SUPREME COURT OF QUEENSLAND

CITATION:	*Murdock v McDermott* [2003] QSC 201 *Murdock v Dwarshius* [2003] QSC 201
PARTIES:	**ARTHUR JAMES MURDOCK** (applicant) **v** **KERRITH MCDERMOTT, GENERAL MANAGER, CAPRICORNIA CORRECTIONAL CENTRE** (respondent) **ARTHUR JAMES MURDOCK** (applicant) **v** **YME DWARSHIUS** (respondent)
FILE NO/S:	11685 of 2002 3150 of 2003
DIVISION:	Trial Division
PROCEEDING:	Applications for judicial review
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	Friday, 11 July 2003
DELIVERED AT:	Brisbane
HEARING DATE:	13 June 2003
JUDGE:	Muir J
ORDER:	**Applications dismissed with costs**
CATCHWORDS:	ADMINISTARTIVE LAW – JUDICIAL REVIEW LEGISLATION – GROUNDS FOR REVIEW OF DECISION – Breach of Rules of Natural Justice – Improper Exercise of Power – where the applicant seeks a review of the decision refusing leave from the Correctional Centre – whether irrelevant considerations taken into account or relevant considerations not taken into account – whether in the circumstances the applicant was denied natural justice *Corrective Services Act* 2000 (Qld), s 58(1)(e), s 188(1) *Judicial Review Act* 1991 (Qld), s 48(1)(a) *Ansett Transport Industries (Operations) Pty Limited v The Commonwealth of Australia* (1977) 139 CLR 54

Barrow v The Chief Executive, Department of Corrective Services [2002] QSC 168, 13 June 2002
Bread Manufacturers of New South Wales v Evans (1981) 38 ALR 93
Corrigan v Chief Executive, Department of Corrective Services [2002] QSC 384, 22 November 2002
Masters v Chief Executive, Department of Corrective Services (2001) 121 A Crim R 173
McEvoy v Lobban [1990] 2 Qd R 235.
Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259
Re Minister for Immigration and Multicultural Affairs; Ex parte Lam (2003) 77 ALJR 699
The Queen v Anderson; Ex parte Ipec-Air Pty Ltd (1965) 113 CLR 177

COUNSEL: Mr D O'Gorman for the applicant
Mr JA Logan SC together with Miss KA Mellifont

SOLICITORS: Queensland Aboriginal and Torres Strait Islanders Corporation for Legal Services Secretariat for the applicant
Crown Law for the respondent

[1] **MUIR J:** In these two applications for judicial review the applicant, an inmate of the Capricornia Correctional Centre, seeks to review a decision of a delegate of the Chief Executive of the Department of Corrective Services refusing him leave of absence from the Correctional Centre on a particular date. The grounds relied on in each case are –

(a) The applicant was denied natural justice in that he was not afforded an opportunity of being heard before the refusal;
(b) The respondent took into account the following irrelevant considerations;
    (i) The views of the Director-General of the Department of Corrective Services;
    (ii) The views of the Minister for Corrective Services;
    (iii) Media reports relating to the applicant's leave of absence; and/or
    (iv) The views of the police in Rockhampton;
(c) The respondent failed to take the following relevant considerations into account –
    (i) The good behaviour of the applicant, particularly since 1999; and/or
    (ii) The good behaviour of the applicant at the time of his resettlement leave of absence on 22 November 2002;
(d) The respondent took the decision at the direction or behest of the Director-General, the Minister and/or the police.

General background information

[2] The applicant, who was born in 1935, was sentenced in 1960 to 10 years' imprisonment for rape and to six years' imprisonment for attempted rape. The terms of imprisonment were cumulative. Shortly after being released from prison in 1977,

he committed another rape for which he was subsequently convicted. In his early years of incarceration he was responsible for violent acts on prison staff and against prison officers. In consequence he was restrained in a cage for many years at Boggo Road and Stewart Prisons. Psychiatric and psychological assessments between 1989 and 1992 included the following observations –

- "He is a crafty, manipulative individual … He has psychopathic personality disorder and as part of this disorder he has poor control of sexual and aggressive impulses."
- "Maturity has made him a master of deception … His rapes are usually confined to white women and he is highly controlled … He poses a great danger to our society."
- "I would concur fully with previous psychiatric assessments which depict this man as an anti-social personality disorder and aggressive sexual psychopath."

[3] The extract last quoted was contained in a psychiatrist's report dated 1 August 1999. Another psychiatrist in a report dated 23 May 1994 expressed the opinion that, from a psychiatric point of view, the applicant appears to have changed for the better and "is psychiatrically normal".

[4] Prior to 15 October 2002, the applicant had undertaken various types of leave of absence, other than resettlement leave of absence, without incident. On 15 October 2002, the Director-General approved a two-stage resettlement leave of absence program. Stage one consisted of familiarising the applicant with contemporary society by walks through the Rockhampton CBD and meetings with local community members. Stage two was an introduction to shopping centres, banks and government agencies.

[5] On 22 November 2002, the applicant, pursuant to leave of absence under the program, walked through designated parts of central Rockhampton. That release subsequently gave rise to considerable media publicity. On 27 November 2002, the Director-General informed the respondent in application 11685/2002, Mr McDermott, the General Manager of the Capricornia Correctional Centre, that in the light of events, she had decided to review personally the applicant's existing resettlement leave of absence program. She further informed Mr McDermott that the Minister had expressed concern to her about a need for further community consultation in respect of resettlement leave for the applicant and that she personally would undertake consultation with "stakeholders such as the regional police commander and the Aboriginal and Torres Strait Islander representatives while visiting Rockhampton".

[6] On 27 November 2002, in the presence of Mr McDermott, the Director-General told the applicant that she had decided to review his resettlement program. On that day, the applicant wrote to the Director-General requesting a leave of absence on 29 November. The request was refused by Mr McDermott as the Director-General's delegate.

[7] In a statement of reasons provided in relation to Mr Murdock's decision on 28 November 2002 under the heading "Reasons for decision", Mr McDermott explains –

> "I was concerned whether the supervision arrangements and conditions in relation to the media that I imposed on the leave of absence order on 22 November 2002 would be practical in the future, taking into account the purpose of the leave was to allow the prisoner to familiarise himself with contemporary society with walks through the CBD of Rockhampton.
> …
> I discussed this challenge with the Director-General in the course of her visit. She informed me of her decision, in light of events, to review the existing program, as well as the concern that had been voiced by the Minister in relation to community consultation. Given the pendency of such review and consultation and the likelihood that leave on 29 November would not be able to be undertaken in conditions of suitable privacy, I decided not to grant that leave."

[8] I now turn to a consideration of the grounds on which review is sought in application 11685 of 2002.

Taking into account the views of the Director-General and/or the Minister

[9] Mr McDermott is a subordinate of the Director-General and a delegate of her powers under s 58(1)(e) of the *Corrective Services Act* 2000 (Qld) in respect of resettlement leave of absence.

[10] The delegation is on condition that a "resettlement leave of absence program must be approved by the Director-General before delegate completes written order".

[11] The purpose of "resettlement leave", which is not an expression defined in the Act, is to provide a prisoner with familiarity with the conditions of contemporary society so as to assist the prisoner's resettlement in society upon release from custody.

[12] As appears from the foregoing narrative, prior to the subject decision, the Director-General, as she was entitled to do, had made the decision to review the applicant's resettlement program. Although the program previously approved continued in existence until reviewed and altered, it was under review at relevant times and subject to a distinct possibility of change. I find it inconceivable that this was not a matter which Mr McDermott was able to take into account in making his determination.

[13] Nor can I accept that he was unable to have regard to the views of the Director-General or even consult with her. Once Mr McDermott knew the program was under review the terms of the delegation made the Director-General's views particularly relevant. But even apart from that consideration, the role of the Director-General under the Act gave relevance to her views on the matters in question.

[14] Section 188(1) of the Act provides –

> "**188 Functions and powers of chief executive**
> (1) Subject to any direction of the Minister, the chief executive is responsible for-
> (a) the security and management of all corrective service facilities; and
> (b) the safe custody and welfare of all prisoners; and

(c) the supervision of offenders in the community."

[15] Under s 189, the Chief Executive is required to make administrative policies and procedures to facilitate the effective and efficient management of corrective services.

[16] Under s 190, the Chief Executive is required to establish services or programs, *inter alia*, "to help prisoners to be integrated into the community after their release from custody".

[17] What Mr McDermott, as the Director-General's delegate, was required to do was to make the decision and not abdicate his responsibility by merely implementing or endorsing another's decision, dictate or view point. The evidence suggests to me that Mr McDermott properly turned his mind to the matter to be decided and made his decision after giving due consideration to relevant matters including the views of the Director-General and the course of action foreshadowed by her.

[18] There is no evidence that in making the subject decision Mr McDermott took into account the views of the Minister. Mr McDermott had been told by the Director-General that the Minister had expressed a concern about the need for further community consultation but that information was overtaken by the Director-General's decision to undertake consultation herself and to review the resettlement leave of absence program.

[19] Even if Mr McDermott had taken the Minister's views into account, it does not appear to me that he would have been in breach of his statutory obligations. The Minister, after all, has ultimate political responsibility for the affairs of the Department. The Director-General's responsibilities are expressed to be "subject to any direction of the Minister".[1]

[20] It would be impractical, if not futile, of the Director-General to exercise a discretion vested in her in a way, which to her understanding, would be highly likely to provoke a Ministerial direction reversing it.[2] It is unnecessary for present purposes to decide whether in such a case the Director-General would be in breach of duty should she merely implement the Minister's wishes. It is sufficient for present purposes to observe that the existence of such a power on the part of the Minister makes it apparent that the Director-General may have regard to the Minister's views in exercising powers vested in her under the Act.

[21] But even if the power to direct did not exist there would be scant basis for concluding that, in exercising her powers, the Director-General is obliged to ignore the views of the Minister. The relevant powers of the Director-General do not stand to be exercised according to any defined criteria or considerations. Her duty is to consider and decide applications such as the subject application honestly and upon broad considerations relating to the purposes of the Act.[3]

[22] In relation to the exercise of such powers the Director-General may consult as broadly or as narrowly as she considers appropriate. She may and, one would think,

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1 s 188(1) of the *Corrective Services Act* 2000 (Qld).

2 Cf the observations of Gibbs CJ in *Bread Manufacturers of New South Wales v Evans* (1981) 38 ALR 93 at 104-105.

3 Cf the observations of Taylor and Owen JJ in *The Queen v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 199.

ought have regard to any relevant Government policy.[4] There is nothing in the Act which provides implicitly or explicitly that the Minister, alone of all people, may not be consulted by the Director-General. Indeed the normal exigencies of the management of a department such as Corrective Services would tend to make consultation between the Minister and the departmental head both frequent and desirable.

[23] What the Act requires of the Director-General is that her decision be reached by the exercise by her of her own judgment and not result from the mere adoption or implementation of a Ministerial wish or dictate. Similar considerations apply to the exercise of the Director-General's powers by her lawful delegate. The evidence does not support the conclusion that the decision-maker abdicated his decision-making responsibility in any such manner.

The media reports allegations

[24] It is not the case that Mr McDermott took into account media reports in making his decision. His concern was not with the views of representatives of the media or, for that matter, with the contents of any media reports as such, but with the impact on the efficacy of the resettlement program of intrusive media attention. Plainly, that is a matter to which Mr McDermott, properly, could have regard.

The Queensland Police Service allegations

[25] The evidence does not establish that there was any abdication by Mr McDermott of his decision-making powers to any police officer. He was informed by the police in a letter dated 21 November 2002 that they "held grave concerns for the safety of members of the public and that the leave of absence had the potential to generate intense media attention". Although the Director-General and her delegate, and not the Queensland Police Service or any of its members, have the duty to make relevant determinations, the communication and its content did not thereby become irrelevant. Having regard to the role of the police in the maintenance of order and the protection of citizens, it was appropriate that there be communication between the Director-General and/or her representatives and members of the Police Service as to any arrangements the Director-General or her representatives might put in place concerning the applicant. There is thus no substance in this allegation.

Failure to take relevant considerations into account

[26] It is contended that the respondent failed to take into account the good behaviour of the applicant, particularly since 1999, and his good behaviour at the time of his resettlement leave of absence on 22 November 2002.

[27] The basis for concluding that such matters were ignored by the decision-maker is that they are not listed under the heading "Reasons for Decision" in the decision-maker's formal statement of reasons. The statement is a six page document consisting of an introduction, a section headed "The decision was based on the following findings of fact" and a concluding section entitled "Reasons for Decision".

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[4] Cf. *Ansett Transport Industries (Operations) Pty Limited v The Commonwealth of Australia* (1977) 139 CLR 54 at 83 per Mason J.

[28] The commencing paragraph, under the heading "Reasons for Decision", is –

> "In my position as the general manager of Capricornia Correctional Centre I had submitted a leave of absence assessment for prisoner Murdock which resulted in the approval of a resettlement leave program by the Director-General. I am familiar with the sentence management of prisoner Murdock."

[29] It appears from this passage and from that part of the statement under the heading "The decision was based on the following findings of fact" that the decision-maker was well aware of the applicant's history of recent good behaviour as well as the conduct of the leave of absence on 22 November 2002. He expressly stated that the latter "occurred satisfactorily" and the applicant's recent history is noted in findings of fact upon which the decision was based. Although the reasons do not expressly state that they include reference to such matters, it is obvious enough from the statement and even from observations made under the heading "Reasons for Decision", where the decision-maker states his familiarity with the applicant's "sentence management", that he made his decision "drawing upon that familiarity". The applicant's submission would have validity only if the statement of reasons were to be construed in an impermissibly pedantic way[5]. Accordingly, this point fails also.

Denial of Natural Justice

[30] The applicant's argument assumes that in connection with the decision there existed a duty to afford natural justice and a denial of it by not affording the applicant an opportunity to be heard.

[31] The respondent argues that there was no entitlement to natural justice in relation to the decision and, alternatively, if there was, it did not have as a component a right on the part of the applicant to be heard. The argument was developed this way. The subject decision is a "prison management decision" in which classes of decision, as a general rule, the courts are reluctant to intervene. The subject decision may be contrasted with a decision such as one to establish or terminate an early settlement leave program. In such a case, it was conceded, a duty to observe the rules of natural justice by affording a hearing would exist. It was also conceded that although leave of absence is a privilege, not a right,[6] a right to be heard may exist where leave was denied or revoked for reasons personal to a prisoner upon which a prisoner may be able to make pertinent comment or submissions. In this case however, it was stressed that the matters leading to the decision were extraneous to the applicant and peculiarly within the decision-maker's role and expertise. It was further contended that the approval of the leave of absence program did not give rise to a legitimate expectation that leave would be granted on a particular day or that there would be prior consultation with the applicant prior to refusing, for reasons unrelated to the applicant's behaviour, leave on a particular day.

[32] It is not necessary for me to finally decide the point because, in the exercise of my discretion under s 48(1)(a) of the *Judicial Review Act* 1991 (Qld), I would, in any event, decline to grant the application. It concerns an application for leave on a specified day in particular circumstances. The day in question has long since passed.

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5 C.f. *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271-2.

6 *Masters v Chief Executive, Department of Corrective Services* (2001) 121 A Crim R 173 at 175.

Any fresh consideration or reconsideration of leave, necessarily, must be in the light of a revised early settlement leave program, or, if it remains the same, further factual matters which have arisen since the earlier determination. Thus a review of the subject decision would lack utility. It is not as if the evidence reveals that the respondent has engaged or is proposing to engage in conduct which would deny the applicant the benefit of an appropriate early settlement leave program or the right to be heard in respect of any such program.

[33] In my view, there is substance in the respondent's contention that the applicant had no right to be heard in relation to the decision. In many cases the day by day working out of an established early settlement leave program will involve "prison management decisions" which call for prompt decisions by an informed person drawing on his or her expertise. Courts are "traditionally, and for good reason, reluctant to interfere with such decisions".[7] Although the fact that a decision meets such a description does not necessarily mean that it is not reviewable.[8]

[34] In normal circumstances a prisoner will not have a "legitimate expectation" of a grant of leave on a day or time of the prisoner's choosing. There was certainly no evidence of the existence of a practice on the part of the department which might provide a source of a legitimate expectation of a right to be heard.

[35] Also, as the subject process was procedural in nature and merely an adjunct to a program which conferred substantive rights, a requirement of procedural fairness would not readily be found. As Gleeson CJ pointed out in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* –[9]

> "Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice."

No practical injustice was involved in the failure of the decision maker to afford the applicant an opportunity to be heard.

Application 3150 of 2003

[36] Application 3150 of 2003 concerns a decision on 17 January 2003 by the Acting General Manager of the Capricornia Correctional Centre refusing leave of absence to the applicant on that day. The reasons for refusal were substantially the same as those of Mr McDermott.

[37] The matter was argued before me on the basis that the result in application 11685 of 2002 would determine the result in application 3150.

[38] I accept that the reasons given in relation to application 11685 apply generally to 3150 of 2003. Accordingly, that application should also be dismissed.

Conclusion

[39] For the above reasons, each application is dismissed with costs.

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7 *Corrigan v Chief Executive, Department of Corrective Services* [2002] QSC 384, 22 November 2002 following M*cEvoy v Lobban* [1990] 2 Qd R 235.

8 Cf *Barrow v The Chief Executive, Department of Corrective Services* [2002] QSC 168, 13 June 2002.

9 (2003) 77 ALJR 699 at 706.