SUPREME COURT OF QUEENSLAND

CITATION:	*McGrane v Queensland State Parole Board* [2015] QSC 34
PARTIES:	**JAMES McGRANE** (Applicant) **v** **QUEENSLAND STATE PAROLE BOARD** (Respondent)
FILE NO/S:	BS 8241 of 2014
DIVISION:	Trial Division
PROCEEDING:	Application filed 2 September 2014
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	25 February 2015
DELIVERED AT:	Brisbane
HEARING DATE:	30 January 2015
JUDGE:	Douglas J
ORDER:	**Application dismissed**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – EXISTENCE OF OBLIGATION – LEGITIMATE EXPECTATIONS – where the applicant seeks a statutory order of review of the Parole Board's decision to refuse parole – whether there had been a breach of the rules of natural justice on the basis that previous suggestions of the Board had been met, giving rise to a legitimate expectation of a favourable review ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – IRRELEVANT CONSIDERATIONS – where the applicant seeks a statutory order of review of the Parole Board's decision to refuse parole – whether the Board took an irrelevant consideration into account, namely the trial judge's sentencing remarks ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – RELEVANT CONSIDERATIONS – where the applicant seeks a statutory order of review of the Parole Board's decision to refuse parole – whether the Board failed to take relevant considerations into account, namely good behaviour and educational achievements since the relevant psychiatric and

psychological assessments occurred

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – ERROR OF LAW – where the applicant seeks a statutory order of review of the Parole Board's decision to refuse parole – whether the Board exercised a discretionary power in accordance with a rule or policy without regard to the merits

Corrective Services Act 2006 (Qld), s 277
Judicial Review Act 1991 (Qld), s 20(2)(a), s 20(2)(e), s 23(a), s 23(b), s 23(f)

Calanca v Queensland Parole Board [2013] QSC 294, cited
DAR v Queensland Parole Board [2009] QSC 399, cited
Haoucher v Minister for Immigration and Ethnic Affairs (1990) 169 CLR 648, cited
McGrane v Queensland State Parole Board [2014] QSC 17, cited
Queensland Parole Board v McGrane [2014] QCA 193, cited
Weribone v Chief Executive, Department of Corrective Services [2007] QSC 129, distinguished
Wigginton v Queensland Parole Board [2010] QSC 059, cited

COUNSEL: The applicant appeared on his own behalf
S A McLeod for the respondent

SOLICITORS: GR Cooper, Crown Solicitor for the respondent

[1] On 5 June 1986 Mr McGrane was sentenced to life imprisonment by Ambrose J for the murder of his sister on 24 March 1986. He was born on 15 July 1968 and has been in custody since he was a 17 year old. He had also raped his sister before he murdered her, for which he was sentenced to 15 years imprisonment, a term which expired in 2001. Other lesser sentences he has served, including for offences of wilful damage, assault and preparing to escape lawful custody between 1988 and 1992, have also expired.

[2] This is an application to review the respondent's decision of 6 June 2014 by which it decided to refuse his application for parole. That hearing was precipitated by an order of Philip McMurdo J setting aside the respondent's earlier decision at a meeting held on 24 May 2013 to refuse the applicant's application for parole and remitting the matter to the respondent for reconsideration taking into account the possible imposition of a set of conditions on his parole.[1] His Honour's decision was itself set aside by the Court of

[1] *McGrane v Queensland State Parole Board* [2014] QSC 17 at [37].

Appeal in *Queensland Parole Board v McGrane*[2] but after the respondent had reconsidered its decision pursuant to McMurdo J's order.

[3] The reasons the board gave for its decision, which were dated 28 July 2014, included:

> "(3) When considering an application for parole, the Board considers the safety of the community to be the highest priority. The Board was informed about the level of risk the Applicant may pose by way of expert psychiatric opinion. The Board accepts the conclusions made by Dr. Robert Moyle, Psychiatrist in his report dated 12 December 2011 who opined the Applicant's risk, 'remains moderately high of committing serious violent crime or sexual abuse in the future, but that [the Applicant] is moving towards building some protective factors.' Further, the Board adopts the conclusions of Dr Moyle, as set out in the Board's correspondence to the Applicant of 2 May 2014.
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> (4) The Board also accepted and relied upon the opinions of Dr Gavin Palk, Psychologist, in his report dated 16 December 2011 and as extracted in the Board's correspondence of 2 May 2014. The Board noted Dr Palk's opinion that the Applicant's overall risk of future offending falls in low to medium risk category. The Board remained concerned about the Applicant's level of risk due to the nature of the offence for which the Applicant is incarcerated for. Further, the Board noted Dr Palk's view that the Applicant is likely to remain a 'moderate risk' for outbursts of 'impulsive verbal and physical aggression'.
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> (5) In accepting the opinions and concerns of both Dr Moyle and Dr Palk, the Board concluded that this evidence indicated that the Applicant poses an unacceptable risk of further offending.
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> (6) The Board sought and gave consideration to the standard *Dangerous Prisoners (Sexual Offenders) Act* (DPSOA) conditions as to whether any conditions of parole could affect the level of risk the Applicant may pose to the community, if the Applicant were released on a parole order. The Board also considered the standard parole conditions that may be imposed by way of a parole order. The Board is of the view that the Applicant's level of risk is such that it cannot be mitigated by way of standard parole conditions nor DPSOA conditions imposed by way of parole order. The Board is not satisfied that a sufficient level of supervision can be provided within the provision of a community based order. In forming this view, the Board was also conscious of the level of resources reasonably available to monitor such parole conditions and the

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[2] [2014] QCA 193.

level of monitoring that would be required in the Applicant's case.

(7) The Board took into consideration the Applicant's submissions dated 15 May 2014, provided in response to the Board's letter dated 2 May 2014. The Board noted that the Applicant sought clarification on the 'specific aspects of my crime that the Board finds 'very concerned''.

(8) In response to that query, the Board specifically drew the Applicant's attention to the paragraphs of Justice Ambrose's comments at the time of sentencing. The Board took into consideration the seriousness of the Applicant's offences, including noting His Honour's comments:

> 'James Patrick McGrane, you have been convicted on your own plea of guilty on a charge of rape, rape of your sister, and you have been convicted by a jury of a charge of murder of your sister. The murder appears to have occurred within a very short time of your raping her.
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> The circumstances of both offences were horrific. The girl must have thought she was having a nightmare when it was occurring to her.
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> There is only one sentence that I may pass on you under our law with respect to the murder count. I have discretion with respect to the rape count.
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> The rape offence is a very serious offence in itself. It was a bad rape - well, I suppose there might be worse ones but it is a very bad case, in my view, so on the count of rape I sentence you to imprisonment with hard labour for 15 years.
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> On the count of murder I sentence you to imprisonment with hard labour for life.'

(9) Following consideration of the Applicant's submission, the Board determined that there was no new information submitted which would alleviate the Board's concerns about the applicant's risk to the community.

<u>Reasons for decision</u>

The Board noted that its paramount duty is to the safety of the community, as outlined in the Ministerial Guidelines to the Queensland Parole Board.

Based on the findings listed above, including the opinions and concerns expressed by Dr Moyle and Dr Palk as outlined above, the very serious circumstances of the Applicant's offence, and the Board's view that

> conditions could not provide a sufficient level of supervision for the Applicant and thereby appropriately manage the Applicant's risk to the community, the Board considered the Applicant poses an unacceptable risk to the community and decided to refuse his application for parole."

[4] The conclusion of the Court of Appeal in *Queensland Parole Board v McGrane*[3] was that the possible imposition of parole conditions was irrelevant because of the Board's conclusion on the medical evidence that the respondent then posed an unacceptable risk to the community if he were released from prison without having had a graduated release through a low security custodial facility.[4]

[5] This application proceeded essentially on the same medical evidence as that before McMurdo J and the Court of Appeal. Mr McGrane's submissions covered four potential areas of judicial review:

(a) whether there had been a breach of the rules of natural justice caused by the Board's decision to refuse him parole, he having conformed with previous suggestions of the Board on earlier occasions as to how he could improve his chances of obtaining parole to the extent that he had a legitimate expectation that he would receive a favourable decision; see s 20(2)(a) of the *Judicial Review Act* 1991 (Qld);

(b) taking an irrelevant consideration into account contrary to ss 20(2)(e) and 23(a) of the Act, namely the trial judge's sentencing remarks;

(c) failing to take into account a relevant consideration, contrary to ss 20(2)(e) and 23(b) of the Act, namely the age of the psychiatric and psychological assessments and the progress of time since the recommendations made in them by Dr Moyle and Dr Palk without reconsideration of their assessments taking into account the applicant's good behaviour and educational achievements since those assessments occurred; and

(d) the exercise of a discretionary power in accordance with a rule or policy without regard to the merits, contrary to ss 20(2)(e) and 23(f) of the Act. In this context, Mr McGrane criticised the Board's consideration of the psychiatric and psychological reports, its assessment of the degree of monitoring he might require if granted parole and what he described as inadequate consideration of the length of time he had spent in custody in what is called "residential" accommodation and the positive steps he had taken to address his offending, including the development of release plans.

Breach of the rules of natural justice

[6] Mr McGrane has met previous suggestions by the Board by participating in the High Intensity Sexual Offenders Program (HISOP). That is a rehabilitation program. He has also been accommodated in the residential section of the prison which, I understand, to be a more trusted environment. Finally, he has maintained proper institutional

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3 [2014] QCA 193.
4 [2014] QCA 193 at [32]-[34].

behaviour in recent years and has long since passed his eligibility date to apply for parole.

[7] None of these achievements, however, warrant the conclusion that he has a legitimate expectation that he will be granted parole or any right to release on parole. What he has is a hope that he will obtain that privilege after a proper hearing and determination by the Board. In this context, Mr McLeod for the respondent relied on the following passage from McHugh J's decision in *Haoucher v Minister for Immigration and Ethnic Affairs*:[5]

> "A legitimate expectation that a person will obtain or continue to enjoy a benefit or privilege must be distinguished, however, from a mere hope that he or she will obtain or continue to enjoy a benefit or privilege. A hope that a statutory power will be exercised so as to confer a benefit or privilege does not give rise to a legitimate expectation sufficient to attract the rules of natural justice … To attract the operation of the rules of procedural fairness, there must be some undertaking or course of conduct acquiesced in by the decision-maker or something about the nature of the benefit or privilege which suggests that, in the absence of some special or unusual circumstance, the person concerned will obtain or continue to enjoy a benefit or privilege."

[8] There was no evidence that any suggestions by the Board in the past as to desirable courses of conduct by Mr McGrane would necessarily result in his obtaining release on parole. This ground of review is not available.

Taking into account an irrelevant consideration

[9] In this context, whether the Board had taken an irrelevant consideration into account, Mr McGrane criticised the Board's reference to the trial judge's sentencing remarks as irrelevant to the decision whether or not parole should be granted, especially because he had far surpassed his parole eligibility date in 1999 and also because the sentencing remarks referred to his rape conviction, the complete sentence for which had long since been served.

[10] The Board had, however, made it clear that it referred to various matters, including the opinions of the psychiatrist and the psychologist, Drs Moyle and Palk in addition to the sentencing remarks of Ambrose J.

[11] The Board also made it clear that it knew that his sentence for rape and the other offences to which I have referred had expired and it does not seem to me at all persuasive to argue that the trial judge's sentencing remarks are irrelevant in an application of this nature, no matter how long before the application for parole the trial occurred. The nature of the offending conduct, as shown in the reasons of the trial judge, is clearly a relevant consideration even if its relevance may diminish with the passage of time.

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[5] (1990) 169 CLR 648, 681-682. See also the decision of Margaret Wilson J in *Calanca v Queensland Parole Board* [2013] QSC 294 at [28].

Failure to take into account a relevant consideration

[12] Mr McGrane submitted that the date and substance of the psychiatric and psychological reports were not taken into account properly by the Board. In particular, he drew attention to the recommendations of Dr Moyle that the Corrective Services Department should implement a graduated release for him, including the development of a management plan to facilitate his release. Dr Palk had also proposed that he could be released under certain conditions. He argued that the passage of time since the writing of those reports made them obsolete or at least attenuated. The substantial reports had been written in 2011.

[13] The Board's statement of reasons makes it clear that it took into account Dr Moyle's view that the applicant remained a moderately high risk of committing serious violent crime or sexual abuse in the future even though he was moving towards building in some protective factors.[6] It also took into account Dr Palk's view that he remained a moderate risk for outbursts of "impulsive verbal and physical aggression".

[14] It is also relevant that, after the most recent lengthy reports obtained from Drs Moyle and Palk, the Board also sought an updated parole recommendation from Dr Palk which he provided in a letter of 14 April 2012. There he said, amongst other things:

> "The writer in his psychological report dated 16th December 2012 [scil 2011] noted the positive steps that Mr. McGrane had taken over the last few years in order to improve his social skills and behaviour. These include being free of any prison breaches for almost 3 years, participating in the prison work force and becoming more adept at managing his emotions in an appropriate manner. There is no doubt that over some 26 years of imprisonment Mr. McGrane has matured considerably.
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> …
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> In terms of managing Mr. McGrane's eventual release to the community, the writer is of the opinion that his release should be managed in a very structured manner due to the length of imprisonment, institutionalisation and his vulnerability to impulsive verbal and physical outbursts. While the writer appreciates that Mr. McGrane does not fit the category of prisoner considered suitable for the Wacol High Risk Offender Housing precinct Mr. McGrane initially requires an environment that will provide structure, close monitoring and reintegration support. The Ozcare parole support facility will not be able to provide the kind of initial close monitoring that is required. The writer also believes that it is inappropriate for Mr. McGrane to reside with his mother or any of his relatives having regard to the nature of his offence (the rape and murder of his natural sister).
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> The writer believes that Corrective services has a number of prisoners in a similar situation to Mr. McGrane and that consideration should be

[6] See para 3 of the Board's findings quoted earlier.

> given to developing some houses close to the Wacol prison environment in order to provide closer monitoring and supports. …"

[15] There is no evidence before me that any recommendation of the type made by Dr Palk, for the provision by the Department of Corrective Services of houses where close monitoring and support could be provided, has yet occurred, but those considerations do emphasise that this has been a balancing exercise by the Board taking into account the numerous factual considerations relevant to Mr McGrane's continued incarceration.

[16] The conclusion I draw from this evidence is that, in the absence of an environment that will provide structure, close monitoring and reintegration support such as that recommended by Dr Palk, it was open to the Board to conclude that the conditions necessary to order Mr McGrane's release on parole had not been met. That is an available conclusion on the evidence before the Board and not one that failed to take into account relevant considerations. It highlights the lack of what Dr Palk regards as a desirable facility, namely, "houses close to the Wacol prison environment … to provide closer monitoring and supports" for prisoners like Mr McGrane. But it explains why the Board reached the decision it made. While the reports were more than two years old when the Board made its decision it is not a necessary conclusion that they were so far out of date as to be irrelevant to the Board's task.

[17] Similar comments apply to Mr McGrane's complaints that his educational achievements have not properly been taken into account. They are certainly a credit to him and include his obtaining a Bachelor's Degree in Information Technology in 2003, an Associate Degree in General Studies, a Diploma in Community Development and his current studies for a Bachelor's Degree in Social Science. But they do not require that he be given parole.

[18] The respondent submitted that the decision in *Weribone v Chief Executive, Department of Corrective Services*[7] was distinguishable from this situation. Mr McGrane had relied on the decision in his submissions. It dealt with the possible grant of remissions in circumstances where the relevant legislation stipulated various considerations were required to be taken into account when determining whether or not to grant remissions. It had not been shown that the decision maker had addressed one of the statutory considerations.

[19] Educational attainments are not one of the relevant matters that must be taken into account in an application for parole, however, as the Board's discretion, subject to the overall structure of the Act, is unfettered.[8] Accordingly there has been no failure to take into account a relevant consideration.

Exercise of a discretionary power in accordance with a rule or policy without regard to the merits

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[7] [2007] QSC 129.

[8] *Wigginton v Queensland Parole Board* [2010] QSC 059 at [25]-[26].

[20] In arguing that the Board had exercised a discretionary power in accordance with a rule or policy without regard to the merits, Mr McGrane referred to the Board's consideration of Ambrose J's sentencing remarks, its consideration of the psychiatric and psychological reports, the Board's comments about the degree of monitoring that would be required if he were to be placed on parole and arguments that it had inadequately considered a number of relevant factors, including the length of time he had spent in residential accommodation, an issue referred to in para 5.2 of the Ministerial Guidelines to the Queensland Parole Board (dated August 2012) under s 227 of the *Corrective Services Act* 2006 (Qld).[9]

[21] I have already indicated that the Board's reference to the sentencing remarks of Ambrose J was appropriate.

[22] Mr McGrane's argument was also that the Board failed to consider whether any of the purported protective factors referred to by Dr Moyle in his report of December 2011 had been established. It seemed to me that, by mid-2014, Dr Moyle's report was rather old but, as Mr McLeod submitted, the Board did have a significant number of other documents before it, including the supplementary report by Dr Palk with its emphasis on the need for Mr McGrane's eventual release to the community to be managed in a very structured way in facilities that did not appear to be then available. There was also further evidence about the appropriateness of granting parole to Mr McGrane since those reports.[10] In those circumstances, it seems legitimate to me for the Board to have reached the view on all the material before it that it did.

[23] The Board's comments about the degree of supervision that may be able to be provided of Mr McGrane were he to be granted parole were, no doubt, precipitated by the reasons of McMurdo J with which the Court of Appeal has since disagreed. The consideration of that issue by the Board does not, however, even if it were relevant, reveal any error in the Board's approach.

[24] Finally, Mr McLeod submitted that it was not incumbent on the Board to address para 5.2 of the Ministerial Guidelines particularly as those guidelines should not "be so rigidly enforced as to deny a true and honest assessment of the merits of a case."[11]

[25] Atkinson J has also observed in *DAR v Queensland Parole Board*:[12]

> "[35] So long as [the Guidelines] are not inconsistent with the duties and functions of the Board set out in the Act, then the guidelines are a relevant consideration which the Board may consider. It is, however, important for the board to consider the individual circumstances of each applicant for parole …"

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[9] See ex JM-8 to the affidavit of James Male filed 15 October 2014 at p.45 of the exhibits to the affidavit.

[10] See ex JM-29 to the affidavit of James Male filed 15 October 2014 at pp.130-131 of the exhibits to the affidavit.

[11] See *Wigginton v Queensland Parole Board* [2010] QSC 059 at [29] citing *Green v Daniels* [1977] HCA 18; (1977) 51 ALRJ 463.

[12] [2009] QSC 399 at [35].

[26] While the applicant's release plans and the positive steps he has undertaken to address his offending behaviour are relevant, the failure of the Board to address them specifically in its reasons does not necessarily make its conclusion reviewable. The reasons themselves drew attention to the Ministerial Guidelines' statement that the paramount duty of the Board was to give the highest priority to the safety of the community. It was also evident from the Board's preliminary view of 2 May 2014, before the delivery of its decision and reasons, that it was aware of Dr Moyle's view that Mr McGrane has made some advances in earning the right to stay in residential accommodation, having a prolonged period of employment whilst studying successfully for degrees and in shutting himself away from anti-social peers in the prison. The Board had also referred to Dr Palk's comments that Mr McGrane had matured over the years and learned skills to manage his emotional and communication difficulties as evidenced by his reduced prison breaches in recent times.

[27] None of this analysis suggests that the Board exercised a discretionary power in accordance with a rule or policy without regard to the merits. Rather they considered the application on its merits. One of the significant problems facing Mr McGrane is that the regime recommended, for example, by Dr Palk of providing physical facilities to help with the transition from prison of prisoners like him is not in place. That is something that it is not in the power of the Board to remedy. Rather it is a matter for the executive government to consider.

Conclusion and order

[28] In those circumstances, it does not seem to me that any proper ground for judicial review of the Board's decision has been established.

[29] The application is therefore dismissed.