

SUPREME COURT OF QUEENSLAND

CITATION: *Batts v Department of Corrective Services; Fogarty v Department of Corrective Services* [2002] QSC 206

PARTIES: **CLIFFORD JOHN BATTS**
(Applicant)
v
DEPARTMENT OF CORRECTIVE SERVICES
(Respondent)

PAUL THOMAS FOGARTY
(Applicant)
v
DEPARTMENT OF CORRECTIVE SERVICES
(Respondent)

FILE NO: S163/2002

S164/2002

DIVISION: Trial Division

DELIVERED ON: 25 July 2002

DELIVERED AT: Rockhampton

HEARING DATE: 14 June 2002

JUDGE: Dutney J

ORDERS: **Application of Clifford John Batts dismissed.**

The decision to refuse the applicant Paul Thomas Fogarty remissions on his sentence is set aside and the matter referred back to the Chief Executive of the Department of Corrective Services for reconsideration

CATCHWORDS: JUDICIAL REVIEW – DEFECTIVE EXERCISE OF
POWER – CONSIDERATION OF AN
IRRELEVANT MATTER -

UNREASONABLENESS - ERROR OF LAW – whether a sex offender who has not completed the sexual offenders treatment programme because he has not admitted the offence can on that basis alone be refused remission on sentence as an unacceptable risk to the community – whether such an outcome constitutes application of a policy without regard to the merits of the particular case.

Corrective Services Act 2000 s75, s77
Judicial Review Act 1991 s20(2)(e), (f), (h), (i), s23, s24
Yeo v Queensland Corrective Services Commission 7534 of 1997 – Dowsett J – 13.02.98 – unreported - followed
Felton v The Queensland Corrective Services Commission [1994] 2 Qd R 490 (Williams J) - followed
Wiskar v Queensland Corrective Services Commission [1998] QSC 279 at [4] (Williams J) - followed
McCasker v The Queensland Corrective Services Commission [1998] 2 Qd R 261 at 279-280 – considered

COUNSEL: R Lo Monaco for the Applicant
 S McLeod for the Respondent

SOLICITORS: John Williams & Associates for the Applicant
 Crown Solicitor for the Respondent

- [1] Two applications for judicial review are before the Court. Each relates to the failure of the delegate of the Chief Executive of the Department of Corrective Services to grant remissions to a prisoner incarcerated for sexual offences.

Batts

- [2] By agreement the argument before me concentrated on the application of Clifford Batts. I propose to deal first with that application. Mr Batts’

application, while similar to that of Mr Fogarty, is not identical and I will refer to the relevant differences when considering that application.

- [3] On 14 February 1997, Clifford Batts was sentenced to an effective term of 8 years imprisonment for offences including maintaining an unlawful sexual relationship with a girl under the age of 16 years. Mr Batts was convicted by a jury after pleading not guilty. Mr Batts became eligible for post prison community based release on 14 February 2001. His application for such release was unsuccessful.
- [4] Mr Batts' earliest release date with full remissions was 16 March, 2002. His full term discharge would be 13 February, 2005. Mr Batts applied for remissions.
- [5] On 14 February, 2002 a letter dated 6 February, 2002 was issued by the Sentence Management Co-ordinator advising Mr Batts that as the delegate of the Chief Executive he was considering not granting the remissions for the reasons set out in the letter. Mr Batts was invited to make submissions before a final decision was made.
- [6] On 21 March the Chief Executive refused the application for remissions.
- [7] Remissions are provided for by s75 of the *Corrective Services Act 2000*. The relevant parts of that section are as follows:
- (1) *A prisoner is eligible for remission only if*
- (a) *The prisoner is serving a term of imprisonment, as defined in the Act, imposed for an offence committed before the commencement of this section; and*
 - (b) *The term of imprisonment is 2 months or more; and*
 - (c) *During the prisoner's period of imprisonment, the prisoner has not been –*
 - (i) *granted leave of absence, under the Corrective Services Act 1988, section 61(1)(b) or (c), to engage in or seek employment....*
- (2) *Subject to subsections (3) and (4), the Chief Executive may grant remission of up to one-third of the term of imprisonment if satisfied –*
- (a) *that the prisoner's discharge does not pose an unacceptable risk to the community; and*

- (b) *that the prisoner has been of good conduct and industry; and*
- (c) *of anything else prescribed under a regulation.*

[8] No other requirements had been prescribed by regulation.

[9] Section 77 of the *Corrective Services Act 2000* provides that:

In deciding whether a prisoner's discharge or release poses an unacceptable risk to the community, the Chief Executive must consider but is not limited to considering, the following –

- (a) *the possibility of the prisoner committing further offences*
- (b) *the risk of physical or psychological harm to a member of the community and the degree of risk;*
- (c) *the prisoner's past offences and any patterns of offending;*
- (d) *whether the circumstances of the offence or offences for which the prisoner was convicted were exceptional when compared with the majority of offences committed of that kind;*
- (e) *whether there are any other circumstances that may increase the risk to the community when compared with the risk posed by an offender committing offences of that kind;*
- (f) *any remarks made by the sentencing judge;*
- (g) *any medical or psychological report relating to the prisoner;*
- (h) *any behavioural report relating to the prisoner;*
- (i) *anything else prescribed under a regulation.*

[10] The statement of reasons issued by the delegate and dated 1 May, 2002 makes plain that Mr Batts was refused remissions because the delegate came to the conclusion that he posed an unacceptable risk to the community.

[11] The critical matter of factual background in Mr Batts' case is that he has never admitted the offence for which he is incarcerated and consequently has never undertaken the sexual offenders treatment programme offered at the Capricorn Correctional Centre. Admission to the course is predicated on admission of the offences by the offender and a desire to address the behaviour that constituted the offences. It should be noted that Mr Batts had previous convictions for offences of dishonesty in the 1970's, robbery in company in 1980, drink driving in 1982 and aggravated assault on a female in 1984. For the last offence Mr Batts received 3 years probation

- [12] The relevant parts of the statement of reasons for present purposes are as follows:

Notice was taken of your client's conduct and industry during the period under consideration. I was satisfied that Mr Batts had complied with industry and conduct requirements as specified in section 78. However, I was concerned in relation to the nature of your client's offending and the sentence incurred and determined that he presented an unacceptable risk based on an assessment of relevant factors listed in section 77.

Particular note was taken of your client's failure to participate in various programs to address the issues surrounding his offending. I was particularly concerned about your client's failure to address the sexual nature of his offending. This factor is significant when considering the length and severity of Mr Batts' current sentence and his criminal history. This factor also weighed heavily in my consideration when I considered the judge's sentencing remarks and in particular his observation that your client lacked remorse or sympathy.

I also placed significant weight on psychological reports dated 11 January 2001 and 10 December 2001 that assess Mr Batts as presenting a medium risk of re-offending. The reports highlight your client presenting with outstanding treatment needs regarding his sexual offending and lack of victim empathy as significant factors to be considered when determining his risk to the community.

It is noted that a psychological report commissioned by you is heavily reliant on your client's self-perception of circumstances and events as listed in section 18.8 of the report. The author of the report also makes comment that: "It is likely that daily contact with a child and alcohol consumption are risk factors that may increase the risk of him re-offending." It is considered that your client's denial of committing offences for which he is presently incarcerated, and the linkage that his abuse of alcohol has previously had in his offending, would moderate the report's finding that Mr Batts presented a low risk of committing further sex offences. The proviso placed on the assessment of low risk that Mr Batts avoid contact with children or alcohol upon unsupervised release appears quite unrealistic. Therefore the delegate is of the view that the prisoner's risk is more accurately assessed in the psychological reports dated 11 January 2001 and 10 December 2001.

Greater weight was also placed on the recommendations of the sentence management co-ordinator and general manager of Capricornia Correctional Centre that your client should not be granted remission on his current sentence as he was assessed as presenting an unacceptable risk to the community.

- [12] Counsel for Mr. Batts submits that the decision to refuse Mr Batts' application for remissions constitutes an improper exercise of the power conferred by s75 of the *Corrective Services Act 2000*. In particular it was submitted to be a decision based on an irrelevant consideration, constituted an exercise of a discretionary

power in accordance with a rule or policy without regard to the merits of the case or was an exercise so unreasonable that no reasonable person could so exercise the power¹. Alternatively, it was submitted that there was no evidence or other material to justify the decision.² As a further alternative counsel for Mr. Batts submitted that the exercise of the discretion involved an error of law as to the proper construction of s77 of the *Corrective Services Act 2000*.³

[13] Whichever of the grounds is ultimately relied upon the argument for Mr. Batts comes down to this. Was he refused remissions because he has refused to admit his commission of the offences for which he was convicted and consequently ineligible to undertake the sexual offenders' treatment programme or demonstrate remorse for the offences or empathy with the victims?

[14] To refuse to grant remissions solely on the basis that there has been no admission of guilt or a failure to undertake a particular course is an entirely improper exercise of the relevant power: see *Yeo v Queensland Corrective Services Commission*⁴; *Felton v The Queensland Corrective Services Commission*⁵ and *Wiskar v Queensland Corrective Services Commission*.⁶ A refusal on this basis is unacceptable because it fails to consider, in the case of the particular applicant, whether or not he is, in terms of s75(2)(a) an unacceptable risk to the community. Rather, it focuses narrowly on two factors which may or may not in the particular case bear upon the relevant question of whether the applicant poses an unacceptable risk. It is, of course, trite that any decision to release an offender carries with it some risk of re-offending.⁷ To be unacceptable the risk to the community must go beyond the ordinary risk attendant upon any unsupervised release.

¹ *Judicial Review Act 1991* sections 20(2)(e), 23

² *Judicial Review Act 1991* sections 20(2)(h), 24

³ *Judicial Review Act 1991* sections 20(2)(f) and (i)

⁴ 7534 of 1997 - Dowsett J – 13.02.98 - unreported

⁵ [1994] 2 Qd R 490 (Williams J)

⁶ [1998] QSC 279 at [14] (Williams J)

⁷ *McCasker v The Queensland Corrective Services Commission* [1998] 2 Qd R 261 at 279-280.

- [15] To determine whether there has been an improper decision it is necessary to consider more closely the matters to which the decision-maker had regard in arriving at that decision.
- [16] Dealing seriatim with the considerations identified by the decision-maker in the statement of reasons the first was the failure of Mr. Batts to address the sexual nature of his offending. The second was the reports of Mr. Paul Grant of 11 January 2001 and Mr. Randall Borg of 10 December 2001, both psychologists. The third is the report of Dr Alan Keen, psychologist, dated 13 March 2002 obtained by Mr. Batts and which was largely rejected by the decision-maker. Finally, there were the recommendations of the Sentence Management Co-ordinator and the General Manager of the Capricorn Correctional Centre.
- [17] The General Manager's recommendation against the grant of remissions was based on the applicant's prior criminal history, his denial of guilt and the assessment of Mr. Grant and Mr. Borg who each assessed Mr Batts as being "a 'medium' risk of re-offending if placed in the community at this point in time". The Sentence Management Co-ordinator's recommendation was based on the denial of guilt, the psychologists' reports of January and December 2001, a unit assessment of 22 September 2000 and a letter to Mr Batts from the Queensland Community Corrections Board dated 26 April 2001. The last of these was in relation to the unsuccessful application for post prison community based release. Each of the latter two reports bases the conclusion that Mr Batts is an unacceptable the risk to the community on his denial of guilt. In these instances, however, the denial was not just in relation to the offences for which Mr Batts is presently incarcerated but also the aggravated assault of a female conviction in 1984 and the robbery in company conviction in 1980.
- [18] In the letter of 26 April 2001 the author writes:

In some cases, a denial of responsibility does not increase the level of risk apparently presented to the community. However, in the Board's experience, where there is a history of denial in respect of different incidents, there is very often a high likelihood that the person will engage in more criminal activity. That seems to be the situation in your case.

- [19] The letter of 26 April 2001 seems to be based on the report of Mr Grant and the information obtained by the unit assessment in September 2000, although the conclusions of Mr Grant and the unit assessment body are expressed in a slightly different way. In the unit assessment, the purpose of which is apparently to determine a recommended release programme for an offender, the reason for recommending against any form of early release is expressed as follows:

Batts continues to deny the offences for which he was convicted. Given that his denial makes him an unsuitable candidate for the S.O.T.P., he has failed to address his offending behaviour. He therefore has not reduced his risk to the community. The Internal Panel therefore unanimously finds him unsuitable for any form of community based release.

This recommendation does not give a true summary of the body of the assessment which also deals with the failure to acknowledge the offences in 1980 and 1984 and for which the explanations furnished by Mr Batts are said to be inconsistent.

- [20] Mr Grant's report of 11 January, 2001 discloses that he conducted a series of psychometric tests on M. Batts as well as conducting interviews on two separate days close together in December 2000. In concluding that Mr Batts was a "medium" risk of re-offending Mr Grant wrote:

Prediction of re-offending behaviour is a difficult task in the majority of cases. Any conclusions about the likelihood of re-offence in Mr Batts' case need to be regarded as having limited reliability. Mr Batts has maintained, since the time of disclosure of the offences, that he did not commit the offences. Working from the assumption that the legal process arrived at the correct decision and that Mr. Batts did in fact commit the offences, Mr Batts denial of his offences has prevented him from accessing appropriate treatment for his sexual offending. Because Mr Batts would be re-entering the community as an untreated sexual offender, his risk of re-offending would be regarded as higher than it would have been had he accessed treatment.

Examination of Mr Batts' personality and psychological functioning suggests a tendency to use denial as one of his preferred psychological coping mechanisms. This tendency limits Mr. Batts insight into his own motivation and behaviour. Mr. Batts has limited ability to identify the factors which lead to his

offending behaviour, and has therefore limited ability to identify warning signs and take proactive preventative measures to reduce inappropriate behaviour.

Mr. Batts also appears to have little ability to empathise with the victims of his offences, and tends to minimise the effects of his offences on the victims. This was apparent in his accounts of his earlier offences, as well as in his accounts of the sex offences for which he is currently incarcerated. This lack of victim empathy increases the likelihood that he will re-offend in the future.

- [21] What is clear from these passages from the report is that Mr Grant’s assessment of Mr Batts as a “medium” risk was based on more than the mere failure to admit guilt or undertake a treatment programme in relation to the offences for which Mr Batts is incarcerated. It is based on a longer history of denial extending back to at least 1980 and subsequent offending. Mr Borg’s report states that it is an adjunct to the report of Mr Grant almost a year earlier. Despite a further interview with Mr Batts being conducted, Mr Borg does little other than to record Mr Batts’ denial of committing the offences and noting that it follows that issues of remorse and victim empathy do not apply. Mr. Borg merely adopts Mr. Grant’s assessment of a “medium” risk.
- [22] I am not concerned, of course, with whether or not I would be satisfied on any of the material before the decision-maker that Mr Batts was an unacceptable risk to the community.
- [23] Counsel for Mr Batts was critical of the rejection of the application because Mr. Grant, whose assessment seems to have been central to the decision referred only to a “medium” risk. It was submitted that to constitute an unacceptable risk to the community there needed to be something more than simply a medium risk of re-offending. Where the basis for the risk assessment is set out, as it is, at length by Mr. Grant the decision maker is not bound to accept the degree of risk adopted by Mr Grant. Where relevant material is available the choice of which material to accept and which to reject is a matter for the decision-maker. It is the decision-maker’s assessment of risk which in the end is critical. Having regard to the parts of Mr Grant’s report I have set out above as well as to the findings of the unit assessment and Mr Borg’s confirmation that Mr Grant’s information in material respects was still current at the time of the decision I

cannot conclude that the decision arrived at in the case of Mr Batts was not one which was open. Indeed, it seems to me that the decision-maker is obliged to examine the underlying reasoning process exposed in any report before accepting the conclusion in a case where the conclusion is in relation to the very decision the decision-maker is called upon to make. To have uncritically accepted the assessment of Mr Batts as a “medium” risk would have been to abrogate the decision making to Mr Grant. On the material before me it is not demonstrated that the decision in relation to Mr Batts was made solely on the basis of a policy not to release untreated sex offenders and not on factors personal to Mr Batts.

- [24] It follows that it has not been demonstrated to my satisfaction that the decision-maker took into account irrelevant considerations, applied a policy without regard to the merits or acted unreasonably. Mr. Batts’ application must be dismissed.

Fogarty

- [25] Although similar, Mr. Fogarty’s application is not identical. Mr. Fogarty was convicted of rape, five counts of indecently dealing with a girl under 16, three of wilfully exposing a child to an indecent video and one count of wilfully exposing a child to an indecent picture. These offences were all alleged to have been committed on a single girl except for those relating to the video which was alleged to have been shown both to the same girl and some of her friends. Mr. Fogarty was sentenced to eight years and six months imprisonment. Mr. Fogarty had pleaded not guilty and was convicted by a jury following a trial in the District Court on 27 August 1996. Mr. Fogarty’s eligibility records show his eligibility date for post prison community based release being 27 December, 2000, his earliest release date 3 April, 2002 and his full term release date at 27 August 2005. His records show an unrelated term of imprisonment of 60 days for what is described as a “breach of the Taxation Act” thus extending the total period of imprisonment to 8 years 8 months and 1 day. Mr Fogarty’s prior criminal history was minor and consisted in the main of drink driving offences

together with a willful damage charge and a failure to appear for which he was fined.

[26] On 11 January, 2002 a letter was issued to Mr. Fogarty dated 4 January, 2002 advising him that the Chief Executive's delegate was considering not to grant him remissions for the reasons set out and inviting him to make submissions. Like Mr. Batts, Mr. Fogarty has steadfastly denied committing the offences for which he is currently imprisoned. Like Mr. Batts, Mr. Fogarty was, by his denial of guilt, ineligible to attend the sexual offenders' treatment programme.

[27] The statement of reasons supplied by the decision maker for refusing admissions relies on the following findings of fact beyond the fact of conviction:

- *In a psychological report dated 27 November your client is identified as an untreated sex offender who presents a high risk to the community. The report states that he should not be released to the community unsupervised.*
- *Your client's conduct and industry during the period under review were reported as acceptable.*
- *In a letter dated 11 July 2001, the Queensland Community Corrections Mr. Fogarty must be considered a significant risk of re-offending."*
- *The centre management team and general manager recommend that your client not Board declined to grant your client community release due to his assessed level of risk in that "If his present denial is not resolved be granted remission due to his risk of re-offending upon release.*

[28] The decision was stated to be made for the following material reasons:

Particular note was taken of your client's high risk to the community as assessed by Dr Booyesen. I was particularly concerned about your client's position of authority over the victim (in place of a father) as stated by the sentencing judge. This factor is significant when considering the length of Mr. Fogarty's current sentence and the severity of these offences. This factor also weighted heavily in my consideration when I considered the judge's sentencing remarks and in particular his observation that your client lacked remorse.

I also placed significant weight on the psychological report of Dr Mariette Booyesen dated 27 November 2001 that assesses Mr. Fogarty as presenting a high risk to the community. The reports highlight your client as presenting with

outstanding treatment needs regarding his sexual offending and a concern that he would re-enter the community an untreated sexual offender.

It is noted that a psychological report commissioned by you is heavily reliant on your client's self perception of circumstances, a point also raised by the Queensland Community Corrections Board in its letter dated 4 June 2001.

Greater weight was also placed on the Queensland Community Corrections Board's assessment that you are not an acceptable risk to be placed on community supervision and the recommendations of the sentence management co-ordinator and General Manager of Capricornia Correctional Centre that your client should not be granted remission on his current sentence as he was assessed as presenting an unacceptable risk to the community.

- [29] Again it is necessary to look at the material on which the decision-maker relied. The report of the sentence management co-ordinator relied on the psychologist's report of 27 November 2001. The General Manager's report states:

This prisoner's institutional history has been acceptable, however he remains an untreated sex offender and therefore the potential exists for high risk of re-offending.

- [30] The two last mentioned reports were handwritten appendages to a remission submission prepared internally. Some of the contents of that report are illuminating. In paragraph 1 headed "The possibility of the prisoner committing further offences" the following appears:

The prisoner has made application for community based release twice during the period under consideration. The first application was declined. This was dated 11/07/2000. The reasons supplied by the Queensland State Community Corrections Board were agreement with the psychologist who supplied a report that "It will be apparent that, if this present denial is not resolved, Mr Fogarty must be considered to constitute a significant risk for re-offending." The second application also resulted in a decline to grant community release. This was dated 04/06/2001. The reason for this decline was unchanged from the decline dated 11/07/2000.

- [31] Heading 4 reports that there is nothing in the Court transcript to indicate the offences were exceptional when compared with the majority of offences of that kind. Heading 5 reported that there was no information that would indicate this prisoner's risk to the community may be increased when compared to another

prisoner who has committed offences of a similar nature. After recording an unexceptional prison behaviour record the report concludes with this summary:

This prisoner institutionally has been of good conduct and behaviour has only been breached once in the period under consideration and has maintained stable employment with no reported adverse incidences.

Whilst the prisoner maintains a stance of denial and fails to address his offending behaviour that he has been found guilty of by the judicial system he will remain an untreated sex offender and therefore will continue to present some risk to the community.

The prisoner has twice been declined release to the community based on psychological reports indicating the inmate would be an unacceptable risk to the community if released unsupervised. This has been further enhanced by a further psychological report dated 27/11/2001

Therefore given the above this submission for the granting of remission would not be supported.

- [32] The original psychological report of Mr Michael John is dated 29 April 2000. Apart from its age the report bases its conclusion that Mr Fogarty poses a significant risk of re-offending on his denial of the offences for which he is presently incarcerated. Interestingly it seeks also to reinforce this denial by reference to another alleged but apparently uncharged offence to which some reference was made in a police brief. The later report of Dr Booyesen also relies on the fact of Mr Fogarty being an untreated sex offender as making him a “high” risk re-offender. This is a catch 22 situation for someone in Mr Fogarty’s position. While it is right that having been convicted Mr Fogarty must be regarded as guilty of the offences it would be unrealistic not to recognize that occasionally miscarriages of justice occur. To continue to deny guilt despite conviction is a right a prisoner has, but he exercises it in the knowledge that by so doing he disqualifies himself from the treatment programme and makes it impossible to demonstrate remorse or empathy with the victim. Inevitably this makes it less likely he will gain the benefit of community release or remissions. Recognising the increased difficulty is, however, a long way from saying that because he has denied guilt a prisoner must be regarded as an unacceptable risk if released. To classify a prisoner as

an unacceptable risk to the community merely because of a refusal to admit guilt is to apply a policy without regard to the merits of a particular case. I can find nothing in Dr Booyesen's report to support a finding of a "high" risk of re-offending other than the fact he has not undertaken the treatment course. The conclusion of limited insight into the offending behaviour is based upon his failure to acknowledge guilt. The balance of the conclusion is, and is admitted by Dr Booyesen to be, speculation.

- [33] I am in agreement in a case like this with the remarks made by Dowsett J in *Yeo v Queensland Corrective services Commission*⁸ in the penultimate paragraph of the judgement:

It is clear that what must be considered are the circumstances in which the denial has been made, and it must be considered against the applicant's background and conduct. To focus narrowly upon his refusal to acknowledge guilt, accompanied by the consequence that he has not undergone a relevant programme, would, in my view, be an inappropriate approach because of its oversimplification of the complexities involved in the situation.

- [34] A decision-maker under s75 of the *Corrective Services Act 2000* is required to make an independent decision as to whether or not the prisoner is an unacceptable risk. In so doing regard may be had to the opinions of appropriate experts such as psychologists and, in my view, to the opinions of persons charged with the supervision of the prisoner. It is not acceptable, however, simply to delegate the decision making duty to those persons. In this case it seems to me clear (because there is no other evidence on which the decision could be based) that the decision maker has merely adopted the conclusion of the psychologist and various prison officials whose own opinion is based upon the same psychologist's report without recognising the qualifications and limitations of that report. The conclusion is based upon the unsubstantiated assumption that attendance at the sexual offenders' treatment programme reduces the risk of re-offending and that the failure attend renders the offender an unacceptable risk to the community. Mr Fogarty's position is distinguishable from Mr Batts' in that in Mr Batts case there was more than the mere refusal to admit guilt with the attendant consequence of a lack of

demonstrated remorse or victim empathy and a failure to complete the treatment programme. Mr Batts had a history of denial precedent to the offences for which he is now incarcerated followed by re-offending.

[35] In my view there was no evidence capable of supporting a conclusion that Mr Fogarty was an unacceptable risk to the community and the decision to refuse him remissions was based on a policy of considering every sex offender an unacceptable risk unless they had undertaken the sexual offenders' treatment programme.

[36] In the case of Mr Fogarty there is a second and fundamental error of law in the decision under review.

[37] The reasons for the decision set out above make it plain that the decision-maker relied heavily on the circumstances of the offence in deciding to refuse remissions. The decision maker also appears to have regarded the length of the sentence and the sentencing judge's observation as to lack of remorse at the time of sentencing as significant factors. In this case there is no suggestion that there was anything exceptional about the offences when compared with other like offences and no comment by the sentencing judge which might reasonably be regarded as bearing upon the question of remission. There is no justification in s75 of the *Corrective Services Act 2000* for basing a decision whether or not to grant remissions on these considerations. They clearly do not bear on whether at the time the decision was made Mr Fogarty was an unacceptable risk to the community or on his conduct while in custody. To base a refusal to grant remissions on such considerations is to have regard to irrelevant considerations and to act unreasonably. To refuse remissions because of a view formed about the length and severity of the sentence is to usurp the sentencing judge's function and is not authorised by the statute pursuant to which the decision is made. These features of the decision are sufficient on their own to invalidate the decision.

⁸ supra

[37] The decision to refuse the applicant Paul Thomas Fogarty remissions on his sentence is set aside and the matter is referred back to the Chief Executive of the Department of Corrective Services for reconsideration.