SUPREME COURT OF QUEENSLAND

CITATION:	*Oakes v Department of Corrective Services* [2004] QSC 011
PARTIES:	**GLEN RAYMOND OAKES** (applicant) v **CHIEF EXECUTIVE, DEPARTMENT OF CORRECTIVE SERVICES** (respondent)
FILE NO/S:	S 3505 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	11 February 2004
DELIVERED AT:	Brisbane
HEARING DATE:	12 November 2003
JUDGE:	McMurdo J
ORDER:	**The application is dismissed**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – judicial review of a decision of a delegate of the Corrective Services Commission refusing remission of a term of imprisonment ADMINISTRATIVE LAW – JUDICIAL REVIEW – CORRECTIVE SERVICES COMMISSION – REMISSION – whether the delegate had followed a rule or policy which denies remission to a person who denies his/her guilt or declines treatment ADMINISTRATIVE LAW – JUDICIAL REVIEW – CORRECTIVE SERVICES COMMISSION – REMISSION – whether the delegate had failed to take into account relevant considerations *Corrective Services Act* 2000 (Qld), s 58, s 75(2)(a) s 75(2)(b), s 75, s 75(1), s 75(2), s 77, s 79 *Judicial Review Act* 1991 (Qld), s 20 *Fogarty v Department of Corrective Services* [2002] QSC 207, cited *Felton v Queensland Corrective Services Commission* [1994] 2 Qd R 490, considered *McCasker v Queensland Corrective Services Commission*

[1998] 2 Qd R 261, cited
Walker v Queensland Corrective Services Commission [1999] QSC 49, cited
Wiskar v Queensland Corrective Services Commission [1998] QSC 279, cited
Yeo v Queensland Corrective Services Commission (unreported 7534 of 1997, 13.02.98), cited

COUNSEL: B Carter Nicoll for the applicant
M Plunkett for the respondent

SOLICITORS: O'Reilly & Lillicrap Solicitors for the applicant
Crown Solicitor for the respondent

[1] **McMURDO J:** This is an application for judicial review of a decision refusing the remission of a term of imprisonment. The decision maker was empowered to grant remission only if satisfied of certain matters, including the fact that the prisoner's discharge would not pose an unacceptable risk to the community. The decision maker was not satisfied of that matter: indeed she expressly concluded that he posed an unacceptable risk. The applicant's case is that her consideration of this question was affected by an error of one or more of the kinds within s 20 of the *Judicial Review Act* 1991 (Qld).

[2] On 11 November 1996, the applicant pleaded guilty to one count of rape, three counts of indecent assault with a circumstance of aggravation, two counts of deprivation of liberty, one count of breaking and entering a dwelling with intent and one count of assault occasioning bodily harm. He was then sentenced to various terms of imprisonment to be served concurrently, of which the longest was a period of ten years for the rape offence. There was a recommendation that he be considered for parole after serving three and a half years. The applicant has made several unsuccessful applications for parole or post-prison community based release. He is presently an inmate at Palen Creek Correctional Centre in Townsville. He is subject to the lowest security classification, in recognition of his good conduct. In the past two or three years he has been granted leave of absence on more than 30 occasions,[1] with no reported incident or adverse comment on any occasion.

[3] He is a prisoner eligible for remission according to s 75(1) of the *Corrective Services Act* 2000 (Qld), because he is serving a term of imprisonment imposed for an offence committed before the commencement of that section, his term exceeds two months and he has not been granted leave or released in any of the circumstances described in that section. Section 75(2) then provides:

> "(2) Subject to sub sections (3) and (4), the chief executive may grant remission of up to one-third of the term of imprisonment if satisfied –
>
> (a) that the prisoner's discharge does not pose an unacceptable risk to the community; and

1 Pursuant to s 58 of the *Corrective Services Act* 2000

(b) that the prisoner has been of good conduct and industry; and
(c) of anything else prescribed under a regulation."

[4] The respondent, through his delegate, refused an application for remission of the applicant's sentence on or about 20 February 2003, and gave reasons for that decision on 17 March 2003. The delegate was satisfied that the applicant had been of good conduct and industry. But as I have mentioned, she was of the view that the applicant's discharge would pose an unacceptable risk to the community, and for that reason refused to grant remission.

[5] In deciding whether there was such an unacceptable risk, the delegate was required by s 77 to consider the matters prescribed by that section as follows:

> "**77 Risk to community**
>
> In deciding whether a prisoner's discharge or release poses an unacceptable risk to the community, the chief executive must consider, but is not limited to considering, the following –
>
> (a) the possibility of the prisoner committing further offences;
>
> (b) the risk of physical or psychological harm to a member of the community and the degree of risk;
>
> (c) the prisoner's past offences and any patterns of offending;
>
> (d) whether the circumstances of the offence or offences for which the prisoner was convicted were exceptional when compared with the majority of offences committed of that kind;
>
> (e) whether there are any other circumstances that may increase the risk to the community when compared with the risk posed by an offender committing offences of that kind;
>
> (f) any remarks made by the sentencing court;
>
> (g) any medical or psychological report relating to the prisoner;
>
> (h) any behavioural report relating to the prisoner;
>
> (i) anything else prescribed under a regulation."

[6] Notwithstanding his plea of guilty, the applicant has for some years now denied the rape offence, and maintains that the complainant consented. For that reason he has not participated in the sexual offender's treatment programme. In essence, his case is that his remission was refused solely because of his denial and non participation, without proper regard to the question of whether there is an unacceptable risk from his discharge. It is submitted that there is a rule or policy to refuse remission to sexual offenders who deny their offences and decline treatment and that the decision maker applied that rule or policy without regard to the merits of this particular case. It is submitted that the decision maker failed to take into account a relevant matter,

which was described as "a proper assessment of the risk the applicant posed to the community and any up to date psychological assessment". As this submission was developed, it seemed little different from the first submission, the effect of which is that the decision maker failed to address the question of risk required by s 75. It was further submitted that the decision involved errors of law, which were described as not acting "on logically probative material or evidence", acting "against the weight of evidence" and failing to make "a proper and genuine assessment of the risk". As I will discuss, each of these submissions attacked the decision as being determined by the applicant's denial of guilt and refusal of treatment. The application as filed also claims that the decision was so unreasonable that no reasonable person could have so exercised the power, but a submission in those terms was not advanced.

[7] In her statement of reasons, the delegate listed the material which she said she had considered in reaching her decision. That material includes certain psychological and psychiatric reports or assessments in respect of the applicant. The delegate extensively quoted from four of those reports. Two were by a psychologist, Ms Grant, and were respectively dated 6 February and 7 October 2002. Another was an assessment prepared by Dr Atkinson, psychiatrist, dated 24 May 2000. The fourth was by another psychologist, Ms Dall, dated 28 April 1999. The delegate also cited the view expressed in a letter of 22 May 2001 from the Queensland Community Corrections Board in which it had concluded that the applicant should be refused parole because it considered that he then presented an unacceptable level of risk to the community. Ms Grant considered that he remained a "medium to high risk of sexual recidivism" in the long term and recommended against remission. Dr Atkinson agreed with Ms Dall that "there is no clear evidence, from this man's presentation, behaviour and psychological assessment that he is a sex offender" but he nevertheless thought that "with his history of personality problems, difficulties in relationships and alcoholism this man will be at some risk of reoffending on community release". Dr Atkinson also said that "the man presents a mixture of some obsessional traits with a degree of amorality (suggestive of an antisocial personality disorder) which is further complicated by alcoholism. I noted in his interview with me that he gave a highly coloured version of the events from his point of view.". Ms Dall's report included the following remarks:

> "The likelihood of reoffending in terms of a violent offence is somewhat more problematical because violent behaviour is notoriously difficult to predict; however, he has shown no tendencies to random violence, and, while there still remains the possibility of violent and/or coercive behaviour under the circumstances of emotional stress, particularly if alcohol is involved, he is not assessed as being a major community risk ..."

[8] After also setting out some of the sentencing judge's remarks, the delegate expressed her reasons as follows:

> "Section 75 of the *Corrective Services Act* outlines that a prisoner may be granted up to one-third remission of the term of imprisonment. I have considered those factors in section 78 in determining that you had been of good conduct and behaviour.

I then gave consideration to those factors in section 77 in determining whether you posed an unacceptable risk to the community.

In considering your case I firstly noted that your current offences related to two linked events wherein you assaulted two females. The first event involves a very serious sexually violent assault of a female that included 'hog tying' the victim and you stopped her from dialling for assistance. The second event relates an incident wherein you assaulted a friend of the first victim. I noted that in his sentencing, the Judge made reference to the seriousness of the offences, the fact that you were on bail for other indictable offences and that you were the subject of a suspended sentence for breach of a domestic violence order.

I also gave consideration to your criminal history, and particularly noticed the frequency at which you had been involved in offending behaviour. I noted that there was a break in your offending. This break has been linked to a period of time in which you were in a stable relationship and it has been surmised that the relationship operated as a stabilising influence. You also noted these factors in your correspondence.

I was equally concerned, as Mr Wright was in his previous correspondence, that you have linked your cessation of offending to an external factor, your relationship. I took particular note that when this factor was removed, you re-commenced offending, including the very serious offences for which you are currently imprisoned. I noted that your most recent offending involved an increased level of violence. I concerned (sic) to note Dr Atkinson's comments that you have interpersonal problems with women, and that this is are aggravated by alcohol use. I was also concerned that the psychological report indicated you are a medium to high risk offending. I took particular note of Dr Atkinson's recommendation that, *RTW to LOA's to Kerry is probably the safest way to test his behaviour initially, HD and parole could then follow if his behaviour is satisfactory*. In essence, he recommended a process of structured community based release.

I then considered your involvement in programs. I noted that you have completed a number of programs. I noted that the exit reports indicated that you responded appropriately to these programs and that, where applicable, you have developed an appropriate relapse plan. I noted your comments in relation to reasons that you have not undertaken a sex offender treatment program and in relation to you having undertaken three individual psychological sessions. I did not rely on your failure to undertake a sex offender treatment program in my decision-making. However, I was concerned that professional staff, including the psychologist who saw you during the three counselling sessions, have assessed you with outstanding intervention needs.

> Mr Wright raised the issue that given your previous demonstrated pattern of offending and your reliance on external locus of control to cease your offending, he considered your attending intervention to develop an internal locus of control as an extremely important factor in reducing the likelihood of you offending in the future. Given the circumstances of your case, I concur with his comment. Therefore, I am particularly concerned, given the level of violence involved in your offending, that you have not developed sufficient skills and strategies to assist you in not offending in this manner in the future.
>
> I noted that the psychologist, sentence management coordinator and General Manager all recommend that remissions not be granted on the basis of your unacceptable risk to the community.
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> I closely considered the information contained in the psychological and psychiatric reports. I took particular note of the recommendations of these professionals including their views on what factors of your case would contribute towards your successful re-integration. I carefully considered your release plan and the steps that you and Kerry have untaken such as contacting support agencies and making contacts. I was also mindful of your positive performance on the resettlement leave of absence program. I noted that you have made a commitment to find work and have been working on developing work based skills in custody.
>
> I noted that your comments in relation to incorrect information being contained in a letter from the Queensland Community Corrections Board. I did not rely upon this matter in the decision making process.
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> After considering all of the available information I formed the view that you posed an unacceptable risk to the community and therefore decided not to grant remission on your 10 year sentence."

(The references to the correspondence from Mr Wright are to a letter written on behalf of the respondent dated 8 January 2003 in which the applicant was notified, pursuant to s 79, that the delegate was proposing to refuse to grant remission.)

[9] The delegate was obliged to consider whether she was satisfied of the matters within s 75(2)(a) and (b). According to her statement of reasons, the delegate correctly identified those matters as the relevant questions and did not manifest any legal error as to what it was about which she had to be satisfied. Within these reasons, there is no indication of any rule or policy to the effect of refusing remission to a person who denies his guilt or declines treatment. Nor does it appear that she simply accepted the opinion and recommendation of Ms Grant, without applying her own judgment to the issue. Clearly the delegate's decision was heavily influenced by Ms Grant's opinion, but that was to be expected from the circumstances that Ms Grant's opinion was the only professional opinion provided to the delegate which was recent or which specifically addressed the issue of risk from a discharge of the applicant upon a remission. The delegate expressly considered the opinions also of Dr Atkinson and Ms Dall, but she demonstrated no

misunderstanding of what had been written by either of them. In summary, the statement of reasons, read alone, does not manifest any error of the kind argued for the applicant.

[10] However, these reasons must be read with the entirety of the experts' reports, and in particular with the proper understanding of the reasoning of Ms Grant which the delegate apparently accepted. The first report of Ms Grant was written to assist in the consideration of the applicant's request for certain leave, described as resettlement leaves of absence. For that report, Ms Grant received various departmental files, which included the reports of Dr Atkinson and Ms Dall, and she interviewed the applicant and conducted certain psychometric testing. She summarised within her report the results of certain tests as administered and reported by Ms Dall, before describing the effect of a risk assessment test called STATIC-99, which Ms Grant had applied. As to that test she wrote:

> " The STATIC-99 predicts, with moderate reliability, the likelihood of recidivism over a ten (10) year period. This risk assessment test relies solely on historical factors, such as previous offences, gender of the victim, and previous violent offences. It was designed to assess the long-term risk of recidivism and does not assess the changes in risk, which may occur because of intervention. The STATIC-99 cannot be used to evaluate whether offenders have benefited from psychological interventions.
>
> The results from this test indicate that Mr Oakes can be considered to be medium to high long-term risk of sexual recidivism. A number of factors contributed to this rating. These include:
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> - The recorded conviction for behaving in an indecent manner;
> - His extensive criminal history; and
> - The violence used during the current offence.
>
> Mr Oakes has scored in the medium to high risk category on the STATIC-99. He has not engaged in any interventions aimed at addressing his sexual offending behaviour which is reflected by the fact that he continues to deny committing the current sexual offences and justifies and minimises his previous offending behaviour. It could be concluded therefore that Mr Oakes is at least a medium to high risk of sexual recidivism in the long-term, and there is little reason to conclude that anything has changed in his offending profile."

After a brief reference to the applicant's incident free experience of leave over the previous eighteen months, Ms Grant recommended that the applicant receive resettlement leaves of absence, notwithstanding his long term risk of recidivism, because of the circumstances of a supportive partner and an abstinence from alcohol or drug use whilst on such leave.

[11] Her report of October 2002 was prepared for the purpose of assessing this application for remission. She again interviewed the applicant. Her opinion of his long term risk of recidivism was unchanged, because she explained, the applicant

had not engaged in any intervention aimed at addressing his offending behaviour, he continued to deny the rape offence and also because he "denies, justifies or minimises his previous offending behaviour, and denies that he has ever experienced a substance abuse problem". She concluded that it appeared that the applicant "has not yet adequately addressed all aspects of his offending behaviour and therefore remains a medium to high risk of recidivism in the long term", adding that "I would therefore not recommend Mr Oakes for remission".

[12] The applicant strongly challenges Ms Grant's opinion, analysing the effect of her reasoning as involving no more than the application of the STATIC-99 test, the outcome of which in this case was determined by historical factors up to and including the offences for which he was imprisoned in 1996, coupled with a conclusion that the results of that test were still sufficiently reliable because the applicant had not engaged in any intervention, which the applicant says is a reference to the sexual offender's treatment program. It is then submitted that the delegate, in accepting Ms Grant's opinion, has effectively followed the same process of reasoning. It follows, the applicant submits, that the delegate has concluded simply from the facts that the applicant denied the rape offence and declined treatment that he posed an unacceptable risk if discharged. By this analysis of the delegate's reasoning, the applicant then likened the decision to those the subject of some previous cases in which judicial review has been granted on the application of a sex offender who denied his guilt and refused treatment, such as *Felton v Queensland Corrective Services Commission* [1994] 2 Qd R 490; *Yeo v Queensland Corrective Services Commission* (unreported 7534 of 1997, 13.02.98); *Wiskar v Queensland Corrective Services Commission* [1998] QSC 279; *Walker v Queensland Corrective Services Commission* [1999] QSC 49 and *Fogarty v Department of Corrective Services* [2002] QSC 207. When considering the application of many of the passages relied upon from those decisions, it must be kept in mind that all of them save for *Fogarty* were decided not in relation to the present Act, but its predecessor, the now repealed *Corrective Services Act* 1988. Under that Act, a prisoner, if his conduct and industry had been good, was entitled to remission unless the relevant decision maker (then the Corrective Services Commission) could be positively satisfied that the prisoner's release would subject the public to unnecessary risk: *Felton* per Williams J at 502.[2] The current Act abolished the process of remission of sentences, save for prisoners such as this applicant who was serving the relevant term upon the commencement of the Act. Under s 75 of the present Act, a prisoner has no legitimate expectation of a grant of remission if he or she has been of good conduct and industry, because the power to remit exists only where the decision maker is also satisfied that there is no unacceptable risk. With that qualification in mind, however, cases such as *Felton* decided in relation to the previous Act plainly demonstrate that a decision maker does not properly consider this issue of risk if the assessment of that matter goes no further than a consideration of the fact of the offence, the prisoner's denial of guilt and his refusal to engage in a treatment program. That is because a decision maker who enquired no further would be addressing the wrong question or questions, and not that which is required to be answered by s 75(2)(a), which is whether the prisoner's discharge posed an unacceptable risk to the community. The essential question in this proceeding is whether the applicant correctly characterises the delegate's process of reasoning as involving a consideration only of those matters.

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[2] See also *McCasker v Queensland Corrective Services Commission* [1998] 2 Qd R 261

[13] There was one curious remark in the course of the delegate's reasons which was that "I did not rely on your failure to undertake a sex offender treatment program in my decision making" before she then said that she was however "concerned that professional staff, including the psychologist who saw you during the three counselling sessions, have assessed you with outstanding intervention needs." It is not clear to me what the delegate intended to mean by her non reliance on his failure to undertake a program. Plainly the fact he had not undertaken that program, coupled with the view of professional staff that he had "outstanding intervention needs" was a relevant matter for her to consider. The existence of an unacceptable risk was not demonstrated simply from an outstanding intervention need, but it was a relevant consideration. However, the delegate's reference to this matter, in the context of her statement of reasons as a whole, and even read with the benefit of the experts' reports including those of Ms Grant, in my view does not justify the characterisation of the delegate's process of reasoning for which the applicant contends.

[14] In my view, the applicant's case misunderstands the delegate's reasoning in two respects. First, the delegate did consider a range of matters, at least including each of those within s 77, and did not simply go to the reports of Ms Grant and adopt them without reference to other matters. It is unnecessary to repeat at this point the many considerations expressly referred to by the delegate in her reasons, and in particular in the passage set out at [8] above. To the delegate, the critical question whether the applicant's discharge posed an unacceptable risk was a complex one which required her to assess and balance a number of facts and circumstances of the applicant's case. Secondly, to the extent that the delegate relied upon the reports of Ms Grant, in my view the applicant's case somewhat misstates the effect of Ms Grant's reasoning. Ms Grant considered more than the facts of the offences themselves, the applicant's denial of them and his refusal of treatment. In her first report, which in substance she confirmed in her second report, she specifically considered the tests undertaken by Ms Dall and Dr Atkinson. But she also saw fit to rely upon the STATIC-99 test as a sufficiently reliable indicator. This was a professional judgment on her part with which other psychologists might not have agreed. But there was no evidence that this was not regarded by at least a reasonable proportion of her profession as a reliable method of predicting the likelihood of recidivism in an offender such as the applicant. No evidence was adduced by the applicant to contradict her view of the reliability of this test. In any case such evidence would have been likely to show no more than a substantial dispute as to the merits of Ms Grant's opinion and, in turn, the delegate's decision. The position is then that Ms Grant has given a professional opinion, based upon what she says is a moderately reliable and recognised test, as well as upon a consideration of other material including other professional opinion, and with the benefit of an interview of the applicant in each case immediately prior to her report.

[15] Much of the applicant's submissions seem to cross the line between proceedings of judicial review and a review of the merits of the decision. So the submission that the delegate failed to consider "any up to date psychological assessment" seems to be premised upon the proposition that the delegate was obliged to disregard Ms Grant's October report as such an assessment. That submission must be rejected, involving as it does the need to reject Ms Grant's opinion as lacking merit. The fact that it was not consistent with what Ms Dall had written some years previously did not require its rejection.

[16] What I have said already is sufficient to deal with the specific submissions that the delegate's conclusion "was not based on logically probative material or evidence". In my view it was, although the material or evidence was not all one way and reasonable minds might reach different conclusions upon it. Nor was the judicial conclusion against the weight of the evidence, in the sense relevant to review proceedings.

[17] The refusal to grant remission to this applicant, who had received a recommendation for parole after three years but who had served nearly seven years of his sentence with unblemished conduct and industry, seems at first impression to be harsh and difficult to justify. However, it was a decision based on a consideration of all relevant matters and was supported by professional opinion. The fact that there is a substantial basis for doubting the correctness of the delegate's decision upon the merits does not justify the court's interference by judicial review.

[18] I have concluded that the applicant has failed to make out his case for judicial review. The application must be dismissed. I shall hear the parties as to costs.