SUPREME COURT OF QUEENSLAND

CITATION:	*Queensland Parole Board v Moore* [2010] QCA 280
PARTIES:	**QUEENSLAND PAROLE BOARD** (respondent/appellant) **v** **ROBERT STEWARD MOORE** (applicant/respondent)
FILE NO/S:	Appeal No 6640 of 2010 SC No 14349 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 October 2010
DELIVERED AT:	Brisbane
HEARING DATE:	1 September 2010
JUDGES:	McMurdo P, Holmes JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS FOR REVIEW – RELEVANT CONSIDERATIONS – where appellant refused respondent's parole application – where respondent applied for judicial review of the appellant's decisions – where appellant considered the respondent an unacceptable risk to the community – where appellant had not been able to observe the respondent's self-management in a low security setting – where there was evidence that the respondent would be a greater threat to the community if released at the expiry of his sentence than if released on parole and subject to supervision – whether respondent's ineligibility for transfer to a lower security setting a relevant consideration – whether future, as opposed to current, risk a relevant consideration – whether appellant failed to take into account these considerations *Corrective Services Act* 2006 (Qld), s 227(1) *Cuzack v Queensland Parole Board* [2010] QSC 264, approved *McGrane v Queensland State Parole Board* [2010] QSC 209, approved

COUNSEL:	R J Flanagan, with K A Mellifont, for the appellant D P O'Gorman SC, with M Black, for the respondent
SOLICITORS:	Crown Law for the appellant Prisoners' Legal Service for the respondent

[1] **McMURDO P:** This appeal should be dismissed with costs for the reasons given by Holmes JA.

[2] **HOLMES JA**: The appellant, the Queensland Parole Board, appeals a decision on a judicial review application which set aside a decision of the Board refusing the respondent parole and ordered that it reconsider his application in accordance with the learned judge's reasons. The appeal turns on whether the learned primary judge was correct in regarding as relevant to the Board's decision two considerations: the first, whether the respondent would ever be in a position to demonstrate behavioural improvement in a less structured environment than high security imprisonment; the second, whether the risk to the community would be greater if he were not granted parole prior to his full-time release date. If those considerations were, contrary to the Board's submission, relevant, there remains a further question as to whether the learned judge erred in any case in concluding that those considerations had not been taken into account.

The respondent's applications for parole

[3] The respondent was sentenced to imprisonment for two terms totalling 14 years nine months and seven days for a variety of offences, the most serious of which was armed robbery. His parole eligibility date was 14 October 2009 and his full-time release date was 22 April 2013. On 19 January 2009, the Board received his application for parole, but it was not considered until 27 March 2009. A month later the Board wrote to the respondent advising a preliminary view that he would, if released, pose an unacceptable risk to the community. The letter set out a number of matters (some of which appeared again in the statement of reasons of 7 May 2010 relevant here) including that the respondent's security classification was high and he was in secure custody, having committed disciplinary breaches and been the subject of unfavourable reports; and that Dr Kar, a psychiatrist who had reported to the Board in 2008, considered that he posed a moderate or high risk and would do better through gradual reintegration into the community than through discharge at the end of his sentence.

[4] At that stage, at the end of April 2009, the respondent was invited to make a written submission as to why his application should be granted. He did so, but his application was refused. The Board provided a statement of reasons on 30 October 2009. Those reasons included the respondent's prior criminal history and the nature of his offences. The Board noted Dr Kar's assessment of the risk that the respondent would commit offences of violence and his recommendation as to gradual reintegration into the community. It expressed concern as to its lack of opportunity to assess the respondent in a "less structured environment", as would be the case had the respondent achieved a low security classification, moved to a low security facility, and abstained from breaches and "incidents". The Board concluded with its opinion that the respondent posed an unacceptable risk.

[5] That decision, however, was rescinded by the Board in April 2010 in the context of a judicial review application brought by the respondent, and he was advised that his application would be reconsidered. After that re-consideration, the Board sent a letter dated 27 April 2010 to the respondent in very similar terms to that of April 2009, with identical paragraphs dealing with the respondent's security classification and behaviour and Dr Kar's report.

[6] Again, the respondent was invited to make any further submissions. He did so in a short letter dated 6 May 2010, the first paragraph of which concerned his proposed accommodation. The remaining paragraphs were in these terms:

> "2. Again I remind the members that your requirement for me to spend a period of time at an open facility it [sic] impossible for me to comply with as Queensland Corrections have stated that I will never be transferred to an open facility due to my history of self harm therefore the Board's stance on this issue makes it IMPOSSIBLE for me to every [sic] be given a parole order.
>
> 3. I urge the Board to revisit the opinions of the professional reports in which it is stated that it is not in the best interests of the community for me to be released unsupervised at my fulltime discharge date."

The Board's statement of reasons for its decision

[7] The Board refused the respondent's application and provided a statement of reasons dated 7 May 2010. The statement identified the material which the Board had considered. It included a Parole Board Assessment Report which a panel at the prison where the respondent was held had prepared for the Board's assistance; it recommended that he be granted parole. The report noted that the respondent's self-mutilation seemed to be a way of coping with perceived stressors; that he suffered from a personality disorder (either Borderline or Antisocial Personality disorder), for which no intervention was offered in the custodial system; and that his conduct and self-harming behaviour had hindered his progression to an open security facility. It made the following point:

> "The amount of time that the offender will be required to serve under a community based order is decreasing as a result of his approaching full-time discharge date. If the offender is unable to progress to the open security facility due to his prison conduct, then it may be prudent to release him under strict community supervision as opposed to releasing him with no supervision on his full-time discharge date."

[8] In the findings of fact, the statement of reasons reiterated verbatim the paragraphs from its earlier correspondence concerning the respondent's security classification and behaviour, as well as the paragraphs concerning Dr Kar's report:

> "Your security classification has remained at high and you are accommodated in secure custody at the Townsville Correctional Centre. You have an extensive history of breaching prison discipline or being negatively reported in incidences. Your overall behaviour was described in the Parole Board Assessment Report as transitional

> and fluctuating between compliant and non-compliant, with daily case notes reflecting that you can be very demanding at times with a tendency to display disruptive behaviour when in receipt of unfavourable responses to your demands. In relation to interacting with staff at the centre, case notes detail concerns of staff including: '*He is becoming increasingly stressed when he feels unattended to. He knows the role of each officer and it is upsetting to him when he perceives that they are not doing what he believes they should do or when they do what he believes they should not*', evidencing to the interview panel as to what they perceived as manipulative behaviour by you.
>
> ...
>
> You were assessed by Psychiatrist Dr Kar, who is [sic] in his report of 13 May 2008 agreed with Dr. Freeman that your inherent personality traits suggest that you remain at a high level of risk to the community. Dr. Kar also stated that:
>
> > '*He will do best if he simply stayed away from drugs and kept himself engaged in some form of occupation and had a regular support person to talk to if he went through phases of instability and was distressed and upset about something*.'
>
> Dr. Kar further recommended that you would benefit from a gradual reintegration back into the community rather than being discharged at the end of your sentence without any supervision:
>
> > '*Despite his profile and risk which I believe is at least moderate or high, he is likely to do better through gradual reintegration into the community than being abruptly discharged at the end of his sentence*.
> >
> > *I believe a very slow process of resettlement can be attempted. It would give an idea in a controlled setting as to his ability to observe discipline in less structured settings. It would perhaps also show for him the disciplined path that he needs to keep to, to get further sentence progression*.'"

The findings concluded with a paragraph which recorded the respondent's submissions of 6 May 2010.

[9] The statement of reasons set out separately the Board's reasons for its decision. Those reasons contained the following paragraphs upon which the Board relied here to support the contention that, if the considerations identified by the learned primary judge were relevant, they had been taken into account:

> "4. The Board noted your elevated risk of violent re-offending as assessed by Dr Freeman and Dr Kar in 2008. The Board paid attention to Dr Kar's assessment; his agreement with Dr Freeman that your inherent personality traits suggest that you remain at a high level of risk to the community, and his recommendation that you would benefit from a gradual reintegration back into the community rather than being

discharged at the end of your sentence without any supervision.

5. The Board noted that your security classification had remained at high and you were accommodated in secure custody at the Townsville Correctional Centre. Your extensive incident and breach history was of particular concern to the Board. The Board was concerned that you appear to struggle to maintain acceptable conduct in a highly structured environment. Once back in the community, a less supervised environment, the Board was of the view that you would struggle to abide by the conditions of a parole order. The Board was of the view that it still has not had sufficient opportunity to assess your progress in institutional behaviour over a reasonable period of time, as you had not yet had the opportunity to:

    - demonstrate your self management skills in a less structured environment, such as progressing to low security classification and a low security facility; and
    - remaining breach and incident free and maintaining positive conduct.

While considering your submissions and concerns about your inability to progress within the correctional system, the Board believed that such progression would give it greater confidence that you had lowered your risk to the community. The Board is of the view that such progression is an important step in the process of re-integration to the community and ensuring community safety."

The reasons of the primary judge

[10] The learned primary judge considered the Board's decision and, for the reasons which follow, reached the conclusion that relevant considerations had not been taken into account:

> "There are, it seems to me, two problems with the consideration which the Board has given to this case. The first, and one which is emphasised by Mr Moore, is that the Board does not appear to have considered whether it will be possible for Mr Moore to demonstrate an improvement in his behaviour while in high security. It is clear that the Board regarded that as an important factor. It expressed its view that it still had not had sufficient opportunity to assess his progress as he had not yet had the opportunity to demonstrate his self-management skills in a less structured environment. It seems that the Board did not even address the question whether it is likely that Mr Moore still [sic] remain in high security.
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> There was before the Board considerable evidence to suggest that Mr Moore was not going to have the opportunity for such a demonstration. His continued record of self-harm, which was effectively forecast in the PBAR report, may have meant that he would have to remain in high security custody until his release.

He told the Board that Queensland Corrections had stated that he would never be transferred to an open facility.

In my judgment, it was in these circumstances incumbent upon the Board to consider whether in fact Mr Moore would ever have the opportunity which it thought he needed or assess Mr Moore on the basis that there was a considerable risk, to put it at its lowest, that the opportunity would never arise.

The Board must, in my judgment, give some consideration to the likely future course of Mr Moore's imprisonment. Parole is for the benefit of the community, as I have already said. It is for rehabilitation. That necessarily involves some exercise of judgment about future events.

There is an associated aspect to the matter and one which is at least equally important and I think perhaps is more important. The Minister's guideline requires the Board to consider the risks to the community if parole is granted. It is also, I think, inherent in this that the Board must consider the risk to the community if parole is granted at any time up to the full-time release date. Counsel for the Board conceded that much.

Whether there is an unacceptable risk to the community must be judged not just by the nature of the risk to the community at his release date but by reference to the risk to the community thereafter. If, to take a hypothetical case, a prisoner was assessed as no risk to the community at the time of release but was likely to become a serious risk at a future time, that would be a material consideration for the Board to take into account.

In my judgment the Board must also take into account (in circumstances where this may be the case) the possibility that the risk to the community will be greater if parole is not granted and the prisoner remains in custody until his full-time release date. The risk to the community is a factor which the Minister has said the Board must consider and I think it is wrong to consider it solely in relation to the risk as it exists as at the date of the Board's consideration or the putative release date.

There is nothing in the Board's reasons which indicates it has attempted to carry out any comparison of the sort which the report of Dr Kar and the PBAR suggest is necessary. It is, of course, a matter for the Board to weigh the evidence as it sees fit. But here, there was no evidence to the contrary. That does not mean that the Board was bound to accept the view that was advanced. It does, however, mean in my judgment, that the Board was obliged to consider the question by reference not only to the present time but also to the future.

The response of counsel for the Board to this was that on the evidence of Dr Kar the applicant could himself improve his position. It is true that Dr Kar did say that but he also said that the applicant would have great difficulty in doing so. The applicant has not improved his position in the intervening two years. The Board must,

> in my judgment, take all of that evidence into account and weigh up whether the acceptability of the risk at the future time is likely to be less than as at the present time.
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> When I weigh that aspect of the matter with the other aspect of the failure of the Board to consider the potential impossibility of compliance with an important requirement, I conclude that the Board has not taken into account all of the relevant factors which apply to the consideration of this case."

(The "PBAR" was the Parole Board Assessment Report.)

The Board's contentions

[11] The Board argued that the prospect that the respondent 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, particularly when he still had three years of his sentence to serve. Senior counsel for the Board referred us to ministerial guidelines made pursuant to s 227(1) of the *Corrective Services Act* 2006 (Qld). The first of those guidelines was that, when considering whether a prisoner should be granted a parole order, the highest priority for the Board should be the safety of the community. Another was that before making a decision to grant a parole order, the Board should "always consider the level of risk that the prisoner may pose to the community". Those guidelines made it clear, counsel argued, that it was when the Board was considering the decision as to parole that it was to consider the risk; so that future prospects were irrelevant. But in any case, the Board having identified Dr Kar's statement as to the benefit of a gradual release, it was to be inferred that it had taken into account the risk the respondent might pose in the future if discharged unsupervised.

[12] As to the second consideration identified by the learned judge, counsel submitted that the Board was entitled to conclude that the only reason the respondent had not had the opportunity to display his ability to function in a less structured form of custody was that he had chosen not to improve his behaviour to achieve that result. To the obvious point that the Board had not actually made any finding as to the reasons for the respondent's apparent inability to move to a lower classification, counsel submitted that such a finding was to be inferred from the Board's statement that it was not prepared to grant the respondent parole until he had demonstrated his "self-management skills" in a less structured environment.

[13] Counsel helpfully referred the court to two single judge decisions, *McGrane v Queensland State Parole Board*[1] and *Cuzack v Queensland Parole Board*,[2] while suggesting that both could be distinguished. In *McGrane*, the Parole Board, having received a psychiatric report recommending that the prisoner work towards lowering his security level, said that it would not be confident that the prisoner posed an acceptable risk until he had demonstrated "stable and responsible" behaviour in a less structured, lower security environment. Unfortunately for that prisoner, the general manager of the prison where he was held had issued a notice to the effect that offenders convicted of certain specified offences (as that prisoner had been) would not be eligible for transfer to a low security facility. Philip McMurdo J

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1 [2010] QSC 209.

2 [2010] QSC 264.

held that the respondent Board, in failing to consider whether it was impossible for the prisoner to be re-classified, and in reaching its conclusion on the premise that he could, had failed to consider an essential matter.

[14] *Cuzack* involved similar issues. The prisoner there had contended that because he was unable, through no fault of his own, to complete certain programs, he could not be re-classified so as to permit his transfer to a low security environment. Nonetheless, the respondent Board in that case referred to his failure to complete one of the programs and his lack of progress to a low security classification as factors which, it considered, made him unsuitable for parole. The failure to have regard to whether the prisoner could in fact advance to a lower security classification when he could not undertake recommended programs was, Boddice J considered, a failure to consider the prisoner's application on its merits, and amounted to adherence to a policy without proper consideration of the merits of the case.

[15] Counsel for the Board submitted that the important distinction between those cases and this case was that the respondent here could, in fact, achieve a lower classification through moderating his own behaviour. Counsel also suggested that the two issues identified by the learned judge were related: the consideration that the respondent might ultimately be a greater risk if he were not granted parole would only be relevant once he had been able to demonstrate compliant behaviour in a less structured environment.

Discussion

[16] As a general proposition, it is no doubt correct that considerations of the kind involved here cannot be quarantined one from the other; but of course the question is whether the Board did in fact take both considerations into account and did make the necessary findings.

[17] The objects of the *Corrective Services Act* 2006 include:

> "community safety and crime prevention through the humane containment, supervision and rehabilitation of offenders."

Considering the function of parole in that context, 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.

[18] In oral submissions, counsel for the Board effectively accepted that it would be a relevant consideration that it was not possible for the respondent to move to a "less structured environment", but contended as a matter of fact that the latter was not the case. The difficulty with that submission is that the Board made no finding in that regard. The proposition that what appeared at paragraph 5 of the Board's reasons constituted such a finding is, with respect, simply not tenable. I do not think the decision in *McGrane* was, in fact, distinguishable; there, too, the Board had failed to reach a view on the correctness of the prisoner's proposition that it was impossible for him to achieve placement in a less structured environment. It did not indicate that it rejected the prisoner's contention, and give reasons for doing so; it simply disregarded it. Precisely the same is true here. Again, this was a matter squarely raised by the respondent in his submissions; it was relevant; and it was not addressed by the Board.

[19] In my view, the learned judge was, with respect, correct in regarding the identified considerations as relevant; and, on an examination of the reasons of the Board, one could not rationally conclude that they had been taken into account.

[20] I would dismiss the appeal with costs.

[21] **MULLINS J:** I agree with Holmes JA.