SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v Fardon* [2013] QCA 16
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **ROBERT JOHN FARDON** (respondent)
FILE NO/S:	Appeal No 1340 of 2013 SC No 5346 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Application for Stay of Execution
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMP ON:	14 February 2013
DELIVERED AT:	Brisbane
HEARING DATE:	14 February 2013
JUDGE:	Muir JA
ORDERS:	**1. The orders made by Justice Mullins on 13 February 2013 be stayed pending determination of the appeal.** **2. The respondent be detained in custody until 4.00 pm on 27 February 2013 pursuant to s 41 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld).**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – WHEN GRANTED – where the respondent had a history of sexual offending – where the respondent was detained in custody for an indefinite term for care, control or treatment – where the respondent sought a periodic review of the continuing detention order – where the primary judge ordered that the continuing detention order be rescinded and that the respondent be released from prison by 4.00 pm on 14 February 2013 – where the applicant seeks a stay pending appeal of the orders of the primary judge – whether a stay should be granted *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 41 *Attorney-General for the State of Queensland v Fardon* [2013] QSC 12, cited

	Attorney-General for the State of Queensland v Fardon [2011] QCA 111, cited *Attorney-General for the State of Queensland v Francis* [2007] 1 Qd R 396; [2006] QCA 324, cited
COUNSEL:	W Sofronoff QC SG, with J Horton, for the applicant D O'Gorman SC for the respondent
SOLICITORS:	Crown Law for the applicant Patrick Murphy for the respondent

MUIR JA: The judge of the trial division of the Supreme Court ordered on 13 February 2013, that the continuing detention order made on 1 July 2011, in respect of the respondent, be rescinded; that the respondent be released from custody by 4 pm today; and that he be subject to the requirements of the supervision order made by her.

The applicant applies for a stay pending appeal of paragraphs 2 and 3 of the orders made yesterday by the primary judge.

The applicant submitted that the primary judge erred in finding that the applicant had failed to discharge the onus of showing that a detention order was necessary to ensure the protection of the community.

It was further submitted that the primary judge erred because she acted upon evidence the weight and significance of which could only be determined when considered together with the expert assessments (whose validity she accepted) of the severity of the respondent's disorder, the difficulty involved in treating it, and the lack of reality in his expressed intentions to be obedient to authority in the future.

Other matters relied on by the applicant were as follows: In the period between the making of the permanent detention order by the Court of Appeal and the periodic review of it by the primary judge, the only material difference was that the respondent in mid last year, had begun seeing a psychologist, and that a rapport had been established.

The evidence remained, however, that the respondent has a complex disorder, which is particularly entrenched and difficult to treat and that little progress had been made beyond this therapeutic relationship having developed.

The assessment of the respondent's risk, notwithstanding this development, remained material: Dr Grant's assessment stood ultimately at "high". Dr Beech's assessment was "moderately high". I interpolate that Doctors Grant and Beech were psychiatrists who gave expert opinion evidence on the hearing before the primary judge.

To continue with the applicant's submissions, the evidence was that the respondent lacked, and he could never realistically be expected ever to have, internal control of his behaviour. And finally, the respondent did express in a short affidavit an intention to comply with any supervision order and with Corrective Services requirements.

The evidence from others, however, was that he did continue to have an antagonism expressed in part in his relapse prevention plan.

In his oral submissions, the Solicitor General who led Mr Horton for the applicant, referred to the evidence of the two psychiatrists. I don't think it necessary to repeat what was said, or to go to the evidence, which was essentially a reference to paragraphs 16 and 17 of the primary judge's reasons. But perhaps it is desirable that I read out a brief extract from Dr Grant's evidence in which he said that he remained of the opinion that "the risk in regard to re-offending in a sexual way and in a general violent way is high and that the completion of a sexual offender treatment program is indicated to assist with reducing the risk and with planning a satisfactory relapse prevention plan".

Mr Sofronoff drew attention to other matters including the respondent's refusal to take a sexual offender's program. He referred also to the evidence which showed that the psychiatrists' opinions were unchanged, notwithstanding evidence of improvement in the respondent's behaviour in relation to his co-operation with authorities and willingness to receive guidance and therapy.

In relation to the balance of convenience, it was submitted that there was an issue of public safety. If the appeal was upheld, it was argued, the applicant would have been shown to be correct in his contention that a detention order was necessary to ensure the protection of the community.

Mr O'Gorman SC, who appeared for the respondent, commenced his oral submissions by referring to the following observations of Justice Chesterman in *Attorney-General for the State of Queensland v Fardon* [2011] QCA 111: "In practical terms, in order to justify the stay, the Attorney-General must demonstrate a degree of likelihood that the order appealed against will not adequately protect the public and that a greater deal of protection than that provided by the order appealed from is necessary pending the appeal. The relevant risk against which the community is to be protected is that of the respondent committing serious sexual offences. For the purposes of the Act and this application the risk of committing other offences, or of breaking the terms of the supervision order, is irrelevant, save to the extent that the risk indicates an increased risk of sexual re-offending."

He went on to submit that the applicant had not demonstrated a degree of likelihood that the order of the primary judge would not adequately protect the public as shown by: comments of the Minister for Police and Community Safety and by the Corrective Services Commissioner; the psychiatric evidence; the terms of the supervision order to which the respondent will be subject of his release; and other matters to which I shall come.

Mr O'Gorman discussed the psychiatric evidence at some length with particular emphasis on the evidence of Mr Smith, a forensic psychologist, engaged in treating the respondent. Mr Smith made some positive comments concerning the respondent's improved attitude to, and engagement in, therapy.

Mr O'Gorman also identified a number of positive aspects of the evidence of Doctors Grant and Beech. He pointed, in particular, to the strictness of the terms of the supervision order which, in his submission, made the risk of re-offending acceptably low.

He placed reliance, as I have mentioned, on a number of press reports, or comments, made by the Corrective Services Commissioner, and the Police and Community Safety Minister. Putting aside the question of relevance of evidence not before the primary judge, in determining applications such as this, I am of the view that the considered and tested, sworn evidence of lay and expert medical witnesses, is to be afforded a great deal more

weight than media reports. I note that I do not intend any criticism of Mr O'Gorman's reliance on the media material.

Relevant considerations on stay applications include: the principle that judgments are not to be regarded as merely provisional; whether the applicant may suffer irretrievable harm if successful on the appeal; and whether the applicant has an arguable case.

I am satisfied that the applicant has an arguable case. I do not think it desirable or necessary to set out in any detail the reasons for that conclusion, beyond referring to the expert psychiatric evidence which I identified earlier.

My conclusions are the result of a necessarily limited consideration of those aspects of the evidence brought to my attention by the parties. Also the arguments advanced on this interlocutory application were far more confined than the submissions likely to be made on the hearing of an appeal.

To succeed in setting aside the primary judge's decision on appeal, as well as showing that he has an arguable case, the applicant must demonstrate an error of fact or law, on the part of the primary judge. It is insufficient that the Appellate Court, if in the position of the primary judge, would not have made the subject order. There is the accompanying difficulty remarked on by the Court in the *Attorney-General v Francis* [2007] 1 Qd R 396 at 402, "[T]hat the primary judge's assessment ‘call[s] for value judgments in respect of which there is room for reasonable differences of opinion, and no particular opinion being uniquely right’."

The applicant concedes that he has the onus of proof. Another consideration here is that the ordering of a stay will deprive the respondent of the personal liberty to which the order under consideration would entitle him at 4 pm today. A countervailing consideration is the risk to the community arising from the possibility of the respondent committing a sexual offence, if released.

Having regard to the fact that this Court is able to hear the appeal on 27 February, and that the parties are able to proceed on that day, it is my conclusion that the balance of convenience favours the grant of a stay.

It is not irrelevant in that regard that the respondent has had a long period of incarceration, and that at recent times he has been released and returned to custody. It would not in my view be in the respondent's best interests that he be released into the community and at the same time exposed to the risk of being returned to prison within a very short period should the appeal succeed.

MR SOFRONOFF: Your Honour, it might be desirable that we give your Honour's associate a draft that you can initial.

MUIR JA: Yes.

MR SOFRONOFF: Because I expect the Corrective Services will want a piece of paper to act upon.

MUIR JA: Yes. I see. Yes.

MR SOFRONOFF: So we'll do that within half an hour, your Honour.

MUIR JA: All right. Are you happy with that Mr O'Gorman?

MR O'GORMAN: Yes, your Honour.

MUIR JA: Okay. Adjourn the Court.