

SUPREME COURT OF QUEENSLAND

CITATION: *Onea v Chief Executive, Department of Corrective Services*
[2002] QSC 420

PARTIES: **CONSTANTIN FRANCISC ONEA**
(applicant)
v
**THE CHIEF EXECUTIVE, DEPARTMENT OF
CORRECTIVE SERVICES**
(first respondent)
**GAVIN A WRIGHT, EXECUTIVE DIRECTOR,
OPERATIONAL SUPPORT SERVICES**
(second respondent)

FILE NO: S9873 of 2002

DIVISION: Trial Division

PROCEEDING: Application for a statutory order of review

DELIVERED ON: 13 December 2002

DELIVERED AT: Brisbane

HEARING DATE: 6 December 2002

JUDGE: Mullins J

ORDER: **1. The decision made by the second respondent on behalf of the first respondent on 2 October 2002 pursuant to s 53(6) of the *Corrective Services Act 2000* to confirm a transfer of the applicant from Blackall to the Arthur Gorrie Correctional Centre be set aside.**
2. The first respondent and/or the second respondent forthwith give to the applicant additional information about the allegation in the intelligence information dated 19 September 2002 addressed to the Director Community Custody which will enable the applicant to make a response that is responsive to that allegation.
3. The matter be referred to the first and/or second respondents for further consideration in the light of these reasons.

CATCHWORDS: ADMINISTRATIVE LAW – PRISONS – transfer order confirmed pursuant to s 53(6) *Corrective Services Act 2000* (Q) – application for statutory order of review in respect of order – construction of ss 53 (1) and (6) – whether the decision made under s 53(6) was authorised given effect of transfer on participation of applicant in the WORC program – nothing in Act to require s 53(1) to be read down

ADMINISTRATIVE LAW – PRISONS – whether respondent’s failure to disclose detail of intelligence

information other than saying that it disclosed applicant had an intention to abscond denied applicant procedural fairness – sufficient notice of allegation in intelligence information must be given to a person likely to be affected by decision to allow for a meaningful response – substance of allegation not put to applicant – procedural fairness requires additional disclosure of information to allow applicant to give a meaningful response

Corrective Services Act 2000
Judicial Review Act 1991

Kidd v Chief Executive, Department of Corrective Services
[2000] QSC 405
Minister for Immigration and Ethnic Affairs v Kurtovic
(1990) 21 FCR 193

COUNSEL: JG Crowley QC for the applicant
JA Logan SC for the respondents

SOLICITORS: Delaney & Delaney for the applicant
CW Lohe, Crown Solicitor for the respondents

- [1] **MULLINS J:** This is an application for a statutory order of review in respect of the decision made by the second respondent on behalf of the first respondent on 2 October 2002 pursuant to s 53(6) of the *Corrective Services Act 2000* (“the Act”) to confirm a transfer of the applicant from Blackall where the applicant was participating in a WORC program to the Arthur Gorrie Correctional Centre.

Background

- [2] On 17 February 1994 the applicant was convicted of 2 counts of drug trafficking and 5 counts of drug possession and sentenced to imprisonment for 20 years. A declaration was made in respect of the 523 days that the applicant had spent in prison prior to sentence. There was no recommendation for parole. At the date of the hearing of this application, the applicant had been in prison for 10 years and 3 months (less 1 day).
- [3] In May 2001 the applicant was classified as a minimum escape risk and given an open classification. On 7 August 2001 the applicant was transferred to Westbrook Correctional Centre. In September 2001 the applicant sought a transfer to the WORC program. When his request for transfer was refused, the applicant applied for a statutory order of review. On 30 January 2002 an order was made by consent that the decision refusing the applicant’s application for transfer to the WORC program be set aside and remitted for reconsideration according to law.
- [4] On 25 March 2002 the request for transfer to the WORC program was reconsidered and again refused. An order was made in this Court on 31 May 2002 remitting the decision for reconsideration. One of the bases on which that order was made was that the summary of the intelligence information on which the decision maker had relied to make the decision was so deficient, that there was a denial of natural justice. The intelligence information which the decision maker had taken into account was that between 1997 and August 2000 the applicant was identified by

informants on two occasions as a person who was using other prisoners to introduce drugs into correctional facilities, that people who visited the applicant in prison and other associates of the applicant were targeted and returned positive drug dog reactions (although no drugs were found on these occasions) and that the applicant had many associates who had been involved in the drug trade. The applicant had denied the allegations about his using other prisoners to introduce drugs into correctional facilities and that, although before the applicant's imprisonment he had associates who were involved in the drug trade, it was not an accurate description of his then current circumstances. The applicant's solicitors queried how it was possible for him to respond to the assertion regarding the drug dog reactions, when the associates were not identified and, in any case, the applicant contended that he had not had any visits other than by family members.

- [5] On 25 June 2002 the applicant was transferred to the WORC program. Since his transfer to the WORC program the applicant had been to the WORC camp at Blackall on five occasions. He had leave of absence at the home of his niece for 5 days in late August 2002. The applicant was looking forward to a further leave of absence at the home of his niece commencing on 20 September 2002.
- [6] When the applicant returned to the WORC program headquarters at Wacol about 3pm on 20 September 2002, the applicant was informed that the first respondent was in possession of information that the applicant was intending to abscond and he was therefore to be returned to secure custody. The applicant was taken to the Arthur Gorrie Correctional Centre. By letter dated 23 September 2002 the applicant's solicitors conveyed to the first respondent that the applicant wished to be returned to the WORC program immediately.
- [7] Prior to being transferred to the Arthur Gorrie Correctional Centre, the applicant had applied for a post prison community based release order. That application was considered at the Queensland Community Corrections Board's meeting on 13 September 2002. By letter dated 26 September 2002 the applicant was advised by the secretary of the Board that the Board considered that the applicant may not be an acceptable risk to the community on any form of community based release order. The letter stated:
- “However, the Board's primary obligation is the protection of the community. The Board noted that you have only been on the WORC program since 27 June 2002 and have yet to commence a program of resettlement leaves of absence. You have been in custody now for over 10 years. In the Board's experience you can be expected to have experienced a degree of institutionalisation over this time and this may compromise your ability to successfully reintegrate into the community if you were released directly to post-prison community based release at this time. The Board therefore considers that an essential pre-requisite to considering granting you post-prison community based release is successful completion of a significant number of unescorted, resettlement leaves of absence.”
- [8] The second respondent, as the authorised delegate of the first respondent, undertook the review of the decision to transfer the applicant from the WORC program to Arthur Gorrie Correctional Centre. On 2 October 2002 the second respondent determined that the applicant should not be returned to the WORC program, but that as he was classified as open security he should be transferred to the Darling Downs

Correctional Centre. By letter dated 4 October 2002 to the applicant's solicitors, the second respondent provided a statement of reasons in relation to the decision made on 2 October 2002 to confirm the transfer of the applicant from the WORC program to the Arthur Gorrie Correctional Centre.

- [9] There are 7 grounds set out in the applicant's application as justifying the review. These are expanded upon in the further and better particulars of the grounds that were filed on 4 December 2002. For the purpose of the hearing, these grounds gave rise to three issues:
- (a) whether, as a matter of construction of the Act, the decision that was made under s 53(6) of the Act was authorised, as it did not merely transfer the applicant from one facility to another, but deprived him of the privilege of participating in the WORC program which it is alleged he was entitled to enjoy, except for removal for proven misconduct;
 - (b) whether the respondents had denied procedural fairness to the applicant in the manner in which the respondents acted on the intelligence information about the applicant's intention to abscond;
 - (c) whether the decision of the respondents was unreasonable.
- [10] It was not in issue that the decision of the second respondent made under s 53(6) of the Act was a decision to which the *Judicial Review Act* 1991 applies.

Reasons for the decision

- [11] In the statement of reasons dated 4 October 2002 the second respondent identifies the materials that were considered by him. The materials included:
- “7. Intelligence summary addressed to the Director Community Custody.
 - 8. Verbal intelligence information provided on 2 October 2002 by the Intelligence Operations Manager, DCSIG, responsible for preparation of the intelligence summary.”
- [12] One of the facts on which the decision was based was that the summary of intelligence provided to the director of the WORC program on 19 September 2002 “indicated that prisoner Onea was intending to abscond”. The statement of reasons does not expand on the details of that intelligence summary.
- [13] In setting out the reasons for the decision, the second respondent made it clear that he was aware of the steps which the applicant had to take in order to obtain approval to participate in the WORC program. The applicant's solicitors in their letter dated 23 September 2002 to the first respondent stated:
- “Our client affirms that he has no intention of absconding. The suggestion is absurd. He presently has an application before the Parole Board – it would therefore be unthinkable to abscond when he is at the point of obtaining parole.”

The applicant's solicitors had forwarded to the second respondent on 26 September 2002 a draft affidavit of the applicant in which was set out the statement “I had no intention of absconding” which is also set out in the affidavit of the applicant filed in support of this application. It is apparent from para 20 of the applicant's affidavit that he took the allegation against him as an allegation that he intended to abscond from the WORC program or while on leave of absence. The second respondent took into account that the applicant considers that someone in the

system or from the outside has a grudge against him and makes “intelligence reports” to try and hinder his progression through the system. The second respondent was aware that in reviewing the decision to transfer the applicant from the WORC program, he would be affecting the applicant’s further participation in the WORC program. The second respondent dealt with the intelligence information in his statement of reasons as follows:

“When making my decision I referred to the intelligence summary and I initially gave the greatest weight to information, which would indicate the prisoner was an escape risk.

I am not able to disclose the details of the intelligence summary, which indicated the increased escape risk. To do so would cause the source of the information to be placed at risk and would also reveal the methodology used by the department to gather and compile intelligence information.

I also noted that there was other information, in that summary which stated that there were no recent intelligence holdings in relation to Onea held by other agencies, that he is not currently the target of any operations and that information concerning him had not come to light in operations that other agencies were conducting.

After considering all of the information in the intelligence summary and the information provided in the unsworn affidavit of prisoner Onea, I decided further to investigate the reliability of the source and the veracity of the latest intelligence information about the escape risk so as better to be able to determine what weight I should give to that information.

My further investigation of this information involved my telephoning the department’s Intelligence Manager who had been responsible for the preparation of the intelligence summary provided to the Director Community. During that conversation, I received additional information concerning the source of the information about the prisoner’s plans for escape.

Once I had obtained that advice I was satisfied that I could place greater weight on the information about the prisoner. I was satisfied from what I had been told, that the source of the information was sufficiently well placed to provide the intelligence information and this information could reasonably be relied on by me.

This information assumed great importance and relevance to me when considered within the context of the prisoner’s continued participation in the WORC program. I considered the prisoner’s escape risk had indeed been elevated because the prisoner had greater access to the community through eligibility for extended periods of leave with only random supervision. I contrasted the source of the information against the fact that the prisoner had already received one leave of absence from the WORC program and returned to the WORC program without incident. I also took into

account that the intelligence was forthcoming following that period of leave.”

Construction of s 53(6) of the Act

- [14] Section 53(6) of the Act empowers the first respondent to confirm, amend or cancel the decision made under s 53(1) of the Act. Section 53(1) of the Act provides:
“(1) A corrective services officer may make an order that transfers a prisoner from a corrective services facility to-
(a) another corrective services facility; or
(b) a place for-
(i) medical or psychological examination or treatment; or
(ii) the examination or treatment of substance dependent persons.”
- [15] It is submitted on behalf of the applicant that s 53(1) of the Act amounts only to an authority to move a prisoner from one facility to another facility without change of status or entitlements. It is submitted that where a transfer would result in the loss of an entitlement (such as the entitlement to participate in a WORC program), s 53(1) cannot be relied upon to support the decision for a transfer.
- [16] A “corrective services facility” is defined in s 3 to the Act to include “a community corrective services facility” which itself is defined in that schedule to include a “WORC site”.
- [17] Section 53(1) of the Act therefore literally authorises a corrective services officer to make an order that transfers a prisoner from a WORC site to another corrective services facility. There are no provisions within Div 7 of Pt 2 of the Act dealing with transfer and removal of prisoners which limits the exercise of the power conferred by s 53(1) of the Act in the manner contended for by the applicant.
- [18] Section 57 of the Act deals with when a prisoner is not eligible to participate in a WORC program and what matters must be taken into account by the first respondent when deciding whether to allow a prisoner to participate in a WORC program. Once that decision is made favourably for a particular prisoner, the question of whether that prisoner can continue to participate in a WORC program will be affected by a decision made under s 53(1) of the Act. If a decision made under s 53(1) of the Act has the effect of precluding a prisoner from continuing to participate in a WORC program, that decision clearly cannot be made, unless consideration was given to that effect of the decision to transfer on participation in a WORC program.
- [19] There is no indication in the related provisions of the Act for the need for ss 53(1) and (6) to be read down in the manner suggested by the applicant.
- [20] The second respondent in making his decision had regard to the effect of the transfer decision on the applicant’s continued participation in the WORC program.

Procedural fairness

- [21] The respondent filed by leave an affidavit of Mr Peter Severin, the Deputy Director-General of the Department of Corrective Services, sworn on 3 December 2002 to

which Ex PS1 was a copy of the intelligence report that was before the second respondent. The respondents make a claim of public interest immunity privilege in respect of this report. That was not opposed on behalf of the applicant. I perused the report and then ordered that it be placed in a sealed envelope and marked “Not to be disclosed without the leave of the court or a Judge”.

- [22] It is recognised that when a decision maker is relying on privileged or confidential information, it may not be appropriate for full details of that information to be disclosed to the person affected by the decision, but in order to afford procedural fairness, the person likely to be affected by the decision must be given sufficient notice of that information, to enable that person to respond, before the decision is made: *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, 197, 204-205 and 223 and *Kidd v Chief Executive, Department of Corrective Services* [2000] QSC 405 at para [31].
- [23] It was submitted on behalf of the respondents that the applicant had been informed at the time of the decision made to transfer him from the WORC program to Arthur Gorrie Correctional Centre of the reason for it – the receipt of information that he was intending to escape - and that before the second respondent made his decision under s 53(6) of the Act, the applicant personally and by his solicitor made representations denying that he had any intention to escape.
- [24] There was a difficulty for the applicant in dealing with this argument, as the applicant did not have the benefit of details of the intelligence information. It is clear, however, that the applicant and his solicitors interpreted what was conveyed to the applicant on 20 September 2002 as referring to an intention on behalf of the applicant merely to escape from either the WORC program site or from a leave of absence undertaken in conjunction with being on the WORC program.
- [25] In broad terms the intelligence information was to the effect that the applicant was intending to abscond and would also be covered by the expressions used in the statement of reasons “escape risk” and “plans for escape”. The gravamen of the allegation contained in the intelligence information was much more specific than merely an intention to abscond. It is not correct to say, as was submitted on behalf of the respondents, that the substance of the allegation had been put to the applicant. Not surprisingly, the applicant and his solicitors placed a limited interpretation on what was meant by the intelligence information that the applicant was intending to abscond and responded accordingly, denying that the applicant had that intention. Such response necessarily had little impact on and did not address the specific allegation in the intelligence information. The respondent made the decision on 2 October 2002 knowing that submissions had been made on behalf of the applicant in response to the information that the applicant was intending to abscond which did not address the essence of what that intelligence information was actually about. The statements made by the applicant and the submissions made on his behalf were not responsive to and did not meet the specific allegation that was raised by the intelligence information.
- [26] It therefore cannot be concluded that the respondents have satisfied their obligation to give the applicant information which was adequate to enable him to respond, before the decision under s 53(6) of the Act was made. At the very least, procedural fairness to the applicant (when the respondents were acting on intelligence information to which they could claim a public interest in keeping it and the sources

of it confidential) required the respondents to disclose sufficient details of the effect of the intelligence information to enable the applicant to make a meaningful response. This must be a response that is responsive to and addresses the allegation which is made in the intelligence information. If the applicant had been supplied with the information on the means by which it was alleged that he was intending to abscond, the applicant would have been given a real opportunity to provide a response that was more than a mere denial of an intention to abscond. There was easily room for additional disclosure to allow for a meaningful response which would not be injurious to the public interest in the manner that was of concern to Mr Severin and detailed in para 4 of his affidavit.

[27] It is therefore not necessary to consider the ground of reasonableness.

Orders

[28] It follows that the orders which should be made are:

1. The decision made by the second respondent on behalf of the first respondent on 2 October 2002 pursuant to s 53(6) of the *Corrective Services Act 2000* to confirm a transfer of the applicant from Blackall to the Arthur Gorrie correctional centre be set aside.
2. The first respondent and/or the second respondent forthwith give to the applicant additional information about the allegation in the intelligence information dated 19 September 2002 addressed to the Director Community Custody which will enable the applicant to make a response that is responsive to that allegation.
3. The matter be referred to the first and/or second respondents for further consideration in the light of these reasons.

[29] I will hear submissions on the appropriate order in respect of the costs of the application.