# SUPREME COURT OF QUEENSLAND

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| CITATION: | *O'Keeffe v Richards and Anor* [2010] QSC 386 |
| PARTIES: | **JOHN DAMIEN O'KEEFFE**<br>(Applicant)<br><br>v<br><br>**P F RICHARDS**<br>(First respondent)<br><br>and<br><br>**KATHLEEN RYNDERS**<br>(Second respondent) |
| FILE NOS: | BS 3147/2010 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 14 October 2010 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 30 September 2010 |
| JUDGE: | McMurdo J |
| ORDER: | **1. The first respondent's decision of 3 March 2010 be set aside.**<br>**2. The matter will be remitted to the Queensland Civil and Administrative Tribunal for reconsideration by a different tribunal member.** |
| CATCHWORDS: | ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – HEARING – GENERALLY – where the applicant was dismissed from the Queensland Police Service after a disciplinary hearing conducted by the second respondent – where the applicant appealed to the Misconduct Tribunal – where the Tribunal, constituted by the first respondent, dismissed the applicant's appeal – where the applicant seeks judicial review of the first respondent's decision, arguing that the first respondent's decision was based on a finding that was inconsistent with the agreed statement of facts and that the parties ought to have been informed that the first respondent intended to depart from the agreed statement of facts – whether the first respondent's decision involved a denial of natural justice. |

*Judicial Review Act 1991* (Qld) s 20(2)(a)
*Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 156, 257

*Ahern v The Queen* (1988) 165 CLR 87
*Aldrich v Ross* [2001] 2 Qd R 235
*Habib v Director-General of Security & Anor* (2009) 175 FCR 411
*Kioa & Ors v West & Anor* (1985) 159 CLR 550
*Lillywhite v Chief Executive, Liquor Licensing Division, Department of Tourism, Fair Trading and Wine Industry Development* [2008] QCA 88
*Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41
*Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 195 ALR 502
*Tripodi v The Queen* (1961) 104 CLR 1
*York v General Medical Assessment Tribunal* [2003] 2 Qd R 104

COUNSEL: T D Gardiner for the applicant
R Devlin SC with S A McLeod for the second respondent

SOLICITORS: Byrne Legal Group for the applicant
Queensland Police Service Solicitor for the second respondent

[1] The applicant was a Detective Sergeant of Police until 2008, when as a result of a disciplinary hearing, he was dismissed. That hearing was conducted by the second respondent, a Deputy Commissioner of Police. He appealed to the Misconduct Tribunal. There was a hearing on 12 November 2009 conducted by the Tribunal constituted by the first respondent. On 3 March 2010, the Tribunal dismissed his appeal.

[2] The applicant seeks judicial review of the first respondent's decision. As is common ground, although the matter was decided after the commencement of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), and was taken to be a proceeding before the QCAT,[1] the decision is not reviewable by an appeal under chapter 2, part 8 of that Act[2] and the susceptibility to review of this decision under the *Judicial Review Act 1991* (Qld) is not affected by its being a decision of the QCAT.[3]

[3] This matter arose from investigations into the practice of some police who were facilitating the removal of prisoners from correctional centres for personal contact with family or partners, as inducements for confessions. In the present case, a prisoner called Howard was removed from the Wolston Correctional Centre by a Detective Skillen on 26 February 2004. He was interviewed by Skillen and another

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1 s 257(2) of that Act.
2 s 257(7).
3 The operation of the *Judicial Review Act* is qualified by s 156 of the *Queensland Civil and Administrative Tribunal Act*, but because s 156 is within chapter 2, part 8, the operation of that provision is excluded by s 257(7).

police officer that morning, in the course of which he confessed to an armed robbery. He said that the clothing worn by him during the robbery might be found at his mother's residence at Zillmere. After the interview, Skillen asked the applicant and a Detective Tuffield to take the prisoner to that house. The case against the applicant was that the trip to Zillmere had no proper purpose and was simply to allow the prisoner to spend the afternoon with his family.

[4] There were three misconduct charges made against the applicant. The first was that his conduct was improper in that he took Howard to the Zillmere house without an official purpose related to the performance of his duties. The second was that in 2007, he knowingly gave false sworn testimony during investigative hearings conducted by the Crime and Misconduct Commission, when he said that a search had been conducted for clothing at the Zillmere house on that occasion. The third charge was that in May 2008, he untruthfully stated to another police officer that he did conduct such a search.

[5] The second respondent found each of those charges was established. For the first and third charges, the sanction imposed was a reduction in his pay. For the second charge, he was dismissed from the Queensland Police Service.

[6] The applicant appealed to the then Misconduct Tribunal against the Deputy Commissioner's conclusions on each charge and as to the sanction imposed on the second charge. His appeal was unsuccessful in each respect.

**The first respondent's reasons**

[7] Before going to the suggested grounds for review, it is necessary to discuss more of the facts and the reasons for the first respondent's decision. On 28 January 2004, Skillen removed Howard from prison and interviewed him in the course of which Howard admitted committing several offences, including the robbery of premises at Zillmere and South Brisbane. According to a Statement of Agreed Facts provided to the first respondent, there was corroboration for the prisoner's claim that Skillen then made an arrangement with him to take him to visit his mother when he was next removed from prison. The first respondent found that Skillen promised this visit, together with "a decent sentence", in return for a so-called "clear up". He found that Skillen told Howard that there was not time to go to his mother's house on that day (28 January), but said that "we'll come and get you in a few weeks and give you the visit then".

[8] On the following day, 29 January 2004, there was a recorded telephone conversation between Howard and his mother which showed that he expected that he would be removed from prison and taken home to visit his mother. They discussed the prospect of other family members being present during the visit.

[9] On 24 February 2004, Skillen obtained an order from a magistrate authorising the removal of Howard from prison on 26 February 2004 to be taken to "the armed robbery unit for the purposes of conducting an electronically recorded record of interview and if necessary, a field record of interview". On the following day there was a further telephone conversation between Howard and his mother, in which he was recorded as confirming that he would visit her either on the next day or the day after. The first respondent found that this conversation clearly demonstrated an expectation in both Howard and his mother that the visit would happen on one of

those days and that she would be telephoned at work on the day of the visit so that she could go home to see her son. The first respondent concluded that Skillen made an arrangement with Howard for this visit prior to his removal from prison on 26 February 2004.

[10] Skillen removed Howard from prison at 8.45am on 26 February 2004. That morning he was taken to the armed robbery unit and interviewed by Skillen and another police officer, the interview concluding by 11.15am. In the course of this interview, Howard admitted to another armed robbery, saying that the clothing worn by him might be at his mother's residence. Skillen asked Howard if he would have any objections to police going to the mother's house and said that Howard would have to come so that he could identify the clothing.

[11] About two hours then passed before Howard was taken to his mother's house. As mentioned already, he was taken there by the applicant and another police officer, Detective Tuffield, who was senior to the applicant. Howard's mother and other family members were at the house. Howard was returned to the prison by 4.15pm.

[12] There was evidence from Howard's mother and other persons at the house that no search was conducted. There was no police record of a search, such as within any diary, notebook or tape recorder. Tuffield's evidence was that there was no search. The applicant claimed that he had searched the premises, but the first respondent said that there was "not one jot of evidence in QPS indices or official records supporting [his] claim". The first respondent described the evidence of the family members and others who were present and as well as that of the prisoner himself, that no search was conducted by the appellant and Tuffield during the visit, as compelling.

[13] In the hearing conducted by the first respondent, each of the applicant and the second respondent was represented by counsel who made written and oral submissions. There was no oral evidence and the arguments addressed the evidence which had been before the second respondent. The applicant's argument was strongly critical of the second respondent's reliance upon events which had not occurred in the applicant's presence. It was argued that these could not be probative because they could not be relevant to the applicant's understanding of the purpose of the visit to Zillmere. His understanding in that respect was critical to the outcome, at least for the first charge. For that charge to have been proved, it must have been established that when he was taking Howard to Zillmere, he knew that this was for the family meeting and not for the purposes of a search.

[14] The applicant's argument in that respect was fortified by the Statement of Agreed Facts which the parties provided to the first respondent. Those facts, which were set out in the first respondent's Reasons, included the following:

> 3. Prior to 26th February 2004 O'Keeffe had never met or had any contact with Christopher Lee Howard.
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> 4. O'Keeffe had had no involvement in the removal (or the Removal Order Application prior thereto) of Christopher Howard on 28th January 2004.

> 5. O'Keeffe had no involvement in the Record of Interview of Howard by Detectives Skillen and Jorgenson on 28th January 2004.
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> 6. O'Keeffe had no involvement in the Application to a Magistrate on 24th February 2004 for the removal of Christopher Howard.
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> 7. O'Keeffe had no involvement in the actual removal of Christopher Howard by Detective Skillen to the Armed Robbery Unit on 26 February, 2004; nor for the return of Howard to Wolston Correctional Centre.
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> 8. O'Keeffe had no involvement in the Record of Interview that took place at the Armed Robbery Unit between Christopher Howard and Detective Skillen and Plain Clothes Snr Constable Riles on 26th February 2004.
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> 9. There is no evidence that O'Keeffe listened to (or that he had any reason or motivation to listen to) Christopher Howard's interview before Howard's being transported to Zillmere.
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> …
>
> 11. Skillen was the principal investigator.
>
> 12. Recorded phone calls on 29 January 2004 and 25th February 2004 corroborate Howard's claim that Skillen made an arrangement with him to take him to visit his mother when he was next removed from prison however, O'Keeffe was not a party to this arrangement.
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> 13. There is no evidence that O'Keeffe was involved in any discussions or arrangements as to the taking of Howard to the Grasspan Street, Zillmere address other than his being requested, by Skillen, to perform that task.

[15] The most significant of those facts was that the applicant was not a party to the arrangement, between the prisoner and Skillen, that the prisoner could visit his mother when he was next removed from prison. For the applicant it was then argued, and again argued here, that consequently events involving the prisoner or Skillen which had not taken place in the applicant's presence could not be relevant. The first respondent asked the applicant's counsel whether this was nevertheless "background evidence". The applicant's counsel replied that still it was not evidence which could be used against his client. There was this exchange between counsel and the first respondent:[4]

> MR GARDINER: … Again that's evidence that you're invited to act upon to make conclusions which in no way, in my submission, can be evidence against Detective O'keeffee.

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[4] Transcript of the hearing before the first respondent, p 19.

> MR RICHARDS: Unless O'keeffee, Tuffield and the other police officer were all parties to the same common, unlawful purpose.
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> MR GARDINER: There's no evidence … in my submission to you, linking O'keeffee to any common, unlawful purpose. Zero.
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> MR RICHARDS: Right.

The applicant's counsel then referred the first respondent to a concession made by counsel for the second respondent (within his written outline) which was in these terms:

> 26. The Tribunal can safety infer from the above that the prisoner was promised, by Detective Skillen, a visit home as he has claimed and that the prisoner's presence at his mother's home was a fulfilment of that promise. However, as was noted by the Respondent, *there is no evidence linking the Appellant to the making of the arrangement with the prisoner*. …
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> (emphasis added)

After that was pointed out there was this exchange:

> MR RICHARDS: Well, no direct evidence.
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> MR GARDINER: Well, there's no evidence, whether it be direct or indirect. There's nothing to allow any reasonable inference to be drawn by way of indirect evidence and there's no direct evidence. So - - -
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> MR RICHARDS: So there's acknowledgement there's no evidence at all.
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> MR GARDINER: Well there's no evidence linking O'keeffee to any arrangement that was made with the prisoner about any home visit or social visit that was to occur in February of – at that place at Zillmere in February when it happened. … And my submission is that it allows no inference to be reasonably drawn concerning O'keeffee's personal knowledge. …

[16] Counsel for the second respondent then submitted that the events which had preceded the day of the visit were relevant, as his client had concluded. They were relevant as "background facts to … the activities of the appellant". His argument was elaborated as follows:[5]

> … You would be familiar with the decisions that came out of the so-called Fitzgerald Inquiry investigation.
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> So one that comes to mind is the decision in the Court of Criminal Appeal - I suppose it then was - in the matter of R v McFarlane. I think it is reported in about [1993] Qd R. It is a very erudite decision, if I may so, of Ambrose J who simply put this proposition, that a body of evidence of system - of the corrupt system could be

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[5] Transcript, pp 51-52.

> heard in the case, and then the role of that particular police officer then assessed against the background of that evidence. And that was - that process by the special prosecutor was upheld in that decision. It is otherwise referred to as the Tripodi principle and it is quite more than a legitimate approach and it is what - in truth, it is what the respondent did here, and I urge you to - in making the decision afresh, I urge you to take that approach.
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> MR RICHARDS: You are saying that I can use a common unlawful purpose approach to - coming to a conclusion that there was inferentially some acquiescence by this appellant in the system.
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> MR DEVLIN: Well, you would need to look at the actions of others with whom he was closely associated by way of his duties - - -
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> MR RICHARDS: Yes.
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> MR DEVLIN: - - and then look at what evidence you find credible about the appellant's own actions or lack of them, as you find them to be on all of the evidence - that requires a sifting process - and then to determine whether from that knowledge of the purpose which was not an authorised purpose could be inferred on all that evidence. It is essentially what the Deputy Commissioner did; she just didn't articulate it that way.
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> MR RICHARDS: Well, that is the problem, isn't it. It is not set out that – 'I have taken into account Tripodi and [Ahern] and I have come to the conclusion that' - - -
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> MR DEVLIN: Well, you wouldn't expect that.

[17] Having reserved his decision, the first respondent produced a written decision containing detailed and comprehensive reasons. He discussed the first charge by initially referring to the facts which were agreed or had been found as to the events up to the conclusion of the interview with the prisoner on the morning of 26 February 2004. On the basis of that evidence he expressed this conclusion:

> 70. A compelling view open on all of the evidence is that there was a pre-existing unlawful plan between Howard, Skillen, Tuffield and the Appellant and perhaps others to remove Howard from [prison] to conduct a recorded interview and later take him for a social visit to see his mother on the pretext of looking for evidence. Given that the visit was not for the purpose of searching for evidence, there could be no official purpose for the visit and hence the visit was not authorised by law. I am reasonably satisfied on all of the evidence that no search was conducted of the unit at Zillmere by the Appellant and Tuffield.
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> 71. On balance, I find that such was the common unlawful purpose of the three police officers involved. In coming to my conclusion I am mindful of the fact that both Counsel in the appeal characterized the case with respect to alleged

> misconduct in Matter 1 as being circumstantial. I am also conscious of the fact that on the face of it the rules of evidence do not apply to disciplinary action. Nevertheless, substantive rules of law and common sense often overlap and in my view the case of misconduct with respect to Matter 1 can be characterized by reference to the principles that have long governed criminal cases involving conspiracy and preconcert. …

The first respondent then referred to *Tripodi v The Queen*[6] and *Ahern v The Queen*[7] before continuing as follows:

> 72. … That the Judge has to decide whether or not there is independent evidence of participation of an accused in the illegal combination sufficient to let in against him evidence of the acts and declarations of the other participants in further proof of that participation. Further, where an accused is charged with conspiracy, evidence in the form of acts done or words uttered outside his presence by a person alleged to be a co-conspirator will be admissible to prove the participation of the accused in the conspiracy only where it is established that there was a combination of the type alleged, that the acts were done or the words uttered by a participant in furtherance of its common purpose and there is reasonable evidence apart from the acts or words that the accused was also a participant.
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> 73. Simply put, in criminal cases involving alleged preconcert, once it is decided that reasonable evidence of preconcert between the accused and others is established, the acts and declarations of the co-conspirators are admissible evidence against each of them provided the acts or declarations were done in furtherance of the common purpose.
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> 74. I have already indicated above my reasonable satisfaction that a common unlawful purpose existed between Skillen, Tuffield and the Appellant to take Howard to his mother's unit under the guise of looking for evidence. That common purpose involved Skillen obtaining a removal Order for the purpose of legitimising an otherwise unnecessary trip to Howard's mother's residence. In coming to that conclusion I have had regard to the subsequent acts of Skillen, Tuffield and the Appellant. I have also had regard to the evidence from the civilian witnesses who were present when Howard was taken to his mother's residence, that is overwhelmingly to the effect that neither Tuffield nor the Appellant searched the unit.
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> 75. The Respondent used similar reasoning, in my view, in coming to her conclusion that Matter I was substantiated.

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6 (1961) 104 CLR 1.
7 (1988) 165 CLR 87.

[18] The applicant now argues that the first respondent should not have concluded that he was a party to a pre-existing unlawful plan with Skillen and others, because that was contrary to the agreed factual premise that he was not a party to any such "arrangement". In particular, he points to the statement within paragraph 12 of the agreed facts that the applicant was not a party to an arrangement between the prisoner and Skillen for the prisoner to visit his mother when he was next removed from the prison.

[19] In my view, the first respondent's conclusion that the applicant was party to a common purpose between Skillen, Tuffield and the applicant, pursuant to which Skillen removed the prisoner on the day in question, is irreconcilable with the agreed fact that the applicant was not a party to an arrangement to take the prisoner on a visit when he was next removed from the prison. According to the agreed facts, the applicant was not a party to any plan, at least prior to the day of the visit to Zillmere.

[20] That reasoning was apparently critical to the outcome on the first charge. The first respondent then went on to consider the second and third charges, for which the essential question was whether a search had been conducted. The second charge alleged a false statement that during the visit to the house a search had been conducted (by someone). The third charge alleged a false statement that *the applicant* had conducted a search. However, there was no serious prospect that if the applicant had not conducted a search, Tuffield had done so or at least that the applicant had believed that Tuffield had done so. Accordingly, as was and remains common ground, the essential factual question for these charges was whether there had been a search conducted.

[21] The first respondent referred to a number of pieces of evidence by which he concluded that there had been no search. Some of those matters were events pre-dating the visit. But there was other evidence, some of which I have already noted, such as the absence of any record of a search and the direct evidence of those who were at the house.

**The applicant's grounds**

[22] The applicant's first argument is that there was an error of law by the first respondent, in that he misunderstood the nature of the appeal which he was to conduct. It is submitted that the first respondent did not make his own decision upon the facts, but rather he examined the second respondent's reasons to see whether it was open to her to conclude that the charges were proved. The argument focuses upon but two passages from the first respondent's extensive reasons which were as follows:

> Bearing in mind that the Tribunal is not bound by the rules of evidence and may inform itself of anything in the way it considers appropriate, the ultimate aim is to review the Respondent's decision to see whether it was a wrong or unacceptable decision. The Tribunal brings to bear the same perception of public interest as that of an outsider.[8]
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> …

[8] First respondent's reasons at [48].

> In view of the preponderance of evidence provided by those people a finding that no search was conducted on that date was clearly open. …[9]

This argument cannot be accepted. Elsewhere in his decision, the first respondent identified correctly the nature of the appeal by reference to the relevant statutory provisions[10] and some authorities, particularly *Aldrich v Ross*.[11] Secondly, the passages relied upon must be considered in the context of the Reasons as a whole, which contained an extensive analysis of the evidence and which expressed the first respondent's own factual conclusions.

[23] The second of the applicant's arguments was that the first respondent misunderstood his function by considering that he was bound by the second respondent's views as to the relevance of evidence and its apparent weight. The argument points to these passages in the Reasons:

> … The Tribunal's role according to the Act is to rehear the evidence given in the proceeding before the original decision maker. Given that the original proceeding was a disciplinary hearing, the Respondent decided which evidence was relevant to the disciplinary process. It is important to understand the nature of the disciplinary process.[12]
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> …
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> … Bearing in mind the purpose of disciplinary proceedings outlined above, it does not seem to me that this Tribunal is required to make rulings about evidence along the lines that a Court is required to when hearing charges of indictable offences or issues of relevance in civil proceedings. If the original decision maker determined that the original evidence was relevant to the determination of the matter, the only question in this Tribunal is whether or not on the rehearing of that original evidence, this Tribunal:
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> (a) confirms the decision appealed against; or
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> (b) sets aside the decision and substitutes another decision; or
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> (c) sets aside the decision and returns the matter to the original decision maker with the directions the Tribunal considers appropriate.
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> Questions concerning the rational probative value of evidence and relevance of evidence need to be assessed by reference to the nature of the disciplinary process.[13]

Again this argument cannot be accepted. When read in context, those passages are to the effect that the appeal is to be by way of a rehearing upon the evidence which

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9 First respondent's reasons at [55].
10 *Misconduct Tribunals Act 1997* (Qld) ss 16, 23, 26
11 [2001] 2 Qd R 235.
12 First respondent's reasons at [26].
13 First respondent's reasons at [30]-[31].

was before the second respondent so that, as Muir JA said in *Lillywhite v Chief Executive, Liquor Licensing Division, Department of Tourism, Fair Trading and Wine Industry Development*,[14] "no question of excluding evidence arose". The first respondent did not write that he was in some way bound by the second respondent's conclusions as to the weight to be given to any of the evidence. Again, it is clear that he made up his own mind in that respect.

[24] The third argument is that which, understandably, was most strongly advanced. It is the complaint that the first respondent held that there was a common plan or purpose to which the applicant was a party, which was inconsistent with the agreed facts. It is argued that this involved a denial of natural justice. One way in which that argument was developed was that there was no evidence to support the finding that the applicant was a party to that plan or arrangement. In that respect, reliance was placed upon what Deane J, sitting in the Federal Court, said in *Minister for Immigration and Ethnic Affairs v Pochi*:[15]

> … it is an ordinary requirement of natural justice that a person bound to act judicially 'base his decision' upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined. …

[25] The applicant is also said to have been denied natural justice because the first respondent ought to have told the parties that he intended to depart from the agreed statement of facts. This was obviously important for the first respondent's conclusion as to the first charge. But it is argued that it affected his reasoning in relation to the second and third charges, or at least that there is a sufficient prospect that this occurred to warrant judicial review.

[26] In the second respondent's written outline in this Court, it is submitted that the first respondent was required to review all of the evidence and was not bound by any agreement between the parties as to the facts. And in their oral argument here, counsel for the second respondent submitted that the case presented a "classic *Tripodi* situation". But neither of those submissions meet the submission that the applicant was denied natural justice because the appeal was decided upon a basis to which he did not have a fair opportunity to respond.

[27] The first respondent appears to have considered this question of preconcert as a result of the applicant's argument that the events which had not occurred in his presence were irrelevant. In my view, they were relevant, not according to the *Tripodi* exception to the hearsay rule, but because they were circumstantial facts which were relevant to the question of whether a search did in fact occur. Accepting that the applicant was not at all involved until he was asked or directed by Skillen to take the prisoner to Zillmere, Skillen's dealings with Howard and Howard's arrangements with his mother were relevant to the likelihood that the applicant was told to search her house and that he did so.

[28] According to *Tripodi*, the existence of some preconcert results in the acts or words of one participant carrying the authority of another participant, so as to be thereby admissible against him.[16] In that way, the principle from Tripodi operates as an

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14 [2008] QCA 88 at [35].
15 (1980) 44 FLR 41 at 67.
16 (1961) 104 CLR 1 at 7.

exception to the hearsay rule.[17] But the evidence in question did not carry any express or implied assertion that the applicant was involved prior to being asked to go to Zillmere. Accordingly, the inquiry as to a pre-existing plan was unnecessary because, had the rules of evidence applied, the hearsay rule would not have been engaged. Rather, this was original evidence of events which were circumstantial facts. The difference was discussed, by reference to *Tripodi*, in the joint judgment in *Ahern v The Queen* as follows:[18]

> An appropriate starting point from which to consider the use which might be made of the acts and declarations of one co-conspirator against another is the rule of thumb referred to in *Tripodi v The Queen* (30). There it was said to be an 'empirical but practical and convenient test' that acts and declarations done or made outside the presence of an accused are not admissible against him. Practical and convenient though that test might be, it can be no more than a rule of thumb, because it is clear that it has a limited application. It represents an attempt to state in practical terms the effect of the hearsay rule although, of course, acts (other than certain acts of communication) cannot of themselves constitute hearsay and, strictly speaking, lie outside the rule. However, acts may contain an implied assertion on the part of the actor which makes it appropriate to treat evidence of those acts for some purposes as the equivalent of hearsay. A conspirator may, in the absence of another person alleged to be a co-conspirator, say or do something carrying with it the implication that the other person is involved.

[29] Of course, had there been evidence that the applicant was involved in this plan prior to the day in question, the case against him overall would have been that much stronger. But that case was not dependent upon that prior involvement. According to the statement of agreed facts, the case against the applicant had to be that he became involved only on the day in question, when he was directed or asked to take the prisoner to Zillmere. With respect, upon the whole of the evidence I am unable to see that it was open to the first respondent to conclude that the applicant was a party to the plan prior to that point. The evidence included the statement of agreed facts. The first respondent was required to treat the agreed facts as proved and to reason upon those premises.

[30] Further, the applicant should have been informed that the first respondent was going to make this finding of his involvement in the pre-planning so that he had the opportunity of addressing it. He was not fairly on notice that this question was going to be considered. Although counsel for the second respondent did address by reference to what he described as the *Tripodi* principle, at the same time he did not ask for a finding of the kind of which complaint is now made. He seems to have argued for an inference that the applicant knew of the purpose of others. But he did not argue that the applicant had been a party to the pre-planning. Had he done so, counsel for the applicant would have objected, having regard to the statement of agreed facts. And what was said about *Tripodi* had to be understood in the context also of the second respondent's written argument to the first respondent, which contained the concession that there was no evidence linking the applicant to the making of the arrangement with the prisoner.

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17 See the discussion in *Cross on Evidence*, Australian edition, at [33565]-[33570].

18 (1988) 165 CLR 87 at 92-93.

[31] In *Habib v Director-General of Security*,[19] the Full Court of the Federal Court discussed the requirement of natural justice in its application to whether a decision-maker is obliged to expose his or her reasoning process or provisional views for comment. Black CJ, Ryan and Lander JJ said that:[20]

> There are sound practical reasons why a decision-maker is generally not obliged to expose his or her reasoning process or provisional views for comment by the person affected: *Re Ruddock; Ex parte Applicant S154/2002* (2003) 77 ALJR 1909; 201 ALR 437 at [47]-[54] (per Gummow and Heydon JJ); [85]-[86] (per Kirby J); *Alphaone* 49 FCR at 591. There may nevertheless be circumstances where fairness requires prior disclosure of such matters, as where they relate to a critical issue or factor, or where they do not follow from an obvious or natural evaluation of the evidence: see *Alphaone* 49 FCR at 591; *Somaghi* 31 FCR at 108-109 (per Jenkinson J); *Lidono* 49 ATR 96; 191 ALR 328 at [19] (per Gyles J).

[32] In this case it is not simply that the second respondent had not sought a finding of the applicant's involvement in the pre-planning. It was that such a finding was contrary to what the parties had agreed to be the truth according to the evidence upon which the appeal was to be decided. The second respondent's counsel's reference to *Tripodi* need not have been understood as some withdrawal from that agreed position. But that reference, imprecise as it was, appears to explain how the critical agreed fact was ultimately overlooked.

[33] The important charge, so far as the outcome for the applicant is concerned, is the second charge for which he was dismissed. It was in respect of the first charge that the Tribunal member discussed the question of the applicant's involvement in pre-planning. And it must be said that the direct evidence and the circumstantial evidence provided an apparently strong case that there was no search conducted, even upon the premise that there was no pre-planning by the applicant. In *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*,[21] Gleeson CJ said that procedural fairness is not an abstract concept, but is instead "essentially practical" and that "the concern of the law is to avoid practical injustice". Much of the first respondent's Reasons suggest that the outcome may have been no different had he not made this error. Particularly from a finding that no search took place, he may have inferred that the applicant had known there was to be no search when he was taking the prisoner to Zillmere.

[34] However, the consideration of this issue of pre-planning cannot be dismissed as inevitably immaterial to the outcome. The first respondent saw fit to write several pages within his Reasons on the question and it has obviously been important for the outcome on the first charge. I am unable to conclude that his finding in that respect had no bearing upon the second and third charges. As I have said, had it been the fact that the applicant was involved in that pre-planning, the case in relation to the second and third charges would have been that much stronger. The first respondent made that finding of pre-planning before setting out his reasons in relation to the second and third charges and there remains the apprehension that the finding did matter for his conclusions in those respects.

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19 (2009) 175 FCR 411.

20 Ibid at [64].

21 (2003) 195 ALR 502 at [37].

[35] The outcome is that the applicant has demonstrated that there was a breach of the rules of natural justice in relation to the making of this decision, providing a ground for review under s 20(2)(a) of the *Judicial Review Act* and that there should be an order setting aside the decision and remitting the matter to what is now the QCAT for reconsideration. In the circumstances, it should be remitted to a different Tribunal member. I will hear the parties as to other orders and as to costs.