SUPREME COURT OF QUEENSLAND

CITATION:	*McGrane v Queensland State Parole Board* [2014] QSC 17
PARTIES:	**JAMES McGRANE** (Applicant) v **QUEENSLAND STATE PAROLE BOARD** (Respondent)
FILE NO/S:	BS 7255 of 2013
DIVISION:	Trial Division
PROCEEDING:	Originating application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	24 February 2014
DELIVERED AT:	Brisbane
HEARING DATE:	15 October 2013
JUDGE:	Philip McMurdo J
ORDER:	**The decision of the respondent made on 24 May 2013, to refuse to grant parole to the applicant, be set aside and the matter be remitted to the respondent to be reconsidered according to this judgment.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – GENERALLY – where the applicant seeks a statutory order of review of the Parole Board's decision to refuse parole – whether the respondent was obliged to consider possible conditions of parole when determining relevant risk – whether the Board failed to take a relevant consideration into account – whether the Board's decision was an improper exercise of power. *Corrective Services Act 2006* (Qld) s 200(1), s 200(2), s 201(1), s 201(2) *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s13 *Judicial Review Act 1991* (Qld) s20(2)(e), s23(b), s23(d), s 23(f) *McQuire v Southern Queensland Regional Community Corrections Board* [2003] QSC 414
COUNSEL:	J McGrane in person

S O McLeod for the respondent

SOLICITORS: Crown Law for the respondent

[1] This is yet another challenge by the applicant to a refusal by the respondent to grant him parole. The decision which is now challenged was made on 24 May 2013.

[2] The applicant was born in July 1968. He has been in prison since April 1986, when he was charged with the rape and murder of a woman a few weeks earlier. He pleaded guilty to the offence of rape and went to trial on the charge of murder, unsuccessfully arguing diminished responsibility. In June 1986, he was sentenced to 15 years imprisonment for the offence of rape and, of course, life imprisonment for the offence of murder.

[3] He has served the whole of the term imposed for the offence of rape, 15 years of his life sentence and the full terms of sentences imposed for offences which he committed in prison in a period from 1988 to 1992.

[4] At aged 45, the applicant thereby has no experience as an adult in the community and no employment experience. But he has undertaken tertiary studies and been awarded by the University of Southern Queensland a Degree of Bachelor of Information Technology, an Associate Degree of General Studies and a Post-Graduate Diploma in Personal Financial Planning.

[5] It is unnecessary to relate the history of his many applications for parole and several unsuccessful applications for judicial review upon being refused parole, the most recent of which appears to be a judgment in November 2012.[1] For present purposes it is sufficient to say that the respondent has consistently concluded that at the time of its decision to refuse parole, it considered that there was an unacceptable risk that the applicant would commit another serious offence. And that was the conclusion of the respondent in the decision which is the subject of the present proceeding.

The respondent's reasons

[6] A statement of reasons was provided by the respondent on 16 July 2013. The reasons are relatively brief and most of the document is made up of a list of the very many documents which were said to have been considered by the respondent. They included the most recent reports of Dr Moyle, psychiatrist (dated 20 March 2012) and Dr Palk, psychologist (dated 14 April 2012), although under a heading "Findings on material questions of fact", the respondent referred instead to earlier reports by them.

[7] The respondent also referred to the nature of the offences which the applicant had committed in 1986, noting that the sentencing judge had described the circumstances as horrific. The respondent stated that it had relied on information which was provided within a report to the respondent by officers of Corrective Services which was dated 12 February 2013, although no particular information was identified in the respondent's reasons.

[8] The respondent stated its acceptance of the opinion of Dr Moyle, expressed in his report of 12 December 2011, from which the respondent set out this passage:

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1 *McGrane v Queensland State Parole Board* [2012] QSC 350.

> "My conclusions are that, in my opinion, Mr McGrane has made some advances in earning the right to stay in Residential accommodation, having a prolonged period of employment while studying successfully for degrees, and shutting himself away from antisocial peers in the prison. He remains emotionally detached and indifferent to the crime and emotionally detached from relationships with others. He has a negative view towards authority, and has not yet been able to make the emotional steps of changing from an adolescent with lots of fantasies and hopes to a man fully capable of living in the real world with all its frustrations without feeling a sense of resentment and without dealing with that resentment by brooding and hostile fantasies. While we have no evidence of hostile fantasies currently, this would require an act of faith. There is some evidence of hostility in the form of the veiled threats he makes in appeals and in writing, but these threats are simply to take things to higher levels. He does get, occasionally, into conflict in the prison and does not see the value of giving up his strong persona, earned initially in the company of antisocial and abusive peers in the prison system but also resulting in increasing sentences in the first six years of imprisonment. I would see his risk remains as moderately high of committing serious violent crime or sexual abuse in the future, but that he his moving towards building some protective factors."

[9] The respondent also accepted the following comments made by Dr Palk, expressed in his report of 16 December 2011:

> "In regards to future risk of offending, scores on the PCL-R, SORAG, SVR-20 and HCR-20 indicate that Mr McGrane has a low to moderate risk of recidivism. The key factors that are likely to increase Mr McGrane's risk of re-offending include:
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> - Failure to manage effective and interpersonal deficits;
> - Misunderstanding the emotional nuisances of others;
> - Interpersonal difficulties in work or social situations;
> - Isolation and irrational thinking;
> - Lack of motivation to continually practice mindfulness techniques;
> - Limited social supports; and
> - Tendency to have a quick temper and act impulsively.
>
> Although Mr McGrane has matured over the years and learnt skills to manage his emotional and communication difficulties as evidenced by reduced prison breaches in recent times he is still vulnerable to impulsive verbal and physical aggression and the writer suspects he will always will be a moderate risk for these outbursts.
>
> …
>
> Overall, Mr McGrane's risk of future offending as rated on the SVR-20 falls in the low to medium risk range."

[10] The respondent stated that upon the basis of those opinions, it considered that the applicant "poses an unacceptable risk of committing an offence if released into the community at this time".

[11] The statement of reasons recorded that the respondent had taken into consideration the applicant's submissions.

[12] Lastly, it also included the following:

> "The Board were aware that the Applicant has a low classification and due to Corrective Services Policies is unable to progress to a low security facility. The Board however would have more confidence if the Applicant maintained a longer period of breach free custodial time in lieu of this normal progression to the low security facility to demonstrate his ability to behave in a less structured environment."

[13] Clearly the respondent considered that the applicant's release on parole would present an unacceptable risk to the community. The risk was the commission of "an offence", although the respondent could be considered to be referring to what Dr Moyle, in the passage which is set out above, had described as "serious violent crime or sexual abuse". As far as its reasons reveal, the respondent did not assess that risk upon any particular premise of the possible conditions of the applicant's parole or, more generally, the circumstances which would surround his release into the community and which might affect the relative probability of his reoffending.

[14] Section 200(1) of the *Corrective Services Act 2006* (Qld) ("the Act") requires a parole order to include the conditions which are there specified. It could be inferred that the respondent had at least those conditions in mind.

[15] Section 200(2) allows for further conditions to be imposed, as follows:

> "(2) A parole order granted by a parole board may also contain conditions the board reasonably considers necessary -
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> (a) to ensure the prisoner's good conduct; or
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> (b) to stop the prisoner committing an offence.
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> *Examples* -
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> • a condition about the prisoner's place of residence, employment or participation in a particular program
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> • a condition imposing a curfew for the prisoner
>
> • a condition requiring the prisoner to give a test sample."

Section 200(2) thereby recognises that, at least in some cases, the risk to the community from the prisoner's release can be reduced to an acceptable level by the imposition of appropriate conditions.

[16] Section 201(1)(a) of the Act permits a parole order to be amended where the chief executive reasonably believes that the prisoner has failed to comply with the parole order. It also permits the chief executive to suspend a parole order if he reasonably believes that the prisoner has failed to comply with the order, poses a serious and

immediate risk of harm to someone else or poses an unacceptable risk of committing an offence.[2]

The professional opinion

[17] When Dr Moyle and Dr Palk assessed the applicant in December 2011, each considered how the applicant's release to the community might be managed by conditions about his accommodation and in other respects. Dr Palk then wrote:

> "In terms of managing Mr McGrane's eventual release to the community, the Parole Board could consider releasing Mr McGrane to the Wacol prison housing precinct with appropriate curfews and restricted liberty as an initial step. The prisoner's behaviour could be monitored over a 12 month period and he could be provided with psychological support to assist him with ongoing mindfulness techniques and reintegration issues. If McGrane exhibits any unreasonable signs of verbal or physical aggression he should be returned to secure custody."

Dr Palk's reference to "the Wacol prison housing precinct" was to that facility used by Corrective Services for some prisoners on supervised release under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ("the DPSOA").

[18] Similarly, Dr Moyle then wrote:

> "… I am inclined to the view that it would be helpful if steps could be made by the correctional system that would allow him a means to see progress towards his eventual goal of getting out of jail. This should include opportunity for lower security and greater responsibility. He does not seem to value the anti-social youth of the prison or anti-social others, preferring pro-social peer activities such as pursuing his academic interests and isolating himself from anti-social peers. I see these steps positively. …
>
> Ideally the old style of imprisonment would suit a gradual reintroduction to society that may not be available to him. The Board might be interested in asking the correctional services to provide it with a plan with his moves towards lower security and increasing responsibility. … It is possible that the process available under the *Dangerous Prisoners (Sexual Offenders) Act* would be an appropriate process for Mr McGrane should he be released into the community."

[19] On 7 March 2012, the respondent wrote to Dr Palk and Dr Moyle about their suggestions within the passages which are to be extracted from their December reports. The letters were in substantially the same terms, saying that the applicant's case could not be considered under the DPSOA and, as to Dr Palk's suggestions, he could not be housed in the Wacol precinct as Dr Palk had recommended. They were asked to advise whether that information affected their views.

[20] Dr Moyle replied on 20 March 2012 saying, amongst other things, the following:

> "My assessment of the risk he poses i.e. moderately high risk of future violence, stands for as long as he is not given any opportunity

[2] s 201(2)(a)-(c).

> to adapt to lower security levels and show he is trustworthy. I don't think anyone can say whether he will or not reoffend with sexually sadistic violence in the future. We can only advise on risk factors and how to manage them. Eventually, assuming no worrying behaviours occur at lower levels of security he could be seen by community agencies with a view to moving to a supported community location from which he can seek employment or education in his interests and make moves towards enjoying adaptive pursuits in the community, limiting contact with women until he has engaged with counselling targeting rape. During this time sober habits to minimise disinhibition should he feel resentful would help but I don't think drugs and alcohol were a significant problem. Once he shows he can live adapting to life's vicissitudes well with acceptance of the limits on his freedom for a year I would feel more comfortable in his engaging in social interests with women, always reporting on feelings and fantasies to his therapist and supervising parole officer. … It is my opinion that James remains an active healthy inmate with no serious mental illness but likely to have a personality that impairs his capacity to work cooperatively with authority figures to get himself lower levels of security and increasing experience in more trusted positions. He is highly self interested which would be healthy if we ignored the crimes he committed and the sentence imposed for those crimes. He is likely therefore to find it hard to adapt on parole if he does not have a support network that is active in assisting his move towards, and while on, parole.
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> If the processes established by Correctional Services are only available to people under DPSOA and there are no similar services available to those who need this process and he is unable to work cooperatively with staff of Queensland Corrective Services then I despair he may not earn parole."

[21] Dr Palk replied on 14 April 2012 saying, amongst other things:

> "The overwhelming psychometric, clinical and historical evidence as pointed out in my psychological report suggests that rather than being psychopathic in nature at the time of the offending, Mr McGrane was an immature adolescent with severe affective and interpersonal deficits stemming from infancy that led to social isolation, oddity in thinking and adjustment problems. These deficits which appear to be entrenched and lifelong have led to Mr McGrane developing emotional dysregulation, a lack of empathy, sexual maladjustment and insensitivity towards others.
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> The writer also noted in his psychological report that although Mr McGrane has matured over the years and learnt skills to manage his emotional and communication difficulties as evidence by reduced prison breaches in recent times he is still vulnerable to impulsive verbal and physical aggression and the writer suspects he will always be a moderate risk for these outbursts. However, in regards to committing further acts of rape and murder the writer believes the prisoner falls in the low risk range."

[22] The applicant, who presented his own case, was critical of the respondent's use of Dr Palk's report of December 2011, by its referring only to the risk of future offending which was indicated by the SVR-20 rating rather than other parts of Dr Palk's report. There is substance in that criticism. At paragraph 13.15 of that report, Dr Palk concluded that "in regards to committing further acts of rape and murder the writer believes the prisoner falls in the low risk range", although he was a "moderate risk" for "impulsive verbal and physical aggression". That opinion was repeated in Dr Palk's letter of April 2012 within the passage set out above.

The applicant's arguments

[23] Before going to the arguments presented by the applicant, it is necessary to identify the predicament for the applicant which is provided by s 67 of the Act.

[24] Section 67(1)(e) provides that a prisoner is not eligible to be transferred to a work camp if "the prisoner has been convicted of a sexual offence". A "work camp" is defined to be a place declared to be such under s 151(1)(a)(ii) of the Act.[3] The view which has been taken by Corrective Services is that the applicant is ineligible under s 67(1)(e) although he is not serving any term or period of imprisonment which is referrable to a sexual offence (having fully served his term of 15 years for the offence of rape).

[25] The applicant has progressed to a low security classification. But for the assumed restriction imposed by s 67(1)(e), it appears that he would have been transferred to a work camp, which presumably would have enhanced his case for parole by providing him with an opportunity to demonstrate his capacity to properly conduct himself in a less secure environment.

[26] In this decision, the respondent has accepted that the applicant cannot be transferred to a work camp. However, in the passage which I have set out at [12], the respondent left open the possibility that the applicant might be granted parole after "a longer period of breach free custodial time in lieu of this normal progression to the low security facility …". The reasons do not indicate the length of the period which the respondent had in mind. The applicant has been in residential accommodation at the Wolston Correctional Centre since September 2009 and has been a low classification prisoner since November 2011. His last recorded breach was in 2009, which was for using abusive, insulting, offensive or threatening language. As to that, the report from Corrective Services to the respondent noted that the applicant's "case notes reflect a significant change in attitude towards staff" and that he "follows the rules and regulations of the centre to an acceptable standard". Evidently, the respondent did not consider that a "period of breach free custodial time" of the order of four years was sufficient.

[27] The first of the applicant's submissions is that the respondent acted in bad faith, thereby providing a ground for a statutory order of review under s 23(d) of the *Judicial Review Act 1991* (Qld) ("the JRA"). The applicant relies upon the respondent's statement, which I have just discussed, that he should spend a longer period of breach free custodial time. He points to somewhat similar statements by the Board in reasons given for previous decisions to refusing parole. And he asserts that the respondent does not require other prisoners, including some serving life

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[3] Schedule 4 to the Act.

sentences, to "spend as much time, or any time at all, in residential [accommodation]" before granting parole.

[28] The applicant's allegation of bad faith is a serious one requiring a proper evidentiary foundation for its acceptance. It is not without some substance from the fact that a period of four years of breach free behaviour in the residential section might be thought to provide as good an indication about the risk of reoffending as would a longer period. But I am not persuaded that this is so obviously true that the respondent's statement to the contrary could found an inference of bad faith.

[29] The next of the applicant's allegations of bad faith is based upon the respondent's statement in relation to this and earlier decisions that it was concerned by the nature of the offences which he had committed. In my view, this was a subject that was plainly relevant and it would be remarkable if the nature of these offences were of no concern to the respondent. Within this argument, the applicant was critical of the respondent's focus upon the need for the protection of the community. The applicant asserted that the ministerial guideline,[4] according to which "the highest priority … should always be the safety of the community", is "unethical". Although the Act itself does not specify criteria to be applied by the respondent in this context, the respondent's discretion is affected by the expressed purpose of the Act which is to provide "community safety and crime prevention through the humane containment, supervision and rehabilitation of offenders".[5] In my view, these submissions do not reveal a basis for an allegation, let alone an inference, that the respondent acted in bad faith.

[30] A further suggested indication of bad faith is the respondent's reference to Dr Palk's assessment of the level of risk, which I have discussed above at [22]. Whilst that involves some misstatement of Dr Palk's opinion, it falls far short of establishing bad faith.

[31] The applicant also submitted that the respondent had exercised its discretionary power in accordance with the rule or policy and without regard to the merits of his case, thereby providing a ground for review under s 23(f) of the JRA. The applicant's submissions for this ground first seek to make something of what the respondent has said about the applicant's classification as a low security prisoner. It is difficult to identify just what is the applicant's complaint in this respect. The respondent has correctly regarded that classification as relevant and, of itself, favourable to the applicant.

[32] Another part of this argument, in pursuit of the ground under s 23(f), returns to the complaint that the respondent continues to require the applicant to spend more time in the residential section yet, it is asserted, other prisoners serving life sentences have not had to do so. However, I am unable to see that this assists in an argument for an order pursuant to s 23(f).

[33] More generally, the applicant's submissions do not identify any rule or policy which has effectively bound the respondent. His submissions about this ground do not characterise the ministerial guidelines as such a rule or policy. But in any case, it is

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4 Ministerial Guidelines to the Queensland Parole Board (August 2012), made pursuant to s 227(1) of the Act.

5 s 3(1). cf *McQuire v Southern Queensland Regional Community Corrections Board* [2003] QSC 414 at [28].

not clear that the application of those guidelines would require the refusal of parole to the applicant.

A further consideration

[34] Consequently, the applicant's arguments do not establish a ground for a review of this decision. But during the hearing, I raised a matter which the respondent could and should have considered, namely the potential for a set of conditions to be attached to a grant of parole, which would significantly reduce the relative risk to the community.

[35] The DPSOA has been in force for more than 10 years and there is now a considerable body of experience from cases under that statutory regime. As the DPSOA itself recognises, the risk of reoffending can be affected by the nature and extent of supervision of a released sexual offender. Hence the DPSOA requires the court to first assess the risk from a release without supervision and then to consider what can and should be ordered to make that an acceptable risk.[6]

[36] Of course the present decision was not one to be made under the DPSOA and there are important differences between a prisoner, such as the applicant, seeking the privilege of parole under a life sentence and a prisoner who, having completed the full term of his sentence, has a prima facie entitlement to be released. However, the operation of the DPSOA is instructive for a parole board in the assessment and management of the risk of reoffending by a released prisoner. It fortifies what ought to be apparent from the terms of s 200 of the *Corrective Services Act*, which is that the particular conditions of parole in an individual case could be of critical importance.

[37] The respondent's assessment of an unacceptable risk to the community was made without reference to the possible imposition of relevant conditions of parole pursuant to s 200(2) of the Act. The opinions of Dr Moyle and Dr Palk demonstrate the potential relevance of a particular regime under which the applicant might be paroled. In my view, that possible regime, or put another way a possible set of conditions of parole, was something which the respondent had to consider in order to make a logical and appropriate assessment of the relevant risk and in turn of the merits of the applicant's case for release.

[38] Had that matter been considered by the respondent, it may or may not have made any difference to the respondent's ultimate decision. But the respondent was obliged to consider it and for that reason, the evidence and in particular the respondent's statement of reasons, reveals a ground for a statutory order of review under s 20(2)(e) and s 23(b) of the JRA. During the hearing I raised with the respondent's counsel the potential for relief under this ground and it was not suggested that relief should be refused because the ground was not specified in the application as filed.

[39] For this reason, it will be ordered that the decision of the respondent made on 24 May 2013, to refuse to grant parole to the applicant, be set aside and the matter be remitted to the respondent to be reconsidered according to this judgment.

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6 DPSOA, s 13.