SUPREME COURT OF QUEENSLAND

CITATION:	*Gerrits v Department of Corrective Services* [2003] QSC 281
PARTIES:	**ALBERT HENDRYKUS GERRITS** (applicant) v **CHIEF EXECUTIVE, DEPARTMENT OF CORRECTIVE SERVICES** (respondent)
FILE NO/S:	SC No 3212 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	5 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	22 August 2003
JUDGE:	McMurdo J
ORDER:	**Application filed 9 April 2003 is dismissed**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW - where applicant seeks judicial review of respondents decision to refuse him grant of remission – where application made more than one year out of time – whether applicant should be allowed extension of time to bring application – whether proposed application has merit *Corrective Services Act* 2000 (Qld), s 75. s 75(1), s 75(2), s 77. s 78 *Judicial Review Act* 1991, s 23(a) to (i), s 26(1)(b), s 26(2) *Fogarty v Department of Corrective Services* [2002] QSC 207, considered *Felton v Queensland Corrective Services Commission* [1994] 2 Qd R 490, cited *Yeo v Queensland Corrective Services Commission* (unreported 7534 of 1997, 13.02.98), cited *Wiskar v Queensland Corrective Services Commission* [1998] QSC 279, cited
COUNSEL:	C Wiltshire for the applicant M Burns for the respondent
SOLICITORS:	Lake Lawyers for the applicant Crown Solicitor for the respondent

[1] **McMURDO J:** On 19 July 1991, the applicant was convicted of offences of breaking and entering a dwelling house at night with intent to commit a crime and unlawful carnal knowledge against the order of nature. He was sentenced to 16 years imprisonment on the first matter and 14 years on the second. In 2001 he applied for remission of the sentences under s 75 of the *Corrective Services Act* 2000 ("the Act"). On 30 November 2001 he received a letter from the chief executive's delegate stating that the delegate was considering refusing to grant any remission. The delegate refused remission by a written decision dated 31 January 2002.

[2] The applicant seeks orders under the *Judicial Review Act* 1991 for the reconsideration of that decision. Because his application was not filed until 9 April February 2003, he requires an extension of time to bring this application. No statement of reasons was requested. Accordingly, this application should have been made not later than 28 days from when he was given written notice of the decision. He requires an extension of time of more than one year.

[3] The applicant's evidence in support of the extension of time is contained in these two paragraphs from his affidavit:

> "9. Although I wanted to immediately challenge the Respondent's decision referred to in Paragraphs 7 and 8 above. I was, until June 2002, unaware of the time limits applicable to Applications for Statutory Orders of Review under the Judicial Review Act 1991.
>
> 10. I was also, until June 2002, impecunious and unable to instruct solicitors and/or brief Counsel in this matter through lack of funds I verily believe that the Respondent has not been prejudiced by my delay in making the Application filed herewith and crave the indulgence of the Court to allow further time, until the date of filing the Application, to apply to the Court for a statutory order of review in relation to the Respondent's Remission Decision."

[4] I accept his evidence that, until June 2002, he was unaware of the time limit and could not afford legal assistance. However, his affidavit does not explain why some eight months then passed before this application was filed. Section 26(1)(b) permits the court to extend time but it does not express the considerations relevant to the exercise of that power. These considerations are established by a number of decisions including *Kuku Djungan Aboriginal Corporation v Christensen* [1993] 2 Qd R 663; *Jobson v Queensland Corrective Services Commission* (unreported application No 434 of 1994, 1 August 1994) and *Hoffman v The Queensland Local Government Superannuation Board* [1994] 1 Qd R 369. They include whether the delay is satisfactorily explained but also whether any prejudice to the respondent would result, where the public interest lies and the apparent merits or otherwise of the challenge to the decision. In *Hoffman*, Thomas J at 372 observed that there was some difference of view as to whether the provision of an adequate explanation for the delay is a pre-condition to an extension of time, and said: "Perhaps it is not, but the absence of an explanation for a delay must at least be a persuasive factor against granting an extension". In my view, the absence of a satisfactory explanation for the delay is not fatal to an extension of time in every case: such a precondition

would require an express qualification to the broad discretion conferred by the section. Nevertheless, the absence of that explanation in this case is very much against the extension of time. In addition, although I was told from the Bar table that a prisoner can only make one remission application, it is not apparent why he cannot reapply: the Act does not so provide and the relevant facts and circumstances of a prisoner might change in the course of a lengthy sentence. If the applicant is entitled to reapply, that is a factor against an extension of time, unless the present decision is affected by some error which is likely to affect that new application. But as I have heard full argument upon the merits of the review application, and I have decided that, if permitted, the application would fail, it is unnecessary to discuss further the considerations relevant to an extension of time.

[5] The applicant was and is a prisoner eligible for remission within s 75(1), so that the chief executive could grant remission if satisfied of the matters in s 75(2). One of those matters is that the prisoner's discharge does not pose an unacceptable risk to the community. In deciding that issue, the delegate was required to consider that the matters set out in s 77 which provides as follows:

> "**77. Risk to community**
>
> In deciding whether a prisoner's discharge or release poses an unacceptable risk to the community, the chief executive must consider, but is not limited to considering, the following –
>
> (a) the possibility of the prisoner committing further offences;
> (b) the risk of physical or psychological harm to a member of the community and the degree of risk;
> (c) the prisoner's past offences and any patterns of offending;
> (d) whether the circumstances of the offence or offences for which the prisoner was convicted were exceptional when compared with the majority of offences committed of that kind;
> (e) whether there are any other circumstances that may increase the risk to the community when compared with the risk posed by an offender committing offences of that kind;
> (f) any remarks made by the sentencing court;
> (g) any medical or psychological report relating to the prisoner;
> (h) any behavioural report relating to the prisoner;
> (i) anything else prescribed under a regulation."

[6] The delegate was Mr G A Wright. To the extent that the written decision dated 31 January 2002 revealed his reasoning, he said:

> "The delegate thanks you for your detailed letter and notes your reference to Dr Atkinson's report. Dr Atkinson refers to a possible mellowing but this is not an indicator of confidence that you will not re-offend in the future. In your letter you also make reference to Dr Walsh's report advising your willingness to attend the Sex Offenders Treatment Program in the community, however, your willingness is no guarantee that you would pursue that avenue upon release. The

> delegate notes you have refused the opportunity to participate in the Sex Offenders Treatment Program whilst in custody.
>
> After considering all the relevant matters, including the matters raised in your correspondence dated 31 December 2001, I have decided not to grant remission on the basis that you pose an unacceptable risk to the community in accordance with sections 77 of the *Corrective Services Act 2000*."

But his reasoning is also evidenced by the letter to the applicant of 30 November 2001. That letter recorded the delegate's consideration of extensive material which included a report entitled "Remission Assessment" dated 28 August 2001, a psychiatric report dated 5 February 2000, and a psychological report dated 19 November 2001. The Remission Assessment discussed the applicant's case by reference to each of the considerations prescribed by s 77. In relation to the second of those matters, being "the risk of … harm to a member of the community and the degree of risk" it suggested an "updated psychological assessment", partly because the applicant "remains untreated in relation to his sexual offending behaviour" and "the sentencing judge recommended that whilst in prison, (the applicant) receive any available treatment for sexual offenders.". It noted that the psychiatric report had concluded in these terms:

> "This man is the product of very dysfunctional, disturbed family upbringing. I believe he is essentially an Antisocial Personality Disorder whose major offence was an expression of his anger towards women rather than a manifestation of a sexual perversion per se.
>
> At the age of forty years, it is possible that he is mellowing. He appears to have achieved at least some intellectual understanding of his behaviour while he has been in prison and he may possibly be able to control the impulses he admitted to me when I saw him at Boggo Road in 1988.
>
> I note that he is now past his eligibility date for parole and has a full time date of 2007.
>
> I believe that in these complex circumstances, the best plan may be to allow this man to work through graduated community-based supervision under the following strict conditions: that he remains substance abuse free, submits to an SOTP equivalent program in the community, and is subject to ongoing, close supervision."

The Assessment concluded with the recommendation that a psychological report be obtained and with this summary:

> "Gerrits has maintained positive institutional behaviour and conduct and has been the subject of only one breach throughout the period under review.
>
> Gerrits has completed recommended programs to address his offending behaviour including SAEP, Cognitive Skills, Anger

> Management, Stress Management and attended individual counselling. However, Gerrits has refused to participate in the SOTP, which is considered the most appropriate program to address his sexual offending. Gerrits claims he is prepared to complete the program in the community, but will not participate in custody.
>
> In his verdict, Judge Skoien stated "I recommend that whilst in prison you receive any available treatment for sexual offenders".
>
> Gerrits has a continual offending history dating back to 1983 with many of the offences involving women."

[7] The resulting psychological report was written by Ms R Grant. In the course of an apparently a thorough assessment, Ms Grant noted that:

> "It was recommended that Mr Gerrits complete the Sex Offender Treatment Program (SOTP), which provides group based therapeutic interventions for men convicted of sexual offences. Mr Gerrits has refused to participate in this program as he feels he would not be able to cope with listening to child sex offenders describing their offences because of the abuse he suffered as a child. This form of justification is also an indication that he has no empathy for his current victim. When challenged during the current interview regarding his refusal to participate in this therapeutic program, Mr Gerrits provided a number of other justifications in an attempt to support his viewpoint."

[8] Her conclusions and recommendations included the following:

> "Mr Gerrits is a forty-one (41) year old man with an extensive history of violent and sexual offending behaviour and a significant history of substance abuse. He has completed 10 (10) years, four (4) months of a sixteen (16) year sentence.
> …
>
> Whilst Mr Gerrits has completed some individual counselling aimed at addressing his sexual offending behaviour he has not completed the Sex Offender Treatment Program and he continues to justify and minimise his sexual offending behaviour. Most importantly, Mr Gerrits has not developed a relapse prevention plan to aid in the prevention of re-offending in the future.
>
> Mr Gerrits has a significant history of substance abuse, which is directly linked to all of his offending behaviour. Prior to his current incarceration he did seek treatment for these issues, but was unsuccessful, and whilst Mr Gerrits has completed the Substance Abuse Education Program, he has not followed through as recommended and completed the Substance Abuse Preventing and Managing Relapse Program.
>
> Mr Gerrits' risk of recidivism is likely to increase if he returns to abusing alcohol or other substances or if he experiences relationship

> problems. Based on the results of the risk assessment tests and corroborated by information provided during the current interview, Mr Gerrits can be considered to be at least a moderate risk of violent or sexual recidivism if his were to be released into the community at this point in time.
>
> Mr Gerrits would benefit from undertaking intensive psychological intervention aimed at addressing both his substance abuse issues and his sexual and violent offending behaviour.
>
> Given the factors outlined above I would not recommend Mr Gerrits for remission at this time."

[9] The letter of 30 November 2001 set out a number of matters as "findings of fact", the last of which was in these terms:

> "You have outstanding treatment needs in relation to your sexual offending. You have been recommended to complete a sex offenders treatment program, however, your (*sic*) have withdrawn from participation when offered to you."

[10] The applicant contends that the decision was an improper exercise of the power conferred by s 75(2) for three reasons, corresponding with paragraphs (a), (b) and (f) of s 23 of the *Judicial Review Act*. I shall discuss them in the order in which they were argued on the applicant's behalf.

[11] The first of them is that the discretion was exercised in accordance with a rule of policy without regard to the merits of the applicant's case.[1] It is argued that the facts demonstrate the existence and application of a policy to the effect that a sexual offender who has not completed the Sexual Offenders Treatment Program should not be granted remission. The argument heavily relied upon decisions involving this respondent or its predecessor in cases which had involved a refusal to remit the sentence of a sex offender who denied his crime or who had refused treatment: *Felton v Queensland Corrective Services Commission* [1994] 2 Qd R 490; *Yeo v Queensland Corrective Services Commission* (unreported 7534 of 1997, 13.02.98); *Wiskar v Queensland Corrective Services Commission* [1998] QSC 279; *Fogarty v Department of Corrective Services* [2002] QSC 207. It is not the principle involved in those cases which is in question but its application to the facts of the present matter. In this case, there is no document such as a Ministerial guideline[2] evidencing the alleged policy. The applicant's case says that the policy is apparent from the documents to which I have referred, but that is not as I read them. Undoubtedly, the fact that the applicant has not undergone the Sexual Offenders Treatment Program has been thought to be relevant as, in my view, it is. As the proper purposes of a program would include the reduction of the prisoner's risk of reoffending, that risk is potentially affected by, amongst other things, whether the prisoner has participated in the program. This prisoner's non participation is given some prominence in the written decision and the preceding letter of 30 November 2001. However, it was but one of many matters considered by the delegate, another of which was the psychological report which details the many matters underpinning

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1 Section 23(f)

2 *cf Felton*

the psychologist's assessment. The delegate was not obliged to accept the psychologist's view and he was required to form his own judgment as to whether he was satisfied that there was not an unacceptable risk. But in reaching his own view, he was entitled to rely upon the psychologist's opinion, which was that the applicant presented "at least a moderate risk of violent or sexual recidivism if … released into the community at this point in time". That opinion was expressly "based on the results of the risk assessment test and corroborated by information provided during the current interview". It was not an opinion that he was such a risk because he had not undertaken the Sexual Offenders Treatment Program. Nor was that the effect of the delegate's decision.

[12] The second ground is in reliance upon s 23(a) in alleging that the delegate considered an irrelevant matter. However, the submissions do not precisely identify that matter. Within the written submissions, a number of distinct points were outlined, although each seemed to be unrelated to s 23(a). One was that "undue weight" was given to the applicant's non participation in the Sexual Offenders Treatment Program. If the submission was intended to go so far as to contend that that was an irrelevant matter, I have already rejected it. Alternatively, an allegation that it was relevant, but given too much weight, does not reveal a ground for review. It is also submitted that the decision maker placed "excessive weight on the psychological report". Again, that submission should be rejected as revealing no ground for review. However, it is to be read with the next submission which is to the effect that this decision maker has "effectively delegated the decision making process to (the psychologist) and unquestioningly adopted her conclusion that, principally because of his non completion of SOTP, the applicant remains … an unacceptable risk to the community.". This submission is inspired by the decision of Dutney J in *Fogarty* although the issue here is a factual one. In the present case, it is not demonstrated that this decision maker failed to make up his own mind. Should it matter, the submission also misstates the effect of the psychologist's report.

[13] Thirdly, the applicant sought to invoke s 23(b) with the assertion that a number of matters which the delegate was required to consider were not considered. However, the allegation was somewhat diluted by the written submission that these matters were "given very little if any weight".[3] The considerations in question are set out in paragraphs 4(a) to (l) within the proposed application. In no instance, however, is it demonstrated that such a matter was not considered by the delegate. Those the subject of paragraphs (a), (b) and (c) involve effectively the one matter, which is the applicant's willingness to participate in a program in the community, once released from custody. That was noted in the third paragraph of the delegate's decision. The matter in paragraph (d) was discussed by the psychologist[4] and is not shown to have been overlooked by the delegate. The matters in paragraphs (e) and (f) were discussed in the applicant's letter of 31 December 2001, written in response to the Department's letter of 30 November 2001. Again, it is not demonstrated that these matters were not considered by the delegate. The matter in (g) is the psychiatric report of Dr Atkinson, which plainly has been considered. The delegate was obliged to consider it but not to accept it in its entirety. The matter in (h) is said to be "the applicant's greatly reduced risk of reoffending consequential upon his own self directed efforts while in custody.". This is related to the matter (i) which is "the

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3 Applicant's outline of submissions para 22

4 At page 8 of the report

applicant's low community risk confirmed by the 'OINI' completed on 22 November 2000.". That matter was discussed within the Remission Assessment[5] and is not shown to have been overlooked by the delegate. More generally, the delegate no doubt considered the applicant's good conduct and industry, of which he was satisfied for the purposes of s 75(2)(b) of the Act. That required the delegate to consider the matters within s 78. Again, it is not demonstrated that he has failed to consider any relevant conduct of the applicant whilst in custody, including each of the matters in paragraphs (j), (k) and (l) of paragraph 4 of the application. Of course, the fact that these are matters which had to be considered under s 78 for the delegate to be properly satisfied of the applicant's good conduct and industry under s 75(2)(b), does not mean that he did consider them, either for that purpose or, if necessary, for the purpose of assessing the extent of the risk from the applicant's discharge. The present question is whether he considered them in assessing that risk, and it is not demonstrated that he failed to do so. All of this then explains why the submissions in reliance upon s 23(b) were reduced to an allegation that insufficient weight had been given to those various matters. The submission became one which would be relevant upon a merits review, but not one grounding an application under the *Judicial Review Act*.

[14] For these reasons, I hold the view that the proposed application is without merit, with the consequence that the applicant should not be permitted to make it outside the period prescribed by s 26(2). The application filed on 9 April 2003 is dismissed. I shall hear the parties as to costs.

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5 Pages 10 and 11