SUPREME COURT OF QUEENSLAND

CITATION:	*McGrane v The Queensland State Parole Board* [2012] QSC 350
PARTIES:	**JAMES McGRANE** **(applicant)** **AND** **THE QUEENSLAND STATE PAROLE BOARD** **(respondent)**
FILE NO/S:	5825 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	15 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	8 October 2012
JUDGE:	Boddice J
ORDER:	**1. The application for statutory review is dismissed.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – FAILURE TO MAKE DECISION – where the applicant was sentenced to life imprisonment for murder and 15 years imprisonment for rape – where the applicant makes application for a statutory order of review of the respondent's decision to refuse the applicant's application for parole – whether the respondent failed to make a decision ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – GENERALLY – where the applicant was sentenced to life imprisonment for murder and 15 years imprisonment for rape – where the applicant makes application for a statutory order of review of the respondent's decision to refuse the applicant's application for parole – whether the respondent exercised its discretionary power in accordance with a rule or policy without regard to the merits – whether the applicant has established a ground for review of the respondent's decision ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – BAD FAITH – where the applicant was sentenced to life imprisonment for murder and

15 years imprisonment for rape – where the applicant makes application for a statutory order of review of the respondent's decision to refuse the applicant's application for parole – whether the respondent exercised its discretionary power in bad faith – whether the applicant has established a ground for review of the respondent's decision

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – FAILURE TO OBSERVE STATUTORY PROCEDURE – where the applicant was sentenced to life imprisonment for murder and 15 years imprisonment for rape – where the applicant makes application for a statutory order of review of the respondent's decision to refuse the applicant's application for parole – whether the respondent failed to observe procedures required by law – whether the applicant has established a ground for review of the respondent's decision

CRIMINAL LAW – SENTENCE – POST-CUSTODIAL ORDERS – PAROLE – BOARDS, TRIBUNALS ETC: POWERS, DUTIES AND CONSTITUTION – where the applicant was sentenced to life imprisonment for murder and 15 years imprisonment for rape – where the applicant makes application for a statutory order of review of the respondent's decision to refuse the applicant's application for parole – whether the applicant has established a ground for review of the respondent's decision

Corrective Services Act 2006 (Qld), s 193(3), s 217
Judicial Review Act 1991 (Qld), s 20(2)(b), s 23, s 33

McQuire v South Qld RCCB [2003] QSC 414
Morales v South Queensland Regional Parole Board (unreported, Supreme Court of Queensland, White J, 3 August 2007)

COUNSEL: The applicant appeared on his own behalf

SA McLeod for the respondent

SOLICITORS: Crown Solicitor for the respondent

[1] This is an application for a statutory order of review of the respondent's decision on 25 May 2012 to refuse the applicant's application for parole.

[2] The application relied on one ground for review, namely, that the respondent failed to make a decision. However, the applicant's outline of submissions places reliance upon three grounds of review.

[3] First, pursuant to s 23 (f) of the *Judicial Review Act* 1991 (Qld) ("the JR Act"), that the respondent exercised its discretionary power in accordance with a rule or policy

without regard to the merits. Second, pursuant to s 23(d) of the JR Act, that the respondent exercised its discretionary power in bad faith. Third, pursuant to s 20(2)(b) of the JR Act, that the respondent failed to observe procedures required by law.

Background

[4] On 5 June 1986, the applicant was sentenced to life imprisonment for murder and 15 years imprisonment for rape. The applicant had pleaded guilty to rape but not guilty to murder. He was convicted by a jury of the charge of murder.

[5] The applicant was born in 1968. He is now 44 years of age. He was 17 at the time of the offences, which were described as "horrific" by the sentencing judge. The murder occurred within a short time of the rape. The victim was his sister.

[6] Following his conviction for these offences, the applicant was sentenced to lesser sentences of imprisonment for offences of wilful damage, assault and preparing to escape lawful custody. Those sentences have long since expired.

[7] The applicant became eligible to apply for parole in respect of the offence of murder on 1 April 1999. He has made numerous applications for parole. Each has been unsuccessful. In its reasons for refusing the earlier applications, the respondent referred to the ongoing risk to the community should the applicant be released without first exhibiting satisfactory behaviour. The applicant was encouraged to undertake necessary courses, to obtain a low security classification, and to remain breach free.

Application for parole

[8] The applicant's application for parole was dated 8 April 2011. It was received by the respondent on 1 August 2011. The Board deferred consideration of that application pending receipt of updated psychiatric and psychological assessments from Dr Moyle and Dr Palk. These reports were received on 19 December 2011.

[9] Prior to the receipt of these reports, the respondent received advice that the applicant had been unsuccessful in securing acceptance to the Ozcare supported parole programme, the applicant's nominated proposed accommodation option. As a consequence, on 15 December 2011, the applicant outlined alternate accommodation proposals.

[10] On 20 January 2012, the respondent considered the applicant's application for parole. Its preliminary view was that the applicant would pose an unacceptable risk to the community if he was released on parole. The applicant was notified of this preliminary view by letter dated 6 February 2012. The respondent invited the applicant to make further submissions. The applicant provided those further submissions by letter dated 22 February 2012.

[11] In March 2012, the respondent sought further opinions from Dr Moyle and Dr Palk in respect of their assessment of the applicant's risk factors. Responses were received from Dr Moyle, dated 20 March 2012, and Dr Palk, dated 14 April 2012. The respondent wrote to the applicant seeking any further comments in respect of these reports. The applicant provided an additional submission dated 26 April 2012.

[12] On 25 May 2012 the respondent decided not to grant the applicant's application. It advised the applicant of its decision by letter dated 4 June 2012.

[13] The respondent's letter dated 4 June 2012 annexed the respondent's statement of reasons pursuant to s 33 of the JR Act. Relevantly, the statement of reasons stated:-

> "5. The Applicant has an extensive breach and incident history recorded during the earlier part of this period of incarceration. These breaches include behaviours resulting in convictions for Wilful damage and Assault. The Board noted that the most recent breach is recorded in February 2009 for using abusive language towards correctional centre staff and in January 2009 for fighting with another offender. The Board accepted the breach history set out in the Parole Board Assessment Report dated 28 July 2011 as an accurate summary of the Applicant's breach and incident history. This breach history gave the Board cause for concern as it indicated to the Board that even in a highly structured environment, the Applicant was unable to control his behaviour and comply with directions given by Prison Management and Corrective Services Officers. This led the Board to have concerns about how the Applicant would be able to cope in the community without the constant supervision that incarceration provides. The Board was concerned that the Applicant would be a greater risk of re-offending and pose an unacceptable risk to community safety if released into the community at this time.
>
> 6. However, the Board did note that the Applicant achieved a low security classification in December 2011. As the Applicant has been convicted of sex offences, the Parole Board is aware (due to Corrective Services policies) that the Applicant cannot progress to a low security facility. However, the Board would be satisfied with the Applicant maintaining a period of breach free custodial time while maintaining his low security classification in the Residential area of the prison instead of a progression to the low security facility. The Board is of the opinion that remaining in the residential area of the correctional centre will enable the Applicant to demonstrate his ability to behave in a less structured environment.
>
> 7. The report of Dr Moyle, Psychiatrist, provided the following conclusion for the Boards consideration:
>
> > 'My conclusions are that, in my opinion, Mr McGrane has made some advances in earning the right to stay in Residential accommodation, having a

> prolonged period of employment while studying successfully for degrees, and shutting himself away from anti-social peers in the prison. He remains emotionally detached and indifferent to the crime and emotionally detached from relationships with others. He has a negative view towards authority, and has not yet been able to make the emotional steps of changing from an adolescent with lots of fantasies and hopes to a man fully capable of living in the real world with all its frustrations without feeling a sense of resentment and without dealing with that resentment by brooding and hostile fantasies. While we have no evidence of hostile fantasies currently, this would require an act of faith. There is some evidence of hostility in the form of the veiled threats he makes in appeals and in writing, but these threats are simply to take things to higher levels. He does get, occasionally, into conflict in the prison and does not see the value of giving up his strong persona, earned initially in the company of anti-social and abusive peers in the prison system but also resulting in increasing sentences in the first six years of imprisonment. I would see his risk remains as moderately high of committing serious violent crime or sexual abuse in the future, but that he is moving towards building some protective factors.'

8. The report of Dr Palk, Psychologist, provided the following assessment and opinions for the Boards consideration:

> 'In regards to future risk of offending, scores on the PCL-R, SORAG, SVR-20 and HCR-20 indicate that Mr McGrane has a low to moderate risk of recidivism. The keys factors that are likely to increase Mr McGrane's risk of re-offending include:
>
> - Failure to manage effective and interpersonal deficits;
> - Misunderstanding the emotional nuisances of others;
> - Interpersonal difficulties in work or social situations;
> - Isolation and irrational thinking;
> - Lack of motivation to continually practice mindfulness techniques;
> - Limited social support; and
> - Tendency to have a quick temper and act impulsively
>
> Although Mr McGrane has matured over the years and learnt skills to manage his emotional and communication difficulties as evidence by reduced prison breaches in recent times he is still vulnerable to impulsive verbal and physical aggression and the

writer suspects he will always will be a moderate risk for these outbursts.'

9. Although the Applicant challenged the findings of both Dr Moyle and Dr Palk's reports, including believing that Dr Moyle 'generally overemphasizes issues to warrant an unreasonably high risk assessment of reoffending' and that 'he dissects factors to such a degree that he loses perspective on the practical issues', and Dr Palk 'exaggerated the level of structure' the Applicant required for a 'graduated release' and 'overemphasized' the Applicant's 'impulsivity to outbursts', the Board did not accept those submissions and accepted the findings contained in both reports and considered the Applicant an unacceptable risk of committing further serious violent offences at this time. Both Dr Moyle and Dr Palk emphasised that any release to the community would need to be managed in a very structured manner due to the length of imprisonment, institutionalisation and the Applicant's vulnerability to impulsive verbal and physical outbursts.

10. The Applicant submitted a release plan, which, although improved since his last Application, lacked the identification of community supports to assist the Applicant's reintegration to the community, continued psychological treatment and lacked the identification of suitable accommodation and an appropriate sponsor who would provide the initial close monitoring required should he be released to Parole. The Board has concerns that the Applicant's inability to create an appropriately detailed release plan demonstrates that he does not appreciate the challenges that parole may pose and that the aspects of his plan identified above need to be more fulsomely addressed before the Board can consider the Applicant to be an appropriate candidate for Parole.

Reasons for decision

Based on the findings listed above, including the nature of the prisoner's offences, the conclusions provided by both Dr Moyle and Dr Palk, the Applicant's inadequate release plan including lack of community supports, proposed psychological treatment, suitable accommodation and sponsor, the Board considered the Applicant poses an unacceptable risk to the community and decided to refuse his application for parole."

Legislative scheme

[14] The functions of the respondent are set out in the *Corrective Services Act* 2006 (Qld). Relevantly, it includes deciding applications for parole.[1] The respondent must decide either to grant or refuse an application for parole within 180 days of receiving the application, unless the respondent defers a decision until it receives

1 *Corrective Services Act* 2006 (Qld), s 217.

further material. In that event, the time period is 210 days.[2] Where the application is refused, the respondent must give written reasons.

[15] The Act gives the respondent a broad discretion in deciding whether to grant or refuse an application. Its terms are unconfined as are the facts relevant to the exercise of that discretion. In *McQuire v South Qld RCCB*[3], White J (as her Honour then was) observed:

> "There are no express criteria for application by a Board when considering an application for post-prison release. The discretion is unconfined except as the matter and scope of the statutory provisions will dictate what it is that must be kept in mind. An object of the *Corrective Services Act* 2000 is for 'community safety and crime prevention through humane containment, supervision and rehabilitation', s 3(1). The interests of the public must be a necessary aspect of any decision to grant release."

[16] Although there are no express criteria, the task "must be the assessment of risk involved in giving the prisoner the privilege of completing part of his sentence in the community".[4] The highest priority is the safety of the community.

Application for review

[17] In support of the first ground of review, the applicant contends that the respondent, in refusing his application, failed to have regard to his more recent performance whilst in custody, and failed to have regard to the significant steps he has taken, since his previous refusal, to attain a low security classification and to demonstrate in multiple ways that he would comply with any condition of a parole board.

[18] The applicant's assertion that the respondent failed to consider the merits of his application is contrary to the respondent's statement of reasons. Those reasons clearly indicate the respondent had regard to the applicant's recent good behaviour in custody. The respondent expressly noted the applicant's last breaches were in early 2009.

[19] The respondent also had regard to the applicant's efforts to achieve a low security classification, and to exhibit his ongoing trustworthiness. The respondent noted that that security classification had only recently been achieved, and considered that having regard to the nature of the applicant's offending, the risk factors identified in the psychiatric and psychological reports, and his previous behaviours, there was a need for the applicant to demonstrate ongoing breach-free behaviour whilst on that low security classification.

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2 Section 193(3).

3 [2003] QSC 414 at [28].

4 *Morales v South Queensland Regional Parole Board* (unreported, Supreme Court of Queensland, White J, 3 August 2007), 11.

[20] The respondent clearly had regard to these relevant factors in reaching its decision. It was for the respondent to consider what weight it gave to those relevant factors. There is no basis for a conclusion that the respondent gave improper weight to them, or failed to have regard to the merits of those factors in determining the applicant's application.

[21] The applicant further contended the respondent failed to undertake a home assessment of a residence nominated by him following the refusal of accommodation at Ozcare. The applicant nominated an alternate address by letter dated 15 December 2011. That letter was in the following terms:

> "I am writing in relation to my parole application dated 30 March 2011 and my nominated accommodation.
>
> I initially nominated Ozcare accommodation, however I have recently been informed that Ozcare has been disapproved. I have therefore contacted the Transitions coordinator in Wolston CC about possible accommodation options and subsequently I was given a list of possible residencies. I intend to write to five of these residencies in application for accommodation. I have also contacted Community Bridges about this matter and who has indicated I would receive strong assistance. In addition to any community housing, I also have a friend (listed below) who is prepared to provide me accommodation.
>
> Whichever accommodation I initially acquire I intend to apply for Public Housing for long-term accommodation.
>
> Nominated private accommodation;
>
> Ms Kay Gardner
> 269 Mac Donald Rd
> Redcliffe, Clontarf, Q. 4019
> Ph: 0405060712
>
> Yours sincerely
>
> (James McGrane)"

[22] The respondent did not undertake any home assessment of that accommodation. However, the failure to do so must be viewed having regard to the terms of that letter. Whilst the applicant nominated private accommodation, he did so in the context of an indication that he intended to make further enquiries in respect of possible options. The applicant provided no further information to the respondent thereafter in relation to those further enquiries.

[23] Against that background, the identified private accommodation was merely an option to be considered, with the results of his further enquiries. It is understandable the respondent found that the applicant's application "lacked identification of suitable accommodation … ".

[24] The applicant has not established that the respondent exercised its discretionary power in accordance with a rule or policy, without regard to the merits.

[25] The applicant's second ground of review asserts that the respondent exercised its discretionary power in bad faith. The applicant contends that the respondent can influence the decision as to whether the applicant reside at Ozcare. He asserts the respondent quoted selected parts of Dr Palk's report.

[26] There is no substance in this ground. The applicant has produced no evidence to support any finding of bad faith on the part of the respondent.

[27] The applicant's third ground of review relies upon a failure of the respondent to make its decision within the 210 days specified by s 193(3)(a) of the *Corrective Services Act*.

[28] Section 193 specifies time periods within which the respondent must decide an application for parole. In respect of the applicant's application, that decision was to be made within 210 days. The respondent did not do so. However, it does not follow that a noncompliance with s 193(3) renders the respondent's decision void.

[29] Section 193 was amended in 2009 to increase the time period in which decisions must be made on parole applications. Those amendments repealed the then existing s 193(5) which deemed that an application was refused if it had not been decided within the specified time frame.

[30] An ordinary meaning of s 193, as presently enacted, is that whilst the respondent is required to grant or refuse an application for parole within a specific period, a failure to do so does not deprive the respondent of jurisdiction to continue to determine the application.

[31] This interpretation is consistent with the terms of the explanatory note to the amending bill. That explanatory note expressly provided, in respect of the proposed amendment to s 193:

> "The purpose of this provision is to increase the time available to parole boards to make a decision. Where this timeframe is exceeded the parole boards will continue to have the jurisdiction to decide the application. This is achieved by the repeal of s 193(5) which acted to exclude the parole boards' jurisdiction once 120 days had elapsed since the application was received … ."

[32] The respondent's failure to make a decision within the time period specified within the *Corrective Services Act* does not mean the respondent failed to observe a procedure required by law in making its decision. The respondent made a decision on the application, as by law, albeit outside the specified time period.

Conclusion

[33] The applicant has not established any ground for review of the respondent's decision.

[34] The application for statutory review is dismissed.