SUPREME COURT OF QUEENSLAND

CITATION:	*Kruck v Southern Queensland Regional Parole Board* [2009] QCA 219
PARTIES:	**MICHAEL CHRISTIAN KRUCK** (appellant) **v** **SOUTHERN QUEENSLAND REGIONAL PAROLE BOARD** (respondent)
FILE NO/S:	Appeal No 2974 of 2009 SC No 9554 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	31 July 2009
DELIVERED AT:	Brisbane
HEARING DATE:	22 July 2009
JUDGES:	Chief Justice and Fraser and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. Appellant to pay the respondent's costs of and incidental to the appeal, to be assessed on the standard basis.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – where appellant refused to undertake psychological assessment – where appellant had not completed sexual offender program – where parole not granted and appellant sought judicial review – where appellant appealed from primary court decision dismissing application for judicial review – where appeal based largely upon the merits of the case – whether the primary judge was correct in dismissing the application for judicial review *Corrective Services Act* 2006 (Qld), s193 *Judicial Review Act* 1991 (Qld)
COUNSEL:	The appellant appeared on his own behalf A Horneman-Wren for the respondent
SOLICITORS:	The appellant appeared on his own behalf Crown Law for the respondent

Introduction

[1] **CHIEF JUSTICE:** The appellant appealed from an order made on 11 March 2009 dismissing his application for judicial review. He filed that application on 23 January 2009, seeking the following relief:

> "1. That the Respondent … abide by the Court-Orders of BS 9554/08 & CA 6543/08 for a lawful decision;
>
> 2. That the Respondent must re-consider their decision within 48 hours;
>
> 3. That the Applicant be informed within same time-frame of 48 hours;
>
> 4. An order that the Respondent … pay the applicant $1500 per day until a lawful decision has been provided;
>
> 5. That the Respondent pay cost …"

[2] The appellant is a prisoner, and the proceeding concerns applications for parole. He is serving a four and a half year term of imprisonment, imposed on 7 December 2006, for rape and indecent treatment of a child under 16 years of age. He represented himself on the hearing of the appeal.

Chronology

[3] What follows is taken substantially from the primary judgment. The appellant first became eligible for parole on 14 March 2008. He made his first application for parole on 17 December 2007. A decision on that was deferred pending the obtaining of a psychological report. A deemed refusal of that first parole application arose on 14 April 2008. The appellant applied for judicial review, and that application was dismissed on 16 May 2008.

[4] On 19 May 2008 the appellant submitted a new application for parole, together with notice that he was unwilling to participate in a psychological assessment. In the meantime on 27 May 2008, the respondent furnished the appellant with reasons relating to his first parole application. The following day the respondent reconsidered that application, and confirmed its previous decision to defer consideration of his application until a psychological assessment had been obtained. On 12 June 2008, there was an attempt at a psychological assessment. The appellant declined to participate and told the psychiatrist (Dr Freeman), among other things: "I've already assessed myself and I'm fine."

[5] On 2 July 2008 the respondent reviewed the appellant's application for parole, advising him it was inclined to decline the application on the basis of his refusal to participate in a psychological assessment or home assessment. The respondent allowed the appellant 14 days in which to respond to its concerns. The appellant furnished further submissions to the respondent on 14 and 21 July 2008. On 20 August 2008 the respondent reviewed the application and determined that, in the absence of any further information, it should be declined. The respondent informed the appellant that reasons for that decision would be furnished within the statutory timeframe. They were provided on 19 September 2008.

[6] The respondent brought a second application for judicial review, which was heard in this court on 19 and 28 October 2008. In the meantime on 3 December 2008, the

Court of Appeal set aside the decision made on 16 May 2008 dismissing the appellant's first application for review, and remitted the matter to the respondent for a decision at its meeting on 17 December 2008. That was the proceeding numbered CA 6543/2008 referred to in paragraph one of the presently relevant application.

[7] On 10 December 2008, the respondent reconsidered the appellant's second application for parole. The same day the respondent advised the appellant that his application for parole had been reconsidered and that "the Respondent decided to request that a psychological assessment be prepared and consideration of your case has been deferred until that assessment has been received".

[8] Then on 15 December 2008, judgment was given in relation to the appellant's second application for review, which had been heard on 19 and 28 October 2008. The court then ordered that the respondent's decision of 20 August 2008 to refuse the appellant's first parole application be set aside, with the application to be referred to the respondent for reconsideration. That occurred two days later.

[9] On 22 December 2008, the respondent advised the appellant that it had reviewed his application at its meeting on 17 December "as per the recent judgment by the Court of Appeal". The respondent had again decided not to grant the appellant parole. The respondent informed the appellant that it had "fully considered the judgments of 3 December 2008 and 15 December 2008 together with (the appellant's) submission of 3 December 2008". The reason for refusing parole was that the appellant "would be an unacceptable risk to the community on a parole order at this time". On 13 January 2009, the respondent provided reasons in response to the appellant's request of 18 December 2008.

[10] It remains to mention that the file number 9554/2008 referred to in paragraph one of the application presently in issue was the proceeding in which judgment was given on 15 December 2008 setting aside the respondent's decision of 20 August 2008, with a reference of the issue of parole for reconsideration by the respondent.

The Board's reasons

[11] The reasons furnished by the respondent on 13 January 2009 were comprehensively expressed, and are as follows:

> "The Parole Board took into account the Ministerial Guidelines as they relate to a Regional Board and in particular that community safety must be the highest priority. However the Board independently exercised its discretion and ensured that your application was considered on its own merits without any inflexible application of policy.
>
> The Board notes that you are serving a period of 4 years and 6 months imprisonment for sexual offences against children. You have been convicted of very serious sexual offences and you have been dealt with in Court previously for offences against children of a similar sexual nature.
>
> The Board notes your plea of guilty to 2 charges of indecent treatment of a child under 16 with circumstances of aggravation and rape, and that now you maintain that you are innocent of all the offences. The mere fact that you maintain your innocence does not prejudice the Board against you. However, it leaves the Board in a

position where it must accept that you were found guilty of these extremely serious offences after a full trial where all of the evidence was fully ventilated. In the criminal justice system, it is the role of the court process to determine the guilt or innocence of an accused person and it is not for the Board to revise or reverse that assessment. The Board must therefore proceed on the basis that you were guilty of these offences and that this was the considered judgement of the judge/jury who had been exposed to the evidence of the case.

The Board took into account Judge Trafford-Walker's sentencing comments of 7 December 2006 in relation to your prior offending and rehabilitation:

> 'The Community demands that children be protected from such conduct so far as can be done by the Courts. The Courts therefore are required to impose severe sentences. There is no option in this case, having regard to the number of children involved, but to impose lengthy periods of imprisonment. Not only is of relevance the fact that on this occasion ranging from a period of 2001 through to 2004 you interfered with a number of children, but it is also relevant that you had a history going back to 1996 of offences against children.
>
> You are not being resentenced, of course, or punished more severely because of the offences committed in 1996, but it is something that I can take into account because it indicates that rehabilitation which might have been hoped for in 1996 was illusory.'

The Board notes that the Court fixed your parole eligibility date at 14 March 2008.

In relation to your application for parole and your further submissions in December 2008, the Board noted the following:

> You had listed a number of short, medium and long term goals for your release. These include: setting up accommodation; renewing your drivers licence; re-establishing family relationships; remaining offence free; establishing new friendships; have stable employment; own a new car; and gaining a long term relationship with a partner.
>
> The letters dated 5 November 2007 and 17 December 2007 to yourself acknowledging that the services of psychologists Dr Frank J Walsh and Ian Campbell were available to you upon release, is indicative of your willingness to seek external assistance;
>
> The Board notes Ian Campbell's preference that you complete a sex offender program in a group environment prior to one on one with him;

The letters of support from your parents, friends and family, is evidence of an additional external support mechanism with your release;

You do not have employment arranged for your release. However you have indicated in your parole application that you can continue with your prior employment, or further studies or gaining employment in the mines;

Your consideration of employment post release is otherwise limited to statements regarding the high availability of work in your areas of experience;

Over half of your 30 page application for parole (pages 14-30) is devoted to legal arguments, observations and citations from case law you require the Board to consider. Close to half your 14 page submission of 3 December 2008 (pages 6-11) details errors in the Parole Board Assessment report and corrections you require to that or your conviction history.

You have advised that you plan to undertake a post-graduate degree and you assert that you have been accepted for such and that at this stage you have deferred such studies. The Board notes the copious amounts of material you have been able to provide to evidence parts of your application yet no evidence such as a letter of acceptance or deferral for the Board to consider in relation to your plans to complete tertiary study;

The Future/Prevention Plan you have provided details what you have learnt since becoming incarcerated; how you can move forward with your life; being aware of the effects and problems associated with victims; and defining your life principles or philosophy. However, it did not identify sufficient high risk factors/triggers other than standard law or parole order conditions such as living no closer than 200 metres to a school or avoiding being alone with a child. Your plan also did not identify how the external support you have identified will assist you in preventing relapse, or what activities or process you will undertake to involve your external support; and

The additional material you provided in your submission in December 2008, following concerns raised by the Board does provide some detail of your consideration of such triggers and high risk situations, as well as ways to avoid such situations, but limited indication of strategies or preventative measures to ensure you avoid such situations in the future.

The Board notes your good institutional conduct as well as your educational and vocational achievements.

The Board further notes the positive recommendation of your proposed residence at Bundamba.

In terms of your innocence stance, the Board is concerned that the material before it (your application and parole report) did not suggest you had an appropriate understanding of how you again came to be in the position of facing charges of a sexual nature against children. The Board is concerned that previous court sanctions have not acted as a deterrent to your continued offending or your placing yourself in a situation where you can face allegations of such offences.

The Board noted that you have been recommended to participate in the specialised assessment for a sexual offending [program]. The Board noted your willingness to participate in the specialised assessment on the proviso that your claim of innocence is not compromised. The Board understands that, notwithstanding your claim of innocence, you remain eligible for this assessment and also for participation in the Getting Started: Program Participation Program if recommended to do so as a result of the assessment.

The Board considers that assessment of offenders by appropriately qualified individuals assists in identifying appropriate treatment targets and effective risk management strategies. Accordingly the Board determined on 7 May 2008 to have a psychological assessment prepared to assist in its consideration of your application.

The Board also notes that despite your stated willingness to undertake assessment, Dr Freeman has advised that as part of his meeting with you on 12 June 2008 in which you refused to participate in a psychological assessment, you stated "I've already assessed myself and I am fine". In the Board's view this displays an unwillingness to gain an insight into your behaviour and a chance to address the issues related to your offending behaviour.

The Board regards the opportunity for offenders to gain knowledge of personal triggers and explore strategies as important in the rehabilitative process and of general assistance to offenders to avoid re-offending in the future.

The Board took into account the very serious sexual nature of your offences, and the significant detrimental effect your offending would have had on your child victims. Were you to re-offend the Board considered that the risk a member of the community would suffer physical or psychological harm was high.

The Board was concerned that the material before it did not suggest that you had an appropriate understanding of how you came to commit these offences or that you fully comprehended the impact that your offending behaviour had on the victims.

> The Board is of the view that your application for parole provides a limited consideration by you, to prevent you (or assist in preventing you) from relapsing into offending behaviour. Your Future/Prevention Plan provides some insight for the Board, however as indicated above, it does not identify sufficient high risk factors/triggers other than standard law or parole order conditions such as living no closer than 200 metres to a school or avoiding being alone with a child. Your plan also does not identify how the external support you have identified will assist you in preventing relapse, or what activities or process you will undertake to involve your support
>
> In the absence of an effective plan the Board was concerned that you would be unable to avoid or manage situations or circumstances that have in the past led to criminal behaviours by you.
>
> The Board examined your employment goals as outlined in your parole application, the Parole Board Assessment Report dated 20 March 2008 and your submission of 3 December 2008. The Board paid particular attention to the phrases "*I haven't decided yet. After I sue Corrective Services I don't know I will see how rich I am*" and that you had "*dreams*" that you are unwilling to share with anyone. The Board's view was that this was very vague and did not constitute a solid employment plan for the community.
>
> The Board is aware that employment is recognised as a significant factor in reducing re-offending. The Board was concerned that your expectation of obtaining employment in your areas of expertise was overly optimistic. The Board is of the view that when unrealistic expectations are not met, individuals often return to former patterns of behaviour which might result in re-offending. The Board was concerned that as you had not sought an offer for work, and the vagueness of your employment future, suggested a lack of commitment to change which may ultimately lead to you re-offending."

The primary Judge's reasons for judgment

[12] The primary Judge's reasons for dismissing the application for judicial review may be summarized as follows:

1. The appellant contended that he had been denied natural justice because of a "legitimate expectation that he would be able to achieve an early release recommendation as the next person". This was a case, however, where the sentencing Judge set a date for eligibility for consideration of parole under s 160D of the *Penalties and Sentences Act 1992*. It was not a parole release date. His Honour said:

   > "The only reasonable expectation (the appellant) could have would be that the relevant Parole Board would consider the application properly."

2. The appellant's next contention was that the respondent denied him parole because he maintained his innocence. That stance led to his ineligibility to

participate in certain prison programmes. The primary Judge observed that the respondent recognized that the appellant had said he was willing to undertake any assessment provided it did not interfere with his stance of innocence. Accordingly, the meeting with the psychiatrist was arranged, yet when the appellant attended on 12 June 2008 he refused to participate. The appellant had argued that the respondent refused parole because he maintained his innocence. The position taken by the respondent was, however, that by refusing to participate in the meeting with the psychiatrist, the appellant had demonstrated an unwillingness to seek insight into his own behaviour and deal with related issues.

3. The appellant alleged non-compliance by the respondent with s 193(4) of the *Corrective Services Act 2006* in relation to the provision of reasons. The refusal of the application was notified on 18 December 2008, and reasons were promised within six days. They were provided on 22 December 2008. The respondent thereby satisfied its obligation under the Act, which did not require that the reasons accompany the notice of the decision.

4. The appellant contended that the respondent should not have taken account of the remarks of the sentencing Judge. His Honour disagreed, concluding that the respondent "should consider all the sentencing remarks and weigh them in the balance with all other relevant material such as, for example, an applicant's conduct since conviction".

5. The appellant raised a considerable number of matters which, he asserted, were improperly not taken into account by the respondent. Some of those clearly were taken into account (work history, proposals for post-release employment for example) as appears from the respondent's reasons. Those reasons were comprehensively expressed. The learned Judge took the view that "much of the argument by (the appellant) under this heading is, in essence, a complaint that the Board has not accepted his arguments. His submission is really a request for a merits review perhaps with a complaint that undue weight was given by the Board to certain matters". His Honour rightly pointed out that this court cannot embark upon a merits review, that it was for the Board to determine the respective allocation of "weight", and that "The process undertaken by the Board demonstrates … that it has carefully considered the relevant matters and given appropriate weight to them". It may be added that it was not necessary for the Board to deal, in its reasons, with each and every point advanced. The Board was only obliged to express the "reasons" for its decision.

6. The appellant contended that the respondent had acted as if constrained by a predetermined policy. That was the aspect on which he succeeded in proceeding 9554/2008. When the respondent made the decision now in question, it was aware of that judgment. The learned primary Judge made these observations:

> "It is clear to me that the Board has, in the light of that decision, approached the matter afresh. The Board did refer to (the appellant's) stance on innocence and his refusal to take part in an assessment. It did not regard these as dictating the decision which it must reach, but rather that these factors were evidence of an attitude it

> was entitled to (and in my view should) take into account."

His Honour pointed out that the Board asserted in its reasons that it had "independently exercised its discretion and ensured that (the appellant's) application was considered on its own merits without any inflexible application of policy", which was relevant though not determinative.

Apparently of concern to the appellant, at the primary hearing, were the psychological assessment issue and the relapse plan.

As to the former, His Honour noted that the respondent did not deny the appellant parole simply because of his refusal to participate in a psychological assessment. It was what should be drawn from that which influenced the Board's decision, being, "an unwillingness to gain an insight into your behaviour and a chance to address the issues related to your offending behaviour".

The point taken by the appellant in relation to a relapse plan was a suggestion the respondent had required the submission of such a plan before it would allow parole. But in his application for parole the appellant had proffered a relapse plan, and it was the inadequacy of that plan which moved the respondent. As observed in its reasons:

> "In the absence of an effective plan the Board was concerned that you would be unable to avoid or manage situations or circumstances that have in the past led to criminal behaviours by you."

7. It suffices in respect of the last group of complaints to provide this extract from the learned Judge's reasons for judgment:

> "(The appellant) submits that:
>
> (a) There is no evidence to justify the Board's decision. There was a substantial amount of material which the Board considered and was capable of supporting its decision.
>
> (b) There has been an abuse of process by the Board in these terms: "That the Abuse of Power by the Respondent consider a assessment by psychologist to cross-examine the applicant and intimidate on facts that are not relevant, with their own policies of the respondent are continuing the abuse against the castration of the applicant." That and the other assertions under this heading are equally unintelligible.
>
> (c) The Board has not complied with orders made by A M Lyons J (in proceeding 9554/08) and the Court of Appeal (CA 6543/08). Those orders were for the Board to reconsider the application. It has."

The appellant's outline of argument

[13] In the appellant's outline of argument, he relies on a number of other matters, of varying degrees of intelligibility. He complains that the primary Judge did not refer to a number of the factual points he made (an example is his low offender risk need inventory assessment). But matters like that fell within the Judge's reference to the unavailability of a review of the merit of the respondent's decision: the Judge was not entitled to reconsider the merit of that decision, and such matters bore on that, not the denial of natural justice of which the appellant primarily complained.

[14] The appellant also revives his concern about the significance to the decision of the respondent of the appellant's not having completed various courses. But the Judge rightly concluded that in the context of the appellant's continuing protestations of innocence, it was the lack of insight into his condition which influenced the denial of parole, especially bearing in mind that the appellant was offered the opportunity for psychological assessment yet declined to cooperate.

[15] It remains in relation to the written outline to mention the appellant's contention in relation to s 193(4) of the *Corrective Services Act*. His written submission reads as follows:

> "That the primary Judge failed to consider the applicant's argument to identify that s 193(3) comes in two sections (a) and (b) as section (b) states 'six months between application' as 'the respondent made a decision on 20 August 2008' it was unlawful according to judgment on 15 December 2008 judgment. However it must be understood the decision on 17 December 2008 was to replace the decision that was set aside on 20 August 2008. 20 August 2008 plus six months equals February 2009 not '17 June 2009'."

[16] Sub-section 4 provides as follows (as relevant):

> "If the parole board refuses to grant the application, the board must –
>
> (a) give the prisoner written reasons for the refusal; and
>
> (b) … decide a period of time, of not more than 6 months after the refusal, within which a further application for a parole order … must not be made without the board's consent."

[17] This point, of no relevance to the relief sought, did not arise before the primary Judge, and therefore does not arise before us.

[18] None of the additional points made by the appellant casts doubt on the validity of the reasoning of the primary Judge. His Honour has dealt comprehensively with the challenge, within the constraints imposed by the *Judicial Review Act*. There is no demonstrated flaw in his reasoning.

The appellant's further material

[19] The appellant relied on his affidavits, principally it seemed to put before us a copy of his outline put before the primary Judge. The affidavits generally dealt only with

the history of the matter, so were not strictly receivable before us. We nevertheless had regard to them, but their contents provide no ground for doubting the primary judgment.

[20] Specific mention should however be made of a complaint in the appellant's affidavit filed 29 May 2009 of not receiving Dr Freeman's letter of 13 June 2008. The respondent set out the relevant part of that letter in its letter of 21 July 2008 (see p 33 record, 5th dot point). As may be seen from the letter Ex 1 before us, the balance of the letter was not relevant, so that any failure to provide the letter to the appellant could not warrant a conclusion he was denied natural justice.

[21] At the oral hearing of the appeal, the appellant produced a typed document of 52 pages, as constituting his submissions. Its content is largely based on the misconception the primary Judge was to review the merits of the respondent's determination. It is in large part repetitive of matters already raised by the appellant.

[22] One of the appellant's points is that the respondent, and His Honour, failed to take account of his skill in mounting judicial review applications. Another is that he has been discriminated against (because deaf), not treated with dignity, and deserves an apology. Those features illustrate the flavour of much of the document.

[23] When we received this substantial document, we adjourned to read it before proceeding with the hearing of the appeal.

[24] There is no need to mention, here, each of the points raised in that document, and to do so would be unduly consumptive of judicial resources.

[25] Mention should however be made of the appellant's complaint that Parole Board officers refused to answer questions he asked for the Parole Board Assessment Report interview. It fell to those officers to make an assessment of the appellant, by means and processes they considered appropriate. That they did not answer the questions asked by the appellant did not invalidate the respondent's subsequent decision.

[26] It sufficies to say in conclusion that none of the points additionally made in that written submission warrants granting the relief now sought.

Conclusion

[27] In these circumstances, the appeal should be dismissed. The respondent seeks costs in those circumstances. There is no reason why they should not follow the event. There should therefore be an additional order, that the appellant pay the respondent's costs of and incidental to the appeal, to be assessed on the standard basis.

[28] **FRASER JA:** I agree with the reasons of the Chief Justice and the orders proposed by his Honour.

[29] **CHESTERMAN JA:** I agree with the judgment of the Chief Justice.