SUPREME COURT OF QUEENSLAND

CITATION:	*Bartz v Department of Corrective Services* [2002] QSC 056
PARTIES:	**WADE ANTHONY BARTZ** (applicant) v **CHIEF EXECUTIVE, DEPARTMENT OF CORRECTIVE SERVICES** (respondent)
FILE NO/S:	S3958 of 2001
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 March 2002
DELIVERED AT:	Brisbane
HEARING DATE:	19 December 2001
JUDGE:	Philippides J
ORDER:	**The application is dismissed with costs**
CATCHWORDS:	ADMINISTRATIVE LAW – Judicial Review legislation – application for judicial review – applicant aggrieved by decision – character of decision – whether decision of Chief Executive was conclusive – whether made under an enactment – grounds for review – whether failure to follow procedural requirements – whether no evidence to justify decision – whether failure to take into account relevant material – whether decision unreasonable. *Corrective Services Act* 1988, s 13(2), s 207B *Corrective Services (Administration) Act* 1988 *Judicial Review Act* 1991, s 3, s 4, s 20, s 20(1), s 52 *Abbott v Chief Executive, Department of Corrective Services,* SC No 9096 of 2000, unreported decision of 21 December 2000 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 *Blizzard v O'Sullivan* [1994] 1 Qd R 112 *Burns v Australian National University* (1982) 40 ALR 707 *Concord Data Solutions Pty Ltd v Director General of Education* [1994] 1 Qd R 343 *Evans v Friemann* (1981) 35 ALR 428 *Kioa v West* (1985) 159 CLR 550

Masters v Chief Executive, Department of Corrective Services, SC No 4827 of 2000, unreported decision of 2 March 2001
McEvoy v Lobban [1990] 2 Qd R 235
Post Office Agents Association Ltd & Anor v Australian Postal Commission (1988) 84 ALR 563
Rice Growers Cooperative Mills Limited v Bannerman (1980) 30 ALR 571
Re: Walker [1993] 2 Qd R 345

COUNSEL: W A Bartz, applicant in person
M Plunkett for the respondent

SOLICITORS: W A Bartz, applicant in person
C W Lohe, Crown Solicitor for the respondent

PHILIPPIDES J:

1. The Application

[1] This is an application for a statutory order of review pursuant to s 20 of the *Judicial Review Act* 1991 ("the JR Act") by Wade Anthony Bartz, the applicant, of a decision of the respondent, the Chief Executive, Department of Corrective Services. The applicant appeared on his own behalf by telephone link to argue the application. He also provided written submissions.

[2] The applicant has identified the relevant "decision" in respect of which he seeks review, as the respondent's decision concerning the removal of the applicant's tattoos, as set out in a letter dated 9 November 2000 from the respondent to the applicant. In that letter, it was indicated that support for the removal of the tattoos was subject to the following conditions:

(a) no measures would be implemented until two years prior to the applicant's earliest due release date;
(b) only the tattoos from the applicant's face would be removed; and
(c) the applicant would be required to make a contribution toward the costs involved as the applicant was seeking private medical consultations.

[3] The applicant claims that he is aggrieved by the decision because:

(a) "the applicant is suffering ongoing psychological problems from the tattoos";
(b) "the applicant will be disadvantaged by them when reintegrating into the community on any community-based order";
(c) "the applicant is continually stereotyped and victimised in the correctional system resultant of the tattoos";
(d) "the decision of the respondent not to assist the applicant with the tattoo removal two years before the applicant's earliest due release date sees the tattoo removal not being performed until on or about

2006 if the applicant is not granted any form of community-based release before that date, and the applicant is unable to cope and live with the tattoos for that extended period";

(e) "when the applicant is granted any form of community-based release before 2006 the applicant's earliest due release date is 2011 pursuant to s 207B of the *Corrective Services Act* 1988, seeing the tattoo removal on or about 2009, and the applicant is unable to cope and live with the tattoos for that extended period";

(f) "the respondent is responsible for the safe custody and welfare of the applicant, shall provide such medical treatment as is necessary for the welfare of the applicant, and is responsible to assist the applicant with staged integration into the community, within the meaning of the term in the *Corrective Services Act* 1988 and the *Corrective Services (Administration) Act* 1988, and the respondent's decision of 9 November 2000 is not faithful to this obligation".

[4] The grounds of the application are that:

(a) procedures that were required by law to be observed in relation to the making of the decision were not observed;
(b) there was no evidence or other material to justify the making of the decision;
(c) there was a failure to take into account relevant considerations;
(d) the decision represented an unreasonable exercise of power.

[5] The applicant seeks an order directing the respondent to reconsider his decision

2. Background Facts

[6] On 10 May 1999,[1] the applicant wrote to the then Minister for Police and Corrective Services concerning three small tattoos which he had voluntarily acquired in 1994, and sought assistance in having the tattoos removed from his face. He stated that the tattoos made him insecure and he believed that they would be a handicap in his reintegration into the community and efforts to obtain employment. He indicated that his inquiries had revealed that when he was released, he could have the tattoos removed pursuant to a scheme which helped prisoners seek employment, but that that would not enable him to pursue full time university studies, nor assist with his taking over the management of the family cleaning business. The applicant inquired as to whether there was any way that he could be assisted in having the tattoos removed from his face, stating that he needed this "to be able to reintegrate back into society" and that "the removal of these tattoos will be an absolute positive when deemed suitable and given an opportunity to reintegrate into the community."

[7] On 16 June 1999,[2] Dr Falconer, a consultant doctor in the Corrective Services Department, responded on the Minister's behalf as follows:

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1 See exhibit "WAB 1", affidavit of Bartz filed 24.4.01.
2 See exhibit "WAB 2", affidavit of Bartz filed 24.4.01.

> "The policy of the Department of Corrective Services in relation to tattoo removal is that this is not to be performed. The reason for this is that tattoo removal is viewed very much as elective surgery and priority is therefore given to prisoners with more urgent conditions.
>
> Exceptions to this policy are very uncommon. I note that your early release date is March 2006 and for that reason I am unwilling to support the request at this time. However, I am willing to again consider the matter when you are within a year or two of your earliest eligibility for release on a community supervision option.
>
> Please note that the *Corrective Services Act* provides for prisoners to access private treatment should they wish to do so. In such cases however all costs must be met by the person concerned."

[8] On 11 September 2000,[3] the applicant wrote to the Director-General of the Department complaining that attempts to correspond with departmental officers about his tattoos had not been responded to, stating that his eligibility date to apply for parole had passed, and reiterating that he would be disadvantaged in reintegrating into the community because of the tattoos.

[9] On 26 September 2000,[4] the Director-General replied, stating *inter alia* that:

> "As you would be aware, tattoos are extremely common in the prison environment. As the vast majority of tattoos are performed with the full agreement of the recipient, removal of tattoos is regarded as cosmetic treatment. The Department … is not capable of facilitating the removal of tattoos from every prisoner who requests the procedure.
>
> Existing policy is that removal is only supported when there are reasons that this would be required other than simply a cosmetic result. Examples would be the presence of infection in a tattoo or likely psychological benefit from its removal. I therefore suggest that you provide such evidence, which based on the concerns that you have raised may require a psychological assessment.
>
> Please note that even if the Department … were to support you in having these tattoos removed, you would be placed on the elective waiting lists for this procedure at the nearest public hospital. Such waiting lists are likely to be extensive and thus there would be no guarantee of your having this procedure completed prior to your release."

[10] On 11 October 2000,[5] the applicant sought to provide the further evidence mentioned stating as follows:

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3 See exhibit "WAB 3", affidavit of Bartz filed 24.4.01.
4 See exhibit "WAB 4", affidavit of Bartz filed 24.4.01.
5 See exhibit "WAB 5", affidavit of Bartz filed 24.4.01.

"I have been advised against attempting to analyse and assess the insecurities, stress and grief I continually endure resultant of the tattoos on my face. I am able to confirm however that I believe I do suffer from the insecurities, stress and grief and psychologists employed in the correctional system have previously affirmed this.

On previous occasions I have discussed and attempted to seek assistance for the problems I continually endure.

It is unclear whether this would be noted on any files held by the correctional system. …. There is record of one instance however, where I have attempted to seek assistance in overcoming the before mentioned disabilities that I face due to the tattoos that I cannot conceal. Unfortunately this therapy has been denied, due to what I was told, lack of resources.

This is noted in a sentence management review document completed at Borallon CC on 29 September 1999. This document is attached. …

I would be willing to undertake whatever psychological assessments are required to determine the issue raised in your correspondence. My family has explored the avenues and possibilities of having this conducted privately and have found that these assessments would not differ greatly in cost to the removal of the said tattoos.

There is numerous correspondences that I have been provided to support me when I eventually apply for a community based order. A reference in particular from my parents states that I will be given my parents cleaning business when I am released. Managing this business and having to deal with people is something that I will be unable to successfully fulfill whilst I have these tattoos on my face.

The tattoos on my face have caused me considerable problems whilst in prison due to different cultures, generations and individuals, holding misconceptions of their meaning. …

Stated in previous correspondence concerning the removal of these tattoos, I sincerely believe that the removal of these tattoos will be a major burden I will overcome when reintegrating back into the community. Although I am fortunate enough to avoid relying on unemployment benefits when released, I cannot fund this procedure.

It is felt that there may be additional avenues that could be explored in assisting with having these tattoos removed. One in particular, if the Department of Corrective services was to fund this procedure, I may agree, with appropriate arrangements, to repay the costs for the mentioned treatment. This is an option that I believe to be viable.

It is hoped that this is sufficient information to assist in reaching a conclusion. Again, I must add that I am genuine in being successful when released, and determined that I will not spend my life

> incarcerated as some offenders do. To successfully achieve this goal and overcome the disabilities I do and will face, I humbly believe that I require the support of the Department of Corrective Services."

[11] On 9 November 2000,[6] the Director-General replied to the further enquiry for assistance in removing the tattoos as follows:

> "I note that you have previously sought assistance in relation to the psychological effects of your tattoos. I am advised that there is no capacity within the Queensland Public Hospital system for tattoo removal. Thus, any removal of tattoos would have to occur in the private sector. Due to your being a prisoner and the cosmetic nature of any procedure, no Medicare rebate would be applicable.
>
> I also note your suggestion that you may be able to repay the cost of any procedure after your release. Advice provided to me is that such an arrangement is not possible under current legislation as this would in essence represent a loan to you on the part of the Government.
>
> In light of these factors I am willing to support the provision of assistance for you in relation to removal of your tattoos. However, the following conditions would apply:
>
> - No measures would be implemented until two years prior to your earliest release date;
> - Only the tattoos on the face would be removed; and
> - You will be required to make a contribution to the cost involved as you are seeking private medical consultations.
>
> As you still have some years to serve, this would allow sufficient time for funds to be accumulated for this purpose. I am advised that the cost of tattoo removal is likely to be in the vicinity of $3,000."

[12] On 17 November 2000,[7] the applicant requested a statement of reasons for the determination concerning the removal of tattoos. Reasons were given on 12 December 2000, wherein it was stated that:

> (a) "The decision not to implement your tattoo removal until two years prior to your earliest release date is to minimise the possibility of your having any new tattoo subsequent to the removal of your existing ones;
> (b) Support is only given for the removal of tattoos from your face as your correspondence states that the majority of your symptoms are due to those tattoos. Also there is less opportunity for you to hide the tattoos on your face in a job interview or other similar situation;
> (c) The reason for seeking the contribution to the cost of the procedure is that it is unavailable in the public system and thus will have to be done through the private sector. I note your advice to reimburse the department for a portion of the cost involved, however the advice

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6 See exhibit "WAB 6", affidavit of Bartz filed 24.4.01.
7 See exhibit "WAB 7", affidavit of Bartz filed 24.4.01.

> provided to us is that such reimbursement would not be possible under current legislation. Instead, the period up until you reach two years prior to your earliest release date will provide the opportunity to yourself and your family to accumulate funds to make a contribution towards the cost of this procedure."[8]

[13] On 24 April 2001 the application for Judicial Review was filed.

3. Is there a Decision to which the Judicial Review Act Applies?

[14] By s 20(1) of the JR Act "a person who is aggrieved by a decision to which the JR Act applies may apply to the court for a statutory order of review in relation to the decision".[9] The first matter for determination therefore is whether the decision is one to which the JR Act applies. By s 4(a) of the JR Act, the expression "decision to which this Act applies" means "a decision of an administrative character made ... under an enactment" (whether or not in the exercise of any discretion). By s 3 of the JR Act, an enactment means an Act or statutory instrument, and includes a part thereof.

(a) Inconclusive Decision

[15] On behalf of the respondent, it was submitted that the decision of 9 November 2000 was not a conclusive decision, but at most merely a step along the way towards the making of a future decision: see *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 337. It was thus submitted that by his letter of 9 November 2000, the respondent was answering a query from the applicant as to whether a private medical procedure would be funded and that that letter merely evinces a preview of the decision that the respondent might make to an application in a proper form for private medical treatment under s 52 of the *Corrective Services Act* 1988 ("the 1988 Act"). Accordingly, it was submitted that there was no conclusive decision capable of being reviewed: *Evans v Friemann* (1981) 35 ALR 428 at 431; *Rice Growers Cooperative Mills Limited v Bannerman* (1980) 30 ALR 571 at 584.

[16] I do not accept that interpretation of the letter of 9 November 2000. The decision recorded in that letter was one to support the provision of assistance on conditions. The decision was not expressed to be in the nature of a recommendation, nor was it conditional on an application being made under s 52 of the 1988 Act, which in any event envisages that a prisoner meet all the costs of treatment.

(b) Decision under an Enactment?

[17] It was further submitted on behalf of the respondent that, even if the decision was a conclusive decision, it was not a decision under an enactment and thus not a decision to which the Act applied.

[18] In order to determine whether a decision is made "under an enactment", it is necessary to characterise the decision which has been made and examine the legislation applicable to it, in order to ascertain whether, in its essential respects, the decision was made under an enactment. That is, one searches for the operative or

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8 See exhibit "WAB 8", affidavit of Bartz filed 24.4.01.

9 A reference to a person aggrieved by a decision includes a reference to a person whose interests are adversely affected by the decision: s 7(1)(a).

substantial source of the power, rather than the incidental source: *Concord Data Solutions Pty Ltd v The Director-General of Education* [1984] 1 Qd R 343 at 350, 352. Each case is to be considered separately to identify the substantial basis upon which the power was exercised: *Burns v Australian National University* (1982) 40 ALR 707 at 716-717.

[19] In some sense every decision that is made by the respondent may be said to be done "under" an Act: *Blizzard v O'Sullivan* [1984] 1 Qd R 112 at 117. What is required is to look to the immediate or proximate source of power, rather than the ultimate source residing in legislation: *Post Office Agents Association Ltd & Anor v Australian Postal Commission* (1988) 84 ALR 563 at 571.

[20] The applicant focused on s 13(2) of the 1988 Act as the source of an obligation to provide medical treatment to prisoners on an individual basis. Section 13(2) states that the "chief executive shall provide such medical services as are necessary for the welfare of prisoners".

[21] It was submitted on behalf of the respondent that, while a provision of the 1988 Act may be identified as an ultimate source of power, it is incidental and not the substantive or operational source of power for making the decision.

[22] The respondent submitted that the correspondence which preceded the decision was in effect a query as to whether the respondent would make a loan to the applicant for the medical procedure for the purposes of meeting the requirements of an application made by the applicant under s 52 of the 1988 Act. Accordingly, it was contended that the decision in question was of a purely contractual nature and, as such, was not a decision under an enactment, but rather the exercise of the prerogative power of the Crown to enter into a contract or not: see *Concord Data Solutions Pty Ltd v Director General of Education* [1994] 1 Qd R 343.

[23] The decision made by the respondent appears to have proceeded on the basis that the medical treatment proposed was not "necessary" for the welfare of the applicant pursuant to s 13(2) of the 1988 Act, but that it would nevertheless be supported on conditions. Thus, although the letter of 9 November 2000 referred to assistance being sought by the applicant "in relation to the psychological effects of the tattoos", and the reasons of 17 November 2000 referred to support being given for the removal of tattoos, because the applicant's correspondence stated that "the majority of [his] symptoms [were] due to those tattoos", it is apparent that the respondent's decision was, nevertheless, premised on a view that the medical treatment sought was not "necessary", but rather was of a cosmetic and elective nature.

[24] In my opinion, the decision necessarily involved a determination as to whether the treatment sought was necessary pursuant to s 13(2) of the 1988 Act, such that the decision was made under an enactment. In my opinion, it is artificial to approach the matter on the basis contended by the respondent; that is that the decision was solely a contractual one.

(c) Was the Decision a Managerial Decision ?

[25] It is therefore necessary to consider the respondent's argument that, even if the decision was one made under an enactment, it was not a decision to which the JR

Act applies, because it was a purely managerial decision, which the Courts will not review, except on the grounds of bad faith: see *McEvoy v Lobban* [1990] 2 Qd R 235 at 236, 241; *Re Walker* [1993] 2 Qd R 345 at 349; *Abbott v Chief Executive, Department of Corrective Services,* SC No 9096 of 2000, 21.12.00 at [27]; *Masters v Chief Executive, Department of Corrective Services,* SC No 4827 of 2000, 2.3.00 at [14] - [16].

[26] It is necessary to determine whether or not the impugned decision involved the exercise of a statutory power which deprived the applicant of a right, interest or legitimate expectation of a benefit so that the exercise of power is reviewable as falling within the category described by Mason J (as he then was) in *Kioa v West* (1985) 159 CLR 550 at 582.

[27] It was submitted by the respondent that the decision was one not to loan money to the applicant to pay for the tattoo removal, or not to permit it until two years prior to release, and that that was a purely managerial decision.

[28] As I mentioned, I consider that that artificially restricts the nature of the decision in question. What the applicant was seeking was assistance with tattoo removal because of a number of specified reasons. Such assistance also broached the issue of funding. The respondent's decision involved a determination as to whether the treatment in respect of which assistance was sought was necessary for the welfare of the applicant and if not, what support or assistance could be given for treatment of a cosmetic nature. In my opinion, the decision therefore involved the exercise of a power in respect of statutory rights or benefits concerning the applicant's welfare and therefore was not of a purely managerial nature.

4. The Grounds of Review

(a) Failure to observe Procedures that were required by Law to be observed in relation to the making of the Decision

[29] It was submitted by the applicant that the respondent was obliged, when determining whether medical treatment was to be provided to the applicant pursuant to s 13(2) of the 1988 Act, to have the applicant medically examined pursuant to s 50 of the 1988 Act, which provides, *inter alia*, that a medical officer shall medically examine a prisoner, if required to do so by the chief executive. It was submitted that s 50 of the 1988 Act is a mandatory procedural requirement for the exercise of the power in s 13(2), with which the respondent failed to comply. The applicant's case was that the respondent was required to inform himself as to whether medical treatment was "necessary" for the applicant's welfare and that this could only be achieved by following the procedure in s 50 of the 1988 Act and requiring psychological assessment.

[30] I do not consider that s 50 of the 1988 Act imposes such an obligation on the respondent. The respondent considered the material presented by the applicant. The respondent had a discretion as to whether to require a medical assessment, if he considered that the material warranted it. However, s 50 of the 1988 Act does not compel the respondent to do so.

[31] I do not consider that this ground of review is made out.

(b) Failure to take into Account relevant Considerations

[32] The applicant submitted that the respondent failed to take into consideration various relevant considerations.

(i) Failure to Consider Applicant's Welfare and Mental well being

[33] The applicant submitted that the respondent failed to consider the applicant's welfare or mental well being, because he failed to subject the applicant to any examination as provided for in s 50 of the 1988 Act. The applicant further submitted that it could not be said that the respondent took into account the mental well being of the applicant simply by considering the material forwarded by the applicant to the respondent.[10] The applicant contended that he merely provided that material in response to a request to provide evidence that might give rise to the need for a psychological assessment.

[34] The applicant also noted that the respondent stated[11] that he was unable to locate documentation which the applicant claimed detailed psychological counselling and assessments undertaken by the applicant between April 1999 and September 1999.[12] The applicant submitted that the respondent was unable to ascertain the welfare or mental well being of the applicant and the necessity for the medical treatment unless he had that documentation. It was therefore submitted that in making the decision of 9 November 2000, the respondent failed to consider the mental well being and welfare of the applicant.

[35] It is implicit in the correspondence between the parties and the nature of the conditions imposed, that the respondent was conscious of the distinction between cases where medical treatment was necessary and cases where it was merely elective.[13] As I have mentioned, it is apparent that the decision was premised on a view that the medical service sought was not "necessary", but rather was of a cosmetic or elective nature. In his letter of 26 September 2000, the respondent invited the applicant "to provide such evidence, which based on the concerns that [he had] raised may require a psychological assessment." While s 50 of the 1988 Act would have permitted the respondent to subject the applicant to a psychological assessment, it did not compel this and, as I have said, the question of whether the respondent considered that such assessment was required on the material before him was a matter for his discretion.

[36] In my opinion, the correspondence from the respondent does not bear out a failure to consider the mental well being of the applicant and in particular whether, from a psychological point of view, the removal of the tattoos was necessary for the applicant's welfare. On the contrary, the material indicates that the respondent considered the claimed effects of the tattoos on the applicant, but determined that the treatment sought by the applicant was not necessary and was of a cosmetic and elective nature only. That the applicant does not agree with the respondent's determination on that issue is irrelevant. No merits based review is permitted in this application.

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10 See exhibit "WAB 5", affidavit of Bartz filed 24.4.01.
11 See exhibit "MS 8", affidavit of Bartz filed 21.8.01.
12 See exhibit "MS 2", affidavit of Bartz filed 21.8.01.
13 See exhibit "WAB4", affidavit of Bartz filed 24.4.01.

(ii) Eligibility for Community Based Release

[37] The decision of 9 November 2000 included a condition that no measures would be implemented until 2 years prior to the applicant's earliest release date. In the reasons given on 12 December 2000, it was explained that the basis of that decision was "to minimise the possibility of your having any new tattoo subsequent to the removal of your existing ones".

[38] The applicant submitted that the respondent failed to consider the applicant's eligibility for the community based release order and that this constituted a failure to take into account a relevant consideration. The applicant also submitted that the respondent failed to consider the parole eligibility date as recommended by the sentencing judge, previous findings of the Queensland Community Corrections Board, and the security rating and potential of open security custody placement at the time the decision was made. The applicant says that the respondent failed to consider implementing medical treatment before the applicant was released on a community based release order.

[39] In my opinion this ground is not made out. I note that the applicant made reference to the prospect of a community based order in his letter of 11 October 2000. There is no evidence that the respondent did not consider the issue of the applicant being eligible for a community based release order.

[40] I also do not consider that there is any basis in the allegation that the respondent failed to consider that the applicant had not had additional tattoos since April 1994.

(iii) Tattoos on the Applicant's hand

[41] The decision of 9 November 2000 stated that support would only be given for the removal of tattoos from the applicant's face. In the reasons for the decision, it was explained that the applicant's correspondence stated that the majority of his symptoms were due to the tattoos on his face and that there was less opportunity for him to hide the tattoos on his face in a job interview or other similar situation.

[42] The applicant submitted that the respondent failed, in making his decision, to consider that the applicant had a small tattoo on his hand, that cannot be hidden in a job interview or other similar situation.

[43] I note that the applicant in his correspondence with the respondent in fact only referred to tattoos which were located on his face. The assistance which the applicant sought related to the tattoos on his face and the difficulties which he reported suffering were said to have resulted from the tattoos on his face. In those circumstances, I do not consider that this ground of review is made out.

(c) No Evidence or other material to Justify the making of the Decision

(i) Whether Legislation permitted Reimbursement by the Applicant

[44] The applicant submitted that the respondent proceeded on an incorrect factual basis in reaching his decision. That incorrect factual basis concerned whether an arrangement whereby the applicant would reimburse the respondent was authorised by current legislation.

[45] In his letter of 11 October 2000, the applicant stated:

> "Although I am fortunate enough to avoid relying on unemployment benefits when released, I cannot fund this procedure.
>
> It is felt that there may be additional avenues that could be explored in assisting with having these tattoos removed. One in particular, if the Department of Corrective Services was to fund this procedure, I may agree, with appropriate arrangements, to repay the costs for the mentioned treatment. This is an option that I believe to be viable."

[46] In his decision of 9 November 2000, the respondent stated: "I also note your suggestion that you may be able to repay the cost of any procedure **after** your release. Advice provided to me is that such an arrangement is not possible under current legislation as it would in essence represent a loan to you on the part of the Government."

[47] In his reasons of 17 November 2000, the respondent stated:

> "I note your advice to reimburse the department for a portion of the cost involved, however the advice provided to us is that such reimbursement would not be possible under current legislation. Instead, the period up until you reach two years prior to your earliest release date will provide the opportunity to yourself and your family to accumulate funds to make a contribution towards the cost of this procedure."

[48] The applicant relied on evidence, which indicated that the respondent had advanced funds in the past to a prisoner, which were repaid during his incarceration.[14] The applicant submitted that the respondent was able to authorise or direct that monies be advanced from the Prisoners' Amenities Funds managed by the Lotus Glen Correctional Centre and in this regard refers to the respondent's answers to interrogatories.[15]

[49] The applicant thus submitted that the respondent's decision was incorrect, in so far as it was premised on a factual basis that reimbursement was not possible under the current legislation, and that the decision in question therefore proceeded on a factual basis that did not exist: see s 20(2)(h) and s 21(2)(h) of the JR Act. However, the applicant's submission appears to have proceeded on a misunderstanding of the point being made by the respondent. The respondent's comments were made in the context of the possibility of the applicant reimbursing the respondent **after** his release. It was that scenario which the respondent indicated was not authorised by current legislation. The respondent's comments were not directed to the possibility of the applicant reimbursing pursuant to any scheme for reimbursement whilst still in prison. I also note that the affidavit evidence of repayment referred to by the applicant relates to repayment prior to release.

[50] The applicant has not demonstrated any error as contended.

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14 See affidavit of Bartz filed 7.11.01.

15 See exhibit "MS 4", affidavit of Bartz filed 21.8.01.

(ii) Availability of the Procedure in the Public Health Sector

[51] The applicant submits that the decision is based on the existence of a fact which was incorrect, that is, the unavailability in the public medical system of the procedure of tattoo removal.

[52] In this regard the applicant referred to the following statements in the respondent's decision of 9 November 2000:

> "I am advised that there is no capacity within the Queensland Hospital system for tattoo removal. Thus, any removal of tattoos would have to occur in the private sector. Due to your being a prisoner and the cosmetic nature of any procedure, no Medicare rebate would be applicable. … You will be required to make a contribution to the cost involved as you are seeking private medical consultations."

[53] The applicant also referred to the statement in the reasons given on 12 December 2000 that the "reason for seeking a contribution to the cost of this procedure is that it is unavailable in the public system and this will have to be done through the private sector."

[54] The applicant referred to evidence that the respondent had provided medical treatment to a prisoner in the public medical sector for removal of tattoos.

[55] The decision of 9 November 2000 to seek a contribution from the applicant in essence flowed from the respondent's implied determination that the removal of the tattoos was not necessary for the applicant's welfare. This is clear from the terms of the condition imposed in respect of the decision in question. The respondent, in the letter of 9 November 2000, stated that the applicant would "be required to make a contribution to the cost involved as [he was] seeking private medical consultations". The effect the respondent's decision was to indicate that he was prepared to assist in what was private medical treatment. Of course, under the 1988 Act, the applicant would normally be required to meet the costs of such treatment on the making of an application under s 52 of the 1988 Act. Accordingly, I do not consider that the respondent's decision can be said to have proceeded on an erroneous basis.

(d) Unreasonable exercise of power

[56] I do not consider that there is any material which indicates that the decision was an unreasonable exercise of power.

ORDER

[57] In the circumstances, the application is dismissed with costs.