SUPREME COURT OF QUEENSLAND

CITATION:	*Renwick v Parole Board Queensland* [2018] QSC 169
PARTIES:	**STEPHEN DALE RENWICK** (Applicant) **v** **PAROLE BOARD QUEENSLAND** (Respondent)
FILE NO:	BS No 7567 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application for a statutory order of review
DELIVERED ON:	2 August 2018
DELIVERED AT:	Brisbane
HEARING DATE:	26 July 2018
JUDGE:	Bowskill J
ORDER:	**1. The application is allowed.** **2. Pursuant to s 30(2)(b) of the *Judicial Review Act* 1991 direct that, for the purposes of the respondent's fresh consideration of the applicant's application for parole, the respondent be constituted by members who did not constitute the parole board when it made its decision dated 16 February 2018.** **3. The respondent pay the applicant's costs of this application.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – BIAS – APPREHENSION OF BIAS – where the applicant is serving a period of imprisonment for the offence of accessory after the fact to manslaughter, and the victim's body has not been located – where the parole board considered and refused his application for parole, because it was not satisfied the applicant had cooperated satisfactorily in the investigation of the offence to identify the victim's location, on the basis of adverse credit findings against the applicant – where the parole board subsequently repealed its decision, on the basis that it failed to take into account certain material it was required to – where the parole board proposes that the fresh consideration of the application be conducted by the parole board constituted by the same members who made the original decision, without any further oral hearing – whether there is a reasonable apprehension of bias, in the form of an appearance of prejudgment

Corrective Services Act 2006 (Qld), ss 198A, 231, 232, 233
Judicial Review Act 1991 (Qld), ss 21, 30

Brackenreg v Comcare Australia (1995) 56 FCR 335
Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337
Laws v Australian Broadcasting Tribunal (1990) 170 CLR 70
Livesey v New South Wales Bar Association (1983) 151 CLR 288
Minister for Immigration and Multicultural Affairs v Jia Legeng (2001) 205 CLR 507

COUNSEL: J Fenton for the Applicant
J M Horton QC and M J Woodford for the Respondent

SOLICITORS: Fisher Dore Lawyers for the Applicant
Crown Law for the Respondent

[1] In June 2016 Mr Renwick was convicted, on his plea of guilty, of the offence of accessory after the fact to manslaughter. He was sentenced to five years' imprisonment, with the date for his eligibility for parole being 20 January 2018. Mr Renwick and another person had taken the body of a man, killed by others on or about 16 April 2012, in a car in order to dispose of it. The body has never been recovered.[1]

[2] He applied for parole in July 2017. By the time he became eligible for parole, the *Corrective Services (No Body, No Parole) Amendment Act* 2017, by which s 193A was inserted into the *Corrective Services Act* 2006 (Qld), had come into force.[2]

[3] It is uncontroversial that s 193A applies to Mr Renwick's application for parole, as he is serving a period of imprisonment for a "homicide offence"[3] and the body or remains of the victim of the offence have not been located (s 193A(1)). Under s 193A(2) the "parole board must refuse to grant the application under section 193 unless the board is satisfied the prisoner has cooperated satisfactorily in the investigation of the offence to identify the victim's location".

[4] Two days prior to his sentence, Mr Renwick travelled with police to an area west of Mackay to try to locate the deceased's remains. Nothing was found.[4] Subsequently, Mr Renwick participated in an interview with police in September 2017, in which he identified on a map where the body was disposed of, but said that the body had been cremated when it was disposed of.[5] Two searches of the site identified by him have occurred, and the body has never been found.

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1 See *R v Lincoln; R v Kister; R v Renwick* [2017] QCA 37 at [30]-[41] for a summary of the factual circumstances of Mr Renwick's offending (his application for leave to appeal against his sentence was refused).
2 The Act commenced on 25 August 2017.
3 Defined in s 193A(8) to include the offence of becoming an accessory after the fact to an offence against ss 303 and 310 of the *Criminal Code*, namely manslaughter.
4 *R v Lincoln; R v Kister; R v Renwick* [2017] QCA 37 at [41].
5 See the Board's decision dated 16 February 2018, exhibit ND3 to Mr Dore's affidavit, at [39].

[5] A hearing of the "threshold issue" in relation to his application, namely "whether the Board is satisfied that the applicant has cooperated satisfactorily in the investigation of the offence to identify the victim's location", took place on 12 January 2018.[6] For the reasons given on 16 February 2018 the Board, constituted by seven members including the president and two vice-presidents, refused the application for parole, on the basis the Board was not satisfied the applicant had cooperated satisfactorily in the investigation of the offence to identify the victim's location.

[6] On 16 March 2018 the applicant filed an application for a statutory order of review of that decision of the Board, on a broad range of grounds.[7] That application has never been determined, and indeed became redundant when on 23 May 2018 the Board repealed its decision to refuse the applicant parole.

[7] That step was taken pursuant to s 24AA of the *Acts Interpretation Act* 1954 (Qld), which relevantly provides that if an Act authorises or requires the making of a decision, the power includes power to repeal the decision. The decision to repeal its decision under this provision was made on the basis that the Board had failed to take into account certain material that it was required to consider under s 193A(7)(a), namely the transcript from the committal hearing, the transmission sheet for committal, the transcript of the sentencing hearing, the transcript of proceedings before the Court of Appeal and material in relation to a bail hearing.[8]

[8] In its letter of 23 May 2018, by which the repeal of the original decision was communicated, the Board invited the applicant "to provide any further written submissions once the further material has been provided to you".

[9] As a consequence of the decision being repealed, there was no utility to the applicant's judicial review application and it was discontinued. It is clear, both from the application for judicial review of the decision and correspondence from the applicant's solicitor to the Board dated 13 June 2018,[9] that there were a number of substantive arguments that would have been made, had the application proceeded. I make no comment on the merit or otherwise of those arguments.

[10] In that letter of 13 June 2018 the applicant also formally requested that, in making a fresh decision on his application for parole, the Board be differently constituted, on the basis of a reasonable apprehension of bias, in the form of prejudgment by the Board as originally constituted, given the conclusion it had previously reached on his application, which was based in large part on adverse credit findings about him. The applicant also requested that the matter proceed in the same way that it initially did, with an oral hearing followed by deliberation by the Board.

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6 See the Board's decision at [26].
7 Exhibit ND4 to Mr Dore's affidavit (pp 25-27).
8 Exhibit ND6 to Mr Dore's affidavit (pp 33-34).
9 Exhibit ND7 to Mr Dore's affidavit (pp 39-44).

[11] The Board responded to the applicant's letter of 13 June, by letter from its solicitor dated 3 July 2018.[10] In that letter, the Board said that, when considering the matter afresh, the Board would be constituted in the same, or substantially the same way as it was when it originally considered the applicant's application and further said:

> "… my client is confident that the totality of the material can be given fresh consideration in light of the additional material which has recently been obtained and placed before the Board. The Board rejects any assertion, implied or otherwise, that its members who decided your client's application for parole have somehow prejudged the outcome of it. To the contrary, the Board's own revocation of the decision shows a desire to conduct this matter regularly and fairly, and with due regard to your client's interests.
>
> My client will now proceed in accordance with the matters set out above. It does not propose to have further oral hearings, having had the advantage of one previously, and now having invited, and received, further written submissions from you."

[12] The applicant now applies, under s 21 of the *Judicial Review Act* 1991 (Qld), for judicial review of conduct the Board proposes to engage in for the purpose of making a decision on his application for parole, namely constituting the Board in the same way as it previously was. The applicant seeks an order directing that, for the purpose of making that decision, the Board be constituted by members who did not constitute the Board when it made the earlier decision refusing the application for parole. The availability of relief of this kind on this basis, as a matter of law, is not controversial; although the grant of it in the circumstances of this case is opposed by the Board.

[13] The applicant contends that, in circumstances where the Board, as previously constituted, has already made a decision unfavourable to his application, on the basis, inter alia, of credit findings against him, a fair-minded lay observer might reasonably apprehend that the Board, constituted in the same way, might not bring an impartial mind to the resolution of the applicant's application,[11] by reason of an appearance of prejudgment of the very issue it would have to determine, on a fresh consideration of his application.

[14] The applicant invokes the principle of procedural fairness, which applies to judicial as well as administrative decision-making, that the decision-maker be independent and impartial; a principle which is so important that even the appearance of departure from it is prohibited.[12] Although there may be some practical differences to be accommodated in the application of the principle to an administrative decision-maker,

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[10] Exhibit ND8 to Mr Dore's affidavit (p 45).
[11] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6]-[7].
[12] *Ebner* at [7].

such as the Board, as compared with a court,[13] these do not obscure the fundamental principle.[14]

[15] In its decision made on 16 February 2018 the Board made reference to the report from the Commissioner of Police (which it is required to take into account, under s 193A(6) and (7)). At [39] of the decision it is said that the Commissioner's report records, and the Board accepts, that when the applicant spoke to a police officer in August 2012 he "lied to the officer, telling her that he had not been to the Collinsville area in the previous two years and did not know Mr Lincoln." (See also [41]-[43] of the decision).

[16] Commencing at [83] of the decision, the Board sets out its reasons for finding the applicant's cooperation, to identify the victim's location, was not timely and had not been satisfactory. Reference is made to the lies told in August 2012 (based on the Commissioner's report) (at [84]-[86]). In relation to the June 2016 cooperation, the Board expresses the view that this was only to the extent necessary to secure a benefit on sentence (at [89]). At each of [99], [102], [114], [116], [117] and [120] the Board expresses the view that it does not accept that the applicant has been truthful in what he has told authorities about the circumstances and location of the victim's remains, including in September 2017 when he said the remains were cremated.

[17] The applicant submits the Board, in this decision, expressed strong credit findings against him, which findings were the basis of its conclusion on his application. In written submissions on his behalf it is said the Board "has found the applicant is a liar". The Board submits that this overstates the findings made by the Board, drawing a distinction between describing someone as a "liar" and finding that what they have said is not truthful. That seems to me to be a distinction without a difference: as defined in the Oxford English Dictionary (online), for example, a "liar" is an untruthful person. It is apparent on the face of the Board's reasons given on 16 February 2018 that adverse credit findings were made by the Board against the applicant.

[18] In determining this application, it is important to be clear about the decision-making process to be undertaken by the Board, following the repeal of its original decision. To repeal a decision means to revoke or rescind it.[15] The effect is that the original decision no longer exists.[16] The process of making a decision on the application must begin afresh.

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[13] *Ebner* at [4]; see also *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [99] per Gleeson CJ and Gummow J, agreeing with the observations of Hayne J in this regard, at [180]-[192].

[14] *Ebner* at [5].

[15] This is the ordinary meaning of repeal in this context (as informed by the Oxford English Dictionary) and is consistent with the inclusive definition of "repeal" in schedule 1 to the *Acts Interpretation Act* 1954, in relation to an instrument (defined to mean any document).

[16] See, by analogy, *Maxwell v Murphy* (1957) 96 CLR 261 at 266-267 as to meaning at common law of repeal (of a statute).

[19] Although the Board did not argue against that as a matter of principle, in my respectful view, the Board's approach to the determination of Mr Renwick's application for parole, following the repeal of its original decision, as it appears from the material and submissions before the court, suggests that, in practice at least, it proposes continuing where it left off, and considering the matter afresh, but only really in light of the additional material previously overlooked.

[20] For example, the Board contends that one of the main problems with the applicant's argument before this court is that the applicant "does not contend that the additional material that the Board will take into account when it reconsiders [his application for] parole informs a re-assessment of the findings on credit that it made".[17] Further, in arguing against the existence of any reasonable apprehension of bias, by prejudgment, the Board submits that the applicant's argument:

> "fails to establish a logical connection between those circumstances [the making of adverse findings as to the truth or reliability of the applicant's version of events by the Board as originally constituted] and the feared deviation [from impartial decision making] because nothing in the additional material is said to be a basis to reach different findings about the truthfulness or reliability of the Applicant's version."[18]

[21] The latter may well be right; in fact the applicant's solicitor says the documents do not appear to contain any factual material not previously before the Board.[19] But that is not the point. The point is that, having repealed its original decision, the Board is now required to consider afresh the applicant's application. It is not a continuing decision-making process. It is a fresh decision-making process.

[22] As previously constituted, the Board has already reached a conclusion on the very issue it will be required to consider in determining the application *afresh;* a conclusion which depended upon findings as to the (lack of) credibility of the applicant's evidence in relation to that issue.

[23] As the High Court said in *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 300:

> "… a fair-minded observer might entertain a reasonable apprehension of bias by reason of prejudgment if a judge sits to hear a case at first instance after he has, in a previous case, expressed clear views either about a question of fact which constitutes a live and significant issue in the

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17 Respondent's submissions at [3b].
18 Respondent's submissions at [7], see also at [16].
19 Mr Dore's affidavit at [14].

> subsequent case or about the credit of a witness whose evidence is of significance on such a question of fact."[20]

[24] Here, the decision-maker (the Board as originally constituted) has expressed clear views about *the* live and significant issue in the case *and* about the credit of a witness whose evidence is of significance to that issue.

[25] It is reasonable for both the applicant, and the fair-minded lay observer, to apprehend that the Board, as originally constituted, might have a predisposition towards[21] the same conclusion, when it considers the application for parole afresh. As Sheppard J observed in *Brackenreg v Comcare Australia* (1995) 56 FCR 335 at 352 (in the slightly different, but related, context of considering whether a matter ought to be remitted, following successful review, to the same or a different decision-maker):

> "… in the administration of justice, appearances are as important as actualities. It would be very difficult to persuade a reasonable person observing what had happened that justice had necessarily been done if it turned out that the decision remained as it is."

[26] Contrary to the Board's submissions, I do not accept that "what the Applicant seeks on this Application is nothing more than a further opportunity to persuade the Board that he is truthful and reliable". The Board repealed its decision. There is currently no decision on the applicant's application. A fresh decision-making process has to be undertaken, untainted by the appearance of an absence of impartiality.

[27] A further argument put by the Board, against a finding of apprehended bias, is that its actions in repealing its original decision, once it realised that it had failed to take into account particular material, demonstrate "good faith and a strong desire to reach a decision in accordance with law". That may immediately be accepted; but it does not provide an answer to the present application. The conclusion that, in the circumstances of this case, a fair minded lay observer *might* reasonably apprehend that the Board as originally constituted *might* not bring an impartial mind to the question it has to determine under s 198A(2) involves no attack on the integrity of the Board members who made the original decision. The issue is the appearance of prejudgment, not the actuality of it:[22] the question is one of possibility (real and not remote), not probability; it requires no prediction about how the Board will in fact approach the matter.[23]

[28] The principle of necessity does not warrant any different conclusion in this case. There is no practical impediment to the Board being constituted differently in order to consider and make a decision in relation to Mr Renwick's application for parole. The

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[20] See also *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 81 and 87 per Mason CJ and Brennan J, at 91-92 per Deane J and at 100 and 102 per Gaudron and McHugh JJ.

[21] *Minister for Immigration v Jia Legeng* at [183] per Hayne J, as to the meaning of "bias" and "apprehension of bias".

[22] *Livesey* at 299.

[23] *Ebner* at [7].

material before the Court indicates that there are 33 members of the Board,[24] seven of which comprised the Board for the purposes of the original decision. A quorum for a meeting of the Board is three members (s 231 of the *Corrective Services Act*). Section 233(2) provides that a meeting of the Board may be called by the president or, in his absence, a deputy present; but having called a meeting, there does not seem to be any requirement for the president or a deputy president to be present at a meeting of the Board (and thereby constitute the Board for a particular decision) (cf s 232(4)), other than where the Board is considering a prescribed prisoner's application, or the cancellation of a prescribed prisoner's parole (cf s 234(1) and (2)). It is not controversial that Mr Renwick is not a "prescribed prisoner" and that s 234 does not apply to him.

[29] The application is allowed. I will direct pursuant to s 30(2)(b) of the *Judicial Review Act* that, for the purposes of the Board's fresh consideration of Mr Renwick's application for parole, the Board be constituted by members who did not constitute the Board when it made its decision on 16 February 2018.

[30] The parties having indicated they do not wish to be heard further in relation to costs, I will also order that the respondent pay the applicant's costs of this application.

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[24] Exhibit ND9 to Mr Dore's affidavit.