SUPREME COURT OF QUEENSLAND

CITATION:	*Winchester v Southern Queensland Regional Parole Board* [2017] QSC 254
PARTIES:	**BARRY DAVID WINCHESTER** (applicant) **v** **SOUTHERN QUEENSLAND REGIONAL PAROLE BOARD** (respondent)
FILE NO/S:	SC No 7053 of 2016
DIVISION:	Trial
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	10 November 2016
DELIVERED AT:	Brisbane
HEARING DATE:	24 October 2016
JUDGE:	Boddice J
ORDER:	**The application for a statutory order of review is dismissed.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – UNREASONABLENESS – where the applicant was convicted by a jury of one count of maintaining a sexual relationship with a female child and numerous other sexual offences against the same child – where the applicant was subsequently released on parole – where it was a condition of that parole that the applicant not reside with a child under the age of 16 years – where the applicant requested the respondent amend or remove that condition to permit the applicant to reside with his family at their home – where the occupants of that home were the applicant's ex-wife and his three male children under the age of 16 years – where the respondent declined to amend or remove that condition – where the respondent provided reasons for that decision – whether the respondent's decision was so unreasonable that no reasonable decision-maker in the respondent's position would have made the same decision – whether the respondent provided adequate reasons for its decision *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24; [1986] HCA 40, cited

Minister for Immigration and Citizenship v Li (2013) 249 CLR 332; [2013] HCA 18, cited

COUNSEL: The applicant appeared on his own behalf
M J Woodford for the respondent

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

[1] On 28 September 2015, the applicant was released on parole. It was a condition of that parole that the applicant not reside with a child under the age of 16 years. On 28 March 2016, the applicant requested the respondent Board amend that condition of his parole so that he be able to reside with his family at their home. The occupants of that home include the applicant's ex-wife and three male children aged 7, 11 and 14 years respectively.

[2] On 20 April 2016, the respondent Board considered the applicant's request to reside with his family but decided not to amend the conditions of his parole to delete the condition that he not reside with children. The Board subsequently supplied a statement of reasons for that decision. It was dated 20 June 2016.

[3] On 12 July 2016, the applicant applied for a statutory order of review of the respondent Board's decision. The grounds of the application were that the respondent had not provided a valid statement of reasons and there was no reasonable basis for the imposition of the condition insofar as it prohibited the applicant from residing with his family. The applicant sought an order that the condition of the parole order be amended to read: "That the prisoner shall not reside with a child under the age of 16 years other than the prisoner's children".

Background

[4] The applicant was born on 30 July 1948. On 8 June 2010, the applicant was convicted by a jury of one count of maintaining a sexual relationship with a child and 20 other sexual offences against the same child. At the time of the offending the child was aged 13 and 14 years and the applicant 59 years.

[5] On 25 March 2011, the applicant was sentenced to 11 years and nine months imprisonment on the count of maintaining a sexual relationship with a child. It was declared that this was a conviction for a serious violent offence. The applicant was ordered to serve concurrent, lesser sentences of imprisonment for the 20 other sexual offences.

[6] On 16 December 2011, the Court of Appeal allowed the applicant's appeal against his conviction on six counts of rape and one count of attempted rape. These offences formed some of the 20 other sexual offences the applicant had been convicted of by a jury. A re-trial was ordered in respect of those counts. The applicant's sentence on the maintaining count was also set aside by the Court of Appeal. The Court ordered the applicant be re-sentenced on that offence upon the outcome of the re-trials. The basis for setting aside that sentence was that it had been imposed in circumstances where the applicant had been convicted of non-consensual offences, namely the offences of rape.

[7] The Director of Public Prosecutions subsequently decided not to proceed with any re-trial of those counts. On 17 October 2012, the applicant was re-sentenced for the count of maintaining a sexual relationship. The applicant was ordered to serve six years and two months imprisonment concurrently with the other sentences of imprisonment imposed on 25 March 2011 which had not been the subject of the successful appeal. The applicant's parole eligibility date was set at 18 December 2014.

[8] The basis for that sentence was enunciated by the sentencing judge in the sentencing remarks:

> "…the proper factual basis on which to sentence you is that you first met the child in February 2008 at the time of the offence of unlawfully procuring her to commit an indecent act which is the subject of Count 3. It was a particular of this charge that she was under 16 years of age. The result is, I proceed on the basis you maintained a sexual relationship with her from that date until at least 12 July 2008 which is the last specific date on or about which it is alleged that you subjected her to sexual misconduct, that is the indecent dealing charge with a child under 16 years which is the subject of Count 23. That is a period of about five months. This was at a time when she was aged 13 and 14 years and you were 59.
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> As I said on the earlier occasion, it does not matter whether you first met her at the beach and you invited her to come to your stables, or whether she first spoke to you on the phone, expressed an interest in being around horses and asked her for work. On either basis you made it clear to her that she could come to your stables and she did so.
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> It must have been clear to you that she had a love of horses and was anxious to leave an unhappy home life. Having had the opportunity to observe the attitude of her mother during the trial, it is my view that the complainant saw through you an opportunity to escape an unhappy household rather than being infatuated with you. If she did at some stage of the relationship become infatuated with you, this was something that you manipulated during the relationship, particularly relying on her love of horses. I do not consider there is any evidence that she had a sexual interest in you or she desired a sexual relationship with you.
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> I consider that having this knowledge you behaved in a predatory and persistent way in gaining her trust and confidence in circumstances where this young girl was susceptible to manipulation.
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> Even if at the time you met her you were not seeking a relationship with a minor, the fact is that you took advantage of the opportunity her circumstances presented to you to establish a sexual relationship with her. In particular you manipulated her emotional vulnerability and her love of horses to gain and maintain her trust, and then sexually abused and exploited her for your own selfish sexual gratification without regard for her ongoing welfare and emotional wellbeing. You acted so as to undermine her self-esteem and to ensure that she was vulnerable to your manipulation so that the relationship would continue.
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> As such, you created a situation which ensured that opportunities for your sexual gratification continued to present themselves to you. There is no

> evidence that she initiated any of the sexual contact. The pretext telephone call demonstrated that you wished the relationship to continue. This view of the facts is consistent with the way I sentenced you on the previous occasion. However, I sentence you on this occasion on the basis that the maintaining charge did not involve non-consensual acts."

Parole release

[9] On 2 June 2014, the applicant submitted an application for parole. In that application, he stated he wished to reside with his family if granted parole. He asserted his children wanted him to reside in the family home. The applicant denied in his application that he had committed any of the sexual offences.

[10] In considering this application, the respondent Board obtained a number of reports including a home assessment report in relation to the family home. That report stated the applicant's wife was divorced from the applicant but wanted the applicant to return to the family home as it would be beneficial for the stability of her children. The applicant's wife stated she believed the applicant was not guilty of any sexual offences against the victim or any children. She expressed no concerns for the safety of her children or other children visiting that home. The applicant's wife agreed to provide supervision for any contact between the applicant and her children, although she saw no need for that supervision.

[11] The author of the home assessment report noted the applicant's children interacted with other families with young children in the area and that there were schools and parks within walking distance of the proposed residence. The author concluded these raised risk factors to children in the home environment and that having regard to the applicant's wife's stance, it was impossible for there to be adequate monitoring of the risk to children. The family home was assessed as unsuitable for parole release.

[12] On 14 August 2014, the respondent Board considered the applicant's application for parole. It deferred consideration pending receipt of a psychological assessment to be undertaken by Dr Ellis-Smith. Dr Ellis-Smith provided a report to the respondent Board on 30 October 2014. It noted the applicant hoped to be able to return to the family home to live with his ex-wife and her three children.

[13] After considering all of the material, Dr Ellis-Smith assessed the applicant as being a low risk of further sexual offending but noted the level of risk was usually managed by environmental controls and sound supervision. Dr Ellis-Smith noted the unsuitable home assessment and opined it would be appropriate for the applicant to reside at a different address to his wife and children. Dr Ellis-Smith further opined the applicant was an appropriate candidate for parole supervision but recommended specific conditions, including a condition he not reside with children under the age of 16 years.

[14] On 12 November 2014, the respondent Board considered the applicant's application for parole and came to the preliminary view to decline the application. In notifying the applicant of this preliminary decision, the respondent Board expressly noted the unsuitability of his proposed residence, namely, the family home. In response, the applicant sent a written submission to the respondent Board dated 9 December 2014. He indicated he would apply for alternate accommodation.

[15] In further submissions dated 26 December 2014 and 1 January 2015, the applicant maintained that residing at his family home was appropriate in all circumstances. The applicant noted his wife and children wanted him to reside at home, his wife had agreed no other children would attend the residence, his wife was aware of the nature of the offences and the circumstances in which they had occurred and his wife had difficulties with English. On 7 January 2015, the respondent Board considered the subsequent submissions but declined the application for parole, noting the absence of a suitable home assessment. On 13 January 2015, the applicant filed an abridged second application for parole. It proposed a new residential address which was also subsequently found to be unsuitable.

[16] In subsequent submissions, dated 6 February 2015 and 19 March 2015, the applicant pressed for release on parole to his family home. These requests were considered by the respondent Board which deferred making a decision until a suitable home assessment had been received by the Board. Thereafter there were numerous further submissions sent to the respondent Board by the applicant. The respondent Board engaged in correspondence with the applicant in relation to possible appropriate parole release addresses. Ultimately, the respondent Board considered those submissions and declined the second application for parole on 15 July 2015.

[17] On 30 July 2015, the applicant filed a third application for parole. On this occasion, the applicant nominated his usual residential address as his parole release accommodation. This address was found to be suitable in a subsequent home assessment report. On 19 August 2015, the respondent Board granted the applicant's parole, with release upon the availability of a bed at that address. The applicant was released on parole to that residence on 28 September 2015, subject to the condition he not reside with children under the age of 16 years and a further condition he have no unsupervised contact with children.

[18] On 15 November 2015, the applicant wrote to the respondent Board requesting he be allowed to live at the family home. He sought deletion of the condition he not reside with children under the age of 16 years. The applicant repeated many of the previous submissions in support of the deletion of that condition.

[19] The respondent Board obtained a report from the parole authorities. The writer of that report did not support the deletion of the condition. On 9 December 2015, the respondent Board considered the request for amendment and declined to amend the parole order. In doing so the Board noted it reasonably believed the applicant would pose an unacceptable risk of committing an offence.

[20] On 2 January 2016, the applicant made a further written submission to the respondent Board seeking an amendment of the parole order to allow him to live in the family home. The applicant repeated many of the previous submissions, raised matters concerning his family and noted he had their support for residing in that residence. The respondent Board considered those further submissions on 13 January 2016 but decided not to vary its decision of 9 December 2015.

[21] On 28 March 2016, the applicant sent a further request for deletion of that condition so that he be able to reside at the family home whilst on parole. By this stage, the family had moved residences. A report from the parole authorities again did not support a variation of that condition. In that report, concerns were expressed as to the applicant's

compliance with the parole order, including that the applicant had declined to further engage with psychological counselling as directed by the parole officer after being informed the psychologist would not prepare a report dealing with his suitability to reside with his family.

[22] The author of that report noted the applicant had by that stage attended the family residence on approved visits with his sons which were supervised by his wife. Home visits had confirmed compliance with that supervision and visit times. However, the author noted there was no meaningful progress made to address the risks associated with his offending.

[23] On 20 April 2016, the respondent Board considered the applicant's further request to reside with his family and decided not to amend the relevant condition. In reaching this decision, the Board noted the applicant's response to supervision and the fact that as his wife did not accept his guilt, living with her was not a protective factor.

Statement of reasons

[24] In its statement of reasons for the decision made on 20 April 2016, the respondent Board stated it decided not to amend the conditions of the applicant's parole in accordance with s 200(2) of the *Corrective Services Act* 2006 (Qld) ("the Act"). The respondent Board reached this decision as it reasonably believed the applicant posed an unacceptable risk of committing an offence.

[25] In rejecting the applicant's further request to amend that condition, the respondent Board noted the serious nature of the applicant's index offences. The Board also noted the applicant had been directed to engage with a psychologist but had only attended two sessions, stating he was only attending to obtain a report with respect to his suitability to reside with his family and that when the applicant was informed that such report would not be prepared, the applicant declined to engage in further treatment with psychologists. The respondent Board also noted that whilst the applicant was reporting as directed, he persisted to shift blame towards the victim for his offending.

[26] The respondent Board also noted that whilst a home assessment report had not been completed for the new family residence, the Board would not on the present material give approval for the applicant to reside at that nominated address noting the applicant's response to supervision and the fact that the applicant's partner did not acknowledge the applicant's guilt. As a result, the Board considered that the applicant residing at the proposed accommodation would not be a protective factor.

[27] In conclusion, the respondent Board noted that having regard to those previous findings, it declined the applicant's request to amend the parole order.

Legislative scheme

[28] The respondent Board has responsibility to decide applications for parole. The respondent Board's power to grant parole includes a power to impose conditions the respondent Board reasonably considers necessary to ensure the prisoner's good conduct or to stop the prisoner from committing an offence.[1]

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[1] *Corrective Services Act* 2006 (Qld), s 200 (2).

[29] The respondent Board also has power to amend parole orders. That power includes a power to amend or remove a condition if the respondent Board reasonably believes the condition is no longer necessary having regard to the purposes of the Act.[2]

Applicant's submissions

[30] The applicant submits the respondent Board's statement of reasons do not constitute valid reasons as they do not explain why the condition that he not reside with children under the age of 16 years is necessary. Further, its decision is unreasonable.

[31] The applicant submits his index offences involved a female complainant. None of the children residing at the family home are female. There is no evidence to suggest he has homosexual tendencies. In those circumstances, whether the applicant denies his guilt and whether his wife accepts his guilt are irrelevant to a determination of relative protective factors. The applicant presents no real risk to any child residing in the family home.

[32] Finally, the applicant submits the respondent Board has misstated his wife's knowledge of the index offences. As his present residence requires him to live in the same facility as other sexual offenders, such a residence does not constitute an appropriate accommodation address. Further, his wife and children need him to live at home.

Respondent's submission

[33] The respondent Board submits its statement of reasons adequately explain the reasons for the refusal to amend the relevant condition of the parole order. Those reasons indicate the applicant would pose an unacceptable risk of re-offending if the condition was amended to enable him to reside at the family home. The reasons set out the evidence and material considered by the Board and noted relevant factors such as the nature of the offences, his disengagement with the psychologist, his response to supervision and his wife's stance in relation to his innocence and that it would not amount to a protective environment. Such reasons comply with the obligations to give reasons for any decision.

[34] The respondent Board further submits there is no basis to find the decision to decline to amend the relevant condition of the parole order was so unreasonable that no unreasonable person could so exercise the power. The respondent Board considered the risk to the community and sought an expert opinion from Dr Ellis-Smith. That opinion, whilst recommending the applicant as an appropriate candidate for parole, specifically recommended conditions be put in place to prevent him from having unsupervised contact with children or residing with children.

[35] The respondent Board submits there is no basis to find the views of the applicant's wife and children have been disregarded by the Board. The respondent Board expressly noted the wishes of the applicant's wife and children. It was entirely a matter for the respondent Board what weight it gave to those express views. Similarly, in assessing the applicant's risk, it was a matter for the respondent Board what weight it placed upon the report of Dr Ellis-Smith as to the applicant's risk of future offending.

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2 *Corrective Services Act* 2006 (Qld), s 205 (1) (a).

[36] Finally, the respondent Board submits the applicant's maintenance of innocence was not a factor taken into account in the Board's consideration. Whilst the applicant's wife's stance was taken into consideration, it was not an irrelevant consideration. That stance impacted upon the effectiveness of any supervision of the applicant whilst residing in the family home. Dr Ellis-Smith expressly opined that environmental controls and supervision were relevant factors in minimising any risk of re-offending.

Discussion

[37] The respondent Board is given a broad discretion under the Act in deciding whether to grant or refuse applications for parole. That discretion includes a discretion to impose conditions on any grant of parole. The Board's power to amend those conditions is equally broad.

[38] In exercising such a broad discretion, it is a matter for the respondent Board to determine what weight to give to relevant factors. What factors are relevant is to be determined by a consideration of the construction of the statute, including its object, scope and purposes.[3]

[39] In the present case, a central consideration for the respondent Board in determining whether to amend or remove the relevant condition was whether the respondent Board reasonably believed the condition was no longer necessary to ensure the applicant's good conduct or to stop him from committing an offence.

[40] In exercising its discretion whether to amend or remove that condition, the respondent Board was entitled to have regard to the applicant's risk of re-offending in the future. Relevant considerations in undertaking that risk assessment included the expert opinion of Dr Ellis-Smith.

[41] The applicant's offending, whilst involving a female complainant, involved predatory conduct for sexual gratification. Such behaviour was properly assessed as constituting a risk of future re-offending if the applicant were not subject to appropriate environmental controls and supervision. Dr Ellis-Smith specifically noted the importance of those environmental controls and supervision in addressing the risk of future offending by the applicant. It was in that context Dr Ellis-Smith recommended the imposition of the condition that the applicant not reside with a child under the age of 16 years.

[42] Having regard to the material as a whole, there were sound reasons for the respondent Board to have imposed that condition as a condition of the parole. It was reasonably open to the respondent Board to conclude that condition was necessary to prevent re-offending by the applicant.

[43] In considering whether to amend that condition, it was also relevant for the respondent Board to have regard to the applicant's performance whilst on parole. The material placed before the respondent Board reasonably supported the finding that that response to supervision and, in particular, the response to the direction that the applicant undertake psychological testing, was not appropriate.

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[3] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 350 [26].

[44] It was also reasonably open to the Board to conclude, having regard to that response, that the applicant's wife's stated stance in respect of his innocence reduced the protective factors present. Those conclusions were sufficient to allow the respondent Board to reasonably conclude that it was necessary for the condition that the applicant not reside with a child under the age of 16 years to remain on the applicant's parole order.

[45] It was reasonably open to the respondent Board to find, having considered the material as a whole, that imposition of that condition remained necessary to stop the applicant from re-offending. The decision of the respondent Board to decline to amend or remove that condition was not unreasonable. It was a decision reasonably open to a reasonable Board, considering all of the relevant material, in the context of the function, scope and purposes of the Act.

[46] In coming to those conclusions the respondent Board did not have regard to irrelevant considerations or fail to have regard to relevant considerations. The factors considered by the respondent Board were all relevant considerations. The weight to be given to those factors was a matter for the respondent Board.

[47] The Board also provided sufficient reasons for its decision not to amend or remove the relevant condition. The reasons expressed the material relied upon and the basis for its decision.

Conclusions

[48] The applicant has not established that the decision of the respondent Board declining to amend or remove the relevant condition the subject of the application was so unreasonable that no reasonable Board could reach that decision. The applicant has also not established that the respondent Board failed to give valid reasons or that it failed to have regard to relevant considerations or had regard to irrelevant considerations.

[49] The application for a statutory order of review is dismissed.

[50] I shall hear the parties as to costs.