

SUPREME COURT OF QUEENSLAND

CITATION: *Garner v Ittensohn & Anor* [2006] QSC 385

PARTIES: **DENNIS WAYNE GARNER**
(applicant)
v
TROY ITTENSOHN
(first respondent)
and
FRANK ROCKETT
(second respondent)

FILE NO/S: BS No 5944/06

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court

DELIVERED ON: 15 December 2006

DELIVERED AT: Brisbane

HEARING DATE: 13 December 2006

JUDGE: White J

ORDER: **Decision made by the first respondent on 20 April 2006 is set aside and the first respondent is directed to reconsider the applicant's security classification taking into account all relevant material**

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – RELEVANT CONSIDERATIONS – application for judicial review of respondent's decision that the applicant's prison classification remain as medium security – respondent failed to take into account two recent programs completed by applicant – decision may not have been the same had the respondent considered those programs – decision set aside

Corrective Services Act 2000 s 12

COUNSEL: The applicant appeared on his own behalf
K Mellifont for the respondents

SOLICITORS: The applicant appeared on his own behalf
The Crown Solicitor for the respondents

- [1] The applicant seeks a statutory order of review of the decision of the first respondent made on 20 April 2006 that the applicant's classification remain as medium security and that he continue to reside at Borallon Correctional Centre rather than as an open security prisoner residing at a facility appropriate to that classification. The first respondent is the delegate of the second respondent the Chief Executive of the Department of Corrective Services.
- [2] The applicant has appeared to argue his application himself. He is aggrieved by the decision because:-
- He is classified as medium security not as open security;
 - He is accommodated at Borallon Correctional Centre not at Darling Downs Correctional Centre or another facility where he will be in open custody; and
 - His sentence of imprisonment is being managed in a way intended and likely to prevent him from succeeding in any application for post-prison community based release.
- [3] The grounds of the application are many and are elaborated by the applicant in his further and better particulars and in his written submissions. In summary he contends that:-
- He was not given an opportunity to make submissions about the material the first respondent considered and was thereby denied natural justice.
 - The first respondent erred in law in not considering all relevant factors as required by s 12 of the *Corrective Services Act 2000*.
 - There has been an improper exercise of power in that the first respondent took irrelevant considerations into account and failed to take relevant considerations into account and exercised the power in bad faith and without regard to the merits of the case; and exercised the power unreasonably.
 - The first respondent erred in law in, effectively, pre-empting the role of the Parole Board.
 - The first respondent made some factual errors about his sentences which affected his understanding of the evidence.
 - The first respondent did not take into account any prior review documents; successful completion of rehabilitation programs and his good record in prison since 2004.
 - The first respondent focussed on all negative factors but failed to consider many relevant positive factors.
- [4] The applicant tendered two post-decision documents which he considered relevant to this review being the Parole Board's preliminary assessment of the applicant's most recent application for parole made 29 September 2006, exhibit 1, and the most recent case plan for the applicant dated 2 October 2006, exhibit 2. In the circumstances of my decision these documents have not been relied on.

- [5] The applicant was born on 13 September 1963 and was sentenced to life imprisonment for murder on 27 November 1986. This arose out of events which occurred on 2 April 1986. He was charged with summary offences arising out of those events and other offences and dealt with in the Toowoomba Magistrates Court in May 1986. He was sentenced to 12 months imprisonment for two break, enter and steal offences, unrelated to the events of 2 April, or, at least, insofar as they occurred on different dates as revealed in the criminal history.
- [6] The applicant had a previous criminal history prior to November 1986 for numerous offences for the most part dealt with in the Toowoomba Magistrates Court including for a number of assaults.
- [7] The applicant was granted release to work on 11 December 1998, then home detention on 13 December 1999. He was granted parole on 3 April 2000. His parole was suspended on 11 May 2001 after he was charged with a driving offence. His parole was cancelled on 30 November 2001 presumably when he was convicted of the driving offence, fined and had his driver's licence suspended.
- [8] In August 2002 the applicant was placed on a release to work program and on 23 December 2002 he was released on parole. The applicant was arrested in respect of offences of some seriousness committed on 15 February 2004. He was returned to prison on 18 February and his parole suspended on 12 March 2004. On 31 January 2005 the applicant was sentenced after pleas of guilty to three years' imprisonment suspended after 12 months and other lesser concurrent sentences. The offences, of which the applicant was not the ringleader, arose out of a home invasion to punish a member of the household for giving information to police.
- [9] After his return to custody from parole on the last occasion the applicant was subject to a number of prison placement reviews. The Offender Management Team in the most recent recommendation, made prior to the decision of the first respondent the subject of this application, recommended that he be classified as an open security prisoner.
- [10] The Chief Executive is required to classify a sentenced prisoner when admitted to a corrective services facility as maximum, high, medium, low or open security. He is required to review that classification, relevantly for this applicant, at intervals of not longer than six months. When deciding on a prisoner's classification the Chief Executive (or his delegate) is required to consider all relevant factors:
"...including for example –
- (a) the risk of the prisoner to the community;
 - (b) the nature of the offence for which the prisoner is charged or has been convicted;
 - (c) the period of imprisonment the prisoner is serving;
 - (d) whether the prisoner has any outstanding charges and the nature of the charges;
 - (e) the prisoner's criminal history (if any);
 - (f) the prisoner's escape history (if any);

- (g) the prisoner's demonstrated attitude towards the sentence being served;
- (h) the likelihood of the prisoner being deported or extradited, and the prisoner's demonstrated attitude towards the deportation or extradition;
- (i) the prisoner's previous conduct in a corrective services facility, including whether the prisoner has committed an offence or breach of discipline or returned a positive test sample;
- (j) the prisoner's previous conduct while subject to a community based order or post-prison community based order;
- (k) the prisoner's medical history, including any psychological or psychiatric history;
- (l) the likely influence of the prisoner's family relationships."

Section 12(3) *Corrective Services Act 2000*.

- [11] The first respondent's decision dated 20 April 2006 stated that notice was taken of the relevant legislation and "all aspects of the prisoner's case, information contained within the document and the comments of the Offender Management Team". The first respondent wrote that after considering all factors he gave particular regard to the applicant's length of sentence, the seriousness of the offence, his criminal history and his progress in addressing offending behaviour as well as his institutional behaviour and conduct during the period under review as well as his proximity to release dates. The first respondent determined that the applicant was suitably classified as medium security. He approved his placement at Borallon Correctional Centre. The first respondent referred to the applicant's poor response to post-prison community based release having been released on two separate occasions and being returned to secure custody due to being convicted of further offences. The first respondent noted that the applicant's offending behaviour had escalated in severity whilst on post prison community based release. He concluded:-

"Prisoner Garner is encouraged to maintain acceptable institutional behaviour during the coming review period by remaining breach and incident free. He is encouraged to participate in the Certificate 1 in Work Preparation Program, Certificate 1 in Engineering Course and the Certificate 1 & 2 in Asset Maintenance course to increase employability and assist in formulating concrete release plans during the coming review period."

The applicant is participating in those courses as he advised the court.

- [12] On 19 May 2006 a statement of reasons was requested and on 8 June 2006 a statement of reasons was provided.
- [13] The first respondent considered the following documents:-
- "1. A Sentence Calculation for Dennis Garner.

2. Offender Management Plan Reviews for Dennis Garner, conducted on 29 November 2005 and 21 March 2006.
3. Offender Management Plan Reviews for Dennis Garner, verified on 30 November 2005 and 20 April 2006.
4. Queensland Criminal History for Dennis Garner.
5. A Transcript of Proceedings, Toowoomba District Court, Judge Howell dated 31 January 2005.”

[14] The reasons set out the findings of fact upon which the decision was based. There are a number of minor inaccuracies contained in the statement of facts. They are not particularly important but they would likely cause a prisoner to feel concerned that the necessary care has not been taken over his review. For example, the first respondent wrote:-

“You are currently serving a life custodial sentence which commenced on 30 April 1986 for the offences of Murder, Break, Enter and Steal ... Exceed Speed Limit ...”

It is clear that the life sentence relates to the murder to which he was sentenced on 27 November 1986 in respect of an offence which was committed on 2 April 1986. The other offences received various concurrent terms of imprisonment the only ones of which are still extant (so far as I can calculate), relate to the most recent breaking into the house at night with violence and in company.

[15] Another example of what is only carelessness appears in the first respondent’s reference to passages in Howell DCJ’s sentencing remarks. There are quotation marks around a short passage from the reasons of his Honour but the two paragraphs in the reasons devoted to the sentencing remarks drift from third person to second person in a most unsatisfactory manner.

[16] In paragraph 8 of the reasons the first respondent sets out the programs completed by the applicant as follows:-

“You have previously completed the following Offender Behaviour Programs during this custodial sentence:

- * Anger Management Program on 31/07/1997 at Numinbah Correctional Centre
- * Cognitive Skills Program on 04/12/1997 at Numinbah Correctional Centre
- * Alternatives to Violence Program on 01/09/1993 at Moreton Correctional Centre
- * Substance Abuse Preventing and Managing Relapse Program on 09/05/1997 at Numinbah Correctional Centre, 04/09/2001 at Borallon Correctional Centre and 28/02/2006 at Borallon Correctional Centre”.

- [17] What was not referred to and, as acknowledged by Ms Mellifont, was not considered by the first respondent was the applicant's participation in a 16 session cognitive skills program completed on 15 June 2005 which comprised sessions on self control, critical reasoning, problem solving and perspective taking. This was conducted at the Sir David Longland Correctional Centre by a psychologist and a counsellor. The applicant also successfully completed an anger management program of three modules about understanding anger, understanding thinking, feeling and doing and managing and expressing anger. The program was completed on 24 August 2005 and was conducted by the same psychologist and counsellor. On my inquiry of the applicant he stated that the cognitive skills program sessions could be of several hours each running over some 16 weeks. These, therefore, were not slight programs by any means.
- [18] The first respondent noted that the applicant had not incurred any breaches of discipline nor returned any positive test samples in the two review periods under consideration. He noted the case officer report that the applicant complied with the rules and regulations given by staff; that he communicated openly and freely with staff and was polite and courteous; his behaviour in front of his peers appeared to be appropriate; he maintained cleanliness and personal hygiene to an acceptable standard; he spent time helping other prisoners in the unit complete their duties in the kitchen and laundry; he attended the voluntary work parties with no adverse outcomes recorded. The case officer further reported that the applicant complied with centre rules and willingly followed all directions given to him by staff and remained breach free with acceptable and appropriate behaviour. It was noted that the applicant had displayed "solid problem solving skills" and had initiated a release plan. He was highly regarded as a floor polisher in B Block and maintained "a high work ethic". He was described as "highly organised in his employment utilising and planning his time well". He was noted as being able to interact in a mature manner with those with whom he came in contact including the need to enter prisoners' cells to undertake the floor cleaning. He was noted as being able to work unsupervised and able to organise all cleaning equipment.
- [19] The first respondent wrote that he made the decision to classify the applicant as medium security by noting the nature of his offences. Of this it should be observed that the first respondent merely set out all the offences that he had set out at the beginning of the reasons including the relatively minor motor vehicle offences. Of more importance, he wrote:
- "I note that you have been afforded two previous opportunities to participate in Community Based Orders and on both occasions have been returned to secure custody after committing further offences, most recently in 2004 and subsequently being convicted of violent offences."
- [20] The first respondent again noted the programs completed but failed to mention the most recent to which I have made reference. The respondent noted the favourable work reports about the applicant and the recommendation of the Offender Management Team that the applicant advance to an open security classification. He balanced these favourable factors against the seriousness of the offences, the length

of sentence imposed and the applicant's previous response to community based orders.

- [21] The only current negative observation against the applicant is to be found in the Offender Management Plan Reviews verified on 30 November 2005 and 20 April 2006 which were part of the documentary materials considered by the first respondent. The report noted that during the review the applicant was openly frustrated due to his previous Offender Management Plan Review not yet being verified. He was told that there was a problem with the Integrated Offender Management System which had not been rectified. The applicant apparently stated that because of the system problem it was delaying his progression. The report contained this passage:-

“He demonstrated in the review poor problem solving skills by stating that if the matter was not rectified soon he ‘will take matters into my own hands, I will breach and lose my cool’. As he has previously completing [sic] the Cognitive Skills Program, this demonstrated a lack of understanding on how to problem solve without being impulsive”.

Notwithstanding that event, the recommendation was that he be assessed as suitable for placement at the Darling Downs Correctional Centre, an open security facility.

- [22] What the applicant is concerned to achieve is an open classification so that, consistently with the observations of the Parole Board, he can demonstrate stability so that he would be better equipped to handle possible risk situations in the future and thereby progress towards full rehabilitation and parole.
- [23] I am not persuaded that the applicant has made out the majority of his grounds of complaint such as, not having an opportunity to make submissions; or bias on the part of the first respondent; or that the first respondent was usurping the role of the Parole Board; or that in any other fashion the applicant was the subject of an improper concerted plan to prevent him from progressing from within the system towards parole. It is not the case that the favourable factors have not been considered. Indeed his complaint might well be that whilst they have been articulated they have been given insufficient weight.
- [24] What the delegate had to do was to weigh the breaches of previous community release orders against the applicant's progress towards stability and self control since being returned to prison. The other factors mentioned in s 12, of course, had to be considered, but these seem to be the most significant.
- [25] Accordingly, the failure of the first respondent to take into account the two most recent programs completed in 2005 to which I have referred may have affected the first respondent's decision. Ms Mellifont has submitted that even if the knowledge of those programs was before the first respondent the outcome would have been no different. But that conclusion cannot be readily reached. It seems more likely than not that the Offender Management Team was aware of those programs because of their comment that the applicant had previously completed offender behaviour

programs and he was not required to participate in any further programs. But that is not sufficient to fix the first respondent with that knowledge. When the decision requires a balancing of a number of factors and substantial material directly impacting on one of those factors is not considered, the decision may not be the same.

- [26] The decision made 20 April 2006 must be set aside and the matter returned to the first respondent to consider the applicant's security classification taking into account all relevant material.