

2009 Semi-final Castan Centre Human Rights Moot Problem

15 year old Peter Jurrah is an Aboriginal child, living in Broadmeadows, who has had a number of run-ins with the law. In late July 2009, He was charged, and found guilty, by the Children's Court of Victoria, Criminal Division, of stealing a bicycle he found in his neighbour's front yard. Victoria enacted *the Children and Young Persons (Koori Court) Act 2004* which created a Children's Koori Court (CKC) to deal with sentencing of Aboriginal youth offenders in Melbourne, pursuant to the *Children, Youth and Families Act 2005*. Having a sentence determined by the CKC is entirely optional. A number of conditions must be satisfied before a young person can be dealt with by the CKC, including that the offender is an Aborigine and has consented to having the sentence hearing before the CKC.

Peter wants to have a normal sentencing hearing before the Children's Court Criminal Division for a number of reasons including the fact that he would face a delay of up to three months before he could be sentenced in the CKC, due to a heavy case backlog in that court. Furthermore, while he is an Aborigine, and views himself as a member of the Aboriginal community, (there is no question regarding his Aboriginality), he wishes to be considered part of the typical Australian community and face sentencing like any other Australian kid. He doesn't want to be treated differently from his non-Aboriginal mates.

Peter's parents, however, want him to go before the CKC. They feel that the CKC sentencing process is an important part of Aboriginal culture and that Peter needs to have a greater appreciation of his culture so that he can learn from his mistakes. They see his most recent run-in with the law as a final straw and do not believe his previous sentences before the Criminal Division have had any positive impact on him. Peter's parents therefore instruct his lawyer to tell the magistrate that Peter wishes to go to the CKC for sentencing. Peter's lawyer told them that Peter himself had to consent to go to the CKC, but his parents informed the lawyer that they were paying the lawyer's fees and since Peter was a minor the lawyer should do what they said.

The lawyer followed Peter's parent's instructions and requested that Peter's case be transferred to the CKC for sentencing. Peter was in the court room at the time and tried to interrupt his lawyer to tell the magistrate that he did not want to go before the CKC. However, the magistrate cut Peter off telling him that it was rude to interrupt people in a court room (Peter had been reprimanded by the magistrate previously for causing an earlier unwarranted interruption in the trial). The magistrate did not ask Peter whether or not he consented to going to the CKC for his sentencing, even though under the *Children, Youth and Families Act 2005*, the child must consent to such a transfer, and Peter was in the court room and could have easily been asked and answered this question. The magistrate accepted the lawyer's submission without further review of the case or discussion with Peter or his parents. He ordered a transfer of the case to the CKC for Sentencing purposes.

Peter was very upset about this and appealed the Magistrate's order to a single judge of the Supreme Court. He argued that the magistrate made an error at law as he had an obligation to consider all of Peter's rights contained in the *Charter of Human Rights and Responsibilities Act 2006*, but did not do so when deciding to transfer the sentencing hearing to the CKC. In particular he failed to confirm that Peter had indeed consented, even after he tried to speak out against the transfer. While Peter concedes that the Magistrate was not acting in his administrative capacity when he made the decision, he argues that pursuant to section 6(2)(b) of the *Charter of Human Rights and Responsibilities Act 2006*, the court had to take into consideration all of his rights during the criminal process. In particular section 23(3) for not treating him in a way that is appropriate for his age because he was old enough that the judge should have heard what he had to say about the proposed transfer, section 17 for not protecting his best interests in failing to confirm that he consented to the transfer, section 19 for not considering his cultural rights and the fact that he wanted to be treated as any other Australian youth offender would have been treated and not in a special manner due to his being Aboriginal, and section 13 as he has a general right to autonomy and could make decisions for himself.

The single judge of the Supreme Court embraced a recent VCAT decision and held that the magistrate did not need to take into consideration any other rights protected within the Victorian Charter other than ensuring that the child had been treated in a manner that was appropriate for his age by the court in its decision-making, and on this issue his rights had not been breached. Furthermore, even had the court had to abide by any other rights contained in the charter, these rights were not breached by ordering Peter to the CKC without confirming whether or not he did consent to going to the CKC.

Peter requested leave to appeal the decision and the Court of Appeal has granted leave to hear the appeal from the single judge's decision on the matter.