SUPREME COURT OF QUEENSLAND

CITATION:	*Day v Queensland Parole Board* [2016] QSC 11
PARTIES:	**TREVOR DAY** (applicant) **v** **QUEENSLAND PAROLE BOARD** (respondent)
FILE NO/S:	SC No 5174 of 2015
DIVISION:	Trial
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 February 2016
DELIVERED AT:	Brisbane
HEARING DATE:	22 October 2015
JUDGE:	Philip McMurdo JA
ORDER:	**Application refused** **Further Order 8 February 2016: Applicant to pay the respondent's costs in the proceeding**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – RELEVANT CONSIDERATIONS – where the applicant completed a sexual offending program – where the applicant submitted the respondent did not consider completion of the program – whether the respondent considered completion of the program ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – FETTERING DISCRETION – where the applicant had withdrawn from sexual offending rehabilitation – where the respondent referred to the withdrawal in its statement of reasons for refusing parole – where the applicant submitted that the respondent inflexibly applied a rule or policy – whether the respondent considered the facts and circumstances of the applicant's case ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – RELEVANT CONSIDERATIONS – where the applicant submitted the respondent did not consider the time remaining before his full-time release date – where the applicant submitted the respondent did not consider the risk to the community of

immediate unsupervised discharge – whether the respondent considered the risk to the community

Day v Queensland Parole Board [2015] QSC 89, cited

Gough v Southern Queensland Regional Parole Board [2008] QSC 222, cited

Queensland Parole Board v Moore [2012] 2 Qd R 294; [2010] QCA 280, distinguished

COUNSEL: S A McLeod for the respondent

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

[1] The applicant is serving a period of imprisonment of nine years which will expire on 30 May 2017. He became eligible for parole on 29 November 2012.

[2] By this proceeding, the applicant seeks judicial review of the refusal of his third parole application, which was made on 5 February 2015 and refused on 26 March 2015.

[3] His period of imprisonment is constituted by various terms imposed for sexual offences. There are terms of nine years for maintaining an unlawful relationship with a child and rape, two terms each of seven years for further offences of rape, a four year term for attempted sodomy and a two year term for the indecent treatment of a child under 16. Each of the sentences was imposed in October 2009.

[4] Before refusing his application, the respondent Board wrote to the applicant on 17 February 2015, informing him that the Board had formed a preliminary view that his application should be declined and providing him with the opportunity to address matters of concern to it. The Board's preliminary review was that there was an unacceptable risk to the community from his being paroled at that time. The Board referred to his conviction for child sex offences including rape and attempted sodomy. It referred also to a psychiatric report, commissioned by the Board and written by Dr Sundin, in which these opinions were expressed:

> "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, 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 for 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".[1]

[5] In that same letter, the Board expressed its disappointment that after attending two sessions, the applicant had withdrawn from the Sexual Offending Maintenance Program ("SOMP"). It also noted that the applicant's proposed accommodation, if released on parole, had been assessed as unsuitable.

[6] The applicant replied by a submission which the Board received on 6 March 2015. Relevantly to his present arguments, the applicant wrote that he did not complete the SOMP because of fears for his personal safety, having experienced, he wrote, threats, harassment and bullying during his participation in another program described as the Crossroads: High Intensity Sexual Offending Program ("HISOP"). He said that he was willing to undergo any treatment within the community if paroled. As to his proposed accommodation, he wrote that he had sought alternative accommodation from Ozcare and would notify the Board of the outcome.

[7] It appears that no further information was provided to the Board before it concluded that he should not be paroled, as it advised the applicant on 26 March 2015. It there expressed its conclusion that the applicant would be "an unacceptable risk to the community on a parole order at this time". It agreed to a further application being made any time from six months from that date.

[8] As requested by the applicant, the Board provided a statement of reasons. The statement was consistent with the Board's previous correspondence. It quoted that part of Dr Sundin's opinion which I have set out above as well as another part where Dr Sundin had noted that on what is called the Sexual Offender Risk Appraisal Guide, the applicant's

[1] Affidavit of Flora Cheng sworn 10 July 2015, p 59-60.

score placed him amongst the group of sexual offenders considered to be at medium risk of sexual recidivism. The Board expressed its concern that the applicant had outstanding treatment requirements as follows:

> "The Board is concerned that the applicant has outstanding treatment requirements which may assist the applicant in his understanding of the reasons for his offending behaviour in the past and assist in developing strategies to prevent such offending recurring when released. It is not a requirement that prisoners must complete treatment programs before being eligible for release on parole however in this case, the Board has determined it would be assisted in determining the potential risk to the community if the applicant were to be released, by the applicant completing those programs identified by the Department."[2]

The statement of reasons continued:

> "The Board has further considered whether it would be possible and/or appropriate for the applicant to complete his outstanding programs in the Community. The Board has determined that in this case, considering the applicant's application for parole as a whole, and having particular regard to the severity of the offences for which the applicant is incarcerated, the applicant would not be an appropriate candidate at this time for community based program participation."[3]

The reasons also referred to the unsuitability of his proposed residence, the Board accepting the report from the Department of Corrective Services to that effect.

[9] The applicant is without legal representation and at the hearing made no oral submissions, relying only upon his written outline of argument. The first of his arguments,[4] is to the effect that the Board did not give "due and proper" consideration to the report of Corrective Services upon the applicant's completion of the HISOP. The applicant says that this is particularly evident from the fact that the Board, in its statement of reasons, did not say that it had considered that report. According to the applicant's submissions, this affected the Board's reasoning because it relied upon the psychiatric opinion based upon "historical facts" occurring prior to his completion of the HISOP.

[10] But this so called exit report from the applicant's completion of the HISOP was extensively discussed in Dr Sundin's opinion. Her discussion of that report occupied some five pages. It included reference to a recommendation within that exit report that the applicant should complete the SOMP upon release into the community. It is not suggested by the applicant that this extensive reference to the exit report in some way misstated or omitted anything which was material to the Board's decision. Clearly the Board considered Dr Sundin's report. It could not have overlooked such an extensive part of it. As to the complaint that Dr Sundin had relied upon facts which predated the applicant's participation in the HISOP, there could be no criticism of Dr Sundin or the

---

2 Affidavit of Flora Cheng sworn 10 July 2015, p 68.
3 Ibid.
4 appearing in paragraphs 11 and 13 of the applicant's outline.

Board in considering such facts. For example they had to consider the applicant's criminal history and other things which had occurred in his life which were relevant to his suitability for parole at that time.

[11] The applicant's written submissions contend that the Board acted according to a rule or policy, namely that sexual offenders should complete the SOMP whilst imprisoned, rather than considering the facts and circumstances of his case. This submission cannot be accepted. In the passage which I have set out above at [8], the Board said otherwise. There is no indication this statement was false and that the Board was acting simply according to some rule or policy as the applicant suggests.

[12] The applicant also complains that the Board failed to consider that the recommendation in the exit report from the HISOP that the SOMP be completed within the community. This is really an argument which is related to the applicant's first contention, namely that the Board did not consider the exit report. Further, as it is set out in Dr Sundin's opinion, this particular recommendation of the exit report was made upon the premise that the applicant was paroled: in other words if he was to be paroled then certain recommendations were made including that he participate in the SOMP. It does not appear from the evidence that, as the applicant asserts, it is the "intent" of the SOMP that it be completed on parole rather than by the prisoner in custody.

[13] A further submission, relying upon the exit report from the HISOP is:

> "The applicant submits that the respondent has failed to consider the needs of the applicant upon his release to the community as recommended by the HISOP completion report".[5]

Again, this seems to be a variant of the applicant's first submission, namely that the Board did not consider the exit report. The applicant did not explain how Dr Sundin's extensive reference to the exit report had failed to refer to have whatever "needs of the applicant" which, in making this submission, the applicant had in mind.

[14] The applicant submits that the Board failed to take into consideration what he says is the relatively short time left before his full time release date, and the potential risk from the unsupervised release of a prisoner such as the applicant. The submission relies upon the reasoning of Holmes JA (as the Chief Justice then was), with whom the other members of the Court agreed, in *Queensland Parole Board v Moore.*[6] In that case, the Board's decision to refuse parole was set aside partly because the Board was found to have erred in not considering the risks to the community if parole was never granted or granted only shortly prior to the expiry of that prisoner's period of imprisonment. The beneficial effect of parole upon that prisoner's rehabilitation, and thereby upon the extent of the risk which his release would present, were the subject of specific evidence from a psychiatrist, who wrote that the prisoner was "likely to do better through gradual integration into the

---

5 Paragraph 15 of the applicant's outline.
6 [2012] 2 Qd R 294 at [17].

community than being abruptly discharged at the end of his sentence". On the appeal, counsel for the Board submitted that it was only the present risk to the community from an immediate release of the prisoner which was to be considered, so that "future prospects were irrelevant".[7] It was in rejecting that submission that Holmes JA wrote:[8]

> "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."

[15] When unsuccessfully seeking judicial review of the Board's previous decision to refuse him parole, the present applicant made the same submission in reliance upon the passage from *Moore*. In rejecting the submission, Bond J noted that unlike in *Moore*, the evidence in the case before him did not at least specifically support the proposition that a gradual and supervised reintegration back into the community via parole would be preferable to a release at the end of the period of imprisonment.[9] I agree that the reasoning in *Moore* must be understood in the context of the specific opinions which were presented to the Board in that case and the Board's position there, as advanced in argument by its counsel, in effect that it had not been obliged to consider that evidence.

[16] In general it must be accepted that parole can be conducive to the rehabilitation of offenders and thereby beneficial in lessening the long term risk to the community of further offending. The relevance of that general proposition will obviously vary from case to case. As a full time release date draws closer, in general this will become a more relevant consideration. In the present case, when this decision was made the full time release date was still more than two years away and the applicant was permitted to make another application in or after September 2015. There was no evidence in the present case that the value of a later grant of parole would be less for the fact that the period of parole would be too short. The Board here was entitled to proceed upon the basis that a refusal of parole this time around would not affect the long term risk of reoffending. This submission based upon *Moore* must be rejected.

---

7 [2012] 1 Qd R 294 at 300 [11].
8 [2012] 2 Qd R 294 at 301 [17].
9 *Day v Queensland Parole Board* [2015] QSC 89 at [17].

[17] Lastly there was a written submission which referred to *Gough v Southern Queensland Regional Parole Board*[10] but which did not seek to relate the facts of the present case and to what was there decided.

[18] It follows that each of the applicant's arguments must be rejected and the application to review the decision will be refused.

[10] [2008] QSC 222.