SUPREME COURT OF QUEENSLAND

CITATION:	*Cutts v The Board of the Queensland Regional Parole Board* [2010] QCA 60
PARTIES:	**WINSTON GERALD CUTTS** (applicant/appellant) **v** **THE BOARD OF THE QUEENSLAND REGIONAL PAROLE BOARD** (respondent)
FILE NO/S:	Appeal No 9662 of 2009 SC No 12409 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 March 2010
DELIVERED AT:	Brisbane
HEARING DATE:	9 March 2010
JUDGES:	Holmes, Muir and Fraser JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GENERALLY – where appellant unsuccessfully sought judicial review of a decision to refuse parole – where appellant not permitted to appear personally before the decision-maker – where appellant not permitted to appear personally to hear delivery of judgment – where decision-maker's meeting conducted by telephone – where decision-maker relied on a report prepared for a fee by a psychologist previously employed by Qld Corrective Services – where decision-maker relied on a report whose factual accuracy the appellant challenged – where appellant maintained innocence and refused to complete relevant course – where appellant did not furnish decision-maker with information as to how he would manage risk factors for re-offending – whether refusal to allow appellant to appear before the decision-maker and to appear for delivery of judgment amounted to breaches of natural justice – whether decision-maker's meeting by telephone within jurisdiction – whether psychologist disqualified from giving opinion and whether decision

infected by bias – whether decision-maker's reliance on a report said to be factually inaccurate invalidated the decision-making process – whether decision-maker's reliance on appellant's failure to complete course blind application of policy – whether decision-maker's reliance on the failure to furnish information regarding risk factors involved any error of law

Corrective Services Act 2006 (Qld), s 238(5), s 238(13)

Abebe v Commonwealth (1999) 197 CLR 510; [1999] HCA 14, cited
Attorney-General (NSW) v Quin (1990) 170 CLR 1; [1990] HCA 21, considered
Kioa v West (1985) 159 CLR 550; [1985] HCA 81, considered
Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611; [1999] HCA 21, cited

COUNSEL: The appellant appeared on his own behalf
A A J Horneman-Wren SC for the respondent

SOLICITORS: The appellant appeared on his own behalf
Crown Law for the respondent

[1] **HOLMES JA:** The appellant appeals a decision dismissing his application for judicial review of the respondent Board's refusal of his parole. The grounds of appeal are not easy to understand, but he has made written and oral submissions which identify his complaints more clearly.

[2] The appellant is serving a sentence of six years imprisonment for a number of offences, including rape, committed against a single complainant. His parole eligibility date was 17 April 2008. In October 2008, his application for parole was rejected by the Board and he sought judicial review of that decision; by consent order, the decision was set aside and his application for parole was remitted to the Board for reconsideration. On 16 February 2009, the Board wrote to the appellant, advising him that it was considering refusing the application and inviting further submissions on specific matters, a request to which the appellant responded. On 27 February 2009, the Board reconsidered all the material which the appellant had placed before it and rejected the application. It provided its reasons to the appellant on 13 March 2009.

[3] The appellant then made an "application for re-directions hearing" to the Supreme Court, which was treated as an application for judicial review of the dismissal of his parole application. It contained no grounds, but the appellant filed an outline of argument in which he contended that there was a breach of natural justice in his not being permitted to attend personally before the Board to make his submissions; that the Board's decision was infected by bias because it had relied on the report of a psychologist, Mr Palk, who had previously worked for Corrective Services and been paid for providing reports on offenders; that the Board's insistence on his completing a sex offender's course, although he maintained his innocence of the charges, was contrary to law; and that the Board had wrongly acted on information provided to it by a Corrective Services internal review panel. To those grounds he

added, in oral argument before the learned primary judge, that the Board lacked jurisdiction because the meeting was held by means of the Board's secretary contacting the members by telephone. The primary judge considered and rejected each of those grounds.

[4] Here, the appellant's first complaint was that there had been a breach of the rules of natural justice because he was not brought in to hear the primary judge's judgment delivered on 3 August 2009 and was not informed of the outcome for nearly two months. However, he clearly became aware that his application was dismissed, because he signed his notice of appeal on 21 August 2009. If there were a delay in providing him with the reasons, that is regrettable, but it is irrelevant to the correctness of the judgment below.

[5] The next complaint was that the learned judge made what is described as "an error of law" as to when the consent order made as a result of the appellant's first application for judicial review was signed. If his Honour did make any such error, it was one of fact and had no bearing on the issues for his decision. Similarly, the appellant said that the learned primary judge made another "error of law" in not recognising that the Board had not paid the appellant's costs in relation to the earlier consent order. Again, whatever the truth of the assertion of default may be, it had nothing to do with what his Honour had to decide.

[6] Next, the appellant asserted error on the judge's part as to his power under the *Judicial Review Act*: his Honour said that it was not the court's function on an application for judicial review to review the merits of the decision or to substitute its decision for that Board. The appellant contended that that was wrong; the learned judge should have decided the matter for himself and granted parole. But the distinction between review of an administrative decision's legality and review of its merits is well entrenched in High Court decisions dealing with the scope of judicial review. Thus, in *Attorney-General (NSW) v Quin*,[1] Brennan J observed:

> "The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone."[2]

Observations to similar effect may be found in *Abebe v Commonwealth*[3] and *Minister for Immigration and Multicultural Affairs v Eshetu*[4]. The learned primary judge's articulation of his role is unimpeachable.

[7] The appellant said that the learned judge was wrong in rejecting his argument that the refusal to allow him to appear before the Board constituted a breach of the rules of natural justice. In this regard, his Honour observed that, in the context of the

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1 (1990) 170 CLR 1.
2 At 35-36.
3 (1999) 197 CLR 510 at 579-580
4 (1999) 197 CLR 611 at 649.

case, natural justice required an opportunity to address the matters thought to be adverse to the appellant, which had been afforded. He went on to observe that the *Corrective Services Act* 2006 (Qld) permitted an appearance before the Board only with leave, upon an application made in the approved form.

[8] The content of what natural justice requires depends largely on construction of the statute under which the decision is being made; the obligation is a flexible one, to

> "adopt fair procedures which are appropriate and adapted to the circumstances of the particular case."[5]

His Honour was right to have regard to the statutory limitation on appearance in person and to conclude in the circumstances of the case that the obligation of fairness was met by the giving of the opportunity to make submissions. The rules of natural justice did not mandate a personal appearance.

[9] The appellant contended that the Board lacked jurisdiction because it had proceeded by telephone at the meeting which declined his parole application. That contention was advanced for the first time at the hearing of the application for judicial review. It was based on a discovered minute for the meeting of 27 February 2009, which said that on that date "a ring around was conducted", involving named members of the Board who were contacted to consider the appellant's further submissions. The learned judge rejected the appellant's argument that the Board had no jurisdiction to proceed by means of telephone in reaching the decision to reject his parole application. His Honour observed that the *Corrective Services Act* permits a meeting to be held by "using a contemporaneous communication link" (s 238(5)), and gives a broader power to the Board to conduct its meetings in the "way it considers appropriate" (s 238(13)).

[10] "Contemporaneous communication link" is defined in schedule 4 of the Act as meaning

> "a link using technology that allows persons using the link to hear and take part in discussions as they happen."

The difficulty is that no evidence was led at first instance as to what was meant by a "ring around"; unsurprisingly, from the Board's perspective, because it had no advance notice of the argument. If it meant that each member was rung in turn and asked for his or her view, I would doubt that that could constitute a meeting in terms of either s 238(5) or s 238(13); but if it meant a telephone link-up at which all parties could hear each other and take part in the discussions, it would unquestionably be encompassed within the definition of "contemporaneous communication link". The language of the minute itself is not sufficiently clear to overcome the presumption of regularity. I would not interfere, on the slender basis of the way in which it is expressed, with the learned judge's conclusion that a lack of jurisdiction was not shown.

[11] The appellant asserted that the learned primary judge erred in rejecting his contention that the psychologist, Mr Palk, should have been regarded as disqualified from providing an opinion because he was the "former Director-General for Southeast Queensland jails", was a lecturer whose income came from giving

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5 *Kioa v West* (1985) 159 CLR 550 per Mason J at 585.

speeches and reports dealing with sex offenders, and had been paid for giving his report to the Parole Board. The Board's reliance on his opinion meant that its decision in turn was infected with bias.

[12] Mr Palk's curriculum vitae identifies his current position, oddly enough, as lecturer in a university centre for accident research and road safety; but it also says that he has a part-time forensic psychology practice and was at one time a "regional director with Queensland Corrective Services". In my view, there is nothing in that background, or the fact that he was to receive a fee for the report, which would cause a fair-minded observer to think he would not bring an objective and independent mind to the task of providing an expert report; but, more importantly, he was not the decision-maker. The Board was entitled to obtain whatever opinion it thought useful and to give it the weight it considered appropriate. The learned judge's conclusion that no case of bias had been made out was correct.

[13] In a complaint akin to that about his Honour's approach to review, the appellant said that his Honour was wrong to say, firstly that the existence of factual errors would not invalidate the decision making process, and secondly that the fact that the Board had preferred one version of the facts to another would not be a proper matter for review, unless it could be said that there was no evidence to support the Board's finding. This complaint, it seems, turns on the Board's receipt of a home assessment report made in relation to the appellant's father's residence. The appellant complained, firstly, that the report suggested that the home had only one front entrance, through a connected shop, when in fact it had two, and secondly, that it attributed remarks to his father which the latter denied. (Before the Board, these matters were the subject of written submissions by the appellant; before the learned primary judge the appellant put on affidavit material to contradict the report.) In addition, the appellant asserted that the learned judge made another "error of law" in not regarding the home assessment as of significance in the Board's conclusion. The Board's reliance on Mr Palk's report, which referred to the comments attributed to his father in the home assessment, meant, he said, that the latter document had affected its decision.

[14] A reading of the Board's reasons for refusal of parole suggests that the home assessment report played no direct part in its decision: it noted that the applicant had been approved for an alternative residence. But whatever view one takes of the report's influence, the learned primary judge was entirely correct in regarding its accuracy as not a matter for enquiry on an application for judicial review, and in making the general observation that it was no part of his function on judicial review to inquire into the Board's resolution of factual issues, provided evidence existed to support its finding.

[15] The appellant described as an "error of law" the learned judge's rejection of his assertion that he was ineligible, because of his claim of innocence, to complete a sex offenders' course. His Honour's conclusions in this regard were based on the Board's finding that the appellant had been approved for the "Getting Started: Preparatory Program". That finding in turn seems to have been based on a Corrective Services report, which said that he had been assessed as suitable to participate in the program but had been unwilling to do so. The finding, then, was based on evidence, and there was no occasion for his Honour to take a different view.

[16] The further aspect to this argument was that appellant maintained that the Board could not lawfully require him to complete such a course as a prerequisite to a grant of parole. But as the learned judge observed, the Board had not purported to mandate the completion of the course. Mr Palk had identified a number of factors which put the appellant at increased risk of committing further sexual offences. The Board was entitled to take the appellant's failure to complete the program into account in considering whether he posed an unacceptable risk if released on parole; it meant that a factor which might have allayed concerns of re-offending was absent. And as his Honour concluded, the Board's approach did not entail any rigid application of policy; it was made by reference to those circumstances, which were personal to the appellant.

[17] In similar vein, the appellant took issue with what he said was the Board's requirement that he furnish a relapse prevention plan as part of his parole application. He argued that a relapse plan was not mandated by the *Corrective Services Act*, and in any event, an innocent person had no risk factors. The learned primary judge observed that the purpose of such a plan was to demonstrate an awareness of the factors which heightened his risk of re-offending and the development of strategies to avoid them, both of which were legitimate areas for the Board's concern. The appellant asserted that this approach was an error of law on the learned judge's part.

[18] In fact, the Board did not require any particular document of the appellant, but observed that his application had not provided sufficient information to reassure it that the appellant himself could identify risk factors; to the contrary, he had asserted that he had none because he did not commit the offence. That was, as his Honour said, a legitimate area for the Board's concern.

[19] The appellant has not demonstrated any error in the judgment below. I would dismiss the appeal with costs.

[20] **MUIR JA:** I agree that the appeal should be dismissed with costs for the reasons given by Holmes JA.

[21] **FRASER JA:** I agree with the reasons for judgment of Holmes JA and the order proposed by her Honour.