

SUPREME COURT OF QUEENSLAND

CITATION: *Swan v Chief Executive, Department of Corrective Services*
[2004] QSC 382

PARTIES: **STEPHEN SWAN**
(applicant)
v
**THE CHIEF EXECUTIVE, DEPARTMENT OF
CORRECTIVE SERVICES**
(respondent)

FILE NO/S: SC No 7421 of 2004

DIVISION: Trial

PROCEEDING: Application

ORIGINATING
COURT: Supreme Court at Brisbane

DELIVERED ON: 8 November 2004

DELIVERED AT: Brisbane

HEARING DATE: 19 October 2004

JUDGE: White J

ORDER: **1. Dismiss the application by the respondent to dismiss the applicant's application for review.**
2. Dismiss the application by the respondent for a stay of the applicant's application for review.
3. The applicant to provide particulars of the decision of the respondent, including the contents of the decision and the name of the decision maker within 21 days of the applicant receiving a copy of this order.

CATCHWORDS: CRIMINAL LAW – PROBATION, PAROLE, RELEASE ON LICENCE AND REMISSIONS – QUEENSLAND – where applicant sentenced to seven years imprisonment – where applicant re-offended whilst on parole – where applicant convicted and sentenced to cumulative sentence with no recommendation for parole – where applicant is seeking a recalculation of his discharge date in accordance with the provisions which apply to cancellation of a parole order under the *Corrective Services Act 2000* – whether the applicant's parole was a post-prison community based release order –

ADMINISTRATIVE LAW – JUDICIAL REVIEW
LEGISLATION – QUEENSLAND – JURISDICTION AND
GENERALLY – 'DECISION' WITHIN ACT'S
APPLICATION – GENERALLY – where the respondent

bought an application pursuant to s 48(1)(a)(i) of the *Judicial Review Act* to dismiss the application on the grounds that there is no operable decision capable of being review – whether the decision determining the applicant’s discharge date is one to which the *Judicial Review Act* applies

Corrective Services Act 1988 (Qld), s 75(1)(c), s 165, s 187, s 90(1), s 207

Corrective Services Act 2000 (Qld), s 75, s 151, s 152(1)(f), s 268A, s 268B

Corrective Services Amendment Act (No 2) (Qld) 2001

Corrective Services Regulations 1989 (Qld), s 29

Corrective Services Regulations 2001 (Qld)

Judicial Review Act 1991 (Qld), s 20, 48(1)(a)(i)

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321, cited

Minister for Aboriginal Affairs and Anor v Peko-Wallsend Ltd & Ors (1986) 162 CLR 24, cited

Swan v Chief Executive, Department of Corrective Services [2004] QCA 59; CA No 8898 of 2003, 14 May 2004, cited

- COUNSEL: G Long for the applicant/the respondent in principal proceedings
S Swan appeared on his own behalf
- SOLICITORS: Crown Solicitor for the applicant/the respondent in principal proceedings
S Swan appeared on his own behalf

- [1] The applicant, Mr Swan, has sought review of what he contends is a decision to which the *Judicial Review Act* 1991 applies, namely

“That the Respondent refused to adjust the applicant[’s] sentence in accordance with the *Corrective Services Act* 2000 (CSA 2000) as they are lawfully required.”

Mr Swan is aggrieved because if his sentence is calculated by reference to the provisions of the *Corrective Services Act* 2000 rather than the repealed *Corrective Services Act* 1988 under which it has been calculated he ought by now to have been discharged from prison.

- [2] Mr Swan wrote to the respondent on 28 July 2004 concerned at the process by which sentence calculations were made. Although couched in general terms it is clear that Mr Swan held those concerns in respect of his own sentence calculation and this understanding is reflected in the letter in response. Mr Swan contended (and contends) that Sentence Management at Borallan (where he is detained) have not applied ss 268A and 268B of the *Corrective Services Act* 2000 as they are required to do when calculating his release date. He contends that Sentence Management has made its calculations erroneously applying the provisions of the 1988 Act as demonstrated by the Sentence Calculations Manual in *Part 6* and the letter from Mr G A Wright, Executive Director, Operational Support Services of 19 August 2004 which relevantly said

“Your sentence calculation has been checked by staff in the Office of Sentence Management who confirm that it is correct. You were released to parole on 21 October 1996 and your parole was cancelled on 20 July 2000 as a result of you being convicted of further offences.

Given that your parole was cancelled prior to the commencement of the *Corrective Services Act 2000*, time at large is calculated under the *Corrective Services Act 1988*.”

- [3] The respondent has brought an application pursuant to s 48(1)(a)(i) of the *Judicial Review Act* to dismiss Mr Swan’s application on the grounds that there is no operable decision made by the respondent or identified by the applicant capable of being reviewed under the *Judicial Review Act*; and that Mr Swan has filed an application for special leave to appeal to the High Court from a decision of the Court of Appeal in *Swan v Chief Executive, Department of Corrective Services* [2004] QCA 59; CA No 8898 of 2003 which covers the same issues. Alternatively, the respondent seeks a stay of Mr Swan’s application pending the hearing and determination of the special leave application.
- [4] The respondent has also filed a request for further and better particulars of the application including particulars of the alleged decision, its contents and the name of the decision-maker.
- [5] Mr Swan appeared on his own behalf on this hearing of the respondent’s application for dismissal or stay. He was adamant that this application related to a different decision from that encompassed in the special leave application. In order to ascertain if that is so it is necessary to examine that earlier application and how it was approached by the Court of Appeal.
- [6] Mr Swan brought an application to review the conduct of the respondent in declining to grant him remissions on his sentence. Mackenzie J considered that complaint and a subsidiary matter of the expiry date of one sentence. His Honour dismissed the application on 16 September 2003. Mr Swan’s appeal from that decision was heard by the Court of Appeal on 10 March 2004 and judgment dismissing the appeal was given on 14 May 2004. Mr Swan’s application for special leave was filed on 11 June 2004 and the summaries of argument have since been filed. No date for the hearing has been set.
- [7] Mr Swan was sentenced to imprisonment for seven years for drug trafficking on 8 September 1993. He was recommended for parole eligibility after serving three years. On 21 October 1996 he was released on parole. He had then served three years 42 days of his seven year sentence. On 21 April 1999 he was arrested and charged with two offences of possession of dangerous drugs under the *Drugs Misuse Act* 1986 and released on bail. On 20 August 1999 he was charged with a further drug possession offence. He was convicted of these three offences on 20 July 2000 after a trial. He was sentenced to five years imprisonment in respect of one of the drug offences and three years for the other two all to be served concurrently amongst themselves but cumulative on the 1993 sentence. The sentencing judge recommended that Mr Swan be eligible to be considered for parole after serving two years of the five year sentence. Mr Swan had served 72 days of

pre-sentence custody. On appeal his five year sentence was reduced on 19 October 2000 to 3 years with no recommendation for parole eligibility outside the legislative scheme. The President, with whom the other members of the court agreed, said

“The applicant’s conviction and sentence on these offences during the parole period for the trafficking offence results in the cancellation of the parole period. The applicant must serve the unexpired portion of that sentence with no consideration for the time spent on parole. This factor was not discussed in detail by counsel with the learned sentencing Judge at the time of sentence.”

- [8] In August 2002 Mr Swan’s solicitors took up the question of his remissions with the respondent who answered that any eligibility which Mr Swan might have had to remissions had been extinguished by a combination of s 28 of the *Corrective Services Regulations* 1989 and s 207B of the *Corrective Services Act* 1988.
- [9] On Mr Swan’s behalf it was argued before the Court of Appeal (there were other submissions) that s 207B of the *Corrective Services Act* 1988 did not apply to him so as to prevent him being granted remissions and he was thus entitled to remissions under s 75 of the *Corrective Services Act* 2000. On 24 November 2000 the *Corrective Services Act* 2000 received assent and Chapter 10 then commenced with the remaining provisions commencing on 1 July 2001.
- [10] Chapter 10 concerned amendments to the *Corrective Services Act* 1988. Section 207B provided
- “(1) This section applies to a prisoner who was, before the commencement of this section, or who is, after the commencement of this section –
- ...
(c) released on parole under an order made under s 165.
- (2) ...
- (3) If this section applies to the prisoner because of subsection (1)(b) or (c) the prisoner’s eligibility for remission –
- (a) if the prisoner was released before the commencement of this section – is taken to have been extinguished when the prisoner was released; or
- (b) if the prisoner is released after the commencement of this section – is extinguished when the prisoner is released.”
- [11] As the Court of Appeal found, Mr Swan was a person who answered the description in s 207B(1)(c) which had the consequence that his eligibility for remission was taken to have been extinguished when he was released on parole. On 1 July 2001 the *Corrective Services Regulation* 2001 commenced. Section 21 repealed the *Regulation* of 1989. Also on 1 July 2001 s 75 of the *Corrective Services Act* 2000 commenced. It established a new regime about remissions in respect of prisoners serving a term of imprisonment imposed for an offence committed before the

commencement of the section. Mr Swan's two terms of imprisonment, in 1993 and 2000, were imposed in respect of offences committed before 1 July 2001.

[12] By legislative amendment on 13 November 2001 the *Corrective Services Amendment Act (No 2) 2001* came into force. New ss 268A and 268B were inserted into the *Corrective Services Act 2000*. These are the provisions which Mr Swan submits ought to govern his sentence calculation and thus release date. Those sections, although referred to by Fryberg J in Mr Swan's appeal were not the subject of submissions by his counsel and the court did not rely on them for the purpose of dealing with Mr Swan's remissions entitlement.

[13] Section 268A provides

“(1) This section applies to a prisoner sentenced for an offence committed before 1 July 2001, whether or not the prisoner was sentenced for the offence before 1 July 2001.

(2) On and from 1 July 2001—

(a) chapters 2 and 5 are the only provisions under which the prisoner may be released before the end of the period of imprisonment to which the prisoner was sentenced; and

(b) the only requirements for the granting of the release are the requirements that apply under this Act.

(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).

(4) Subsections (2) and (3) apply in relation to an application made by the prisoner and dealt with on or after 1 July 2001 even if the application was made before 1 July 2001.

(5) If a form of release for which the prisoner made an application before 1 July 2001 corresponds to a form of release that, after 1 July 2001, is available under chapter 5, the application must be dealt with, to the greatest practicable extent, as an application for the form of release under chapter 5, but this subsection does not authorise release before a date prescribed by section 135.

(6) This section prevails to the extent it is inconsistent with section 268 or 273.

(7) In this section—

“**expectation**” includes right, privilege, entitlement and eligibility.”

[14] Section 268B which relates to further transitional provisions about release does not apply to Mr Swan but because he has referred to it in his material, relevantly, it provides

“(1) Section 268A has no effect in relation to—

(a) a post-prison community based release order granted on or after 1 July 2001 but before 30 October 2001 on the basis of an application made before 1 July 2001 for a form of release that corresponds to a form of release available under chapter 5; or

(b) a decision made by a court before 30 October 2001 upholding, an action brought by a particular prisoner, that prisoner’s expectation to be released, or to be considered for release; or

(c) the terms of a release instrument made before 1 July 2001, or any decision relating to the making of the release instrument, giving a prisoner an expectation to be further released after, or to be considered for a further release taking effect after, 1 July 2001.

(2) For giving effect to terms mentioned in subsection (1)(c), a prisoner may be released at any time the prisoner may have been released under the terms if the repealed *Corrective Services Act 1988* had not been repealed.

(3) Subject to subsections (1) and (2) and without limiting section 268A, any requirement that may have existed after the repeal of the repealed *Corrective Services Act 1988* and before the commencement of this section that a person be dealt with in a way inconsistent with section 135(2) is extinguished.

(4) Section 268A and subsection (3) prevail to the extent they are inconsistent with the *Acts Interpretation Act 1954*, sections 20 and 20C(3), the Criminal Code, section 11(2), the *Penalties and Sentences Act 1992*, section 180(1) or any other law of similar effect.

(5) In this section—

“**expectation**” includes right, privilege, entitlement and eligibility.

“**release instrument**” means an instrument under which a prisoner was released.”

[15] The Court of Appeal considered the refusal to grant remissions to Mr Swan on the sentences imposed in 2000 although, as noted by Fryberg J, he had not previously sought such remissions. The court concluded that s 75 of the *Corrective Services Act 2000* which provides that a prisoner is only eligible for remission on sentence if the prisoner is serving “a term of imprisonment” as defined in the *Corrective Services Act 2000* imposed for an offence committed before the commencement of the section in respect of a term of imprisonment of two months or more and during the period of imprisonment the prisoner has not been released on parole under s 165 of the *Corrective Services Act 1988* applied to Mr Swan. Since Mr Swan had been released on parole he was not entitled to remissions.

[16] Although the Court of Appeal decision for which special leave is sought mentioned the legislation which is relevant to the present application the matter which Mr Swan wishes to agitate was only peripherally referred to. It is necessary, then, to look a little more closely at Mr Swan's contentions about the approach by the respondent to the calculation of his sentence.

[17] The respondent's Sentence Calculation Manual dealing with "time at large" concerns the situation where a prisoner remains in the community after certain orders which have allowed him to be there have been suspended or cancelled. Schedule 3 to the *Corrective Services Act* 2000, the dictionary, says "unlawfully at large" in relation to a prisoner

"... means the prisoner remains in the community after any of the following orders has been suspended or cancelled –

...

(g) a parole order

..."

[18] Section 187 of the repealed *Corrective Services Act* 1988 provided that where a prisoner who had been released on parole is sentenced to another term of imprisonment upon conviction for an offence committed during the parole period, the prisoner's parole is automatically cancelled whether or not the parole period has expired. That was the position of Mr Swan in July 2000 when he was convicted of and sentenced to a term of imprisonment for the further drug offences. The effect of cancellation of parole on sentence is set out in s 190(1) of the same Act.

"Upon the cancellation of a prisoner's parole, the original warrant of commitment or other authority for the prisoner's imprisonment or detention shall again be enforced and no part of the time between the prisoner's release on parole and the prisoner recommencing to serve the unexpired portion of the prisoner's term of imprisonment or detention, other than the period (if any) during which the prisoner was kept in custody consequent upon the prisoner's parole being suspended, shall be regarded as time served in respect of that term."

[19] That was the state of affairs when Mr Swan was returned to custody after being sentenced for the second group of drug offences in 2000. The period from the date of his release on 21 October 1996 until he was returned to custody on 20 July 2000 was not counted as time served. He still had approximately three years 10 and a half months of his 1993 seven year term of imprisonment remaining.

[20] Section 268A(2) provides that after 1 July 2001 chapters 2 and 5 are the only provisions under which a prisoner "may be released before the end of the period of imprisonment to which the prisoner was sentenced". Mr Swan is not seeking release before the end of the period of imprisonment to which he was sentenced. He is seeking a recalculation of his discharge date in accordance with the provisions which apply to the cancellation of a parole order under the *Corrective Services Act* 2000. "Released" as defined in Schedule 3 means released from a corrective services facility subject to the conditions of a post-prison community based release

order or a conditional release order. “Discharge” a prisoner means unconditionally release the prisoner from lawful custody. Section 152(1)(f) which is in chapter 5 provides that if a prisoner’s post-prison community based release order is cancelled because the prisoner was sentenced to another term of imprisonment for an offence committed during the term of the order the time for which the prisoner was released under the order before he committed the offence for which he was sentenced to another term of imprisonment is to be counted as time served. But Mr Swan’s parole was not a “post-prison community based release order” and was not made under s 151 of the *Corrective Services Act 2000*.

- [21] These were not matters agitated before or by the Court of Appeal and accordingly need not await the outcome of the special leave application.
- [22] The second question is whether the decision determining Mr Swan’s discharge date is one to which the *Judicial Review Act* applies. The decision is a final decision. It is not a preliminary determination or a step along the way to a major decision as discussed by Mason CJ in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 335-9.
- [23] My view about Mr Swan’s prospects of success are plain. Nonetheless, this is not the final hearing and I was not asked to proceed to hear and determine Mr Swan’s application under s 48(1)(b) that no reasonable basis for the claim is disclosed. Mr Swan was not informed that his application might be dismissed on grounds other than those in the amended application of the respondent. He should be given an opportunity to proceed to elaborate his arguments should he chose to do so. The respondent has a request for further and better particulars expressed, if I might say so, in far too complex a fashion. Although Mr Swan challenges the decision on a number of the grounds set out in s 20(2) of the *Judicial Review Act* his real challenge is that the decision was not authorised by the enactment under which it was purported to be made, s 20(2)(d). In my view Mr Swan’s challenge to the decision about how his release date has been arrived at does not involve a review of a decision in the sense described by Mason CJ in *Minister for Aboriginal Affairs and Anor v Peko-Wallsend Ltd & Ors* (1986) 162 CLR 24 at 40-1. The respondent knows what it is Mr Swan wants reviewed but to remove any doubt he should provide the matters sought in para 1 of the request namely the particulars of the alleged decision the applicant is seeking to review, the contents of the decision and the name of the decision maker.
- [24] The orders are
1. Dismiss the application by the respondent to dismiss the applicant’s application for review.
 2. Dismiss the application by the respondent for a stay of the applicant’s application for review.
 3. The applicant to provide particulars of the decision of the respondent, including the contents of the decision and the name of the decision maker within 21 days of the applicant receiving a copy of this order.