SUPREME COURT OF QUEENSLAND

CITATION:	*Day v Queensland Parole Board* [2015] QSC 89
PARTIES:	**TREVOR GLEN DAY** (applicant) **v** **THE QUEENSLAND PAROLE BOARD** (respondent)
FILE NO/S:	BS 7864/14
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	17 April 2015
DELIVERED AT:	Brisbane
HEARING DATE:	31 March 2015
JUDGE:	Bond J
ORDER:	**The order of the court is:** **1. The application for a statutory order of review is dismissed.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – RELEVANT CONSIDERATIONS – where the applicant's parole application was refused on the grounds that he posed an unacceptable risk to the community – where the respondent relied upon expert reports in reaching this conclusion – where the experts considered the applicant was at a high risk of re-offending – whether the respondent exercised its decision according to a rule or policy and without consideration of the merits *Corrective Services Act* 2006 (Qld), s 187 *Judicial Review Act* 1991 (Qld), ss 20(2), 23(a), 23(b), 23(f), 23(g) *McQuire v South Queensland Regional Community Corrections Board* [2003] QSC 414, cited *Queensland Parole Board v Moore* (2012) 2 Qd R 294; [2010] QCA 280, considered *Wotton v State of Queensland* (2012) 246 CLR 1, cited
COUNSEL:	The applicant appeared on his own behalf S A McLeod for the respondent
SOLICITORS:	The applicant appeared on his own behalf Crown Law for the respondent

Background facts

[1] Pursuant to s 187(1) of the *Corrective Services Act* 2006 ("the CS Act"), the respondent Board has power to hear and decide an application for a parole order by a prisoner.

[2] On 13 May 2013, the applicant lodged an application with the Board for a parole order. He was then serving a 9 year sentence for the offences of maintaining a sexual relationship with a child; three counts of rape; sodomy, and –indecent treatment or dealings with child under 16.

[3] At a meeting on 19 July 2013, the Board decided to defer consideration of the application pending receipt of certain information which it had sought. Amongst other things, the Board requested the preparation of a psychological and psychiatric assessment.

[4] By its meeting on 7 February 2014, the Board had been furnished with a psychological report from Dr Gavin Palk and a psychiatric report from Dr Josephine Sundin.

[5] The report of Dr Palk, Forensic and Consultant Psychologist, found that:

> "In regards to the future risk of sexual violence, scores on the PCL-R, SORAG and SVR-20 indicate Mr Day currently falls in the medium risk range of being involved in further sexual offences. However exposure to stressful situations and unsatisfactory relationships may increase his risk of engaging in his previous addictive pursuits of alcohol and gambling leading to becoming a high risk for re-offending.
>
> . . .
>
> Mr Day's most recent offences appear to have only ceased when the victim reported them to his (victim's) father. Of concern, Mr Day appears to have an entrenched history of impulsive behaviour related to numerous sexual liaisons, gambling and alcohol misuse. He shares many of the features of someone diagnosed with a borderline Personality Disorder and someone who has a long history of deviant sexual interests and arousal. His sexual offending history indicates he has a preference for young males just before the onset of puberty. He acknowledged that his current victim did not have any pubescent hair growth in the genital region and that his previous victim was just starting to show signs of growing pubescent hairs in the genital region. It may well be that Mr Day has targeted boys of this age as their sexual feelings become enlivened during the normal course of sexual development. There is certainly evidence of long term paedophile interests".

[6] The report of Dr Sundin, Consultant Psychiatrist, found that:

> "On the Sexual Violence Risk Scale (SVR-20 Boet et al, 1997), a professional guideline used in assessing the risk of violence; I note the following items to be present:

- Sexual deviation
- Victim of victim child abuse
- Substance abuse problems
- Relationship problems
- Employment problems
- Minimisation of sex offences (partial)

…

On the Sexual Offender Risk Appraisal Guide (SORAG, Quinsey et al, 1998, 2005) Mr Day's score places him amongst the group of sexual offenders considered to be at medium risk of sexual recidivism"

. . .

Mr Day has a very lengthy history of a persistent paraphilia in that he is sexually attracted to underage males. Despite having engaged in multiple adult homosexual contacts, this has not been sufficient to quench his persistent paraphilic fantasy and he appears to have remained locked into a level of emotional identification with teenage and underage males

While he has undoubtedly made progress during his participation in the HISOP [High Intensity Sexual Offending Program], I am concerned by a number of factors from his history. These include:

- His entrenched paraphilia
- His past history of impulsivity and promiscuity
- His ongoing projection of responsibility onto victims
- His justification of offending on the basis of loneliness, financial difficulties and alcohol
- The ease with which he has been able to engender trust in others
- The length between the two sets of offending behaviours

In my opinion, Mr Day remains a significant ongoing risk to the community. Future victims are likely to be underage males who will be engaged in high levels of sexual molestation up to and including anal intercourse. While it is unlikely that there will be any violence associated with any future potential sexual offending, the risk of psychological damage to the victims is substantial. The enduring nature of Mr Day's paraphilic cognition raises concerns that the ordinary levels of supervision both in terms of intensity and duration of parole offered in the current circumstances are likely to be insufficient to ensure the safe protection of the community. I would therefore recommend to the Queensland Parole Board that Mr Day does present an ongoing substantial risk to the community and is not an appropriate person for parole at this time".

[7] At the meeting on 7 February 2014, the Board formed a preliminary view adverse to the application and by letter to the applicant dated 25 February 2014 drew the applicant's attention to factors which the Board had considered in forming that view

and invited the applicant to make further submissions. The applicant provided a further submission dated 12 March 2014.

[8] On 4 April 2014, the Board met and decided to decline the applicant's application. The Board advised the applicant of this outcome by letter dated 15 April 2014. It provided a statement of reasons on 12 May 2014.

[9] The structure of the statement of reasons was as follows:

(a) The Board recited a history of the steps taken leading up to its decision not to grant the application.

(b) The Board then listed the "evidence and other material upon which findings of fact were based."

(c) The Board then recorded its "Findings on material questions of fact". In stating its findings, the Board specifically quoted the passages from the expert reports to which I have earlier referred.

(d) Finally the Board stated its "Reasons for decision" under which it stated:

> "Based on the findings as set out above, in particular the serious nature of the Applicant's index sexual offences, the Applicant's previous conviction for sexual offences against a child, and the assessed risk of re-offending by Dr Palk and Dr Sundin, the Board considered the Applicant poses unacceptable risk to the community and decided to refuse his application for parole."

[10] By an application for a statutory order of review pursuant to s 20 of the *Judicial Review Act* 1991 (Qld) ("the JR Act"), the applicant seeks to have reviewed the decision of the Board dated 15 April 2014, which declined his application for parole.

The applicant's grounds for review

[11] Written submissions filed on behalf of the applicant stated that the applicant relied on ss 20(2)(e) and (f) of the JR Act, which provide:

> "s 20(2) The application may be made on any 1 or more of the following grounds –
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> …
>
> (e) that the making of the decision was an improper exercise of the power conferred by the enactment under which it was purported to be made;
>
> (f) that the decision involved an error of law (whether or not the error appears on the record of the decision)."

[12] In seeking to establish that the decision was an improper exercise of power the applicant relied on ss 23(a), (b), (f) and (g) of the JR Act, which provide:

> "(23) In sections 20(2)(e) …, a reference to an improper exercise of the power includes a reference to -

(a) taking an irrelevant consideration into account in the exercise of a power; and

(b) failing to take a relevant consideration into account in the exercise of a power; and

…

(f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case; and

(g) an exercise of a power that is so unreasonable that no reasonable person could so exercise the power;"

[13] The applicant's written submissions then proceeded in a repetitious way to seek to make good his reliance on the sections I have identified. In what follows, I have sought to categorize those arguments in a way which permits reasoned analysis, even though it was not quite the way they were put in the written submissions.

[14] The applicant's first argument was that the Board had not given due and proper consideration to his application and had, in arriving at its decision, exercised its power according to a rule or policy without full and proper consideration of its merits. In support of this proposition, the applicant also submitted that the Board –

(a) failed to take into consideration "that psychiatry is not an exact science"; and

(b) failed to consider whether there were effective ways of monitoring the Applicant within the community.

[15] I reject this argument for the following reasons.

(a) Counsel for the Board submitted, and I accept, that –

(i) although the CS Act does not specify the criteria for making a decision whether to grant or refuse to grant an application for a parole order, the decision making power is, in accordance with settled principles, exercisable having regard to the subject matter, scope and purpose of the CS Act;[1] and

(ii) whilst the question of the appropriate means of rehabilitation of an offender is obviously a relevant consideration, the risk that an applicant might re-offend is also a relevant consideration to the decision.

(b) Having regard to the Board's statement of reasons, I consider that the findings which the Board made and the ultimate conclusion it expressed were based on a consideration of the evidence and other material listed under the heading to which I have earlier referred.

(c) It is clear that the Board gave considerable weight to the conclusions expressed in the expert reports. However, I find that the analysis expressed in

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1 *Wotton v State of Queensland* (2012) 246 CLR 1 at 9[8]-[9] and 32[84] and *McQuire v South Queensland Regional Community Corrections Board* [2003] QSC 414 at [28].

those reports was relevant to the Board's decision and the Board was entitled to act upon those conclusions. I note in particular that Dr Sundin's conclusion expressed concerns that available levels of supervision were likely to be insufficient to provide appropriate protection to the community.

(d) I am not persuaded that the Board acted on conclusions expressed in the expert reports to the exclusion of any consideration of the other material that was before it. The applicant did not draw my attention to any evidence which suggested that the Board exercised its discretionary power in accordance with a rule or policy without regard to the merits of the case.

(e) It seems to me that the applicant's criticisms of the Board were criticisms of the merits of its decision and not matters which made good the proposition that the Board's exercise of power was "improper" in the sense contemplated by s 20(2)(f).

[16] The applicant's second argument was based upon *Queensland Parole Board v Moore* (2012) 2 Qd R 294. He submitted that the Board failed to take into account the relatively short time left to him before he reached his discharge date and submitted that the Board failed to take into consideration the risk to the community if he was released at the discharge date without any period of supervised reintegration.

[17] I reject this argument for the following reasons:

(a) Counsel for the Board submitted, and I accept, that the applicant's argument probably intended to rely on the following observations of Holmes JA in *Moore* (at 301):

> *"*Considering the function of parole . . . it cannot be accepted that the Board is not obliged, in considering risk, to look beyond the time at which it is dealing with a parole application. If community safety is to be achieved by supervision and rehabilitation, it is necessary to consider an applicant's likely progress over the potential parole period, rather than confining considerations to the present or the immediate future. Dr Kar had advised that it would be preferable for the respondent to be gradually re-integrated back into the community; the Parole Board Assessment Report had made the point that the benefits of supervision would diminish as the length of the prospective parole period was reduced. It was accordingly, both relevant and necessary for the Board to take into account and weigh the relative risks of discharging the respondent at or towards the end of his sentence and of giving him earlier supervised release on parole. It was perfectly open to the Board to decide that the time was not yet right to undertake the latter exercise, but the respondent had squarely raised the issue in his submissions; it was relevant; and the mere allusion to Dr Kar's report did not amount to taking it into account."

(b) I do not read her Honour's decision as suggesting a general proposition that in all cases it is relevant and necessary for the Board specifically to take into account and weigh the relative risks of (1) discharging an offender at or

towards the end of his sentence as compared with (2) giving the offender earlier supervised release on parole. I observe that in *Moore* the evidence of Dr Kar had specifically raised the possibility that the risk to the community would be greater if parole was not granted and the offender remained in custody until his full time discharge date and this point had been adverted to by the offender in submissions before the Board. Moreover, her Honour's observations were a rejection of the Board's argument before the Court of Appeal that the prospect that the offender would pose a greater danger to the community if he were discharged at the end of his sentence rather than earlier and under supervision was not a relevant consideration.

(c) Unlike in *Moore*, the evidence in the present case does not support the proposition that a gradual and supervised reintegration back into the community via parole would be preferable to simple release at the full time discharge date. Nor does it support the proposition that the risk to the community might be greater if parole was not granted and the applicant remained in custody until his discharge date. Nor was there any comparable submission made by the applicant to the Board.

(d) In reaching its final determination, the Board specifically took into account the fact that the applicant had completed the Crossroads High Intensity Sexual Offending Program, but its statement of reasons reveals that it found the opinions of Drs Palk and Sundin outweighed any favourable consideration which might derive from the completion of that Program.

(e) I agree with the Board's submission in this regard. It seems to me that the circumstances of the present case did not engage the considerations which found favour with the Court of Appeal in *Moore*.

[18] The applicant's third argument, made in reliance upon s 23(g) of the JR Act, was that the Board's decision involved the exercise of a power that was so unreasonable that no reasonable person could so exercise the power. Although the applicant asserted that the decision involved such an exercise of power, he did not develop any submissions which explained why the decision could be so regarded. It seems to me that the material before the Board and in particular the seriousness of the offences of which the applicant had been convicted and the professional opinions about the risk of reoffending indicated that the conclusion the Board reached was one which was open to it. Accordingly, I reject this argument.

[19] The applicant's fourth argument was that his previous history and the nature of his offending conduct were irrelevant considerations because "they are historical". I reject his submission. Those matter are, in my view, obviously matters with which the Board ought properly be concerned and at the least formed part of the basis upon which the professional opinion, which I have already said is relevant, was founded.

[20] It remains to deal with the applicant's reliance on s 20(2)(f) of the JR Act. Although the applicant's written submissions specifically mention sub-section (f), the applicant did not identify the alleged error of law either in those submissions or at the hearing. Accordingly, I find that the applicant has not made out this ground.

Conclusion

[21] I find that the applicant has not established any of the grounds for review which he sought to establish. Accordingly, I dismiss the application for statutory order of review.

[22] I will hear the parties as to costs.