# SUPREME COURT OF QUEENSLAND

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| CITATION: | *McGrane v Queensland Parole Board* [2009] QSC 380 |
| PARTIES: | **JAMES PATRICK MCGRANE**<br>(applicant)<br>**v**<br>**QUEENSLAND PAROLE BOARD**<br>(respondent) |
| FILE NO/S: | BS 3164 of 2009 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court, Brisbane |
| DELIVERED ON: | 25 November 2009 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 20 August 2009 |
| JUDGE: | P Lyons J |
| ORDER: | **Application dismissed** |
| CATCHWORDS: | ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – GENERALLY – where the applicant seeks a statutory order of review of a decision by the Queensland Parole Board to decline to grant parole to the applicant pursuant to the *Judicial Review Act* 1991 (Qld) – where the applicant alleges a breach of natural justice has occurred – where the applicant submits that the breach has occurred on several grounds – whether any of the grounds are established – whether a breach of natural justice has occurred<br><br>*Corrective Services Act* 2006 (Qld), s 3, s 193, s 227<br>*Judicial Review Act* 1991 (Qld), s 20, s 23, s 24<br><br>*McGuire v South Queensland Regional Community Corrections Board* [2003] QSC 414, considered<br>*Minister for Aboriginal Affairs v Peko-Wallsend Ltd & Ors* (1986) 162 CLR 24, applied<br>*R v Deputy Industrial Injuries Commissioner; ex parte Moore* [1965] 1 QB 456, considered |
| COUNSEL: | The applicant appeared on his own behalf<br>S A McLeod for the respondent |
| SOLICITORS: | The applicant appeared on his own behalf<br>Crown Law for the respondent |

[1] **P LYONS J:** On about 5 September 2008, Mr McGrane made an application for a parole order. That application was refused. Mr McGrane now seeks a statutory order of review of that decision under the *Judicial Review Act* 1991 (Qld) (*JR Act*).

**Background**

[2] Mr McGrane is now 41 years of age, his date of birth being 15 July 1968.

[3] On 5 June 1986 he was convicted of the murder and rape of his sister, the offences having been committed on 24 March 1986. He was then 17 years of age. He was sentenced to life imprisonment for the offence of murder, and to 15 years' imprisonment on the offence of rape. He has been in custody since that time.

[4] Between 1988 and 1992 he was convicted of a number of offences whilst in custody, mostly relating to wilful damage of his cell, but some convictions were for assault, and one was for preparing to escape lawful custody.

[5] In the earlier period in which he was in custody, a number of breaches of prison discipline were recorded. However, between 1999 and March 2007 there were no such breaches. In March 2007 a breach described as a major breach for offensive language occurred. A further breach of prison discipline is said to have occurred in March 2008.

[6] Mr McGrane's current classification is high security. In December 2003 he was in the residential section of Wolston Correctional Centre. However, in March 2005, he was returned to the secure section, the reported reasons being poor employment history and behavioural issues.

[7] Whilst in custody, to his credit, Mr McGrane has completed a number of courses. Although he left school after grade 10, he has successfully undertaken tertiary studies, including for two degrees, and a number of other courses relating to vocational and personal development. He has also undertaken a number of courses directed to his rehabilitation, including anger management programs, cognitive skills programs, a number of personal development courses, the Getting Started: Preparatory Program, and the Cross-roads: High Intensity Sexual Offending Program (*HISOP*). He submits, and there is no reason on the material to doubt this, that he has undertaken every program and attempted to take every step which has been suggested to him in the past by the Parole Board, and which is within his power.

[8] Nevertheless, the Board has refused his present application.

**Parole Board's decision**

[9] On 3 October 2008, the Board wrote to Mr McGrane, giving notice that it was considering declining to grant him parole on the basis that he poses an unacceptable risk to the community. The letter identified the material which the Board considered relevant, and set out at some length matters which it considered would be of some significance to its final decision. The letter is of some length, and I do not propose to canvas all of the matters mentioned in it. It noted that he had completed the *HISOP* but that the Board did not have the exit report from that program. The program had been completed on 16 August 2007. The Board did,

however, have information from the facilitators of the Getting Stated: Preparatory Program which spoke positively of Mr McGrane's participation.

[10] The letter referred to a number of assessments of Mr McGrane, the most recent being in 2008. One of those was from a Mr Gavin Palk, a psychologist, who referred to likely difficulties Mr McGrane would encounter in transferring from prison life. Another was from Dr Moyle, a forensic psychiatrist, whose view was that Mr McGrane remained a person who is prone to aggression, including angry outbursts and violence, and that he remained a moderately high risk of serious sexual offence. Dr Moyle had recommended that Mr McGrane work "to overcome his tendency to isolate himself in his world of fantasy, so that he can lower his security level and together with corrections staff move toward lower security situations and eventual parole."

[11] The letter made reference to Mr McGrane's Relapse Prevention Plan and identified further matters that should be addressed. It also referred to inadequacies with his proposed Release Plan. It contained a summary of positive and negative factors, as well as risk factors and protective factors. It expressed the view in favour of a graduated progression by Mr McGrane to lower security custody.

[12] Mr McGrane responded with a substantial submission on 22 October 2008, and a further letter of 2 November 2008. The first of these documents was considered by the Board on 14 November 2008, and the second document at its meeting on 28 November 2008, where the Board reconsidered the views that it formed on 14 November 2008. It confirmed the decision which had been foreshadowed in the letter 3 October 2008.

[13] By letter of 19 February 2009, a statement of reasons for the Board's decision was given to Mr McGrane.

[14] The statement of reasons commenced with a history of the application, including reference to Mr McGrane's letters of 22 October and 2 November 2008. It then set out a lengthy list of material considered by the Board. It referred to the matters which I have mentioned earlier, and a number of others, relating to Mr McGrane's history and assessments of him, including the courses he had undertaken, his Release Plan and his Relapse Prevention Plan. It noted the effect of the reports of Mr Palk and Dr Moyle. It identified a number of matters dealt with in Mr McGrane's letters dealt with in 22 October and 2 November 2008. It then turned to the reasons for its decision.

[15] The letter made mention of the Ministerial Guidelines and considered that community safety must be the highest priority. It noted that Mr McGrane had become eligible for parole on 1 April 1999. It expressed the view that Mr McGrane's standard of conduct during his period of imprisonment had fluctuated, and expressed the view that for a large part of his time in custody he was unable to maintain acceptable behaviour while in a highly structured environment. It expressed concern that after 22½ years in custody he still had a high security classification in a secure custodial environment. It noted positive matters, including his active participation in vocational courses, his academic achievements, his program participation over the last 15 years and in particular in the *HISOP,* and the positive comments from the facilitators of the Getting Started: Preparatory Program. It noted that the Sexual Offending Program Allocation Assessment identified he had

a high risk of sexual recidivism and high intervention needs, and also noted that he had completed the recommended intervention programs from that assessment. It noted his willingness to participate in suitable intervention programs. It made particular reference to the reports of Mr Palk and Dr Moyle, and Dr Moyle's recommendation of therapy to overcome the tendency on the part of Mr McGrane to isolate himself. It expressed the view that it was desirable that Mr McGrane have a graduated release to the community. It noted Mr McGrane's concerns whether it was possible for him to progress to a lower security environment. It expressed the view that unless he engaged more openly with others in less restrictive environments, he would not have the social skill successfully to return to the community. It considered that progression within the prison system to a residential environment was highly desirable for Mr McGrane. It commented on his Release Plan, expressing some concerns. It also commented on his Relapse Prevention Plan, making some suggestions, and noting his preparedness to revise it.

**Statutory provision for application and decision**

[16] Statutory provision is made for the making of an application for parole in Chapter 5 of the *Corrective Services Act* 2006 (*CSA*). The Board's decision-making power is conferred by s 193, which is as follows:

**193 Decision of parole board**

(1) A parole board required to consider a prisoner's application for a parole order must decide—

(a) to grant the application; or

(b) to refuse to grant the application.

(2) However, subject to subsection (3), the parole board may defer making a decision until it obtains any additional information it considers necessary to make the decision.

(3) The parole board must decide the application within the following period after receiving the application—

(a) for a decision deferred under subsection (2)—210 days;

(b) otherwise—180 days.

(4) The parole board may grant the application even though a parole order for the same period of imprisonment was previously cancelled.

(5) If the parole board refuses to grant the application, the board must—

(a) give the prisoner written reasons for the refusal; and

(b) if the application is for a parole order other than an exceptional circumstances parole order—decide a period of time, of not more than 6 months after the refusal, within which a further application for a parole order (other than an exceptional circumstances parole order) by the prisoner must not be made without the board's consent.

[17] Section 3(1) of the *CSA* states that the purpose of corrective services (and, one would infer, of the *CSA*) is "community safety and crime prevention through the humane containment, supervision, and rehabilitation of offenders."

[18] Section 227 of the *CSA* permits the Minister to make guidelines about the policy to be followed by the Queensland Parole Board when it is performing its functions. It also permits the Board, in consultation with the chief executive, to make guidelines about such a policy. It is implicit in these provisions that in performing its functions, the Board may have regard to such policies.

[19] Otherwise, the discretion is broad. It is not expressly confined, although some limitations may be implied by virtue of the general purpose of the Act to which I have referred, and by virtue of s 227.[1]

[20] As noted by White J in *McQuire v South Queensland Regional Community Corrections Board*,[2] the interest of the public must be a necessary aspect of any decision to grant relief.

**Basis for application**

[21] It is apparent from the material that Mr McGrane has put considerable effort into preparing his material and his submissions. In his written submissions, he has identified a number of grounds based on the *JR Act*. However, he has relied on the same or a similar factual basis in respect of a number of them. It is convenient to provide some understanding, therefore, of the general nature of his grounds. Although they are more fully expressed in his written submissions, they include the following matters:-

(a) For a number of reasons it was pointless to suggest that Mr McGrane move to residential accommodation in the prison;

(b) Suggestions for a graduated release to the community were inappropriate as this was not possible;

(c) Mr McGrane had acted on all previous recommendations by the Parole Board, on the understanding they would assist him in obtaining parole, but his application had been refused;

(d) The Board had not obtained and considered the *HISOP* exit report for Mr McGrane;

(e) The Board had not recognised some of the programs that Mr McGrane had undertaken while in prison;

(f) Mr McGrane's Relapse Prevention Plan had satisfied the facilitators of the *HISOP*, and in any event he was prepared to make changes to it;

(g) The Board's summary of his conduct in custody emphasises all the negatives, and did not properly recognise his generally good behaviour over now what is a long period;

(h) Mr McGrane could not do more to prepare himself for release from prison than what he is already doing;

(i) The Board should have, but did not, obtain an update of the Parole Board Assessment Report dated 2 November 2006;

(j) Mr McGrane's security classification is a result of mismanagement;

(k) Mr McGrane's lack of success in obtaining parole, despite his efforts over a substantial period of time, are causing him difficulty in remaining motivated to prepare for the transition to community life.

[22] It is also apparent from Mr McGrane's submission that he recognises the difficulties he faces in anticipating what a transition to community life would require for him, and in preparing for it.

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[1] Compare *McQuire v Sothern Queensland Regional Community Corrections Board* [2003] QSC 414 at [28]; *Kruck v The Southern Queensland Regional Parole Board* [2008] QSC 332 at [39] and *Kruck v Southern Queensland Regional Parole Board* [2009] QSC 39 at [6]-[7].

[2] [2003] QSC 414 at [28].

[23] Mr McGrane's submissions are cast in terms of the following recognised grounds for a statutory order of review:-

(a) Breach of the rules of natural justice;[3]
(b) Taking into account irrelevant considerations;[4]
(c) Failing to take into account relevant considerations;[5]
(d) Exercise of discretionary power in bad faith;[6]
(e) Exercise of a discretionary power without regard to the merits of the case;[7]
(f) Irrationality;[8]
(g) Uncertain result from the exercise of a power;[9]
(h) Exercise of a power at the direction or behest of another person;[10]
(i) Absence of evidence to justify the making of a decision.[11]

[24] In deciding the application, it is necessary to focus on the fact that this is an application for a statutory order of review. On such an application, it is not possible to grant relief simply because it is thought that the decision was wrong, whether that conclusion be based on the material before the decision-maker, or on additional material before the Court. Ultimately, the legislation is concerned with the question whether the decision is made within the power conferred on the decision-maker, rather than whether the decision is the correct decision in all the circumstances.

**Relevant and irrelevant considerations**

[25] It is convenient to deal with these matters together. Ultimately, the question whether a consideration is relevant or irrelevant in the sense in which those terms are used in this context, depends upon the proper construction of the statute which confers the power to make the decision. A consideration is irrelevant, only if on the proper construction of that statute, the decision-maker is precluded from taking that consideration into account. Equally, a consideration is a relevant consideration in this context, only if on the proper construction of that statute, the consideration is one that the decision-maker is required to take into account.[12]

[26] I have read, with some care, Mr McGrane's submissions relating to the matters which he contends to be relevant considerations not taken into account, or irrelevant considerations taken into account. In my view, the statutory provisions which confer power on the Board to decide Mr McGrane's application for parole do not make it necessary as a matter of law to take into account the matters to which he refers, or to exclude from consideration the matters which he contends to be irrelevant.

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3 Section 20(a) *JR Act*.
4 Section 20(2)(e) and s 23(a) *JR Act*.
5 Section 20(2)(e) and s 23(b) *JR Act*.
6 Section 20(2)(e) and s 23(d) *JR Act*.
7 Section 20(2)(f) and s 23(d) *JR Act*.
8 Section 20(2)(f) and s 23(f) *JR Act*.
9 Section 20(2)(f) and s 23(h) *JR Act*.
10 Section 20(2)(f) and s 23(e) *JR Act*.
11 Section 20(2)(h) *JR Act*.
12 See *Minister for Aboriginal Affairs v Peko-Wallsend Ltd & Ors* (1986) 162 CLR 24, 39-41.

**Breach of natural justice**

[27] It will be apparent that the Board gave Mr McGrane quite substantial notice of the matters it was considering taking into account, and received from him, and considered, his two responses. Mr McGrane appears to recognise this. His natural justice argument is not the traditional one, but is, in effect, that in lieu of considering the Parole Board Assessment Report from October 2007 in isolation, the Board should have required an update before making its decision.

[28] It may be possible to relate the proposition to a statement of Diplock LJ in *R v Deputy Industrial Injuries Commissioner; ex parte Moore*[13] where his Lordship stated as the first rule of natural justice that the decision-maker must base the decision on evidence. However the connection is remote. In this case, it could not be said that the Board has made its decision in the absence of evidence as to Mr McGrane's current condition, particularly in view of the report of Mr Palk and the report from Dr Moyle. I note that the material includes a letter from the Board to Dr Moyle of 3 October 2008, said to relate to the *HISOP*.

[29] In my view, Mr McGrane's submission does not establish a breach of the rules of natural justice.

**Decision without regard to merit case**

[30] I note that Mr McGrane's submissions refer to s 23(d) and s 20(2)(f) of the *JR Act* as the basis for relief. Neither section deals with the topic identified in this part of his submission, and I assume that he intended to rely upon s 23(f), in conjunction with s 20(2)(e).

[31] Although I have in general summarised the matters on which Mr McGrane relies, in respect of this topic it is probably useful to identify them more specifically. They are as follows:-

(a) Mr McGrane would benefit from a period in the residential section of Wolston Correctional Centre (which Mr McGrane asserts to be untrue);

(b) Mr McGrane has carried out all matters previously suggested by the Board, the suggestions creating in him an expectation that that would result in his release. The Board has disregarded these efforts;

(c) Mr McGrane has acknowledged the need for a graduated release, a course not available to him, but the Board has not recognised this;

(d) The Board has expressed the view that he has not adequately prepared himself for release when in fact he has completed the Transitions Course, at the Board's suggestion, in April 2005, to prepare him for life outside prison;

(e) The Board appeared to consider as a matter of some significance, the absence of a reference to the Lifeline Manual in Mr McGrane's Release Prevention Plan, when the resources identified in the Lifeline Manual are available to him through Community Bridges, itself something identified in Mr McGrane's Release Prevention Plan;

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13 [1965] 1 QB 456, 488 adopted by Deane J in *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41, 66-68.

(f) The Board's characterisation of Mr McGrane's behaviour ignores that it has been good in recent years;

(g) The Board considered that Mr McGrane should engage more openly with others (in a less restrictive environment), when there is no evidence that he experiences an isolating lifestyle;

(h) The Board acted on Mr McGrane's security classification.

[32] It should first be noted that the ground in s 23(f) in the *JR Act* is stated as being an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case. It is not simply, as formulated by Mr McGrane, a failure to have regard to the merits of the case. What the statutory provision makes plain is that the ground is based on a failure to exercise the power by deciding the matter, as a result of the consideration of the circumstances of the case. It is not intended to create a means of challenging conclusions reached by a decision-maker, by reviewing the evidence that the decision maker considered, and concluding that the decision is wrong.

[33] Mr McGrane's submission, in my opinion, did not correctly reflect the effect of s 23(f). Nor does the evidence establish that the Board did not have regard to the merits of the case. It is plain that it considered a substantial volume of material, a not insignificant proportion of which supported his application.

[34] In my view, Mr McGrane has not established this ground.

**Irrationality**

[35] This ground is made available by s 20(2)(e), read together s 23(g), of the *JR Act*. Again, the statutory provisions cited by Mr McGrane in support of this proposition are incorrect, and I assume that he intended to refer to those to which I have made reference.

[36] In this context, he relies upon the comments about his Relapse Prevention Plan, his inability to do more than he has done to prepare for release, the statements relating to engagement with others and residential accommodation, his response to the previous suggestions from the Board about undertaking courses, the assessment of his institutional behaviour, and his security rating.

[37] I have sought in this summary to identify what appear to be the more important matters which he has raised. Having considered them, I have formed the view that, notwithstanding what is raised by Mr McGrane's submissions, the decision of the Board is not so irrational that no rational decision-maker could have made it. I note in this context in particular that the reasons of the Board reveal that it has acted on the basis that community safety must be the highest priority. Its reference to the opinions of Mr Palk and Dr Moyle, and its consideration of Mr McGrane's history, weigh against a number of matters which would support his application for parole. The nature of these considerations, it seems to me, precludes a conclusion that the decision was so irrational that no reasonable decision-maker could have made it.

**Uncertain result**

[38] This ground is provided for in s 20(2)(e) in combination with s 23(h) of the *JR Act*. It is only made out if the decision itself is uncertain. Here, the decision was to refuse the application. That is a matter about which there is no uncertainty.

**Exercise of discretion at behest of another**

[39] This ground is raised by s 20(2)(e) and s 23(e) of the *JR Act*.

[40] Mr McGrane argues that because the Board appears to place weight on the need for Mr McGrane to move to the residential section of Wolston Correctional Centre, and because that is a matter in the control of the management of the Centre, whose conduct he criticises, the Board has effectively acted at the direction of the Centre's management, and has, in a practical sense, given to the management of the Centre the power to refuse his application.

[41] It is apparent from the reasons that this is only one of a number of considerations that the Board took into account. It appears to be a lesser consideration, the major consideration relating to the assessments of Mr Palk and Dr Moyle. Accordingly, I do not consider that the power to refuse the application has effectively been transferred by the Board to the management of the Centre.

[42] Indeed, if the Board were of the opinion that it were critical that Mr McGrane spend time in some other form of accommodation within the Centre before he was released on parole, and it formed that assessment on its own consideration of the material, the mere fact that the management of the Centre would in a practical sense be able to prevent Mr McGrane's release, does not mean that a decision was made at the behest or direction of the management of the Centre. It simply means that the Board, reaching an independent view of the matter, considered that Mr McGrane should not be released unless a decision was made by the management of the Centre, and acted upon by Mr McGrane.

[43] In my view, this ground is not made out.

**No evidence**

[44] Section 20(2)(h) of the *JR Act* sets out this ground. It is qualified by s 24, though this has not been relied upon in the submissions made on behalf of the Board.

[45] In essence, Mr McGrane submits that the factors identified in the Ministerial Guidelines favour his release. He also submits that his risk of re-offending is low, having regard to the steps he has taken to rehabilitate himself, and the time that has passed since his original offences. These submissions, in my view, when properly characterised, amount to an attempt by Mr McGrane to argue the factual merits of his case, rather than to establish that there was no evidence on which the Board's decision was based. It is apparent from its reasons that it considered a substantial body of evidence, a not inconsiderable part of which would support its decision.

[46] Mr McGrane submits in particular that there was no evidence of his isolating behaviour. However, that reflects the evidence of Dr Moyle, who referred to the tendency of Mr McGrane "to isolate himself in his world of fantasy". I do not accept this submission.

[47] Mr McGrane has not satisfied me that there was no evidence or other material to justify the decision made by the Board.

**Conclusion**

[48] Notwithstanding the extensive and detailed submissions presented by Mr McGrane, and the fact that he has made substantial efforts to prepare himself for release, he has not established that he is entitled to a statutory order of review. The application should be dismissed.