Transcript of Proceedings

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

PHILIPPIDES J

No 8739 of 2000

MARK ANTHONY MIDDLETON Applicant

and

DEPARTMENT OF CORRECTIVE SERVICES Respondent

BRISBANE

..DATE 16/10/2002

JUDGMENT

HER HONOUR: This is an application for review of the decision of the authorised delegate of the Serious Offenders Committee to reclassify the applicant from medium to high classification on 5 April 2000. That decision took place at the same time as an emergency transfer of the applicant from Borallon Correctional Centre to Sir David Longland Correctional Centre. In addition, the applicant seeks an order for review of his classification as at 1 February 2002 as a high risk of escape and his strict security management plan. The stated grounds of the application are that there was a breach of the rules of natural justice in relation to the decision in that the applicant was not afforded an opportunity to be heard, that the decision was not made by an impartial and unbiased person, that the decision was an improper exercise of the power conferred by the enactment under which it was made in that it failed to take into account relevant considerations and that there was no evidence or material to justify the making of the decision. It is also said that the decision was induced or affected by fraud.

The applicant claims relief in respect of part only of the relief sought in the application. Subparagraphs (a), (b), (c) and (e) are no longer pursued. In relation to paragraph (d) the applicant seeks an order that the "misinformation on his Corrective Services Investigation Unit and CIS files and/or his personal management file be removed".

The applicant seeks an order that the decision be quashed or set aside, or alternatively an order that the Department of

Corrective Service reconsider the decision according to law. The applicant also seeks an order for loss of wages over the period.

The application is made out of time. Section 26(1) of the Judicial Review Act 1991 provides that an application is to be made within 28 days. The decision in question having been made on 5 April 2000 and the original application having been filed in October 2000, the applicant seeks leave to bring the application beyond the 28 days. The applicant is required, in order to commence the application outside the limitation period, to show that there is an acceptable explanation for the delay and that it would be fair and equitable in the circumstances to extend time. It is also necessary to show that the merits of the application are such that an extension of time is justified and that there is no prejudice occasioned to the respondent.

The applicant gave some explanation as to the delay in bringing the application, which essentially rested on the applicant's difficulty in obtaining legal advice and assistance. In addition, it appears that the applicant perhaps confused his actions in appealing the decision with the statutory review process.

The respondent submits that since the decision was made in April 2000 a substantial period has transpired, and that the applicant has since been transferred to New South Wales and his security is therefore determined by the relevant laws of

that State and that therefore the current application is entirely speculative. The respondent, however, could not say that the classification in question might not influence the relevant authorities either in New South Wales or upon the applicant's return to Queensland if that were to eventuate.

Whilst the applicant has put forward only an explanation as to the delay which is slim, I am nevertheless not persuaded that the applicant should not have leave to extend the time in which to bring the application. I will therefore consider the application on its merits.

The relevant chronology is as follows. The material shows that on 22 April 1999 the applicant was given a medium security classification. On 5 April 2000 an emergency transfer from Borallon to the Sir David Longland Correctional Centre was made and the applicant's security classification was changed from medium to high. The decision was said to have been made following reports provided by the Borallon Correctional Centre identifying the applicant as the key figure in an escape plan. On 4 May 2000 a sentence management review inquiry was completed and it was recommended that the increased classification be maintained until a thorough escape risk assessment could be completed. Also on 4 May 2000 the Department of Corrective Services gave notice that the applicant's appeal of the transfer decision had been unsuccessful.

On 18 July 2000 a review was conducted and an escape risk assessment was completed, which included a report from the Sir David Longland Correctional Centre. It was stated in the assessment that the information provided indicated that the level of risk was considered to be still valid.

On 20 July 2000 a decision was made that the applicant was appropriately classified as high security. On 1 August 2000 a statement of reasons for the decision of the delegate to maintain the applicant on a high security classification was given. On 6 October 2000 the application for statutory order of review was brought.

On 15 November 2000 a sentence management review was conducted. It was determined that the applicant remain on a high security classification and remain at the Sir David Longland Correctional Centre. On 15 November 2000 an escape risk assessment was also made. The assessment was that the applicant remained a high risk. It appears to have been influenced by the fact that the applicant was required in New South Wales on serious drug charges.

On 3 May 2001 the applicant's security classification was reviewed and on 4 May 2001 the security classification was reduced to medium, apparently based on the high standard of the applicant's industry and conduct throughout the period under review.

On 3 May 2001 an escape risk assessment was conducted. The assessment indicated that an intelligence check had been generated on 20 April 2001 and that the information in question had been verified on 23 April 2001. It noted that "intelligence information relevant to escape risk does exist for this prisoner". Reference was made to three intelligence reports. The information contained was summarised as "completely reliable" and "probably true".

It was determined that the applicant be assessed as a high escape risk on the basis of the intelligence information, the fact that the applicant was wanted for extradition interstate and the applicant's declaration as a serious violent offender.

On 3 December 2001 a sentence management review was conducted and it was determined that the applicant was appropriately classified as a medium security classification. On 15 January 2002 an order was made in the Magistrates Court, Brisbane, that the applicant be transferred to New South Wales to face charges there. The subsequent application for review of that order was dismissed. In April 2002 the applicant was transferred to New South Wales. The parole eligibility date of the applicant is 19 July 2003 and his full-time release date is 11 December 2004.

The respondent has referred me to certain provisions of the Corrective Services Act 1998 (now repealed) which were applicable at the time of the decision in question. Section 13.1 provides:

> "The chief executive shall be responsible for the security and management of prisons and community correction centres and for the safe custody and welfare of prisoners."

Section 69.2 provides:

> "Subject to the provisions of the Mental Health Act 1974, the chief executive may, by instrument and subject to such condition as the chief executive thinks fit, order the transfer of a prisoner from one institution to another."

Regulation 13 of the Corrective Services Regulation 1989, also now repealed but relevant at the time, requires the classification of prisoners according to certain conditions.

The respondent referred to decisions such as McEvoy v. Lobban [1990] 2 QdR 235 in respect of the proposition that the decision the subject of the current application was a managerial decision and in the absence of bad faith the Court would not interfere with the decision.

While counsel for the respondent did appear in oral submissions to resile from the proposition that the decision in question was a managerial one, it was also nevertheless pressed that the duties incumbent on a prison to preserve the safety of the members of the community from escapees and to deal quickly with relevant information concerning the security of persons convicted of serious offences does not require a process of extending natural justice prior to the decision.

Counsel for the respondent placed emphasis on the fact that the decision made in April 2000 was superseded by a number of subsequent decisions relating to the applicant's security classification which, as I have mentioned, was ultimately reduced to a medium classification. It was also submitted that that regime which governed the applicant at the time in question has now been replaced by the Corrective Services Act 2000 and that there is therefore no purpose in proceeding to examine the decision made nearly two years ago since it can have no impact on the applicant's present situation. It was further submitted that the applicant is no longer a prisoner in this jurisdiction and therefore the current application should be refused. It was said that the respondent could not reconsider the security application of the applicant as he is no longer a prisoner and possibly may not be returned to Queensland. Further, if he were convicted of the offences with which he is charged in New South Wales he would not necessarily return to Queensland and should he be returned to Queensland his security classification would be considered afresh.

I was referred to a number of authorities by the applicant and the respondent. The authority which is particularly pertinent is that of Re Walker [1993] 2 QdR 345. In that case Williams J held that a determination resulting in the transfer of a prisoner did not give rise to a legitimate expectation such as to enliven judicial review on the basis of breach of natural justice. His Honour came to a similar conclusion in respect of the contention that the prisoner in that case had a

legitimate expectation that his security classification would not be altered. His Honour held that that submission could not succeed in the light of the statutory requirement that the security rating be reviewed at least every six months. However, apart from that Williams J held that the applicant in the case before him had no right to any particular classification.

In concluding that the prisoner had no right to any particular classification, his Honour referred to Smith v. Commissioner of Corrective Services [1978] NSWLR 317, where Hutley JA at 329 expressed the opinion that the corresponding New South Wales Act and regulations "in so far as they deal with the classification of prisoners do not give rise to private rights enforceable in the ordinary Court". His Honour held that the position under the current - under the then current Queensland legislation was the same.

His Honour noted that a similar conclusion had been reached with respect to the Victorian legislation: see R v. Classification Committee: ex parte Finnerty [1980] VR 561 at 568, where it was stated:

> "The effect of classification is to determine the disposition or placement of a prisoner within the system of penal establishments. It is not to promote a prisoner or arouse in him a lawful expectation that he will continue to enjoy particular facilities or privileges so long as he remains in custody."

Williams J also referred to the decision of Dixon J, as he then was, in Flynn v. The King (1949) 79 CLR 1 at 8.

Williams J acknowledged that the statement in Flynn v. The King, upon which the decisions in both Smith and Finnerty were largely based was made before the development of the doctrine of "legitimate expectations". However Williams J nevertheless held that the statutes and regulations in question before him were in any event not intended to create legitimate expectations in prisoners except where an entitlement to a specific benefit was clearly conferred either by the legislative provision or by the administrative policy and practice which gave effect to such provision. His Honour therefore concluded that the evidence in the case before him did not establish that the managerial decisions in question deprived the applicant of any specific benefit to which he had a right or with respect to which he had a legitimate expectation.

Applying that decision in the present case, the evidence before the Court in this case does not establish that the applicant was deprived of any specific benefit to which he had a right or legitimate expectation. On that basis it follows that the applicant must be unsuccessful in his application for review. However, even if the approach of Williams J in Re Walker were not to apply here, on the basis that the nature of the decisions were such as to give rise to a legitimate expectation for the purposes of judicial review, I am satisfied that there are no grounds for setting aside the challenged decision.

In particular, procedural fairness was adequately accorded by way of the availability of an appeal which the applicant availed himself of. In addition, the decision as documented in the material before me was based on reasonable grounds and is not shown to have been based on an improper exercise of power, nor was it based on irrelevant considerations, nor any failure to take into account relevant considerations, nor was it shown to have been induced by fraud.

The classification decision was reviewed periodically and eventually the applicant was reclassified. In those circumstances the application for review of the decision to reclassify the applicant must be dismissed. As regards the decision to assess the applicant as a high escape risk and the security management plan put in place by the respondent, again issues arise as to whether those decisions relate to merely managerial ones. I am satisfied that those decisions were of a managerial type and therefore should only be reviewed where bad faith is shown. No such case is shown here.

However, even if the decisions in question were not merely managerial ones, the decisions are not shown to have been defective for the purposes of judicial review so as to warrant the orders sought by the applicant. The decisions were reviewed periodically, they were based on intelligence which was reassessed and which was determined to be reliable and probably true. The source material has not been divulged and I note that the applicant has sought to subpoena that material.

However, as White J recognised in Kidd v. Chief Executive, Department of Corrective Services [2000] QSC 405, 10 November 2000, there is a tension between the applicant's entitlement to view such documents and legitimate security interests to which the respondent must have regard.

In the circumstances of this case, the applicant has not shown any bad faith in relation to any of the decisions. I therefore dismiss the application

---