SUPREME COURT OF QUEENSLAND

CITATION:	*GAB v Kan & Anor* [2018] QSC 161
PARTIES:	**GAB** (applicant) **v** **JAMES KAN** (first respondent) and **DEPARTMENT OF COMMUNITIES CHILD SAFETY** (second respondent)
FILE NO/S:	SC No 10010 of 2017
DIVISION:	Trial
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	20 July 2018
DELIVERED AT:	Brisbane
HEARING DATE:	8 June 2018
JUDGE:	Holmes CJ
ORDERS:	**The application is dismissed.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – DECISIONS TO WHICH JUDICIAL REVIEW LEGISLATION APPLIES – DECISIONS UNDER AN ENACTMENT – DECISIONS UNDER INSTRUMENTS – where the applicant seeks an order under s 38 of the *Judicial Review Act* 1991 that the respondents comply with his request for a written statement of reasons for a decision of the first respondent as an officer of the second respondent – where the first respondent decided to refuse the applicant information about a departmental investigation into the risk of harm to the daughter of his former de-facto partner – where the respondents contend that the application should be dismissed because the decision was not a decision of an administrative character made under an enactment – where the applicant contends that he falls within the definition of someone 'having or exercising parental responsibility' under s 11(1) of the *Child Protection Act* 1999 – whether the applicant had or could be given any right in respect of the information – whether the applicant could be said to have or exercise parental responsibility under the *Child Protection Act* 1999

ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – DECISIONS TO WHICH JUDICIAL REVIEW LEGISLATION APPLIES – DECISIONS UNDER AN ENACTMENT – DECISIONS UNDER INSTRUMENTS – where the applicant seeks an order under s 38 of the *Judicial Review Act* 1991 that the respondents comply with his request for a written statement of reasons for a decision of the first respondent as an officer of the second respondent – where the first respondent advised Corrective Services that the applicant, a prisoner, should not be permitted to have telephone access to the daughter of his former de facto partner while she was in departmental custody – where the respondents contend that the application should be dismissed because the decision was not a decision of an administrative character made under an enactment – where the applicant contends that he exercised parental responsibility for the child and should not have been refused contact with her – whether the applicant had a right to make telephone calls which could be affected by the decision of the first respondent

Acts Interpretation Act 1954 (Qld), ss 5A, 14A(1)
Child Protection Act 1999 (Qld), ss 11(1), 12, 13, 15, 20, 23, 87
Child Protection Bill 1998 (Qld)
Corrective Services Act 2006 (Qld), ss 50, 271
Corrective Services Regulation 2017 (Qld), s 18
Judicial Review Act 1991 (Qld), ss 4(a), 31, 32, 38
Status of Children Act 1978 (Qld)

Griffith University v Tang (2005) 221 CLR 99, applied
Palmer v The Chief Executive, Qld Corrective Services & Ors [2010] QCA 316, applied

COUNSEL: The applicant appeared on his own behalf
F J Chen for the first and second respondents

SOLICITORS: The applicant appeared on his own behalf
Crown Law for the first and second respondents

[1] The applicant, a prisoner, seeks an order under s 38 of the *Judicial Review Act* 1991 that the respondents comply with his request for a written statement of reasons for a decision to refuse him contact with the 15 year old daughter of his former de facto wife. (I will refer to the girl as "BZ".) Section 32 of the *Judicial Review Act* permits a request for a

statement in relation to "a decision to which [the part of the Act containing s 32] applies", which is defined in s 31 as "a decision to which [the] Act applies"; an expression defined, in turn, in s 4(a) as meaning,

> "a decision of an administrative character made, proposed to be made, or required to be made, under an enactment (whether or not in the exercise of a discretion)".

[2] By way of further particulars of the decision for which he seeks reasons, the applicant has identified two decisions by the first respondent, an officer of the second respondent Department. He characterised the first, on 9 August 2017, as a decision to refuse his application to have BZ's phone number added to those available to him to telephone from the prison; the second was a decision on 25 August 2017 that information about a departmental investigation into the risk of harm to BZ would not be disclosed to him. The respondents say that the application should be dismissed because neither decision is "a decision of an administrative character made…under an enactment" within the meaning of s 4(a) of the *Judicial Review Act*.

Background

[3] The applicant set out in an affidavit and, to some extent, in unchallenged oral submissions, the details of his relationship with BZ. He had been in a de facto relationship with her mother from the time BZ was about 12 months old; her biological father had nothing to do with the child. The applicant was imprisoned in 2009, when BZ was five years old, and is presently at a regional correctional centre. He regards himself as exercising parental responsibilities in relation to BZ: he said in oral submissions that he telephoned her daily, wrote to her and received visits from her, and that he communicated with her mother about decisions in relation to her, such as schooling and discipline. In a supplementary written submission, he also asserted that he had, through his parents, provided financial support, but provided no detail as to how much, when or how often. I proceed for present purposes on the basis that all of this is correct.

[4] In August 2017, a court made a temporary assessment order in relation to BZ. Under s 23 of the *Child Protection Act* 1999, an order of that kind may be made to enable an investigation to assess whether a child is at risk of harm. A child reasonably believed by an authorised officer under the Act to be at immediate risk of harm may be taken into the custody of the chief executive of the Department. It appears that occurred in this case. According to the applicant, violence in the relationship between BZ's mother and her

current partner resulted in BZ being removed from her mother's custody from early August 2017 until 11 September 2017.

[5] During that time, the applicant made contact with the first respondent and asked him to advise what was happening in relation to BZ. The applicant was particularly concerned because BZ's mother had informed him that the girl was self-harming while in the care of foster parents. The first respondent declined to provide any information because the applicant was not BZ's father. During the same period, the applicant was informed by a Corrective Services employee that his application to have BZ's mobile telephone number included on the list of numbers to which he was permitted to have access through the jail's ARUNTA telephone system had been refused, because the first respondent had not approved his telephone contact with BZ. The applicant applied for a statement of reasons, which the respondents refused.

The legislation

[6] Under s 15 of the *Child Protection Act*, where a child does not have long-term guardians,[1] an authorised officer who investigates an allegation of harm to the child must give specified information about the harm and the outcome of the investigation to at least one of the child's parents. (Where the child has a long-term guardian, the information must be given to one of the child's parents if the officer is satisfied that it would be in the child's best interests.) A similar obligation applies if an authorised officer takes the child into the chief executive's custody under s 20 of the Act: the officer must as soon as practicable tell at least one of the child's parents that the child has been taken into custody, and the reasons, and must advise when that custody has ended.

[7] Section 12 of the Act deals with what occurs when the child is taken into the chief executive's custody; the chief executive has:

> "(a) the right to have the child's daily care; and
> (b) the right and responsibility to make decisions about the child's daily care".

That power would, one infers, extend to making a decision as to who should be permitted to have contact with the child. In addition, s 87 of the Act permits the chief executive to

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[1] "Long term guardian" is defined in the Schedule 3 Dictionary to the Act to mean "a person, other than the chief executive, who is granted long term guardianship of the child under a Child Protection Order."

refuse to allow contact between a child in custody and the child's parents or members of its family if he or she is satisfied the refusal is in the child's best interests or the contact is not reasonably practicable.

[8] "Parent" is defined in s 11(1) of the *Child Protection Act* as extending to:

> "the child's mother, father or someone else (other than the chief executive) having or exercising parental responsibility for the child"

and to persons having the status of parents under Aboriginal or Torres Strait Islander customary law. That definition applies for the purposes of Chapter 2, Part 1 of the Act, in which ss 15 and 20 appear. However, the term "parent" is more narrowly defined for the purposes of other provisions of the Act as meaning: the child's mother or father; a person in respect of whom an order is in operation under the *Family Law Act* 1975 (Cth); a person having custody or guardianship under Queensland law or the law of another State; or a long-term guardian. It seems that parents within the meaning of that narrower definition may have greater rights; they are given the status of respondents to applications for court assessment orders and child protection orders, and have rights of appeal.

The parties' submissions

[9] The respondents contended that the application should be dismissed. The applicant was not, they submitted, entitled to a statement of reasons because neither particularised decision was "made…under an enactment" for the purposes of the *Judicial Review Act*, on the two criteria identified in *Griffith University v Tang*:[2]

> "First, the decision must be expressly or impliedly required or authorised by the enactment; and secondly the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment."[3]

The respondents argued that the decision not to include BZ's number in the applicant's dialling list was, in fact, a matter for the chief executive of Corrective Services. Under s 50 of the *Corrective Services Act* 2006, a prisoner was permitted to "phone approved persons at approved telephone numbers", "approved" being defined as meaning "approved by the chief executive", who had, however, power to delegate the function.[4]

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2 (2005) 221 CLR 99.
3 At [89].
4 Section 271.

The making of calls was properly to be regarded as a privilege rather than a right; it was included in the list of "privileges for a prisoner" in s 18 of the *Corrective Services Regulation* 2017. The applicant was not entitled to information about the investigation into whether BZ was at risk of harm because he was not her biological father, was not declared or presumed to be her "parent" under the *Status of Children Act* 1978, and had no parental responsibility for her.

[10] The applicant argued that he was "someone… having or exercising parental responsibility for" BZ, within the meaning of s 11(1) of the *Child Protection Act.*[5] As to the meaning of the phrase "having or exercising parental responsibility", he pointed out, correctly, that s 14A(1) of the *Acts Interpretation Act* 1954 requires a purposive approach to construction. He submitted that the best interests of children were paramount under the Act,[6] and it was in the best interests of BZ that he be recognised as her parent. The purpose of the use of the term "parental responsibility" in the *Child Protection Act*, the applicant maintained, was to ensure that children achieved their full potential as a person by the involvement of both parents in their lives. It was irrelevant that he was not BZ's step-father (never having been married to her mother), nor did it matter that he did not live with the girl. A fly-in fly-out mine worker or a member of the armed forces might not live with his or her child but nonetheless be the child's parent. The respondents were obliged to tell him about the alleged risk of harm to BZ and the investigation of it, and should not have prevented his telephone access to the girl. He was aggrieved by both decisions.

The refusal of information under s 15 and s 20

[11] Even if the applicant could show that he was BZ's parent within the meaning of s 11 of the *Child Protection Act*, it would not follow that he had a right under s 15 or s 20 of the Act to be given details about the alleged risk of harm to her, the outcome of the investigation, or her being taken into the chief executive's custody. Those sections oblige an authorised officer to give the information to "at least one of the child's parents". If there is more than one parent, it follows that the obligation can be discharged by advising whichever parent the authorised officer chooses to tell. If, as seems likely, the first

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5 In written submissions, he also asserted that he was BZ's "long-term guardian" but it is clear that he does not fall within that definition, there being no relevant order in place granting him guardianship.

6 Section 5A.

respondent in this case gave the information to BZ's mother, he had no obligation to give it to anyone else, including the applicant. It would only be if there were only one person who fell within the definition of "parent" that it could be said that the parent had a right to the information (as opposed to being eligible to receive it). That was not this case, because on no view of things was BZ's mother her only parent. Quite apart from the applicant's claim to parental status, her biological father was still alive, and notwithstanding his apparent neglect, remained by definition her parent.

[12] That conclusion means that it cannot be said that the decision altered or affected any legal right of the applicant. Nor would a decision to provide him with the information have conferred any legal right on him; no further entitlement would have flowed from it. It is not, therefore, strictly necessary to consider whether he did in fact fall within the definition of "parent" as "having or exercising parental responsibility" for BZ, but I doubt that he could be regarded as doing so.

[13] The Explanatory Note to the *Child Protection Bill* 1998 sheds some light on what the definition in s 11 was intended to encompass:

> "*Clause 11* defines the meaning of the term **"parent".** Throughout most of the Bill, the word "parent" has a broad meaning and can include anyone caring in an ongoing way for the child like a parent, e.g. step-parents, or grandparents with whom the child lives. "Parent" does not include temporary carers, e.g. relatives with whom the child stays for a few weeks or neighbours who mind the child each day. It does not include persons standing in temporary "loco parentis" for the parent, for example school principals. The definition for Aboriginal and Torres Strait Islander parents is able to be interpreted broadly to include customary relationships within a community or tribal grouping."[7]

[14] Some further assistance as to the kind of responsibility regarded as "parental" can be gained from s 13 of the Act, which describes the effect of a grant of guardianship under a Child Protection Order. The guardian acquires:

> "(a) the right to have the child's daily care; and
> (b) the right and responsibility to make decisions about the child's daily care; and
> (c) all the powers, rights and responsibilities in relation to the child that would otherwise have been vested in the person having parental responsibility for making decisions about the long-term care, wellbeing and development of the child."

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[7] At 12.

[15] It is apparent, particularly from the Explanatory Note, that the fact that an individual acts on some occasions or in some respects as a parent would, does not necessarily mean he or she is exercising parental responsibility; it is a question of fact and degree. There is no advantage, for present purposes, in endeavouring to set the limits of what might constitute the exercise of "parental responsibility", but it is clear that the term contemplates, at least, the continuing physical care of a child by an adult living with him or her. (That might allow for some absences, but could not be met in a situation of continuing physical separation.) And it entails a responsibility to make effective decisions about the child's welfare in both the short and the long term.

[16] The applicant said that he was in regular contact with BZ, advising her and supporting her emotionally, that he was consulted about decisions in relation to her and that he provided some financial support (as to which there was no detail, other than that it was through his parents). But as a prisoner, the applicant could not practically contribute to BZ's day-to-day care: he could not meet her health or education needs or ensure that she was fed or housed. His role in decision-making could only be at the will of BZ's mother, since there was nothing that he could do to ensure that any view he took had any practical effect. Nor was there any element of responsibility in what he did; his involvement in the child's life was entirely a matter of choice. Had he chosen to end it overnight, he could not have been called to account in any way.

[17] Although the applicant may well have played a valuable role in the upbringing of BZ within the limitations imposed by his incarceration, it was no more than any significant adult in the child's life living at a distance from her might do: an uncle, a grandparent, a godparent. It did not amount to having or exercising parental responsibility. He was not, therefore, a person to whom the first respondent could have properly conveyed the information contemplated by s 15 or s 20.

The decision not to grant the applicant telephone access

[18] The period for which the applicant was denied telephone access to BZ seems to have lasted for about a month, almost a year ago, with his being able to resume calls to her once she returned to her mother's custody. That being the case, I questioned the utility of reaching a conclusion on this aspect of the decisions. However, the respondents did not seek the dismissal of the application on that basis.

[19] The decision of the first respondent was to advise Corrective Services that telephone calls to BZ ought not to be approved. That could only be a decision under an enactment in the *Tang* sense if it affected an existing right of the applicant to have telephone contact with BZ, or was apt to confer such a right. As the respondents point out, s 18 of the *Corrective Service Regulation* 2017 characterises "making or receiving phone calls" as a privilege for a prisoner, with the exception of telephone calls to the prisoner's lawyer or the ombudsman. In *Palmer v The Chief Executive, Qld Corrective Services & Ors*,[8] the question was whether a prisoner had a right to access to his property. The relevant section of the *Corrective Services Act* was expressed in permissive terms – "The chief executive may allow property to be brought into a [jail]" – and the relevant Regulation described accessing the prisoner's property as a privilege. The implication from the language of the section, it was held, was that it was a matter of permission, not duty, on the part of the chief executive, and there was no right for a prisoner to keep his personal property. That implication was reinforced by the terms of the then Regulation, which classified access to property as a privilege.

[20] Similarly in the present case, the language of approval in s 50 of the *Corrective Services Act* makes it clear that, other than in relation to the prisoner's lawyer or the ombudsman, a prisoner has no right to make telephone calls; it is the choice of the chief executive of Corrective Services whether he or she should be permitted to ring any particular person or number. That conclusion is reinforced by the express reference in the Regulation to making and receiving phone calls as a privilege. It follows that the applicant had no right which could be affected by the first respondent's adverse advice to Corrective Services; nor, had the first respondent decided instead to give favourable advice, could he have conferred on the applicant any right to telephone contact with BZ.

Conclusion

[21] The respondents' decisions not to give the applicant information and to inform Corrective Services that access should not be granted to BZ's telephone number were not decisions made under an enactment because they did not "alter or otherwise affect" any legal right of the applicant and could not, however made, have conferred any right on him.

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[8] [2010] QCA 316.

Accordingly, they were not decisions in relation to which the applicant was entitled to a statement of reasons. His application must, accordingly, be dismissed.