SUPREME COURT OF QUEENSLAND

CITATION:	*Tientjes v Chief Executive, Department of Corrective Services* [2004] QSC 208
PARTIES:	**MARK ANTHONY TIENTJES** (Applicant) v **CHIEF EXECUTIVE, DEPARTMENT OF CORRECTIVE SERVICES**
FILE NO/S:	581 of 2003
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Cairns
DELIVERED ON:	8 July 2004
DELIVERED AT:	Cairns
HEARING DATE:	30 June 2004
JUDGE:	Jones J
ORDER:	**1. The decision refusing to grant remission dated 20 November 2003 is set aside and the matter is remitted to the respondent for further consideration.** **2. That the respondent pay to the applicant any outlays incurred by him in the pursuance of the application.**
CATCHWORDS:	ADMINISTRATIVE LAW - statutory review - refusal to grant remission – whether failure by respondent to consider relevant factors in making decision – whether breach of natural justice through lack of procedural fairness *Corrective Services Act* 2000 *Judicial Review Act* 1991 *Buck v Bavone* (1975-6) 135 CLR 110 cited *Minister for Immigration and Ethnic Affairs v Eshetu* 197 CLR 611 cited *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* 185 CLR 259 cited *Wiskar v Queensland Corrective Services Commission* (1998)

QSC 279 followed

COUNSEL: Applicant in person; Mr Plunkett for the respondent

SOLICITORS: Crown Law for the respondent

[1] The applicant seeks, pursuant to the *Judicial Review Act* 1991 ("JRA"), a statutory order to review the decision of the respondent refusing a grant of remission of part of the applicant's sentence of imprisonment.

[2] The applicant was, following an appeal to the Court of Appeal, sentenced to seven years imprisonment commencing from 7 May 1999. He sought the remission of one third of his penalty on the grounds of his eligibility pursuant to s 75 of the *Corrective Services Act* 2000 ("the Act"). Were he successful in this quest his release date would have been 19 November 2003.

[3] The respondent's decision not to grant remission was made on 20 November 2003 by Ms Diane Ryan, Acting Senior Advisor within the Office of Sentence Management, who held a delegation from the Chief Executive for the making of such decisions. The decision was made known to the applicant on 27 November 2003.

[4] A prisoner's eligibility for remission is defined by s 75 of the Act. The applicant is a prisoner meeting the requirements of subsection (1) and thus the respondent was required to consider whether to grant remission in accordance with subsection (2) which provides:-

> "(2) Subject to subsections (3) and (4), 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."

[5] The decision maker was required to have regard to two further sections of the Act – s 77 concerning **Risk to community** and s 78 concerning **Good conduct and industry.** As the respondent acknowledges that the applicant has been of good conduct and industry it is not necessary to detail s 78. There is, however, an issue as to whether the applicant is a risk to community. Section 77 provides:-

> "77. **Risk to community**
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> 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;
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> (b) The risk of physical or psychological harm to a member of the community and the degree of risk;
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> (c) The prisoner's past offences and any patterns of offending;
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> (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 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."

[6] The applicant sought, pursuant to s 33 of JRA, formal reasons for the decision and these were provided in writing dated 5 January 2004 but not received by the applicant until 20 January 2004, well outside the 28 day time limit. The basis for refusing remission included the following relevant remarks:-

> "I was mindful that the psychological report was written specifically for a leave of absence program. It indicated that it was apparent that you continued to deny your potential difficulties with alcohol abuse. I was mindful of the interpretational comment "given that he may be prone to problems with future alcohol abuse; and his potential interpersonal reactivity under the influence of alcohol may also serve to escalate his risk of future violence."
>
> I noted that the psychologist assessed you as being a low to moderate risk of future violence and a low to moderate risk of re-offending. I noted the factors that were said to be likely to moderate your risk of future re-offending.
>
> I noted that you have been able to abstain from substance abuse whilst subject to high levels of supervision within a highly structured environment. I am concerned that you require a well-structured supervision that supports and facilitates you actioning your relapse prevention plan and post-release strategies. I was also mindful that you had not made an application for post-prison community based release.
>
> While mindful of the matters raised above, and notwithstanding matters raised by yourself and your solicitor, when balancing all the factors in your case, both positive and negative, I was not satisfied that your discharge does not pose an unacceptable risk to the community in accordance with section 77 of the *Corrective Services Act* 2000."[1]

[7] The applicant who appeared in person contended that the decision ought to be reviewed on the following grounds:-

1. That there was a breach of the rules of natural justice particularly in relation to the respondent's failure to comply with procedures required by the Act and its own guidelines.
2. That the decision maker failed to consider materials which the respondent's guidelines required her to take into account.
3. That the decision maker lacked balance in her assessment of the materials upon which the decision was based.
4. That the decision maker took into account irrelevant considerations.

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1 Ex DMR 1 to Affidavit of Diane Margaret Ryan sworn 9 March 2004

Breach of natural justice

[8] To understand the applicant's complaint it is necessary to note the obligations imposed on the respondent by s 79 of the Act when the Chief Executive is considering refusing to grant remission. They are, that the Chief Executive must give to the prisoner a notice –

(a) Stating that the chief executive is considering refusing to grant remission or make the order; and
(b) Outlining the reason for the proposed refusal; and
(c) Inviting the prisoner to show cause, by written submissions given to the chief executive within 21 days after the notice is given, why the remission or conditional release order should not be refused.

The Chief Executive is required to consider all written submissions made within the 21 days and inform the prisoner of the decision.

[9] By letter dated 14 October 2003 the decision maker advised the applicant that she was considering not granting remission "on the basis that you would pose an unacceptable risk to the community". She identified the material relied upon, some 19 documents, concluded by saying, "You are invited to comment on the materials referred to in sections (1) to (19) inclusive by writing to this office within 21 days of receiving this letter."[2] Nowhere in that letter was any reference made to s 79 of the Act or to the need for the applicant "to show cause".

[10] The applicant however opened his response on 27 October 2003 with the words "I refer to your s 79 letter of 21 October 2003. I find your letter very difficult to respond to".[3] The response essentially dealt with three themes. The major concern was of a pre-determination of the issue and he queried whether the show cause process was a charade disguising a departmental policy not to grant remissions. The second theme concerned the use of a psychologist's report obtained for the purpose of a Leave of Absence application ("LOA") rather than one obtained for the purpose of granting remission. The third was a reference to his proposed residence with his father in Tasmania and his readiness to put into practice his learned concepts about substance abuse.

[11] In the applicant's response, the treatment of the second and third themes was somewhat overshadowed by the extensive reference to the first theme.

[12] The applicant at this time had engaged a firm of solicitors to represent him. The solicitors responded on 3 November 2003 seeking an extension of time in order to receive and consider the documentary materials relied upon by the decision maker. That request was granted extending the response time by 21 days. However, on 14 November, the solicitors (who had not yet seen the documentary materials) asserted that the delegate's letter of 14 October was not a proper show cause notice within the meaning of s 79 of the Act and that the applicant was entitled to the remission. Copies of the documents were sent by facsimile (59 pages) but not until 17 November 2003 (see ex 2). There was further response by the solicitors after the 17

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2 Ibid at p 6
3 Ibid at p 65

November[4] by which they simply maintained the earlier stance. The applicant by letter dated 20 November attempted to make further submissions (ex 3) but by the time this was received by the department the delegate had already made her decision. Relevantly, the applicant's letter again called for independent psychological testing and for more weight to be given to the recommendations made by prison managers.

[13] The applicant argues two basic points from these facts. Firstly, the failure by the decision maker to invite the applicant "to show cause" limited his response to her initiating letter and secondly, the late delivery of the documentary material to his solicitors did not allow sufficient time to make a measured response thus resulting in procedural unfairness. Some argument was raised about the fact that the psychologist's report was given on a limited release basis. It is not necessary to pursue this question because the applicant did access the report by other means. It is relevant to the larger concern of the delayed release of all documents to the solicitors.

[14] As to the first point, Mr Plunkett of Counsel for the respondent argued that the applicant was clearly aware that the initiating letter was written pursuant to s 79 and must be taken to have known of his right to show cause. He conceded that if the words did in fact limit the applicant's response it would constitute a reviewable error, but asserts that this did not happen. The terms of the response reveals that the applicant did not regard himself as restricted to commenting on the materials in the scope of his reply.

[15] As to the second point, Mr Plunkett argued that the letter dated 20 November 2003 did not include any new factual material but it simply re-asserted propositions of law. He contended that the applicant had himself received all the documents and had responded to the initiating letter to the extent that he wished.

[16] Whilst there is some force in the respondent's argument that the applicant was aware of the nature of the initiating letter, the applicant was at the time receiving legal advice and that advice was that the delegate had not complied with s 79. His response was more in the character of challenging the process rather than showing cause why the grant of remission should be made. The response revealed a deeply suspicious applicant seeking assurance of the decision maker's independence and impartiality. No such assurance was given. The response sought also clarification of "the unacceptable risk" basis for considering not to grant remission. None was given. More critically, the response questioned the focus of the psychologist's report but there was no response to this concern. In short there was little in the content of the applicant's response which was in the nature of showing cause.

[17] One difficulty for the decision maker was knowing whether she was to act upon the response of the applicant or that of his solicitors. On 3 November 2003 the applicant's solicitors sought, and on 5 November were granted, an extension of time within which to respond to the initiating letter. They sought copies of the documentation relied upon but as I have mentioned those copies were only supplied on 17 November. The question of the status of the initiating letter remained unresolved. The stance taken by the applicant's solicitors did not help but that

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[4] See letter incorrectly dated 14 Nov 03 @ p 71 of Ex CMR4(1) – xxii to affidavit Ryan sworn 09.03.04

could have been corrected by the delegate indicating an intention to make the decision after allowing further time for the applicant to show cause.

[18] In the result, the applicant was not given a realistic opportunity to show cause after the copy documents were made available to his solicitors. The rush to decision making may well have been motivated by the desire to determine the matter before the remission release date. But such a rush was occasioned by the respondent's lack of timeliness in initiating the whole process. Having regard to the apparent delays in receiving correspondence, the initiating letter advising that the chief executive was considering not granting remission should have been sent much earlier than the date if the applicant was to have a reasonable opportunity to respond. The applicant with some prescience as to timing difficulties, had requested the early commencement of the process in a letter dated 4 July 2003.[5] In the end result the decision was made before the agreed extended time had expired and without adequate time being given for the applicant to take advice and to make a measured response to the initiating letter. I do not regard the applicant's letter of 20 November as being indicative of the response that he would have made if the show cause process had have proceeded in a timely way and with the expeditious delivery of the documentary material to the applicant's solicitors.

[19] I regard the applicant as not having been accorded procedural fairness and I find there was a denial of natural justice in this process.

Failure to consider material required by guidelines.

[20] The applicant points to a number of shortcomings in the materials which ought to have been considered by the decision maker. Consistently with concerns expressed in his earlier letters, he points to the lack of an updated purpose directed psychologist's report. The one available to the decision maker was that of Mr Renyeberg dated 16 June 2003[6] which was prepared for the purpose of a Leave of Absence programme ("LoA"). That report recommended that the applicant was suitable for a Resettlement LoA programme but additionally recommended "that Mr Teintjes abstain from future alcohol abuse and be monitored for alcohol use whilst he is on LoA". This recommendation and other comments about past alcohol abuse feature in the decision maker's Reasons. Such monitoring would not be possible in the context of a grant of remission but the psychologist was not aware of the details of the applicant's Prison Release Plan ("the Plan") as this document was only prepared on 28 July 2003. The Plan gave details of the applicant's intended residence and then contain confirmation of his intended employment. The psychologist was aware of the applicant's claim of available employment but he was not aware that that claim had been verified.[7]

[21] The applicant points to the fact that the decision maker did not peruse the Plan, a copy of which is ex G to his affidavit of 23 February 2004. This fact is conceded by the respondent and is explained as being "an administrative oversight or error"[8] but it is however a document that is required to be considered under departmental guidelines.

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5 Ex F to applicant's affidavit filed 1 December 2003
6 Ex DMR4 at p 49-57
7 Ibid at p 52
8 Answers to Interrogatories para 8

[22] Though some of the detail contained in the Plan were known to the decision maker from other sources (i.e. the psychologist's report) the verification letter from the proposed employer was not disclosed to her. This, it seems to me, was an important feature of the Plan and one that ought to have been shared with the psychologist when giving a remission focussed report.

[23] The Plan also disclosed the applicant's involvement in sponsored community service LoAs. These occurred on three separate occasions between 17 April and 22 April 2002. Again the delegate concedes she did not have regard to these but asserts that the information would not have affected the outcome [9]. Mr Plunkett suggested these facts were inconsequential.

[24] Mr Plunkett argued that these deficiencies have to be considered in the context of the decision maker exercising a wide unconfined power. He relied particularly on a passage from the judgment of Gibbs J in *Buck v Bavone*[10] who said (at p 118):-

> "It is not uncommon for statutes to provide that a board or other authority shall or may take certain action if it is satisfied of the existence of certain matters specified in the statute. Whether the decision of the authority under such a statute can be effectively reviewed by the courts will often largely depend on the nature of the matters of which the authority is required to be satisfied. In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously. Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that the decision could not reasonably have been reached. In such cases the authority will be left with a very wide discretion which cannot be effectively reviewed by the courts."[11]

[25] Mr Plunkett referred to the salient features operative on the mind of the decision maker in determining the risk to community – viz, the absence of high levels of well structured supervision and the relevance of that to the potential for alcohol abuse. He submitted that the lack of reference to the contents of the Plan was not sufficiently material to make the decision reviewable.

[26] I do not accept that argument. Firstly, the Plan was available as early as 28 July 2003. It could have been made available to a psychologist if a review of Mr Reneberg's opinion was sought in circumstances where the grant of remission was to be considered. The psychologist would have had the opportunity to explore the supervisory structure that would be in place and to assess whether that structure would moderate the risk of re-offending. As well, there is a need to assess the

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9 Affidavit Ms Ryan sworn 29 June 2004 at para 8

10 (1975-6) 135 CLR 110

11 See also *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* 185 CLR 259; *Minister for Immigration and Ethnic Affairs v Eshetu* 197 CLR 611

applicant's claim that he would put into practice what he had absorbed from the behaviour modifying programmes. The importance of such a report commenting upon the applicant's individual circumstances was considered by Williams J in *Wiskar v Queensland Corrective Services Commission*[12]. I see the combination of these deficiencies and the lack of consideration of the individual circumstances applicable to the applicant on release to be a major shortcoming in the delegate's determination in this case. It seems to me these were important matters for determining the nature and level of the risk to community that might be occasioned by the grant of remission. I would, on this ground, also order that there should be a review.

Lack of balance

[27] The applicant complains that there was a lack of balance in the decision maker's approach to the materials and points to her reference to unfavourable features and lack of reference to favourable ones. There are, of course, a number of matters required by s 77 of the Act to be considered by the decision maker. Obviously they are not all of equal importance. I would refer particularly to the periodic sentence management reviews which ought by their very nature in most instances carry more weight than sentencing judge remarks, despite the latter being expressly referred to in this section and the others as part of general reference. But the applicant's submission does not identify any error. Having determined not to grant remission the delegate properly identified the matters impacting on her decision. Inevitably these relate to the negative aspects notwithstanding that there were many aspects favourable to the applicant which appear to have been taken into account. As has been expressed in numerous cases, in a Judicial Review of this kind, it is not the function of the Court to weight competing considerations – the more so when there is to be further consideration. It is unnecessary to consider further the applicant's submission in respect of this matter.

Taking into account irrelevant considerations

[28] The applicant's submissions under this heading focused on the remarks by the decision maker that the applicant had failed to apply for Post-Prison Community Based Release ("PPCBR") for which he became eligible on 7 November 2002. The applicant points out that the consequence of such an application if successful would deny him the opportunity of being granted remission. He submitted it was an irrelevant consideration.

[29] If the decision maker's reference to PPCBR carried the implication that under such release there would be an opportunity to monitor the applicant's use of alcohol and other structures relevant to the risk of re-offending and therefore it was to be preferred to remission there might be cause complaint. The applicant was entitled to have the question of remission determined based on considerations relevant to that type of release. Consequently any comparison with the effect or benefits of a different type of release is an irrelevant consideration. In saying this, I am not satisfied that the decision maker in this instance was swayed in any way by the fact that the applicant did not apply for PPCBR. The only reference to that fact appears in the Reasons as a statement of fact[13] rather than as a relevant circumstance

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12 (1998) QSC 279

13 See ex DMR4 to affidavit of Ms Ryan filed 12 March 2004.

affecting the decision. I am not satisfied that this submission by the applicant adds to his claim that the decision is reviewable.

Decision

[30] For the reasons that I have mentioned I conclude that the applicant was not accorded procedural fairness and that the decision maker failed to have regard to relevant circumstances. Either instance requires that the decision be set aside and the matter be remitted to the respondent for further consideration. Having regard to the manner in which the process has been conducted it would be appropriate for the reconsideration to be undertaken by a different decision maker.

Orders

[31] 1. The decision refusing to grant remission dated 20 November 2003 is set aside and the matter is remitted to the respondent for further consideration.

2. I order the respondent to pay to the applicant any outlays incurred by him in the pursuance of the application.