SUPREME COURT OF QUEENSLAND

CITATION:	*Wigginton v Queensland Parole Board & Anor* [2010] QSC 59
PARTIES:	**TRACEY AVRIL WIGGINTON** (applicant) **v** **QUEENSLAND PAROLE BOARD** (first respondent) **and** **PETER BOTTOMLEY** (second respondent)
FILE NO/S:	12913 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 March 2010
DELIVERED AT:	Brisbane
HEARING DATE:	11 December 2009
JUDGE:	Martin J
ORDER:	**Application dismissed**
CATCHWORDS:	*Acts Interpretation Act* 1954, s 27A *Corrective Services Act* 2006, s 187, s 192, s 193, s 217 *Judicial Review Act* 1991 *Abbott v Chief Executive, Department of Corrective Services* [2000] QSC 492 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 *Australian Chemical Refiners Pty Ltd v Bradwell* (unreported, CCA 236 of 1985, 28 February 1986) *British Oxygen Co Ltd v Minister for Technology* [1971] AC 610 *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 *Dairy Farmers' Co-operative Milk Company Ltd v Cth* (1946) 73 CLR 381 *Graveson v The Queensland Corrective Services Commission*

[2000] 1 Qd R 529
Habib v Director-General of Security (2009) 175 FCR 411
Haoucher v Minister for Immigration and Ethnic Affairs (1990) 169 CLR 648
Ibeneweka v Egbuna [1964] 1 WLR 219
Jennings v Queensland Parole Board [2007] QSC 364
McQuire v South Queensland Regional Community Corrections Board [2003] QSC 414
Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259
R v Port of London Authority Ltd; ex parte Kynoch [1919] 1 KB 176
Renton v Bradbury & Anor [2001] QSC 167

COUNSEL: J Fenton for the applicant
GJ Handran for the first respondent
KA Mellifont for the second respondent

SOLICITORS: Prisoners' Legal Service, Inc for the applicant
Crown Solicitor for the first and second respondents

[1] The applicant in this case seeks:

(a) a declaration that the decision of the first respondent to refuse her application for parole was "unlawful and of no effect, void, not a decision at all and illegal";
(b) a declaration that the decision of the second respondent not to transfer the applicant to the Numinbah Correctional Centre was "unlawful and of no effect, void, not a decision at all and illegal"; and
(c) an order that the respondents pay the applicant's costs of the application.

[2] In January 1991 the applicant, Ms Wigginton, pleaded guilty to the murder of Edward Balldock. She was sentenced to life imprisonment. She was originally accommodated at the Brisbane Women's Correctional Centre ("**BWCC**"). In 2003 she was transferred to the Numinbah Correctional Centre ("**Numinbah**") where she remained until 2006. In that year she was transferred back to BWCC following an incident the details of which are disputed and need not be considered. In June 2007 Wiggington was classified as low security and it was decided that she should remain at BWCC.

[3] The applicant has been a 'low security classification offender' since 25 June 2006, a standard which indicates that she is of least security risk under the *Corrective Services Act* 2006 (Qld) ("**the Act**") prisoner classification system. Following the transfer to BWCC, Ms Wigginton sustained a serious knee injury that has seriously reduced her mobility and requires medical attention.

[4] Since her transfer to BWCC, she has twice applied to be transferred back to the Numinbah facility. Each of these applications was refused, although the first was challenged by the applicant and reviewed. This application challenges the decision to refuse the latest transfer request, which was made on 21 July 2009.

[5] The applicant applied for parole on 10 December 2008. When the time limited for consideration by the first respondent ("**the Board")** of that application was about to expire the applicant made a "new" application on 8 April 2009. On 17 July 2009 the Board refused that application and that decision is also the subject of this application.

[6] On 11 August 2009, the applicant (through her solicitors) requested a statement of reasons.

[7] On or about 30 September 2009, the Board delivered a statement of reasons. That statement of reasons set out the various facts and information taken into account in making its decision, and gave reasons for that decision. Among those reasons, the Board stated:

> "6. However, the Board did note the circumstances that resulted in your return to Brisbane Women's Correctional Centre and you lack of progression back to a low/open security centre since that date. The Board noted your recent injury in April 2009 and your concerns that this will prevent you from progressing back to Numinbah Correctional Centre in the immediately [sic] future.
>
> 7. The Board remains of the view that, when medically fit, your progression to low custody would be an essential element in your successful reintegration to the community, both to negate the effects of institutionalisation, and to allow for the assessment of your progression and your preparedness for community release, in a less structured and more autonomous environment."

The Board then concluded by determining that the applicant posed an unacceptable risk to the community.

[8] The applicant has been entitled to make a fresh application for parole since 17 January 2010.

Grounds of the application

[9] In her application, the applicant lists a large number of grounds for contesting the respondents' decisions to refuse parole or a transfer. Most of those grounds were not pursued in any way either in the applicant's written submissions or in argument at the hearing. I will only consider those which were advanced.

The decision not to grant parole

[10] On 8 April 2009, after becoming eligible for parole, the applicant submitted a parole application to the Board, together with supporting documentation from various mental health professionals. According to the applicant, the thrust of those reports was that the applicant posed a low risk of re-offending in the same manner, but that she was significantly institutionalised and that a graduated form of release into the community was appropriate.

[11] The experts' recommendations described above are consistent with the Ministerial Guidelines formulated under s 226 of the Act, which require that a long-term prisoner, being one that has already served more than 8 years imprisonment, ordinarily serve six months in a low security centre immediately prior to his or her release.

[12] The Board considered the applicant's parole application on 24 April 2009 and indicated that they were considering not granting parole.

[13] On 29 April 2009, the applicant's co-offender, Ms Ptaschinski was released on parole. Ms Ptaschinski had been found guilty after a trial, unlike the applicant who had been sentenced after pleading guilty.

[14] By a letter dated 12 May 2009, the Board notified Ms Wigginton of five factors which it considered could mean that she was an unacceptable risk to the community. They were:

(a) Her serving a period of life imprisonment for murder;
(b) The circumstances of the offence and its "very serious and violent" nature;
(c) The Palk report and Violence Risk Appraisal Guide (VRAG) assessment, indicating that the applicant was a "medium to moderate risk for further violent offences";
(d) That the applicant's conduct during her period of imprisonment had fluctuated and that she had appeared to struggle to conduct herself in an appropriate manner at times;
(e) The General Manager's recommendation that due to the period which Ms Wigginton had been incarcerated, she progress to a low custody centre to permit her to negate the effects of institutionalisation and allow her to be observed in an autonomous environment.

[15] On or about 30 June 2009, Ms Wigginton provided further submissions to address those grounds. In particular, she raised the matter of her knee injury and its role in inhibiting her progress to a low security facility. In her submissions, she refers to earlier information that she had received from prison staff that she could not be accommodated at Numinbah, as it does not have adequate medical facilities to deal with her in her present condition.

[16] At its meeting on 12 July 2009, the Board considered the application for parole and declined to grant the applicant parole on the basis that she presented an unacceptable risk to the community on a parole order at that

time. A statement of reasons was requested and it was supplied on 30 September 2009.

[17] The main grounds advanced by the applicant with respect to that decision are:

(a) The Board refused the application because of "blind adherence" to a Ministerial guideline that long-term offenders spend six months in a low security facility prior to release, without giving due consideration to the "exceptional" circumstances of the particular case.

(b) The Board denied the applicant natural justice by failing to disclose to her two factors which were later relied upon as bases for refusing her application, namely the behaviour which led to her transfer back to a higher security facility (which was earlier referred to by the Board as 'irrelevant'), and the alleged unsuitability of her proposed place of residence.

(c) The respondent failed to consider the judge's sentencing remarks, contrary to the requirements of s 2.4 of the relevant *Ministerial Guidelines.*

[18] The applicant's chief complaint appears to be the Board's insistence that the applicant spend six months in a low security correctional facility before being released, when she contends that there is no prospect of her being admitted to such a facility due to circumstances beyond her control.

[19] The situation was described by counsel for the applicant as a 'Catch-22', whereby the applicant could not be granted parole because she is not at Numinbah, but where she would not be admitted to Numinbah because of the alleged deleterious effects of earlier refusals of her parole applications. In addition, the apparent inability to house the applicant at Numinbah, due to her health needs, is said to make it improper for the Board to require her placement there before release.

The Board's arguments on the decision not to grant parole

[20] On the first ground of objection, the Board submits that the Ministerial guidelines referred to by the Board were lawful guidelines that reflect common sense. It says that its decision not to grant parole was not made through blind adherence to those guidelines, but rather was in accordance with the weight of evidence presented by various mental health and other professionals working at the prison. Further, it expressly took into account the applicant's position and those factors which would inhibit her progress to a low classification facility in the "immediate future" but decided, as it was entitled to do in its wide discretion, that her release should nonetheless be delayed, pending such progression.

[21] As to the second ground relating to natural justice, the first respondent points out that, in both cases, there is no evidence to show that there was any reliance or inducement on the part of Ms Wigginton as to bring about a loss of opportunity, nor is there evidence that Ms Wigginton had anything to say

on the topics. With regard to the incident leading to her removal to BWCC, she addressed this in her submissions, in any case, under the separate heading "Allegations of Assaulting another Prisoner". With regard to the unsuitability of housing, there is uncontested evidence that she was advised separately of this but chose not to nominate an alternative address.

[22] As to failing to take the sentencing remarks into account, the Board contends that there is no regulatory requirement to take them into account, and any failure to do so cannot be regarded as a failure to take account of a relevant consideration. In any case, the Board says, the sentencing remarks were unavailable. The circumstances of the offence, while relevant, were sufficiently dealt with in a largely uncontested account of the facts.

Blind adherence to a policy?

[23] The primary issue in contention in this part of the proceedings was whether the decision to refuse parole was made in "blind adherence" to the Ministerial guidelines, and without consideration of the merits of the case.

[24] Under s 217 of the Act, one of the functions of the Board is to decide parole applications.

[25] There is almost no legislative guidance on how the Board is to decide a parole application or on what matters should be taken into account. Sections 187, 192 and 193 of the Act provide:

> **"187 Which parole board may hear and decide application**
> (1) The Queensland board may hear and decide an application for a parole order from a prisoner who—
>
> (a) has been sentenced, before or after the commencement of this section, to a period of imprisonment of 8 years or more; or
>
> …
>
> **192 Parole board not bound by sentencing court's recommendation or parole eligibility date**
> When deciding whether to grant a parole order, a parole board is not bound by the recommendation of the sentencing court or the parole eligibility date fixed by the court under the *Penalties and Sentences Act 1992*, part 9, division 3 if the board—
>
> (a) receives information about the prisoner that was not before the court at the time of sentencing; and
> *Example—*
> a psychologist's report obtained during the prisoner's period of imprisonment
> (b) after considering the information, considers that the prisoner is not suitable for parole at the time recommended or fixed by the court.
>
> **193 Decision of parole board**
> (1) A parole board required to consider a prisoner's application for a parole order must decide—

(a) to grant the application; or
(b) to refuse to grant the application.
(2) However, subject to subsection (3), the parole board may defer making a decision until it obtains any additional information it considers necessary to make the decision.
(3) The parole board must decide the application within the following period after receiving the application—
(a) for a decision deferred under subsection (2)—210 days;
(b) otherwise—180 days.
(4) The parole board may grant the application even though a parole order for the same period of imprisonment was previously cancelled.
(5) If the parole board refuses to grant the application, the board must—
(a) give the prisoner written reasons for the refusal; and
(b) if the application is for a parole order other than an exceptional circumstances parole order—decide a period of time, of not more than 6 months after the refusal, within which a further application for a parole order (other than an exceptional circumstances parole order) by the prisoner must not be made without the board's consent."

[26] Under s 193 of the Act, the Board's discretion is unfettered. As observed by White J in *McQuire v South Queensland Regional Community Corrections Board* [2003] QSC 414, at [28], and applied by me in *Jennings v Queensland Parole Board* [2007] QSC 364 at [25]:

> "There are no express criteria for application by a Board when considering an application for post-prison release. The discretion is unconfined except as the matter and scope of the statutory provisions will dictate what it is that must be kept in mind. An object of the *Corrective Services Act* 2000 is for 'community safety and crime prevention through humane containment, supervision and rehabilitation', s 3(1). The interests of the public must be a necessary aspect of any decision to grant release."

[27] The Act does provide, though, for the making of Ministerial Guidelines. Section 227 of the Act provides:

> **"227 Guidelines**
> (1) The Minister may make guidelines about the policy to be followed by the Queensland board when performing its functions.
> (2) The Queensland board may, in consultation with the chief executive, make guidelines about—
> (a) the policy to be followed by a regional board when—
> (i) performing its functions; or
> (ii) conducting its business, including, for example, the procedure at its meetings; and
> (b) the matters to be dealt with, and the information to be contained, in an annual report given by a regional board to the Queensland board under section 240.

> (3) The guidelines made by the Queensland board must be consistent with the guidelines made by the Minister under subsection (1)."

[28] In March 2008 the Minister issued guidelines under s 227 entitled "Resettlement Leave Programs and Parole Orders". The Guideline which the Board took into account in this instance was:

> "It is recommended that prisoners serving a period of imprisonment of eight years or more, should spend at least six months in a low security environment immediately prior to the application for parole. A 'low security environment' includes a –
>
> a) community corrections centre as defined by the Act; or
>
> b) low security or secure custody facility where the prisoner has worked with minimal supervision outside the secure perimeter on a continuous basis."

[29] The role of guidelines within a decision making context are as the name suggests – to guide a decision. They should not, however, be so rigidly enforced as to deny a true and honest assessment of the merits of a case: *Green v Daniels* (1977) 51 ALJR 463. The general rule is that anyone who has to exercise a statutory discretion must not 'shut his (or her) ears to an application': *British Oxygen Co Ltd v Minister for Technology* [1971] AC 610 at 625; *R v Port of London Authority Ltd; ex parte Kynoch* [1919] 1 KB 176.

[30] In this case, the applicant contends that the Board did just that – that it decided the case in line with the Ministerial policy without any consideration of whether such policy should be departed from in the circumstances.

[31] I cannot accept that submission. The reasons given by the Board recite the various matters which were taken into account. It is important to remember that a court should not be too quick to find an error in a decision-maker's reasons. As explained by Brennan CJ, Toohey, McHugh and Gummow JJ in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272:

> "… the reasons of an administrative decision-maker are meant to inform and not meant to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed."

[32] In that case, their Honours approved the remark of Neaves, French and Cooper JJ in *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287 that:

> "The reasons for the decision under review are not to be construed minutely and with an eye keenly attuned to the perception of error."

[33] The reasons given by the Board disclose that a wide variety of matters were taken into account:

> "The reasons for the Board's decision were:
>
> 1. The Board noted the serious and violent nature of your offence, the sentence imposed and the detrimental impact your offending had on your victim, victim's family and also to the wider community.
> 2. The Board noted the detail of your application for parole, including your offer for employment and your proposed support network to assist with your re-integration. The Board noted that your proposed residence was considered unsuitable at the time of assessment and the board had yet to receive details of an alternative residential address. The Board agreed that your relapse prevention plan appeared comprehensive, achievable and realistic.
> 3. The Board noted your recent completion of the Transitions Pre-Release Preparation Program and the Getting SMART: Moderate Intensity Substance Abuse Program.
> 4. The Board considered the psychological and psychiatric reports available to them. The Board noted that while all authors considered you significantly institutionalised, and the need for a gradual or cautious approach to your release to the community, there was some disparity of opinions in regards to your assessed risk of recidivism. The Board paid particular attention to G Palk's psychological report of 5 February 2009, as the most contemporaneous report available to the Board, when considering your risk of re-offending in the community.
> 5. The Board noted your good conduct in prison in more recent years and that you remain accommodated in the residential area of the Brisbane Women's Correctional Centre, as a Low security classification offender. The Board noted your good employment record and your extensive educational and vocational achievements whilst in custody. The Board were of the view that you had voluntarily and actively participated in vocational or skill based programs and considered that the knowledge and skills gained would improve your employment and rehabilitation prospects in the community.
> 6. However, the Board did note the circumstances that resulted in your return to Brisbane Women's Correctional Centre and your lack of progression back to a low/open security centre since that date. The board noted your recent injury in April 2009 and your concerns that this will prevent you from progressing back to Numinbah Correctional Centre in the immediately (sic) future.

> 7. The Board remained of the view that, when medically fit, your progression to low custody would be an essential element in your successful reintegration to the community, both to negate the effects of institutionalisation, and to allow for the assessment of your progression and your preparedness for community release, in a less structured and more autonomous environment.
>
> Taking into account all of the relevant factors of your case, both positive and negative, the Board formed the view that you posed an unacceptable risk to the community at that time and decided to decline your application for a parole order."

[34] In considering the Board's reasons, I note that it also refers to factors which the applicant says were not given proper consideration. In particular, it noted the circumstances of her knee injury, and its interference with her progression to a low security facility in the "immediate" future. Nonetheless, it decided that her progression through that facility prior to release was "essential".

Natural justice

[35] The requirements of natural justice have recently been summarised in the decision of the Full Court of the Federal Court in *Habib v Director-General of Security* (2009) 175 FCR 411:

> "[63] Natural justice requires that a person **know the substance of the case against him or her and be given the opportunity to respond to adverse material that is credible, relevant or significant**: *Kioa v West* (1985) 159 CLR 550 at 629 (per Brennan J). As the respondents have submitted, however, **the obligation to afford natural justice is shaped not only by the statute pursuant to which the impugned decision has been made but also the particular circumstances of the case**: *Ex parte Aala* 204 CLR at 109 (per Gaudron and Gummow JJ); *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 94, 98 (per McHugh J); *Kioa* 159 CLR at 611-612 (per Brennan J). Thus, the content of the Tribunal's obligation must be considered in the context of s 33 of the *AAT* Act and with due regard to practical considerations related to the course of the hearing including, in the present case, the receipt of a large volume of evidence during a hearing over some 20 days.
>
> [64] There are sound practical reasons why a decision-maker is generally not obliged to expose his or her reasoning process or provisional views for comment by the person affected: *Re Ruddock; Ex parte Applicant S154/2002* (2003) 77 ALJR 1909; 201 ALR 437 at [47]-[54] (per Gummow and Heydon JJ); [85]-[86] (per Kirby J); *Alphaone* 49 FCR at 591. There may nevertheless be circumstances where fairness requires prior

> disclosure of such matters, as where they relate to a critical issue or factor, or where they do not follow from an obvious or natural evaluation of the evidence: see *Alphaone* 49 FCR at 591; *Somaghi* 31 FCR at 108-109 (per Jenkinson J); *Lidono* 49 ATR 96; 191 ALR 328 at [19] (per Gyles J)." (emphasis added)

[36] The first part of this ground relates to the transfer to secure custody after three years at Numinbah. The Board refers to this in paragraph 8 of its decision. In its letter of 12 May, the Board refers to the allegations about the reasons for her return. In the applicant's response of 30 June to that letter she specifically deals with that allegation. The applicant was given, and took, the opportunity of making a submission to the Board on that point. No more need have been done. It was suggested that, by referring to the reasons for the return to BWCC as "irrelevant" in its letter of 12 May, the Board misled the applicant. But the applicant had been alerted to the issue and had responded to it.

[37] The second part of this ground relates to the reference by the Board to the unsuitability of the applicant's proposed residence. In its reasons the Board recorded: "The Board noted that your proposed residence was unsuitable at the time of assessment and the Board had yet to receive details of an alternative residential address." The applicant argued that she had not been alerted to that before the decision. But that is not correct. The applicant knew earlier, from the terms of the Parole Board Assessment Report, that the nominated residence was regarded as being unsuitable. She had an opportunity to address that in her application and in her subsequent letter. She was aware of it as she told those compiling the report that she was seeking other accommodation.

Sentencing remarks

[38] The applicant argues that the Ministerial Guidelines make it mandatory that the Board consider the sentencing judge's remarks. Paragraph 2.4 of the Guidelines relevantly provides:

> "When deciding the level of risk that a prisoner may pose to the community, the Board should have regard to all relevant factors, including but not limited to the following –
> (i) The recommendation for parole or the parole eligibility date fixed by the sentencing court;
> (ii) The sentencing court's recommendation or comments;
> …"

[39] As I have said above, a guideline is simply that. The import of paragraph 2.4 is that the Board "should" take into account certain matters. The Minister cannot through guidelines impose upon the Board a fetter which is not otherwise present in the substantive legislation. No doubt, the sentencing remarks of judges are of general assistance to parole boards in many matters. Quite often, the sentencing remarks constitute a convenient repository of the relevant facts relating to the offence. There was no need for the Board to refer to the sentencing remarks for that as there were other unchallenged sources of that information available to them.

[40] The Board notes that "no sentencing remarks are available to the Parole Board" and there is no explanation for that having occurred. Of course, the sentencing remarks were made some 20 years ago but, nevertheless, they should have been available. The circumstances of the crime were described in the Parole Board assessment report and there was no criticism of that summary. The nature of the crime was also described by the applicant in a number of places in which she acknowledged the horrific nature of the crime which she had committed. The ministerial guidelines do not, in the framework of this legislation, create a mandatory requirement that the Parole Board take into account sentencing remarks. Thus, the failure to do so, especially in circumstances where there are other sources of information to a broadly similar effect, does not mean that the Board failed to take into account a relevant consideration.

The decision not to transfer the applicant to Numinbah

[41] The transfer of prisoners is dealt with in s 68 of the Act. It provides:

> **"68 Transfer to another corrective services facility or a health institution**
> (1) The chief executive may, by written order, transfer a prisoner from a corrective services facility to—
> (a) another corrective services facility; or
> (b) a place for—
> (i) medical or psychological examination or treatment; or
> (ii) examination or treatment for substance dependency.
> (2) The order may include the conditions the chief executive reasonably considers necessary to effect the transfer.
> (3) The prisoner must be escorted by a corrective services officer or police officer.
> (4) The prisoner may be detained in a place for as long as is necessary or convenient to give effect to the order.
> (5) If a prisoner is transferred to an authorised mental health service and becomes a classified patient under the *Mental Health Act 2000*, the patient is taken to be in the custody of the administrator of the patient's treating health service under that Act.
> (6) The *Judicial Review Act 1991*, parts 3, 4 and 5, other than section 41(1), do not apply to a decision made, or purportedly made, under this section about transferring a prisoner.
> *Note—*
> The *Judicial Review Act 1991*, part 3 deals with statutory orders of review, part 4 deals with reasons for decisions and part 5 deals with prerogative orders and injunctions.
> (7) In this section—
>
> ***decision*** includes a decision affected by jurisdictional error."

[42] On 20 February 2008 a decision was made that the applicant should remain at BWCC. She made a complaint to the Ombudsman who, in turn, provided reports on 24 June 2008 and 24 December 2008.

[43] On 13 February 2009 the applicant made a formal request that she be transferred to Numinbah. An offender management review team discussed the transfer request on 25 February 2009 and, as a result, the General Manager of BWCC endorsed the recommendation of the offender management review team that the applicant be transferred to the Numinbah facility.

[44] On 31 March 2009 the Director General under the Act issued an instrument of Delegation pursuant to s 271, purporting to delegate the power to make a transfer decision to the second respondent, Peter Bottomley.

[45] On 21 July 2009, the request for transfer to Numinbah was declined. In refusing the application, Mr Bottomley gave as reasons: the possible destabilising effects upon the applicant of her failed parole application, the release of her co-offender on parole, her health, and the logistical problems associated with her health.

[46] In relation to the transfer decision, the main grounds advanced for the applicant are:

(a) Mr Bottomley denied the applicant procedural fairness in failing to advise her that the recommendation of the General Manager (that she be transferred to Numinbah) would not be followed, and not advising the Applicant of the reasons for the decision.
(b) Mr Bottomley based his decision in part on assertions which were unsupported by evidence, namely that the applicant's behaviour would deteriorate because of the release of her co-offender or because her application for parole was refused.
(c) There was no proper delegation to Mr Bottomley to make the decision.

[47] The second respondent's case in relation to this application is essentially that the applicant was not entitled to natural justice in the present case. The second defendant's consideration of a transfer or his decision not to transfer were not made pursuant to any statutory legal duty, but rather as part of the broad responsibilities of the chief executive for the management of prisons under the Act. It was a prison management decision. In any case, no natural justice principle requires a decision-maker to advise that he or she does not intend to follow another's recommendation. Further, the applicant had no legitimate expectation of a transfer or of reasons for declining such transfer. The decision was not made in bad faith.

[48] As to supporting evidence, the second respondent submits that the fact that the application's parole application had been refused but her co-offender's had been granted is not disputed. As to the inference that knowledge of these facts may have a destabilising effect on the applicant, the second respondent says that this is something he is entitled to do, based on his many years of experience in the corrective services system.

[49] As to the lack of power, the second respondent said it had the power to make the decision under a specific delegation instrument to that effect. The

delegation is to the person holding the position of "Assistant Director-General, Probation and Parole", dated 31 March 2009. As a result of departmental restructuring, Mr Bottomley, who earlier held that position, came to be known as "Deputy Commissioner, Probation and Parole". To all intents and purposes, the two positions are the same and the name change does not affect the regularity of the decision.

[50] Further, the second respondent argues that the declaration sought will produce no foreseeable consequences for the parties, and thus should not be made.

Procedural fairness

[51] The second respondent argues that there is no principle of natural justice that requires a decision-maker to communicate that he or she does not intend to follow the recommendation of another. That submission is too broad to be accepted. Whether or not the fact that someone in the chain of decisions leading to a final decision makes a recommendation, and whether or not the failure to follow such a recommendation will give rise to a conclusion that procedural fairness has been denied, will depend upon many factors; not least the historical circumstances of the decision, the legislation underlying the decision, the effect of the final decision and the context in which the decision is made. As was said by Deane J in *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 654:

> "… there is much to be said for the view that where a person has made the effort and incurred the expense involved in persuading the Tribunal to make findings and recommendations in his or her favour, after a full hearing on the merits in proceedings in which the Minister has been fully heard as an active opposing party, there will arise a new and distinct legitimate or reasonable expectation that the Minister will accept the findings and abide by the recommendation of that Tribunal."

[52] Of course, in this case, there was no such hearing, nor was the second respondent an "active opposing party" in any matter leading up to the recommendation by the general manager. The difference between the circumstances in *Haoucher* and those which apply here can be seen in the reasons of McHugh J (at 681-682) where he said:

> "A legitimate expectation that a person will obtain or continue to enjoy a benefit or privilege must be distinguished, however, from a mere hope that he or she will obtain or continue to enjoy a benefit or privilege. A hope that a statutory power will be exercised so as to confer a benefit or privilege does not give rise to a legitimate expectation sufficient to attract the rules of natural justice … To attract the operation of the rules of procedural fairness, there must be some undertaking or course of conduct acquiesced in by the decision-maker or something about the nature of the benefit or privilege which suggests that, in the absence of some

> special or unusual circumstance, the person concerned will obtain or continue to enjoy a benefit or privilege."

[53] In these circumstances, there was no course of conduct by the decision-maker (the second respondent) to suggest that the general manager's recommendation would be accepted, nor is there anything in the nature of the benefit (that is, a transfer) to dictate that it would be obtained in accordance with the general manager's recommendation.

[54] The second respondent also argued that there was no need to afford procedural fairness to the applicant because the decision to transfer a prisoner was one which came within the general description of a "prison management decision". It followed from this that there was no entitlement or legitimate expectation that she would be transferred from one facility to another. I agree with the statement by Muir J in *Renton v Bradbury & Anor* [2001] QSC 167 "that, as a general proposition, decisions concerning the transfer of prisoners are decisions of a prison management nature". Similarly, in *Abbott v Chief Executive, Department of Corrective Services* [2000] QSC 492, Williams J said that "…the position may well be different where an entitlement to a specific benefit was clearly confirmed either by the legislative provision or by the administrative policy and practice in question. But short of such considerations a court should be loathe to interfere with what are essentially operational matters within the prison system." (at [28]).

[55] There are, though, points of departure from the general propositions above. One of those points was recognised by Muir J in *Renton v Bradbury*, where it was accepted that when what would otherwise be a prison management matter directly impinged on the liberty of the person concerned, then the person concerned would have a right to natural justice in respect of the decision. To similar effect was the decision of Fryberg J in *Graveson v The Queensland Corrective Services Commission* [2000] 1 Qd R 529, where his Honour distinguished between decisions, such as the decision to make an emergency transfer of a prisoner from one establishment to the other, and a decision which has a relevance to a prisoner's freedom on parole.

[56] This was a decision which clearly was relevant to the issue of parole. Because of that, it was a decision which should have been attended with appropriate concerns about procedural fairness. This is not a case which falls within the ordinary ambit of a "prison management decision". But the basis upon which it is said by the applicant that procedural fairness was denied – failing to follow the General Manager's recommendation – is not open for the reasons I have given above.

No evidence

[57] The applicant argues that there was no evidence for the conclusion drawn by the second respondent that the applicant's behaviour would deteriorate because of the release of her co-offender or because the application for parole was refused. The complaint centres on the inference which was drawn by the second respondent as to the effect that those matters may have had on the state of mind of the applicant. He described it as a "potentially destabilising effect".

[58] On this question, the principles enunciated by Mason CJ in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355 are determinative:

(a) Whether there is any evidence of a particular fact is a question of law;
(b) Whether a particular inference can be drawn from facts found or agreed is a question of law;
(c) The making of findings and the drawing of inferences in the absence of evidence is an error of law;
(d) There is no error of law simply in making a wrong finding of fact;
(e) So long as there is some basis for an inference – in other words, the particular inference is reasonably open – there is no place for judicial review because no error of law has taken place.

An inference, even it appears to have been drawn as a result of illogical reasoning will, provided it is reasonably open, not establish an error.

[59] It is not for this court to assess the logicality of the inference. The facts which are uncontentious could give rise to the inference which was drawn by the second respondent and, as a result, no error has been shown.

The "no power" ground

[60] It was advanced by the applicant that there was no proper delegation to Mr Bottomley to make the decision. The delegation was to the person holding the position of "Assistant Director-General, Probation and Parole". At all relevant times, the second respondent held the position "Deputy Commissioner, Probation and Parole". He had held the position of "Assistant Director-General, Probation and Parole".

[61] The evidence before me was that Mr Bottomley had held the position named in the delegation but that, as a result of the merging of departments and the consequent re-arrangement, the title of the position which he held was changed.

[62] The "Instrument of Delegation of Chief Executive Powers" dated 31 March 2009 relevantly provides that:

> "The Chief Executive has decided that the person holding the position of Assistant Director-General, Probation and Parole is an appropriately qualified person to make a transfer decision under section 68 of the *Corrective Services Act* 2006 for prisoner Tracy Avril Wigginton …
> "This instrument delegates the power to make a transfer decision under section 68 of the *Corrective Services Act* 2006 for Tracy Avril Wigginton … to the person holding the position of Assistant Director-General, Probation and Parole."

[63] At the time of the delegation there was only one position entitled "Assistant Director-General, Probation and Parole". The Instrument of Delegation

specifically records the Chief Executive's determination that the person who was holding the position of Assistant Director-General, Probation and Parole at the time was an appropriately qualified person to make a transfer decision.

[64] Mr Bottomley, who held the position at the time of the delegation, remained in the same role but, as a result of the departmental changes to which I have referred, the title of his position was changed. Therefore, the evidence established that the person holding the position of Assistant Commissioner, Probation and Parole, was the same as the person who had held the position of Assistant Director-General, Probation and Parole.

[65] The question to be determined, then, is whether the Instrument of Delegation worked to delegate the power to the person who, on the date of the delegation, held the office of Assistant Director-General, Probation and Parole and would remain with that person notwithstanding that the title of his office changed.

[66] Section 27A of the *Acts Interpretation Act* 1954 relevantly provides:

> "**27A Delegation of functions or powers**
> (1) If an Act authorises a person or body to delegate a function or power, the person or body may, in accordance with the Act and any other applicable law, delegate the function or power to—
> (a) a person or body by name; or
> (b) a specified officer, or the holder of a specified office, by reference to the title of the office concerned.
> (2) The delegation may be—
> (a) general or limited; and
> (b) made from time to time; and
> (c) revoked, wholly or partly, by the delegator.
> (3) The delegation, or a revocation of the delegation, must be in, or evidenced by, writing signed by the delegator or, if the delegator is a body, by a person authorised by the body for the purpose.
> …
>
> (4) A delegated function or power may be exercised only in accordance with any conditions to which the delegation is subject.
> …
>
> (6) A delegated function or power that purports to have been performed or exercised by the delegate is taken to have been properly performed or exercised by the delegate unless the contrary is proved.
> …
>
> (9) If a function or power is delegated to a specified officer or the holder of a specified office—
> (a) the delegation does not cease to have effect merely because the person who was the specified officer or the holder of the specified office when the function or power was delegated ceases to be the officer or the holder of the office; and

> (b) the function or power may be performed or exercised by the person for the time being occupying or acting in the office concerned.
>
> …
>
> (10A) The delegation of a function or power does not relieve the delegator of the delegator's obligation to ensure that the function or power is properly performed or exercised.
>
> …
>
> (16) In this section—
> ***power*** includes doing an act or making a decision for the purpose of performing a function."

[67] Section 27A(9) deals with a situation which does arise from time to time, namely, that the identity of an office-holder changes. Section 27A(9) would now cover the circumstances considered by the New South Wales Court of Criminal Appeal in *Australian Chemical Refiners Pty Ltd v Bradwell* (unreported, CCA 236 of 1985, 28 February 1986). In that case the State Pollution Control Commission had delegated to the Director of the Commission certain powers. One question which arose was whether the powers which were delegated were those which the Commission could delegate at the date of delegation or whether it included powers which were later bestowed on the Commission. It was held that the later powers were not bestowed on the Commission. The question of relevance, though, was whether the reference in the Instrument of Delegation to the "Director" was limited to the particular individual who held that office as at the date of delegation. Street CJ said:

> "It is difficult, indeed, to conclude that powers conferred upon the director were intended to be of a personal character, perishing on the relinquishment by the person of his office, and not surviving for the benefit of his successor. Administrative commonsense points strongly towards the powers availing to the holder of that office, whoever he may be, from time to time. If authority be needed to support that view, it is to be found in *Barton v Croner Trading Pty Ltd* 54 ALR 541 at 557. In my view the operative significance of the legislation contemplates that the director is an office which may be held by an individual, and that duties and powers attach to the occupant of that office rather than to an individual. I would accordingly propose that the question in that regard be answered in favour of the contention that the power is not limited in a personal sense to the occupant of the position of director as at December 1974."

[68] The question which arises in this case, though, is whether powers delegated to the person holding a particular office continue to be available to that person when the title of his office changes. Evidence was led about changes that were made as a result of the alterations to the organisation of the relevant department. New delegations were issued for many officers and holders of offices but not for the position of Assistant Director-General,

Probation and Parole and its successor office the Deputy Commissioner, Probation and Parole. That could, of course, have come about either because the relevant officers did not regard a new delegation as necessary or it was forgotten about. The uncontested evidence on behalf of Mr Bottomley is that the position he now holds is identical, for all intents and purposes, to the position he formerly held.

[69] The intent and purpose of the instrument was, on its face, to delegate to a particular person on the basis of the qualifications that that person held. Section 271 of the Act permits the delegation of functions to an "appropriately qualified person". It also allows for, but does not require, the delegation be to an officer of the Department. It is possible for a delegation to be to a person who is not employed within the Department or, indeed, within any of the government departments.

[70] In this case, the delegation was to the person who held the office at the time of the delegation and not to any person who might later hold it. Just as the delegation in *Australian Chemical Refiners Pty Ltd v Bradwell* could not extend to any new powers conferred upon the Commission after the date of the delegation, so, in this case, the delegation was fixed to the person holding the office at the time of the instrument. The fact that the title of the office later changed did not alter the effect of the delegation having been made to Mr Bottomley. The delegation remained in force.

Declaratory relief

[71] Declaratory relief is sought by the applicant with respect to the transfer decision because s 68(6) of the Act precludes the application of the *Judicial Review Act* 1991 to decisions under s 68.

[72] The court has an inherent power to grant declaratory relief (*Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564), but it is a discretionary remedy and should not be lightly granted (*Ibeneweka v Egbuna* [1964] 1 WLR 219 at [224]-[225]), especially where the declaration can offer little practical benefit (*Dairy Farmers' Co-operative Milk Company Ltd v Commonwealth* (1946) 73 CLR 381).

[73] In *Ainsworth v Criminal Justice Commission* Mason CJ, Dawson, Toohey and Gaudron JJ said (at 580-581):

> "It is now accepted that superior courts have inherent power to grant declaratory relief. It is a discretionary power which '[i]t is neither possible nor desirable to fetter ... by laying down rules as to the manner of its exercise.' … However, it is confined by the considerations which mark out the boundaries of judicial power. Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions … . The person seeking relief must have 'a real interest' … and relief will not be granted if the question 'is purely hypothetical', if relief is 'claimed in relation to circumstances that [have] not occurred and might never happen' … or if 'the Court's

> declaration will produce no foreseeable consequences for the parties' … ."

[74] While I have held that, in the circumstances of this case, a decision about the transfer of the applicant attracts the requirements of natural justice, I have also held that, on the case advanced, there had been no breach of those requirements. Thus, my decision has no effect on the transfer decision made by the second respondent and it is, therefore, inappropriate to make any declaration.

Disposition

[75] The application is dismissed.