# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Pollentine v Parole Board Queensland* [2018] QSC 247 |
| PARTIES: | **EDWARD POLLENTINE**<br>(applicant)<br>**v**<br>**PAROLE BOARD QUEENSLAND**<br>(respondent) |
| FILE NO/S: | SC No 4164 of 2018 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| DELIVERED ON: | 31 October 2018 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | On the papers |
| JUDGE: | Bond J |
| ORDER: | **Each party must bear their own costs of the proceeding.** |
| CATCHWORDS: | ADMINISTRATIVE LAW – JUDICIAL REVIEW – PROCEDURE AND EVIDENCE – COSTS – where the applicant's application for judicial review was unsuccessful – where the applicant applies for an order pursuant to s 49 of the *Judicial Review Act* 1991 (Qld) that each party bear their own costs of the review proceeding – whether it is appropriate to order that each party bear their own costs<br><br>*Judicial Review Act* 1991 (Qld), s 49<br><br>*Burragubba v Minister for Natural Resources and Mines (No 2)* [2017] QSC 265, cited<br><br>*Pollentine v Parole Board Queensland* [2018] QSC 243, related |
| COUNSEL: | D P O'Gorman SC with S T Lane for the applicant<br>G Beacham QC with B O'Brien for the respondent |
| SOLICITORS: | Prisoner's Legal Services for the applicant<br>Crown Law for the respondent |

[1] In *Pollentine v Parole Board Queensland* [2018] QSC 243, I dismissed an application for judicial review of a Parole Board decision refusing a parole order application which had been made by a person who was detained at Her Majesty's pleasure pursuant to the *Criminal Law Amendment Act* 1945 (Qld).

[2] The Board had written to the applicant expressing a negative preliminary view in respect of his application, and explaining why. One of its expressed concerns was as to the applicant's personal credibility, an issue which affected the reliability of his self-reporting. The Board wrote that letter so as to give the applicant an opportunity to respond to its concerns.

[3] The applicant, by a letter written by his solicitors, availed himself of the opportunity to make detailed written submissions responding to the Board's various concerns, including on the issue of his credibility. At the conclusion of their written submissions on that topic, the applicant's solicitors wrote "Should the Board continue to hold misgivings about [the applicant's] credibility, we respectfully request an oral hearing is conducted with [the applicant]."

[4] The Board proceeded to refuse the application for a parole order and also to deny the request for an oral hearing. The question which rose for determination was whether in the particular circumstances of the case the failure to accord the applicant an oral hearing operated to deny natural justice to him.

[5] In the course of my judgment I identified the general principles which were relevant to the assessment of a contention that procedural fairness has been denied by a failure to afford an oral hearing to a person affected by an administrative decision. There was no particular controversy between the parties as to the content of those principles.

[6] However, so far as counsel could ascertain, the case was the first time in which a Queensland court had ruled on the application of those principles where issues of credibility were important issues in a parole order decision.

[7] The applicant has now advanced an application pursuant to s 49 of the *Judicial Review Act* 1991 (Qld) that I should make an order that each party to the review proceeding bear their own costs of the proceeding. The Board opposes that application and seeks an order that the applicant pay its costs.

[8] I identified the legal principles relevant to such an application in *Burragubba v Minister for Natural Resources and Mines (No 2)* [2017] QSC 265 at [11] to [15]:

> [11] First, the applicants have made an application under s 49(1)(e) of the Act. It is true that the application was not contained in the originating application and was only made after the applicants failed before me. However, despite some contrary indications, s 49(1)(e) is to be taken to authorize an order about costs incurred before the making of a "costs application" under s 49(1): see *Foster v Shaddock* [2016] QCA 163.
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> [12] Second, if an application for costs falls within the scope of s 49, it is the provisions of that section which will govern the Court's discretion as to costs: *Anghel v Minister for Transport (No 2)* [1995] 2 Qd R 454.
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> [13] Third, in considering an application under s 49(1), I must have regard to the considerations made relevant by s 49(2). In this regard, the relevant considerations are:
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> (a) the financial resources of the applicants: s 49(2)(a);
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> (b) whether the proceeding involves an issue that affects or may affect the public interest in addition to any personal right or interest of the applicants: s 49(2)(b); and
>
> (c) whether the proceeding discloses a reasonable basis for the review application: s 49(2)(c).
>
> [14] Fourth, although the s 49(2) considerations are mandatory, they are not to be regarded as exhaustive: *Sharples v Council of the Queensland Law Society* [2000] QSC 392 per Mullins J at [25]-[26]; *Alliance to Save Hinchinbrook Inc v Cook* [2005] QSC 355 per Jones J at [4]. The most obvious relevant consideration – which is not mentioned in s 49(2) – is the manner of disposition of the review application.

> [15] Fifth, s 49(4) of the Act provides that subject to s 49, the ordinary rules regarding costs under the *Uniform Civil Procedure Rules* apply. The relevant rule is r 681, which provides that the costs are in the discretion of the Court but follow the event unless the Court orders otherwise.

[9] The fact that the application failed is a pointer in favour of the costs order sought by the Board. The Board also pointed to the fact that it had made an early offer to allow the application to be dismissed with no costs order in its favour, but I do not find that to be a persuasive consideration.

[10] On the other hand, in considering the exercise of the costs discretion in the present circumstances, I am specifically obliged to have regard to:

(a) the financial resources of the applicant;

(b) whether there are issues that affect or may affect the public interest in addition to the personal rights or interests of the applicant; and

(c) whether there was a reasonable basis for the review application,

and, for reasons which follow, each of those considerations points in favour of the costs order sought by the applicant.

[11] I will consider those issues in reverse order.

[12] First, I do not think there is any basis upon which it could be contended that the application failed to disclose a reasonable basis for the review application. That much is obvious on the face of my previous reasons.

[13] Second, the issues which I dealt with might affect the public interest in addition to the applicant's personal rights and interests. In the first place that is so because of the discussion of the operation of the principles of natural justice in a parole order context where credibility was a real issue. But second that is so because I expressed a view in relation to the operation of the statutory regime which differed from a previous decision of Jackson J, because of amendments to the statutory regime that took place in 2017, after his Honour's decision.

[14] Finally, the evidence reveals that the financial resources of the applicant are scant. Any costs order in favour of the Board would inevitably exhaust them. As it was on the subject occasion, the ability of the applicant to pay for appropriate accommodation is likely to be a relevant consideration in any future parole order application. Thus, making the costs order sought by the Board would adversely affect any future parole order applications by the applicant, a detainee with no fulltime release date. I think that would be an unjust outcome for an applicant in his position who had a reasonably arguable case for judicial review.

[15] In the circumstances, I think the appropriate order in the exercise of the discretion concerning costs is to order that each party bear their own costs of the proceeding.