SUPREME COURT OF QUEENSLAND

CITATION:	*Sullivan v Department of Corrective Services* [2003] QSC 013
PARTIES:	**KIM ROBERT SULLIVAN** (applicant) v **DEPARTMENT OF CORRECTIVE SERVICES** (respondent)
FILE NO/S:	S10683 of 2000
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	4 February 2003
DELIVERED AT:	Brisbane
HEARING DATE:	10 January 2003
JUDGE:	Mackenzie J
ORDER:	**The application be dismissed with costs to be assessed**
CATCHWORDS:	ADMINISTRATIVE LAW- JUDICIAL REVIEW LEGISLATION- GROUNDS FOR REVIEW OF DECISION- IMPROPER EXERCISE OF POWER- UNREASONABLENESS- RELEVANT AND IRRELEVANT CONSIDERATIONS- ERROR OF LAW- application for a statutory order view of a decision to refuse parole- whether the decision was made by an improper exercise of power- whether irrelevant considerations were taken into account- whether a discretionary power was exercised without regard to the particular facts of the case- whether the power was exercised unreasonably- whether there was an error of law in failing to grant remission *McCasker v Queensland Corrective Services Commission* (1998) 2 Qd R 261 *Wiskar v Queensland Corrective Services Commission* (1998) QSC 79
COUNSEL:	P E Smith for the applicant M O Plunkett for the respondent
SOLICITORS:	Russo & Coburn for the applicant C W Lohe, Crown Solicitor, for the respondent

[1] **MACKENZIE J:** The applicant was sentenced on 6 December 1996 to seven years imprisonment for doing grievous bodily harm, with a recommendation that he be eligible to be considered for release on parole after two years and three months of that period. On 12 September 1997 he was sentenced to two years imprisonment for unlawfully wounding, to be served concurrently. If he did not achieve release on parole, for which he was eligible on 23 September 1998, but had been granted remissions, he would have been due for release on 5 October 2000. His "full time release date" is 22 April 2003.

[2] The applicant was refused remission, the date of the decision being in dispute. The resolution of that dispute is of importance to the applicant's case. The application for a statutory order of review is based on five grounds, they are:

1. Improper exercise of power (particularised as a failure to give weight to the applicant's good conduct and industry);
2. Taking into account an irrelevant factor (that the applicant had a previous criminal history, and that since it had been taken into account on sentence, the applicant was being twice punished for it);
3. Exercising a discretionary power in accordance with a rule or policy without regard to the particular facts of the case;
4. Exercising power so unreasonably that no reasonable person could exercise it in that way.

With regard to these alleged administrative defects the application asserts that a reasonable decision maker giving proper weight to all relevant circumstances would have granted remission. The remaining ground is the following:

> 5. Error of law by failing to grant remission when the applicant had been of good conduct and industry.

[3] There is evidence that the applicant received numerous good reports concerning his conduct from 1997 to 2000 although not uniformly so. In any event for the purposes of this hearing it was conceded that he should be treated as having sufficiently satisfied the criteria of good conduct and industry. The focus of the respondent's case is that notwithstanding good conduct and industry on the part of the applicant there were reasons of the kind discussed in *McCasker v Queensland Corrective Services Commission* (1998) 2 Qd R 261 and *Wiskar v Queensland Corrective Services Commission* [1998] QSC 79 which justified the decision to refuse remission. A memorandum dated 3 October 2000 under the hand of the Senior Adviser, Office of Sentence Management, confirms that this was the approach taken at the time.

[4] Throughout 1999 several assessments canvassed outstanding issues relating to violence and the need for the applicant to do a Violence Intervention Program (VIP) before being released into the community. It was an important part of the applicant's case that while he had been at Woodford Correctional Centre a VIP was being implemented and he was asked if he wished to participate in it. He says that after discussing it with the course co-ordinator it was decided that he did not need to undertake the course. By the time the issue of the need to do the course had become prominent, he had been transferred to a low security classification and to Moreton

Bay Correctional Centre. To do the course would have required him to be reinstated to a higher classification which he felt would affect his chances of release in a timely way.

[5] In mid 1998 he had applied for community based release to coincide with his parole recommendation date. It was after that had occurred that the reports raising the need to do the VIP program began to be generated,. He says that he told the authorities that he had previously been told that he did not need to do the course and that he did not want to go back to a high security prison when he was a low security prisoner. Nevertheless, the recommendations that it was necessary for him to undertake the program remained current as the documents show. He says that he was told verbally, although no one would commit it to writing, that if he did not go to Woodford his remission would be removed.

[6] In consequence of the memorandum of 4 October 2000, a Consultant Senior Psychologist saw the applicant. There is a factual dispute as to the duration of the consultation which need not be resolved for present purposes. The reason why it was terminated was that the applicant displayed a confrontational, angry and abusive attitude towards the prospect of having the interview and towards the staff of the correctional system. The psychologist accepted for the purposes of the report that the files relating to the applicant showed he had no major behavioural problems while working in custodial situations and was reported as being enthusiastic, dependable, easy going and having a good attitude to work.

[7] Nevertheless, on the basis of the applicant's behaviour and comments at interview and a file review, it was concluded that the applicant displayed a high level of anger,

and persecutory ideation which appeared unjustified but had increased in intensity over the preceding 12 months. The opinion was expressed that until he was willing to gain insight into his current and past behaviour and seek assistance in addressing his persecutory ideation and high levels of anger he would continue to pose a risk to the community. Whatever the applicant's belief was about the need to do the VIP, it could not override later developments. This report, which was consistent with a series of earlier recommendations about the current need to address attitudinal issues, had to be given due weight by the decision maker.

[8] Following receipt of the psychologist's report, the Senior Advisor, Sentence Management wrote to the applicant setting out "findings of fact" that he had reviewed. Among them were the sentencing judge's description of the offence, exit reports from programs which had "documented that [he had] verbalised entrenched criminal attitudes", a report that he had made threats of violence against his ex-partner (the victim of the violent offence) and the psychologist's report of 4 October 2000.

[9] The critical passage for the applicant's argument that the decision was already made before he was given the opportunity to respond is the following:

> "In forming the intention not to grant remission, the delegate first had regard to Section 21 of the Corrective Services Regulations 1989. It was determined that your institutional conduct and industry has been of an acceptable standard. However, the Administrative Guideline attached to the Commission's Instrument of Delegation provides a framework for not granting remission in those instances where a prisoner who has met the requirements of section 21 Corrective Services Regulation 1989 but has been assessed as an unacceptable risk to the community should the prisoner be released unsupervised.

> You are invited to comment on the enclosed material referred to in sections (1) to (16) by writing to this office within twenty-one (21) days of receiving this letter.
>
> If you require an extension of time in which to respond, please write to me before the end of the twenty-one day period mentioned above."

[10] I should mention that there was a complaint about the terms of a letter written when the applicant requested an extension of time, the tenor of which was that it was an inevitable consequence that his release, if granted, would be after the date upon which he should have been released on remission. It means no more than that but it was valid for the applicant to observe that, given the time frame, that would occur in any event. However, that is not a matter that affects the outcome of the present application.

[11] The primary argument about the passage quoted above was that the reference to forming an intention not to grant remission demonstrated that the decision had already been made. There are parts of this letter and the letter of 14 November 2000 advising that a decision was made on that date not to grant remission that are virtually identical. However, the second paragraph differs, and the passage quoted above is replaced by reasons for the decision. In my view, the letter of 6 November 2000 expresses only a provisional conclusion, subject to modification in light of submissions made by or on behalf of the applicant. By referring to it as an intention, the decision maker is alerting the applicant to the fact that a provisional conclusion, which should be addressed by the applicant in his submissions, has been reached. To put it as frankly as it was put removes any misapprehension that may be created by a less direct form of expression. The relevant decision was made on 14 October 2000.

[12] The submissions made by Mr Smith on behalf of the applicant were comprehension and thorough, but I am satisfied that none of the grounds have been made out. It is apparent from the evidence that the applicant's good conduct and industry was accepted. The issue of substantial risk of violence if he were released was the competing consideration and the decision maker had sufficient material before him to justify the conclusion that there were grounds to refuse remission. The decision was one which a decision maker could reasonably reach. It was not the fact that the applicant had a criminal history that was critical. It was the unresolved issue related to violence that formed the basis of the decision. That decision was made with regard to the particular facts of the case.

[13] The application is dismissed with costs to be assessed.