FEDERAL COURT OF AUSTRALIA

DWE18 as litigation representative for DWD18 v Minister for Home Affairs [2018] FCA 1121

|  |  |
| --- | --- |
| File number: | NSD 1332 of 2018 |
|  |  |
| Judge: | **ROBERTSON J** |
|  |  |
| Date of judgment: | 26 July 2018 |
|  |  |
| Catchwords: | **PRACTICE AND PROCEDURE** – application for mandatory interlocutory injunction – applicant an adolescent girl residing in the Republic of Nauru (**Nauru**) – applicant a refugee – applicant’s self-harm – applicant’s limited eating and drinking – applicant requiring urgent medical attention not available to her on Nauru – applicant at imminent risk to her health, both in the short term and in the long term – whether necessary for all members of the applicant’s family to accompany her to a child and adolescent medical facility in Australia for investigation of the applicant’s deteriorating health, and any treatment that may be identified as necessary or appropriate |
|  |  |
| Legislation: | *Federal Court of Australia Act 1976* (Cth) ss 37AF, 37AG |
|  |  |
| Cases cited: | *DCQ18 v Minister for Home Affairs* [2018] FCA 918 |
|  |  |
| Date of hearing: | 26 July 2018 |
|  |  |
| Registry: | New South Wales |
|  |  |
| Division: | General Division |
|  |  |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 37 |
|  |  |
| Counsel for the Applicant: | Mr DF Villa |
|  |  |
| Solicitor for the Applicant: | The National Justice Project Ltd |
|  |  |
| Counsel for the Respondents: | Mr D Godwin |
|  |  |
| Solicitor for the Respondents: | Australian Government Solicitor |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | NSD 1332 of 2018 |
|  | | |
| BETWEEN: | DWE18 AS LITIGATION REPRESENTATIVE FOR DWD18  Applicant | |
| AND: | MINISTER FOR HOME AFFAIRS  First Respondent  **COMMONWEALTH OF AUSTRALIA**  Second Respondent  **SECRETARY OF THE DEPARTMENT OF HOME AFFAIRS**  Third Respondent | |

|  |  |
| --- | --- |
| JUDGE: | ROBERTSON J |
| DATE OF ORDER: | 26 JULY 2018 |

THE COURT ORDERS THAT:

1. The mother of the applicant be appointed the applicant’s litigation representative.
2. The applicant hereafter be identified as DWD18.
3. The applicant’s mother hereafter be identified as DWE18.
4. Until further order or six months from today, whichever first occurs, under s 37AF of the *Federal Court of Australia Act 1976* (Cth), on the grounds in s 37AG(1)(a) and (c), the publication of information which would reveal or tend to reveal the identity of the applicant, or any member of her family or any officer of the International Health and Medical Services involved in treating the applicant or reporting in respect of the condition of the applicant be prohibited.
5. Costs reserved.
6. Liberty to restore on short notice.

UPON THE UNDERTAKING OF THE APPLICANT by her counsel:

(a) To submit to such order (if any) as the Court may consider to be just for the payment of compensation to be assessed by the Court or as it may direct, to any person, whether or not a party, adversely affected by the operation of the interlocutory order or undertaking or any continuation (with or without variation) thereof; and

(b) To pay the compensation referred to in (a) to the person there referred to.

**THE COURT ORDERS THAT:**

1. As soon as reasonably practicable, the first respondent is to cause the transfer of the applicant and the younger of her sisters to a child and adolescent medical facility in Australia for investigation of the applicant’s deteriorating health, and any treatment that may be identified as necessary or appropriate as a result of the foregoing investigation, or as agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

ROBERTSON J:

1. This urgent application concerns an adolescent girl who since 2013 has resided in the Republic of Nauru (**Nauru**) with her mother, her two older sisters and her older brother, as well as her aunt and four cousins. She is a refugee.
2. The application is that the Minister urgently transfer the applicant, together with her whole family, to a location where the applicant can receive “Specified Treatment”, being urgent transfer to a child and adolescent medical facility for investigations and management of the applicant’s deteriorating health, in line with the recommendations of Dr Patricia Schmid, Professor Louise Newman and Dr Beth O’Connor, and any counselling, support work or other treatment for the applicant’s family members, where the treating doctor so recommends.
3. The evidence on behalf of the applicant is in the form of five affidavits. Two affidavits, dated 25 and 26 July 2018, are by Ms Natasha Blucher, Detention Advocacy Manager of the Asylum Seeker Resources Centre, the caseworker of the applicant. A third affidavit dated 25 July 2018 is affirmed by Ms Anna Talbot, solicitor, employed by the National Justice Project, the solicitors for the applicant. Another affidavit, also affirmed by Ms Talbot, dated 26 July 2018, annexes a report by Dr Joshua Francis, a paediatrician and paediatric infectious diseases specialist. There is also an affidavit by Ms Emma Hearne, solicitor, employed by the National Justice Project, annexing an affidavit, presently unsworn, by Dr Nicholas Martin, general practitioner. Counsel for the applicant assures me that affidavit will be sworn and filed. Counsel for the respondents did not object to the admission of that affidavit on that basis.
4. The respondents’ evidence is an affidavit affirmed by Ms Vanessa Jane Holben, dated 26 July 2018. Ms Holben is the Assistant Commissioner, Detention and Offshore Operations Command within the Australian Border Force.
5. I note that none of the evidence before me has been tested in cross-examination.
6. I shall consider Ms Holben’s affidavit first.
7. In relation to the applicant’s current circumstances, there is a clinical record dated yesterday, 25 July 2018, following a visit to the applicant from an International Health and Medical Services (**IHMS**) nurse. IHMS is a company contracted by the Australian Government to provide health services to asylum seekers and refugees on Nauru. There is also a clinical record of the same date following an assessment by an IHMS psychiatrist. That second record states:

… No clear evidence for a depressive illness and this seems more likely to be a severe reaction to her situation.…

…

If she deteriorates physically she will need rehydration initially. There is no suitable place in Nauru for in-patient level mental health care should this become indicated.

1. Ms Holben deposes to the health and settlement services that are available to the applicant. She refers to a “Settlement Health Clinic” run by IHMS personnel, located at the Nauru Hospital. It is said that psychiatrist and psychologist services “are also available, as required through IHMS. Refugees can access mental health services through the Settlement Health Clinic.” IHMS is funded to provide a sub specialist Child and Adolescent Mental Health Service and that team includes two child and adolescent psychiatrists deployed on an alternating part-time fly-in fly-out basis. Ms Holben also deposes that three sites were, from May 2017, designated as mental health facilities under the *Mentally Disordered Persons Act 1963* of Nauru. Ms Holben deposes to Nauru Hospital participating in the Nauru Ministry of Health’s Overseas Medical Referral process which allows referral of members of the Nauruan community, including refugees, for overseas medical treatment that is not available at the Nauru Hospital. That process works through a committee that meets as required.
2. On the basis of the evidence I find, focussing on the events of this month, that on 9 July 2018 the applicant cut her thighs multiple times “superficially” with a razor. She stopped eating and drinking after this self-harm and continues to deteriorate, although there is a dispute in the evidence about the extent to which she has stopped eating and drinking and the extent to which she has deteriorated.
3. I also find that on 10 July 2018 the applicant cut her legs and both arms and was taken to the emergency room in the Nauru Hospital. Subsequently she was taken to a general ward in that hospital, apparently a nursing home room.
4. The applicant was later discharged from the hospital then readmitted on 11 and 14 July for rehydration, which supports an inference that she has been drinking very little water and eating very little food.
5. I note, in general, the medical evidence by medical practitioners who have seen the applicant is of more weight than reviews on the papers.
6. I note and accept for the purposes of this urgent application a report by Dr O’Connor, adult psychiatrist, following a home visit and a hospital visit of the applicant. That report was annexed to Ms Talbot’s first affidavit. Dr O’Connor diagnosed the applicant with Major Depressive Disorder and Resignation Syndrome.
7. Dr O’Connor’s report notes that Resignation Syndrome has been described in the medical literature as a disorder which affects “psychologically traumatised children and adolescents in the midst of a strenuous and lengthy migration process”.
8. In the same report Dr O’ Connor noted that the applicant needed further medical treatment, including an EEG which is not available in the Nauru Hospital. The same report stated that the applicant requires care in a child and adolescent hospital where she can also have access to child and adolescent psychiatric care to manage her disorder. Dr O’Connor’s report stated that it is not possible for this to be provided in the Nauru Hospital because there is no child and adolescent team which can provide psychiatric and psychological support.
9. It is likely, the report noted, that the applicant would soon require nasogastric feeds if she follows the course of Resignation Syndrome that has been documented in the medical literature.
10. Counsel for the applicant relies on that part of Dr O’Connor’s report which referred to recovery from Resignation Syndrome in a secure and hopeful environment and the difficulties for families to provide that security and hope when they are worried about family members separated from them.
11. There is a report dated 17 July 2018, prepared by Dr Schmid, Child and Adolescent Psychiatrist following a hospital visit to the applicant. That report is also annexed to Ms Talbot’s first affidavit. That report states: “This … adolescent needs to be transferred to a child and adolescent hospital with intensive support from children and adolescent mental health specialists. There is no specialized care available to manage her condition appropriately in Nauru.”
12. The same psychiatrist, in a report dated 19 July 2018 following a home visit, stated that the applicant “requires prolonged admission and intensive medical care to re-establish proper food and drink intake and to continue her mental health treatment.”
13. A further report by the same psychiatrist, Dr Schmid, dated 23 July 2018, following a further home visit noted that the applicant had not eaten for three days and that she remained in need of being hospitalised in a specialised inpatient facility.
14. Professor Newman, in a report dated 23 July 2018 based on a review of the records and earlier medical reports, stated that the applicant:

… requires urgent transfer to a child and adolescent medical facility for investigations and management of her deteriorating physical health. She may require nasogastric feeding and is described as clinically dehydrated. [She] requires a treatment team of specialist pediatric physicians and child and adolescent psychiatrists and admission to a medical unit…

This treatment should be seen as a matter of urgency and transfer arranged as soon as practicable. In the interim it is vital that [the applicant] is rehydrated with IV fluids and electrolytes and renal function monitored…

A child in this condition if not treated will develop severe dehydration, renal failure and malnutrition, [sic] Other complications include pneumonia, other infections, pressure sores and contractures. The long-term risks of harm relate to the degree of metabolic compromise and organ failure and the duration of the unresponsive state.

…

RON hospital has been documented as failing to provide adequate supportive treatment and rehydration for this child thus increasing the risk of severe complications…

1. There is also in evidence some notes prepared by Dr Schmid yesterday, 25 July 2018, following a home visit. Those notes stated that the applicant needed an emergency medical examination. The notes said that she had had no food intake for six days, no water intake for six days, her blood pressure was difficult to measure, she had no patella reflex and was hypotonic.
2. A further report prepared by Dr Schmid on the same day stated that the applicant remained in need of hospitalisation in a specialist inpatient facility, and that she should be admitted to Nauru Hospital while waiting for transfer to a specialised inpatient facility.
3. Dr Francis’ opinion, given on the basis of records and the reports by Dr Schmid, Professor Newman and Dr O’Connor, is that the applicant has had:

a significant deterioration in her mental health since early July 2018. She has been diagnosed with a severe major depressive disorder, and pervasive refusal syndrome.

Dr Francis supported recommendations for intensive psychological therapy under the care of child and adolescent mental health specialists.

In addition, in Dr Francis’ opinion:

a child with such poor oral intake requires urgent assessment for sequelae of dehydration and malnutrition because of prolonged fasting. In addition to a thorough physical examination, she should have blood tests to evaluate her renal and liver function, electrolyte levels, and to exclude hypoglycaemia; and an electrocardiogram to exclude arrhythmias secondary to electrolyte disturbances. She is likely to require parenteral or enteral fluid resuscitation and nutrition, with ongoing inpatient assessment for electrolyte disturbances and refeeding syndrome. These interventions to address her physical health, should happen concurrently with due attention to her mental health needs.

…

With ongoing food and fluid refusal, her risk of complications of dehydration and hypoglycaemia are significant, and I believe she should be admitted to hospital for assessment and treatment within 24 hours.

… There is a short-term risk of deterioration in physical health as a result of acute dehydration, hypoglycaemia and electrolyte disturbances, giving rise to cardiac arrhythmias, kidney failure and decreased consciousness. Longer term complications could include permanent cardiac and/or neurological damage. Ongoing, untreated depressive symptoms in a XX year old can also contribute to long-term psychological morbidity.…

[The applicant] should be referred urgently to an inpatient child and adolescent mental health unit, with access to specialist inpatient paediatric services which can assess her physical health status. She requires input from paediatric and child psychiatry specialists.…

In summary, the information available to me suggests that [the applicant is] at extremely high risk of serious harm to her physical and mental health as a result of her severe psychological symptoms. I support the recommendations of the child and adolescent psychiatrists, Dr Patricia Schmid and Prof Louise Newman, that [the applicant] “requires urgent transfer to a child and adolescent medical facility for investigations and management of her deteriorating physical health”.

1. In relation to the facilities on Nauru to care for children there is evidence, which I accept for the purposes of this urgent hearing, to the effect that IHMS does not have facilities to provide inpatient care for children, for physical or mental health problems.
2. The submission on behalf of the applicant is that on the basis of the evidence and the opinions of Dr O’Connor, Dr Schmid, Professor Newman and Dr Francis, the applicant requires urgent medical attention, to prevent further deterioration of her health and to begin effective and ongoing treatment. I accept this submission and so find. I also find, as submitted on behalf of the applicant, that the applicant is at serious risk of permanent complications from her current medical situation which does not appear to be being monitored or managed.
3. The applicant submits she is currently being supervised by her family, who have expressed serious concern that they are unable to properly care for her. The applicant appears to be at imminent risk. The applicant risks harm for which damages will not be an adequate remedy.
4. The respondents rely on evidence by a qualified mental health nurse and also a psychiatrist, both of whom had treated the patient and who saw her yesterday: see [7] above.
5. The resolution of the present interlocutory application turns primarily on my findings as to the medical condition of the applicant. I have referred to the evidence and I find that the medical evidence of the applicant’s physical and psychological condition given primarily by Drs O’Connor and Schmid but also by Professor Newman and Dr Francis is more persuasive than the medical evidence adduced by the respondents for these reasons.
6. First, the applicant’s medical evidence is more specific to the applicant and, with respect to the reports annexed to Ms Holben’s affidavit, pages 17 and 18, is more reasoned and given by apparently more senior and experienced practitioners in the relevant field. Some of the respondents’ evidence is necessarily at a high level of generality and therefore less cogent and less persuasive in terms of the weight that I have given it.
7. I prefer the evidence adduced on behalf of the applicant as to, first of all, her medical condition, secondly, the type and quality of the treatment she needs for that condition specifically, and, thirdly and consequentially, the non-availability of treatment of that type and quality on Nauru.
8. As I have said, I accept the submission on behalf of the applicant that she requires urgent medical attention to prevent further deterioration of her health and to begin effective and ongoing treatment. I also find that the applicant is at serious risk of permanent complications from her current medical situation and find that the applicant appears to be at imminent risk to her health, both in the short term and in the long term.
9. It follows that I do not accept the submission on behalf of the Minister that the applicant has not shown sufficient evidence of the seriousness of her medical condition or sufficient urgency in terms of the treatment for her medical condition.
10. I note that the applicant has by her counsel provided an undertaking in the form of the orders I made in *DCQ18 Minister for Home Affairs* [2018] FCA 918 at [29].

(a) To submit to such order (if any) as the Court may consider to be just for the payment of compensation to be assessed by the Court or as it may direct, to any person, whether or not a party, adversely affected by the operation of the interlocutory order or undertaking or any continuation (with or without variation) thereof; and

(b) To pay the compensation referred to in (a) to the person there referred to.

1. There are two other matters that need to be dealt with. One is the question of the place of treatment, and it seems to me that the evidence supports the conclusion that Australia is the nearest centre of appropriate medical expertise. Although I do not specify where in Australia, it will save further argumentation if Australia is included in the order that I propose to make. That certainly is the tendency of the applicant’s affidavit material and is specific in [17] of the report of Dr Martin, that is, Australia is the nearest centre of medical excellence.
2. The last matter is the question of the extent to which the members of the applicant’s immediate family should be included in the order. I am not persuaded that the whole of the applicant’s immediate family should be included in the order. I take the approach that for an urgent interlocutory injunction of this sort, it is not appropriate to go further than necessary in terms of the immediate issues to be resolved. I would therefore reason that the applicant, given her age and condition, should be accompanied, but I am not persuaded at the moment that she should be accompanied by anyone other than either the younger of her sisters or her mother, and my preference would be for the younger sister, given that the balance of the family would, at least on an interlocutory basis, be remaining in Nauru.
3. The order that I propose is that as soon as reasonably practicable, the Minister, by his officers or agents, urgently transfer the applicant to a child and adolescent medical facility in Australia for investigation and any treatment that may be necessary or that may be identified as necessary or appropriate as a result of the investigation for management of her deteriorating health. I would include in that order that the applicant should be accompanied by the younger of her sisters. I will hear counsel as to the precise form of the order.

|  |
| --- |
| I certify that the preceding thirty-seven (37) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Robertson. |

Associate:

Dated: 26 July 2018