SUPREME COURT OF QUEENSLAND

CITATION:	*Fuller & Anor v Lawrence* [2023] QCA 257
PARTIES:	**BIANCA FULLER** (first appellant) **CHIEF EXECUTIVE OF QUEENSLAND CORRECTIVE SERVICES** (second appellant) **v** **MARK LAWRENCE** (respondent)
FILE NO/S:	Appeal No 9598 of 2023 SC No 2257 of 2023
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2023] QSC 156 (Applegarth J)
DELIVERED ON:	15 December 2023
DELIVERED AT:	Brisbane
HEARING DATE:	9 November 2023
JUDGES:	Bowskill CJ and Morrison and Bond JJA
ORDERS:	**1. Appeal dismissed.** **2. The appellants pay the respondent's costs of the appeal.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – DECISIONS TO WHICH JUDICIAL REVIEW LEGISLATION APPLIES – DECISIONS UNDER AN ENACTMENT – where the appellants gave a direction to the respondent limiting the respondent's contact with a particular person pursuant to the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) – where the respondent requested reasons for the direction – where the appellants refused to give the respondent reasons under the *Judicial Review Act 1991* (Qld) – where the primary judge ruled that the respondent was entitled to a statement of reasons under s 33 of the *Judicial Review Act 1991* (Qld) – where the appellants submitted that the primary judge erred in finding that the direction was a decision under an enactment – whether the direction is a decision made under an enactment within the meaning of the *Judicial Review Act 1991* (Qld) *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld),

s 13, s 16, s 16C
Judicial Review Act 1991 (Qld), s 3, s 4(a), s 33

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321; [1990] HCA 33, considered
Griffith University v Tang (2005) 221 CLR 99; [2005] HCA 7, applied
Nona v Barnes [2013] 2 Qd R 528; [2012] QCA 346, considered

COUNSEL: A D Scott KC with P K O'Higgins KC for the appellants
M Black for the respondent

SOLICITORS: Crown Law for the appellants
Suncoast Community Legal Service for the respondent

[1] **BOWSKILL CJ:** I agree with the reasons of Morrison JA and the further reasons of Bond JA and with the orders proposed.

[2] **MORRISON JA:** The respondent is a prisoner released under a supervision order made on 16 April 2020 pursuant to the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).[1]

[3] In November 2022 a Corrective Services Officer gave a direction to the respondent, approving phone contact with a particular person, including facetime or video calls, but denying the respondent's request to have in-person contact with that person. The supervision order permitted such a direction to be given.

[4] The respondent requested reasons for the direction in so far as it denied in-person contact. The appellant's response was that the respondent was not entitled to a statement of reasons under the *Judicial Review Act 1991* (Qld).[2]

[5] The respondent issued proceedings under s 38 of the JRA seeking that the appellant give reasons for the direction. The essential steps in his case at first instance were:

(a) the JRA applies to a decision of an administrative character made "under an enactment": s 4(a);

(b) an "enactment" means "an Act or statutory instrument, and includes a part of an Act or statutory instrument": s 3;

(c) the decision was made under the DPSOA and, therefore, was made "under an enactment"; and

(d) alternatively, the decision was made under the supervision order, that the supervision order is a "statutory instrument" and, therefore, was made "under an enactment".

[6] The learned primary judge found that the direction was a decision under an enactment within the meaning of the JRA and therefore the respondent was entitled to a statement of reasons under s 33 of the JRA.[3] A declaration to that effect was made.

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1 To which I shall refer as the DPSOA.
2 To which I shall refer as the JRA.
3 *Lawrence v Fuller & Anor* [2023] QSC 156.

[7] The appellants seek to challenge that decision.

[8] There are no facts in issue. The central issue is a legal question as to whether the direction is a "decision … made under an enactment" within the meaning of the JRA.

[9] The reasons which follow explain why that issue was correctly decided by the learned primary judge, and the appeal must be dismissed.

The order

[10] The supervision order made on 16 April 2020 is in the following terms:

> "The Court orders that Mark Richard Lawrence be released from prison and must follow the rules in the supervision order for 20 years, until 16 April 2040."

[11] Paragraph 6 of the order is in the following terms:

> "A Corrective Services officer will supervise you until this order is finished. This means you must obey any reasonable direction that a Corrective Services officer gives you about:
>
> (a) where you are allowed to live;
>
> (b) rehabilitation, care or treatment programs;
>
> (c) using drugs and alcohol;
>
> (d) who you may not have contact with; and
>
> (e) anything else, except for instructions that mean you will break the rules in this supervision order.
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> A 'reasonable direction' is an instruction about what you must do, or what you must not do, that is reasonable in that situation.
>
> If you are not sure about a direction, you can ask a Corrective Services officer for more information, or talk to your lawyer about it."

The legislative framework

[12] The DPSOA confers power on the Supreme Court to make a supervision order. The effect of what is done under such an order is best assessed in the statutory context in which it is found. In *Nona v Barnes*,[4] this Court explained the general approach to considering if there is a "decision" to which the JRA applies:[5]

> "The question whether there is a 'decision' to which the *Judicial Review Act* 1991 applies must be answered with reference to the statutory context in which that word appears and the particular facts and statutory provisions of each case."

[13] Section 3 of the DPSOA provides for the objects of the Act:

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4 [2013] 2 Qd R 528; [2012] QCA 346.

5 *Nona v Barnes* at [11], per Fraser JA, Philippides and Douglas JJ agreeing.

"The objects of this Act are—

(a) to provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community; and

(b) to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation."

[14] Part 2 of the DPSOA makes provision for the continuing detention or supervision of prisoners. The Attorney-General is empowered to apply to the Supreme Court for orders under Division 3: s 5.

[15] Section 13 of Division 3 provides for orders that may be made where the court is satisfied that a prisoner is a serious danger to the community in the absence of a division 3 order. Section 13(5) provides:

"(5) If the court is satisfied as required under subsection (1), the court may order—

(a) that the prisoner be detained in custody for an indefinite term for control, care or treatment (***continuing detention order***); or

(b) that the prisoner be released from custody subject to the requirements it considers appropriate that are stated in the order (***supervision order***)."

[16] The respondent is the subject of an order under s 13(5)(b).

[17] The considerations that affect the making of an order such as a supervision order are set out in s 13(6):

"(6) In deciding whether to make an order under subsection (5)(a) or (b) —

(a) the paramount consideration is to be the need to ensure adequate protection of the community; and

(b) the court must consider whether—

(i) adequate protection of the community can be reasonably and practicably managed by a supervision order; and

(ii) requirements under section 16 can be reasonably and practicably managed by corrective services officers."

[18] As is evident the court has to consider how the protection of the community can be managed, and whether Corrective Services officers can manage the requirements of s 16.

[19] Section 16 is found in Division 3B which deals with the particular requirements of supervision orders. It provides:

"**16 Requirements for orders**

(1) If the court or a relevant appeal court orders that a prisoner's release from custody be supervised under a supervision order

or interim supervision order, the order must contain requirements that the prisoner—

(a) report to a corrective services officer at the place, and within the time, stated in the order and advise the officer of the prisoner's current name and address; and

(b) report to, and receive visits from, a corrective services officer as directed by the court or a relevant appeal court; and

(c) notify a corrective services officer of every change of the prisoner's name, place of residence or employment at least 2 business days before the change happens; and

(d) be under the supervision of a corrective services officer; and

(da) comply with a curfew direction or monitoring direction; and

(daa) comply with any reasonable direction under section 16B given to the prisoner; and

(db) comply with every reasonable direction of a corrective services officer that is not directly inconsistent with a requirement of the order; and

Examples of direct inconsistency—

If the only requirement under subsection (2) contained in a particular order is that the released prisoner must live at least 1km from any school—

1 A proposed direction to the prisoner would be directly inconsistent if it requires the released prisoner to live at least 2km from any school.

2 A proposed direction to the prisoner would not be directly inconsistent if it requires the released prisoner to live at least a stated distance from something else, including, for example, children's playgrounds, public parks, education and care service premises or QEC service premises.

3 A proposed direction to the prisoner would not be directly inconsistent if it requires the released prisoner not to live anywhere unless that place has been approved by a corrective services officer.

(e) not leave or stay out of Queensland without the permission of a corrective services officer; and

(f) not commit an offence of a sexual nature during the period of the order.

(2) The order may contain any other requirement the court or a relevant appeal court considers appropriate—

(a) to ensure adequate protection of the community; or

Examples for paragraph (a)—

- a requirement that the prisoner must not knowingly reside with a convicted sexual offender
- a requirement that the prisoner must not, without reasonable excuse, be within 200m of a school
- a requirement that the prisoner must wear a device for monitoring the prisoner's location

(b) for the prisoner's rehabilitation or care or treatment."

[20] There are two central features to note about s 16.

[21] First, the requirements to which an order is subject are mandatory and must be contained in the order itself. So much is evident from the words "the order must contain requirements that …".

[22] Secondly, the requirements are all things that **the prisoner** must do or (in the case of s 16(1)(e) and (f)) not do. None of them expressly impose a requirement or power on a corrective services officer.

[23] When the DPSOA empowers a corrective services officer expressly, that is made clear from the provisions themselves. Thus, s 16A provides that a corrective services officer "may give" one or both of a curfew direction or a monitoring direction, and "may give" any reasonable direction to properly administer such directions: s 16A(2)and (3).

[24] Similarly, s 16B provides that a corrective services officer "may give" certain directions about the prisoner's accommodation, rehabilitation, care and treatment.

[25] In that context regard must be had to s 16C, which provides:

"**16C Criteria for giving directions**

(1) A corrective services officer may give a direction under this subdivision or a direction mentioned in section 16(1)(db) only if the officer reasonably believes the direction is necessary

(a) to ensure the adequate protection of the community; or

(b) for the prisoner's rehabilitation or care or treatment.

(2) In this section –

reasonably believes means believes on grounds that are reasonable in all the circumstances of the case."

[26] Section 16C extends to subdivision 2, which comprises s 16A, s 16B, s 16C and s 16D. As noted above s 16A and s 16B both empower a corrective services officer to "give" a direction.

[27] It also extends to s 16(1)(db), which imposes a requirement in an order that the prisoner "comply with every reasonable direction of a corrective services officer that is not directly inconsistent with a requirement of the order".[6]

[28] Thus, s 16C provides that a corrective services officer "may give" a direction mentioned in section 16(1)(db) but only on the condition that the officer has a reasonable state of belief as to one of two particular matters.

[29] In my view, whilst the power to give a direction under s 16C is not as clearly conferred as it is in s 16A and s 16B, nonetheless s 16C(1) should be construed as expressly conferring the power to give a direction under s 16(1)(db).

[30] Support for that conclusion is given by s 16D which provides that the terms of s 16(1)(db) are not limited by other sections which, themselves, confer power to give directions:

> "Sections 16(1)(da), 16(1)(daa), 16A and 16B do not limit section 16(1)(db)."

[31] It can be seen that the DPSOA proceeds on the basis that corrective services officers are empowered to give directions about: (i) a curfew or monitoring direction, and any direction to administer those directions: s 16(1)(da) and s 16A; and (ii) the prisoner's accommodation, rehabilitation, care and treatment: s 16(1)(daa) and s 16B; but those powers do not limit what may be directed under s 16(1)(db). It would be an odd result if the presumed intention of the legislature was to ensure that sections giving express powers were not to limit a section that gave no power.

[32] Even if, contrary to my conclusion, it did not do so expressly, in my view the power to give such a direction is implicit in s 16C(1) when read with s 16(1)(db) and s 16D.

[33] It can be seen from the above analysis that the source of the power to give a direction to a supervised prisoner is the DPSOA and not the supervision order itself. In the present context the order does no more than oblige a prisoner to meet certain conditions of the release. It confers no power itself on the corrective services officers who have the responsibility of reasonably and practicably managing the requirements in the supervision order.

[34] That conclusion is inevitable when one considers that Corrective Services is not a party to the proceedings under which a supervision order is made. Those parties are the Attorney-General and the prisoner: ss 5-10. It is only after an order is made that Corrective Services become involved, and can seek relief from the court, such as an amendment of the order under s 18.

[35] In my view, that confirms the evident scheme under the DPSOA, namely that:

(a) the State and the prisoner are the parties to proceedings under which a supervision order may be made;

(b) supervision orders only exist because the DPSOA provide for them to be made by the Court;

(c) the order contains the requirements imposed on the prisoner to manage the adequate protection of the public, and the control care and treatment of the prisoner to facilitate their rehabilitation; and

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6 The direction must be objectively reasonable: *Wallace v Tannock* [2023] QSC 122 at [62].

(d) the order does not impose obligations on, or give powers to, Corrective Services officers, because the DPSOA does so.

[36] A decision by the Supreme Court to make a supervision order is the result of a rigorous, independent and impartial exercise of judicial power by the Court.[7]

Is the direction a decision under an enactment?

[37] Except in one respect there was no dispute as to the applicable principles before this Court.

[38] In *Griffith University v Tang*,[8] Gummow, Callinan and Heydon JJ stated the relevant test as follows:

> "The determination of whether a decision is 'made … under an enactment' involves two criteria: first, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment. A decision will only be 'made … under an enactment' if both these criteria are met. It should be emphasised that this construction of the statutory definition does not require the relevant decision to affect or alter *existing* rights or obligations, and it will be sufficient that the enactment requires or authorises decisions from which new rights or obligations arise. Similarly, it is not necessary that the relevantly affected legal rights owe their existence to the enactment in question. Affection of rights or obligations derived from the general law or statute will suffice."

[39] For the reasons explained earlier the direction was one expressly or impliedly authorised by the DPSOA. The first requirement in *Tang* is therefore met.

[40] As for the second requirement, that was at the heart of the appellant's contention on appeal. Focussing on the phrase "decision must itself confer, alter or otherwise affect legal rights or obligations", the appellant submitted that the decision **itself** did not alter or otherwise affect legal rights, because that was done by the supervision order.

[41] The contention was that the learned primary judge erred in the application of the test in *Tang*, by failing to consider if the direction **itself** altered rights:[9]

> "18. The error of the primary judge was to fail to apply the word 'itself' in the second limb of the *Tang* test. The primary judge found that the direction affected rights. However, the primary judge did not consider whether that affect was the product of the direction of the Corrective Services Officer 'itself' (i.e. without the intervention of the order). The primary judge then reasoned that the second limb of the *Tang* test was satisfied on

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7 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 502 [19], 596 [34], 602 [44], 614 [90] to 621 [113], 647 [196] and 656 [220]-[224].

8 (2005) 221 CLR 99 at [89].

9 Appellant's outline, paragraph 18. Footnotes omitted.

the basis that this affect on rights was derived from the DPSO Act."

[42] As it was put:[10]

> "27. It cannot be said that the direction 'itself' affected rights. Without the supervision order, the direction has no legal effect. The relevant legal obligation imposed on the Respondent to do what the direction says is imposed by the supervision order, rather than the direction 'itself'. Legal consequences flow from any failure by the Respondent to comply with the direction because it is a breach of the order, rather than because it is a breach of the direction.
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> 28. The position can be tested by consideration of the effect of any order by the Supreme Court quashing or setting aside the direction in a review of it under Part 3 of the JR Act. A quashing or setting aside order would only quash or set aside the legal effect of the direction. It would not remove the fact of the direction having been made. Provided that the direction meets the description of a direction under the supervision order, the Respondent would continue to be bound to comply with the direction and liable to possible contravention and offence proceedings if he does not. That is because the legal effect of the direction comes from the supervision order rather than the direction 'itself'. While the supervision order stands, any order quashing or setting aside the direction will have no legal effect."

[43] In my view, for several reasons the contention must be rejected.

[44] First, the supervision order is merely the way in which directions made under the DPSOA are enforceable. The scheme of the DPSOA is that the DPSOA provides that the order must contain provisions which compel the prisoner to obey the directions which are made under the DPSOA. The order cannot be divorced from the direction in the way postulated by the appellant.

[45] In *Tang* the High Court said:[11]

> "[79] The decision so required or authorised must be 'of an administrative character'. This element of the definition casts some light on the force to be given by the phrase '*under* an enactment'. **What is it, in the course of administration, that flows from or arises out of the decision taken so as to give that significance which has merited the legislative conferral of a right of judicial review** upon those aggrieved?
>
> [80] The answer in general terms is the affecting of legal rights and obligations. **Do legal rights** or duties owe in an immediate sense their existence to the decision, or **depend upon the presence of the decision for their enforcement**? To adapt what was said by Lehane J in *Lewins*, does the decision in

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10 Appellant's outline, paragraphs 27-28.

11 *Tang* at [79]-[80]. Footnotes omitted. Emphasis added.

> question derive from the enactment the capacity to affect legal rights and obligations? Are legal rights and obligations affected not under the general law but by virtue of the statute?"

[46] Secondly, the appellant's contention can only succeed if one reads the relevant phrase from *Tang*, "the decision must itself … alter or otherwise affect legal rights", as meaning that "the decision must itself, **and only itself**, … alter or otherwise affect legal rights". There is no warrant to confine the High Court's expression in that way. It cannot be supposed that the High Court intended such a refinement when it rejected the search for immediate and proximate relationships between the enactment and the decision:[12]

> "The circumstance that a decision could not have been made but for the concurrence of a range of circumstances of fact and law does not deny that in the necessary sense it was 'made under' a particular enactment. The search for 'immediate' and 'proximate' relationships between a statute and a decision deflects attention from the interpretation of the Review Act and the AD(JR) Act in the light of their subject, scope and purpose."

[47] To confine the High Court's expression in that way is to treat the reasons in *Tang* as if they were a statute requiring construction, which they are not.[13]

[48] Thirdly, the direction did, itself, affect or alter rights. It was made after the supervision order was in place. It follows that the direction was made under an enactment (the DPSOA), on the basis that the prisoner the subject of the direction was, at the time the direction was made, obliged to comply with it, without more.

[49] In my view, that is a clearer case than, for example, that in *Australian Broadcasting Tribunal v Bond*,[14] where the relevant finding, that the entities were no longer fit and proper persons to hold a licence, was said to be an intermediate determination on the way to a decision whether to revoke or suspend the licence, but nonetheless an essential preliminary to that decision and therefore a decision under an enactment. As to that Toohey and Gaudron JJ said:[15]

> "The finding by the Tribunal that the sixth to ninth respondents [ie, the Bond companies] were no longer fit and proper persons within the terms of s. 88(2)(b)(i) of the *Broadcasting Act* is, as conceded on behalf of the Tribunal, a decision under an enactment. It was, in the circumstance with which the Tribunal was concerned, a finding which was required before the Tribunal could exercise its power under that section to suspend or revoke the licences."

[50] Mason CJ[16] reached the same conclusion, referring to the Tribunal's "fit and proper" finding:[17]

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12 *Tang* at [69].

13 *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* (1987) 61 ALJR 393, [1987] HCA 27, [9].

14 (1990) 170 CLR 321.

15 *Bond* at 377.

16 With whom Brennan and Deane JJ agreed.

17 *Bond* at 339.

> "Although that decision was an intermediate determination made on the way to deciding whether to revoke or suspend the licences or to impose conditions on them, it was a decision on a matter of substance for which the statute provided as an essential preliminary to the making of the ultimate decision."

[51] This ground of appeal fails.

A caveat

[52] I would respectfully adopt what was said by the learned primary judge. As was the case below, this decision turns on a question of law and says nothing as to the merits of the decision to give the direction, let alone its susceptibility to judicial review. As the learned primary judge said:[18]

> "[79] Finally, it should be made clear to the applicant and others that my decision turns on a question of law about whether the decision in question was made 'under an enactment'. My decision says nothing about the merits of the decision, let alone its vulnerability to judicial review. While the first respondent declined to provide a statement of reasons under the JRA, she helpfully explained to the applicant in writing why the decision was made. That explanation seems rational and reasonable. The disposition of this application is not intended to provide any encouragement to the applicant to pursue an application to review the decision or any subsequent decision to like effect. The provision of a statement of reasons under the JRA may enable him to obtain legal advice about the utility or futility of doing so."

Conclusion

[53] For the reasons expressed above, the appeal must be dismissed.

[54] I propose the following orders:

1. Appeal dismissed.
2. The appellants pay the respondent's costs of the appeal.

[55] **BOND JA:** I agree with the orders proposed by Morrison JA and with his Honour's reasons for proposing them. I wish only to make some additional remarks explaining why I reach that conclusion.

[56] The operation of the supervised release regime provided for by the DPSOA turns on an exercise of judicial power, namely the making of a supervision order. If such an order is made it will subject a released prisoner to a regime to which the released prisoner would not otherwise have been subject. It will render a number of the rights and freedoms which would otherwise have been held by the released prisoner subject to a contingency, namely that those rights and freedoms might subsequently be affected by particular decisions made by corrective services officers.

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18 Reasons below at [79].

[57] The DPSOA explicitly empowers corrective services officers to make some of those decisions. Section 16A explicitly empowers corrective services officers to make curfew and monitoring directions in relation to a released prisoner. Section 16B explicitly empowers corrective services officers to make reasonable directions about a released prisoner's accommodation; rehabilitation or care or treatment; or their drug or alcohol use. The source of the corrective services officers' power to make such decisions is the enactment, not the Court's order. That must be so even though s 16(1)(da) and s 16(1)(daa) require the Court to express in its order that the released prisoner must comply with any such decisions by a corrective services officer.

[58] The DPSOA does not explicitly empower corrective services officers to make decisions of the character presently under consideration. Section 16C is expressed as a constraint on the power to make such decisions, not as the source of the power to make them. Nevertheless, s 16C plainly assumes that a corrective services officer has such a power. Indeed, if a supervision order containing the requirement set out in s 16(1)(db) is to be effective, corrective services officers must be regarded as having been empowered to make such decisions. The source of corrective services officers' power to make such decisions must be regarded as the enactment itself, whether directly or impliedly.

[59] In the present case the rights and privileges of the respondent were affected by two types of decision. The first was a decision made by a Court in exercise of a judicial power. That decision operated so that the rights and privileges were capable of being affected by the second type of decision, namely that made by a corrective service officer of the character mentioned in s 16(1)(db) and contemplated by s 16C. The enactment empowered the corrective services officer to make the second type of decision. And in the context in which the decision was made it affected the released prisoner's rights and freedoms in a way in which they had not previously been affected. As Morrison JA has explained, it is entirely consistent with *Griffith University v Tang* to regard such a decision as having been made under an enactment.