secretary committed an egregious breach of procedural fairness and/or the requirements in s 11 of the Act in the failure to provide the Father the s 331 Report and the decision to remove the Children from the Father's care on 6 May 2020.

239 Counsel for the Grandparents and the Secretary did not really address this issue in their submissions. However, both parties agreed that the implementation of the s 331 Report was unsatisfactory. Counsel for the Secretary offered a genuine apology for the way in which the case plan decision was implemented.

240 On 14 April 2020 the Children's Court ordered that '[t]he outcome of the case plan to be provided to the parties' representatives as soon as possible after the decision is made.' [131]

241 There is no evidence that the Father was given a copy of the s 331 Report before 6 May 2020 or even contacted to be informed that the Department workers would be coming to remove the children from his care. It is astonishing that the people responsible at the relevant time could proceed in the manner they did on 6 May, particularly given the strained relationships, the Children's Courts orders, and having only a few months before that removed the children from the Grandparents' care without any notice.

242 By not providing the Father the s 331 Report, he was denied an opportunity to be heard at VCAT or this Court on the legality of the decision and the other matters that are now raised in the these proceedings. If he had been given the s 331 Report on 1 May 2020, he may have sought a review of the decision at VCAT or sought an injunction to stop the removal of the Children, because he would have been put on notice that the 6 May 2020 Removal Decision was the Secretary's plan. If the Children were still in the Father's care, the considerations related to relief by this

131 Affidavit of John Brennan, affirmed on 24 May 2020, Exhibit JB-5.

Court would be inherently different. In addition, the failure to comply with an order of the Children's Court was completely unjustified.

243 Whether or not the 6 May 2020 Removal Decision is properly characterised as a decision, I emphasise that the Secretary is required to consider the s 11 principles not only when making a decision but also when taking action in relation to a child. By deciding to implement the case planning decision in the way that it did, the Secretary clearly breached most of the requirements in s 11. The Father could not participate in a decision that he did not know would take place. He was not given an opportunity to be heard. The confused and erroneous information given by the Secretary and the Departmental staff when the Children were removed did not enable the Father to understand what was occurring. This was not an instance where the safety or wellbeing of the Children was seriously considered to be at risk. There was therefore no justification for the Secretary and the departmental staff to act in the rash, abrupt and extremely disrespectful manner in which it did.

244 The acts subsequent to the 1 May s 331 Report, namely the failure to provide the s 331 Report to the Father, and the actual implementation of the new case planning decision culminating in the removal of the Children from the Father's care, constituted a breach of procedural fairness and the decision-making principles in s 11. It would be anathema for the Court to hold otherwise.

Relief

245 I now return to the relief that can be provided to both of the aggrieved parties. The procedural history of this case is important in considering the relief that is available to the parties. It is not open to me to consider the relief available to the Father solely on the basis that his Proceeding precedes the Grandparents' and the Secretary's Proceedings; I must consider the parties' respective claims together.

246 As the relief sought by the parties in the three Proceedings are different, I am compelled to consider the Grandparents' claim first. It makes logical and legal sense. It was accepted by all of the parties that if I agree with the Grandparents that the

Direction Notice was contaminated by jurisdictional error, the Father cannot claim that an FPO remains validly in force and that the Children should therefore be returned to him. The relief sought by the Grandparents and the Father are polar opposites — if I make one order, the other cannot be made.

247 As I have found that the Grandparents claim for jurisdictional error should succeed, I will make an order quashing the Direction Notice. The Father's claim is therefore challenged by an insurmountable hurdle. He cannot receive a declaration that the FPO remains in force nor can he receive the injunctive relief he seeks.

248 The Father claims that he is entitled to an injunction from this Court to reverse the unlawful action of the Secretary and to return the children to his care. The Father claims that this would be consistent with the FPO that, on his submission, is still in force.

249 In light of my decision to quash the Direction Notice, an injunction would be, legally speaking, ineffective and futile.[132] Without the operation of an FPO, the Father would not have the legal authority for parental responsibility for the children.

250 Notwithstanding the legal outcome denying the Father the injunctive relief he seeks, it would be remiss of me not to acknowledge the unlawfulness of the Secretary's conduct and the egregious manner in which the children were removed from the Father's care on 6 May 2020. The impact on the children to be removed from their Father's care without any notice or preparation is contrary to common sense and cannot be in the children's best interests. That is to say nothing of the impact on the Father to have the children removed from his care, when there was no evidence or suggestion by the Secretary that the children were not well cared for or were in any way at risk while in his care. The affidavit evidence setting out the circumstances of the implementation of the removal of the children from their Father's care on 6 May 2020 highlights the inexcusable manner in which the children were removed.

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132 *Public Service Association of SA Inc v Industrial Relations Commission of SA* [2013] SASCFC 5; (2013) 115 SASR 413.

251 The Direction Notice had some legal effect notwithstanding that it was made in jurisdictional error and therefore the FPO remained in place *until* set aside by this Court. I will therefore make the declaration sought by the Father that the action of the Secretary in the May 2020 Removal Decision was contrary to the FPO in force on that date, and was not authorised by the Act, and beyond power. The declaration determines that the Secretary's actions were unlawful and that the Secretary cannot unlawfully remove a child in circumstances similar to the present circumstances. In the circumstances it also appropriate to make an additional declaration to vindicate the Father's claim that the Secretary denied him procedural fairness.

252 Declarations to this effect will bring finality to the parties on this claim.[133] It allows them to chart the next course they wish to take, a course that should be away from judicial review proceedings. The Secretary, through the harsh lessons this experience must impose on her and her staff, will be able to conduct the case planning process in an appropriate and responsible manner. Importantly, the Father can, if he wishes, pursue the legislative options open to him under the Act to challenge, revoke or alter the CBSO currently in effect.

253 The better approach, and the orders that reflects the best interests of the Children, are as follows:

(a) I will grant the Grandparents the relief they have sought in their Originating Motion, namely an order of certiorari quashing the Direction Notice made by the Secretary to take the CBSO to be an FPO;

(b) I make a declaration that the CBSO made by the Children's Court on 15 November 2019 in relation to the Children remain in force;

(c) I make a declaration that the action of the Secretary in the 6 May 2020 Removal Decision was contrary to the FPO that, until my order in (a) above,

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133 *Magman International Pty Ltd v Westpac Banking Corporation* [1991] FCA 41; (1991) 32 FCR 1, 15 citing *International General Electric Co of New York Ltd v Customs and Excise Commissioners* [1962] Ch 784, 789.

remained in force, and was not authorised by the Act, and was beyond power;

(d) I make a declaration that the Secretary did not afford the Father procedural fairness and/or comply with the principles in ss 10 and 11 of the Act in relation to removing the Children from the care of the Father on 6 May 2020; and

(e) the Father's Proceeding and the Secretary's Proceeding are otherwise dismissed.

254 For completeness, I will also make an order granting the Grandparents and the Secretary an extension of time to file their respective Originating Motions, and for the Grandparents to be added to the Father's proceeding as a defendant.

255 Finally, save for any submissions, I consider that given the orders made and my findings, it is appropriate that the Father's costs and the Grandparents' costs of their respective proceedings be paid by the Secretary. I will now hear the parties on the form of orders for the three proceedings and costs.