SUPREME COURT OF QUEENSLAND

CITATION:	*Robertson v Chief Executive, Department of Corrective Services* [2004] QSC 099
PARTIES:	**JOHN ROBERTSON** (Applicant) v **CHIEF EXECUTIVE, DEPARTMENT OF CORRECTIVE SERVICES**
FILE NO/S:	405 of 2003
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Cairns
DELIVERED ON:	2 April 2004
DELIVERED AT:	Cairns
HEARING DATE:	12 February 2004
JUDGE:	Jones J
ORDER:	**The application is dismissed.** **The parties have liberty to make written submissions on the issue of costs.**
CATCHWORDS:	ADMINISTRATIVE LAW - JUDICIAL REVIEW LEGISLATION - COMMONWEALTH, QUEENSLAND AND AUSTRALIAN CAPITAL TERRITORY - GROUNDS FOR REVIEW OF DECISION - IMPROPER EXERCISE OF POWER - RELEVANT AND IRRELEVANT CONSIDERATIONS - where applicant sought statutory order of review in respect of a decision not to grant remission on sentence - whether the respondent failed to take relevant considerations into account - whether error apparent in the respondent's process of reasoning
COUNSEL:	Applicant in Person Mr. M Plunkett for the Respondent
SOLICITORS:	Crown Solicitors for the Respondent

[1] This is an application for a statutory order of review of a decision of the respondent not to grant any remission to the three year term of an imprisonment to which the applicant was sentenced on 14 June 2001.

[2] The decision of the respondent's delegate, Ms Perry, refusing the grant of remission was made on 14 August 2003 and a formal statement of her reasons were given on 2 September 2003.[1] Those reasons listed the documents to which the decision maker had regard and records certain findings of fact. The statement then annunciates the decision in the following terms:-

> "I then gave consideration to whether your discharge posed an unacceptable risk to the community in accordance with section 77 of *Corrective Services Act* 2000. In coming to a decision I took into account your criminal history and your current offences and determined that you demonstrate a continuing pattern of offending over a number of years.
>
> I had regard to the offences for which you are currently incarcerated. I note you committed numerous offences over an eight-month period, and the impact of your offending has had on the community as indicated in the sentencing transcripts; "*The facts in relation to all of these offences show that over that period of time you were a menace to small business in the Cairns and surrounding areas and a number of businesses suffered quite significant losses as a result of your activities."*
>
> Further, I was concerned that previous court sanctions has not been a deterrent to your continued offending as highlighted in the Sentencing Judges remarks; *"A number of these offences were committed whilst you were on bail and a number of these offences were committed whilst you were subject to a suspended sentence of imprisonment."*
>
> I noted that you had been previously imprisoned for serious offences, however this has not deterred you from committing further offences post discharge. I also noted the North Queensland Regional Community Corrections Board declined to grant you community based release stating; '*the Board has not satisfied you would abide by the strict conditions associated with Post Prison Community Based Release.'*
>
> Taking into account all the above factors I determined that in accordance with section 75(2)(a) and section 77 of the *Corrective Services Act* 2000 that your discharge posed an unacceptable risk to the community."

[3] The applicant seeks a review of the decision on two grounds as follows:-

(i) The making of the decision was an improper exercise of the power conferred by the enactment of the Corrective Services Act 2000;

(ii) There is no lawful or legislated basis for the delegate's "personal belief" that I pose an unacceptable risk to the community.

(iii) There was no evidence to justify the making of the decision.

---

[1] Ex 1 to affidavit of John Robertson filed 22 September 2003

By his addendum affidavit, the applicant sought to extend the ambit of the review by reference to some specific questions seeking to identify the relevant matters considered by the decision maker. Included amongst these was the contention that the issue of "unacceptable risk" is to be approached in the manner outlined in *McCasker v The Queensland Corrective Services Commission*[2]

The statutory provisions

[4] The applicant's eligibility for remission fell to be considered under the terms of ss 75 and 77 of the *Corrective Services Act* 2000 ("the Act") which came into operation on 1 July 2001 some two weeks after the date of sentencing.

[5] By s 275 of the Act the predecessor legislation was repealed. That repeal and the provisions of the new Act brought changes in the way in which a prisoner's eligibility for remission was to be considered. Firstly, under the new regime eligibility for remission applied only to prisoners who were sentenced for an offence committed before 1 July 2001. S 75(1)(a). For those prisoners, their rights to be released before the end of the period of imprisonment by virtue of s 268A were to be determined by reference only to the provisions of chapters 2 and 5 of the Act. S 268A(3) specifically extinguishes any other expectation for early release. The section provides:-

> "(3) If, before 1 July 2001, the prisoner had any expectation to be able, after 1 July 2001, to be released before, or to be considered for a release taking effect before, the end of the period of imprisonment to which the prisoner was sentenced, the expectation is extinguished to the extent that the release is not provided for under subsection (2)."

The term "**expectation**" includes right, privilege, entitlement and eligibility.

[6] The relevant section of the Act under which the applicant had any remaining eligibility for remission is s 75. By s 75(2) –

> "(2)…the Chief Executive may grant remission of up to one third of the term of imprisonment if satisfied –
>
> (a) That the prisoner's discharge does not pose an unacceptable risk to the community; and
>
> (b) That the prisoner has been of good conduct and industry; and
>
> (c) Of anything else prescribed under a regulation."

[7] In deciding whether there was no such unacceptable risk s 77 obliged the decision maker to consider 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;

---

2 (1998) 2 QdR 261

(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 relevant remarks made by the sentencing court;
(g) Any relevant medical or psychological report relating to the prisoner;
(h) Any relevant behavioural report relating to the prisoner;
(i) Anything else prescribed under a regulation.

[8] These legislative provisions changed the focus for the consideration of eligibility for remissions. Under the 1998 Act the general entitlement to remission was found in Regulation 21. This was said by Williams J (as he then was) in *Felton v The Queensland Corrective Services Commission*[3] to give rise to a "legitimate expectation in a prisoner of good conduct and industry to be granted remission in accordance with Regulation 21".

[9] In *McCasker*, also decided under the previous legislative regime, Macrossan CJ described what was meant by "unacceptable risk in the following way:-

> "It is not a simple risk of reoffending which would or should call for loss of remissions. In a great number of cases that risk will exist. It is only where there is an "unacceptable risk" involving, it is clear, concern for the need "to protect members of the community" against "the risk of serious physical harm" that the delegate is encouraged to consider whether a release on remission should be refused. In the instructions given to the delegate the need for balance between competing considerations, already referred to, is maintained. The conclusion should be reached that it is wholly compatible with the purpose of the discretion and its exercise to have regard to the level of risk of serious physical harm to the community that would follow release."

[10] Under the present legislative regime the process of granting remissions was abolished save as identified above. This change was discussed by P McMurdo J in *Oakes v The Chief Executive, Department of Corrective Services*[4] in the following terms:-

> "Under s 75 of the present Act, a prisoner has no legitimate expectation of a grant of remission if he or she has been of good conduct and industry, because the power to remit exists only where the decision maker is also satisfied that there is no unacceptable risk. With that qualification in mind, however, cases such as *Felton* decided in relation to the previous Act plainly demonstrate that a decision maker does not properly consider this issue of risk if the assessment of that matter goes no further than a consideration of the fact of the offence, the prisoner's denial of guilt and his refusal to engage in a treatment program. That is because a decision maker who enquired no further would be addressing the wrong question or questions, and not that which is required to be answered by s 75(2)(a), which is whether the prisoner's discharge posed an unacceptable risk to the community."

---

3 (1994) 2 QdR 490 at 502
4 (2004) QSC 11

The power to decide

[11] As to the ground that there was an improper exercise of the decision maker's power, the Chief executive's power is found in s 75 of the Act referred to above. The chief executive has, pursuant to s 57 of *The Public Service* Act 1996, the power to delegate and did so by instrument dated 12 August 2003. Section 75 requires the exercise by the decision maker of an administrative discretion. That discretion is conditioned upon the decision maker being "satisfied" of two matters –

(i) The prisoner's discharge does not pose an unacceptable risk to the community; and

(ii) The prisoner has been of good conduct and industry.

Thus, the requirement that the decision maker "be satisfied" of both of those matters is at the heart of the exercise of the power. Satisfaction about these matters depends on there being evidence to ground that satisfaction and is not a matter of unsubstantiated personal belief. In the present case the decision maker had before her a number of documents which she identified in the Statement of Reasons.

[12] By the findings of fact in the Statement of Reasons, it is clear that the decision maker was satisfied as to the prisoner's conduct and industry. The focus of the application thus falls on the question of the decision maker's satisfaction of whether the prisoner's discharge would pose an unacceptable risk to the community. Consequently to review the decision on the basis of a "balance between competing considerations" referred to in *McCasker* would be to adopt an incorrect approach.

Unacceptable risk

[13] As to whether the applicant posed an unacceptable risk, the decision maker made a number of findings which are referred to in para 2 hereof, each of which were supported by the evidence contained in various documents to which the decision maker had regard. The impact of those findings on the considerations required by s 77 of the Act appears to have been undertaken by the decision maker. These included the applicant's criminal history, his current offences, his pattern of offending, his prior convictions, the failure of prior imprisonment to deter later offences, the remarks of the sentencing judge and the refusal of a corrections board to grant community based release.

[14] I am satisfied that there was ample evidence upon which the decision maker could be satisfied that the applicant posed an unacceptable risk to the community for the purpose of s 75. The court has no authority to delve into the merits of the decision which remains a matter for the decision maker. The court's power to interfere in an application of this time is quite limited.

[15] In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[5] Mason J said (at p 40-41):-

> "The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of

---

5 (1985-6) 162 CLR 24

> that discretion, and a decision made within those boundaries cannot be impugned: *Wednesbury Corporation* (41).
>
> It follow that, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power:"

Also in *Immigration and Ethnic Affairs v Wu*[6] Kirby J said:-

> "The weight to be given to the material before the decision-maker is, in a case submitted to judicial review, reserved to the decision-maker so long as he or she applies the correct legal test and does not reach a conclusion which is so unreasonable as to authorise review. The decision-maker will usually have advantages over the reviewing judge in evaluation evidence and submissions. Those advantages will include the conventional ones of seeing any parties and witnesses who are heard and having time to reflect upon all of the material. But there are additional reasons for restraint and resistance to any temptation to turn a case of judicial review into, effectively, a reconsideration of the merits. Often, the decision-maker will have more experience in the consistent application of applicable administrative rules to achieve fairness to a wider range of people than typically come before the courts."

[16] The applicant here is challenging a decision based upon the decision maker being "satisfied", that essentially is a matter of opinion. Minds may differ about the evidence and the weight of evidence. Different persons might reach different conclusions upon the evidence. It is not open to the court to judge the merits of such an opinion.

[17] I am satisfied that the decision of the respondent's delegate has not made under any error of law or principle, that there was evidence upon which the decision could be made and that there is no other basis upon which the court could interfere with it.

[18] The application is dismissed. The parties have liberty to make written submissions on the issue of costs.

---

6 (1996) 185 CLR 259 at 291