SUPREME COURT OF QUEENSLAND

CITATION:	*Fardon v Attorney-General for the State of Queensland & Anor* [2006] QSC 005
PARTIES:	**ROBERT JOHN FARDON** (applicant) v **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (first respondent) **CHIEF EXECUTIVE OF DEPARTMENT OF CORRECTIVE SERVICES** (second respondent)
FILE NO/S:	BS 9948 of 2005
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	27 January 2006
DELIVERED AT:	Brisbane
HEARING DATE:	1 December 2005
JUDGE:	Philippides J
ORDER:	**The application is dismissed.**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – STATUTORY POWERS AND DUTIES – where continuing detention order made under *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) – where first review required at the end of one year after the continuing detention order first had effect and afterwards at intervals of not more than one year after the last review was made – where first review of the continuing detention order made – whether first review required to be made within first anniversary of the continuing detention order – whether subsequent review required to be made by second anniversary of the continuing detention order *Acts Interpretation Act* 1954 (Qld), s 38 *Corrective Services Act* 2000 (Qld) *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 3 s 5, s 13, s 14, s 15, s 26, s 27, s 28, s 29, s 30, s 45, s 46, s 50 *A-G v Fardon* [2005] QSC 137

A-G v Fardon [2003] QSC 200
A-G v Fardon [2003] QSC 331
Attorney-General v Fardon [2003] QSC 370
Attorney-General (Qld) v Fardon [2003] QSC 379
Attorney-General v Foy [2005] QSC 1
Fardon v Attorney-General (Qld) (2004) 78 ALJR 1519

COUNSEL: V D O'Gorman for the applicant
M Hinson SC for the first respondent
R G Marsh for the second respondent

SOLICITORS: Prisoners Legal Service for the applicant
Crown Law for the first and the second respondents

PHILIPPIDES J:

Background

[1] This application concerns the construction of s 27 of the *Dangerous Prisoners (Sexual Offenders)* Act 2003 (Qld) ("the Act") which provides for the review of a continuing detention order made under the Act.

[2] The applicant, Robert John Fardon, was convicted on 30 June 1989 of rape, sodomy and assault occasioning bodily harm and sentenced to 14 years imprisonment. His term of imprisonment expired on or about 30 June 2003.

[3] On 17 June 2003 the Attorney-General brought an application for orders including an interim detention order pursuant to s 8 and a continuing detention order pursuant to s 13(5) of the Act. The applicant was detained pursuant to a number of interim detention orders made under the Act until the determination of the application for the continuing detention order. That application was heard by White J, who on 6 November 2003 made a continuing detention order that the applicant be detained in custody for an indefinite term.[1]

[4] An application for a review of the continuing detention order pursuant to s 27 of the Act was made by the Attorney-General on 1 November 2004. On 9 November 2004 Douglas J made a directions order in respect of the review hearing. That review hearing, which was the first review of the order, took place on 8 and 9 February 2005 before Moynihan J. On 11 May 2005 Moynihan J, affirming the decision of White J, ordered, pursuant to s 30(3) of the Act, that the applicant continue to be the subject of the continuing detention order.[2]

[5] The present application is for declarations that by s 27 of the Act:

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1 *Attorney-General (Qld) v Fardon* [2003] QSC 379.
2 *Attorney-General (Qld) v Fardon* [2003] QSC 137.

(a) "the first annual review … was required to have been completed with an order made by the Supreme Court by 6 November 2004"; and

(b) "the second annual review … was required to have been completed with an order in respect of that review having been made by the Supreme Court by 6 November 2005".

[6] The applicant also seeks an order that the continuing detention order be rescinded.

[7] The first respondent opposes the making of the declarations. The second respondent appeared on the application, but took no active role.

The provisions and scheme of the Act

[8] The stated objects of the Act are expressed in s 3 of the Act as being:

(a) to provide for the continued detention in custody or supervised release of a particular class of prisoner[3] to ensure adequate protection of the community; and

(b) to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation.

[9] Under Pt 2 of the Act, if the court is satisfied that the prisoner is a serious danger to the community, because of an unacceptable risk that the prisoner will commit a serious sexual offence if released, or released unsupervised, the court may make an order under s 13 of the Act. That is, it may make a continuing detention order that the prisoner be detained in custody for an indefinite term for control, care or treatment (s 13(5)(a)), or a supervision order that the prisoner be released from custody subject to the conditions stated in the order (s 13(5)(b)). The paramount consideration in deciding whether to make such orders is the need to ensure adequate protection of the community (s 13(6)).

[10] The Act specifies that a continuing detention order has effect in accordance with its terms until rescinded by the court's order (s 14(1)(b)) and that a person subject to a continuing detention order remains a prisoner (s 14(2)). A supervision order has effect for the period specified in the order (s 15(b)).

[11] Part 3 of the Act which is entitled "Annual Reviews" mandates a system of review of a prisoner's continued detention under a continuing detention order. The stated purpose of Pt 3 "is to ensure that a prisoner's continued detention under a continuing detention order is subject to regular review" (s 26). Section 27 of the Act places an obligation on the Attorney-General to bring the requisite application for review so as to ensure that this purpose is effected. Section 27 of the Act provides:

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[3] A "prisoner" is defined as a person detained in custody who is serving a period of imprisonment for a serious sexual offence, or serving a period of imprisonment that includes a term of imprisonment for a serious sexual offence: see s 5(6). "Serious sexual offence" is one of a sexual nature involving violence or against children.

> "**27 Review- periodic**
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> (1) If the court makes a continuing detention order, the court must review the order at the end of 1 year after the order first has effect and afterwards at intervals of not more than 1 year after the last review was made while the prisoner continues to be subject to the order.
>
> (2) The Attorney-General must make any application that is required to be made to cause the reviews mentioned in subsection (1) to be carried out."

[12] After the first review is made, the prisoner may also be given leave pursuant to s 28 of the Act to bring an application for review in exceptional circumstances:

> "**28 Review - application by prisoner**
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> (1) The prisoner may apply to the court for the prisoner's continuing detention order to be reviewed at any time after the court makes its first review under section 27(1) if the court gives leave to apply on the ground that there are exceptional circumstances that relate to the prisoner.
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> (2) The registrar must immediately forward a copy of the application to the Attorney-General.
>
> (3) As soon as practicable after the making of the application, the court must give directions to enable the application to be heard.
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> (4) Subject to any directions given by the court, the application must be heard as soon as practicable after the application is made."

[13] The procedure on a review hearing is dealt with in s 29 of the Act:

> "**29 Psychiatric reports to be prepared for review**
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> (1) Unless the court otherwise orders at the hearing of any application under this Act, for the purposes of a review under section 27 or 28, the chief executive must arrange for the prisoner to be examined by 2 psychiatrists.
>
> (2) For subsection (1) and the purposes of a review, sections 11 and 12 apply with necessary changes.
>
> (3) Subsection (1) authorises examinations of the prisoner by the 2 psychiatrists." (footnotes omitted)

[14] The orders that may be made on the hearing of the review are dealt with in s 30 of the Act:

> "**30 Review hearing**
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> (1) This section applies if, on the hearing of a review under section 27 or 28 and having regard to the matters mentioned in section 13(4), the court affirms a decision that the prisoner is a

> serious danger to the community in the absence of a division 3 order.
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> (2) On the hearing of the review, the court may affirm the decision only if it is satisfied –
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> (a) by acceptable, cogent evidence; and
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> (b) to a high degree of probability;
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> that the evidence is of sufficient weight to affirm the decision.
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> (3) If the court affirms the decision, the court may order that the prisoner –
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> (a) continue to be subject to the continuing detention order; or
>
> (b) be released from custody subject to a supervision order.
>
> (4) In deciding whether to make an order under subsection (3)(a) or (b), the paramount consideration is to be the need to ensure adequate protection of the community.
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> (5) If the court does not make the order under subsection (3)(a), the court must rescind the continuing detention order." (footnotes omitted)

The applicant's submissions

[15] The applicant submitted that what s 27(1) of the Act contemplated were periods of continuing imprisonment that could extend no longer than one year after the continuing detention order first had effect or the last review was made. The applicant contended that the proper construction of the words "the court must review the order at the end of 1 year after the order first has effect" in s 27(1), required that the review be both heard and determined by making of an order under s 30 of the Act *by or before* the anniversary of the continuing detention order first taking effect. In effect, the applicant submitted that the obligation to first review the order "at the end of 1 year" was an obligation to complete a review by making a determination "within 1 year". It was thus contended that the first review was required to be carried out and determined with an order made by 6 November 2004.

[16] In support of these submissions the applicant placed reliance on dicta emphasising the importance of the right to personal liberty as the most fundamental of all legal rights and on the rule of statutory construction that presumes a construction which favours liberty where fundamental rights and freedoms are impaired.[4]

[17] The applicant further contended that not only was the first review required to be completed and determined by 6 November 2004, but that irrespective of when

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[4] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 per Gleeson CJ at [30]; *Director Public Prosecutions v Serratore* (1995) 38 NSWLR 137 per Kirby P (as he then was) at 142; *A-G v Fardon* [2003] QSC 331 per Atkinson J at [19]-[24]; *Attorney-General v Fardon* [2004] QSC 370 per White J at [23] and [25]; *Attorney-General v Foy* [2005] QSC 1 per Douglas J at [11].

the first review was actually made, the date of 6 November 2004 remained the determinative date for the calculation of the time period by which subsequent reviews were to be made, so that the second review was required to be completed by 6 November 2005. It was thus contended by the applicant that, in respect of the first review conducted by Moynihan J, while his Honour did not deliver his decision ordering the applicant to continue to be the subject of a continuing detention order until 11 May 2005, that order in fact took effect from 6 November 2004. It was therefore contended that his Honour's order did not have effect beyond one year after the order of White J which took effect from 6 November 2004. Consequently, it was argued that the order of Moynihan J lapsed on 6 November 2005 and that no further review having been made by that date, the applicant ought to be released from detention.

The first respondent's submissions

[18] The first respondent argued against the construction of s 27(1) urged by the applicant, pointing to textual difficulties and considerations of practical convenience and fairness which militated against the applicant's approach.

[19] In respect of the textual obstacles, the first respondent observed that the requirement to review the detention order initially "at the end of 1 year" after the order first took effect was not expressed as one to review the order "before", "by" or "within" a year of its first taking effect. The first respondent submitted that what the words "at the end of 1 year after the order first has effect" required was that the review commence after 1 year had elapsed since the order first had effect and, applying s 38(4) of the *Acts Interpretation Act* 1954 (Qld), was to be completed as soon as possible. The first respondent thus submitted that the requirement that the court "review" the order at the end of 1 year was satisfied by the commencement of the review process, not the completion of the review by the time specified in s 27(1).

[20] In support of this analysis, the first respondent submitted that, in the expression "the court must review the order", review is used as a verb and expressed as an action which the court must take. That action involved a hearing of an application for review (ss 45(1), 45(2), 30(1) and 30(2)) and if necessary the giving of directions in relation to the conduct of an application for review (s 46). That process, it was submitted, involved an independent examination of the circumstances prevailing when it was conducted, requiring the court to hear evidence in circumstances where the issues upon which the court was required to adjudicate were likely to require time for consideration of the evidence and the preparation of reasons for judgment and where considerations of procedural fairness might call for an adjournment of the hearing. Citing *Cooper Brookes (Wollongong) Pty. Ltd. v FCT*, it was submitted that a construction which avoided inconvenience or injustice was to be preferred.[5] It was thus submitted that considerations of practical convenience and fairness also militated against a construction which required that the review be completed by the making of a decision or order under s 30 within 1 year after an order first had effect.

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5 (1981) 147 CLR 297 at 305.

[21] As regards the second declaration sought, the first respondent submitted that it was based on an erroneous construction of s 27(1) and should be refused. The first respondent pointed to the terminology used in s 27(1) requiring that subsequent reviews occur at "intervals of not more than 1 year after the last review was made". It was argued that a review is only "made" when it is concluded by the making of a decision or order under s 30(3) or s 30(5) on the hearing of the application (see s 45(2)) and it is only if a s 30(3)(a) order is made that s 27(1) requires a further review. It was therefore submitted that in the present case the last review was "made" when it was concluded by the order made on 11 May 2005 and that the second review was required no more than 1 year from that date.

Whether the first review was required to have been completed by 6 November 2004

[22] What s 27(1) specifies is that the court must first review the continuing detention order "at the end of 1 year after the order first has effect". For present purposes, that means at the end of one year after 6 November 2003, ie 6 November 2004. As mentioned, the application for the first review was filed by the Attorney-General on 1 November 2004, with a directions hearing on 9 November 2004, the review hearing taking place on 8 and 9 February 2005 and an order under s 30 being made on 11 May 2005.

[23] I accept the first respondent's submissions that there are textual difficulties in the construction of s 27(1) urged by the applicant as to the meaning of the expression "at the end of 1 year after the order first has effect". If the intention of the legislature was that the court first review the continuing detention order "by" or "within" 1 year of the order first having effect, one would have expected that to have been stated. That would have been a simple drafting exercise.[6] In my view the expression "at the end of 1 year" does not mean "before", "by" or "within" the end of 1 year. I accept the first respondent's submission that, in specifying that the court review the order "at the end of 1 year after the order first has effect", s 27(1) prescribes the period of time, being 1 year after the order first has effect, that must elapse before the court reviews the detention order. It also follows that the terminology used in s 27(1) is not apt to require the first review to be completed by the making of a decision or order under s 30 by the end of the 1 year period. However, it is implicit, given the purpose of Pt 3 and the intrusion on personal liberty that a detention order entails, that the review is to be completed as soon as is practically possible.

[24] It follows that I reject the applicant's submission that the detention order was first required to be reviewed by 6 November 2004 and the application in respect of the first declaration sought is refused.

Whether the second review was required to have been completed by 6 November 2005

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[6] Such an approach is adopted for the purpose of s 171(1) of the *Penalties and Sentences Act* 1992 (Qld) which provides for the first review of an indefinite sentence within 6 months after certain specified events have occurred.

[25] Nor do I consider that there is any basis for the making of the second declaration sought.

[26] There is a variety of terminology used in Pt 3 in respect of the frequency required for the review of a continuing detention order. The heading of Pt 3 refers to "annual reviews", s 26 speaks of the purpose of Pt 3 being to ensure "regular" reviews, while the heading of s 27 refers to "periodic" reviews.

[27] In my view, s 27(1) does not require second and subsequent reviews by the anniversary of the initial continuing detention order taking effect. Notwithstanding the heading of Pt 3, s 27(1) clarifies that such reviews are to be annual in the sense that they are to be at intervals of not more than one year, with such intervals being calculated from the date when the last review "was made". That position is reinforced when regard is had to the overall scheme of the Act, which it is relevant to consider in construing s 27. The scheme established under the Act is one which permits continuing detention for an indefinite term, if the court considers that a prisoner is a danger to the community because there is an unacceptable risk that the prisoner will commit a sexual offence, but subjects such indefinite detention to annual review. It is not one whereby an order for continued detention is made for a finite term of years, to be renewed annually upon the expiry of the term.

[28] I also consider that the expression "last review was made" refers to the date when the review is determined by the making of a decision and orders under s 30 of the Act upon the hearing of the application. This interpretation is supported by s 28(1) which only permits an application to be brought by a prisoner after the court *makes* its first review under s 27(1). It is also supported by ss 45(2) and (4) which refer to the court *making* a decision or order on an application for review.

[29] It follows that the second review was not required to have been made no later than 1 year after 6 November 2004, ie by 6 November 2005. Rather the relevant date for the calculation of the time frame for the second review is 11 May 2005. The second declaration sought is refused.

[30] Having said that, there is a distinction made in the terminology used in s 27(1) to specify the timeframe required for a first review and for a subsequent review. The order is to be first reviewed "at the end of 1 year after the order first has effect", whereas subsequent reviews are required at intervals of "not more than 1 year after the last review was made". It is therefore of utmost importance that the application for review which the Attorney-General is charged to make to cause the review to be carried out is brought with reasonable dispatch, so that the continuing detention order can be reviewed by the court within the time prescribed.

[31] While the legislature has expressed a clear intention that in certain specified circumstances the liberty of the individual may be curtailed, that is counter-balanced by the mandatory review provisions contained in Pt 3 of the Act. The review provisions are a significant feature of the Act and are recognised as an

important hallmark of the judicial process set up under the Act.[7] It is clearly of great importance that the mandated review be conducted expeditiously and that the requisite application by the Attorney-General for the review to be carried out is brought promptly. Indeed, if the requisite application for review by the Attorney-General is not made in a timely manner so as to enable the review process to proceed expeditiously, a prisoner is not left without recourse. He or she might be given leave to apply for a review under s 28 on the ground of exceptional circumstances.

Whether the continued detention order ought to be rescinded

[32] But in any event, even if contrary to my view, there was a failure to review the continuing detention order in the time period prescribed by s 27(1) of the Act, I do not consider that such a failure results in the applicant being entitled to be released, as contended for by the applicant.

[33] As mentioned, the applicant was detained pursuant to various interim detention orders, in addition to the continuing detention order of 6 November 2004. By virtue of s 50 of the Act, each of those orders is taken to be a warrant committing the applicant into custody in the sense spoken of in the *Corrective Services Act* 2000 (Qld).

[34] By s 14(1) of the Act, the order of White J of 6 November 2004 took effect from that date and continues to have effect until rescinded by an order of the court. The order of Moynihan J under s 30(3)(a) made on the first review did not extend the term of the continuing detention order of 6 November 2004, but rather affirmed the primary decision of White J that the prisoner is a serious danger to the community.[8] The order made pursuant to s 30(3)(a) where the primary decision is affirmed is, by the terms of that section, one that the prisoner continue to be subject to *the* continuing detention order.

[35] Furthermore, the continuing detention order can only be rescinded under the Act by an order under s 30(5) on the hearing of an application for review under ss 27 or 28. Although the Act imposes a system of mandatory review, it is not the case that a prisoner may be released from a continuing detention order or that such an order expires if the time period prescribed for review is not complied with. There is no basis upon which the continuing detention order can be rescinded on the present application.

Orders

[36] The application for the declarations and an order rescinding the continuing detention order is refused. The application is therefore dismissed.

Costs

[37] On the issue of costs, the first respondent accepted that matters of public interest were raised in the application, such that it was appropriate that no order for costs be made even if the applicant was unsuccessful in his application.

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7 *Fardon v Attorney-General (Qld)* (2004) 78 ALJR 1519 at [114] - [115].

8 *Fardon v Attorney-General (Qld)* (2004) 78 ALJR 1519 at [112].

That was a proper concession. Accordingly, although the application is dismissed, I make no order as to costs.