SUPREME COURT OF QUEENSLAND

File No S4340 of 2004

BETWEEN:

Darryl Francis Stansbury

Applicant

AND:

Chief Executive, Department of Corrective Services

Respondent

MOYNIHAN J – REASONS FOR JUDGMENT

CITATION:	*Stansbury v Chief Executive, Department of Corrective Services,* [2004] QSC 287
PARTIES:	**Darryl Francis Stansbury** Applicant **v** **Chief Executive, Department of Corrective Services** Respondent
FILE NO/S:	S4340 of 2004
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	Wednesday, 1 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	19 August 2004
JUDGE:	Moynihan J
ORDER:	**1. Application dismissed** **2. No order as to costs**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – COMMONWEALTH, QUEENSLAND AND AUSTRALIAN CAPITAL TERRITORY – GROUNDS FOR REVIEW OF DECISION – BREACH OF RULES – judicial review of a decision of a delegate of the Department of Corrective Services refusing remission of a term of imprisonment

	Corrective Services Act 2000 *Oakes v The Chief Executive, Department of Corrective Services* (2004) QSC 11 *Robertson v Chief Executive, Department of Corrective Services* [2004] QSC 99 *Walker v Corrective Services Commission* (Qld) [1998] 104A Crim R127
COUNSEL:	Applicant in person KA Mellifont for the Respondent
SOLICITORS:	Crown Law for the Respondent

[1] The applicant, seeks the judicial review of a decision by the Chief Executive not to grant him remission on the terms of imprisonment which he is serving.

[2] The applicant appeared on his own behalf although it is apparent that he had assistance in the preparation of his written material.

[3] On 19 November 2002, the applicant was sentenced in the District Court in Brisbane on counts of dangerous operation of a motor vehicle while adversely affected by an intoxicating substance, wilful damage and serious assault. He received a head sentence of two years and six months imprisonment.

[4] The sentencing judge described the applicant's conduct as a "very serious example" of dangerous driving and stated the applicant was lucky that no-one was killed or injured. A blood sample taken at the time revealed a "cocktail of various drugs" in the applicant's blood including amphetamines and morphine.

[5] On 3 March 2003 the applicant was sentenced for further offences, possession of a dangerous drug, obstruction of police, possession of stolen property, unlicensed driving, possession of a weapon, driving under the influence, failing to take reasonable care and precautions in respect of needles and syringe.

[6] The applicant had what could be referred to as an ongoing problem with heroin and other drugs for 20 years. That is reflected in his criminal history going back 20 years. His criminal history includes a large number of traffic offences and illegal use of motor vehicle, stealing, trespass, break enter and steal, attempted stealing, larceny, malicious injury, unlawful assault, offensive language, failure to appear, stealing from the person, driving whilst his licence was cancelled, resisting police, driving in a dangerous manner, malicious wounding, breaking and entering a place with intent, robbery in company, assault with intent to steal, threats to use actual violence whilst in company, pretending to be armed with a dangerous weapon, possession of weapons, possession of knife in a public place, breaches of fine options orders and of the *Bail Act*.

[7] The applicant has a statutory entitlement to be considered for remission after serving one-third of the two and a half year sentence. Had the maximum permissible remission been granted he would have been discharged on 14 April 2004. As things presently stand the applicant became eligible for post prison community based release on 15 November 2003 but did not apply. His full-time release date is 14 February 2005.

[8] On 5 May 2004 the respondent, by his delegate, decided not to grant the applicant remissions on the ground that he was not satisfied in terms of s75(2)(a) of the *Corrective Services Act* 2000 (the *Act)* that the respondent did not pose an unacceptable risk.

[9] The applicant seeks a review of the decision on the ground that the respondent's delegate did not afford him procedural fairness.

[10] Section 75 of the *Act* provides to the effect that the applicant was eligible for remission "only if" a number of specified conditions were satisfied. Section 75(2) subjects the grant of remission to the respondent being satisfied that the applicant's "discharge does not pose an unacceptable risk to the community" and "he had been of good conduct and industry".

[11] In this case, the respondent was not satisfied the applicant's discharge did not pose an unacceptable risk to the community. The applicant was not refused remission on the ground that the respondent was not satisfied he had been of good character and industry.

[12] Section 77 sets out the considerations to be taken into account in deciding whether the applicant's discharge or release did not pose an unacceptable risk to the community.

(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 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.

[13] The regime reflected in s77 and associated sections replaced an existing regime which had been considered in earlier cases. Cases decided under the earlier regime are of limited application. As PD McMurdo J stated in *Oakes v The Chief Executive, Department of Corrective Services* (2004) QSC 11 "if a prisoner had no legitimate

expectation of a grant of remission even though they had been of good conduct and industry". This was because the power to remit depended on the decision maker being properly satisfied that there was no unacceptable risk.

[14] If the Chief Executive is considering refusing to grant remission he must (see s 79 of the *Act)* give a person in the applicant's position a notice:-

(a) Stating the chief executive is considering refusing to grant remission…; 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…should not be refused

[15] All written submissions must be considered within 21 days and the prisoner informed by written notice whether the remission is refused.

[16] On 1 April 2004 the respondent's delegate wrote to the applicant stating that she was considering not granting the remission on the basis that she was not satisfied his discharge did not pose an unacceptable risk to the community.

[17] The letter stated that the delegate considered that the applicant had "failed to demonstrate your ability to self regulate your behaviour while under low levels of supervision or no supervision. I am also concerned that while you have maintained abstinence in a structured environment your history of offending indicates an inability to remain abstinent when you are required to self regulate your behaviour and that this has a direction correlation with your offending."

[18] On 15 April and 3 May 2004 the applicant wrote to the delegate stating why he believed he was no longer a risk to the community and attaching some 25 documents which the applicant requested the delegate take into account. That was done but remission was refused for the reason I stated earlier.

[19] The applicant contends that the respondent's delegate relied on information which was incorrectly interpreted and which the delegate was not qualified to assess. By "asserting" that the applicant was an unacceptable risk the delegate "ignored and minimised the applicant's rehabilitative efforts" and "consequently espouses the point of view that the programs conducted by (the department) are of little or no value in the rehabilitative process. It is also contended that the delegate relied on evidence having no probative value and did not act impartially "in that the substantability of evidence must take into account both the evidence that supports the determination and whatever evidence is in the record which fairly detracts from its weight."

[20] It is asserted that the decision was reached on evidence having no probative value and is not sustained by consideration of the material considered by the delegate.

[21] It is true, and it is reflected in the extensive material considered by the delegate

which is in evidence, that views were expressed as to whether or not the applicant continued to pose a risk to the community. This material has been subjected to a fairly detailed analysis in the applicant's written outline.

[22] It has, however, not been demonstrated that the delegate did other than take a different view of the effect of the considerations canvassed in the material than that for which the applicant contends in circumstances where that view was fairly open on the evidence and the delegate gave the applicant the opportunity to address her reservation which she did in response to her letter of 1 April 2004.

[23] As Jones J said in *Robertson v Chief Executive, Department of Corrective Services* [2004] QSC099 at [11] [12] minds may differ about evidence and the weight of evidence and different persons might reach conclusions on the same evidence. The court's task in cases such as this is not to judge the merits of the opinion of the Chief Executive's delegate but rather to consider whether there is a reviewable error of law.

[24] The applicant has been addressing the causes of the behaviour reflected in his offending conduct while he's been in custody with apparent success. He is understandably disappointed that this is not reflected in his being granted remission. It by no means follows from that, however, that the delegate's determination reflects a reviewable error.

[25] The applicant complained that the respondent's delegate was not qualified to assess the material. The delegate was, however, duly authorised to carry out the task of determining whether or not the applicant should be allowed remissions and no further qualification is required by the legislation. She was then obliged to consider the relevant material, afford the applicant an opportunity to address any adverse view, and did so.

[26] The applicant is critical of the delegate for not having obtained an updated risk needs inventory on the basis that an inventory completed on 9 December 2002 would not be an accurate assessment of the risk he constituted at later date. This was particularly in the light of his efforts to address the extent of his behaviour whilst in prison.

[27] There may be circumstances, (*Walker v Corrective Services Commission* (Qld) [1998] 104A Crim R127 is an example) where a decision maker's failure to update or obtain a psychological or similar report constitutes a reviewable error.

[28] In this case, the delegate considered a wide range of material relevant to the considerations raised by s77. The applicant was given the opportunity to put forward his case that that risk inventory was no longer accurate because of his endeavours, for example, to improve himself and did so.

[29] The applicant also complains about the respondent not having made available statistics dealing with the number of prisoners who had become eligible for remission and been granted it between 1999 and 2004 since they might tend to confirm his

submission of a blanket policy.

[30] It has been deposed to that information pertaining to the refusal of remission is not maintained and, in any event, without a good deal more it would not support the contention.

[31] The applicant's contention of a blanket policy is not supported by evidence, is contradicted by the responses, and is not reflected in the letter of 1 April 2004.

[32] The applicant complains that he was not notified that consideration was being given to not granting him remission at least 30 days prior to his eligibility date. It is true, that in this case there was non compliance with a policy expressed in those terms. That is regrettable but does not constitute a reviewable error.

[33] The considerations being those I have canvassed I dismiss the application. I make no order as to costs.