

SUPREME COURT OF QUEENSLAND

CITATION: *Allison v Chief Executive, Department of Corrective Services*
[2007] QCA 52

PARTIES: **ALEXANDER ALLISON**
(applicant/appellant)
v
**CHIEF EXECUTIVE, DEPARTMENT OF
CORRECTIVE SERVICES**
(respondent)

FILE NO/S: Appeal No 8027 of 2006
SC No 5362 of 2006

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING
COURT: Supreme Court at Brisbane

DELIVERED ON: 2 March 2007

DELIVERED AT: Brisbane

HEARING DATE: 19 February 2007

JUDGES: McMurdo P, Jerrard JA and Mackenzie J
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDER: **1. Allow the appeal**
**2. Set aside the decision of 30 June 2006 that the appellant
be classified low security**
**3. That the appellant's classification as at 30 June 2006 be
reconsidered by the respondent or by an officer holding
an unlimited delegation of the powers then given under
s 12(2) and s 12(4) of the *Corrective Services Act 2000***
**4. The respondent pay the appellant's costs for the appeal
and costs below**

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW AT
COMMON LAW – EXCESS OF POWER AND
DEFECTIVE USE OF POWER – ABUSE OF
DISCRETIONARY POWER – CONSIDERATION OF
IRRELEVANT MATTER OR REFUSAL TO CONSIDER
RELEVANT MATTER – where the *Corrective Services Act
2000* (Qld) required the respondent to make and review
prisoner classifications – where the respondent delegated said
authority – where the Sentence Management Review Team
had recommended the appellant be given open classification
– where the appellant was given low security classification –

whether the respondent had impermissibly narrowed the scope of review required by the *Corrective Services Act 2000* (Qld)

Acts Interpretation Act 1954 (Qld), s 27A(1)

Corrective Services Act 2000 (Qld), s 12(2), s 12(3), s 12(4)

Corrective Services Act 2006 (Qld), s 13(1)(b), s 13(2), s 363(3), s 363(4)

Judicial Review Act 1991 (Qld), s 20(2)(b)

Public Service Act 1996 (Qld), s 57(1)

Griffiths v Chief Executive, Department of Corrective Services, unreported, McMurdo J, BS No 6692 of 2005, 4 August 2006, considered

COUNSEL: J Fenton for the appellant
J Logan SC, with G Long SC for the respondent

SOLICITORS: Qld Prisoners' Legal Service for the appellant
Crown Solicitor for the respondent

- [1] **McMURDO P:** The appellant has been serving a life sentence since 13 July 1993 when he was 19 years old for murdering a 16 year old youth. He is now 33 years old. He appeals against the learned primary judge's dismissal of his application for judicial review of the respondent's decision of 30 June 2006 classifying him as a low security prisoner.
- [2] Jerrard JA has set out the relevant facts, statutory provisions and competing contentions. I agree that the appeal should be allowed and, subject to the following, with his reasons.
- [3] The Chief Executive's delegation to the General Manager of his obligation to classify a prisoner under s 12 *Corrective Services Act 2000* (Qld) was subject to conditions. A delegation may be limited and subject to conditions: see s 27A(2)(a) and 27A(4) *Acts Interpretation Act 1954* (Qld). The relevant limitation on the General Manager's delegated power as the appellant's case was argued at first instance and in this Court was "For a prisoner serving a period of imprisonment of ten years or more, a General Manager may only classify a prisoner open security if the prisoner is already classified open security."¹ The appellant was a prisoner serving a period of imprisonment of 10 years or more and on 30 June 2006 was not an open security classified prisoner. The Chief Executive's limited and conditional delegation to the General Manager of his power under s 12 in my view meant that the General Manager could only exercise that power in respect of a prisoner serving a period of imprisonment of 10 years or more where the prisoner was classified as open security. Otherwise, the General Manager would be exercising a delegated power under s 12 impermissibly fettered in its terms by the narrowing of the scope of the review required to be made by the Chief Executive under that section. It

¹ The delegation was further limited by these terms: "Except for a prisoner who is or has previously been (during the current or any previous period of imprisonment) classified maximum security". The Court enquired whether that exception applied to the appellant but neither party made that submission either at first instance or in this Court and there was no evidence before this Court that the exception applied to the appellant.

follows that the appellant has established that the General Manager's decision of 30 June 2006 was not a decision lawfully made. The decision was therefore reviewable under s 20(2)(b) *Judicial Review Act 1991* (Qld). The appeal must be allowed.

- [4] I agree with the orders proposed by Jerrard JA.
- [5] **JERRARD JA:** This appeal is from a judgment given on 24 August 2006, dismissing an amended application for judicial review of the respondent's decision made 30 June 2006 to classify Mr Allison as a low security prisoner. That decision was made under s 12 of the *Corrective Services Act 2000* (Qld) ("the 2000 Act"); the *Corrective Services Act 2006* (Qld) ("the 2006 Act"), in force since 28 August 2006, provides in s 17 thereof that the *Judicial Review Act 1991* (Qld) does not apply to decisions made under ss 12-16 of that Act, about a prisoner's security classification. Mr Allison exercises the right of review still open to him with the argument that the decision maker exercised an improperly fettered power. He also complains that an irrelevant matter was considered.

The legislation

- [6] Section 363(3) of the 2006 Act converted Mr Allison's low security classification as at 28 August 2006 into a high security classification, and s 13(1)(b) requires that the respondent review that security classification no later than 30 June 2007. If Mr Allison had been classified open security as at 28 August 2006 – and still been in custody – s 363(4) of the 2006 Act would have converted that to a low security classification; s 13(2) of the 2006 Act would empower but not oblige the respondent to review that security classification. The 2006 Act provides only for maximum, high, and low security classifications, whereas the 2000 Act provided for maximum, high, medium, low, and open security classifications. Section 363(3) of the 2006 Act converts all classifications of high, medium, or low, security as at 28 August 2006 into high security classification. A low security classification under the 2006 Act is automatically granted by s 363(4) of that Act only to prisoners classified as open security when the 2006 Act came into force.
- [7] The respondent submits that if Mr Allison succeeds on the appeal, this Court could remit the question of reviewing the security classification that Mr Allison should have had as at 30 June 2006, under the 2000 Act, to the respondent for further consideration according to law. The respondent submits that s 363 of the 2006 Act would have the effect that upon that review, the resultant classification would translate into what should have been Mr Allison's initial classification for the purposes of the 2006 Act. The respondent apparently accepts that if, on further consideration, Mr Allison should have had an open classification as at 30 June 2006 and not a low security classification, he would have been entitled on 28 August 2006 to convert to a low security classification under the 2006 Act. The possibility of the lowest classification under the 2006 Act is relevant to Mr Allison's chances of getting parole.

Mr Allison's crime

- [8] He was sentenced on 19 September 1994 to life imprisonment for murder, and the sentencing judge stated:

“The killing seems to me to have been a pre-meditated, brutal, and savage offence. It was apparently worked out between you and your co-offender that, presumably, the boy might be able to give a lead as to who had broken and entered his house and stolen goods and you decided to avoid his doing that by killing him and that is what you did.”²

The victim was a 16 year old boy who had recognised Mr Allison when the latter was committing an offence of breaking and entering. The sentence was backdated to begin on 31 July 1993, and Mr Allison’s potential parole date was 31 July 2006.

Performance on open security

- [9] The appeal record reveals that Mr Allison was transferred to the Darling Downs Correctional Centre on 22 June 2004, after 11 years in more secure custody, and apparently after achieving an open security classification. However, he was returned to the Wolston Correctional Centre on 17 November 2005, after a search conducted on 10 November 2005 located what was considered an excessive amount of property in his cell. That included some prohibited items, namely two “burnt” CD’s, and a glass bottle partly full of an alcohol based aftershave. Mr Allison was apparently suspected of trading in goods for sale to other prisoners, but he was not found guilty of doing that. He admitted the possession of prohibited articles. He was next transferred to Palen Creek Correctional Centre on 2 March 2006, apparently after again achieving an open security classification, but then returned to Wolston Correctional Centre on 14 March 2006.³
- [10] A report dated 14 March 2006 explained the circumstances. It describes that Mr Allison had on two separate occasions on 13 March 2006 grabbed another prisoner around the chest. On the first he tried to tickle the other prisoner; on the second occasion he grabbed him from behind and bit the other prisoner on the shoulder. That report observes that Mr Allison was demonstrating what the report writer considered to be an increasing predatory behaviour towards the other prisoner, and that Mr Allison had demonstrated the need for a higher level of supervision and was unsuitable to remain in open custody. The writer recommended that his classification be increased to medium, and that he be transferred to secure custody. That was done.
- [11] Mr Allison appealed that transfer on 15 March 2006, and in his hand written application⁴ he admitted seizing the other prisoner from behind, apparently for the purpose of tickling him, but admitted nothing else. His appeal was refused, and the Executive Director, Custodial Operations, advised in a letter of refusal dated 16 March 2006 that:

“You are a life sentenced prisoner who has now been returned from two farms for inappropriate behaviour on two separate occasions. You need to seriously reassess your total behaviour and focus on demonstrating a more mature and responsible attitude to your current sentence plan. I note you have a Post Prison Community Based

² Those remarks were quoted at AR 73.

³ At AR 71-72.

⁴ Reproduced at AR 34.

Release eligibility date of 31/07/2006 and are currently classified as medium security and are housed in a high security facility.

It is recommended that when you next involve yourself in your offender management plan review that you be assessed for consideration to participate in the making choices program.”

- [12] The respondent exhibited its (then) policy document on reviewing classifications, the contents of which explain that the letter of 16 March 2006 was an “event based” review. The policy document also explains that a “standard review” (under s 12(4) of the 2000 Act) had to be undertaken within 12 weeks of the transfer to more secure custody. That standard review would reconsider placement in open custody.
- [13] Next, Mr Allison was advised by the General Manager of the Wolston Correctional Centre, by letter dated 26 April 2006, that the General Manager had reviewed the circumstances of his transfer and re-classification, and had concluded that due to Mr Allison’s poor response to being accommodated in an open custody environment, Mr Allison should remain on medium security classification until his next Offender Management Plan Review, scheduled for June 2006. Mr Allison then obtained the assistance of the Prisoners’ Legal Service Inc., asking for a further review of the decision in relation to his classification and transfer, and asking for his transfer back to Palen Creek Correctional Centre as an open security prisoner.
- [14] The General Manager of Wolston Correctional Centre replied to the Legal Service on 31 May 2006, advising that the General Manager had reviewed Mr Allison’s classification under s 12 of the 2000 Act, and considered Mr Allison had demonstrated a need for a higher level of supervision and was unsuitable to remain in open custody; hence the classification increase to medium. He was scheduled for a full review in June 2006. The appeal record does not explicitly reveal which review – the ones of 26 April, 31 May, or the June 2006 review – was the required standard review. All three were conducted by the General Manager.

The order to review

- [15] Mr Allison then filed an application for a statutory order of review of the decisions of 14 March and 26 April 2006, which had resulted in a medium security classification. On 30 June 2006 the General Manager conducted the promised review, and classified Mr Allison as low security. His reasons noted that Mr Allison had been waitlisted for the Making Choices program, which would commence in August 2006 (at Wolston Correctional Centre), and the General Manager advised that Mr Allison would be considered for a reduction in classification following the successful completion of that program. That is the decision which Mr Allison sought to review in the application to this Court heard and determined on 24 August 2006, from which this appeal comes (Mr Allison had amended his application on 19 July 2006, to review instead the decision of 30 June 2006).

The delegated authority

- [16] Mr Allison attacked the decision of 30 June, on the ground that the delegated authority to make and review classifications, held by the General Manager, granted on 7 February 2006, was subject to the following express condition:

“For a prisoner serving a period of imprisonment of 10 years or more, a General Manager may only classify a prisoner as open security if the prisoner is already classified as open security.”

Section 12(2) of the 2000 Act provided that:

“When another prisoner is admitted to a corrective services facility for detention, the chief executive must classify the prisoner into 1 of the following classifications –

- (a) maximum security;
- (b) high security;
- (c) medium security;
- (d) low security;
- (e) open security.”

Section 12(3) of that Act provided:

“When deciding a prisoner’s classification, the chief executive must consider all relevant factors, including for example –

- (a) the risk of the prisoner to the community;
- (b) the nature of the offence for which the prisoner is charged or has been convicted;
- (c) the period of imprisonment the prisoner is serving;
- (d) whether the prisoner has any outstanding charges and the nature of the charges;
- (e) the prisoner’s criminal history (if any);
- (f) the prisoner’s escape history (if any);
- (g) the prisoner’s demonstrated attitude towards the sentence being served;
- (h) the likelihood of the prisoner being deported or extradited, and the prisoner’s demonstrated attitude toward the deportation or extradition;
- (i) the prisoner’s previous conduct in a corrective services facility, including whether the prisoner has committed an offence or breach of discipline or returned a positive test sample;
- (j) the prisoner’s previous conduct while subject to a community based order or post-prisoner community based order;
- (k) the prisoner’s medical history, including any psychological or psychiatric history;

- (l) the likely influence of the prisoner's family relationships.

Section 12(4) relevantly required that the Chief Executive review a prisoner's classification at intervals of no longer than six months. The Chief Executive had delegated the authority under s 12(2) and s 12(4) to, inter alia, General Managers of Correctional Services facilities, but subject to various conditions.

- [17] The instrument of delegation delegated the powers under s 12(2) and (4) to Deputy Directors-General, to the Executive Director, Custodial Operations, to General Managers of Corrective Services facilities, Assistant General Managers, and to the General Manager, Custodial Operations and the Manager, Custodial Operations. Those powers were delegated on different terms and conditions. A General Manager of a Corrective Services facility, in respect of a prisoner serving 10 years or more, might only classify the prisoner as open security if the prisoner was already classified as open security. Likewise, that General Manager had no delegated powers regarding a prisoner who was or had previously been classified as maximum security. Even more restraints were imposed on the delegated powers given to Assistant General Managers of Correctives Services facilities, and to the General Manager and Manager of Custodial Operations.
- [18] The Court raised in argument on the appeal whether Mr Allison, as a life-sentenced murderer, had been classified earlier in his term as a maximum security prisoner. If so, the terms of the delegation meant the General Manager had no authority to make a decision about Mr Allison's classification. Neither counsel showed interest in the point, and the appeal record did not disclose the answer.
- [19] Mr Allison accepts that the respondent was empowered by s 57(1) of the *Public Service Act 1996* (Qld) to delegate the powers given under the 2000 Act of classifying prisoners and reviewing their classification, and that s 27A(1) of the *Acts Interpretation Act 1954* (Qld) contained detailed provisions in respect of delegations, which envisaged that a delegation might be subject to conditions. However, Mr Allison's counsel submits that the terms of the delegation mean that a General Manager might review the security classification of a life sentenced prisoner only where the prisoner is already classified as open security. I respectfully disagree; the General Manager was delegated the power of classifying prisoners, given by s 12(2) and (4) of the 2000 Act, but a General Manager's delegated power to classify a prisoner as open security was subject to conditions.
- [20] I also disagree with the submission that the delegated power had no application to Mr Allison because he was not already classified as open security, but I accept the submission that once the General Manager undertook the review, it was inevitable that Mr Allison would not be classified as open security. The important question is whether or not, as Mr Allison's counsel contends, that means that the respondent had impermissibly narrowed the scope of the review required by the Act and impermissibly excluded an outcome actually recommended by an executive body, the Sentence Management Review Team. Mr Allison had asked, through the Legal Service, for a return to open security classification, and the standard review required by the respondent's policy was a reconsideration of an open security classification.
- [21] The result of the conditions imposed in the instrument of delegation is that officers such as the General Manager, when exercising delegated powers of the Chief Executive, had a limited capacity to do as specified in s 12(2), because of the

restricted capacity to classify long sentenced prisoners as open security. The conditions on the delegation to the General Manager made that limiting condition the only relevant factor to an open security classification, when a General Manager of a corrective services facility was deciding if a life-sentence prisoner not already classified as open security should be so classified. But s 12(3) required that all relevant factors be considered on that decision, not just one, namely a limitation (not appearing in the statute) on the delegated power of the Chief Executive, and not appearing in the factors to be considered listed in s 12(3).

- [22] I accept the appellant's argument based on s 20(2)(b) of the *Judicial Review Act 1991* (Qld), that procedures that were required by law to be observed in relation to the making of the decision were not observed. Those procedures were that all relevant factors be considered, including those listed in s 12(3) of the 2000 Act, and not simply the one listed in s 12(3)(c), namely the period of imprisonment Mr Allison was serving. For that reason I respectfully disagree with the decision of the learned judge below that the condition on the delegation did not in any way affect the decision that was made. The learned judge remarked that that decision changed his classification from medium to low, and that the condition on the delegation was irrelevant to that result. But the condition meant the General Manager could never classify Mr Allison as open security, irrespective of other factors supporting that outcome. He may or may not have been a reasonable candidate for open security as at 30 June 2006 - he had achieved that classification twice already, but without distinction in his performance on it.
- [23] The same issue arose in *Griffiths v Chief Executive, Department of Corrective Services*, unreported, McMurdo J, BS No 6692 of 2005, 4 August 2006, in which McMurdo J decided in that applicant's favour on another ground, and found it unnecessary to decide the point now argued. He did observe that the argument had force, that the restricted power delegated to a General Manager was not the discretionary power which had to be exercised under s 12, but a more limited authority to decide if a (in that case, medium) security prisoner should remain on that classification, or be changed to maximum, high, or low. His Honour also expressed the argument as being that the purported delegation did not release the Chief Executive of the responsibility of deciding if a prisoner should be assessed as open security, where no-one who could make that decision had considered it.
- [24] I agree that the power the General Manger exercised was not the power given by s 12(2) and 12(4), which power required consideration of all relevant factors for its exercise according to the 2000 Act. The far more limited power exercised by the General Manager did not constitute a reconsideration of placement in open custody, as required by the respondent's own policy document, and as asked for by Mr Allison. The evidence does not show that the decision whether Mr Allison should be re-classified as open security was considered on its merits. The General Manager may have intended to, but his reasons do not show that he considered and rejected an open security classification, which he had no power to make. The decision on an open security classification was certainly not considered by anyone who could decide it in compliance with the 2000 Act.
- [25] Accordingly, I would allow the appeal, set aside the decision of 30 June 2006 that Mr Allison be classified low security, and order that the matter of his classification as at that date be referred for further consideration by the respondent or by an officer holding an unlimited delegation of the powers then given under s 12(2) and

s 12(4) of the *Corrective Services Act 2000*. I also order that the respondent pay Mr Allison's costs for the appeal and costs below. That makes it unnecessary to consider Mr Allison's other complaint, about an allegedly irrelevant matter being considered; that ground seemed unpromising for Mr Allison.

[26] **MACKENZIE J:** I have had the advantage of reading Jerrard JA's reasons. I agree that, for the reasons given by him, the orders proposed by him should be made.