SUPREME COURT OF QUEENSLAND

CITATION:	*Kruck v Southern Queensland Regional Parole Board* [2010] QCA 290
PARTIES:	**MICHAEL CHRISTIAN KRUCK** (applicant/appellant) **v** **SOUTHERN QUEENSLAND REGIONAL PAROLE BOARD** (respondent/respondent)
FILE NO/S:	Appeal No 6550 of 2010 SC No 1321 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 October 2010
DELIVERED AT:	Brisbane
HEARING DATE:	6 October 2010
JUDGES:	Muir and Fraser JJA and Cullinane J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal be dismissed with costs**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GENERALLY – appellant unsuccessfully sought judicial review of respondent's decision to refuse parole – appellant failed to acknowledge guilt or participate in a sexual offender's program – appellant failed to cooperate with psychiatrists – respondent used STATIC-99 test to assess appellant's risk of sexual recidivism – appellant with relevant criminal history – appellant argued primary judge failed to take into account relevant considerations – appellant argued STATIC-99 assessment was an irrelevant consideration – appellant argued that psychiatric reports contained irrelevant material – whether primary judge failed to take into account relevant considerations – whether primary judge took into account irrelevant considerations *Corrective Services Act* 2006 (Qld), s 193
COUNSEL:	The appellant appeared on his own behalf S A McLeod for the respondent

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

[1] **MUIR JA:** The appellant appeals against a decision of a judge of the trial division of this Court dismissing his application for a statutory order of review of the decision of the respondent, Southern Queensland Regional Parole Board, made on 10 March 2010, refusing the appellant's application dated 10 August 2009 for a parole order.

The nature of the appellant's offending

[2] The notice of appeal contains nine grounds, some of which are extremely general and uninformative. For example, ground (h) is, "An appeal is necessary to correct a substantial injustice to the applicant". The grounds of appeal or, perhaps more accurately, the appellant's contentions, arise more clearly from his outline of argument. These are addressed below. I have not attempted to summarise the contents of a written submission of 43 pages produced by the appellant on the hearing of the appeal. It elaborated on the grounds in the outline of argument and the substance of its contentions are addressed below.

[3] Many of the facts relevant to the application for a parole order and its refusal by the respondent are set out in the primary judge's reasons and it is unnecessary to repeat them here.

[4] The appellant alleges in his outline of argument that the primary judge failed to consider that:

(a) The respondent did not examine or refer to any part of the material provided by the appellant to the respondent on 4 March 2010, including his "upgraded or reviewed (sic) future-plan";

(b) The respondent's decision was based on the superseded plan provided with his application;

(c) The respondent refused parole because the appellant maintained his "stance-of-innocence" or because "the applicant did not discuss the circumstances and identify personal triggers within the plan";

(d) The appellant had identified "activities and processes" to assist him with his future plan;

(e) The respondent failed to provide "guidelines for a plan for prisoners who maintain their stance-of-innocence";

(f) The respondent abused its power knowing that the appellant had a disability and would not be offered programs and thus not be in a position to provide a "robust plan while maintaining his stance-of-innocence";

(g) The respondent's decision "in diagnosing … the [appellant's] plan had flaws for prisoners who maintain their stance-of-innocence" was unreasonable; and

(h) The appellant had demonstrated "excellent conduct and industry" whilst in prison.

[5] The respondent had a duty under s 193 of the *Corrective Services Act* 2006 (Qld) to consider the appellant's application for a parole order. The respondent also had

a duty under that section, having decided to refuse to grant the appellant's application, to give written reasons for its refusal.

[6] The respondent wrote to the appellant on 26 February 2010 informing the appellant of its concerns in relation to his application for a parole order and inviting further submissions from him. The material which had been considered by the respondent was identified in the letter. The appellant made a further submission to the respondent dated 4 March 2010.

[7] It is inherently improbable that the respondent failed to consider the further submission made by the appellant at its request. The respondent stated expressly that it had "fully considered" that submission. Nothing was placed before the primary judge to warrant the conclusion that, despite the respondent's express statement in this regard, it failed to give due consideration to the submission and the accompanying documents, including the appellant's new future prevention plan.

[8] The primary judge's reasons refer to the respondent's letter of 16 March 2010 and to the statement in that letter that the appellant's 4 March 2010 submission had been fully considered by the respondent. It is implicit in the reasons that the primary judge accepted that the further submissions were duly considered by the respondent. A contrary conclusion was not open on the evidence and the grounds of appeal based on failure to consider the 4 March 2010 submission and accompanying documents therefore fail.

[9] The other grounds listed above are equally unmeritorious. The appellant did not point to any obligation of the respondent imposed by statute or otherwise, to provide "guidelines for a plan for prisoners who maintain their stance-of-innocence". The respondent, in its letter of 26 February 2010, the content of which was reaffirmed in the 16 March reasons, pointed out, implicitly, that failure to acknowledge guilt was not a disqualifying factor but was, nevertheless, relevant to the respondent's determination. One aspect of its relevance touched on in the 26 February letter was that it made it more difficult to make an assessment of the appellant's ability to "empathise or show remorse". It was stated in the letter that the appellant's "… unwillingness to divulge or discuss the nature of [his] offences or the nature of the offending behaviour …" left the respondent "with only one guide as to [his] assessed risk of sexual recidivism, the STATIC-99 instrument". This assessed his long term static risk of sexual recidivism as being in the moderate-high range. There is thus no substance in the grounds based on the appellant's failure to acknowledge guilt or to be offered a sexual offender's program or to conclude a sexual offender's program. Indeed, the respondent expressly stated that the mere fact that the appellant had maintained his innocence did not prejudice the respondent against him.

[10] The appellant's "excellent conduct and industry" during his imprisonment was raised in his application and touched on in the report of Dr de Leacy, a psychiatrist who interviewed the appellant and reported to the respondent in relation to the appellant's application. The appellant has not shown that this matter was not considered by the respondent. The primary judge found that "… the analysis of the material before the respondent in conjunction with the reasons is consistent only with decision-making that has been undertaken on the basis of the respondent's consideration of the merits of the application". No doubt has been cast on that finding.

[11] The appellant had two grounds of challenge which related to the use by the respondent of the STATIC-99 test. One of these was that the test-calculation was not provided to him or to the primary judge. This was said to be a breach of s 193(5) of the *Corrective Services Act* 2006 (Qld). That provision is concerned only with the time within which an application for a parole order must be determined.

[12] The STATIC-99 assessment had been made in February 2009. It was referred to in a Parole Board Assessment Report of 9 October 2009. The 26 February 2010 reasons merely stated the outcome of the STATIC-99 assessment. There is no evidence that the STATIC-99 assessment itself, apart from its conclusions, was before the respondent. The appellant was made aware of the use to which the results of the assessment would be put by the respondent and addressed that matter in his submissions to the respondent. And as discussed below, the STATIC-99 assessment had something of an historical character and was but one of many matters considered by the respondent which appeared to be principally concerned with the presence of many factors suggestive of a risk of re-offending and the absence of contrary indications. There has thus been no denial of natural justice as alleged.

[13] The other ground which relied on the STATIC-99 assessment was that, by having regard to it, the respondent took into account an irrelevant consideration as the assessment was of little or limited value in predicting the risk of recidivism. In this regard particular reliance was placed on an article in a journal which doubted the usefulness of STATIC-99 assessments as predictors of an individual's risk of re-offending. There is no reason to doubt that the respondent was aware of the limitations of the STATIC-99 assessment.

[14] The STATIC-99 assessment was only one of the matters to which the respondent had regard. It provided the only formal assessment of the appellant's risk of re-offending available to the respondent. That was because of the appellant's failure to cooperate with the respondent and consulting psychiatrists. That no other psychiatric assessment was available was a consequence of the appellant's own conduct.

[15] Another ground was that the primary judge failed to have regard to the respondent's consideration of irrelevant material in that:

(a) A letter of Dr Freeman dated 13 June 2008 failed to consider that the application for a parole order did have a future prevention plan included; and

(b) Dr de Leacy did not read the appellant's parole application as his report states that the appellant "has not participated in any core programmes".

[16] If the appellant's assertions concerning Dr Freeman's letter and Dr de Leacy's report were correct, the opinions expressed by those psychiatrists may have been vulnerable to challenge, but the opinions or the documents in which they were expressed would not be rendered irrelevant and the respondent would have remained entitled to consider them. Dr Freeman’s role was not to consider the content or substance of any future prevention plan. In his short letter, Dr Freeman reported that he attempted to conduct a psychological assessment of the appellant but that the appellant refused to participate. He specified a number of "outlandish claims" which he said were made by the appellant.

[17] As for the reference to Dr de Leacy's report, there was no successful challenge to the accuracy of Dr de Leacy's assertion that the appellant has not participated in any "core" programs but there may be some confusion concerning the meaning of "core". However, even if Dr de Leacy erred as alleged, the error did not appear to have had any material bearing on the opinions expressed by him. Dr de Leacy reported that the appellant's case was complicated because he was reluctant to discuss any detail of his offences or offending conduct. He concluded that the appellant had limited insight, was preoccupied with legal issues and was unable to distinguish between psychiatric and legal issues.

[18] The appellant has a lengthy history of paedophilia. He was placed on probation for three years in 1996, when he was 23 years of age, for indecently dealing with a child under 16 with circumstances of aggravation, permitting himself to be indecently dealt with by a child under 16 with circumstances of aggravation and wilfully exposing a child under 16 to an indecent act with circumstances of aggravation.

[19] On 18 May 2006 he was sentenced to three years imprisonment on each of three counts of indecent treatment of a complainant who was under 12 and in his care. The sentences were reduced to take into account 286 days spent by the appellant in pre-sentence custody which could not be declared as time spent in serving his sentences.

[20] The appellant was found guilty on 7 December 2006, after a trial, of five counts of indecent treatment of a child under 16 years with circumstances of aggravation. He had pleaded guilty at an earlier date to one count of indecent treatment of a child under 16 years with circumstances of aggravation and one count of rape. He was sentenced to four years and six months imprisonment for the rape. Lesser sentences were imposed for the other offences and all sentences were ordered to be served concurrently. Having regard to the guilty pleas and the protracted nature of the offending conduct, which, apart from the 1996 offences, occurred over a period of three to four years, the respondent was entitled to approach the appellant's application with caution.

[21] The respondent's reasons reveal that it gave careful consideration to pertinent matters concerning the appellant's risk of re-offending. None of the errors alleged by the appellant have been shown to exist and I would dismiss the appeal with costs.

[22] **FRASER JA:** I agree with the reasons for judgment of Muir JA and the order proposed by his Honour.

[23] **CULLINANE J:** I have read the draft reasons of Muir JA in this matter. I agree with the draft reasons and the order proposed.