SUPREME COURT OF QUEENSLAND

CITATION:	*Gilbey v Central and Northern Queensland Regional Parole Board* [2015] QSC 217
PARTIES:	COLIN GILBEY (applicant) **v** THE CENTRAL AND NORTHERN QUEENSLAND REGIONAL PAROLE BOARD (respondent)
FILE NO:	BS 4404 of 2015
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	31 July 2015
DELIVERED AT:	Brisbane
HEARING DATE:	22 July 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 respondent cancelled the applicant's parole order – where the applicant applied for judicial review of the respondent's decision – rules of natural justice – applicant's opportunity to address concerns – effect of respondent's failure to request further information *Corrective Services Act 2006* (Qld), ss 205, 208, *Judicial Review Act 1991* (Qld), s 20 *Day v Queensland Parole Board* [2015] QSC 89, cited *F Hoffman-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, cited *Lidono Pty Ltd v Commissioner of Taxation* (2002) 191 ALR 328, cited *Moore v Queensland Parole Board* [2012] 2 Qd R 294, 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

[1] **Bond J:** On 26 November 2013 the applicant was sentenced to 2 ½ years' imprisonment for a variety of offences including possession of dangerous drugs. It was common ground that his full-time release date is 8 December 2015.

[2] On 24 December 2013 the applicant was released on a court ordered parole order which was subject to a number of conditions, including the following:

> …
>
> (b) carry out the chief executive or delegate's lawful instructions;
>
> (c) give a test sample as directed by the chief executive or delegate;
>
> …
>
> (g) Abstain from Drugs;
>
> (h) Breath Testing;
>
> (i) Urinalysis Testing.

[3] Between 30 January 2014 and 3 September 2014 the applicant's parole order was suspended on a number of occasions for breach of parole conditions. The last suspension for breach was considered by the Board on 3 September 2014 at which time the Board decided to cancel the suspension order effective from that date.

[4] However on 3 November 2014 the chief executive suspended the applicant's parole order again. That suspension was due to the applicant's failure on 3 November 2014 to provide a urine sample in compliance with condition (c) of his parole order. The Board convened on 18 November 2014 to consider the chief executive's decision and decided to cancel the applicant's parole order due to his failure to comply with condition (c). The Board did not give the applicant an opportunity to be heard before taking the decision to cancel his parole order, but nothing flows from that because s 205(4) of the *Corrective Services Act 2006* (Qld) specifically states that the Board is not required to do so in those circumstances.

[5] Consequent upon the cancellation of his parole order, the applicant was returned to custody on 31 December 2014.

[6] In compliance with s 208 of the *Corrective Services Act*, on 5 January 2015 an information notice was issued to the applicant as follows:

> Notice is given that on 18 November 2014 the Central and Northern Queensland Regional Parole Board cancelled the Court Ordered Parole Order granted to you which commenced on 24 December 2013.
>
> The reason for the Board's decision is:
>
> The Board reasonably believes that you failed to comply with condition (c) of the Court Ordered Parole Order, namely, "give a test sample as directed by the chief executive or delegate". You failed to supply a test sample on 03 November 2014.
>
> You are hereby invited to show cause, by written submission given to the Central and Northern Queensland Regional Parole Board within 21 days of receiving this notice, why the Central and Northern Queensland Regional Parole Board should change its decision.

[7] The applicant responded to the invitation to show cause by providing to the Board a written submission which was received on 6 February 2015. For present purposes the material submissions made by the applicant were as follows:

(a) his failure to supply a urine test was not because of drug use but was because he had been interfered with as a child;

(b) on the day in question he had struggled with the fact that the officer who gave him the direction to provide the sample had imposed a time frame and had indicated that he

(the officer) wanted to observe the applicant's penis in the process of providing the sample; and

(c) the fact that another male wanted to look at his penis for a length of time together with the urinary tract infection which he said he was suffering at the time made it impossible for him to comply with the directive.

[8] The Board considered those submissions at a meeting on 19 February 2015 and decided not to vary its decision to cancel the applicant's parole order. The applicant subsequently requested the Board to provide a statement of reasons and reasons were furnished to the applicant on 8 July 2015.

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

(a) First, to recite in an introduction the uncontroversial history of the applicant's sentence; the various suspensions which had been made because of the applicant's previous breaches; and the course of events leading up to the ultimate decision by the Board to cancel the applicant's parole order;

(b) Second, to recite the lengthy list of the evidence and other material upon which its findings of fact were based, including:

(i) the applicant's written submissions responding to the invitation to show cause, to which I have earlier referred;

(ii) a letter of support sent by the applicant's partner dated 29 January 2015; and

(iii) the Queensland Parole Board Guidelines to the Queensland Regional Parole Board;

(c) Third, to make findings on material questions of fact and to set out its reasons for decision.

[10] Affidavit evidence admitted at the hearing before me proved that, when the Board made its decision to cancel the applicant's parole order, the Board had in fact also had regard to information in the Integrated Offender Management System database which identified the relevant history of the applicant's previous provision of urine samples. An administrative oversight had resulted in an omission of that material being listed in the relevant section of the statement of reasons. As will appear, that the Board in fact had regard to that material was obvious from the terms of paragraph 8 of its findings.

[11] It is appropriate to quote the relevant findings on material questions of fact and the Board's reasons for decision:

> 4. The Board considered the Chief Executive's suspension at its meeting on 18 November 2014. The Board decided to cancel the Applicant's court ordered parole order in accordance with section 205(2)(a)(i) of the *Corrective Services Act* 2006.
>
> Section 205(2)(a)(i) provides the following:
>
> 205 Amendment, suspension or cancellation
>
> (2) A parole board may, by written order-
>
> (a) amend, suspend or cancel a parole order if the board reasonably believes the prisoner subject to the parole order-
>
> (i) has failed to comply with the parole order.
>
> The Applicant failed to supply a urine sample for testing on 03 November 2014.
>
> 5. An Information Notice dated 05 January 2015 was issued to the Applicant informing him of the Board's decision.

6. On 06 February 2015, the Board received a three page submission from the Applicant and one page supporting letter in response to its correspondence dated 05 January 2015.

7. On 19 February 2015, the Board further considered the Applicant's matter and decided not to vary its decision of 18 November 2014.

8. The Board considered the Applicants submission including his reason for being unable to provide a urine sample. In the context of the Applicants previous breaches of his Parole Order, together with his ability to provide urine samples on five other occasions in 2014 and one other occasion in 2015, and the lack of corroborating evidence from any other person in relation to the alleged abuse, the Board did not accept the Applicants submission.

9. On 04 March 2015, the Board sent a letter to the Applicant informing him of its decision.

Reasons for decision

Based on the findings listed above, the Board considered the Applicant was non-compliant with the conditions of his court ordered parole order by failing to supply a urine sample for testing. In the context of previous suspensions of this order due to breaches by the Applicant, on this occasion, the Board decided to cancel the order.

[12] Pursuant to s 20 of the *Judicial Review Act 1991* (Qld) the applicant – who was self-represented before me - applied for a statutory order of review of the Board's decision to confirm the cancellation of his parole order.

[13] Before me the applicant relied on both written and oral submissions.

[14] His written submissions stated:

Grounds of Review

The Applicant relies essentially on three points.

The Applicant submits that the respondent did not give proper weight to the fact that the Applicant is unable to produce a urine sample whilst his genitals are in view of another person as was the case when he failed to produce in the presence of a parole officer.

The Respondent failed to give proper weight to the reasons that the Applicant suffers from this affliction and that he was severely sexually molested as a child.

The Respondent had not taken into account that the Applicant only has an extremely short period of time until he reaches his full-time discharge date. "*Moore v Queensland Parole Board BSB14349 of 2010 23 April 2010 Fryberg J*"

[15] The first two of these points were also the subject of oral submissions by the applicant. They may be dismissed without detailed consideration. This is not a case where the Board failed to take account of the considerations to which the applicant has adverted because the reasons reveal that the Board plainly did. The question of the weight which should be given to relevant factors is a matter for the Board and does not provide a ground for the grant of a statutory order of review unless the contention is made that the decision was so unreasonable that no reasonable person could so exercise the power. The applicant did not advance that argument. It would, in any event, have failed.

[16] The third point was also elaborated upon in oral submissions by the applicant. I dealt with and rejected a similar argument in *Day v Queensland Parole Board* [2015] QSC 89 at [16] - [17]. It transpired that the applicant's point was similar to that advanced in *Day*, namely that the Board failed to take into account-

(a) the relatively short time left to the applicant before he reached his full time discharge date; and

(b) the risk to the community if he was released at the discharge date without any period of supervised reintegration.

[17] I reject this argument because:

(a) there was no evidence which supported either –

(i) 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; or

(ii) the proposition that the risk to the community might be greater if the decision to cancel the parole order was not overturned and the applicant remained in custody until his full time discharge date;

(b) there was no comparable submission made by the applicant to the Board; and

(c) the circumstances of the present case did not engage the considerations which found favour with the Court of Appeal in *Moore*.

[18] The applicant made a further complaint in his oral submissions, namely that the Board failed properly to investigate his submissions concerning the reasons he failed to provide the test sample on the date in question. Essentially his complaint was that if the Board had asked him–

(a) he could have provided evidence addressing the matters referred to by the Board; and

(b) he could have demonstrated to the Board that there was no inconsistency between the fact that he had been able to provide urine samples on the other occasions referred to in the Board's findings and his explanation for his inability to provide a sample on the occasion in question, because on the other occasions he was allowed to provide the sample whilst staying behind a curtain and without having another male insisting on looking at his penis,

and the Board's failure to take that course had the result that the Board failed to decide the case on the totality of the evidence.

[19] It seems to me that the complaint is properly analysed as a complaint that the rules of natural justice required the Board, if it had the concerns regarding the applicant's submission which it expressed in paragraph 8 of its findings (quoted at [11] above), to raise those concerns with the applicant in order to give him an opportunity to address them.

[20] The views of Gyles J in *Lidono Pty Ltd v Commissioner of Taxation* (2002) 191 ALR 328 at [18] to [20] are instructive and particularly apposite (emphasis added):

> [18] **A fundamental aspect of procedural fairness is that a party should know the case it has to meet and have the opportunity of meeting it. A party should not be ambushed, to use an evocative word which appears in some of the cases. I can appreciate that the applicant may have a sense of grievance at a finding about a principal witness being made without warning, either from the other side or the tribunal, prior to the decision, and may regard itself as having been ambushed. In one sense, that is correct**.
>
> [19] **On the other hand, the nature of the proceedings meant that the subjective intention of Mr X was plainly in issue and it behove the applicant to produce all it could to corroborate him**. It did so. **The tribunal did not rely upon any new fact or matter, or any new basis for liability — it considered, and took a view about, the evidence which was before it. The result which ensued was open as a logical and a practical possibility upon the whole body of evidence.** The "ambush", if there was one, was as to the reasoning of the fact-finder.
>
> [20] In my opinion, a tribunal, in assessing and reconciling material before it, is not bound to accept or reject any piece of evidence in whole, and it is often the case that a view of the facts is found which does not accord with the evidence or submissions by either side. In my opinion, that is what occurred here. Provided that such a view is properly open on the evidence, and does not involve the use of any fresh undisclosed material or undisclosed head of liability or defence, in my view, the tribunal is not bound to call the parties back and warn of that possibility. **As Lord Diplock said in *F Hoffman-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 369 ; [1973] 2 All ER 1128 at 1157:**

> **… the rules of natural justice do not require the decision maker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision. If that were a rule of natural justice only the most talkative of judges would satisfy it and trial by jury would be abolished.**

See the discussion in *Commissioner for Revenue (ACT) v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590–2; 127 ALR 699, cited with approval by Kirby J in R*e Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 179 ALR 238 at [194] ; 75 ALJR 889. It is relevant to bear in mind that the essence of the case was whether the tribunal believed Mr X. This is a finding on credibility which is a function of the tribunal par excellence: *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 179 ALR 238 at [67]; 74 ALJR 405.

[21] In the circumstances of this case, the credibility of the submissions which the applicant put before the Board, particularly the credibility of any explanations he put to the Board to justify his breach of the condition was obviously in issue. The applicant had been invited to "show cause … by written submissions … why the board should change its decision." It behoved the applicant to produce all he could to corroborate the explanations he put before the Board.

[22] Moreover the fact that he had previously successfully provided urine samples was obviously relevant as a potential basis to undermine the credibility of the explanation he was putting forward. Again, it behoved him to put forward any evidentiary basis for explaining away the apparent inconsistency.

[23] All that has happened here is that the Board has taken a view about the evidence which was before it. I think the observations by Lord Diplock in *F Hoffman-La Roche* quoted by Gyles J in *Lidono* apply equally here.

[24] I observe further that counsel for the Board submitted and I accept that there was no evidence before me justifying the submissions I have recorded in either [18](a) or [18](b) above.

[25] Accordingly, I reject this further complaint.

[26] It remains to note that there was also a suggestion that the Board had inappropriately exercised a discretionary power in accordance with a rule or policy. However there was no evidentiary support for that proposition. Although the Board's reasons demonstrated that it had had regard to Queensland Parole Board Guidelines for Queensland Regional Parole Boards, there was no basis for a conclusion that it did so other than by also having proper regard to the merits of the case.

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

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