

SUPREME COURT OF QUEENSLAND

CITATION: *Mentink v Commissioner for Queensland Police* [2018] QSC 151

PARTIES: **WILFRED JAN REINIER MENTINK**
(applicant)
v
COMMISSIONER FOR QUEENSLAND POLICE
(respondent)

FILE NO: BS6265 of 2018

DIVISION: Trial Division

PROCEEDING: Application for statutory order of review

DELIVERED ON: 4 July 2018

DELIVERED AT: Brisbane

HEARING DATE: 28 June 2018

JUDGE: Mullins J

ORDER:

- 1. The applicant’s application for permission to travel to Indonesia is referred to Assistant Commissioner Carless for further consideration according to law.**
- 2. The applicant must provide any additional material to Assistant Commissioner Carless for the purpose of that further consideration within seven days of the date of this order.**
- 3. Assistant Commissioner Carless is directed to make a decision on the application of the applicant for permission to travel to Indonesia within 14 days of the provision of any additional material by the applicant or notice that the applicant will not be submitting additional material.**

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW
GROUNDS OF REVIEW – ERROR OF LAW – where the applicant is a “reportable offender” under the *Child Protection (Offender Reporting and Offender Prohibition Order) Act* 2004 (Qld) — where the applicant on his release from prison applied to the respondent pursuant to s 271A.1(3) of the *Criminal Code* (Cth) for permission to travel to Indonesia to return to living with his wife – where the decision maker refused the applicant permission to leave Australia – where the applicant applies for a review of the decision on the ground of error of law – where decision maker imposed a standard of satisfaction for granting the permission which was not warranted under s 271A.1(3)

Acts Interpretation Act 1901 (Cth), s 15AA, s 15AB
Criminal Code (Cth), s 271A.1
Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Act 2017 (Cth), schedule 1

Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004 (Qld), s 3, s 5, s 19A, s 20, s 24, s 34, s 35
Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 13
Judicial Review Act 1991 (Qld), s 30, s 49

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259; [1996] HCA 6, considered

COUNSEL: K W Gover for the applicant (*pro bono*)
 K A McMillan QC and J Crawford for the respondent

SOLICITORS: Antigone Legal for the applicant (*pro bono*)
 Queensland Police Service Legal Unit for the respondent

- [1] Mr Mentink is a “reportable offender” within the meaning of s 5 of the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004 (Qld)* (the Reporting Act). The *Criminal Code (Cth)* was amended by item 13 of schedule 1 to the *Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Act 2017 (Cth)* (the 2017 Act) which inserted s 271A.1 into the *Code*. Section 271A.1 provides:

“271A.1 Restrictions on overseas travel by certain registered offenders

- (1) A person commits an offence if:
- (a) the person is an Australian citizen; and
 - (b) the person’s name is entered on a child protection offender register (however described) of a State or Territory; and
 - (c) the person has reporting obligations (however described) in connection with that entry on the register; and
 - (d) the person leaves Australia.

Penalty: Imprisonment for 5 years.

- (2) Absolute liability applies to paragraph (1)(a).

Note: For absolute liability, see section 6.2.

- (3) Subsection (1) does not apply if:
- (a) a competent authority (within the meaning of section 12 of the *Australian Passports Act 2005* or section 13 of the *Foreign Passports (Law Enforcement and Security) Act*

2005) has given permission (however described) for the person to leave Australia; or

- (b) the reporting obligations of the person are suspended at the time the person leaves Australia.

Note: The defendant bears an evidential burden in relation to the matters in this subsection: see subsection 13.3(3).”

- [2] For a number of years Mr Mentink has been living in Indonesia, having married his Indonesian wife in 2009, although he returned from time to time to Australia, spending around 60 per cent of his time outside Australia. Mr Mentink is now 71 years old, his wife is 50 years old and he has a stepson (his wife’s son) who is 20 years old. Mr Mentink has a valid Australian passport that is not due to expire until 2021. Mr Mentink has a residency visa for Indonesia that is due to expire in July 2019, but Mr Mentink asserts it is renewable.
- [3] In November 2017 Mr Mentink was convicted after trial in the District Court at Brisbane of two counts of indecent treatment of a child under 16 committed between 31 May and 31 December 1976. There were two complainants who were school students on a camp with Mr Mentink who was then a teacher. On 14 November 2017 Mr Mentink was sentenced for each count to nine months’ imprisonment suspended after serving four months for an operational period of two years. He was released from prison on 13 March 2018 and applied to the respondent for permission to travel to Indonesia. He wants to return home to the community where he has lived with his wife, her son and her extended family, particularly as his wife has breast cancer and he believes his wife’s health is deteriorating. The Commissioner of Police is the competent authority in Queensland. His powers are delegated to Assistant Commissioner Carless (the Commissioner) who decided on 7 June 2018 to refuse permission to Mr Mentink to leave Australia.
- [4] By application for a statutory order of review filed on 14 June 2018, Mr Mentink seeks to review the Commissioner’s decision. An amended originating application was filed by leave at the hearing that confined the grounds of review as follows:
- “1. The decision-maker erred in law by erroneously proceeding on the basis that:
 - a. the applicant had an onus of proof;
 - b. there is a presumption that a reportable offender will not be travelling overseas whilst subject to the reporting obligations; and
 - c. the decision-maker had to be satisfied by acceptable and cogent evidence, and to a high degree of probability, that the evidence was of sufficient weight to justify the decision.
 2. The making of the decision was an improper exercise of power in that the decision-maker wrongly constrained the exercise of the discretion by reliance on a static risk factor that would apply in any consideration of the exercise of the discretion.”

- [5] The relief that Mr Mentink seeks pursuant to s 30(1)(b) of the *Judicial Review Act 1991 (Qld)* (JRA) is that the matter be referred back to the decision maker for further consideration, with directions that Mr Mentink provide any additional material within seven days and the decision-maker be directed to make a decision within 14 days. Mr Mentink also seeks an order pursuant to s 49(1)(d) of the JRA that the respondent indemnify him in relation to costs properly incurred in the application from the time the proceeding was commenced.

The decision

- [6] In anticipation that Mr Mentink would challenge the decision, the Commissioner provided a lengthy statement of reasons (comprising 107 paragraphs) to Mr Mentink on 7 June 2018.
- [7] As this is not a merits review and the grounds for review are confined, it is not necessary to summarise either the statement of reasons or Mr Mentink's history or circumstances at length. The Commissioner referred to relevant legislation in paragraphs 4 to 15 of the statement of reasons. Ground 1b is based on the summary of the objective of the amendments made by the 2017 Act set out in paragraph 13:

“The clear objective of the amendments was to ensure there is a presumption against reportable offenders travelling overseas unless the reportable offender can satisfy the decision maker that there are good reasons for travelling, and any relevant risk factors have been adequately identified and ameliorated.”

- [8] Ground 1a is based on paragraph 15 of the statement of reasons:

“The onus is on the Applicant to provide sufficient information in support of any travel plans and displace the presumption which restricts international travel.”

- [9] Ground 1c is based on paragraph 19 of the statement of reasons which is found within the section of the statement of reasons on the decision making framework. Paragraph 16 notes that the legislation is silent as to the test to be applied in determining whether or not a competent authority approves an application for overseas travel, but records that “it is apparent from the explanatory notes, the second reading speeches and the legislative provisions that the approval process involves a risk assessment of the Applicant (as it relates to the proposed travel) by the competent authority”. Paragraphs 17 and 18 then identify the risks the decision maker must consider and relevant considerations. Paragraph 19 states:

“The final decision is one that involves a balancing of factors by the decision maker as to the perceived risks to children weighted against depriving the Applicant of the ability to leave this country. The decision maker must be satisfied by acceptable and cogent evidence, and to a high degree of probability, that the evidence is of sufficient weight to justify the decision.”

The Reporting Act

- [10] Section 3(1) of the Reporting Act sets out Parliament’s recognition that “any risk to the lives or sexual safety of one or more children, or of children generally, is unacceptable”. The purposes of the Act are then set out in s 3(1A):
- “(a) to provide for the protection of the lives of children and their sexual safety; and
 - (b) to require particular offenders who commit sexual, or particular other serious, offences against children to keep police informed of the offender’s whereabouts and other personal details for a period of time after the offender’s release into the community—
 - (i) to reduce the likelihood that the offender will re-offend; and
 - (ii) to facilitate the investigation and prosecution of any future offences that the offender may commit.”
- [11] When the Reporting Act was first enacted in Queensland, it was the Queensland component of a national child protection registration scheme: see the Explanatory Notes for the *Child Protection (Offender Reporting) Bill 2004*. The Explanatory Notes explain that by requiring child sex offenders to report certain personal details to police when released into the community that would be kept on a register, it was intended that police from all Australian jurisdictions would be able to track the movements of offenders who may seek to avoid compliance with the scheme and to achieve the purposes that continue to be set out in s 3(1A)(b)(i) and (ii) of the Act.
- [12] Mr Mentink is subject to the reporting obligations under the Reporting Act by virtue of his conviction of reportable offences on 13 November 2017. Pursuant to s 35(1)(b) of the Reporting Act, he is liable to the reporting obligations imposed under part 4 of the Reporting Act for a period of five years from his release from custody.
- [13] The reporting obligations commence with the initial report from the reportable offender providing the personal details that are set out in schedule 2 to the Reporting Act. There is then a requirement to make a periodic report in each month starting in the first month after the offender has made the initial report. In addition, s 19A of the Reporting Act requires certain changes in personal details to be reported by the reportable offender to the respondent within specified time periods. Under s 20 of the Reporting Act, the reportable offender must prior to leaving Queensland report intended travel to the respondent, giving specified details about the travel which includes travel out of Australia. Under s 24 of the Reporting Act, the respondent must ensure that a copy of the report about a reportable offender’s intentions in relation to travel out of Australia is given to the commissioner of the Australian Federal Police. The reporting obligations are suspended for any period during which the offender is outside Queensland, by virtue of s 34(1)(b) of the Reporting Act. (I note in passing that the protection of children in Queensland which is one of the purposes of the Reporting Act only applies to the reportable offender whilst in Queensland, so the fact that the reportable offender is overseas and not required to report under the Reporting Act does not frustrate the purpose of the Reporting Act.)

- [14] The Reporting Act therefore monitors a reportable offender by keeping a register of the reportable offender's personal details which must be continually updated by the reportable offender. Periodic reporting is required whilst the reportable offender remains in Queensland (with concomitant obligations if the reportable offender moves interstate under similar legislation in the other States and Territory). Presumably, fulfillment of the purpose of reducing the likelihood of reoffending by the offender relies on the regular contact by the offender with the police for reporting purposes and that the offender's personal details remain known to the police during the reporting period. There is no treatment or counselling offered to reportable offenders under the Reporting Act. There is no supervision of reportable offenders under the Reporting Act of the type that is provided to offenders who are on parole or offenders who are subject to close supervision under a supervision order made under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) (DPSOA).

Construction of s 271A.1 of the Code

- [15] Section 15AA of the *Acts Interpretation Act 1901* (Cth) (AIA) provides:
- “In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.”
- [16] During the hearing of the application, both parties relied on extrinsic material in the interpretation of s 271A.1, particularly for ascertaining its purpose or object, which is permissible under s 15AB(1) of the AIA in the context of this provision of confirming that its meaning is the ordinary meaning conveyed by the text, taking into account the purpose or object underlying the provision.
- [17] As s 271A.1 of the *Code* was inserted by the 2017 Act, it is necessary to consider the extrinsic material that relates to that Act.
- [18] Apart from creating an offence under the *Code*, if a reportable offender leaves Australia without permission of a competent authority, the 2017 Act amended the *Australian Passports Act 2005* (Cth) to facilitate cancellation by the Minister of an Australian passport issued to a person who is an Australian citizen and a reportable offender, or refusal by the Minister to issue an Australian passport to such a person, at the request of a competent authority.
- [19] The purpose of the 2017 Act was outlined in the Explanatory Memorandum for the *Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Bill 2017*:
- “The purpose of the Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Bill 2017 (Bill) is to prevent Australians listed on a State or Territory child sex offender register with reporting obligations (a reportable offender) from travelling overseas to sexually exploit or sexually abuse vulnerable children in overseas countries where the law enforcement framework is weaker and their activities are not monitored.”

[20] The Statement of Compatibility with Human Rights included in the Explanatory Memorandum acknowledges that the measures in the Bill promote the principles underpinning, and the fundamental rights and freedoms protected by, the *Convention on the Rights of the Child* (CRC), including the best interests of the child as a primary consideration, the right of the child to be protected from all forms of sexual exploitation and sexual abuse, and the importance of international cooperation for improving the living conditions of children in development countries. In dealing with the best interests of the child, this Statement notes:

- “6. Consistent with the CRC, this Bill gives priority to the best interests of the child through amendments to the domestic legal framework applicable to reportable offenders. The legislation is intended specifically to protect vulnerable children overseas from sexual exploitation or sexual abuse by reportable offenders due to their ongoing risk to children.
7. While reportable offenders are in Australia they are monitored and subject to the robust legal framework Australia has for child sex offences. If allowed to travel overseas these offenders may evade their reporting obligations and supervision. There is a high risk of reportable offenders re-offending in countries where the legal framework is weaker, their activities are not monitored and child sexual exploitation is rampant.”

[21] The Statement recognises that there were the limitations on the freedom of movement of a reportable offender, as a result of the provisions in the Bill, but notes:

- “15. The measure is proportionate and reasonable because it only captures those who have been convicted in a court of law for child sex offences and/or who have been placed by a court on a register with reporting obligations due to the seriousness of their offences and/or risk of reoffending. The passport measures will be legislated, are not arbitrary and will cease to take effect once the person’s reporting obligations end. Further, if there are good reasons for making an exception, a competent authority will be able to permit a reportable offender to travel on a case by case basis.
16. Any limitation of the right to freedom of movement is no more than necessary to achieve a legitimate, lawful objective; to protect vulnerable children overseas from reportable offenders.”

[22] The Statement anticipates that a reportable offender may have family members residing overseas and, in reference to the right to protection against arbitrary interference with the family, notes:

- “32 To the extent that a reportable offender may have other family members residing overseas, the measures in this Bill may engage this right. This right is accommodated by the ability of reportable offenders to seek the permission of the relevant competent authority to travel. In circumstances where they are not deemed a risk to those family members, a competent authority will be able to permit a reportable offender to travel overseas, providing the risks to children

overseas can be appropriately addressed. As such, the measures are proportionate, reasonable and necessary to protect vulnerable children overseas.”

- [23] In dealing with the amendments to the *Australian Passports Act 2005* to enable the Minister to refuse to issue a passport or to cancel an Australian travel document, because the person is an Australian citizen and a reportable offender, the following statistics were outlined in the Explanatory Memorandum:

“According to data from the Australian Federal Police, more than 770 Australian registered child sex offenders travelled overseas in 2016. At least 50 per cent had been recorded by State or Territory police as being part of a cohort of medium-high risk offenders, based on offence type. For 37 per cent of those trips, the offender had violated an obligation under State or Territory laws to notify police of their intended travel.”

- [24] In dealing with the same amendment, the Explanatory Memorandum notes:

“The amendment will not amount to a permanent travel ban for persons who are listed on a relevant child sex offender register. Child sex offenders who are listed on such a register will only be subject to passport restrictions for the period that they are subject to reporting obligations under the register. Further, if there are good reasons for making an exception, a competent authority will be able to permit a reportable offender to travel on a case by case basis.”

- [25] During the second reading speech, Ms Bishop, the Minister for Foreign Affairs, after referring to the statistics of how many registered child sex offenders travelled overseas during 2016 stated:

“These offenders have a high propensity to re-offend in countries where they are not monitored and where child sexual exploitation is rampant. Registered child sex offenders are subject to reporting obligations in Australia specifically because of their ongoing risk to children.

Existing measures are clearly ineffective.

This bill will address current deficiencies and will prevent Australian registered child sex offenders with reporting obligations from travelling overseas by:

- (1) denying offenders a passport; and
- (2) making it an offence for offenders to travel overseas without permission from authorities.

The passport measures introduced under this bill will apply to the approximately 20,000 registered child sex offenders with reporting obligations in Australia. It will also apply to future child sex offenders registered annually. If there are good reasons, offenders with reporting obligations will be able to obtain permission from authorities to travel overseas.

Once their reporting obligations have concluded, offenders will be able to apply for a passport in the usual way.

These laws will make Australia a world leader in protecting vulnerable children from child sex tourism.”

- [26] Much of the extrinsic material relates specifically to the power conferred on the Minister automatically to cancel or refuse to issue a passport to an Australian citizen who is a reportable offender at the request of a competent authority. Where the extrinsic material does assist in relation to s 271A.1 of the *Code* is in the ascertainment of its purpose or object which is to prevent reportable offenders from travelling overseas to sexually exploit or sexually abuse vulnerable children in countries where the protection of those children from the activities of child sex offenders is less stringent than in Australia. This is facilitated by the creation of an offence under s 271A.1 of the *Code*, if a reportable offender leaves Australia without the permission of a competent authority.
- [27] There is no ambiguity in the terms s 271A.1. Its connection with the underlying purpose of the 2017 Act to prevent child sex offenders from travelling overseas to sexually abuse vulnerable children is readily apparent from its terms. The purpose of the proposed travel by the reportable offender and the risk of the reportable offender sexually abusing vulnerable children overseas must be relevant considerations to the decision of the competent authority on whether to grant permission to the reportable offender to travel overseas. Counsel for both Mr Mentink and the respondent submitted that the discretion conferred on the competent authority to grant or refuse permission is broad. That must be correct in the context of the purpose of its enactment.

Did the Commissioner err in law in making his decision?

- [28] In construing the Commissioner’s statement of reasons, it is important that the reasons be read and construed for what they are – the reasons why he, as an administrative decision maker, reached the decision he did. They should not be construed as if they were a statute, or even read as if they were the judgment of a court: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 271-272.
- [29] The decision the Commissioner had to make in response to Mr Mentink’s request was either to grant or to refuse permission for him to travel to Indonesia. If the permission were not obtained, Mr Mentink could not travel overseas without committing an offence under s 271A.1 of the *Code*. There is no “presumption” expressed or implied in s 271A.1(3) against international travel that applies as the starting point when a reportable offender requests the competent authority for permission to leave Australia.
- [30] In order to allow the Commissioner to address the relevant considerations in respect of Mr Mentink’s request, it was necessary for Mr Mentink to provide the information that addressed relevant considerations for the making of that decision. It was unnecessary for the Commissioner to use the term “onus” found in paragraph 13 of the statement of reasons to describe the process of Mr Mentink’s providing the Commissioner with the material within Mr Mentink’s control that was relevant to his request for permission to travel. The fact that the term “onus” was used by the Commissioner in paragraph 13 of

the statement of reasons was a shorthand way of describing the process that had to occur in the provision of Mr Mentink's material to the Commissioner.

- [31] Similarly, the reference to a "presumption" against travel overseas by the reportable offenders should not be construed as the imposition of a fixed starting point for the decision making that there was a presumption against overseas travel. It is a shorthand reference to the position that now applies after the enactment of s 271A.1 of the *Code* that makes it an offence for a reportable offender to travel overseas without the permission of a competent authority.
- [32] I cannot explain away, however, in a similar manner the imposition by the Commissioner in paragraph 19 of the statement of reasons of the requirement that the decision maker "must be satisfied by acceptable and cogent evidence, and to a high degree of probability, that the evidence is of sufficient weight to justify the decision". It is implicit in paragraph 19 that the Commissioner has applied that standard to the material in deciding whether to grant the permission Mr Mentink requested.
- [33] These words in paragraph 19 have a remarkable similarity to s 13(3) of the DPSOA which provides that on the hearing of an application for a division 3 order (where the court must be satisfied under s 13(1) that the prisoner is a serious danger to the community in the absence of a division 3 order):
- "... the court may decide that it is satisfied as required under subsection (1) only if it is satisfied-
- (a) by acceptable, cogent evidence; and
- (b) to a high degree of probability;"
- [34] In fact, paragraph 32 of the respondent's written submissions for this application concedes that the reference to the DPSOA was considered "as an analogous framework" that was of assistance.
- [35] There is nothing whatsoever in s 271A.1 of the *Code* that warrants the decision maker imposing, as the parameter for making a decision in favour of granting permission to a reportable offender to travel overseas, satisfaction "by acceptable and cogent evidence, and to a high degree of probability, that the evidence is of sufficient weight to justify the decision". As Ms Gover of counsel submitted on behalf of Mr Mentink, the high standard of proof "seems to have been erroneously imported" from the DPSOA, where it is a legislative hurdle to the making of orders which curtail a prisoner's right to unconditional release from prison upon completion of a sentence of imprisonment. Mr Mentink's request of the Commissioner for permission to travel overseas required the Commissioner to ascertain and weigh up all the relevant considerations to decide whether to grant or refuse the permission. The standard the Commissioner set in paragraph 19 of the statement of reasons for Mr Mentink to satisfy in order to obtain a decision in his favour was not justified by the terms of s 271A.1 of the *Code* and therefore the Commissioner has made an error of law. It was fundamental to the decision as it was set out as part of the framework for his decision making, and it is therefore appropriate to refer the application back to the Commissioner for further consideration in the light of these reasons.

[36] As Mr Mentink has succeeded on ground 1c, it is not necessary to consider ground 2, but it is not apparent there was any improper exercise of power in the respect that is alleged by Mr Mentink. It is submitted that the Commissioner constrained the exercise of his discretion by reference to “a static and universal risk” that would apply to all reportable offenders travelling overseas. There will be a number of risks of the same or similar nature that may have to be considered for any reportable offender who requests permission from a competent authority to travel overseas, but the weight to be given to a particular risk in any one case may vary according to the circumstances pertaining to that reportable offender which is a matter for the decision maker.

Orders

[37] The following orders should be made:

1. The applicant’s application for permission to travel to Indonesia is referred to Assistant Commissioner Carless for further consideration according to law.
2. The applicant must provide any additional material to Assistant Commissioner Carless for the purpose of that further consideration within seven days of the date of this order.
3. Assistant Commissioner Carless is directed to make a decision on the application of the applicant for permission to travel to Indonesia within 14 days of the provision of any additional material by the applicant or notice that the applicant will not be submitting additional material.

[38] As the respondent foreshadowed being heard on the order Mr Mentink seeks in relation to costs, I will hear submissions from the parties on costs, before making any order for the costs of the application.