Cultural Burial and the Law

Case Study 1: Darcy v Duckett [2016] NSWSC 1756

This case involved an application to the Supreme Court of NSW before His Honour Justice Campbell by the sister and de facto wife of a deceased Aboriginal person. Both the sister and the de facto wife wished the deceased man to be buried in their traditional Aboriginal lands, which were in different areas of NSW.

Facts

The deceased man and his de-facto were in a permanent relationship. The deceased had not been in close contact with his sister or his birth family for a number of years and had rarely visited his traditional Aboriginal lands. The deceased had lived with his de facto partner in her traditional Aboriginal lands for some years. He had been accepted into that community and had encouraged his children to learn their mother's cultural traditions. He had told his de-facto wife that he wanted to be buried in her traditional lands.

The deceased died 'intestate', which means that he died without having prepared a will. In that case, specific rules apply as to who should look after the affairs of a deceased person, including their funeral.

In his judgment Justice Campbell discussed the common law in NSW regarding deceased estates and held that the legal principles that usually apply in such matters are as follows:

"A person with the highest right to look after the affairs of a deceased person should make the decisions about the funeral and burial."

The right of a spouse or de-facto spouse is a higher right than the children or the other family members of a deceased person, they generally have the highest right and can make the decisions about the funeral.

The person who has the highest right to arrange the burial should consult with other interested parties and family members about the funeral, but cannot be legally forced to do so.

In this case the court said that it was necessary to consider common law principles, practical considerations and cultural or religious considerations in making its decision.

The court heard evidence from the parties about customary Aboriginal law and burial and accepted that the general rule is for an Aboriginal person to be buried in their traditional country, as the soul of that person will not rest if it is buried in other country.

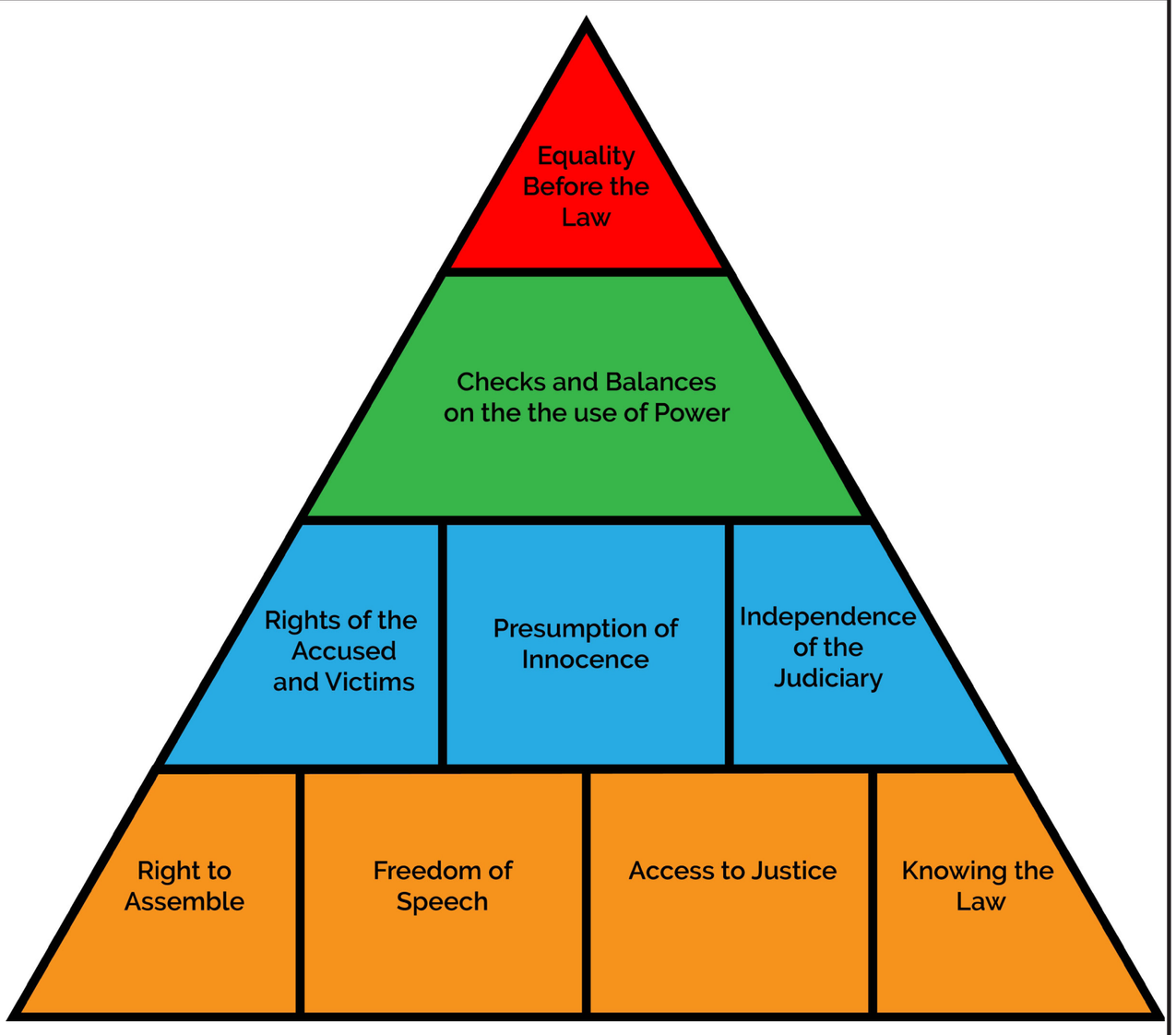
The Court Decision

The court found that the de-facto wife had the highest right at common law and so should decide where the deceased should be buried.

However, the fact that the deceased had made his home in his de-facto wife's traditional lands, that he had been accepted in that community, had encouraged his children to learn its traditions and had said he wanted to be buried there meant that these were now essentially his traditional lands. The court found that this then fit the rules of Aboriginal law and custom, which required burial on traditional lands.

His Honour found that the de-facto partner should respect the wishes of the other family members and involve some of his family's traditions in the funeral ceremony.

The decision followed the 'black letter law' (the de-facto wife having the right to decide on the funeral). The court also took account of cultural law, but decided that being buried on 'traditional lands' had a broad meaning and could include adopted 'traditional lands'.



Equality before the law

The rule of law is interested in maintaining equality before the law. Equality before the law requires above all that a person cannot be punished unless it is done by the law.

Equality before the law is that an individual, regardless of their status in society, can challenge a law which is unconstitutional or otherwise invalid under Australian law to the highest court in the land.

Equality before the law includes being able to challenge the decision of a government agency on equal footing. For equality before the law to exist here the government must follow certain rules when dealing with an individual, because the resources of the government far outstrip those of most, if not all, individuals.

Human Rights and The Rule of Law

A legal system under the rule of law has processes which give people, regardless of their status, equal access to the rights they are entitled to under the law. It is well accepted that the rule of law and the maintenance of human rights are connected. The Universal Declaration of Human Rights states in its preamble that human rights are to be protected by the rule of law.

Cultural Burial and the Law

The law in Australia is found in legislation (laws made by Parliament) and case law (laws made by judges). This is sometimes called 'Black Letter Law' which is the foundation of the rule of law. However, due to the cultural diversity of the people who live in Australia, there are frequently cases where judges need to assess the intersection between black letter law and customary law and cultural practices.

Sometimes courts have to make decisions that take into account practical matters to reach a decision, that will work in the real world. The courts may need to take into account the impact of the cultural background and practices of the parties, in order to reach the best decision on the case. In doing this the courts always have to consider that the black letter law first as it is the superior law in our country and then examine customary law and cultural practices so that they can be taken into account as long as they do not unreasonably contradict the law. This process is an example of how judicial idependence can protect human rights.

The rule of law is essential for human rights to be protected - this resource deals with two key areas of law. Cultural Burial Practices and Migration.

Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

Section 15 of the New Zealand Bill of Rights Act 1990 (BORA)

Case Study 2: Abraham v Magistrate Stone, Deputy State Coroner [2017] NSWSC 1684

Facts

A young Maori person passed away in Australia and his separated parents each applied to have the Supreme Court of NSW for a decision about where he should be buried. His mother applied for the deceased to be buried in New Zealand. His father applied for the deceased to be cremated and his ashes divided equally between the mother and father, for them to bury as they wished. The main issue between the mother and father was whether the deceased should be buried or cremated.

Evidence given at the hearing indicated that there can be debate in Maori culture as to funeral arrangements. This can delay any funeral proceedings.

The deceased's sister gave evidence that the deceased had little connection with New Zealand or the Maori culture and that Australia was his home.

Justice Rotham outlined the relevant legal principles regarding burial in NSW as follows:

"A person with the highest right to look after the affairs of a deceased person should make the decisions about the funeral and burial"

Where more than one party has the highest right, the practicalities of burial without unreasonable delay should decide who should succeed on the case.

The person who has the highest right to arrange the burial should consult with other interested parties and family members about the funeral, but cannot be legally forced to do so.

Cremation is equivalent to burial.

The court heard evidence on traditional Maori law and decided that this law meant that a body should be buried, but that in recent generations cremation had become acceptable. Maori culture required that a person be buried where their ancestors were from.

The Court Decision

The court found that both the mother and father had equal rights to decide on funeral arrangements. As they could not agree, the issue should be decided by the person who could arrange the funeral without unreasonable delay. In this case that was the father. The principle that cremation is equal to burial may be broadly correct, but it does not fully take into account cultural practices.

The decision of the court ultimately prejudiced one of the parties, noting that the major objection of the mother was to cremation due to her cultural beliefs.

"Ultimately, the deceased had expressed no view, but his perceived views are, in the circumstances, probably less important than the views of those around him and who will and do mourn his loss. The circumstances are tragic. The Court is not King Solomon. Whatever happens, one or other party will be disadvantaged. "[45]

The court decided that there ought to be a cremation in Australia, with the appropriate Maori funeral ceremony, and that the ashes should be divided equally between the parents thereafter, so that they could be buried at the relevant ancestral or other location, as each parent wished.

Once again, the decision followed the black letter law (the father providing the quickest option for funeral arrangements). The court also took account of cultural law and accepted that burial was the preferred method in Maori culture. It noted, however, that cremation was acceptable and in the circumstances of the case decided that this was the appropriate option.

Preamble of the Universal Declaration of Human Rights (1948):

'Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.'

LEGAL RESPONSES TO PROTECTING HUMAN RIGHTS IN AUSTRALIA

1 The Universal Declaration of Human Rights (1948) - UDHR

SOFT LAW

Laws which are not legally binding but promote protection of human rights. Sometimes called customary law.

The UDHR was written in 1948 as a response to the horrors of the Second World War.

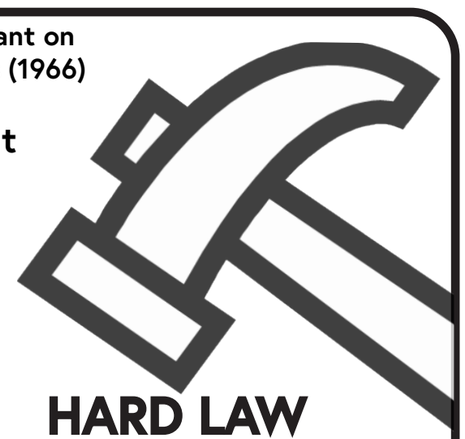
Australia's Government signed the UDHR in 1948 to promote the importance of human rights.

While it is a soft law, it is widely recognised as a conerstone of human rights law.

2 The International Covenant on Civil and Political Rights (1966)

Australia's Government signed it in 1972 and ratified it in 1980.

The ICCPR is a legally binding agreement between sovereign states that aims to enforce civil and political rights.
Example:
Article 14 establishes the right to a fair trial.



HARD LAW

Laws which are legally binding on sovereign states and aim to enforce protection of rights

3 Human Rights in Australian Statute Law

KEY LEGISLATION

Sex Discrimination Act 1974 (Cth)

Racial Discrimination Act 1975 (Cth

Disability Discrimination Act 1992(Cth)

Age Discrimination Act 2004 (Cth)

In Australia fundamental human rights are also upheld by the Common Law (judge made law)

4 Legal Process for Enforcement of Human Rights
Human Right Commission Act 1986 (Cth)

Australian Human Rights Commission
everyone, everywhere, everyday

Role
- education and public awareness
- investigate cases of human rights discrimination
- human rights compliance
- advises government on legislation and policy

If the AHRC cannot resolve a complaint made under key legislation then a person can pursue their complaint in the Courts

Federal Court of Australia

Human Rights and the Migration Act

Case Study 1: AYX18 v Minister of Home Affairs[2018] FCA 283

A recent decision by Justice Perram in the Federal Court demonstrates how independent decision making by judges protects human rights and enforces international human rights agreements. This migration case involves immigration detention in Nauru and concerns fundamental human rights, under the rule of law, such as the right to life and the right to health. It is an urgent interlocutory application .This application, by a mother on behalf of her son, requesting the Federal court to order the Home Affairs Minister bring the child from Nauru to Australia for urgent specialist medical treatment.

Facts

In 2013 - the son and his mother arrived from Iran on board a boat somewhere in Australian waters, they were taken to Christmas Island. Both were unauthorised maritime arrivals within the meaning of s 5AA of the Migration Act 1958 (Cth) They were sent to a regional processing centre in Nauru and granted temporary settlement visa to live in Nauru. The Nauruan government found them to be refugees under the Refugee Convention . The father joined them and they lived in a house in the Nauruan community. The father suffered a brain injury after falling during a bicycle accident and was removed to Australia for medical treatment, where he remains in Immigration Detention in Brisbane.

In late 2013 and early 2014 - the then 6 year old boy's mental health deteriorated and he threatened to self-harm. The boy developed a painful medical condition in his genitals which was not able to adequately treated by the hospital in Nauru. At the time of the hearing on the 6th of March 2018 this condition remained untreated.

In July 2017 a Doctor recommended that the boy be transferred to Australia for surgery. This recommendation was rejected by the Minister for Home Affairs. He considered that there was adequate medical treatment available on Nauru. By January 2018 the boy's mental health further deteriorated and he attempted to commit suicide three times.

In February 2018 he was assessed by two psychiatrists and they both recommended immediate removal to Australia for medical treatment to preserve his life and treat his physical and mental health, as the facilities available on Nauru were not suitable for a child with his complex needs. The Minister disagreed.

His Honour Justice Perram stated:

"The Minister resisted these propositions but the evidence was very clear." [23]

Consideration

To determine whether to grant this urgent interlocutory application the judge had to decide whether the 'injury' that would occur if the application by the boy's mother was refused was greater than the damage that the Minister for Home Affairs would suffer if it was granted.

In this case, the potential 'injury' for the boy involved the possible loss of life and lack of access to appropriate medical care. The potential damage to the Minister was the monetary cost of removing the boy to Australia and the cost of his medical treatment along with the political cost of allowing a refugee who has been in an offshore regional processing centre to receive medical care in Australia.

Justice Perram found as follows:

."*..the evidence suggests an arguable case that the boy and his mother are dependent on the Commonwealth either directly or indirectly for their survival and sustenance... it is arguable also that if the Minister wishes to be engaged in the medical treatment of persons such as the boy, it should do so competently*"[26]

I regard the risk of the boy's death as being a most powerful and compelling consideration. [29]

Decision

His Honour granted 'injunctive relief' and made the following statement:

"...I note the next plane out of Nauru is on Wednesday 7 March 2018. To be quite clear, the boy and his mother should be on that plane."[31]

Update

The lawyers for the boy and his mother have informed the media, as of the 22nd of March 2018 that the boy is now receiving medical treatment in Australia.

Case Study 2: Furlong and Minister for Immigration and Border Protection (Migration) [2017] AATA 3014 (21 December 2017)

The right to appeal is fundamental to the rule of law and human rights as it acts as a restraint on the use of government power. Transparency of decision making, both governmental and judicial, maintains Australians confidence in our legal system.

This case is about an application for a review of a decision to grant a visa under section 501(1) of the Migration Act 1958 (the Act) heard before the Administrative Appeals Tribunal (AAT). A decision to refuse a visa was made by a delegate of the Minister (that is an employee of the Office of Home Affairs, authorised by legislation to make such a decision on behalf of the minister) on 3 October 2017.

Facts

Mr Gavin Furlong is a citizen of the Republic of Ireland who first came to Australia in 2010. He lived in Darwin where he worked as a bricklayer. Since coming to live in Australia Mr Furlong has contributed to his local community through engaging in sport and charity work. He has close community ties with family members living in Darwin.

In October 2017 his visa to be a resident in Australia was canceled by the Minister for Home Affairs and he left Australia as it was considered that Mr Furlong had failed the 'character test'. He appealed the Minister's decision in the AAT.

The Minister's reason for the cancellation was that Mr Furlong had failed the character test under the Migration Act 1958 (Cth).

Section 501 of the Migration Act 1958 (Cth) states:

(1) The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.

An applicant can fail the character test if they have been sentenced to jail for more than 12 months.

The tribunal must first consider whether the person passes the character test, due to their past and present criminal and general conduct.

Whilst living in Australia Mr Furlong had been convicted of a number of offences from four separate incidents in 2013 and 2014. Three of them involved alcohol. The offences were:

- Disorderly Conduct
- Driving whilst using a mobile phone and driving whilst unlicensed.
- Assault against a hotel worker and failing to leave a licenced premises.
- Drink driving and driving dangerously including crashing the car and failing to stop or assist after a crash and abusing police.

Senior member Britten Jones of the AAT noted that Mr Furlong had been sentenced to one month in jail and 200 hours of Community Service after the dangerous driving offence. Since that time there has been no new offending.

Mr Furlong admitted that he had a problem with alcohol that affected his behaviour in 2013 and 2014 and that he sought counseling help after he committed those offences. He provided evidence that he was now leading a very different lifestyle and that it did not involve high levels of alcohol consumption. Witnesses gave evidence of his good character and he provided references from community members regarding his connection to his local community and his charity work.

Consideration

The tribunal then considered whether there would be a risk in the future of Mr Furlong engaging in criminal conduct or other behaviour involving harassment or vilification of other persons in our community. He provided evidence that he was married to an Australian and settled in long term employment. His evidence also noted that he had significant ties with his wife's family and was continuing to contribute positively to his community.

Decision

Senior Member Britten Jones found that:

The applicant's past criminal conduct and his past and present general conduct are not sufficient to establish that the applicant at the time of the decision was not then of good character. [45]

The Member also found that the there was no evidence that Mr Furlong would engage in future criminal conduct

Senior Member Britten-Jones stated that the Minister's decision should be set aside and that the visa application should not be refused on character grounds.