SUPREME COURT OF QUEENSLAND

File No S6405 of 2003

BETWEEN:

MARTIN FRANCIS FLYNN

Applicant

AND:

DIANNE RYAN

First Respondent

AND:

DEPARTMENT OF COMMUNITY CORRECTIVE SERVICES

Second Respondent

MOYNIHAN J – REASONS FOR JUDGMENT

CITATION:	*Martin Francis Flynn v Dianne Ryan & Anor* [2003] QSC 392
PARTIES:	**Martin Francis Flynn** (Applicant) **v** **Dianne Ryan** (First Respondent) **Chief Executive of the Department of Corrective Services** (Second Respondent)
FILE NO/S:	SC 6405 of 2003
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	20 November 2003

DELIVERED AT:	Brisbane
HEARING DATE:	7 August 2003
JUDGE:	Moynihan SJA
ORDER:	**Application Dismissed**
CATCHWORDS:	ADMINSTRATIVE LAW – statutory review – refusal to grant remission – where Applicant failed to address offending behaviour in prison – where prisoner of good conduct and industry - whether Respondent concluded that Applicant would be risk to community if released without supervision by relying on material not available to the Applicant
	Cases Cited
	Associated Provincial Picture Houses Ltd v Wednesbury Corporation 1948 1 KB 223
	Avon Downs Pty Ltd v The Commissioner of Taxation (Cth)(1949) 78 CLR 353
	Batts v Department of Corrective Services (25 July 2002, SCQld unreported S163 of 2002)
	Buck v Bavone (1976) 135 CLR 110
	Fogarty v Department of Corrective Services (25 July 2003, SCQLD unreported S164 of 2002)
	McCasker v Queensland Corrective Services Commission [1998] 2 Qd R 261
	Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24
	Minister for Immigration v Eshetu & Anor (1999) 197 CLR 611
	re Minister for Immigration and Cultural Affairs ex parte Applicant S20 of 2002 (2003) 198 ALR 59
	Wiskar v Queensland Corrective Services Commission [1998] QSC 279
	Yeo v Queensland Corrective Services Commission (13 February 1998, SCQld unreported S7534 of 1997)
	Legislation Cited
	Corrective Services Act 2000 (Qld)
	Criminal Law Amendment Act 1945 (Qld)
	Judicial Review Act 1991 (Qld)
COUNSEL:	Mr MO Plunkett for the Applicant

	Mr J Logan SC for the Respondent
SOLICITORS:	Howden Saggers Lawyers for the Applicant
	Crown Law for the Respondent

[1] The Applicant seeks judicial review of a decision by the first Respondent, as delegate of the Second, refusing remission on his sentence of imprisonment.

[2] One of the grounds of review was that the First Respondent was not the delegate of the Second. A second ground was premised that the First Respondent took into account a psychiatric assessment of April 2002 which was not available to the Applicant. Neither ground is now pursued. It was accepted that there was a valid delegation and that the date of April 2002 was a mistake for April 2001. The Applicant, in fact, had a report of that date.

[3] The relevant provision is s75 (2) of the *Corrective Services Act* 2000 (Qld) (the Act). This provides that the First Respondent "may" grant remission if satisfied:

(a) the applicant's discharge "does not pose an unacceptable risk to the community"; and
(b) the applicant has been of good conduct and industry.

It is the first of these criteria which is in contention here, it is not in issue that the second has been satisfied.

[4] Section 77 of the Act provides that, "in deciding whether a prisoner's discharge or release poses an unacceptable risk to the community", the First Respondent "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.

There is no prescription under a regulation to be considered in this case.

[5] What is relevant or irrelevant to a decision such as that in issue here depends on what the statute requires or empowers the decision maker to do; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39. Where relevant material is available the choice of what is accepted and what is rejected is a matter for the decision maker *Batts v Department of Corrective Services* (25 July 2002, SCQld unreported S163 of 2002), *Fogarty v Department of Corrective Services* (25 July 2003, SCQLD unreported S164 of 2002).

[6] The First Respondent's reasons for refusing remission, dated 17 June 2003, recite the material considered by the First Respondent and are in evidence, as is the material considered.

[7] It is unnecessary to recite the list of material, which is extensive. It, may however be noted that it includes material capable of supporting a conclusion that the Applicant's discharge did not pose an unacceptable risk to the community and other material leading to a contrary view. In other words, the evidence was not all one way. The reasons demonstrate the First Respondent was aware of this.

[8] The Applicant was found guilty after a trial in the District Court in which he gave evidence. He was sentenced on 16 December 1999 to concurrent terms of four years' imprisonment on each of two counts of indecent dealing with a child under the age of 16 years with a circumstance of aggravation, that the child was under the age of 12 years. It was recommended that the Applicant receive psychiatric treatment while in goal for his "sexual problems".

[9] The judge was satisfied that there was a substantial risk that, in the future, the Applicant was likely to commit a further offence of a sexual nature on a child under 16 years. He imposed a reporting condition for 10 years pursuant to s19 of the *Criminal Law Amendment Act* 1945 (Qld).

[10] The learned sentencing judge remarked that the Applicant showed no remorse. The Applicant continues to deny that he is guilty of the offences of which he was convicted and has declined to participate in any program premised on his acknowledgement of guilt, including any program addressing sexually offending behaviour.

[11] The circumstances of the offences were that the Applicant was the coach of an under 12 cricket team of which the complainant's brother was a member. The Applicant procured the complainant's brother to bring the complainant to the Applicant's residence on the pretext of a practice session with team members. There was no practice session. The sentencing judge went on to describe the sexual acts which constituted the offence before outlining the Applicant's previous convictions.

[12] These were that on 30 April 1993 the Applicant was convicted in the Victorian County Court on two counts, one of sexual penetration of a boy under 10 and the other of attempted sexual penetration of a boy under 10. The Applicant successfully appealed against his sentence with the consequence that he was to serve concurrent terms of three years' imprisonment to serve a maximum period of eight months.

[13] In sentencing, the Applicant the Victorian County Court judge recounted that the offences were committed on a boy in the cricket team of which the Applicant was

coach and with a friend of that team member whose attendance on the occasion had been procured by the Applicant. The description of the sexual acts involved in the commission of these offences closely resembles the description of the sexual acts involved in the Queensland proceeding.

[14] It is convenient, at this stage, to dispose of four submissions made on behalf of the Applicant in support of particular grounds of review. First, the offences were not capable of constituting a pattern of offending behaviour in terms of s77(c).

[15] The circumstances of the Victorian and Queensland offences are strikingly similar. Notwithstanding the time gap, these are relevant considerations in any event. They are also capable of being regarded as demonstrating a pattern of offending behaviour when taken in the context of the whole of the material.

[16] Secondly, it was submitted that what the sentencing judge said in terms of applying s19 of the *Criminal Law Amendment Act* 1945 were not "remarks made by the sentencing court" in terms of s77 (f). I am not persuaded that the provisions of s77 (f) so restrict "any remarks made by the sentencing court".

[17] In any event, the sentencing judge's finding provided a basis for the operation of s19 as they were findings of fact based on the evidence which the sentencing judge heard as part of the trial. The First Respondent was quite entitled to take them into account.

[18] Thirdly, a fair reading of the reasons of the First Respondent does not sustain a conclusion that the First Respondent had a "fixation with the s19 order and its relevance" which tainted the decision. It was a relevant consideration properly taken into account.

[19] Finally, a fair reading of the reasons does not sustain a conclusion that the First Respondent acted under direction or in accordance with a rule or policy. Rather, it supports a conclusion that she made a decision as to the merits of the particular case based on the material considered.

[20] Turning to the remaining grounds it was submitted for the Applicant that remissions could only be legitimately withheld if the decision to do so was based on a proper consideration of current psychological and psychiatric reports based on observations of the prisoner in prison and the knowledge of the Applicant's history. *McCasker v Queensland Corrective Services Commission* [1998] 2 Qd R 261 and *Wiskar v Queensland Corrective Services Commission* [1998] QSC 279 were cited in support of the proposition, although they do not sustain it.

[21] *McCasker* is authority for the proposition that it is a capricious exercise of discretion to refuse a prisoner of good conduct and industry remission when there

was nothing before the decision maker indicating that the risk to the community on the prisoner's release would be above an acceptable level.

[22] *Wiskar* also supports such a proposition. It was a case where no psychiatric or psychological reports were before the decision maker in respect of a person convicted of sexual offences who denied committing the offences and declined to participate in a program addressing offending sexual behaviour.

[23] It was held in *Wiskar*, following *Yeo v Queensland Corrective Services Commission* (13 February 1998, SCQld unreported S7534 of 1997) that there was a reviewable error of law. This was because the decision maker applied general guidelines and principles without addressing the particular circumstances of the Applicant. As I have said that is not the case here.

[24] It should be noted that *McCasker, Wiskar* and *Yeo* are cases decided before s75(2) was enacted with its requirement that the decision maker have a satisfaction of the negative; that the release "did not pose an unacceptable act to the community".

[25] In any event, in this case, there were reports by qualified psychologists and psychiatrists over the period from April 2000 to June 2003. Some were based on interviews with the Applicant, some on reviews of the material on the file. There was also a deal of other material.

[26] Without purporting to undertake an exhaustive summary of the psychiatric and psychological material Professor Whiteford acknowledged that an assessment of the potential risk to the community of the Applicant's release was "a difficult evaluation to make". Miss Selano, a psychologist employed by the Corrective Services Department saw the Applicant on a number of occasions. She stated that with respect to sexual offenders there is some evidence that failure to receive treatment, refusal of treatment and the dropping out of treatment predict future sexual violence. Dr Atkinson, a psychiatrist, expressed a view that it was "highly likely" that the Applicant was a paedophile. On the other hand, Professor Whiteford expressed the view that his behaviour was not of such a pattern as to satisfy the diagnostic criteria for a paedophile.

[27] The evaluation of the material was a matter for the First Respondent. She was quite entitled to proceed on the basis there was sufficient material on which to reach a conclusion without the need for further psychological or psychiatric reports.

[28] It is submitted that the decision was so unreasonable that no reasonable person could have reached it. This ground appears to be framed by reference to s23(g) of the *Judicial Review Act* 1991 (Qld) and is a statutory expression of what is commonly referred to as the *Wednesbury* test; see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* 1948 1 KB 223.

[29] In this case the Applicant's complaint is of the First Respondent's not being satisfied that the Applicant did not pose an unacceptable risk to the community. Decisions of this kind are not unreviewable; see for example *Buck v Bavone* (1976) 135 CLR 110 at 118, per Gibb J *re Minister for Immigration and Cultural Affairs ex parte Applicant S20 of 2002* (2003) 198 ALR 59, per Gleeson CJ citing *Avon Downs Pty Ltd v The Commissioner of Taxation (Cth)*(1949) 78 CLR 353.

[30] As Gummow J noted however,

> "Where the criterion of which the authority is required to be satisfied turns upon factual matters upon which reasonable minds could reasonably differ, it would be very difficult to show that no reasonable decision maker could have arrived at that decision in question. It may be otherwise if the evidence which established or denies, or, with other matters, goes to establish or to deny, that the particular criteria has been met was all one way."

Minister for Immigration v Eshetu & Anor (1999) 197 CLR 611 at 654 [137].

[31] It was properly open for the First Respondent not to be satisfied that the requirements of s75(2)(a) as to an absence of unacceptable risk were made out.

[32] A further submission was that there was no evidence or other material to justify the decision that the First Respondent "was an unacceptable risk to the community". As I have already indicated, the test more accurately ought to be framed in terms of failing to reach the necessary state of satisfaction.

[33] The submission was made "in the light of evidence" that the Applicant was to be supervised by Dr Peter Field when released. It cannot, however, be said that the First Respondent erred by not accepting and acting on that evidence. On the material the proposition concerning Dr Field's supervision and its effectiveness in dealing with risk was essentially speculative. In any event, as already pointed out, it was for the First Respondent to give this consideration such weight as she saw fit.

[34] It was submitted that the First Respondent erred by taking into account irrelevant consideration which are identified in ground of review (c)(i). Ground (c)(ii) sets out considerations which it said ought to have been taken into account.

[35] As I have already said the issue of relevance was for the First Respondent to determine. Again, as I said, having regard to s75 (2)(a) it requires what is described as a state of negative satisfaction. There is no substance in this complaint that impermissible considerations were taken into account.

[36] A fair reading of the reasons, in my view, shows that the First Respondent took into account the considerations referred to in ground (e)(ii). The Applicant's complaint

essentially is that she did not give them the decisive consequence for which the Applicant contends. That is, of course, not a reviewable error of law.

[37] The application should be dismissed.