SUPREME COURT OF QUEENSLAND

CITATION:	*Saunders v Queensland Community Corrections & Anor* [2003] QSC 397
PARTIES:	**MERVYN EDWARD SAUNDERS** (applicant) **v** **QUEENSLAND COMMUNITY CORRECTIONS BOARD** (first respondent) **DIANE M RYAN (Delegate of the Chief Executive of the Department of Corrective Services)** (second respondent)
FILE NO/S:	SC No 3646 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application for Judicial Review
DELIVERED ON:	21 November 2003
DELIVERED AT:	Brisbane
HEARING DATE:	13 October 2003
JUDGE:	White J
ORDER:	**1. Dismiss the application for a statutory order for review against the first respondent** **2. Dismiss the application for a statutory order for review against the second respondent**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – COMMONWEALTH, QUEENSLAND AND AUSTRALIAN CAPITAL TERRITORY – GROUNDS FOR REVIEW OF DECISION – IMPROPER EXERCISE OF POWER – RELEVANT AND IRRELEVANT CONSIDERATIONS – where applicant sought statutory orders of review in respect of decisions refusing him post-prison community based relief and not to grant remission on sentence – whether first respondent rigidly followed policy without taking relevant considerations into account – whether error apparent in second respondent's process of reasoning ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – COMMONWEALTH, QUEENSLAND AND AUSTRALIAN CAPITAL TERRITORY – GROUNDS FOR REVIEW OF DECISION – IMPROPER EXERCISE OF POWER – UNREASONABLENESS – whether decision of first respondent so unreasonable that no reasonable decision-maker could have made the decision –

whether decision of second respondent unreasonable due to excessive weight being given to relevant factors

ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – COMMONWEALTH, QUEENSLAND AND AUSTRALIAN CAPITAL TERRITORY – GROUNDS FOR REVIEW OF DECISION – IMPROPER EXERCISE OF POWER – OTHER CASES – where first respondent failed to actively ascertain appropriate residential arrangements for applicant – whether decision not to defer hearing the application until accommodation situation investigated is a decision governed by the *Judicial Review Act* 1991 (Qld)

ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – COMMONWEALTH, QUEENSLAND AND AUSTRALIAN CAPITAL TERRITORY – PROCEDURE ON APPLICATION FOR REVIEW – EXTENSION OF TIME – where application filed out of time – where application made for extension of time in which to file the application

Acts Interpretation Act 1954 (Qld), s 32CA
Corrective Services Act 2000 (Qld), s 3, s 75
Judicial Review Act 1991 (Qld), s 26

Attorney-General (NSW) v Quin (1989-1990) 170 CLR 1, considered
Buck v Bavone (1975-1976) 135 CLR 110, considered
Felton v The Queensland Corrective Services Commission [1994] 2 Qd R 490, distinguished
Finance Facilities Pty Ltd v Commissioner of Taxation (1970-1971) 127 CLR 106, referred to
Minister for Aboriginal Affairs & Anor v Peko-Wallsend Ltd & Ors (1985-1986) 162 CLR 24, followed
Minister for Immigration & Multicultural Affairs v Eshetu (1999) 197 CLR 611, considered
Phil Winkless Pty Ltd v Commissioner of State Taxation (WA) (1986) 86 ATC 4556, referred to
Sean Investments Pty Ltd v MacKellar (1981) 38 ALR 363, considered
Walker v The Queensland Corrective Services Commission [1999] QSC 49 (18 March 1999), distinguished
Webster v The Queensland Corrective Services Commission [1998] QSC 178 (10 September 1998), distinguished
Wiskar v The Queensland Corrective Services Commission [1998] QSC 279 (15 December 1998), distinguished

COUNSEL: S J Keim for the applicant
B Thomas for the first respondent
J A Logan SC for the second respondent

SOLICITORS: Justin Crosby Solicitors for the applicant
Crown Solicitor for the first respondent

Crown Solicitor for the second respondent

[1] The applicant seeks statutory orders of review in respect of two decisions made by the first respondent, Queensland Community Corrections Board ("the Queensland Board") refusing him post-prison community based relief made on 21 February 2002 and 10 February 2003. Mr Keim, for the applicant, concedes that the second decision is the operative one for this application. The applicant seeks a similar order in respect of a decision made by the second respondent, the delegate of the chief executive of the Department of Corrective Services ("the delegate"), that he not be granted remission on his sentence on the basis that he poses an unacceptable risk to the community.

[2] There are issues of extension of time which are not strongly pressed against the applicant and will be considered after the substance of the application has been discussed.

[3] Mr Keim accepted that if the applicant is granted post-prison community release he will not also be entitled to remission, *Corrective Services Act* 2000 ("the Act") s75.

[4] The applicant was sentenced in the District Court on 6 December 1996 to 9 years and 5 years imprisonment respectively after he had pleaded guilty to two charges of maintaining a sexual relationship with each of two girls under the age of 14 years and to lesser charges of indecent dealing. All sentences were to be served concurrently.

[5] When sentencing the applicant the learned sentencing judge said:

> "Normally you would be considered eligible for parole, in other words you would be able to apply for parole when you had served half the sentence or sentences imposed by me. It is the practice to recognise the fact that a person has pleaded guilty with attendant savings to the State and to victims, and perhaps indicating remorse by recommending eligibility for parole at a time earlier than half the sentence and I intend to do that in your case.
>
> Whether or not you are in fact paroled when you become eligible is not a matter for me. It is a matter for the parole authorities who will no doubt have regard to the facts of the case and to all other circumstances including your conduct while in custody.
>
> I recommend you be considered eligible for parole after you have served four years of the sentence which has been imposed in the case of [X]."

[6] The applicant's parole eligibility date, in accordance with the sentencing judge's recommendation, was 6 December 2000. He has not been granted parole. His full time release date is 5 December 2005. He has been of good conduct and industry throughout his incarceration. He has had no discipline breaches. He had a low security classification at the date of the decisions and on 28 March 2003 was accorded an open security classification. He has very poor physical health and certain cognitive deficits.

[7] The applicant contends that the Queensland Board's decision constituted an improper exercise of the power conferred by Part 1 Chapter 5 of the Act in that it failed to take into account relevant considerations; placed "excessive weight" on certain factors; applied a rule or policy without regard to the merits of the particular case; and was an unreasonable exercise of the power conferred on it.

[8] As against the delegate, the applicant contends that she reached her decision through a process that constituted an improper exercise of the power conferred on her by s 75 of the Act in that she placed excessive weight on certain factors; failed to take into account relevant considerations; failed to give relevant considerations sufficient weight because of an existing rule or policy; and the decision was unreasonable.

[9] On 3 July 2003 the delegate to the Secretary of the Department of Health and Aged Care informed the applicant that after assessment he had been approved as eligible to receive residential respite care and residential care at a low level (indicating the level of assistance required). Mr Logan SC, for the delegate, objected to the receipt of this evidence on the basis that it was not before the delegate when she made her decision on 6 January 2003 not to grant him remission. A decision-maker need only consider those matters which are required to be taken into account specified by the legislature and, where not specified, determine, in the light of the matters placed before her, those factors which she regards as relevant and the comparative importance to be accorded to them, *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363 at 374-5. That much was conceded by Mr Keim but he contended that statutory obligations imposed on both respondents, but particularly the chief executive, required them to take active steps to rehabilitate and integrate offenders into the community and this material could readily have been obtained prior to the decisions concerning the applicant's accommodation. As will become apparent, it is because, in part, the applicant did not have available to him appropriate accommodation that the respondents reached their decisions not to release him into the community. The fate of the material requires an analysis of the relevant statutory provisions and will be considered in the body of the discussion.

Background

[10] What follows is taken from material considered by each respondent. The applicant is an unmarried man who was born on the 10 October 1942 and lived with his parents and older brother on a farm. The applicant has reported a positive sense of being cared for by his parents. He experienced significant academic difficulties at his local school. Whether his intellectual deficits were always present or arose more acutely as a result of a blow to his head by a drink bottle as he suggests, he found school difficult and isolating. He left at the age of 12 and worked on a dairy farm. He was hospitalised at 15 for 6 months following a knee injury and saw little of his family during that period. His father died the following year and his mother two years later. His brother sold the family farm without consultation with him. The applicant lived with close relatives and worked as a farm labourer. He was asked to leave shortly after arriving for reasons which he was unable to articulate to the psychologists who questioned him about his early life. He then moved from place to place living in caravans and temporary accommodation. He was invited to live and board with the families of his victims working as a labourer in the district and helping on their farms in part payment for his board. He seems to have had some problems with alcohol.

[11] The psychologists who have examined the applicant have concluded that his life experiences from early childhood to adulthood gave him little social interaction and gave him no opportunity to develop any level of intimacy with others. Mr Matt Strickland, a psychologist with the Sex Offender Treatment Program at the Moreton Correctional Centre, reported on 6 September 1999:

> "It appears that throughout his life he has had little opportunity to reflect on his inner world or has actively avoided such, and as a result, experiences difficulty being introspective. Given his early negative social experience, time spent away from his family and other social contact when hospitalised as a teenager, the loss of his parents and other family relationships in his late teens, it seems that Mr Saunders may have actively avoided social interaction and relationships with others to protect himself from feeling stupid, experiencing further loss and avoid possible negative experiences. He also verbalised feeling shy around people, particularly females, and seems to have attempted to avoid interaction with others and manage this deficit through working and drinking. Furthermore, the minimal social contact from his late teens onwards would have limited Mr Saunders opportunity to model appropriate social behaviours from others leaving him with what he may have learnt in his childhood and adolescence as templates for his adult behaviour."

Sexual Offending

[12] In 1969 the applicant was residing with a family, one of whose members was a young girl under 12 years. The information about this offence is as related to a psychologist by the applicant. He said the child would sit on his lap whilst watching television after her parents had gone to bed. Sexual touching and kissing occurred. The applicant denies sexual intercourse took place although he was convicted in 1975 of carnal knowledge of a girl under the age of 12. He was asked to leave the household when his offending conduct became known. He was placed on probation for two years. He was then aged 33.

[13] The applicant commenced living with the family of the victims of the offences for which he is presently imprisoned. He reported knowing the girls since their birth. The sexual conduct with the older girl began when she was about seven years commencing, according to the sentencing remarks, with touchings and rubbings and progressing to regular sexual intercourse. According to the applicant, when the girl moved away he commenced indecently dealing with her younger sister when she was about eight. The applicant attempted sexual intercourse with her unsuccessfully on a number of occasions. Mr Strickland characterised the applicant's sexual offending as opportunistic:

> "It appears that Mr Saunders viewed his victims in adult roles and viewed his offending as being in the context of a consensual relationship. Given his limited social and sexual experience, limited opportunity to establish appropriate adult and sexual relationships it seems that Mr Saunders' sexual offences were an opportunistic attempt to have his intimacy and sexual needs met. The sexualisation of seemingly innocent behaviour, placement of his

> victims in adult roles and viewing them as being in a relationship with him seems to provide further evidence for this hypothesis. Furthermore, his offences have occurred within the context of a relationship where he has lived with the families of his victims, and probably where he could have been viewed in a parental role by his victims."

Other criminal history

[14] The applicant has two convictions for receiving stolen goods and for drink driving in 1972.

The applicant's physical health and intellectual functioning

[15] The applicant, now aged 61 years, has very poor physical health. He was described by Dr Ian Atkinson, a consultant psychiatrist, in July 2000 as presenting a complicated medical picture

> "... having various vascular problems (including deep vein thrombosis, pulmonary embolism, hypertension and ischaemic heart disease), obesity (he weighs 125 kgs), diminished renal function and gout."

[16] The applicant has had several operative procedures to deal with his vascular problems. He is on a great deal of medication, some of which excludes the use of *Androcur* to control his sexual drive. His physical health is such that he is and has been for some years unable to work in the prison although when he did he was described as a good worker.

[17] The psychological testing which was administered in 1999 indicated an IQ of 77 points which Dr Atkinson described as in the borderline range of intellectual functioning.

Participation in the SOTP

[18] The applicant was offered a position in the Sex Offender Treatment Program (SOTP). This program provides intensive therapeutic intervention, predominantly group based, for men convicted of sexual offences. The applicant began the assessment phase of the program in January 1999 but was exited from the program after completing this phase in the middle of July 1999. In his detailed and careful report which was considered by both respondents, Mr Strickland indicated that the applicant had participated in approximately 90 hours of group-based psycho education and psychotherapy. He attended all sessions and was said to be respectful of the facilitators and other participants, that he attempted to answer all questions and completed the required written work and group exercises in the assessment phase of the program. However, he did not meet the objectives of the program. An intelligence test conducted at the end of this phase placed his intelligent quotient below the minimum required for participation in the program. He was able to recognise that his offending was wrong but was limited to explaining this by reference to the law and consequences for himself. The applicant's inability to provide an explanation for his sexual offending behaviour was attributed to his

limited cognitive ability restricting his opportunity to develop insight and understanding about his offending. Mr Strickland listed other difficulties experienced by the applicant in the course:

> "...marked difficulty describing his inner experience and relating this information to the group in relation to both his past and present experiences; difficulty recalling detail about his past history; difficulty completing written work without a great deal of assistance from others; difficulty cognitively manipulating any more than one verbal concept; difficulty either understanding and/or internalising concepts discussed within the group relating to his offending and; concretised thinking limiting his ability to consider abstract concepts or generalise new information to other experiences."

Other programs

[19] Subsequently the applicant attended the Cognitive Skills Core Program but he did not meet the requirements successfully to complete the program due largely to his intellectual deficits. He was assessed in December 2000 for placement in the Community Sex Offender Programme. Due to his cognitive deficits and his limited acceptance of responsibility for his offending behaviour he was not considered eligible for the program. The Community Corrections officer who assessed the applicant concluded

> "While individual counselling may be an option for him to address his sexual offending, it is considered the above factors [cognitive deficits and limited acceptance of responsibility for actions] may also impair any benefit of such counselling. Rather, strict boundaries, a high level of supervision and a directive approach may be a more realistic alternative to program work or counselling."

He has not had any other program, counselling or treatment directed to his sexual offending.

[20] He has been offered a number of educational programs through Education Services but apart from certificates in adult literacy, communications and pottery early in his sentence he has been unable to avail himself of any other programs.

[21] Throughout the applicant's sentence he has been subject to regular sentence management reviews by various management officers including psychologists. Because of his cognitive deficits those reviews were unable to recommend any available programs aimed at addressing his offending behaviour.

Release plans

[22] Consistently throughout all the reviews in the material is a concern that the applicant has had in the past and continues to have no appropriate post-prison release plans. He had initially been offered accommodation with Mr and Mrs AB, long time friends, in broadly the area where he grew up, an hour's bus ride from a large town and this was reported as satisfactory. It would seem that whilst they

were prepared to give the applicant support they were, at the time of his most recent applications, no longer able to offer him accommodation.

[23] It was also proposed that he might reside in a caravan park where he had lived before his imprisonment. The owners of the caravan park were his friends and were prepared to permit him to reside there. At the time Corrective Services officers investigated the placement in September 2001 there were some 15 to 20 children of varying ages residing in the caravan park.

Reports and assessments about the applicant

[24] The respondents have had regard to a wide range of material about the applicant. Reference will be made to some of the reports and assessments. The earliest report is that of Mr B Kerr a clinical psychologist, which was tendered on sentence in 1996. He administered psychometric assessment tests and placed the applicant in the "borderline-retarded" range. He concluded:

> "In my opinion his actions are analagous to those of adolescents who are intellectually impaired. That is, they can become aroused but don't have the conscious impulse control to counteract their behaviours. I believe Mr Saunders was aware of his actions but, whether he could reason the implications and/or consequences of such actions, I cannot be sure. This situation would have been exacerbated if, in fact, his alleged assertions that the girls were responsive to his approaches are true."

[25] I have already made reference to the exit report by Mr Strickland in 1999 when the applicant left the SOTP. He noted:

> "The experience of having been caught and incarcerated seems to have made some impression on Mr Saunders. His risk of re-offending sexually is regarded as moderate based upon the number and sex of victims, his age, his early termination from the program and his poor health. He will need a high level of support and assistance during the remainder of his sentence in regard to establishing an achievable post-release plan and securing appropriate post-release accommodation. ... his sexual offending behaviour will remain an outstanding treatment issue."

[26] Mr Strickland detailed the post-release plan that should be implemented for the applicant as including:

> "1. *Basic interventions which Mr Saunders should put in place to reduce his risk of reoffending. These would include:*
>
> > a) not befriending female children; b) leaving the area if he is left alone with female children; c) having another adult present who is aware of his past sexual offending if female children are present; d) reminding himself of his incarceration should he begin to think sexually about or become sexually aroused by female children; e) talking with a pre-arranged support person or counsellor as soon as is

> possible should he notice himself thinking sexually about or becoming aroused by female children; f) immediately leaving the vicinity of female children should he think sexually about them or notice he is becoming aroused.
>
> 2. *Alcohol-free accommodation with a support person/counsellor on the premises for assistance preferably located on or near acreage*
> 3. *A list of community agencies which may be of general assistance upon his release*
> 4. *Establishing some meaningful activities given his inability to participate in paid work*
>
> - Prior to his release, he participate in the Sexuality and Intimate Relationships courses. Whilst it is not anticipated that these courses will address his sexual offending behaviour, they may provide him with information relating to appropriate adult relationships.
> - His release be contingent with an extended period of supervision so that he be monitored in relation to maintaining suitable accommodation and assisting him with avenues for social contact/support.
> - That he be discouraged by his community corrections officer from residing with families where female children reside or visit on a regular basis.
> - He be placed in contact with a community based counsellor to provide him the opportunity to discuss issues related to his sexual offending and potential difficulties re-adjusting to post-release life.
> - He be monitored for the possibility of self-harm and suicide particularly after he is notified of his possible release and immediately prior to his release as he has verbalised a fear of returning to the community as a result of threats made against him prior to his incarceration."

[27] In May 2000 the applicant was assessed by the Assessment Unit for the purposes of a home detention/parole application. It was suggested that he be assessed for his suitability to participate in the Community Sex Offender Program and that a full psychiatric assessment might be of benefit.

[28] Dr Ian Atkinson performed a psychiatric examination of the applicant on 14 July 2000. He concluded that the management of the applicant's sexual offending "will lie essentially in the blocking of opportunistic contact with young females". He emphasised that the suitability of his accommodation was a very important factor about the applicant moving to a parole situation.

[29] The matters raised by Mr Strickland and Dr Atkinson were endorsed by Mr Wayne Hunt, a psychologist with the Department of Corrective Services, in August 2000. As has been mentioned, the applicant was assessed as not suitable for the Community Sex Offender Program in December 2000.

[30] The applicant was assessed by a senior Community Correctional officer in May 2001. She concluded:

> "While it is considered that this man remains a risk to the community for the reasons stated above, it is also felt that a long period of supervision in the community with counselling in relation to avoiding contact with female children, and the importance of not boarding with families may provide the best means of preventing further offending in the future."

[31] Ms Tamara Smith, a senior psychologist with Corrective Services, prepared a detailed report dated 8 October 2002 for the delegate. She concluded:

> "Based on the information presented in this report it is considered that Mr Saunders remains untreated and that the underlying factors of his offending behaviour are still prevalent. It could be argued that Mr Saunders is an opportunistic sex offender whose previous and current offending follows a particular pattern:
>
> - All victims were female aged under 16;
> - Mr Saunders's befriended the parents of the victims and resided at the victims homes;
> - The offences occurred in the victims home when the parents were in the home;
> - Each offence included masturbation and/or intercourse."

[32] A report of 9 January 2003 by Ms Anne Dunn, an acting senior Community Correctional officer, is a detailed review of the various programs, courses, treatment and reviews about the applicant during his period of imprisonment. She concluded that although he had remained breach free throughout the term of his imprisonment he was considered to be a high risk of re-offending on the RNI (Risk/Needs Inventory) assessment. He was noted to have been unable to address his sexual offending behaviour thought completion of various courses. His release plan was described as "vague" and his relapse prevention plan "virtually non-existent" and "his willingness to comply with community supervision could be questioned". Should he be granted a community-based order in the future it was suggested that additional requirements should include:

> "
> - That he must not reside at any premises where there are children of either gender under the age of 16 years
> - That he must not have contact with children of either gender under the age of 16 years
> - That he access psychological therapy for issues relating to his sexual offending behaviour
> - That he produce a Relapse Prevention Plan and present this plan to his Community Correctional Officer for development and further revision."

The Queensland Board's decision

[33] The applicant had applied to the Queensland Board without success on two previous occasions in 2000 and 2002 for post-prison community based release. Although

reference is made to the previous letters of refusal in the most recent letter it is unnecessary to canvas them. The Queensland Board provided a statement of reasons on 29 April 2003. It set out the documents which it took into account in reaching its decision. It is not contended that it omitted to take into account relevant documentation relating to the prisoner's conduct and treatment in the course of his term of imprisonment. Neither is it submitted that there was any misapprehension of the relevant facts. The reasons set out the facts and circumstances surrounding the applicant's offences, make reference to the sentencing remarks of the sentencing court and comment that the applicant "has a long-standing problem of being sexually attracted to young girls". The Queensland Board noted that all of his offences occurred in circumstances where he was boarding with the victim's families.

[34] The Queensland Board noted the applicant's age and his health problems giving rise to a significant degree of physical disability, but that he was not totally immobilised. It was concerned that because of intellectual and memory deficits the applicant had been unable to complete programs designed to address his offending behaviour and was, therefore, essentially untreated. The many evaluations by a psychiatrist, psychologists and assessment unit officers were referred to as showing the applicant demonstrated:

> "... very little insight into the reasons for and seriousness of his offending behaviour. He has minimized the effect of his offending behaviour on his young victims and his role as the perpetrator of those offences against them instead characterizing them as largely willing participants in and even responsible for that behaviour as the 'instigators' of it. Ms Smith summarized the situation thus: 'it is considered that Mr Saunders remains untreated and that the underlying factors of his offending behaviour are still prevalent'."

[35] In light of those concerns the Queensland Board considered the applicant's relapse prevention and release plans were "totally inadequate". It was inappropriate for him to live in an environment where he was likely to have opportunistic contact with young girls since this was the context in which the current and earlier offences had occurred. It was inappropriate for the applicant to live by himself since he was then likely to suffer social isolation and "being unfettered by the presence of an adult who accepts the risks involved is more prone to unsupervised contract with young girls."

[36] The Queensland Board concluded

> "The Board's primary obligation is to ensure the protection of the community. Unfortunately, despite your client's exemplary record of behaviour in custody, for the reasons set out above, the Board is completely unable to conclude that he is anything other than an extremely high risk of re-offending if he is released at this time. The Board therefore declined his application for post-prison community based release."

[37] I could not find any psychologists' or the psychiatrist's report which described the applicant as an "extremely high risk of re-offending". He was assessed as a "high",

"moderate" or "medium" risk of offending in a number of the reports. This seeming overstatement would not impact on the decision.

[38] Mr Keim's major contention is that the Queensland Board approached its decision with "a rigid mindset" and thus failed to deal with the significant issues. He does not point to any flaw in the Queensland Board's reasoning. The main focus of his submissions was the failure of Queensland Board to be active in ascertaining appropriate residential arrangements for the applicant which would minimise these concerns to an acceptable level. He based this submission on s 3 of the Act which recognises that some offenders may have special needs. It provides:

> "(1) The purpose of corrective services is community safety and crime prevention through the humane containment, supervision and rehabilitation of offenders.
>
> (2) This Act recognises that every member of society has certain basic human entitlements, and that, for this reason, an offender's entitlements, other than those that are necessarily diminished because of imprisonment or another court sentence, should be safeguarded.
>
> (3) This Act also recognises –
>
> (a) the need to respect an offender's dignity; and
>
> (b) the special needs of some offenders by taking into account –
>
> (i) an offender's age, gender or race; and
>
> (ii) any disability an offender has; and
>
> (c) the culturally specific need of Aboriginal and Torres Strait Islander offenders."

[39] The Queensland Board has, pursuant to s 181 of the Act, power to do all things necessary or convenient to be done "for, or in connection with, the performance of its function". It has the power to compel relevant information to be given to it. It may request the chief executive to provide it with a report or information relating to a prisoner's application for a post-prison community based release order, s 185. Mr Keim also points to s 190 which obliges the chief executive to establish services or programs to help prisoners to be integrated into the community after their release from custody and which are required to take into account the special needs of offenders. He submitted that these powers and obligations required the Queensland Board to inform itself about arrangements that might be put in place to accommodate the applicant so as to minimise risk to the community. This is said to be a positive obligation to seek out appropriate accommodation. The Queensland Board may defer making a decision until it obtains any additional information that it considers necessary to make the decision, s 140(2) of the Act, but the failure to decide to defer hearing the application so that it could initiate the collection of information about other accommodation options for the applicant is arguably not a decision of the kind governed by the *Judicial Review Act* 1991. It is not this application. Neither is there any application for an order in the nature of mandamus to compel the Queensland Board to act in the way contended for.

[40] The assessment of the applicant's eligibility for residential care and any placement availability would, no doubt, be relevant information to be placed before the Queensland Board should the applicant make a further application for post-prison community release.

[41] There is also complaint about the failure of the Queensland Board to follow the sentencing recommendation for post-prison community release (parole). Section 139 of the Act provides that a board is not bound by the recommendation of the sentencing court if the board receives information about the prisoner that was not before the court at the time of sentencing and, after considering the information, considers that the prisoner is not suitable for release at the time recommended by the court. Mr Keim submitted that there is no new information not before the sentencing court. He submitted that the court understood the applicant; the nature of his offending behaviour; had the report of a psychologist who made reference to the applicant's limited intellectual and social development and his want of insight into his offending behaviour. The sentencing court expressly indicated that early release would be dependent on future matters. It was not then clear that the applicant would be unable to obtain any benefit from the SOTP or Cognitive Skills Courses. Neither was the suitability of post-prison accommodation or lack thereof within the court's knowledge. The Queensland Board was entitled to depart from the recommendation.

[42] Mr Keim contended that the matter was, at heart, one of unreasonableness in following fixed policies that the applicant constituted an unacceptable risk to the community because he had not completed a sex offender treatment program. The Minister may make guidelines about the policy to be followed by the Queensland Board when performing its functions, s 167 of the Act. There is no challenge to the present guidelines. They provide that the "highest priority" for the Queensland Board "should always be the safety of the community". Mr Keim contends that failure to put into place special treatment and programs for this applicant has meant that the Queensland Board has failed to address the individual case. The applicant has been subjected to numerous reviews by qualified professionals. The assessment of his risk of re-offending revolved around his lack of insight into his own sexuality and the reasons for his offending. He has been unable to develop risk avoiding strategies. Had he been able to participate in or complete programs successfully then these concerns would have been addressed. Not only does he have intellectual deficits but he also has significant problems with recall so that skills even if learned may not be retained. Neither did he have when the Queensland Board considered his application suitable accommodation which would have minimised the risk. These are the concerns which have driven the Queensland Board's decision rather than an automatic requirement that programs be completed. Cases such as *Felton v The Queensland Corrective Services Commission* [1994] 2 Qd R 490, *Webster v The Queensland Corrective Services Commission* [1998] 2 SC 178 (10 September 1998), *Wiskar v The Queensland Corrective Services Commission* [1998] QSC 279 (15 December 1998) and *Walker v The Queensland Corrective Services Commission* [1999] 2 SC 49 (18 March 1999) referred to by Mr Keim concerning non-participation in sexual offender programs are not relevant to this application.

[43] In *Attorney-General (NSW) v Quin* (1989-1990) 170 CLR 1, Brennan J noted at 36:

> Properly applied, *Wednesbury* unreasonableness leaves the merits of a decision or action unaffected unless the decision or action is such as to amount to an abuse of power: *Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240 at 249. Acting on the implied intention of the legislature that a power be exercised reasonably, the court holds invalid a purported exercise of the power which is so unreasonable that no reasonable repository of

> the power could have taken the impugned decision or action. The limitation is extremely confined.

[44] The decision of the Queensland Board is not one which falls into the impugned category identified in *Wednesbury*.

The delegate's decision

[45] The delegate decided on 6 January 2003 that she would refuse to grant remission of the applicant's terms of imprisonment. The applicant sought a statement of reasons which were given on 5 March 2003. The delegate set out the material which she considered and there is no submission that she overlooked any available, relevant material. The delegate noted the applicant's good conduct and industry and relevant passages from the reports of psychologists and the psychiatrist who examined him and the Queensland Board's concerns about suitable accommodation. The delegate's principle concerns were the applicant's failure to address his sexual offending; not having suitable accommodation or a suitable person to monitor his behaviour continuously if released; his risk of offending if associations were formed with young female children; his slight insight into his offending and the reasons for his offending; no relapse prevention strategy; and the opinion of the sentence management coordinator and the general manager that the applicant was an unacceptable risk of re-offending in the community.

[46] The statutory framework for remission contained in the present Act is different in certain respects from the previous regime. The applicant, although sentenced prior to its commencement, falls within the terms of s 75 of the Act. In contrast with the former scheme, the granting of remission is not simply a matter of an exercise of discretion, it is conditioned upon the attainment of administrative "satisfaction" as to two criteria, namely, an absence of unacceptable risk to the community and a history of good conduct and industry. Relevantly s 75 provides:

> "(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."

Sub-sections (3) and (4) are not here relevant. There are no other matters the subject of regulation in respect of which the chief executive must be satisfied.

[47] "May" is said to indicate, in relation to a power, "that the power may be exercised or not exercised, at discretion", *Acts Interpretation Act* 1954, s 32CA. Mr Logan SC, for the delegate, submitted that in s 75(2) "may" is facultative rather than indicative of a residual discretion. That is, if the chief executive is satisfied that a prisoner has been of good conduct and industry and the prisoner's discharge does not pose an unacceptable risk to the community, there is no further discretion which may be exercised, *Finance Facilities Pty Ltd v Commissioner of Taxation* (1970-1971) 127 CLR 106 per Windeyer J at 134-5 and Barwick CJ agreeing at 128; *Phil Winkless Pty Ltd v Commissioner of State Taxation* (WA) (1986) 86 ATC 4556 per Burt CJ at 4557. This legislative device of conditioning a discretionary power upon

a state of satisfaction of a decision-maker is distinct from a purely discretionary decision, see the discussion by Gummow J in the *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 651 and following.

[48] Where the legislature has conferred the power in such a form the decision is reviewable by a court but often in a more limited fashion than where it is simply a matter of discretion. Gibbs J in *Buck v Bavone* (1975-1976) 135 CLR 110 in the course of construing the powers conferred upon a board established under the *Potato Marketing Act* 1948 (SA) which provided that the board had to be satisfied about certain matters, observed at 118:

> [W]hether the decision of the authority under such a statute can be effectively reviewed by the courts will often largely depend on the nature of the matters of which the authority is required to be satisfied. In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously. Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached. In such cases the authority will be left with a very wide discretion which cannot be effectively reviewed by the courts.

[49] Gummow J in *Eshetu* observed at 654 that where the criterion of which the authority is required to be satisfied turns upon factual matters "upon which reasonable minds could reasonably differ" it will be very difficult to conclude that no reasonable decision-maker could have arrived at the relevant decision. He noted:

> "It may be otherwise if the evidence which establishes or denies, or, with other matters, goes to establish or to deny, that the necessary criterion has been met was all one way."

See also *Re Minister for Immigration and Multicultural affairs; Ex parte Applicant S20/2002* [2003] HCA 30; (2003) 77 ALJR 1165 at 1167 per Gleeson CJ and 1171 per McHugh and Gummow JJ and Kirby J at 1186.

[50] In deciding whether a prisoner's discharge or release poses an unacceptable risk to the community the chief executive must consider a number of factors although is not limited to those factors, s 77. Specifically identified is the possibility of the prisoner committing further offences, s 77(a); the risk of physical or psychological harm to a member of the community and the degree of risk, s 77(b); the prisoner's past offences and any patterns of offending, s 77(c); and any medical or psychological report relating to the prisoner, s 77(g). Similarly, s 78 sets out certain factors which the chief executive must consider but is not limited to considering in respect of good conduct and industry, not here relevant.

[51] The applicant contends that the delegate reached her conclusion that she was not satisfied that the applicant's discharge did not pose an unacceptable risk to the community through a process, described in the application, as an improper exercise of the power conferred upon her by s 75. This is said to have occurred by her placing "excessive weight" on certain factors:

- the applicant's failure to complete the sex offender program;
- the applicant's limited ability to explain that his offending behaviour was wrong other than by reference to the law and adverse consequences for himself;
- the applicant's limited ability due to lack of resources and social connections to provide accommodation where he was constantly supervised by another adult person;
- the nature of the offences for which the applicant was sentenced; and
- the failure of the applicant to show victim empathy of the kind that might be expected of a person with higher intelligence and cognitive understanding.

[52] The exercise of the power is said to have been improper because the delegate failed to consider or consider in any real or substantial way certain relevant considerations in respect of the applicant including:

- the recommendation of the sentencing judge about release on parole; and
- the applicant's cooperation with the program until prevented from continuing because of his limited cognitive ability;
- that the applicant's sexual offending was opportunistic and not the result of a deliberate attempt to seek out children;
- that there had been only one other incident of such offending and the circumstances were unlikely to reoccur to give rise to such an opportunity;
- the applicant's very poor health which would limit any likelihood of an opportunity to re-offend;
- the deterring effect of having served six years in prison and his stated determination not to commit such offences again;
- the applicant's low classification;
- the applicant's good conduct in prison;
- the applicant's initial intention to reside with family friends;
- the applicant's acceptance of rules and procedures and cooperation with the staff in the prison;
- the failure to provide more intensively supervised forms of prison release;
- the applicant's statements as to his lack of interest in sexual matters; and
- the sentencing remarks.

[53] The failure to take into account or place proper weight on those factors and placing excessive weight on the factors earlier set out is contended to result in an improper exercise of the power by reference to a rule or policy without regard to the merits of the particular case.

[54] Unreasonable exercise of power can occur when excessive weight or no weight at all is given to a relevant factor. The approach in the review of an administrative decision in respect of the weight to be given to various factors was discussed by Mason J in *Minister for Aboriginal Affairs & Anor v Peko-Wallsend Ltd & Ors* (1985-1986) 162 CLR 24 at 41:

> It follows that, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power: *Sean Investments Pty. Ltd. v MacKellar*; *Reg. v Anderson; Ex parte Ipen-Air Pty. Ltd.*; *Elliott v Southwark London Borough Council*; *Pickwell v Camden London Borough Council* [citations omitted]. I say "generally" because both principle and authority indicate that in some circumstances a court may set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance.

[55] Although the exercise of the power is predicated on satisfaction in respect of certain criteria the court may, consistently with Gibbs J's observations in *Buck v Bavone*, examine whether the decision-maker reached or did not reach the requisite level of satisfaction by proper means. The delegate had regard to all relevant factors set out in the Act and relevant material. She identified particularly the concern which was expressed in much of that material that the applicant did not have suitable accommodation to "block" him from any opportunistic contact with young females. His need for considerable help and support with his medical conditions was identified. While he remained untreated for his sexual offending (and it seems to be accepted that there is little or nothing that can be offered to him available within the Community Corrections system) unless that risk was able to be acceptably reduced, particularly by appropriate accommodation, he was at risk to a moderate degree of re-offending.

[56] Mr Keim submitted that by virtue of s 190 of the Act there was a positive obligation on the chief executive to take account of the applicant's disabilities and provide appropriate programs for him or cause investigations to be carried out about suitable accommodation. As noted in respect to the Board that is not this application. I would prefer to make no further comment on the availability of an order in the nature of mandamus about how a department of government orders its priorities and programs.

[57] No error has been revealed in the process leading to the delegate not being satisfied that the applicant's discharge would not pose an unacceptable risk to the community.

Extension of time

[58] It is unnecessary to consider further an extension of time for the decision by the Queensland Board of February 2002.

[59] By letter dated 10 February 2003 the applicant was notified of the Queensland Board's decision of 7 February 2003. If no submissions were received the decision

was to take effect within 14 days. By letter dated 20 March 2003 his solicitor maintained that the letter was not received until 27 February 2003. Accepting that date, the decision took effect on 13 March. Section 26(2) of the *Judicial Review Act* 1991 provides that an application for a statutory order of review is required to be made within 28 days after the date of the decision. The application was filed on 23 April 2003. It is out of time. Section 26(1)(b) allows an application to be made in such further time as the court allows. There is no basis for declining to extend the time to file the application. The applicant is given an extension of time to file the application to 23 April 2003.

[60] The delegate's decision was made on the 6 January 2003. Correspondence was engaged in with the applicant's solicitor at least from 29 January 2003. The application was filed on 23 April 2003. It is out of time but the second respondent does not take the point. Any necessary extensions of time are granted.

[61] The orders are:

1. Dismiss the application for a statutory order for review against the first respondent.
2. Dismiss the application for a statutory order for review against the second respondent.