SUPREME COURT OF QUEENSLAND

CITATION:	*Abbott v Chief Executive, Department of Corrective Services* [2006] QSC 283
PARTIES:	**BRENDEN JAMES ABBOTT** (applicant) **v** **CHIEF EXECUTIVE, DEPARTMENT OF CORRECTIVE SERVICES** (respondent)
FILE NO:	BS3046/06
DIVISION:	Trial Division
PROCEEDING:	Application for judicial review
DELIVERED ON:	4 October 2006
DELIVERED AT:	Supreme Court, Brisbane
HEARING DATE:	26 September 2006
JUDGE:	Wilson J
ORDER:	**1. The application is dismissed.** **2. The applicant is to pay the respondent's costs of and incidental to the application, to be assessed on the standard basis.**
CATCHWORDS:	CRIMINAL LAW – PROBATION, PAROLE, RELEASE ON LICENCE AND REMISSIONS – QUEENSLAND – where the authorised delegate of the Department of Corrective Services refused to grant remission – where prisoner convicted of offences committed during term of imprisonment – where the decision maker was not satisfied that the applicant did not pose an unacceptable risk to the community and had been of good conduct and industry – where the decision maker considered the applicant's behaviour prior to the latest offence committed in the course of the term of imprisonment – whether this was an error of law *Corrective Services Act* 2000 (Qld) s 75(4), s77, s 78 *Judicial Review Act* 1991 (Qld) s 30
COUNSEL:	D O'Gorman for the applicant MJ Burns for the respondent
SOLICITORS:	Nyst Lawyers for the applicant Crown Solicitor for the respondent

[1] **WILSON J:** The applicant seeks a statutory order of review in respect of a decision of the respondent made on 1 February 2006 to refuse him remission on a 10 year sentence for armed robbery in company. The decision was made pursuant to s 75(4) of the *Corrective Services Act* 2000 (Qld), which provides –

> "**Eligibility for remission**
> …
>
> (4) If the prisoner is convicted of any offence committed during the term of imprisonment, the chief executive may grant remission of up to one-third of the balance of the term after the offence was committed 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 since the offence was committed; and
>
> (c) of anything else prescribed under a regulation."

[2] The applicant was born on 8 May 1962. He has a long history of crimes of violence and dishonesty committed in Western Australia and Queensland. The following are of most significance.

(a) On 30 March 1988 the applicant was convicted of robbery whilst armed in company and other offences by the Supreme Court of Western Australia and sentenced to 10 years imprisonment cumulative on a three year sentence for breaking and entering with intent. Eighteen months into that sentence he escaped from a Western Australian prison. Whilst at large he committed offences in Queensland.

(b) On 7 June 1996 Judge Hoath sentenced the applicant to 9 years imprisonment for armed robbery committed on 20 January 1995.

(c) On 2 May 1997 Judge Pratt QC sentenced the applicant to 9 years imprisonment for armed robbery on 16 April 1992 and 10 years imprisonment for armed robbery whilst in company on 24 December 1993. The sentences were ordered to be served concurrently and concurrently with the 9 years imposed by Judge Hoath. The decision under review was to refuse remission on the 10 year sentence.

(d) On 5 November 1997 the applicant escaped from a high security prison and was at large for 182 days. On 14 September 1998 Senior Judge Trafford-Walker sentenced him to 6 years imprisonment for escaping lawful custody and four counts of serious assault. The sentences were ordered to be served concurrently with each other but cumulatively upon the sentence currently being served. The offences were declared to be serious violent offences. An application for leave to appeal against sentence was dismissed.

(e) On 29 June 1999 Judge Boulton sentenced the applicant to 7 years imprisonment for armed robbery and 6 years imprisonment for unlawful use of

a motor vehicle with a circumstance of aggravation committed whilst at large. The terms were ordered to be served concurrently with each other but cumulatively upon the other sentences already being served. The armed robbery was declared to be a serious violent offence.

[3] The applicant's full-time release date is 29 October 2020. The effect of granting him the remission would be to advance the date upon which he will commence to serve the terms ordered to be served cumulatively upon the 10 year term. He has also to complete the sentence imposed in Western Australia in 1988.

[4] On his return to custody, the applicant was placed under maximum security where he remained until the decision not to continue with a maximum security order was made on 26 May 2004. He commenced a Reintegration Management Plan on 10 August 2004. He has been convicted of one offence since his return to custody: on 22 February 2001 he was convicted of wilful damage of a security or communications system of a prison committed on 25 October 2000 and sentenced to 6 months imprisonment to be served concurrently with the sentences already being served.

[5] Counsel for the applicant's submissions were premised on the decision under review being to refuse remission on the balance of the 10 year sentence after the offence on 25 October 2000. However, there is nothing expressly to that effect in the terms of the decision or the reasons for it.

[6] There have been incidents of poor behaviour within the prison system apart from the offence committed on 25 October 2000. The decision-maker referred to 11 reportable incidents and 3 major breaches. The major breaches were –

(a) on 25 October 2000 21 cms of wire was missing from an electric shaver, and five cms of wire was found concealed in the stereo volume control;

(b) on or about 1 February 2005 the applicant produced some spreadsheet documents which he said would be used for harmless amusement in his accommodation unit, but which appear to have been for use in gambling;

(c) on 28 February 2005 the applicant used indecent, insulting and threatening language to a Corrective Services officer and invited physical confrontation.

The decision-maker did not particularise the 11 reportable incidents. There is a Violation History at exhibit AH25 to her affidavit filed on 3 July 2006, which covers a 10 year period from 1995 to 2005. Suffice it to say that there were incidents before and after the applicant's escape and return to custody, and in the period after his return to custody there were incidents before, contemporaneous with, and after the offence committed on 25 October 2000.

[7] On 14 October 2005 the Deputy Director-General of the Department of Corrective Services wrote to the applicant advising him that she was considering not granting him remission with respect to the 10 year term of imprisonment on two bases -

(a) that she was not satisfied that he did not pose an unacceptable risk to the community;

(b) that she was not satisfied he had been of good conduct and industry.

She called on him to show cause why remission should not be refused.

[8] On 10 January 2006 the Deputy Director-General received a response from the applicant making submissions why remission should not be refused.

[9] On 1 February the Deputy Director-General decided not to grant remission, and informed the applicant accordingly. On 13 March 2006 she provided him with a statement of reasons for her decision.

[10] On 10 April 2006 the applicant filed this application for judicial review of the decision to refuse him remission, and it was heard on 26 September 2006. Although a number of grounds of review were set out in the application, only three were pursued in written submissions and at the hearing -

(i) failure to follow procedures required by law to be observed in relation to making the decision;

(ii) error of law; and

(iii) taking irrelevant considerations into account in the exercise of the power.

[11] In her statement of reasons the decision-maker set out the materials she had considered: the applicant's criminal history, various sentencing remarks, and the applicant's conduct within the prison system. Then, under the heading *The decision was made for the following reasons* she set out in about 3 typewritten pages reasons for concluding -

> "...that I was not satisfied that your discharge did not pose an unacceptable risk to the community and that that [sic] you have not been of good conduct and industry during the period under consideration in accordance with section 75 of the *Corrective Services Act 2000*."

The material in those 3 pages may be summarised as follows -

(a) the applicant's criminal history - persistent offending, somewhat of a pattern related to armed robbery and escape, a number of offences of violence, court sanctions not acting as a personal deterrent to continued offending;

(b) observations of Dr Peter Mulholland, psychiatrist, in a report dated 11 September 1998 about the applicant's frame of mind and difficulties serving time in custody - the decision-maker expressing the view that they did not warrant the view that the applicant's institutional conduct and industry had been acceptable;

(c) the major breach in February 2005 for using indecent, insulting, obscene, threatening language;

(d) that the Sentence Management Co-ordinator and the General Manager did not recommend that the applicant be granted remissions and considered him not to have been of good conduct and industry and as posing an unacceptable risk of reoffending;

(e) a report by the MSU Counsellor dated 24 March 2003 that after initially refusing intervention the applicant had attended 7 counselling sessions and had been beneficially occupied in Narrative Therapy, had complied with the Management Plan and was not posing a behavioural management problem within the MSU;

(f) participation in courses - cognitive skills (completed May 1999), anger management (completed September 2000), enrolment in a spreadsheet course (unable to be completed for administrative reasons), keenness to continue with courses relating to information technology and language studies;

(g) failure to participate in psychological assessment because prison management had refused his request to have sessions with the assessing psychologist audiotaped;

(h) a submission by the applicant about the interpretation of s 75(6) which the decision-maker rejected;

(i) the applicant's comments about the breaches, the decision-maker observing that in each instance the breach was found proved and punishment imposed;

(j) "relevant Legislation and Procedure together with all aspects of the prisoner[’]s case, information contained within the document and the comments of the General Manager and Sentence Management Team;"

(k) the applicant's comments about the length of his total sentence considering the Queensland and Western Australian sentences – which the decision-maker considered did not provide any additional information which should influence her decision.

[12] The applicant's criminal history is clearly relevant to the assessment of whether he posed an unacceptable risk to the community: s 77(c), (d). His counsel conceded this. But, he submitted, the decision-maker had erroneously considered incidents and/or breaches which occurred prior to 25 October 2000, and there is nothing in her statement of reasons to indicate that she turned her mind to the question whether the applicant had been of good conduct and industry since the offence on 25 October 2000. He submitted -

> "17. On the other hand, it is apparent that the decision-maker took into account matters that occurred <u>before</u> the wilful damage of security or communication system of a prisoner [sic] was committed on 25 October 2000.
>
> 18. The Statement of Reasons discloses that the respondent considered that the applicant has been the subject of 11 reportable incidents. However, this is incorrect:
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> (a) six of the alleged incidents occurred prior to 25 October 2000 and should not have been taken into consideration by the respondent;
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> (b) two of the alleged incidents occurred on the same day of the 25 October 2000 offence (but appear to have been

reported on 26 October 200[0]) and accordingly should not have been taken into consideration by the respondent;

(c) the respondent has taken into account the commission of an escape by the applicant and four offences of serious assault committed during the subject sentence and considers these to be a '*clear example of non-compliance with the requirements to which* [the applicant] *was subject …'*, incidents which occurred prior to 25 October 2000.

(d) the respondent has considered a report from a Maximum Security Unit Counsellor regarding the applicant's reluctance to undertake psychological assessment; and

19. Further, the respondent considered the offence of '*wilful damage of a security or communications system of a prison*' of 25 October 2000. This was the last offence for which the applicant was convicted and accordingly is irrelevant to the applicant's conduct and industry from the date of that offence.

20. It is submitted that this constitutes:

(a) a failure to follow procedures that were required by law to be observed in relation to the making of the decision under review; and/or

(b) an error of law in the making of the decision under review; and/or

(c) taking irrelevant considerations into account in the exercise of the power."

[13] The decision-maker's reasons are largely a chronological recitation of the applicant's offending and performance within the prison system. They do not deal discretely with those matters considered in concluding she was not satisfied under paragraph (a) and paragraph (b) respectively of subsection (4) of s 75.

[14] The submissions for the applicant overlook the first offences committed during the 10 year term (the escape from custody and four serious assaults on 5 November 1997) and the offences committed whilst at large. Where a prisoner has been convicted of more than one offence committed during the term of imprisonment, there is no warrant for selecting the last offence as the time since which his conduct and industry are relevant under s 75(4)(b). As counsel for the respondent submitted–

"[11] … However, because there was more than one episode of offending on the part of the Applicant during the term, the decision-maker was right to consider the Applicant's conduct and industry from the date of the first episode.

[12] To do otherwise would be to ignore the plain dictates of the provision and would potentially lead to absurd results, not the least of which would be to unjustifiably truncate the period of conduct to be considered. In the absence of clear language shutting out the longer period from consideration, such an outcome could not have been intended."

[15] Sections 77 and 78 contain lists of matters which must be taken into account in assessing risk to the community and good conduct and industry, although there may be further relevant matters in any particular case.

"**77 Risk to community**

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;

(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.

78 Good conduct and industry

In deciding whether a prisoner has been of good conduct and industry, the chief executive must consider, but is not limited to considering, the following –

(a) whether the prisoner has complied with all requirements to which the prisoner was subject;

(b) whether the prisoner has undergone separate confinement for a major breach of discipline;

(c) whether the prisoner has participated in approved activities or programs to the best of the prisoner's ability;

(d) anything else prescribed under a regulation."

[16] The applicant's behaviour from the time the 10 year term commenced was relevant to the assessment of risk to the community. See in particular s 77(a), (c), (d), (f), (g) and (h), and the decision-maker did not err in taking his behaviour over the whole of that period into account under s 75(4)(a).

[17] Because the applicant's conduct and industry since 5 November 1997 were to be assessed under s 75(4)(b), the decision-maker did not make any error in considering his behaviour before and on 25 October 2000.

[18] In his oral submissions, counsel for the applicant submitted that if the decision maker had not considered matters relevant to s75(4)(a) and (b) together she may have come to a different conclusion as to whether the applicant posed an unacceptable risk to the community. This argument is unpersuasive: the decision maker did not take into account matters that were irrelevant to the risk the appellant posed to the community.

[19] Unless the decision-maker was satisfied that the applicant did not pose an unacceptable risk to the community, the discretion to grant remission was not enlivened. Even if, contrary to my view, there was a reviewable error in the application of paragraph (b), in the circumstances I would decline to exercise discretion to make a statutory order of review: *Judicial Review Act* 1991 (Qld) s 30.

[20] The application is dismissed.