# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Meizer v Chief Executive, Dept of Corrective Services & Anor* [2005] QSC 351 |
| PARTIES: | **LYELL GRANT MEIZER**<br>(applicant)<br><br>**v**<br><br>**CHIEF EXECUTIVE, DEPARTMENT OF CORRECTIVE SERVICES**<br>(first respondent)<br><br>and<br><br>**LIDIA PENNINGTON**<br>(second respondent) |
| FILE NO: | BS5394 of 2005 |
| DIVISION: | Trial |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court, Brisbane |
| DELIVERED ON: | 1 December 2005 |
| DELIVERED AT: | Supreme Court, Brisbane |
| HEARING DATE: | 7 November 2005 |
| JUDGE: | Douglas J |
| ORDER: | **THE APPLICATION FOR STATUTORY ORDER FOR REVIEW IS STRUCK OUT. ORDER THAT, PURSUANT TO S 49 OF THE JUDICIAL REVIEW ACT, THE RESPONDENT INDEMNIFY THE APPLICANT FOR HIS COSTS PROPERLY INCURRED IN THE REVIEW APPLICATION IN RESPECT OF THE RESPONDENT'S APPLICATION PURSUANT TO S 48 OF THE *JUDICIAL REVIEW ACT*** |
| CATCHWORDS: | ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – DECISION TO WHICH JUDICIAL REVIEW LEGISLATION APPLIES – DECISIONS UNDER AN ENACTMENT – PARTICULAR CASES – where applicant was a prisoner who was suspended from a prison work program for making derogatory comments to prison visitors – where applicant denies he made those comments – where respondents were seeking to have the proceeding struck out, contending that the decision challenged is not one to which the *Judicial Review Act* applies; that if the Act did apply the |

grounds of review are limited to bad faith of which there was no evidence and that, in any event, the applicant has been treated fairly procedurally and the decision is otherwise an unremarkable instance of a prison managerial decision reasonably open on the merits in respect of which considerable reticence should be exercised on judicial review – whether the decision was one to which the *Judicial Review Act* applies

*Corrective Services Act 2000* (Qld), s190, s 238, Sch 3
*Corrective Services Act 1988* (Qld), s 59(2)
*Corrective Services Regulation 2001* (Qld), s 16
*Judicial Review Act 1991* (Qld), s 4, s 20, s 21, s 48, s 49

*Bartz v Chief Executive, Department of Corrective Services* [2002] 2 Qd R 114, distinguished
*Gray v Hamburger* [1993] 1 Qd R 595, cited
*Griffith University v Tang* (2005) 79 ALJR 627, applied

COUNSEL: D P O'Gorman for the applicants
J A Logan SC, with him G P Long, for the respondents

SOLICITORS: Howden Saggers Lawyers for the applicants
C W Lohe, Crown Solicitor, for the respondents

[1] **Douglas J**: This is an application to dismiss summarily, under s 48 of the *Judicial Review Act* 1991, an application for judicial review brought pursuant to ss 20 and 21 of that Act. The relevant decision is one of 2 March 2005 by Lidia Pennington, the second respondent, refusing to exonerate the applicant, Lyell Meizer, in respect of a complaint made against him in prison as a result of which he was suspended from a work programme for 14 days. That suspension had occurred from 19 January 2005 in circumstances where he was reported as having made derogatory remarks towards members of a delegation visiting the prison where he was working. He contended that any derogatory remarks were not made by him and has since produced statements supporting that view from other persons present.

[2] He was given a chance to make submissions in defence of the complaint made against him and did that by letter of 16 February 2005, which denied that he had made the comments attributed to him and referred to the existence of other witnesses who supported his recollection of the events. The other witnesses may not have been interviewed. The version of events given by his supervisor was accepted. He said that he saw and heard the applicant making the offending comments at the time.

[3] The work program he was engaged in was authorised under s 190 of the *Corrective Services Act* 2000, which required the chief executive to establish services or programs to help prisoners to be integrated into the community after their release from custody, including by acquiring skills. By s 238 of that Act the chief executive "may approve an activity or program to be an activity or program for which remuneration, at rates set by the chief executive, may be paid to a prisoner". The applicant here was being paid for the work he was doing.

[4] Schedule 3 of that Act defines "privileges" to mean "privileges prescribed under a regulation" and s 16 of the *Corrective Services Regulation* 2001 provides that "participating in an activity, course or program" is a privilege. Whether his participation was a privilege rather than a right assumes a significant degree of importance in this decision.

[5] The applicant's main factual grievance relates to the merits of the case, whether he said what was attributed to him. His counsel was not in a position to make submissions about the substantive merits of his application for judicial review on this hearing, however, because he had only recently been engaged and had not had a sufficient opportunity to take instructions about those issues.

[6] The respondents oppose the application and seek to strike it out at this stage on three grounds: that the decision challenged is not one to which the Act applies; that if the Act did apply the grounds of review are limited to bad faith of which there was no evidence; and that, in any event, the applicant has been treated fairly procedurally and the decision is otherwise an unremarkable instance of a prison managerial decision reasonably open on the merits in respect of which considerable reticence should be exercised on judicial review.

[7] The first issue at least of those three identified by the respondents can be determined at this stage - whether the decision challenged is capable of being reviewed under the Act. In my view the matter can be resolved by addressing that issue.

**"A decision to which this Act applies"**

[8] The words, "a decision to which this Act applies" used in ss 20 and 21 of the *Judicial Review Act* are defined in s 4 to mean, in this context, "a decision of an administrative character made, proposed to be made, or required to be made, under an enactment (whether or not in the exercise of a discretion)". Those words have been considered recently by the High Court in *Griffith University v Tang* (2005) 79 ALJR 627. The principal judgment of Gummow, Callinan and Heydon JJ, when considering what was required for a decision to meet the statutory description, concluded at 644, [89]:

> "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."

[9] Because the *Corrective Services Act* does not contain any provision dealing with the exclusion of a prisoner from a program it may well be the case that the first limb of that test, that the decision be expressly or impliedly required or authorised by the enactment, is not met here. The crucial issue is, however, that the *Corrective Services Regulation* makes it clear that participation in the program is simply a privilege, not a right.

[10] The decision in *Griffith University v Tang* and the legislative prescription that participation in the program here was a privilege rather than a right distinguishes this decision from that in *Bartz v Chief Executive, Department of Corrective Services* [2002] 2 Qd R 114, 117-118 where White J concluded that a decision to

order a prisoner to participate in an approved compulsory program under s 59(2) of the then *Corrective Services Act* 1988, or a decision that a prisoner may not participate in a voluntary program for the purpose of being remunerated, was a decision of an administrative character made under an enactment. The situation is more akin, under this statutory regime, to that expressed by Byrne J in *Gray v Hamburger* [1993] 1 Qd R 595, 602, namely that "today's favour is not yet tomorrow's duty".

[11] Mr O'Gorman, for the applicant, submitted that the obligation imposed on the Chief Executive by s 190 of the *Corrective Services Act* to establish services or programs to help prisoners to be integrated into the community by acquiring skills itself conferred a legal right or obligation. That the Chief Executive has an obligation to establish such programs seems clear, but participation in those programs by individual prisoners has been made a privilege by s 16 of the *Corrective Services Regulation.* Accordingly, as the applicant has no legal right to participate in the program, his application must fail and should be struck out at this stage in the exercise of the powers available to me under s 48 of the *Judicial Review Act.*

[12] It is, therefore, unnecessary for me to consider the other submissions of the respondents.

**Order**

[13] The application for a statutory order of review is struck out.

[14] These applications were treated as being of some general importance, likely to affect many applications that might be made by prisoners. The matter was adjourned to enable the applicant to be represented properly. The applicant is a long-term prisoner with extremely limited financial resources. This appears to be one of the first occasions that this Court has been requested to consider the effect of the decision in *Griffith University v Tang* on the ability of prisoners to seek judicial review of decisions of the Department of Corrective Services. It seems appropriate to me, therefore, to order, pursuant to s 49 of the *Judicial Review Act*, that the respondent indemnify the applicant in relation to his costs properly incurred in the review application in respect of the respondent's application pursuant to s 48 of the *Judicial Review Act.*