SUPREME COURT OF QUEENSLAND

CITATION:	*Dunkley v Queensland Corrective Services* [2013] QSC 261
PARTIES:	**JASON BRIAN DUNKLEY** **(applicant)** **v** **QUEENSLAND CORRECTIVE SERVICES** **(respondent)**
FILE NO:	BS2221 of 2013
DIVISION:	Trial Division
PROCEEDING:	Application for statutory order of review, interlocutory application for stay of proceeding
DELIVERED ON:	24 June 2013 (ex tempore)
DELIVERED AT:	Brisbane
HEARING DATE:	24 June 2013
JUDGE:	Margaret Wilson J
ORDER:	**1. The applicant's application for a statutory order of review filed 11 March 2013 is dismissed.** **2. The applicant is to pay the respondent's costs of the application for a statutory order of review, and the application to stay the proceeding, on the standard basis as agreed or to be assessed.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – POWERS OF COURTS UNDER JUDICIAL REVIEW LEGISLATION – STAY OF PROCEEDINGS AND INTERLOCUTORY RELIEF – where the applicant in the substantive application was subject to a supervision order under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) – where there was a condition of the supervision order that the applicant not have contact with his children or stepchildren except if agreed between the applicant and the child's mother and subject to such conditions as directed by an authorised Corrective Services Officer – where respondent issued contact approval subject to a condition that the contact be supervised by the applicant's mother-in-law – where the applicant sought an order of review of the decision of the respondent – where the imposition of condition was under the authority of, and pursuant to, a Court order – whether the decision was 'made under an enactment' within the meaning of the *Judicial Review Act* 1991 (Qld) *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), Pt 2

Div 3
Judicial Review Act 1991 (Qld), Pt 3, Pt 5

Griffith University v Tang (2005) 221 CLR 99, cited

COUNSEL: The applicant appeared on his own behalf
AD Scott for the respondent

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

MARGARET WILSON J: In the substantive application in this proceeding, the applicant, Mr Dunkley, seeks a statutory order of review of "the decision of the respondent, made 7 October 2011, varying the Supreme Court order dated 23 August 2011".

The grounds stated in the substantive application are:

> "(1) A breach of the rules of natural justice has happened in relation to the making of the decision.
> (2) The making of the decision was an improper exercise of the power conferred by the enactment under which it was purported to be made in that (a) the Respondent took a personal and irrelevant consideration into account in the exercise of its power;
> (b) the Respondent failed to take a relevant consideration into account in the exercise of its power;
> (c) the Respondent exercised its power in bad faith.
> (3) The decision of the Respondent was contrary to the rules of natural justice:
> (a) there was no cogent evidence, to any degree of probability, before the Respondent that the Applicant posed any risk [to] his step son justifying the variation of the Supreme Court order, other that [sic] the material which was available to the Supreme Court when it considered and made the order dated 23rd August 2011."

What is before the Court today is an application by the respondent, filed on 22 May 2013, for orders staying and/or dismissing the substantive application for a statutory order of review.

It is necessary to consider the background in order to understand the application.

The applicant committed a number of serious sexual offences against children for which he was imprisoned. On 10 December 2010, Justice Byrne ordered that, upon his release from custody, he be subject to a supervision order pursuant to part 2 division 3 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003. One of the conditions of the order was

> "(xxvii) not establish or maintain any supervised or unsupervised contact with children under 16 years of age, except with prior written approval of an authorised Corrective Services officer".

On 9 February 2011, Andrew Wilson, an operations manager with the High Risk Offender Management Unit of Queensland Corrective Services, made a decision, in reliance on information provided by the Department of Child Safety,

> "that approvals under requirement (xxvii)…for the applicant to have contact with [his] stepson would be subject to condition that such contact must be supervised by the applicant's mother in law, Ms Janice O'Brien"

Thereafter, Corrective Services officers issued written approvals for the applicant to have contact with his stepson, subject to that condition.
The supervision order was amended by Justice Peter Lyons on 23 August 2011. Relevantly, condition (xxvii) was deleted and the following condition was substituted for it:

> "(xxvii) not establish or maintain contact with children under 16 years of age except:
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> (i) with the prior written approval of an authorised Corrective Services officer; or
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> (ii) in the case of the [applicant's] own children / stepchildren, by way of contact if agreed between the [applicant] and the mother of the child and subject to such conditions as directed by an authorised Corrective Services officer or approved by order of a Court under the *Family Law Act* 1975".

The next day, 24 August 2011, Mr Wilson, on behalf of Queensland Corrective Services, affirmed his decision of 9 February 2011. Subsequently, contact approvals were issued in writing, subject to the condition that the contact be supervised by the applicant's mother in law.
In oral submissions today, counsel for Queensland Corrective Services conceded that, under the new condition (xxvii), a fresh consent was not required every time there was contact, so long as the condition imposed by Mr Wilson remained in force. He said that, as an administrative matter, written instruments had been issued each time containing that condition.
On 3 October 2011, the applicant requested a statement of reasons for the decision that he not have contact with his stepson unless in the presence of his mother in law. Mr Wilson replied, on 7 October 2011, that the applicant was not entitled to a statement of reasons because the decision was not made under an enactment. He nevertheless listed eight factors that he said had been taken into account and made some observations on concerns the applicant had raised.

As I understood the applicant's oral submissions today, what he really wants reviewed is the decision of Mr Wilson made on 24 August 2011 to impose the requirement that his mother in law supervise contact with his stepson. One of the matters which is apparently of present concern to the applicant is that his mother in law is no longer willing to act in the supervisory role required by Mr Wilson's decision. The applicant informed the Court that he has taken this up with Corrective Services, who have disallowed any further access.

The substantive application was filed on 11 March 2013, approximately 17 months after 7 October 2011. On 6 May 2013, a deputy registrar made an order by consent giving directions for the further conduct of the substantive application. That order provided, inter alia, that the respondent file and serve any request for particulars by 10 May 2013 and that the applicant answer any such request by 17 May 2013. The respondent filed a request for particulars on 8 May 2013, but the applicant has not filed any answer to it. The deputy registrar also ordered that the respondent file any application to stay or dismiss the

substantive application by 24 May 2013. The present application was filed on 22 May 2013.

As I have said, the applicant is really seeking judicial review of Mr Wilson's decision of 24 August 2011. A statutory order of review under part 3 of the *Judicial Review Act* 1991 may be made only in relation to a "decision made under an enactment". The test for whether a decision is made under an enactment has two limbs:

> "first, the decision must be expressly or impliedly required or authorised by the enactment; and secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations and, in that sense, the decision must derive from the enactment. A decision will only be 'made … under an enactment' if both of these criteria are met"

See *Griffith University v Tang* (2005) 221 CLR 99 at paragraph 89.

Condition (xxvii) was clearly included in the supervision order in order to address the risk which Mr Dunkley posed to the safety of children. He had committed a number of serious sexual offences against children, for which he had been sentenced to terms of imprisonment. Further, there was psychiatric evidence before Justice Byrne to the effect that he suffers from paedophilia. The condition imposed by Mr Wilson on 24 August 2011, was one within the range of conditions contemplated by paragraph (ii) of condition (xxvii) and it was authorised by the Court order. It was a condition directed to the risk the applicant posed to children by reason of his paedophilia and the attendant need for his contact with his stepson, who is now 12, to be subject to strict conditions. The Court left the formulation of the details of those conditions to an authorised Corrective Services officer.

On analysis, the condition imposed by Mr Wilson was not the making of a decision under an enactment. On the contrary, it was the imposition of a condition under the authority of, and pursuant to, a Court order. In those circumstances, it is not open to the Court to review the imposition of the condition on an application for a statutory order of review.

Further, as there is no question of an excess of jurisdiction, it is not open to the Court to treat the substantive application as one for review under part 5 of the *Judicial Review Act*, leading to a certiorari order or declaration.

This Court cannot review or overturn the imposition of condition (xxvii) in the supervision order on the present application.

Even if the decision sought to be reviewed were one made under an enactment, the Court could not review it on the merits on an application under the *Judicial Review Act*. It may be that Mr Dunkley could have the condition reviewed on the merits on an application for the amendment of the supervision order, or on an appeal against the order of Justice Lyons (although, I note the time for appeal has well passed). However, these are not matters on which the Court can give him advice, and certainly not matters the Court can deal with on the present application.

There is the further consideration that the substantive application was filed out of time. An application for a statutory order of review should be filed within 28 days of the decision complained of, and an application under part 5 of the *Judicial Review Act* should

be filed within three months after the ground for review arose. Mr Dunkley has put material before the Court indicating that he is a self-represented litigant, and not a trained lawyer; that he was unaware of the time limits; and further material which may suggest that he had hoped to obtain legal aid for this application but, was rejected by Legal Aid.

It is not necessary to consider the effect of the delay, because I am satisfied otherwise that the substantive application cannot succeed. In those circumstances, the application made today by the respondent to the substantive application must succeed.

I shall ask Mr Scott if he has a draft order.

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